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**SUBMISSION OF THE INTERNATIONAL COMMISSION OF JURISTS TO THE
UN HUMAN RIGHTS COMMITTEE IN VIEW OF THE COMMITTEE'S
EXAMINATION OF ISRAEL'S FIFTH PERIODIC REPORT
UNDER ARTICLE 40 OF THE INTERNATIONAL COVENANT ON CIVIL AND
POLITICAL RIGHTS**

Submitted on 31 January 2022

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I. Introduction

1. During its 134th session from 28 February to 25 March 2022, the Human Rights Committee (the Committee) will examine Israel's implementation of, and compliance with, the provisions of the International Covenant on Civil and Political Rights (ICCPR or the Covenant), including in light of the State Party's fifth periodic report under article 40 of the Covenant.
2. In the context of this review, the International Commission of Jurists (ICJ) wishes to bring to the Committee's attention its concerns about Israel's failure to implement and comply with certain ICCPR obligations, and its consequences for the protection of certain Covenant rights. In particular, this submission addresses the above-mentioned concerns as they arise in the following contexts: (a) the annexation of portions of the Occupied Palestinian Territory (OPT); (b) excessive use of force in the context of Israel's response to the "Great March of Return" in Gaza; and (c) the accountability gaps within the Israeli military justice system.
3. This submission is relevant for the Committee's evaluation of Israel's implementation of its Covenant obligations and related Covenant rights under articles 1, 2, 4, 6, 7, 9, 10, 12, 17, 18, 21 and 26.

II. Settlements and annexation

4. Since 1967, Israel's occupation of the OPT, which comprises the West Bank, including East Jerusalem, and the Gaza Strip, has been characterized by a process of *de facto* annexation.¹ This has been effected through the establishment and continuous expansion of Israeli settlements and related infrastructures, as well as the construction of a "Separation Wall" within the West Bank. These actions, combined with Israel's legislation extending its territorial jurisdiction to the settlements, constitute important evidence of Israel's intention to appropriate some parts of the OPT in disregard of international law,² including the ICCPR.³

i. Settlements

5. In its previous Concluding Observations, the Committee called on Israel to cease the construction and expansion of settlements in the West Bank and East Jerusalem, as well as the transfer of its own population thereto, and to reroute the Separation Wall in accordance with the International Court of Justice's 2004 advisory opinion.⁴ Not only has Israel failed to implement the Committee's recommendations, but it has continued to expand the settlements and to transfer its own population into the OPT.⁵
6. As the Committee noted with concern in 2014, Israel's settlements and related infrastructure violate various Covenant rights, including the right to self-determination under article 1 of the ICCPR.⁶ By failing to dismantle the settlements and related infrastructure, including the portions

¹ *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967* A/73/447 (2018), para. 25.

² The acquisition of territory from another State through the use of force, i.e., annexation, violates the prohibition on the use of force under article 2(4) of the Charter of the United Nations and customary international law. See International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion (2004), para. 87.

³ ICJ, *The Road to annexation: Israel's maneuvers to change the status of the Occupied Palestinian Territory*, November 2019, at <https://www.icj.org/wp-content/uploads/2019/11/Israel-Road-to-Annexion-Advocacy-Analysis-brief-2019-ENG.pdf>.

⁴ CCPR/C/ISR/CO/4, para. 17.

⁵ *Report of the High Commissioner for Human Rights on Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and in the occupied Syrian Golan* A/HRC/34/39 (2017), para. 11.

⁶ CCPR/C/ISR/CO/4, para. 17.

of the Separation Wall located in the West Bank, and withdrawing all settlers, Israel continues to violate articles 1, 2, 9, 12, 17, 18 and 26 of the ICCPR.

ii. Annexation

7. East Jerusalem is the only area of the OPT that has been formally annexed by Israel.⁷ In 1967, Israel enacted a number of laws aimed at expanding its jurisdiction over East Jerusalem and its adjacent areas, effectively annexing the city.⁸ In 1980, with a view to further consolidating its annexation over East Jerusalem, the Knesset adopted a Basic Law (a quasi-constitutional law) declaring Jerusalem, complete and united, as the capital of Israel.⁹ The UN General Assembly and Security Council condemned such acts of annexation as contrary to international law, declaring them null and void.¹⁰
8. Besides East Jerusalem, until 2015, Israel did not attempt to apply its sovereignty to the West Bank, keeping the two territorial entities – the State of Israel and the West Bank – as distinct, one subject to Israel’s sovereignty and jurisdiction, the other subject to Israel’s military rule under the military commander’s jurisdiction. During the 20th legislature (31 March 2015 – 28 April 2019), however, sixty bills extending Israeli law to the West Bank,¹¹ or laying the foundation for some form of future annexation, were introduced in the Knesset, eight of which were approved and entered into force.¹²
9. In February 2017, the Knesset adopted the *Law for the Regulation of Settlements in Judea and Samaria* (“Regularization Law”) with the objective of expropriating Palestinian private land in the West Bank and retroactively “legalizing” Israeli “outposts” and settlements unlawfully established on it.¹³ This is the first Law enacted by the Knesset that applies to the West Bank on a territorial basis.¹⁴ On 9 June 2020, the Israeli Supreme Court, sitting as the High Court of Justice (HCJ), declared the “Regularization Law” unconstitutional.¹⁵
10. The *Higher Education Law*, adopted in February 2018 and entered into force on 15 February 2019, aimed at dissolving the Council for Higher Education operating in the West Bank – which was up until then headed by the OPT’s military commander – and at placing higher education institutions based in the Israeli settlements under the authority of the Council for Higher Education operating in Israel. The Law placed higher education institutions located in the settlements on an equal footing with all other Israeli universities and colleges to “normalize” their illegal presence in the

⁷ In 1981, Israel formally annexed the Golan Heights as well, which are part of Syria. Security Council Resolution 497 declared this act of annexation “null and void and without international legal effect.” See S/RES/497 (1981).

