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Framing Israel: The U.N. Commission of Inquiry on the Spring 2018 Gaza Border Confrontations

By Geoffrey S. Corn, Peter Margulies Monday, March 18, 2019, 8:07 AM

Politicians, trial lawyers and drafters of reports learn early on that framing an argument is central to the task of persuasion. And so it goes for the report by the U.N. Human Rights Council's Commission of Inquiry (COI) on the border confrontation that occurred last spring between Israeli Defense Forces (IDF) and the tens of thousands of Gaza residents who sought to force their way into Israel by breaching the security barrier. The COI's full report was published on Monday, March 18, but a summary was released in February. The COI framed these events as a series of demonstrations that were "civilian in nature." Israel and its Supreme Court framed the same events quite differently: as a new evolution in Israel's ongoing armed conflict with the terrorist organization Hamas. Consistency and common sense suggest that the Israeli High Court of Justice's framing is a more rational explanation of what occurred at the Israel-Gaza border in spring 2018.

Kites play a telltale role in the framing debate. When most people think of kites, they think of a child's plaything or a hobbyist's harmless passion. In the Gaza confrontation, kites took on a more ominous meaning, as they represented a new and effective (albeit low-tech) tactic to attack Israel. As the COI report conceded, senior Gaza leaders, including from Hamas, "encouraged" the unleashing of waves of incendiary kites that during and since the spring 2018 confrontations have burned thousands of acres of arable land within Israel. The resulting destruction included fires that damaged the Kerem Shalom border crossing, which conveys goods and gasoline from Israel to Gaza. The quaint delivery vehicles belied their devastating physical, psychological, economic and ecological effect. Moreover, the incendiary kite offensive was an effective diversion from the efforts encouraged and coordinated by Hamas last spring to pierce the border with Israel and attack both IDF personnel and the civilian residents of the beleaguered Israeli towns a short distance from the border fence.

Hamas asserts iron control over Gaza and its residents, including a near-monopoly on the use of force directed against Israel. While isolated acts may occur outside its purview, simple common sense would suggest that a substantial protracted attack from within Gaza would not escape Hamas's notice, and indeed could not have proceeded without Hamas's involvement and direction. Indeed, the COI's acknowledgment that Hamas "encouraged" the kite attacks might provide all the evidence a reasonable person would need that Hamas was complicit with *all* aspects of the spring 2018 border confrontations. Those other aspects included what the COI acknowledged as "acts of significant violence," such as efforts to breach the border fence. But the COI report did not even try to explain how it could reconcile such acts with its anodyne description of the Gazan actions as "civilian in nature."

This flight from consistency and common sense is typical of the COI report, the flaws of which fall into four broad categories. First, as already noted, the COI's conclusion that the events subject to inquiry are appropriately characterized as peaceful civilian protests is unjustified. Second, the report appears to rely almost exclusively on information provided by Palestinian participants and witnesses to these events with almost no consideration of the perspectives of IDF forces tasked with protecting the border. Third, the findings rest on an operationally invalid assumption that the lethal threat to IDF personnel and Israeli civilians living near the border could never qualify as imminent until *after* a breach in the security barrier had been achieved and threatening individuals were in close proximity to IDF personnel or Israeli civilians. And fourth, the COI reaches the incomprehensible conclusion that due to the "civilian" nature of the protests, the IDF was required to treat identified members of Hamas's belligerent forces as civilians for use-of-force purposes.

The report begins by laying out an important touchstone: the assessment of applicable legal regimes. Like the Israeli High Court of Justice, the COI recognized that these events occurred within the broader context of an ongoing non-international armed conflict between Israel and Hamas (and several other nonstate organized armed groups). This is important because it leads the COI to properly acknowledge that *all* parties to this armed conflict bear an obligation to comply with applicable international law. Under the armed-conflict paradigm, armed forces may target individuals reasonably believed to be combatants or civilians directly participating in hostilities. Moreover, under the rule of proportionality, an attack that causes collateral harm to civilians protected from deliberate attack is not per se illegal. Instead, the law tolerates this incidental harm so long as the commander assesses that this harm is not "excessive" when compared to the "concrete and direct" military advantage that the commander anticipates.

The COI, IDF, and Israeli High Court of Justice also recognized that, even in the midst of armed conflict, there are situations in which armed forces are subject to a more restrictive law-enforcement use-of-force paradigm, specifically when dealing with security threats presented by civilians who are not participating directly in hostilities. In the typical application of this more restrictive paradigm, security forces may use lethal force only in response to an imminent threat to life, and any collateral harm must be absolutely necessary for the efficacy of these life-saving efforts. However, the COI parted ways from both the IDF and the Israeli High Court on the interaction between the armed-conflict and law-enforcement paradigms.

