

## “Great March of Return” Demonstrations and Israel’s Military Response

**INTRODUCTORY TEXT:** This case deals with the Israeli response to Palestinian activities during the “Great March of Return” demonstrations in Gaza in 2018. The situation gave rise to a court action before the Israeli Supreme Court challenging the legality of the Rules of Engagement of Israel’s security forces and to the adoption of a resolution by the Human Rights Council establishing the International Independent Commission of Inquiry with a mandate to investigate alleged violations of IHL and human rights law. The case discusses the complexity of determining the law applicable to demonstrations that have turned violent.

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**N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents.** Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

### ***A. HCJ, Yesh Din and Others v. the IDF Chief of Staff and Others***

[Source: *Yesh Din and Others v. the IDF Chief of Staff and Others*, HCJ 3003/18, Judgment, 24 May 2018, available at <https://supremedecisions.court.gov.il/>]

[...]

1. The petitions before us address the Rules of Engagement of Israel’s security forces in the area of the security barrier between the Gaza Strip and Israel. These Rules are relevant to the violent events which have been recently taking place in that area.

[...]

## Background

5. During the past weeks, violent and large-scale events, with tens of thousands of Palestinian participants, have been taking place in the area of the security barrier between the Gaza Strip and Israel. The organizers of the events refer to these violent events as the “Great Return March”, and call, in this framework, for a mass return of the “Palestinian refugees” to the “homes of their ancestors” within the territory of the State of Israel. The majority of these events have been taking place at the direction of the Hamas terror organization and have included, *inter alia*: organized, intentional and significant clashes with Israel’s security forces, as well as attempts to damage Israel’s security infrastructures. Terrorist attacks have also been committed during these events and under their cover. However, there is no dispute that there are also Palestinian civilian demonstrators not involved in terrorist activity, who have participated and participate in these events. [...]

6. The aforesaid violent events began on March 30, 2018, the date the Palestinians commemorate “Land Day”, and they have continued since, at varying intensity, primarily on weekends. [...].

7. The arena in which the violent events have been occurring is located at a number of focus points along the security barrier that stretches between Israel and the Gaza Strip. [...]

8. Since its construction, the barrier has been meant to protect Israeli civilians and the security forces against various threats, with an emphasis on preventing the infiltration of terrorists from the Gaza Strip into Israel. The barrier is located only hundreds of meters from a series of Israeli towns and only dozens of meters from IDF [Israel Defense Forces] troops. Therefore, its breach – especially by rioting masses – poses danger to both civilians and soldiers.

[...]

10. The violent events that have been taking place in the Perimeter in recent weeks were preceded by extensive and significant planning and according to the information that was delivered to us on behalf of the Respondents – these events are directed and organized by an entity that refers to itself as the “Return Committee”. The committee, led by Hamas, [...] formulated an organized action plan, with an objective to maximize the chance of breaching Israel’s security fence and harming the security forces.

[...]

12. [...] IDF troops stationed in the area were equipped in advance with a variety of means to accommodate the operational challenge of dealing with a hostile crowd, including warning and announcement equipment and non-lethal means for dispersing demonstrations. In light of the extraordinary nature of the violent events,

and in accordance with the Standard Operating Procedures, other designated non-lethal means were also allocated (such as: a drone that disperses tear gas). It was prescribed that if it becomes necessary – it will be possible as a last resort to also use live ammunition towards violent rioters, who are not deterred by the warnings and who endanger security. This last resort shall first and foremost be done by precise fire by snipers. All of these policies were constructed in order to reduce, to the extent possible, the harm to the participants of the violent riots.

[...]

14. It is here appropriate to further state that the organizers' action plan indeed materialized and the mass violent events that took place in the area of the security barrier were unusual in their scope and in the intensity of the threat that they posed. Up until now, tens of thousands of people have participated therein [...]; under the cover of the riots, grenade and explosive devices were hurled towards the IDF troops, live ammunition was fired at the soldiers and explosive devices were hurled towards Israeli territory, in addition to the flying of more than 15 incendiary kites intended to harm towns and residents of Israel near the Gaza periphery. The riots continued uninterrupted from the morning hours until the evening hours and occurred simultaneously at a number of geographical focus points. Some of the participants in the riots acted with the clear and determined goal of breaching the security barrier between the State of Israel and the Gaza Strip, infiltrating into Israeli territory and harming the security forces. [...] Some of the rioters equipped themselves with arms.

15. In an attempt to prevent the violent events from occurring – the Israeli security forces sent warning messages to the Palestinian population in the Gaza Strip, through a number of channels, calling on them to avoid coming to the area of the security barrier. [...]

