

# Defending the Fence: Legal and Operational Challenges in Hamas-Israel Clashes, 2018-19

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*JINSA's Gemunder Center Hybrid Warfare Task Force*

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# Executive Summary

On March 18 the U.N. Human Rights Council (UNHRC) will hold a hearing and issue a report likely accusing Israel of violating international law through its use of force in response to the March of Return demonstrations on the Gaza border last year. An advance report by a special U.N. Commission of Inquiry (COI) claims these events have been “civilian in nature” and that Israel intentionally shot unarmed civilians, “despite seeing that they were clearly marked as such.” Its criticisms of Hamas’ actions are conspicuously far less prominent.<sup>1</sup>

As retired U.S. generals and admirals and military legal experts with decades of service in Iraq, Afghanistan and Asia as well as intimate knowledge of international law, our own operational and legal review of recent regional conflicts, including the March of Return, leads us to very different conclusions than the UNHRC. Specifically, we assess:

- Hamas systematically violates international law by purposely using Gazan Palestinian civilians as human shields for attacking Israel, provoking Israeli actions that would lead to civilian casualties, and attacking Israeli civilians indiscriminately;
- Israel’s rules of engagement in addressing the March of Return are consistent with international law and operational practice;
- Despite this, Hamas exploits Gazan civilian casualties to propagate a false narrative of illegal Israeli use of force to delegitimize and pressure Israel; and
- The COI’s findings reflect the success of Hamas’ tactics, and they encourage Hamas and other militant and terrorist groups to continue such illegal tactics against not only Israel but also the United States – at the direct expense of civilians that will be injured and killed by these actions.

Rather than attempt an exhaustive account of these events, we are issuing this brief report as an update and addendum to a JINSA-commissioned assessment of Israel’s 2014 Operation Protective Edge against Hamas, and to provide useful context and inform opinion in response to the COI report and UNHRC hearing.<sup>2</sup> We are drawing on our U.S. military backgrounds and our perspectives from recent fact-finding missions to the region, during which we visited the Gaza border and met with Israel Defense Forces (IDF) soldiers and commanders, high-ranking Israeli defense officials, U.N. officials, independent media and others.



The actions of Hamas – designated by the United States and European Union as a terrorist organization – mark the latest form of the broader phenomenon of hybrid warfare. Non-state actors and their organized armed groups blend advanced military capabilities with unconventional tactics – such as exposing civilians to harm – and information operations to discredit lawful self-defense by conventional militaries like those of Israel and the United States.

Ever since Hamas seized power in Gaza in 2007, its opposition to Israel’s very existence has driven it to violence against Israel, which in turn led Israel to impose security restrictions on Gaza, further intensifying the situation. Hamas’ charter states no true Muslim can “abandon [Palestine] or part of it” and there is “no escape from raising the banner of Jihad” to “obliterate” Israel.<sup>3</sup> Hamas and Israel have fought three wars, most recently in 2014.

Following Israel's increasingly effective defense against Hamas' rockets and cross-border tunnels, and amid deteriorating conditions inside Gaza, Hamas sought new opportunities to attack Israel, raise its standing among Palestinians and garner greater global sympathy. Hence the March of Return, in which Hamas sought to manipulate large crowds, composed mostly of Gazan civilians, on the Israel border, ostensibly to flood Israel with Palestinians "returning" to their ancestors' lands.<sup>4</sup> Hamas' leader in Gaza Yahya Sinwar helped set the stage by declaring "we will take down the border and we will tear out their hearts from their bodies."<sup>5</sup>

Hamas and other armed groups in Gaza intermixed their own belligerent operatives in these crowds and exploited them as passive shields and a tactical cover for their operatives to approach and attempt to breach the border fence. Any breach would enable attacks on Israeli security personnel and Israeli civilian communities near the border. Instructions on Facebook exhorted crowds to "bring a knife, dagger, or gun if available."<sup>6</sup> These armed groups also attacked Israeli civilians indiscriminately with airborne incendiaries and explosives launched from the Gaza side of the border.

