

The Israeli Supreme Court Sitting as the High Court of Justice

High Court Ruling 8990

Presiding:

The Honourable Justice E. Matza  
The Honourable Justice M. Heshin  
The Honourable Justice A. Hayout

Appellants:

Physicians for Human Rights  
The Palestinian Center for Human Rights

v.

Respondents

O.C. Southern Command David Almog  
The State of Israel – Minister of Defense

Petition for the Granting of an Order Nisi

Date of Session: 11 Nissan 5763; April 13,

On Behalf of the Appellants:  
Atty. Y. Arnon, Y. Zur

On Behalf of the Respondents:  
Atty. Y. Gensin

## Ruling

Justice E. Matza:

The appellants' petition is for the granting of an order that will prohibit the IDF from using tank shells of the "flechette" type in the framework of its activities in the Gaza Strip area.

The flechette shell contains a bundle of metal arrows. It is unique in that when it explodes at a certain height above the ground, its arrows are dispersed across a surface that is a few hundred meters in width. Similar to other means of combat that include sub-ammunition – such as the various kinds of cluster bombs – flechette shells are intended to hit area goals, as distinct from point-specific goals. The claim of the petitioners is that the use of flechette shells is in contravention of the principles of the laws of war, under which a prohibition applies to the use of weapons that are likely to strike indiscriminately also at those who are not taking part in the fighting and to cause unnecessary suffering to the wounded. In the petition, two cases were mentioned in which the use of flechette shells resulted in fatal injuries to civilians: In one case, a flechette shell fired in response to fire opened at an IDF outpost in Netzarim landed near a Bedouin tent and brought about the death of three women; while in the second case, as a result of the strike of a flechette shell, shot during an operational action against suspected terrorists on their way to carry out a terrorist attack, three young men were killed. The appellants sought to determine that the use of flechette shells by the IDF in the Gaza Strip area is illegal, and that their use must be prevented entirely.

From an examination of the respondents' response it emerges that the question of whether it is fitting to prohibit the use of flechette shells – in the framework of the Convention for Restrictions on the Use of Conventional Weapons [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]: – was indeed raised for discussion, a number of times, before various international forums. However, the suggestions to prohibit or limit the use of flechette shells were never really supported and were removed from the agenda. The 1980 convention regarding conventional weapons prohibited use of certain other weapons; and Israel, which in 1995, joined this convention and ratified it, indeed views itself as obligated to the convention's prohibitions and restrictions. This convention, however, did not prohibit the use of weapons that contain sub-ammunition (such as flechette shells). It has been found that the claim of the appellants, that the laws of war prohibit use of flechette shells, has no basis and it should be rejected.

The respondents do not argue that use of flechette shells – intended for a surface target – involves a heightened danger for incidental injury even of those not participating in the fighting against the army, and who happen to be within the boundaries of the area at which the shell was fired. The respondents explained that according to the estimates of the command and professional personnel charged with IDF activity in the Gaza Strip area, the use of flechette shells in the present security reality is necessary and has no suitable replacement. This notwithstanding, they emphasized that the rules composed in the IDF assure that no regular use of the

flechette will be made; and the guidelines determined detailed the only situations and conditions under which commanders in the field are permitted to instruct the firing of a flechette shell. In general, and without entering into the details of the instructions, it was stated that the use of the flechette is restricted to areas [Heb. *gizra*, is closer to 'sector,' implying a more closed, delineated area] in which the danger to innocent civilians is not actual, and only against those suspected of activity that endangers IDF soldiers or Israeli citizens. In their treatment of the cases mentioned in the appeal, in which the use of flechette shells led to the killing of civilians, the respondents enumerated the circumstances of the events. As saddening as the attack on these civilians is, in our estimate there is no foundation for accepting that the use of the flechette in any of these situations deviated from the guidelines restricting the use of this weapon. Moreover: under our impression, these same civilians were likely to have been struck by the firing of ordinary shells, meaning that the harm to them cannot necessarily be attributed to use of the flechette.

The appellants asked us to prohibit the army from using flechette shells. Since we have realized that the use of this ammunition is not prohibited by the laws of war, the petitioners' request cannot be accepted. This court has ruled that "the choice of weapons, which the respondents use for the goal of preventing murderous terror attacks, is not one of the topics in which this court sees fit to intervene." (HCJ 5872/01, Bracha v Prime Minister, PD 56 (3)1). Needless to say, the respondents have eased our minds that the scope of use of this ammunition is arranged by the IDF through rules that are binding on the commanders of forces acting in the field. The decision regarding the question as to whether the conditions in the arena of combat, in every given case, justify use of the flechette, is determined by the authorized commander, who in formulating his decision is commanded to act according to professional guidelines, that in principle were intended to prevent harming residents not involved in activities that endanger IDF soldiers or Israeli citizens.

The petition is rejected.

Justice

The Honourable Justice M. Heshin:  
I agree.

Justice

The Honourable Justice A. Hayout:  
I agree.

Decided, as stated, in Justice E. Matza's decision.  
Rendered today, 25 Nissan 5763 (27 April 2003)