16. These efforts were unfortunately unsuccessful and as mentioned, the violent events began on March 30, 2018. According to the Respondents, certain events necessitated the use of live ammunition in order to prevent the materialization of the risks and harm to human life.

[...]

## **The Normative Background**

[...]

38. As has been ruled more than once by this Court, there is a continuous armed conflict between the State of Israel and those governing the Gaza Strip (and the Hamas terrorist organization), to which the international law of Armed Conflict applies [...].

39. The international law of Armed Conflict delineates two different paradigms for the use of force in the course of an armed conflict:

The first is the conduct of hostilities paradigm and the second is the law enforcement paradigm.

The conduct of hostilities paradigm relates to a situation in which the parties are actually combatting each other by various means and methods, and *inter alia*, addresses the attacking of “military targets” and the legality of various types of arms.

The law enforcement paradigm, in contrast, regulates the exercise of force in other situations in which actions for maintaining public order and security are necessary.

[...]

Considering the fact that armed conflicts occasionally involve various operational scenarios, it can be said that both of the paradigms are relevant at all times, and in order to know which paradigm is applicable, it is necessary to examine the circumstances behind the concrete exercise of force. Thus, which paradigm regulates a specific exercise of force is a complicated and complex question, which first and foremost depends on whether the exercise of force is part of the hostilities. It is therefore difficult to classify complex events under only one paradigm because hostilities in an armed conflict are often intermingled with other actions.

As a rule, the Respondents analyze the exercise of force by the IDF towards the participants of the violent events addressed herein, as being covered, by default, under the law enforcement paradigm. [...] Alongside this, in certain circumstances, when there is information that indicates the actual participation of a certain person in the hostilities at the fence (for example, when a person is identified holding an explosive device in his hands) – the exercise of force against him is covered by the conduct of hostilities paradigm.

[...]

40. [...] Under the law enforcement paradigm of the law of Armed Conflict, use of potentially lethal force is permitted only as a last resort, and subject to strict requirements that derive from the principles of necessity and proportionality, meaning, this can only be done in circumstances in which there is an actual danger to life or to bodily integrity. Such danger could derive from the action of a single person or from an action of masses. Further elaboration on these matters shall be presented below.

### **Use of Potentially Lethal Force**

41. Guiding rules as to the use of potentially lethal force have been prescribed in the rulings of this Court. In [...] *Ankonina v. The Chief Military Prosecutor* [...], which dealt with the use of potentially lethal force in order

to effect an arrest or prevent the escape of a detainee at a check-post [...], the honorable Court ruled that a person's life can be harmed only in order to prevent an actual danger to life or to a person's bodily integrity. [...].

42. In [...] *Ra'ed v. The State of Israel* [...], the honorable Court referred to the use of potentially lethal force for the objective of removing a danger to life or to bodily integrity. [...] In that case the honorable Court ruled as follows:

According to law, policemen are permitted, in order to perform their said duty, to stand their ground and not to retreat, and therefore, if consequently their lives or bodies are in danger, then they shall be justified to use such means as they deem necessary to both prevent the danger and to overcome the rioters, including use of firearms, even if this could lead to death or other bodily harm to any of the rioters [...] However, it is necessary to agree that even in these conditions, one must never justify the act of an intentional or indifferent shooting on the part of the policeman [...] which is completely unrelated to reasonable force [...].

43. The [...] *Al-Masri v. The Military Advocate General* [...] addressed the request [...] to initiate a criminal investigation of circumstances in which one of the petitioners was wounded, allegedly as a result of fire in his direction by an IDF soldier at the Israel-Lebanon border. This arose during the attempt by hundreds of Palestinians and foreigners to cross the network of fences that separate between Lebanon and the State of Israel [...]. In that case, my colleague, Justice U. Shoham, with the consent of the entire bench, denied the petition and ruled, *inter alia*, that the fire in the direction of the rioters who were attempting to trample and breach the border fence – and by doing so created an actual danger of infiltration of terrorists from an enemy state into the territory of the State in an area that is adjacent to Israeli towns – was carried out as a last resort, when the rioters did not comply with the warnings that called on them to cease their actions, and after there was no other practical option of using alternative means for crowd dispersal.

I shall here note that the Court's conclusion in the Al-Masri Case, as to the IDF's fire in the circumstances of that case corresponding with the provisions of international law and the rules of Israeli law, should *prima facie* apply *a fortiori* to the case at hand, in light of the characteristics of the current events, in which the threat that is posed to Israeli civilians and the security forces as a result of the violent riots on the Gaza Strip border, is greater and more severe than that which was posed to the security forces and Israeli civilians in the events that were the subject of the Al- Masri Case.

