

## ARTICLE

The Law Enforcement Paradigm under the Laws of Armed Conflict:  
Conceptualizing *Yesh Din v. IDF Chief of Staff*

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## Abstract

While the two traditional paradigms for the use of force in international law are law enforcement under international human rights law and conduct of hostilities under laws of armed conflict, this Article examines the possibility of a new paradigm of law enforcement under the laws of armed conflict. In the judgment of *Yesh Din v. IDF Chief of Staff (Yesh Din)* recently given by the Supreme Court of Israel, the court endorsed this entirely new paradigm, which challenges the traditional distinction between law enforcement and the conduct of hostilities. This Article explores the legal justifications of the paradigm and examines whether it has legal grounds to rely upon. It further demonstrates that the new paradigm is vague, permissive, and extremely under-developed. The new paradigm has the potential to be abused by states picking and choosing the norms they wish to apply from either international human rights law or the laws of armed conflict. It is a common saying that “hard cases make bad law.” The arguably problematic judgment of *Yesh Din* is the result of a complicated and challenging situation that has created bad law indeed.

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## I. Introduction

The possibility of a new paradigm for the use of force in international law has recently been at the heart of the controversial case of *Yesh Din v. IDF Chief of Staff (Yesh Din)*, decided by the Supreme Court of Israel in 2018.<sup>1</sup> *Yesh Din* has challenged the traditional distinction between the conduct of hostilities under the Laws of Armed Conflict (LOAC) and law enforcement under international human rights law (IHRL). The judgment created a new creature in international law—the general law enforcement paradigm under the LOAC. This Article demonstrates that the new paradigm is extremely underdeveloped and may very well be abused by states to pick and choose which law enforcement norms (under LOAC or IHRL) they wish to adhere to rather than accept either body of law as it stands.

It is a common saying that “hard cases make bad law.” The arguably problematic judgment of *Yesh Din* is indeed the result of a complicated and challenging situation, namely the recent protests at the Gaza border.

The Gaza Strip, or simply Gaza, is a coastal territory along the Mediterranean Sea bordered by Israel and Egypt, which is internationally recognized as part of the Palestinian territories.<sup>2</sup> The State of Israel gained control of Gaza in the aftermath of the Six Day War and the Israeli Defence Forces (IDF) remained the authority in Gaza until 1994.<sup>3</sup> Upon the signing of the Oslo Accords of 1993, governmental authority was transferred to a newly established Palestinian Authority, which controlled most of Gaza, with the exception of the Israeli settlement blocs and military areas.<sup>4</sup> As a consequence of the Second Intifada (uprising), which lasted from 2000 to 2005, the Israeli government, after a lengthy legislative process, finally voted in February 2005 to unilaterally disengage from the Gaza Strip.<sup>5</sup>

Despite its withdrawal of forces and civilians, the Disengagement Plan granted Israel certain military privileges including exclusive authority in the Gaza air space and the ability to exercise security activity in the sea off the coast of the

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<sup>1</sup> HCJ 3003/18, 3250/18 *Yesh Din v. IDF Chief of Staff* (2018) (Isr.).

<sup>2</sup> See, e.g., Elizabeth Samson, *Is Gaza Occupied?: Redefining the Status of Gaza Under International Law*, 25 AM. U. INT’L L. REV. 915, 919 (2010); MARTIN GILBERT, *ISRAEL: A HISTORY* 491–92 (1998).

<sup>3</sup> Samson, *supra* note 2, at 922–23.

<sup>4</sup> *Id.*

<sup>5</sup> See PRIME MINISTER’S OFFICE, *THE DISENGAGEMENT PLAN—GENERAL OUTLINE* (Apr. 18, 2004) (Isr.),

<http://www.mfa.gov.il/mfa/foreignpolicy/peace/mfadocuments/pages/disengagement%20plan%20-%20general%20outline.aspx> [https://perma.cc/U64J-BYUX].

Gaza Strip.<sup>6</sup> As a result, all goods and people entering or leaving Gaza are subject to Israeli control.<sup>7</sup>

In 2006, the Islamist political party Hamas, which is recognized as a terrorist organization by the United States, Israel, Canada, Japan and the European Union, was elected ruler of Gaza.<sup>8</sup> Over the years, and within its covenant, Hamas has officially and explicitly declared its intentions of destroying Israel and waging a war against the Jewish people; hence, Israel has been troubled by the control Hamas has over Gaza.<sup>9</sup>

Following the Gaza elections, a new Palestinian Government was established which was led by Hamas but also included members of Fatah, which is considered more moderate than Hamas.<sup>10</sup> However, by June 2007 tensions between Fatah and Hamas escalated and resulted in a violent takeover by Hamas known as the Battle of Gaza.<sup>11</sup> The takeover led to the expulsion of the Palestinian Authority and Fatah from Gaza, leaving Hamas without opposition as it executed, maimed and jailed opponents.<sup>12</sup> As a response to the Battle of Gaza, and in light of Israel's distrust of Hamas, Israel blockaded Gaza, declaring it hostile territory and cutting both food and fuel supplies.<sup>13</sup> Israel patrols the coastal waters and airspace of Gaza, which does not have its own operating international seaports or airports. Consequently, Israel blocks most international maritime travel to and from local Gazan seaports.<sup>14</sup>

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<sup>6</sup> *Id.* ¶ 3.i.1.

<sup>7</sup> Yuval Shany, *Faraway, so Close: The Legal Status of Gaza After Israel's Disengagement*, 8 Y.B. OF INT'L HUMANITARIAN L. 369, 373 (2005).

<sup>8</sup> RHODA E. HOWARD-HASSMANN, STATE FOOD CRIMES 114–16 (2016); Tally Helfont, *Egypt's Wall with Gaza and the Emergence of a New Middle East Alignment*, 54 ORBIS 426, 427–28 (2010); JIM ZANOTTI, CONG. RESEARCH SERV., R41514, HAMAS: BACKGROUND AND ISSUES FOR CONGRESS 1 (2010).

<sup>9</sup> HAMAS, THE COVENANT OF THE ISLAMIC RESISTANCE MOVEMENT art. 7 (Aug. 18, 1988), available at [http://avalon.law.yale.edu/20th\\_century/hamas.asp](http://avalon.law.yale.edu/20th_century/hamas.asp) [<https://perma.cc/UN2R-XX4T>] (including the phrases “Israel will exist and will continue to exist until Islam will obliterate it, just as it obliterated others before it.”; “Israel, Judaism and Jews challenge Islam and the Moslem people.”; “May the cowards never sleep.”; “The Day of Judgment will not come about until Moslems fight the Jews (killing the Jews), when the Jew will hide behind stones and trees. The stones and trees will say O Moslems, O Abdulla, there is a Jew behind me, come and kill him. Only the Gharkad tree, (evidently a certain kind of tree) would not do that because it is one of the trees of the Jews.”).

<sup>10</sup> U. N. COUNTRY TEAM IN THE OCCUPIED PALESTINIAN TERRITORY, GAZA TEN YEARS LATER 5 (2017), <https://unsco.unmissions.org/gaza-ten-years-later-report-july-2017> [<https://perma.cc/3QTG-C22T>] [hereinafter GAZA TEN YEARS LATER].

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*; Howard-Hassmann, *supra* note 8, at 116; Helfont, *supra* note 8, at 428.

<sup>13</sup> *Id.*; GAZA TEN YEARS LATER, *supra* note 10, at 7.

<sup>14</sup> Avi Bell & Dov Shefi, *The Mythical Post-2005 Israeli Occupation of the Gaza Strip*, 16 ISRAEL AFF. 268, 270 (2010).

In the years after the disengagement, Israel was involved in numerous military operations in Gaza, including Operation Cast Lead in 2008,<sup>15</sup> Operation Pillar of Defense (or Pillar of Cloud) in 2012,<sup>16</sup> and Operation Protective Edge in 2014.<sup>17</sup> All three operations led the international community to criticize Israel for its violation of international humanitarian law (IHL) as well as IHRL.<sup>18</sup> The criticism mostly related to a lack of respect Israel demonstrated for the basic rules concerning the conduct of hostilities, including distinction, proportionality and precautions in attack, which resulted in massive civilian casualties on the Palestinian side.<sup>19</sup> The operations in Gaza and the ongoing blockade created great poverty, poor sanitary conditions and an overall very low quality of life in Gaza.<sup>20</sup>

The most recent clash between Israel and Hamas, which ultimately provoked the *Yesh Din* judgment, is that of the “Great March of Return.” This is the name given by Hamas to a series of protests that started on “Land Day” of March 30, 2018.<sup>21</sup> According to the Israeli government, the protests included tens of thousands of Palestinians who staged large-scale, violent demonstrations in the area of the security perimeter between Israel and the Gaza Strip.<sup>22</sup> The organizers of the protests mainly consisted of Hamas members, as well as members of both Islamic Jihad and the Popular Front for the Liberation of Palestine.<sup>23</sup> The organizers have called for a mass return of Palestinians to the homes of their ancestors within the State of Israel.<sup>24</sup> The demonstrations included organized, intentional and significant confrontations with Israeli security forces, as well as attempts to damage security infrastructure. Amnesty International has described some of the violent aspects of the protest to include burning tires, flying incendiary kites (kites or balloons carrying explosives), and throwing stones and Molotov cocktails at Israeli

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<sup>15</sup> Gabi Siboni, *Operations Cast Lead, Pillar of Defense, and Protective Edge: A Comparative Review*, in THE LESSONS OF OPERATION PROTECTIVE EDGE 27, 28 (Kurz Anat & Brom Shlomo eds., 2014).

