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Briefing Paper on Israeli Supreme Court petition challenging the Israeli military's use of lethal force against Gaza protesters and the State of Israel's response

HCJ 3250/18, Adalah – The Legal Center for Arab Minority Rights in Israel and Al Mezan Centre for Human Rights v. Israeli Military Chief of Staff (case pending)

15 May 2018

Introduction

Palestinians living under closure and blockade in the Gaza Strip have been demonstrating weekly in a series of protests known as “The Great Return March”, which began on 30 March 2018, Land Day, and continued until the most recent and deadly demonstration yesterday, 14 May, the eve of Palestinian Nakba Day. Every week, the Israeli military has responded to the civilian, peaceful protests with lethal and other excessive force, which has resulted to date in the killing of over 100 people, including 12 children, two journalists, and the injury of 11,000. Of the injured, 3,615 were shot by live fire. In stark contrast, no Israeli citizens, be they military personnel, soldiers or citizens, have been harmed.

In the single bloodiest day of the seven weeks, on 14 May 2018 the Israeli military killed 59 Palestinians, including 43 protesters, of whom seven were children and one a person with disability. At least another 2,000 persons were also injured, including 304 children, 77 women, ten journalists, and three paramedics—1,114 of whom by live ammunition. At least 70 are in serious or critical condition at hospitals, according to medical sources, and have restricted access to adequate medical care.

The protesters are demanding that the Palestinian refugees and their descendants, living in Gaza and elsewhere, return to their towns and villages of origin in present-day Israel, in accordance with UN General Assembly Resolution 194, as well as an end to Israel's closure and blockade of Gaza. The General Principles (see annex), as set forth by the organizers of the march, stress that:

- “It is a national march that transcends the political differences in which the Palestinians meet with their various components on the overall issue of the return of the refugees”;
- “It is a national popular march led by families with men, women, children and old people in which all the components of the Palestinian society and the free supporters from all countries of the world participate”;
- “It is a human rights based march, calling for return of Palestinian refugees to their land, so the failure to achieve the right of return is a justification to continue the march no matter how long it takes to achieve, and has nothing to do with any deals or political offers from any side”;

- “It is a popular process of peaceful nature from its beginning to end and must be devoid of any manifestations of the weapon”.¹

Protest tents have been erected in many locations along the Gaza border with Israel to represent the various towns and villages from which the refugees were expelled by Israel. Some of these tents were shelled by the Israeli military on 14 May 2018.

The petition

On 23 April 2018, Adalah and Al Mezan filed an urgent petition to the Israeli Supreme Court demanding that it order the Israeli military to stop using snipers and live ammunition to disperse Palestinian protesters participating in the March of Return in the Gaza Strip. Adalah and Al Mezan argue in the petition that the open-fire policy being used against the protesters is patently illegal and excessive, as evidenced by the high number of deaths and injuries. According to medical reports, 94% of the fatally wounded were shot in the upper body (head, neck, face, chest, stomach, and back); 20 people were shot in the head, face, and neck (about 52%); nine were shot in the stomach; seven were shot in the chest and back; and two were shot in the legs and thighs (in one case the petitioners are still unaware of the location of the injuries sustained). These figures, which comprise the casualties of only the first several weeks of protests, included the killing of four children and two journalists.

Factual background

Unlawful use of lethal force

The petition lays out the facts of the case based on the testimonies of protesters, rescue workers, journalists and doctors, as well as on video documentation and reports and statements made by international organizations. This information includes evidence and testimony of the civilian nature of the protests, the arbitrary use of lethal force by the Israeli military against unarmed demonstrators, and the fatal and other serious injuries sustained by the protesters.

Video footage and testimonies provided by the injured give a chilling picture of live ammunition being used routinely and in large quantities against the demonstrators, who appear not to have posed any imminent danger to anyone, and of snipers shooting at specific demonstrators in order to kill them or cause grave injury to them, including by directing fire at the upper body – head, neck, and chest – often with fatal consequences. Among the dead and injured are hundreds of children, women, journalists, medical personnel and people with disability. Notably, the Supreme Court rejected the petitioners’ motion to allow the submission of video evidence via USB that would have allowed the justices to see the footage as part of the evidence provided.