⁸ *Law and Administration Ordinance (Amendment No. 11) Law* (1967); *Municipal Corporation Ordinance (Amendment) Law* (1967).

⁹ *Basic Law: Jerusalem, Capital of Israel* (1980).

¹⁰ Resolution 2253(ES-V) A/RES/2253(ES-V) (1967); Resolution 2254(ES-V) A/RES/2254(ES-V) (1967); Resolution 252 S/RES/252 (1968); Resolution 478 S/RES/478 (1980).

¹¹ Since the late 1970s, Israeli domestic law has applied to the Israeli settlers living in the West Bank on a personal and extraterritorial basis. Israel had never attempted to proceed to a territorial application of the law in the OPT, knowing that this would have amounted to prohibited annexation. See Association for Civil Rights in Israel (ACRI), *One Rule, Two Legal Systems: Israel’s Regime of Laws in the West Bank* (2014), pp. 15–18, at <https://law.acri.org.il/en/wp-content/uploads/2015/02/Two-Systems-of-Law-English-FINAL.pdf>.

¹² Yesh Din, *Annexation Legislation Database*, at <https://www.yesh-din.org/en/about-the-database/>.

¹³ *Law for the Regulation of Settlements in Judea and Samaria* (2017).

¹⁴ Yesh Din, *The Israeli Occupation of the West Bank and the Crime of Apartheid* (2020), at <https://www.yesh-din.org/en/the-occupation-of-the-west-bank-and-the-crime-of-apartheid-legal-opinion/>, p. 33.

¹⁵ *Head of the Ein Yabrud Village Council v. Knesset HCJ 2055/17* (2020); Adalah, *Israeli Supreme Court strikes down law allowing Israel to expropriate private West Bank Palestinian lands for settlements*, 10 June 2020, at <https://www.adalah.org/en/content/view/10024>.

West Bank. Furthermore, through this Law the Knesset went beyond its authority by abrogating the military commander's authority in the OPT and transferring it to an official Israeli institution.¹⁶

11. In July 2018, the Ministry of Justice drafted a legal memorandum amending the *Law on the Administrative Affairs Court*, transferring to the Jerusalem District Court, as opposed to the HCJ, the authority to adjudicate petitions by Palestinians residing in the West Bank. The memorandum refers to petitions submitted by Palestinians and by Israeli settlers relating to four issues: freedom of information, planning and building, entry to and exit from the West Bank, and administrative restraining orders. While the HCJ's competence as appellate court in such matters is preserved, the *Law on the Administrative Affairs Court* directs the litigation for all practical matters from the HCJ to the Jerusalem District Court. As a result, the Law extends the jurisdiction of an Israeli domestic court to the OPT, in contravention of international law.¹⁷
12. Israeli law-makers also proposed a number of bills with clearly-stated annexation aims. In August 2016, a few members of the Knesset introduced a bill with the stated purpose to annex Maale Adumim, one of the biggest settlements in the vicinities of Jerusalem. The bill was presented to the Knesset for a preliminary reading, but the legislative process was stopped because of the end of the Knesset term. Similarly, the *Greater Jerusalem Bill*, presented in October 2017, aims to formally annex five major settlements located in the West Bank into the Jerusalem municipality. This Bill would add around 120,000 Israeli settlers to Jerusalem, altering the demographics of the city by enhancing its Jewish majority.¹⁸ Additional Bills were introduced with the intention to annex all settlements and outposts located in the West Bank (January 2016), the Etzion Bloc (June 2016), the entire West Bank (May 2018), the Jordan Valley (December 2018), just to name a few.¹⁹ While these attempts do not constitute *per se* acts of annexation, they signal future risks of *de jure* annexation should they be realized in the future.
13. Calls in favour of the *de jure* annexation of the West Bank, or portions thereof, have been made by several Israeli state officials.²⁰ The annexation of portions of the West Bank was also part of

¹⁶ Yesh Din, *Annexation Legislation Database*.

¹⁷ For more information see ACRI, *Transfer of OPT petitions from the High Court to the Court for Administrative Affairs in Jerusalem* (2018), at <https://law.acri.org.il/en/2018/02/25/transfer-of-opt-petitions-from-the-high-court-to-the-court-for-administrative-affairs-in-jerusalem/>; ACRI, *Memorandum on Administrative Affairs Courts Law (amendment – a decision of an authority in the area) 5768 – 2018* (2018), at <https://law.acri.org.il/en/wp-content/uploads/2018/02/ACRI-Position-on-Legal-Memorandum-Administrative-Affairs-Courts-Law.pdf>.

¹⁸ *Report of the UN Special Rapporteur on the Situation of human rights in the Palestinian territories occupied since 1967 A/73/45717* (2018), para. 42.

¹⁹ Yesh Din, *Annexation Legislation Database*.

²⁰ In the aftermath of the adoption of the "Regularization Law", the then Minister of Education and current prime minister, Naftali Bennett, declared: "[t]oday, the Israeli Knesset moved from heading toward establishing a Palestinian state to heading toward sovereignty in Judea and Samaria ... The outpost regulation bill is the tip of the iceberg in applying sovereignty." See *Report of the UN Special Rapporteur on the Situation of human rights in the Palestinian territories occupied since 1967 A/73/45717* (2018), para. 54. Ayelet Shaked, former Minister of Justice, said: "I think we should apply the Israeli law to the Israeli towns and villages [settlements], and to normalize the life there, and in the far future, to apply the Israeli law in Area C [occupied West Bank]. In Area C, there are a half-million Israelis [settlers] and 100,000 Palestinians; they will have citizenship with full rights, of course, like myself. And that Area A and B will be part of a confederation with Gaza, with Jordan." See Hamodia, *Exclusive Interview With Israeli Justice Minister Ayelet Shaked*, 7 March 2018, at <http://hamodia.com/2018/03/07/exclusive-interview-justice-minister-ayelet-shaked/>. Ze'ev Elkin, the Minister for Jerusalem Affairs, stated: "Halas [‘enough’ in Arabic] with the story of two states. There is no other option but the State of Israel, certainly between the Jordan [River] to the [Mediterranean] sea there will be one State." See Middle East Monitor, *Israel minister: We must plan for a million settlers in the West Bank*, 15 November 2017, at <https://www.middleeastmonitor.com/20171115-israel-minister-we-must-plan-for-a-million-settlers-in-the-west-bank/>.

