The Supreme Court sitting as the High Court of Justice

HCJ 3003/18
HCJ 3250/18

Before:	The Honorable President E. Hayut The Honorable Deputy President H. Melcer The Honorable Justice N. Hendel
The Petitioners in HCJ 3003/18:	1. *Yesh Din* – Volunteers for Human Rights 2. The Association for Civil Rights in Israel 3. *Gisha* – Legal Center for Freedom of Movement 4. *Hamoked* – Center for the Defense of the Individual
The Petitioners in HCJ 3250/18:	1. *Adalah* – The Legal Center for Arab Minority Rights in Israel 2. *Al-Mezan* Center for Human Rights in Gaza

v e r s u s

The Respondents:	1. The IDF Chief of Staff 2. The Military Advocate General
The Party Requesting to Join as *amicus curiae* in HCJ 3003/18:	The *Almagor* Organization – The Terror Victims Association

A petition to grant an order *nisi* and an interim order

Date of Session:	15th of Iyar, 5778 (April 30, 2018);
On behalf of the Petitioners in HCJ 3003/18:	Adv. Michael Sfard; Adv. Dan Yakir; Adv. Roni Pelli
On behalf of the Petitioners in HCJ 3250/18:	Adv. Suhad Bishara; Adv. Hassan Jabareen
On behalf of the Respondents:	Adv. Avi Milikovsky
On behalf of the Party Requesting to Join:	Adv. Shmuel Paz; Adv. Maurice Hirsch

J U D G M E N T

Deputy President H. Melcer:

1. The petitions before us address the Rules of Engagement of Israel's security forces in the area of the security barrier between the Gaza Strip and Israel. These Rules are relevant to the violent events which have been recently taking place in that area.

2. In the petitions, the following orders *nisi* have been requested:

In HCJ 3003/18 (hereinafter also the "***Yesh Din* Petition**"):

> "A. Any order permitting soldiers at the Israel-Gaza Strip border to fire live ammunition towards protestors who are Gaza Strip residents, if the protestors do not actually endanger human lives, should be revoked;
>
> B. The Respondents should immediately implement a ground-level prohibition to exercise lethal force towards unarmed civilian residents of the Gaza Strip, protesting at the Israel-Gaza Strip Border, when the protestors do not actually and imminently endanger human lives."

In HCJ 3250/18 (hereinafter also the "***Adalah* Petition**"):

> "A. It should be determined that the policy of opening fire on protestors in Gaza, regarding the protests that commenced on March 30, 2018, is illegal;
>
> B. The Respondents should clearly and immediately prohibit the use of snipers or live ammunition as a means to disperse civilian demonstrations and/or crowds in Gaza, as these are lethal means and contrary to provisions of international law and Israeli law."

3. As part of the two petitions, motions to hold an urgent hearing were filed and the ***Adalah* Petition** requested an interim order "prohibiting the Respondents from using live ammunition, including by snipers, against the protestors in Gaza, until a final decision in the petition is granted."

4. On April 23, 2018, our colleague, Justice **A. Baron** ruled that: "The request for an interim order shall be discussed by the bench that shall hear the petition," and on April 30, 2018, we indeed held an urgent hearing on both of the petitions, after receiving preliminary responses from the Respondents (for additional developments following the hearing – see paragraphs 28-35 below).

I shall now present the facts that are necessary in order to rule on the petitions.

Background

5. During the past weeks, violent and large-scale events, with tens of thousands of Palestinian participants, have been taking place in the area of the security barrier between the Gaza Strip and Israel. The organizers of the events refer to these violent events as the "Great Return March", and call, in this framework, for a mass return of the "Palestinian refugees" to the "homes of their ancestors" within the territory of the State of Israel. The majority of these events have been taking place at the direction of the *Hamas* terror organization and have included, *inter alia*: organized, intentional and significant clashes with Israel's security forces, as well as attempts to damage Israel's security infrastructures. Terrorist attacks have also been committed during these events and under their cover. However, there is no dispute that there are also Palestinian civilian demonstrators not involved in terrorist activity, who have participated and participate in these events.

According to the Respondents, these events are facilitated by the *Hamas* organization as a new tactic in the conflict with Israel, masking terror attacks within "national memorial events" and "popular protests". These events often include popular demonstrations, accompanied by propaganda campaigns (which include significant disinformation), about the nature of the violent events occurring in the security barrier area, with particular emphases on the IDF's Rules of Engagement and on the means exercised by the IDF when dealing with the events.

6. The aforesaid violent events began on March 30, 2018, the date the Palestinians commemorate "Land Day", and they have continued since, at varying intensity, primarily on weekends. Up through this point, the events peaked on May 14, 2018, adjacent to the Gregorian calendar date of the establishment of the State of Israel (May 15, 2018), a date which the Palestinians commemorate "*Nakba* Day".

7. The arena in which the violent events have been occurring is located at a number of focus points along the security barrier that stretches between Israel and the Gaza Strip. This barrier was constructed by the Government of Israel in response to the continued and significant security threats from the Gaza Strip. The vast majority of the present barrier is a relatively simple barrier that is easy to intentionally infiltrate. It is comprised of a basic metal fence inside Israeli territory, which has electronic warning sensors installed on top, but is vulnerable to being cut and is only about the height of one person. A concertina wire is located in the Gaza Strip territory which can also be cut and jumped over easily. The distance between the wire and the fence changes in accordance with the topographical conditions and ranges from 20 to 80 meters, so a person who overcomes the concertina wire could reach the metal fence and be inside Israeli territory within a few seconds. It shall be stated in this context that both of the components of the barrier are clearly noticeable and are known to the population living in the Gaza Strip.

8. Since its construction, the barrier has been meant to protect Israeli civilians and the security forces against various threats, with an emphasis on preventing the infiltration of terrorists from the Gaza Strip into Israel. The barrier is located only

hundreds of meters from a series of Israeli towns and only dozens of meters from IDF troops. Therefore its breach – especially by rioting masses – poses danger to both civilians and soldiers.

Note: The Government of Israel has been recently investing significant resources in upgrading the existing security barrier to include a large concrete wall that will rise to six meters above ground and include an underground foundation in order to mitigate the threat of underground tunnels. The wall will include more attack-resistant and advanced means of warning. However, this upgrade is far from completion and the currently existing barrier has significant points of vulnerability, as described above.

9. Based on various operational and intelligence assessments, Israel recognizes that the area on the Gaza side and adjacent to the security barrier presents enhanced dangers for hostile terrorist activity against residents of the State of Israel and Israel's security forces (this area, which is not populated, is occasionally referred to as the **"Buffer Zone"** or the **"Perimeter"**). In order to somewhat mitigate this danger, there are various restrictions on movement in the Perimeter. The residents of the Gaza Strip are well aware of these restrictions, and a few years ago *Hamas* itself, who at that time did not wish to create a security escalation, has built outposts adjacent to the Buffer Zone in order to obstruct intentional attempts by Palestinians to breach the border

10. The violent events that have been taking place in the Perimeter in recent weeks were preceded by extensive and significant planning and according to the information that was delivered to us on behalf of the Respondents – these events are directed and organized by an entity that refers to itself as the "Return Committee". The committee, led by *Hamas*, includes representatives of various terrorist organizations that operate in the Strip, including: *Hamas*, the "Palestinian Islamic *Jihad*" and the "Popular Front for the Liberation of Palestine". The committee formulated an organized action plan, with an objective to maximize the chance of breaching Israel's security fence and harming the security forces.

11. As mentioned in the preliminary response on behalf of the Respondents, the events has three main aspects:

a) Encouraging residents of the Gaza Strip, including by means of social networks, to come to the area of the violent events and actively participate in the riots.

b) Preliminary and detailed planning of how the events shall be conducted and proceed, while dividing them into various geographical focus points in order to make it difficult for the Israeli security forces to deal with the many different breach attempts. Some protestors are provided with cutting tools while others have been burning tires for "masking" purposes, throwing Molotov cocktails, and the like.

c) Committing a series of "real time" terror attacks, either thanks to the breach of the barrier or under the cover of the riots themselves.

Note: The Petitioners in the ***Yesh Din*** **Petition** also agreed that during the course of

the demonstrations, there were likely violent events such as rock throwing, tire burning, attempts to harm the border fence, and even throwing Molotov cocktails and shooting. (See Section 37 of the ***Yesh Din*** **Petition**; also see in this context paragraph 62 of the ***Adalah*** **Petition**.)

12. It is appropriate here to state that it is the view of Israel's political echelon and of its security forces that preventing this violent activity necessitated and necessitates operational-military preparations, in all senses, in order to deal with the clear and present danger to the lives and bodily integrity of Israeli civilians and Israeli security forces, and to prevent the breach of the border. Thus, in order to deal with these threats – large IDF forces from various units, have been deployed along the Israeli side of the security barrier (for many kilometers along the Gaza Strip), including forces that were diverted from their standard regions of operation and especially stationed there.

IDF troops stationed in the area were equipped in advance with a variety of means to accommodate the operational challenge of dealing with a hostile crowd, including warning and announcement equipment and non-lethal means for dispersing demonstrations. In light of the extraordinary nature of the violent events, and in accordance with the Standard Operating Procedures, other designated non-lethal means were also allocated (such as: a drone that disperses tear gas). It was prescribed that if it becomes necessary – it will be possible **as a last resort** to also use live ammunition towards violent rioters, who are not deterred by the warnings and who endanger security. This last resort shall first and foremost be done by precise fire by snipers. All of these policies were constructed in order to reduce, to the extent possible, the harm to the participants of the violent riots.

13. Finally, significant infrastructure actions were performed on the ground, *inter alia*: the concertina wire that comprises the security barrier was reinforced; the area on both sides of the security barrier was significantly exposed and deep trenches were dug on Israel's side near the anticipated geographical focus points of the violent events, in order to delay a mass breach, if the protesters were to break through the fence. Additionally, the commanders also briefed the forces regarding the Rules of Engagement in the region of operation, in accordance with the anticipated violent events.

14. It is here appropriate to further state that the organizers' action plan indeed materialized and the mass violent events that took place in the area of the security barrier were unusual in their scope and in the intensity of the threat that they posed. Up until now, tens of thousands of people have participated therein (on March 30, 2018 – approximately 41,000; on April 6, 2018 – approximately 29,000, on April 13, 2018 – approximately 15,000; on April 20, 2018 – approximately 13,000; on April 27, 2018 – approximately 13,800; and on May 14, 2018 – approximately 45,000; on that day – under the cover of the riots, grenade and explosive devices were hurled towards the IDF troops, live ammunition was fired at the soldiers and explosive devices were hurled towards Israeli territory, in addition to the flying of more than 15 incendiary kites intended to harm towns and residents of Israel near the Gaza periphery). The riots continued uninterrupted from the morning hours until the evening hours and occurred simultaneously at a number of geographical focus points.

