

Armed Violence in the Gaza Strip and International Humanitarian Law ガザ地区における武装的暴力と国際人道法

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要 旨

2008 年末から翌年 1 月にかけてのイスラエル・ハマスの武力紛争が終結した後も、パレスチナ・ガザ地区においては暴力が継続している。この状況が非国際的武力紛争における「暴力の強度 (intensity)」と「組織性 (organization)」の要件を満たし、武力紛争の状況が存在すると言えるか否かがこの論文の主題である。これはイスラエルによるガザ地区の占領の有無と並んで、ガザ地区内の住民を保護する法体系がどのようなものかを明らかにする上で重要な問題である。結論としては、ハマスはその高い軍事的能力から組織性の要件は満たすものの、衝突の被害・頻度・国際社会の関与等の点で、2008 年末のガザ紛争以降は強度の要件を満たさず、よって現在ガザに武力紛争の存在を認めることはできない。これは旧ユーゴ国際刑事裁判所において非国際的武力紛争の存在 / 不存在を認定した判例と比較することにより明らかとなる。

Introduction

The battle between the Israel Defense Forces (IDF) and Hamas¹ in late 2008 brought dire humanitarian consequences on the population in Gaza. According to the United Nations (UN) Office for the Coordination of Humanitarian Affairs (OCHA), as a result of the conflict from 27 December 2008 to 18 January 2009, over 1300 Palestinians were killed and 5300 injured, while 3 Israelis were killed and 182 injured.² A survey conducted by the United Nations Development Programme (UNDP) indicated that 38% of Gazan population (approximately half a million) has been displaced as a result of the Israeli military operations.³

¹ There were additional Palestinian armed groups participating in the war. According to the Report of the United Nations Fact Finding Mission on the Gaza Conflict (UN Doc. A/HRC/12/48, 15 September 2009, p.86. Hereinafter Goldstone Report), conflict parties include the Hamas' Izz ad-Din al-Qassam Brigades, the al-Aqsa Martyrs' Brigades, the Islamic Jihad, the Abu Ali Mustafa Brigades, and al-Naser Salah ad-Din Brigades.

² United Nations Office for the Coordination of Humanitarian Affairs (UN OCHA), Field Update on Gaza from the Humanitarian Coordinator: 30 January – 2 February 2009, 1700 hours, p.1.

³ United Nations Development Programme (UNDP), Attitudes and perceptions of the Gaza Strip residents in the aftermath of the Israeli military attacks, 3 February 2009, p.

The international community's response to the crisis was swift. The UN General Assembly,⁴ the Human Rights Council,⁵ and the Security Council⁶ passed resolutions calling for immediate cease-fire by the conflict parties. The Fact Finding Mission established by the Human Rights Council published the “Goldstone Report” which accused both sides of their alleged war crimes. International NGOs, such as Amnesty International,⁷ Human Rights Watch,⁸ as well as the International Committee of the Red Cross (ICRC)⁹ also issued reports and statements regarding their positions on legal and humanitarian implications of the conflict.

These reactions indicate that large-scale Israeli-Palestinian violence attracts a high-level of media attention, mobilizing a massive political and humanitarian response. However, except for wartime, the question of Palestine is generally not high on the agenda for most people in the Western world. According to a survey for the BBC Governors’ Impartiality Review on Coverage of the Israeli-Palestinian Conflict, only 2% of respondents answered that the Israeli-Palestinian conflict was a major international issue they could recall being reported in the media in 2005.¹⁰ Even among issues relating to the conflict, only 5% answered that “tit for tat / retaliations” were events that they remembered being reported in the last couple of years.¹¹ Thus, even though the Israeli-Palestinian conflict itself is well-known, it does not elicit much interest from the general public without heavy exchange of fire.

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⁴ United Nations, Department of Public Information, News and Media Division, Meetings Coverage, General Assembly Demands Full Respect for Security Council Resolution 1860 Calling for Immediate Gaza Ceasefire, as Emergency Session Concludes, GA/10809/Rev. 1 (not an official record), 16 January 2009.

⁵ United Nations Human Rights Council Resolution, adopted at 9th special session on 12 January 2009. (UN Doc. A/HRC/S-9/L.1.)

⁶ Resolution 1860 (2009), adopted by the Security Council at its 6063rd meeting, on 8 January 2009. (UN Doc. S/RES/1860)

⁷ Amnesty International, Israel/Gaza: Operation “Cast Lead”: 22 Days of Death and Destruction, 2009.

⁸ Human Rights Watch, White Flag Deaths: Killings of Palestinian Civilians during Operation Cast Lead, August 2009. Human Rights Watch, Rain of Fire: Israel’s Unlawful Use of White Phosphorus in Gaza, March 2009.

⁹ International Committee of the Red Cross (ICRC), News Release, Gaza crisis: joint public statement by the International Red Cross and Red Crescent Movement, 13 January 2009. ICRC, News Release 09/04, Gaza: ICRC demands urgent access to wounded as Israeli army fails to assist wounded Palestinians, 8 January 2009.

¹⁰ The British Broadcasting Corporation (BBC), BBC Governors’ Impartiality Review on Coverage of the Israeli-Palestinian Conflict, Qualitative and quantitative audience research conducted by Opinion Leader Research in October and November 2005, January 2006, p.18, Chart 18. In 2005, there were relatively few violent incidents in the context of Israeli-Palestinian conflict.

¹¹ Ibid. p.22, Chart.9.

Despite little attention from the external world, intermittent armed violence is claiming a number of lives in Gaza and Southern Israel. A UN survey shows that, since the cease-fire in January 2009, a total of 51 Palestinians were killed and 121 injured, as well as 1 Israeli killed and 7 injured in the context of the Israeli-Palestinian conflict (in Gaza and Southern Israel until October 2009).¹² This means that every month on average more than 5 persons have been killed and 12 injured since the end of the Gaza conflict.

These statistics raise a stark question: is armed conflict still continuing in Gaza? Although it seems clear that the Gaza conflict in late 2008 can be qualified as an armed conflict, is that also the case in the subsequent period of time? Whether or not a particular situation amounts to armed conflict directly affects the applicability of International Humanitarian Law (IHL), or Law of Armed Conflict (LOAC). IHL protects civilians and those being “out of combat” (*hors de combat*) due to wound or sickness, from the negative effects of war. IHL is applicable to situations of armed conflict and occupation. Although it is recently submitted that the difference between the legal protection regimes in wartime and in peacetime has increasingly converged,¹³ there still exist some differences.¹⁴ Consequently, it is still essential to distinguish the situation of armed conflict from other situations.

