

**The Violent Riots and Attacks in the Border Area between
Israel and the Gaza Strip –
Summary of the Government of Israel's Submissions to the Israeli
Supreme Court (HCJ 3003/18)**

Background

1. In April 2018, two petitions were filed with Israel's Supreme Court sitting as the High Court of Justice against the Israel Defense Forces (IDF) Chief of General Staff and the IDF Military Advocate General, challenging the legality of the IDF's Standard Operating Procedures (SOPs) applicable in the border area between Israel and the Gaza Strip (file reference numbers HCJ 3003/18 & HCJ 3250/18). The petitions were filed by a number of Israeli and Gaza Strip non-governmental organizations.
2. The petitions were filed immediately after the violent riots and attacks in the border area between Israel and the Gaza Strip (hereinafter: the border events) began. Following the petition's submission and the submission of the State's response, the High Court of Justice ordered the sides to file additional submissions. While these submissions were being considered by the High Court of Justice, significant factual developments occurred regarding the events, and both sides filed additional submissions addressing these developments.
3. In all, during the proceedings, the State of Israel filed three submissions to the Court, including an affidavit signed by the IDF's Head of Operations Directorate. The State also prepared a classified intelligence report to be presented before the Court *in-camera*, which, on the basis of the petitioners' objections, ultimately was not provided to the Court.
4. This document intends to collate and summarize the State's submissions to the Court in Hebrew of 29 April, 6 May and 16 May 2018. Accordingly, the factual information presented below is correct as to the date of the submissions to the Court. This document does not address the substantial developments that have occurred in the context of the border events since these submissions, nor does it address issues not related to the petition, such as other developments in the armed conflict waged against Israel by Hamas and other armed groups in the Gaza Strip, or wider regional and political contexts. It should also be noted that the Submissions to the Supreme Court were filed in Hebrew, and drafted in the accepted style and with the understanding of the Court's prior knowledge of the Gaza context. For the purposes of this document, some relevant terms and historical background have been expanded upon (such as geographical information regarding the Gaza Strip and historical context regarding the armed

conflict with Hamas), and most legal references have been omitted, in order to facilitate proper understanding by the wider readership.

5. The Supreme Court published its decision on 24 May 2018, unanimously rejecting the petition and finding in favor of the State both with regards to the factual circumstances of the border events and the State's legal positions. A translation of the Court's decision, delivered by President Esther Hayut, Deputy President Hanan Melcer and Justice Neal Hendel, may be found at the Supreme Court's website at <https://supreme.court.gov.il/sites/en/Pages/FullCase.aspx?&CaseYear=2018&CaseNumber=3003>.
6. For further information regarding the ongoing armed conflict between Israel and Hamas and other armed groups in the Gaza Strip, please refer to the Government of Israel's Report in regard to the 2014 Gaza Conflict ('The 2014 Gaza Conflict: Factual and Legal Aspects'), available online at: www.protectiveedge.gov.il).
7. For further information regarding the border event, please refer to the "Gaza Border Events: Questions & Answers" webpage, available online at: <https://www.idf.il/en/minisites/questions-and-answers-concerning-the-violent-riots-and-attacks-occurring-on-the-border-between-gaza-and-israel-during-2018-9/>.

Factual Context as Presented in the Submissions

The Gaza Border Area

8. Hamas is an internationally recognized terrorist organization that has been waging an ongoing armed conflict against Israel for many years. Since June 2007, when it forcibly took over control from the Palestinian Authority, Hamas has been exclusively exercising effective control over the Gaza Strip and has held responsibility for all security, civil and other aspects of the Gaza Strip (Israel withdrew all military and civilian presence from the Gaza Strip in 2005). Hamas has since used its control over territory, population and resources to further its armed conflict against Israel, with whom Gaza shares land and maritime borders. In addition, a number of additional armed groups operate in the Gaza Strip and have joined Hamas in its armed conflict against Israel.
9. These efforts have included sending suicide bombers into Israel, firing tens of thousands of rockets and mortars towards Israeli civilian population centers, and particularly those communities in the vicinity of the Gaza Strip, developing a network of cross-border assault tunnels towards these same communities, firing

ground-to-ground missiles and light-arms at these communities, conducting cross-border infiltrations for the purposes of kidnapping and attacking civilians and security forces alike, laying explosives along patrol areas for detonation against security forces, and sabotaging defensive infrastructure (such as surveillance equipment, sensors and the infrastructure currently being built underground designed to detect cross-border tunnels). These efforts have been constant and ongoing, with peaks and troughs in the level of violence.

