



## **Twelve key points relevant to the complementarity assessment being undertaken by the Office of the Prosecutor of the International Criminal Court on the grave issue of targeted airstrikes against family homes in Gaza**

This short report presents twelve key points on the deeply grave issue of widespread targeted airstrikes against family homes in Gaza during Israel's military offensive in 2014 that are relevant to the critical assessment on complementarity currently being undertaken by the Office of the Prosecutor of the International Criminal Court (**Office of the Prosecutor**) in its preliminary examination on the situation of Palestine.

Complementarity refers to a governing principle at the heart of the International Criminal Court (**ICC**) that national courts should first and foremost deal with alleged serious crimes. The ICC shall therefore only deal with cases as a court of “last resort”, when it has been determined that the state in question is either unable or unwilling to carry out genuine proceedings.

In December 2018, the Office of the Prosecutor announced in its [annual update report](#) that in relation to crimes allegedly committed by members of Israeli military forces during the 2014 hostilities in Gaza, *'the information available indicates that all of the relevant incidents are or have been the subject of some form of investigative activities at the national level within the IDF military justice system'*.

The Office of the Prosecutor must therefore thoroughly assess the genuineness of Israel's military investigation into incidents of attacks against family homes in Gaza. This short report outlines twelve key points that have fundamental relevance to this crucial assessment.

LPHR has a firm background reviewing the extremely serious issue of targeted airstrikes against family homes. We worked very closely with our partner in Gaza, Al Mezan Centre for Human Rights, in the summer of 2014 to prepare a [comprehensive complaint](#) on the widespread targeted airstrikes of family homes during the 2014 hostilities in Gaza, that was submitted to the UN independent Commission of Inquiry on the 2014 Gaza Conflict (**Commission of Inquiry**).

Our submission featured 40 grave incidents of attacks against family homes resulting in 385 documented fatalities and scores of other individuals being injured, plus an accompanying initial legal analysis. We then met with the Commission of Inquiry to discuss relevant legal questions.

Our submission was later referenced in the Commission of Inquiry's June 2015 report, where it is notable that airstrikes against family homes is given particularly prominent attention. The Commission of Inquiry itself noted that, *'a significant percentage of civilians killed during the conflict died inside their home as a direct result of air-strikes or artillery shelling of their neighbourhoods, making attacks on houses a key-feature of the conflict'*. (para. 243)



The Commission of Inquiry's report quoted the casualty statistics carefully compiled by Al Mezan that 1,066 people, including 370 children and 241 women, were killed inside their homes in Gaza. This starkly means that over 66 per cent of children (*370 out of 556 child fatalities*) and over 82 per cent of women (*241 out of 293 woman fatalities*) were killed by attacks whilst inside their homes during the 2014 military offensive on Gaza.

These figures do not include those who were killed or injured in the vicinity of their homes, including situations where people were trying to flee from their family homes as a result of targeted airstrikes (the Commission of Inquiry's report gives the examples of the Al Siyam, Dheir and Al Farra cases -- as were also featured in the LPHR and Al Mezan September 2014 comprehensive complaint).

The legal analysis in the Commission of Inquiry's report raised the same very significant legal questions and issues as raised in our September 2014 comprehensive complaint. Both reports found that serious violations of international humanitarian law and international criminal law may have been committed in the context of targeted airstrikes against family homes in Gaza.

LPHR has an unequivocal position that there is a paramount need for genuine criminal investigations into individual airstrike incidents against family homes, and into the apparent broader policy of carrying out widespread targeted attacks against family homes that may have been '*approved at least tacitly by decision makers at the highest levels of the Government of Israel*' (para 243, Commission of Inquiry). Genuine criminal investigations are essential for ensuring legal accountability and justice for the massive number of victims, survivors and their families, and also to provide the most effective possible deterrent against the potential future use of a policy of widespread targeting of family homes in any other conflict.