the agreement between Prime Minister Benjamin Netanyahu and Kahanah Chairman Benny Gantz, which led to the formation of the new Israeli government in April 2020.²¹

14. Annexation, *de facto* or *de jure*, violates the right to self-determination under article 1 of the ICCPR.²² By formally annexing East Jerusalem, and appropriating on a permanent basis portions of the West Bank, including the natural resources present therein, Israel impedes the Palestinians to “freely determine their political status and freely pursue their economic, social and cultural development”, as well as to “freely dispose of their natural wealth and resources”, as guaranteed by the right of self-determination enshrined in article 1 of the Covenant. As the Committee stated, the right to self-determination is “an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights.”²³ Annexation also infringes other Covenant rights, including freedom of movement (article 12) and the rights to home, property and family life (article 17). For example, the above-mentioned “Regularization Law” (now declared unconstitutional) would have had the effect of depriving Palestinians in the West Bank of their right to protection of their private property from confiscation and destruction in violation of article 17. By effecting acts of annexation, *de facto* or *de jure*, Israel contravenes its obligations under the ICCPR.

In light of the above, the Human Rights Committee should recommend that Israel:

- **Dismantle all the settlements and related infrastructure, including the “Separation Wall”, in the West Bank and East Jerusalem, and withdraw all settlers;**
- **Abide by relevant UN General Assembly and Security Council resolutions declaring the annexation of East Jerusalem as “null and void” under international law, and renounce its sovereignty claims over East Jerusalem;**
- **End any conduct aiming at annexing parts or all of the West Bank, and refrain from taking legislative steps to that end.**

III. Excessive use of force in response to the “Great March of Return”

15. In its previous Concluding Observations, the Committee expressed concern over the Israeli Defence Force’s (IDF) excessive use of lethal force during law enforcement operations in the OPT, recommending that rules of engagement or “open fire regulations” comply with article 6 of the ICCPR and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.²⁴ With respect to this, the ICJ draws the Committee’s attention to the fact that, according to the UN Office for the Coordination of Humanitarian Affairs (OCHA), as a result of Israel’s response to the “Great March of Return” in Gaza, which started on 30 March 2018 and continued throughout 2019, “214 Palestinians, including 46 children, were killed, and over 36,100, including nearly 8,800 children have been injured. One in five of those injured (over 8,000) were hit by live ammunition.”²⁵ In light of the above, the ICJ considers that the way Israel employed lethal force in its response to the “Great March of Return” demonstrates its failure to implement the Committee’s recommendation and comply with its obligations under the ICCPR.

²¹ Haaretz, *Netanyahu, Gantz Agree on West Bank Annexation Proposal as Unity Deal Nears*, 6 April 2020, at <https://www.haaretz.com/israel-news/elections/.premium-netanyahu-gantz-agree-on-west-bank-annexation-as-unity-deal-nears-1.8745742>.

²² The right to self-determination of peoples is a norm *jus cogens* that has *erga omnes* effects. See *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* Advisory Opinion (2019), paras. 150–153, 180; *Draft articles on the law of treaties with commentary* Yearbook of the International Law Commission (1966), p. 248.

²³ *General Comment No. 12: Right to self-determination (Article 1)* HRI/GEN/1/Rev.9 (1984), para. 1.

²⁴ CCPR/C/ISR/CO/4, para. 13.

²⁵ OCHA, *Two years on: people injured and traumatized during the “Great March of Return” are still struggling*, 6 April 2020, at <https://www.ochaopt.org/content/two-years-people-injured-and-traumatized-during-great-march-return-are-still-struggling#ftn3>.

16. Domestic law must protect the right to life from any “intentional or otherwise foreseeable and preventable life-terminating harm or injury, caused by an act or omission.”²⁶ The use of potentially lethal force for law enforcement purposes must be regulated by law; any grounds for deprivation of life must be “defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.”²⁷ To comply with the ICCPR, potentially lethal force by law enforcement officers must be employed in a non-arbitrary manner, that is: (i) as a last resort measure for the sole purpose of protecting life or preventing serious injury from an imminent threat; (ii) only if strictly necessary, when less harmful means would be ineffective to achieve a legitimate result; and (iii) with maximum restraint and in a manner which is proportionate to the threat that needs to be countered.²⁸ These requirements must be incorporated into domestic law and be applied in practice by law enforcement officers. All law enforcement operations must be “adequately planned in a manner consistent with the need to minimize the risk they pose to human life.”²⁹ Any deprivation of life that does not comply with the requirements of article 6 is arbitrary and therefore in breach of the ICCPR.
17. States parties to the ICCPR have an obligation to respect the right of peaceful assembly, which may be limited only in conformity with the exhaustive requirements set in article 21.³⁰ Law enforcement officials “must respect and ensure the exercise of the fundamental rights of organizers and participants”³¹ in assemblies, and “should seek to de-escalate situations that might result in violence. They are obliged to exhaust non-violent means and to give prior warning if it becomes absolutely necessary to use force, unless doing either would be manifestly ineffective.”³² Any use of force, including *a fortiori* potentially lethal force, must comply with “the fundamental principles of legality, necessity, proportionality, precaution and non-discrimination applicable to articles 6 and 7 of the Covenant, and those using force must be accountable for each use of force”,³³ as described above. As stated by the Committee, “[f]irearms are not an appropriate tool for the policing of assemblies. They must never be used simply to disperse an assembly. In order to comply with international law, any use of firearms by law enforcement officials in the context of assemblies must be limited to targeted individuals in circumstances in which it is strictly necessary to confront an imminent threat of death or serious injury.”³⁴
18. In situations of armed conflict, including belligerent occupation, the use of potentially lethal force during the policing of assemblies remains regulated by the ICCPR.³⁵ As stated by the Committee, “[c]ivilians in an assembly are protected from being targeted with lethal force unless and for such time as they take a direct part in hostilities, as that term is understood under international humanitarian law. In such a circumstance, they may be targeted only to the extent that they are not otherwise protected under international law from attack. Any use of force under applicable

²⁶ *General Comment No. 36: The Right to Life (Article 6)* CCPR/C/GC/36 (2018), para. 6.