In violation of international law, Hamas and other armed groups undertook these actions in full anticipation that doing so placed Gazan civilians in harm's way by provoking defensive actions by the IDF. Hamas admitted at least 50 deaths among the crowds have been members of its armed wing.<sup>7</sup>

In responding to the March of Return, by contrast, publicly available information suggests the IDF's rules of engagement (ROE) are based on the appropriate frameworks under international law. Our task force assesses Israel was legally justified in addressing this situation in the context of an ongoing armed conflict with Hamas, wherein the law of armed conflict applies. However, we also agree with Israel's position that certain operations within this context are governed by a more restrictive law enforcement paradigm. This complex legal framework is proper to address the equally complex tactical situation presented by Hamas' deliberate efforts to blur combat with civilian protests.

Accordingly, the IDF's ROE integrated law enforcement-type principles on the use of force, limiting lethal force to a measure of last resort in response to what could reasonably be perceived as an imminent threat to IDF personnel or Israeli civilians. At times, massed crowds attempting to breach the fence may have constituted such a threat even under the more restrictive law enforcement paradigm – especially if the dangers to the IDF, Israeli civilians and Gazan civilian protestors would increase if a breach occurred.

To prevent crowds massing near the fence, IDF personnel were required to employ non-lethal measures whenever feasible. When employed, lethal measures were strictly controlled by commanders on the scene. When these commanders assessed that an individual represented an imminent threat, fire was aimed at legs in an attempt to produce a non-lethal result. In compliance with the law of armed conflict, these same ROE also authorized targeting belligerent operatives, and any other individuals assessed as directly participating in hostilities. IDF police and legal personnel were required to investigate potential violations of these ROE by their forces. Pursuant to this directive, the IDF has initiated five investigations of IDF personnel related to 11 Palestinian deaths.

We believe the totality of this use of force authority was consistent with past U.S. operational practice. In fact, in unanimously rejecting a challenge to the IDF's ROE, Israel's Supreme Court



cited U.S. military ROE for law enforcement scenarios in Haiti which permitted lethal force as a last resort to disperse violent riots.

Yet Hamas, not Israel, won the larger battle of narratives about the March of Return. Despite Israel's efforts to conform its conduct to applicable international and domestic law, Hamas' goal was clear: generate casualties it could manipulate to undermine Israel. It exploited the death and injury to Gazan civilians resulting from IDF action – action necessitated by illegal Hamas tactics in the first place – to portray the IDF's use of force as indiscriminate and disproportionate.

It did so through information operations that intentionally confused the nature of individuals killed or wounded during operations, characterized almost all casualties as civilians and provided no context for the IDF's decisions to use force.

Specifically, Hamas relied on manipulating misunderstandings about international law. This includes the belief that legal responsibility for civilian suffering automatically lies with those using force, coupled with the impact of images showing only the effects, but not the context, of the use of force.

Therefore, a credible assessment requires considering both the law and the operational context. In this regard, we note it is unclear what, if any, experts in military or police security operations the COI relied on during its investigation. We also note that none of its principal members appear to have expertise in military law or these types of security operations. This may help explain why many of the COI's assertions seem so attenuated from military operational logic. Most problematically, the report relied on an arbitrary and tactically invalid standard for what qualifies as an imminent threat in the context facing Israel on the Gaza border.

We are concerned the COI's findings may contribute to Hamas' strategic objectives and serve to validate the pernicious tactics it employs. As such, the COI's report undermines the international legal regime it seeks to enhance and sets a precedent encouraging Hamas and similar armed groups to double down on these illegal tactics. Hamas will be further incentivized to continue placing Gazan civilians in harm's way. Hezbollah, Iran and others can be expected to draw similar lessons for their own future conflicts against Israel.

Hybrid warfare features prominently in strategies adopted against the United States, including by ISIS, the Taliban and other illicit armed groups. As the recent U.S. National Defense Strategy Commission notes, similar strategies likely will be used against the United States in the future.<sup>8</sup> Given our U.S. military backgrounds, we certainly appreciate how tactics employed by Hamas to undermine Israel could easily be turned against U.S. forces.

