

The “Total Defeat” of Hamas and the End of NIAC

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Since the onset of the hostilities in Gaza that began on October 7, 2023, Israel has consistently identified the “complete destruction” of the “military and governmental capabilities” of Hamas as one of its principal war aims. If Israel were to achieve that objective, it would conclusively end its ongoing non-international armed conflict (NIAC) with Hamas. Critically, and as this post concludes by contrast with a negotiated settlement of the conflict, if the Israel-Hamas NIAC terminated on that basis, Israel would retain substantial authority to use armed force against whatever remnants of Hamas survive.

The End of a Non-International Armed Conflict

While scholars have advanced a number of theories for how the current Israel-Hamas war can be most accurately classified under the *jus in bello*, the most doctrinally sound is Professor Michael Schmitt’s contention that it is a NIAC between the State of Israel and Hamas. The latter is an organized armed group not subject to the control of any State.

Irrespective of its classification, an armed conflict comes to an end when the factual realities that gave rise to that legal state of affairs no longer exist (U.S. *Department of Defense Law of War Manual*, §3.8.1). This is typically effectuated by the mutual agreement of the parties, whether express or implied, to conclusively end hostile actions against one another. Such mutual consent may be expressed through the conclusion of a “peaceful settlement” to the conflict between the opposing parties.

In some situations, however, the end of an armed conflict may be effectuated by unilateral means, including by a change in the status of one of the parties. Pursuant to the doctrine of *debellatio*, an international armed conflict (IAC) may be terminated upon the complete subjugation of a belligerent party. As the late Professor Yoram Dinstein explained, this occurs when a State suffers such a comprehensive defeat that its sovereignty is effectively extinguished, and therefore an inter-State conflict no longer exists. This requires the complete occupation of that State’s territory, the total defeat of its armed forces, and the collapse of its government. It also requires that no co-belligerents continue to fight on the State’s behalf and that no government-in-exile “continues to offer effective opposition” (Yoram Dinstein, *War, Aggression, and Self-Defence*, 6th ed., p. 52-53).

Though not as well-established from a doctrinal perspective, many scholars recognize that a kind of analogue to *debellatio* can terminate a NIAC. Those authorities note that the factual conditions that give rise to a NIAC between a State and an organized armed group necessarily cease to exist when that armed group is defeated such that it can no longer effectuate hostilities sufficient to constitute an armed conflict (see, e.g., International Committee of the Red Cross (ICRC), 2016 *Commentary to the First Geneva Convention*, art. 3, para. 489). Important State practice likewise supports the notion that a *debellatio*-type defeat of an organized armed group can end a NIAC. For example, the United States previously advanced the proposition that its ongoing NIAC with al-Qaeda would end if and when that organization were to be “effectively defeated” as a cohesive terrorist network.

Consistent with this doctrine, should Israel succeed in its “complete destruction” of Hamas as a fighting and governing force, the NIAC between it and Hamas would cease.

Defeat of an Organized Armed Group

Of course, noting that the complete destruction of a group ends a conflict tells us little about the requisite level of destruction required to reach that conclusion. The precise factual conditions associated with the comprehensive defeat of an organized armed group in a NIAC are not well-established. Accordingly, determining whether the Israel-Hamas NIAC has been terminated by the wholesale destruction of Hamas requires first considering how the full-scale defeat of any organized armed group should be assessed in concrete terms.

Existing scholarship makes a persuasive case that this can best be accomplished by “reverse-engineering” the criteria that have been widely recognized, most prominently by the International Criminal Tribunal for the former Yugoslavia (ICTY), for determining the existence of an organized armed group.

In its *Boškoski and Tarčulovski* judgment, the ICTY held that five groups of factors indicate the requisite degree of organization (*Prosecutor v. Ljube Boškoski and Johan Tarčulovski*, Judgment paras. 199-204). These consider whether the group possesses (1) a command structure, (2) the operational and (3) logistical capabilities necessary for conducting and sustaining cohesive military operations, (4) an internal discipline system allowing it to implement its obligations under the law of armed conflict (LOAC), and (5) the ability to “speak with one voice” vis-à-vis other international actors.

While none of these factors is determinative, Professor Jann Kleffner has argued that, fundamentally, an organized armed group must necessarily be capable of engaging in the collective conduct of violence in a cohesive manner and at scale. As Professor Schmitt has reasoned, this means that an organized armed group must possess some kind of effective command and control apparatus as well as the ability to plan, conduct, and sustain coordinated military operations.

