



General Assembly

Distr.: General
22 February 2019

English only

Human Rights Council

Fortieth session

25 February–22 March 2019

Agenda item 7

Human rights situation in Palestine and other occupied Arab territories

Written statement* submitted by United Nations Watch, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[11 February 2019]

* Issued as received, in the language(s) of submission only.



How the Gaza COI Can Overcome the Omissions and Misstatements of Resolution S/28-1

The Commission of Inquiry on the “2018 protests in the Occupied Palestinian Territory” (COI) derives its mandate from Resolution S-28/1. However, in light of the imbalances of fact and law enshrined therein, serious concerns arise over the ability of the COI to exercise independence of scope, thought and action.

The “March of Return” commenced in March 2018 with weekly violence along the border fence, and shows no signs of stopping. Some 10,000 rioters burn tires, hurl rocks and explosives at IDF soldiers, and attempt to breach the fence.¹

Resolution S-28/1 prejudices the result of any investigation. It determines in OP1 that Israel is “in violation of international humanitarian law, international human rights law and relevant United Nations resolutions.” It is replete with conclusory language that purports to dispose of the fundamental questions facing the COI. For example, it falsely characterizes all of the Palestinians at the border fence as “civilians” and their activities as “peaceful protests.”

The resolution title itself presumptively refers to “civilian protests”; PP8 refers to Israel’s “intentional targeting” of Palestinian “civilians”; OP1 refers to “peaceful protests”; OP3 refers to “demonstrations” of “civilians” that are “peaceful”; OP5 refers to Israel’s “assaults” on the large-scale “civilian protest.”

These blanket characterizations of the individuals on the Gaza side and of their intentions and actions are false, incomplete and misleading. Hamas rules Gaza and played an essential role in overseeing and inciting the events, and in dispatching operatives under the guise of protests to engage in hostilities.

Thomas M. Franck, the late NYU scholar, lamented the emergence of this UN pattern in his authoritative article on procedural due process in human rights fact-finding by international agencies.² Referring to a 1968 General Assembly resolution that had taken it for granted “that Israel was in breach of its international obligations,” Prof. Franck criticized the creation of a fact-finding mission whose mandate included “conclusory language that palpably interfered with the integrity of the fact-finding process by violating the essential line between political assumptions and issues to be impartially determined.”

Prof. Franck’s evaluation of such resolutions neatly summarizes the essential defects of the S-28/1 mandate: “A fact-finding group created by terms of reference that seek to direct its conclusions is essentially a waste of time. Its findings, at most, will reassure those whose minds are already made up.”³

Second, through its telling omissions which remove all context from the events, and erroneously characterize them as (a) “protests,” (b) “peaceful,” and (c) “civilian,” the resolution suggests that the applicable body of law is the domestic law enforcement standard. However, International Humanitarian Law (IHL) is the proper legal framework here, and not International Human Rights Law, which concerns domestic law enforcement. This is consistent with the judicial conclusion of the Supreme Court of Israel in its May 24, 2018 decision about the IDF’s rules of engagement that rioters taking an active part in hostilities are subject to IHL.⁴

¹ *Palestinians try to breach border fence during Gaza protests, 15 wounded*, TIMES OF ISRAEL (Jan. 4, 2019), <https://www.timesofisrael.com/palestinians-try-to-breach-border-fence-during-gaza-protests-15-wounded/>; Yoav Zitun and Elior Levy, *Palestinian woman killed during Gaza border riots*, YNET (Jan. 11, 2019), <https://www.ynetnews.com/articles/0,7340,L-5445112,00.html>.

² T.M. Franck & H.S. Fairley, “Procedural Due Process in Human Rights Fact-Finding by International Agencies” (1980) 74 *American Journal of International Law* 308 at 316.

³ *Id.*

⁴ HCJ 3003/18 *Yesh Din v. IDF Chief of General Staff*, available at <https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\18\030\030\k08&fileN>

Omissions and misstatements in resolution S/28-1, which affect the legal analysis and prejudice the COI, include:

