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## Use of Force at the Gaza Border: A Hybrid Approach to Tactical Challenges

By Geoffrey S. Corn, Peter Margulies    Wednesday, June 20, 2018, 7:00 AM

The recent confrontation at the Israel-Gaza border between thousands of Gazans and the Israeli Defense Forces (IDF) took a heavy human toll, raising concerns about excessive uses of force and complex issues of international law. The Israeli High Court of Justice declined to order modification of the IDF's rules and procedures that dictate when, where and how its forces may employ lethal force. These rules appear to reflect what some consider a controversial hybrid response to the Gaza confrontation, informed by both the law of armed conflict and the more restrictive rules on use of force derived from the traditional law enforcement paradigm. (See commentary [here](#) and [here](#) on these IDF rules and procedures, and [here](#) and [here](#) on the high court's decision.)

In our view, this hybrid approach was the appropriate and essential legal framework to guide the response to the confrontations engineered by Hamas, the terrorist organization that controls Gaza and is its de facto government. We also believe, however, that the operations in response to these incidents raise legitimate questions about some of the tactical choices made by the IDF. Accordingly, it is vital that the IDF take, in good faith, appropriate investigatory steps in response to any use of force that appears to have been improper, consistent with the Israeli high court's opinion. Such measures should identify whether disciplinary or criminal measures are warranted and provide vital lessons learned to improve the effectiveness and credibility of future operations. Of equal importance, they would serve to rebut the temptation to rush to judgment that every killing in these confrontations was unlawful. Indeed, any credible critique of IDF actions must be based on consideration of the complex tactical situation those forces confronted; investigatory measures can help inform such analyses by providing greater transparency into the tactical challenges faced by the IDF.

The Israeli government has advanced the legal position that the border confrontation arose in the context of Hamas's long-running armed conflict with Israel. For the IDF, therefore, operations in this situation fell within the scope of regulation under the law of armed conflict. *Within* the LOAC paradigm, however, the government asserted (we believe quite properly) that certain aspects of these security operations were controlled by authority derived from a traditional law enforcement regime and that imposition of this more limited use-of-force authority within the context of an ongoing armed conflict is inherent in the fabric of the law of armed conflict itself.

Brig. Gen. Kenneth Watkin characterizes this as a "blended" application of the two branches of international law in his book "Fighting at the Legal Boundaries." This blended, or hybrid, approach—either innovative or anomalous, depending on your perspective—is at the core of legal assessment of the IDF's handling of the Gaza confrontation. And equally central to this assessment is the context in which the IDF exercised its use-of-force authority.

A central difference between the law of armed conflict and law enforcement regulatory regimes involves the scope of use-of-force authority. Under the LOAC conduct-of-hostilities paradigm, a state may authorize use of lethal force as a first resort based on status determinations: against either another state's forces or against members of organized armed groups under the control of a hostile nonstate actor such as Hamas. (There are also other non-state armed groups operating in the Gaza Strip, such as the Palestinian Islamic Jihad.) To be targetable under LOAC, persons must be reasonably assessed as either belligerent subordinates of the organized armed group or directly participating in hostilities (DPH); no further "imminence" assessment is required. While the exact contours of direct participation in hostilities are subject to some debate, use of weapons against state security forces clearly falls within the scope of this concept, including the use of weapons in the course of efforts to cross into that state's territory. While there may be policy considerations that impose use-of-force restrictions against civilians directly participating in such hostilities, as a matter of law the civilian who directly participates loses protection from deliberate attack for "such time" as they directly participate.

In contrast, the law enforcement regime imposes more restrictive use-of-force rules on state security personnel. Under this regime, which is generally considered co-extensive with international human rights law obligations related to use of force, state forces may employ lethal force against individuals only to repel an imminent threat of death or substantial bodily harm to either state personnel or other civilians. In the context of a mass protest involving concerted efforts to gain immediate proximity to potential victims of such violence, this threat can emanate from individuals or from the massed crowd itself, especially when there is a genuine risk of a breach to a security barrier. However, even at this point, use of lethal force is permissible only when lesser measures have been exhausted or when it is reasonably assessed that such measures will be ineffective at reducing the threat. When such harm is not imminent, state forces may use other types of force, to include "less than lethal" civilian crowd-control measures such as batons, rubber bullets and tear gas.