Use of more harmful ammunition

Testimonies from doctors working in Gaza hospitals discuss the dangerous type of “explosive” live bullets used by the military, which are designed to cause massive wounds and irreparable damage upon impact. According to the testimony of Dr. Ayman al-Sabhani, Director of Admissions at Al-Shifa Hospital:

¹ “The General Principles of the Great Return March” as published by the organizers. On file with Adalah and Al Mezan and annexed to this document.

“We have treated a new type of injury that we have not encountered before. The bullet entry wound was small while the exit wound was large. Each patient required several hours of surgery in the operating room and a medical team with numerous specialties to deal with the one case. Some of the wounded who were shot in the lower body suffered fatal injuries resulting in their deaths. This was the case of Tha’ir Rabi’a, who was shot and wounded in both legs and died. We also treated a number of wounded who had many [bullet] fragments embedded in the area of the injury.”

According to a press release issued by Amnesty International on 27 April 2018, and that was submitted to Supreme Court by the petitioners on 29 April 2018:

“Doctors at the European and Shifa hospitals in Gaza City told Amnesty International that many of the serious injuries they have witnessed are to the lower limbs, including the knees, which are typical of war wounds that they have not observed since the 2014 Gaza conflict. Many have suffered extreme bone and tissue damage, as well as large exit wounds measuring between 10 and 15mm, and will likely face further complications, infections and some form of physical disability, such as paralysis or amputation. Reports of the high number of injuries to the knees, which increase the probability of bullet fragmentation, are particularly disturbing. If true, they would suggest that the Israeli army is intentionally intending to inflict life-changing injuries.”

Another type of serious injury observed by the doctors was characterized by the creation of large internal cavities in the injured body, with plastic residue, and no exit wound. According to experts on the subject, it was reported by Amnesty International, these injuries were apparently the result of the use of powerful rifles and unconventional bullets, some of which are also used for hunting:

“According to military experts as well as a forensic pathologist who reviewed photographs of injuries obtained by Amnesty International, many of the wounds observed by doctors in Gaza are consistent with those caused by high-velocity Israeli-manufactured Tavor rifles using 5.56mm military ammunition. Other wounds bear the hallmarks of US-manufactured M24 Remington sniper rifles shooting 7.62mm hunting ammunition, which expand and mushroom inside the body.”

Prior Intent to Use Snipers and Live Ammunition Against the Demonstrators

In the run-up to the protests, the Israel Military Spokesperson’s Unit threatened to place snipers near the fence and stated that the soldiers would not hesitate to use live ammunition against the demonstrators. For example, in a Facebook post dated 28 March 2018, the army’s spokesperson in the Arabic language, Avichai Edrei, stated clearly that the army would not hesitate to use snipers against “any attempt to damage the security fence” (Facebook post by the army’s spokesperson in Arabic on 28 March 2018, 22:49).

Edrei published two additional posts on 29 March 2018, which include two videos. One video shows snipers “getting ready”, taking up weapons and firing. The video’s subtitles state, “Along the entire border with the Gaza Strip, IDF forces, including snipers, have been reinforced in order to repel any attempt to damage the security fence or enter Israel in the context of the chaos parade.” The second video shows a Palestinian man standing in the proximity of the fence who was shot by a sniper with live ammunition. The video’s subtitles state, “This is how we will deal with anyone who wants to breach our sovereignty [...]” Similar

threats were made by Israeli Defense Minister Avigdor Lieberman, who stated during interviews with the press that anyone who approached the fence was putting their lives in danger.

In response to the high death toll and the high number of injuries on 30 March 2018, the first day of demonstrations (19 killed and 854 injured by live ammunition), the army spokesperson stated on Twitter that, “Yesterday we saw 30,000 people; we arrived prepared and with precise reinforcements. Nothing was carried out uncontrolled; everything was accurate and measured, and we know where every bullet landed.



