

The Supreme Court of Israel Dismisses a Petition Against Gaza Rules of Engagement

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Omphalos: Middle East Conflict in Perspective

On Thursday, the Supreme Court of Israel dismissed a petition against the rules of engagement governing use of force by the Israeli security forces in the violent clashes in Gaza (HCJ 3003/18 *Yesh Din v. IDF Chief of General Staff*). The clashes began on March 30, 2018, around mass Palestinian protests held in various points along the fence separating the Gaza Strip from Israel. The court's judgment deals with several international law issues arising from the use of force by Israel, but the positions taken on some of these issues are less than clear. Moreover, although the three justices on the panel unanimously dismissed the petition, there are certain differences between the positions expressed in their opinions. Still, some of the court's assertions represent a controversial interpretation of what international law requires of the Israeli security forces in the circumstances that have unfolded in Gaza.

The petitioners, a number of human rights organizations (five Israeli NGOs and one Palestinian NGO), sought to invalidate any rules of engagement that empower the Israeli security forces to use lethal force against Gazans protesting near the fence unless they pose an imminent and actual threat to human life. According to the petitioners, the current rules of engagement allow the use of live ammunition against “main inciters,” who call on protesters to move towards the fence, even if the inciters do not create an immediate danger. As a result of the application of the rules of engagement, tens of protesters were killed and thousands were injured so far. The petitioners asserted that the protests in Gaza should be treated as civilian protests, notwithstanding the role of Hamas in organizing the protests and the affiliation with Hamas of part of their participants—including many of those killed and injured during the clashes. The response to these protests, they argued, should consequently be governed by international human rights law's norms relating to the application of law enforcement powers by security agencies, which are significantly more restrictive than the law of armed conflict regarding use of force. The petitioners maintained that the large number of casualties is proof that the Israel Defense Forces' (IDF) application of the rules of engagement is inconsistent with both international and Israeli law.



In a recent Just Security post, Eliav Lieblich offered a detailed critique of the government's arguments. In a nutshell, the government argued that the current use of lethal force in Gaza occurs in the framework of an armed conflict between Hamas and Israel. It is thus governed by the law of armed conflict and not by international human rights law (whose application to situations of armed conflict Israel traditionally contests). In the government's view, two distinct paradigms co-exist within the framework of the law of armed conflict: a conduct of hostilities paradigm and a law enforcement paradigm (the content of the latter paradigm and the doctrinal support for its existence outside situations governed by the laws of belligerent occupation remain, as noted by Lieblich, unclear). The clashes in Gaza implicate both paradigms, which apply interchangeably, depending on the particular circumstances on the ground.

The government proclaimed that as a general matter, the default paradigm in the Gaza situation is the law enforcement paradigm. Under this paradigm, which according to the government largely mirrors international human rights law standards, lethal force may be used as a measure of last resort to control violent disturbances. However, use of lethal force against an individual based on indications that he or she is taking an active part in the hostilities—for instance, by holding an explosive device—is governed by the hostilities paradigm, which allows for more permissive rules of engagement than the law enforcement paradigm.

One peculiar aspect of the case is that the court never actually saw the rules of engagement. The rules remain classified, and unavailable for public scrutiny. While the government offered to present the classified version of the rules *ex parte* in a closed session, as well as intelligence concerning the clashes, the court's procedures require the consent of the petitioners for this to take place. If the petitioners refuse to allow *ex parte* presentation of classified material, the government conduct they challenge, which is premised on the classified material, is deemed presumptively lawful.

In this case, the petitioners consented to the presentation of the rules of engagement, but objected to the presentation of additional intelligence materials by the government. As a result, neither the rules of engagement nor the additional material were presented to the court. However, the court did receive information—in open session—about the gist of the rules of engagement and about security risks presented by the clashes from the head of the international law division in the IDF Military Advocate General Corps, Colonel Eran Shamir-Borer, as well as from Major General Nitzan Alon, head of the IDF's Operations Branch.

A three-Justice panel of the Supreme Court (sitting as a High Court of Justice) unanimously dismissed the petition. But there are potentially significant differences between the main opinions, those of Deputy-Chief Justice Hanan Melcer and Chief Justice Esther Hayut.

Melcer opened his opinion with a narrative of the events of the past two months. He described the vulnerability of the Gaza border fence; its proximity to Israeli civilian population on the other side of the fence; the large scale and organized nature of the protests and clashes under the direction of Hamas; the active encouragement of Gaza's residents to participate in the clashes; the fact that the protests involved violence and attempts to breach the border fence; and the cover they gave to terrorist attacks on and across the border. These attacks included gun and grenade fire, placing explosive devices along the fence or throwing them across the border, igniting fires on Israeli territory, 25 instances in which Palestinians infiltrated Israeli territory and were detained, and several other incidents involving Palestinians who crossed the border and returned to Gaza. Melcer asserted that the protesters' aims, particularly the planned mass breach of the fence; the role of Hamas in the protest; and the means employed by the protesters distinguish the recent events in Gaza from ordinary civilian demonstrations.