While the majority view is that any use of "live fire" (live ammunition fired from guns) constitutes lethal force subject to the law enforcement regime's narrow use-of-force rules, the Gaza situation raises the critical question of whether this assertion is, in some situations, overbroad. At the Gaza border, IDF personnel confronted a mix of innocent civilians, civilians directly participating in hostilities and belligerent operatives. The publicly available facts suggest that the IDF forces *reasonably* concluded that they faced an imminent threat of death or serious physical harm if they failed to act promptly and decisively to prevent a breach of the security fence. In such exigent situations, can a defender use precisely employed live fire that is intended to be nonlethal, such as precise sniper fire aimed at the individual's lower extremities?

Many experts believe that security operations cannot be governed by a blended or hybrid application of these two legal regimes; that any given engagement must be governed by *either* the law of armed conflict *or* the law enforcement paradigm. However, the unique circumstances of the Gaza conflict made this unitary characterization impracticable. Hamas controls all massed public movement in Gaza, and the border confrontations arose because Hamas departed from the long-standing status quo by which it prevented massed encroachments on that security barrier. But it would be dangerously overbroad to assume that every civilian subject to Hamas control during these protests qualified as directly participating in hostilities.

Accordingly, to place the IDF's action into proper focus, some aspects of that situation demand emphasis. First, Hamas's strategic objective is not to defeat the IDF in battle, something Hamas must know is not even remotely feasible. Instead, it is to delegitimize Israel (an objective that seemed to bear fruit almost immediately after the first confrontation) and, especially, to undermine Israeli use of force in response to Hamas threats. Hamas implemented this objective through two primary tactics: first, inflicting casualties on IDF personnel and Israeli civilians; second, forcing the IDF to engage in countermeasures that in turn inflicted casualties on Palestinians. Superficially, the Gaza confrontations may have appeared to be civilian protests. In fact, the confrontations were orchestrated tactical maneuvers specifically intended to produce outcomes supporting Hamas's broader strategic objective (see page 9 [here](#) for a graphic account of Hamas operatives' use of the mass confrontation as cover to maneuver closer to the fence).

Second, the Gaza border is in many ways unique, as it represents a divide between a state and a quasi-state engaged in a situation of ongoing hostilities. These hostilities have been defined by an ebb and flow in intensity, periodically flaring up for a variety of reasons. Hamas has also employed constantly evolving tactics to achieve its objectives of killing or capturing IDF personnel or inflicting casualties on Israeli civilians. Those tactics include using rockets, infiltration tunnels, mortars, improvised explosive devices and suicide vests. Some observers believe this demonstrates the “crude” or “minimal” capabilities of Hamas, but in truth it shows the adaptability of a sophisticated armed group that utilizes low-tech weapons and tactics a countermeasure to high-tech. One need only consider the tunnels discovered during Operation Protective Edge in 2014—tunnels each of us observed firsthand—to understand that low-tech measures can often be the product of carefully calculated tactics to gain isolated advantage and produce the type of casualties that will trigger what will then be characterized as an excessive and heavy-handed response.

From a threat-assessment perspective, the border confrontation might have been reasonably assessed by the IDF as the next Hamas tactical evolution. As Israel develops its technology to locate and neutralize infiltration tunnels, Hamas appears to have developed another method for border penetrations in order to attack IDF forces, security infrastructure and nearby residential areas. By inciting mobs to storm the border fence, Hamas is creating tactical opportunities that can be exploited by armed operatives.

Third, in achieving those tactical goals, Hamas has habitually shown either indifference to the risk to Palestinian civilians or eagerness to exploit those civilians as shields for its military operations.

The Gaza strategy of border confrontations is a case study in Hamas’s grim repertoire, reflecting a two-pronged design. First, Hamas sought to exploit the efforts by thousands of Gazan civilians to storm and breach the barrier fence in order to enter Israeli territory. Many of these individuals were responding to three dynamics: (1) the much-publicized movement of the U.S. embassy from Tel Aviv to Jerusalem, which cast additional doubt on the already-dim prospects for an equitable “final-status agreement” between Israel and the Palestinians; (2) the advent on May 15 of what Palestinians call “Nakba Day” (the day of the catastrophe), which this year memorialized the 70th anniversary of Israel’s Declaration of Independence, along with the displacement of Palestinians that followed; and (3) the general despair and frustration with substandard living conditions within Gaza.