# I. Background: Hamas vs. Israel

Fundamentally, the ongoing Israel-Hamas armed conflict stems from Hamas' opposition to Israel's very existence. Designated by the U.S. government as a foreign terrorist organization, it has ruled Gaza since violently seizing power from the Palestinian Authority in 2007.<sup>9</sup> Much of the money and materiel for its military infrastructure in Gaza comes from Iran, smuggling, and diverting Israel-supplied goods and foreign aid intended for Gazan civilians.<sup>10</sup>

The group's founding charter asserts "the Day of Judgement will not come until Muslims fight the Jews (killing the Jews)."<sup>11</sup> It contends no true Muslim "can abandon [Palestine] or part of it" and there is "no escape for raising the banner of Jihad" to "obliterate" Israel.<sup>12</sup> As a corollary, and in contrast to the Western notion that war is a competition between uniformed combatants, Hamas' ideology imposes on every Muslim an obligation, "not confined to the carrying of arms," to "join the ranks of the fighters."<sup>13</sup> Fighting Israel "with all means and methods is a legitimate right," suggesting no need to distinguish between Israeli soldiers and civilians.<sup>14</sup> The ability of Hamas to pursue these goals is aided by its uncontested control over Gaza.<sup>15</sup>

By contrast, in secular democratic Israel the Israel Defense Forces (IDF) is responsible for military operations under rigorous civilian oversight, and the IDF Code of Ethics reaffirms a commitment to compliance with the law of armed conflict and clearly differentiates between enemy combatants and civilians.<sup>16</sup>

These different ideologies directly influence the concept of operations pursued by either side in their ongoing conflict. Knowing it cannot achieve tactical military success against the IDF, Hamas and likeminded militant groups in Gaza, including Palestinian Islamic Jihad (PIJ), in the past three wars instead sought to impose costs on the IDF and Israeli civilians with rockets, mortars and tunnels (among other capabilities).

When the IDF responded to these threats in 2014, for instance, Hamas sought deliberately to exacerbate collateral damage by placing Gazan civilians in harm's way. Despite the IDF's often significant efforts to avoid inflicting such damage, Hamas was able to delegitimize and pressure Israel with a well-orchestrated information campaign of distorted facts and legal principles that – ironically and cynically – automatically framed Israel as legally culpable for any civilian casualties.<sup>17</sup>

Unlike Hamas, for whom the destruction of Israel justifies any and all means – in particular, exacerbating mortal dangers to Palestinian civilians – Israel's goals and tactics in dealing with Hamas are consistent with the law of armed conflict. Rather than reassume the burdens of removing Hamas and reoccupying Gaza, Israel emphasizes limited and principally defensive military operations to prevent Hamas from harming Israeli civilians.<sup>18</sup>

## II. Hamas' Concept of Operations: March of Return

By early 2018, Israel's anti-tunneling barrier along the Gaza border had largely neutralized one of Hamas' most effective means of attacking Israel, with Israel's air defenses doing likewise against rocket fire from Gaza. At the same time, a convergence of factors including Hamas' poor governance, financial destitution and expropriation of humanitarian aid for military purposes made Gaza increasingly uninhabitable and drove its citizens into the streets in protest.<sup>19</sup>

Hamas exploited a justifiably frustrated and despondent civilian population by redirecting the nascent protests away from itself and toward Israel, both figuratively and literally.<sup>20</sup> While retaining the veneer of peaceful disobedience originally adopted by grassroots activists, Hamas leveraged its control over most aspects of life in Gaza to convert these small independent protests into mass gatherings.<sup>21</sup> At key dates throughout 2018, crowds ranging from 10,000 to 45,000 were transported in Hamas-coordinated buses and then massed near the border.<sup>22</sup>

In addition to diverting Gazans' legitimate complaints about their perilous economic circumstances and pressuring the international community to address these conditions, coopting and expanding the protests offered Hamas new opportunities to attack and discredit Israel.<sup>23</sup> Its leadership escalated one of the protests' initial demands that Palestinians be allowed to return to Israel by proclaiming the massed crowds would "break the walls of the blockade," "return to all of Palestine" and "breach the borders and pray at Al-Aqsa" in Jerusalem.<sup>24</sup>

