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The Violent Events along the Gaza-Israel Border:
The Report of the Commission of Inquiry of the Human Rights Council
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According to the report presented by the Commission of Inquiry (COI) established by the United Nations Human Rights Council to investigate the use of force surrounding the events at the Gaza fence, there are reasonable grounds to believe that in the vast majority of cases the use of live ammunition by Israeli soldiers against the demonstrators was unlawful and may constitute war crimes or crimes against humanity. The report claims that 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. Israel, however, contends that one cannot view the events as peaceful demonstrations within a state, since these were violent riots taking place along the border between two entities engaged in an armed conflict, organized and led by one of those parties, i.e., Hamas. The huge gap between the positions of Israel and the COI stems mainly from the fact that the report adopts entirely the viewpoint of the Palestinian victims, with no regard to the complex reality of the situation and to the ramifications of the armed conflict between Israel and Hamas. As with previous reports on Israel's conduct, there is no doubt that this report will serve to criticize Israel in the international arena and to spur efforts toward criminal proceedings, sanctions, and other measures. However, the one-sidedness of the report might prevent reliance on its conclusions by those making professional determinations.

On February 25, 2019, the Commission of Inquiry (COI) established by the United Nations Human Rights Council to investigate the use of force surrounding the demonstrations held at the Gaza fence that began on March 30, 2018 presented its report. Israel did not cooperate with the COI, and members of the Commission were not granted access to the Gaza Strip. The report concludes that there are reasonable grounds to believe that in the vast majority of cases the use of live ammunition by Israeli soldiers against the demonstrators was unlawful and may constitute war crimes or crimes against humanity. The responsibility for these developments lies with those who employed, assisted, or authorized the lethal force, including snipers, spotters, and/or on site commanders, as well as on those who drafted and approved the rules of engagement. The report notes that it collected information about the identity of those deemed responsible, and recommends that the dossiers on alleged perpetrators be provided to the International Criminal Court (ICC), where a preliminary

examination is already underway into the incidents, as well as to national justice mechanisms undertaking credible investigations into the alleged crimes. It also recommends that states exercise criminal jurisdiction and consider imposing sanctions, such as travel bans or assets freezes, on those identified as responsible.

According to the report, 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 applicable legal framework was that of law enforcement, grounded in international human rights law, which permits potentially lethal force only in self-defense or for the defense of others when there is an imminent threat to life and the force is necessary and proportionate. An imminent threat is understood as a matter of seconds, not hours. The COI also states that owing to the ongoing armed conflict, the rules of international humanitarian law, which allow the use of force against someone who is directly participating in hostilities, were applicable during active hostilities.

The report focuses on the Palestinian casualties and specifies killings and injuries without referring to the threat posed to Israel by the events, except in a short mention stating that "Israeli security forces stated that they perceived a new security threat in the demonstrations as being closely linked with Palestinian armed groups and an attempt to mask 'terror activities,'" and that crossing the separation fence was perceived as a potential imminent threat.

According to the report, the COI investigated 189 fatalities, of which 183 were victims of live ammunition, and 300 injuries, out of an estimated 6103 persons who were wounded by live ammunition. Thousands more were injured from tear gas inhalation and canisters. The report notes that according to Israeli sources, one soldier was killed and four were injured during the demonstrations, and that extensive damage to Israeli civilian property was caused by hundreds of incendiary kites and balloons launched from the Gaza Strip.

The report concludes that, with the exception of two fatalities - one person who fired toward the Israeli side of the fence and one who allegedly approached a soldier with a knife – the use of live ammunition by Israeli security forces against demonstrators was unlawful. Victims were far away from the Israeli forces and were visibly engaged in civilian activities. The report even suggests that snipers intentionally shot children, health workers, journalists, and people with disabilities, despite identifying them as warranting special protection. Moreover, "less lethal alternatives remained available and substantial defences were in place, rendering the use of lethal force neither necessary nor proportionate, and therefore impermissible." The report does not specify what these alternative measures are, but concludes that there are reasonable grounds to believe that demonstrators were shot in

violation of their right to life and of the principle of distinction under international humanitarian law (which prohibits intentionally targeting civilians).