Hamas likely initially acquiesced in a bottom-up movement for direct action challenging the security barrier and the restriction of trade enforced for years by both Egypt and Israel. It is equally likely, however, that once the scale of the protests became apparent, Hamas operatives turned to active incitement of crowds seeking to pierce the border fence and stream onto the Israeli side of the border, established as part of “Green-Line Israel” in 1949. As of May 14, according to the Israeli High Court of Justice, crowds seeking to storm the border had swelled to 45,000 people—a size equal to two U.S. Army divisions. Israeli villages, such as Sderot, Nachal Oz and Kfar Aza—most of which were established by Israeli socialist kibbutzniks in 1948—are less than a mile from the security fence where these crowds were massing.

Hamas also encouraged its armed operatives to mingle in the crowds to find opportunities to storm the fence. The IDF documented incidents in which armed cells opened fire on IDF forces from within the crowds. Public statements by both Hamas and another terrorist organization, Palestinian Islamic Jihad, indicate that at least 50 of the 62 people killed on one of the bloodiest days of the May confrontation were members of one of these groups. Many protesters utilized Molotov cocktails and improvised explosive devices in an effort to breach the barrier and/or attack IDF personnel. In addition, a substantial number of individuals massed at the border flew “Molotov kites” and helium balloons carrying flammable fuel that landed in Israel, causing raging brush fires in areas where highly flammable cultivated fields surround civilian communities. Hamas operatives and mobs also started fires that damaged the Kerem Shalom border crossing, which conveys goods and gasoline from Israel to Gaza. The precise number of armed individuals is difficult to determine, given the density of the crowds at the fence. However, if even 5 percent of the crowd was armed, that would mean more than 2,000 armed Hamas operatives at the scene.

It is therefore quite understandable that IDF commanders on scene, tasked with the mission of protecting proximate Israeli communities from an enemy that had consistently demonstrated its determination to attack these civilians, perceived this situation as creating a dire threat. If even a fraction of these protesters and Hamas operatives had achieved the desired breach, the situation would have grown even more exigent. Consider, for example, the challenge if even a fraction of the huge crowd—e.g., 10 percent, or 4,500 people—had breached the fence and headed toward the Israeli villages nearby. Using a conservative calculation that 5 percent of the crowd was armed, that would have resulted in more than 200 armed individuals heading toward the villages. It is true that the confrontation extended to several points along the border, but this dispersion only increased the tactical challenge to the IDF by requiring them to repel multiple attempts at disparate locations. By our own on-the-ground assessment, the modest villages on the Israeli side are approximately a five-minute trot away from the fence. Therefore, IDF forces would surely have prioritized targeting the border-crossers in the vicinity of such villages, which would likely have resulted in substantial casualties, including harm to both Palestinian and Israeli civilians caught in the chaos. And if even a few Hamas operatives evaded these protective efforts, they could have inflicted a serious amount of harm. IDF personnel themselves would also be targets of Hamas and Islamic Jihad violence.

This leads to what is probably the most difficult aspect of assessing IDF actions: What level of force was reasonable in response to the coordinated Hamas efforts? Some may believe that no use of deadly force could have been justified until the fence was actually breached. But that likely was not tactically reasonable and, therefore, not the only lawful option. First, if Israeli forces had sufficient information to support a reasonable determination that certain individuals in the crowd were in fact Hamas belligerent operatives, that status alone would have justified use of lethal force. Perhaps there are policy considerations that would lead to greater restraint at that point, such as a conduct-based threat assessment. But as a matter of law, there is no such requirement in the context of this ongoing armed conflict. Second, even if such a determination could not be made, the question arises as to whether in *this context* allowing a breach to occur was a necessary predicate for an assessment of imminent threat.

To this end, it is worth considering what an IDF unit might have been compelled to do if a breach did occur. First, there would have been an imperative to immediately seal the breach. The dozens if not hundreds of civilians flowing through would almost certainly have required employment of force to reach the breach location and stem the flow: Military personnel would have had to disperse the crowd, set up a security perimeter, flow in engineering assets, hold off the angry crowd during repair operations and then withdraw. How would a commander have assessed the potential risk of casualties in the execution of such an action? This is difficult enough in the context of ordinary civil unrest. It is exponentially more challenging when the mob includes enemy belligerents bent on exploiting that unrest. Second, with Israeli civilian communities within one mile of the border, the IDF would have assessed the use of deadly force as necessary in response to even a small number of individuals who penetrated the fence-line and began moving toward those communities. Nor would the IDF have been able to “swarm” massed forces to any single point, for doing so would have created vulnerabilities at other points along the border. In short, forces in limited numbers would have been compelled to conduct high-risk actions that probably would have resulted in an increased risk of civilian casualties.