<sup>16</sup> U.N. High Comm’r for Hum. Rts., *Rep. of the U.N. High Commissioner for Human Rights on the Implementation of Human Rights Council Resolutions S-9/1 and S-12/1*, ch. 2, U.N. Doc. A/HRC/22/35/Add.1 (Mar. 5, 2013) [hereinafter *Implementation of Human Rights Council Resolutions S-9/1 and S-12/1*].

<sup>17</sup> See generally STATE OF ISRAEL, THE 2014 GAZA CONFLICT (2015), available at <http://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf> [<https://perma.cc/AUF2-RV8Z>].

<sup>18</sup> Rep. of the Indep. Int’l Comm’n of Inquiry Established Pursuant to Human Rights Council Res. S-21/1, U.N. Doc. A/HRC/28/79 (2015); *Implementation of Human Rights Council Resolutions S-9/1 and S-12/1*, *supra* note 16, at 14; Rep. of the United Nations Fact-Finding Mission on the Gaza Conflict, U.N. Doc. A/HRC/12/48 (2009).

<sup>19</sup> *Id.*

<sup>20</sup> See generally GAZA TEN YEARS LATER, *supra* note 10. See also Aeyal Gross, *Litigating the Right to Health Under Occupation: Between Bureaucracy and Humanitarianism*, 27 MINN. J. INT’L L. 421, 424 (2018).

<sup>21</sup> *Yesh Din*, *supra* note 1, ¶ 6.

<sup>22</sup> *Id.* ¶ 5.

<sup>23</sup> *Id.* ¶¶ 5–10.

<sup>24</sup> *Id.* ¶ 5.

soldiers.<sup>25</sup> The incendiary kites sent from Gaza have caused great damage on the Israeli side of the border, setting hundreds of fires that left thousands of dunams burned.<sup>26</sup>

Despite such events, not all protesters took part in violent actions—many were Gazan civilians who merely wished to protest the blockade of Gaza and poor conditions in the Strip.<sup>27</sup> Accordingly, such protesters engaged in clearly non-violent activities. Peaceful protesters initiated family-oriented events and activities at the border, such as public reading events, communal baking, group dancing and even weddings.<sup>28</sup> Abu Ratima, one of the organizers and spokespersons of the protests, explained the significance of such activities: “We incorporate into the protest cultural activity to send the world a message that we will never forget our legacy and customs that remind us of home. This cultural activity shows that our activity to obtain our rights is not violent.”<sup>29</sup> However, ironically enough, the very same Ahmad Abu Ratima explicitly called for a mass infiltration into Israeli communities, even at the cost of Palestinian lives.<sup>30</sup> In fact, in the Palestinian leadership itself, there was a deep disagreement regarding the nature of the protests and their purpose.<sup>31</sup>

<sup>25</sup> *Six Months On: Gaza’s Great March of Return*, AMNESTY INT’L., <https://www.amnesty.org/en/latest/campaigns/2018/10/gaza-great-march-of-return/> [https://perma.cc/8AET-SJYE].

<sup>26</sup> A dunam equals 1000 square meters. Almog B. Zikiri, *Burning Kites From Gaza Cause Widespread Damage to Israeli Fields*, HAARETZ, (May 29, 2018), <https://www.haaretz.com/israel-news/premium.MAGAZINE-burning-kites-from-gaza-cause-widespread-damage-to-israeli-fields-1.6131396> [https://perma.cc/RJ8W-HBCL].

<sup>27</sup> See Yesh Din, *supra* note 1, ¶ 5.

<sup>28</sup> Fadi Al-Naji, *Marriage Celebrations, Reading Evenings: The Unfamiliar Side of the Return Marches*, SIKHA MEKOMIT (March 5, 2018), <https://mekomit.co.il/%D7%97%D7%92%D7%99%D7%92%D7%95%D7%AA-%D7%A0%D7%99%D7%A9%D7%95%D7%90%D7%99%D7%9F-%D7%A2%D7%A8%D7%91%D7%99-%D7%A7%D7%A8%D7%99%D7%90%D7%94-%D7%94%D7%A6%D7%93-%D7%94%D7%9C%D7%90-%D7%9E%D7%95%D7%9B%D7%A8/> [https://perma.cc/RL2D-C2N7].

<sup>29</sup> *Id.*

<sup>30</sup> *The “Great Return March” Campaign: An Initiative Sponsored by Hamas, Whose Goal Was to Breach the Border Fence, Penetrate Israeli Territory*, MEMRI (May 18, 2018), [https://www.memri.org/reports/great-return-march-campaign-initiative-sponsored-hamas-whose-goal-was-breach-border-fence#\\_edn3](https://www.memri.org/reports/great-return-march-campaign-initiative-sponsored-hamas-whose-goal-was-breach-border-fence#_edn3) [https://perma.cc/F29A-27WH] (“Even if some people are killed during the actual breaching [of the border] . . . but thanks to [their sacrifice] the Palestinians manage to cross the separation fence and reach their land that was occupied in 1948, it will be a reasonable price to pay. Thousands of victims have fallen in the wars without [achieving] any political results . . . . [T]his time, deaths will be justified and will be for the sake of making a significant national achievement.”); see also *Gaza Strip Initiative, In Collaboration With Hamas, Palestinian Islamic Jihad, And Supporters Of Fatah’s Muhammad Dahlan: Masses Will Throng To Border With Israel To Demand Right Of Return*, MEMRI (March 22, 2018), <https://www.memri.org/reports/gaza-strip-initiative-collaboration-hamas-palestinian-islamic-jihad-and-supporters-fatah> [https://perma.cc/9RBL-FYGL].

<sup>31</sup> Hamas official Mahmoud Al-Zahhar addressed the issue stating: “When you have weapons that are being wielded by men who were able to prevent the strongest army in the region from entering the Gaza Strip for 51 days, and were able to capture or kill soldiers of that army—is this really

The IDF was underprepared to address the complexity of the situation. In anticipation of the protests, it enforced a no-go perimeter at the Palestinian side of the border, and the IDF forces in the area received a variety of means for response, including equipment for broadcasting warnings and non-lethal means for crowd dispersal such as water cannons and tear gas.<sup>32</sup> Giant fans were stationed at the border to address the heavy smokescreen at the border created by tires set on fire by protesters.<sup>33</sup>

Nevertheless, the Israeli response to the proximity of peaceful protesters to violent ones under these poor visual conditions, and the greater danger of a mass invasion into Israeli territory, resulted in many casualties on the Palestinian side. So far, Israeli fire has killed dozens of Palestinian protesters and injured thousands more.<sup>34</sup> According to the Al Mezan Center for Human Rights (“Al Mezan”), the death count for the first six months of protests stood at 203 Palestinians. Among them are two journalists and three paramedics.<sup>35</sup> Al Mezan has also reported over 10,234 injured protesters.<sup>36</sup> According to Amnesty International’s report, many of the serious injuries were to the lower limbs and caused by live fire, which led to over seventy amputations.<sup>37</sup>

The high casualty count and the use of live fire at protesters led to significant controversy, both within the international community and within Israeli society.<sup>38</sup>

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‘peaceful resistance’? This is not peaceful resistance. Has the option [of armed struggle] diminished? No. On the contrary, it is growing and developing. That’s clear. So when we talk about ‘peaceful resistance,’ we are deceiving the public . . . [A]s for [Fatah’s] ‘peaceful resistance,’ it consists of rallies, demonstrations, protests, pleas, and requests, in order to improve the terms of the negotiations, or to enable talks with the Israeli enemy. This deception does not fool the Palestinian public.” *Senior Hamas Official Mahmoud Al-Zahhar on Gaza Protests: This Is Not Peaceful Resistance, It Is Supported by Our Weapons*, MEMRI (May 13, 2018), <https://www.memri.org/tv/senior-hamas-official-mahmoud-zahhar-on-gaza-protests-this-is-not-peaceful-resistance> [<https://perma.cc/43F5-YGA2>]; *The “Great Return March” Campaign*, *supra* note 30.

<sup>32</sup> Yesh Din, *supra* note 1, ¶ 12; *7 Palestinians killed, 5 seriously wounded in ‘Friday of Tires’ protest*, YNET (Apr. 6, 2018), <https://www.ynetnews.com/articles/0,7340,L-5221844,00.html> [<https://perma.cc/NUL6-QRGS>]; David M. Halbfinger, Iyad Abuheweila & Isabel Kershner, *Nine Killed in Gaza as Palestinian Protesters Face Off with Israeli Soldiers*, N.Y. TIMES (Apr. 6, 2018), <https://www.nytimes.com/2018/04/06/world/middleeast/gaza-palestinian-protest-israel.html> [<https://perma.cc/EF7X-X948>].

<sup>33</sup> See Halbfinger, Abuheweila, & Kershner, *supra* note 32.

<sup>34</sup> Yesh Din, *supra* note 1, ¶ 17.

