normal and desirable feature of international criminal adjudication, this particular acquittal seems problematic. On June 18, 2018, Bemba returned to Belgium to rejoin his family. He was subsequently sentenced to one-year imprisonment and a EUR300,000 fine for offenses against the administration of justice[30] (pp. 50–51) resulting from his participation in a "vast and systematic . . . criminal enterprise" to taint the evidence in the case.[31] In such circumstances, even taking the majority's view of the proof adduced in the main case, it seems that ordering a retrial would have been both fair and appropriate.

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Law of armed conflict and international human rights law—law enforcement and conduct of hostilities—imminence—international law in domestic courts—complementarity and national investigations

HCJ 3003/18 YESH DIN – VOLUNTEERS FOR HUMAN RIGHTS v. CHIEF OF GENERAL STAFF, ISRAEL DEFENSE FORCES (IDF). *At* https://supreme.court.gov.ilsazx.
Israel Supreme Court, May 24, 2018.

In *Yesh Din v. Chief of General Staff, IDF*,[1] the Israeli Supreme Court (Court) unanimously dismissed two petitions by six human rights NGOs who challenged the rules of engagement (RoE) governing Israel Defense Forces (IDF) activities in clashes near the fence separating the Gaza Strip and Israel between March and May 2018. The decision discusses several controversial international law issues relating to the use of force in response to cross-border mass demonstrations. In addition, it provides a closer look at the application of international law by a domestic court that is conscious of a potential International Criminal Court (ICC) investigation.

The mass demonstrations near the Gaza border are the subjects of conflicting narratives that are well-reflected in the submissions of the petitioners and the government. The petitioners claim that these events are mostly peaceful demonstrations, that they are expressions of the right to peaceful assembly. Although some violent events occur during these demonstrations, the petitioners maintain that these exceptions do not alter the nature of the events. The government's response is that these are organized violent events that should be understood as part of the existing armed conflict between Israel and Hamas. There is no dispute that at least some of the demonstrators were non-violent civilians and that the clashes resulted in, at the time of the petitions, the deaths of dozens of Palestinians and injuries to thousands more. Israel's actions were the subject of international and domestic criticism.[2] The ICC prosecutor issued

[30] Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/13, Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo (Sept. 17, 2018).
[31] Nilsson, *supra* note 21, at 478.
[1] HCJ 3003/18 Yesh Din – Volunteers for Human Rights v. Chief of General Staff, IDF (May 24, 2018) (Isr.), *at* https://supreme.court.gov.il.
[2] *See, e.g.*, Amnesty International, *Israel/OPT: Stop the Use of Lethal and Other Excessive Force and Investigate Deaths of Palestinian Protesters* (Mar. 31, 2018).

a statement reminding Israel and Hamas of her office's ongoing preliminary examination and that the current events fall under the mandate of the Office of the Prosecutor (OTP).[3]

Six human rights NGOs filed petitions asking the Court to invalidate sections of the RoE that allegedly allow soldiers to use lethal force against protesters that do not pose an immediate threat to life. It is important to note that the petitioners and the justices did not see the actual RoE, but only received a general description of the rules. The government offered to show the classified RoE *ex parte* only with additional explanations and classified intelligence. The petitioners, whose consent is required for such process to take place, refused to allow the presentation of additional intelligence *ex parte*, and as a result, the RoE were not presented to the Court.

In addition to the invalidation of parts of the RoE, the petitioners requested that the Court instruct the IDF to implement effectively the prohibition on the use of lethal force against persons that do not pose an imminent threat in the context of the demonstrations. The petitioners' arguments are straightforward. They contend that even if an armed conflict exists, the demonstrations are governed by a law enforcement paradigm grounded in international human rights law (IHRL) rather than the law of armed conflict (LOAC). Under this regime, as recently affirmed by the UN Human Rights Committee, the use of lethal force is only permissible in response to an imminent threat to life or of serious injury.[4] The petitioners contend that the evidence shows that the IDF used lethal force when no such threat was present.