10. One of the focal points of the armed conflict between Israel and the Palestinian armed groups has been the border area between Israel and the Gaza Strip, from which many of the above attacks originate or pass through. As a result, Israel has erected defensive infrastructure and maintains security operations along the approximately 60 kilometers (approximately 37 miles) of that area, in order to secure the border region and prevent attacks into Israel.
11. The Government of Israel is currently working towards upgrading the existent defensive infrastructure, erecting a robust barrier in order to contend with both underground and above-the-ground threats emanating from the Gaza Strip. However, the construction of this barrier, at a very high cost of billions of NIS, has not been completed yet, and the effectiveness of the existent defensive infrastructure in coping with the ever-evolving security threats is rather limited. The main purpose of this infrastructure is to facilitate early identification of attempted infiltration into Israel, so as to allow security forces to arrive at the area and thwart the infiltration. Thus, the focus of the fence is on electronic sensors and other technology that identifies attempts to breach it and provides early warning to security forces.
12. The main security fence is comprised of an easy-to-cut basic steel fence in Israeli territory, which is approximately three meter in height and which holds the electronic sensors designed to identify interference. The fence itself can be penetrated with ease, especially by more than one person at a time. In addition, at certain points, Israel has placed barbed wire near the security fence, designed to deter approaching the fence. The barbed wire can be cut, moved or climbed over with relative ease.
13. The distance between the two parts of the defensive infrastructure varies in accordance with topographical conditions, but in any case it is limited and ranges from 20 to 80 meters. As a result, a person who passes the barbed wire can reach the fence in Israeli territory within a few seconds time. Since the defensive infrastructure is located only hundreds of meters from several Israeli towns and only tens of meters from IDF forces, its breach, certainly *en masse*, endangers both Israeli civilians and Israeli soldiers.

14. Damage to the defensive infrastructure thus enables infiltration by militants and compromises the ability to detect such infiltration with sufficient time, especially if the damage includes – as it generally does – damage to electronic sensors.
15. Damage to electronic sensors and the rest of the defensive infrastructure cannot be repaired quickly, easily or safely. Repairs can take significant time (including the need to remove damaged sections of the fence, install new fencing and sensors, conduct electrical work, and so on), and demand various operational resources (such as the simultaneous presence of engineering forces, electricians, logistic forces, and operational forces to protect those fixing the infrastructure from attack – as they are typically operating in open areas in dangerous enemy territory and are thus exposed to attack).
16. In light of the ongoing armed conflict between Israel and the Palestinian armed groups, the historical record of exploiting the border area to carry out and facilitate attacks, and the repeated stated intentions of Hamas and other armed groups in the Gaza Strip, the area adjacent to the defensive infrastructure is an area in which there exists a heightened danger of hostile activity against Israeli civilians and Israeli soldiers, and which is of heightened tension in general.
17. In order to mitigate this danger to some degree, certain restrictions on movement in the area adjacent to the defensive infrastructure – which is unpopulated – have been imposed. Residents of the Gaza Strip are well aware of these restrictions. Hamas itself established several years ago a line of posts manned by its security personnel, as well as regular patrols, designed to enforce these conditions and ensure that this area is generally devoid of civilian presence.

The Purpose and Planning behind the Border Events

18. Since 30 March 2018, the entire length of the defensive infrastructure in the area described above has been the site of widespread violent riots and attacks, in which tens of thousands of Palestinians have participated simultaneously, at the direction and sometimes under the coercion of Hamas. The stated aim of these events, referred to by Hamas as the "Great Return March", was to destroy the defensive infrastructure separating Gaza from Israel, cause a mass infiltration into Israeli territory and overrun Israeli communities and towns (ostensibly in order to 'reclaim' lands). Hamas's additional intentions were to use the cover of these events in order to carry out attacks against Israeli security forces and Israeli civilians living in the vicinity of the Gaza Strip.
19. These events were preceded by lengthy and substantial planning in the Gaza Strip. They were organized and coordinated by a self-proclaimed "Committee of Return", which is led by Hamas and includes representatives of other terrorist organizations operating in the Gaza Strip, such as the "Palestinian Islamic Jihad"

and the “Popular Front for the Liberation of Palestine”. The Hamas-led committee prepared a clear plan of action, aimed at causing large numbers of incited Palestinians to approach the defensive infrastructure between Israel and the Gaza Strip, sabotage it, penetrate it *en masse* and confront Israeli soldiers as well as civilians living in the area. In order to achieve these objectives, the plan of action included several main components:

- a. Incitement of large numbers of Gaza Strip residents, including by means of social media, to enter the area of the defensive infrastructure and actively engage in violent riots. To this end, Hamas instructed its personnel to refrain from enforcing the prohibition of entering the vicinity of the defensive infrastructure, physically removed its military posts designed to enforce this prohibition and ceased all patrols.
- b. Members of terrorist organizations, especially Hamas, were positioned in the area to coordinate the violent riots in practice and to assist in achieving the pre-defined goals.
- c. Detailed planning of the events and their progression:
 - i. The violent riots were spread across different sites in order to make it difficult for the security forces to contend with them. The precise location of each site was carefully chosen in advance, so that each will be in close proximity to population centers in the Gaza Strip and will enable the prompt arrival of thousands of people at each site. Hamas actively partook in transporting the participants from urban centers to the border area.
 - ii. Significant logistical and financial resources were dedicated by Hamas, including erecting tent cities, diverting electricity, providing services such as free internet, food and drink, and organizing buses to transit masses to the different areas.
 - iii. Methods of action were prepared to impede the security forces in detecting and addressing sabotage and infiltration attempts, such as using smoke to mask activities, and equipment needed to implement these methods was provided to the rioters in advance by Hamas, including tires, various cutting implements, and explosive devices for burning the fence and harming soldiers.
- d. Attacks were planned to be launched by Hamas and armed groups under the cover of the violent riots (planning which was indeed carried out).