Legal analysis

Adalah and Al Mezan argue in the petition that the Israeli military’s response to the protests constitutes the arbitrary use of force for the purpose of punishing and deterring protesters, in violation of both international law and Israeli constitutional law. The human rights organizations clarified firstly the civilian nature of the protests, adding, however, that even if some of the civilians threw stones or burned tires, it would not alter the categorization of the event as civilian. Nor is this categorization affected by Israel’s claim, made in its initial response to the court on 29 April 2018, that it is engaged in an ongoing armed conflict with Hamas in Gaza.

The petitioners contend that the normative framework that applies to civilian demonstrations is that of “law enforcement”, governed by international human rights law, a framework has also been adopted in Israeli law. The norms associated with the law enforcement paradigm apply equally to citizens and non-citizens, irrespective of the subject of the protest, the slogans used, the location of the protesters, their organizational affiliations, or their ethnic and national backgrounds. The “law enforcement” paradigm was also specified as the appropriate framework in what is popularly known as the “Goldstone Report,” published following a UN fact-finding mission into the 2008/9 War on Gaza. This standard can also be inferred from rulings of the European Court of Human Rights, as well as from a report by the International Committee of the Red Cross (ICRC).²

The principles governing the use of force by law enforcement agencies were set forth in two main documents: (1) The UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990) (Havana Basic Principles); and (2) The UN Code of Conduct for Law Enforcement Officials (1979). The core principle is that the rights to life and to bodily integrity are near-absolute, and cannot be violated unless a person poses an immediate and concrete danger to the life of another person. Furthermore, even when a person does pose such a danger, lethal means can only be employed against him/her as a last resort, and in situations where resort to lethal means is absolutely unavoidable, it should be employed with a view not to kill or cause irreversible bodily harm, but rather to remove the immediate, concrete danger while aiming to inflict minimal possible injury.

These same norms have also been adopted into Israeli law, including in the report of the “Or Commission of Inquiry”, which investigated the events of October 2000, during which 13 unarmed Palestinian citizens of Israel were shot dead by police during protests. The Commission stated explicitly in its findings that the use

² ICRC, “THE USE OF FORCE IN ARMED CONFLICTS – Interplay Between the Conduct of Hostilities and Law Enforcement Paradigm” 2013: <https://www.icrc.org/eng/assets/files/publications/icrc-002-4171.pdf>

of live ammunition, including by snipers, against demonstrators was illegal, as it is inherently lethal and disproportionate in nature.

The petitioners further argued that the current policy used against the Gaza protesters violates the right to life and bodily integrity as protected Israel's Basic Law: Human Dignity and Liberty. In previous rulings, the Supreme Court of Israel has found that this Basic Law applies to cases involving the exercise of Israeli control in the occupied Palestinian territory (oPt), because, *inter alia*, such cases can be tried in Israeli courts, and the Israeli authorities are arguably bound by the provisions of the law, which include protection of the right to life, bodily integrity and dignity, in all of their actions, toward any person, regardless of the location in the territory. Further, the soldiers are located and the shooting is taking place in the territory of Israel.

The State's response to the petition

The Character of the Events

On 29 April 2018, the State responded to the petition filed by Adalah and Al Mezan, and to a separate petition submitted by Israeli human rights organizations the Association for Civil Rights in Israel (ACRI), Gisha, Hamoked and Yesh Din. The State's response opens with the assertion that: "The starting point for the State's position is that these aforementioned incidents occur as part of the armed conflict between the Hamas terrorist organization and Israel" (para. 6), and that, "In recent weeks, Hamas has been leading a new tactic of terrorist activity under the cover of 'national commemoration events' and 'popular protests'" (para. 10). Israel further claims that the careful planning of the events included the use of tire-burning allegedly to conceal attempts to infiltrate Israel, and the use of Molotov cocktails to damage the border fence and the Israeli military.

