



LPHR Commentary: Israel's Supreme Court judgment on the legality of Israel's rules of engagement in the context of use of force against Gaza protesters

“It is with grave concern that I note the violence and deteriorating situation in the Gaza Strip in the context of recent mass demonstrations. Since 30 March 2018, at least 27 Palestinians have been reportedly killed by the Israeli Defence Forces, with over a thousand more injured, many, as a result of shootings using live ammunition and rubber-bullets. Violence against civilians - in a situation such as the one prevailing in Gaza – could constitute crimes under the Rome Statute of the International Criminal Court .”

Fatou Bensouda, Prosecutor of the International Criminal Court – 8 April 2018.

“In contrast to an examination of the legality of the Rules of Engagement, which is within the purview of this Court, examination of the manner in which these Rules are applied touches on professional aspects regarding which it is doubtful that this Court – particularly when the events that are the subject of this petition are still going on – has the tools to carry out. At this stage... we cannot determine that implementation of the Rules of Engagement was executed illegally.”

Esther Hayut, President of the Israeli Supreme Court – 24 May 2018

Executive Summary

On 24 May 2018, Israel's Supreme Court [the Court] handed down a unanimous judgment rejecting a petition submitted by a number of Israeli and Palestinian human rights organisations that sought to annul any rules of engagement empowering Israel's forces to use lethal force against Gaza residents protesting near the perimeter fence with Israel, except for where an individual posed an imminent and actual threat to human life. The petition was brought against a context where there was widespread grave concern that excessive force was systematically being used by Israel's forces against protesters in Gaza participating in 'the Great March of Return'.

The Court's judgment is both deeply circumscribed and troubling. As noted in the quote above by Israel's Supreme Court President, Esther Hayut, the Court did not take a position on whether the rules of engagement were being implemented lawfully by Israel's forces in the context of the Gaza protests. The Court therefore carefully limited its judgment on whether the rules of engagement are lawful; finding unanimously that the “soldiers are acting in accordance with the



binding provisions of both international law and domestic Israeli law”¹, despite not having full sight of the rules of engagement at any stage of the legal proceedings. In addition, the reasoning presented in the judgment gravely undermines the right to freedom of expression and assembly and is highly dangerous from a civilian protection perspective.

This commentary outlines how we have reached this conclusion. It has been prepared for submission to the UN independent Commission of Inquiry on the 2018 protests in the Occupied Palestinian Territory. We have relied on an English translation of the Supreme Court Judgment commissioned by the Swedish international NGO, Diakonia, for our analysis.

Lawyers for Palestinian Human Rights (LPHR) is a lawyer-based legal charity in the UK that works on projects to protect and promote Palestinian human rights. We distinctly provide a legal and human rights perspective on issues affecting Palestinians. Our trustees include leading human rights lawyers, Sir Geoffrey Bindman QC, Fiona McKay and Tessa Gregory.

Context for the Israeli Supreme Court hearing: 'the Great March of Return'

1. Between 30 March and 7 June 2018, the UN Office for the Coordination of Humanitarian Affairs (OCHA) reported that 131 Palestinians were killed, and 13,900 were injured, by Israeli forces using live ammunition and plastic coated steel bullets while participating during mass protests inside the occupied Gaza Strip called the 'the Great March of Return'.² This large number of casualties occurred on the Gaza side of the perimeter fence with Israel, where Israeli forces imposed a 'No Go Zone', citing security concerns.
2. The March of Return was planned as a series of mass civilian protests to take place on successive Fridays leading up to 15 May 2018, which was the 70th anniversary of what Palestinians refer to as the 'Nakba' ('the Catastrophe'). The protests, however, have continued on successive Fridays subsequent to 15 May.
3. The protests took place against the broader context of an illegal closure policy imposed by successive Israeli governments upon the entire population of the occupied Gaza Strip since June 2007. One of its effects is to prohibit civilians, with very limited exceptions, from entering and exiting the Gaza Strip, so that the population is effectively locked in the territory. The closure of Gaza is an illegal act of collective punishment and stands in violation of both international law.