<sup>35</sup> *Seven Protesters Killed, Two of Them Children, and 257 Injured at Friday Demonstrations in Gaza*, AL MEZAN CTR. FOR HUM. RTS. (Sept. 29, 2018), <http://www.mezan.org/en/post/23230/Seven+Protesters+Killed%2C+Two+of+Them+Children%2C+and+257+Injured+at+Friday+Demonstrations+in+Gaza> [<https://perma.cc/APB3-GJ6F>].

<sup>36</sup> *Id.*

<sup>37</sup> AMNESTY INT’L, *supra* note 25.

<sup>38</sup> See UN expert denounces killing of more Palestinian protesters, as “affront to human rights,” UN NEWS (Oct. 2, 2018), <https://news.un.org/en/story/2018/10/1022032> [<https://perma.cc/QME3-57GN>]; Sarah Helm, “Will he lose his leg?”: Thousands of Gaza protesters facing life-altering injuries from Israeli high velocity bullets, INDEPENDENT (Nov. 11, 2018),

The fear of a mass breach of the security barrier (the fence) between Israel and Gaza has also created a much-polarized public debate in Israel. The residents of Israeli communities and kibbutzim in the nearby Gaza Envelope region have claimed that Israel is too soft in addressing the violence at the border, including use of incendiary kites and rocket fire from Gaza.<sup>39</sup> In contrast, non-government organizations, scholars and left wing politicians have demanded that Israel immediately stop the excessive use of force at the border because it interferes with protesters' rights.<sup>40</sup> At the height of the public debate and great controversy over Israel's actions on the border, the Supreme Court faced the difficult task of assessing the IDF's rules of engagement (ROE) in Gaza while enduring vast amounts of pressure and harsh criticism even prior to the release of the judgment.

## II. Law Enforcement and Conduct of Hostilities—Separate Paradigms Based on Different Rationales

The relationship between IHRL and LOAC has been fertile ground for legal debates and scholarship. While IHL's scope of application is limited to situations of armed conflicts, IHRL is generally perceived to apply in peacetime *and* in situations of armed conflict.<sup>41</sup> Moreover, nowadays it is widely accepted that human rights obligations do not cease to exist during armed conflict even though, "the exact scope of the extraterritorial reach of human rights law remains a matter of ongoing legal debate."<sup>42</sup> The overlap between LOAC and IHRL regimes is especially notable in the case of occupation due to control over an occupied territory.<sup>43</sup> Traditionally, international law acknowledges two separate paradigms

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[https://www.independent.co.uk/news/long\\_reads/gaza-israel-protests-children-injuries-bullets-great-march-of-return-surgery-shifa-hospital-a8627521.html](https://www.independent.co.uk/news/long_reads/gaza-israel-protests-children-injuries-bullets-great-march-of-return-surgery-shifa-hospital-a8627521.html) [https://perma.cc/7ZXR-TZEC]; Toi Staff, *Meretz head warns of IDF "trigger-happy policy," demands probe of Gaza violence*, TIMES OF ISRAEL (March 31, 2018), <https://www.timesofisrael.com/meretz-head-slams-idf-trigger-happy-policy-calls-to-probe-gaza-violence/> [https://perma.cc/WZV2-RKQ8].

<sup>39</sup> Gilad Morag, *Protests by Residents of the Gaza Vicinity in Tel Aviv: Alarms and Dummy Balloons*, YNET (Aug. 18, 2018), <https://www.ynet.co.il/articles/0,7340,L-5330955,00.html> [https://perma.cc/CN4Y-QSPR]; Dana Yarkzi, *Israel is Burning: Residents of the Gaza vicinity demonstrated in Tel Aviv Against the Helplessness of the Government*, WALLA (Aug. 11, 2018), <https://news.walla.co.il/item/3180235> [https://perma.cc/A4RD-N6FH].

<sup>40</sup> Moran Azoulay, *Meretz Chairman: Investigate the Live Fire in Gaza and Lift the Siege*, YNET (March 31, 2018), <https://www.ynet.co.il/articles/0,7340,L-5213284,00.html> [https://perma.cc/Z72P-9K6D]; Adel Hana, *Do Not Shoot Palestinian Demonstrators on the Gaza Border*, HAARETZ (June 13, 2018), <https://www.haaretz.co.il/opinions/.premium-1.6173951> [https://perma.cc/ZH2D-YEXZ].

<sup>41</sup> G. GAGGIOLI, INT'L COMM. OF THE RED CROSS, THE USE OF FORCE IN ARMED CONFLICTS: INTERPLAY BETWEEN THE CONDUCT OF HOSTILITIES & LAW ENFORCEMENT PARADIGMS 5 (2013).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*; see also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶¶ 107–13 (July 9); Hum. Rts. Comm., Concluding Observations: Israel, U.N. Doc. CCPR/C/79/Add.93, ¶ 10 (Aug. 18, 1998) [hereinafter 1998 Concluding Observations]; Hum. Rts. Comm., Concluding Observations: Israel, U.N. Doc. CCPR/CO/78/ISR, ¶ 11 (Aug. 21, 2003) [hereinafter 2003 Concluding Observations]; Loizidou v. Turkey, 1996-VI Eur. Ct. H.R. (1996) 70, ¶ 62; Cyprus v. Turkey, 2001-IV Eur. Ct. H.R. 331, ¶ 30; Al Skeini v. United Kingdom, 2011 Eur. Ct. H.R. 1093, ¶¶ 130–50. On control over the person, see,

for the use of force: LE, which is governed by IHRL, and conduct of hostilities (CH), which is governed by LOAC.

LOAC rules governing CH were designed to reflect the realities of armed conflict, and they are based on the assumption that the use of force “is inherent to waging war because the ultimate aim of military operations is to prevail over the enemy’s armed forces.”<sup>44</sup> The LOAC has two driving forces—military necessity and humanitarian considerations; it is predicated on the subtle equilibrium between those opposing agendas since it “allows Belligerent Parties much leeway (in keeping with the demands of military necessity) and nevertheless curbs their freedom of action (in the name of humanitarianism).”<sup>45</sup> This idea was manifested in the *Hostage Case*, which established that “[m]ilitary necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.”<sup>46</sup> The aforementioned “laws of war” are intended to restrain the otherwise boundless pursuit of enemy submission. Indeed, not all means and methods of warfare are permissible under the LOAC.

The two “cardinal principles” limiting the ability of belligerents to defeat enemies by all means are the rules of distinction and the prohibition of unnecessary suffering.<sup>47</sup> The rule of distinction distinguishes between combatants and military objectives, which are valid targets of attack, and civilians or civilian objects, which are not. It has been described as the quintessence of the LOAC.<sup>48</sup> Under the principle of distinction lies the requirement of proportionality in attacks, which forbids the launching of an attack that “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>49</sup> The prohibition of unnecessary suffering is the requirement to

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e.g., *Öcalan v. Turkey*, 2005-IV Eur. Ct. H.R. 282, ¶ 93; *Issa v. Turkey*, 2004 Eur. Ct. H.R. 629, ¶¶ 69–71; *Al-Saadoon and Mufdhi v. United Kingdom*, 2010 Eur. Ct. H.R. 409, ¶ 88; *Al-Jedda v. United Kingdom*, 2011 Eur. Ct. H.R. 1092, ¶¶ 74–86.

<sup>44</sup> GAGGIOLI, *supra* note 41, at 6.

<sup>45</sup> YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 8–9 (2016).

<sup>46</sup> *Hostage Case*, U.S. v. List, et al., Case No. 7, 11 N.M.T. 1230, 1253 (American Military Tribunal, Nuremberg 1948).

<sup>47</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (AP/I), June 8, 1977, 1125 U.N.T.S. 17512; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. ¶ 78 (July 8).

<sup>48</sup> See DINSTEIN, *supra* note 45, at 332.

<sup>49</sup> JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECKS, *INT’L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 46 (2005) [hereinafter ICRC STUDY]; see also Additional Protocol I, *supra* note 47, at arts. 51(5)(b), 57(2)(a)(iii).

refrain from “the use of means and methods of warfare, which are of a nature to cause superfluous injury or unnecessary suffering.”<sup>50</sup>

According to Dinstein, the above-mentioned elements of distinction, proportionality and the prohibition of unnecessary suffering “are elevated to the pinnacle of the law regulating the conduct of hostilities.”<sup>51</sup> Such rules have gained the status of customary international law, and they apply to both non-international armed conflicts (NIAC) and international armed conflicts (IAC).<sup>52</sup>

Unlike LOAC, IHRL rules governing LE aim to protect people from abuse by their state. LE aims to provide guidance on “how force can be used by State agents when it is absolutely necessary in self-defence; to prevent crime, to effect or assist in the lawful arrest of offenders or suspected offenders; to prevent the escape of offenders or suspected offenders and in quelling a riot.”<sup>53</sup> According to the Code of Conduct for Law Enforcement Officials and the UN Basic Principles on the Use of Force and Firearms, the term law enforcement refers to the exercise by state agents of police powers, especially powers of arrest or detention.<sup>54</sup> The core duties of LE officials under international law are “serving the community” and “protecting all persons against illegal acts.”<sup>55</sup> Under European Union law, LE authorities hold the duty “of upholding the properly enacted and constituted law of the state, including securing a general condition of public tranquillity.”<sup>56</sup> In Israel, the meaning of LE can be derived from the Police Ordinance, which defines police duty as the prevention and detection of offenses, the seizure and prosecution of offenders, the safe custody of prisoners, and the maintenance of public order and the security of life and property.<sup>57</sup>

Because of the large range of possible LE activities, relevant human rights will vary according to the specific situation.<sup>58</sup> However, the most directly affected

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<sup>50</sup> ICRC STUDY, *supra* note 49, at 237; *see also* Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868; Hague Declaration (IV,2) concerning Asphyxiating Gases, July 29, 1899; Hague Declaration (IV,3) concerning Expanding Bullets, July 29, 1899; Hague Convention (II) with Respect to the Laws and Customs of War on Land art. 23(e), July 29, 1899, 32 Stat. 1803; Hague Convention (IV) with Respect to the Laws and Customs of War on Land art. 23(e), Oct. 18, 1907, 36 Stat. 2277.

