



*The City University of New York*  
**CUNY SCHOOL OF LAW**  
*Law in the Service of Human Needs*

**Submission to the UN Commission of Inquiry on the 2018 protests in the Occupied Palestinian Territory concerning unlawful killing and use of excessive force by Israeli forces against Palestinian children**

11 January 2019

Submitted by:

Defense for Children International – Palestine  
Al-Sartawi Building, 3rd Floor  
Al-Khoulafa' St., Al-Bireh/Ramallah  
State of Palestine

Human Rights and Gender Justice Law Clinic  
City University of New York School of Law  
2 Court Square  
Long Island City, New York 11101 U.S.

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## **EXECUTIVE SUMMARY**

Israeli armed forces have been regularly implicated in widespread and systematic human rights violations against Palestinian children living in the Occupied Palestinian Territory. Children affected by armed conflict are entitled to special respect and protections under international law, but Israeli armed forces have consistently violated these protections through indiscriminate and disproportionate attacks that result in the unlawful killing and maiming of children amounting to war crimes.

The “Great March of Return” civilian demonstrations began in the Gaza Strip on 30 March 2018 in protest of Palestinian refugees’ inability to return to properties lost during events surrounding the establishment of the state of Israel in 1948 and also to demand an end to Israel’s 11-year near total closure of Gaza. These mass civilian protests, which have taken place weekly in the area along the Israeli-installed Gaza perimeter fence or near the Mediterranean shore, have drawn large and diverse crowds of demonstrators, including women, children, and elderly people.

Between January 2018 and 21 December 2018, Israeli forces and settlers killed at least 56 Palestinian children in the West Bank and Gaza, including a total of 46 with live ammunition or crowd-control weapons. The majority of these fatalities took place in the context of mass protests along the Gaza Strip perimeter fence. DCIP has confirmed in the overwhelming majority of cases children did not pose a direct, mortal threat at the time of their death.

While Israeli authorities have selectively opened their own investigations into several incidents occurring since 30 March 2018, previous experience has shown that Israeli authorities persistently fail to impartially investigate alleged violations in accordance with international standards.

The legal analysis below and evidence annexed to this submission add to the body of well-documented evidence of war crimes, crimes against humanity and other serious violations of international law committed by Israeli armed forces over the past decade. In a context where systemic impunity is the status quo, the need for justice and accountability is urgent.

## **SUBMITTING ORGANIZATIONS**

This report is submitted by Defense for Children International – Palestine (DCIP) and the Human Rights and Gender Justice Law Clinic at the City University of New York (CUNY) School of Law.

DCIP is an independent, local Palestinian child rights organization based in Ramallah dedicated to defending and promoting the rights of children living in the West Bank, including East Jerusalem, and the Gaza Strip. For over 25 years, DCIP has investigated, documented and pursued accountability for grave human rights violations against children; held Israeli and Palestinian authorities accountable to universal human rights principles; and advocated at the international and national levels to advance access to justice and protection for children.

The Human Rights and Gender Justice Clinic at CUNY School of Law, widely recognized for its expertise and contributions to gender jurisprudence and human rights practice, advocates before international and regional human rights bodies and national and local courts and legal institutions on issues involving gender-based violence, reproductive rights, sexual orientation and gender identity, economic and social rights, children’s rights and anti-trafficking.

*“Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.”<sup>1</sup>*

## **I. INTRODUCTION**

The Occupied Palestinian Territory (OPT), comprised of the West Bank, including East Jerusalem, and the Gaza Strip, has a population of nearly 4.8 million, including approximately 2.1 million persons under the age of 18 years, according to the Palestinian Central Bureau of Statistics. This incredibly young Palestinian population has grown up in the shadow of failed negotiations and lives under an oppressive Israeli military occupation that has no end in sight. Their futures have been stifled and decimated by systemic discrimination, persistent settlement expansion, closure, and repeated Israeli military offensives.

In Gaza, Israel’s now 11-year near-total closure has largely cut Gaza off from the rest of the world and prevented or acutely limited a wide range of goods and services from reaching Palestinians in Gaza. It has created and perpetuated an entirely human-made humanitarian disaster with grave consequences for approximately 1.9 million Palestinians living in what is one of the most densely populated areas in the world where Palestinians aged 0–14 comprise 41.8 percent of the population.<sup>2</sup>

Israel’s closure policy toward the Gaza Strip has a disproportionate impact on the civilian population and has decimated Gaza’s economy. Gaza now has one of the highest unemployment rates in the world at 48.2 percent.<sup>3</sup> With their freedom of movement denied, Palestinians in Gaza continue to slip deeper into poverty with 53 percent of people living in poverty, an increase by more than 14 percent since the last time poverty was assessed in 2011.<sup>4</sup> This is despite the fact that 80 percent of the population receives humanitarian assistance.<sup>5</sup> Without adequate food, health care, education, or safe spaces, children in Gaza are growing up without a childhood.

### ***United States government recognizes Jerusalem as Israel’s capital***

On 6 December 2017, United States President Donald Trump announced he would move the United States Embassy from Tel Aviv to Jerusalem prompting large-scale civilian demonstrations, marches, and clashes throughout the West Bank, including East Jerusalem, and the Gaza Strip.

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<sup>1</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 77(1), 8 June 1977, 1125 U.N.T.S. 3, [https://www.icrc.org/en/doc/assets/files/other/icrc\\_002\\_0321.pdf](https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf).

<sup>2</sup> Population density of the Gaza Strip is 5,204 persons/km<sup>2</sup>. Palestinian Central Bureau of Statistics (PCBS), *On the Occasion of the Int’l Population Day 11/7/2018*, 1 (11 July 2018), [http://www.pcbs.gov.ps/portals/\\_pcbs/PressRelease/Press\\_En\\_IntPopDay2018E.pdf](http://www.pcbs.gov.ps/portals/_pcbs/PressRelease/Press_En_IntPopDay2018E.pdf) (“PCBS 11 July 2018”).

<sup>3</sup> UNICEF, *State of Palestine Humanitarian Situation Report* (July – Sept. 2018), [https://www.unicef.org/appeals/files/UNICEF\\_State\\_of\\_Palestine\\_Humanitarian\\_Situation\\_Report\\_Sept\\_2018.pdf](https://www.unicef.org/appeals/files/UNICEF_State_of_Palestine_Humanitarian_Situation_Report_Sept_2018.pdf) (“UNICEF SitRep July-Sept. 2018”).

<sup>4</sup> U.N. Office for the Coordination of Humanitarian Affairs (OCHA), *Humanitarian Bulletin Occupied Palestinian Territory*, 8 (May 2018), [https://www.ochaopt.org/sites/default/files/hummonitor\\_may\\_04\\_06\\_2018\\_final.pdf](https://www.ochaopt.org/sites/default/files/hummonitor_may_04_06_2018_final.pdf) (“OCHA Humanitarian Bulletin May 2018”).

<sup>5</sup> UNICEF SitRep July-Sept. 2018, *supra* n. 3.

In response to the protests, Israeli forces misused crowd-control weapons and utilized intentional lethal force against civilians, including children, in the context of confrontations with Palestinian protestors. At least 345 Palestinian children in the OPT were injured by Israeli forces between 5 and 18 December 2017, according to the United Nations Office for the Coordination of Humanitarian Affairs (OCHA). Over a third of those injured during clashes in the Gaza Strip were shot with live ammunition, OCHA reported.<sup>6</sup>

The decision to recognize Jerusalem as the capital of Israel was overwhelmingly condemned by the United Nations General Assembly in a vote on 21 December 2017, just days after the UN Security Council proposed a resolution aimed at withdrawal of the U.S. recognition.<sup>7</sup> With the exception of the United States, which used its veto power to defeat the resolution, all of the 14 other members supported the resolution. Despite this, on 14 May 2018, the Trump administration held a ceremony in Jerusalem marking the opening of the new U.S. Embassy in Israel, relocating it from Tel Aviv.

### ***Great March of Return demonstrations***

The “Great March of Return” civilian demonstrations began in the Gaza Strip on 30 March 2018 in protest of Palestinian refugees’ inability to return to properties lost during events surrounding the establishment of the state of Israel in 1948. Approximately 70 percent of Palestinians living in the Gaza Strip are registered Palestine refugees, according to United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). In addition to the right of return, demonstrators are calling for an end to Israel’s 11-year near total closure of Gaza.<sup>8</sup>

Mass civilian protests, which have taken place weekly in the area along the Israeli-installed perimeter fence or near the Mediterranean shore, have drawn large and diverse crowds of demonstrators, including women, children, and elderly people.

It is recalled that international human rights law recognizes the right to protest as a realization of the rights to freedom of opinion, expression, peaceful assembly and association.<sup>9</sup>

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<sup>6</sup> OCHA, *Protection of Civilians Report* (21 Dec. 2017),

[https://www.ochaopt.org/sites/default/files/protection\\_of\\_civilians\\_biweekly\\_report\\_5-18\\_dec\\_2017.pdf](https://www.ochaopt.org/sites/default/files/protection_of_civilians_biweekly_report_5-18_dec_2017.pdf).

<sup>7</sup> See S/2017/1060 (18 Dec. 2017). Since Israel’s occupation of the West Bank, including East Jerusalem in 1967, and its annexation of Jerusalem in 1980, the international community has consistently reaffirmed the inadmissibility of the acquisition of territory by force, and condemned all measures to alter the demographic composition, character and status of Occupied Palestinian Territory, including East Jerusalem. See, e.g., U.N. Security Council Resolutions 242 (1967), 338 (1973), 476 (1980), 478 (1980) and 2334 (2016). Security Council Resolution 478 specifically calls upon all States to refrain from the establishment of diplomatic missions in Jerusalem. S.C. Res. 478, ¶ 5(b), U.N. SCOR, U.N. Doc. S/Res/478 (20 Aug. 1980), <https://unispal.un.org/DPA/DPR/UNISPAL.NSF/0/DDE590C6FF232007852560DF0065FDDB>.

<sup>8</sup> Amnesty International, *Six Months On: Gaza’s Great March of Return* (Oct. 2018), <https://www.amnesty.org/en/latest/campaigns/2018/10/gaza-great-march-of-return/> (“Amnesty International. *Six Months On: Gaza’s Great March of Return*”).

<sup>9</sup> See, e.g., Human Rights Council Res. 25/38, The promotion and protection of human rights in the context of peaceful protests, 25th Sess., 28 Mar. 2014, U.N. GAOR, 56th Sess., A/HRC/Res/25/38 (11 April 2014), <https://www.ohchr.org/Documents/Issues/Executions/A-HRC-RES-25-38.pdf>.

Organizers have repeatedly stated the protests are intended to be peaceful,<sup>10</sup> and protestors' activities have largely and consistently involved erecting supporter tent encampments, peaceful gatherings, including music and dancing, and marches to the perimeter fence or shore, displaying signs and Palestinian flags.

Some protestors have resorted to throwing stones across the fence toward deployed Israeli soldiers and burned tires to provide a smokescreen. A limited number of individuals have made efforts to pass through the perimeter fence on foot or into Israeli-enforced "no-go zones" at sea on fishing boats. Others have thrown Molotov cocktails, firebombs or other objects toward the perimeter fence and Israeli forces' positions that are often hundreds of meters away.

As mass protests continue, some demonstrators have developed other protest strategies. Self-organized "night confusion" groups seek to create distractions for Israeli forces late at night by utilizing loud sounds and fireworks. Another group has self-organized to construct large kites with flaming tails to be flown across the perimeter fence.

However, the standard for the use of intentional lethal force is not whether an individual is engaged in conduct deemed to be violent, but whether the person presented a mortal threat to Israeli forces at the time they were targeted with intentional lethal force. Documentation collected by DCIP and other Israeli, Palestinian, and international human rights groups overwhelmingly establishes that Israeli forces shot and killed unarmed protestors that did not pose any threat.<sup>11</sup> And after nearly nine months of protests, there are no reports of civilian protestors shooting any weapons at Israeli forces, or reports of Israeli forces being wounded, let alone killed, by protestors.

Based on DCIP's research, and as confirmed by other human rights groups, the protests are organized independently by civilians and not by directives of the Hamas-led government in the Gaza Strip.<sup>12</sup>

Protests continued after the opening of the U.S. Embassy to Jerusalem in May 2018, a move that was widely censured by global leaders.

### ***Establishment of the UN Commission of Inquiry on the 2018 protests in the Occupied Palestinian Territory***

Due to the deteriorating human rights situation in the OPT, the UN Human Rights Council convened a special session on 18 May 2018 in Geneva, at which it adopted a resolution creating an independent, international commission of inquiry to investigate all alleged violations of international law in the OPT in the context of mass protests that began on 30

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<sup>10</sup> See Ahmed Abu Artema, *I Helped Start the Gaza Protests. I Don't Regret It.*, N.Y. TIMES (14 May 2018), <https://www.nytimes.com/2018/05/14/opinion/gaza-protests-organizer-great-return-march.html>.

<sup>11</sup> See, e.g., Amnesty International, *Six Months On: Gaza's Great March of Return*, *supra* n. 8; Human Rights Watch, *Israel: Gaza Killings Unlawful, Calculated* (3 April 2018), <https://www.hrw.org/news/2018/04/03/israel-gaza-killings-unlawful-calculated>; Human Rights Watch, *Israel: Apparent War Crimes in Gaza* (13 June 2018), <https://www.hrw.org/news/2018/06/13/israel-apparent-war-crimes-gaza>; B'Tselem, *In 6 Months of Gaza Protests, Israeli Forces Fatally Shoot 31 Palestinian Minors* (15 October 2018), [https://www.btselem.org/firearm/20181015\\_31\\_minors\\_killed\\_in\\_gaza\\_protests\\_in\\_6\\_months](https://www.btselem.org/firearm/20181015_31_minors_killed_in_gaza_protests_in_6_months); DCIP, *Four Year Old Dies of Shrapnel Wounds From Israeli Fire* (15 December 2018), [https://www.dci-palestine.org/four\\_year\\_old\\_dies\\_of\\_shrapnel\\_wounds\\_from\\_israeli\\_forces\\_fire](https://www.dci-palestine.org/four_year_old_dies_of_shrapnel_wounds_from_israeli_forces_fire).

<sup>12</sup> See, e.g., Abu Artema, *I Helped Start the Gaza Protests. I Don't Regret It*, *supra* n. 10.

March 2018.<sup>13</sup> The resolution requested the UN High Commissioner for Human Rights to work to enable the commission of inquiry to fulfil its mandate.<sup>14</sup> The Commissioners are expected to present their final report at the March 2019 session of the Human Rights Council in Geneva.

### ***Mass protests in Gaza continue and Israeli forces kill and maim children***

Since 30 March 2018, protests have continued throughout 2018 each week and Israeli forces have consistently responded across the perimeter fence with the use of excessive force and intentional lethal force against unarmed civilians of all ages. In addition to tear gas and other crowd-control weapons, Israeli forces deployed in armored vehicles or behind earth mounds or berms on the Israeli side of the perimeter fence have frequently employed live ammunition against civilian demonstrators in circumstances not justified by international law resulting in unlawful killings.

Between 30 March and 18 October 2018, OCHA reported that at least 217 Palestinians were killed and 11,913 Palestinians were hospitalized for injuries in the Gaza Strip. Of the injuries, 5,502, were from live ammunition.

Since the mass civilian protests began on 30 March 2018, DCIP has documented a severe increase in the number of Palestinian children killed by Israeli forces. Of the 56 confirmed Palestinian child fatalities in 2018 at the hands of Israeli forces and settlers, 45 were killed by Israeli forces in the Gaza Strip since 30 March 2018. At least 16 children from the Gaza Strip suffered permanent disability in 2018 as a result of injuries sustained at the hands of Israeli forces.

Evidence collected by DCIP suggests Israeli forces and officials are responsible for war crimes, crimes against humanity and other serious violations of international law. In the overwhelming majority of cases, DCIP was able to confirm children did not present any imminent, mortal threat or threat of serious injury at the time Israeli forces resorted to the intentional use of lethal force against them. Critically, Israeli forces' repeated use of intentional lethal force against civilian protestors resulting in the killing or maiming of children where they posed no imminent threat to life amounts to war crimes.

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<sup>13</sup> UN Human Rights Council, *Violations of International Law in the Context of Large-scale Civilian Protests in the Occupied Palestinian Territory, Including East Jerusalem*, ¶ 5, U.N. Doc. A/HRC/RES/S-28/1, (22 May 2018), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/137/36/pdf/G1813736.pdf>. The resolution, in part, provides:

[The Human Rights Council] [d]ecides to urgently dispatch an independent, international commission of inquiry, to be appointed by the President of the Human Rights Council, to investigate all alleged violations and abuses of international humanitarian law and international human rights law in the Occupied Palestinian Territory, including East Jerusalem, particularly in the occupied Gaza Strip, in the context of the military assaults on the large-scale civilian protests that began on 30 March 2018, whether before, during or after; to establish the facts and circumstances, with assistance from relevant experts and special procedure mandate holders, of the alleged violations and abuses, including those that may amount to war crimes; to identify those responsible; to make recommendations, in particular on accountability measures, all with a view to avoiding and ending impunity and ensuring legal accountability, including individual criminal and command responsibility, for such violations and abuses, and on protecting civilians against any further assaults; and to present an oral update thereon to the Council at its thirty-ninth session and a final, written report at its fortieth session. *Id.* at ¶ 5.

<sup>14</sup> *See id.* at ¶ 6.



## II. CONTEXTUAL BACKGROUND

Israel's 51-year belligerent military occupation of the West Bank, including East Jerusalem, and the Gaza Strip is characterized by widespread, systematic and institutionalized human rights and humanitarian law violations against Palestinian civilians. Israeli occupation policies and practices expressly deny Palestinians living under Israeli control fundamental human rights guarantees and protections, including the right of self-determination, the right to equality and non-discrimination, and the right to life, liberty and security. It is critical that the Commission of Inquiry considers the context in which the Great March of Return protests, and alleged Israeli violations, are occurring.<sup>15</sup>

### *Israel is the “Occupying Power” under international law*

Israel occupied the West Bank, including East Jerusalem, and the Gaza Strip in 1967 when Israeli forces entered and established authority in the territory.<sup>16</sup> In doing so, Israel became the “Occupying Power” for purposes of international law, which carries clear obligations to protect the Palestinian civilian population under its control. To this day, the West Bank, including East Jerusalem, and the Gaza Strip remain occupied by Israel and claims otherwise are “not supported by law or fact.”<sup>17</sup> Israel has consistently been found to occupy Gaza because *inter alia* it maintains “effective control” of Gaza’s borders, coastline, airspace, economy, telecommunications, energy supplies, and water and sewage systems.<sup>18</sup> Despite

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<sup>15</sup> See H.R.C., *Rep. of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1*, U.N. Doc. A/HRC/29/CRP.4, at ¶ 24; GAOR, 29th Sess. (24 June 2015), <http://www.ohchr.org/EN/HRBodies/HRC/ColGazaConflict/Pages/ReportCoIGaza.aspx>. (“The impact of the hostilities in Gaza cannot be assessed separately from the blockade imposed by Israel.”) (“2015 U.N. Commission of Inquiry Report”); see also H.R.C., *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, U.N. Doc. A/HRC/12/48, at ¶ 176, 311, 1877-1879 (25 Sept. 2009), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/158/66/PDF/G0915866.pdf> (describing the 2009 Israeli military hostilities as “the culmination of the long process of economic and political isolation imposed on the Gaza Strip by Israel, which is generally described as a blockade.”) (“2009 UN Fact Finding Mission Report”).

<sup>16</sup> Territory is deemed “occupied” when it, either wholly or in part, is placed under the authority of the hostile army. See Hague Convention (IV): Laws and Customs of War on Land art. 42, 18 Oct. 1907, <http://www.icrc.org/applic/ihl/ihl.nsf/xsp/.ibmmodes/domino/OpenAttachment/applic/ihl/ihl.nsf/4D47F92DF3966A7EC12563CD002D6788/FULLTEXT/IHL-19-EN.pdf>. In 1967, the U.N. Security Council recognized that Israeli forces had occupied the West Bank, including East Jerusalem and the Gaza Strip. See S.C. Res. 242, ¶ 1(i), U.N. Doc. S/RES/242 (22 Nov. 1967), <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/IP%20S%20RES%20242.pdf>.

<sup>17</sup> Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, *Rep. on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, ¶ 10, U.N. Doc. A/62/275 (17 Aug. 2007) (by John Dugard), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/62/275](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/62/275) (“Special Rapporteur on Palestine 2007 Report”).

<sup>18</sup> See, e.g., Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 78, 101 (July 9), <https://unispal.un.org/DPA/DPR/unispal.nsf/0/B59ECB7F4C73BDBC85256EEB004F6D20>; Human Rights Committee, *Concluding Observations on the Fourth Periodic Report of Israel*, U.N. Doc. CCPR/C/ISR/CO/4 (21 Nov. 2014), <https://www.icj.org/wp-content/uploads/2015/04/Concluding-Observations-CCPR-Israel-2014-eng.pdf> (“Human Rights Committee, 2014 *Concluding Observations: Israel*”); U.N. Dep’t of Pub. Info., Statement by the Special Advisers of the Secretary-General on the Prevention of Genocide, Mr. Adama Dieng, and on the Responsibility to Protect, Ms. Jennifer Welsh, on the Situation in Israel and in the Palestinian Occupied Territory of Gaza Strip (24 July 2010), [www.un.org/en/preventgenocide/adviser/pdf/24.07.2014%20Special%20Advisers%20Statement%20on%20the%20situation%20in%20Israel%20and%20the%20occupied%20Gaza%20strip.pdf](http://www.un.org/en/preventgenocide/adviser/pdf/24.07.2014%20Special%20Advisers%20Statement%20on%20the%20situation%20in%20Israel%20and%20the%20occupied%20Gaza%20strip.pdf); Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied Since 1967, *Rep. of the Special Rapporteur on*

claims by Israeli officials that Israel no longer occupies Gaza following the September 2005 Disengagement Plan, which removed Israeli settlers and soldiers from permanent locations inside Gaza, the test under international law does not hinge on a permanent ground presence.<sup>19</sup> Israel's "disengagement" has not been found to affect its status as an Occupying Power.<sup>20</sup> Indeed, in 2012 the President of the ICRC stated that "[w]hile the shape and degree of this military occupation have varied, Israel has continuously maintained effective control" over the Gaza Strip.<sup>21</sup>

Likewise, the accordance to Palestine "non-member Observer status" at the United Nations by the United Nations General Assembly in 2012,<sup>22</sup> the recognition of the "State of Palestine" by an increasing number of States (currently 137 States), and Palestine's inclusion in international bodies<sup>23</sup> do not affect the West Bank, including East Jerusalem, and the Gaza

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*the Situation of Human Rights in the Palestinian Territories Occupied Since 1967*, U.N. Doc. A/HRC/25/67 (13 Jan. 2014) (by Richard Falk), <https://www.securitycouncilreport.org/wp-content/uploads/A-HRC-25-67.pdf>; 2009 U.N. Fact Finding Mission Report, *supra* n. 15, at ¶ 276.