In its response, the government argued that LOAC governs the entire situation. The LOAC regime, it suggests, includes both conduct of hostilities and law enforcement paradigms. The law enforcement paradigm under LOAC is informed by IHRL's law enforcement rules yet distinguishable from those rules. Under this paradigm, the use of lethal force is permissible when there is an actual threat to life or limb even if the threat is not immediate. Specifically, the RoE allow the IDF to fire, if the use of non-lethal means does not remove the threat, toward the legs of a "main rioter" or a "main instigator." The government stated that the law enforcement paradigm is the default for using lethal force during the demonstrations, but that in some cases, such as when an individual is holding an explosive device, the conduct of hostilities paradigm governs. The government further argued that IHRL does not apply to the situation, but stressed that even under IHRL, the RoE are legally sound. Finally, it argued that the Court in the *Al-Masri* case had previously decided that a similar use of lethal force was permissible.[5]

The Court unanimously dismissed the petitioner's submissions. In the context of the demonstrations, all three justices agreed that a law enforcement paradigm permits the use of lethal force even before a person crosses the fence that separates Gaza from Israel. In addition, the justices stressed that the Court will rarely, and only narrowly, intervene in operational considerations. Importantly, each of the justices alluded to the fact that they did not see the actual RoE but only received a general description of these rules. The justices criticized the

[3] International Criminal Court, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, Regarding the Worsening Situation in Gaza (Apr. 8, 2018), *at* https://www.icc-cpi.int/Pages/item.aspx?name=180408-otp-stat.

[4] Human Rights Committee, General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, para. 12, UN Doc. CCPR/C/GC/36 (Oct. 30, 2018).

[5] HCJ 1971/15 Al-Masri v. The Chief Military Advocate General (July 7, 2017) (Isr.), *at* https://supreme.court.gov.il (mass demonstrations near the border between Lebanon and Israel).

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petitioners' decision not to consent to *ex parte* review of the classified RoE with additional explanations and classified intelligence, and held that, in the absence of such review, the Court had to presume that government conduct based on those rules is lawful. From there, however, the justices' reasoning diverges.

Deputy Chief Justice Melcer, who wrote the lead opinion, mirrored the government's framing of the events in Gaza (paras. 5–16). He described at length their violent nature, the role of Hamas, the proximity to the fence, and organized attempts to destroy parts of the fence. Justice Melcer accepted the vast majority of the government's legal arguments. His opinion determined that there is a continuous armed conflict between Israel and Hamas and that in such situations LOAC governs the use of force under both the conduct of hostilities paradigm and the law enforcement paradigm (paras. 38–39). As to the contents of this latter paradigm, Justice Melcer relied on the government's position without citing any supporting material. He determined that the use of lethal force under the LOAC law enforcement paradigm is allowed when facing an actual threat to life, from an individual or a group of people. The use of such force should be a last resort, governed by strict requirements of necessity and proportionality. He also accepted that the *Al-Masri* decision demonstrates the Court's earlier acceptance of this position (para. 43). Finally, he stressed that those participants directly participating in the hostilities can be targeted under the conduct of hostilities paradigm, referring to the International Committee of the Red Cross (ICRC) *Interpretive Guidance on Direct Participation in Hostilities* (DPH) (para. 45).[6]

In contrast to the petitioners, the government, and Deputy Chief Justice Melcer, Chief Justice Hayut did not address the question whether LOAC or IHRL governs the law enforcement paradigm during an armed conflict. Instead, her opinion only considered the *content* of the law enforcement and conduct of hostilities paradigms. This might suggest that her position is that the content of the law enforcement paradigm is similar under LOAC and IHRL. Chief Justice Hayut differentiated between three categories of persons under the current RoE: (1) those who take a direct part in hostilities; (2) main rioters and instigators; and (3) other participants. The first category is governed by the conduct of hostilities paradigm, she determined; the remaining two, by the law enforcement paradigm (para. 11). Justice Hayut also accepted the government's interpretation of the content of the law enforcement paradigm (para. 10). Nonetheless, she stated that the distinct category of "main rioter or main instigator" was not supported by external materials (para. 12), seemingly implying that the use of lethal force against this category should be evaluated in light of the general requirements of the law enforcement paradigm.

Chief Justice Hayut offered two additional notable statements in her opinion. First, she stated that Israel has been engaged in an armed conflict with Hamas for thirty years (para. 1). This statement, which could have a significant impact on the legal evaluation of past events,[7] was not explained by the chief justice, supported by external references, nor part of the government's submission. Second, Chief Justice Hayut classified the conflict as an international armed conflict as opposed to a non-international one, maintaining the position first articulated by the

[6] International Committee of the Red Cross, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law (2009) [hereinafter Interpretive Guidance].

[7] *See* Laurie Blank & Benjamin R. Farley, *Determining When the Armed Conflict with Al-Qaeda Started*, Just Security (Mar. 11, 2016), *at* https://www.justsecurity.org/29898/determining-armed-conflict-al-qaeda-started.