Some of the participants in the riots acted with the clear and determined goal of breaching the security barrier between the State of Israel and the Gaza Strip, infiltrating into Israeli territory and harming the security forces. This raised a significant concern for the safety of Israeli civilians who live near the security barrier. To this end, tires were also set on fire (at the organizers' direction) with the intention of burning the security barrier and creating a "smoke screen" which would disguise the attempts to sabotage the barrier and enable unidentified infiltration into Israel. Some of the rioters equipped themselves with arms.

15. In an attempt to prevent the violent events from occurring – the Israeli security forces sent warning messages to the Palestinian population in the Gaza Strip, through a number of channels, calling on them to avoid coming to the area of the security barrier. The IDF even held direct discussions with the bus companies that were hired by *Hamas* to transport the residents to the area, in which the IDF requested that the companies not cooperate with Hamas's attempt to place the residents at risk.

16. These efforts were unfortunately unsuccessful and as mentioned, the violent events began on March 30, 2018. According to the Respondents, certain events necessitated the use of live ammunition in order to prevent the materialization of the risks and harm to human life.

The Parties' Arguments

17. The Petitioners in the ***Yesh Din*** **Petition** state at the outset of their statements that to the best of their knowledge, the IDF's Rules of Engagement include a provision that permits soldiers to fire at protestors at the Israel-Gaza Strip border, who are classified thereby as "central inciters" or "central rioters", even when such are not actually and imminently endangering human lives. It is argued that as a result of these provisions, since the beginning of the riots at the border and through the submission of the petition, tens of protestors have been killed and thousands have been injured, without the protestors actually and imminently having endangered the lives of Israeli soldiers or civilians.

The Petitioners in the ***Yesh Din*** **Petition** argue that in accordance with Israeli and international law, it is forbidden to open potentially lethal fire when not necessary to prevent a severe and imminent risk to human life.

The Petitioners in the ***Yesh Din*** **Petition** further argue that even if it is possible to classify the area where the riots occur as a combat zone, the events currently taking place at the border are "civilian" in their essence, and therefore the law of Armed Conflict does not apply thereto.

18. Also according to the Petitioners in the ***Adalah*** **Petition**, the said riots should be characterized as "civilian" events and as such, are covered, according to international law, by the law enforcement paradigm. They argue that the paradigm applies even if at the event there were a number of incidents in which rocks were thrown, tires were set on fire, Molotov cocktails were hurled and live ammunition was shot (which is denied by the Petitioners in that petition). The Petitioners in the ***Adalah*** **Petition** further argue that the policy on use of live ammunition against rioters is contrary to the norms of international law which apply to Rules of Engagement. It

was also argued that the Rules of Engagement are also contrary to the **Basic Law: Human Dignity and Liberty**.

19. In their preliminary response – the Respondents argue that the petitions should be dismissed *in limine*, on grounds of lack of exhaustion of proceedings, lack of factual background and threshold issues of lack of right of standing and lack of justiciability. The Respondents further argue that the petitions should also be denied on their merits, due to the lack of cause of action to intervene in such matters, which are directly linked to clear operational-professional military aspects of the planning of the IDF's defensive and combative activity.

20. The Respondents further argue that the security forces' Rules of Engagement in the security barrier area are consistent with Israeli law, with international law, and with the rulings of this Court, Respondents emphasized that there have been circumstances in which the security forces were required to deal with mass life-threatening riots. The starting point of the Respondents' position is that these riots are taking place as part of the **armed conflict** existing between the *Hamas* terrorist organization and Israel – and therefore the legal framework that regulates the opening of fire is the **law of Armed Conflict**. In this context, they distinguished between fire that is opened and is regulated by the conduct of hostilities paradigm (for example, when the fire is opened as part of actual combat between *Hamas* and Israel), and fire that is opened and regulated by the law enforcement paradigm. The events which are the subject of the petitions combine both.

21. The Respondents further argue that there is also no merit to the Petitioners' arguments in the ***Adalah* Petition** that the actions of the security forces are contrary to the **Basic Law: Human Dignity and Liberty**. According to the Respondents' position, the Petitioners' arguments in this context are not supported by the cases to which they refer and are also inconsistent with the rulings of this Court in all that relates to the IDF's authority to open fire in order to perform its assignments in accordance with the law.

22. The Respondents further argue that the contents of the Rules of Engagement are consistent with the provisions of the law and accord with the terms dictated by both paradigms for applying force during an armed conflict. The Respondents are of the opinion that the Petitioners' arguments regarding the contents of the Rules are not based on knowledge, but rather, at best, on assumption, and that unofficial publications as well as pictures and videos to which the Petitioners refer in both of the petitions portray a partial and misleading picture from which one can neither learn about what is actually happening nor about the Rules of Engagement themselves.

The Course of the Proceedings

23. Following the submission of the petitions, the "***Almagor*" Organization** – a Terror Victims Association – requested to join as a respondent to the ***Yesh Din* Petition** on April 16, 2018 as an "*amicus curiae*", and my colleague, the President, **E. Hayut**, ruled that the motion shall be addressed at the hearing of the petitions.

I shall here note that following the hearing we deemed it fit to allow the ***Almagor* Organization** to join as a respondent, in light of CFH 7398/09 *The*

Jerusalem Municipality v. Clalit Health Services (April 14, 2015), where President **A. Grunis** ruled that joining is permissible for the sake of an efficient and complete decision in a case, or in order to contribute to clarifying the matter at hand.

24. As mentioned, a hearing on the petitions was held before us on April 30, 2018, after we received a preliminary response on behalf of the Respondents. During the hearing the Petitioners reiterated their main argument against the use of "live ammunition" as part of the IDF's policy on the use of live fire. According to the Petitioners, the events had a "civilian nature", and if the rioters are not actually and imminently endangering human lives, the use of live fire is prohibited. In this context, the Petitioners referred to rules and treaties from international law and to Israeli and foreign case law, which, according to them, supported these arguments.

25. The Respondents, on the other hand, argued that the petitions should be dismissed *in limine*, due to the presentation by the Petitioners of a flawed and lacking factual background, which was inconsistent with the actual state of affairs as to the nature of the violent events and the real dangers to human lives that they posed. In this context, the Respondents requested to present, *in camera* and *ex parte*, confidential intelligence information that is relevant to the violent events, as well as a copy of the classified Rules of Engagement that are applicable in this case, along with explanations. The Petitioners, however, refused to grant their consent to such review, and announced that they were only willing for with the Rules of Engagement to be presented without any explanation or additional specification whatsoever.

Although we warned the Petitioners that a refusal could lead to a presumption of regularity in regard to the Respondents' actions, they insisted on their objection and therefore the Rules of Engagement and the ancillary explanations of their contents, their manner of implementation, and various alternative actions were not presented to us.

26. During the hearing and in the presence of the parties, we also heard the statement of the Head of the International Law Department at the Military Advocate General Corps, Colonel **Eran Shamir-Borer**. He stated that although the Rules of Engagement are static, the paradigm under which they operate is dynamic in accordance with the reality on the ground (the topography of the area, the size of the threat, the extent to which the threat is actual and imminent, the response of the riots to warnings, the activity of the demonstrators and the involvement of terrorist entities among them, etc.). It follows that the means of deterrence which the IDF uses are also varied.

The Respondents further emphasized during the hearing that the Rules of Engagement permit firing towards the legs of a central rioter or of a central inciter, but are only carried out in the framework of the armed conflict that exists between Israel and the residents of the Gaza Strip, and only as a last resort, subject to strict requirements that derive from the principles of necessity and proportionality, and after all other means have been exhausted and failed.

27. The ***Almagor* Organization** argued that it is inappropriate to intervene in the discretion of the military forces with respect to the course of action that they exercise, when in the midst of continuous combat activity based upon security considerations.

28. At the end of the hearing, we instructed, as per the request of the Petitioners in the ***Yesh Din*** **Petition**, that the Petitioners be granted the opportunity to file the various supporting references mentioned during the hearing (and related thereto), because the preliminary response on the Respondents' behalf had been delivered to them (and to us) only on the eve of the hearing. It was also ruled that the Respondents and the ***Almagor*** **Organization** would be able to relate and file on their behalf in this context.

29. On May 1, 2018, the Petitioners in both of the petitions filed complementary supporting references on their behalf, *inter alia*: supporting references relating to the customary use of the "**Havana Principles**" (the U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990), supporting references relating to restrictions that apply to the use of force to suppress riots, and supporting references relating to the use of force against violent rioters at a border.

30. On May 6, 2018, the Respondents filed a completion of arguments on their behalf. The Respondents related to the use of potentially lethal force under the law enforcement paradigm of the law of Armed Conflict and under international human rights laws, and specified their position in all that relates to the legal status of the "**Havana Principles**", upon which the Petitioners are relying. In this context, the Respondents further stated that all of the judgments of the European Court of Human Rights, to which the Petitioners referred, deal with factual scenarios which clearly and absolutely differ from the events which are at the basis of the petitions, and no inference can be drawn to the case at hand.

31. On May 9, 2018, the Petitioners, with permission, filed a response to the completion of arguments by the Respondents, in which they rejected the Respondents' argument that the "**Havana Principles**" constitute "soft law", and are not binding. They further argued that the judgments cited in their complementary notice were meant to illustrate situations which raised the question of using potentially lethal force against violent rioters, and that they had not attemptted to argue that the factual circumstances in each reference were identical to what is taking place at the Israel-Gaza Strip border. Finally, it was argued that the Respondents did not lift the burden of demonstrating that the law allows firing towards a person who is considered a "central inciter".

32. On May 16, 2018, the Respondents filed an additional affidavit, with permission and with the Petitioners' consent, which was signed by the Head of the IDF's Operations Directorate, Major General **Nitzan Alon**, which included an update regarding the violent events, and a non-exhaustive list of acts of terrorism which had been committed during and under the cover of the violent riots but after the filing of the response dated April 29, 2018. In this context, it was noted that on May 4, 2018, there were violent riots in which approximately 11,000 people participated, during which: a grenade was hurled at IDF troops, the security fence was damaged, and approximately 9 incendiary kites were flown towards Israel. On May 11, 2018, approximately 20,000 people participated in violent riots during which the protesters engaged in: shooting towards the IDF troops, hurling explosive devices and grenades in an attempt to cross the fence and harm it, and setting fire to the *Kerem Shalom* Crossing by hurling Molotov cocktails. Finally, it was reported that the violent events

peaked on May 14, 2018, and took place at eight additional focus point (beyond the five permanent focus points). At these violent events, in which approximately 45,000 people participated, explosive devices were hurled into Israeli territory, live fire was shot towards IDF troops and significant IDF security infrastructures were damaged.

The Respondents once again emphasized that in order to present the entire factual picture to the Court an *ex parte* disclosure of relevant confidential information that is in their possession is necessary, and that this information is not being presented to the Court only due to the Petitioners' position on this matter.

33. In response to the aforesaid affidavit, the Petitioners in the ***Adalah* Petition** reiterated their position that the events at issue are of a popular-civilian nature, and that the characterization of these events is not affected by the fact that some of the participants are organizationally affiliated with the military arm of the *Hamas* organization.