For authority on the "effective control" test, see *Prosecutor v. Duško Tadić*, Case No. IT-94-I-T, Opinion & Judgment, ¶ 580 (Int'l Crim. Trib. for the Former Yugoslavia 7 May 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-tsji70507JT2-e.pdf>; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 2005 I.C.J. 168, ¶¶ 172, 175-176 (19 Dec.), <https://www.icj-cij.org/files/case-related/116/116-20051219-JUD-01-00-EN.pdf>; International Criminal Court, The Office of the Prosecutor: *Situation on Registered Vessels of Comoros, Greece and Cambodia Article 53(1) Report*, 6 Nov. 2014, ("OTP Flotilla Report") ¶ 24, [https://www.icc-cpi.int/iccdocs/otp/otp-com-article\\_53\(1\)-report-06nov2014eng.pdf](https://www.icc-cpi.int/iccdocs/otp/otp-com-article_53(1)-report-06nov2014eng.pdf); 2015 UN Commission of Inquiry Report, *supra* n. 15 at ¶ 26 ("The commission agrees that the exercise of the 'effective control' test is the correct standard to use in determining whether a State is the occupying power over a given territory . . .").

<sup>19</sup> For an elaboration on the application of the test for occupation, in 2007, for example, the former United Nations Special Rapporteur on the Situation of Human Rights in the Occupied Palestinian Territory John Dugard explained that Israel's continuing effective control of Gaza is manifested by the following: (a) substantial control of Gaza's six land crossings; (b) control through military incursions, rocket attacks and sonic booms, and the declaration of areas inside the Strip as "no-go" zones where anyone who enters can be shot; (c) complete control of Gaza's airspace and territorial waters; and (d) control of the Palestinian Population Registry, which has the power and authority to define who is a "Palestinian" and who is a resident of Gaza. Also, where physical control over the territory at any time is established under the "effective control" threshold, determining authority does not require a fixed armed presence. Special Rapporteur on Palestine 2007 Report at ¶ 10.

Withdrawing settlements and permanent military ground installations from the Gaza Strip did not end Israeli control of the territory. See GISHA, *DISENGAGED OCCUPIERS: THE LEGAL STATUS OF THE GAZA STRIP 9* (2009), <http://www.gisha.org/UserFiles/File/Report%20for%20the%20website.pdf>.

<sup>20</sup> See, e.g., 2015 UN Commission of Inquiry Report, at ¶ 26; U.N. General Assembly Resolution 64/92, *Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War*, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories, U.N. Doc A/Res/64/92 (19 Jan. 2010); UNGA Resolution 64/94, *Israeli practices affecting the human rights of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem* U.N. Doc A/Res/64/94 (19 Jan. 2010), (UNGA Resolutions to be read jointly).

The Office of the Prosecutor at the International Criminal Court as recognized that "Israel reserved its right to re-enter the Gaza Strip on the basis of military necessity and maintained control over the air and maritime space as well as borders of the Gaza Strip," citing Israel's Ministry of Foreign Affairs, "The Cabinet Resolution Regarding the Revised Disengagement Plan," 6 June 2004. OTP Flotilla Report, *supra* n. 19 at ¶ 25.

<sup>21</sup> Peter Maurer, *Challenges to International Humanitarian Law: Israel's Occupation Policy*, *International Review of the Red Cross*, vol. 94, number 888, p. 1504-1505.

<sup>22</sup> U.N. General Assembly resolution 67/19, 4 Dec. 2012, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/67/19](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/67/19).

<sup>23</sup> See UN General Assembly, "General Assembly Votes Overwhelmingly to Accord Palestine 'Non-Member Observer State' Status in United Nations," 29 Nov. 2012, Press Release GA/11317 <http://www.un.org/press/en/2012/ga11317.doc.htm>; See, e.g., Palestine's membership in UNESCO <http://www.unesco.org/new/en/unesco/worldwide/arab-states/palestine/>.

Strip's status as occupied territory and do not alter the international legal obligations imposed on Israel as the Occupying Power.<sup>24</sup>

### ***Discriminatory legal framework in the Occupied Palestinian Territory***

Since 1967, Israel has operated two separate and unequal legal systems in the same territory. While military law should apply to any person located in the occupied territory under international humanitarian law, Israeli settlers who reside within the bounds of the West Bank, in violation of international law, are subject to the Israeli civilian legal framework whereas Palestinians live under military law.

Unlike in the occupied West Bank, where Israeli authorities apply military law to the Palestinian population, Israeli authorities apply Israeli civilian law to Palestinians in East Jerusalem. The legal distinctions again trace back to 1967, when Israel occupied the Gaza Strip and the West Bank, including East Jerusalem, following the Six Day War. Contrary to principles of international law, Israel formally extended its law and administration to East Jerusalem and surrounding West Bank Palestinian villages, enlarging its Jerusalem municipality, in a move amounting to *de jure* annexation and rejected by the international community.<sup>25</sup> Later, Israel enacted the 1980 Basic Law – a move also unrecognized by the international community.<sup>26</sup> Over the decades since, Israeli authorities have taken various administrative, legislative, and demographic measures to ensure that its *de jure* annexation of East Jerusalem is irreversible.

### ***Israeli occupation policies and practices deny Palestinians fundamental rights***

While the right of self-determination for all peoples is enshrined in the Charter of the United Nations and other international human rights treaties,<sup>27</sup> successive Israeli governments since 1967 have implemented, maintained and perpetuated non-rights-respecting, oppressive policies and practices directly preventing Palestinians from freely determining their political status or freely pursuing their economic, social and cultural development.

In addition to widespread and systematic violations against Palestinian civilians, Israeli officials have repeatedly taken legal, administrative and practical measures aimed to establish and expand illegal Israeli settlements in occupied territory and simultaneously create a coercive environment resulting in forcible transfer of the occupied Palestinian population. Israeli occupation policies and practices, including the now 11-year-closure of Gaza, that

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<sup>24</sup> See, e.g., Commentary to Additional Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 U.N.T.S. 3 (“Additional Protocol I”), ¶ 156.

<sup>25</sup> Report of the Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, ¶ 34, U.N. Doc. A/73/45717 (22 Oct. 2018), [https://www.ohchr.org/Documents/AboutUs/NY/GA73/A\\_73\\_45717.docx](https://www.ohchr.org/Documents/AboutUs/NY/GA73/A_73_45717.docx) (“Special Rapporteur Lynk 2018 Report”).

<sup>26</sup> See S.C. Res. 478 (1980); and Special Rapporteur Lynk 2018 Report, *supra* n. 25, at ¶ 35.

<sup>27</sup> See, e.g., U.N. Charter art. 1, ¶2, and International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Art. 1(1), U.N. Doc. A/6316 (1966).

Importantly, the right of the Palestinian people to self-determination, including the right to their independent State of Palestine, has been reaffirmed by the United Nations General Assembly in a resolution adopted on 19 December 2017. See G.A. Res. 72/160, U.N. Doc. A/RES/72/160 (23 January 2018), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/455/05/PDF/N1745505.pdf>.

actively deny Palestinians the right to self-determination collectively amount to persecution, a crime against humanity under international law.

### ***Gaza closure and human-made humanitarian crisis***

In Gaza, Israel's now 11-year near-total closure has largely cut Gaza off from the rest of the world, with freedom of movement denied to approximately 1.9 million, resulting in the denial of other human rights, including the right to work; to health; to obtain an education; to physical security; to adequate food, water, and housing; and to family life.<sup>28</sup> The closure also prevented or acutely limited a wide range of goods and services from reaching Palestinians in Gaza. Israeli policies and actions have created and perpetuated an entirely human-made humanitarian disaster with grave consequences for Palestinians living in what is one of the most densely populated areas in the world.<sup>29</sup> Treaty bodies and previous fact-finding missions and commissions of inquiry, as well as the International Committee of the Red Cross (ICRC), have called upon Israel to end the closure.<sup>30</sup>

Israel's closure policy toward the Gaza Strip has a disproportionate impact on the civilian population and has decimated Gaza's economy. Gaza now has one of the highest unemployment rates in the world at 48.2 percent.<sup>31</sup> Palestinians in Gaza continue to slip deeper into poverty with 53 percent of people living in poverty, an increase by more than 14 percent since the last time poverty was assessed in 2011.<sup>32</sup> This is despite the fact that 80 percent of the population receives humanitarian assistance.<sup>33</sup>

Palestinians aged 0–14 comprise 41.8 percent of the population<sup>34</sup> and without adequate food, health care, education, or safe spaces, children in Gaza are growing up without a childhood. Israeli authorities have limited or prohibited staple foods, including flour, yeast, rice, salt, sugar, and cooking oil, at different times from entering Gaza over the last decade. Further exacerbating food shortages, Israel has restricted Palestinian access to up to 85 percent of Gaza's fishing waters and 35 percent of its agricultural land, including a strip of Palestinian

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<sup>28</sup> See Al Haq, Al Mezan Center for Human Rights, et al., *Palestinian Human Rights Organizations & Victims' Communication to the International Criminal Court Pursuant to Article 15 of the Rome Statute Requesting Investigation and Prosecution of The Illegal Closure of the Gaza Strip: Persecution and Other Inhumane Acts Perpetrated against the Civilian Population as Crimes against Humanity* (2016), <https://ccrjustice.org/sites/default/files/attach/2016/11/GAZA%20CLOSURE%20FOR%20ICC%20November%202022%202016.pdf>, (hereinafter "*Palestinian Human Rights Organizations submission to ICC*").

<sup>29</sup> Population density of the Gaza Strip is 5,204 persons/km<sup>2</sup>, according to recent data released by the Palestinian Central Bureau of Statistics. See Palestinian Central Bureau of Statistics 11 July 2018, *supra* n. 2,

<sup>30</sup> See, e.g., Committee on the Rights of the Child, *Concluding Observations: Israel*, U.N. Doc.

CRC/C/OPAC/ISR/CO/1, ¶ 11(b) (4 March 2010); Human Rights Committee, 2014 *Concluding Observations: Israel*, ¶ 12; Committee on the Elimination of Racial Discrimination, *Concluding Observations: Israel*, U.N.

Doc. CERD/C/ISR/CO/14-16, ¶ 26 (3 April 2012); 2015 UN Commission of Inquiry Report, ¶ 681(d); ICRC, "Gaza Closure: Not Another Year!" ICRC News Release, 10/103, 14 June 2010,

<https://www.icrc.org/en/doc/resources/documents/update/palestine-update-140610.htm>; 2009 UN Fact Finding Mission Report, ¶ 1972 (a), (b) and (d). See also *id.* at ¶¶ 78, 204, 1329, 1334.

<sup>31</sup> UNICEF SitRep July-Sept. 2018, *supra* n. 3.

<sup>32</sup> OCHA Humanitarian Bulletin May 2018, *supra* n. 4, at 8.

<sup>33</sup> UNICEF SitRep July-Sept. 2018, *supra* n. 3.

<sup>34</sup> Palestinian Central Bureau of Statistics 11 July 2018, *supra* n. 2.

territory along the Israeli fence with Gaza unilaterally declared a “no-go” or “buffer” zone by Israeli forces.<sup>35</sup>

It must be recalled that during this closure, Israel has undertaken three major military offensives against Gaza – “Operation Cast Lead” in December 2008-January 2009, “Operation Pillar of Defence” in 2012, and “Operation Protective Edge” in 2014 – which collectively left over 3,800 Palestinians dead, and thousands more Palestinians injured or disabled. Since 2007, DCIP has verified and documented over 1,000 child fatalities as a direct result of Israeli military offensives, incursions, and explosive remnants of war (ERW). These repeated military offensives have exacerbated the situation.

Between July 8 and August 26, 2014, in Israel’s so-called “Operation Protective Edge” offensive, DCIP independently verified the deaths of 547 Palestinian children, 535 of them as a direct result of Israeli attacks.<sup>36</sup> An unprecedented 22,000 Palestinian homes were left uninhabitable. Despite overwhelming and repeated evidence of war crimes committed by Israeli forces during the 2014 military assault, including direct attacks on civilians, indiscriminate and disproportionate attacks on civilian homes, schools, and residential neighborhoods, justice and accountability for these children remain elusive.

Recurring Israeli bombardments have severely damaged Gaza’s sole power plant, causing frequent and lasting blackouts. In June 2017, at the request of the Palestinian Authority, Israel drastically reduced its power supply by 40 percent, plunging the population into approximately 20 hours of darkness a day. Despite recent increases in electricity supply, 11 years of chronic electricity deficit have left Gaza’s remaining hospitals operating with little power, causing reduced capacity and treatment delays.

### ***Widespread and systematic violations against Palestinian civilians***

Israeli armed forces are regularly implicated in widespread and systematic human rights violations against Palestinian civilians, including children, living in the West Bank, including East Jerusalem, and the Gaza Strip. Concerning Israeli forces’ use of force outside of military offensives and the detention and prosecution of Palestinian minors in Israeli military courts, DCIP has documented violations sufficient to allege Israeli forces routinely perpetrate a variety of crimes within the jurisdiction of the International Criminal Court, such as war crimes or crimes against humanity of torture, inhuman treatment, wilfully causing great suffering, denying fair trials, unlawful transfer of the population of the occupied territory outside of this territory by the Occupying Power, and wilful killing.<sup>37</sup>

Investigations undertaken by DCIP into Palestinian child fatalities during Israel’s 2014 military offensive on Gaza, known as Operation Protective Edge, found overwhelming and repeated evidence of war crimes committed by Israeli forces, including direct attacks on

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<sup>35</sup> See Report of the UN Special Coordinator for the Middle East Peace Process to the Ad Hoc Liaison Committee (May 2017), [https://unsco.unmissions.org/sites/default/files/unsco\\_report\\_to\\_ahlc\\_-\\_1\\_may\\_2017.pdf](https://unsco.unmissions.org/sites/default/files/unsco_report_to_ahlc_-_1_may_2017.pdf).

<sup>36</sup> See DCIP, A WAR WAGED ON GAZA’S CHILDREN (2015), [https://d3n8a8pro7vhnmx.cloudfront.net/dcipalestine/pages/530/attachments/original/1436292897/OPE\\_A\\_War\\_Waged\\_on\\_Children.pdf?1436292897](https://d3n8a8pro7vhnmx.cloudfront.net/dcipalestine/pages/530/attachments/original/1436292897/OPE_A_War_Waged_on_Children.pdf?1436292897) (hereinafter “*War Waged on Gaza’s Children report*”).

<sup>37</sup> See, e.g., War Waged on Gaza’s Children report; and DCIP, NO WAY TO TREAT A CHILD: PALESTINIAN CHILDREN IN THE ISRAELI MILITARY DETENTION SYSTEM (2016), [https://d3n8a8pro7vhnmx.cloudfront.net/dcipalestine/pages/1527/attachments/original/1460665378/DCIP\\_NWT\\_TAC\\_Report\\_Final\\_April\\_2016.pdf?1460665378](https://d3n8a8pro7vhnmx.cloudfront.net/dcipalestine/pages/1527/attachments/original/1460665378/DCIP_NWT_TAC_Report_Final_April_2016.pdf?1460665378).

children and indiscriminate and disproportionate attacks on civilian homes, schools, and residential neighborhoods.<sup>38</sup>

### ***Systemic impunity is the norm***

Children affected by armed conflict are entitled to special respect and protections under international law. Instead, Israel has consistently violated these protections through indiscriminate and disproportionate attacks that have resulted in large numbers of child fatalities and injuries. Repeated military assaults and the 11-year Israeli closure of Gaza deny and disrupt access to food, healthcare, education, and safe spaces, amounting to collective punishment and persecution of Palestinian civilians.

While Israeli authorities have selectively opened their own investigations into several incidents over the past few years, systemic impunity is the norm. Past experience establishes Israeli authorities persistently fail to investigate alleged violations of its armed forces in accordance with international standards.

### **III. FACTUAL OVERVIEW**

Between January 2013 and 19 December 2018, Israeli forces and settlers killed at least 690 Palestinian children in the occupied West Bank, including East Jerusalem, and the Gaza Strip, according to documentation collected by DCIP.

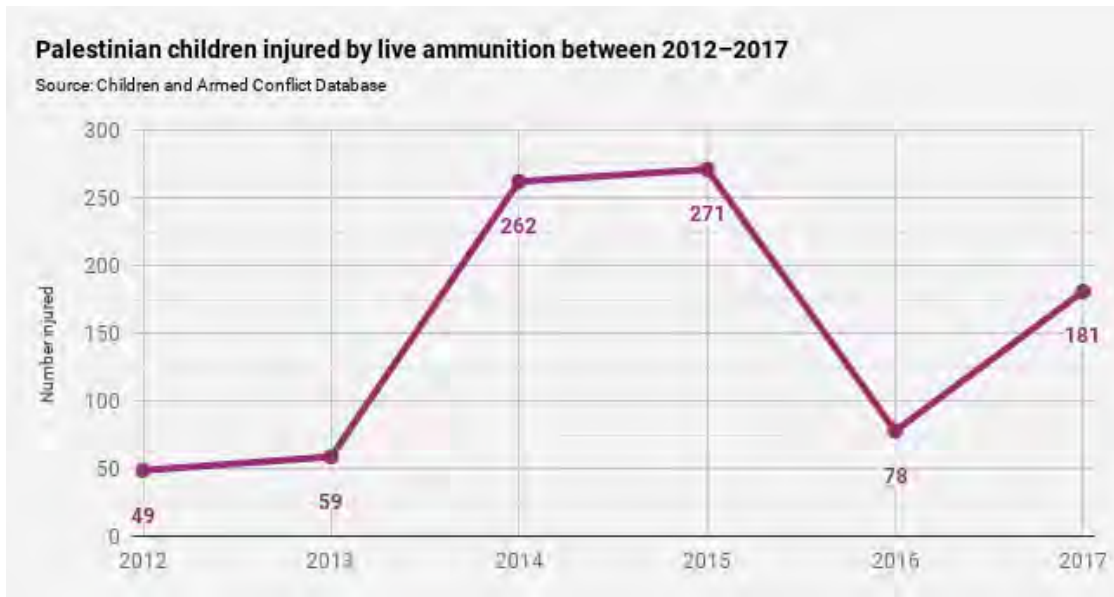
While the majority of these deaths occurred during the summer 2014 Israeli military offensive on Gaza, known as Operation Protective Edge, at least 132 Palestinian children were killed outside of this military assault across the Occupied Palestinian Territory with live ammunition or crowd-control weapons, according to documentation collected by DCIP.

Analysing these specific incidents and the context in which they occurred shows Israeli forces in the occupied West Bank, including East Jerusalem, increasingly targeted Palestinian children with live ammunition to quash protests beginning in 2014.

The number of children injured by live ammunition similarly shows Israeli forces increasingly employed intentional lethal force throughout the Occupied Palestinian Territory starting in 2014, according to information collected by the UNICEF-led Working Group on Grave Violations against Children in the OPT. Israeli forces injured 49 Palestinian children with live ammunition in 2012 and 59 children in 2013. In 2014, this figure spiked to 262 children injured with live ammunition fired by Israeli forces. Another 271 children were injured by live ammunition in 2015.

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<sup>38</sup> See War Waged on Gaza's Children report.



DCIP independently verified the killing of two Palestinian children by Israeli forces with live ammunition in 2013, then in 2014 this figure spiked to a total of 12 Palestinian children killed by Israeli forces, all in the West Bank.

With escalations in violence throughout the Occupied Palestinian Territory in 2015, the increase continued as Israeli forces more than doubled the number of children killed the previous year with at least 27 Palestinian children killed with live ammunition or crowd control in the West Bank and Gaza.

The killing spiked in 2016 as Israeli forces and security guards killed 32 Palestinian children, all from the West Bank, making it, at the time, the deadliest year in a decade for West Bank children. In 2017, Israeli forces killed 12 Palestinian children in the West Bank and Gaza with live ammunition.

Despite these trends, impunity is the norm as accountability for shootings of Palestinian children by Israeli forces is extremely rare. Only one incident involving the death of a child, the fatal shooting of 17-year-old Nadeem Nawara, in May 2014, has resulted in an investigation, indictment, and conviction. Ben Deri, the Israeli paramilitary border police officer accused of killing Nawara, was sentenced to a 9-month prison sentence in April 2018.

Between January 2018 and 21 December 2018, Israeli forces and settlers killed at least 56 Palestinian children in the West Bank and Gaza, including a total of 46 with live ammunition or crowd-control weapons.<sup>39</sup> The majority of child fatalities in 2018 have taken place in the context of protests along the Gaza Strip perimeter fence. DCIP evidence has determined in the overwhelming majority of cases children killed along the Gaza Strip perimeter did not pose a direct, mortal threat at the time of their death.

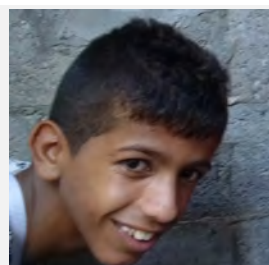
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<sup>39</sup> One additional child, Mohammad Naser Ziad al-Reefi, 13, died during 2018 from spinal cord injuries sustained from an Israeli drone-fired missile strike in 2014.

## Case summaries

Below are brief case summaries for the child fatalities in the Gaza Strip documented by DCIP during 2018:

### JANUARY 2018 INCIDENTS



#### Amir Abdel Hamid MUSAAD

أمير أبو مساعد

Ref. No. F18002

15 Y / 5 M

Date of Birth 11 Aug 2002

Deir al-Balah Governorate

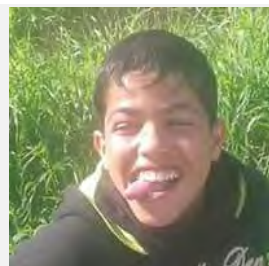
Incident Date 11 Jan 2018

Live ammunition

Date of Death 11 Jan 2018

Amir was shot in the chest by Israeli forces around 4:30 p.m. on January 11, dying instantly. An eyewitness said soldiers fired live ammunition from across the Gaza perimeter fence at a group of around 20 protestors throwing stones toward the fence.

### FEBRUARY 2018 INCIDENTS



#### Abdullah Ermilat

عبد الله أيمن سليم إرميلات

Ref. No. F18005

14 Y / 7 M

Date of Birth 17 Jul 2003

Rafah Governorate

Incident Date 17 Feb 2018

Tank-fired shell

Date of Death 17 Feb 2018

Israeli soldiers fired live ammunition and artillery shells at four children who approached the perimeter fence near Al-Shouka southeast of Rafah in the southern Gaza Strip on February 17, killing Abdullah Ermilat, 14, and Salem Sabah, 16. The children's bodies were found the following morning around 30 to 50 meters (98 to 165 feet) from the fence.