<sup>51</sup> DINSTEIN, *supra* note 45, at 332.

<sup>52</sup> *See* ICRC STUDY, *supra* note 49, at 3, 46, 237.

<sup>53</sup> *Id.* at 7; *see also* G.A. RES 34/169, U.N. Code of Conduct for Law Enforcement Officials (Dec. 17, 1979) [hereinafter Code of Conduct]; G.A. RES 45/166, U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (Dec. 18, 1990) [hereinafter Basic Principles].

<sup>54</sup> *See* N. Melzer, *Conceptual Distinction and Overlaps Between Law Enforcement and the Conduct of Hostilities*, in HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 63–64 (T. D. Gill & D. Fleck eds., 2015); *see also* Code of Conduct, *supra* note 53; Basic Principles, *supra* note 53.

<sup>55</sup> Melzer, *supra* note 54, at 64.

<sup>56</sup> EUR. COUNCIL, THE EUROPEAN CODE OF POLICE ETHICS 18 (2001).

<sup>57</sup> Police Ordinance [New Version] 5731-1971 art. 3 (1971) (Isr.), [https://www.nevo.co.il/law\\_html/Law01/290\\_002.htm#Seif3](https://www.nevo.co.il/law_html/Law01/290_002.htm#Seif3) [<https://perma.cc/46L6-ZYD6>].

<sup>58</sup> Melzer, *supra* note 54, at 69–70.

human right, when it comes to the use of potentially lethal weapons under LE, is the right to life. The Universal Declaration of Human Rights proclaims in article 3: “everyone has the right to life.”<sup>59</sup> The right to life is protected in article 6 of the International Covenant on Civil and Political Rights (ICCPR) as well. It states: “every human being has an inherent right to life. This right shall be protected by law. No one should be arbitrarily deprived of his life.”<sup>60</sup> Such definitions give the right to life a unique status, since it is the only right in the International Bill of Human Rights described as inherent.<sup>61</sup> Scholars have suggested that the ICCPR treats the right to life of the individual similarly to states’ right to self-defense, which is also described as “inherent.”<sup>62</sup> The right to life does not derive its validity from international instruments and their ratification by states. Rather, it exists independently. It does not cease in times of war, but is interpreted with reference to IHL.<sup>63</sup>

In its first General Comment on the right to life under the ICCPR, the U.N. Human Rights Committee noted that “the right to life has been too often narrowly interpreted.”<sup>64</sup> The Committee asserted that the inherent right to life cannot be understood in a restrictive manner and that states need to adopt positive measures to protect it.<sup>65</sup> States are obliged to respect and protect the right to life—to refrain from extrajudicial killings while also actively keeping people’s lives safe. International tribunals have adopted the positive obligation of the right to life in various cases.<sup>66</sup>

The three general principles governing the use of force under the LE paradigm are precaution, proportionality and necessity.<sup>67</sup> Such principles are design to protect the right to life to the greatest extent possible. The principle of precaution

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<sup>59</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 3 (Dec. 10, 1948).

<sup>60</sup> G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights art. 6 (Dec. 16, 1966).

<sup>61</sup> See NIGEL RODLEY & MATT POLLARD, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* 246, 247 (3rd ed. 2011).

<sup>62</sup> *Id.*

<sup>63</sup> See generally *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 47, ¶ 25: “In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”

<sup>64</sup> Hum. Rts. Comm., Gen. Comment No. 6, ¶ 5, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008); see also ELIZABETH WICKS, *THE RIGHT TO LIFE AND CONFLICTING INTERESTS* 7 (2010).

<sup>65</sup> See Hum. Rts. Comm., *supra* note 63, ¶ 5.

<sup>66</sup> See, e.g., Hum. Rts. Comm., *Gilmet Dermit v. Uru.*, ¶ 10(b), U.N. Doc. CCPR/C/17/D/84/1981, IHRL 2560 (1982); *Velasquez Rodriguez v. Hond.*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 157 (1988); *Oneryildiz v. Turkey*, 2004-XII Eur. Ct. H.R. 79, ¶ 89; *Osman v. United Kingdom*, 1998-VII Eur. Ct. H.R. 3124, ¶ 115; *Kaya v. Turkey*, 2000-III Eur. Ct. H.R. 149, ¶ 85.

<sup>67</sup> GENEVA ACAD. OF INT’L HUMANITARIAN LAW AND HUM. RTS., *USE OF FORCE IN LAW ENFORCEMENT AND THE RIGHT TO LIFE: THE ROLE OF THE HUMAN RIGHTS COUNCIL* 6–10 (Nov. 2016); Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/26/36, 10–12 (Apr. 1, 2014) [hereinafter *Rep. of the Special Rapporteur*, Apr. 2014].

requires that any operation under the LE paradigm “must be planned, prepared, and conducted so as to minimize, to the greatest extent possible, the recourse to lethal force.”<sup>68</sup> Such planning is crucial since:

Once a situation arises where the use of force is considered, it is often too late to rescue the situation. Instead, in order to save lives, all possible measures should be taken ‘upstream’ to avoid situations where the decision on whether to pull the trigger arises, or to ensure that all the possible steps have been taken to ensure that if that happens, the damage is contained as much as is possible.<sup>69</sup>

The principle of necessity requires that force used under the LE paradigm must be necessary in the circumstances. LE officials may use force “only when strictly necessary,”<sup>70</sup> and any use of force by LE officials must be exceptional.<sup>71</sup> It also requires that LE officials use force only as required to perform their duty.<sup>72</sup> Moreover, the use of force by LE officials “must be in response to an imminent or immediate threat—a matter of seconds, not hours.”<sup>73</sup>

The principal of proportionality requires that the amount of force used will not exceed the amount necessary to achieve a legitimate objective.<sup>74</sup> Heyns offers the visualization of a ladder, where “proportionality is a scale that determines how high up the ladder of force one is allowed to go.”<sup>75</sup> When it comes to lethal force the demand is for strict proportionality because potentially lethal force can be applied only to save life or limb; that notion is known as the “protect life principle.”<sup>76</sup> The all-over requirements of necessity and proportionality are best reflected in principle 9 of the Basic Principles:

Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against an imminent threat of death or serious injury ... and only when less extreme measures are insufficient to achieve these objectives. In any event,

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<sup>68</sup> Melzer, *supra* note 54, at 70.

<sup>69</sup> *Rep. of the Special Rapporteur*, Apr. 2014, *supra* note 67, at 11.

<sup>70</sup> Code of Conduct, *supra* note 53, art. 3.

<sup>71</sup> *Id.* art. 3 cmt a.

<sup>72</sup> See *Rep. of the Special Rapporteur*, Apr. 2014, *supra* note 67, at 11.

<sup>73</sup> *Id.* at 10; see also Christof Heyns (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, ¶¶ 33–37, U.N. Doc. A/68/382 (Sept. 13, 2013) [hereinafter *Rep. of the Special Rapporteur*, Sept. 2013]; Philip Alston (Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions), *Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. Doc. A/HRC/14/24 (May 20, 2010) [hereinafter *Rep. of the Special Rapporteur*, May 2010].

<sup>74</sup> See *Rep. of the Special Rapporteur*, Apr. 2014, *supra* note 67, at 11.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 11–12.

intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.<sup>77</sup>

The complexity of security situations in modern times means that LE and CH paradigms will at times intersect and even overlap.<sup>78</sup> It is important to note that the instinctive division of military following the CH paradigm and police following the LE paradigm is inaccurate because the governing framework is to be determined according to the situation at hand. In fact, nowadays military forces are oftentimes required to act under both frameworks:

Forces involved in contemporary military operations are often called upon to assume functions both of law enforcement and of hostilities, each of which are governed by different legal standards. It is therefore important to distinguish between these two concepts, identify potential overlaps between them, and determine how the respective legal paradigms governing each type of operation interrelate.<sup>79</sup>

### III. *Yesh Din v. IDF Chief of Staff*

In April 2018, six human rights organizations consisting of Yesh Din, The Association for Civil Rights in Israel, HaMoked: Center for the Defence of the Individual, Gisha, Adalah, and Al Mezan petitioned to Israel's High Court of Justice to challenge and revoke the IDF's ROE permitting live fire at demonstrators near the Gaza fence.<sup>80</sup>

The petitioners argued that the IDF's ROE in Gaza are repugnant to both international law and Israeli law, specifically the basic law of human dignity and liberty.<sup>81</sup> According to the petition, the ROE concerning Gaza allegedly permit live fire by snipers at protesters classified by the IDF as "primary inciters" or "major disturbers of the peace," even when these individuals do not pose a clear and immediate threat to human life. It was suggested that the orders also permit soldiers to shoot at demonstrators for merely approaching the Gaza-Israel fence from its Gazan side.<sup>82</sup>

The petitioners further argued that even if the demonstration area is considered a combat zone, the recent protests are of a civilian character and therefore the law of armed conflict is not applicable; rather the law enforcement

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<sup>77</sup> Basic Principles, *supra* note 53.