This short article will examine whether the prevailing situation after the Gaza conflict in 2008-2009 amounts to armed conflict or not. Chapter 2 describes the political and the legal backgrounds of the Israeli-Palestinian conflict. Chapter 3 will clarify the difference between international and non-international armed conflict. This will be followed by an analysis as to which category the Gaza conflict can be classified. Finally, the status of armed conflict in Gaza will be examined, based on the criteria of organization and intensity.

¹² UN OCHA, occupied Palestinian territory, The Humanitarian Monitor, October 2009, p.8.

¹³ Cordula Droegge “Elective affinities?: Human rights and humanitarian law”, International Review of the Red Cross, Vol.90, No.871, September 2008.

¹⁴ Ibid. See also Sylvain Vité, “The interrelation of the law of occupation and economic, social and cultural rights: the examples of food, health and property”, International Review of the Red Cross, Vol.90, No.871, September 2008, and Françoise J. Hampson, “The relationship between international humanitarian law and human rights law from the perspective of a human rights treaty body.” International Review of the Red Cross, Vol.90, No.871, September 2008.

I. Political and Legal Background of Israeli-Palestinian Conflict

1. Brief History of Israeli-Palestinian Conflict

The conflict between Israel and Palestine has a history of more than half a century. The Jewish population, who migrated to the biblical land of Israel and later declared its independence as a State in 1948, based their actions on the expiring British Mandate and the UN resolution on the Partition Plan of Palestine.¹⁵ The declaration of independence triggered a declaration of war by Arab countries against Israel (the 1948 Arab-Israeli War). Israel and Arab countries fought again in 1967 (Six Day War), resulting in Israel's occupation of the West Bank including East Jerusalem, the Gaza Strip, the Syrian Golan Heights and the Egyptian Sinai Peninsula.¹⁶ The UN Security Council adopted the landmark resolution 242, calling for "[w]ithdrawal of Israel armed forces from territories occupied in the recent conflict" and recognizing "respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area" (the so-called "land-for-peace" principle). It was not until the 1990's that the peace process between Israel and Palestine commenced. In 1993, Israel and the Palestine Liberation Organization (PLO) signed the Declaration of Principles on Interim Self-Government Arrangements (Oslo Accord), which recognized their mutual legitimate and political rights, and also agreed on the five-year transitional period upon commencement of the withdrawal from the Gaza Strip and the Jericho area. The following year, the Palestinian Authority (PA) was established by the Agreement on the Gaza Strip and the Jericho Area (Cairo Agreement). Although this agreement stipulated Israel's disengagement from the Gaza Strip within three weeks, the withdrawal had not been implemented until 2005, long after the collapse of the Oslo peace process. The absence of Israeli military authority in Gaza caused another problem, namely rocket fire. According to the Intelligence and Terrorism Information Center in Israel,¹⁷ the number of rocket fire dramatically increased from 179 in 2005 (the year of disengagement) to 946 in 2006. After the Gaza Strip was taken over by Hamas, the number further jumped from 783 in 2007 (the year of takeover) to 1730 in 2008. Currently, the Palestinian territory is politically divided into the PA-ruled West Bank and the Hamas-ruled Gaza. At present, the reconciliation process between Hamas and Fatah (a leading party of the PA) is at a stalemate.

¹⁵ United Nations General Assembly Resolution 181 (II). Future Government of Palestine.

¹⁶ Israeli Parliament (*Knesset*) adopted its Basic Law in 1980 and Golan Heights Law in 1981, which annexed East Jerusalem and the Golan Heights. Israel withdrew from the Sinai Peninsula in accordance with 1979 Egyptian-Israeli Peace Treaty.

¹⁷ Intelligence and Terrorism Information Center, at the Israel Intelligence Heritage & Commemoration Center (IICC), Summary of rocket fire and mortar shelling in 2008.

2. Legal Status of the Palestinian Territory

Whether or not a territory falls under belligerent occupation is an important question for the legal protection of the civilian population therein. For instance, the Fourth Geneva Convention¹⁸ (GCIV) specifically provides for the protection of people in occupied territory. It offers extensive legal protection to civilians against possible abuse of power by occupying forces, such as deportation (Art.49), forced labor (Art.51), deprivation of foods and medical supply (Art.55), and abuse of legal authority (Arts.64-78). Before addressing the question on the occupation of Gaza, the following section briefly reviews the IHL regime applicable to the Palestinian territory as a whole, mainly focusing on the West Bank.

The Israeli Government does not consider the Palestinian territory as an “occupied” territory, but “disputed” territory.¹⁹ It argues that although customary international law relating to belligerent occupation, such as the Hague Regulations,²⁰ applies to the territory, the GCIV, which in Israel’s opinion has not yet attained customary law status, does not apply to the Palestinian territory. As a consequence, the Government officially rejects *de jure* applicability of the GCIV to the Palestinian territory, whereas it promises to adhere to “humanitarian provisions” of the Geneva Conventions on a *de facto* basis.²¹ Israel has not specified which provisions are “humanitarian” in their nature.²² Similarly, the Israeli Supreme Court, sitting as the High Court of Justice (HCJ), has never officially pronounced the territory as occupied,²³ but in fact has applied the GCIV in many cases on a *de facto* basis.²⁴

On the contrary, the Palestinian side argues for the full applicability of the

¹⁸ Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

¹⁹ Government of Israel, Disputed Territories: Forgotten Facts About the West Bank and Gaza Strip, 1 February 2003, p.5.

²⁰ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.

²¹ High Court of Justice (HCJ), Ajuri v. The Commander of IDF Forces in the West Bank, 7015/02, para.13. English translation retrieved from: http://elyon1.court.gov.il/Files_ENG/02/150/070/A15/02070150.A15.pdf (accessed 6 April 2010)

See also, Meir Shamgar, “The Observance of International Law in the Administered Territories”, Israel Yearbook on Human Rights, Vol.1, 1971, p.266.

²² Grant T. Harris, “Human Rights, Israel, and the Political Realities of Occupation”, Israel Law Review, Vol.41, 2008, note.25.

²³ Roy S. Schondorf, “The Targeted Killings Judgment: A Preliminary Assessment”, Journal of International Criminal Justice, Vol.5, Issue 2, p.305.