#### Salem Sabah

سالم محمد سليمان صباح

Ref. No. F18006

16 Y / 8 M

Date of Birth 05 Jun 2001

Rafah Governorate

Incident Date 17 Feb 2018

Tank-fired shell

Date of Death 17 Feb 2018

Israeli soldiers fired live ammunition and artillery shells at four children who approached the perimeter fence near Al-Shouka southeast of Rafah in the southern Gaza Strip on February 17, killing Abdullah Ermilat, 14, and Salem Sabah, 16. The children's bodies were found the following morning around 30 to 50 meters (98 to 165 feet) from the fence.



## MARCH 2018 INCIDENTS



**Ibrahim Abu Shaer**

إبراهيم صلاح إبراهيم أبو شعر

Ref. No.	F18007		17 Y / 0 M
		Date of Birth	12 Mar 2001
Rafah Governorate		Incident Date	30 Mar 2018
Live ammunition		Date of Death	30 Mar 2018

According to witnesses, around 4 p.m., Israeli forces fatally shot Ibrahim after he threw stones at forces stationed behind the Gaza perimeter fence. Ibrahim was approximately 70 to 100 meters (230 to 328 feet) from the soldiers at the time that he was shot twice, in the neck and back of his head.



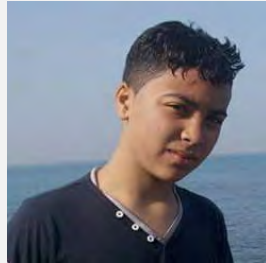
**Ahmad Jihad Ahmad al-Aydi**

أحمد جهاد أحمد العائدي

Ref. No.	F18036		17 Y / 5 M
		Date of Birth	16 Feb 2001
Deir al-Balah Governorate		Incident Date	30 Mar 2018
Live ammunition		Date of Death	05 Aug 2018

Around 1 p.m., Ahmad was walking away from the March of Return protests when he was shot in the head. Ahmad was in a coma and transferred to Istishari hospital in Ramallah. He returned to Gaza on July 31 and died from his injuries on August 5.

## APRIL 2018 INCIDENTS

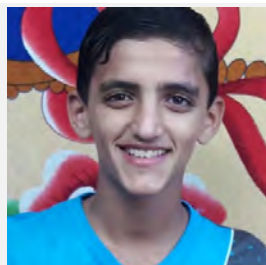


**Hussein Mohammad Adnan Madi**

حسين محمد عدنان ماضي

Ref. No.	F18008		13 Y / 11 M
		Date of Birth	09 Apr 2004
Gaza Governorate		Incident Date	06 Apr 2018
Live ammunition		Date of Death	06 Apr 2018

Around 4 p.m., Israeli forces shot Hussein in the abdomen. An eyewitness told DCIP that Hussein had joined a peaceful march that afternoon. He was declared dead at Shifa hospital in the northern Gaza Strip.



**Aladdin Yahia Ismail Zamili**

علاء الدين يحيى إسماعيل الزامللي

Ref. No.	F18009		15 Y / 3 M
		Date of Birth	27 Dec 2002
Rafah Governorate		Incident Date	06 Apr 2018
Live ammunition		Date of Death	06 Apr 2018

Around 6 p.m., Israeli snipers across the perimeter fence shot Aladdin while he was marching with a group of Palestinians towards the fence. He sustained a gunshot wound to his neck and was later pronounced dead at Abu Yousef al-Najjar hospital in Rafah.



**Mohammad Ibrahim Ayoub**

محمد ابراهيم أيوب أيوب

Ref. No.	F18010		14 Y / 2 M
		Date of Birth	09 Feb 2004
North Gaza Governorate		Incident Date	20 Apr 2018
Live ammunition		Date of Death	20 Apr 2018

An Israeli sniper stationed on a sand hill on other side of the Gaza perimeter fence shot Mohammad in the head while he was between 70-200 meters from the fence. Witnesses said Mohammad was attempting to run away from tear gas at the time he was shot.



**Azzam Hilal Riad Awaidah**

عزام هلال رياض عويضة

Ref. No.	F18011		15 Y / 1 M
		Date of Birth	13 Mar 2003
Khan Younis Governorate		Incident Date	27 Apr 2018
Tear gas canister / Rubber-coated metal bullet		Date of Death	28 Apr 2018

Around 6 p.m., an Israeli soldier stationed on a sand hill on other side of the Gaza perimeter fence shot Azzam in the head with what doctors believed to be a tear gas canister or rubber bullet. He suffered skull fractures and brain damage and died the following morning around 5 a.m.

#### MAY 2018 INCIDENTS



**Jamal Abdel Hadi Mohammad Afaneh**

جمال عفانة

Ref. No.	F18012		15 Y / 10 M
		Date of Birth	18 Jun 2002
Rafah Governorate		Incident Date	11 May 2018
Tear gas canister		Date of Death	12 May 2018

Around 4 p.m., Jamal was watching protests around 200 meters from the Gaza perimeter fence when Israeli forces shot heavy rounds of tear gas and live ammunition. A tear gas canister hit him in the back of the head. Jamal was transferred to the European hospital in critical condition and died the following evening.

**Wassal Khalil**

وصال الشيخ خليل

Ref. No. F18013

14 Y / 5 M

Date of Birth 07 Dec 2003

Deir al-Balah Governorate

Incident Date 14 May 2018

Live ammunition

Date of Death 14 May 2018

Around 3 p.m., Wassal was participating in March of Return protests along the Gaza perimeter fence when an Israeli soldier shot her in the head with live ammunition. She was transferred to Al-Aqsa Martyrs hospital where she was pronounced dead on arrival.

**Izzedine al-Samak**

عز الدين موسى محمد السمك

Ref. No. F18014

13 Y / 11 M

Date of Birth 21 May 2004

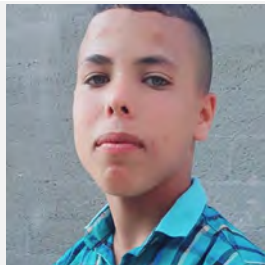
Deir al-Balah Governorate

Incident Date 14 May 2018

Live ammunition

Date of Death 14 May 2018

Around 10:30 a.m., Izzedine was approximately 150 meters from the perimeter fence with a bag of stones when he was shot in the back. The bullet exited through his stomach, and he was pronounced dead at Al-Aqsa Martyrs hospital around noon.

**Saadi Abu Salah**

سعدي سعيد فهمي أبو صلاح

Ref. No. F18015

16 Y / 2 M

Date of Birth 13 Mar 2002

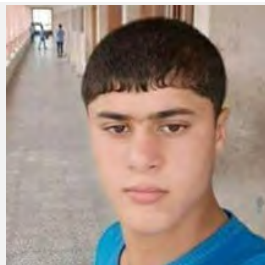
North Gaza Governorate

Incident Date 14 May 2018

Live ammunition

Date of Death 14 May 2018

After 3 p.m., Saadi was with a group of youths who were throwing stones at Israeli soldiers stationed near the Gaza perimeter fence. He was shot in the left side of his stomach near the main fence. He was transferred to hospital in critical condition and was pronounced dead in the operating room around 4 p.m.

**Ahmad al-Shaar**

أحمد عادل موسى الشاعر

Ref. No. F18016

15 Y / 11 M

Date of Birth 25 May 2002

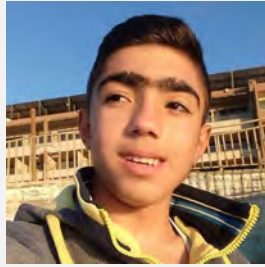
Khan Younis Governorate

Incident Date 14 May 2018

Live ammunition

Date of Death 14 May 2018

Ahmad threw two tires during the protest in the moments before an Israeli soldier shot him in the head. He was transferred to European hospital where he was pronounced dead on arrival.

**Said al-Kheir**

سعيد محمد سعيد أبو الخير

Ref. No.	F18017		15 Y / 7 M
		Date of Birth	13 Oct 2002
North Gaza Governorate		Incident Date	14 May 2018
Live ammunition		Date of Death	14 May 2018

Around 2 p.m., Said was participating in protests when an Israeli soldier shot him with live ammunition. The bullet entered and exited his neck. Said was transferred to the Indonesian hospital and pronounced dead on arrival. Around 15 others were killed in the same incident, some of whom possessed weapons. DCIP's Monitoring and Documentation Unit confirmed that Said was in the vicinity, but not connected to the group with weapons. Paramedics said Said was between 100-150 meters from the fence at the time he was shot.

**Ibrahim al-Zarqa**

ابراهيم أحمد علي الزرقا

Ref. No.	F18018		17 Y / 9 M
		Date of Birth	17 Jul 2000
North Gaza Governorate		Incident Date	14 May 2018
Live ammunition		Date of Death	14 May 2018

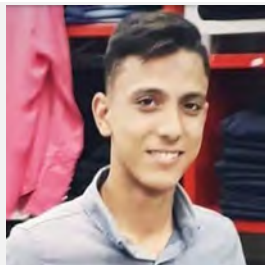
Israeli forces opened fire indiscriminately at protestors, and Ibrahim was shot in the left side of the head above his ear. The incident led to the deaths of 15 people including both members of a military wing, who had thrown a grenade, and civilians. Ibrahim was among those killed in the incident, raising questions to his connection to Palestinian armed groups. DCIP's Monitoring and Documentation Unit concluded that Ibrahim was in the vicinity but not connected to the members of the armed group. The Al-Qassam Brigades investigated the incident and reported the armed men carried out an impromptu attack that was not otherwise planned by the armed group. They did not claim children as participants in the attack or as armed group members.

**Talal Matar**

طلال عدنان ابراهيم مطر

Ref. No.	F18019		16 Y / 0 M
		Date of Birth	05 May 2002
Deir al-Balah Governorate		Incident Date	14 May 2018
Live ammunition		Date of Death	14 May 2018

Talal was participating in protests in the afternoon when an Israeli soldier shot him with live ammunition. The bullet entered and exited his head. He was transferred to Al-Aqsa Martyrs hospital and then to Shifa hospital, where he died before reaching the operating room. His parents identified his body the next day at 10 a.m.

**Mahmoud Dawoud**

محمود ماجد أحمد داود

Ref. No.	F18026		15 Y / 4 M
		Date of Birth	11 Feb 2003
Gaza Governorate		Incident Date	14 May 2018
Live ammunition		Date of Death	04 Jul 2018

Around 5 p.m., Israeli forces shot Mahmoud in the head with live ammunition. The bullet entered his forehead and exited through the top of his head. He was pronounced dead around 9 p.m. in Shifa hospital on 4 July.

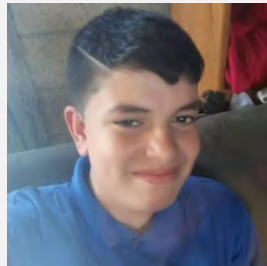


**Bilal al-Ashram**

بلال بدير حسين الأشرم

Ref. No.	F18020		17 Y / 11 M
		Date of Birth	29 May 2000
Deir al-Balah Governorate		Incident Date	15 May 2018
Live ammunition		Date of Death	15 May 2018

Around 7:15 p.m. Bilal was running around 150 meters from the perimeter fence when Israeli soldiers shot him in the leg. He fell to the ground and was shot a second time. The second bullet entered the right side of his chest under his armpit and exited from the left side of his chest.



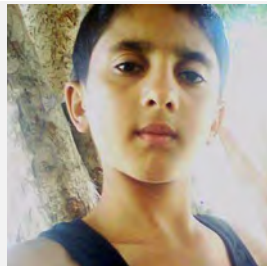
**Zakaria Bashbash**

زكريا سيد مصطفى بشبش

Ref. No.	F18023		14 Y / 10 M
		Date of Birth	22 Jul 2003
Deir al-Balah Governorate		Incident Date	30 May 2018
Live ammunition		Date of Death	18 Jun 2018

Around 6 p.m. on March 30, an Israeli soldier stationed on the eastern side of the perimeter fence near Al-Bureij camp in the central Gaza Strip shot Zakaria in the back. The bullet entered his mid back, damaging his internal organs. He underwent surgery but remained in critical condition. Israeli authorities denied Zakaria an exit permit from the Gaza Strip to receive treatment at a Jerusalem hospital. He succumbed to his wounds in Shifa hospital around 4 p.m. on June 18.

**JUNE 2018 INCIDENTS**

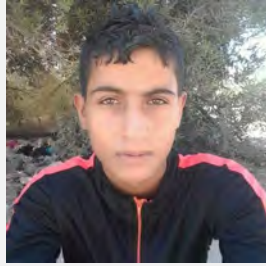


**Haitham Mohammad Khalil al-Jamal**

هيثم الجمل

Ref. No.	F18022		14 Y / 10 M
		Date of Birth	12 Jul 2003
Rafah Governorate		Incident Date	08 Jun 2018
Live ammunition		Date of Death	08 Jun 2018

Haitham was participating in a march near the Gaza perimeter fence when an Israeli soldier shot him in the stomach. The bullet exited out his back. He was transferred to Abu Youssef al-Najjar hospital and then to European hospital where he was pronounced dead around 6:30 p.m.

**Abdel-Fattah Abu Azoum**

عبد الفتاح أبو عزوم

Ref. No. F18024

17 Y / 3 M

Date of Birth 08 Mar 2001

Rafah Governorate

Incident Date 28 Jun 2018

Tank-fired shell

Date of Death 28 Jun 2018

Around 1:30 a.m., Abdel-Fattah went to the perimeter fence east of Rafah with a Molotov cocktail with the intention of starting a fire on the Israeli side of the fence when he was targeted by an Israeli tank. He was laying on the ground between 30 to 40 meters (98 to 131 feet) from the fence when he came under artillery fire and was hit by shrapnel in the head. Paramedics arrived to the scene around 4 a.m. and transferred him to European hospital, where doctors pronounced him dead around noon.

**Yasser Amjad Mousa Abu Naja**

ياسر أمجد أبو النجا

Ref. No. F18025

11 Y / 9 M

Date of Birth 19 Sep 2006

Khan Younis Governorate

Incident Date 29 Jun 2018

Live ammunition

Date of Death 29 Jun 2018

Around 7:15 p.m., an Israeli soldier shot Yasser in the head with live ammunition. He was killed instantly. The bullet entered the right side of his head and left a large exit wound on the left side of his head. His body was initially unidentifiable due to the severity of the injury.

**JULY 2018 INCIDENTS****Khaled Samir Shehdeh Abdel-Aal**

خالد سمير عبد العال

Ref. No. F18027

17 Y / 9 M

Date of Birth 14 Sep 2000

Rafah Governorate

Incident Date 02 Jul 2018

Live ammunition

Date of Death 02 Jul 2018

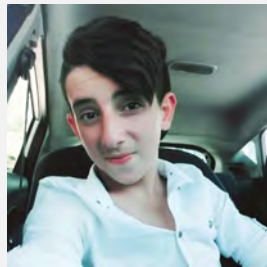
Around 2:30 p.m., Khaled, two other children and an adult crossed to the Israeli side of the perimeter fence and lit an Israeli army post at the top of a hill on fire. No soldiers were seen in the area at the time. The group ran back to the Palestinian side of the fence and Khaled was shot when they came under heavy fire around 5 meters after they crossed back to the Palestinian side. Another child continued running and was shot in the shoulder from around 250-300 meters. An ambulance attempted to reach Khaled, but came under heavy fire. Israeli soldiers dragged him by his hands from the scene and his family was later notified of his death.

**Othman Hilles**

عثمان رامي جواد حلس

Ref. No.	F18028		14 Y / 5 M
		Date of Birth	04 Feb 2004
Gaza Governorate		Incident Date	13 Jul 2018
Live ammunition		Date of Death	13 Jul 2018

Israeli forces shot dead 14-year-old Othman Hilles at the March of Return protests. A live bullet struck him in the chest and exited through his back. Video shows he posed no direct or mortal threat at the time he was killed.

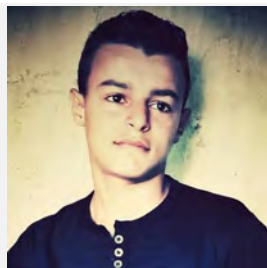
**Amir Mohammad Walid al-Nimra**

أمير محمد وليد النمره

Ref. No.	F18029		14 Y / 10 M
		Date of Birth	28 Aug 2003
Gaza Governorate		Incident Date	14 Jul 2018
Drone-fired missile		Date of Death	14 Jul 2018

Around 6 p.m. on July 14, Amir al-Nimra and Louay Kahil were sitting on eastern side of the rooftop of a building under construction west of Gaza City, overlooking an adjacent public park. A drone missile hit the roof and the children suffered injury to the backs of their heads, according to an eyewitness who reached the scene shortly after.

Israeli forces dropped two additional drone missiles on the south end of the building as bystanders evacuated the children, later followed by missiles from an Israeli warplane, the eyewitness said. The children were later pronounced dead at Shifa hospital.

**Louay Mazen Nabeel Kahil**

لؤي مازن نبيل كحيل

Ref. No.	F18030		14 Y / 10 M
		Date of Birth	13 Sep 2003
Gaza Governorate		Incident Date	14 Jul 2018
Drone-fired missile		Date of Death	14 Jul 2018

Around 6 p.m. on July 14, Amir al-Nimra and Louay Kahil were sitting on eastern side of the rooftop of a building under construction west of Gaza City, overlooking an adjacent public park. A drone missile hit the roof and the children suffered injury to the backs of their heads, according to an eyewitness who reached the scene shortly after.

Israeli forces dropped two additional drone missiles on the south end of the building as bystanders evacuated the children, later followed by missiles from an Israeli warplane, the eyewitness said. The children were later pronounced dead at Shifa hospital.



**Majdi Ramzi Kamal al-Satri**

مجدي رمزي كمال السطري

Ref. No.	F18033		11 Y / 9 M
		Date of Birth	03 Oct 2006
Rafah Governorate		Incident Date	27 Jul 2018
Live ammunition		Date of Death	27 Jul 2018

Around 5:30 p.m., Majdi was participating in a March of Return protest and was approximately 50 meters from the Gaza perimeter fence when Israeli forces opened fire on protestors. The bullet entered his forehead and exited the back of his head.



**Mo'men Fathi Yousef al-Hams**

مومن فتحي يوسف الهمص

Ref. No.	F18034		16 Y / 10 M
		Date of Birth	31 Aug 2001
Rafah Governorate		Incident Date	27 Jul 2018
Live ammunition		Date of Death	28 Jul 2018

Around 5:30 p.m., Mo'men was seen with a group of men and boys cutting and attempting to cross the perimeter fence. Israeli forces opened fire on the group. A bullet hit Mo'men in the back near the spine and exited out the front of the right side of his chest. He was transferred to the hospital in critical condition, underwent several operations, and was pronounced dead around 4:30 a.m. the next day.

#### AUGUST 2018 INCIDENTS



**Muath Ziad Ibrahim al-Soury**

معاذ زياد ابراهيم الصوري

Ref. No.	F18035		15 Y / 0 M
		Date of Birth	18 Jul 2003
Deir al-Balah Governorate		Incident Date	03 Aug 2018
Live ammunition		Date of Death	04 Aug 2018

Around 7:25 p.m., Muath was participating in March of Return protests and was approximately 20 meters from the barbed wire fence and 50 meters from the main fence when Israeli soldiers shot at several demonstrators. Muath was shot in the abdomen. He was taken to Al-Aqsa Martyrs hospital, and his identity was initially unknown. Muath's family identified him late that night, and he was pronounced dead early the next morning.



**Suhaib Abdel Salam Mohammed Abu Kashf**

صهيب عبد السلام محمد أبو كاشف

Ref. No.	F18040		16 Y / 1 M
		Date of Birth	05 Aug 2002
Khan Younis Governorate		Incident Date	03 Aug 2018
Live ammunition		Date of Death	15 Sep 2018



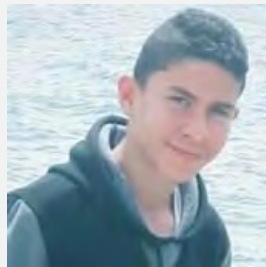
Suhaib was throwing stones during March of Return protests when an Israeli soldier shot him in the neck. According to witnesses, he was hit by an explosive bullet, and four others in his proximity were injured by the bullet's fragments. The injury led to quadriplegia. Suhaib was transferred to Al-Ahli hospital in Hebron where he remained for two weeks. He returned to Gaza and was admitted to the intensive care unit at the European hospital, where he stayed until he was pronounced dead at approximately 11 p.m. on September 15.



**Bayan Mohammed Kamil Abu Khammash** بيان محمد كامل أبو خماش  
 Ref. No. F18037 1 Y / 10 M  
 Date of Birth 22 Sep 2016  
 Deir al-Balah Governorate Incident Date 09 Aug 2018  
 Airstrike Date of Death 09 Aug 2018

Around 1:30 a.m., an Israeli warplane dropped a missile on the Abu Khammash home. The missile penetrated the ceiling of the home's living room, decapitating 22-month-old Bayan Abu Khammah and her mother, Enas, who was eight months pregnant. Her father, Mohammad, was also injured in the airstrike. An explosives engineering team found part of a missile approximately 700 meters away from the house and the unexploded head of a warplane missile, suggesting that the body of the missile exploded in the Abu Khammash's house.

#### SEPTEMBER 2018 INCIDENTS



**Bilal Mustafa Mohammed Khafajeh** بلال مصطفى محمد خفاجة  
 Ref. No. F18038 16 Y / 8 M  
 Date of Birth 08 Dec 2001  
 Rafah Governorate Incident Date 07 Sep 2018  
 Live ammunition Date of Death 07 Sep 2018

Israeli forces shot 17-year-old Bilal Khafajeh around 6 p.m. near the Gaza perimeter fence in Rafah. He sustained a gunshot wound to chest and was pronounced dead at the Gaza European hospital.



**Ahmad Misbah Ahmad Abu Tyour** أحمد مصباح أحمد أبو طيور  
 Ref. No. F18039 16 Y / 2 M  
 Date of Birth 29 Jun 2002  
 Rafah Governorate Incident Date 07 Sep 2018  
 Live ammunition Date of Death 08 Sep 2018


Ahmad was participating in March of Return protests and was making the victory sign when an Israeli soldier shot him in the right knee. He was standing approximately 20 meters from the main perimeter fence when he was shot. Ahmad was taken to the European hospital and underwent a 6-hour surgery that lasted until midnight. At 1:30 a.m., Ahmad returned to the operating room for an artery transplant. He returned to the intensive care unit around 4 a.m. Ahmad's brother was told by a doctor at 11 a.m. that Ahmad had died because a main artery had been severed.

<b>Naji Jamil Hassan Abu Assi</b>		ناجي جميل حسن أبو عاصي	
Ref. No.	F18041	16 Y / 10 M	
<b>No Photo</b>		Date of Birth	21 Oct 2001
	Khan Younis Governorate	Incident Date	17 Sep 2018
	Drone-fired missile	Date of Death	17 Sep 2018


Around 11:55 p.m., Palestinian paramedics were informed of Israel forces shelling a group of young men near the Gaza perimeter fence east of al-Qarara village. After receiving permission from Israeli authorities to enter the border area to evacuate casualties, the paramedics found Naji's body. His body was covered in wounds from fragments, and his head was smashed.