34. In the response to the aforesaid affidavit, the Petitioners in the ***Yesh Din* Petition** argued that even the existence of life threatening events during the mass demonstrations cannot legitimize using potentially lethal force towards unarmed participants, as long as they do not imminently endanger human lives.

35. In its' response, the ***Almagor* Organization** argued that the violent riots are organized, directed and funded by the *Hamas* organization, and that the purpose of the demonstrations is both to serve as a cover for the attempts to harm and breach the security barrier that separates between Israel and the Gaza Strip and also to enable entrance of terrorists in order to commit terrorist attacks. In this context the ***Almagor* Organization** referred to the statements of the leaders and founders of the *Hamas* organization in interviews that were given to the media, in which they admitted that they instructed the participants of the events to equip themselves with arms and to use them during the riots, and even encouraged them to try to carry out an abduction of Israeli soldiers and civilians and to hand them over to the *Hamas* organization. They even declared in those interviews that among the 60 fatalities in the events of May 14, 2018, approximately 50 were member of *Hamas*.

Discussion and Ruling

36. After examining the entire material in the cases before us, hearing the parties' representatives in the hearing, and reviewing the supporting references that were attached following the hearing and in the completions of arguments – I have reached the conclusion that the **petitions are to be denied**, and I will suggest to my colleague the President and to my colleague, that we do so. I shall succinctly present below the reasons of this conclusion of mine.

The Normative Background

37. The essence of the petitions before us focuses, as mentioned, on the legality of the IDF Rules of Engagement, and on their actual implementation. Prior to addressing this, however, I shall begin by presenting the normative background that is relevant to the matter.

38. As has been ruled more than once by this Court, there is a continuous **armed conflict** between the State of Israel and those governing the Gaza Strip (and the *Hamas* terrorist organization), to which the international law of Armed Conflict applies (see, *inter alia*: HCJ 7015/02 *Ajuri v. The IDF Commander in the West Bank* [2002] IsrSC 56(6) 352; HCJ 769/02 *The Public Committee Against Torture in Israel v. The Government of Israel* [2006] IsrSC 62(1) 507 (hereinafter: the "**Targeted Killing Case**"), and recently: HCJ 4466/16 *Alian v. The IDF Commander in the West Bank* (February 14, 2017). Note: A further hearing is scheduled to take place in the **Alian** case, HCJFH 10190/17, however the matters that are under further discussion there are different from the questions before us).

39. The international law of Armed Conflict delineates two different paradigms for the use of force in the course of an **armed conflict**:

The first is the **conduct of hostilities paradigm** and the second is the **law enforcement paradigm**.

The conduct of hostilities paradigm relates to a situation in which the parties are actually combatting each other by various means and methods, and *inter alia*, addresses the attacking of "military targets" and the legality of various types of arms.

The law enforcement paradigm, in contrast, regulates the exercise of force in other situations in which actions for maintaining public order and security are necessary.

See: The report of the Public Commission to Examine the Maritime Incident of May 31, 2010 (Part 1, from January, 2011) (hereinafter: the "**Turkel Commission Report A**"), in paragraph 234; report of the Public Commission to Examine the Maritime Incident of May 31, 2010 (Part 2, from February, 2013) (hereinafter: the "**Turkel Commission Report B**"), on pages 48-83 and the references included therein).

Considering the fact that armed conflicts occasionally involve various operational scenarios, it can be said that both of the paradigms are relevant at all times, and in order to know which paradigm is applicable, it is necessary to examine the circumstances behind the concrete exercise of force. Thus, which paradigm regulates a specific exercise of force is a complicated and complex question, which first and foremost depends on whether the exercise of force is part of the hostilities. It is therefore difficult to classify complex events under only one paradigm because hostilities in an armed conflict are often intermingled with other actions.

As a rule, the Respondents analyze the exercise of force by the IDF towards the participants of the violent events addressed herein, as being covered, by default, under the law enforcement paradigm. This presumption is favorable to the Petitioners' arguments, as they, themselves, stated in the hearing. Alongside this, in certain circumstances, when there is information that indicates the actual participation of a certain person in the hostilities at the fence (for example, when a person is identified holding an explosive device in his hands) – the exercise of force against him is covered by the conduct of hostilities paradigm.

40. Although the law enforcement paradigm in the law of Armed Conflict is not

elaborately regulated in written sources, support can be found in various treaties (see, for example, Article 42 of the III Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949, and Article 43 of the Hague Regulations which are annexed to the Fourth Geneva Convention with respect to the Laws and Customs of War on Land from 1907). The Public Commission to Examine the Maritime Incident of May 31, 2010, also elaborated on the fact that the law enforcement paradigm is part of the **law of Armed Conflict**, when stating as follows:

> "Each use of force was assessed according to the applicable law - international humanitarian law. According to that legal regime, the use of force against civilians who are not taking a direct part in hostilities is governed by law enforcement norms, whereas direct participants can be targeted for such time they are taking part in hostilities" (*ibid*, in paragraph 234 of the **Turkel Commission Report A**).

Under the law enforcement paradigm of the law of Armed Conflict, use of potentially lethal force is permitted only as a last resort, and subject to strict requirements that derive from the principles of necessity and proportionality, meaning, this can only be done in circumstances in which there is an actual danger to life or to bodily integrity. Such danger could derive from the action of a single person or from an action of masses. Further elaboration on these matters shall be presented below.

Use of Potentially Lethal Force

41. Guiding rules as to the use of potentially lethal force have been prescribed in the rulings of this Court. In CrimA 486/88 *Ankonina v. The Chief Military Prosecutor* [1990] IsrSC 44(2) 353 (hereinafter: the "**Ankonina Case**") which dealt with the use of potentially lethal force in order to effect an arrest or prevent the escape of a detainee at a check-post in the Gaza Strip (when it was under full Israeli control) – the honorable Court ruled that a person's life can be harmed only in order to prevent an actual danger to life or to a person's bodily integrity. In this context, President **M. Shamgar** ruled as follows:

> One must avoid taking human life or harming bodily integrity when this does not reasonably correspond to the scope of the danger which one is attempting to prevent, even when at issue is the capturing of the offender
> […]
> The logical reciprocal relationship between the means applied and the evil which is trying to be prevented dictates delineating narrow boundaries to the officer with authority, who is required or who requests to exercise his powers in order to arrest an offender or prevent his escape. The maximum punishment that is prescribed by the law cannot be a clear and exclusive criterion for this purpose. It is therefore appropriate, as has already been noted, that a response which could harm life or bodily

> integrity be limited to circumstances in which a reasonable concern exists such that refraining from applying an extreme measure will lead to a result which creates a danger of the nature described above, on the part of those who are attempting to arrest him or prevent his escape.
>
> Instances in which permission is granted to exercise force, includes, for example […] the arrest of a person who is suspected of performing a hostile terrorist act that endangered or endangers the lives or severely endangers the bodily integrity of others (see: *ibid*, on pages 371-372)

42. In CA 751/68 *Ra'ed v. The State of Israel* [1971] IsrSC 25(1) 197, the honorable Court referred to the use of potentially lethal force for the objective of removing a danger to life or to bodily integrity. Here, a violent riot took place near Shfaram (within the State of Israel), and during an attempt to disperse it, a policeman's gunfire led to the death of one of the rioters. In that case the honorable Court ruled as follows:

> According to law, policemen are permitted, in order to perform their said duty, to stand their ground and not to retreat, and therefore, if consequently their lives or bodies are in danger, then they shall be justified to use such means as they deem necessary to both prevent the danger and to overcome the rioters, including use of firearms, even if this could lead to death or other bodily harm to any of the rioters […]
>
> However, it is necessary to agree that even in these conditions, one must never justify the act of an intentional or indifferent shooting on the part of the policeman […] which is completely unrelated to reasonable force (see: *ibid*, on page 216).

43. The recent HCJ 1971/15 *Al-Masri v. The Military Advocate General* (July 18, 2017) (hereinafter: the "**Al-Masri Case**"), addressed the request of the petitioners to obligate the Military Advocate General to instruct the Military Police Criminal Investigation Division to initiate a criminal investigation of circumstances in which one of the petitioners was wounded, allegedly as a result of fire in his direction by an IDF soldier at the Israel-Lebanon border. This arose during the attempt by hundreds of Palestinians and foreigners to cross the network of fences that separate between Lebanon and the State of Israel on May 15, 2011, on the occasion of the "*Nakba* Day". In that case, my colleague, Justice **U. Shoham**, with the consent of the entire bench, denied the petition and ruled, *inter alia*, that the fire in the direction of the rioters who were attempting to trample and breach the border fence – and by doing so created an actual danger of infiltration of terrorists from an enemy state into the territory of the State in an area that is adjacent to Israeli towns – was carried out as a last resort, when the rioters did not comply with the warnings that called on them to

cease their actions, and after there was no other practical option of using alternative means for crowd dispersal.

I shall here note that the Court's conclusion in the **Al-Masri Case**, as to the IDF's fire in the circumstances of that case corresponding with the provisions of international law and the rules of Israeli law, **should *prima facie* apply *a fortiori* to the case at hand**, in light of the characteristics of the current events, in which the threat that is posed to Israeli civilians and the security forces as a result of the violent riots on the Gaza Strip border, is greater and more severe than that which was posed to the security forces and Israeli civilians in the events that were the subject of the **Al-Masri Case**.

44. The option of dispersing violent riots by the military is also mentioned in the legal literature that addresses this matter, and it is stated in one of the sources as follows:

> Situations of armed conflict and military occupation are often characterized by high political tensions and unstable general security. As a result, soldiers may also confront riots, violent demonstrations, opportunistic banditry, and other types of civilian violence. While such civilians do not use violence in direct support of a party to an armed conflict at a level of organization and intensity that qualifies them as participants in the armed conflict, soldiers and other security forces may still take measures against them (See: Jan Arno Hessbruegge, Personal Self-Defense in Military-Led Operations (in Human Rights and Personal Self-Defense in International Law), p. 221-223 (2017)).

It is here appropriate to note that in accordance with the Rules of Engagement that the **United States** applied in the law enforcement scenario in Haiti, it was clarified that lethal force can be used as a last resort in order to disperse violent riots, even in a situation in which the civilians that are participating in the riots are not armed (see: Rules of Engagement Handbook for Judge Advocates (May 1, 2000), Res/20 of the Supporting References Binder on behalf of the Respondents, dated May 7, 2018). Additionally, it was officially published by the United States Government that related to violent and unarmed riots, sniper fire can be used and lethal force can be applied towards: "Leaders or Troublemakers" (see: US Army Field Manual 3-19.15, Civil Disturbance Operations, p. 2-15 (2005)).