²⁴ Yoram Dinstein, “The International Legal Status of the West Bank and the Gaza Strip-1998”, Israel Yearbook on Human Rights, Vol.28, 1998, p.39.

GCIV to its territory.²⁵ Most States, the International Court of Justice (ICJ), the ICRC, as well as the academic community in general support the Palestinian view. The UN General Assembly²⁶ and the Security Council²⁷ have adopted resolutions that recognize the Israeli occupation. The ICJ also found in its Advisory Opinion that “[u]nder customary international law, these were therefore occupied territories in which Israel had the status of occupying Power”.²⁸ It also found “that the Convention [was] applicable in the Palestinian territories before the conflict lay to the east of the Green Line and which, during that conflict, were occupied by Israel...”²⁹ Moreover, the Conference of High Contracting Parties to the Fourth Geneva Convention on 5 December 2001 adopted a declaration which “reaffirm[ed] the applicability of the Convention to the Occupied Palestinian Territory, including East Jerusalem.”³⁰ In this Conference, the ICRC also issued a statement that “the ICRC has always affirmed the de jure applicability of the Fourth Geneva Convention to the territories occupied since 1967 by the State of Israel, including East Jerusalem.”³¹ The academic community also shares the view that the Palestinian territory is under Israeli occupation,³² although

²⁵ In a Written Statement on the occasion of the advisory proceeding in the International Court of Justice (ICJ), it emphasized that “[t]he proper characterization of Israel's current status in respect of this territory remains that of an occupier,” (Written Statement submitted by Palestine, International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Request for an Advisory Opinion), 30 January 2004, p.156, para.346.) and therefore “[i]nternational humanitarian law is binding upon Israel in respect of its occupation of the Occupied Palestinian Territory, including East Jerusalem.”(p.181, para.397.)

²⁶ A recent resolution titled “Applicability of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949, to the Occupied Palestinian Territory, including East Jerusalem, and the other occupied Arab territories” (UN Doc. A/RES/64/92), adopted on 10 December 2009, “1. [r]eaffirms that the Geneva Convention ... is applicable to the Occupied Palestinian Territory, including East Jerusalem, and other Arab territories occupied by Israel since 1967.”

²⁷ Resolution 1435 (2002), adopted by the Security Council at its 4614th meeting, on 24 September 2002 “3. [d]emands also the expeditious withdrawal of the Israeli occupying forces from Palestinian cities.”

²⁸ Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports, 2004, p. 167, para.78.

²⁹ *Ibid.* p.177, para.101.

³⁰ Pierre-Yves Fux et Mirko Zambelli “Mise en œuvre de la quatrième Convention de Genève dans les territoires palestiniens occupés: historique d'un processus multilatéral (1997-2001). Annex 1: Conference of High Contracting Parties to the Fourth Geneva Convention. Geneva, 5 December 2001” Revue internationale de la Croix-Rouge, No. 847, 30 Septembre 2002, p.683.

³¹ *Ibid.*

³² For example, David Kretzmer, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?”, European Journal of International Law, Vol.16, No.2, 2005, p.205. Ardi Imseis, “On the Fourth Geneva

there are varying degrees of opinion on this issue.³³

3. Legal Status of the Gaza Strip

Israel withdrew its military forces and settlers from the Gaza Strip in August 2005, which left an important legal question: whether the situation in Gaza amounts to belligerent occupation. Although there is no longer military presence, Israel has maintained a strict blockade in the Gaza Strip since Hamas's takeover in June 2007.³⁴ The humanitarian consequences caused by the blockade are significant, with some reports suggesting that approximately 75 percent of Gaza's population (more than 1.1 million people) is without proper access to food.³⁵

Former Israeli Prime Minister Ariel Sharon, whilst addressing the UN General Assembly a few weeks after the completion of disengagement, declared "[t]he end of Israeli control over and responsibility for the Gaza Strip".³⁶ The Israeli Government

Convention and the Occupied Palestinian Territory", Harvard International Law Journal, Vol. 44, No. 1, 2003, pp.92-100. Adam Roberts, "Prolonged Military Occupation: the Israeli-Occupied Territories since 1967", American Journal of International Law, Vol. 84, 1990, p.66. Grant T. Harris, "Human Rights, Israel, and the Political Realities of Occupation", Israel Law Review, Vol. 41, 2008, p.100. Yehuda Z. Blum, "The Missing Reversioner: Reflections on the Status of Judea and Samaria", Israel Law Review, Vol.3, No.2, April 1968, p.294. Yoram Dinstein, "The International Legal Status of the West Bank and the Gaza Strip-1998", Israel Yearbook on Human Rights, Vol.28, 1998, p.39.

³³ Such issues include the validity of Article 6 (3) ("In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of the present Convention: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143."). Roberts (1990) considers this clause as no longer valid, while Dinstein (1998) argues "only a partial application of the Geneva Convention" (p.43) because of this provision.

International legal effect of the Oslo Accord on the occupation has also been disputed. Main points of controversy are summarized in: "Review of the Applicability of International Humanitarian Law to the Occupied Palestinian Territory", Policy Brief, July 2004, Program on Humanitarian Policy and Conflict Research, Harvard University, pp.9-10. See also Peter Malanczuk, "Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law", European Journal of International Law, Vol.7, No.4, 1996, pp.494-498. Now the discussion seems to have become rather theoretical, because of the collapse of the implementation process.

³⁴ UN OCHA, occupied Palestinian territory, Locked in - The Humanitarian Impact of Two Years of Blockade on the Gaza Strip, August 2009.

³⁵ Ibid.

³⁶ Website of Israel Ministry of Foreign Affairs: PM Sharon addresses the United Nations General Assembly 15 Sep 2005.