As a Hamas press release acknowledged during one of the largest actions on May 14-15, the purportedly peaceful marches were managed and supervised by the group's armed wing.<sup>25</sup> Around the same time a member of Hamas senior leadership told al-Jazeera "when we talk about 'peaceful resistance,' we are deceiving the public. This is a peaceful resistance bolstered by a military force and by security agencies...."<sup>26</sup>

Unlike in 2014, Hamas exploited civilians not only as passive shields for its fighters, but as an active tactical tool enabling its fighters to approach and attempt to breach the fence running the length of the Gaza-Israel border.

Under cover of thick smokescreens from burning tires, Hamas encouraged masses of unarmed protestors toward the fence with its own plainclothes operatives interspersed among them and carrying small arms, sniper rifles, grenades, improvised explosive devices and airborne incendiaries and explosives, among other weapons. Indeed, shortly afterward a Hamas official admitted its fighters accounted for 50 of the estimated 60 deaths during the May 14-15 operation. Hamas' admission was partly in response to concerns in Gaza that it was using civilian casualties as political fodder.<sup>27</sup> According to one of its operatives captured during those demonstrations, Hamas instructed women and children in the massed crowds to move closest to the fence.<sup>28</sup> Videos from the demonstrations also appear to show children assisting in rolling tires for smokescreens.<sup>29</sup>

From the start Hamas' objective was to infiltrate through the fence and attack nearby Israeli towns and military infrastructure, as well as target IDF personnel along the border – including

an IDF officer wounded in the head by a sniper during one of this task force's fact-finding missions to the area. As actions continued into the spring, Hamas also employed these massed crowds to get its operatives close enough to the fence to launch hundreds of incendiaries and explosives into Israel, such as kites festooned with swastikas and laden with explosives designed to resemble children's toys.<sup>30</sup> As of March 2019, regular marches along the border fence continue.

### III. Israel's Response

The IDF's objective has been to protect the sovereignty of Israel and the life and property of Israeli citizens from terrorist attacks. Along the Gaza border, this meant preventing any breach of the fence. This in turn necessitated keeping massed crowds away from the fence, since their presence immediately adjacent the fence would dramatically simplify a breakthrough by Hamas and other combatants. The crowds themselves also could attempt to pour into Israel through any breaches.<sup>31</sup>

The IDF's rules of engagement (ROE) prioritized non-lethal means to deter and prevent crowds from massing near or breaching the fence, and to subdue individuals who penetrated the barrier. The IDF made phone calls and text messages to drivers compelled by Hamas to bus crowds to the border, dropped leaflets warning Gaza residents to stay away from the fence and used loudspeakers along the border itself.<sup>32</sup>

The IDF also employed a riot control agent (tear gas) in attempts to disperse crowds a safe distance from the fence, including the first-ever use of drones to deliver the tear gas more accurately, and fired warning shots near individuals launching airborne weapons.<sup>33</sup> Attempts were also made, largely unsuccessfully, to counter smokescreens with industrial-sized fans and firehoses.<sup>34</sup> A senior IDF official conveyed to members of this task force that his one wish would be for better non-lethal options.

It appears lethal force was authorized to be employed only as a last resort – primarily by snipers, in an effort to maximize precision – and only when non-lethal options failed. In these instances, the senior IDF commander at the scene was responsible for any decision to use live fire, which was aimed at instigators of violence and aimed at the instigators' legs in an attempt to produce a non-lethal result. IDF officers stated their snipers were permitted to target chests only in response to apparent intent to target IDF personnel with lethal weapons.<sup>35</sup>

Though accurate accounting is difficult, as of March 2019 at least 180 Gazans had died during the March of Return, with thousands more injured (including by tear gas). According to Israeli estimates, at least 102 of the dead were from Hamas or other militant groups in Gaza.<sup>36</sup> The IDF claims most killings were unintentional, resulting from shots at an individual's legs ricocheting off the ground, targets bending over or shots missing their target among the massed crowds.<sup>37</sup> One IDF soldier was killed by a sniper near the fence, and another injured by a grenade. In Israel more than 6,000 acres of farmland, as well as other civilian property, were damaged or destroyed by airborne incendiaries and explosives.<sup>38</sup>