<sup>78</sup> K. Watkin, *Use of Force During Occupation: Law Enforcement and Conduct of Hostilities*, 94 INT'L REV. RED CROSS 267, 311 (2012).

<sup>79</sup> Melzer, *supra* note 54, at 63.

<sup>80</sup> Yesh Din, *supra* note 1.

<sup>81</sup> *Id.* ¶¶ 17–18.

<sup>82</sup> *Id.*

paradigm under the IHRL regime should apply.<sup>83</sup> The LE paradigm, they explained, requires the state to respect the right to life of the demonstrators, even in cases of un-peaceful demonstrations, since the use of lethal force is permitted only as a last resort.<sup>84</sup>

The petitioners were admittedly caught off guard by the state's response.<sup>85</sup> While they expected the state to argue that they consider the protesters to be directly participating in hostilities, the state's argument followed a different, very much unorthodox vein.

The state responded that the protests were part of an ongoing armed conflict between Israel and the Hamas terror organization, and the applicable law is, therefore, the LOAC.<sup>86</sup> This argument was based on previous judgments of the Israeli court that the LOAC applies to the ongoing hostilities between Israel and Hamas.<sup>87</sup> The state further argued that the complex nature of events obliges it to differentiate between the use of force under LE and the use of force under conduct of hostilities, both of which were covered by the legal framework of LOAC.<sup>88</sup>

The petitioners were trying to get the Supreme Court to declare the IDF's ROE unlawful, which would require the court to examine the rules in order to determine their status. The state asked to present the classified ROE (as well as other classified information and documents) *ex parte* and *in camera*.<sup>89</sup> The petitioners objected to such review by the court.<sup>90</sup> The court warned the petitioners that their objection could result in a presumption of regularity in relation to the legality of the rules.<sup>91</sup> However, the petitioners maintained their objection, and eventually the ROE were not presented to the court.<sup>92</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> See Petition for Plaintiff *Adalah* ¶¶ 63, 69–81, H CJ 3003/18, 3250/18 *Yesh Din v. IDF Chief of Staff* (2018) (Isr.); see generally Güleç v. Turkey, 1998-IV, Eur. Ct. H. R. 58; Şimşek v. Turkey, 2005 Eur. Ct. H.R. 546.

<sup>85</sup> Court Protocol 4, H CJ 3003/18, 3250/18 *Yesh Din v. IDF Chief of Staff* (2018) (Isr.), available at <http://www.hamoked.org.il/files/2018/1162831.pdf> [<https://perma.cc/A8SZ-EVLY>] [hereinafter Court Protocol].

<sup>86</sup> State Response ¶ 26, H CJ 3003/18, 3250/18 *Yesh Din v. IDF Chief of Staff* (2018) (Isr.) [hereinafter State Response].

<sup>87</sup> *Id.*; see, e.g., H CJ 7015/02 *Ajuri v. IDF Commander in West Bank* ¶ 1 (2002) (Isr.); H CJ 769/02 *Public Committee Against Torture v. Government* ¶¶ 16–18 (2006) (Isr.); H CJ 4466/16 *Muhammed Eliyan v. Commander of the Israeli Army in the West Bank* (2017) (Isr.).

<sup>88</sup> State Response, *supra* note 86, ¶ 6.

<sup>89</sup> *Yesh Din*, *supra* note 1, ¶ 25.

<sup>90</sup> *Id.* ¶¶ 25, 62.

<sup>91</sup> *Id.* Under Israeli law, in cases in which the Petitioner objects to the presentation of confidential material of the administrative authority *ex parte*, it raises a presumption of regularity, and the actions of the authority based on the un-presented material are assumed to be lawful (an assumption that can be refuted). See, e.g., H CJ 4350/14 *Aladin v. IDF Commander in the West Bank* ¶ 5 (2014) (Isr.); H CJ 5696/09 *Mugrabi vs Home Front Command Major General* (2012) (Isr.).

<sup>92</sup> *Yesh Din*, *supra* note 1, ¶ 62.

The court ultimately accepted the state's position, based on the state's arguments as well as the presumption of regularity, and denied the petition. It acknowledged the poor legal ground on which the state's argument is based, but nevertheless accepted the LE paradigm under the LOAC.<sup>93</sup> This is a curious result given international legal precedent on this issue.

#### IV. Does *Yesh Din* Have Legal Grounds?

While the state acknowledged that it lacked a solid legal foundation for its argument regarding the existence of an LE paradigm under the LOAC, it did attempt to identify roots in article 42 of the Geneva Convention Relative to the Treatment of Prisoners of War (GCIII) and article 43 of the Hague Convention from 1907, as well as the Turkel Commission Report.<sup>94</sup>

In doing this, the state assumed that as a default, the events of the protests are governed by LE under the LOAC paradigm. In some circumstances, with the existence of information that demonstrates actual participation in hostilities by a protester (the example given in the judgment is that of a protester holding an explosive device), the governing paradigm would be that of conduct of hostilities (CH) rather than LE.<sup>95</sup>

The state further argued that while IHRL does not apply to the events, the interpretation of the content of the LE paradigm under the LOAC may be inspired by IHRL. Thus, according to the state, the LE paradigm under the LOAC enables, as a minimum, what is deemed lawful by the LE paradigm under IHRL.<sup>96</sup>

The state offered a very brief analysis of the actual content of the LE paradigm under the LOAC:

Under the framework of Law Enforcement under the Laws of Armed Conflict, the use of potentially lethal force is permissible under circumstances of concrete risk to life or limb. Such risk may stem from an individual or a crowd. The use of such force is subject to the following conditions: The use of unlethal methods to face risk of life or limb has been exhausted, or is non-applicable in the circumstances at hand; it is necessary to use potentially lethal force to address the risk (meaning, the estimation is that it is necessary to use force at that moment to prevent such risk before it materializes, even if the risk itself has not yet turned immediate); and the force

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<sup>93</sup> *Yesh Din*, *supra* note 1, ¶ 40.

<sup>94</sup> State Response, *supra* note 86, ¶ 31; JACOB TURKEL, THE PUBLIC COMMISSION TO EXAMINE THE MARITIME INCIDENT OF 31 MAY 2010 (2011) [hereinafter TURKEL REPORT]. The Turkel Commission was an inquiry set by Israeli Government with the mission to investigate the Gaza flotilla incident, led by Israeli retired Supreme Court Judge Jacob Turkel.

<sup>95</sup> See State Response, *supra* note 86, ¶ 30.

<sup>96</sup> *Id.* ¶ 32.

that is being used is proportional to the risk. Indeed ... under the law enforcement paradigm, potentially lethal force is to be used as a last resort, in proportional manner and under the minimal required scope.<sup>97</sup>

The state denied the allegations that the IDF's ROE automatically allow the use of live fire at the perimeter, but rather stated that they permit live fire aimed at the legs of "central inciters" as a last resort, to avoid a situation of mass breach of the fence that would require much greater use of force.<sup>98</sup>

Advocate Michael Sfar, who represented the petitioners, observed that the state was "turning international law on its head."<sup>99</sup> He further stated that he had never heard of an LE paradigm under the LOAC, and sarcastically noted that perhaps he had missed the relevant lesson in law school.<sup>100</sup> Judge Melcer suggested that the lack of legal basis meant that the situation was new to international law.<sup>101</sup>

#### A. Law Enforcement Under the Laws of Armed Conflict in International Law

In *Yesh Din*, the court briefly mentioned article 42 of GCIII and article 43 of the Hague Convention from 1907, as well as the Turkel Commission, as examples of legal sources that regulate the LE under the LOAC paradigm. But do these legal sources indeed use such a paradigm?

*Article 42 of GCIII* – Article 42 of the GCIII regulates the use of weapons against prisoners of war. It provides that "[t]he use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances."<sup>102</sup> Article 42 of the GCIII was not intended to create a new rule of international law, but to reflect an existing custom, which was already codified in the Brussels Declaration of 1874.<sup>103</sup> The commentary to the Convention explained that "[c]aptivity is based on force, and although there can be no doubt on the matter, it is recognized in international customary law that the

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<sup>97</sup> *Id.* ¶ 33.

<sup>98</sup> *Id.* ¶ 44. For the mass breach threat, see ¶ 83.

<sup>99</sup> Court Protocol, *supra* note 85, at 4.

<sup>100</sup> *Id.* at 4–5.

<sup>101</sup> *Id.* at 5 ("Some situations are not yet of age.")

<sup>102</sup> III Geneva Convention relative to the Treatment of Prisoners of War art. 42 (Aug. 12, 1949) 75 U.N.T.S. 135 [hereinafter GCIII].