The Progression of the Border Events

20. In accordance with Hamas's plan of action, the widespread border events were exceptional in their scope and in the intensity of the threat they posed. Tens of thousands of people participated in them, often simultaneously. The events persisted from morning to evening, and took place simultaneously in different sites. Many of the participants in the violent riots were clearly determined to breach the defensive infrastructure between Israel and the Gaza Strip, penetrate the territory of Israel and harm security forces and civilians. To this end, the rioters were equipped in advance with a variety of means, including weapons. Naturally, these facts gave rise to real concerns as to the safety of Israeli civilians residing in proximity to the defensive infrastructure as well as that of Israeli soldiers stationed in the area.

21. Led by senior members of the military wing of Hamas and with the involvement of its commanders on the ground, numerous attacks were carried out against civilian and military infrastructure under the cover of the violent riots:

- Explosives and grenades were thrown towards IDF forces and laid by the fence, both endangering IDF forces and causing damage to military infrastructure (and, as noted above, exposing large portions of the defensive infrastructure to undetected infiltration, and requiring significant military operations and resources for repair).
- A number of Palestinians succeeded in penetrating Israeli territory in order to damage the defensive infrastructure and adjacent infrastructure as well as harm military forces operating in the vicinity of the fence. Some of those apprehended were in possession of weapons and some admitted under investigation that they crossed into Israel in order to harm IDF forces.

22. On 14 May 2018, the violence reached its peak: violent riots took place in thirteen different locations and involved approximately 45,000 people. Some of the incidents that occurred that day, and the days preceding, included:

- Countless grenades and explosive devices thrown at IDF forces.
- Shooting attacks on IDF forces. In one incident, a force of eight armed terrorists opened fire on IDF forces. An additional shooting incident occurred as four terrorists were laying an explosive device.
- Stones, marbles and Molotov cocktails were launched, including using launching devices such as slingshots, at IDF forces.

- Launching of kites carrying incendiary materials intended to harm residents of the Israeli communities around Gaza. These kites ignited fires in numerous locations. For example, fires occurred on the agricultural property of the communities of Nir Am, Kfar Aza, Nachal Oz, Kerem Shalom and Be'eri. These fires caused damage to fields and also endangered the lives of local residents.
- Numerous organized maneuvers with the aim of cutting the security fence and facilitating penetration into Israeli territory.
- The downing of several drones operated by the IDF.
- Significant damage to important defensive infrastructure, thereby necessitating risky repair work and the investment of operational resources.
- Overrunning, ransacking and setting ablaze the Kerem Shalom crossing (the crossing point for transferring goods between Israel and the Gaza Strip) and related infrastructure.

23. The intentions of the rioters, their massive numbers, the means at their disposal and the violence they employed distinguishes the violent events from ordinary demonstrations and civilian protests. Moreover, as explained above, these were not spontaneous protests. The violent riots were organized, coordinated and directed by Hamas, which is a terrorist organization engaged in an armed conflict with Israel. Hamas has sought to achieve a military advantage by breaching the defensive infrastructure, which will assist assailants in entering Israel. In order to achieve this objective, a significant number of participants in the violent incidents were operatives of the organization, including its military wings, who were sent to the violent riots with the instruction to incite the masses, encourage them to move towards Israeli territory, breach the defensive infrastructure and carry out attacks. A senior Hamas leader – Salah al-Bardawil – admitted in a televised interview on 16 May 2018, that 50 of those killed during the violent riots of 14 May were Hamas members.

24. As elaborated further below, the violent riots created at times a real and imminent danger to the lives and bodily integrity of Israeli forces and civilians, a danger which only intensified due to the terrorist activities carried out under their guise. Where the threat posed by the violence did not fully materialize, this was only due to the prior preparation of the IDF to the events (a full description of how the IDF contended with the violent events appears following the outline of the applicable law).

Applicable International Law

The Paradigms for the Use of Force in the Context of Armed Conflict

25. Israel and Hamas have been involved in an ongoing armed conflict for many years. Unfortunately, the hostilities as part of this armed conflict persist, due to Hamas's insistence to carry out attacks against Israeli civilians and Israeli soldiers. Israel engages in this armed conflict in accordance with its obligations under the international law of armed conflict (LOAC).
26. International law lays down two normative paradigms for the use of force in the context of armed conflict. One paradigm, often called the 'conduct of hostilities' paradigm, regulates the actual fighting between the parties and sets forth their obligations on issues such as the definition of military objectives and taking feasible precautions in attack. A second paradigm, often called the 'law enforcement' paradigm, regulates uses of force occurring in parallel to the hostilities, and it stipulates how armed forces may interact with the civilian population of the other party.
27. A central conceptual difference between the two paradigms lies in their approach towards the use of potentially lethal force. While the 'law enforcement' paradigm places stringent restrictions on the use of such force and sees it as a measure of last resort, the 'conduct of hostilities' paradigm allows it even as a measure of first resort (for example, against members of the enemy's armed forces). Accordingly, the application of a particular paradigm affects what action may be lawfully taken in a particular scenario.
28. The analytical division into two so-called 'paradigms' is relatively new, and largely affected by the terminology employed by the International Committee of the Red Cross in a 2012 expert meeting on the use of force in armed conflicts. Nevertheless, it reflects deep-rooted legal thinking and the realities that have persisted in armed conflicts for many centuries. Ever since armed forces first came in contact with the civilian population of the adversary, they have exercised various types of authority towards civilians, including, where mandated, the use of potentially lethal force. Likewise, where necessary, armed forces have sometimes used force vis-à-vis combatants who were *hors de combat*. Examples include various kinds of situations in which civilians or *hors de combat* combatants refused to obey orders aimed at securing public order and safety; attempted to break ceasefire lines; threateningly approached foreign forces; attempted to breach a naval blockade; or tried to escape a detention facility. In these and other cases, states involved in armed conflicts have applied rules on the use of force that are mostly different than those applied in the context of hostilities.

