Israel-Hamas 2024 Symposium – Israel's Declaration of War on Hamas: A Modern Invocation of Recognized Belligerency?

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by Benjamin R. Farley | Mar 5, 2024

Hours after Hamas launched a horrific and unprecedentedly large-scale terrorist assault on Israel, the Israeli Security Cabinet invoked, for the first time in Israel's history, Article 40(a) of its Basic Law: The Government. Israel's invocation of Article 40(a) was widely described as Israel "formally declar[ing] war on Hamas," a surprising characterization both because States rarely declare war and because Hamas is a non-State, terrorist organization. These two facets of Israel's recourse to Article 40(a) raised the prospect of an even more surprising development: that Israel had recognized Hamas as a belligerent power in the context of its ongoing armed conflict with the terrorist group.

Recognition of belligerency is a relic of the nineteenth century that, when invoked, caused "civil wars," internal non-international armed conflicts (NIACs) of certain dimensions, to be treated as if they were international armed conflicts (IACs) for law of war purposes. In those circumstances, a sufficiently established rebellious non-State actor was treated as if it were a State actor under the law of war. The international law of war regulated the conflict as

opposed to domestic law, and neutrality law entered into force. A State could recognize the belligerency of its rebellious, non-State opponents explicitly or impliedly. Although rare, explicit, formal recognition of belligerency could come in the form of a proclamation of blockade, as when the United States proclaimed a blockade against the so-called Confederate States of America in late April 1861, or through a declaration of war, as when Nigeria declared war on the secessionist Republic of Biafra. But belligerency has been recognized so rarely in the last century or more that the doctrine is sometimes accused of desuetude.

This post considers whether, by invoking Article 40(a), Israel simultaneously declared war on and recognized the belligerency of Hamas. It examines, first, whether Israel's recourse to Article 40(a) constitutes a declaration of war for international law purposes and, second, whether a declaration of war in the context of Israel's armed conflict with Hamas comports with the traditional parameters of recognition of belligerency. Finally, the post broadly surveys the consequences of recognizing the belligerency of Hamas. The most salutary of these is that such recognition would simultaneously side-step and resolve the debate over the appropriate legal character of the Israel-Hamas armed conflict. If Israel recognized Hamas's belligerency, the conflict would be treated as an IAC to which the full panoply of international humanitarian law (IHL) applies.

Did Israel Declare War on Hamas?

It is not entirely clear whether Israel's invocation of Article 40(a) effected a declaration of war for domestic Israeli law purposes alone or for international law purposes, as well. In an October 8, 2023 press release, the government of Israel announced,

the Security Cabinet approved the war situation [or, according to Professor Amichai Cohen, a state of war] and, to this end, the taking of significant military steps, as per Article 40 of Basic Law: The Government. The war that was forced on the State of Israel in a murderous terrorist assault from the Gaza Strip began at 06:00 yesterday (Saturday, 7 October 2023).

Article 40 provides that the "State shall not start a war, and shall not initiate a significant military operation, which is liable to lead, at a level of probability close to certainty, to war, save by force of a Government decision." Israel's October 8 invocation of Article 40(a) means that it intended either to "start a war" or to "initiate significant military operation[s]" nearly certain "to lead . . . to war." Unfortunately, neither Article 40 nor any other provision of Israeli law defines "war," leaving uncertain whether recourse to the provision carries any international legal effect.

However, in 2006, the Israeli Supreme Court (sitting as the High Court of Justice) suggested in *dicta* in *Beilin v. Prime Minister*—the only case in which the Court has considered the meaning of Article 40—that the meaning of "war" in Article 40(a) should be drawn from international law. In that case, the Court rejected petitioner Beilin's argument that Israel acted

unconstitutionally when it failed to "make a decision to start a war" under Article 40 before launching military operations against Hezbollah in 2006. In discussing the meaning of Article 40(a), the Court remarked that "the interpretation of the concept of 'war' in [the Basic Law: The Government, Article 40] context . . . is based mainly on the rules of international law."

The *Beilin* Court premised this conclusion on its view that "[t]he definition of the concept of 'war,' when we are speaking of the government's powers with regard to military operations, cannot be separated from the foreign affairs of the state and the functioning of the government in the sphere of international relations." The Court explained that "[a] decision of the government that can be interpreted as a declaration of war is likely to have extreme consequences in the sphere of international relations." Moreover, according to the Court, "the government is entitled to determine that the military operations that it decided to carry out [against Hezbollah] do not constitute 'starting a war' but merely military operations that constitute self-defence in response to aggression."

