

Between the Paradigms: Israel's Rules of Engagement around the Gaza Fence under International Law in light of Recent Supreme Court Jurisprudence

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Since March 2018, mass – occasionally violent – demonstrations have been taking place around the fence between Gaza and Israel. In ensuing clashes, hundreds of Palestinians were killed and thousands injured as a result of the use of force, including sniper fire, by Israeli security forces. In H CJ 3003/18 Yesh Din v. Chief of Staff of the IDF, the Supreme Court of Israel unanimously rejected petitions against the rules of engagement in the area, ruling that on its face, they are lawful under international and domestic law.

Beyond the factual disputes between the petitioners and the respondents – mainly concerning the civilian or belligerent nature of the demonstrations – the parties differed also on the normative framework applicable to the use of force in such situations. For instance, questions arose regarding the legal framework, or “paradigm,” that controls the use of force in relation to these demonstrations. Does it derive from the laws of armed conflict (LOAC), from international human rights law (IHRL), or from some combination of both? And in any case, what is the content of the standards applicable to resort to live fire in mixed scenarios such as these, where demonstrations take place against the backdrop of an armed conflict?

Placing these questions in a wider doctrinal and theoretical context, this article criticizes the Court's conclusions on these questions – at least as reflected in the lead opinion – and the positions undergirding them presented by the state. In this context, the article contests both the normative framework applied to the Gaza events, as well as its substance. Concerning the former, it argues that the law enforcement paradigm under IHRL is the applicable framework to the events, rather than the “law enforcement paradigm under LOAC” as suggested by the state and accepted by the Court. Regarding the contents of the paradigm seemingly adopted by the Court, the article argues that the permission given to use potentially lethal force against “key rioters and key instigators” is especially problematic. This category, it is argued, widens excessively the circumstances in which resort to force might be permitted outside the immediate context of hostilities; it allows for force against persons not personally constituting imminent threats, and blurs the distinction between civilians and combatants.