**Report of the Independent UN Commission of Inquiry on Gaza Strip – An Initial Evaluation of a Problematic Report**

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On February 25th, the Independent International Commission of Inquiry established by the UN Human Rights Council published its report following an investigation of the events that took place near the fence separating the Gaza strip from Israel since March 2018 The report will be presented to the Council on March 18. The Commission focused on five demonstrations that took place between March 30, 2018 and the end of December 2018. The Commission found that during the Palestinian demonstrations and protests near the fence, 183 Palestinians were killed by the Israeli Defense Forces (IDF), and more than 9000 were injured. After having looked at all the deaths that occurred during the demonstrations, and at 300 injuries, the Commission concluded that only in two cases was the use of force by the IDF justified. In all other cases, the Commission claims, “the use of live ammunition by Israeli security forces against demonstrators was unlawful.” (Commission report para. 94).

It should be stated at the outset that both the factual information (such as the number of casualties caused by the IDF) and the legality of the use of force by the IDF are hotly debated. The Commission did not actually visit the Gaza strip, and its information is based on materials such as video footage, medical registries, testimonies submitted to it in writing or orally presented in 325 meetings, and interviews held by the Commission. The following discussion identifies and analyzes some of the main findings of the Commission, but does not necessarily endorse these findings. After summarizing the main findings of the Commission, I briefly discuss problematic aspects of the Commission’s report and the Israeli response.

The Commission’s view of context of the demonstrations

The Commission’s description of the background to the Palestinian demonstrations focuses on their civilian nature. The Commission’s report describes the history of the conflict, starting with its origins and the 1949 UN General Assembly decision supporting the ‘right of return’ of Palestinian refugees to Israel. It then turns to more recent events, briefly describing the conflict between Hamas and Israel in the Gaza strip and the Israeli blockade of the Gaza strip. The Commission explicitly states that currently there is an ongoing armed conflict between Israel and Hamas and various other armed organized Palestinian groups operating at the Gaza strip.

The Commission’s report also describes the origins of the 2018 demonstrations and maintains that they were purely civilian. The initial idea was suggested in a Facebook post, and then turned into a civil society movement, which had a peaceful and non-violent aim of taking down the barriers separating the Gaza strip from Israel, according to the report.

The applicable legal framework and the main findings of the Commission

The report also provides at the outset the Commission’s view of the legal framework applicable to the situation. Having found that the demonstrations were peaceful in nature, it decides that the applicable legal regime was both international human rights law (IHRL), especially including the right to life enshrined in the International Covenant on Civil and Political Rights (ICCPR), and the principles of distinctions and proportionality derived from international humanitarian law (IHL). It states that “the de facto authorities led by Hamas” in Gaza “bear human rights obligations given their exercise of government-like functions,” and concludes that all parties to the armed conflict are bound by IHL. It also states that as “the occupying Power, Israel is also bound by the rules on occupation” under treaty and customary international law.

The Commission finds that both legal regimes – IHRL and IHL – protected all participants in the demonstrations and provided special coverage to members of internationally protected groups such as children, medical support personnel, persons with disabilities and journalists.

Given the Commission’s view that the demonstrations “were civilian in nature” and “did not constitute combat or a military campaign,” the report analyzes the policing of the protests as a law enforcement action “based in international human rights law.” In this context, lethal force may be used only “in self-defense or for the defense of others when there is an imminent threat to life.” The Commission notes that a use of force in this context “must be necessary to achieve a legitimate law enforcement objective” and that any force used must be “proportionate to the harm being averted.”

The Commission’s report does cite a possible Israeli explanation for the shootings. The IDF’s Rules of Engagement (RoEs) appear to have allowed the use of potentially lethal force against ‘main inciters’ at the demonstrations, for fear that the demonstrators would breach the fence and threaten the lives of Israeli soldiers and civilians. The Commission rejects this justification stating that the use of potentially lethal force against persons who participated in the demonstrations would have been allowed only if they posed imminent danger – in a matter of seconds or at the most hours. According to the report, however, such an imminent threat almost never existed, and hence there was no legal justification for almost all the cases in which potentially lethal force was used against Palestinian demonstrators.

The Commission states in this regard that even members of the Hamas that participated in the demonstrations were protected civilians at the time of demonstrations, and, therefore, using potentially lethal force against them too would have been allowed only if they posed an imminent danger.

The next part of the report contains a list of persons that according to the Commission were killed or severely injured by the IDF. The list includes a little more than seventy named or unnamed persons. There is no explanation as to why only seventy of the more than 500 cases the Commissions examined were explicitly mentioned. There is also no explanation why some of the persons listed remained anonymous. Every person listed is briefly described, followed by a very short description of the events of his or her death or injury. In almost all cases described in the report the person was more than 100 meters away from the fence, and in almost no case was the person involved in any violent activity against the IDF or Israeli civilians.