<http://www.mfa.gov.il/MFA/Peace+Process/Key+Speeches/PM+Sharon+addresses+the+UN+General+Assembly+15-Sep-2005.htm> (accessed 6 April 2010)

maintains its position that Israel neither occupies nor controls the territory.³⁷

Other States disagreed with Israel's view. A resolution was adopted at the ninth Special Session of UN Human Rights Council, which convened in response to the Gaza conflict, referring to "the massive ongoing Israeli military operation in the Occupied Palestinian Territory, particularly in the occupied Gaza Strip..."³⁸ The Fact Finding Mission established by this resolution also confirmed that "the Gaza Strip remains occupied by Israel".³⁹ Moreover, in response to the Gaza conflict in 2006, the Security Council voted on a draft resolution submitted by Qatar, which condemned "the military operations being carried out by Israel, the occupying Power, in the Gaza Strip".⁴⁰

The HCJ proposed an interesting compromise between the positions advocated by the Israeli Government and the majority's view expressed by opposing nations. In *Bassiouni v. Prime Minister* in January 2008, the Court found that "since September 2005 Israel no longer has effective control over what happens in the Gaza Strip".⁴¹ Consequently, it concluded that Israel did not have any responsibility arising from the law of occupation. Nevertheless, the Court made the following statement:

In the prevailing circumstances, the main duties of the State of Israel relating to the residents of the Gaza Strip derive from the state of armed conflict that exists between it and the Hamas organization that controls the Gaza Strip; these duties also derive from the degree of control exercised by the State of Israel over the border crossings between it and the Gaza Strip, as well as from the relationship that was created between Israel and the territory of the Gaza Strip after the years of Israeli military rule in the territory, as a result of which the Gaza Strip is currently almost completely dependent upon the supply of electricity from Israel.⁴²

³⁷ The Government of Israel, The Operation in Gaza – Factual and Legal Aspects, July 2009, p.11, para.30.

³⁸ Preambular paragraph 12. (UN Doc. A/HRC/S-9/L.1.)

³⁹ Goldstone Report, p. 73, para.276.

⁴⁰ Preambular paragraph 4. (UN Doc. S/2006/878) This draft resolution garnered 10 votes in favor, but was vetoed by the United States. Yet the U.S., as well as other 4 abstaining countries (Denmark, Japan, Slovakia, and the United Kingdom), did not mention this paragraph as a reason not to support the draft resolution. (See UN Doc. S/PV.5565.)

⁴¹ Al-Bassiouni v. Prime Minister, 9132/07, para.12.

English translation retrieved from:

http://elyon1.court.gov.il/Files_ENG/07/320/091/n25/07091320.n25.pdf (accessed 6 April 2010)

⁴² Ibid. In another case, the court states "because of the unique situation that prevails

These three legal sources seem to be comprised of (1) IHL provisions applicable to the situation of armed conflict, (2) some Human Rights obligations which are applicable extraterritorially and to the situation where the Government of Israel does not have “effective control” over the territory, and (3) some obligations relating to historical connection between Israel and the Gaza Strip.⁴³

In sum, the legal status of the Gaza Strip is more controversial than that of the West Bank, since Israel’s capacity to exercise direct control over Gaza is relatively weak. There is no Israeli military presence within the Gaza Strip. Moreover, the Hamas authority in Gaza often wages wars against Israel. These elements put in doubt whether the Gaza Strip is occupied or not.

This question itself does not fall within the scope of this article, but if the law of occupation does not apply to the Gaza Strip, then the legal regime applicable to Gaza would be very complicated. Of the three legal sources which the HCJ found applicable to Gaza, only “(1) IHL provisions applicable to the situation of armed conflict” has sufficient basis as positive international law.⁴⁴ Even for this law to be applied, an armed conflict must exist. Consequently, whether or not the situation of armed conflict exists in the Gaza Strip will significantly affect the legal protection of the population therein. The following section will examine whether the ongoing situation in Gaza can be characterized as an armed conflict.

II. Legal Analysis

1. Differences between International and Non-International Armed Conflict

IHL distinguishes between two types of armed conflict: international armed conflict (IAC) and non-international armed conflict (NIAC). Depending on the type of armed conflict, different IHL rules apply. Although the difference between those two legal regimes is diminishing,⁴⁵ there are some areas where the gap between them

there, the State of Israel has certain duties to the inhabitants of the Gaza Strip.” See CrimA 6659/06 Anonymous v. State of Israel, 11 June 2008, para.11.

English translation retrieved from:

http://elyon1.court.gov.il/Files_ENG/06/590/066/n04/06066590.n04.pdf (accessed 6 April 2010)

⁴³ Yuval Shany, “The Law Applicable to Non-Occupied Gaza: A Comment on Bassiouni v. Prime Minister of Israel”, Research Paper No.13-09, International Law Forum of the Hebrew University of Jerusalem, 25 February 2009.

⁴⁴ Ibid. pp.10-18. It is not clearly established whether human rights law applies to a situation where effective control does not exist.

⁴⁵ See Emily Crawford, “Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts”, Leiden

cannot be overcome.⁴⁶

One of these areas would be the threshold of armed conflict. According to a commentary of the Geneva Conventions prepared by the ICRC, the situation is qualified as IAC when there is “[a]ny difference arising between two States and leading to the intervention of members of the armed forces. ... It makes no difference how long the conflict lasts, or how much slaughter takes place. The respect due to human personality is not measured by the number of victims. Nor, incidentally, does the application of the Convention necessarily involve the intervention of cumbersome machinery.”⁴⁷ This interpretation by the ICRC implies very low threshold of IAC.

In contrast, the threshold of an NIAC is generally considered to be higher. Case law from the International Criminal Tribunal for former Yugoslavia (ICTY) and Rwanda (ICTR) established that an NIAC does not include situations of internal disturbances and tensions,⁴⁸ and that an NIAC could be defined as “protracted armed violence between governmental authorities and organized armed groups.”⁴⁹ This definition has been interpreted to include two criteria: intensity of violence and organization of armed groups. Higher intensity is required for an NIAC because States are reluctant to admit the existence of an armed conflict within their territories. Applying IHL to the situation within a State indicates the weakness of territorial control by the Government. A mere internal violence with low intensity does not qualify as an NIAC. Moreover, for there to be an NIAC, the organization of armed group must be such a level that it can conduct concerted military operations. This “organization” criterion is also important for the distinction between armed conflict and sporadic acts

Journal of International Law, Vol.20, No.2, 2007. Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law: Volume 1, Rules, Cambridge University Press, 2005.

⁴⁶ See Ibid. rules.3, 4, 41, 49, 51, 106, 107, 108, 114, 130.

⁴⁷ ICRC, Commentary, Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949. Part I: General provisions, Article 2- Application of the Convention. Retrieved from:

<http://www.icrc.org/IHL.NSF/COM/380-600005?OpenDocument> (accessed 6 April 2010)

⁴⁸ Human Rights Watch, Genocide, War Crimes, and Crimes Against Humanity: Topical Digests of the Case Law of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia, 2004, pp.52-53.

