Are IDF soldiers more afraid of their lawyers than they are of Hamas

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Israel is again at a crossroads in the area of law and war. nIt has not figured out militarily or diplomatically how to stop or [solve Hamas’s latest low-grade escalation](https://www.jpost.com/Israel-News/Senior-IDF-general-We-aim-to-avoid-open-war-maintain-strong-deterrence-572442) tactics dating back to March.

With no satisfactory solution, Education Minister Naftali Bennett recently reignited the debate over the involvement of lawyers in giving IDF soldiers legal advice before targeting decisions are made and the possible prosecution of some IDF soldiers after those decisions.

What is the right place of IDF lawyers in this latest conflict between the IDF and Hamas?

Bennett and those on the Right say the IDF lawyers have gone too far in restraining the country’s soldiers from either going to war aggressively or shooting violent protesters, including those attacking Israel with incendiary kites and balloons.

They are especially angry that since the 2006 Lebanon War, the 2008-2009 Gaza war and the UN Human Rights Council Goldstone Report accusing Israel of war crimes, the IDF started to embed legal advisers into forward-operating units.

All of this is exacerbated by the recent history of the convictions and sentencing to jail of two [IDF soldiers for killing Palestinians](https://www.jpost.com/Israel-News/Why-trials-against-IDF-soldiers-killing-Palestinians-are-falling-apart-559247): the March 2016 Hebron shooter, Elor Azaria, and the May 2014 Nakba Day shooter, Ben Deri.

Israel’s critics on the Left, including the International Criminal Court, have criticized Israel explicitly or implicitly for using too much lethal force, leading to over 200 killed and thousands of injured Palestinians with nearly no physical casualties (excluding massive economic damage to burned agricultural lands) on the Israeli side.

This tension is augmented by the fact that the current border conflict with Hamas is the first where the ICC has publicly threatened Israel mid-conflict and is [deep into probing the legality of its conduct](https://www.jpost.com/Arab-Israeli-Conflict/Is-the-IDF-ready-for-its-next-legal-war-563568) of the 2014 Gaza war.

IDF Chief-of-Staff Lt.-Gen. Gadi Eisenkot and Attorney-General Avichai Mandelblit both put out statements unequivocally supporting the IDF legal division as striking the right balance.

But their statements did not really get at the legal, security or emotional complexities that IDF lawyers, soldiers and the public are dealing with in the newest confrontation.

The serious questions beneath the populist disagreements are: How much should the ICC and fear of it and other human rights groups dictate targeting decisions? How much should the IDF go beyond the law’s strict parameters in restricting targeting as part of the public relations battle over Israel’s legitimacy? When should the IDF use lethal force on Palestinians in confrontations at the Gaza border and on those using incendiary kites/balloons? Is the IDF treating the Gaza situation as an “armed conflict” or a law enforcement situation – or both?

Most current and former military-government legal officials addressing these issues did so under condition of anonymity due to the sensitivity of the issues.

REGARDING THE ICC and human rights groups criticism, Bennett probably represents the majority of the public which has a serious distaste for international legal bodies or critics who they believe are biased and do not understand the dangers Israelis face.

However, almost all lawyers say that the public here is just misinformed. They say the public does not understand that one cannot merely snap one’s fingers to make the ICC and other critics disappear.

The consequences of the ICC getting deeper into Israel’s business, if it views Israel as violating international law, could be global arrest warrants against soldiers and cabinet officials. Around 125 countries, including nearly all of Europe, would be treaty-bound to comply.

Additional consequences of being labeled by the ICC as a war-crime committing country could be both economic and diplomatic.

In contrast, top lawyers, while they are worried that the ICC may be dead-set biased against Israel like the UN Human Rights Council, are hopeful that the ICC is a different animal and that dialogue with it can lead to dodging accusations of war crimes.

They point to the ICC’s waiting more than four years since the 2014 Gaza war to receive the results of the IDF’s probes, despite pressure from the Palestinians to rush to judgment.

Further, they point to supportive articles from top experts such as Michael Schmitt regarding embedding legal advisers and other decisions.

They add that the IDF legal division has a strong backbone to uphold Israel’s foundational commitments to human rights and the rule of law, whether there is an ICC threat or not.

Where critics of the IDF on the Right worry that sending the Hebron shooter and the 2014 Nakba Day shooter to jail confuses soldiers into failing to defend themselves, most lawyers say that these jail sentences are exhibit A to the ICC of Israel’s readiness to self-prosecute.

If the ICC acknowledges that Israel self-prosecutes, then under its own rules it cannot get involved against Israelis.

Critics from the Right say that the ICC will for sure be biased against Israel like many other international bodies and that there is no sense in any unnecessary risk to Israeli lives to try to placate it.