Critically, the application of those criteria is more complex when assessing the status of a “mixed” organized armed group. Hamas is a non-State entity that possesses an armed wing as well as other subgroups that carry out non-hostile functions, such as various political or governmental activities. Unlike their “armed” counterparts, members of these “non-armed” wings cannot necessarily be targeted with lethal force based merely on their association with the overall group. Nonetheless, the existence of those non-armed elements may bear upon whether the larger entity of which they are a part is sufficiently organized for conflict classification purposes.

While the *Boškoski and Tarčulovski* organization criteria primarily assess issues that are relevant to the coherence of an “armed force”—the armed wing of a non-State entity—those criteria were based on “the principle that an armed conflict can exist only between *parties that are sufficiently organized* to confront each other with military means” (*Boškoski and Tarčulovski*, Judgment, para. 198) (emphasis added). The concept of a “party to the conflict,” importantly, describes “the entire political entity” engaged in an armed conflict. This suggests that, for conflict classification purposes, an assessment of whether a non-State armed group is sufficiently organized must consider the overall coherence of that entity as a singular political or governmental actor.

Indeed, this notion is supported by the drafting history and original ICRC *Commentary* to Common Article 3 of the Geneva Conventions, which regulates NIACs, as well as jurisprudence of the International Criminal Court that has assessed the organizational coherence of several “mixed” non-State armed groups (see Katharine Fortin, *Armed Groups*

and International Law, p. 145–48). The ICRC’s 1952 *Commentary* provides that “distinguishing a genuine armed conflict” from lesser forms of internal violence may be accomplished by assessing whether, *inter alia*: “(1) the insurgents have an organization purporting to have the characteristics of a State; (2) the insurgent civil authority exercises de facto authority over persons within a determinate territory; [and] (3) the armed forces act under the direction of the organized civil authority (ICRC, 1952 *Commentary*, p. 52).

Whether a “mixed” organized armed group like Hamas is sufficiently organized to engage in armed conflict therefore not only depends upon whether it possesses organized armed forces, but also upon whether the hostile activities of those forces are controlled by a singular, cohesive civil authority. As Professor Fortin indicates, the governmental or political wing of an organized armed group often controls the military elements of the organization, enters into international agreements on its behalf, and carries out the group’s administration of territory (Fortin, *Armed Groups*, p. 158–60). Accordingly, it is conceivable that even if a non-State actor’s principal armed forces were to be destroyed, its paramount civil authority could survive as a locus of coherent military resistance. In those circumstances, that non-State actor would arguably remain sufficiently organized to confront an opposing belligerent with military means, similar to a situation in which a State does not suffer *debellatio* in an IAC when it possesses a government-in-exile that “continues to offer effective opposition” to the enemy.

In view of all the foregoing considerations, “reverse engineering” Hamas as an organized armed group requires an appreciation of its particular organizational characteristics.

Defeating Hamas

Hamas is best understood as a hybrid armed group that simultaneously possesses qualities of a government, a conventional armed force, an insurgency, and a terrorist network. It exercises classically governmental functions and has regular military capabilities that it has used to engage in high-intensity hostilities against the Israel Defense Forces (IDF) and to attack Israeli population centers. At the same time, it tends to operate with irregular warfare tactics and has conducted mass-casualty terror attacks against Israel—most notably on October 7.

Accordingly, the destruction of Hamas as an organized armed group must at the very least involve Israel achieving three distinct military objectives.

First, Israel would need to comprehensively neutralize Hamas’s ability to conduct large-scale combat operations. Specifically, Israel would need to render Hamas’s combat battalions operationally ineffective through the attrition of front-line personnel and materiel and/or effectuating the collapse or surrender of those formations. The latter could be accomplished by isolating Hamas’s regular combat forces from their sources of reinforcement and resupply

and/or disrupting their mechanisms for command and control. Israel would also need to eliminate Hamas's long-range fires capabilities, whether by targeting specific platforms, disrupting its broader system for conducting deep fires, or a combination thereof.