⁴⁹ Prosecutor v. Dusko Tadić, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, IT-94-1-AR72, para.70. This criterion has been repeatedly referred by judgements of ICTY itself. It is also incorporated in the Rome Statute of the International Criminal Court. Art.8 (2) (f). See Knut Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court - sources and commentary, ICRC, 2003, p.441. Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court, Nomos Verlagsgesellschaft, 1999, p.285.

of violence which is often conducted by disorganized mobs. These two requirements are further discussed below.

2. Nature of Conflict between Israel and Hamas in Gaza

Whether international or non-international, the fighting that took place in Gaza in late-2008 can be undoubtedly classified as an “armed conflict.” As mentioned at the introduction of this article, the magnitude of the Gaza conflict was so immense that none of the conflict parties and third parties denied the existence of armed conflict. However, considering its high-profile nature, one may find it odd that there were few discussions on the legal characterization of this conflict. The UN Security Council,⁵⁰ the General Assembly,⁵¹ the Fact Finding Mission on the Gaza Conflict established by the Human Rights Council,⁵² international human rights NGOs,⁵³ and the ICRC⁵⁴ did not determine whether the Gaza conflict was IAC or NIAC. Given the political sensitivity of the Israeli-Palestinian conflict and the right of self-determination of Palestinians, it would be difficult for the international community to imply the lack of statehood of Palestine, by classifying the Gaza conflict as NIAC.

However, since the 9/11 event and the subsequent American use of force in Afghanistan, there has been a huge discussion over the nature of armed conflict between a State and non-State armed group outside the State’s territory.⁵⁵ The majority view seems that a battle between a State and a non-State armed group should be classified as an NIAC.⁵⁶ The main difference between an IAC and an NIAC comes

⁵⁰ Resolution 1860 (2009), adopted by the Security Council at its 6063rd meeting, on 8 January 2009.

⁵¹ Resolution adopted by the General Assembly, Tenth Emergency Special Session, 34th & 35th Meetings (UN Doc. A/ES-10/L.21/Rev.1)

⁵² Goldstone Report, pp.75, paras.281-283.

⁵³ Amnesty International, op.cit., p.80. Human Rights Watch, *White Flag*, p.51.

⁵⁴ ICRC, News Release 08/250, Gaza: civilians at risk as attacks continue, 31 December 2008.

⁵⁵ Derek Jinks, “September 11 and Laws of War”, Yale Journal of International Law, Vol. 28, 2003. Roy S.Schondorf, “Extra-State Armed Conflicts: Is There A Need For A New Legal Regime?” New York University Journal of International Law and Politics. Vol.37, No.1, December 2005.

⁵⁶ Derek Jinks, op.cit., p.38-41. Resolution of the Institute of International Law, The Application of International Humanitarian Law and Fundamental Human Rights, in Armed Conflicts in which Non-State Entities are Parties. On the Legal Aspects of ‘Targeted Killings’: Review of the Judgment of the Israeli Supreme Court, Policy Brief, May 2007, Program on Humanitarian Policy and Conflict Research (HPCR), Harvard University, p.7. Marco Sassoli, “Transnational Armed Groups and International Humanitarian Law” HPCR Occasional Paper Series, Harvard University, Winter 2006, p.9.

from the different legal status of the parties to the conflict itself, rather than the cross-border nature of the conflict.⁵⁷ In case of the Israeli-Palestinian conflict, because Hamas cannot be seen as a government representing a State, the armed conflict between it and Israel should be classified as NIAC.⁵⁸ The application of IHL only depends on the facts on the ground and not based on political considerations.

Even if the Israel-Hamas war is characterized as an IAC according to the HCJ,⁵⁹ some authors were of the view that some level of intensity is required even in an IAC, which disagreed with ICRC's interpretation.⁶⁰ The Initial Report on the Meaning

⁵⁷ An ICRC representative in drafting the Additional Protocol II to the Geneva Conventions made a Statement: "a non-international armed conflict differed from an international armed conflict because of the legal status of the subjects of law involved: in non-international armed conflict the legal status of the parties was fundamentally unequal..." Haward. S. Levie, The Law of Non-International Armed Conflict: Protocol II to the 1949 Geneva Conventions, Martinus Nijhoff Publishers, Dordrecht, 1987, p.29, para.13. See also Initial Report on the Meaning of Armed Conflict in International Law, Prepared by the International Law Association (ILA), Committee on the Use of Force, p.6. ICRC, Interpretive Guidance on the notion of direct participation in hostilities under International Humanitarian Law, pp.23-24.

⁵⁸ One may also argue that conducts of Hamas are attributable to Syria or Iran, but it is difficult to find, even during the Gaza conflict, the evidence to meet "overall control" test of attribution, "going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations." (Prosecutor v. Duško Tadić, Judgement, No.94-1-A, 15 July 1999, para.145.) Even the Government of Israel did not argue such substantial support was provided by Iran and Syria. See Government of Israel, The Operation in Gaza, 27 December 2008 – 18 January 2009: Factual and Legal Aspects, July 2009, paras.40, 59, 75.

Another possibility is to assume that the armed conflict between Hamas and Israel as "armed conflicts in which peoples are fighting against colonial domination and alien occupation ... in the exercise of their right of self-determination", as stipulated in Art.1 (4) of the Additional Protocol I to the Geneva Conventions, which is applicable to IAC. The first difficulty is that Israel is not a State party to this Protocol, and this provision has not attained the status of customary international law. (Christopher Greenwood, "Customary Law Status of the 1977 Geneva Protocols", in Humanitarian Law of Armed Conflict: Challenges Ahead, pp.111-112. Roy S. Schondorf, "The Targeted Killings Judgment: A Preliminary Assessment", Journal of International Criminal Justice, Vol.5, Issue 2, p.304.). Zimmermann observed that "[i]t might be said that, as of today, the rule contained in article 1 para. 4 of the First Add. Prot. has become a generally binding rule of customary international law with the possible exception of those countries which have persistently objected to the formation of such rule including *inter alia* Israel." (Otto Triffterer (ed.), Commentary on the Rome Statute of the International Criminal Court, Nomos Verlagsgesellschaft, 1999, p.266.) Second, it seems difficult to regard Hamas as "[t]he authority representing a people" (Art.96 (3)) of Palestine.