1 Paragraph 66, Judgment of Deputy Melcer; *HCI 3003/18 Yesh Din v IDF Chief of General Staff*

2 <https://www.ochaopt.org/content/humanitarian-snapshot-casualties-context-demonstrations-and-hostilities-gaza-30-march-7-june>



The legal framework that should govern Israel's use of force against protesters in Gaza

4. As noted by LPHR in our April 2018 Q&A entitled 'the use of force against Gaza protesters'³, Palestinian civilians in the Gaza Strip under Israeli military occupation are entitled to legal protections under international humanitarian law and international human rights law.
5. Palestinians participating in protests or demonstrations cannot be deemed to be lawful military targets under international humanitarian law, even if some weapons are used. Rather, they are considered to be civilians whom must be policed using a law enforcement legal framework that respects and protects their fundamental human rights under international human rights law. These include the right to life, the prohibition on cruel and inhuman treatment, and the rights to freedom of peaceful assembly and association.
6. The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials is widely regarded as an authoritative statement of international rules governing use of force in law enforcement operations, including in the specific context of protests⁴. They include three main principles: necessity, proportionality, and precaution. These norms are binding on all states as general principles of law.
7. The UN Basic Principles provides that security forces shall “apply non-violent means before resorting to the use of force and firearms,” and that “whenever the lawful use of force and firearms is unavoidable, officials shall: (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved; and (b) Minimise damage and injury, and respect and preserve human life.” Moreover, “intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.”
8. The UN Basic Principles therefore provide that the use of force and firearms by a State against an individual can only be deployed in exceptional situations where an individual is posing an imminent threat of death or serious injury. When the use of force is deployed, it must be done so in a manner which is proportionate.
9. The excessive use of force deployed by Israeli forces against Palestinian protesters in Gaza since 30 March 2018 raised serious concerns that these basic legal standards have been seriously violated, leading to the most fundamental violation of basic human rights protections, including the right to life. The then UN High Commissioner for Human Rights, Zeid Ra'as al Hussein echoed this grave concern in his [statement](#) on 6 April: “While a minority of protesters reportedly used means that could be dangerous, the use

³ [LPHR's Q&A on the Use of Force against Gaza Protesters](#) – 13 April 2018

⁴ Pages 16-19, [Use of Force in Law Enforcement and the Right to Life: The Role of the Human Rights Council](#) - Geneva Academy. November 2016.



of protective gear and defensive positions by law enforcement officials would have mitigated the risk and should not have led to recourse to lethal force.”

10. As Palestinian protesters are considered to be protected persons under the Fourth Geneva Convention, any serious violations of the law enforcement standards may also amount to grave breaches of that Convention. Wilful killing and wilfully causing great suffering or serious injury to body or health are among the grave breaches stipulated under the Convention. Such grave breaches amount to war crimes and incur individual criminal responsibility.
11. Within this context, the Prosecutor of the International Criminal Court, Fatou Bensouda, issued a significant [statement](#) on 8 April, in which she informed all parties that her Office is closely monitoring the protests in Gaza, and that any new alleged crime may be subjected to the scrutiny of her Office as part of its ongoing preliminary examination into the situation in Palestine (*for more on this specific issue, please see the final section below*).
12. It must also be clarified that the UN Basic Principles are fully applicable notwithstanding the declaration by Israeli forces that the Access Restricted Areas near the border fence with Gaza is a closed military zone. As noted by the then UN High Commissioner for Human Rights in his [statement](#) on 6 April, “[a]n attempt to approach or cross the green-line fence by itself certainly does not amount to a threat to life or serious injury that would justify the use of live ammunition.”

The petitions to Israel's Supreme Court against the rules of engagement

13. Amid the grave concern about the apparent excessive use of force against protesters, a number of Israeli and Palestinian human rights organisations submitted petitions to Israel's Supreme Court to seek the revocation of the rules of engagement being employed by Israel's forces against protesters who do not pose a clear and immediate mortal threat.
14. The petition submitted by Adalah and Al Mezan Centre for Human Rights (Gaza) on 23 April, was heard by the Court alongside a petition by Yesh Din, the Association for Civil Rights Israel, Gisha and Hamoked - Centre for the Defence of the Individual that was submitted on 15 April.
15. Adalah and Al Mezan's petition sought:

“That the Rules of Engagement pertaining to demonstrators in Gaza instituted on March 30, 2018 be determined to be illegal”; and

“A clear and immediate instruction to the Israeli government regarding the prohibition against the use of snipers or live ammunition as a means of dispersing civilian demonstrations and/or dispersing a crowd in Gaza as they are



extremely deadly means and contrary to the directives of international law and Israeli law.”

- 16.** Yesh Din, the Association for Civil Rights Israel, Gisha and Hamoked - Centre for the Defence of the Individual's petition sought:

“Every directive permitting soldiers to shoot live fire at demonstrators who are residents of the Gaza Strip at Israel’s border with the Gaza Strip should be annulled, if they are not actually endangering human life;

“The respondents should immediately devise an effective mechanism for implementing the prohibition on the use of lethal force against unarmed civilian residents of the Gaza Strip at Israel’s border with the Gaza Strip who are not actually and immediately endangering human life.”