<b>Moemen Abu Ayada</b>		مؤمن ابراهيم سليم أبو عيادة	
Ref. No.	F18042	15 Y / 2 M	
<b>No Photo</b>		Date of Birth	23 Jun 2003
	Rafah Governorate	Incident Date	19 Sep 2018
	Live ammunition	Date of Death	19 Sep 2018

Moemen was participating in a night distraction unit when he approached the perimeter fence around 11:30 p.m. He was sitting on the ground talking to his cousin and facing the fence when an Israeli soldier shot him in the head. The bullet entered the left cheek in front of his ear and exited from the right eye. He was pronounced dead at Abu Youef al-Najjar hospital in Rafah.

	<b>Mohammed Nayef Yousef al-Houm</b>	محمد نايف يوسف الحوم	
	Ref. No.	F18043	14 Y / 5 M
		Date of Birth	15 Apr 2004
	Deir al-Balah Governorate	Incident Date	28 Sep 2018
	Live ammunition	Date of Death	28 Sep 2018

Israeli forces shot 14-year-old Mohammed Nayef Yousef al-Houm with live ammunition around 5 p.m. near the Gaza perimeter fence near Al-Bureij refugee camp. He sustained a gunshot wound to the chest and was pronounced dead in hospital at 5:30 p.m..

	<b>Nasser Azmi Khalil Musbeh</b>	ناصر عزمي خليل مصبح	
	Ref. No.	F18044	11 Y / 8 M
		Date of Birth	29 Dec 2006
	Khan Younis Governorate	Incident Date	28 Sep 2018
	Live ammunition	Date of Death	28 Sep 2018

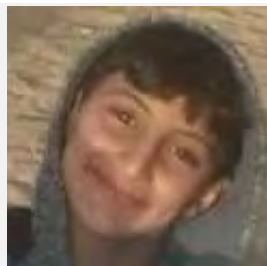
Israeli forces shot and killed 11-year-old Nasser Azmi Khalil Musbeh around 6:15 p.m. near the Gaza perimeter fence in Khan Younis. He was shot in the head with live ammunition, killing him instantly. He was reportedly 150-200 meters away from the fence when killed.

#### OCTOBER 2018 INCIDENTS



<b>Ahmad Samir Harb Abu Habil</b>		أحمد سمير حرب أبو حبل	
Ref. No.	F18045		15 Y / 3 M
		Date of Birth	07 Jun 2003
North Gaza Governorate		Incident Date	03 Oct 2018
Tear gas canister		Date of Death	03 Oct 2018

Around 6 p.m., Ahmad was participating protests in Beit Hanoun when he was struck in the head by an Israeli-fired tear gas canister. An eyewitness told DCIP that forces were firing “dozens” of tear gas canisters into a large crowd of protesters. Several witness estimated that Ahmad was around 300 meters from the fence when the tear gas canister struck his head, lodging in his skull and causing extensive injuries. Paramedics rushed to Ahmad and transported him to the Indonesian hospital where doctors were unable to save his life.



<b>Fares Hafez Abdel Aziz Sersawi</b>		فارس حافظ عبد العزيز السرساوي	
Ref. No.	F18046		13 Y / 2 M
		Date of Birth	04 Aug 2005
Gaza Governorate		Incident Date	05 Oct 2018
Live ammunition		Date of Death	05 Oct 2018

Israeli forces shot and killed 13-year-old Fares Hafez Abdel Aziz Sersawi around 5:30 p.m. near the Gaza perimeter fence in Shujaiya. He sustained a gunshot wound to the chest and was later pronounced dead at Shifa hospital.

<b>Ahmad Ahmad Abdullah Abu Naim</b>		أحمد أحمد عبد الله أبو نعيم	
Ref. No.	F18047		17 Y / 3 M
<b>No Photo</b>		Date of Birth	15 Jun 2001
Deir al-Balah Governorate		Incident Date	12 Oct 2018
Live ammunition		Date of Death	12 Oct 2018

Around 5 p.m., Ahmad and some other protesters broke through the perimeter fence east of Al-Bureij refugee camp in the central Gaza Strip. Israeli forces opened fire at the group, according to eyewitnesses. As many protesters fled back toward the fence, Ahmad ran in the other direction, toward a soldier standing on a concrete block and grabbed onto the soldier's foot. The two struggled with each other for some moments before the soldier managed to escape. According to eyewitness reports and other evidence gathered by DCIP, another soldier then shot Ahmad twice in the back at close range. The bullets exited through his chest, killing him.

<b>Khaled Bassam Mahmoud Abu Said</b>		خالد بسام محمود أبو سعيد
Ref. No.	F18048	14 Y / 0 M
<b>No Photo</b>	Date of Birth	24 Oct 2004
Deir al-Balah Governorate	Incident Date	28 Oct 2018
Drone-fired missile	Date of Death	28 Oct 2018

Around 6:30 p.m., an Israeli aircraft fired at least one missile at Khaled Bassam Mahmoud Abu Said, 14, Abdul Hamid Mohammad Abdul Aziz Abu Daher, 13, and Mohammad Ibrahim Abdullah al-Sattari, 15, as they approached the Gaza perimeter fence, east of Wadi al-Salqa village, killing all three children.


<b>Abdul Hamid Mohammad Abu Daher</b>		عبد الحميد محمد عبد العزيز أبو ضاهر
Ref. No.	F18049	13 Y / 10 M
<b>No Photo</b>	Date of Birth	14 Dec 2004
Deir al-Balah Governorate	Incident Date	28 Oct 2018
Drone-fired missile	Date of Death	28 Oct 2018

Around 6:30 p.m., an Israeli aircraft fired at least one missile at Khaled Bassam Mahmoud Abu Said, 14, Abdul Hamid Mohammad Abdul Aziz Abu Daher, 13, and Mohammad Ibrahim Abdullah al-Sattari, 15, as they approached the Gaza perimeter fence, east of Wadi al-Salqa village, killing all three children.

<b>Mohammad Ibrahim Abdullah al-Sattari</b>		محمد إبراهيم عبد الله السطري
Ref. No.	F18050	15 Y / 6 M
<b>No Photo</b>	Date of Birth	27 Apr 2003
Deir al-Balah Governorate	Incident Date	28 Oct 2018
Drone-fired missile	Date of Death	28 Oct 2018

Around 6:30 p.m., an Israeli aircraft fired at least one missile at Khaled Bassam Mahmoud Abu Said, 14, Abdul Hamid Mohammad Abdul Aziz Abu Daher, 13, and Mohammad Ibrahim Abdullah al-Sattari, 15, as they approached the Gaza perimeter fence, east of Wadi al-Salqa village, killing all three children.

#### NOVEMBER 2018 INCIDENTS

	<b>Emad Khalil Ibrahim Shahin</b>	عماد خليل إبراهيم شاهين
Ref. No.	F18052	17 Y / 8 M
	Date of Birth	26 Feb 2001
Deir al-Balah Governorate	Incident Date	03 Nov 2018
Live ammunition	Date of Death	03 Nov 2018

Around 2 p.m. on November 3, Israeli forces shot Emad while he was attempting to cut the Gaza perimeter fence in Deir Al-Balah in the central Gaza Strip. An eyewitness who was also shot told DCIP he heard a


gunshot and saw Emad collapse. The witness said that shortly after, Israeli forces carried Emad away on a stretcher and a helicopter arrived.

The next day, Emad's family saw Israeli media reports that their son died in an Israeli hospital on Sunday. On November 11, the Palestinian liaison office reported Emad's death and said Israeli forces were withholding his body, according to the boy's family. The family also told DCIP that despite continuous communication, the Red Cross was unable to provide official confirmation of Emad's death, saying that the Israeli military had not provide them with information.

#### DECEMBER 2018 INCIDENTS

	<b>Ahmad Yasser Sabri Abu Abed</b>	أحمد ياسر صبري أبو عابد
	Ref. No. F18054	4 Y / 9 M
		Date of Birth 13 Feb 2014
	Khan Younis Governorate	Incident Date 07 Dec 2018
	Live ammunition	Date of Death 11 Dec 2018

Ahmad Yasser Sabri Abu Abed, 4, was in his fathers arms around 3:30 p.m. local time when they were struck by bullet fragments when Israeli forces opened fire on protestors in Khan Younis, Gaza, on December 7. Ahmad sustained injuries to his head, chest and abdomen. He succumbed to his wounds on December 12.

	<b>Mohammad Muin Khalil Jahjouh</b>	محمد معين خليل جججوح
	Ref. No. F18056	16 Y / 5 M
		Date of Birth 14 Jul 2002
	Gaza Governorate	Incident Date 21 Dec 2018
	Live ammunition	Date of Death 21 Dec 2018

Israeli forces shot and killed Mohammad Jahjouh, 16, during a protest near the perimeter fence east of Gaza City on December 21 around 4 p.m. local time. He sustained a gunshot wound to the neck from behind and died shortly after at Shifa hospital.

#### IV. LEGAL FRAMEWORK

International human rights law and international humanitarian law, which regulates situations of armed conflict, both concurrently apply in the Occupied Palestinian Territory.

##### A. Status of international human rights law in the Occupied Palestinian Territory

International human rights law applies in the Occupied Palestinian Territory, including the Convention on the Rights of the Child, the Convention against Torture (CAT), and the International Covenant on Civil and Political Rights (ICCPR), and both Israel (as the

Occupying Power) and the State of Palestine have the obligation to respect and ensure respect to all individuals in the OPT.<sup>40</sup>

These human rights treaties generally provide that in all actions involving or impacting children, their best interests shall be a primary consideration, and they should only be detained as a measure of last resort and for the shortest appropriate period of time. All persons shall be entitled to a fair and public hearing by a competent, independent, and impartial tribunal and torture and ill-treatment are absolutely prohibited without exception. International law's non-discrimination and equality protections and guarantees prohibit States from discriminating on the basis of race or nationality, including in the exercise and implementation of penal jurisdiction.

Despite the fact that Israel has ratified most of the core international human rights treaties, and, as a result, has bound itself to act in accordance with those treaties; Israeli authorities persistently disregard and fail to comply with international law.

Israel ratified the CRC in 1991, obligating itself to implement the full range of rights and protections included in the convention. During its initial review in 2002, the Committee on the Rights of the Child, expressed serious concern regarding “allegations and complaints of inhuman or degrading practices and of torture and ill-treatment of Palestinian children” during arrest, interrogation, and detention.<sup>41</sup> The Committee also noted deep regret for the killing and injuring of children and urged Israel officials “[t]o investigate immediately and effectively all killings of children and bring the perpetrators to justice.”<sup>42</sup>

In July 2013, over a decade later, the Committee on the Rights of the Child again reviewed Israel's compliance with the CRC and found the situation was even worse. The committee found that Palestinian children arrested by Israeli forces were “systematically subject to degrading treatment, and often to acts of torture” and expressed serious concern that hundreds of Palestinian children have been killed and thousands injured since the initial review as a result of Israeli military operations, especially in Gaza.<sup>43</sup> The Committee noted Israeli armed forces carried out air and naval strikes on densely populated areas with a significant presence of children, disregarding the principles of proportionality and distinction.<sup>44</sup>

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<sup>40</sup> See International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶¶ 101, 109-113 (9 July 2004), <http://www.icj-cij.org/doCKET/files/131/1671.pdf>. Israel ratified the International Covenant on the Elimination of All Forms of Racial Discrimination (CERD) in 1979; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the CAT, the CRC all in 1991; the ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) in 1992; the Convention on the Rights of Persons with Disabilities (CRPD) in 2002; and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (CRC-OP-AC) in 2005. The State of Palestine acceded to CAT, the ICCPR, CEDAW, the ICESCR, CRPD, and the CRC-OP-AC all in 2014.

<sup>41</sup> Committee on the Rights of the Child, *Concluding Observations: Israel*, U.N. Doc. CRC/C/15/Add.195, ¶ 36 (9 Oct. 2002), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G02/453/97/PDF/G0245397.pdf>.

<sup>42</sup> *Id.* at ¶¶ 31, 32(c).

<sup>43</sup> Committee on the Rights of the Child, *Concluding Observations on the Second to Fourth Periodic Reports of Israel*, U.N. Doc. CRC/C/ISR/CO/2-4, ¶¶ 73 and 25 (4 July 2013), <http://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-ISR-CO-2-4.pdf>, (hereinafter “*CRC Concluding Observations 2013*”).

<sup>44</sup> *Id.* at ¶ 25. Additionally, in 2010, the Committee on the Rights of the Child reviewed Israel's compliance under the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict finding Palestinian children were disproportionately vulnerable to violations of the right to life due to Israeli military offensives. The Committee expressed grave concern for serious violations suffered by

The Committee concluded its review finding that Israel had “fully disregarded” previous recommendations to comply with international law and urged Israel to “take prompt measures to comply with the fundamental principles of proportionality and distinction enshrined in humanitarian law, including the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War, put an end to all killings and injuring of children, investigate immediately and effectively all such crimes, [and] bring the perpetrators to justice.”<sup>45</sup> The Committee has also called on Israel to end the closure of Gaza.<sup>46</sup>

## B. International humanitarian law

International humanitarian law regulates international and non-international armed conflicts, and specifically the methods and means of warfare, the conduct of armed forces and armed groups, and the relationship between an occupying power and an occupied territory and its inhabitants.<sup>47</sup> An “international armed conflict” includes military occupations.<sup>48</sup> There is broad consensus that Israel continues to exercise effective control over the West Bank, including East Jerusalem, and the Gaza Strip, such that these areas remain occupied by Israel as a matter of law.<sup>49</sup> Accordingly, international humanitarian law, whether conventional, including the Geneva Conventions and Additional Protocol I, or customary in nature continues to apply in the Occupied Palestinian Territory, including Gaza.<sup>50</sup>

Notably, international law places “more onerous duties on an occupying power than on a party to an international armed conflict.”<sup>51</sup> In particular, Israel must respect the rights of the

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children in Gaza during the Israeli military offensive known as Operation “Cast Lead” in December 2008 and January 2009 due to the “disproportionate violence, the lack of distinction for civilians and the obstruction of humanitarian and medical aid.” See Committee on the Rights of the Child, Concluding Observations on the Initial Report of Israel under article 8 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, U.N. Doc. CRC/C/OPAC/ISR/CO/1, ¶¶ 5, 10–11 (4 Mar. 2010), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/410/68/PDF/G1041068.pdf>, (hereinafter “*CRC OPAC Concluding Observations*”).

<sup>45</sup> CRC Concluding Observations 2013, ¶¶ 73 and 26.

<sup>46</sup> CRC OPAC Concluding Observations, ¶ 11(b); and CRC Concluding Observations 2013, ¶ 26(c).

<sup>47</sup> First codified in the Hague Conventions of 1899 and 1907, many of these rules were subsequently incorporated into the Fourth Geneva Convention of 1949 and further strengthened by the fundamental guarantees expressed in Article 75 of Additional Protocol I.

<sup>48</sup> See Geneva Convention (No. IV) Relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, 12 Aug. 1949, Art. 2; Additional Protocol I, Art. 3; ICC, Elements of Crimes, Art. 8 (2)(a)(i)-no. 4, n. 34. See also *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgement pursuant to Article 74 of the Statute, 14 Mar. 2012. As one leading scholar opined:

The law of occupation is also a means of regulating what may well be the tense relationship between the occupying power and the persons within the occupied territory and a means of providing restraint with regard to how the occupier treats the local population. The tension between the occupier and the local population may well result in acts of hostilities but the fact that the local population has chosen to rise up in arms does not free the occupier from the restraints it otherwise has. Indeed it out to strengthen those restraints. The law of occupation is no less necessary in those situations.

Dapo Akande, “*Classification of Armed Conflicts: Relevant Legal Concepts*,” in Elizabeth Wilmhurst, INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 47.

<sup>49</sup> See *supra* n. 16 and 18.

<sup>50</sup> Israel ratified the four Geneva Conventions of 1949 in 1951. The State of Palestine acceded to the four Geneva Conventions of 1949 on 2 April 2014. Palestine acceded to Additional Protocol I on 2 April 2014. The Hague Regulations of 1907, the Geneva Conventions of 1949 and Additional Protocol I are considered to largely reflect customary international law.

<sup>51</sup> Trial Chamber, *Mladen Naletilić and Vinko Martinović*, IT-98-34-T, Judgement, 31 Mar. 2003, ¶ 214.

occupied population of the West Bank, including East Jerusalem, and the Gaza Strip, who are recognized as ‘protected persons’ under international law.<sup>52</sup>

### C. International criminal law and the International Criminal Court

The statute of the International Criminal Court (ICC) was adopted pursuant to the Rome Statute in 1998 and entered into force in 2002.<sup>53</sup> The State of Palestine acceded to the ICC Statute on 2 January 2015 and lodged a declaration under Article 12(3) of the ICC Statute on 1 January 2015 accepting jurisdiction of the ICC over alleged crimes committed “in the occupied Palestinian territory, including East Jerusalem, since June 13, 2014.”<sup>54</sup> On 1 April 2015, Palestine became the 123<sup>rd</sup> State Party to the ICC. On 22 May 2018, the State of Palestine referred the situation in Palestine for investigation to the ICC and requested the Prosecutor “to investigate, in accordance with the temporal jurisdiction of the Court, past, ongoing and future crimes within the court’s jurisdiction, committed in all parts of the territory of the State of Palestine.”<sup>55</sup>

On 16 January 2015, the Prosecutor of the ICC, Mrs. Fatou Bensouda, opened a preliminary examination into the situation of Palestine.<sup>56</sup> The preliminary examination is currently listed as being in Phase 3, *i.e.*, admissibility.<sup>57</sup> In April 2018, the Prosecutor issued a statement expressing her “grave concern” regarding the worsening situation in Gaza, and falls within the ongoing Preliminary Examination.<sup>58</sup>

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<sup>52</sup> See, for example, Conference of High Contracting Parties to the Fourth Geneva Convention Declaration, 17 Dec. 2014, ¶¶ 4-5, <http://www.news.admin.ch/NSBSubscriber/message/attachments/37764.pdf>. See also Commentary to Geneva Convention IV, p. 47, on Article 4: “[t]he expression ‘in the hands of’ is used in an extremely general sense. It is not merely a question of being in enemy hands directly, as a prisoner is. The mere fact of being in the territory of a Party to the conflict or in occupied territory implies that one is in the power or ‘hands’ of the Occupying Power.”

<sup>53</sup> Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998, [https://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome\\_Statute\\_English.pdf](https://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf).

<sup>54</sup> Declaration Accepting the Jurisdiction of the International Criminal Court, Mahmoud Abbas, President of the State of Palestine, 31 Dec. 2014, [http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine\\_A\\_12-3.pdf](http://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf). On 6 January 2015, the United Nations Secretary General, acting in his capacity as depository for the Rome Statute, accepted Palestine’s accession to the Rome Statute. United Nations, Depository Notification, Ref: C.N.13.2015.TREATIES-XVIII.10, 6 Jan. 2015, <https://treaties.un.org/doc/Publication/CN.13.2015-Eng.pdf>. On 7 January, the Registrar of the ICC informed President Abbas of Palestine of his acceptance of the Article 12(3) declaration. Letter from Herman von Hebel (Registrar) to Mahmoud Abbas President of the State of Palestine, Ref: 2015/IOR/3496/HvH, 7 Jan. 2015, <http://www.icc-cpi.int/iccdocs/PIDS/press/150107-Registrar-Letter-to-HE-President-Abbas-regarding-Palestine-Art-12-3--Declaration.pdf>

<sup>55</sup> See ICC, Statement by ICC Prosecutor, Mrs. Fatou Bensouda, on the referral submitted by Palestine, 22 May 2018, <https://www.icc-cpi.int/Pages/item.aspx?name=180522-otp-stat>.

<sup>56</sup> Press Release, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine,” ICC-OTP-201501160PR1083, 16 Jan. 2015, [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1083.aspx).

<sup>57</sup> ICC, Office of the Prosecutor: Report on Preliminary Examination Activities (2018), 4 Dec. 2018, pp. 63-69, <https://www.icc-cpi.int/Pages/item.aspx?name=PR1422>.

<sup>58</sup> See Press Release, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the worsening situation in Gaza, 8 April 2018, <https://www.icc-cpi.int/Pages/item.aspx?name=180408-otp-stat>.



Accordingly, the Commission should include an assessment of potential violations of international criminal law falling within the jurisdiction of the ICC, or indeed, punishable under universal jurisdiction.<sup>59</sup>

## V. International law violations

As the Human Rights Council affirmed, international human rights law and international humanitarian law are applicable to the Occupied Palestinian Territory, including East Jerusalem. In accordance with the mandate of the Commission of Inquiry “to investigate all alleged violations and abuses of international humanitarian and international human rights law” in Occupied Palestine “in the context of the military assaults on the large scale civilian protests,”<sup>60</sup> DCIP and the CUNY HRGJ Clinic provide the following analysis of the most relevant violations.

### A. Human rights violations

#### 1. Right to self-determination

The right of self-determination for all peoples is enshrined in the Charter of the United Nations and other international human rights treaties and is accepted as constituting customary international law.<sup>61</sup> Article 1 of the ICCPR provides that “[a]ll peoples have the right of self-determination” and “[b]y virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”<sup>62</sup> The right of self-determination stems from and is directly connected to the right of colonized peoples to secede from a colonial state,<sup>63</sup> and all States have the duty to promote its realization. The right of the Palestinian people to self-determination has been regularly reaffirmed by the UN General Assembly and other UN bodies and special procedure mandate holders.<sup>64</sup>

Israeli occupation policies and practices since 1967 have expressly denied Palestinians living under Israeli control the fundamental right of self-determination. In 2009, the UN Fact Finding Mission on the Gaza conflict found that “movement and access restrictions, the settlements and their infrastructure, demographic policies with regards to Jerusalem and Area C, and the separation of Gaza from the West Bank prevent a viable, contiguous and sovereign

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<sup>59</sup> See Fourth Geneva Convention, Art. 147 (grave breaches applicable in the context of an international armed conflict against protected persons include wilful killing, inhuman treatment, and willfully causing great suffering).

<sup>60</sup> UN Human Rights Council, *Violations of International Law in the Context of Large-scale Civilian Protests in the Occupied Palestinian Territory, Including East Jerusalem*, ¶ 5, U.N. Doc. A/HRC/RES/S-28/1, (22 May 2018), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/137/36/pdf/G1813736.pdf>.

<sup>61</sup> See, e.g., U.N. Charter art. 1, ¶2, and International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Art. 1(1), U.N. Doc. A/6316 (1966); see also UN Fact Finding Mission Report, *supra* n. 15, at ¶ 269. Importantly, the right of the Palestinian people to self-determination, including the right to their independent State of Palestine, has been reaffirmed by the United Nations General Assembly in a resolution adopted on 19 December 2017. See G.A. Res. 72/160, U.N. Doc. A/RES/72/160 (23 January 2018), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N17/455/05/PDF/N1745505.pdf>.

