Gaza Border Events Revisited—Has the U.N. Commission of Inquiry Sharpened the Picture?

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Almost a year has passed since I wrote [here](https://www.lawfareblog.com/blurred-distinction-between-armed-conflict-and-civil-unrest-recent-events-gaza) about the blurred distinction between armed conflict and civil unrest in the context of unfolding demonstrations and confrontations on the Israel-Gaza border. On Feb. 28, the Commission of Inquiry established by the U.N. Human Rights Council to probe the events held a press conference and released a [summary of the final full report](https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoIOPT/A_HRC_40_74.pdf?fbclid=IwAR0PhlKvLC4gCCHvAGe85W_QvwdXgtU3IqQaP74eDGUQC6cnCOUp-gBFqs0)—the [full report](https://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session40/Documents/A_HRC_40_74_CRP2.18March.pdf) was released on March 18. Simultaneously, the Israel Defense Forces (IDF) unveiled a very detailed website with [factual](https://www.idf.il/80688/?fbclid=IwAR2yZKeTJKQoiE59HpHyAQnhBvLLzrQqP-SHpYJbRKL5IWBMJwNFma42BnI) and [legal](https://www.idf.il/81278/?fbclid=IwAR3uRR9JKxOC9jFcUlXCfTUKalBrrdWSDKA4F6ttfq6oDac-veoGZFbFO7I) questions and answers (Q&A) about the events.

Have the U.N. report and the information provided by the IDF cleared the blurred factual and legal picture I explored last year? I am afraid not. In many respects, the perspectives offered by the Israeli government and the U.N. are so divergent, they seem to concern completely different fact patterns.

In this piece I will focus on the different perspectives that the U.N. commission and the IDF have when examining what occured on the border in the past year, as well as the differences in their legal analyses. Many other interesting aspects of the U.N. report are analyzed [elsewhere](https://www.justsecurity.org/63101/report-independent-commission-inquiry-gaza-strip-initial-evaluation-problematic-report/?fbclid=IwAR1Y2likkHRBCZx1SvnHk-t3qsbkjt1rcxS95VMrQuy8-xfLVHKUEMTQCRE).

When you see something blurred in the distance through binoculars, you may try to zoom in. The image becomes sharper. However, there is a price: The angle of reality you see becomes narrower. This it what the U.N. commission did. Surprisingly, the commission accepted the Israeli position as to the existence of an ongoing armed conflict between Israel and Hamas and other Palestinian armed organizations in Gaza. Therefore, international humanitarian law (IHL) applies. The commission, however, “zoomed in” on five specific sites of repeated demonstrations and limited its view to the time and place of these demonstrations. Limiting itself to this narrow angle, the commission found only one incident, on May 14, 2018, of a Palestinian gunman firing at Israeli forces from amid the demonstration. Only with regard to this incident was the commission willing to consider the persons involved as directly participating in hostilities—a definition that justifies a live-fire response by the IDF under IHL. In another incident, which occured on Oct. 12 of last year, the commission was willing to accept that there may have been an “imminent threat to life or serious injury” that, under international human rights law (IHRL) standards, justified the use of live fire against the source of danger. Regarding the rest of the 183 cases in which Palestinians were killed by live fire during the events the commission examined, the U.N. concluded that there were reasonable grounds to believe that the use of live fire by the IDF was unlawful, under both IHRL and IHL. This “narrow angle” approach does not consider the possibility that an activity can be part of an armed conflict even without the use of weapons—for example, diverting the enemy’s attention to a specific area in order to execute an attack in another location, or removing obstacles put in place by the enemy, such as a fence along the border.

Another way to clear up a blurry image is to zoom out to see the subject from a longer distance. This seems to be the IDF’s approach in the Q&A on its website. The IDF presented a multitude of facts and evidence to show how Hamas took over what may originally have been a “grassroots” idea of the “great march of return” and embedded it in the strategy and tactics of its armed conflict with Israel. The IDF also provides a detailed description of the security threats perceived by Israel and the means taken to face them, including the parameters for the use of lethal force. What is lacking is some reference to specific incidents in which Palestinians were killed, especially cases that drew attention where persons with special protection were killed (medics, journalists, children). Indeed, the IDF is [investigating](https://www.jpost.com/Israel-News/IDF-investigates-11-Palestinian-deaths-on-Gaza-border-war-crimes-allegations-583386) some of these incidents, partly by its fact-finding mechanism and partly by criminal investigation by the military police. Investigating these complex events can be a challenging and time-consuming effort; however, one might have expected some results to have been released given that nearly a year has elapsed since the events began.