- 17.** Both petitions submitted that the rules of engagement were in violation of Israeli and international law by allowing for the use of live ammunition against a category of individuals classified by Israel's forces as “main inciters” - who call on protesters to move towards the fence - even if these individuals do not pose an actual and imminent risk to life.
- 18.** Both petitions further submitted that the protests were civilian in nature and, accordingly, that the applicable legal framework governing the use of force in this context is the law of law enforcement framework provided under international human rights law.
- 19.** Notably, the petitioners also sought an urgent interim order that prohibited the Israeli forces from using live ammunition, including snipers, until the handing down of the final decision in the petition. The impetus for this request was a very real concern that there were further demonstrations arranged for coming weeks, and that this in turn meant there was a risk of further loss of life and injury as a result of the use of force against demonstrators.
- 20.** On 23 April 2018, it was ruled that the urgent request for the interim order to prohibit the use of live ammunition would be discussed by the panel of the Court hearing the substantive matter on 30 April. The urgent interim order was rejected by the Court in its judgment dated 24 May.

The Government of Israel's response before Israel's Supreme Court

- 21.** Israel's government pursued a line of argument in response to the petitions which posited that the protests were part of an ongoing armed conflict between Israel and Hamas. Their rationale is that in their view the protests displayed a high level of violence and were furthering the operational interest of Hamas. They therefore argued that the



laws of armed conflict under international humanitarian law is the applicable legal framework governing the use of force against protesters.

22. In addition, Israel's government asserted that within international humanitarian law there are two regimes which regulate the resort to force. These regimes are: (i) the hostilities paradigm, and (ii) the law enforcement paradigm. They argued that the way these regimes would operate in practice is that use of force against individuals would primarily be considered under the law enforcement regime, unless or until the individual directly participates in hostilities during the demonstrations. Should the latter scenario occur, the law enforcement regime would cease and make way for the hostilities paradigm, which gives wider leeway for lethal use of force against protesters.

Israel's Supreme Court judgment validating the rules of engagement used against the protesters in Gaza

23. On 24 May 2018, the Court handed down a unanimous judgment rejecting the petitions and upholding the legal position of the Israeli government.
24. It should first be importantly noted that President Esther Hayut and Deputy President Hanan Melcer determined that as they had not seen the full, classified version of the rules of engagement and had limited information on their actual application, the Court was not in a position to review the legality of their implementation in the context of the protests. They both also cited the Court's general position of deference to the military's operational discretion when rejecting the petitions.
25. Within these restrictive boundaries, both justices outlined their position on the applicable legal regime governing the use of force in the context of the protests.
26. In the leading judgment of Deputy President Hanan Melcer, the Court outlined the factual basis upon which it would provide its ruling on the legality of the rules of engagement, as opposed to considering and deciding upon the legality of its implementation. This included characterising the protests as occurring “under the directorship of the Hamas terror organisation” and involving “significant organised clashes with the Israeli security forces, as well as attempts to damage security infrastructures, even including, under their cover, the conduct of hostilities”. Notwithstanding the framing of facts that clearly appeared to show deference to the description of the protests presented by the Israeli government, the Court did accept that among the protesters were civilians who were not involved in terrorist activity.
27. In the judgment, Justice Melcer determined that the legal framework applicable to the mass protests was the law of armed conflict, also known as international humanitarian law. He accepted the Israeli government’s argument that international humanitarian law



delineates two different paradigms, the conduct of hostilities and the law enforcement paradigm. The judgment proceeded to state that:

“The question of which paradigm governs the application of specific force is therefore a tangled and complex question, deriving first and foremost from the question of whether the application of force is part of the terror actions”.

28. The example was given by Justice Melcer of a protester who is identified as holding an explosive device in his hands. Under the Court’s construction of international humanitarian law, the individual would no longer fall to be dealt with under the law enforcement paradigm, but rather the use of force against this individual would be considered under the paradigm of the conduct of hostilities.

29. President Esther Hayut took a similar position in her concurring opinion when, after stating that the conflict between Israel and Hamas is an international armed conflict, she asserted:

“The war on terror and terrorist organizations poses difficult challenges for Israel – and in recent years for additional countries in the world – in dealing with complex scenarios that do not fall squarely under one of the two categories noted above – ‘combat’ activity or ‘law enforcement’ activity”.