<sup>62</sup> ICCPR, Art. 1.

<sup>63</sup> See, e.g., U.N. General Assembly, Declaration on the granting of independence to colonial countries and peoples, G.A. Res. 1514 (XV), 12 December 1960, <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/152/88/IMG/NR015288.pdf>.

<sup>64</sup> See Report of the Secretary-General, *Right of peoples to self-determination*, U.N. Doc. A/73/329 (20 Aug. 2018) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/263/02/PDF/N1826302.pdf>; and UN Fact Finding Mission Report, *supra* n. 15, at ¶ 269.

Palestinian State from being created, [] in violation of the *jus cogens* right to self-determination.”<sup>65</sup>

The Human Rights Committee, reviewing Israel’s compliance with the ICCPR in 2014, expressed concern that “continu[ed] restrictions on access of Palestinians in the OPT, including East Jerusalem...to natural resources, *inter alia*, agricultural land and adequate water supply” as well as other confiscation of land and restriction of access would “undermine the enjoyment by Palestinians of a wide range of their Covenant rights, including the right to self-determination.”<sup>66</sup>

More recently, focusing specifically on Israeli settlement policy and annexation of Palestinian land, Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967, Michael Lynk, concluded “the political purpose of the Israeli settlement enterprise has always been to establish facts-on-the-ground and to obstruct Palestinian self-determination.”<sup>67</sup>

The Israeli settlement enterprise and resulting annexation, and other occupation policies, amounts to the express denial of the right to self-determination for the Palestinian people. DCIP and the CUNY HRGJ urge the Commission to reaffirm full recognition of the Palestinian people’s right to self-determination in accordance with the Charter of the United Nations and international human rights conventions, and to consider the denial of this right when analyzing Israeli policies and practices in accordance with the Commission’s mandate.

## 2. Right to life

Article 6 of the ICCPR provides that “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”<sup>68</sup> In order for the use of potentially lethal force to not qualify as “arbitrary,” a number of factors must be satisfied: the user of such force must be acting in self-defense in response to a threat of imminent death or serious injury; its use must be strictly necessary in light of the threat posed; it must represent a method of last resort; the amount of force applied cannot exceed the amount strictly needed for responding to the threat; and the force applied must be directed only against the attacker.<sup>69</sup>

The Human Rights Committee has emphasized that the use of potentially lethal force for law enforcement purposes is an “extreme measure,” which should be resorted to only when strictly necessary in order to protect life or prevent serious injury from imminent threat.<sup>70</sup> Even prior to the Great March of Return, the Human Rights Committee had expressed concern at the use of lethal force by Israeli security forces and recommended the State party

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<sup>65</sup> 2009 UN Fact Finding Mission Report, *supra* n. 15, at ¶ 1549.

<sup>66</sup> Human Rights Committee, 2014 *Concluding Observations: Israel*, ¶ 17.

<sup>67</sup> Special Rapporteur Lynk 2018 Report, *supra* n. 25, at ¶ 45.

<sup>68</sup> ICCPR, Art. 6. General Comment 36 explains that the requirements in the second and third sentences “partly overlap in that a deprivation of life that lacks a legal basis or is otherwise inconsistent with life-protecting laws and procedures is, as a rule, arbitrary in nature.” U.N. Human Rights Committee, General Comment No. 36, Article 6 (Right to Life), 30 October 2018, CCPR/C/GC/36, (“General Comment 36”), [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1\\_Global/CCPR\\_C\\_GC\\_36\\_8785\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf), ¶ 11.

<sup>69</sup> General Comment 36, ¶ 12.

<sup>70</sup> *Id.* See also Special Rapporteur Lynk 2018 Report, ¶ 12 (finding that the test on how to respond is “not the use of violence, but...whether law enforcement official[s] face an imminent threat to life.”).

“take all necessary measures to prevent incidents of excessive use of force during law enforcement operations, including by ensuring that rules of engagement or open fire regulations of the State party’s security forces in the West Bank, including East Jerusalem, and the Access Restricted Areas of Gaza, are consistent with article 6 of the Covenant and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.”<sup>71</sup>

The deprivation of life “involves an intentional or otherwise foreseeable and preventable life-terminating harm or injury, caused by an act or omission”<sup>72</sup> and States “may be in violation of article 6 even if...threats and situations do not result in loss of life.”<sup>73</sup> States are obligated to protect “persons in situation[s] of vulnerability whose lives have been placed at particular risk because of specific threats or pre-existing patterns of violence” including “children, especially children in street situations...and children in situations of armed conflict, [and] members of ethnic and religious minorities.”<sup>74</sup>

Notably, while reaffirming that the right to life is guaranteed to all without distinction, in its recently adopted General Comment, the Human Rights Committee advises this right should not be interpreted narrowly as it “concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, *as well as to enjoy a life with dignity*.”<sup>75</sup> (emphasis added) The right to life “implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity.”<sup>76</sup> Taking appropriate measures entails “ensur[ing] access without delay by individuals to essential goods and services such as food, water, shelter, health-care, electricity and sanitation, and...the bolstering of effective emergency health services.”<sup>77</sup>

Accordingly, DCIP and the CUNY HRGJ urge the Commission to consider not only the deaths caused by firing on Great March of Return protestors, but also the ongoing impact of the blockade on the enjoyment of the right to life of Palestinian civilians, including the negative impacts on the health care system as well as the serious infringement on access to the building blocks of a dignified life, including access to basic functioning infrastructure and housing.<sup>78</sup>

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<sup>71</sup> Human Rights Committee, 2014 *Concluding Observations: Israel*, ¶ 13.

<sup>72</sup> General Comment 36, at ¶ 6.

<sup>73</sup> *Id.* at ¶ 7 (citations omitted).

<sup>74</sup> General Comment 36, ¶ 23. *See also* Convention on the Rights of the Child, U.N. Doc. A/44/49 (1989), Art. 6.

<sup>75</sup> General Comment 36, ¶ 3. *See also* Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. Doc. A/810 (1948), Art. 1 (“All human beings are born free and equal in dignity and rights”) and Art. 3 (“Everyone has the right to life, liberty and the security of person.”).

<sup>76</sup> General Comment 36, ¶ 26. The Human Rights Committee further explains that “general conditions” includes deprivation of land, territories and resources...and extreme poverty and homelessness. *Id.* *See also* United Nations, Human Rights Committee, Communication No. 2348/2014, *Toussaint v. Canada*, CCPR/C/123/D/2348/2014, 24 July 2018, ¶ 11.3.

<sup>77</sup> General Comment 36, ¶ 26.

<sup>78</sup> The Special Rapporteur recently concluded that “the electricity crisis which deepened last year has continued with little change, severely restricting Palestinians’ access to medical care...and livelihoods.” Special Rapporteur Lynk 2018 Report, at ¶ 9. Physicians for Human Rights advised the Human Rights Committee that when [critical social] determinants [of health] are not protected, there is an increased likelihood of disease, mortality, and morbidity” which “created a situation that dramatically violates the right to health.” PHYSICIANS FOR HUMAN RIGHTS – ISRAEL, Suggested Issues for Adoption of List of Issues Prior to Reporting UN Human Rights Committee’s review of Israel at the 122nd Session, ¶ 4.1.2, (2017), [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ISR/INT\\_CCPR\\_ICR\\_ISR\\_31484\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ISR/INT_CCPR_ICR_ISR_31484_E.pdf).

In the context of Gaza, where the freedom of movement of Palestinians is severely curtailed, it is useful to recall that States are under a heightened duty of care “to protect the lives of individuals deprived of their liberty by the State since by...depriving individuals of their liberty, States parties assume the responsibility to care for their life and bodily integrity, and they may not rely on lack of financial resources or other logistical problems to reduce this responsibility.”<sup>79</sup> In their most recent Concluding Observations upon review of Israel, the Human Rights Committee expressed concern how the blockade affected the right to life, as it prevents Palestinians from accessing “basic and life-saving services such as food, health, electricity, water and sanitation” and recommended that the State Party “provide unrestricted access for the provision of urgent humanitarian assistance.”<sup>80</sup> As the decision to establish this Commission attests, the situation in the Occupied Palestinian Territory has only deteriorated since the Human Rights Committee issued those recommendations.

The facts set forth above and evidence collected by DCIP demonstrate that Israeli forces, through their acts and omissions, are regularly breaching their obligation to protect and respect right to life of Palestinians in Gaza and the West Bank, including East Jerusalem. The use of deadly force by Israeli forces stationed along the Gaza perimeter fence and in operations in the West Bank, including East Jerusalem, against persons who posed no imminent threat to life or to serious injury violates Israel’s obligation to protect and respect the right to life. This conclusion accords with the recent finding of the Special Rapporteur on the situation of human rights in the Occupied Palestinian Territory: “A majority of these incidents did not appear to pose a credible threat to life or risk of serious injury to the heavily armed Israeli forces that would justify the use of deadly force under the relevant human rights law provisions.”<sup>81</sup>

Additionally, the ongoing closure of Gaza negatively impacts the right to life; it does not allow for the proper delivery of healthcare services despite the harm caused by the security forces. Israel is preventing Palestinian civilians to enter or exit to access proper medical service, thereby violating their heightened responsibility to guarantee the right to life by further “depriving individuals of their right to liberty.”<sup>82</sup>

### 3. Right to freedom of movement

As the Human Rights Committee opined, “[l]iberty of movement is an indispensable condition for the free development of a person.”<sup>83</sup> Article 12 of the ICCPR provides, in part, that “everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”<sup>84</sup> Article 12(2) specifically provides for the freedom to leave a country, including one’s own. A person’s freedom of movement is not inhibited by their reason for traveling or how long they intend to

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<sup>79</sup> General Comment 36, ¶ 25.

<sup>80</sup> Human Rights Committee, 2014 *Concluding Observations: Israel*, *supra* n. 18, ¶ 12.

<sup>81</sup> Special Rapporteur Lynk 2018, at ¶ 14. The Special Rapporteur found that “[m]ost of those killed were reportedly unarmed, and were shot in the back, head, or chest with live ammunition.” *Id.* at ¶ 12.

<sup>82</sup> See General Comment 36, ¶ 25.

<sup>83</sup> U.N. Human Rights Committee, General Comment No. 27, Article 12 (Freedom of Movement), 2 November 1999, CCPR/C/21/Rev.1/Add.9, (“General Comment 27”),

[https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1\\_Global/CCPR\\_C\\_GC\\_36\\_8785\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf), ¶ 1.

<sup>84</sup> ICCPR, Art. 12 (1). See also UDHR, Art. 13.

leave their country.<sup>85</sup> The right also includes “protection from all forms of internal displacement.”<sup>86</sup>

These rights cannot be restricted “except those which are provided by law, are *necessary* to protect national security, public order, public health or morals or the rights and freedoms of others, *and are consistent with the other rights recognized in the present Covenant.*” Art. 12(3) (emphasis added). The Human Rights Committee made clear in its General Comment on freedom of movement: “it is not sufficient that the restriction serve the permissible purpose; they must be necessary to protect them. Restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.”<sup>87</sup>

The General Comment further provides that “[t]he application of the restrictions ... needs to be consistent with the other rights guaranteed in the Covenant and with the fundamental principles of equality and non-discrimination...it would be a clear violation of the Covenant if the rights enshrined in article 12, paragraphs 1 and 2, were restricted by making distinctions of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin[...].”<sup>88</sup>

The Human Rights Committee also emphasizes that in no case may a person be arbitrarily deprived of the right to enter “his own country.”<sup>89</sup> This right embraces a concept or expression of nationality beyond the formal understanding of “nationality acquired at birth” and expands it to “an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien.”<sup>90</sup> The obligation includes a mandate not to extradite, deport, expel or otherwise remove a person from their territory, where there is a real risk of irreparable harm,<sup>91</sup> which could include *inter alia* the inability to return to one’s home country.

In its most recent Concluding Observations on Israel, the Human Rights Committee instructed Israel to take all necessary measures with a view to ensuring respect for the right to

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<sup>85</sup> See General Comment 27, ¶ 8 (finding this freedom “may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country”).

<sup>86</sup> See *Id.*, at ¶ 7

<sup>87</sup> *Id.*, at ¶ 14. The Human Rights Committee has found, for example, that “an obligation to have a travel permit and to have it stamped at regular intervals by the authorities” is not “necessary and proportionate” to the end of maintaining public order, and thus violates Article 12(3). See *Ory v. France*, Communication No. 1960/2010, CCPR/C/110/DR/1960/2010, 28 Mar. 2014, ¶¶ 8.3-8.5.

<sup>88</sup> General Comment 27, ¶ 18. Article 2(1) mandates that State Parties undertake “to respect and ensure to all individuals within its territory or subject to its jurisdiction” without distinction, including vis-à-vis the enjoyment of rights of all persons “under their control.” U.N. Human Rights Committee, *General Comment no. 31, (The nature of the general legal obligation imposed on States Parties to the Covenant)*, 26 May 2004, CCPR/C/21/Rev.1/Add.13, (“General Comment 31”), ¶ 12. See also *Prosecutor v. Brđjanin*, IT-99-36-T, Trial Judgment, 1 Sept. 2004, ¶¶ 1042-1043, 1049.

<sup>89</sup> ICCPR, Article 12(4). The Human Rights Committee has observed, that “[t]he right to return is of the utmost importance for refugees seeking voluntary repatriation.” General Comment 27, ¶ 19. See also *id.*, at ¶ 21. It continued: “It also implies prohibition of enforced population transfers or mass expulsions to other countries.” *Id.* See also *Ilyasov v. Kazakhstan*, Communication No. 2009/2010, CCPR/C/111/D/2009/2010, 23 July 2014, Joint opinion of Committee members Gerald L. Neuman, Yuji Iwasawa and Walter Kälin (concurring), ¶ 3 (explaining “the article was carefully drafted so that the citizens’ right would not be subject to the limitations on freedom of movement permitted by article 12, paragraph 3”).

<sup>90</sup> General Comment 27, ¶ 20.

<sup>91</sup> General Comment 31, ¶ 12.

freedom of movement for Palestinians throughout the OPT, and ensure that any restrictions on freedom of movement are in line with its obligations under the Covenant. The Committee expressed serious concerns about the impairment of this right in light of the ongoing blockade of Gaza,<sup>92</sup> for residents of the so-called “Seam Zone” (Palestinians beyond the Green Line who are on the Israel-side of the separation barrier),<sup>93</sup> and for residents of East Jerusalem.<sup>94</sup>

As the facts set forth above demonstrate, Israel has failed to comply with the Committee’s recommendations. Indeed, the 2018 report by the Special Rapporteur details how the situation in the OPT has only gotten worse.<sup>95</sup> Special Rapporteur Lynk observed “the continued existence of a coercive environment in many parts of the West Bank, including East Jerusalem, seen in measures such as checkpoints, closures, residency revocations, and movement restrictions.”<sup>96</sup> He further found that “[i]n addition to the use of force, Israel has responded to the demonstrations with movement and access restrictions which have had a significant negative impact on the residents of Gaza,” including the inability to adequately treat injuries sustained by the protestors due to the lack of freedom of movement.<sup>97</sup> Like the Human Rights Committee in 2014, Special Rapporteur Lynk has called explicitly for an end to the blockade and to reverse the closure of Kerem Shalom/Karm Abu Salem crossing.<sup>98</sup>

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<sup>92</sup> Human Rights Committee, 2014 Concluding Observations: Israel, *supra* n. 18, ¶ 12. Restrictions on freedom of movement due to the closure of Gaza have led to deaths of patients in need of urgent medical care, and restrictions on the access to sufficient drinking water and adequate sanitation. *Id.*

<sup>93</sup> Human Rights Committee, *Concluding Observations of the Human Rights Committee: Israel*. CCPR/C/078/ISR, 21 Aug. 2003, ¶ 19. The “Seam Zone” has “adverse repercussions on nearly all walks of Palestinian life; in particular, the wide-ranging restrictions on freedom of movement disrupt access to health care, including emergency medical services, and access to water. The Committee considers that these restrictions are incompatible with article 12 of the Covenant.” *Id.* See also HRC 2014 Concluding Observations: Israel, ¶ 17.

<sup>94</sup> Human Rights Committee, 2014 Concluding Observations: Israel, *supra* n. 18, ¶ 18. the committee expressed concern that there was a “restriction on the freedom of movement of residents of the OPT” and at “the treatment of Palestinian residents in East Jerusalem as aliens and the insecurity of their permanent residency status that can be revoked if they live outside the municipal boundary of Jerusalem.” *Id.*

<sup>95</sup> Human Rights organizations have come to similar conclusions. For example, Maat Foundation for Peace, Development and Human Rights states that “[d]uring the period from 2014 to 2018, there has been no structural change in the procedures of the blockade and restrictions imposed in the Gaza Strip despite Israel’s claim that it has facilitated the movement of individuals and goods to and from Gaza.” The report also discusses the denial of students’ access to their schools and the difficulty in receiving proper medical attention for those living in the West Bank. Report on the Israeli violations of the civil and political rights to the Palestinian civilians in West Bank and Gaza. MAAT FOUNDATION FOR PEACE, DEVELOPMENT AND HUMAN RIGHTS, Report on the Israeli violations of the civil and political rights to the Palestinian civilians in West Bank and Gaza, (2017), [https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fICS%2fISR%2f30995&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fICS%2fISR%2f30995&Lang=en).

<sup>96</sup> Special Rapporteur Lynk 2018 Report, ¶ 7.

<sup>97</sup> *Id.* at ¶ 16. Physicians for Human Rights-Israel explained that “when the healthcare needs of Palestinian patients extend beyond that which local institutions can provide, Palestinians cannot transfer to an external medical institution without receiving a medical referral and financial coverage from the Palestinian Ministry of Health. Palestinian patients then have to receive a timely permit to enter or cross Israel on their way from the Coordination of Government Activities in the Territories (COGAT) and Israeli Security Agency (ISA), who is authorized to deny the request without giving any explanation to the applicant.” PHYSICIANS FOR HUMAN RIGHTS – ISRAEL, *Suggested Issues for Adoption of List of Issues Prior to Reporting UN Human Rights Committee’s review of Israel at the 122nd Session*, ¶ 4.1.2, (2017), [https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ISR/INT\\_CCPR\\_ICR\\_ISR\\_31484\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/ISR/INT_CCPR_ICR_ISR_31484_E.pdf).

<sup>98</sup> Press Release, OHCHR, *Closure of Gaza commercial crossing: UN expert calls on Israel to reverse decision*. 13 July 2018, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23375&LangID=E>

A lack of freedom of movement negatively impacts a range of additional rights – to travel, to education, to family, to work, and of particular urgency in the current moment, the right to health.<sup>99</sup> Requests to leave are often denied.<sup>100</sup> It is therefore urgent that Palestinians throughout the OPT, are particularly those in Gaza and those who are injured, be granted their full rights under ICCPR Article 12.

#### 4. Right to protest

The right to protest is protected through the application of a number of human rights. It is the manifestation of the freedom of thought, opinion, speech, peaceful assembly, and freedom of association.<sup>101</sup> These rights are “essential for the enjoyment of other human rights freedoms, and constitute[] a fundamental pillar for building a democratic society;” it is important for the Commission to assess these rights as “indivisible, interdependent and interrelated.”<sup>102</sup>

Resolution 25/38, adopted by the Human Rights Council on 11 April 2014, concerns the promotion and protection of human rights in the context of peaceful protests. The resolution emphasizes the duty States have to protect human rights in the context of peaceful protest – an “important form of exercising the rights to freedom of peaceful assembly, of expression, of association and of participation in the conduct of public affairs.”<sup>103</sup> The resolution further highlights the particular obligations in relation to children, affirming that “States must take all appropriate measures for the safety and protection of children, including while they exercise their rights to freedom of peaceful assembly, expression and association, including in the context of peaceful protests.”<sup>104</sup>

Instructing that “peaceful protests should not be viewed as a threat,” it recognizes that protest can be a means to hold human rights violators accountable for abuses, and “can contribute to the full enjoyment of civil, political, economic, social and cultural rights.” In that resolution, the Human Rights Council urged States to provide protesters with access to public spaces, protect them from discrimination, and ensure that “no one is subject to excessive or indiscriminate use of force,” affirming that “nothing can ever justify the indiscriminate use of lethal force against a crowd, which is unlawful under international human rights law.”<sup>105</sup> It makes clear that “isolated acts of violence committed by others in the course of a protest do not deprive peaceful individuals of their rights to freedom of peaceful assembly, of expression and of association.”<sup>106</sup>

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<sup>99</sup> See ICCPR, Art. 17; ICESCR, Arts. 6, 10, 11, 12, 13; CRC, Arts. 10, 16, 23, 24, 25 and 28.

<sup>100</sup> See, e.g., DCIP, *No Power, No Supplies, No Way Out: A Year Without the Right to Health in the Gaza Strip*, 2 March 2018, [https://www.dci-palestine.org/no\\_power\\_no\\_supplies\\_no\\_way\\_out](https://www.dci-palestine.org/no_power_no_supplies_no_way_out). [as described in the report by Physicians for Human Rights]

<sup>101</sup> See ICCPR, Art. 18, 19, 21 and 22.

<sup>102</sup> Human Rights Council, Res. 25/2, 24 March 2014.

<sup>103</sup> Human Rights Council, Res. 25/38, A/HRC/Res/25/38 (11 April 2014).

<sup>104</sup> *Id.*

<sup>105</sup> The resolution further provides that, “everyone must be able to express their grievances or aspirations in a peaceful manner, including through public protests, without fear of reprisals or of being intimidated, harassed, injured, sexually assaulted, beaten, arbitrarily arrested and detained, tortured, killed or subjected to enforced disappearance.” *Id.*

<sup>106</sup> *Id.*

Finally, it calls for “full accountability for human rights violations or abuses in the context of peaceful protests.”<sup>107</sup> This Commission of Inquiry can be critical to ensuring such accountability.

#### a. Right to freedom of expression and opinion

Article 19 of the ICCPR provides that everyone shall have the right (1) to hold opinions without interference, and (2) to freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers.<sup>108</sup> “Expression” includes *inter alia* political discourse, commentary on one’s own and on public affairs, discussion of human rights, journalism, and cultural and artistic expression, even if the expression is deemed “deeply offensive.”<sup>109</sup> As the Human Rights Committee has recognized, “[f]reedom of expression is a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights.”<sup>110</sup> It further emphasizes that the freedom of expression and opinion must be given to children, and that every possible measure be taken to provide an environment where children can exhibit educated expression and opinions.<sup>111</sup> Indeed, the Convention on the Rights of the Child expressly provides that these rights apply to children.<sup>112</sup>

The right to freedom of expression carries with it special duties, and may be subject to restrictions that are “provided by law” and necessary (a) for respect of the “rights or reputations of others” or (b) for the protection of national security or of public order, or of public health or morals,<sup>113</sup> there is no similar permissible restriction on the freedom of opinion. Any restriction on expression must be “in accordance with States’ obligations under applicable international human rights instruments and subject to a competent, independent, impartial and prompt administrative or judicial review.”<sup>114</sup> This includes adherence to the principle of non-discrimination.<sup>115</sup> The Human Rights Committee General Comment 34 explains, “[w]hen a State party invokes a legitimate ground for restriction of freedom of expression, it must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken, in particular by establishing a direct and immediate connection between the expression and the threat.”<sup>116</sup> Critically, the Human Rights Committee has instructed that *inter alia* national security or public order “may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights” nor to “attack” a person “because of the exercise of [their] freedom of opinion or expression, including...threats to

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<sup>107</sup> *Id.*

<sup>108</sup> ICCPR, Art. 19 (1) and (2).