By relying on international law to interpret Article 40, emphasizing the international consequences of invoking Article 40(a), and distinguishing between "war" under Article 40(a) and "military operations that constitute self-defence," the Court seemed to suggest—albeit in *dicta*—that an invocation of Article 40(a) may constitute a declaration of war for international law purposes, as well as for the purposes of domestic Israeli law.

The International Law Requirements for a Declaration of War

International law prescribes little in terms of the form or formalities attending valid declarations of war. Instead, as Professor Yoram Dinstein explained, under international law, a declaration of war is "a unilateral and formal announcement, issued by the constitutionally competent authority of a State, setting the exact point at which war begins with a designated enemy."

In this case, Israel's October 8 invocation of Article 40(a) appears to satisfy the meagre requirements for such declarations under international law. The Israeli Security Cabinet—the component of the Israeli State constitutionally competent to declare war under a 2018 Article 40(a)(1) delegation of authority—promulgated a unilateral, formal announcement that Israel was at war with Hamas. This was recorded in a press release that explicitly affirmed that Israel and Hamas entered either a "war situation" or a "state of war" in October 2023. And that press release, at least, purported to fix the point at which the war began: 6:00am on October 7, 2023.

Consequences of Construing Israel's Article 40(a) Invocation as a Declaration of War

As it was traditionally understood under international law, "war" could exist exclusively between States (see e.g., Lauterpacht, *Oppenheim's International Law*, vol. II, p. 202; U.S. Department of Defense (DOD) *Law of War Manual*, § 1.5.1). When hostilities arose between

States and rebellious non-State actors they were not war—even when they were characterized as "civil war"—unless the rebels were recognized as a belligerent power.

Following the adoption of the 1949 Geneva Conventions, the international legal concept of "war" was replaced by "armed conflict." As a legal matter, inter-State "war" was subsumed within the broader legal type "international armed conflict," to which the full breadth of IHL applies. Unlike the pre-1949 concepts of "war" and "states of war," IACs are triggered by any recourse to armed force between States with or without declarations of war. Nevertheless, declarations of war continue to be legally significant because a State may trigger an IAC by merely declaring war on another State. As formulated in common Article 2 to the 1949 Geneva Conventions, IHL applies to "all cases of declared war or of any other armed conflict which may arise between two or more [States]." In contrast, NIACs—those that occur between States and non-State actors, or among non-State actors—are triggered when the two-prong *Tadić* test of intensity and organization is satisfied. So, while IACs may be triggered by a declaration of war alone, the mere verbal act of a State (or of a non-State actor, for that matter) cannot start or constitute a NIAC.

This framework makes the characterization of Israel's invocation of Article 40(a) as a "formal declaration of war" confusing. Under international law, had Israel made a State the object of its Article 40(a) invocation, it would have constituted an IAC to which the full panoply of IHL applies irrespective of any actual hostilities. But Israel invoked Article 40(a) *vis-à-vis* a non-State actor, which presents an apparent category error: Israel's declaration of war could not create an IAC because Hamas is a non-State actor; nor could it inaugurate a NIAC because NIACs cannot be triggered by verbal acts.

Recognition of belligerency would resolve that confusion. Because hostilities between Israel and Hamas unquestionably satisfy *Tadić*'s intensity and organization thresholds, treating Israel's invocation of Article 40(a) as a declaration of war for international law purposes could be rationalized as a formal recognition of Hamas as a belligerent power.

What is Recognition of Belligerency?

The doctrine of recognition of belligerency evolved during the epoch of international law in which States enjoyed largely unfettered sovereign discretion to respond to internal threats posed by rebels, insurgents, and revolutionaries (International Committee of the Red Cross (ICRC), *2020 Commentary* to common Article 3; McLaughlin, p. 21).

Nevertheless, by the nineteenth century, States and international law scholars identified that certain contests between States and non-State actors were so *internationally* significant that international law must apply. Such contests occurred when: (1) a "civil war" featured widespread and sustained hostilities; (2) those in revolt stably and enduringly controlled and administered a substantial portion of territory; (3) the non-State armed force adhered to the laws of war; and (4) the conflict State chose to acknowledge its adversaries as belligerents.