29. LOAC treaties, while not as expansive on these matters as they could have been, exhibit this idea. Examples include, among others, the use of firearms against prisoners of war who are escaping or attempting to escape (Article 42 of the Third Geneva Convention on Prisoners of War of 1949); and the interaction of military forces with civilians in territory under belligerent occupation (especially Article 43 of the Regulations annexed to the Fourth Hague Convention of 1907, which has been widely interpreted as allowing the use of potentially lethal force as a measure of last resort; for additional regulation of the interaction of military forces with the civilian population, see Articles 44-56 of the Regulations, and Articles 27-34 and 47-78 of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War of 1949).
30. Longstanding state practice further indicates various specific circumstances in which potentially lethal force may be used outside actual hostilities in the context of armed conflict. For example, it is widely accepted that a soldier is entitled to use force in self-defense during an armed conflict. While not expressly addressed in LOAC treaties, this right of personal self-defense is considered to apply whenever a soldier is faced with a real and imminent risk to his or her life or bodily integrity by any person, including a civilian not directly participating in hostilities. Rules of engagement applicable in armed conflicts around the world thus routinely include such a right even outside the context of hostilities (see, in this context, the San Remo Handbook on Rules of Engagement (2009)).
31. Similarly, while not expressly addressed in LOAC treaties, it is widely accepted that soldiers may use force to quell life-threatening riots during an armed conflict, including through the use of potentially lethal force. Thus, in the aforementioned San Remo Handbook on Rules of Engagement, one of the suggested formats for drafting rules of engagement during armed conflicts for riot control situations is stated as follows: *“Use of force, up to and including deadly force, during riot control in (SPECIFY circumstances), is permitted”* (p.58). Another example may be found in Field Manual 3-19.15 (Civil Disturbance Operations) (2005) of the United States Army. This manual regulates riot control in a variety of operational scenarios, including peacekeeping missions in the context of an armed conflict. After clarifying that LOAC is the relevant international law framework (para. 2-43), it refers to the permissible use of lethal force in certain cases: “Graduated responses can range from command presence through the show of force, a demonstration, the use of RCAs [riot control agents], and other techniques (such as the application of lethal force using snipers, small arms, AC-130s, and indirect fires)” (para. 2-65; see also Figure 2-1 on page 2-15). The manual further states that lethal force may be used in such cases, including by snipers, against “leaders” of the riot and “troublemakers” (see table on p. 2-15).
32. During the expert meeting convened by the ICRC in 2012, experts debated where the ‘law enforcement’ paradigm was in fact regulated. While all experts

agreed this paradigm existed in the context of armed conflict and allowed the use of potentially lethal force against civilians in certain circumstances, the experts differed on where the relevant rules were to be found. Some experts believed that the 'law enforcement' paradigm was regulated in international human rights law (IHRL), whereas others took the view that it was regulated within LOAC.

33. Israel acknowledges this difference of opinion, which has also been replicated in subsequent discussions. In line with LOAC treaties and longstanding state practice, Israel takes the view that the 'law enforcement' paradigm is regulated within LOAC, a rich legal framework that stipulates what is permissible and impermissible in the course of armed conflict in a wide variety of contexts, and which has existed long before IHRL first emerged. This view is also in line with Israel's longstanding position that IHRL does not apply extraterritorially and is displaced by LOAC, which is the *lex specialis* in times of armed conflict.
34. Israel nevertheless believes that the question of the source of the 'law enforcement' paradigm – i.e. whether it is to be found in LOAC or in IHRL – is of no practical significance whatsoever in the context of the border events, since in the context of violent riots that paradigm, wherever it is to be found, lays down one set of rules for the use of potentially lethal force. Accordingly, the regulation of such riots in IDF Standard Operating Procedures fully accords with the requirements of LOAC as well as with those of IHRL.