⁵⁹ The Public Committee against Torture in Israel, v. The Government of Israel, 769/02, paras.16-18. English translation retrieved from: http://elyon1.court.gov.il/Files_ENG/02/690/007/A34/02007690.A34.pdf (accessed 6 April 2010)

⁶⁰ Andreas Paulus and Mindia Vashakmadze, "Asymmetrical war and the notion of

of Armed Conflict in International Law, prepared by the International Law Association, Committee on the Use of Force (hereinafter ILA Report) concludes that “following the adoption of the 1949 Conventions, conflicts were commonly classified on the basis of the intensity of the fighting and not whether the armed forces of the parties to the Conventions were engaged.”⁶¹ If this is the case, the intensity of violence also matters in case of an IAC, though it may be possible that the required threshold for IAC is still lower than that of an NIAC.

Based on the assumption that the fight between Israeli forces and Hamas is non-international, when does the situation turn into an armed conflict? Are Israeli intermittent airstrikes against Gaza sufficient to trigger an armed conflict? Does the frequent launching of Qassam rockets from Gaza, which often fail to hit their targets,⁶² meet the requirement of intensity for an armed conflict?

3. Does Armed Violence in Gaza meet the “Protracted Armed Violence” Test?

As mentioned above, the “protracted armed violence” test is regarded as the formal threshold that distinguishes a situation of war from mere internal violence. Decisions made by international criminal tribunals do not necessarily provide clear definition of “protracted armed violence.”⁶³ However, the absence of clear definition is understandable, because once there is a clear definition and the scope of armed conflict, there will certainly be a gap, which does not neatly fit into the definition. The definition of armed conflict should be as holistic as possible, so that the protection of IHL should be extended as far as possible. This is analogous to the fact that IHL also applies to the situation of belligerent occupation without any armed resistance.⁶⁴ In the *Limaj* case, the ICTY Trial Chamber stated that the assessment of existence of armed conflict should be “on a case-by-case basis.”⁶⁵

armed conflict – An attempt at a conceptualization” International Review of the Red Cross, No 873, 31 March 2009, p.101. Mary Ellen O’Connell, “Defining Armed Conflict”, Journal of Conflict and Security Law, Vol. 13, 2009, p.397.

⁶¹ Initial Report on the Meaning of Armed Conflict in International Law, Prepared by the International Law Association (ILA), Committee on the Use of Force, p.10. (hereinafter ILA Report)

⁶² Intelligence and Terrorism Information Center at the Israel Intelligence Heritage & Commemoration Center (IICC), “Rocket threat from the Gaza Strip, 2000-2007”, December 2007, p.17.

⁶³ Prosecutor v. Ljube Boškoski, Trial Chamber Judgement, IT-04-82-T, 10 July 2008. (hereinafter Boškoski case)

⁶⁴ GCIV, Art.2 (2) “The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.”

⁶⁵ Prosecutor v. Fatmir Limaj et al., Trial Chamber Judgement, IT-03-66-T, 30

The following sections will assess whether the armed violence in Gaza fulfills the specific criteria of an armed conflict, which can be found in the jurisprudence of the ICTY. The reason for relying mainly on the ICTY case law is because its expertise on IHL issues is much better than domestic courts or human rights bodies.⁶⁶ It is a specialized international criminal tribunal designated for the prosecution of IHL violations. ICTY cases such as *Tadić*, *Haradinaj*, *Boškoski* provided in depth analyses on the issue of threshold of an NIAC.⁶⁷

(i) Organization

As discussed above, the *Tadić* case defined an armed conflict as protracted armed violence between governmental authorities and “organized armed groups or between such groups within a State.”⁶⁸ Two requirements of NIAC are derived from this definition: organization and intensity. The ILA Report, after reviewing various decisions of courts and State practices regarding the threshold of armed conflict, concluded that “[t]he criteria of organisation and intensity are clearly related and should be considered together when assessing whether a particular situation amounts to an armed conflict”.⁶⁹

As for the requirement of organization, required degree of organization has not

November 2005, para. 90.

⁶⁶ The ICTR is also prominent specialized tribunal for war crimes and other international crimes, but as the armed conflict in Rwanda in 1994, in which the ICTR has its jurisdiction, obviously met the requirement of protracted armed violence test, it did not have to look closely into the issue of threshold of armed conflict. (See The Prosecutor v. Clément Kayishema and Obed Ruzindana, Judgement and Sentence, ICTR-95-1-T, 21 May 1999, para. 597. (“The Trial Chamber finds that this is not a question that need be addressed. It has been established, beyond a reasonable doubt, that there was an armed conflict, not of an international character, in Rwanda.”)) Consequently, the case law of ICTR does not provide sufficient implications on this issue. In contrast, the jurisdiction of ICTY “shall extend to the territory of the former Socialist Federal Republic of Yugoslavia” which fell apart into 7 countries (including Kosovo) in the course of conflict, and “shall extend to a period beginning on 1 January 1991.” (Art.8 of the Statute) Thus, the ICTY have examined various types and phases of armed violence in former Yugoslavia.

⁶⁷ For example, *Haradinaj* case “sets a precedent for what falls short of non-international armed conflict” in the jurisprudence of ICTY. (Anthony Cullen and Marko Divac Öberg, “Prosecutor v. Ramush Haradinaj et al.: The International Criminal Tribunal for the Former Yugoslavia and the Threshold of Non-International Armed Conflict in International Humanitarian Law”, ASIL Insights, Volume 12, Issue 7, 23 April 2008.)

⁶⁸ Prosecutor v. Duško Tadić, Appeals Chamber Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, op.cit., para.70.

⁶⁹ ILA Report, p.22.

been specifically defined in legal texts or in jurisprudence.⁷⁰ Yet the case law of ICTY has gradually clarified some core elements of “organization” criterion. In *Boškoski* case, the Trial Chamber confirmed “five broad groups” as an indicator of organization: (1) the presence of a command structure, (2) the ability to carry out operations in an organized manner, (3) the level of logistics, (4) the level of discipline and the ability to implement the basic obligations of Common Article 3 of the Geneva Conventions, and (5) the ability to speak with one voice,⁷¹ although “none of which are, in themselves, essential to establish whether the ‘organization’ criterion is fulfilled”.⁷² It should be emphasized that the fulfillment of these requirements neither confers the combatant status to an armed group, nor deprives its members of the civilian immunity “unless and for such time as they take a direct part in hostilities,” as far as IHL is concerned.⁷³ This means that in order to determine whether the armed conflict exist in the Israel-Palestine context, it is necessary to analyze the structure of Hamas in the light of these five groups.