Consequently, according to Melcer, the Israeli government views the prolonged clashes at the border and the risk of a mass breach of the fence as a real and immediate threat to the lives of Israeli civilians and members of the security forces. In response to the clashes, Israel mobilized forces to the Gaza border and equipped them with non-lethal riot control gear. However, security forces were allowed—as a measure of last resort—to shoot live ammunition at individuals that pose a security threat and ignore warnings to discontinue their activities, while minimizing harm to other protesters. These individuals include “main rioters” and “main inciters,” who may be targeted—subject to tests of strict necessity and proportionality,—with live fire directed at the lower half of their body.

Melcer then turned to question of the legal framework governing the situation, accepting most of the government's legal position. Melcer agreed that an armed conflict exists between Israel and Hamas in Gaza, and that it is governed by the law of armed conflict. He also accepted the government's two-paradigm approach, which posits that the law of armed conflict has two different modes that apply interchangeably depending on the circumstances—the conduct of hostilities mode and the law enforcement mode. The conduct of hostilities paradigm governs situations of actual warfare among the parties to the armed conflict, whereas the law enforcement paradigm governs use of force in other situations in which it is necessary to maintain security and public order. Under the law enforcement paradigm, necessary and proportional lethal force can be applied only as a last resort, and only in the face of a real danger to human life or bodily integrity. Melcer did not explicitly express an opinion on the applicability of international human rights law to the clashes in Gaza, although he did refer, by way of analogy, to domestic Israeli law standards and European Court of Human Rights case law.

Melcer also noted that those who directly participate in the hostilities between Israel and Hamas are targetable. He included in this category members of terrorist groups disguised as protesters and those who voluntarily act as human shields for terrorists. The targetability of civilians directly participating in hostilities is a well-established rule of the law of armed conflict, enshrined in both Additional Protocols to the Geneva Conventions and supported by the International Committee of the Red Cross interpretive guidance on direct participation in hostilities (which the Court cites). But the opinion does not clearly specify which paradigm—hostilities or law enforcement—covers such targeting in the situation unfolding in Gaza.

Ultimately, however, it appears that Melcer's discussion of international law is largely *dicta*. His opinion mainly turned on the principle of broad deference to governmental decisions in military operational matters under Israeli law. Melcer maintained that since the court did not see the full, classified version of the rules of engagement and had limited information on their actual application, it was not in a position to review the legality of their implementation in the midst of the clashes. Melcer took note of the government's commitment to investigate claims of unlawful use of force through an independent fact-finding mechanism and to draw lessons that would enable it to minimize casualties in the future, as well as its commitment to act in accordance with both international and domestic law.

Chief Justice Esther Hayut concurred with Melcer regarding the outcome of the judgment, but offered her own reasoning on the international law aspects of the situation in Gaza. Justice Neal Hendel joined in her opinion, though he noted that he agrees with most of Melcer's opinion.

Hayut made three main points. First, she relied on the principle of deference to the government on operational issues, especially in view of the “fog of war” surrounding the clashes that were taking place in parallel to the court's consideration of the petition. Second, Hayut invoked the general presumption in Israeli administrative law that government's actions are lawful unless proven otherwise. The refusal of the petitioners to allow the court to receive a classified *ex parte* briefing, she maintained, reinforced that presumption in this case.

Third, the chief justice asserted—in more explicit terms than Melcer—that the rules of engagement themselves are *prima facie* lawful based on the general description provided to the court. She noted that a number of the petitioners conceded this point during oral arguments. Hayut maintained that the rules essentially distinguish among three groups: individuals who directly participate in hostilities, who everyone agrees are targetable under the law of armed conflict; individuals engaging in significant violent disorderly conduct (“main rioters”) and “main inciters”; and individuals that do not belong to either category (other protestors). According to the government, she observed, the law enforcement framework governs the targeting of the latter two categories. Hayut emphasized that the rules as described to the Court only allow for use of live ammunition if an individual in those categories created a real and

immediate danger to Israeli civilians or soldiers, after exhausting non-lethal options. The chief justice stressed that according to the government, individuals are not targeted with lethal force simply because of their presence in proximity to the border fence, because they support Hamas, or because they participate in protests.