## IV. International Law and the March of Return

Any credible legal critique of Israel's actions must be placed in the complex tactical situation its forces confront. Certainly, widespread concerns naturally arise when force is used against massed crowds and casualties are much higher on one side of the fence, and certainly there are specific instances where decision-making by individuals in the IDF may have been improper and have merited investigation (see below). Yet while mistakes and civilian casualties occur in such settings, they violate international law only if they stem from unreasonable judgments by those conducting the targeting.

Overall, our task force assesses that the IDF's ROE followed the appropriate frameworks under international law to regulate its use of force in addressing the March of Return. IDF conduct was guided by the law of armed conflict, but importantly, largely controlled by more restrictive regulations found in the traditional law enforcement legal paradigm. This blended approach reflects both the strategic situation – the broader ongoing armed conflict between Israel and Hamas, of which the demonstrations are part – and the complicated tactical situation presented by the demonstrations themselves.<sup>39</sup>

If the fence was breached successfully, we believe it was reasonable to assess that the casualties on all sides would have been much higher, due to attacks inside Israel and the far greater force needed to stem a mass infiltration. Indeed, unlike the 2012 or 2014 Gaza conflicts, when the efficacy of Israel's Iron Dome air defenses almost certainly afforded the IDF operational patience in responding to Hamas' rocket barrages, the prospect of trying to prevent hundreds or thousands of infiltrators from attacking nearby villages offered no such relative luxury.<sup>40</sup>

Provided the appropriate steps are taken in situations like these, under international law it is reasonable for commanders on the scene to permit live fire both in response to a breach of the fence itself and, under certain conditions, to prevent a breach in the first place. It is also lawful to employ lethal force against any individual identified as a belligerent operative of an enemy organized armed group.

Accordingly, we believe it was reasonable to authorize the use of lethal force against individuals openly carrying arms or launching weapons into Israel, and against any other individual posing an imminent threat to the lives of IDF personnel or Israeli civilians. This includes individuals participating in hostilities, as well as agitators provoking a massed crowd to facilitate a breach in the fence and attack Israeli soldiers and civilians. It appears lethal force was permitted only after lesser options had been exhausted or reasonably assessed to be ineffective.

In unanimously rejecting a challenge to these rules last May, Israel's Supreme Court cited the U.S. military's own ROE for law enforcement scenarios in Haiti which permitted lethal force as a last resort to disperse violent riots, even if the rioting civilians were unarmed. It also cited a U.S. Army Field Manual authorizing lethal force against "leaders or troublemakers" of violent and unarmed riots.<sup>41</sup>

By contrast, Hamas violated international law in its attacks against Israel – namely, attacking civilians and civilian property indiscriminately with airborne incendiaries and explosives – and

its deliberate exploitation of Palestinian civilians to shield its belligerent operations and attempt to breach the fence.<sup>42</sup>

Israel is further demonstrating a good-faith commitment to international law by investigating instances where IDF members potentially engaged in unauthorized action, with the IDF Military Advocate General (MAG) currently examining at least five separate cases.<sup>43</sup> On the other hand, there is no evidence of Hamas conducting investigations or after-action reviews into its operatives' compliance with international law.

## V. Waging the Information Campaign

As in the 2014 Gaza conflict, Hamas used these illegal military tactics to support its strategic misinformation campaign. It exploited the ensuing collateral damage to sway international opinion against Israel by propagating a false narrative of disproportionate and indiscriminate IDF use of force. Fundamentally, this relied on manipulating widespread misunderstandings about international law, first and foremost the common but incorrect belief that legal responsibility for civilian suffering automatically lies with those using force. As in prior rounds of conflict with Hamas, Israel's actions were undermined further by the popular misconception that an imbalance of civilian casualties on either side of the border is evidence of illegal use of force.