[...]

45. An additional insight must be added here:

If some of the demonstrators can be classified as direct participants in the armed conflict that exists between Israel and the Hamas (this is certainly the case with respect to the terrorists and the armed persons among

them; two close categories also includes both members of the terrorist organizations who disguise themselves as demonstrators and also participants in the protest who agree to serve as “human shields” for the terrorists hiding behind them), then the demonstrators lose the protection granted to them pursuant to the principle expressed in Article 51(3) of the First Additional Protocol to the Geneva Conventions, which prescribes that the protection afforded to them as civilians shall be removed for such time during which they (actually) take a part in hostilities. In situations such as those, it is highly likely that the three pronged criterion – which was outlined by the team of international experts that the Red Cross convened – would be fulfilled. Upon the fulfillment of the three conditions by the demonstrators, civilians who take part in hostilities lose their protections. [...]

46. In light of all of the aforesaid, it appears that the use of potentially lethal force for the sake of dispersing a mass riot – from which an actual and imminent danger is posed to life or bodily integrity – is, in principle, permitted, subject to proving necessity and to proportionality.

[...]

### **The Rules of Engagement**

[...]

50. [...] The Rules of Engagement that are the subject of the petitions before us allow the use of “live ammunition” only in order to deal with violent riots, from which an actual, imminent and close danger is posed to IDF troops or Israeli civilians. In accordance with these Rules, the danger shall first and foremost be dealt with by verbal warnings and nonlethal means. If the use of these means does not remove the actual and imminent danger that is posed from the violent riot – and only in such case – do the rules permit, according to what we have been told, precise shooting towards the legs of a central rioter or central inciter, in order to eliminate the close and foreseeable danger. [...]

In light of the importance of the matter, I shall reemphasize that in accordance with the information delivered to us with regard to the relevant Rules of Engagement – firing towards the legs of a central rioter or central inciter is meant to occur only as a last resort, and subject to strict requirements that derive from the principles of necessity and proportionality [...]

[...]

### **From the General to the Particular**

52. I am of the opinion that in the circumstances of the violent events that underlie the petitions, and as the violent riots and all that they entail came closer to the security barrier – the Respondents’ argument that an actual and imminent danger to the IDF troops as well as to Israeli civilians in the towns in the Gaza periphery,

was occasionally created, cannot be ruled out. [...].

53. In these senses: The intentions of the rioters who are the subject of these petitions, their huge number, the means at their disposal and the violence they exercised – *prima facie*, on a factual level, distinguish the mass events we are discussing from mere demonstrations and from ordinary “civilian” protests. [...]

54. I shall further add that according to my position, the incidents that are described do not address a popular, ordinary, or spontaneous protest, and moreover the violent riots which are the subject of the petitions occasionally created an actual and imminent danger to the lives and bodily integrity of the security forces and Israeli residents. This danger was enhanced and exacerbated due to the acts of terrorism that were carried out from within them and under their cover. The violent riots were organized, coordinated and directed by Hamas, which is a terrorist organization that is in an armed conflict with Israel. It can also be said that Hamas requested to reap a military benefit from a possible breach of the security barrier, which would have also assisted the infiltration of terrorists into Israel. In order to promote this objective, a not insignificant number of participants in the violent events and of the casualties, were activists in the Hamas organization, including its military mechanisms. They were sent in order to disturb public order and security, to excite crowds and encourage them to advance towards the territory of Israel, to lead to the breach of the security barrier, and to carry out terror attacks.

In these contexts, the Almagor Organization referred to publications of the Major General Meir Amit Intelligence and Terrorism Information Center regarding the identity of those killed in the “Great Return March” events, the majority of whom were terrorist activists, or person who were identified with terrorist organizations. The Almagor Organization also referred to publications from the media in which Salah Al-Bardwil, a member of Hamas’ political bureau, said in an interview on a Palestinian television channel that according to official figures in the “last event” (May 14, 2018), 61 Shahids (martyrs) were killed, among which 50 Shahids belong to the Hamas organization (approximately 80%). [...]

55. The said threats eventually did not materialize in their entirety [...] yet, a large number of acts of terrorism were committed under the cover of the violent riots. Thus, according to the Respondents’ declaration, during the last month, at the instruction of senior people from the military arm of the Hamas and with the involvement of the ground commanders’ levels, demonstrators committed dozens of acts of sabotage against Israeli military and civilian infrastructures near the Gaza periphery, under the cover of the riots. These acts included dozens of grenades and explosive devices that were planted in the area of the fence or hurled towards IDF troops, causing damage to military infrastructures. [...] Weapons were caught in the possession of some of the rioters and some of them admitted in their interrogation that they had crossed into Israeli territory in order to harm IDF troops. Additionally, significant damage was caused to civilian infrastructures and to widespread agricultural areas as a result of fires, which were caused by the “parachuting” of improvised devices and Molotov cocktails into Israeli territory by means of improvised kites and hurling means. [...]