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Court in the *Targeted Killings* case (para. 2),[8] and since subject to domestic and international criticism.[9]

Finally, Justice Hendel accepted the government position regarding the content of the law enforcement paradigm. In addition, he seemed to lean toward different treatment of "main rioters and instigators" as a practical matter (para. 4). Similar to Chief Justice Hayut, he did not discuss the overall legal regime that governs the two paradigms.

* * * *

Yesh Din v. Chief of General Staff, IDF raises crucial questions regarding the use of force in law enforcement situations and, more broadly, questions concerning the contribution of domestic courts to the development of international law and their behavior in the shadow of the ICC.

Much of the commentary on the decision has questioned the law-enforcement-under-LOAC approach.[10] This focus is justified because the government's approach is controversial and provides states greater discretion in applying an uncertain and underdeveloped set of rules. The discussion here focuses instead on the content of the law enforcement paradigm rather than on the bodies of law from which the paradigms are derived. In addition, it discusses two broader insights on the application of international law in domestic courts.

Whether the law-enforcement-under-LOAC paradigm raises concerns depends on its content. As the decision demonstrates, certain states continue to maintain a narrow position on the extraterritorial application of IHRL and the application of IHRL during an armed conflict. As long as those states do not change their approaches, it is preferable to have binding international norms rather than the notorious "legal black hole." In addition, the government promoted the same approach under both LOAC and IHRL, and Chief Justice Hayut and Justice Hendel accepted the government's approach despite failing to ground the law enforcement paradigm in LOAC. There is nothing that prevents the law-enforcement-under-LOAC paradigm from having exactly the same content as the law-enforcement-under-IHRL paradigm.

In the present case, the most concerning part of Deputy Chief Justice Melcer's opinion is his acceptance of the government's articulation of the *content* of the law enforcement under LOAC paradigm without questioning the government's failure to provide external sources in support of it. The notion of imminent threat is at the heart of the debate over the law enforcement paradigm. The petitioners stressed the need to maintain the well-accepted IHRL "immediate threat" standard and, in this specific case, that such threat could not materialize before individuals have crossed the border fence.[11] The government and the Court rejected

[8] HCJ 769/02 Public Comm. Against Torture in Israel v. Gov't of Israel, para. 18, PD 62(1) 507 [2006] (Isr.). [hereinafter *Targeted Killings* case].

[9] THE STATE OF ISRAEL, THE 2014 GAZA CONFLICT: FACTUAL AND LEGAL ASPECTS, at para. 233 (2015) [hereinafter GAZA CONFLICT REPORT].

[10] See, *e.g.*, Eliav Lieblich, *Collectivizing Threat: An Analysis of Israel's Legal Claims for Resort to Force on the Gaza Border*, JUST SECURITY (May 16, 2018), *at* https://www.justsecurity.org/56346/collectivizing-threat-analysis-israels-legal-claims-resort-force-gaza-border; Elena Chachko & Yuval Shany, *The Supreme Court of Israel Dismisses a Petition Against Gaza Rules of Engagement*, LAWFARE (May 26, 2018), *at* https://www.lawfareblog.com/supreme-court-israel-dismisses-petition-against-gaza-rules-engagement.

[11] Hannes Jöbstl, *Lost Between Law Enforcement and Active Hostilities: A First Glance at the Israeli Supreme Court Judgment on the Use of Lethal Force During the Gaza Border Demonstrations,* EJIL: *TALK!* (June 4, 2018), *at* https://

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this position, reasoning that lethal force could be used even before an individual, believed to pose a threat, has crossed the fence, when the use of non-lethal means is insufficient to remove the threat. This approach seems similar to the immediacy of the action, rather than the immediacy of the threat, test for imminence that has been promoted by states and scholars in other international law contexts. The paradigmatic example concerns imminence in the *jus ad bellum,* and specifically the controversy surrounding the use of force against an imminent armed attack by nonstate actors.[12] In that instance, addressing the term "imminent," the focus is on the immediacy (or necessity) of the action rather than on the immediacy of the threat.[13] Imminence has also featured in the Court's torture jurisprudence. In the landmark 1999 *Public Committee Against Torture* decision, the Court controversially held that a "ticking bomb" scenario includes future attacks that may take place weeks later.[14] The Court has recently upheld this position.[15]