30. President Hayut proceeded to classify three distinct groups as participating in the protests based upon the Israeli government submissions during the substantive hearing, and asserted which specific legal framework applied to each:

- (i) A person who during events takes direct and active part in carrying out terrorist acts (who potentially lethal force can be used against in keeping with the rules in the conduct of hostilities paradigm);
- (ii) Primary disturbers of the peace and primary inciters (who fall to be dealt with under the law enforcement paradigm); and
- (iii) Other protesters, including disturbers of the peace who do not carry out activities attributed to the other groups (again, dealt with under the law enforcement paradigm)

LPHR's analysis of the Israeli Supreme Court judgment

Rules of engagement not actually examined

31. It should first be noted that, in arriving at this judgment, the Court did not actually look at the rules of engagement to which the core of the case related. The reason for this is that the rules of engagement were held to be classified and not open to public scrutiny.



Israel's government offered for the rules to be provided to the court ex parte, alongside classified intelligence information relevant to the demonstrations. However this process requires the consent of the petitioners, which was not given (see paragraph 25 of the Judgment).

32. The judgment makes reference on numerous occasions to the fact that during the proceedings the Court warned the petitioners that, absent their consent that the Rules of Engagement being revealed ex parte and accompanied by explanatory classified material, there would likely be a presumption of proper conduct on the part of Israel's government.
33. In such circumstances, the extent to which this case can be accepted as a fully considered legal judgment on the legality of the rules of engagement deployed by Israel's forces in the context of 'the Great March of Return' protests is questionable. The rules of procedure and evidence of the Court has rendered it largely redundant in being able to meaningfully assess the legality of the Israeli forces rules of engagement.

The Court omitted to consider the ICRC's view that the 'law enforcement framework' may appropriately apply to the entire context of the Gaza protests

34. LPHR agrees with Court's assessment that the situation of the Gaza protests is taking place within an "ongoing armed conflict".⁵ However, it is concerning that the Court did not consider the International Committee of the Red Cross' (ICRC) view on the appropriate legal framework that flows from this assessment, . The ICRC suggests that 'it might be appropriate to deal with the entire situation under law enforcement':

"Thus, for example, if a civilian demonstration against the authorities in a situation of armed conflict were to turn violent, a resort to force in response to this would be governed by law enforcement rules. If enemy fighters were located in the crowd of rioting civilians, they could be directly targeted under international humanitarian law rules on the conduct of hostilities. However, their mere presence, or the fact that the fighters launched attacks from the crowd, would not turn the rioting civilians into direct participants in the hostilities. Thus, all precautions provided for under international humanitarian law would need to be taken to spare the civilians in case of attacks against the fighters. If it were to prove too difficult to distinguish the rioting civilians from the fighters, it might be appropriate to deal with the entire situation under law enforcement, and apply an escalation of force procedure with respect to all persons posing a threat".⁶

5 Paragraph 38, Judgment of Deputy Melcer; Paragraph 5, Judgment of President Hayut



- 35.** The workability of the legal regime endorsed by the Court is substantially called into question in light of the Court’s continuous assertion that the Rules of Engagement apply interchangeably according to a developing situation on the ground. This was acknowledged in part by Justice Neal Hendel, when he defended the need for such an approach, stating:

“The two-part division of the paradigms can be misleading, not for a lack of logic and reasoning in the distinction – since surely such exists – but because the reality overshadows neatly organized categorizations, as if each paradigm resides in a separate draw. In the case at hand, the difficulty in identifying the relevant paradigm is no coincidence; quite the contrary; Hamas and the terror organizations intentionally seek to blur the boundaries between civilian protest and combat activity, and to exploit the laws of war, while creating a mixture in a reality that wears two hats”.

- 36.** LPHR submits the categorisation approach taken by Israel cannot be safely sustained. Seeking to establish the designation of individuals as belonging to particular categories, to which different legal frameworks apply, has the inevitable consequence of broadening and complicating the discretion over whether a person can be targeted for lethal force or not. This can effectively operate to provide a carte blanche for the targeting of protesters, when all that should be considered in a protest environment is whether an individual is posing an imminent threat of death or serious injury to necessitate the use of force in a manner which is proportionate.
- 37.** There is no real basis upon which to assert that the law can operate in an ad hoc and interchangeable manner when the entirety of the State’s actions could and should properly and appropriately be dealt with under international human rights law. In the case of civilian protesters taking part in a demonstration, the law of law enforcement under international human rights law is the established and applicable legal regime governing the use of force in protest scenarios. Any other construct severely undermines the ability to exercise of the basic human right to freedom of assembly and expression, and clearly presents an aggravated danger to the protection of civilians.
- 38.** To conclude, from a legal perspective the primary position must be as follows: If actions and decisions in a protest context cannot comfortably be justified under international human right law, this does not serve as an indication that the law must evolve or be reinterpreted to encompass a justification for the action in question. Rather, it serves as an indication that such action is prohibited by international law; it is unlawful. The Court took a converse view in this instant case by providing wholesale approval to the rules of engagement formulated by the government of Israel. The Court's assent appears



fundamentally inadmissible when applying an objective legal analysis combined with considering its practical ramifications for excessively endangering civilians whom are exercising their basic human right to peaceful protest.