For the IDF and the High Court, the Gaza border confrontation implicated a *hybrid* application of both these use-of-force paradigms. That hybrid necessitated careful consideration of the tactical situation and the overall nature of the threat presented to Israeli security forces. This resulted in a more pragmatic assessment of what *might* qualify as an imminent threat than that reflected in the COI report, albeit one that was more restrictive than the scope of authority applicable during the conduct of hostilities. As best we can determine from publicly available information,

the IDF and the High Court recognized that during a mass border confrontation with civilians controlled by a terrorist adversary, the threat of a security barrier breach, although certainly not automatic, could qualify as the point of imminence. Accordingly, even when subject to the more restrictive law-enforcement use-of-force standard, the need to *prevent* border breaches might justify employing lethal force as a measure of last resort. This means lethal force could be appropriate *prior* to a breach to prevent the breach from occurring. In contrast, the COI based most of its findings on the conclusion that the situation met the imminence threshold only *after* a border breach had already occurred and hostile actors were in close proximity to IDF personnel or other Israeli civilians. In our view, the IDF and High Court of Israel have the better argument, while the COI's definition is unreasonably narrow.

The COI's per-se approach to what qualifies as an imminent threat in such a situation will certainly appeal to many observers, but it ignores the hybrid nature of the Gaza confrontation. While the COI asserted that the confrontation was purely "civilian in nature," even Hamas has acknowledged that it not only encouraged, incited and supported these protests but also sought to exploit the cover they provided to infiltrate belligerent operatives into positions where they could engage in hostilities against the IDF and Israeli civilians. The COI failed to acknowledge the complexity of conducting military security operations within the context of a mix of law-enforcement and belligerent-type threats (not to mention the illegality of Hamas deliberately encouraging civilian protests so that civilians could be used to shield its operatives). Instead, the COI adopted an operationally and legally unrealistic approach to the challenge created by Hamas's effort to exploit the participation of civilians in these protests. In contrast, the Israeli High Court recognized this complexity and addressed how Hamas not only incited but also sought to exploit it:

The division of the paradigms into two can be misleading. This is not for lack of logic and grounds for the distinction—as such do exist—but rather because reality overcomes neat and organized classifications as though each paradigm resides in a separate drawer. In the case at hand, the problem of identifying the relevant paradigm is not coincidental; au contraire: the Hamas and the terrorist organizations intentionally attempt to blur the borders between civilian protest activity and combative activity, and to exploit the law of Armed Conflict, while creating an intermingled dual-capacity reality. However, one cannot allow a terrorist organization that intentionally mingles civilian population and terrorist activists in the vicinity of the fence—and which under the cover of the mingling, endangers the lives of IDF soldiers and Israeli civilians—to paralyze the army and prevent it from protecting and defending against the threat for which there is near certainty that it will materialize.

Ignoring the true nature of these events made it almost inevitable that the COI would conclude that almost all uses of force were unjustified. Had the IDF been confronting "peaceful" civilians with no interest in engaging in violence, that conclusion would have merit. But an abundance of evidence indicates that these events were anything but a peaceful civilian protest, most notably Hamas's own acknowledgment of the objectives it sought to achieve by exploiting the civilians involved in the confrontations.

This flawed understanding of the nature of events is likely also attributable to the COI's sources of information. While the final report may demonstrate otherwise, all indications are that the COI relied almost exclusively on information provided by Palestinians involved in these events. Such information is obviously relevant, but it borders on absurd to suggest that it provides a complete picture of actual events. Nothing close to such a picture can be painted without carefully considering the abundant information made publicly available by the IDF and the government of Israel. We do not suggest that such Israeli-proffered information is any more dispositive. But a credible reconstruction of events demands an even-handed assessment of all available information.

The COI's apparent decision to ignore the IDF's findings contributed to its unreasonably narrow definition of imminent threats to life under the law-enforcement paradigm. As we explained in a previous article on the Gaza border confrontations, the assessment of imminent lethal threats in such situations is highly complex and not amenable to arbitrary line drawing. To be sure, the majority of decisions to use force in this situation were subject to a law-enforcement paradigm, and not the more permissive conduct-of-hostilities paradigm applicable in other contexts of an ongoing armed conflict. Indeed, it is relatively clear that IDF commanders implemented this more restrictive use-of-force regime through rules of engagement that imposed law-enforcement-type use-of-force rules restricting the employment of lethal force to a measure of last resort employed only in response to what was reasonably perceived as an imminent threat to IDF personnel or Israeli civilians. Furthermore, IDF personnel were required to employ nonlethal measures whenever feasible to prevent crowds from massing near the fence, and IDF police and legal personnel were required to investigate potential violations of the rules of engagement by its forces.