²⁷ *Ibid.*, para. 19.

²⁸ *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (1990), principles 4-5, 9; *Code of Conduct for Law Enforcement Officials* (1979), art. 3; *General Comment No. 36*, paras. 12-13.

²⁹ *General Comment No. 36*, para. 13.

³⁰ “No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.”

³¹ *General Comment No. 37: The Right of Peaceful Assembly (Article 21)* CCPR/C/GC/37 (17 September 2020), para. 74.

³² *Ibid.*, para. 78.

³³ *Ibid.*

³⁴ *Ibid.*, para. 88.

³⁵ *Ibid.*, para. 97.

international humanitarian law is subject to the rules and principles of distinction, precautions in attack, proportionality, military necessity and humanity."³⁶

19. Under Israeli domestic law, when undertaking law enforcement operations, the IDF can resort to potentially lethal force only to "remove a real danger to human life or bodily integrity, and subject to necessity and proportionality."³⁷ According to the Israeli Government, these principles have been translated into the rules of engagement employed in the context of Israel's response to the "Great March of Return."³⁸ However, Israel has failed to comply with its obligations under the ICCPR where: (i) it asserted that the legal basis for using potentially lethal force during law enforcement operations is international humanitarian law, rather than article 6; (ii) it created the category of "key instigator" or "key rioter" as individuals targetable even when they do not pose an imminent threat to life or bodily integrity; and (iii) it did not ensure the practical adherence by IDF members to the principles governing the use of potentially lethal force under the ICCPR.

i. The legal basis for the use of potentially lethal force

20. According to Israel, the ICCPR does not apply either extraterritorially, beyond Israel's boundaries, or in situations of armed conflict, where international humanitarian law applies, purportedly displacing the Covenant. Israel therefore asserts that it is not bound by the ICCPR in the OPT, including in relation to its response to the "Great March of Return."³⁹ While the Committee has previously recommended the Israeli authorities to review this position,⁴⁰ Israel continues to maintain it.⁴¹

21. To circumvent the ICCPR in the context of its response to the "Great March of Return" in Gaza, Israel contended that international humanitarian law provides for rules on the use of potentially lethal force for law enforcement purposes that are similar to the criteria for such a use of force under the Covenant.⁴² This position, however, is merely instrumental to Israel's rejection of the applicability of the ICCPR extraterritorially and during armed conflict. By denying the applicability of the ICCPR to the OPT, Israel, by implication, refuses to adhere to the detailed guidance on the use of potentially lethal force the Committee has set out in its General Comments Nos. 36 and 37, which should always be followed in the design of rules of engagement, the planning of law enforcement operations, including the policing of assemblies, and by law enforcement officers in practice.

22. Furthermore, Israel characterized the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials as "legally irrelevant", declaring them a "non-binding policy statement", and contending that the Principles are applicable only to "domestic, crime-related scenarios, whereas the border events [the "Great March of Return" demonstrations] are of a different character."⁴³ Israel's position plainly contradicts the Committee's specific recommendation that

³⁶ Ibid.

³⁷ *Summary of the Government of Israel's Submissions to the Israeli Supreme Court HCJ 3003/18 (2018)* (Israel's HCJ 3003/18 Submission), at <https://www.idf.il/media/48315/petition-gaza-border-events-summary-of-state-position.pdf>, para. 56.

³⁸ *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory A/HRC/40/CRP.2 (2019)*, paras. 401-402. The rules of engagement remain classified. Available information regarding their content is drawn from the Israeli Government's submission to the HCJ; see Israel's HCJ 3003/18 Submission.

³⁹ Israel's HCJ 3003/18 Submission, para. 33.

⁴⁰ CCPR/C/ISR/CO/4, para. 5.

⁴¹ CCPR/C/ISR/5, paras. 23-26.

⁴² Israel's HCJ 3003/18 Submission, para. 51. See also *Yesh Din et al. v. The IDF Chief of Staff and The Military Advocate General HCJ 3003/18 & HCJ 3250/18 (2018)*, para. 40.

⁴³ Israel's HCJ 3003/18 Submission, para. 47; HCJ *Yesh Din et al. Case*, para. 53.

Israel abide by the Principles during law enforcement operations,⁴⁴ and overlooks the fact that the Principles are designed to apply to any type of law enforcement operations, including violent demonstrations.⁴⁵

23. Israel should acknowledge that its obligations under the ICCPR, including articles 6, 7 and 21, apply in respect of “all persons subject to its jurisdiction, that is, all persons over whose enjoyment of the right to life it exercises power or effective control”, and in situations of armed conflict, including belligerent occupation, where the Covenant applies concurrently with international humanitarian law.⁴⁶ Additionally, Israel should incorporate the principles and guidance detailed in the Committee’s General Comments No. 36 and 37, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the Code of Conduct for Law Enforcement Officials and the UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement⁴⁷ into its domestic rules governing the use of potentially lethal force during law enforcement operations, including the policing of peaceful assemblies.

ii. The notions of “key instigator” and “key rioter”

24. The rules of engagement employed by the IDF in the context of Israel’s response to the “Great March of Return” are classified. However, the State of Israel confirmed that they provided that “where a violent riot poses a real and imminent danger to the life or bodily integrity of IDF forces or Israeli civilians”, and all other means have been exhausted, “precise fire below the knees of a key rioter or a key instigator, in order to remove the real and imminent danger the riot poses” is allowed subject to the principles of necessity and proportionality.⁴⁸ The HCJ did not seem to question the legality of this position.⁴⁹ This ground for using potentially lethal force was based on an expanded interpretation of what constitutes an “imminent threat” to human life or bodily integrity, which in the IDF and the HCJ’s view encompasses the ability of protestors to breach the separation fence between Gaza and Israel, and cross into the vicinity of Israeli towns.⁵⁰