56. Given the above background, I shall reemphasize that the judgments of this Court have recognized the fact that the dispersal of a violent and life-threatening riot – including in circumstances of breaching a security barrier between enemy territory and Israeli territory – can, upon the existence of certain necessary conditions, including a legal objective, allow the use of potentially lethal force [...]

57. The basic principles of international law also permit the use of potentially lethal force, provided that it is applied for recognized and specific objectives – *inter alia*, for the sake of self-defense, or the defense of others – and all use of force shall be subject to the limitations of a concrete necessity and proportionality [...] Among the rioters were those who hurled rocks and Molotov cocktails towards IDF troops. Therefore, it appears that live ammunition was used in order to obtain a legal objective – defending the citizens of the State of Israel and IDF soldiers. [...].

[...]

63. Prior to concluding, it is important to add that leading up to the violent events at issue in this case, there was significant preparation within the IDF, during which the commanders briefed the forces deployed in the area regarding the Rules of Engagement in the region of operation, and the forces were equipped with non-lethal means for the dispersal of riots. [...] We have noted the Respondents' notice that immediately following the violent events on March 30, 2018, and consistently since then, there has been an orderly process for debriefing and extracting operational lessons for future implementation. The security forces were also given various instructions which were intended to further reduce the scope of casualties.

In addition, the Respondents informed us that they referred certain instances – when it was alleged that a person's death was caused as a result of IDF fire that was not in accordance with the Orders and Rules of Engagement – to be examined by the General Staff's independent mechanism for debriefing unusual events [...]. In this context it shall be noted that the mission of the mechanism is to conduct a comprehensive factual examination and debriefing of the events and a gathering of relevant data and materials, [...] in order to decide whether there is a reasonable suspicion of a criminal offence and whether to initiate a more in-depth criminal investigation. We assume that the multitude of fatalities and wounded until now, and allegations by the Petitioners that many of the demonstrators were injured in upper body parts, and some of them in the back – will lead, on the one hand, to the extraction of operational lessons regarding implementation of alternative non-lethal means to the extent possible, and on the other hand, to a thorough examination, by means of the mechanisms mentioned here, as to what happened in the past.

64. In light of all of the aforesaid, I am, of the opinion that we cannot examine the means that the IDF exercises in response to the violent events that underlie the petitions for two reasons. First, due to the significant restraint that is required in applying judicial review in all that relates to operational military activity that is not *prima facie* contrary to the law. And second, especially in the circumstances of this matter, when the review is requested with respect to the implementation of operational policy that is occurring in real time.



Therefore, I have found it appropriate to also leave for “further review” the question of the ex-territorial application of the Basic Law: Human Dignity and Liberty and whether and to what extent it applies in these circumstances. [...]

65. For the avoidance of doubt it shall be finally clarified that all stated above is not intended to derogate in any way whatsoever from the security forces’ obligation to act in accordance with the Rules that apply thereto, both by virtue of Israeli law and by virtue of international humanitarian law. This obligation also requires the security forces to examine, increase, and improve, to the extent possible, the use of alternative non-lethal means, all alongside maintaining an orderly process for debriefing and extracting operational and other lessons for implementing them.

66. While acting to prevent conflict in the context and risk of recent events, I assume that the Respondents will continue to comply with their declaration [...] that they and the soldiers have and will act in accordance with the binding rules of international law and the local Israeli law and honor the humanitarian obligations that are imposed upon them by virtue of the law of Armed Conflict. I have, therefore, reached the conclusion that the petitions, in their current format, are to be denied [...].

[...]

## **B. Report of the Independent International Commission of Inquiry on the Protests in the Occupied Palestinian Territory**

[Source: “Report of the independent international commission of inquiry on the protests in the Occupied Palestinian Territory”, UN Doc. A/HRC/40/74, 25 February 2019, available at <https://www.ohchr.org/>]

### **I. Introduction**

1. In its resolution S-28/1, the Human Rights Council established the international independent commission of inquiry with a mandate to, *inter alia*, investigate all alleged violations and abuses of international humanitarian law and international human rights law in the Occupied Palestinian Territory, including East Jerusalem, particularly in the occupied Gaza Strip, in the context of the military assaults on the large-scale civilian protests that began on 30 March 2018 [...].

[...]