The commission found that at least 29 of those killed at the demonstration sites were members of Palestinian organized armed groups (and mentions another 18 as inconclusive cases). Yet since the law enforcement paradigm is the relevant framework, this cannot justify targeting them, unless they were, at the time targeted, directly participating in hostilities or posed an imminent threat to life. According to the report, permitting to shoot at the legs of “main inciters,” as stipulated in the IDF rules of engagement, creates a status that does not exist in international law and undermines the legal threshold for the use of potentially legal force. There is no legal analysis of this contention in the report.

After noting that some deaths were examined by the IDF internal fact-finding assessment and that criminal investigations were opened in five cases, the report recommends that Israel investigate all the other cases as well. The report contends that Israel’s consistent failure to “meaningfully investigate” crimes and violations committed against Palestinians, as well as public comments made by high-ranking public officials, cast doubt over its willingness to scrutinize the actions of military and civilian leadership responsible for the rules of engagement. It also asserts that Israel refrains from compensating victims and hampers their access to remedies in Israeli courts.

The report refers to the blockade of Gaza and its humanitarian consequences, to the deterioration of the health system, exacerbated by the burden of caring for the large number of injuries, and to the limitations placed by Israel and Egypt on requests to exit Gaza for medical treatment. All these amount to a violation of the right to life with dignity and of the obligations of Israel as the occupying power to ensure the health and welfare of the Palestinian population. In addition, it claims that Israel violated the right to freedom of expression and peaceful assembly, the rights of children, and the obligations to respect and protect medical personnel, journalists, and children in armed conflict situations.

As for Hamas, the report only notes that members of the committee organizing the demonstrations, including Hamas, encouraged or defended demonstrators’ use of incendiary kites and balloons, and that “the de facto authorities in Gaza” (namely Hamas) failed in their due diligence obligations to prevent and stop the use of these indiscriminate devices. There is no reference to Hamas’s responsibility for the violence and terrorist activity that were part of the events or to its use of civilians, placing them in harm’s way.

Israel’s position was presented in detail in public documents accessible to the COI, including on the IDF website and the state’s submission to the High Court of Justice. According to these, the Standard Operating Procedures (SOPs) of the IDF are compatible

with the law that applies in situations of law enforcement, taking into account the existence of an armed conflict between Israel and Hamas. The SOPs do not permit the use of potentially lethal force unless the violent riot reaches the level of a real and imminent threat to the life or bodily integrity of Israeli civilians or IDF forces, and all relevant non-lethal means have been exhausted. During the events, ongoing over a period of many months, there were incidents where the riot became violent, posing a threat to soldiers and civilians, with scores of rioters attempting to breach the border fence and security infrastructure. In addition there were numerous instances of persons shooting at IDF forces and positions, throwing grenades and other explosives, and laying mines and booby-traps along the fence. In such cases, the SOPs permit precise and measured fire, deemed necessary in order to remove the threat and in proportion to the threat posed, against a “key instigator” or “key rioter,” in order to remove the real and imminent danger posed by the riot. These rules also permit lethal force to be employed where a person is identified as a member of Hamas’s armed forces or is engaged in activities amounting to direct participation in hostilities, such as firing at Israeli soldiers.

Israel contends that one cannot view the events as peaceful demonstrations within a state, since these are violent riots taking place along the border between two entities engaged in an armed conflict, organized and led by one of those parties (Hamas) whose members were actively involved. Moreover, if the mob manages to breach the border and storms toward the Israeli localities adjacent to the border, the events could snowball to a point where the IDF would be forced to use greater force against the mob as a whole, causing many more casualties. Israel also emphasized that petitions challenging the legality of the SOPs were rejected by the court, finding in favor of the State with regard to both the factual circumstances and its legal positions.

The huge gap between the positions of Israel and the COI stems mainly from the fact that the report adopts entirely the viewpoint of the Palestinian victims, portraying the events as peaceful demonstrations that do not warrant the use of force and with no regard to the complex reality of the situation, and especially to the ramifications of the armed conflict between Israel and Hamas underway on the border between them and with active involvement of Hamas military operatives. Therefore, although both Israel and the COI agree in general that lethal force is justified in cases of an imminent threat to life or serious injury, each has a very different notion of what constitutes such a danger.

As with previous reports on Israel's conduct, there is no doubt that this report will serve to criticize Israel in the international arena and to spur efforts toward sanctions and other measures against Israel. In particular the referral of the report and the material collected by the COI about alleged perpetrators to the ICC, which is examining these cases, could affect the prosecutor's decision whether to open an investigation into the events. However, the

one sidedness of the report might prevent reliance on its conclusions by those making professional determinations.