Therefore, the chief justice considered that the main question is whether the application of these rules in practice is lawful. And the court has no way of assessing the legality of the implementation of the rules without reviewing them in full and without reference to the factual circumstance of particular incidents. Like Melcer, Hayut also emphasized the government's representations that it strives to act in accordance with domestic and international law, and that it investigates all cases of potential violations.

While international law was not at the heart of her opinion, Hayut did comment on the application of international law to the situation in Gaza. Like Melcer, Hayut's point of departure was that Israel and Hamas are parties to a prolonged armed conflict. Yet, her analysis seems to more clearly distinguish between use of force in law enforcement and armed conflict. Hayut recognized that those are analytically distinct frameworks, and, unlike Melcer, she did not endorse the government's claim that the law enforcement paradigm constitutes part of the law of armed conflict.

At the same time, Hayut underscored that the nature of modern warfare defies clear distinctions between normative paradigms. The situation in Gaza straddles the two paradigms, and the question of which one applies depends on the particular circumstances of every operation. The situation has been complicated, she observed, by Hamas's deliberate exploitation of civilian population during the clashes to create cover for its operations against Israel and its attempts to stage a mass breach of the border fence. The unique attributes of the situation compel the security forces to apply both frameworks in the course of a single chain of events. The chief justice further noted that since Israel no longer has effective control of the Gaza side of the fence, its security forces cannot rely on ordinary policing to curb the violence originating from that territory.

Where does this leave us?

The judgment in the *Yesh Din* case sets no clear precedent regarding the specifics of the international law applicable to the current situation in Gaza. The international law aspects of both of the main opinions appear to be *dicta*, and at the end of the day the outcome of the case turned on other issues: deference to the military's operational discretion, and the difficulty of evaluating rules of engagement in the abstract and without reviewing their full text and the circumstances surrounding their application. Nevertheless, a number of points are worth highlighting.

First, Melcer's analysis of international law (accepting the position of the government) infuses the law of armed conflict with elements of international human rights law. It conflates and obfuscates the international legal frameworks at play, creating an extremely pliable set of rules that can be manipulated depending on the exigencies of the moment. As Lieblich pointed out, this is a highly controversial interpretation of the law of armed conflict. International law distinguishes between use of force in law enforcement and use of force in the framework of an armed conflict. The former is mainly governed by international human rights law (which in situations of occupation complements the laws of belligerent occupation). The latter is mainly governed by international humanitarian law (although international human rights law continues to apply even then). With regard to the use of force, the former is highly restrictive, and requires the showing of an imminent threat to life and exhaustion of non-lethal measures prior to applying lethal force. The latter is not as restrictive. It allows use of force against combatants and civilians if and for such time as they directly participate in hostilities, and tolerates indirect harm to civilians under certain conditions.

Hayut seems to make an effort to follow the traditional analytical distinction in international law between the law of armed conflict and law enforcement, while highlighting its limits in the unique situation that has developed in Gaza. But the practical implication of her analysis is the same as Melcer's: we are left with two international legal paradigms that apply in parallel, their concrete application determined by the forces on the ground depending on the circumstances. Even though this position does not formally have the force of precedent, it signals approval of the government's approach, which regards the protests as linked to a military conflict and thus likely to generate unacceptable levels of risk to lives in the Israeli side if the fence were to be breached by large numbers of protesters.

Second, both justices, and especially Hayut, appeared to conclude that the government adheres to a law enforcement paradigm in all cases except in relation to those individuals who directly participate in the hostilities between Israel and Hamas. Under this interpretation, it is possible to reconcile the rules of engagement as they stand with international law. But the devil is in the details of the application of these principles on the ground. The decision does not give any insight as to what specific behavior could render an individual targetable under the more permissive law of armed conflict. Nor does it make clear what kinds of behavior would count as an actual an immediate threat to life or bodily integrity that merits the use of lethal force under the law enforcement paradigm. Hayut noted that according to the rules simply being close to the border or supporting Hamas is not enough, but did not seem to take an independent position on the lawfulness of targeting individuals under these circumstances. The legal status of the "main inciters," who do not themselves pose a direct threat to the life of others, but contribute to the escalation of a dangerous situation and have been targeted by live sniper fire aimed at incapacitating them, remains particularly unclear. In fact, Hayut suggested that the legality of targeting "main inciters" in particular cases should be further investigated.

Finally, both justices emphasized the need to investigate the implementation of rules of engagement after the fact. Melcer referred to the importance of investigating claims that many of the casualties were shot in the upper part of their body and sometimes in the back, which is inconsistent with the government's statements about the rules of engagement. The government has already initiated a number of such investigations. While it will be interesting to see what those probes produce, past experience with IDF internal investigations indicates that they are better at monitoring compliance with IDF orders and procedures than at examining the compatibility of such orders and procedures with international law.

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