<sup>103</sup> See NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 151 (2008) [hereinafter TARGETED KILLINGS]; INT'L COMM. OF THE RED CROSS, COMMENTARY ON III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 245–46 (Jean Pictet ed., 1960) [hereinafter Commentary GCIII]; Brussels Declaration "Project of an International Declaration concerning the Laws and Customs of War," art. 28 (Aug. 27, 1874).

Detaining Power has the right to resort to force in order to keep prisoners captive.”<sup>104</sup>

The commentary also makes clear that resort to force is permissible regarding only escape proper, rather than preparatory acts or phases.<sup>105</sup> Therefore, it is not lawful to open fire against a prisoner making preparations to escape within camp limits.<sup>106</sup> During WWII, forces solved the problem of differentiating between actual escape and mere preparations by establishing “death-lines,” designated boundaries beyond which guards could fire upon escaping prisoners.<sup>107</sup> In the case of a riot or a rebellion, if guards have to open fire, “they should first aim low, unless they are themselves in imminent danger, so as to avoid inflicting fatal wounds.”<sup>108</sup>

Since article 42 of the GCIII includes the principle of necessity as well as of proportionality (even though when there is no less “extreme measure” to prevent escape the use of lethal force would be presumed proportional),<sup>109</sup> it is indeed an example of LE “logic” under the LOAC. It is “inspired by HRL paradigm *avant la lettre*.”<sup>110</sup> However, the article refers to prisoners of war (“POWs”) within a very specific situation; it certainly does not create a separate paradigm of LE under the LOAC in its wide sense, as the Israeli Supreme Court implied.

It makes sense that LE norms would apply to POW situations, since prisoners are indeed under the state’s custody and under its *control*, since “IHL makes a basic distinction between the conduct of hostilities and the exercise of power or authority over persons or territory.”<sup>111</sup> Melzer described POWs during the process of escape as “crossing the Rubicon between the two normative paradigms of law enforcement and hostilities, a legal grey zone in which the influence of either paradigm grows with the increasing proximity to either shore.”<sup>112</sup> The logic behind such a shift in paradigms is the assumption that once a POW escapes, he or she will pose a “renewed military threat.”<sup>113</sup>

In that sense, there is a similarity between the “death-lines” of prisons in WWII and the no-go perimeter that Israel purportedly enforces in Gaza. Israel uses

<sup>104</sup> Commentary GCIII, *supra* note 103, at 246.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 246–47 (citing Maurice Bretonniere, *L’application de la Convention de Genève aux prisonniers français en Allemagne durant la seconde guerre mondiale* (thesis) 338–39 (1949); *see also* HANS K. FREY, *DIE DISZIPLINARISCHE UND GERICHTLICHE BESTRAFUNG VON KRIEGSGEFANGENEN* 44–45 (1948)).

<sup>108</sup> Commentary GCIII, *supra* note 103, at 248.

<sup>109</sup> TARGETED KILLINGS, *supra* note 103, at 152–54. Proportionality of the use of lethal weapons on an escaping POW is due to the presumption that such prisoner would pose a military threat once escaped.

<sup>110</sup> ROBERT KOLB, *ADVANCED INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW* 46 (2014).

<sup>111</sup> NILS MELZER, *INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW* 61 (ICRC 2009) [hereinafter MELZER, *INTERPRETIVE GUIDANCE*].

<sup>112</sup> TARGETED KILLINGS, *supra* note 103, at 154.

<sup>113</sup> *Id.* at 153.

the perimeter as an indication that the person who crosses the line intends to damage the fence and cross over to the Israeli side. Such an assumption is problematic, *inter alia*, in the sense that people have a right to go near the fence from their side of the border. However, if we accept, for the purpose of the discussion, Israel's assertion that there is a continuous armed conflict between Israel and Hamas, and a protester approaching the perimeter intends to cross over to Israeli territory to harm security forces, then a protestor entering the perimeter may have similar characteristics to the POW who tries to escape captivity.

*Article 43 of the Hague Convention* – Article 43 of the Hague Convention provides that:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.<sup>114</sup>

Like article 42 of the GCIII, this article too requires LE norms concerning *people under the control of the state*. Article 43 of the Hague Convention does not refer to POWs like article 42 of GCIII, but to people under occupation.

It is generally understood that an occupation is “the effective control of a foreign territory by hostile armed forces.”<sup>115</sup> Legal literature has established the notion of effective control as a central element in the identification of occupation.<sup>116</sup> It is undoubtedly the most significant tool in identifying whether a territory has in fact been occupied. Scholars incorporate effective control as an integral part of the very definition of occupation itself.<sup>117</sup> According to Dinstein, “effective control is a *conditio sine qua non* of belligerent occupation.”<sup>118</sup>

The tendency to view the effective control test as the essence of occupation is to be found within international jurisprudence as well. For example, both the ICTY in the Tadić case and the International Court of Justice in the Armed

<sup>114</sup> Hague Convention (IV), *supra* note 50, art. 43.

<sup>115</sup> INT'L COMM. OF THE RED CROSS, OCCUPATION AND OTHER FORMS OF ADMINISTRATION OF FOREIGN TERRITORY 4, 7 (Tristan Ferraro ed., 2012) [hereinafter ICRC OCCUPATION].

<sup>116</sup> Tristan Ferraro, *Determining the Beginning and End of an Occupation Under International Humanitarian Law*, 94 INT'L REV. RED CROSS 133, 140 (2012); George Schwarzenberg, *International Law as Applied by International Courts and Tribunals*, in 2 THE LAW OF ARMED CONFLICT 274–76 (1968); GERHARD VON GLAHN, THE OCCUPATION OF ENEMY TERRITORY: A COMMENTARY ON THE LAW AND PRACTICE OF BELLIGERENT OCCUPATION 27–29 (1957); EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 4 (1993); YORAM DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION 42–43 (2009).

<sup>117</sup> BENVENISTI, *supra* note 116, at 4 (defining occupation as “effective control of a power . . . over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory.”).

<sup>118</sup> DINSTEIN, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION, *supra* note 116, at 43.

Activities case emphasized the significance and centrality of the effective control test.<sup>119</sup> The significant status of the effective control test is also reflected in military manuals of states such as the United States, Germany, Italy, Canada, the United Kingdom and New Zealand.<sup>120</sup>

Scholars and experts widely agree that the requirement of authority refers to the notion of *governmental functions* “since occupation had to do with political direction of the territory concerned and could not be enforced by anything short of governmental control.”<sup>121</sup> Such a notion is in line with the *Hostage Case*, where it was established and clarified that the authority required is that of governmental authority:

[A]n occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant’s control is maintained and that of the civil government eliminated, the area will be said to be occupied.<sup>122</sup>

The intention is that the governmental authority of the defeated enemy is to be replaced with that of the occupying power.

Once a situation has amounted to occupation, occupation law would offer the legal framework for the exercise of authority by the occupying power, “striking a balance between the occupier’s security needs and the interests of the ousted authority as well as those of the local population.”<sup>123</sup>

The obligation under article 43 to *restore and ensure public order and safety* has been interpreted widely to include “conducting a proper administration on all its branches accepted nowadays in a well-functioning country, including security, health, education, welfare, and also, inter-alia, quality of life and transportation . . .

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<sup>119</sup> Prosecutor v. Duško Tadić, Case No. IT-94-1-T, Trial Chamber, Judgment, ¶ 580 (Int’l Crim. Trib. for the Former Yugoslavia, May 7, 1997); Armed Activities on the Territory of the Congo (DRC v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 175.

<sup>120</sup> Ferraro, *supra* note 116, at 140; *see also* U.S. DEPT. OF THE ARMY, FM 27-10, DEPT. OF THE ARMY FIELD MANUAL: THE LAW OF LAND WARFARE, sec. 352 (1956); UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, sec. 11.7 (2004) (U.K.); STATA MAGGIORE DELLA DIFESA, MANUALE DI DIRITTO UMANITARIO, SMD-G-014, 12, 32 (1991) (It.); N.Z. DEFENCE FORCE, DM 112, INTERIM LAW OF ARMED CONFLICT MANUAL 1302 (1992) (N.Z.); BUNDESMINISTERIUM DER VERTEIDIGUNG, HUMANITÄRES VÖLKERRECHT IN BEWAFFNETEN KONFLIKTEN—HANDBUCH, ¶ 526 (1992) (Ger.); THE DEPARTMENT OF NATIONAL DEFENCE AND THE CANADIAN ARMED FORCES, JOINT DOCTRINE MANUAL: LAW OF ARMED CONFLICT AT OPERATIONAL AND TACTICAL LEVELS, ¶ 1203.7 (2001) (Can.).

<sup>121</sup> ICRC OCCUPATION, *supra* note 115, at 19.

<sup>122</sup> Hostage Case, *supra* note 46, at 1243.

<sup>123</sup> ICRC OCCUPATION, *supra* note 115, at 7 n.1.

.”<sup>124</sup> To assure that security requirements are met, as well as public order, the occupying force must be engaged in “policing”—performing LE functions.