### **III. Applicable law**

11. Both Israel and the State of Palestine are party to the International Covenant on Civil and Political Rights, other core international human rights treaties and the Geneva Conventions of 1949, and are bound

by customary international law. [...].

12. Israel and Palestinian organized armed groups (Izz al-Din al-Qassam Brigades and Al Quds Brigades, the military wings of Hamas and Palestinian Islamic Jihad respectively), as parties to the armed conflict, are bound by international humanitarian law. [...].

[...]

#### IV. Context and background

[...]

#### C. The “great march of return and breaking of the siege”: background and principles

22. On 7 January 2018, Ahmed Abu Artema, a 34-year-old Palestinian poet and journalist, posted on Facebook the idea of a non-violent march at the separation fence, to draw attention to General Assembly resolution 194 and to the dire humanitarian situation in Gaza. In the post, ending #GreatMarchofReturn, he wrote, “what if 200,000 demonstrators marched peacefully and broke through the fence east of Gaza and entered a few kilometres into the lands that are ours, holding the flags of Palestine and the keys to return, accompanied by international media, and then set up tents inside and established a city there.”

23. The idea evolved into a movement of Palestinians. [...]

24. A higher national committee and 12 subcommittees were subsequently established to organize and oversee the planning of the march. Its members came from all sectors of Palestinian society, including civil society, cultural and social organizations, student unions, women’s groups, eminent persons and members of clans. Representatives of several political parties, including the Democratic Front for the Liberation of Palestine, Fatah, Hamas, the Popular Front for the Liberation of Palestine and Palestinian Islamic Jihad, were also members (the armed wings of these parties were not represented on the committee). While the members of the committee held diverse political views, they stated that their unifying element was the principle that the march was to be “fully peaceful from beginning to the end” and demonstrators would be unarmed.

25. The higher national committee established demonstration sites in open land along the separation fence in all five Gaza governorates [...].

26. Demonstrations were held at these sites every Friday and occasionally other weekdays between 30 March and 31 December 2018, and continued thereafter. Beginning in August, weekly demonstrations were also organized at the Zikim beach in North Gaza.

[...]

## F. Legal assessment of the demonstrations

32. In the commission's view, the demonstrations were civilian in nature, had clearly stated political aims and, despite some acts of significant violence, did not constitute combat or a military campaign. Thus, the legal framework applicable to policing the protests was that of law enforcement, based in international human rights law. [...]

33. Founded in the right to life, law enforcement rules based on international human rights law permit potentially lethal force by law enforcement agencies or security forces only in self-defence or for the defence of others when there is an imminent threat to life. [...].

34. For a threat to life to be regarded as imminent, an attacker should have no remaining preparatory steps and be in sufficient geographic proximity for the attack to succeed. An imminent or immediate threat should be understood to mean a matter of seconds, not hours [...].

35. Israeli and Palestinian non-governmental human rights organizations challenged the application of lethal force by Israeli forces at the fence in the Israel Supreme Court, contending that the rules of engagement violated international law because they were too permissive or were being applied permissively. The Court disagreed and approved the rules of engagement, holding that "the use of potentially lethal force for the sake of dispersing a mass riot – from which an actual and imminent danger is posed to life or bodily integrity – is, in principle, permitted, subject to proving necessity and proportionality." The Court declined to examine how the rules were applied on the ground, deferring to the internal investigations of Israeli security forces.

36. The interpretation and application of the legal thresholds of "imminent threat to life" under international human rights law and "direct participation in hostilities" under international humanitarian law had a direct impact on the commission's findings, ultimately serving to distinguish between lawful and unlawful uses of lethal force. To make such an assessment was the commission's primary task when analysing whether violations had been committed against demonstrators. [...].

[...]

## V. Inquiry into specific incidents

### A. 30 March 2018

[...]

42. Most gathered at their respective camp of return along Jakkar Street, which runs parallel to and is

approximately 300 m from the separation fence. Smaller numbers of demonstrators moved closer to the fence, and stood, sat or lay on the ground. Some demonstrators near the fence threw stones, burned tyres and waved Palestinian flags. The commission did not find that demonstrators were armed.

43. As early as 9 a.m., Israeli security forces responded to the demonstrations with live ammunition.

[...]

46. Overall, at the demonstrations held on 30 March, Israeli forces killed 18 people and wounded 703 people with live ammunition; another 62 people were wounded by bullet fragmentation or shrapnel. The youngest casualty was a 2-year-old, wounded in the head; the oldest, a 71-year-old woman shot in the legs.

#### B. 31 March–13 May 2018

47. Over the weeks that followed, demonstrations were held every Friday at the five main sites. A minority of demonstrators slung and threw stones, burned tyres and cut and removed barbed wire coils on the Gaza side of the separation fence. From April, some demonstrators flew kites or balloons carrying burning rags or coals wrapped in chicken wire towards Israel, damaging Israeli property, including agricultural land.