25. According to the IDF, “key instigators’ may be persons who direct or order activities within the mob, such as coordinating the tactical placement and setting on fire of tires, coordinating people to contribute towards pulling back parts of the security infrastructure and so on.” In turn, “key rioters’ are those who by virtue of their actions incite the mob, influence their behavior or provide the conditions for which mass breach or infiltration may occur. For example, a person who successfully breaches the security infrastructure and carries out attacks on IDF positions, exciting the mob into following his lead. Another example could be a person who works to connect wires to the security infrastructure so that it may be pulled backwards and made ineffective by the crowds.”⁵¹ The IDF has affirmed that using potentially lethal force against “key instigators” and “key rioters” is “an effective method for contending with the very real threats posed by violent crowds. By acting against an individual who contributes towards the actions of the crowd, the IDF is often able to repel the threats posed by the collective without having to use more substantial

⁴⁴ CCPR/C/ISR/CO/4, para. 13.

⁴⁵ *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, principle 14.

⁴⁶ *General Comment No. 36*, paras. 63-64; *General Comment No. 31: Nature of the General Legal Obligation on States Parties to the Covenant* CCPR/C/21/Rev.1/Add.13 (2004), paras. 10-11.

⁴⁷ UN Office of the High Commissioner for Human Rights (OHCHR), Doc. HR/PUB/20/1 (2020).

⁴⁸ Israel’s HCJ 3003/18 Submission, para. 69.

⁴⁹ HCJ *Yesh Din et al. Case*, paras. 50, 57. In its concurring opinion, Justice Hayut acknowledged that, based on the available information, the categories of key instigator” and “key rioter” had not “been grounded in international law;” yet, he did not exclude their possible compatibility with international and Israeli law, depending on the facts of the case. See *ibid.*, Concurring Opinion of President E. Hayut, paras. 12-13. See also *Al-Masri v. The Military Advocate General* HCJ 1971/15 (2017), para. 23.

⁵⁰ HCJ *Yesh Din et al. Case*, paras. 52, 56-57; Israel’s HCJ 3003/18 Submission, para. 56.

⁵¹ IDF, *Gaza Border Events: Questions & Answers*, p. 84, at <https://www.idf.il/media/48555/gaza-border-events-questions-and-answers.pdf>.

force against the crowd itself.”⁵² The IDF has contended that potentially lethal force can be used against “key instigators” and “key rioters” even when they are not actively part of the action: “[k]ey instigators’ and ‘key rioters’ are often conducting activities within the violent riots for a lengthy period of time, and snipers face a challenge in identifying a time which provides the necessary circumstances for carrying out their fire while reducing the risk of hitting above the knee or hitting someone else. For example, snipers may act as a person temporarily moves away from the crowd or rests before continuing his activity.”⁵³ Accordingly, in the IDF’s view, the rationale for shooting “key instigators” and “key rioters” is not the imminent threat they pose, but the end result of causing the rest of the protestors to withdraw.⁵⁴

26. The notions of “key instigators” and “key rioters” contravene article 6 of the ICCPR. First, as asserted by the IDF itself, the use of potentially lethal force against these individuals does not respond to the purpose of protecting life or preventing serious injury from an imminent threat, which is the applicable principle under the ICCPR. Any use of force that fails to adhere to this principle is arbitrary and thus in breach of the Covenant. Second, the notions of “key instigator” and “key rioter” purport to justify the use of potentially lethal force based on status, i.e., their membership of a category, rather than their conduct of posing an imminent threat. Status-based targeting is prohibited under article 6. Unless it is proved on a case-by-case basis that an individual poses an imminent threat to the life or bodily integrity of another, potentially lethal force against them cannot be used.

iii. The use of force in practice during Israel’s response to the “Great March of Return”

27. While the events surrounding the “Great March of Return” were still unfolding, the HCJ assessed that, on the basis of the materials available to it, it appeared that the IDF had employed potentially lethal force against Palestinians demonstrators in accordance with the rules governing the use of force under international and Israeli law, and as incorporated into the rules of engagement.⁵⁵ The HCJ, however, decided not to consider the actual implementation of these rules on the ground due to: (i) its general restraint with respect to reviewing military operational matters, which, it considers, exceed the judicial and legal realm; and (ii) the fact that the protests and law enforcement operations were still ongoing.⁵⁶

28. The independent international Commission of Inquiry on the protest in Gaza assessed the use of potentially lethal force by the IDF in the context of the military assaults on the large-scale civilian protests, taking into account the distance between the demonstrators and the IDF soldiers, as well as the protection measures set up by Israel ahead of the demonstrations.⁵⁷ According to the Commission of Inquiry, the IDF failed to adhere in practice to the principles governing the use of potentially lethal force. First, the Commission found that, based on the concrete circumstances and the information it had reviewed, protestors who had resorted to violent means, including throwing stones and other non-explosive objects and burning tyres, had nonetheless not posed an imminent threat to the life or bodily integrity of IDF soldiers or Israeli civilians. On the other hand, the Commission conceded that certain tools, such as slinging stones and incendiary kites,

⁵² Ibid., p. 85.

⁵³ Ibid., p. 87.

⁵⁴ *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory A/HRC/40/CRP.2* (2019), para. 314. See also Palestinian Center for Human Rights and BTselem, *Unwilling and Unable: Israel’s Whitewashed Investigations of the Great March of Return Protests* (December 2021), pp. 4-7, at https://www.btselem.org/sites/default/files/publications/202112_unwilling_and_unable_eng.pdf.

⁵⁵ HCJ *Yesh Din et al. Case*, para. 57.

⁵⁶ Ibid., paras. 60-64.