Determining the Applicable Paradigm in the context of the Border Events

35. Since armed conflicts involve different operational scenarios, both the 'conduct of hostilities' paradigm and the 'law enforcement' paradigm are potentially relevant at all times. Nevertheless, a particular use of force – for example, firing at a specific person – is necessarily governed by a single paradigm.
36. Determining the paradigm relevant to a particular use of force depends on whether that force is used as part of the conduct of hostilities, i.e. whether it is part of the actual fighting between the parties to the conflict. For example, if a person is directly participating in the hostilities between the parties, that participation as well as responses to it by force will be analysed under the 'conduct of hostilities' paradigm. On the other hand, action taken by a civilian not as part of the hostilities between the parties, as well as responses to it by force, will be analysed under the 'law enforcement' paradigm.
37. Armed conflicts sometimes present complex situations, which mix actions that are part of the conduct of hostilities with other violent activities that are not part of the hostilities. In such situations, determining the paradigm applicable to a particular use of force must be made in light of the specific circumstances.

38. The border events are a prime example of such complex situations. While the events are clearly linked to the armed conflict between Hamas and Israel, Israel does not treat mere participation in the violent riots, let alone merely approaching the defensive infrastructure, as direct participation in the hostilities between Hamas and Israel. At the same time, it is conceivable that a participant in the events will engage in an activity that constitutes direct participation in the hostilities (for example, by deliberately carrying out an attack against IDF forces or Israeli civilians, whether in coordination with Hamas or independently).
39. Under these circumstances, and in light of the fact that a particular use of force is necessarily governed by a single paradigm, Israel believes a careful distinction must be maintained between uses of force falling under the 'conduct of hostilities' paradigm and uses of force falling under the 'law enforcement' paradigm. Based on its analysis of the participation in the riots by different Palestinians, Israel considers the 'law enforcement' paradigm to be the default paradigm applicable to the use of force against participants in the border events, with all the limitations that this paradigm entails. At the same time, in certain circumstances, including when Israel has specific information indicating that a person is participating in the hostilities in the course of the violent riots and qualifies as a lawful target, the use of force against such a person will fall under the 'conduct of hostilities' paradigm. Each case must be carefully evaluated in light of its particular circumstances.

The Content of the 'Conduct of Hostilities' and the 'Law Enforcement' Paradigms

40. Under the 'conduct of hostilities' paradigm, both the status of a person and their behavior may determine whether potentially lethal force may be used as a measure of first resort. Membership in the armed forces of the enemy renders a person a lawful target under the 'conduct of hostilities' paradigm. Likewise, a civilian taking a direct part in the hostilities between the parties to the conflict may be attacked as a first resort. In the context of the border events, potentially lethal force may therefore be lawfully used as a measure of first resort when a person is identified as a member of Hamas's armed forces, or when a civilian is engaged in activities amounting to direct participation in hostilities.
41. Under the 'law enforcement' paradigm, potentially lethal force may only be used under stringent conditions. LOAC treaties, as well as the aforementioned longstanding practice of states, reflect several such conditions. Firstly, potentially lethal force may only be used when there is a real danger to human life or bodily integrity, whether it emanates from a single individual or a mob. Dangers that are not as serious cannot be dealt with by the use of potentially lethal force. Moreover, potentially lethal force may only be used as a measure of last resort. Accordingly, the use of less-lethal means must have been exhausted or unfeasible in the circumstances; it must be necessary to use potentially lethal force in order to address the danger, or else it could not be removed; and the

force used must be proportionate in relation to the danger. Taken together, these requirements mean that potentially lethal force may only be used as a last resort in order to address a real and imminent danger to human life or bodily integrity, and in such a case the force being used must be exercised in a proportionate manner and to the minimal extent necessary.

42. An identical conclusion as to the requirements of the 'law enforcement' paradigm can be reached if it is interpreted by drawing inspiration from IHRL. As already stated, it is Israel's longstanding position that IHRL does not apply extraterritorially and that it is displaced by LOAC, which is the *lex specialis* in times of armed conflict. However, since LOAC's 'law enforcement' paradigm and IHRL both regard the use of potentially lethal force as a measure of last resort, IHRL's more detailed written regulation of the use of such force can provide guidance in identifying the conditions laid down by LOAC's 'law enforcement' paradigm. Clearly, any inspiration in this regard must be drawn carefully and *mutatis mutandis*. LOAC and IHRL radically differ in their factual assumptions, and IHRL cannot apply to scenarios such as the border events as it applies to everyday criminal scenarios within the territory of a state. Nevertheless, LOAC's 'law enforcement' paradigm undoubtedly allows the use of potentially lethal force in those cases where such force would have been permissible under IHRL.

Assessment under International Human Rights Law (IHRL)

43. As stated, situations that arise within armed conflicts yet outside the hostilities and necessitate the use of force are regulated by LOAC's 'law enforcement' paradigm. Nevertheless, even when adopting the position that this paradigm is in fact regulated within IHRL, it is permissible to use potentially lethal force in certain circumstances, notably in circumstances where life-threatening riots, such as those occurring in the border events, take place.

44. IHRL's foremost regulation of the use of potentially lethal force can be found in Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR) of 1966: "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Deprivations of life are thus prohibited if they are arbitrary.