As Professor Rob McLaughlin explains, the fourth criterion of recognition of belligerency was generally within the discretion of the conflict State subject to its "naked self-interest" irrespective of a "rigid application of a set of general legal criteria." Indeed, the Institut de Droit International's 1900 resolution on the Rights and Duties of Foreign Powers as Regards the Established and Recognized Governments in Case of Insurrection suggests that recognition of belligerency was entirely a discretionary matter for the conflict State (compare Ch. 2, art. 4, with Ch. 2, art. 8.) Professor Lauterpacht similarly pronounced that "the lawful government may exercise belligerent rights at its option . . . so long as it does so in conformity with international law." Such a sovereign election imposed a duty on the part of third States "to submit to the normal incidence of . . . operation [of the law of war]—such incidence including the obligation to treat the insurgents in the same manner as the lawful government, i.e. as belligerents" (p. 176).

When a non-State armed group's belligerency was recognized, the character of the conflict itself was regarded "as a fully fledged state of war – with all of the legal accoutrements thereof" (Neff, p. 264). Thus, recognition of belligerency caused the international laws of war that applied to contests between States to come into force with respect to otherwise unregulated—or, after the adoption of the 1949 Geneva Conventions, minimally regulated—internal conflicts. The rebel armed force was consequently treated as if it were a State armed force: its fighters were able to lawfully participate in hostilities; they were entitled to prisoner of war status upon capture; its vessels could capture enemy vessels and condemn them as lawful prize; and the newly-belligerent power was entitled to impartial treatment by neutral States.

Conflict States could recognize the belligerency of their non-State opponents by, *inter alia*, formally regarding or practically treating them as belligerents. Thus, a State recognized the belligerency of its rebellious foes when it employed its belligerent rights rather than its sovereign rights to quell a revolt. For example, as the U.S. Supreme Court explained in the *Prize Cases*, during the American Civil War, President Lincoln recognized the belligerency of the Confederacy when he declared a blockade against it: "The proclamation of blockade [was] itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure [recognition of the Confederacy's belligerency] . . . ." Because blockades are a tool of inter-State warfare, the object of which must be a belligerent power, a proclamation of blockade against a non-State actor is *ipso facto* a recognition of the non-State actor's belligerency.

The doctrine of recognition of belligerency has been little used in the last nearly one hundred years in part because it sits uncomfortably with modern IHL. Since the adoption of the 1949 Geneva Conventions, the doctrine's continuing vitality has been open to question because it does not easily or completely map onto the post-1949 dichotomy between IACs and NIACs. The innovation of NIAC as a legal category removed from States their earlier discretion to cause international regulation of warfare to apply to hostilities with non-State actors. Instead, the IHL applicable to NIACs applies to *all* conflicts between State and non-State actors that

satisfy the organization and intensity prongs of the *Tadic* test, even those that would likely fall below the threshold of "civil war" and, therefore, would be outside the ambit of recognition of belligerency.

But, as Professor McLaughlin argues, neither the 1949 Geneva Conventions nor their Additional Protocols supplanted or extinguished the doctrine (p. 202-22). Further, he catalogs diverse instances since the Second World War in which States have evaluated their actions *vis-à-vis* foreign NIACs in light of the doctrine (p. 232-40). Together, this data leads him to conclude that "[c]ertainly . . . some state practice . . . some treaties, some commentary, and some academic discussion . . . tend to indicate that [recognition of belligerency survived the post-1949 progressive development of IHL]" (p. 222). Likewise, as recently as 2014, Professor Dinstein declared, "'Recognition of belligerency' is a relevant today as ever, but its award is usually deduced by implication" (p. 111).

Could Recognition of Belligerency Apply to the Israel-Hamas Armed Conflict?

Assuming both that invocation of Article 40(a) effects a declaration of war under international law and that recognition of belligerency remains a viable doctrine of international law, Israel's actions on October 8 may have resulted in its recognition of Hamas as a belligerent power. Declaring war is the paramount invocation of a State's belligerent rights because it, *ipso facto*, creates a state of war. Thus, a State's declaration of war on its non-State actor adversary—at least in the midst of a "civil war"—would constitute the most formal, explicit recognition of belligerency imaginable (see DOD *Law of War Manual*, § 3.3.3.2.).

However, there are at least two problems with treating Israel's arguable declaration of war on Hamas as a recognition of Hamas's belligerency. First, although the armed conflict between Israel and Hamas may be a NIAC, it does not seem to fall within the descriptive category of "civil war" to which recognition of belligerency traditionally applied.