45. An additional insight must be added here:

If some of the demonstrators can be classified as direct participants in the armed conflict that exists between Israel and the *Hamas* (this is certainly the case with respect to the terrorists and the armed persons among them; two close categories also includes both members of the terrorist organizations who disguise themselves as demonstrators and also participants in the protest who agree to serve as "human shields" for the terrorists hiding behind them), then the demonstrators lose the protection granted to them pursuant to the principle expressed in Article 51(3) of the

First Additional Protocol to the Geneva Conventions, which prescribes that the protection afforded to them as civilians shall be removed for such time during which they (actually) take a part in hostilities. In situations such as those, it is highly likely that the **three pronged criterion** – which was outlined by the team of international experts that the **Red Cross** convened – would be fulfilled. Upon the fulfillment of the three conditions by the demonstrators, civilians who take part in hostilities lose their protections. The conditions are as follows:

a) The acts must be highly likely to cause damage to the military operations and the military capacity of the enemy force or to inflict death or injuries and destruction to the enemy's civilians (this being the Threshold of Harm Condition);

b) There must be a direct causal link between the prohibited activity and the minimal damage defined above (this being Direct Causal Link Condition);

c) The acts were especially designed to cause damage to part of the military effort of a party to the conflict (this being the Belligerent Nexus Condition).

See: Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (International Committee of the Red Cross 2009), p. 46

Also review: ICRC, The Use of Force in Armed Conflicts – Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms 26, f. 70 (Gloria Gaggioli ed., 2013).

Thomas H. Lee, *The Law of War and the Responsibility to Protect Civilians: A Reinterpretation*, 55 HARV. INTL. L. REV. 251 (2014).

Christian Marxsen, *Territorial Integrity in International Law – It's Concept Implications for Crimea*? 75 ZAÖRV REV. 7-26. (2015).

46. In light of all of the aforesaid, it appears that the use of potentially lethal force for the sake of dispersing a mass riot – from which an actual and imminent danger is posed to life or bodily integrity – is, in principle, permitted, **subject to proving necessity and to proportionality**.

47. Considering these fundamental principles, I shall now address the relevant Rules of Engagement.

The Rules of Engagement

48. The Rules of Engagement of the security forces in the area of the Gaza Strip security barrier are classified and, as mentioned, have not been presented to us due to the Petitioners' objection that we review them, along with receipt of relevant explanations, *ex parte*. **It is here appropriate to note that, as we have been informed, the wording of the Rules of Engagement was approved by the Military Advocate General and by the Attorney General**.

49. Justice **E. Mazza** elaborated on the nature of such Rules of Engagement in CA 3889/00 *Lerner v. The State of Israel, The Ministry of Defense* [2002] IsrSC 56(4) 304, on pages 313-314, stating as follows:

> The main objective of the Rules of Engagement is operational: to instruct the IDF soldiers as to the courses of action that they must take in certain typical situations which may require, or justify, using weapons. However the delineation of these rules also has an educational aspect in that they assist the internalization by the soldier of fundamental values, such as the purity of arms and the rights of a suspect, and they enhance the chances that the soldier shall also preserve these values when encountering stressful and pressured situations.

50. In accordance with the legal rules that were described above, and with the information that was provided to us on behalf of the Respondents – the Rules of Engagement that are the subject of the petitions before us allow the use of "live ammunition" only in order to deal with violent riots, from which an actual, imminent and close danger is posed to IDF troops or Israeli civilians. In accordance with these Rules, the danger shall first and foremost be dealt with by verbal warnings and non-lethal means. If the use of these means does not remove the actual and imminent danger that is posed from the violent riot – and only in such case – do the rules permit, according to what we have been told, precise shooting towards the legs of a central rioter or central inciter, in order to eliminate the close and foreseeable danger.

In this context it is appropriate to refer to the description of the conduct of the IDF troops during the event in the **Al-Masri Case**, where the court stated as follows:

> The event which occurred on the Israel-Lebanon border, on May 15, 2011, was a mass, violent and dangerous event. There were more than 1,000 rioters in the event, who threw stones, rocks and Molotov cocktails towards IDF soldiers, and caused real damage to the border fence. The event ended with the injury of a number of IDF soldiers, the injury of dozens of South Lebanon soldiers, and a number of fatalities among the rioters (between 6 and 10), as well as dozens of injured among them. The rioters, including the petitioner, did not respond to the many warning shots by the Lebanese Army, and therefore the IDF soldiers subsequently opened fire towards the legs of the central rioters at the event, **who were damaging the border fence, in order to prevent their infiltration** into Israel (see: *ibid*, in paragraph 23; original emphasis – **H.M.**)

In light of the importance of the matter, I shall reemphasize that in accordance with the information delivered to us with regard to the relevant Rules of Engagement – firing towards the legs of a central rioter or central inciter is meant to occur only as

a last resort, and subject to strict requirements that derive from the principles of necessity and proportionality (as were recognized in the **Al-Masri Case**).

Given the aforesaid, I shall now turn to examining the merits of the Petitioners' arguments, however prior to doing so, I must preface with an additional remark as to the status of the Gaza Strip and with regard to abiding with the rules of Israeli and international law with respect thereto.

51. In HCJ 9132/07 *Al-Bassiouni v. The Prime Minister* (January 30, 2008), this Court, by President **D. Beinisch** (with the consent of the other members of the bench: Justice **E. Hayut** (as was her title at the time) and Justice **J. Elon**), ruled that since the disengagement was effected – Israel does not have "effective control" over that which happens place in the Gaza Strip. However, it was ruled there that during periods of combat between Israel and whoever is controlling the Gaza Strip, the law of Armed Conflict should be upheld. For discussion and elaboration on this matter, see: Dana Wolf, Transitional Post-Occupation Obligations under the Law of Belligerent Occupation 27 Minn. J. of Int'l L. 5 (2018).

From the General to the Particular

52. I am of the opinion that in the circumstances of the violent events that underlie the petitions, and as the violent riots and all that they entail came closer to the security barrier – the Respondents' argument that an actual and imminent danger to the IDF troops as well as to Israeli civilians in the towns in the Gaza periphery, was occasionally created, cannot be ruled out. As mentioned, this Court elaborated on the existence of such a danger in the **Al-Masri Case** which presented similar circumstances and addressed a situation in which rioters – of much smaller numbers than the rioters in the case at hand – attempted to breach the security barrier between Lebanon and Israel. It was ruled as follows:

> It is here appropriate to mention that the legality of the shooting that was carried out in the course of the event must be examined considering the special circumstances which are indicative of the operational nature of the event. At issue is an event during which a violent riot occurred on Israel's border with Lebanon, which included the demonstration of severe violence towards IDF soldiers and the causing of significant damage to the border fences, amounting to a concern that terrorists would infiltrate into the territory of the State. The rioters, who did not respond to the many warning shots by the Lebanese Army, continued to advance towards the fence, while attempting to breach it. The IDF soldiers, as well as the State's civilians who live adjacent to the border, were at an actual risk of harm to their safety and body (*ibid*, in paragraph 31).

53. In these senses: The intentions of the rioters who are the subject of these petitions, their huge number, the means at their disposal and the violence they exercised – *prima facie*, on a factual level, distinguish the mass events we are

discussing from mere demonstrations and from ordinary "civilian" protests. Therefore, the "**Havana Principles**" are *a priori* not relevant in this case, and moreover, the Respondents are of the opinion that these principles constitute "soft law". I am thus of the opinion that in the circumstances at hand, the legal status of the "**Havana Principles**" can be set aside for future deliberation. In any event, the majority of Israeli and comparative case law that the Petitioners presented in these contexts addresses local situations of riots in the framework of demonstrations (which were not held during periods of the existence of an armed conflict), and therefore the said references are irrelevant to the case at hand (the only foreign case that has a certain proximately whatsoever – shall be discussed in paragraph 58 below).

54. I shall further add that according to my position, the incidents that are described do not address a popular, ordinary, or spontaneous protest, and moreover the violent riots which are the subject of the petitions occasionally created an actual and imminent danger to the lives and bodily integrity of the security forces and Israeli residents. This danger was enhanced and exacerbated due to the acts of terrorism that were carried out from within them and under their cover. The violent riots were organized, coordinated and directed by *Hamas*, which is a terrorist organization that is in an armed conflict with Israel. It can also be said that *Hamas* requested to reap a military benefit from a possible breach of the security barrier, which would have also assisted the infiltration of terrorists into Israel. In order to promote this objective, a not insignificant number of participants in the violent events and of the casualties, were activists in the *Hamas* organization, including its military mechanisms. They were sent in order to disturb public order and security, to excite crowds and encourage them to advance towards the territory of Israel, to lead to the breach of the security barrier, and to carry out terror attacks.

In these contexts, the ***Almagor* Organization** referred to publications of the **Major General Meir Amit Intelligence and Terrorism Information Center** regarding the identity of those killed in the "Great Return March" events, the majority of whom were terrorist activists, or person who were identified with terrorist organizations. The ***Almagor* Organization** also referred to publications from the media in which Salah Al-Bardwil, a member of *Hamas'* political bureau, said in an interview on a Palestinian television channel that according to official figures in the "last event" (May 14, 2018), 61 *Shahids* (martyrs) were killed, among which 50 *Shahids* belong to the *Hamas* organization (approximately 80%). The ***Almagor* Organization** also referred to the statements made by Yahya Sinwar, the leader of *Hamas* in the Strip, on April 6, 2018, before a crowd of demonstrators in the Strip, in which he stated that "[Israel] should wait for the great push, we will level the fence and tear their hearts from out of their bodies."

Similar information was filed on behalf of the Respondents in the notice dated May 16, 2018, which was supported by the affidavit of Major General **Nitzan Alon**. The affidavit stated that, in accordance with the figures in the IDF's possession, dozens of the fatalities in the events of May 14, 2018 were activists of the military arm of *Hamas* and of the Islamic *Jihad* organization.

55. The said threats eventually did not materialize in their entirety, *inter alia*, due to the fact that the security forces analyzed the nature of the anticipated events ahead of time and prepared accordingly. And yet, a large number of acts of terrorism were

committed under the cover of the violent riots. Thus, according to the Respondents' declaration, during the last month, at the instruction of senior people from the military arm of the *Hamas* and with the involvement of the ground commanders' levels, demonstrators committed dozens of acts of sabotage against Israeli military and civilian infrastructures near the Gaza periphery, under the cover of the riots. These acts included dozens of grenades and explosive devices that were planted in the area of the fence or hurled towards IDF troops, causing damage to military infrastructures. In addition, approximately 25 Palestinians who crossed into Israeli territory and were caught, and dozens more who crossed and returned to the territory of the Strip, in order to harm the barrier and the infrastructures adjacent thereto and the forces operating in the area of the fence. Weapons were caught in the possession of some of the rioters and some of them admitted in their interrogation that they had crossed into Israeli territory in order to harm IDF troops. Additionally, significant damage was caused to civilian infrastructures and to widespread agricultural areas as a result of fires, which were caused by the "parachuting" of improvised devices and Molotov cocktails into Israeli territory by means of improvised kites and hurling means.

It is thus clear that the Petitioners' attempt to present the events as "unarmed civilian protests" in which "there apparently were events of violence, such as hurling of rocks, burning of tires, attempts to damage the border fence and even a number of events of shooting and hurling Molotov cocktails" (see: Section 37 of the ***Yesh Din*** **Petition**, and also see Sections 10 and 65 of the ***Adalah*** **Petition**) – does injustice to the reality of the matter, to say the least.

