



## **Legal Q&A: Use of force against Gaza protesters**

**“It is with grave concern that I note the violence and deteriorating situation in the Gaza Strip in the context of recent mass demonstrations. Since 30 March 2018, at least 27 Palestinians have been reportedly killed by the Israeli Defence Forces, with over a thousand more injured, many, as a result of shootings using live ammunition and rubber-bullets. Violence against civilians - in a situation such as the one prevailing in Gaza – could constitute crimes under the Rome Statute of the International Criminal Court .”**

**Fatou Bensouda, Prosecutor of the International Criminal Court – 8 April 2018.**

### **What has happened at the mass protests in Gaza since 30 March 2018?**

Our partner, Al Mezan Centre for Human Rights (based in Gaza), has documented that 26 Palestinians, including three children and a photojournalist, have been killed by Israeli military forces using live ammunition and plastic coated steel bullets while participating during the mass protests on 30 March and 6 April inside the occupied Gaza Strip.

In addition, about 2,000 Palestinians – 1,150 of them with live ammunition – have been injured. They include 342 children, 76 women, seven journalists, and three paramedics. Of those injured, around 40 are in serious or critical condition.

The casualties occurred in the context of ongoing mass demonstrations by Palestinians on the Gaza side of the perimeter fence with Israel, where the Israeli army has imposed a ‘No Go Zone’, citing security concerns. The ‘March of Return’ is a series of mass protests on successive Fridays, leading up to the 70th anniversary of what Palestinians refer to as the 1948 ‘Nakba’, on 15 May.

The demonstrations have been largely non-violent, in line with the call of the organisers, who have established tent camps in all five Gaza governorates, some 700 metres from the fence. The large number of casualties among unarmed demonstrators, including a high percentage of demonstrators hit by live ammunition, has raised concerns about excessive use of force.

The protests take place against the context of an illegal closure policy imposed by Israel upon the entire population of the occupied Gaza Strip since June 2007. One of its effects is to prohibit civilians, with very limited exceptions, from entering and exiting the Gaza Strip, so that the



population is effectively locked in the territory. The closure of Gaza is an illegal act of collective punishment and stands in violation of both international and Israeli law.

## **What is the applicable legal framework governing Israel's use of force against protesters?**

Palestinian civilians in the Gaza Strip under Israeli military occupation are entitled to legal protections under international humanitarian law and international human rights law.

Palestinians participating in protests or demonstrations cannot be deemed to be lawful military targets under international humanitarian law, even if some weapons are used. Rather, they are considered to be civilians whom must be policed using a law enforcement legal framework that respects and protects their fundamental human rights under international human rights law. These include the right to life, the prohibition on cruel and inhuman treatment, and the rights to freedom of peaceful assembly and association.

The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials is widely regarded as an authoritative statement of international rules governing use of force in law enforcement operations. They include three main principles: necessity, proportionality, and precaution. These norms are binding on all states as general principles of law.

The UN Basic Principles provides that security forces shall “apply non-violent means before resorting to the use of force and firearms,” and that “whenever the lawful use of force and firearms is unavoidable, officials shall: (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; and (b) Minimise damage and injury, and respect and preserve human life.” Moreover, “intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”

The UN Basic Principles therefore provide that the use of force and firearms by a State against an individual can only be deployed in exceptional situations where an individual is posing an imminent threat of death or serious injury. When the use of force is deployed, it must be done so in a manner which is proportionate.

The excessive use of force deployed since 30 March against Palestinian protesters in Gaza raises grave concerns that these basic legal standards have been seriously violated, leading to the most fundamental violation of basic human rights protections, including the right to life. The UN High Commissioner for Human Rights echoes this grave concern in his [statement](#) on 6 April: “While a minority of protesters reportedly used means that could be dangerous, the use of protective gear and defensive positions by law enforcement officials would have mitigated the risk and should not have led to recourse to lethal force.”



As Palestinian protesters are considered to be protected persons under the Fourth Geneva Convention, any serious violations of the law enforcement standards may also amount to grave breaches of that Convention. Wilful killing and wilfully causing great suffering or serious injury to body or health are among the grave breaches stipulated under the Convention. Such grave breaches amount to war crimes and incur individual criminal responsibility (read more on this at the final question of this Q&A below).

It must also be clarified that the UN Basic Principles are fully applicable notwithstanding the declaration by Israeli forces that the Access Restricted Areas near the border fence with Gaza is a closed military zone. As noted by the UN High Commissioner for Human Rights in his [statement](#) on 6 April, “[a]n attempt to approach or cross the green-line fence by itself certainly does not amount to a threat to life or serious injury that would justify the use of live ammunition.”