The immediacy of the action approach makes sense when it is the only available alternative. However, it significantly increases the risk of state abuse of the law by strategically identifying the immediacy of the action and broadly defining notions of last resort. The present case seems to be an example of the latter. If we accept the government arguments, it is possible to stop the threat to life after a mass of people cross the fence, but it will require a massive use of lethal force with significant consequences that the government wishes to avoid.[16] Thus, this position is in fact a broad, lesser evil version of the last resort argument that includes the potential consequences of the use of lethal force within the calculation. In addition, it addresses a threat that emanates from a mass of people rather than a threat of a specific individual.[17] The legality of such an approach is questionable and should have been explicitly discussed in the Court decision.

A second, broader concern is the Court's increasing deference to the government's military operations policies, a trend that has emerged over the past decade that, as I have previously argued, results from the Court's growing self-identification as a domestic actor as opposed to an international one.[18] The current decision enables a closer look at this shift and, in addition, highlights the unintended (negative) influence of complementarity under the Rome Statute.[19]

www.ejiltalk.org/lost-between-law-enforcement-and-active-hostilities-a-first-glance-at-the-israeli-supreme-court-judgment-on-the-use-of-lethal-force-during-the-gaza-border-demonstrations.

[12] *See, e.g.*, Daniel Bethlehem, *Self-Defense Against an Imminent or Actual Armed Attack by Non-state Actors*, 106 AJIL 769 (2012).

[13] Marty Lederman, *The Egan Speech and the Bush Doctrine: Imminence, Necessity, and "First Use" in the* Jus ad Bellum, JUST SECURITY (Apr. 11, 2016), *at* https://www.justsecurity.org/30522/egan-speech-bush-doctrine-imminence-necessity-first-use-jus-ad-bellum.

[14] HCJ 5100/94 Public Committee Against Torture v. Israel 53(4) IsrSC 817, para. 34 to the Opinion of Chief Justice Barak (1999) (Isr.).

[15] HCJ 9018/17 Tbeish v. Attorney General, para. 43 to the Lead Opinion of Justice Elron (Nov. 26, 2018) (Isr.), *at* https://supreme.court.gov.il.

[16] Response of the Government, HCJ 3003/18 Yesh Din – Volunteers for Human Rights v. Chief of General Staff, IDF, para. 83 (Apr. 29, 2018) (Isr.), *available at* https://www.acri.org.il/he/wp-content/uploads/2018/04/bagatz-3003-18-Gaza-shooting-meshivim1-2-0418.pdf.

[17] Lieblich, *supra* note 10.

[18] Yahli Shereshevsky, *Targeting the Targeted Killings Case – International Lawmaking in Domestic Contexts,* 39 MICH. J. INT'L L. 241, 261–66 (2018).

[19] Rome Statute of the International Criminal Court, Art. 17, July 17, 1998, 2187 UNTS 90.

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The principle of complementarity under Article 17 of the Rome Statute dictates that a case is inadmissible before the ICC "unless the State is unwilling or unable genuinely to carry out the investigation or prosecution."[20] The notion of positive complementarity aims to utilize complementarity to incentivize states to investigate and prosecute alleged international crimes themselves.[21]

Positive complementarity is relevant not only to active ICC investigations, but also to preliminary examinations, such as the one that is being conducted with respect to the situation in Palestine. The OTP itself has stated that one of the main goals of preliminary examinations is to encourage genuine national proceedings.[22] Nonetheless, whether preliminary examinations can have that effect is questionable. A recent report by Human Rights Watch suggests that expectations should be modest with respect to the influence of positive complementarity at the preliminary examinations stage.[23] The commentary on the report and studies of preliminary examinations acknowledge the limits of positive complementarity, including the preliminary examination of the situation in Palestine.[24] They do not, however, suggest that complementarity has a negative effect on courts' willingness to review government actions relating to military operations as compared to a situation without potential ICC involvement.

As previously mentioned, the ICC prosecutor issued a statement regarding the situation at the Gaza border,[25] and the OTP discussed the events in its 2018 *Report on Preliminary Examination Activities*.[26] In line with positive complementarity, Israel is investigating specific incidents at the Gaza border, emphasizing incidents that resulted in the death of one or more participants. All three justices emphasized this investigation. Similar investigations occurred in the aftermath of the 2014 Gaza conflict.