45. Article 6(1) of the ICCPR is the result of a conscious decision to set a standard of arbitrariness rather than a list of specific permissible exceptions. As the Chairman of the Drafting Committee explained, the Committee had "feared that all possible exceptions could not be enumerated in detail and that the result would be to make the article far too complex" (U.N. Doc. E/CN.4/SR.139, p. 4). Nevertheless, in response to the suggestion of the United Kingdom that Article 6(1) acknowledge the lawfulness of the use of potentially lethal force "for the purpose of quelling a riot", the Chairman further clarified that a standard of arbitrariness

already incorporated such a purpose as long as the force used was “no more than absolutely necessary” (*ibid.*, at p. 7). It was therefore understood that IHRL allows the use of potentially lethal force to quell a riot, subject to certain conditions.

46. A comparative perusal of European human rights law, to which Israel is not bound, yields the same conclusion. Article 2 of the European Convention on Human Rights (ECHR) of 1950 reads as follows:

1. *Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*
2. *Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:*
 - (a) *in defence of any person from unlawful violence;*
 - (b) *in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;*
 - (c) *in action lawfully taken for the purpose of quelling a riot or insurrection.*

Here, as well, human rights law sets down stringent limitations on the use of potentially lethal force while acknowledging the permissibility of such force in quelling a riot.

47. The petitioners’ claim that the lawfulness of using potentially lethal force should be assessed in reference to a 1990 document titled “Basic Principles on the Use of Force and Firearms by Law Enforcement Officials”, adopted at a crime prevention congress under the auspices of the United Nations is incorrect. This document is not relevant to the border events, as it only applies to domestic, crime-related scenarios, whereas the border events are of a different character. The document had been regarded as a non-binding policy statement already at the time of its drafting, and this status has not changed since, as also reflected in contemporary statements by important international humanitarian organizations. Therefore, the document is legally irrelevant and any analysis of IHRL binding Israel should be limited to an analysis of the ICCPR. For similar reasons, analogies made by the petitioners to the case-law of the European Court of Human Rights are also misguided. This case-law is not binding on Israel, and the situations it dealt with have no factual or legal affinities with the border events. At the same time, Israel believes that even if these non-binding documents and cases were applied in the context of the border events, the SOPs regulating the actions of IDF soldiers during the events would accord with them.

48. IHRL’s acknowledgment that potentially lethal force may be lawfully used to quell a riot reflects the unique characteristics of the life-threatening danger that riots may pose. When a violent riot takes place, a danger posed by its many

participants to human life or bodily integrity is exponentially greater than that posed by a single individual or a small group of individuals. In fact, violent riots may wreak havoc and threaten lives and bodily integrity in ways that cannot be reduced to the actions of a single individual. Additionally, crowd dynamics render the materialization of that danger particularly volatile. In certain situations, a violent riot instantly escalates and poses an imminent danger to human life or bodily integrity. In such cases, where the collective action of a group of people creates an imminent threat to life or bodily integrity, and no such threat can be identified in the actions of each individual involved, potentially lethal force may still have to be used immediately in order to remove the threat, and any delay will necessitate, from an operational perspective, the use of greater force which would likely lead to more casualties.

49. In any case, IHRL's 'law enforcement' paradigm lays down stringent conditions for the use of potentially lethal force. Potentially lethal force may only be used in circumstances in which there is real danger to human life or bodily integrity, whether it emanates from a single individual or a mob. Dangers that are not as serious cannot be dealt with by the use of such force. Moreover, potentially lethal force may only be used as a measure of last resort. Accordingly, such force may only be used once several conditions have been met: that the use of less-lethal means has been exhausted or is not feasible in the circumstances; that it is necessary to use potentially lethal force in order to address the danger, or else it could not be removed; and that the force being used is proportionate in relation to the danger. Taken together, these requirements mean that potentially lethal force may only be used as a last resort in order to address a real and imminent danger to human life or bodily integrity, and in such a case the force being used must be exercised in a proportionate manner and to the minimal extent necessary.
50. These requirements and conditions are applicable to every use of potentially lethal force. At the same time, how they apply will depend on the circumstances. Violent riots orchestrated by a party to an armed conflict, including tens of thousands of people, taking place in enemy territory and exploited by the enemy to carry out hostilities – as is the case of the violent events at hand – are clearly different from a peaceful demonstration by a small group of people in an area under sovereign control. Accordingly, what IHRL requires in each case varies in accordance with its particular characteristics.
51. As explained above, it is Israel's longstanding position that IHRL does not apply extraterritorially and that it is displaced by LOAC, which is the *lex specialis* in times of armed conflict. Accordingly, Israel believes that the 'law enforcement' paradigm is regulated within LOAC. However, even under an alternative analysis based on IHRL, violent riots posing a real and imminent danger to human life or bodily integrity may be quelled by using potentially lethal force, subject to strict conditions of necessity and proportionality. In the specific circumstances of the

border events, IHRL's requirements are identical to those of LOAC's 'law enforcement' paradigm, and it is therefore of no practical significance which of the two normative frameworks is applied.

Applicable Domestic Law

52. In addition to their obligations under international law, Israeli authorities are also subject to obligations stemming from Israeli domestic law. These obligations have been heavily discussed in the case law of the Israeli Supreme Court.