LPHR has therefore carefully reviewed [six updates between December 2014 and August 2018 provided by Israel's Military Advocate General](#) – a central component of Israel's military justice system – in relation to its account of its investigation of individual incidents of attacks against family homes during the 2014 hostilities in Gaza, and also the [May 2015 report by the Government of Israel](#) entitled: 'The 2014 Gaza Conflict: Factual and Legal Aspects'. We have also reviewed the [B'Tselem September 2016 report](#) entitled 'Whitewash Protocol: The So Called Investigation of Operation Protective Edge', and the considered findings made by the [UN independent Commission of Inquiry in its June 2015 report](#).

The conclusions we make on Israel's own investigations into the use of airstrikes against family homes concur with findings made by B'Tselem and the Commission of Inquiry in their reports. Our conclusions are outlined in the following twelve key points that we believe are relevant to the complementarity assessment being made by the Office of the Prosecutor of the ICC.



1. A major omission from the six updates published by Israel's Military Advocate General (**MAG**) and the Government of Israel May 2015 report into the 2014 Gaza conflict is the absence of consideration as to whether or not there was an expressly or tacitly approved policy at the highest military and political levels that authorised widespread targeted airstrikes of family homes in Gaza.

A criminal investigation into this issue is imperative given the well-documented evidence of the pervasive extent of such attacks during the seven-week span of the 2014 hostilities in Gaza. Such an investigation should consider whether such an apparent approved policy in itself constituted a serious violation of international humanitarian law and international criminal law. And it should further consider why there was no discernible change to the apparent policy when large civilian casualty figures from such attacks had become glaringly evident early on into the conflict.

The UN Commission of Inquiry on the 2014 Gaza Conflict (**Commission of Inquiry**) highlighted this fundamental omission of Israel's military investigation at paragraph 640 of its report, when noting, '*Currently, the Fact Finding Assessment Mechanism focuses on so-called 'exceptional incidents' suggesting a rather narrow approach, which may fail to take into account violations of international law that result from an intentional policy or military command, which itself may fail to comply with international legal obligations. The commission's investigations also raise the issue of why the political and military leadership did not revise their policies or change their course of action, despite considerable information regarding massive death and destruction in Gaza, which in turn raises questions as to potential violations of international humanitarian law and criminal law by these officials*'.

2. A further overarching deficiency arises in the materially limited framework of Israel's domestic law for prosecuting war crimes and crimes against humanity. As highlighted by the Israeli human rights organisation, [Yesh Din](#), in its analysis of the Chiechanover Commission report on the implementation of the Turkel recommendations, Israel's domestic law still does not legislate for the following crimes:

- crimes against humanity;
- offences committed during the time of war; and
- special responsibility on military commanders and civilian superiors for offences committed by their subordinates.

LPHR submits that these omissions are clearly materially relevant to a complementarity assessment in the context of targeted airstrikes against family homes in Gaza.

3. In regard to the individual incidents of targeted airstrikes against family homes examined by the Fact-Finding Assessment Mechanism (**FFAM**) – a mechanism



established to determine facts on individual incidents so as to enable the MAG to reach decisions regarding whether or not to open a criminal investigation – only one has resulted in the opening of a criminal investigation: the case of the attack on the Abu Jame home on 20 July 2014 which resulted in 27 fatalities. This one criminal investigation was later closed without further action being taken, as outlined in the sixth MAG update dated 15 August 2018. Therefore, four and half years on from the 2014 hostilities in Gaza, there are no current criminal investigations into targeted airstrikes against family homes.

A salient point in relation to the Abu Jame family case, as also raised by B'Tselem in its September 2016 report entitled 'Whitewash Protocol: The So Called Investigation of Operation Protective Edge', is that no explanation has been provided by the MAG as to why this incident was exceptionally opened for criminal investigation. There appears to be no material difference in the Abu Jame case when compared to scores of other family home airstrike cases. This raises a key question that if a criminal investigation was opened into the Abu Jame case, why have no other criminal investigations been opened for apparently similar incidents of targeted airstrikes against family homes?

**4.** The six MAG updates cumulatively reference twenty incidents of attacks against family homes, which is a minority of all such incidents during the 2014 Gaza hostilities. Aside from the Abu Jame case, all others documented in the six MAG updates were closed without the opening of a criminal investigation following an FFAM examination.