Ostensibly, we might have expected that the shadow of the ICC would push the Court to intervene more in military operations policies. However, in contrast to the court behavior in the first decade of the twenty-first century, the Court has been reluctant to intervene in such cases since the ICC's involvement in the situation began in 2009.[27] This reticence can be explained by the fact that the logic of positive complementarity does not work in the context of general policies. While it is reasonable to assume that states will investigate cases of low- and

[20] *Id.*

[21] *See, e.g.*, William W. Burke-White, *Implementing a Policy of Positive Complementarity in the Rome System of Justice,* 19 CRIM. L. F. 59, 70 (2008).

[22] ICC Office of the Prosecutor, Policy Paper on Preliminary Examinations, paras. 93–94, 100–01 (Nov. 2013), *available at* https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf.

[23] Human Rights Watch, *Pressure Point: The ICC's Impact on National Justice – Lessons from Colombia, Georgia, Guinea, and the United Kingdom* (2018), *available at* https://www.hrw.org/sites/default/files/report_pdf/ij0418_web_0.pdf; Elizabeth Evenson, Balkees Jarrah, Elise Keppler, Juan Pappier & Param-Preet Singh, *The ICC's Impact on National Justice: Can the ICC Prosecutor Catalyze Domestic Cases?*, EJIL: *TALK!* (Dec. 6, 2018), *at* https://www.ejiltalk.org/the-iccs-impact-on-national-justice-can-the-icc-prosecutor-catalyze-domestic-cases.

[24] *See, e.g.*, Thomas Obel Hansen, *Complementarity (In)action in the UK?*, EJIL: *TALK!* (Dec. 7, 2018), *at* https://www.ejiltalk.org/complementarity-inaction-in-the-uk; Sharon Weill, *The Situation of Palestine in Wonderland*: *An Investigation into the ICC's Impact in Israel*, *in* QUALITY CONTROL IN PRELIMINARY EXAMINATION: VOL. I, at 493, 507–19 (Morten Bergsmo & Carsten Stahn eds., 2018).

[25] *Supra* note 3.

[26] ICC Office of the Prosecutor, Report on Preliminary Examination Activities, paras. 262–66 (Dec. 5, 2018), *available at* https://www.icc-cpi.int/itemsDocuments/181205-rep-otp-PE-ENG.pdf.

[27] Shereshevsky, *supra* note 18, at 257.

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mid-ranking soldiers who allegedly committed international crimes, those responsible for general policies are the highest-ranking officers and government officials. In most cases, it is highly doubtful that these individuals will be criminally investigated or whether a state will be willing to genuinely investigate the systematic violations resulting from such policies.[28] Under these circumstances, determining that a policy is illegal will not help show that the state is willing and able to prosecute, since it will probably not be followed by a criminal investigation of the relevant crimes and suspects, in contrast to specific incidents of alleged severe violations of the law. Moreover, while illegality under international law does not necessarily imply an international crime, in cases such as house demolitions and targeting, determinations of illegality come very close to acknowledging potential international criminality, since the norms in question were criminalized in the Rome Statute.[29] At best, intervention will have no effect, and at worst (from the state perspective), it will highlight the state's failure to investigate the relevant crimes and the appropriate suspects, increasing the likelihood of ICC intervention.[30] The logic of positive complementary is inverted in these cases; domestic courts have an incentive not to review the legality of general policies such as the RoE in the present case. This might explain at least part of the Court's reluctance to intervene in recent years.[31]

A final, broader insight concerns the expertise of domestic courts in international law. Domestic judges often do not possess specific international law expertise.[32] The present case highlights two potential implications of such limited expertise. The first is a potential overreliance on the arguments of the parties. Deputy Chief Justice Melcer's opinion is a good example. Significant parts of the factual background and legal analysis are almost identical to the government response.[33] Justice Melcer's reliance on the parties' arguments goes beyond the government's submissions, suggesting that it results from more than just favoritism. For example, when the deputy chief justice discusses DPH, he only refers to the ICRC *Interpretive Guidance* and not to the Court's *Targeted Killings* case. This is puzzling for two reasons. First, it is the Court's most direct precedent on DPH. Second, the *Targeted Killings* case offers more open-ended description of specific activities that can be classified as DPH.[34]

[28] *See* Obel Hansen, *supra* note 24; Weill, *supra* note 24, at 509–10.

[29] For house demolitions, the potential war crimes under the Rome Statute include, among other crimes, (depending on the classification of the conflict) Articles 8(2)(b)(xiii) and 8(2)(e)(xii); for the use of lethal force against individuals in the context of an armed conflict the potential crimes include Articles 8(2)(b)(i) and 8(2)(e)(i).