Hamas has its own military wing: Ezzedeen Al-Qassam Brigades.⁷⁴ Hamas was founded in 1987, by leaders of the Muslim Brotherhood in the Gaza Strip. It has its own charter⁷⁵ defining their objectives and activities. While it had been refusing to recognize the Palestinian peace process with Israel, Hamas decided to participate in the Palestinian municipal elections in 2004, which resulted in an unexpected Hamas victory. However, the attempt to form a Hamas-headed national unity government failed, and

⁷⁰ *Boškoski case*, para.194.

⁷¹ *Ibid.*, paras.199-203

⁷² *Prosecutor v. Ramush Haradinaj*, Trial Chamber Judgement, IT-04-84-T, 3 April 2008, para 60. (hereinafter *Haradinaj case*)

⁷³ Additional Protocol I to the Geneva Conventions, Article 51 (3). Additional Protocol II to the Geneva Conventions, Article 13 (3). The ICRC recently published a guideline for interpreting the notion of “direct participation in hostilities.” The guideline suggested that mere membership to an organized armed group does not jeopardize the protection afforded to civilian. They lose the protection when they assume “continuous combat function.” (ICRC, *Interpretive Guidance on the notion of direct participation in hostilities under International Humanitarian Law*, p.33.) The category of “continuous combat function” was invented to address the situation, which can often be found in Gaza, where civilians take part in hostilities on a daily basis, but they benefit from civilian immunity as soon as they lay down their weapons.

⁷⁴ There are several other armed groups active in the Gaza Strip (See footnote 1. In each case of rocket fire and shelling, it is not necessarily clear from which organization they are fired. See Intelligence and Terrorism Information Center, at the Israel Intelligence Heritage & Commemoration Center (IICC), “Summary of rocket fire and mortar shelling in 2008”) but this article focuses on the organization and acts of Hamas.

⁷⁵ English translation is available at Yale Law School, Lillian Goldman Law Library, “The Avalon Project : Hamas Covenant 1988”

http://avalon.law.yale.edu/20th_century/hamas.asp (accessed 6 April 2010)

Hamas took over the Gaza Strip in 2007. According to a report of the International Crisis Group, Hamas has 7,000-10,000 full time forces with more than 10,000 reserves.⁷⁶

Though the organizational structure of Hamas remains unclear, at least they have leaders and high ranked personnel who gave orders to their subordinates.⁷⁷ (*The presence of a command structure*) They conduct military operations in individual cells. Hamas proved its capacity to adjust its strategy according to the phases of Gaza conflict and even to coordinate with other brigades in Gaza.⁷⁸ (*The ability to carry out operations in an organized manner*) Hamas has “a substantial weapons inventory of light automatic weapons and grenades, improvised rockets, mortars, bombs, suicide belts and explosives.”⁷⁹ It also conducts military training within the Gaza Strip or in other countries such as Syria or Iran. (*The level of logistics*) Hamas has a poor record of implementing IHL and punishing its violation during and after the Gaza conflict.⁸⁰ Nevertheless, the *Boškoski* case stated that “so long as the armed group possesses the organisational *ability* to comply with the obligations of international humanitarian law, even a pattern of such type of violations would not necessarily suggest that the party did not possess the level of organisation required to be a party to an armed conflict”.⁸¹ In addition, Hamas also received training on IHL conducted by the ICRC.⁸² (*The level of discipline and the ability to implement the basic obligations of Common Article 3 of the Geneva Conventions*) While the al-Qassam Brigade sometimes acts independently of its political wing, the brigade itself has its own website and expresses its own policy.⁸³ (*The ability to speak with one voice*) Based on the facts and analysis above, it seems reasonable to conclude that Hamas meets the requirement of an organization.

(ii) Intensity

As for the criterion of intensity, the ICTY Trial Chamber in the *Boškoski* case enumerated the elements for assessing the intensity of conflict.

⁷⁶ International Crisis Group, Gaza's Unfinished Business, Middle East Report N°85 23 April 2009, note 20.

⁷⁷ Australian National Security, “Hamas's Izz al-Din al-Qassam Brigades” http://www.ema.gov.au/agd/WWW/nationalsecurity.nsf/Page/What_Governments_are_doing_Listing_of_Terrorism_Organisations_Hamas (accessed 6 April 2010)

⁷⁸ International Crisis Group *op.cit.*, p.2.

⁷⁹ Australian National Security, *op.cit.*

⁸⁰ Goldstone Report, p.394-396, paras.1836-1842.

⁸¹ Boškoski case, para.205.

⁸² BBC, Red Cross gives war lessons in Gaza, 19 November 2007.

http://news.bbc.co.uk/2/hi/middle_east/7102248.stm (accessed 6 April 2010)

⁸³ Australian National Security, *op.cit.*. Brigade's website is: <http://www.qassam.ps/>

Various indicative factors have been taken into account by Trial Chambers to assess the “intensity” of the conflict. These include the seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council, and whether any resolutions on the matter have been passed. Trial Chambers have also taken into account in this respect the number of civilians forced to flee from the combat zones; the type of weapons used, in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles; the blocking or besieging of towns and the heavy shelling of these towns; the extent of destruction and the number of casualties caused by shelling or fighting; the quantity of troops and units deployed; existence and change of front lines between the parties; the occupation of territory, and towns and villages; the deployment of government forces to the crisis area; the closure of roads; cease fire orders and agreements, and the attempt of representatives from international organisations to broker and enforce cease fire agreements.⁸⁴

As the Trial Chamber used the term “include”, this extensive list of indicative factors is not exhaustive. While the Chamber in this case found the existence of an armed conflict during the entire period of indictment (from January to September 2001), it also pointed out some negative indicators for the existence of an armed conflict. These elements include; relatively few casualties (168 for the highest estimates of total number in 2001); relatively small scale material damage to property; small scale of armed clashes; and indication of applying a law enforcement framework by the government security force.⁸⁵ Nevertheless, the Chamber gave a “significant consideration” to “the extent of the civil disruption being experienced as evidenced by the extensive displacement of persons from their homes and villages, at least 64,000 of whom became refugees and 70,000 of whom were internally displaced.”⁸⁶ The sequence of events in this case is summarized in Table 1.

⁸⁴ Ibid. para.177. Footnotes omitted.

⁸⁵ Boškoski case, paras.244-245.

⁸⁶ Ibid. para.248.

In the *Haradinaj* case, despite the indictment period from March to September 1998, the Trial Chamber found that armed conflict had existed only since 22 April 1998. It explained that before that date, there were only “isolated events followed by periods of relative calm.” The Chamber especially took into account the following factors: frequent shelling, the flight of civilians from the countryside, the daily clashes between the armed force and an armed group, unprecedented scale of deployment of the armed force and their participation in combat.⁸⁷ The sequence of events in this case is summarized in Table 2.