In addition to the differences in scope, there are some major differences between the legal positions espoused by Israel and the U.N. commission.

First, on the application of IHRL to the situation: Israel denies its application and contends that IHL is the relevant body of law with regard to all events within the wider context of the armed conflict, even when there are clashes with civilians resembling law enforcement situations. The commission took the view that IHRL applies to these clashes.

Second, there is a dispute over whether, more than a decade after its disengagement from the Gaza Strip, Israel is still the “occupying power” in Gaza, meaning it would have obligations in the territory under the law of belligerent occupation. The commission gave a positive answer to this question in the summary report, without any reasoning, and the short reasoning provided in the full report is unsatisfactory. It leans mainly on resolutions from political U.N. organs (the Security Council and the General Assembly) and on an advisory opinion of the International Court of Justice, which is irrelevant since it preceded Israel’s disengagement from Gaza. Furthermore, the references to Security Council resolutions are unconvincing, pointing to one resolution that doesn’t mention Gaza explicitly ([res. 2334](http://www.un.org/webcast/pdfs/SRES2334-2016.pdf)) and another ([res. 1860](https://www.un.org/press/en/2009/sc9567.doc.htm)) that just declares that “the Gaza Strip constitutes an integral part of the territory occupied in 1967 and will be a part of the Palestinian state.” This statement comprises an uncontested historical fact and a normative assertion about the future, having no bearing on the present status of the territory. Furthermore, the commission is probably aware that the “functional approach” to the end of occupation—in which even without “boots on the ground” a withdrawn occupier retains obligations under the law of occupation commensurate to the functions over which it retained control—is contested by many. These opponents warn that there is no such a thing as a partial occupation and that the set of rules that protect the population in belligerent occupation should not be dismantled into maneuverable fragments. Even advocates of the functional approach acknowledge that at least some linkage should be made between the legal obligations a withdrawn power has to residents in the territory from which it withdrew and the powers it continues to exercise over that territory. However, the commission makes no effort to point to the linkage between Israel’s powers over Gaza and the actions taken against attempts to cross the border or compromise the border fence. Israel’s position, backed by a reasoned judgment of the Israeli Supreme Court ([here](https://www.idf.il/81278/?fbclid=IwAR3uRR9JKxOC9jFcUlXCfTUKalBrrdWSDKA4F6ttfq6oDac-veoGZFbFO7I), p. 229), is that Israel is no longer the occupying force in Gaza, notwithstanding the fact that Israel still has some obligations toward Gaza residents, arising from other legal sources. This dispute may have ramifications for the first legal difference described, since it is easier to apply IHRL on a state having effective control of a territory than in other extraterritorial contexts.

Third, and perhaps most important, the U.N. commission and Israel disagree over the interpretation of the “imminent threat to life or serious bodily harm” standard—a standard that both agree should be applied when evaluating the use of potentially lethal force against civilians who do not directly participate in hostilities. The commission has taken the view that “imminence” is a matter of seconds, not hours. Israel’s view is that an imminent threat includes a serious threat that could not be prevented at a later stage. The Israeli argument is that a Hamas-incited mob breaking down the border fences and entering Israeli civilian communities—some of which are just a few hundred meters from the fence—may result in a large number of casualties. According to this argument, these potential casualties were averted by the use of measured live fire as a last resort, directed toward the legs of persons identified as “main inciters” of the mob leading the crowd toward the fence.

To conclude, the difference in the conclusions of the U.N. commission and the IDF is partly due to different perspectives and partly due to different legal analyses.

Time will tell if this legal and factual blurriness can be sharpened. Due to a lack of clear institutional hierarchy in international law, I doubt if the legal differences will be settled authoritatively. However, the facts on the ground may be clearer if and when the IDF releases information about the outcomes of specific investigations into the incidents mentioned in the U.N. commission’s report.