While the law of occupation is a branch of IHL, the interpretation is arguably that the LE paradigm that applies is not LE under the LOAC, but rather LE under IHRL: “Public order is restored through police operations, which are governed by domestic law and international human rights law, and not through military operations governed by IHL on the conduct of hostilities.”<sup>125</sup> After occupation has been established, the troops are required to “switch from combat to law enforcement mode”<sup>126</sup> That suggests that while in the case of POWs there is a different setting of the LE paradigm, inspired by IHRL but not identical thereto, in the case of occupation, there is a switch to the traditional LE paradigm under IHRL. One may counter such a claim and argue that given the fact that occupation law demands the occupying power to take all the measures in his power to maintain law and order, IHRL norms would not be similar to domestic ones. Unless the control over the territory is similar to that of the domestic state, the occupying powers would have difficulty in providing identical human rights.<sup>127</sup> Scholars have accordingly pointed out that for the LE paradigm to apply during occupation there should be “a relatively secure grip by the foreign authority over the occupied territory.”<sup>128</sup>

While article 43 would be the easiest way to justify LE under the LOAC at the Gaza border, the State of Israel has deliberately chosen to distance itself from such applicability because of Israel’s position that Gaza is not under Israeli occupation.<sup>129</sup> While the law of occupation may provide Israel with some practical tools to deal with events such as the March of Return, Israel is not willing to admit an ongoing occupation of Gaza and maintains that it ended the occupation in 2005.<sup>130</sup>

*The Turkel Report* – Finally, the third suggested legal basis for the LE under LOAC is the Turkel Commission’s Report.<sup>131</sup> The Turkel Commission was

<sup>124</sup> HCJ 202/81 Tabeeb et al., Minister of Defence et al., 36(2) PD 629 (1981) (Isr.).

<sup>125</sup> Marco Sassòli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16 EURO. J OF INT’L L 661, 665 (2005).

<sup>126</sup> *Id.* at 668.

<sup>127</sup> For the applicability of IHRL during occupation, see Legal Consequences, *supra* note 43, ¶¶ 107–13; 1998 Concluding Observations, *supra* note 43, ¶ 10; 2003 Concluding Observations, *supra* note 43, ¶ 11; Loizidou, *supra* note 43, ¶ 62; Cyprus, *supra* note 43, ¶ 30; Al Skeini, *supra* note 43, ¶¶ 130–50.

<sup>128</sup> ANDREW CLAPHAM, PAOLA GAETA, & TOM HAECK, *THE OXFORD HANDBOOK OF INTERNATIONAL LAW IN ARMED CONFLICT* 200 (2014).

<sup>129</sup> HCJ 9132107 Jaber Al-Bassiouni Ahmed v. The Prime Minister (2008) (Isr.).

<sup>130</sup> For a lengthy discussion regarding the status of Israel as occupying force in Gaza, see Shelly Aviv Yeini, *The Vague Standards for End of Occupation and the Spectrum Based Approach to its Identification: Gaza as a Test Case*, 29 TRANSNATIONAL LAW & CONTEMPORARY PROBLEMS (forthcoming 2019).

<sup>131</sup> Yesh Din, *supra* note 1, ¶¶ 39, 40, 57.

appointed by Israel to investigate the incident of the Mavi Marmara, which took place in May 2010.<sup>132</sup> The Supreme Court seems to consider the Turkel Report of similar normative force as the Hague Convention and GCIII, but the Report clearly does not establish binding rules of international law.

The court quoted the following section from the Turkel Report as evidence for LE under the LOAC paradigm:

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.<sup>133</sup>

The commission first assessed the possibility that a civilian against whom force was used had taken direct part in hostilities. If that was not the case, “that use of force was assessed solely under law enforcement norms.”<sup>134</sup>

The ROE of the IDF in the Mavi Marmara incident were as follows:

The use of lethal weapons was permitted in one situation only, namely in self-defense, for the purpose of averting a *real and immediate* danger to life, when it is not possible to avert the danger by less harmful means. It should be noted that the definition of “danger to life” in the operation order is: “*a real and immediate* danger of the loss of human life or serious physical injury.” It should also be noted that the order states that lethal weapons should be used only as a last resort, after warnings have been given to the person against whom a lethal weapon is going to be used. It also states, with respect to the use of lethal weapons, that if there is a real concern that the gradual action would endanger life, then it is permissible to shoot at the one creating the danger in order to eliminate the danger immediately, even without engaging in all of the stages set forth above.<sup>135</sup>

While the report does not detail exactly whether LE under the LOAC differs from LE under IHRL, it does maintain the temporal demand of necessity. The danger

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<sup>132</sup> On May 31, 2010, seventy-two nautical miles from land, Israeli defense forces boarded a flotilla of six vessels carrying people and humanitarian supplies headed to Gaza. Nine passengers lost their lives and many others were wounded as a result of the use of force during the takeover operation by Israeli forces. *See generally* U.N. Panel of Inquiry on the Gaza Flotilla Incident of 31 May 2010, *Rep. of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident* (Sept. 2011), [http://www.un.org/News/dh/infocus/middle\\_east/Gaza\\_Flotilla\\_Panel\\_Report.pdf](http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf) [<https://perma.cc/Y6BA-J3YN>].

<sup>133</sup> TURKEL REPORT, *supra* note 94, at Part 1, ¶ 234.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* ¶ 121 (emphasis added).

posed to human lives that can be addressed by potentially lethal weapons must be an *immediate* one.

The court in *Yesh Din* accepted the claim that article 42 of the GCIII and article 43 of the Hague Convention represent LE under the LOAC. While both articles do require the use of LE, they do not stipulate that such law enforcement activities would be carried out any differently from the traditional LE paradigm, even if carried out by military personnel. The Turkel Report referred to traditional LE principles as well—that is, it detailed the requirements of necessity (temporal and substantive) and proportionality.

*B. General Law Enforcement Under the Laws of Armed Conflict Paradigm—How Does It Differ from Specific Situations of Law Enforcement Under the Laws of Armed Conflict?*

The situations of escaping POW and of occupation are both characterized by a great amount of control over people and territory. The situation in *Yesh Din*, if one agrees with Israel's claim of not being an occupying force in Gaza after the disengagement (and of having a continuous armed conflict with Hamas), is different: people and territory are not under the complete power or effective control of Israeli forces. The commonality in all three scenarios is their preventive nature. In all three situations, there is an attempt to use force to prevent an escalation of affairs that may resume hostilities or combatant status. The common ground is a starting point of a contained situation engaging people who are not at that moment actively participating in hostilities, but have the potential to do so.<sup>136</sup> POWs and people under occupation could be seen as having the potential to re-engage (or simply engage) in hostilities if the state does not prevent them from escaping or pacify an insurgency. In the case of the March of Return, while protesting clearly does not constitute direct participation in hostilities (DPH), breaching the fence and attempting to harm Israeli soldiers and civilians might. It seems that the court, at the bottom line, has considered the option of a permissive LE paradigm to be better than the worsening of a combustible situation that could evolve into a full-scale war.

In *Yesh Din*, the chamber seems to assume that article 43 of the Hague Convention and article 42 of the GCIII (as well as the Turkel Report) require a special application of LE—a more permissive version thereof—that does not demand a situation of immediate danger to use lethal weapons.

The state in its response argued that the element of necessity requires that “it is necessary to use force at that moment to prevent such risk before it

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<sup>136</sup> Clearly, not all people under occupation have participated in hostilities, and there is a distinction between non-combatants and combatants. This is not meant to undermine such principles, but only to stress the point that the situation of POW and occupation are both characterized by momentary control, which could potentially be disrupted by either an escape or by an insurgent.

materializes, even if the risk itself has not yet turned immediate.”<sup>137</sup> The state further explained that the danger that a violent crowd poses is far greater than that of a single person or a small group of individuals acting the same way.<sup>138</sup> Such danger “would become immediate at the second the crowd would reach its destination [*e.g.*, cross the border] and removing it at that point would require, operationally, a vast shooting of live fire which the respondents wish to prevent.”<sup>139</sup> The state described the required degree of temporal necessity as “near danger,” a phrase that indicates more distant danger than that of “immediate danger.”<sup>140</sup>

The court has somewhat softened its approach (at least rhetorically) and has not stated openly that immediacy is not required as part of LE under the LOAC paradigm. However, it did interpret the temporal requirement in a way that is more in line with the state’s response than with the common understanding of immediacy. The court was inconsistent, and sometimes described the temporal requirement of necessity as “immediate danger” and sometimes as “near danger.”<sup>141</sup> When it did use the term “immediacy,” it did so to describe a near rather than immediate danger: “as the violent riots, and all they entail, get closer to the security barrier—one cannot deny the Respondents’ argument that frequently there is an imminent and immediate danger to the IDF forces as well as to Israeli civilians in the communities of the Gaza Envelope area.”<sup>142</sup>

While some of the kibbutzim in the Gaza Envelope area are indeed located only a few hundred meters from the fence, such proximity does not constitute what LE traditionally defines as an immediate danger. As explained, immediacy is interpreted in IHRL as a matter of *seconds*.<sup>143</sup> Therefore, it does seem that the court has practically accepted the state’s argument of the temporal demand of “near danger” in LE under the LOAC paradigm.

Consequently, it would appear that the Israeli court has subscribed to the idea that LE under the LOAC is a different paradigm than LE under IHRL, and that temporal necessity may be defined differently. In places, it seems to accept “near danger” rather than “immediate danger” as the threshold for the use of potentially lethal force. Even if one does not accept that the use of such language by the court means that the court has endorsed the state’s argument of a new standard for use of force, at the very least the deviation of language represents an attempt to expand the meaning of the term ‘immediacy’ in the context of LE under LOAC. The court

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<sup>137</sup> State Response, *supra* note 86, ¶ 82.