An independent and transparent investigation is necessary to determine if unlawful force was used against protesters

39. In the context of law enforcement operations, at a minimum, States must investigate alleged violations of the right to life, resulting from use of force by State agents, in accordance with international human rights law⁷. The Court acknowledged this by expressly referencing the need for the Israeli government to investigate the implementation of the rules of engagement and any alleged violations.
40. On 8 April, the Israeli military [announced](#) that an internal investigation will be opened and led by the current head of its Training and Doctrine Division. Following this internal investigation, a decision will be made on whether to open a military police investigation.
41. LPHR submits that among the critical questions an investigation should ascertain is what were the precise rules of engagement and who approved them; were they amended at any stage in light of widespread concern that excessive force was being used; and were all those shot by live ammunition posing an imminent threat of death or serious injury.

A role for the ICC in relation to individual criminal responsibility

42. If the investigation carried out by Israel into the recent Gaza protests falls short of international standards⁸, there is a clear possibility that the International Criminal Court may become engaged.
43. As aforementioned, the Prosecutor of the International Criminal Court, Fatou Bensouda, issued a significant [statement](#) on 8 April informing all parties that her Office is closely monitoring the protests in Gaza, and that any new alleged crime may be subjected to the scrutiny of her Office as part of its ongoing preliminary examination into the situation in Palestine. Her statement concluded:

“Any person who incites or engages in acts of violence including by ordering, requesting, encouraging or contributing in any other manner to the commission of crimes within ICC’s jurisdiction is liable to prosecution before the Court, with full respect for the principle of complementarity.”

⁷ For an elaboration of the requirements of international human rights law please see [LPHR’s Q&A on the Use of Force against Gaza Protesters](#) – 13 April 2018

⁸ For an outline on the substantial concerns that Israel’s investigation will not meet international standards, please see [LPHR’s Q&A on the Use of Force against Gaza Protesters](#) – 13 April 2018



44. Article 8(2) of the Rome Statute of the International Criminal Court expressly includes grave breaches of the Geneva Conventions as war crimes that fall within the jurisdiction of the Court. These include the grave breaches of wilful killing, and wilfully causing great suffering or serious injury to health. These specific war crimes appear to be engaged by the lethal and injurious incidents at 'the Great March of Return' protests since 30 March 2018.
45. It is also pertinent to note two related provisions of the Rome Statute. Article 8(1) provides that "The Court shall have jurisdiction in respect of war crimes **in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes**" (Bolded by LPHR for emphasis). And Article 28 provides that a military commander or civilian official can be held criminally responsible for crimes committed by subordinates where, at the time relevant to the charges, he was in a relationship of superior-subordinate with the perpetrators, knew or had reason to know (or, in the case of military superiors, "should have known") that these crimes had been committed or were about to be committed and, with and despite that knowledge, wilfully and culpably failed to prevent or punish these crimes.
46. The reference to the principle of complementarity in the Prosecutor's statement relates to a cornerstone principle of the International Criminal Court that it "shall be complementary to national criminal jurisdictions." The Rome Statute provides that the International Criminal Court works in tandem with states, and accordingly only opens full investigations into criminal claims when states with primary jurisdiction are unwilling or unable to genuinely investigate and prosecute where appropriate.
47. The question of the genuineness of Israel's investigation into the use of force by its military forces against Palestinians protesters will therefore be crucial for the Prosecutor of the International Criminal Court to determine in the context of her complementarity assessment. It is one of the key admissibility issues that must be assessed by her Office when deciding whether or not to proceed with a full criminal investigation into the events in Gaza since 30 March.
48. Given the substantial limitations of the Israeli Supreme Court judgment on the rules of engagement used by Israel's forces against protesters in Gaza during 'the Great March of Return', it is unlikely that this judgment alone can be considered to amount to sufficient evidence to demonstrate that Israel has carried out an adequate investigation into the legality of the rules of engagement that were in operation, and nor into their actual implementation.