1. Existence of Hamas/Israel armed conflict. As the UN's Palmer Commission concluded in 2011, Israel and Hamas are engaged in an international armed conflict⁵. The current round of violence is part of that armed conflict.
2. Israel's right to self-defense. This basic right is enshrined in Article 51 of the UN Charter and customary international law, but ignored by Resolution S-28/1. Israel is not required to sit back and wait to suffer casualties before responding to imminent threats.⁶
3. Hamas, not Israel, controls Gaza. Unlike civilian protests in a domestic context, where the governing authority controls the territory, the Gaza riots are being carried out by a hostile population on the opposite side of a hostile border. The question of whether international human rights law applies in a case like this—extraterritorially—is complex and subject to legal debate.⁷
4. Hamas incites and directs the violence. As documented by numerous publicly available sources, many of the so-called protesters were and are Hamas combatants—not “civilians”—acting on orders to breach Israel's Gaza border, invade Israeli towns and attack Israelis.⁸ Furthermore, Hamas controls the level of violence and can order it reduced when that serves its interests.⁹
5. Hamas engages in widespread and severe violations of international law, including of the Geneva Conventions and customary law rules. Hamas violations include: targeting Israeli civilians with indiscriminate rocket and mortar attacks, other airborne incendiary devices and machine gun attacks; intentionally burning thousands of acres of Israeli agricultural fields and forests; using Palestinian civilians, including women and children, as human shields; disguising its own fighters as civilians; attacking humanitarian aid, such as the Kerem Shalom crossing; and inciting terrorism.
6. Imminent threat to Israelis from Gaza border breach. The border fence is just a few hundred meters from Israeli towns, and just dozens of meters from IDF positions.¹⁰ Therefore, the danger to Israeli civilians and soldiers posed by a breach from a riotous mob with murderous intentions is not just theoretical, but very real.
7. Rioters directly participating in hostilities not entitled to civilian protections. Article 51(3) of the First Additional Protocol to the Geneva Conventions (1949) permits attacks on civilians “for such time as they take direct part in hostilities.”¹¹ Engaging in violent acts intended to breach Israel's border fence with Gaza and/or cause harm on the Israeli side of the fence causes rioters to lose protected civilian status.

ame=18030030.K08&type=4.

⁵ See Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (Sep. 2011), Para. 73, http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf.

⁶ See, e.g., *A More Secure World: Our Shared Responsibility*, Report of the High-level Panel on Threats, Challenges and Change, (2004) UN Doc A/59/565, at para. 188, <https://undocs.org/A/59/565>.

⁷ See, e.g., Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, AMERICAN JOURNAL OF INTERNATIONAL LAW (Jan. 2005).

⁸ See, e.g., Twitter accounts of Hamas (@PalinfoAr), independent analyst Joe Truzman (@Jtruzmah), and Israel Defense Forces (@IDF); www.memri.org; <https://www.terrorism-info.org.il/en/>; <https://www.palwatch.org/>; and various other media sources.

⁹ Jack Khoury, *Gaza Protests to Go On, but with Less Violence, Organizers Say*, Haaretz (Nov. 18, 2018), <https://www.haaretz.com/israel-news/.premium-gaza-protests-to-go-on-but-with-less-violence-organizers-say-1.6634216>.

¹⁰ See, e.g. video footage showing distance between rioters and IDF positions, @Jtruzmah, TWITTER (Jan. 11, 2019, 12:02 PM), <https://twitter.com/Jtruzmah/status/1083816513742598144>.

¹¹ See also Commentary of 1987 to Article 51(3), Protection of the Civilian Population, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=5E5142B6BA102B45C12563CD00434741>.

Significantly, when rioters have stayed away from the fence, casualties were reduced.

8. Effects of force do not render it disproportionate. Resolution S-28/1 refers to Israel's "disproportionate and indiscriminate use of force," suggesting that "the extensive loss of life" on the Palestinian side renders force used by Israel not proportional. However, notwithstanding ^{the} common misconception, proportionality in IHL is not a question of tabulating and comparing the number of Israelis versus the number of Palestinians killed or injured. Rather, it is a prospective assessment that requires access to information known to the military commanders prior to an attack, including enemy locations, presence of military targets, presence of and anticipated harm to civilians, expected military advantage, and evidence of intent to cause civilian harm. Significantly, IHL accepts the possibility of civilian casualties.¹²

Finally, even under a law enforcement standard, it is clear that lethal force may be used to protect the lives *and bodily integrity* of oneself *or others* from imminent (not necessarily immediate) threats. Therefore, the suggestion by UN human rights officials, like former High Commissioner Zeid and Palestine rapporteur Michael Lynk, that lethal force can be used only when the law enforcement official *himself* faces an imminent threat to *his own life*¹³ is incorrect as a matter of law, and highly misleading.

Factual context is essential. People may attempt to cut fences with wire cutters when trying to burglarize a home in a residential neighborhood. That is entirely different from cutting a border fence between two entities engaged in an armed conflict, in a place with a history of military attacks and incursions through that same fence, and doing so at the same time that shots are being fired, explosives being thrown, booby-traps being laid, other military infrastructure being destroyed, and all with the knowledge that both the participants and the organizers have stated their intent to kill, maim and destroy when they reach the other side.

Another important distinction is that in downtown Tel Aviv, for example, Israel has full control of the territory, whereas in Gaza it has no control. This leads to major differences in the means and methods available for responding.

The United Nations will be credible on international law when its reports are balanced and accurately reflect the facts and law.

¹² Article 57 of Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I).

¹³ Gaza deaths: Israel must address excessive use of force, Zeid says, OHCHR (April 27, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22995&LangID=E>; Michael Lynk, Situation of human rights in the Palestinian territories, UN Doc. A/73/45717, para. 12-14 (Oct. 22, 2018).