56. Given the above background, I shall reemphasize that the judgments of this Court have recognized the fact that the dispersal of a violent and life-threatening riot – including in circumstances of breaching a security barrier between enemy territory and Israeli territory – can, upon the existence of certain necessary conditions, including a legal objective, allow the use of potentially lethal force (see: the **Ankonina Case**; the **Al-Masri Case**).

57. The basic principles of international law also permit the use of potentially lethal force, provided that it is applied for recognized and specific objectives - *inter alia*, for the sake of self-defense, or the defense of others – and all use of force shall be subject to the limitations of a **concrete necessity** and **proportionality** (the **Turkel Commission Report A**, *ibid* in paragraph 188). As mentioned in the Respondents' response and as emerges from the material that was before us, some of the rioters attempted to trample and breach the border fence, and by doing so created a tangible and imminent danger of infiltration of terrorists into the territory of the State, in areas that are adjacent to towns on the Israeli side. Among the rioters were those who hurled rocks and Molotov cocktails towards IDF troops. Therefore, it appears that live ammunition was used in order to obtain a legal objective – defending the citizens of the State of Israel and IDF soldiers. It further emerges from the Respondents' response that the shooting of live ammunition at the rioters was carried out only after no practical option of using other means to disperse the crowds had been found and after the use of more moderate means was to no avail. According to the Respondents, measured and directed live ammunition was used only in such a state of affairs, as a last resort and in accordance with the Rules of Engagement. The fire was against terrorists and towards the legs of the central rioters who were harming the security barrier (compare: the **Ankonina Case**).

58. During the hearing, the Petitioners relied on a judgment of the European Court of Human Rights (see: *Issak v. Turkey*, 24 June 2008, Application no. 44587/98) (hereinafter: the "**Issak Case**") (this judgment was filed to us following the hearing). The judgment concerned incidents that had occurred in Cyprus and discussed the use of force against violent demonstrators at a border and appeared, according to the Petitioners, to be the judgment closest to the case at hand. The case, however, is **materially different** from the events underlying the petitions at hand. In that case, at issue was a riot that took place based on the tension that existed between Turkey and Cyprus, during which a group from the Cyprus Motorcycle Federation – that had set out from Berlin and included Greek Cypriots and other Europeans – demonstrated against the Turkish presence in Northern Cyprus. Upon reaching the demilitarized zone separating the southern part of Cyprus from its northern part – where U.N. forces are stationed – the demonstrators advanced by foot towards the other side of the zone. At the same time, a crowd of Turkish civilians who had positioned themselves next to the Turkish soldiers and policemen stationed in the zone, began gathering opposite the Cypriot demonstrators. In that case the European Court of Human Rights held, **retroactively**, that the Turkish soldiers and policemen did not try to stop the riots, but instead participated therein alongside the Turkish crowd that arrived at the area. At a certain point, Antonios Issak (the deceased Greek-Cypriot) found himself surrounded by approximately 15 Turks and Turkish-Cypriots, some of whom were policemen and soldiers, who beat him to death.

I am of the opinion, based on a number of reasons as I shall briefly explain below, that in these circumstances, it is justified to distinguish between the events which are the subject of the petitions at hand and the **Issak Case**, and that conclusions from the judgment of the European Court of Human Rights cannot be applied to the matters at hand:

First, in the **Issak Case**, the riot occurred during a time of relative calm without ongoing hostilities between the parties, and was located in a demilitarized zone with the presence of U.N. forces (and not in enemy territory, as in the case at hand).

Second, in that case, the Turkish security forces did not attempt to stop the riots but rather participated in them themselves (as the *Hamas* entities actually do in this case).

Third, the use of force against the deceased was carried out while he was surrounded by soldiers and policemen who could have arrested him, but instead violently beat him to death.

Fourth, the European Court of Human Rights held that in those circumstances, the use of lethal force was not necessary or justified (this is noted without determining whether international law discussed in that case is binding or not).

59. In furtherance to that stated above, we shall now move from the corridor to the parlor and examine the merits of the Petitioners' arguments. As may be recalled, the petitions at hand raised arguments against the legality of the IDF's Rules of

Engagement – regarding their actual implementation, regarding the creation of an "effective mechanism for implementation of the prohibition" to exercise prohibited lethal force, and regarding the prohibition on using snipers or live ammunition during the events which are the subject of the petitions.

60. According to case law, the range of the Court's intervention in decisions that are based on operational considerations is very limited and narrow. In HCJ 3261/06 *Physicians for Human Rights Association v. The Minister of Defense* (January 31, 2011) (hereinafter: the "**Physicians for Human Rights Association Case**"), the Court addressed the IDF's operational rules regarding artillery firing ranges in the Gaza Strip and ruled as follows:

> From the outset we were of the opinion that the boundaries of this court's intervention in the petition are very limited. The petition at hand is directly linked to clear professional-operational aspects of the planning of the IDF's combative and defensive activity against the Qassam rockets that are launched towards Israeli territory with the aim of harming its residents, since a remedy was requested therein to instruct the IDF to avoid acting in a certain operational manner while preferring a different one. This demand creates difficulty since it embeds clear military operational aspects, and as it is known, the military authorities are entrusted with such matters and have the expertise therein. Therefore the court will be inclined to stand away from intervening therewith" (*ibid*, paragraph 10).

Based on this case law, this Court also denied additional petitions of similar character. For example, the following was ruled concerning a petition that challenged the legality of the use of Flechette shells:

> The petitioners have requested that we prohibit the military from using Flechette shells. Once we have found that the use of this ammunition is not prohibited under the law of Armed Conflict, the petitioners' request cannot be granted. Existing case law prescribes that the "choice of weapons which the respondents use in order to prevent, in advance, murderous terrorist attacks, is not among the matters in which this court will find appropriate to intervene" (HCJ 5872/01 *Barakeh v. The Prime Minister* [2002] IsrSC 56(3) 1). We shall note, above and beyond that which is necessary, that the Respondents satisfied us by showing that the use of this ammunition was regulated by IDF rules that bind the commanders of the ground forces. The decision as to whether the conditions on the battle field justify the use of Flechettes is, of course, to be decided by the authorized commander. When formulating his decision, the commander is obligated to act in accordance with the

> professional guidelines, which are primarily intended to prevent harm to the residents not involved in activity that endangers the IDF soldiers or Israeli civilians (HCJ 8990/02 *Physicians for Human Rights v. Commander of the Southern Command* (April 27, 2003)).
>
> (also see: The **Physicians for Human Rights Association Case**; HCJ 3022/02 **Cannon *(LAW)* -** *Palestinian Organization for the Defense of Human Rights and the Environment v. The IDF Commander in the West Bank* [2002] IsrSC 56(3) 9; HCJ 2940/18 *Hass v. The Chief of Staff, Lt.-Gen. Gadi Eizenkot* (April 12, 2018)).

61. In the circumstances of the case at hand, the Petitioners indeed posited that the dominant aspect of their petitions focuses on the legal arguments. I, however, have difficulty seeing how our intervention at this stage would not exceed the boundaries of judicial review which are customary in our legal system. Given that the Rules of Engagement, as such, comply with the required criteria, the decision as to **how they are implemented** is subject to the discretion of the commanders on the ground. In contrast, our role as the Court is limited to judicial review of compliance with the rules of Israeli and international law that bind Israel, and by which the Respondents have declared that the State abides (compare: the **Al-Bassiouni Case**).

62. It is here appropriate to reiterate that we offered to the Petitioners that they consent to our *ex parte* examination of the relevant Rules of Engagement and all of the accompanying classified material upon which the Respondents are relying, prior to deciding whether to issue an order *nisi* in the petitions. As mentioned, the Petitioners refused this offer, and made their consent contingent upon conditions which could not be accepted. Given that the Rules of Engagement address **various situations in different ways**, it is not possible to interpret or analyze these Rules without understanding the specific situations being addressed. We therefore warned the Petitioners that such a refusal could lead to the creation of a presumption of regularity with regard to the Respondents' actions, however they insisted on their refusal (see and compare: HCJ 7993/11 *Hamdan v. Military Judge* (January 18, 2012); HCJ 5696/09 *Mughrabi v. Commander of the Home Front Command – Major General Yair Golan* (February 15, 2010)).

Given the above, I am of the opinion that the existing factual foundation does not, at this time, allow any intervention whatsoever, in accordance to that which is requested in the petitions. This is due to the fact that we do not possess any concrete information regarding: the identity of the central activist and inciters; the nature of their actions; their organizational affiliation and their involvement in terrorist activity, or in any other prohibited hostile activity; and whether and in what manner they posed an actual and imminent danger, which – as a last resort – necessitated fire.

63. Prior to concluding, it is important to add that leading up to the violent events at issue in this case, there was significant preparation within the IDF, during which the commanders briefed the forces deployed in the area regarding the Rules of Engagement in the region of operation, and the forces were equipped with non-lethal

means for the dispersal of riots. The Respondents stated on more than one occasion that they attribute great significance to reducing the scope of casualties in the violent riots, to the extent possible, given the circumstances. Accordingly, we have noted the Respondents' notice that immediately following the violent events on March 30, 2018, and consistently since then, there has been an orderly process for debriefing and extracting operational lessons for future implementation. The security forces were also given various instructions which were intended to further reduce the scope of casualties.

In addition, the Respondents informed us that they referred certain instances – when it was alleged that a person's death was caused as a result of IDF fire that was not in accordance with the Orders and Rules of Engagement – to be examined by the General Staff's independent mechanism for debriefing unusual events, which was established following the recommendation of the **Turkel Commission Report B**. In this context it shall be noted that the mission of the mechanism is to conduct a comprehensive factual examination and debriefing of the events and a gathering of relevant data and materials, in order to provide Respondent 2 with full factual information, to the extent necessary, in order to decide whether there is a reasonable suspicion of a criminal offence and whether to initiate a more in-depth criminal investigation. We assume that the multitude of fatalities and wounded until now, and allegations by the Petitioners that many of the demonstrators were injured in upper body parts, and some of them in the back – will lead, on the one hand, to the extraction of operational lessons regarding implementation of alternative non-lethal means to the extent possible, and on the other hand, to a thorough examination, by means of the mechanisms mentioned here, as to what happened in the past.

64. In light of all of the aforesaid, I am, of the opinion that we cannot examine the means that the IDF exercises in response to the violent events that underlie the petitions for two reasons. First, due to the significant restraint that is required in applying judicial review in all that relates to operational military activity that is not *prima facie* contrary to the law. And second, **especially in the circumstances of this matter, when the review is requested with respect to the implementation of operational policy that is occurring in real time**. Therefore, I have found it appropriate to also leave for "further review" the question of the ex-territorial application of the **Basic Law: Human Dignity and Liberty** and whether and to what extent is applies in these circumstances. (compare: HCJ 1661/05 *Gaza Coast Regional Council v. The Israel Knesset* [2005] IsrSC 59(2) 481, on pages 560-561 (2005)). This also holds true regarding the questions on right of standing that the Respondents raised in their request to dismiss the petitions *in limine*.