The three family home airstrike incidents summarised in the six MAG updates with the highest number of fatalities (Abu Jame family – 27 fatalities; Abu Amer, Al Najjar, Brecker and Mu'ammam families – 35 fatalities; Abu Jaber family – 19 fatalities) had the recurrent finding that the number of those killed was 'higher than had been assessed'. This raises two broader questions relevant to a criminal investigation that do not appear to have been addressed in the six MAG updates nor in the Government of Israel May 2015 report. They are, i) was there a sufficiently rigorous assessment of the expected civilian harm before the authorisation of each specific attack against a family home, and ii) why had the proportionality assessment used by Israel's forces not apparently been necessarily modified after it had become clear that excessive number of civilians were being killed and injured in attacks against family homes.

Both questions critically relate to whether or not the proportionality assessment and precautionary measures used by military commanders when authorising airstrikes against family homes during the 2014 hostilities in Gaza were reasonable and in compliance with international humanitarian law at all times, or, alternatively, were unlawful in serious violation of international humanitarian law either systemically or in specific cases. For more on this, please see points 7, 8, 9 and 10 below.



5. On the principle of distinction, it is notable that at paragraph 223 of its report, the Commission of Inquiry significantly raises concern that attributing family homes as a military objective appears to constitute an excessively-broad interpretation that accordingly may amount to a serious violation of international humanitarian law and international criminal law: *'In the absence of precise information about the possible military use of these premises, the commission is unable to make a final assessment regarding the principle of distinction. However, the massive scale of destruction and the number of homes and civilian buildings attacked raise concerns that Israel's interpretation of what constitutes a "military objective" is broader than the definition provided by IHL. Should attacks have been directed against buildings that did not constitute a military objective this may amount to a war crime'*.

6. The Commission of Inquiry further noted the following which LPHR submits has fundamental relevance in regard to determining whether Israel's military command satisfied the principle of distinction whenever it re-classified a family home with presumed civilian object status under international humanitarian law as a command and control centre: *'The IDF later stated that many commanders of armed groups were using their homes as command centres and that it was the command centres, rather than the homes themselves, that were targeted. Although issuing operational orders may be construed as using a home for military purposes, in order for it to become a military objective, its destruction must offer a definite military advantage at the time of the attack. The mere presence of a laptop or mobile phone used for military purposes in the apartment, or the fact that meetings of a military nature had been held there in the past, are not sufficient to turn a civilian object into a military objective owing to the extremely limited military advantage the destruction of the home would offer. Indeed a meeting can easily be held elsewhere, and mobile phones and laptops are portable and can be replaced when destroyed'*. (para. 222)

The six MAG updates regularly refer to homes being targeted because, in part, they were command and control centres. However, this assertion is never further elaborated upon so as to provide the essential clarity required for an accurate assessment on whether the presumed civilian status of a home under international humanitarian law was reasonably overturned in each examined incident. It would appear that such essential clarity may only be provided through a genuine criminal investigation.

LPHR retains the position – as noted in our September 2014 comprehensive complaint with Al Mezan Centre for Human Rights to the Commission of Inquiry – that the apparent policy approved by Israel's military and political leadership to target the family homes of individuals who belong to Palestinian armed groups, is substantially and gravely incompatible with any reasonable interpretation of the provisions and principles of international humanitarian law relevant to this specific issue.



7. Finally on the principle of distinction, it is notable that out of the four cases highlighted in the Commission of Inquiry report of civilians being killed while fleeing their homes (Al Siyam, Dheir and Al Farra families) or on the roof of their house (three children from the Shuheibar family), only one has been addressed by the six MAG updates: the case of the Al Siyam family. The fifth MAG update found that the FFAM had ruled out that this fatal attack was caused by IDF munitions. In stating this conclusion, it omitted to address the findings by the Commission of Inquiry that the fatal attack appeared to have been caused by a precision-guided AGM 114 Hellfire Missile guided by an aircraft (para. 192, Commission of Inquiry).

The Commission of Inquiry notes at paragraph 228 in regard to the cases of families fleeing from their homes that '*[U]nless there were legitimate military objectives, the targeting of civilians not taking part in the hostilities would be a violation of the principle of distinction - and could constitute a direct attack against civilians, a war crime under international criminal law.*' LPHR submits that the inadequate reasoning provided by in the fifth MAG update in relation to the Al Siyam case, and the MAG updates silence on the cases of Al Farra, Dheir and Shuheibar, demonstrates that there cannot be any conviction that there has been a credible and transparent military investigation into these incidents.

