How Israel beat Netherlands war-crimes case against Gantz - analysis

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Blue and White head Benny Gantz, a former IDF chief, and former Israeli IAF commander Amir Eshel just emerged victorious from a civil lawsuit in the Netherlands filed against them by Palestinian supporters.

How did they get off, and where did the lawsuit come from?

The Jerusalem Post learned that it all started with a strange “notice of liability” sent by Holland to Israeli defense officials. The notice was not criminal; rather, it was a simple notice stating that a party might be seeking to sue Gantz and Eshel.

The notice was unprecedented. As such, the defense officials passed the notice on to a combination of the Justice Ministry, the IDF and Foreign Ministry lawyers who were charged with figuring out what it meant. They eventually determined that Gantz and Eshel would be facing a civil-damages case for alleged wrongful death of Palestinians.

During the 2014 Gaza war, six members of Ismail Ziada’s family were killed, along with one other person, during an IDF strike.

Ziada alleged that the strike was a war crime, that the IDF did not objectively probe it, and that the Dutch court should grant Ziada damages for wrongful death.

In fact, the IDF legal division probed the incident and found that four out of the seven people killed were terrorists involved in combat in a 24-hour period, when around 120 rockets were fired from Gaza at Israeli civilians.

The IDF legal division admitted that three of the seven people were civilians. But it said while the civilian deaths were tragic, the terrorists had made the location a legitimate target under the laws of war– including any proportional collateral harm to civilians – by bringing their military activities there.

Israel’s state lawyers assisted Gantz and Eshel with whatever they needed in finding their own local counsel in the Netherlands and provided any documents they needed, strategic advice from past unique experience in dealing with lawsuits worldwide and some undefined amount of financial backing.

According to Deputy Attorney-General (International Law) Roy Schöndorf, the context was as follows: “After the Palestinians’ criminal war crimes cases against Israelis in foreign countries failed for a number of years one after the other, they came up with a new strategy… filing civil cases against IDF and government officials.”

Civil cases are only for damages and not jail time, but they also require a lower threshold of proof.

Yet, Schöndorf said, based on the multiple terrorists being targeted, “the attack was completely legal.”

When the Justice Ministry spoke to Gantz, he did not get overly anxious, as he understood from the start that the chances of him being in jeopardy were low. He knew he had strong legal arguments, and that the facts of the case were already well known and had been probed by the IDF. Gantz did recognize that the issue was one that needed to be dealt with and not ignored.

Two weeks before the mid-September hearing, both sides filed legal briefs. At the end of the hearing, the court set January 29 as the date it would issue a decision.

Gantz and Eshel, and essentially the State of Israel, because of the wide implications for other soldiers, said the court had no jurisdiction to take the case. They made two main arguments. One, that Gantz and Eshel had immunity since they were acting not as individuals but on behalf of Israel, and two, by debunking the plaintiff’s claim that there is no fair court system to do justice in Israel.

The idea of the first immunity argument is that international law bars states from judging other states. No country knows when they might be on the wrong end of such an issue, so there is broad immunity for state actions from civil-damages lawsuits. This also would apply to officials, including military officers, who are acting on behalf of their states.

Anticipating that they might lose their case because of this legal obstacle, the plaintiffs asked the court to find that this case met an exception. There is a possible exception, allowing civil cases against foreigners acting on behalf of a foreign state if they committed war crimes, and if the foreign state will not prosecute its own officials’ war crimes.

Ultimately, the Netherlands court did not give any deep analysis of the second issue, finding the immunity argument decisive when it ruled for Gantz and Eshel last week.

Israel’s legal team was not in the Netherlands to hear the decision. It was basically given notice simultaneously – verbally by Gantz and Eshel’s lawyers who were there, as well as receiving the full decision by email.

Attorney Galit Raguan of the Office of the Deputy Attorney-General (International Law) happened to be the first staff member to see the decision. She immediately popped into Schöndorf’s office to excitedly inform him. Attorney Marlene Mazel, of the same office, was also a key member of the team that handled the case.

Israel’s government lawyers discussed the result with Gantz, who was very happy with the result and wanted to know how the decision would impact other soldiers and if it would be helpful in a broader way.

Gantz and Eshel also thanked all of the Israeli government lawyers involved.

The plaintiffs made noise about appealing last week’s decision, so Israel will need to hold its breath a bit for a few months.

Still, Israeli officials viewed the court decision as very important for several reasons. First, it was issued by a European court, where Israel often feels it is fighting an uphill battle. The case does follow some other Israeli victories over war-crimes charges in Europe, such as in Germany, England and Spain.

Second, the court’s approach to interpreting international law was what Israeli officials consider “mainstream” – not rogue interpretations used by more-biased UN bodies to politicize the process against Israel.

Further, Schöndorf said, “It shows that the Netherlands understands that Israel was acting to deal with terrorism.”

Schöndorf complimented the Foreign Ministry and the IDF International Law Division lawyers in working seamlessly together with his office to help get the win.