65. For the avoidance of doubt it shall be finally clarified that all stated above is not intended to derogate in any way whatsoever from the security forces' obligation to act in accordance with the Rules that apply thereto, both by virtue of Israeli law and by virtue of international humanitarian law. This obligation also requires the security forces to examine, increase, and improve, to the extent possible, the use of alternative non-lethal means, all alongside maintaining an orderly process for debriefing and extracting operational and other lessons for implementing them.

66. While acting to prevent conflict in the context and risk of recent events, I assume that the Respondents will continue to comply with their declaration – as was

delivered to us in writing and during the hearing that was held before us – that they and the soldiers have and will act in accordance with the binding rules of international law and the local Israeli law and honor the humanitarian obligations that are imposed upon them by virtue of the law of Armed Conflict. I have therefore reached the conclusion that the **petitions, in their current format, are to be denied** (and it follows that the motion for an interim order is also not granted), all without an order for expenses, and I shall suggest to my colleague the President, **E. Hayut**, and to my colleague, Justice **N. Hendel** that we do so.

Deputy President

President E. Hayut:

I concur with the conclusion that my colleague, Deputy President **H. Melcer**, reached pursuant to which the petitions are to be denied, and I shall request to add and specify a number of reasons that led me to this conclusion.

1. Since 2007, the Gaza Strip has been under the control of the *Hamas* organization, which has been declared a terrorist organization in Israel and worldwide (*inter alia*, in the United States, Britain and the European Union). For approximately 30 years now, there has been an armed conflict between Israel and the *Hamas* organization, which operates, besides in Gaza, also in the Judea and Samaria region (see HCJ 201/09 *Physicians for Human Rights v. Prime Minister* [2009] IsrSC 63(1) 521, 534 (hereinafter: the "**Physicians for Human Rights** Case"); HCJ 9132/07 *Al-Bassiouni v. Prime Minister*, paragraph 18 (January 30, 2008) (hereinafter: the "**Al-Bassiouni** Case"); The Public Commission to Examine the Maritime Incident of May 31, 2010 – The Turkel Commission **The Commission Report**, Part A, 43-44 (2011) (hereinafter: the "**Turkel Commission**" and the "**First Turkel Report**"); regarding this matter, also see paragraph 38 of the opinion of my colleague, Deputy **H. Melcer** and the additional supporting references presented there).

This is an armed conflict with unique characteristics. It does not exist between two states, but rather between Israel, as a sovereign state, and a terrorist organization. In the **Rachel Corrie** case, I stated in this context that:

> Indeed, modern warfare is changing face. To a large extent, it no longer entails a war waged by the army of one state against the army of another state, but rather a war, sometimes a daily one, against **new threats that we did not know in the past**, created by various terrorist entities in the local Israeli arena and in the international arena. (emphases added; CA 6982/12 *The Estate of the Late Rachel Aliene Corrie, RIP v. The State of Israel, The Ministry of Defense*, paragraph 11 (February 12, 2015)).

2. Although it is not an armed conflict between two states, the position of the Israeli legal system is that the armed conflict between Israel and *Hamas* should be

classified as an international armed conflict (see: the **Physicians for Human Rights** Case, ***ibid***; HCJ 769/02 *The Public Committee Against Torture in Israel v. The Government of Israel* [2006] IsrSC 62(1) 507, 549 (hereinafter: the "**Targeted Killings** Case"); the **First Turkel Report**, ***ibid***). As has been ruled on more than one occasion, the conflict is not taking place in a normative void and is subject to the principles of international law and to relevant Israeli law (the **Al-Bassiouni** Case, paragraph 20; the **Targeted Killings** Case, on pages 545-547; HCJ 3451/02 *Al-Madani v. The Minister of Defense* [2002] IsrSC 56(3) 30, 34).

3. It is customary in international law to refer to two paradigms that legally regulate operational actions of security forces. The first being the **conduct of hostilities** paradigm, and the second being the **law enforcement** paradigm. The first paradigm, as a rule, refers to **combative** situations, while the **law enforcement** paradigm regulates the forces' conduct in situations in which actions of law enforcement and maintenance of public order and safety are being carried out (see the **First Turkel Report**, on pages 187-188; for the position of the Red Cross, see: ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts Report 33 (2015) (hereinafter: the "**Red Cross Report**"); Nils Melzer, Conceptual Distinction and Overlaps Between Law Enforcement and the Conduct of Hostilities *in* THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 34-33 (Terry D. Gill & Dieter Fleck ed., 2010) (hereinafter: "**Nils Melzer**")).

As mentioned, each of the two paradigms relates to different operational scenarios and therefore delineates different rules for the conduct of the forces on the ground, including the policy on using force and particularly potentially lethal force. Succinctly, the conduct of hostilities paradigm distinguishes between civilians and between combatants or terrorists. The starting point is that civilians are entitled to protection against harm, and that no exercise of force towards military targets which is foreseen to lead to harm to civilians or civilian targets, should be permitted, if the harm is not proportional to the military benefit that is expected from the actions (see, for example, Articles 51(5)(b) and 57 of the **First Additional** Protocol to the Geneva Convention (August 12, 1949), which have customary status; the **Targeted Killings** Case, on pages 573-577; Orna Ben-Naftali and Yuval Shany **International Law Between War and Peace** 154-157 (2006)). In the law enforcement paradigm, the authority to use force is more limited, since it relates, as a rule, to situations in which the objective is to enforce order. Under this paradigm, potentially lethal force shall be used in order to obtain certain objectives (the scope of which is disputed between the parties before us), and as a last resort after the use of less harmful means has been exhausted (Nils Melzer, on pages 283-273; ICRC, The Use of Force in Armed Conflicts – Interplay Between the Conduct of Hostilities and Law Enforcement Paradigms 9-8 (Gloria Gaggioli ed., 2013) (hereinafter: the "**Red Cross Experts' Document**")).

4. The war on terror and on the terrorist organizations faces Israel – and in recent years also other countries around the world – with challenges which are not simple when dealing with complex scenarios which do not clearly fall into one of the two categories that were stated above – an act of "combat" or an act of "law enforcement". Scholar Kenneth Watkin, who was an observer in the Turkel Commission elaborated on this:

> **Global terrorism seems to straddle the law enforcement and armed conflict paradigms** […] Both military forces and their traditional law enforcement counterparts may be confronted with threats that range from violence associated with normal criminal activity to military type attacks under circumstances where **it could be difficult to distinguish initially the nature or scope of the threat**
> (emphases added; Kenneth Watkin, Warriors Without Rights? Combatants, Unprivileged Belligerents, and Struggle Over Legitimacy, HARVARD PROGRAM ON HUMANITARIAN POLICY AND (CONFLICT RESEARCH 66 (2005); Kenneth Watkin, Controlling the Use of Force: A Role for Human Rights Norm in Contemporary Armed Conflicts, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 5 (2004); Yuval Shany "The Law Enforcement Paradigm and the Armed Conflict Paradigm" the Israel Democracy Institute (September 2, 2008), available at: www.idi.org.il/parliaments/5478/6935).

The Turkel Commission also elaborated on this matter, stating that "there may be operations during armed conflict which lie on the borderline between combat actions and law enforcement activity" (The Public Commission to Examine the Maritime Incident of May 31, 2010 – The Turkel Commission the **Commission Report**, Part 2, 64 (hereinafter: the "**Second Turkel Report**")). In complex situations such as these, changes that occur on the ground could necessitate an individual examination of the appropriate action paradigm for each concrete use of force (see the discussion in this context in the **Red Cross Experts' Document**, on pages 24-28; see the Red Cross' position in the **Red Cross Report**, on pages 33-37).

5. Over the years Israel has been forced to repeatedly deal with such complex situations during the continuous armed conflict between it and *Hamas* and the other terrorist organizations that operate in our region. In furtherance thereof, the courts have been required, on more than one occasion, to characterize the operational activity in concrete cases and to determine criteria to determine, for example, whether the case is a "combative" event which is covered by the exemption from tort liability pursuant to Section 5 of the Civil Wrongs (State Liability) Law, 5712-1952 (CA 5964/92 *Bani Odeh v. The State of Israel* [2002] IsrSC 56(4) 1, 9 (hereinafter: the "**Bani Odeh** Case"); also see CA 1459/11 *The Estate of the Late Muhammed (Nabil) Nafa Hardan,RIP v. The State of Israel, The Ministry of Defense*, paragraphs 17-18 (June 16, 2013). For cases in which an action began as a "policing" action but became a "combative" action due to a complication which the forces encountered or a sudden change of circumstances, see for example CA 8384/05 *Salem v. The State of Israel* (October 7, 2008); CA 3038/05 *Zidan v. The Military Commander in the Judea and Samaria Area* (August 9, 2006); CA 8599/02 *Hazima v. The Military Commander in the Judea and Samaria Area* **(**February 26, 2006) – in which routine IDF patrol troops found themselves under a direct attack of fire, rocks or other objects; on the other hand, compare CA 361/00 *Dhaher v. Captain Yoav* [2005] IsrSC 59(4) 310; CA

5604/94 *Hamad v. The State of Israel* [2004] IsrSC 58(2) 498; CA 2176/94 *The State of Israel v. Tabenja* [2003] IsrSC 57(3) 693); the **Bani Odeh** Case; also see LCA 10482/07 *Alawna v. The State of Israel* (March 17, 2010) which addressed an act which was combative by nature during which there was a pause the nature and essence of which was not clarified; for a case in which it was ruled that firing from within an outpost in order to prevent the infiltration of hundreds of rioters constitutes a "combative" act, see CA 9561/05 *Hatib v. The State of Israel* (November 4, 2008)).

6. The events which are the subject of the petitions before us were reviewed elaborately and in detail in the opinion of my colleague, the Deputy, and there is no need to add thereto. I shall state in brief that for the past month and a half violent large-scale events have been taking place adjacent to the Gaza Strip border fence (hereinafter: the "**Fence**" or the "**Border Fence**") in which tens of thousands of Gaza Strip resident Palestinians have been participating, which are organized and funded by the *Hamas* organization and the other terrorist organizations that operate in the Strip. The organizers of these events have set a goal to breach the Border Fence, infiltrate into Israeli territory and commit terrorist attacks against the Israeli security forces and Israeli residents who live on the other side of the Fence. During those events, the Palestinians indeed acted to sabotage the Fence and breach it, *inter alia*, while creating a smoke screen by burning tires. They also committed acts of terrorism that included hurling grenades and Molotov cocktails, planting and hurling explosive devices and firing at the Israeli forces. During these events, the Palestinians also launched incendiary kites which caused widespread fires and destruction of significant fields and property in Israeli towns adjacent to the Fence. In one of the events, the Kerem Shalom Crossing, which was used for the transfer of goods, fuel and gas, from Israel to the Strip, was completely destroyed. These events peaked, to date, on May 14, 2018, with the participation of approximately 45,000 Palestinians who spread out over 13 focus points along the Border Fence in order to commit the actions described above.