By assuming the protests were purely civilian in nature, the COI set the conditions for summarily dismissing legitimate operational and security concerns confronted by IDF commanders tasked with protecting Israeli territory. From what we have gleaned from available sources, it seems that these commanders were responsible for preventing any breach of the border fence escalating into a mass incursion into Israel, or any takeover by massed crowds of the area immediately adjacent, as this would provide needed cover for Hamas breaching efforts. For Hamas commanders, the operational logic of such a mission seems clear: Breach of the fence could enable Hamas belligerent operatives embedded among the crowds to surge into Israel and attack nearby villages and IDF units, an objective similar to the one Hamas sought to achieve by building and exploiting cross-border tunnels discovered during the 2014 Gaza conflict. The effectiveness of tunneling has been reduced by Israel's development of a new "smart fence" that will detect and deter such incursions, which may make the tactic of infiltrating across the border via crowds more appealing.

The COI also failed to acknowledge that Hamas sought to use civilians as an operational cover to move members of its armed wing into position along the fence. For IDF commanders, this increased the importance of preventing a breach. Large crowds directly along the fence would simplify breakthrough attempts by intermingled Hamas and other belligerent operatives. The crowds themselves also could attempt to pour through any

breach. Unfortunately, the COI seems to have completely omitted any credible assessment of the potential casualties on all sides that would have resulted from IDF action to seal a breach once it was achieved. Calculation of imminence must consider the narrow temporal window for preventing this threatening situation.

Employment of lethal force is, of course, permitted only in certain circumstances. Certainly, the validity of those circumstances justifies inquiry. But by adopting an arbitrary position that only an actual breach could justify the use of lethal force, the COI forfeited the opportunity to engage in a more credible assessment of this issue.

In any case, the IDF sought to mitigate lethal effects in executing this complicated mission. Available information suggests that the IDF rules of engagement permitted the use of lethal force only as a last resort—primarily by snipers in an effort to maximize precision—and only when nonlethal options failed to prevent crowds massing near the fence. In these instances, it also appears that the use of force was carefully controlled by the senior IDF commander at the scene, and that even when authorized, live fire was aimed at the legs of targets in an effort to incapacitate rather than kill. IDF officers stated their snipers were permitted to target chests only in response to apparent intent to use weapons.

Unfortunately, loss of life became unavoidable even under these restrictive rules of engagement. However, the assumption that the vast majority of casualties resulted from unjustified and unlawful uses of force should be met with a great deal of skepticism. In this regard, it is certainly relevant that, contrary to COI findings, Israeli estimates indicate that at least 102 of those killed during operations were members of Hamas or other militant groups in Gaza. Indeed, even Hamas and other groups have admitted that at least 50 fatalities were their operatives. Furthermore, the IDF concluded most killings were unintentional, resulting from shots at legs ricocheting off the ground, targets bending over or shots missing their target among massed crowds. While some skepticism as to the accuracy of these accounts may be justified, such skepticism is equally applicable to the COI finding that only “2 to 3” deaths in this dangerous confrontation resulted from justified uses of force by the IDF.

This can only be the case under the report’s assertion that the IDF was obligated to treat all participants as civilians immune from attack under the armed-conflict paradigm, even including belligerent members of Hamas and other organized armed groups assessed as taking direct part in hostilities. There is simply no basis for such an assertion. In the context of an ongoing armed conflict, members of the enemy belligerent forces are subject to lethal attack once identified as such unless they have surrendered or been incapacitated by wounds or sickness. The fact that *both* the IDF *and* Hamas have asserted that a substantial number of individuals subjected to lethal force in fact fell within this category requires assessment not of use of force directed at civilians, but whether the enemy belligerent determination was reasonable under the circumstances. That determination then prompts an additional question: whether death or injury to some of the civilians was a legally permissible collateral consequence of an otherwise lawful use of force. This would require consideration of the precautions implemented by IDF forces and their proportionality assessments. Unfortunately, the COI bypassed these complicated questions by simply adopting an arbitrary conclusion that the IDF should have treated even belligerent operatives as civilians.

The COI’s biased and arbitrary framing is especially regrettable because an objective external inquiry into these complex security challenges could yield more effective policies, tactics and training to enhance security and mitigate risks to civilians. Instead of seizing this opportunity, the COI has produced a report that will only affirm ill-founded assumptions about the security operations conducted by the IDF last spring, and possibly spur fresh resort to dangerous confrontations by illicit actors such as Hamas.

Topics: Israel-Palestine

Tags: Gaza, Hamas, IDF, Israel Defense Forces, Israel, Supreme Court of Israel, United Nations Human Rights Council

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