

1. **Physicians for Human Rights**
 2. **The Palestinian Center for Human Rights**
- v.
1. **Doron Almog—O.C. Southern Command**
 2. **The State of Israel—The Minister of Defence**

The Supreme Court Sitting as the High Court of Justice
[April 27, 2003]
Before Justices E. Mazza, M. Cheshin, E. Hayut

Petition to the Supreme Court sitting as the High Court of Justice.

Facts: Petitioner requested an order that would prohibit the IDF from employing flechette shells in the context of military activities in the Gaza Strip. According to petitioners, the use of flechette shells means increased danger that there will be inadvertent casualties to non-combatants. As such, petitioners assert, flechette shells should be prohibited by the law of war.

Held: The Court held that, since the use of flechette shells was not prohibited by international conventions, it could not grant the petition. The Court noted that it had previously held that it would not intervene in the IDF's choice of military weapons, which it employs order to prevent terrorist attacks. The Court further held that it believed that the IDF had properly set out the conditions under which the use of flechettes was authorized. Of course, the question of whether the use of flechettes is justified under individual circumstances is given to the discretion of the authorized commander. This commander will act according the military directives, which are intended to prevent casualties among residents who do not endanger the IDF forces or Israeli civilians.

Treaties Cited

United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (1980)

Israeli Supreme Court cases cited:

[1] HCJ 5872/01 Barakeh v. The Prime Minister, IsrSC 56(3) 1

Petition denied.

For the petitioners—Y. Argon, Y. Zur

For the respondent—Y. Gensin

JUDGMENT

Justice E. Mazza

Petitioners request an *order nisi* that will order the Israeli Defense Forces, in the context of its operations in the Gaza Strip, to cease using flechette shells. A flechette shell contains a cluster of steel darts. When a flechette shell detonates, at a certain height above the ground, these darts are dispersed over an area of several hundred square meters. Like other armaments that contain submunitions—such as cluster bombs—flechettes are intended to be used against field targets, as opposed to distinct, individual targets.

According to petitioners, the use of flechette shells violates the laws of war, which prohibit the use of weapons that do not discriminate between combatants and non-combatants. Petitioners point to two instances in which flechette shells have caused civilian deaths. In the first incident, a flechette shell was used to respond to fire upon a military position in Netzarim, in the Gaza Strip. The shell landed near a Bedouin encampment and caused the deaths of three women. In the second incident, flechette shells were fired upon individuals suspected of being terrorists, on their way to carry out a terrorist attack. In this incident, three youths were

killed. As such, petitioners assert that the use of flechette shells is illegal, and that the IDF should be completely prohibited from using such shells.

Respondents assert that the question of whether to prohibit the use of flechette shells, in the context of the United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (1980) [hereinafter The 1980 Convention on Certain Conventional Weapons], has been raised several times before various international forums. However, a prohibition against the use of flechette shells has never received significant international support. The 1980 Convention on Certain Conventional Weapons completely prohibited the use of other weapons. Israel joined this treaty in 1995, subsequently ratified it, and sees itself as bound by its provisions. But this treaty does not ban the use of weapons that contain submunitions, such as flechette shells. As such, petitioner's claim that the use of flechette shells is prohibited by the law of war is incorrect, and should be rejected.

Respondents do not dispute that the use of flechettes—which are intended to be used against military targets in a combat zone—entails increased danger towards civilians that inadvertently enter the zone of fire. Respondents assert, however, that the use of flechettes, according to the military authorities and professionals that command the IDF forces in the Gaza Strip, is absolutely necessary under current security conditions. At the same time, however, respondents emphasized that military directives ensure that the use of flechettes will not become frequent or regular. These directives detail the only circumstances under which field commanders are authorized to use flechette shells. In general, and without fully detailing the matter, these directives restrict the use of flechettes to circumstances under which there exists no significant chance of injuring innocent civilians, and they may only be used against those suspected of activities that will injure the IDF forces or Israeli civilians.

With regard to the incidences raised by petitioners, in which the use of flechettes caused civilian casualties, respondents detailed the circumstances surrounding each incident. Respondents assert that, though

they mourn the loss of innocent life, the use of flechettes during both of the cited incidents did not contravene the conditions set down by the directives. Furthermore, respondents assert that, according to their estimates, the civilians injured by the flechettes would probably have been injured by standard shells also.

Petitioners request that we prohibit the military from using flechette shells. As the use of such artillery is not prohibited by international conventions, we cannot grant their petition. Our decisions have stated that “this Court will not intervene in the choice of military weapons, which the respondents use in order to prevent vicious terrorist attacks.” *See* HCJ 5872/01 *Barake v. The Prime Minister* [1]. We further note that we think the IDF has properly set out the conditions under which the use of flechettes is authorized. Of course, the question of whether the use of flechettes is justified under individual circumstances is given to the discretion of the authorized commander. This commander will act according to the military directives, which are intended to prevent casualties among residents who do not endanger the IDF forces or Israeli civilians.

Petition denied.

TRANSLATED BY: Leora Dahan
EDITED BY: Eli Greenbaum

Comments, questions and suggestions are all welcomed, and may be directed towards elig@supreme.court.gov.il