According to the State, "The Hamas plan was successful in that the violent mass events that took place in the buffer zone were unusual in their size and in the intensity of their threat," "occasionally" amounting to an immediate threat to the life and bodily integrity of Israeli civilians. The confluence of that alleged risk with the so-called terror activity described creates an even bigger danger. This, according to the State, differentiates the events from a "regular civilian protest".

Ignoring the fact that none of the demonstrators who were shot dead or injured by live ammunition were armed or posed a security threat, Israel claimed that, "The security forces were prepared to deal with two major threats": a) "a massive breach of the security barrier by thousands of Palestinians"; and b) "execution of attacks by terrorist cells" (para. 18). Thus the threat, according to Israel, "may be caused by a single person or a crowd", and "It is estimated that potentially lethal force is needed to deal with the danger (i.e. the assessment is that force is required at the time to remove the danger before its realization, even if the danger itself has not yet become immediate)" (para. 33).

According to the State's response, the military regarded and prepared for these eventualities in the same manner as it would for a military operation. There was a major deployment of troops along the border/fence, armed with both lethal and non-lethal weapons.

The Normative Framework and Legal Analysis

Contesting the petitioners' arguments regarding the applicability of the "law enforcement" paradigm, as detailed above, the State argued that "The legal framework that regulates the opening of fire is the **laws of warfare**", i.e. International Humanitarian Law (IHL). "The complex nature of the events require, **within the**

laws of warfare, distinction between the opening of fire within a paradigm of hostilities (for example, firing in the context of fighting between Hamas and Israel), and the opening of fire within a paradigm of law enforcement" (emphasis in the original).

Adalah and Al Mezan argue that the paradigm of law enforcement within IHL/hostilities, however, does not exist as an established body of law and has been *invented by Israel* in an attempt to justify the conduct of its armed forces in their deadly response to the Gaza protests and to give the Israeli forces greater leeway to use lethal fire than that provided for in the regular paradigm of law enforcement, which the petitioners argue applies in the case of the Gaza protests. The Attorney General (AG) admitted (in the State's first response) that, "The law enforcement paradigm in the laws of warfare is not extensively regulated in written sources." The *invented category of law enforcement within IHL/hostilities* attempts to circumvent even the limitations imposed by IHL on the exercise of force via the customary distinction between combatants and civilians during armed conflicts. These limitations in IHL are not the applicable rules regarding protesters, but the state references them as part of its legal framework.

According to this newly invented framework proposed by the State, the open-fire regulations currently being used by Israel – which are classified and the State wished to present to the court *ex parte* – are a legal and appropriate response to what it fallaciously described as "life-endangering mass riots". In its response to the petitions, the State also asserted that when the "riots" come near to the barrier, they "intermittently cause immediate danger to the IDF forces and Israeli civilians", and claimed to have in its possession secret evidence that it wished to present to the court relating to the regulations and the circumstances of the current "violent events". Following the petitioners' objection, however, the State was not permitted to present secret evidence to the court at a hearing that took place on 14 May 2018.

In its response, the State did not dispute the factual basis as presented in the petition. Instead, the State tried to justify the killings of unarmed demonstrators (94% of whom were shot in the upper body) by soldiers using live ammunition, and the injury of over 2,000 more. In his oral arguments before the Supreme Court on 30 April 2018, the AG claimed that the results of the military's open-fire policy on the ground, i.e. the deaths and injuries caused to thousands of Palestinians, were irrelevant in light of the State's determination of the danger posed to it and to Israeli civilians by demonstrators. The State was, however, unable to cite any provision of either international or Israeli law that permits the use of live, lethal fire against unarmed demonstrators as a preventive measure against danger.