7. These events present the Israeli security forces with one of the most significant challenges they must face. This is due to the complex state of affairs which the *Hamas* organization and the other terrorist organizations who are leading the events are – intentionally – creating on the ground. The complexity of the situation primarily derives from the intermingling of the terrorist activists among the civilian population, including women and children, participating in the events. This intentional intermingling is intended to blur and create difficulty in locating the terrorist activists from among the masses participating in the events, in order to allow those activists to commit the acts of terrorism that were described, under the cover of the civilian population. In the **Targeted Killings** Case, Deputy President **E. Rivlin** elaborated in another context, on this wrong and intentional conduct systematically applied by terrorist organizations systematically. He stated:

> Indeed, in conventional war combatants are marked and differentiated from the civilian population. Those combatants can be harmed (subject to the restrictions of international law). Civilians are not to be harmed. Similarly, in the context of the fight against terrorism, it is permissible to harm international-law breaking combatants, but harm to civilians should be avoided to

> the extent possible. **The difficulty stems, of course, from the fact that the unlawful combatants, by definition, do not act according to the laws of war, often disguising themselves within the civilian population – in contradiction to the express provisions of *The Protocol of the Geneva Conventions***. They do so in order to gain an advantage from the fact that their opponent wishes to honor the rules of international law […] However, even under the difficult conditions of combating terrorism, the differentiation between the unlawful combatants and civilians must be ensured (emphases added; the **Targeted Killings** Case, on page 594).

In addition to the acts of terrorism committed under the cover of mass events involving civilian population, Respondents describe another threat, the "mass breach of the security barrier by thousands of Palestinians, who were incited to infiltrate into Israeli territory, reach Israeli towns that are located only hundreds of meters from the barrier and harm the soldiers who are stationed at the barrier itself, and perhaps even the civilians who live adjacent thereto".

This state of affairs that was "created" by the *Hamas* organization and the other terrorist organizations, *prima facie* raises difficulty in clearly categorizing the events, which are at the focus of the petitions at hand, under one of the paradigms upon which we elaborated above. In the events at issue, characteristics of each of the two paradigms – the conduct of hostilities paradigm and the law enforcement paradigm are intertwined. Therefore, the Israeli security forces are, as stated, faced with a very complex task. They must operate interchangeably within the course of one same event in accordance with the different rules that apply under each of the two paradigms.

8. To this one must add the fact that the area in which the events are taking place is the area adjacent to the Border Fence which separates Israel from the Gaza Strip. This area marks the actual buffer separating the State of Israel and its residents from the hostile Palestinian population in Gaza, which is controlled by a terrorist organization, with which Israel has been in an armed conflict for approximately 30 years. In other words, Israel does not have any physical control over the area where the riots are taking place. Therefore, the security forces do not possess any "policing and enforcement" means, such as arrest and interrogation, which characterize handling violent riots that take place in territory subject to belligerent occupation (compare with the position of President (Ret.) **A. Barak**, in the **Targeted Killings** Case, on page 572 and with the position of Deputy President **E. Rivlin**, on page 590, and also compare with Nils Melzer, Targeted Killing in Operational Law Perspective in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 282 (Terry D. Gill & Dieter Fleck ed., 2010)), unless the participants cross the Fence, in which case they can be arrested. This restriction in terms of the range of means available to the security forces, given the circumstances of the matter, also bears weight when examining the means exercised thereby.

9. As my colleague, Deputy **H. Melcer**, specified in his opinion, the petitions

before us are directed against the IDF's Rules of Engagement at these events and against the manner in which they are implemented on the ground "towards unarmed civilian residents of the Gaza Strip […] who do not actually and imminently endanger human lives". The petitions were filed while the events are taking place on the ground, and this Court has in the past addressed the difficulty of exercising judicial review while such events are taking place, *inter alia*, in HCJ 4764/04 *Physicians for Human Rights v. The IDF Commander in Gaza* [2004] IsrSC 58(5) 385 (hereinafter: the "**Rafah** Case")), stating that "in such circumstances, the judicial review process is limited and suffers from the lack of adequate arrangements with which to ascertain the relevant particulars in order to examine them in real time and to grant effective relief for them" (***ibid***, on page 410). The Court further emphasized in the **Rafah** Case that it is not the Court's role to take a stand on the manner in which the IDF conducts its military activity, and that judicial review is intended only to examine the legality of such activity in accordance with the criteria that are prescribed by relevant international and Israeli law (the **Physicians for Human Rights** Case, on page 533; the **Rafah** Case, on page 393).

In addition to the inherent difficulty the Court faces while being required to relate to petitions filed while the events are taking place, the Petitioners added an additional difficulty by objecting to us holding an *ex parte* hearing in which we would have been able to receive explanations and clarifications from the security entities, if and to the extent necessary, as well as classified intelligence material, following the presentation to us of the classified Rules of Engagement pursuant to which the IDF is operating during these events. We were of the opinion that in light of the Petitioners' said objection, we should suffice with the overt description of the Rules of Engagement that was presented in the Respondents' response because it would be unproductive to hold an *ex parte* hearing to review the Rules without being able to receive clarifications and explanations. This, as stated by my colleague, Deputy **H. Melcer**, being due to the fact that "the Rules of Engagement address **various situations in different ways**, and it is not possible to interpret or analyze these Rules without understanding the specific situations being addressed" (see paragraph 62 of his opinion). As mentioned, the Petitioners' refusal to allow us to examine the matters while relating to the dynamic developments on the ground, adds additional difficulty to the already existing difficulty of a proceeding that is being held while the events are taking place, and makes performing the necessary examination even harder. In light of this refusal, according to case law, at this stage a presumption is created for the benefit of the authority that it acted lawfully based on the classified material that could not be presented (see HCJ 4350/14 *Al-Din v. The IDF Commander in the Judea and Samaria Area*, paragraph 5 (July 13, 2014); HCJ 5696/09 *Mughrabi v. Commander of the Home Front Command – Major General Yair Golan* (February 15, 2010)).

10. According to the overt description of the Rules of Engagement that the Respondents presented in their arguments, the Rules allow use of live ammunition only in order to deal with violent riots which pose a **close and actual danger** to the IDF troops or to Israeli civilians and they prescribe that the danger shall be dealt with in a gradual manner. First, by means of verbal warnings and non-lethal means for dispersal of demonstrations. Thereafter, to the extent that the use of these means did not lead to the removal of the danger posed by the violent disturbance of public order, the Rules permit precise shooting towards the legs of a "central rioter or a central

inciter" in order to remove the danger. It was argued that the Rules prescribe that shooting towards the legs of a central rioter or central inciter must **only be as a last resort**, and subject to strict requirements that derive from the principles of **necessity** and **proportionality**. The Respondents clarified that the Rules were approved by the Military Advocate General and the Attorney General and that the Rules **do not permit the firing of live ammunition towards a person only due to him being in the Buffer Zone or due to him being near the Border Fence, and they do not permit the firing of live ammunition towards a person only due to his participation in a violent riot or support of the *Hamas* organization**. The Respondents further stated that the policy on use of potentially lethal force – in accordance with the relevant legal Rules – is examined in **each concrete exercise of force**, in accordance with the changing circumstances on the ground, and as per the professional discretion of the military entities managing the events. For example, the Respondents note that "in certain circumstances, including when specific information indicates a person's participation in hostilities during the events (for example when a person is identified holding an explosive device in his hands), the exercise of force against him is carried out under by the conduct of hostilities paradigm".

11. It emerges from this description of the Rules of Engagement that with regard to potentially lethal force, the Rules, in principle, distinguish between three groups that participate in the violent events: **First**, participants who during the events take a direct and active part in committing terrorist activity, and with respect to which there is no dispute that it is permissible to use potentially lethal force in accordance with the rules prescribed in the conduct of hostilities paradigm. **Second**, which includes central rioters and central inciters. And **third**, other participants, including rioters who do not commit any of the activities that are attributed to the other two groups. According to the approach of both the Petitioners and the Respondents, the Rules prescribed in the law enforcement paradigm apply to the two latter groups.

It also emerges from the description that the Rules of Engagement prescribe criteria of gradual use of means for dealing with the dangers that derive from the events. These criteria are directly related to the severity of the danger and the certainty of its materialization. It further emerges from the description that according to the Rules, the exercise of potentially lethal force in a concrete case is subject to the strict principles of necessity and proportionality that are prescribed by international law in each of the paradigms that are relevant to such case (compare CrimA 486/88 *Ankonina v. The Chief Military Prosecutor* [1990] IsrSC 44(2) 353, 374; CA 751/68 *Ra'ed v. The State of Israel* [1971] IsrSC 25(1) 197, 224; and also see the **First Turkel Report**, on page 191).

12. The second category of a "central rioter or central inciter" to which the Rules of Engagement refer, has not – according to the supporting references that the Respondents presented to us – been grounded in international law and this is said with due caution given the fact that we were not given the opportunity *ex parte* to examine the relevant intelligence material and receive clarifications and explanations as to its characteristics. In this context, my colleague, the Deputy, referred in his opinion to a judgment delivered approximately a year ago in HCJ 1971/15 *Al-Masri v. The Military Advocate General* (July 18, 2017) (hereinafter: the "**Al-Masri** Case") (an application for a further hearing was denied: see HCJFH 6626/17 *Al-Masri v. The Military Advocate General* (October 16, 2017)). In this case, the Court denied a

petition to retroactively initiate a criminal investigation regarding shooting by IDF soldiers towards the petitioner during violent riots in 2011 on the Lebanese border, because the petitioner "was suspected of being a central rioter or inciter endangering the soldiers' safety". However, in the **Al-Masri** Case the Rules of Engagement were not presented to the Court and the question of their legality in this context of central rioters or central inciters was not examined thereby (see ***ibid***, paragraph 29). Similarly to the **Al-Masri** Case, one cannot rule out the possibility that in a **retroactive examination** of the concrete cases in which live ammunition was used, if and to the extent such shall occur, it shall be found that it was justified under the rules of international law and Israeli law, given the entire factual facts that would be presented regarding the extent of their involvement and the danger that derived therefrom.

13. Indeed, in the circumstances of the case at hand, I am of the opinion that operational and other debriefings (the nature of which I shall elaborate upon below) which are held and shall continue to be held retroactively with respect to the implementation of the Rules are the appropriate venue for examining the allegations raised regarding harm to those who belong to the category of central rioters and central inciters. A review of the petitions reveals that many of the allegations raised therein are not directed towards the legality of the Rules of Engagement *per se*, but rather towards the manner in which they are implemented on the ground by the commanders and the soldiers. The Petitioners in HCJ 3250/18 even claimed that they are willing to assume that the Rules of Engagement are legal, or as their attorney, Adv. Bishara said "I shall assume for the purpose of the hearing, without agreeing to the classification of the information, that the Rules that are written on paper are most meticulous" (Minutes of the hearing dated April 30, 2018, on page 8, lines 16-17). However, they further emphasized that based on the "end result criteria" and in light of the scope of the casualties and fatalities among the Palestinians, the logical conclusion according to them is that the use of live ammunition contradicts international law and Israeli law and that the use of snipers or of live ammunition in order to "disperse civilian demonstrations and/or disperse crowds in Gaza" should be prohibited.