[30] This is relevant even to preliminary examinations by the ICC. *See, e.g.*, ICC Office of the Prosecutor, Report on Preliminary Examination Activities (2017) – Colombia, paras. 130–35 (Dec. 4, 2017), *at* https://www.icc-cpi.int//Pages/item.aspx?name=2017-otp-rep-PE-Colombia.

[31] The one exception is the decision of the Court to order the government to return the bodies of Palestinians who committed attacks to their families. This exceptional case, which is the subject of additional hearing at the court, involves an international humanitarian law norm that does not constitute a crime under the Rome Statute and thus the logic of positive complementarity does not lead to deference in this specific case. *See* HCJ 4466/16 Muhammed Eliyan v. Commander of the Israeli Army in the West Bank (Dec. 14, 2017) (Isr.), *at* https://supreme.court.gov.il.

[32] Naz K. Modirzadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARV. NAT'L SEC. J. 225, 257–58 (2014).

[33] See, for example, paragraphs five and forty of Deputy Chief Justice Melcer opinion and paragraphs nine and thirty-three of the government response, *supra* note 16.

[34] Compare *Targeted Killings* case, *supra* note 8, para. 35; INTERPRETIVE GUIDANCE, *supra* note 6, at 35, 56.

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This allows the Israeli Military Advocate General (MAG) Corps to adopt a broader view on acts that qualify as DPH than the *Interpretive Guidance*.[35] Some commentary mentions the Court's reference to the *Interpretive Guidance* as "an important message of adherence to international law."[36] However, a look at the parties' arguments suggests a different answer. The petitioners referred only to the *Interpretive Guidance*, and the government hastily noted its disagreement with the analysis without referring to the *Targeted Killings* case. This tendency to mirror the parties' arguments may incentivize the parties to present far-reaching and unsubstantiated arguments in the hope that at least some will be adopted by the court.

A second manifestation of limited judicial expertise in international law is visible in the Court's vague discussion of the main legal controversy. The government made clear that under the LOAC law enforcement paradigm, force can be used if the threat is substantial, even if the threat is not immediate. Yet, Deputy Chief Justice Melcer (paras. 46, 50) and Chief Justice Hayut (para. 9) both referred to the government position as requiring an immediate threat. In other parts of the decision, the Court's articulation of the government position is different, and nowhere do the justices explicitly discuss the controversy around the immediacy requirement (*See* Melcer, para. 40; Hayut, para. 10). Limited expertise seems to be the best explanation of this terminological vagueness.[37]

The Court's apparent lack of expertise highlights the need for caution in the weight given by states and other actors to any specific judicial decision interpreting and applying international law, and the importance of taking into consideration the reasoning and context of the decision rather than just its sound bites.[38]

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International Criminal Court—Pre-Trial Chamber—territorial jurisdiction over a crime committed in part on state-party territory—the ICC's objective international legal personality

CASE NO. ICC-RoC46(3)-01/18, Decision on the "Prosecution's Request for a Ruling on Jurisdiction Under Article 19(3) of the Statute." *At* http://www.icc-cpi.int. International Criminal Court, September 6, 2018.

[35] GAZA CONFLICT REPORT, *supra* note 9, para. 268; Michal N. Schmitt & John J. Merriam, *The Tyranny of Context: Israeli Targeting Practices in Legal Perspective*, 37 U. PA. J. INT'L L. 53, 113–14 (2015).

[36] Amichai Cohen, *Analysis of Israel's Supreme Court Decision Allowing Lethal Force in Gaza*, JUST SECURITY (May 27, 2018), *at* https://www.justsecurity.org/57033/analysis-israels-supreme-court-decision-allowing-lethal-force-gaza. *See also* Jöbstl, *supra* note 11.

[37] Another example of limited expertise is Chief Justice Hayut's statement that Israel and Hamas have been involved in an armed conflict for thirty years. This statement does not rely on the argument of the parties, is not supported by the references in the judgment, and does not have support in the international law literature on the conflict. The only reasonable explanation for this statement is that Chief Justice Hayut used "armed conflict" as a colloquial phrase rather than legal term of art with significant potential implications.

[38] Anthea Roberts, *Comparative International Law? The Role of Domestic Courts in Creating and Enforcing International Law*, 60 INT'L COMP. L. Q. 57, 63 (2011).