Furthermore, the State admitted that, "leading inciters or breachers of order" were among the demonstrators it regarded as legitimate targets for lethal live fire. With this alarming assertion, the State appears to acknowledge that it has extra-judicially executed people on this categorically illegal basis, even though they were unarmed and did not present a danger to life or limb to Israeli soldiers or civilians. This policy contravenes not only international law, but also the case law of the Israeli Supreme Court as it relates to targeted killings.³

The State additionally argues that the Havana Basic Principles do not apply under the circumstances, and that Israel has been a persistent objector to their application during armed conflict. That said, it continues,

³ HCI 769/02, *The Public Committee Against Torture in Israel v. The State of Israel* (decision delivered 14 December 2006).

even if human rights law were applicable, it does not follow that the use of lethal force is illegal here: human rights law does not allow use of lethal force only for the purposes of preventing risk to life and bodily integrity and prevention of a life-endangering offense, as claimed by the petitioners. According to Israel, Article 6 of the International Covenant on Civil and Political Rights (ICCPR) allows use of lethal force to suppress a riot or uprising.

The State further argued that, “A similar conclusion is drawn from the European Convention for Human Rights, 1950 [...] Article 2 of the Convention states that every person has the right to life and states that potentially lethal force, if absolutely necessary, may be used in three alternative scenarios, including dealing with suppression of a riot or uprising”. However, this position contradicts numerous decisions delivered by the European Court of Human Rights, including in the cases of *Güleç v. Turkey* (1998) and *Şimşek v. Turkey* (2005), which are referred to in the petition.

The State’s extreme position seeks to manipulate and distort international law in order to justify indiscriminate firing of live ammunition at unarmed civilians, and the killing of persons based on the fact that they are part of a crowd of protesters, and regardless of whether or not they present an immediate threat to anyone. This and the targeted killing of persons it has identified as “leading inciters or breachers of order” raise grave suspicions that the Israeli military has deliberately committed willful killing, an act that is classified as a grave breach of the Fourth Geneva Convention and as a war crime under Article 8 of the Rome Statute of the International Criminal Court.

ANNEX

The general principles of the Great Return March

1. It is a sustained and cumulative struggle not a seasonal event or one-day event and will continue until the actual return of the Palestinian refugees is achieved.
2. It is a national march that transcends the political differences in which the Palestinians meet with their various components on the overall issue of the return of the refugees.
3. It is a national popular march led by families with men, women, children and old people in which all the components of the Palestinian society and the free supporters from all countries of the world participate.
4. It is a human rights based march, calling for return of Palestinian refugees to their land, so the failure to achieve the right of return is a justification to continue the march no matter how long it takes to achieve, and has nothing to do with any deals or political offers from any side.
5. It is a legal march based on international resolutions, notably paragraph 11 of UN Resolution 194 which explicitly calls for the return of Palestinian refugees to their villages and towns as soon as possible.
6. It includes the various locations of Palestinian refugees in Gaza, the West Bank, Jerusalem, the interior, Lebanon, Syria, Jordan and elsewhere and aims to peacefully organize the refugees at the nearest point of their forcibly displaced towns.
7. The success of the march requires an active role of all factions in mobilizing and all forms of support while taking into consideration that no military character should be present in the march to deepen the impasse of the occupation and facing the people directly and depriving the occupation of 2 marketing international propaganda to justify violence against it.
8. It is a popular process of peaceful nature from its beginning to end and must be devoid of any manifestations of the weapon.
9. The march depends on the method of open sit-ins and gradual progress if possible, the setting up of tents and the establishment of refugee life near the dividing line with our lands and homes forcibly displaced in 1948, and invite the international media to convey their message to the whole world.
10. Use the popular and peaceful character of the march to ensure that the march is not marred from its mission and prefer to start sit-ins before the fence at least seven hundred meters and then gradually progress in stages to prolong the internal and external mobilization.
11. Raising the flag of Palestine only during the march and sit-in and humanitarian slogans explaining the justice of the refugee issue in Arabic English and Hebrew.
12. The refugees are the responsibility of the United Nations. Therefore, the human rights organizations have the task of communicating to the United Nations and its international institutions and asking for supervision by them on these marches and sending warning messages to the occupying state not to target them.
13. Communicate with various activists and institutions in support of Palestinian rights throughout the world and create a global support for the idea of the return march.
14. All media and human rights efforts must be mobilized throughout the world to represent the backbone of the march against the potential of Israeli violence.

The march of return is an additional step to return to Palestine