Second, Israel would need to render Hamas incapable of exercising effective control over territory and populations as a quasi-governmental authority. As the ICRC notes, "it is not possible to conclude that [a non-State party to an armed conflict] has ceased to exist" when it continues to control territory (ICRC, 2016 Commentary, para. 489). In the context of an ongoing armed conflict, such effective control should be understood to exist where an organized armed group has firm possession of territory and the capability to exercise governmental authority therein (see Dinstein, *The International Law of Belligerent Occupation*, 2nd ed., p. 43-54 for a discussion of "effective control" in the occupation context; see ICRC, 2016 Commentary, para. 234 on the concept of "effectiveness" regarding recognition of governments). Consistent with that definition, this means that beyond neutralizing Hamas's main conventional forces, Israel will also need to seize Gaza's population centers from any irregular Hamas militants and paramilitary forces that remain in control of those geographies. Likewise, to fully displace Hamas as the quasi-government in those areas, Israel will need to assert its own military authority over the administrative and civil infrastructure that Hamas continues to operate across the Gaza Strip.

To date, Israel has made appreciable progress toward attaining these two objectives. As of late July, Israel claimed to have dismantled 22 of the 24 battalions that constituted the Qassam Brigades—Hamas's military wing—at the start of the war, having rendered those units combat ineffective. Indeed, after over six months of intense combat in the northern and central Gaza Strip, on April 7, the Israeli Defense Ministry asserted that Hamas had "stopped functioning as a military organization" in those areas. According to Israeli officials, moreover, Hamas's remaining battalions are "close to being dismantled" in the southern Rafah area of Gaza. Independent military analysts have tended to agree that the IDF has neutralized the overwhelming preponderance of Hamas's maneuver forces. Analysts likewise note that Israel has killed many top Hamas military commanders and has "destroyed many of Hamas's tunnels, fortified positions, and arms depots."

Despite those successes, however, Israel's progress in dismantling Hamas's principal maneuver forces and clearing them from major population centers has not eliminated its ability to contest territory in Gaza or conduct major attacks against IDF forces. Following its major combat operations in the northern and central parts of the Gaza Strip, the IDF largely evacuated those areas. As a result, smaller formations of Hamas militants have been able to successfully reassemble and wage guerilla warfare against the IDF in parts of Gaza where Israel has previously claimed to have gained control. Meanwhile, Israel claims to have killed half of Hamas's military commanders, and may have eliminated the leader of its military wing. However, analysts have noted that Hamas's top political and military leadership both in Gaza and abroad remains largely intact, capable of directing effective guerilla warfare against Israel throughout the Gaza Strip.

Those realities mean that, as its third military objective, Israel will need to also render Hamas incapable of operating as a cohesive insurgency or terrorist network. To accomplish this goal, Israel will need to conclusively eliminate Hamas's capacity to execute coordinated, mass-casualty terror attacks and organized guerilla activities within or outside Gaza. This will require, at the very least, disrupting the ability of Hamas fighters, operatives, and leaders to systematically gather and communicate. This effort would clearly need to focus on eliminating Hamas's military commanders or isolating them from their fighters. In addition, Israel would have to destroy and prevent the reconstitution of Hamas's bases of operation and supply, safe houses, and sanctuaries, and sever the group's lines of communications for materiel supplies from locations outside the Gaza Strip. Critically, however, Israel would also need to eliminate the ability of Hamas's paramount political leaders to organize cohesive hostile acts against Israel by smaller contingents of Hamas militants or largely self-sustaining terror cells. As alluded to above, so long as Hamas's paramount civil authority retains a capacity to direct comprehensive hostilities against Israel—such as by coordinating sustained large-scale terror attacks via a decentralized terrorist network—Hamas arguably remains in existence as an organized armed group.

None of this is impossible. Most insurgencies and terrorist groups are defeated by the government forces they oppose. Critically, however, achieving that objective will require Israel to adopt a strategy that allows it to control and stabilize the territory it has seized from Hamas. To date, IDF operations in Gaza have largely failed to accomplish this requirement.

The International Legal Implications of Destroying Hamas

The end of an IAC pursuant to *debellatio* is significant because, relative to situations where an IAC ends by a mutual agreement to terminate hostilities, the victor State acquires a unique degree of authority over the defeated State in the post-conflict period. For instance, the victor State may effectuate a “transformative occupation” of the subjugated State. In other words, the victor may fundamentally restructure the occupied State's political structures and governmental institutions without the consent of the defeated sovereign, an authority that does not exist in normal cases of post-conflict occupation (Yoram Dinstein, *The International Law of Belligerent Occupation*, 2nd ed., p. 36-37).