⁵⁷ *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory A/HRC/40/CRP.2* (2019), paras. 328-342.

may pose an imminent threat, while concluding that the possibility of using potentially lethal force against individuals employing such means had to be assessed on a case-by-case basis.⁵⁸

29. Second, the Commission of Inquiry affirmed that, in respect of the incidents it had reviewed, the use of less-lethal force, including sponge-tipped bullets and tear gas, had been sufficient to avert the possibility of protestors approaching the separations fence or to counter any eventual threat they could pose. In light of this, it concluded that in all those instances the use of potentially lethal force could not be justified. The Commission of Inquiry also noted that the use of potentially lethal force against individual "key instigators" or "key rioters" is inherently unnecessary as long as they do not concretely pose an imminent threat. Furthermore, it stated that, while defending the separation fence may in itself be a legitimate aim and deploying non-lethal means for this purpose may be justified, employing potentially lethal force to protect the fence as such does not meet the necessity criterion of averting an imminent threat to life or bodily integrity.⁵⁹
30. The Commission also opined with regard to the choice of the bullets employed. The IDF justified the use of 7.62 sniper bullets, which may cause serious permanent and life-changing injuries, based on the fact that smaller caliber bullets are not as accurate when employed to fire from a distance of over 250 meters from the intended target. The Commission, however, noted that an individual located more than 250 meters away from the shooter is unlikely to be posing an imminent threat to her or him, hence raising doubts on the necessity to use 7.62 bullets that can cause greater damage than smaller bullets. Moreover, the Commission observed that the IDF had generally applied potentially lethal force to avert a threat from becoming imminent, rather than to prevent an existing imminent threat, calling into question the IDF's adherence to the principle of proportionality.⁶⁰
31. The UN Commission of Inquiry's findings confirmed that Israel had failed to ensure that the IDF respected in practice the principles governing the use of potentially lethal force in its response to the "Great March of Return", and hence had violated article 6 of the ICCPR.

In light of the above, the Human Rights Committee should recommend that Israel:

- **Review its legal position to positively acknowledge that it is bound by the ICCPR both in the context of its engagement in armed conflict and that the Covenant applies to its operations extraterritorially, including in the OPT;**
- **Incorporate into the rules of engagement governing the use of potentially lethal force the principles and guidance set out in the Committee's General Comments Nos. 36 and 37, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the Code of Conduct for Law Enforcement Officials, and the UN Human Rights Guidance on Less-Lethal Weapons in Law Enforcement;**
- **Ensure that Israeli security forces' operations strictly comply with these principles and guidance;**
- **Repeal the category of "key instigators" and "key rioters" from the rules of engagement regulating the use of potentially lethal force;**
- **Ensure that law enforcement officers, including IDF members, use potentially lethal force in accordance with article 6 to guarantee the right to life and bodily integrity;**
- **Respect the right to peaceful assembly of Palestinians throughout the OPT in accordance with article 21.**

⁵⁸ Ibid., paras. 343-374.

⁵⁹ Ibid., paras. 383-385.

⁶⁰ Ibid., paras. 388-390.

IV. Lack of accountability

32. In its previous concluding observations, the Committee recommended that Israel reform its investigative system and ensure accountability for the human rights violations committed during the 2008-2009, 2012 and 2014 military operations in Gaza.⁶¹ While it has adopted some limited reform,⁶² Israel has failed to undertake a major overhaul of its military justice system. Failure to investigate and prosecute gross human rights violations, including arbitrary deprivations of life, torture and other ill-treatment, and enforced disappearance, constitute violations of the ICCPR, including articles 2(3), 6, 7, 9, 10 and 16.⁶³ Accountability gaps in Israeli domestic law regard both the legal and institutional frameworks, particularly: (i) the lack of legislation concerning superior responsibility; (ii) the office of the Military Advocate General; (iii) the threshold to open an investigation; (iv) operational debriefings; and (v) the fact-finding assessment mechanism.

i. Superior responsibility

33. No provision in Israeli criminal law establishes criminal liability and corresponding sanctions consistent with the superior responsibility doctrine,⁶⁴ according to which superiors are responsible for failure to prevent or punish crimes under international law by their subordinates, when they have the requisite knowledge that such crimes are about to be, are being, or have been committed.⁶⁵

34. Israel has an obligation under the ICCPR to establish the responsibility of superiors with regard to those violations amounting to crimes under international law, including violations of the right to life, torture and other ill-treatment, and enforced disappearance.⁶⁶

ii. The Military Advocate General (MAG)

35. The MAG heads the MAG Corps, the Israeli legal institution in charge of both deterring possible violations of international law committed by the IDF and holding soldiers accountable. The MAG acts as a legal adviser to the IDF Chief of General Staff and all other military authorities, while at the same time enforces law and order within the IDF as the head of the Military Prosecution System with the support of the Military Police Criminal Investigative Division (MPCID).⁶⁷ This dual role of the MAG Corps compromises the independence and impartiality of the military investigative system: the MAG is in charge of providing legal advice to the military bodies whose activities she or he may successively investigate. For instance, the MAG approved the rules of engagement governing the use of potentially lethal force employed by the IDF during its response to the "Great

⁶¹ CCPR/C/ISR/CO/4, para. 6.

⁶² CCPR/C/ISR/5, paras. 97-99.

⁶³ *General Comment No. 31*, paras. 15, 18; *General Comment No. 36*, paras. 27-28; *Boucherf v. Algeria* CCPR/C/86/D/1196/2003 (2006), para. 9.2.

⁶⁴ The Turkel Commission specifically recommended that Israel amend the law and impose criminal liability in accordance with the superior responsibility doctrine, yet this recommendation has remained unimplemented. See Turkel Commission, *Second Report: Israel's Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law* (2013), at https://www.gov.il/BlobFolder/generalpage/alternatefiles/he/turkel_eng_b1-474_0.pdf, p. 369.

⁶⁵ *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* E/CN.4/2005/102/Add.1 (2005), principle 27(b).