### **Is an independent and transparent investigation necessary to determine if unlawful force was used against protesters?**

In the context of law enforcement operations, at a minimum, States must investigate alleged violations of the right to life, resulting from use of force by State agents, in accordance with international human rights law.

In relation to the duty to investigate, human rights treaties, guidelines and principles elaborate standards against which investigations are evaluated in order to determine compliance with the law. Thus, investigations are assessed against the following criteria: independence; impartiality; thoroughness; effectiveness; and promptness. Transparency is also an increasingly important element.

International human rights law further sets out the obligation to ensure that individuals have accessible and effective remedies, including compensation, for gross violations of international human rights law and serious violations of international humanitarian law. Remedies include the victim’s right to: (a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; and (c) Access to relevant information concerning violations and reparation mechanisms. Reparations include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Satisfaction includes a range of measures: measures aimed at the cessation of continuing violations; verification of the facts and full and public disclosure of the truth; a public apology; and legal reform.

The above clarifies that is vital from a human rights and rule of law perspective that an independent and transparent investigation is undertaken by Israeli authorities into the events at the Gaza border since Friday 30 March 2018, and that criminal prosecutions and legal accountability properly follow if there is evidence of wrongdoing by soldiers and/or their



superiors. Among the critical questions that an investigation should ascertain is what were the precise open-fire instructions given to Israeli soldiers, and were all those shot by live ammunition posing an imminent threat to life.

The [UN Secretary General](#) and [UN High Commissioner for Human Rights](#) have called for an independent and transparent investigation following the use of force against Palestinian protesters on 30 March. The [EU High Representative](#), on 31 March, asserted that the “use of live ammunition should, in particular, be part of an independent and transparent investigation.”

On 1 April, [Israel's defence minister](#) rejected these calls. Subsequently, however, on 08 April, the Israeli military [announced](#) that an internal investigation will be opened and led by the current head of its Training and Doctrine Division. Following this internal investigation, a decision will be made on whether to open a military police investigation.

There are serious doubts whether this investigation process will meet the international standards outlined above. These concerns are based on authoritative reports detailing the severe shortcomings in Israel's investigation processes for its military forces.

### **Does Israel's investigation system meet international standards?**

The UN Commission of Inquiry into the Gaza Conflict 2014 (UN Commission) published its significant report in June 2015, a part of which examines whether Israel's investigations are compliant with international standards. It states at paragraph 618 that “the Commission is concerned about a number of procedural, structural and substantive shortcomings, which continue to compromise Israel’s ability to adequately fulfil its duty to investigate. Many of these have been identified by the Turkel Commission, as well as by international human rights mechanisms.”

In regard to the key criterion of independence and impartiality, the UN Commission found: “As noted by the UN Committee of Experts in 2010 and 2011, a central failing of the investigation system stems from the dual responsibilities of the Military Advocate General, both as the legal advisor to the Chief of General Staff and other military authorities and as the supervisor of disciplinary law and of criminal investigations in the military.”

The UN Commission's report makes reference to the findings of a Government of Israel appointed commission – called the Turkel Commission – whose report in 2013 stated: “[T]here are grounds for amending the examination and investigation mechanisms”. The Turkel Commission made 18 recommendations directed at various Israeli government agencies.

A further commission – called the Ciechanover Commission – was then established by the Government of Israel to recommend practical steps towards implementing the recommendations of the Turkel Commission to improve Israel’s mechanisms for investigating



alleged violations of the laws of war. They published their report in September 2015. It was, however, criticised by the leading Israeli human rights organisation, Yesh Din, who concluded:

“Twenty months after the establishment of the Ciechanover Commission (January 2014), and five years and four months after the establishment of the Turkel Commission, with the wars and military operations such as Pillar of Defense and Protective Edge that took place in the interim, there are still no prospects for improvement in Israel’s investigation and examination mechanism or for legislative measures that would bring Israel in line with its obligations under international law... [T]he Ciechanover Commission set out to buy time, create the false impression that the investigation and examination mechanism is undergoing improvements and continue to grant impunity to members of the security forces and civilian superiors who violate the laws of war under international law.”

This striking analysis by Yesh Din strongly suggests that despite the existence of the recommendations of the Turkel Commission, very significant concerns remain in place relating to the basic issue of the genuineness of investigation and accountability processes in Israel concerning alleged serious violations of international law, due to, a) the absence of an adequate legislative framework for investigations, b) the deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more responsible, and c) more general issues relating to lack of political will.