Second, Hamas's military forces do not comply with IHL. The adherence of the non-State actor to the law of war is one of the four traditional criteria of recognition of belligerency. Among other things, Hamas's murder of civilians, its taking of civilian hostages, its indiscriminate rocket attacks on Israel, and its colocation of fighters with protected objects during the present armed conflict are all examples of its refusal to abide by the law of war.

Despite these defects, there are several reasons why it may be appropriate to regard Israel's invocation of Article 40(a) as a declaration of war on Hamas that entails recognition of its belligerency. First, "civil war" is a descriptive rather than legal category. As such, it is not clear that a conflict's failure to satisfy the parameters of "civil war" should exclude the possibility of recognized belligerency, particularly because since 1949 "civil war" has been subsumed within the broader legal category NIAC much as "war" has been subsumed within the broader legal category IAC.

Moreover, recognition of belligerency always constituted a liminal category between true international war and internal hostilities, or, in modern terms, between IACs and NIACs as they were originally contemplated. The extension of IHL to the regulation of extraterritorial NIACs at least implies the possibility of the extension of that liminal category to extraterritorial NIACs. The possibility that recognition of belligerency could apply to extraterritorial NIACs would be consistent with IHL's general policy of reducing suffering during armed conflict by extending the more robust and protective rules of the IHL applicable to IACs. Indeed, extending recognition of belligerency to extraterritorial NIACs would also be consistent with the policy origins of the doctrine, which imposed international legal regulation as a function of international concerns arising from certain conflicts between States and non-State actors. Finally, extraterritorial recognition of belligerency would extend the more robust international criminal accountability regime applicable to IACs.

Second, given the post-1949 legal obligation of non-State armed groups to comply with IHL during NIACs, it would be somewhat inconsistent to condition their recognition as belligerent powers on voluntary compliance with IHL. Of course, during NIACs, non-State actors are required to comply only with the IHL applicable to NIACs and, logically, the IHL-compliance criterion could be interpreted as requiring voluntary compliance with the IHL applicable to IACs—a condition Hamas would clearly fail to satisfy due its policy of lawlessness.

Ultimately, however, the Israel-Hamas armed conflict appears to satisfy three of the four criteria of recognized belligerency. The long-standing armed conflict between Israel and Hamas has been marked, since October 7, by particularly widespread, intensive, and sustained hostilities that have involved all of Gaza and much of Israel over more than 100 days. Before the intensification of hostilities between Israel and Hamas from October 7, the terrorist organization stably and effectively controlled substantial territory for sixteen years. Hamas also possesses a substantial armed force, which Israel estimated as comprising 30,000 to 40,000 fighters following the October 7 attacks. Moreover, if Israel's invocation of Article 40(a) is construed as a declaration of war on Hamas, it would indicate that Israel chose to acknowledge Hamas as a belligerent power. As Professor Lauterpacht admonished, "[t]he fact that the [conflict] State has recognized or treated [a non-State armed group] as belligerents constitutes a strong presumption" that the criteria of recognition of belligerency are satisfied (p. 176). So, from a traditional perspective, Israel's arguable October 8 declaration of war on Hamas might overcome Hamas's otherwise patent lawlessness for the purposes of recognition of belligerency.

The Effect of Israel's Recognition of Hamas's Belligerency

The most significant consequence of an Israeli recognition of Hamas as a belligerent power would be resolution of the debate over the appropriate subset of IHL applicable to the conflict. Rather than debating whether the Israel-Hamas armed conflict is an IAC or NIAC depending on whether Israel could be construed as occupying Gaza before October 7, recognition of belligerency would mean treating the armed conflict as if it were an IAC. It

would, therefore, be regulated by the rules of IHL that govern IACs. These rules are more protective of civilians and individuals *hors de combat* than the amorphous and underdeveloped rules of IHL applicable to NIAC. They also clearly establish the international legal authority available to Israel for the capture and detention of Hamas fighters, which may inure to the benefit of Israel and its men and women under arms. While treating the Israel-Hamas armed conflict as an IAC holds out the prospect that captured Hamas fighters could be eligible for prisoner of war status, Hamas's brazen refusal to comply with IHL would likely disqualify Hamas fighters from this status.

Finally, treating the Israel-Hamas armed conflict as an IAC would logically ensure that IHL violations perpetrated during the course of the armed conflict are subject to the more expansive international criminal accountability framework that applies to IACs, which includes obligatory universal jurisdiction under the grave-breaches regime. For those interested in humanizing warfare or promoting conflict-related accountability, there may be good reason to seriously consider whether Israel recognized Hamas as a belligerent power by invoking Article 40(a) on October 8, 2023.

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