As opposed to the examination of the legality of the Rules of Engagement, with which the Court is entrusted, there is doubt whether the Court possesses the tools to perform the examination of the manner in which these Rules are implemented, as it relates to professional aspects – particularly when the events are still taking place (compare HCJ 8990/02 *Physicians for Human Rights v. Commander of the Southern Command – Doron Almog* [2003] IsrSC 57(4) 193, 196; HCJ 2977/02 *Adalah v. The IDF Commander in the Judea and Samaria Area* [2002] IsrSC 56(3) 6, 8). At this stage, and particularly in light of the presumption that is created as specified in Section 9 above, we are not able to rule that the Rules of Engagement were not implemented lawfully.

14. As my colleague, the Deputy, stated in his opinion, the IDF applied various measures prior to the commencement of the events in order to minimize, to the extent possible, the damage caused to uninvolved civilians participating therein. Alongside these measures, the IDF has been conducting, during the events, an organized process of extracting operational lessons, following which the forces on the ground are given emphases and clarifications in order to reduce – to the extent possible – the scope of the casualties among the Palestinians. The Respondents even emphasized to us that

certain incidents – particularly cases in which it was alleged that a person's death was caused as a result of IDF fire during riots – were referred to the examination of an independent General Staff mechanism for debriefing unusual events. This mechanism is comprised of officers with relevant fields of expertise all of whom are external to the chain of command of the current events. The objective of this mechanism is to conduct a comprehensive factual examination and gathering of relevant facts and materials in order to enable the Military Advocate General (Respondent 2 in these petitions) to receive all of the necessary information in order to decide whether there is a reasonable suspicion of a criminal offence being committed in a concrete case, which justifies initiating an investigation. This mechanism also serves as an additional channel for extracting operational lessons, the findings of which shall be sent for the Military Advocate General's examination.

For the avoidance of doubt, it shall be emphasized that this judgment of ours does not intend to replace such retroactive examination and investigation proceedings (see the **Second Turkel Report**, on pages 94-96, for the State's duty to investigate law enforcement activity in the context of an armed conflict), once all of the necessary information has been gathered and a full and exhaustive factual picture has been received (compare HCJ 9594/03 B'Tselem v. The Military Advocate General, paragraph 11 (August 21, 2011); the **Physicians for Human Rights** Case, on page 534).

15. Based on all of the reasons specified above, I concur, as mentioned, with the conclusion of my colleague, Deputy **H. Melcer**, that the petitions are to be denied.

The President

Justice N. Hendel:

1. I concur and join the conclusion and the essence of the comprehensive statements of my colleague, Deputy President **H. Melcer**, and completely join the clear and supplementing opinion of my colleague, President **E. Hayut**. In light of the importance of the matter at issue, I have found it appropriate to add a number of emphases.

2. If we look at both of the petitions as a whole, including the arguments that were added during the hearing and thereafter, they are directed towards the legality of the Rules of Engagement and against the manner in which they are implemented on the ground. It emerges that the IDF considers these Rules binding, as part of the army's approach and as part of international law. Meaning, the Rules express recognition of both of the paradigms that are customary in international law – the conduct of hostilities paradigm and the law enforcement paradigm – of the difference between combative acts and policing acts, and of the effort to avoid harming uninvolved civilians also during combat, subject to considerations of necessity and proportionality.

Indeed, the Petitioners' attorneys argued that the end-results on the ground indicate that the Rules are flawed. However, as shall be immediately clarified, this conclusion contradicts the Rules of Engagement as were presented by the Respondents. Since the Petitioners prevented the review of the Rules of Engagement *ex parte*, we can only relate to the description by the Respondents:

> The Rules of Engagement allow the use of live ammunition only in order to deal with violent riots which pose an actual and close danger to the IDF troops or to Israeli civilians […] The danger shall first and foremost be dealt with by verbal warnings and non-lethal means for dispersal of demonstrations. If the use of these means did not lead to the removal of the danger posed by the violent riot, the Rules permit precise shooting towards the legs of a central rioter or central inciter, in order to remove the danger from the violent riot (paragraph 44 of the preliminary response).

Meaning, the Rules allow the exercise of potentially lethal force only as a last resort, and subject to the existence of necessity and proportionality. The Rules therefore coincide with the law enforcement paradigm, and to a greater extent with the conduct of hostilities paradigm. It thus follows that the Israel Defense Forces adopted, in the circumstances of the case at hand, a strict interpretation of international law. This refers to the necessity level, as in the case at hand it was clarified that potentially lethal force shall be used as a last resort, only in the case of a "close and actual danger to IDF troops or to Israeli civilians", and not in order to merely secure law and order (as to the legitimacy of the later need, see Gil Limon, **The War on Terrorism from the International Law Perspective** 248 (2016), while referring to Article 2(2) of the European Convention on Human Rights; the Public Commission to Examine the Maritime Incident of May 31, 2010 – Turkel Commission **The Commission Report**, Part 1 204 (2011) and the sources from international law presented there).

In any event, it appears that the focus is not the contents of the Rules of Engagement. We heard this in the words of the Petitioners' attorney in HCJ 3250/18, when she was willing to assume for the sake of the hearing that "the Rules written on paper are most meticulous" (see the Minutes of the hearing dated April 30, 2018, page 8, lines 16-17; paragraph 13 of the opinion of my colleague, the President) – but that their implementation on the ground is problematic. We shall now turn to this matter.

3. The examination of the **implementation** of the Rules on the ground is a more difficult task. Borrowing from the words of my colleague, the President, there is an inherent difficulty resting on an inherent difficulty as a result of the Petitioners' refusal to allow an *ex parte* hearing of the relevant classified material. There exists a third difficulty because facts have changed and developed during the course of the hearing, and in any event the factual background that is required to reach a ruling was not presented to us. Notwithstanding that stated, and even just in order to clarify the boundaries of the matter, I shall refer to the proportionality and necessity criteria which apply in the framework of both of the paradigms.

The division of the paradigms into two can be misleading. This is not for lack of logic and grounds for the distinction – as such do exist – but rather because reality overcomes neat and organized classifications as though each paradigm resides in a separate drawer. In the case at hand, the problem of identifying the relevant paradigm is not coincidental; *au contraire*: the *Hamas* and the terrorist organizations intentionally attempt to blur the borders between civilian protest activity and combative activity, and to exploit the law of Armed Conflict, while creating an intermingled dual-capacity reality. However, one cannot allow a terrorist organization that intentionally mingles civilian population and terrorist activists in the vicinity of the fence – and which under the cover of the mingling, endangers the lives of IDF soldiers and Israeli civilians – to paralyze the army and prevent it from protecting and defending against the threat for which there is near certainty that it will materialize.

It could even be said that "the voice is the voice of protest yet the hands are the hands of terror" (compare: Genesis 27:22). The Petitioners' attorneys emphasized the end result criteria while referring to numbers, and especially to the events of May 14, 2018. However, proportionality is not just examined based on end results and not just according to a particular number. It is true the number of casualties is relevant, but it is also important to understand the entire picture. There is significance to the number of people on the ground, for example, approximately 45,000 on the said date. The sensitivity of the event is also significant, given its location adjacent to the fence and at a number of points of focus. There is also the fact that the event is controlled by a terrorist organization who, under the its cover, wishes to harm human lives. These issues cannot be ignored.

4. I shall clarify that it is not my goal to rule on implementation. It is clear that even in a complex reality, it is necessary to comply with the necessity and proportionality criteria, while also distinguishing between the three different groups – those who commit hostilities, those who are central rioters and inciters, and people who do not belong to these groups. It was argued by the State that the implementation of the Rules was in accordance with the general criteria and the needs created on the ground. As my colleagues, I am not of the opinion that it is possible to rule on the matter in the framework of this Petition. This being due to the lack of an adequate factual background and the fact that internal investigations by the IDF – in accordance with its duty and by means of the supervisory mechanisms it has created – have not yet been performed.

An additional example of the complexity of the implementation task is the category of central inciters or law breakers, with respect to which, as stated, unique Rules of Engagement were prescribed. It appears that a different **practical** treatment of this group should not be ruled out, since dealing with the special challenge created on the ground, leads to implementing the proportionality requirement also by distinguishing between central disturbers of public order and others. Although this category indeed highlights a certain group, it significantly limits the harm to others. In other words, the task of implementation requires adjustment and examination of that which is occurring on the ground. Also in the field of civil law, the law derives from the facts, and this perspective is *a fortiori* appropriate in all that relates to the law of Armed Conflict – with all of the complexity of its implementation in a dynamic and vague reality.

We shall conclude and say: the statement that the law derives from the facts embodies recognition of the concrete foundation, as well as the fact that there is law which also applies in the field at hand.

5. This is appropriate for a Jewish and democratic state. We shall remind, that as Rabbi Shaul Yisraeli, of blessed memory (recipient of Israel Prize for Judaic Studies, Head of the *Merkaz Harav Yeshiva* and a member of the Chief Rabbinate Council, who passed away in 1995), ruled, Jewish Law attributes significant consideration to the rules of international law in all that relates to the law of Armed Conflict –

> Therefore, one must see the consent of nations that war is one of the legal means, as long as the nations that are at combat abide by the practice that is customary among nations regarding war […] and from now on we shall see that the law of the land between one state and another is also by virtue of the consent of the states' people, and although this relates to laws relating to life and death (*dinei nefashot*), their consent is of value. And this is the foundation of the legality of war (***Amud Hayemini***, no. 16, Chapter 5 (1992))

Concurrently, and as Rabbi Aharon Lichtenstein (recipient of Israel Prize for Literature, who passed away in 2015) said:

> In this day and age, war has become a total war. It no longer separates, as in the middle ages, between the front lines and behind the front lines. Therefore the distinction between civilian population and a combating military is difficult… However, Jewish law (*Halacha*) also does not have a fixed prescription for each case. Each incident must be discussed on its own merits in accordance with its special conditions and nature (***Tchumin*** 4, 184-185 (5743)).

"The tools of war have changed, but this is not all. Occasionally, one party breaks the rules while abusing them, in order to create an advantage, with all that that entails, over the counterpart" (CA 4112/09 *Anonymous v. The Military Commander in the Judea and Samaria Area*, paragraph 5 of my opinion (January 3, 2012)). Not only is the State of Israel permitted to fight back at terrorist organizations that are trying to abuse the rules in order to harm its civilians and soldiers, but it has a duty to do so.

The rules of law when combating terrorism necessitate a concrete examination of each and every case, and the duty to meticulously maintain the law necessitates thoroughly understanding the facts on the ground.

6. I concur with the position of my colleagues that the petitions are to be denied.

Justice

It was decided unanimously to deny the petitions.

Delivered on this 10th day of Sivan, 5778 (May 24, 2018).

THE PRESIDENT **THE DEPUTY PRESIDENT** **JUSTICE**