<sup>109</sup> U.N. Human Rights Committee, *General Comment No. 34, (Freedoms of opinion and expression)*, CCPR/C/GC/34, 12 Sept. 2011, (“General Comment 34”), ¶ 11, <http://www.refworld.org/docid/4ed34b562.html>.

<sup>110</sup> General Comment 34, ¶ 3.

<sup>111</sup> U.N. Human Rights Committee, *General Comment No. 17, (Rights of the Child)*, CCPR/C/GC/17, 7 Apr. 1989, (“General Comment 17”), ¶ 3, <http://www.refworld.org/docid/45139b464.html>.

<sup>112</sup> CRC, Arts. 12, 13 and 14.

<sup>113</sup> ICCPR, Art. 19 (3).

<sup>114</sup> Human Rights Council Res. 25/38.

<sup>115</sup> General Comment No. 34, ¶ 26.

<sup>116</sup> General Comment No. 34, ¶ 35.



life and killing.”<sup>117</sup> Persons subject to such attack enjoy the right to a remedy, including accountability and redress.<sup>118</sup>

As an initial matter in assessing Israel’s restrictions on the rights of Palestinians in Gaza to expression and opinion through protest and Article 19(3)’s requirement that such restrictions must be “provided by law,” it is notable that Israel has claimed to have no legal obligations towards Gaza; under such circumstances, it is incongruous that Israel would – or could – also claim the right to restrict the right of Palestinians in Gaza to expression through protest. (It cannot be contested, however, that Israel carries responsibility for its actions beyond its borders, into the Occupied Palestinian Territory.<sup>119</sup>)

In terms of posing a demonstrated threat to public order or the national security of either the State of Palestine or Israel, the Palestinian protestors in Gaza have declared their protest to be a *peaceful* protest, and include all strata of Palestinian society, including the elderly and children.<sup>120</sup> Indeed, since the Great March of Return protests began in March 2018, no Israeli civilians have been killed or injured as a result of the demonstrations and no member of the Israeli forces has been killed by persons participating in the protests. On the other hand, between 30 March and 31 October 2018 Israeli forces killed 228 Palestinians and injured over 24,000 Palestinians, including 2,274 children that required hospitalization.<sup>121</sup> Between 30 March and 21 December 2018, DCIP confirmed a total of 45 Palestinian children killed by Israeli forces in Gaza.

Even if a valid restriction based on national security or public order<sup>122</sup> based in law was advanced,<sup>123</sup> courts have applied strict tests of necessity and proportionality to any such restriction. “Necessity” asks whether there is a “pressing” or substantial need for a restriction,<sup>124</sup> and “proportionality” whether the restrictive measures are the least intrusive means to protect against the threat.<sup>125</sup>

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<sup>117</sup> *Id.*, at ¶ 23.

<sup>118</sup> *Id.*

<sup>119</sup> See *supra*, sec. II. See, e.g., Human Rights Committee, 2014 Concluding Observations: Israel, *supra* n. 18, ¶ 5; ICJ Advisory Opinion regarding the Construction of a Wall, ¶ 101.

<sup>120</sup> See, e.g., Abu Artema, *I Helped Start the Gaza Protests. I Don’t Regret It.*, *supra* n. 10.

<sup>121</sup> UN Office for the Coordination of Humanitarian Affairs, Humanitarian Bulletin October 2018, p. 3, [https://www.ochaopt.org/sites/default/files/hummonitor\\_october\\_2018.pdf](https://www.ochaopt.org/sites/default/files/hummonitor_october_2018.pdf).

<sup>122</sup> “Public order” has been invoked in cases involving acquiring a permit ahead of a public speech or finding persons in contempt of court. See, e.g., *Coleman v. Australia*, CCPR/C/87/D/1157/2003, 10 August 2005; *Dissanayake v. Sri Lanka*, CCPR/93/D/1373/2005, 4 August 2008.

<sup>123</sup> See generally, *Johannesburg Principles: National Security, Freedom of Expression and Access to Information*, ARTICLE 19 (London: Nov. 1996),

<https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>, and in particular Principle 1.2 (Protection of a Legitimate National Security Interest), Principle 1.3 (Necessary in a Democratic Society), Principle 2 (Legitimate National Security Interest) and Principle 7 (Protected Expression).

<sup>124</sup> See, e.g., European Court of Human Rights *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, ¶ 39; *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, ¶ 63 (necessity for restriction must be “convincingly established”). For the application of “necessity,” see, e.g., *Mukong v. Cameroon*, CCPR/51/D/458/1991 (10 Aug. 1994), ¶ 9.7 (the legitimate objective or safeguarding and strengthening national unity under difficult political circumstances “cannot be achieved” by attempting to muzzle democracy, democratic tenets and human rights, and thus the “necessity” test “does not arise” in such situations).

<sup>125</sup> See, e.g., Inter-American Commission on Human Rights, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, ¶ 46. See e.g., *Coleman v. Australia*, CCPR/C/87/D/1157/2003, 10 August 2005, ¶ 7.3 (finding that being fined and held in custody for five days as punishment for delivering a speech without a permit was a

The threshold of necessity is high: as the former U.N. High Commissioner for Human Rights made clear in response to situation in Gaza, States may resort to lethal force in cases of “extreme necessity,” as “a last resort in response to an imminent threat of death or risk of serious injury.”<sup>126</sup> His statement further observed that “[i]t is difficult to see how tire-burning or stone-throwing, or even Molotov-cocktails thrown from a significant distance at heavily protected security forces in defensive positions can be seen to constitute such threat.”<sup>127</sup>

Likewise, in applying the principles regarding protest and particularly the right to freedom of opinion and expression in the context of the Great March of Return, a number of Special Rapporteurs released a joint statement affirming that “[t]he Basic Principles on the Use of Force and Firearms by Law Enforcement Officials require law enforcement officials to refrain from using lethal force on demonstrators unless strictly unavoidable in order to protect their own or others’ lives – their safety must be in actual danger [...] There is no available evidence to suggest that the lives of heavily armed security forces were threatened.”<sup>128</sup> They have also reminded the Government of Israel that peaceful protest is a legitimate exercise of the rights of freedom of expression, assembly, and association, and that Israel, as the occupying power, is obligated to protect and to respect the human rights of the Palestinians living in occupied Gaza.<sup>129</sup>

#### **b. Right to peaceful assembly and association**

The right to peaceful assembly and to association with others, codified in Articles 21 and 22 of the ICCPR, respectively, are directly linked to the right to freedom of expression, and indeed, “constitute a form of expression to raise legitimate concerns and grievances.”<sup>130</sup> As the former Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, observed, these rights “serve as a vehicle for the exercise of many other civil, cultural, economic, political and social rights... Such interdependence and interrelatedness with other rights make them a valuable indicator of a State’s respect for the enjoyment of many other human rights.”<sup>131</sup>

The Human Rights Committee took special note that “peaceful assembly” is a fundamental human right that is essential for the public expression of an individual’s views and opinions

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disproportionate infringement on freedom of speech); *Ross v. Canada*, CCPR/C/70/D/736/1997, 26 Oct. 2000, ¶ 11.6 (finding that being transferred to a non-teaching position after a minimal period of leave without pay in order to protect children’s right to school system free of bias, prejudice and intolerance did not go beyond what was necessary to achieve protective function).

<sup>126</sup> Press Release, Secretariat, Gaza Deaths: Israel Must Address Excessive Use of Force, Zeid Says. 27 April 2018, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22995&LangID=E>

<sup>127</sup> *Id.*

<sup>128</sup> Press Release, Secretariat, U.N. Rights Experts Condemn Israel’s Response to Palestinian Protests in Gaza. 6 April 2018, (Joint Statement of Special Rapporteur on extrajudicial, summary or arbitrary killings; on the promotion and protection of the right to freedom of opinion and expression; and on the situation of human rights in the Palestinian Territory), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22924>

<sup>129</sup> *Id.*

<sup>130</sup> Statement by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression at the conclusion of his visit to Israel and the occupied Palestinian territory, Frank La Rue, 18 December 2011, <https://unispal.un.org/DPA/DPR/unispal.nsf/0/67C53F54894114298525796C0056DED2>.

<sup>131</sup> See UN Human Rights Council, *First Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, Maina Kiai, UN Doc. A/HRC/20/27, 21 May 2012, ¶ 12, available at: [https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27\\_en.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session20/A-HRC-20-27_en.pdf) (“Special Rapporteur Kiai 2012 Thematic Report”).

and indispensable in a democratic society.<sup>132</sup> The right includes the possibility of organizing and participating in a stationary assembly, including demonstrations, processions, rallies, sit-ins and roadblocks, in a public location to *inter alia* “mobiliz[e] the population and formulat[e] grievances and aspirations” to influence States’ public policy.<sup>133</sup> The organizers of an assembly generally have the right to choose a location within sight and sound of their target audience.<sup>134</sup>

Former Special Rapporteur Kiai confirmed only “peaceful” assemblies – meaning “not violent, where participants have peaceful intentions, which should be presumed” – are protected under international human rights law.<sup>135</sup> Special Rapporteur Kiai drew extensively from the Organization for Security and Co-operation in Europe/Office for Democratic Institutions and Human Rights (OSCE/ODIHR) *Guidelines on Freedom of Peaceful Assembly*, which he considered the most advanced set of good practices available as of 2012. The *Guidelines* state:

an assembly should, therefore, be deemed peaceful if its organizers have professed peaceful intentions, and this should be presumed unless there is compelling and demonstrable evidence that those organizing or participating in that particular event themselves intend to use, advocate or incite imminent violence. The term “peaceful” should be interpreted to include conduct that may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote, and even include conduct that temporarily hinders, impedes or obstructs the activities of third parties.<sup>136</sup>

As for freedom of association with others, “association” is defined as any group of individuals or any legal entities brought together in order to collectively act, express, promote, pursue or defend a field of common interests, working through *inter alia* civil society organizations, religious associations, political parties, and trade unions.<sup>137</sup> It is crucial that individuals exercising this right are able to operate freely without fear that they may be subjected to any threats, acts of intimidation or violence, including summary or arbitrary executions, enforced or involuntary disappearances, arbitrary arrest or detention.<sup>138</sup>

The only restrictions permitted on the right of peaceful assembly are those “in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, [...] or the protection of the rights and freedoms of others.”<sup>139</sup> When a State party imposes restrictions on an individual’s right to assembly, it should be guided by the objective of facilitating the right, rather than seeking unnecessary or disproportionate limitations to it. The State party is thus under the obligation to justify the

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<sup>132</sup> See *Koreshkov v. Belarus*, Human Rights Committee, Views of 21 December 2017, UN Doc. CCPR/C/121/D/2168/2012, ¶ 8.5.

<sup>133</sup> See Special Rapporteur Kiai 2012 Thematic Report, ¶ 24.

<sup>134</sup> See, e.g., *Denis Turchenyak et al. v. Belarus*, Human Rights Committee, Views of 10 September 2013, UN Doc. CCPR/C/108/D/1948/2010, ¶ 7.4; UN Human Rights Council, *Second Thematic Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai*, UN Doc. A/HRC/23/39, 24 April 2013, ¶¶ 59- 60.

<sup>135</sup> Special Rapporteur Kiai 2012 Thematic Report, ¶ 25.

<sup>136</sup> OSCE Office for Democratic Institutions and Human Rights. *Guidelines on Freedom of Peaceful Assembly*, 2d. 2010, <https://www.osce.org/odihr/73405?download=true>, at p. 33.

<sup>137</sup> Special Rapporteur Kiai 2012 Thematic Report, ¶¶ 51-52.

<sup>138</sup> *Id.* at ¶ 63. In that report, the Rapporteur took special note that Israel was in violation of Article 22. *Id.*

<sup>139</sup> ICCPR, Art. 21.

limitation of the right protected by Article 21 of the Covenant.<sup>140</sup>

In *Alekseyev v. Russia*, the European Court of Human Rights addressed a scenario where a serious threat of a violent counter-demonstration existed, and in that situation, allowed the domestic authorities wide discretion in the choice of means to enable assemblies to take place without disturbance.<sup>141</sup> It ruled, however, the mere existence of a risk is insufficient for banning the event: in making their assessment the authorities must produce concrete estimates of the potential scale of disturbance in order to evaluate the resources necessary for neutralising the threat of violent clashes.<sup>142</sup> In so ruling, the court opined that freedom of assembly and association protect “a demonstration that may annoy or cause offence to persons opposed to the ideas or claims that it is seeking to promote,” and affirmed that the State has to take “reasonable and appropriate measures to enable lawful demonstrations” at which participants do not have to “fear that they will be subjected to physical violence by their opponents.”<sup>143</sup>

## **B. International crimes**

The conduct of Israeli officials, and Israeli forces under their command and control, also triggers the application of international criminal law, and in particular Articles 7 (crimes against humanity) and 8 (war crimes) of the Rome Statute of the International Criminal Court.

### **1. Crimes Against Humanity**

Crimes against humanity are among the most serious crimes that can be committed and have been recognized as such by the international community. As the Special Rapporteur on crimes against humanity opined, these crimes constitute “an attack not just upon the immediate victims, but also against all humanity, and hence the entire community of humankind has an interest in [their] punishment.”<sup>144</sup>

All crimes against humanity share certain contextual elements. Article 7 of the Rome Statute defines crimes against humanity as entailing (i) a widespread or systematic attack; (ii) directed against any civilian populations; (iii) pursuant to or in furtherance of a State or organizational policy; (iv) a nexus exists between the individual act and the attack; and (v) knowledge of the attack.<sup>145</sup>

Article 7(2)(a) of the ICC Statute defines “attack directed against any civilian population” as “a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational

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<sup>140</sup> See, e.g., *Shumilina v. Belarus*, Human Rights Committee, Views of 29 August 2017, U.N. Doc. CCPR/C/120/D/2142/2012. ¶ 6.4; General Comment 31, ¶ 6.

<sup>141</sup> European Court of Human Rights, *Alekseyev v. Russia*, Application nos. 4916/07, 25924/08 and 14599/09, (Judgment of 21 October 2010, Final issued 11 April 2011).

<sup>142</sup> *Id.*, at ¶ 75.

<sup>143</sup> *Id.*, at ¶ 73.

<sup>144</sup> International Law Commission, First report on crimes against humanity, Sean D. Murphy, Special Rapporteur, A/CN.4/680, 17 Feb. 2015, ¶ 27.

<sup>145</sup> Rome Statute, Art. 7(1) and 7(2)(a). See also *Situation in the Republic of Côte d'Ivoire*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11, 3 Oct. 2011, ¶ 29 (“Côte d'Ivoire Authorisation to Investigate Decision”).

policy to commit such attack.”<sup>146</sup> The term “attack” is not used in the military sense of the word,<sup>147</sup> but is defined as a “campaign or operation carried out against the civilian population.”<sup>148</sup> The ICC has found that a “campaign of violence” against civilians from an ethnic group over the course of approximately 15 weeks in a geographically limited area (South Ossetia and a “buffer zone”) “constitutes an attack against the civilian population within the meaning of article 7(2)(a) of the Statute.”<sup>149</sup> Notably, the violence need not be purely physical, but can include *inter alia*, psychological, economic or juridical violence.<sup>150</sup> In this case, the specific crimes against humanity of murder and persecution need to be understood in both the context of the 11-year closure, and 39-weeks of attacks on protestors since the Great March of Return began.<sup>151</sup>

The attack needs to be either widespread *or* systematic, not both.<sup>152</sup> The Rome Statute does not define these terms, but the jurisprudence of the ICC and international tribunals have come to a general consensus on the factors used to determine their existence. “Widespread” is understood as “large-scale... massive, frequent, carried out collectively with considerable *seriousness* and directed against a multiplicity of victims. It entails an attack carried out over a large geographical area or an attack in a small geographical area directed against a large number of civilians.”<sup>153</sup> It can refer to “the singular effect of an inhumane act of extraordinary magnitude,” or to the “cumulative effect of a series of inhumane acts.”<sup>154</sup> To determine if an attack is “systematic,” courts look to the following factors: (a) how organized the attack was; (b) if the attacks are part of a pattern of attacks; (c) if the pattern of the attacks are non-accidental or non-random; (c) if similar attacks have been repeated; (d) how often are the attacks; and (e) if the attacks are part of a “systematic occurrence.”<sup>155</sup>

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<sup>146</sup> Rome Statute, Art. 7(2)(a).

<sup>147</sup> See ICC, Elements of Crimes, Introduction to Article 7: Crimes Against Humanity, ¶ 3.

<sup>148</sup> Pre Trial Chamber, *Prosecutor v. Laurent Gbagbo*, Decision on the confirmation of charges, ICC-02/11-01/11-656, 12 June 2014, ¶ 209: “The expression ‘course of conduct’ already embodies a systematic aspect as it describes a series or overall flow of events as opposed to a mere aggregate of random acts. [...] it implies the existence of a certain pattern [...]”

<sup>149</sup> Pre-Trial Chamber I, *Situation in Georgia*, “Decision on the Prosecutor’s request for authorization of an investigation,” ICC-01/15, 27 Jan. 2016, ¶ 30.

<sup>150</sup> H. Brady, R. Liss, “The Evolution of Persecution as a Crime Against Humanity,” in Morten Bergsmo et al. (eds.), *Historical Origins of International Law*, Vol. 3 (Torkel Opsahl Academic EPublishers, 2015), p. 505.

<sup>151</sup> See, e.g., Palestinian Center for Human Rights, Press Release, “On 39<sup>th</sup> Friday of Great March of Return and Breaking Siege, Israeli Forces Kill 3 Palestinian Civilians, including 1 Child and Person with Mobility Impairment, and Wound 115 Other Civilians, including 21 Children, 2 Women, 2 Journalists and 3 Paramedics,” 21 Dec. 2018, <https://pchrgaza.org/en/?p=11778>.

<sup>152</sup> Rome Statute, Art. 7(1). See, e.g., *Prosecutor v. Rutaganda*, ICTR-96-3-T, Trial Judgement, 6 Dec. 1999, ¶ 68.

<sup>153</sup> See Pre-Trial Chamber II, *Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo,” ICC-01/05-01/08, 15 June 2009, ¶ 83 (“*Bemba* Confirmation of Charges Decision”).

<sup>154</sup> Pre-Trial Chamber II, *Situation in the Republic of Kenya*, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya,” ICC-01/09, 31 Mar. 2010, ¶ 95 (citations omitted) (“*Kenya* Authorization to Investigate Decision”).

<sup>155</sup> See, e.g., *Prosecutor V. Kunarac, Kovac and Vukovic*, IT-96-23-T & IT-96-23/1-T, Trial Judgement, 22 Feb. 2001, ¶ 429; See Trial Chamber II, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Judgment pursuant to article 74 of the Statute, 7 Mar. 2014, ¶ 1113 (“*Katanga* Trial Judgment”).

A “civilian population” is understood to include those persons who are not members of armed forces or who otherwise constitute legitimate combatants.<sup>156</sup> In case of doubt, international law clearly stipulates that status determinations should always err on the side of presuming a person is a civilian.<sup>157</sup> The population as a whole does not need to solely consist of civilians, and that the “civilian” nature of a population is not terminated by the presence of armed combatants; the court will weigh the number of combatants with the number of civilians.<sup>158</sup> Pre-trial chambers at the ICC have found the element of “attacks directed at any civilian population” satisfied when civilians were singled out as ethnic or political targets because of their memberships,<sup>159</sup> it may also be sufficient that the group share the same territory or place of residence.<sup>160</sup> A civilian population need not be the *only* target of the attack; a military target can comprise a secondary target or objective of the attack.<sup>161</sup> Relevant to this case, the ICTY has found among the factors for determining whether the attack was directed against a civilian population are both the means and methods used in the attack, and the level of resistance or ease to the attacker.<sup>162</sup> Notably, courts have found that an attack on civilians can be inferred from the indiscriminate character of the weapon used.<sup>163</sup>

The Elements of Crimes states that “*policy*” is understood to mean when an organization “actively promote[s] or encourage[s]” the attack.<sup>164</sup> The “organizational policy” need not be explicitly defined; a showing that the attack was planned, directed or organized and not spontaneous or isolated will meet this requirement.<sup>165</sup> “Such a policy may be made either by groups of persons who govern a specific territory or by any organization with the capacity to commit a widespread or systematic attack against a civilian population.”<sup>166</sup>

The final chapeau element is that the accused had knowledge of the widespread or attack on a civilian population. It is not required that the accused must have detailed knowledge of every

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<sup>156</sup> Article 50(1) of Additional Protocol I provides: “A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1)(2)(3) and (6) of the Third Convention and in Article 43 of this Protocol.” See also *Katanga* Trial Judgment ¶ 801.

<sup>157</sup> Additional Protocol I, Art. 50(1): “[i]n case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”

<sup>158</sup> See Additional Protocol I, Art. 50(3). See also *Katanga* Trial Judgment, ¶ 729; *Prosecutor v Blaškić*, IT-95-14-A, Appeal Judgement, 29 July 2004, ¶¶ 113 and 115. Courts have inferred the attack was directed against a civilian population based on the number of civilians who were victims of the attack. *Prosecutor v. Kunarac, Kovac and Vukovic*, IT-96-23-T & IT-96-23/1-A, Appeal Judgement, 12 June 2002, ¶ 91.

<sup>159</sup> See, e.g., *Côte d’Ivoire* Authorisation to Investigate Decision, ¶ 41 (civilians perceived to support the opposition and members of specific ethnic and religious communities in Abidjan and the western part of the country were targeted from 28 November 2010 onwards) and 95 (civilians perceived to support Gbagbo and from specific ethnic communities were the object of attacks in the western part of Côte d’Ivoire in March 2011).

<sup>160</sup> W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford University Press, 2010), p.153.

<sup>161</sup> See *Katanga* Trial Judgment, ¶ 1136.

<sup>162</sup> *Kunarac* Appeal Judgement, ¶ 91. See also *Katanga* Trial Chamber, ¶ 1104 (citing to *Kunarac* factors).

<sup>163</sup> *Prosecutor v. Stanislav Galić*, IT-98-29-A, Appeal Judgement, 30 Nov. 2006, ¶ 132

<sup>164</sup> ICC, *Elements of Crimes*, Introduction to Article 7: Crimes Against Humanity, ¶ 3.

<sup>165</sup> See, e.g., *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/0401/07, Decision on Confirmation of Charges, 30 Sept. 2008, ¶ 396 (“*Katanga* Confirmation of Charges”).