48. Some activities, such as the launching of incendiary kites, cutting barbed wire or tyre burning, began to be organized by self-declared “units”, some of them through their own Facebook pages. The commission found no evidence to suggest that they were directed or coordinated by armed groups.

49. Israeli forces continued to employ live ammunition against demonstrators [...].

#### C. 14 May 2018

50. The demonstrations of 14 May were scheduled to coincide with the opening of the United States Embassy in Jerusalem and the seventieth anniversary of the Nakba. Under the theme “Return of a million”, between 35,000 and 40,000 people reportedly attended the demonstrations held at the five original sites and at eight additional temporary sites.

51. The day before, the Israel Defense Forces claimed in an English language video that, on 14 May, “the Hamas terrorist organization plans to send armed terrorists among 250,000 violent rioters to swarm and breach Israel’s border with Gaza and enter Israeli communities”. Hamas “plans to carry out a massacre in Israel. The Israel Defense Forces will not let them.”

52. At all sites, large crowds of unarmed demonstrators congregated around the tents and in the open space between Jakkar Street and the separation fence. Many primarily young and middle-aged men slung or threw

stones, shouted slogans and burned tyres, which created a wall of smoke. Some demonstrators cut or pulled away the barbed wire coils or approached the separation fence. In one incident in the Bureij site, two demonstrators crossed the separation fence and set fire to an empty berm, and then ran back towards the fence.

53. Throughout the day, Israeli forces responded to the demonstrations with live ammunition and tear gas.

[...]

57. The commission investigated an incident that occurred during the demonstrations in the early afternoon of 14 May that may have amounted to “direct participation in hostilities”. Near Al-Shuhada cemetery (North Gaza), a person in civilian clothes, metres away from a sizeable group of demonstrators and cheered on by them, fired a rifle towards the Israeli side of the separation fence at a distance of between 50 and 70 m from the fence, amid the thick smoke of the burning tyres. It is unclear whether he was part of a group of militants. Israeli forces responded to the attack with tank and gunfire for about 40 minutes, killing 21 people, including 8 alleged members of armed groups, a paramedic and 2 children [...].

[...]

60. That day one Israeli soldier was lightly wounded, reportedly by a stone.

#### D. Mid-May–11 October 2018

61. The nature of the demonstrations changed after the violent events of 14 May. [...] The use of incendiary kites became more prevalent over the summer months. [...]

#### E. 12 October 2018

[...]

63. That afternoon, east of El Bureij, a group of demonstrators cut the separation fence with machetes, axes and wire cutters. Approximately 20 demonstrators crossed the fence into Israeli territory. Israeli forces shot at them with live ammunition. While most retreated to the Gaza side, Ahmad from the Nuseirat refugee camp remained on the Israeli side with at least one other demonstrator. Israeli forces allege that Ahmad approached an Israeli soldier with a knife, and was shot by Israeli forces at point-blank range. Eyewitness accounts are contradictory. According to one, a group of armed Israeli soldiers approached Ahmad, who was on the ground, unarmed; when he reached up to an Israeli soldier’s arm, the soldier shot him multiple times in the chest and the female witness in the leg. Another witness alleged that Ahmad was shot while he was running away.

[...]

## IX. Findings

93. The commission investigated all 189 fatalities and tracked more than 300 injuries caused by the Israeli security forces at the demonstration sites and during the demonstrations.

94. With the exception of one incident in North Gaza on 14 May that may have amounted to “direct participation in hostilities” and one incident in Central Gaza on 12 October that may have constituted an “imminent threat to life or serious injury” to the Israeli security forces, the commission found reasonable grounds to believe that, in all other cases, the use of live ammunition by Israeli security forces against demonstrators was unlawful.

[...]

96. The Israeli security forces killed and maimed Palestinian demonstrators who did not pose an imminent threat of death or serious injury to others when they were shot, nor were they directly participating in hostilities. Less lethal alternatives remained available and substantial defences were in place, rendering the use of lethal force neither necessary nor proportionate, and therefore impermissible.

97. The commission therefore found reasonable grounds to believe that demonstrators were shot in violation of their right to life or of the principle of distinction under international humanitarian law.

98. The commission found that at least 29 of those killed at the demonstration sites were members of Palestinian organized armed groups. It is aware that the international legal community holds divergent views on whether organized armed group members may be targeted at any time, or only when directly participating in hostilities. In accordance with the law enforcement paradigm as informed by international human rights law and in the absence of arms and active hostilities, the commission concluded that, in this specific context, targeting individuals purely on the basis of their membership of an armed group and not on their conduct at the time was impermissible. The applicable tests remain whether an individual, at the time targeted, was directly participating in hostilities or posed an imminent threat to life. If not, targeting of such persons with lethal force was unlawful.