Furthermore, they say that the feeling that virtually all commanders in the field during the 2014 Gaza war were questioned (not prosecuted) for one criminal probe or another sent a problematic message which has weakened those commanders’ readiness to be aggressive about self-defense.

Critics from the Left want the ICC involved, as they believe that the IDF’s targeting is already overly aggressive and needs to be forcibly restrained.

WHAT ABOUT the public relations battle and decisions to restrain military force beyond international law’s strict requirements?
While this overlaps with the ICC and legal criticisms, here the issue is best understood from the standpoint of IDF warnings to targets.

Though international law requires warnings as feasible to allow civilians to flee a war zone area before attacking, in many cases it does not require a warning, since that would also allow the enemy to escape.

Here, the IDF says it frequently issues warnings via telephone calls, fliers and carries out roof-knocking (hitting the roof of an impending target with a nonexplosive missile to motivate civilians to evacuate), which are not required by international law.

Lawyers say the IDF does so because of Israel’s commitment to reduce civilian casualties and to increase the perception globally of [Israel’s commitment to human rights](https://www.jpost.com/Arab-Israeli-Conflict/Israel-admits-it-revised-approach-to-open-fire-during-Gaza-border-crisis-553180).

The Left criticizes the warnings as ineffective, pointing to 2,100 killed Palestinians (between 50%-80% civilians) during the 2014 Gaza war.
The Right says the warnings reward Hamas for using human shields.

GETTING INTO specifics about the current border confrontation, when should the IDF use lethal force on Palestinians at the Gaza border and on those using incendiary kites/balloons?

On the Right, many argue that if the IDF had issued shoot to kill orders more aggressively, including for incendiary kite/balloon users, from the start in March, the confrontation would be long over.

On the Left, the 200 dead and thousands of injured Palestinians with nearly zero Israeli casualties are used to prove that the IDF has used far too much lethal force for general deterrence purposes. They say lethal force should be used only if there is immediate danger.

Most lawyers, who overwhelmingly support the IDF, point to the High Court of Justice’s May decision endorsing the IDF’s rules of engagement as legal.

Also, they point to a small number of criminal probes to show that the IDF investigates itself, and maintain that the legal proceedings are not out of control.

However, the debate gets very complicated once you get into concrete cases like whether to shoot to kill at a 12-year-old getting ready to unleash an incendiary kite.

Legally, those on the Right could say that Hamas is committing a war crime by using 12-year-olds to commit violence, and that since Israel is in an armed conflict with Gaza, the IDF can shoot to kill anyone who is taking a direct part in violence.

Those on the Left would react with horror to such a suggestion, and say that a 12-year-old with an incendiary kite from a distance cannot possibly present an immediate danger (since such kites have not caused many casualties).

The IDF’s commanders and lawyers would most likely say that in theory they might have the right to shoot to kill even a 12-year-old incendiary kite user, but that the image of using a missile to blow up a 12-year-old with a kite is too much to bear.

Furthermore, they would argue that even if there is a right to shoot him, the limited danger he presents can be tolerated or negated by shooting at the knees or, in some instances, risking sending a small unit briefly over the border and exposed, to remove him.

THIS CASE gets directly into the question of whether the IDF is truly treating the Gaza situation as an armed conflict or as a law enforcement situation.

The answer is likely both.

While in international legal forums, it maintains its rights to act as if in a constant armed conflict with Hamas, in practice the IDF sometimes is recognizing that the world will not judge it kindly if it acts in this fashion toward low-grade violence.

Accordingly, in many cases the IDF is treating the current border conflict as if it is a law enforcement situation in which the use of lethal force is highly restricted.

If the IDF is so restricted, how have so many Palestinians died and been injured?

First, “so many” is in the eye of the beholder. With sometimes tens of thousands of Palestinians confronting the IDF on the border in a single day, and these confrontations lasting eight months, some might say that 200 Palestinian dead is a very small number.

Still, even the High Court warned the IDF in May that it appeared that there were more wounds above the knee and the waist than there should have been, and even the IDF admitted that it has tried to improve and change its implementation of the open fire rules week-to-week.

Former Canadian chief judge advocate-general and a foreign expert member of the Turkel Commission Kenneth Watkin has posited in his book, Fighting at the Legal Boundaries, that the situation in Gaza is so complicated that sometimes, in the same skirmish, the smartest thing may be to flip back and forth between armed conflict rules and law enforcement rules – all depending on the level of violence at the particular moment.

It is this very complexity and confusion that is so hard for the IDF commanders and lawyers to explain to critics both on the Right and on the Left.

With violence continuing, it is unlikely that this debate will cool off anytime soon.