<sup>166</sup> *Id.*

aspect of how the crime is targeting civilian populations,<sup>167</sup> this element may be inferred by the circumstances.<sup>168</sup>

#### a. Crime against humanity of murder

In addition to establishing the contextual elements for crimes against humanity, the specific crime of “murder,” under Article 7(1)(a) of the Rome Statute, requires establishing that a “perpetrator killed one or more persons,”<sup>169</sup> and did so by an act or omission such that there is a “causal link” between the conduct of the accused and the result.<sup>170</sup> The Elements of Crimes confirms that “killing” is interchangeable with “caused death” for the purposes of establishing this crime.<sup>171</sup> For liability at the ICC, the mental element is either intent (i.e., person means to cause the consequence) or awareness that the consequence “will occur in the ordinary course of events.”<sup>172</sup> Notably, intent can be inferred “from the use of a firearm against unarmed persons.”<sup>173</sup>

The facts above demonstrate both that *mens rea* and *actus reus* for murder, as a crime against humanity, have been satisfied. Criminal liability applies to both the individual Israeli forces who have targeted and killed civilian protestors without justification, and their civilian superiors and military commanders.

#### *Widespread or systematic attack*

The ongoing killings of Palestinian civilians meet the criteria for both a widespread *and* systematic attack. These attacks targeted a multiplicity of victims: more than two hundred civilians, including 45 children,<sup>174</sup> have been killed during the Israeli forces’ most recent campaign – numbers comparable to the number of civilians killed (184) in the anti-Gbagbo demonstration.<sup>175</sup> Of the 56 children killed by Israeli forces in 2018, 46 were killed by use of live ammunition or crowd-control weapons. Children who observed the protests from

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<sup>167</sup> *Prosecutor v. Stanislav Galić*, IT-98-29-T, Trial Judgement, 5 Dec. 2003, ¶148, citing *Prosecutor v. Milorad Krnojelac*, IT-97-25-A, Appeal Judgment, 17 Sept. 2003, ¶102.

<sup>168</sup> *Galić* Trial Judgement, ¶172 citing *Prosecutor v. Delalić et al*, IT-96-21-T, Trial Judgement, 16 Nov. 1998, ¶328 (“*Čelebići* Trial Judgment”).

<sup>169</sup> *Côte d’Ivoire* Authorization to Investigate Decision, ¶63.

<sup>170</sup> See *Katanga* Trial Judgment, ¶767. The ICTY has held that a standard of “substantial contribution” to death of a victim is sufficient to establish the *actus reus* of murder: See Trial Chamber II, *Prosecutor v. Radoslav Brdanin*, IT-99-36-T, Judgment, 1 Sept. 2004, ¶382: “The Prosecution need only prove beyond reasonable doubt that the accused’s conduct contributed substantially to the death of the victim.” See also *Galić*, Trial Judgment, ¶150 (defining murder as: “(a) the victim died, b) the victims death was caused by an act or omission of the accused or of a person or persons for whose the act or omissions the accused bears criminal responsibility; and c) the act was done, or the omission was made by the accused, or by a person or persons for whose acts or omissions the accused bears criminal responsibility with an intention: (i) to kill, or (ii) to inflict serious injury, in reckless disregard for human life”).

<sup>171</sup> ICC, Elements of Crimes, n. 7.

<sup>172</sup> *Katanga* Trial Judgment, ¶774. See also, *id.* at ¶777 (“the person knows that his or her actions will necessarily bring about the consequence in question, barring an unforeseen or unexpected intervention or event to prevent its occurrence”) and ¶781.

<sup>173</sup> *Bemba* Confirmation of Charges Decision, ¶138; citing *Čelebići* Trial Judgment, ¶903.

<sup>174</sup> DCIP has confirmed a total of 56 Palestinian children killed by Israeli forces or settlers during 2018, including 48 Palestinian children in Gaza with 45 of these children killed between 30 March and the end of 2018.

<sup>175</sup> *Prosecutor vs Charles Blé Goudé*, ICC-02/11-02/11, Pre-Trial Chamber I, Confirmation of the Charges, 11 Dec. 2014, ¶183. See also *Galić*, Trial Judgment, ¶584 (finding a similar use of snipers to kill children in “Sniper Ally” constituted a systematic attack on civilians)

hundreds of meters away have been shot and killed in front of their families by Israeli snipers.<sup>176</sup> Israeli forces used excessive deadly force when targeting children running away from gunfire;<sup>177</sup> the same is true when Israeli targeted children while throwing rocks toward the Gaza perimeter fence – an act which does not constitute a serious threat of imminent death or serious injury to armed Israeli forces.<sup>178</sup>

The civilian killings are not isolated; they have been occurring on a weekly basis, particularly on Fridays, for more than eight months, primarily in the area along the perimeter fence between occupied Gaza and Israel.<sup>179</sup> The regular and repeated use of intentional lethal force by Israeli snipers against Palestinian civilians, particularly children, illustrates a recognizable pattern of attack: Palestinian civilians of all ages engaged in demonstrations along the perimeter fence were shot *in the head* as well as *center mass* of their bodies by Israeli snipers; in some months close to a dozen children were killed.<sup>180</sup>

### ***The attack is directed at a civilian population***

The use of deadly force on Palestinian demonstrators constitutes an attack on a “civilian population.” Israeli forces have used snipers and live ammunition to target, shoot and kill or seriously injure thousands of Palestinian civilians engaged in peaceful protests along the perimeter. Even if there were some persons who *could* qualify as “combatants”<sup>181</sup> present at these protests, the overwhelming nature of the demonstrations are civilian as several thousand civilian demonstrators participate on any given day.<sup>182</sup> DCIP and the CUNY HRGJ Clinic are not aware of any substantial evidence showing the use or bearing of arms or the association of the protestors with any armed group that would justify a military attack. Moreover, if doubt exists, there should be a presumption that the population engaging in protests is civilian; this is particularly true in the case of children, since child soldiers are prohibited by international law.<sup>183</sup>

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<sup>176</sup> F18038 Bilal Mustafa Mohammad Khafajeh Affidavit

<sup>177</sup> See F18039 Ahmad Misbah Mhmed Abu Tyour Affidavit and F8010 Mohammad Ibrahim Ayoub Affidavit.

<sup>178</sup> See F18039 Ahmad Misbah Mhmed Abu Tyour Affidavit and F8010 Mohammad Ibrahim Ayoub Affidavit.

<sup>179</sup> See Al Jazeera, GAZA PROTESTS: ALL THE LATEST UPDATES GCC NEWS (2018), <https://www.aljazeera.com/news/2018/04/gaza-protest-latest-updates-180406092506561.html>

<sup>180</sup> DCIP, *Distribution of Palestinian Child Fatalities by Month*, [https://www.dci-Palestine.Org/Child\\_Fatalities\\_By\\_Month](https://www.dci-Palestine.Org/Child_Fatalities_By_Month).

<sup>181</sup> It is unclear which, if any, Palestinians could be considered a “combatant.” Israel generally speaks in terms of “ Hamas.” Hamas is a political party, serving as de facto governing authority in the Gaza Strip, where it fulfills administrative governmental functions, such as running schools, health sector, social affairs, policing and security. The civil servants who carry out such administrative functions are civilians and entitled to protection under IHL. Armed resistance groups exist, and operate within the Gaza Strip. Some of these, such as Al Qassam Brigades, are associated with Hamas. However, as recognized under international humanitarian law, a clear distinction must be drawn between the political and military wings of all organizations and groups. As such, a clear distinction must be drawn between those members of Hamas who are carrying out solely civilian functions and those members who may be a member of an armed group directly participating in hostilities. Moreover, and most critically, civilians in Gaza must be granted the full protections of international humanitarian law, irrespective of political opinion.

<sup>182</sup> Jack Khoury & Yaniv Kubovich, *Gaza protests: 'Three killed, 174 wounded' as Palestinians March on Border for Fifth Week*, HAARETZ, (28 Apr. 2018), <https://www.haaretz.com/middle-east-news/palestinians/fifth-week-of-gaza-march-of-return-protests-to-begin-1.6033006>.

<sup>183</sup> See ICC Statute, Art. 8(2)(b)(xxvi); CRC-OP-AC, Arts. 1-4.



### *In furtherance of a State policy*

There is evidence that these attacks are in furtherance of a State or organizational policy. For example, the Chief of General Staff of the Israeli Forces, Gadi Eizenkot, made the following public statement confirming Israeli officials authorized sniper's along the borders; "We have deployed more than 100 sharpshooters who were called up from all of the military's units, primarily from the special forces... If lives are in jeopardy, there is permission to open fire."<sup>184</sup> Eizenkot further said that the military would not allow "mass infiltration" or tolerate damage to the barrier during the protests.<sup>185</sup> This public statement was made prior to the official start of the March of Return and illustrates Israeli forces' policy of using snipers against civilian demonstrators. Prime Minister of Israel, Benjamin Netanyahu, tweeted a statement declaring "[e]very country has the duty to defend its borders. The Hamas terrorist organization declares that it intends to destroy Israel and sends thousands to break through the border fence in order to realize this goal. We will continue to act with determination to protect our sovereignty and our citizens." (Translated from Hebrew).<sup>186</sup> Targeting of Palestinian demonstrators is part of an accepted policy of the Israeli officials and Israeli armed forces and they have been authorized to use intentional lethal force.

### **b. Crime against humanity of persecution**

Persecution has been described as "the quintessential international crime against humanity" as it cuts "to the heart of what it is to be human" by targeting "the combination of a person's very individuality and his or her ability to associate and identify with others."<sup>187</sup> While persecution can manifest in many different forms, its central characteristic is the deprivation of fundamental rights that every individual is entitled to without distinction.<sup>188</sup> Article 7(1)(h) of the Rome Statute prohibits the "persecution," meaning the intention and severe denial or deprivation of a fundamental right, against an identifiable group was based on political, racial, national, ethnic, cultural, religious, or gender grounds, when the crime is committed was with connection with one of the crimes stated in Article 7(1) or any other crime within the ICC's jurisdiction.<sup>189</sup>

The ICTY gives guidance on what constitutes a "severe" deprivation. In *Kupreškić*, the court stated that to determine the severity of a denial or deprivation of a right, the "acts of persecution must be evaluated not in isolation but in context, by looking at their cumulative effect."<sup>190</sup> To further explain this, the trial chamber in *Kvočka* reasoned that "humiliating treatment that forms part of a discriminatory attack against a civilian population may, in combination with other crimes or, in extreme cases alone, similarly constitute

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<sup>184</sup> Alex Fishman & Yossi Yehoshua, *Eizenkot says Israel deployed 100 sharpshooters on Gaza border for Palestinian protests*, YNETNEWS (28 Mar. 2018), <https://www.ynetnews.com/articles/0.7340.L-5204745.00.html>.

<sup>185</sup> *Id.*

<sup>186</sup> Benjamin Netanyahu Verified Account (@netanyahu) Twitter, 9:47 AM, 14 May 2018, <https://twitter.com/netanyahu/status/996069591389495296>.

<sup>187</sup> Evolution of Persecution, *supra* n. 146 at 554. For a detailed discussion of persecution see Palestinian Human Rights Organizations submission to the ICC, Nov. 2016, *supra* n. 28.

<sup>188</sup> Special Rapporteur on Crimes Against Humanity report, *supra* n. 139, ¶ 81.

<sup>189</sup> See Rome Statute, Art. 7(2)(g).

<sup>190</sup> *Kupreškić* Trial Judgement, ¶ 622.

persecution.”<sup>191</sup> Persecution can be effectuated either by acts committed or the omission or failure to act.<sup>192</sup>

The *mens rea* of intent does not need to be shown explicitly and can be inferred from the totality of the circumstances.<sup>193</sup> Intent has been inferred when government or military officials have implemented common plans of a crime; created the structure which either inhibits or facilitates these crimes; failed to punish those who commit crimes as well as failed to stop the crimes from happening, as well as arming those who commit the crimes and either being brief about the crimes or briefing subordinated and either directly or indirectly ordering the criminal acts.<sup>194</sup> Intent has also been inferred from directing hate speech, including referring to political opponents as terrorists, bandits, and traitors, against a group.<sup>195</sup>

In this case, the 11-year closure policy of the Gaza Strip as well as the nine-month deadly attack on peaceful protests, resulting in the denial of a range of fundamental rights (*see* Sec. V (A)), to Palestinians *because* they are Palestinians, and as Palestinians in Gaza who are politically associated with Hamas by Israel, constitute the crime against humanity of persecution.

### ***The persecution of Palestinian civilians***

Through its policies and practices, carried out against the civilian population of Gaza as a whole through its closure policy, and particularly those Palestinians engaging in peaceful protest since 30 March 2018, Israel has systematically denied Palestinian civilians a range of fundamental rights including but not limited to:<sup>196</sup> the right to self-determination; the right to life; freedom of movement; freedom of expression and opinion; and right to peaceful assembly and association. Moreover, Israel’s policies and practices have denied Palestinian civilians the right not to be collectively punished.<sup>197</sup>

Those whom are denied these rights are targeted by the Israeli civilian and military leadership based solely on their membership of two primary identifiable groups: national identity as Palestinians and political grounds, based on their opposition to Israel’s ongoing occupation and closure; Israel also perceives all Palestinians in Gaza as politically aligned with Hamas, and targets them for this association.<sup>198</sup>

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<sup>191</sup> *Prosecutor v. Miroslav Kvočka*, IT-98-30/1-T, Trial Judgment, 2 Nov. 2001, ¶ 190, cited by *Prosecutor v. Kvočka*, IT-98-30/1-A, Appeal Judgment, 28 Feb. 2005, ¶ 324.

<sup>192</sup> *See, e.g., Prosecutor v. Karadžić*, IT-95-5/18-T, Judgment, 24 Mar. 2016, ¶ 498.

<sup>193</sup> *See, e.g., Krnojelac* Appeal Judgment, ¶ 184.

<sup>194</sup> *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11, Pre-Trial Chamber I Confirmation of Charges, 12 Jun. 2014, ¶ 276.

<sup>195</sup> *Id.* at ¶ 129.

<sup>196</sup> It is beyond the scope of this report to address the full range of rights denied to Palestinians because of the closure, such as right to education, right to work, right to family. *See* Palestinian Human Rights Organizations Submission to the ICC, November 2016, *supra* n. 28.

<sup>197</sup> *See* Fourth Geneva Convention, Art. 33.

<sup>198</sup> *See Gbagbo* Confirmation of Charges Decision, ¶¶ 204-206. In June 2018, the Israeli Knesset chose to deduct funds from tax revenue payments owed to the Palestinian government as compensation because of fires alleged to have been started by Palestinians in Gaza. The Prime Minister himself thanked members of the Knesset for taking such measures and declared, “Those who burn fields knew that there was a price.” (translated from Hebrew). Benjamin Netanyahu (@netanyahu) Twitter, 11 June 2018, 2:46AM, <https://twitter.com/netanyahu/status/1006110523136577536>.

Public statements can also be used to illustrate the intent to persecute a group of people. The Israeli Defense Forces Twitter account as well as the public statements made by high ranking government officials consistently describe the civilian population of Gaza as “terrorists” deserving of their punishment.<sup>199</sup> Official Israeli sources, including politicians and military leadership, have repeatedly referred to protestors as “terrorists” and have the killing of children by referring to the victims as members of Hamas.<sup>200</sup> Israel’s Deputy Minister for Public Diplomacy gave an interview on National Public Radio in the United States in which he stated: “This is not a peaceful protest. According to the organizers, according to Hamas, the protest was designed to break through the border, to kill Israelis and destroy our country” and further said “There actually is no other effective method we know of defending the border. And the choice is - you know, is paying a price in terms of, you know, tough interviews like this one or letting these terrorists come through the border and kill our civilians. And for us, that’s a no-brainer.”<sup>201</sup> Benjamin Netanyahu, Prime Minister of Israel, has tweeted a similar narrative and justified the Israeli forces attacks on civilians by claiming that “Hamas” intends to send thousands of people to break the perimeter fences and “destroy” Israel.<sup>202</sup>

Such statements illustrate discriminatory speech that aims to create the narrative that the protestors are all terrorists and thus it is justified to kill them. These statements must be understood in the context of operational policies and government practices that have caused, and continue to cause, and indeed, are *intended* to cause, the severe denial of fundamental rights to Palestinian civilian.

### ***Collective punishment of Palestinian civilians***

Collective punishment has been prohibited since the Hague Convention of 1907: “No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible.”<sup>203</sup> This prohibition has been codified in the Fourth Geneva Convention and is now considered customary international law: “a prohibition on collective penalties. This does not refer to punishments inflicted under penal law, i.e. sentences pronounced by a court after due process of law, but penalties of any kind inflicted on persons or entire groups of persons, in defiance of the most elementary principles of humanity, for acts that these persons have not committed.”<sup>204</sup> This provision is absolute and mandatory in character and cannot be derogated even in case of military necessity.<sup>205</sup>

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<sup>199</sup> See, e.g., Israel Defense Forces Verified account (@IDFSpokesperson) Twitter, May 30 and Israel Defense Forces Verified account (@IDFSpokesperson) Twitter, 2 Jun 2018.

<sup>200</sup> *Id.*

<sup>201</sup> Ari Shapiro, *Israel's Deputy Minister For Public Diplomacy Discusses Response To Gaza Protests*, NPR, (16 May 2018), <https://www.npr.org/2018/05/16/611727738/israels-deputy-minister-for-public-diplomacy-discusses-response-to-gaza-protests>.

<sup>202</sup> Benjamin Netanyahu Verified Account (@netanyahu) Twitter, May 14 2018, 9:47 AM, <https://twitter.com/netanyahu/status/996069591389495296>.

<sup>203</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. <https://ihl.databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=B2D5C9BD27F0DC51C12563CD005168FB>.

<sup>204</sup> ICRC Commentary on IV Geneva Convention, Article 33, Individual Responsibility, Collective Penalties, Pillage, Reprisals, para 1. Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. (1958, reprint 1994), p. 225-26.

<sup>205</sup> *Id.*

In *Čelebići* case, the ICTY found that the detainees in the Čelebići camp were collectively detained, beaten and severely mistreated because they belonged to or were perceived to belong to a particular group of people.<sup>206</sup> The court concluded that the number of detainees could not have all committed the crimes they were accused of, and instead were being detained based on their membership in an identifiable a group of people.<sup>207</sup> Here, as established above, Palestinian population as a whole is being targeted and punished – denied their most basic rights – because of their status.

## 2. War crimes

In addition to qualifying as crimes against humanity, Israel's conduct towards Palestinian civilians participating in protests qualify as war crimes. Specifically, and in addition to collective punishment in violation of Article 33 of the Fourth Geneva Convention, Israel wilfully killed Palestinian children; wilfully caused great suffering and serious injury to the body and health of Palestinian children; intentionally directed attacks against the civilian population and against individual civilian Palestinian children not taking direct part in hostilities; and intentionally launched attacks in the knowledge that such attacks would cause incidental loss of life or injury to Palestinian civilian children or damage to civilian objects. Each of these acts is punishable as a war crime under the Rome Statute.<sup>208</sup>

### *The armed conflict is an international armed conflict*

The continuation of Israel's belligerent occupation of the Gaza Strip, and its status as an Occupying Power, has been recognized by the international community, as articulated by the United Nations General Assembly and Security Council, and affirmed by, *inter alia*, the International Committee of the Red Cross (ICRC) and United Nations human rights mechanisms.<sup>209</sup>

Israeli officials committed a range of crimes in the context of an international armed conflict, against persons protected under the Geneva Conventions of 12 August 1949. The Geneva Convention's "grave breaches" provisions apply to international armed conflicts, as do the corresponding war crimes under the Rome Statute.<sup>210</sup> Common Article 2 of the Geneva Conventions provides that the "conventions should apply to . . . all cases of partial or total occupation even if such occupation does not meet the standard of armed resistance."<sup>211</sup> Article 1(4) of Additional Protocol I provides that armed conflict includes conflict where "people are fighting against colonial domination and alien occupation and against racist regimes in their exercise of the right to self-determination."<sup>212</sup> Thus, "the exercise of self-determination in such circumstances would turn what would otherwise be viewed as an

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<sup>206</sup> *Prosecutor v. Delalić*, IT-96-21-A, Appeal Judgement, 20 Feb. 2001, ¶ 309 ("*Čelebići* Appeal Judgment").

<sup>207</sup> *Id.*, ¶¶ 323-24.

<sup>208</sup> ICC Rome Statute, Article 8 (2)(a)(i), (ii) and (iii), and Article 8 (2)(b)(i) and (iv).

<sup>209</sup> *See supra* Sec. II ("Israel is the 'Occupying Power' under international law") and Sec. IV (B). As set forth above, Israel continues to exercise the key element of belligerent occupation – "effective control" – over the Occupied Palestinian Territory, including Gaza. *See also Naletilić and Martinović* Trial Judgment, ¶¶ 217-18 (defining "effective control" as "sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt"): Palestinian Human Rights Organizations submission to the ICC, Nov. 2016, *supra* n. 28, at ¶ 59.

<sup>210</sup> Fourth Geneva Convention, Arts. 4 and 147; Rome Statute, Art. 8(2)(a).

<sup>211</sup> Fourth Geneva Convention, Art. 2.

<sup>212</sup> Additional Protocol I, Relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977.

internal conflict, international.”<sup>213</sup> Such is the case for Palestinians seeking to end Israel’s occupation.<sup>214</sup>

### ***Nexus between the crimes and the armed conflict***

A jurisdictional requirement of war crimes under Article 8(2) of the Rome Statute is the offence take place “in the context of and associated with” an armed conflict.<sup>215</sup> The ICTY has defined “in the context of an armed conflict” as alleged crimes that “were closely related to the conflict” or “hostilities occurring in other parts of the territories controlled by the parties to the conflict.”<sup>216</sup> The nexus does not need to be causal, “but the existence of an armed conflict must . . . have played a substantial part in the perpetrator’s ability to commit the crime, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.”<sup>217</sup> Additionally, there must be a “geographical and temporal linkage between crimes ascribed to the accused and armed conflict.”<sup>218</sup>

Here, there is a nexus between the crimes committed by Israel and the armed conflict, as the crimes were committed in the context of Israel’s prolonged belligerent occupation; the crimes detailed below were “closely related to the conflict” and “hostilities” that have occurred throughout the Occupied Palestinian Territory, including the Gaza strip.

### ***Palestinian children are “protected persons”***

Protected persons include civilians, with children among the categories of persons who are vulnerable during armed conflict.<sup>219</sup> Article 4 of the Fourth Geneva Convention provides that “persons protected by the Convention are those who . . . find themselves, in case of a[n] . . . occupation, in the hands of persons a[n] . . . Occupying Power of which they are not nationals.”<sup>220</sup> Protected persons include persons who, in the course of a military occupation, find themselves in the hands of the Occupying Power, which includes “the mere fact of being . . . in occupied territory.”<sup>221</sup> It must only be shown that perpetrators knew “that the victim belonged to an adverse party to the conflict.”<sup>222</sup>

### ***Israeli forces are aware of the existence of an armed conflict***

Israeli forces are “sufficiently aware of the circumstances which objectively establish an armed conflict to comprehend the context in which” they committed their offenses.<sup>223</sup>

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<sup>213</sup> Christine Byron, *WAR CRIMES AND CRIMES AGAINST HUMANITY IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* (Manchester University Press: 2009) 20.