53. In CrimA 486/88 *Ankonina v. the Chief Military Prosecutor*, 44 (2) 353 (1990), the Supreme Court dealt with the use of potentially lethal force in a military checkpoint at the Gaza Strip, when it was still under Israeli control. President M. Shamgar held (at p. 371-372):

"One must avoid taking human life or harming bodily integrity when this does not reasonably correspond to the scope of the danger which one is attempting to prevent, even when at issue is the capturing of the offender

[...]

The logical reciprocal relationship between the means applied and the evil which is trying to be prevented dictates delineating narrow boundaries to the officer with authority, who is required or who requests to exercise his powers in order to arrest an offender or prevent his escape. The maximum punishment that is prescribed by the law cannot be a clear and exclusive criterion for this purpose. It is therefore appropriate, as has already been noted, that a response which could harm life or bodily integrity be limited to circumstances in which a reasonable concern exists such that refraining from applying an extreme measure will lead to a result which creates a danger of the nature described above, on the part of those who are attempting to arrest him or prevent his escape.

[...]

Instances in which permission is granted to exercise force, includes, for example [...] the arrest of a person who is suspected of performing a hostile terrorist act that endangered or endangers the lives or severely endangers the bodily integrity of others."

54. The Supreme Court's judgment in *Ankonina* reflects a basic principle of Israeli domestic law, according to which potentially lethal force may only be used to remove a real danger to human life or bodily integrity. This principle is also evident in an earlier case, CA 751/68 *Ra'ed v. the State of Israel*, 25 (1) 197

(1971). In *Ra'ed*, policemen used potentially lethal force to remove a real danger to human life or bodily integrity resulting from a violent riot that was occurring near the Israeli town of Shfar'am. In the course of dispersing the riot, one of the rioters was killed. President S. Agranat held (at p. 216):

"According to law, policemen are permitted, in order to perform their said duty, to stand their ground and not to retreat, and therefore, if consequently their lives or bodies are in danger, then they shall be justified to use such means as they deem necessary to both prevent the danger and to overcome the rioters, including use of firearms, even if this could lead to death or other bodily harm to any of the rioters.

[...]

However, it is necessary to agree that even in these conditions, one must never justify the act of an intentional or indifferent shooting on the part of the policeman [...] which is completely unrelated to reasonable force."

55. *Ra'ed* is not the only case dealing with the quelling of riots through the use of potentially lethal force. Recently, the Supreme Court discussed the matter in HCJ 1971/15 *Al-Masri v. Military Advocate General* (18 July 2017). Notably, the facts in *Al-Masri* resemble somewhat those of the current border event. In *Al-Masri*, hundreds of Lebanese rioters approached the defensive infrastructure between Israel and Lebanon on 15 May 2011, and attempted to storm into Israel. IDF soldiers positioned in the area, operating under the Standard Operating Procedures governing the use of forces along Israel's border with Lebanon, used potentially lethal force to quell the riot and prevent the breach. Justice U. Shoham held in this regard (para 26):

"[T]he rioters tried to trample and breach the border fence, thereby creating an actual danger of infiltration of terrorists from an enemy state into the territory of Israel, in proximity to Jewish communities. As the material before us shows, the rioters threw stones and Molotov cocktails towards the soldiers of the IDF. Therefore, the live fire was used for a lawful purpose – defending the citizens of Israel and the soldiers of the IDF."

56. Taken together, the judgments of the Israeli Supreme Court in *Ankonina*, *Ra'ed* and *Al-Masri* indicate that, under Israeli law, potentially lethal force may only be used to remove a real danger to human life or bodily integrity, and subject to necessity and proportionality. Moreover, the judgments reflect an acknowledgment by the Supreme Court that such force may be used to quell a life-threatening riot, including in circumstances where the rioters attempt to

breach a security barrier between Israeli territory and enemy territory, where the threat to life emanates from the actions of the mob (rather than a single individual), and that the force may be employed against key rioters and key inciters.

How Israel Contended with the Border Events

Initial Preparations

57. After identifying Hamas's preparations for the events along the length of the defensive infrastructure separating Israel from the Gaza Strip, Israel undertook a serious effort to convey messages to the Palestinian population in the Gaza Strip, through several channels, calling them to refrain from entering the vicinity of the defensive infrastructure and participating in the riots. The IDF also directly contacted bus companies contracted by Hamas for the purpose of transporting residents to the area of the defensive infrastructure. The companies were warned not to assist Hamas in transporting participants and placing them in danger.
58. Significant engineering activities were also carried out in the area in order to reduce the masses from encroaching the border area and successfully infiltrating into Israel. These activities included adding to the barbed wire sections of the defensive infrastructure; setting up additional IDF positions and clearing the defensive infrastructure area.
59. Unfortunately, these efforts were not successful, and the violent events and attacks ultimately commenced, as stated, on 30 March 2018.
60. The IDF took various steps in preparation. In addition to the Gaza Division responsible for security vis-à-vis the Gaza Strip, large numbers of IDF forces from different units were positioned in defensive positions along the length of the defensive infrastructure, including forces which were specially transferred from their usual sectors.
61. The forces positioned in the area were equipped in advance with a range of means suitable for the significant operational challenge of contending with a hostile mob, including warning systems and non-lethal riot control means. In light of the exceptional character of the violent incidents, and in accordance with procedures, the forces were also provided with additional non-lethal means developed specifically for this scenario, such as drones capable of dispensing tear gas at a greater distance than what existing means could deliver.
62. In addition, snipers were deployed at different points along the defensive infrastructure, so that in the event live fire would be deemed necessary – as a measure of last resort – it would be employed through the precise and restrained fire

that snipers can provide (a detailed account of the regulation of live fire in the Standard Operating Procedures appears below).