Hamas relied extensively on the prevalent but mistaken public tendency to use images of the effects of combat to determine whether use of force was justified. Hamas did so precisely because such snapshots – literal and metaphorical – provide little or none of the complex context in which the legality of a decision to use force must be made. Specifically, such images obscure Hamas' violations of international law that intentionally exposed civilians to potential harm in the first place.

For years, Hamas has used its control of Gaza both to manipulate access by journalists, nongovernmental organizations (NGO) and U.N. officials, and to disseminate false, misleading or incomplete information through its own media organs. Most notably, Hamas pressured the parents of a Gazan infant who died of a blood disease to blame her tragic death on inhaling IDF tear gas.<sup>44</sup> This falsification was then amplified through traditional and social media worldwide, joining a chorus of NGOs and media (both Western and Middle Eastern) condemning Israel's "illegal," "unacceptable and inhuman" behavior as "war crimes."<sup>45</sup> Moreover, many of those actually injured received compensation from Hamas. Nevertheless, Hamas cannot control everything in Gaza: numerous incidents captured on film show youths along the border faking injuries.<sup>46</sup>

At the same time, Israel's strategic communications capabilities fail to match its commitment to international law or to counter Hamas' distorted narrative. As a liberal democracy, Israel (unlike Hamas) is expected to be accurate in its media statements and to carefully investigate potential legal violations by its forces – both of which complicate its ability to compete in the news cycle where breaking a story takes precedence over getting it right.<sup>47</sup> It lost the information war against Hezbollah in 2006 and Hamas in 2014, in both cases resulting in immense international pressure to terminate IDF operations prematurely and negatively shaping the environment for future operations – including the ongoing defense of its Gaza border.



## VI. Implications of U.N. Commission's Findings

The COI released an advance copy of its findings on February 25, 2019. It found “reasonable grounds” to believe that, with only two individual exceptions over the course of several dozen weekly actions, Israel’s use of live fire violated international law by intentionally shooting children, health workers, journalists and persons with disabilities “despite seeing that they were clearly marked as such.”<sup>48</sup> This finding borders on incomprehensible, considering Hamas itself acknowledged at least 50 casualties were members of its armed wing.

In framing the mass demonstrations as “civilian in nature,” and “not constituting combat or a military campaign,” the report simultaneously downplays or outright ignores how Hamas systematically violates international law by turning the protests into a tactical tool for infiltrating Israel, launching airborne attacks and exploiting Gazan civilians as human shields.<sup>49</sup>

Most problematically, the report establishes an arbitrary and tactically invalid *per se* standard for what qualifies as an imminent threat in such a situation. By so doing, the report set the conditions for a broad-based condemnation of IDF actions that may appeal to many observers because it aligns with an instinctive “effects based” approach to assessing legality. Such condemnations are divorced from the realities confronted by military commanders in complex situations like these.<sup>50</sup>

Furthermore, the report makes little to no attempt to assess either the reasonableness of the decisions to use force at the time those decisions were made, or the information available to the commander in authorizing those actions. While deeply lamentable, the casualties recounted at length in the COI’s report omit any such context, making it all but impossible to determine whether they were shot “intentionally” by the IDF.<sup>51</sup> In general incidental injuries inflicted while engaging in otherwise permissible use of force, while tragic and unfortunate, are insufficient to justify the conclusion that these attacks were the result of unreasonable and unlawful judgments.

Like much of the reporting on the March of Return, the COI’s findings reflect the effectiveness of strategic misinformation campaigns employed by groups like Hamas. As such, they reinforce the already-strong incentive for Hamas to continue to ignore the most basic obligations of international law and expose Palestinian civilians to harm in pursuit of its larger political objectives. Other hybrid actors such as Hezbollah and Iran likely will double down on similar strategies in their next encounter with the IDF.

More broadly, the U.N.’s findings serve to undermine the international legal regime intended to mitigate civilian suffering in conflicts. As American military legal experts and former senior operational commanders, we also appreciate how this challenge confronting Israel strongly resembles what the United States faces in its own conflicts in the region.<sup>52</sup> Adversaries emboldened by the lack of censure for Hamas’ hybrid warfare tactics will surely employ similar strategies against U.S. forces in future operations.

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