<sup>214</sup> *See supra* Sec. IV (A).

<sup>215</sup> ICC, *Elements of Crimes*, Article 8: War Crimes, Introduction.

<sup>216</sup> *Prosecutor v. Milomir Stakic*, IT-97-24-A, Appeal Judgement, 22 Mar. 2006, ¶ 342. *See also Naletilić and Martinović* Trial Judgment, ¶ 180.

<sup>217</sup> *Stakic* Appeal Judgement, ¶ 342.

<sup>218</sup> *Id.*

<sup>219</sup> *See* ICRC, *Civilians protected under international humanitarian law*, 29 Oct. 2010, <https://www.icrc.org/en/document/protected-persons/civilians-protected-international-humanitarian-law>.

<sup>220</sup> Fourth Geneva Convention, Art. 4.

<sup>221</sup> ICRC *Commentary to Fourth Geneva Convention*, p. 47. *See also Naletilić and Martinović* Trial Judgment, ¶¶ 205, 208.

<sup>222</sup> Rome Statute, *Elements of Crimes*, Note 33.

<sup>223</sup> *See* ICC *Elements of Crimes: War Crimes, Introduction*; *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, Appeal Judgement, 3 May 2006, ¶ 119.

### a. War crime of wilful killing

To establish the war crime of wilful killing under Article 8(2)(a)(i) of the Rome Statute, the following elements must be met: (1) the perpetrator killed one or more persons,<sup>224</sup> (2) such person or persons were protected under one or more of the Geneva Conventions of 1949, (3) the perpetrator was aware of the factual circumstances that established that protected status,<sup>225</sup> (4) the conduct took place in the context of and was associated with an international armed conflict, and (5) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>226</sup> The “nature and purpose” of the prohibition of wilful killing in the Geneva Conventions is to “proscribe the deliberate taking of the lives of those defenseless and vulnerable persons who are the objects of the Conventions’ protections.”<sup>227</sup>

The *mens rea* “exists once it has been demonstrated that the accused intended to cause death or serious bodily injury which, as it is reasonable to assume, he had to understand was likely to lead to death.”<sup>228</sup> The “death should not be an accidental consequence of the acts of the accused.”<sup>229</sup>

Israeli forces apparently wilfully killed hundreds of Palestinian civilians, including dozens of Palestinian children, since the beginning of the Great March of Return. As children have been regular participants in the protests since March 2018, and amongst the victims nearly each week, it cannot reasonably be disputed that Israeli forces are unaware of the presence children in the areas where they have opened live fire and, in many instances, seemingly directly targeted minors.

Moreover, with children being killed week after week, the killing of these children cannot be understood as “an accidental consequence of the acts” of Israeli forces, but rather that children have been “deliberately targeted.”<sup>230</sup> The information collected by DCIP establishes that children were killed as the result of shots to the neck,<sup>231</sup> head,<sup>232</sup> chest,<sup>233</sup> abdomen,<sup>234</sup> or

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<sup>224</sup> See *Čelebići* Trial Judgment, ¶ 424 (finding “omissions as well as concrete actions can satisfy the *actus reus* element and . . . the conduct of the accused must be a substantial cause of the death of the victim”). See also *Katanga* Confirmation of Charges, ¶¶ 287, 296.

<sup>225</sup> This element does not require that perpetrators “evaluate the protective status” of victims, but only that they were aware of the circumstances that would grant them such status. *Katanga Decision on the Confirmation of Charges*, ¶ 297.

<sup>226</sup> ICC, Elements of Crimes, Article 8 (2)(a)(i).

<sup>227</sup> *Čelebići* Trial Judgment, ¶ 431.

<sup>228</sup> *Prosecutor v. Tihomir Blaškić*, IT-95-14, Trial Judgement, 3 Mar. 2000, ¶ 153.

<sup>229</sup> *Čelebići* Trial Judgment, ¶ 433. See also, *id.* at ¶ 436 (advising to examine “all of the circumstances surrounding the infliction of harm and the resulting death of the victim” so as to determine whether “the accused’s actions were committed in a manner ‘manifesting extreme indifference to the value of human life’”).

<sup>230</sup> *Čelebići* Trial Judgment, ¶ 433; *Prosecutor v. Karadžić*, IT-95/5-18, 24 Mar. 2016, ¶ 4616. In relation to assessment of “sniping and shelling” charges in *Karadžić*, the Chamber was “satisfied that the only reasonable inference to be drawn from the circumstances and the manner in which the victims were killed [wa]s that the perpetrators had the intent to kill.” *Id.*

<sup>231</sup> See F18018 Ibrahim al-Zarqa, ¶ 8; F18017 Said al-Kheir, ¶ 7; F18009 Aladdin Yahia Ismail Zamili, ¶ 7.

<sup>232</sup> See F18025 Yasser Amjad Mousa Abu Naja, ¶ 6; F18026 Mahmoud Dawoud, ¶ 8; F18016 Ahmad al-Shaar, ¶ 4, 5; F18013 Wassal Khalil, para. 7; F18012 Jamal Abdel Hadi Mohammad Afaneh, para. 4; F18010 Mohammad Ibrahim Ayoub, ¶ 5; F18007 Ibrahim Abu Shaer, ¶ 6; F18033 Majdi Ramzi Kamal al-Satri, ¶ 6; F18036 Ahmad Jihad Ahmad al-Aydi, ¶ 6; F18042 Moemen Abu Ayada, ¶ 9.

<sup>233</sup> See F18028 Othman Hilles; F18020 Bilal al-Ashram, ¶ 4; F18034 Mo’men Fathi Yousef al-Hams, ¶ 6; F18038 Bilal Mustafa Mohammed Khafajeh, ¶ 8.

<sup>234</sup> See F18022 Haitham Mohammad Khalil al-Jamal, ¶ 4; F18015 Saadi Abu Salah, ¶ 9, 10; F18008 Hussein Mohammad Adnan Madi, ¶ 7; F18035 Muath Ziad Ibrahim al-Soury, ¶ 5.

back.<sup>235</sup> Israeli forces knew that by deliberately aiming and targeting Palestinian children and shooting specific areas of their bodies, Israeli forces “intended to cause death or serious bodily injury which . . . was likely to lead to death” of these Palestinian children.<sup>236</sup> Israeli forces have shot and killed children for simply being present at a protest, for throwing stones, and for being near the perimeter fence – none of which constitute a serious threat to Israeli forces.<sup>237</sup>

### **b. War crime of wilfully causing great suffering or serious injury**

To establish the war crime of wilfully causing great suffering, or serious injury to body or health the following elements must be met: (1) the perpetrator caused great physical *or* mental pain or suffering to, *or* serious injury to body or health of, one or more persons;<sup>238</sup> (2) such person or persons were protected under one or more of the Geneva Conventions of 1949; (3) the perpetrator was aware of the factual circumstances that established that protected status; (4) the conduct took place in the context of and was associated with an armed conflict; and (5) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>239</sup>

“The offence of wilfully causing great suffering or serious injury to body or health constitutes an act . . . that is intentional, being an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury.”<sup>240</sup> The words “serious” and “great” can be interpreted as “quantitative expressions . . . providing for the basic requirement that a particular act of mistreatment results in a requisite level of serious suffering or injury.”<sup>241</sup> “Wilfully” has been found to include intent and recklessness, and excludes “mere negligence.”<sup>242</sup> “Wilfully causing great suffering” refers “to suffering inflicted without the ends in view for which torture is inflicted;” a “prohibited purpose behind the infliction of suffering or serious injury” is not needed to establish this war crime.<sup>243</sup> Additionally, wilfully causing great suffering is not limited to “physical suffering” but also could include “moral suffering,”<sup>244</sup> and acts that constitute a “serious affront to human dignity.”<sup>245</sup>

As set forth above, through the physical injuries, mental suffering and moral harm caused both by the attacks on protestors and the impact of the ongoing closure, Israeli forces have

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<sup>235</sup> See F18023 Zakaria Bashbash; F18013 Wassal Khalil, ¶ 5.

<sup>236</sup> See *Blaškić* Trial Judgment, ¶ 153.

<sup>237</sup> See F18002 Amir Abdel Hamid Mosaad; F18022 Haitham Mohammad Khalil al-Jamal, ¶ 4.

<sup>238</sup> The elements of the crime are set out in the alternative. See, e.g., *Čelebići* Trial Judgment, ¶ 506.

<sup>239</sup> ICC, Elements of Crimes, Article 8 (2)(a)(iii).

<sup>240</sup> *Čelebići* Trial Judgment, ¶ 511: “It covers those acts that do not meet the purposive requirements for the offence of torture, although clearly all acts constituting torture could also fall within the ambit of this offence.”

<sup>241</sup> *Čelebići* Trial Judgment, ¶ 510.

<sup>242</sup> *Galić* Trial Judgment, ¶ 54. The Commentary to Article 85 of Additional Protocol I explains the term as follows:

*wilfully*: the accused must have acted consciously and with intent, *i.e.*, with his mind on the act and its consequences, and willing them (‘criminal intent’ or ‘malice aforethought’); this encompasses the concepts of ‘wrongful intent’ or ‘recklessness’, *viz.*, the attitude of an agent who, without being certain of a particular result, accepts the possibility of it happening; on the other hand, ordinary negligence or lack of foresight is not covered, *i.e.*, when a man acts without having his mind on the act or its consequences.

<sup>243</sup> ICRC Commentary to Fourth Geneva Convention, p. 599 (on Article 147, grave breaches).

<sup>244</sup> *Id.*

<sup>245</sup> *Čelebići* Trial Judgment, ¶ 1026.

wilfully and deliberately caused great physical and mental pain and suffering to, and serious injury to the body and health of Palestinian children.

### c. War crime of intentionally directing attacks against civilians

To establish a war crime of intentionally directed attacks against civilians, the following elements must be met: (1) the perpetrator directed an attack, (2) the object of the attack was a civilian population as such *or* individual civilians not taking direct part in hostilities, (3) the perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack, (4) the conduct took place in the context of and was associated with an international armed conflict, and (5) the perpetrator was aware of factual circumstances that established the existence of an armed conflict.<sup>246</sup> This crime is derived from Article 85(3)(a) of Additional Protocol I, in conjunction with Article 51(2) and (3) thereof.<sup>247</sup>

There is “an absolute prohibition on the targeting of civilians in customary international law and the prohibition against attacking civilians and civilian objects may not be derogated from because of military necessity.”<sup>248</sup> A “basic rule” of international humanitarian law is that “parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>249</sup> A civilian “refers to those persons who enjoy immunity from direct attack unless and for such time as they take a direct part in hostilities.”<sup>250</sup> The “civilian population” includes all persons who are civilians and “the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.”<sup>251</sup> According to Additional Protocol I, “attacks” are “acts of violence against the adversary, whether in offence or in defense,”<sup>252</sup> and case-law from the ICTY and the ICC have found shelling and sniping to constitute an “attack.”<sup>253</sup> In addition to prohibiting civilians or the civilian

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<sup>246</sup> ICC, Elements of Crimes, 8(2)(b)(i).

<sup>247</sup> See H. von Hebel and D. Robinson, “Crimes within the Jurisdiction of the Court, in Roy S. Lee, Ed. THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 109.

<sup>248</sup> *Galić* Appeal Judgment, ¶ 130 (internal citations omitted). The *Galić* Trial Chamber explained elaborated: The prohibition against attacking civilians stems from a fundamental principle of international humanitarian law, the principle of distinction, which obliges warring parties to distinguish *at all times* between the civilian population and combatants and between civilian objects and military objectives and accordingly to direct their operations only against military objectives. In its Advisory Opinion on the Legality of Nuclear Weapons, the International Court of Justice described the principle of distinction, along with the principle of protection of the civilian population, as “the cardinal principles contained in the texts constituting the fabric of humanitarian law” and stated that “States must never make civilians the object of attack [...].” *Galić* Trial Judgment, ¶ 45 (emphasis in original; internal citations omitted).

<sup>249</sup> Additional Protocol I, Art. 48.

<sup>250</sup> ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, Geneva, May 2009, p. 20. <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> (“ICRC Interpretive Guidance on Direct Participation in Hostilities”). “Direct participation in hostilities” consists of specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. *Id.* at 43.

<sup>251</sup> Additional Protocol I, Art. 50 (2, 3). See also, e.g., *Katanga*, Trial Judgment, ¶¶ 729-730.

<sup>252</sup> Additional Protocol I, Art. 49.

<sup>253</sup> See, e.g., *Galić* Trial Judgment; *Karadžić* Trial Judgment; *Prosecutor v. Strugar*, IT-01-42-T, Judgment, 31 Jan. 2005, ¶¶ 284-289; *Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda 9 June 2014, ¶ 48. See also *Katanga* Trial Judgment, ¶ 878.



population as such from being the object of attack, “acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”<sup>254</sup> A grave breach of the Protocol includes “making the civilian population or individual civilians the object of attack and launching an indiscriminate attack affecting the civilian population . . . in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects . . .”<sup>255</sup>

Israeli forces have intentionally directed attacks against Palestinian children as evidenced by the killing of 46 children in Gaza by Israeli forces during 2018. Israeli forces have acted offensively with violence against Palestinian children while they are present at protests, specifically sniping and killing children with “the knowledge that such attack will cause excessive loss of life, injury to” them.<sup>256</sup> Palestinian children would have been easily identifiable to Israeli military forces as part of the civilian population and not “combatants.”<sup>257</sup> The children were not carrying any weapons at the Great March of Return protests and were not part of any military deployment or engagement.<sup>258</sup> The victims were often gathered in a group of other children at the protests and were unarmed at the time of their deaths.<sup>259</sup>

Israeli forces have also seemingly utilized weaponized drones and other warplanes to target buildings in Gaza directly resulting in the deaths of Palestinian children.<sup>260</sup> Israeli forces have attacked and killed Palestinian children using military tanks and mortar fire.<sup>261</sup> In all of the above-mentioned situations, Israeli forces “employed a method . . . of combat” that targeted civilians and civilian objects “without distinction.”<sup>262</sup>

#### **d. War crime of excessive incidental death, injury, or damage**

To establish a war crime of excessive incidental death, injury, or damage, the following elements must be met: (1) the perpetrator launched an attack; (2) the attack was such that it would cause incidental death or injury to civilians [ . . . ] and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated; (3) the perpetrator knew that the attack would cause incidental death or injury [ . . . ] and that such death, injury or damage would be of such an extent as to be clearly excessive in relation to the concrete and direct overall military advantage anticipated; (4) the conduct took place in the context of and was associated with an international armed conflict; and (5) the perpetrator was aware of factual circumstances that

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<sup>254</sup> Additional Protocol I, Art. 51 (2).

<sup>255</sup> Additional Protocol I, Art. 85 (3)(a, b).

<sup>256</sup> See Additional Protocol I, Article 49, 85 (3)(a-b).

<sup>257</sup> Moreover, Palestinian children did not lose their protected status because they did not “directly participate in hostilities.” Direct participation in hostilities requires that: (1) the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm); (2) there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and (3) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus). See ICRC Interpretive Guidance on Direct Participation in Hostilities, *supra* n. 245, at 46.

<sup>258</sup> See Additional Protocol I, Art. 44(3).

<sup>259</sup> See Sec. III, and affidavits attached hereto.

<sup>260</sup> See F18029 Amir Mohammad Walid al-Nimra; see also F18037 Bayan Mohammed Kamil Abu Khammash.

<sup>261</sup> See Abdel-Fattah Abu Azoum.

<sup>262</sup> See Additional Protocol I, Article 51(4); see also Article 51(5) for examples of indiscriminate attacks.

established the existence of an armed conflict.<sup>263</sup> Article 8(2)(b)(iv) of the Rome Statute draws on the principles in Article 51(5)(b) of Additional Protocol I, which was drafted so as to reach “the most serious criminal conduct of concern to the international community, not mere errors of judgement by commanders in the field.”<sup>264</sup>

For this crime, the perpetrator “launch[ed] an *indiscriminate* attack affecting the civilian population . . . in the knowledge that such attack [would] cause excessive loss of life, injury to civilians . . .”<sup>265</sup> Attacks “which are not directed at a specific military objective” and thus, “are of a nature to strike military objectives and civilians or civilian objects without distinction” are indiscriminate.<sup>266</sup> Notably, “indiscriminate attacks, that is to say, attacks which strike civilians or civilian objects and military objectives without distinction, may qualify as direct attacks against civilians.”<sup>267</sup> The perpetrator who plans or decides an attack shall “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives;” “take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians;” and “refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>268</sup>

The ICC Elements of Crimes explains “concrete and direct overall military advantage” means “a military advantage that is foreseeable by the perpetrator at the relevant time.”<sup>269</sup> The foreseeability requirement was intended “to exclude advantages which are vague and, more importantly, to exclude reliance on *ex post facto* justifications.”<sup>270</sup> “Overall” was not understood as referring to long-term political advantages of “winning of a war *per se*.”<sup>271</sup>

Israeli forces have no established military objective as it related to Palestinian children at the Great March of Return protests. Israeli forces had no justified reason to shoot at and kill Palestinian children. By responding to the presence of children at the protests with sniper fire, Israeli forces used excessive and indiscriminate force they knew would cause death or serious injury. The attacks on Palestinian children were not directed against any specific military targets nor did Israeli forces make any effort to avoid or minimize any expected harm that

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<sup>263</sup> ICC, Elements of Crimes, Article 8 (2)(b)(iv).

<sup>264</sup> H. von Hebel and D. Robinson, *supra* n. 245, at 111.

<sup>265</sup> Additional Protocol I, Article 85 (3)(b) (emphasis added).

<sup>266</sup> Additional Protocol I, Article 51(4)(a); *see also* ICRC, Practice Relating to Rule 12. Definition of Indiscriminate Attacks, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule12](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule12). Indeed, Israel’s Manual on the Rules of Warfare provides that “in any attack, it is a duty to ensure that the attack is directed against specific military targets.” Israel, *Rules of Warfare on the Battlefield*, Military Advocate-General’s Corps Command, IDF School of Military Law, Second Edition, 2006, p. 26.

<sup>267</sup> *Galić* Trial Judgment, ¶ 57.

<sup>268</sup> Additional Protocol I, Article 57 (2)(a)(i-iii). Even when civilians have not been removed to the maximum extent feasible from the vicinity of military objectives, this failure “does not relieve the attacking side of its duty to abide by the principles of distinction and proportionality when launching an attack.” *Galić* Trial Judgment, ¶ 61.

<sup>269</sup> ICC, Elements of Crimes, n. 36. *See also Galić* Appeal Judgment, ¶ 190.

<sup>270</sup> K. Dormann, War Crimes under the Rome Statute of the International Criminal Court, with a Special Focus on the Negotiations on the Elements of Crimes, Max Planck Yearbook of United Nations Law, Vol. 7, 341-407, 386 (2003).

<sup>271</sup> *Id.*

may result from their actions during the Great March of Return. Accordingly, these attacks on children constitute war crimes.

## VI. RECOMMENDATIONS

Israeli armed forces have been regularly implicated in widespread and systematic human rights violations against Palestinian children living in the Occupied Palestinian Territory.<sup>272</sup> Children affected by armed conflict are entitled to special respect and protections under international law, but Israel has consistently violated these protections through indiscriminate and disproportionate attacks that have resulted in large numbers of child fatalities and injuries.

The cases annexed to this submission add to the body of well-documented evidence of war crimes, crimes against humanity and other serious violations of international law committed by Israeli armed forces over the past decade.

While Israeli authorities have selectively opened their own investigations into several incidents occurring since 30 March 2018, previous experience has shown that Israeli authorities persistently fail to impartially and independently investigate alleged violations of its armed forces in accordance with international standards.

The international community must demand an end to Israel's illegal closure of the Gaza Strip, investigate allegations of war crimes, and hold perpetrators accountable. Without an end to the current regime of collective punishment, targeted assassinations, and regular military offensives, the situation for Gaza's children is all but guaranteed to further deteriorate. In a context where systemic impunity is the status quo, the need for justice and accountability is urgent.

In order to challenge systemic and seemingly perpetual impunity and increase protections for children, we strongly urge the Commission to:

- include an assessment of potential violations of international criminal law falling within the jurisdiction of the International Criminal Court;
- consider the context in which the Great March of Return protests and alleged Israeli violations are occurring and address root causes for the commission of alleged crimes, including over 50 years of Israeli military occupation, an 11-year closure of Gaza, denial of the right to self-determination and persecution of the Palestinian people;
- name individuals that are responsible for the commission of crimes alleged in this submission, including assigning criminal responsibility to higher-ranking members of armed forces or other officials for war crimes and crimes against humanity committed by their subordinates; and
- include an assessment of the genuineness of Israeli authorities' investigations into alleged crimes, considering the current and previous ability and willingness of

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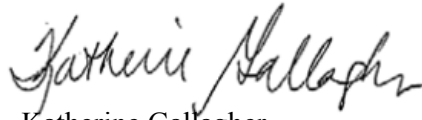
<sup>272</sup> See UN Committee on the Rights of the Child, *Concluding Observations on the Second to Fourth Periodic Reports of Israel*, U.N. Doc. CRC/C/ISR/CO/2-4 (4 July 2013), <http://www2.ohchr.org/english/bodies/crc/docs/co/CRC-C-ISR-CO-2-4.pdf>; Human Rights Committee, 2014 Concluding Observations: Israel, *supra* n. 18; and 2009 UN Fact Finding Mission Report, *supra* n. 15.

Israeli authorities and mechanisms to fairly and independently investigate alleged crimes and hold perpetrators accountable to international standards.

Submitted: 11 January 2019



Brad Parker  
Attorney & International Advocacy Officer  
Defense for Children International – Palestine  
Al-Sartawi Building, 3rd Floor  
Al-Khoulafa' St., Al-Bireh/Ramallah  
State of Palestine  
[brad.parker@dcips.org](mailto:brad.parker@dcips.org)  
Office: +970 (0)2 242 7530 (Ramallah)  
Office: +1 646 912 8093 (New York)



Katherine Gallagher  
Visiting Clinical Professor of Law  
Human Rights and Gender Justice Law Clinic  
City University of New York School of Law  
2 Court Square  
Long Island City, NY 11101  
[katie.gallagher@law.cuny.edu](mailto:katie.gallagher@law.cuny.edu)  
Office: +1 718 340 4016

*On the brief:*  
Lorre-Ann Fisher, *Legal Intern*  
Francis Galvez, *Legal Intern*  
Joseph Noonan, *Legal Intern*  
Nelson Rhodes, *Legal Intern*