Can a binary LOAC/law enforcement paradigm effectively address the exigencies of such a situation? We think not. As the Israeli high court observed, in the opinion by Deputy Chief Justice Hanan Melcer, the failure to use force *prior* to breaches of the fence would have resulted in Hamas operatives’ infiltration into Israel and the near-certainty of severe harm to civilians. Nonetheless, many critics assert that an imminent threat justifying the use of live fire “would have only been present once

the fence had actually been breached.” Yet this rigid standard would have deprived the IDF of the authority to use force in a manner that may have actually averted the need to use much more extensive and dangerous force, ultimately leaving the villages near the fence unprotected. In other words, the opportunity for the IDF to halt thousands of people seeking to storm the fence on the Gaza side was a rapidly closing window of time; once that window shut and large agitated crowds moved to the Israeli side, it would have been impossible to assure the safety of the villages nearby, and IDF personnel would have faced an increased perceived need to employ lethal force to defend themselves and Israeli civilians. A restrictive application of law enforcement use-of-force authority requiring that IDF personnel wait for the fence’s breach would have given Hamas a massive advantage in harming Israeli civilians.

The Israeli response to the Gaza confrontation, as upheld by the High Court of Justice, seems to recognize this inherent complexity. The hybrid approach advanced by the government was responsive to the nature the situation: massed confrontations involving civilians protesters, other civilians directly participating in hostilities, and belligerent members of an enemy organized armed group, all in the context of an armed conflict. In this context, it is appropriate to blend conduct-of-hostilities rules with rules derived from the law enforcement regime. Pursuant to this approach, it is unjustified to assert that state forces may never use lethal force to repel what is reasonably assessed as an imminent threat posed by a violent crowd, and specifically use such force to prevent a breach, targeting agitators who are provoking the crowd.

That said, state forces must follow a graduated approach consistent with the principles of necessity and proportionality. They must start with verbal warnings and non-lethal means such as tear gas and demonstrations of force. When and if these measures fail, state personnel can resort to live fire, aiming for the legs of targets. Lethal force can also be used on individuals openly carrying arms. Generally, IDF snipers had to seek the approval of senior officers to use live fire. This approach allowed for a tailored response to the tactical challenges inherent in the situation.

All this confirms our main point: that assessing the legality of a use of force by state security personnel necessitates careful consideration of the context of that decision. It is simply unrealistic to assert that in a situation such as this, an actual breach of the security barrier is an essential requirement for a threat to be reasonably assessed as imminent. Indeed, any soldier ordered to guard a perimeter against a hostile crowd determined to force a breach understands the nuanced nature of such an imminence assessment. Similarly, the small-unit leader responsible for sealing the breach understands the inherent complexity of that mission. A *per se* test for imminence in that fraught and fluid situation would not fit tactical reality. No legal varnish can obscure the fact that no two threat situations are identical. As a result, there are many situations where a breach of a fence-line would not support a reasonable assessment of imminence, just as there are many in which pre-breach activities would supply an adequate predicate. Assessing the validity of the judgment requires careful attention to context.

Public records related to these uses of force ought to trigger credible scrutiny. But there is a fundamental difference between calling for an accounting of such action and reflexively asserting the illegality of such action prior to access to the contextual facts. Like most observers, we share the concern that arises when military forces employ lethal force against masses of protesters. We also understand that no credible military commander would authorize the use of such force casually. Yet we understand that the law allows that complex missions may necessitate such measures and that such allowance often prevents greater bloodshed than the alternatives.

In the context of the Gaza border, both critics and those responsible for investigating these incidents should approach their task with a commitment to understanding all aspects of the situation that those IDF units confronted and could continue to confront. They will also hopefully recognize that the IDF’s hybrid approach was a reasonable response to that challenging situation. But the legitimacy of certain uses of force pursuant to that operational framework does require, as the Israeli high court noted, further inquiry to ensure that tactical implementation fell within the realm of reasonableness. It is the IDF itself that has the greatest interest in the credibility of such inquiries, as it will inform commanders of how to better manage such complex situations in the future.

Initial indications suggest that the IDF understands this: It has already initiated such inquiries. Ideally, some good can come from these incidents in the form of greater clarity on both the appropriate legal framework for conducting such operations and how best to tactically implement that law.

Topics: Israel-Palestine

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