99. The shooting by Israeli security forces of Palestinian demonstrators with high-velocity weaponry at close range resulted in killings and long-term, life-changing injuries, including paralysis and amputations. Although this was well known as early as April 2018, Israeli forces continued this practice throughout the period under review. Using such weaponry at short range, and justifying it by the need for accuracy at long range, indicates a disproportionate use of force.

[...]

103. Customary and conventional international humanitarian law requires that medical personnel be respected and protected. Similar protection is afforded to journalists and children who do not take part in hostilities. The commission found that the Israeli security forces shot paramedics, journalists and children who had not lost their protected status; Israel is thus in violation of international humanitarian law.

[...].

105. The commission found that, on 14 May, at least one gunman fired a weapon at the Israeli forces from within or near the demonstrations at a temporary demonstration site in North Gaza. Firing from the vicinity of a crowd of unarmed demonstrators endangers civilian lives and risks violating the principle of distinction under international humanitarian law.

## **X. Accountability**

106. Violations of international law, such as those committed by the Israeli security forces and set out in the present report, give rise to State responsibility on the part of the State of Israel. Israel has an obligation to investigate alleged violations of international human rights law and international humanitarian by its security forces and, where appropriate, to prosecute those deemed responsible. Victims of human rights violations are entitled to remedies, including equal and effective access to justice and adequate, effective and prompt reparation, including compensation, and guarantees of non-repetition.

107. The commission found that responsibility for unlawful deaths and injuries lay primarily on two fronts. First, those who employed lethal force, assisted with or authorized it to be deployed in specific instances, in the absence of an imminent threat to life or where the victim was not directly participating in hostilities; this includes snipers, spotters and/or commanders on site. Second, those who drafted and approved the rules of engagement.

108. While some deaths may have been examined by the Israel Defense Forces' internal "fact-finding assessment", criminal investigations were opened in only five cases, including the deaths of four children. The commission's findings suggest strongly that other killings and gunshot injuries appeared factually similar and therefore also warrant criminal investigation. [...]

111. To date, the Government of Israel has consistently failed to meaningfully investigate and prosecute commanders and soldiers for crimes and violations committed against Palestinians or to provide reparation to victims in accordance with international norms. [...]

## **XI. Individual criminal responsibility**

113. Certain violations of international law attract individual criminal responsibility and are prosecutable in both domestic and international courts. [...]

## **Discussion**

### **I. Classification of the Situation and Applicable Law**

1. (*Document A, paras 5, 10, 14; Document B, paras 12, 24-26, 32*)

a. How would you classify the situation along the Gaza border? What is the opinion of the Israeli Supreme Court? Does it amount to an armed conflict? Even if exclusively the law enforcement paradigm applied? If it was an armed co, is it an IAC or a NIAC? Why? Who are the parties to the conflict? (GC I-IV, Art. 2, 3)

b. What is the legal regime applicable to this situation? Does the law of armed conflict apply? Is IHRL applicable to Israeli actions in Gaza?

2. (*Document A, paras 10, 54; Document B, para. 24*) Would your answer on the classification of the situation be different if Hamas was not involved in the demonstrations? Is it relevant in this context that the armed wing of Hamas was not represented in the organizing committee of the demonstrations? What are the implications of the claim by Salah Al-Bardwil, a member of Hamas' political bureau, that 80% of those killed belong to Hamas?

3. (*Document A, para. 14; Document B, paras 48, 61, 104*) Could flying of incendiary kites and balloons into Israeli territory by the demonstrators' trigger an armed conflict? How about hurling of grenade and explosive devices and firing live ammunitions at the soldiers? What criteria had to be fulfilled in order to establish that there was an armed conflict between the demonstrators and Israel? (GC I-IV, Art. 3)

4. (*Document A, paras 38, 45*) Does the Israeli Supreme Court allude to a particular classification of the situation in the case at hand?

5. (*Document B, paras 32, 36, 96-97, 103, 105*) How does the Commission of Inquiry classify the situation in Gaza during the demonstrations? What is its basis for such a classification?