8. On the principle of proportionality, LPHR is deeply concerned that the proportionality assessment undertaken by military commanders when authorising airstrikes against family homes during the 2014 hostilities in Gaza was not reasonable either on a systemic basis or in relation to specific incidents, and accordingly may constitute a serious violation of international humanitarian law and international criminal law.

LPHR takes this position based on considering the following relevant factors, i) the targeting of a family home – after being classified as a command and control centre and/or after an assessment that an individual with a continuous combat function was residing within the home – objectively carries with it a substantial inherent risk of endangering a large number of civilians that should accordingly entail only a minimal number of homes, if any, being authorised for attack; ii) the recurrent large casualty figures from targeted airstrikes against family homes indicates that the proportionality assessment implemented during the 2014 hostilities in Gaza permitted an excessive imbalance between the expected civilian harm and the anticipated military advantage of an attack; and iii) there was apparently no modification of the parameters of the proportionality assessment being used by military commanders despite it being apparent early on during the 2014 hostilities in Gaza that massive civilian harm was being caused as a result of the targeting of family homes.

Against this context, it is notable that the Government of Israel acknowledges in its May 2015 report that, '*the estimation of potential collateral damage can be very*





*challenging... this is all the more so when operating in a complex urban environment... while militaries are required to exercise due diligence and to devote reasonable efforts to collect information with respect to the collateral damage expected, information deficits are inevitable'* (para. 326). These acknowledgements strongly indicate that a reasonable commander should have erred on the side of considerable caution when making the proportionality assessment, especially with knowledge of the large casualty figures from previously authorised airstrikes against family homes.

The large casualty figures from specific airstrike incidents against family homes, coupled with the overall casualty figures from attacks against family homes during the 2014 hostilities in Gaza, is indicative that military commanders did not take such a required reasonable approach when undertaking the proportionality assessment, and accordingly may have acted in serious violation of international humanitarian law and international criminal law.

**9.** The Commission of Inquiry provides an analysis on the fundamental question of whether airstrike attacks against family homes during the 2014 hostilities in Gaza were in conformity with the principle of proportionality. It concludes, *'[I]n most of the incidents examined by the commission and others, however, given the following circumstances: the fact that the targeted buildings except one were residential in nature; that they were located in densely populated areas; that the attacks were carried out when it could be expected that most family members would be at home (in the evening or at dawn when families gathered for iftar and suhkur, the Ramadan meals, or during the night when people were asleep); and that large weapons apparently meant to raze buildings were used; it is possible to conclude that a reasonable commander must have been aware that such an attack was likely to result in a high number of civilians casualties as well as in considerable destruction. Given the absence of information suggesting in each case that the anticipated military advantage at the time of the attack was such that the expected civilian casualties and damage to the targeted and surrounding buildings were not excessive, there are strong indications that these attacks could be disproportionate, and therefore amount to a war crime'*. (para. 221)

**10.** Against the context of the above observations in relation to proportionality, it is a striking omission that neither the six MAG updates nor the Government of Israel May 2015 report provide overall fatality and injury numbers for those grievously affected by attacks against family homes. The Government of Israel May 2015 report only refers to four specific incidents with no reference at all to civilian casualties.

It is also notable that transparent full disclosure has not been made of all the incidents of attacks against family homes that have been subject to the FFAM. The six MAG updates cumulatively refers to only twenty incidents, and deals with them as individual 'exceptional incidents', without providing the broader overall context that they



represented just a minority of all attacks against family homes – [UN OCHA reported](#) that at least 142 Palestinian families had three or more family members killed in the same incident as a result of attacks on residential buildings – and that such attacks were a 'key-feature of the conflict', as noted by the Commission of Inquiry in its report.

The sole focus of Israel's military investigation process on individual 'exceptional incidents', as opposed to also necessarily investigating whether there was an expressly or tacitly approved policy at the highest military and political levels authorising widespread targeted airstrikes of family homes – as outlined in point one above – is a particularly glaring deficit in the context of its investigation of targeted airstrikes against family homes.