The list of casualties is followed by the findings of the Commission, which qualify Israeli shootings as illegal (with two possible exceptions, where fire appears to have been used against armed Palestinian militants). The last part of the report calls for investigations of the cases mentioned in the report. The Commission expresses distrust of internal Israeli investigations and calls for international bodies such as the International Criminal Court to become involved.

Disagreements and debates

Prior to the release of the report the IDF publicized its own version of the events in two internet pages dedicated to the Gaza strip events: here and here. Reading these material provided by the IDF, as well as the Israeli Supreme Court’s judgment in the Yesh Din Case, which discussed the legality of the IDF’s RoEs in the described events, assists in clarifying some of the debates revolving around the 2018 events in the Gaza strip.

First, there are major factual and legal disagreements between the Commission and the IDF. One such disagreement is how to characterize the events. While the Commission found that the demonstrations were civilian in nature, both the IDF’s website and the Supreme Court’s opinion stress that the demonstrations were organized and directed by Hamas and had a conspicuous violent component. According to the IDF, Hamas intended to use the demonstrations, which indeed were mostly attended by civilians, as cover for committing violent acts and terror attacks against Israeli civilians living near the Gaza strip. As a result, Israel perceived the demonstrations as a security threat and the RoEs reflected this perception of the events. Israeli RoEs indeed appear to allow the use of potentially lethal force against “main inciters” at the demonstrations. However, the RoEs, as explained to the Israeli Supreme Court (the Rules themselves are classified and the parties to litigation did not reach agreement about the terms according to which the Court would be able to review them ex parte), allowed shooting main inciters only as a last resort, and shots were to be aimed at their legs.

A second factual disagreement relates to the number of persons killed by the IDF. The IDF claims that it is impossible to verify the number of people that were killed, and that some of the Palestinians that were killed were unintentionally killed by Palestinians, for example, by reckless use of hand-grenades.

There are also some significant legal disagreements between the Commission and the Israeli position. One such legal disagreement involves the relevant applicable legal regime. As Eliav Lieblich explained in a detailed article at Just Security, the IDF’s position was that the relevant legal regime was the “law enforcement paradigm of international humanitarian law” and not international human rights law. This position was heavily criticized by Lieblich, while defended by others. It seems that in the IDF’s view, this legal framing of the situation allowed for a more flexible use of potentially lethal force, allowing, for example, shooting of “main inciters.”

A further legal disagreement involved the protected status of the members of Hamas. While the Commission’s position was that all participants in the demonstration enjoyed civilian status, the IDF’s position is that given the ongoing hostilities in and around Gaza, Hamas members should be considered legitimate targets at all times, due to their membership in the Hamas, and hence lethal force can be used against them, even as a measure of first resort.

Notwithstanding these legal and factual disagreements, it seems to me that the major flaw of the Commission’s report is its somewhat simplistic analysis of the events. For example: the insistence of the Commission that Hamas was not a major actor behind the demonstrations does not seem plausible in the circumstances at the Gaza strip, where Hamas has almost total control.

Even more problematic is the implicit assumption of the Commission that every shot at a person under the age of 18, or wearing a vest with “journalist” written over it, is likely to have been deliberate, since such persons could have been identified as such by the IDF. This simply ignores the complexity of the situation. Live footage clearly shows that large areas in which the demonstrations took place were covered by smoke. Under these condition, it is hard to believe that IDF soldiers could actually clearly identify that they were shooting at journalists. There is also evidence that some civilians were harmed by bullet ricochets or inaccurate shooting.

Lingering questions

There are clearly many questions concerning the use of force by the IDF in the Gaza strip events of 2018. Certain uses of lethal force should be looked at closely, in order to verify whether they were indeed justified. Furthermore, the fact that the RoEs supposedly allowed for a very limited use of lethal force, and still the result was so many Palestinians’ deaths, suggest a degree of recklessness and requires further attention.

However, I am not sure that the report of the Commission did much to promote our understanding of these events. While some of the findings of the Commission seem plausible, its final conclusions seem to me to be far beyond what the factual information in the possession of the Commission could suggest. A far more credible approach would have been, I believe, to flag what the Commission believed were the most problematic aspects of the IDF’s behavior, and call for an appropriate investigation, with possible involvement of all parties and the international community. Instead, the Commission chose to infer far reaching conclusions from the limited evidence before it, thus discrediting much that should be appreciated in the report.

Correction: An earlier version of this post stated that the IDF published its version of the 2018 events immediately after the release of the Commission’s report. The IDF published this information before the commission published its report.