### **II. Use of Lethal Force**



6. (*Document A, paras 39-40; Document B, para. 32*) Do you agree with the Israeli Supreme Court that IHL delineates two distinct paradigms for the use of force during an armed conflict, namely the conduct of hostilities and the law enforcement? Does IHL provide for rules on law enforcement? Is this not rather an IHRL issue? Do the Israeli Supreme Court and the Commission of Inquiry disagree about the applicable rules or about the facts? On what legal issues, if any do they disagree?
7. (*Document A, paras 39, 42; Document B, paras 32, 57, 63*) How do you determine whether the conduct of hostilities paradigm or the law enforcement paradigm applies to a use of potentially lethal force? Does it matter whether the military or the police use lethal force? Does the territory in which the use of lethal force occurred matter? What about the status/function of the person who is targeted? If the target is a civilian, does IHRL always apply except if they were directly participating in hostilities at the time of the attack? Is it possible to directly participate in hostilities if there are no hostilities occurring around? Would the actions of a person always automatically activate the conduct of hostilities paradigm if it involves use of weapons, as argued before the Court by the respondents?
8. (*Document A, para. 12*) Was IHL applicable to the use of lethal force by the Israel Defence Force against the demonstrators? Or were Israel Defence Forces engaged in a law enforcement operation? Do different legal standards apply to same armed forces of a State depending on whether they engage in hostilities or law enforcement operations? How can one determine whether they conducted one or the other?
9. (*Document A, paras 52-54; Document B, para. 34*) If IHRL applied, did the demonstrators create an actual and imminent threat to human life? Could a threat to the life of soldiers suffice under the law enforcement paradigm to justify a use of potentially lethal force? Do the Israeli Supreme Court and the Commission of Inquiry diverge on the concept of imminence?
10. (*Document B, para. 103*) Does the special protection of medical personnel, journalists and children under IHL matter under the law enforcement paradigm?
11. (*Document B, para. 98*) Do you agree with the conclusion of the Commission that targeting of persons based on their membership of an armed group while they are not directly participating in hostilities at the time of the targeting is impermissible and unlawful? (Interpretive Guidance on Direct Participation in Hostilities)
12. (*Document B, para. 98*) May persons who are legitimate targets such as combatants, civilians directly participating in hostilities and members of an armed group with a continuous fighting function, be targeted under IHL under the conduct of hostilities paradigm in the absence of arms and active hostilities?
13. (*Document A, paras 12, 57; Document B, paras 33, 36*) Is there a different standard on when it is permissible to resort to lethal force between conduct of hostilities and law enforcement operations? What is the relationship between the concept of imminent threat to human life and that of direct participation in

hostilities? Does IHL require graduated use of force? (Interpretive Guidance on Direct Participation in Hostilities)

14. (*Document A, paras 15, 50*) Is the warning requirement espoused by the Rules of Engagement and implemented by the Israeli troops during the demonstrations identical under the conduct of hostilities and law enforcement paradigms? Does IHL require belligerents to give advance warnings to enemy combatants before they resort to lethal force against them?

15. (*Document B, para. 57*) Did the incident at Al-Shuhada cemetery involve a case of direct participation in hostilities? Why could the Commission of Inquiry have had doubts?

16. (*Document A, para. 45*) Do you agree with the Court's assertion that civilian demonstrators who serve as human shields for members of armed groups like Hamas are directly participating in hostilities and consequently lose their civilian protection under IHL? (API, Art. 51 (3); Interpretive Guidance on Direct Participation in Hostilities)

17. (*Document A, para. 55; Document B, paras 8-9, 61*) Could the flying of incendiary kites and balloons into Israeli territory by the demonstrators be considered as direct participation in hostilities? Even if they have targeted civilian objects? How about causing damage to military infrastructure by use of explosive devices? (Interpretive Guidance on Direct Participation in Hostilities)

18. (*Document A, para. 4; Document B, para. 7*) What specifically does the conduct of hostilities paradigm require before lethal force can be used? How do these requirements differ from those under the law enforcement paradigm? May the armed forces only target civilians directly participating in hostilities in case of imminent threat to human life and only after exhausting less lethal means? (Interpretive Guidance on Direct Participation in Hostilities, Section IX)

19. (*Document B, paras 42-63, 95-96, 99*) If IHL was applicable to the situation, do you think that the Israel Defence Force made disproportionate or indiscriminate use of weapons leading to injury of civilians as prohibited by IHL? Why? (CIHL, Rules 12, 71)

20. (*Document A, para. 63*) To which legal paradigm do the Respondents allude to when informing the Court that alleged death of a person caused as a result of IDF fire in breach of the Orders and Rules of Engagement shall be investigated and prosecuted? How do IHL and IHRL differ when it comes to investigating the use of force that has led to loss of human life? Is there an obligation to investigate all alleged violations of IHL? Only alleged grave breaches of IHL? (GC I, Arts 49, 50; GC III, Art. 121; GC IV, Arts 131, 146, 147)