⁶⁶ *General Comment No. 31*, para. 18; *General Comment No. 36*, para. 27.

⁶⁷ The MAG is also responsible for the legal supervision of disciplinary proceedings, and for carrying out every other function prescribed by law and army regulations. See *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory* A/HRC/40/CRP.2 (2019), para. 718.

March of Return" in Gaza,⁶⁸ while also being in charge of the possible investigation into the incidents that occurred during such demonstrations. Moreover, the MAG, being a military officer, is not endowed with the institutional competence to investigate civilian authorities, such as members of the Government, who may be responsible for crimes under international law committed by IDF members. In light of the strict hierarchical relationship characteristic of any armed forces, it is likewise difficult to have confidence in the MAG's ability and commitment to investigate higher-ranking officers, such as the chief of staff, or peers in rank.

36. The MAG does not satisfy the requirements of independence and impartiality required under the ICCPR.⁶⁹ As set out in the Minnesota Protocol, "[i]nquiries into serious human rights violations, such as extrajudicial executions and torture, must be conducted under the jurisdiction of ordinary civilian courts."⁷⁰ The MAG's competence to enforce criminal jurisdiction against IDF members should be limited to military and disciplinary offences committed by IDF personnel not constituting human rights violations.⁷¹

iii. Threshold to open an investigation

37. Pursuant to a 2011 policy, approved by the HCJ,⁷² every death of a Palestinian resulting from the IDF operations in the West Bank will trigger the duty to open an immediate investigation except in "cases where it is clear that the operations during which the Palestinian inhabitant was killed were of a *real combat nature*."⁷³ In the latter case, the decision by the MAG of whether to open an investigation or not will be taken after the submission of an operational debriefing and other relevant material.⁷⁴

38. In the context of Israel's obligation to ensure respect for the right to life under article 6 of the Covenant, the concept of "real combat nature" is of concern as the 2011 policy fails to define it. Law enforcement operations, such as "disturbances of the peace" or "riots at checkpoints", have explicitly been defined by the IDF as of non-combat nature, which restricts the application of the policy to instances occurring in the conduct of hostilities. However, figures point out that in 2016 at least 79% of the incidents in which Palestinians have been killed in the West Bank by IDF gunfire were defined by the MAG as incidents of "a real combat nature", which, therefore, did not trigger an immediate investigation.⁷⁵ Accordingly, there is considerable cause to be concerned about the overbroad definition of the notion of "real combat nature" adopted by the MAG.

39. The "real combat nature" exception does not comply with Israel's obligations under the ICCPR, particularly for the lack of clarity regarding its meaning and scope, which adversely affects the fulfillment of Israel's duty to investigate. When potentially unlawful deaths occur in connection with the conduct of hostilities, an investigation should be opened whenever "reasonable grounds to suspect that a war crime was committed" exist.⁷⁶ In all other cases, Israeli authorities should open an investigation "where they know or should have known of potentially unlawful deprivations

⁶⁸ Israel's HCJ 3003/18 Submission, para. 66.

⁶⁹ *General Comment No. 31*, para. 15.

⁷⁰ *The Minnesota Protocol on the Investigation of Potentially Unlawful Death* (2016), para. 28; *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, principle 29.

⁷¹ *Concluding Observations: Colombia* CCPR/C/79/Add.2 (1992), paras. 5-6.

⁷² *B'Tselem – Israeli Information Center for Human Rights in the Occupied Territories v the Chief Military Prosecutor*, HCJ 9594/03 (2011), paras. 10-11.

⁷³ *Letter of Major-General Avichai Mandelblit, the MAG, to Yehuda Weinstein, Attorney-General, Investigations Policy of IDF operations in the West Bank*, 4 April 2011, p. 8 (emphasis added) cited in Turkel Commission, *Second Report*, p. 322.

⁷⁴ *Ibid.*

⁷⁵ Yesh Din, *Position Paper submitted to the UN Independent Commission of Inquiry on the 2018 protests in the OPT* (2018), pp. 10-11.

⁷⁶ *The Minnesota Protocol on the Investigation of Potentially Unlawful Death*, para. 21.

of life⁷⁷ of Palestinians. More generally, as recommended by the Committee, Israeli authorities should open an investigation "into all incidents involving the use of firearms by law enforcement officers."⁷⁸

iv. Operational debriefings

40. Unless the death of a Palestinian occurs during law enforcement operations (as opposed to operations of a "real combat nature"), or there is a "reasonable suspicion" regarding the commission of a war crime during the conduct of hostilities (e.g. rape), the MAG will postpone its decision on the opening of a criminal investigation until she or he receives the findings of an "operational debriefing".⁷⁹ According to Israeli military law, the operational debriefing is an "inquiry made by the army, based on army orders, concerning an incident that occurred during training or military operations, or with regard thereto."⁸⁰ Operational debriefings are confidential reviews of incidents and operations conducted by soldiers from the same unit or line of command, together with a superior officer. They are meant to serve operational purposes and examine the performance of the forces, in order to learn what should be retained and what should be improved.⁸¹ The MAG uses the findings of such debriefings in deciding whether to open an investigation; however, if an investigation is open and a criminal trial ensues, operational debriefings cannot be used as evidence.⁸² An operational debriefing is fundamentally different, in its purpose and procedure, from a criminal investigation.⁸³
41. The operational debriefing is conducted by military officers, instead of trained investigators, with the aim of avoiding the recurrence of problematic scenarios, rather than uncovering the truth regarding an incident and ensuring accountability.⁸⁴ Moreover, the operational debriefing lacks the necessary independence since it is carried out by the IDF into its own members' conduct, and does not usually include evidence from the plaintiffs or witnesses; it is normally based on soldiers' testimony only.⁸⁵
42. Operational debriefings fall short of the international standards governing investigations into human rights violations, particularly in respect of the required independence of investigators from the persons whose conduct is under scrutiny. By relying on operational debriefings to decide whether or not to open a criminal investigation into an incident, the procedure followed by the MAG does not comply with Israel's obligations under the ICCPR.

v. Fact-Finding Assessment Mechanism (FFAM)

43. Shortly after the commencement of the 2014 Operation "Protective Edge", the IDF Chief of General Staff established a FFAM, headed by a Major General who was not part of the chain of command during the Operation. The FFAM's task was to gather "information and relevant materials in order to assess the facts of individual incidents", in order to "provide the MAG with as much factual information as possible in order to enable the MAG to reach decisions regarding

⁷⁷ *General Comment No. 36*, para. 27.