Logic dictates that a State that ends a NIAC by fully defeating an organized armed group may enjoy a similar degree of latitude regarding its conduct towards the dislocated remnants of that organization in the post-conflict period.

The most common mode of ending a NIAC involves some form of mutual agreement between the opposing belligerents to conclusively terminate hostilities against each other. Importantly, as with an IAC, such a settlement should be understood to encompass an implied mutual agreement between the parties to permanently cease hostilities. The 2016 *Commentary* to Common Article 3 of the Geneva Conventions, for example, notes that “a

lasting cessation of armed confrontations without real risk of resumption” may be equated to a “peaceful settlement” of a NIAC even without a formal agreement and even if the organized armed group remains in existence (para. 491).

The critical implication is that the ordinary mode of NIAC termination necessarily involves a mutual commitment between the parties to refrain from the future use of armed force against each other. Some scholars doubt whether such obligations are technically binding on the State party as a matter of international law. As David Wippman argues, however, State practice suggests that when a non-State organized armed group enters into an agreement with a State for purposes of ending a NIAC, “the international community treats their agreements as the functional equivalent of treaties.” Particularly notable in this regard are the many instances in which the UN Security Council has treated the commitments made in peace agreements between a State and an organized armed group as binding under international law.

By contrast, when a NIAC ends by means of the total defeat of an organized armed group, the victorious State makes no such commitment. As a consequence, beyond those limitations arising from general international law, the victor State is not subject to any additional restrictions on its ability to continue to use force against any possible remnants of that entity.

In general, international law does not prohibit States from using armed force against non-State actors, provided that the State complies with applicable LOAC and international human rights law rules, and does not impermissibly violate another State’s sovereignty. By accepting a binding obligation not to use force against a non-State actor, therefore, the State party to a NIAC accepts a significant limitation on its sovereign rights.

When a State inflicts a *debellatio*-type defeat on an organized armed group, no such concession of sovereignty occurs. This is particularly significant in situations where a State is engaged in a NIAC with an armed group whose belligerency it has recognized. In those circumstances—which may apply to the Israel-Hamas NIAC—an organized armed group is treated as a State for *jus in bello* purposes. The total defeat of a recognized belligerent group, however—as in the case of *de jure debellatio*—would logically extinguish whatever degree of sovereignty had been afforded to that entity.

Those conclusions indicate that if Israel completely dismantles Hamas as an organized armed group, it will lose the right to conduct comprehensive hostilities against the remnants of that entity; the end of the Israel-Hamas NIAC would mean that LOAC would no longer govern Israel’s hostile interactions with any remaining elements of that organization. However, Israel would nonetheless retain the authority to use armed force against the group’s surviving membership in the context of law enforcement activities (see, e.g., Dinstein, *Non-International Armed Conflicts*, p. 22). Critically, Israel would not enjoy such

authority in a situation where it agreed, under the terms of a peaceful settlement to its NIAC against Hamas, to permanently abstain from the use of force or hostile acts against that entity.

In practical terms, such a calculation is relevant to Israel's international legal authority to secure itself from future threats emanating from the Gaza Strip in the aftermath of its NIAC against Hamas, without reoccupying that territory. For instance, because it would necessarily prohibit the opposing parties from continuing to conduct hostilities against each other, a peaceful settlement of the Israel-Hamas NIAC would implicitly prohibit a renewed Israeli land siege and maritime blockade of the Gaza Strip, as such measures involve the use of armed force. However, in the case of a *debellatio*-type end of the conflict occasioned by the complete destruction of Hamas, Israel could—all other things being equal—conduct naval, land, and air interdiction operations in that territory consistent with the extraterritorial law enforcement use of force paradigm.

Conclusion

If Israel can successfully dismantle Hamas's conventional military capabilities, render it incapable of exercising effective control over territory in the Gaza Strip, and eliminate its ability to engage in sustained irregular warfare or execute mass-casualty terror attacks—whether as a guerilla force in Gaza or as a decentralized terrorist network coordinated by its paramount political leadership from outside the Palestinian Territory—then it will have “fully defeated” Hamas from an international legal perspective. The complete destruction of Hamas as an organized armed group would bring an end to the Israel-Hamas NIAC. Critically, however, Israel would retain authority to use armed force against the remnants of Hamas that it would not possess if the Israel-Hamas NIAC ends pursuant to a peaceful settlement between the opposing belligerents.

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