**11.** In the context of considering the IHL principle of taking precautionary measures, it is important to note the findings of the Commission of Inquiry where it states, '*[T]here are concerns that the IDF may not have done everything feasible to verify whether civilians were present in the buildings selected for attack and to assess whether the impending strike would result in civilians casualties and damage to civilians objects, which would be excessive in relation to the anticipated military advantage. The incidents examined in this section point to a potential failure by the IDF to take all appropriate measures to avoid or at the very least to minimise death and injury to civilians and damage to civilian objects. The limited effectiveness of these precautionary measures must have been abundantly clear during the early days of the operation, given that many buildings were completely destroyed together with their inhabitants. The apparent lack of steps taken to re-examine these measures in light of the mounting civilian toll suggests that Israel did not fully comply with its obligation to take all feasible precautions in attack*'. (para. 241 and 242)

To take just one example of the targeted airstrike on the family home of the Abu Jaber family on 29 July, the sixth MAG update states that it had been assessed by the military commander that civilians were present in the home, but that the harm caused would not be excessive in relation to the anticipated military advantage. It goes on to state that the number of 19 killed was 'substantially higher than assessed'. This suggests a grave breach to exercise all feasible precautions, which appears to have been a feature of a number of targeted airstrikes against family homes during the 2014 Gaza hostilities.

**12.** A deeply grave concern over the widespread use of targeted airstrikes against family homes during the 2014 hostilities in Gaza is that women, children and the elderly were particularly vulnerable to death and injury, as noted by the Commission of Inquiry.

At paragraph 243 of its report, the Commission of Inquiry quoted the casualty statistics carefully compiled by our colleagues at the Al Mezan Centre for Human Rights that 1,066 people, including 370 children and 241 women, were killed inside their homes in





Gaza. This starkly means that over 66 per cent of children (*370 out of 556 child fatalities*) and over 82 per cent of women (*241 out of 293 woman fatalities*) were killed by attacks whilst inside their homes during the 2014 hostilities in Gaza. These figures do not include those killed or injured in the vicinity of their homes; including where civilians were fleeing from their family homes as a result of targeted airstrike attacks.

The profoundly harmful impact upon civilians of the widespread targeted airstrikes against family homes during the 2014 hostilities in Gaza is concisely and gravely summarised by the anonymous witness at paragraph 110 of the Commission of Inquiry report: *'This war was different from previous wars, especially for women. Civilians were attacked particularly in their homes'*.

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The above twelve points underscore LPHR's long-held substantial concern that the widespread targeted airstrikes against family homes in Gaza during the 2014 hostilities appear to be in serious violation of international humanitarian law and international criminal law.

A massive number of grievous civilian casualties resulted from the widespread targeted airstrikes against family homes. LPHR takes the position that the apparent expressly or tacitly approved policy during the 2014 hostilities in Gaza of authorising widespread targeted airstrikes against family homes is excessively dangerous and harmful for civilians, and must not be emboldened to recur in any current or future conflict anywhere in the world.

It is against this context that LPHR has taken the unequivocal position that there is a paramount need for genuine criminal investigations into individual airstrike incidents against family homes, and also into the apparent broader policy of carrying out widespread and targeted airstrikes against family homes that may have been *'approved at least tacitly by decision makers at the highest levels of the Government of Israel'*. As further noted by the Commission of Inquiry, *'Such tactics appear to have prioritised the perceived military objective over other considerations, disregarding the obligation to minimise effects on civilians. In this context, with respect to the importance of adhering to the principles of distinction and proportionality, the ICTY has ruled that in some circumstances "a pattern of military conduct may turn out to jeopardise excessively the lives and assets of civilians".'* (para. 243)

Genuine criminal investigations are essential for ensuring legal accountability and justice for the massive number of victims, survivors and their families of targeted airstrikes against family homes, and also to provide the most effective possible deterrent against the potential future use of a policy of widespread targeting of family homes in any other conflict. A review of the six MAG updates and the Government of Israel's May 2015 report raises objectively substantial concerns that Israel's military investigation system is clearly unwilling to provide the required genuine criminal investigations in this deeply grave and egregious context.