Then, in 2016, the prominent Israeli human rights organisation, B'Tselem, announced it will stop referring complaints to Israel's military law enforcement system. It stated: “There is no longer any point in pursuing justice and defending human rights by working with a system whose real function is measured by its ability to continue to successfully cover up.”

Finally, Israel will be using the same 'probe' process that was used to review and investigate its troops conduct during the military offensive on Gaza in 2014. The result to date is that there has been no criminal prosecution against commanders or officers for use of force that resulted in at least 1,545 Palestinian civilians being killed. The investigation system has not been restructured and there is no credible reason based on empirical evidence to expect a different outcome.

It is against this context that there are substantial grounds for concern that the planned internal investigation announced by the Israeli military into the use of force at the Gaza protests will not meet the aforementioned international standards for a credible investigation; and therefore frustrate hopes for legal accountability and justice if there has been criminal wrongdoing.

**Is there a role for the International Criminal Court to secure accountability and justice if Israel's investigation into the Gaza protests does not meet international standards?**



If the investigation carried out by Israel into the recent Gaza protests falls short of international standards, there is a clear possibility that the International Criminal Court may become engaged with the potential ultimate outcome of providing legal accountability and justice.

On 16 January 2015, the Prosecutor of the International Criminal Court announced the opening of a preliminary examination into the situation in Palestine. This occurred after the Government of Palestine lodged a declaration under article 12(3) of the Rome Statute of the International Criminal Court accepting the jurisdiction of the Court over alleged crimes committed “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014”, and after it had deposited its instrument of accession to the Rome Statute, thereby becoming a State Party.

These seminal developments provides the International Criminal Court with jurisdiction over the situation in occupied Gaza, despite Israel not being a State party to the Court.

It is against this context that the Prosecutor of the International Criminal Court, Fatou Bensouda, issued a significant [statement](#) on 8 April informing all parties that her Office is closely monitoring the protests in Gaza, and that any new alleged crime may be subjected to the scrutiny of her Office as part of its ongoing preliminary examination into the situation in Palestine. She concluded by pointedly stating:

*“Any person who incites or engages in acts of violence including by ordering, requesting, encouraging or contributing in any other manner to the commission of crimes within ICC’s jurisdiction is liable to prosecution before the Court, with full respect for the principle of complementarity.”*

Article 8(2) of the Rome Statute of the International Criminal Court expressly includes grave breaches of the Geneva Conventions as war crimes that fall within the jurisdiction of the Court. These include the grave breaches of wilful killing, and wilfully causing great suffering or serious injury to health. These specific war crimes appear to be engaged by the lethal and injurious incidents of 30 March and 6 April, as aforementioned in the second question of this Q&A.

It is also pertinent to note two related provisions of the Rome Statute. Article 8(1) provides that “The Court shall have jurisdiction in respect of war crimes **in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes**” (bolded by LPHR for emphasis). And Article 28 provides that a military commander or civilian official can be held criminally responsible for crimes committed by subordinates where, at the time relevant to the charges, he was in a relationship of superior-subordinate with the perpetrators, knew or had reason to know (or, in the case of military superiors, “should have known”) that these crimes had been committed or were about to be committed and, with and despite that knowledge, wilfully and culpably failed to prevent or punish these crimes.



The reference to the principle of complementarity in the above excerpt from the Prosecutor's statement relates to a cornerstone principle of the International Criminal Court - provided in the preamble to the Rome Statute - that the Court "shall be complementary to national criminal jurisdictions." Articles 53(1)(b) and 17(1)(a-c) of the Rome Statute set out the principle of complementarity. It provides that as a court of last resort, the International Criminal Court works in tandem with states, and accordingly only opens full investigations into criminal claims when states with primary jurisdiction are unwilling or unable to genuinely investigate and prosecute where appropriate.

Therefore, the question of the genuineness of Israel's investigation into the use of force by its military forces against Palestinians protesters, will be crucial for the Prosecutor of the International Criminal Court to determine in the context of her complementarity assessment. It is one of the key admissibility issues that must be assessed by her Office when deciding whether or not to proceed with a full criminal investigation into the events in Gaza on 30 March, 6 April and to any related future incidents.

The above makes clear that securing legal accountability and justice for the victims, survivors and their families of the Gaza protests may not rest alone on the outcome of Israel's investigation. As strongly indicated by the statement of the Prosecutor of the International Criminal Court, accountability and justice may potentially be achieved at the international level should Israel's own investigation fail to meet international standards.

**Tareq Shourou**