63. Engineering forces dug long stretches of deep trenches in Israeli territory behind IDF positions, in order to stall the masses from reaching Israeli communities nearby in the event of a successful mass breach.
64. Lastly, the commanders ensured that their forces were familiar with the sector-specific Standard Operating Procedures and provided them with relevant emphases in anticipation of the expected violent incidents.

The IDF's Standard Operating Procedures for the Events

65. In accordance with intelligence information received and operational analysis carried out in advance, the primary threat that Israeli security forces prepared to contend with was mass breaches of the defensive infrastructure, subsequent penetration of thousands of Palestinians into Israel and life-threatening violence, including terror attacks, against Israelis. It was assessed that such a mass breach would create a real and imminent danger to the lives and bodily integrity of Israeli civilians living and working in close proximity to the Gaza Strip, as well the lives and bodily integrity of security forces stationed along the length of the defensive infrastructure. It was also assessed that once thousands of Palestinians crossed into Israel and began charging towards Israeli towns and military positions, the attacks could only be negated by the use of considerable force, including live fire that could lead to hundreds of casualties at a time. Finally, the forces also prepared for terror attacks carried out under the cover of the violent riots, which indeed occurred.
66. The Standard Operating Procedures (SOPs) applicable during these events are those that are in force in the area of the defensive infrastructure, and have been approved by the Military Advocate General as well as by the Attorney General. These SOPs were thoroughly reviewed during the preparation for the border events, and it was determined they adequately regulated the use of force in complex, life-threatening scenarios involving Palestinian civilians.
67. The SOPs are classified and cannot be publicly disclosed. In the context of the petitions filed against their lawfulness, the Government of Israel proposed to provide the Supreme Court with them *in camera*. The petitioners objected to this proposal. Nevertheless, to the extent possible, Israel has publicly outlined their main provisions, which are also elaborated below.
68. By default, the violent events are treated by the SOPs as falling under the 'law enforcement' paradigm. At the same time, the SOPs also contain provisions relevant to the 'conduct of hostilities' paradigm, that are applicable where there

are reliable indications that a person is participating in the hostilities (for example, when a person is identified as a member of Hamas's armed forces, or when a person is engaged in activities amounting to direct participation in hostilities, such as firing at Israeli soldiers).

69. In line with the requirements of the 'law enforcement' paradigm, the SOPs forbid the use of potentially lethal force against rioters save for exceptional circumstances. Potentially lethal force is permissible only where a violent riot poses a real and imminent danger to the life or bodily integrity of IDF forces or Israeli civilians, and only as a measure of last resort. The SOPs emphasize that the danger must be first addressed by way of verbal warnings and non-lethal means. If these means have been exhausted (or were unfeasible in the circumstances) and the danger has not been removed, the SOPs allow – subject to stringent requirements of necessity and proportionality – precise fire below the knees of a key rioter or a key instigator, in order to remove the real and imminent danger the riot poses.

70. As described above, the violent events took place over many hours each day, and across several locations along border. Most of the time, they did not pose a real and imminent danger to human life or bodily integrity, and, accordingly, the use of potentially lethal force was not permitted. Nevertheless, there were specific times when the riots posed a real and imminent danger to IDF forces and to Israeli civilians, especially as they grew particularly violent and large numbers of rioters attempted to breach the defensive infrastructure. In those limited times, potentially lethal force could be used subject to the stringent requirements imposed by the SOPs.

71. Contrary to claims made, the SOPs do not permit the use of potentially lethal force against individuals simply due to any presence in the area adjacent to the defensive infrastructure, any proximity to the defensive infrastructure, any participation in a violent riot or support of Hamas. Any claims made in this regard are unsubstantiated and false.

Lessons Learned and Investigation of Exceptional Incidents

72. The IDF maintains a robust process for implementing lessons learned from contending with the events. When relevant lessons are identified, they are implemented immediately and disseminated among all relevant forces.

73. In addition to its ongoing "lessons learned" process, the IDF maintains a 'Fact-Finding and Assessment Mechanism' (the FFAM) which is responsible for conducting factual examinations of certain operational incidents. The Mechanism is led by a Brigadier General, and its members, who are all outside the relevant chain of command, include officers from different relevant fields of expertise. In

the context of the violent events, the FFAM has collected relevant information and materials pertaining to certain incidents where potentially lethal force was apparently used by the IDF, particularly incidents in which it was alleged that it had led to the death of individuals. The FFAM's findings and materials are provided to the Military Advocate General, who examines them and decides whether they give rise to a reasonable suspicion that a criminal offence had been committed and thus warrant a criminal investigation.