⁷⁸ CCPR/C/ISR/CO/4, para. 13.

⁷⁹ Turkel Commission, *Second Report*, pp. 335-336.

⁸⁰ The Military Justice Law, art. 539A(a).

⁸¹ *Report of the United Nations Fact-Finding Mission on the Gaza Conflict A/HRC/12/48* (2009), para. 1795.

⁸² The Military Justice Law, art. 539A(a).

⁸³ *Report of the detailed findings of the independent international Commission of inquiry on the protests in the Occupied Palestinian Territory A/HRC/40/CRP.2* (2019), para. 720.

⁸⁴ M. Sfar, *Investigations*, in O. Ben-Naftali, M. Sfar and H. Viterbo, *The ABC of the OPT: A Legal Lexicon of the Israeli Control over the Occupied Palestinian Territory* (Cambridge University Press 2018), p. 192.

⁸⁵ Turkel Commission, *Second Report*, pp. 32, 381.

whether or not to open a criminal investigation.”⁸⁶ Similarly, during the “Great March of Return” in Gaza, the IDF Chief of Staff entrusted the FFAM with examining “exceptional incidents allegedly occurring during the Gaza border events” and providing the relevant findings and materials to the MAG for review. A dedicated team was formed within the FFAM, comprising “senior active duty and reservist officers with relevant professional military expertise ... accompanied by legal advisors”, who were all outside the chain of command of the “Great March of Return” events.⁸⁷

44. The FFAM was established following the recommendations of the Turkel Commission, which suggested its use in relation to incidents occurring during the conduct of hostilities, whenever no “reasonable suspicion” that a war crime has been committed exists but, the available information being only partial or circumstantial, “there is a need to ascertain the circumstances of the event.”⁸⁸ Similarly, the Minnesota Protocol requires the undertaking of a “post-operation assessment to establish the facts, including the accuracy of the targeting”, when during the conduct of hostilities casualties result from an attack and it is necessary to ascertain whether a criminal investigation should be opened.⁸⁹
45. Israel’s State Comptroller, in its capacity as the ombudsperson, found numerous flaws with regard to the FFAM’s inquiry into Operation “Protective Edge.” First, the FFAM remains subordinated to the IDF Chief of General Staff, of which it is therefore not independent. Second, shortcomings existed in respect of the impartiality of the FFAM as well as the thoroughness and effectiveness of its work. Third, in 80 percent of cases the length of time necessary to the FFAM to examine the events exceeded the time limits provided by law. Fourth, it was not envisaged that the MAG’s decision on the opening of investigations and their findings be published.⁹⁰ The Office of the High Commission for Human Rights (OHCHR) raised concern regarding the “quality of the Military Advocate General’s decisions concerning possible criminal behaviour in relation to the cases referred to him”, also in light of the fact that the FFAM examination does not encompass whether IDF orders and procedures comply with international law.⁹¹ In light of this, the OHCHR questioned whether the FFAM “meets accountability requirements under international law”, raising concern about its employment in relation to the “Great March of Return” in Gaza as well.⁹²
46. The FFAM fails to meet the requirements of independence, impartiality, promptness, thoroughness and transparency required for inquiries that may lead to a full investigation of potential violations of the Covenant. Although the inquiry of the FFAM differs from a full criminal investigation, in certain circumstances it remains a necessary step to ascertain whether the grounds for opening an investigation exist. Hence, the FFAM should be completely independent of the IDF, and its inquiries should be conducted impartially and with the necessary promptness and thoroughness.

In light of the above, the Human Rights Committee should recommend that Israel:

- **Enact domestic legislation to establish criminal liability and corresponding sanctions consistent with the doctrine of superior responsibility;**
- **Transfer the institutional competence to investigate and prosecute alleged crimes under international law committed by IDF members from the MAG to a civilian authority, and limit the MAG’s competence in respect of enforcing criminal**

⁸⁶ IDF, *Operation Protective Edge: Investigation of exceptional incidents* (2015), at <https://mfa.gov.il/MFA/ForeignPolicy/IsraelGaza2014/Pages/Operation-Protective-Edge-Investigation-of-exceptional-incidents-Update-4.aspx>.

⁸⁷ IDF, *Gaza Border Events: Questions & Answers*, p. 93.

⁸⁸ Turkel Commission, *Second Report*, pp. 102-103, 378-384.

⁸⁹ *The Minnesota Protocol on the Investigation of Potentially Unlawful Death*, para. 21.

⁹⁰ Israel State Comptroller, *Report on Operation “Protective Edge”* (2014), pp. 129-130.

⁹¹ *Ensuring accountability and justice for all violations of international law in the Occupied Palestinian Territory, including East Jerusalem A/HRC/40/43* (2019), para. 12.

⁹² *Ibid.*, para. 15.

jurisdiction against IDF members to military and disciplinary offences not constituting human rights violations;

- **Reform the laws and institutions governing the initiation of an investigation, in particular:**
 - **Prescribe the opening of an investigation into all incidents involving the use of firearms by the IDF in the OPT, particularly when resulting in a potentially unlawful death or serious injury;**
 - **Repeal the “real combat nature” clause as a ground to exclude the initiation of an investigation;**
 - **Ensure that “operational debriefings” do not hinder the decision on whether to open a criminal investigation into crimes allegedly committed by IDF members;**
 - **Reform the FFAM to guarantee its independence from the IDF, as well as the impartiality, promptness and thoroughness of its inquiries.**