<sup>138</sup> *Id.* ¶ 83.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* ¶ 44.

<sup>141</sup> Yesh Din, *supra* note 1, ¶ 50. It may be noted that in past cases concerning international law, the court used strictly the term of “immediate danger” and not “near danger.” *See, e.g.*, H CJ 769/02 The Public Committee Against Torture in Israel v. The Government of Israel (2006) (Isr.).

<sup>142</sup> Yesh Din, *supra* note 1, at 52 (J. Melzer).

<sup>143</sup> *See Rep. of the Special Rapporteur*, Apr. 2014, *supra* note 67, at 10.

seems to allow for a much broader definition of immediacy than traditionally provided in LE.

This interpretation of LE has no legal grounds, not even under the Turkel Report. Further, the targeting of “central inciters” is not in line with standards of either LE under IHRL or LOAC. Inciting the crowd surely does not constitute imminent and immediate danger to life or limb, as required under IHRL for the use of potentially lethal force.<sup>144</sup> But even under IHL, targeting central inciters would have not been permitted. The rules of targeting require that the targeted person be directly participating in hostilities.<sup>145</sup> Under customary and treaty IHL, civilians lose protection against direct attack either by DPH or by ceasing to be civilians altogether, namely by becoming members of state armed forces or organized armed groups belonging to a party to an armed conflict.<sup>146</sup> The relevant question is whether “inciting” amounts to DPH, and thus leads to the suspension of a civilian’s protection against direct attack. The state of Israel has systematically avoided the determination of whether the conflict between Israel and Hamas is either an IAC or a NIAC.<sup>147</sup> International bodies have also avoided the question of classification of the conflict.<sup>148</sup> However, in both IACs and NIACs, civilians are persons who are not members of the armed forces. They are consequently protected against direct attack, unless and for such time as they take a direct part in hostilities.<sup>149</sup> While there is a question of whether such an “inciter” may be targeted on the basis of being a member of Hamas (and for such question the classification of the conflict is important), Israel’s stand was that inciters are targeted because of their central position in the protest and their function in inciting the crowds to act violently.

A civilian act claimed to be DPH must include the following components:

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<sup>144</sup> See MELZER, INTERPRETIVE GUIDANCE, *supra* note 111, at 53; Code of Conduct, *supra* note 53, art. 3 commentary c; Basic Principles, *supra* note 53, art 9.

<sup>145</sup> Additional Protocol I, *supra* note 47, art. 51(3) (reflecting customary law in international and non-international conflicts); *see also* ICRC Study, *supra* note 49, at 19–24.

<sup>146</sup> MELZER, INTERPRETIVE GUIDANCE, *supra* note 111, at 69.

<sup>147</sup> NIGEL D. WHITE & CHRISTIAN HENDERSON, RESEARCH HANDBOOK ON INTERNATIONAL CONFLICT AND SECURITY LAW 299 (2013).

<sup>148</sup> *See generally* S.C. Res. 1860 (Jan. 8, 2009) (analyzing and discussing Israel-Gaza conflict while avoiding classification of the conflict); G.A. Res. ES-10/18 (Jan. 23 2009) (same); Rep. of the U.N. Fact-Finding Mission on the Gaza Conflict, *Human Rights in Palestine and Other Occupied Arab Territories* ¶¶ 281–83, U.N. Doc. A/HRC/12/48 (Sept. 25, 2009) (same); AMNESTY INT’L, ISRAEL/GAZA OPERATION ‘CAST LEAD’: 22 DAYS OF DEATH AND DESTRUCTION, 80 (2009), <https://www.amnesty.org/download/Documents/48000/mde150152009en.pdf> [<https://perma.cc/5GCZ-QX2X>] (same); HUMAN RIGHTS WATCH, WHITE FLAG DEATHS 51 (2009), [https://www.hrw.org/sites/default/files/reports/ioptwf0809webwcover\\_1.pdf](https://www.hrw.org/sites/default/files/reports/ioptwf0809webwcover_1.pdf) [<https://perma.cc/2C86-KC4L>] (same); News Release, Int’l. Comm. of the Red Cross, Gaza: Civilians at Risk as Attacks Continue (Dec. 31, 2008), <https://www.icrc.org/en/doc/resources/documents/news-release/2009-and-earlier/palestine-news-311208.htm> [<https://perma.cc/QF5Q-WL6J>] (same).

<sup>149</sup> ICRC STUDY, *supra* note 49, at 17–24.

1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).<sup>150</sup>

While one may attempt to argue that incitement meets the threshold of harm because it has a substantial effect on protesters' decision to destroy the fence and take hostile actions that may result in great harm, and that belligerent nexus exists since the actions are in support of a party to the conflict, a similar argument cannot be made with regards to direct causation between incitement and breaching of the fence. Direct causation means that "the harm in question must be brought about in one causal step."<sup>151</sup> The act of incitement may cause, or rather inspire, *others* to DPH, but it does not constitute one causal step to the materialization of the harm. In case there is doubt whether a person is a civilian, and whether such person directly participates in hostilities, the person must be presumed to be protected against direct attack.<sup>152</sup> Therefore, intentionally and directly targeting "central inciters" because of their actions of inciting is not legal under IHL.

Hence, it seems that *Yesh Din* has construed the principle of targeting to be less protective of lives, and more permissive of lethal force, than it is according to LE under IHRL, as well as according to CH under IHL.

### Conclusion

In *Yesh Din*, the court needed to address the complicated situation at the Gaza border and evaluate the legality of the IDF's ROE regarding large protests. It is a tricky task since protesters included innocent civilians protesting the impossible living conditions in Gaza as well as terror organization members attempting to damage the security barrier and attack Israeli soldiers and civilians. The entire area was in chaos: it was heavily masked by thick smoke, visual conditions were poor, the wind often changed direction, and traditional crowd control methods proved ineffective.

It appears that the court wished to allow the IDF leeway to deal with the threat of a potential breach of the barrier, while still insisting that some IHRL norms apply. Thus, the court accepted the creation of a new creature in international law—a general, rather than specific, LE under the LOAC paradigm, which does not

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<sup>150</sup> MELZER, *supra* note 111, at 46.

<sup>151</sup> *Id.* at 53.

<sup>152</sup> DINSTEN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT, *supra* note 45, at 180–81.

contain the demand of “immediate danger” as part of the temporal necessity requirement, and which allows targeting of “central inciters.” It exempts the state from complying fully with the demands of LE in IHRL, while also exempting it from complying fully with the principle of targeting in IHL. General LE under the LOAC paradigm as constructed in *Yesh Din* seems to enable states to pick and choose norms from both paradigms as they please to suit their specific needs in a given situation.

Neither the court nor the state make clear what exactly are the content and limitations of general LE under the LOAC paradigm. Is the demand of “near danger” rather than “immediate danger” the only difference it has from LE under LOAC, or may any of the LE requirements be softened and shaped with relation to the threat posed? The vagueness of this clearly-underdeveloped paradigm is dangerous since states can easily abuse it to claim greater power in the name of guarding human rights and protecting people’s lives. It may be tempting to accept such an idea as a useful middle ground between LE under IHRL and CH in situations that may escalate. While it is obviously desirable to contain any situation before it spirals out of control, the state must do so within its existing legal toolkit, and without re-inventing international law at its convenience. That does not mean the State of Israel cannot protect itself from attacks; it should rather examine whether the situation at hand is indeed part of ongoing hostilities, and if it is, target only those who actively participate in hostilities rather than “central inciters.” However, it makes more sense to treat such instances of violent demonstration as covered by IHRL and use lethal force only after all other methods have failed, and only against such persons as pose an immediate and imminent danger to life or limb.

The invention of a general LE under the LOAC may seem like an “easy fix,” but when looking at the bigger picture, it is clear that it undermines the entire order and validity of international law. The distinction between different paradigms in international law serves a certain purpose. The categorization of a given situation “has direct consequences for both the commanders and the victims of the violence, because it determines which rules apply, and the protection they provide is established in greater or lesser detail according to the legal situation.”<sup>153</sup> The blurring of such categorization carries dangerous implications.

With a growing acknowledgment of the influence domestic courts have over the development of international law, one should not brush off the potential influence of *Yesh Din*.<sup>154</sup> What today appears a poorly-justified deviation from the

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<sup>153</sup> INT’L COMM. OF THE RED CROSS, VIOLENCE AND THE USE OF FORCE 6 (2011).

<sup>154</sup> See Antonios Tzanakopoulos & Christian J. Tams, *Domestic Courts as Agents of Development of International Law*, 26 LEIDEN J. INT’L L. 531–40 (2013); ANDRÉ NOLLKAEMPER, DOMESTIC COURTS AND THE INTERNATIONAL RULE OF LAW (2011); Jean d’Aspremont, *The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order*, in THE PRACTICE OF INTERNATIONAL AND NATIONAL COURTS AND THE (DE-)FRAGMENTATION OF INTERNATIONAL LAW 141 (Ole Kristian Fauchald & André Nollkaemper eds., 2012).

traditional understanding of LE and CH, might be adopted in the future by states to slowly gain status in international law.