The timeline of violent incidents in the Gaza Strip is found in Table 3. Compared to the other two cases, it became clear that the degree of violence in Gaza is rather limited. The total number of the persons killed during whole 2009 was 77,⁸⁸ far fewer than the *Boškoski* case (168 persons were killed in 2001), which was described by the Trial Chamber as “relatively few casualties.” We cannot find a major spread of range or escalation of violence in the Gaza context. The UN Security Council discussed the Palestinian question periodically in 2009, but did not address each incident of violence in Gaza. Many Palestinian populations in Gaza were affected by the conflict, but not so many by the armed confrontation itself. While it is debatable whether Israel is an occupying power in Gaza or not, it does not have military presence in Gaza. This evidence indicates the lack of intensity required for an NIAC.

4. Other Arguments Indicating the Existence of Armed Conflict

(i) HCJ – International Armed Conflict

The HCJ in *The Public Committee against Torture in Israel, v. The Government of Israel*⁸⁹ in December 2006, found the existence of an international armed conflict since the first *intifada* in 1987. Two main reasons for this finding are (1) the armed conflict between an occupying power and the terrorists who come from the occupied area has an international character; (2) the military capability of terrorists is nowadays not less than that of a State.

It is however difficult to find support for this argument. Firstly, as Kretzmer pointed out, the application of law of belligerent occupation does not automatically internationalize the armed struggle of an occupied population.⁹⁰ As discussed above, the difference between IAC and NIAC comes from the difference of the legal status of

⁸⁷ *Haradinaj case*, para.99.

⁸⁸ Excluding January 2009. (the Gaza conflict was fought until 18 January 2009.)

⁸⁹ *The Public Committee against Torture in Israel, v. The Government of Israel*, *op.cit.*, paras.16-21.

⁹⁰ Kretzmer, *op.cit.*, pp.208-211.

conflict parties. Secondly, for the same reason, the high military capability of an armed group does not internationalize the armed conflict. If such a rule existed, States would have to treat “terrorists” with high military capacity as combatants who can legitimately participate in hostilities against the States. It seems unrealistic to assume that such a rule has been agreed by States as a binding norm. Moreover, the HCJ judgment reviewed the situation of the whole Palestinian territory, including the period of the first and the second intifadas, whereas this article merely focuses on the situation of the Gaza Strip after the end of the Gaza conflict. Consequently, the decision by the HCJ does not have direct relevance to the existence of an NIAC in Gaza.

(ii) ILA Report – Intensity-Protraction Relationship

The ILA Report suggested that limited severity of armed violence over an extended time period would satisfy the intensity requirement. It pointed out that “[t]he two concepts, intensity and protraction, are clearly linked and a lesser level of duration may satisfy the criterion if the intensity level is high. The reverse is also the case.”⁹¹ According to this argument, it may be argued that the protracted nature of the violence in Gaza would satisfy the intensity requirement of an NIAC.

However, the ILA Report cited para.49 of the *Haradinaj* case to support its argument, which clearly stated “[t]he criterion of protracted armed violence has therefore been interpreted in practice, including by the *Tadić* Trial Chamber itself, as referring more to the intensity of the armed violence than to its duration.” This sentence actually suggests the weak link between intensity and protraction. It puts the main emphasis on intensity rather than duration (or protraction).⁹² Although the *Haradinaj* case did refer to the “frequent shelling” and “daily clashes” as decisive factors to reach the threshold of armed conflict, there were “daily” clashes in Kosovo at that time, (see Table 2), while the violence in Gaza is far less frequent. Thus, the relationship between intensity and protraction remains unclear, and the armed violence in Gaza is not protracted enough to be regarded as an armed conflict.

(iii) ILA Report – Organization-Intensity Relationship

The ILA Report also states that “[i]t seems that the higher the level of organisation the less degree of intensity may be required and vice versa.”⁹³ This

⁹¹ ILA Report, p.23.

⁹² The Inter-American Commission on Human Rights found the existence of armed conflict lasted only 30 hours. (Juan Carlos Abella v. Argentina, Case 11.137, Report No. 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.98, Doc. 6 rev., 18 November 1997, para. 156.)

⁹³ Ibid., p.22.

argument can be interpreted as follows; since Hamas has a high organizational structure, even sporadic and less intensive armed violence in Gaza would amount to an NIAC.

Of course, if an armed group has strong organization and military capability, it is likely that the violence becomes intense. But it is not sufficient to meet the test of “protracted armed violence” just because the armed group is likely to incite high level of violence. A certain degree of violence should exist in reality, regardless of its capacity.⁹⁴

It is also difficult to find in the ICTY jurisprudence such inverse relationship between requirements of organization and intensity. If the requirement of organization had to be analyzed in the context of intensity of violence (or vice versa), it is impossible to examine one by one whether each requirement is fulfilled/satisfied or not. In the *Haradinaj* case, the Trial Chamber found that the requirement of organization had been already met earlier than 22 April 1998 (on that date the intensity requirement was met), before analyzing the intensity requirement.⁹⁵ In this judgment, like most other decisions of the ICTY, the Trial Chamber determined whether the organization requirement was fulfilled, regardless of how intensive the armed violence was, and vice versa. The jurisprudence of the ICTY has treated these two requirements as mutually independent elements.

Conclusion

Based on the above assessment, this article concludes that a situation of armed conflict does not exist between Israel and Hamas in the Gaza Strip. Although the military capability of Hamas is sufficient to meet the organization criterion, the sporadic and limited nature of armed violence in Gaza does not fulfill/satisfy the level required in the intensity test.⁹⁶

⁹⁴ From another point of view, the theory of inverse relationship between organization and intensity may sound plausible because it supports the difference of intensity requirement between IAC and NIAC. Armed forces of States are well organized, and any collision between them is regarded as armed conflict, no matter how small the accident is. Any State armed force is, by its very nature, presumed to be well-organized. (*Haradinaj case*, *op.cit.*, para.60.) The definition of armed force in Art.43 of Additional Protocol I to the Geneva Conventions, requires State armed forces to be “organized” and “under a command responsible to that Party for the conduct of its subordinates” and “subject to an internal disciplinary system which, 'inter alia', shall enforce compliance with the rules of international law applicable in armed conflict.” Nevertheless, as mentioned above, the difference of intensity requirement between IAC and NIAC comes from the difference of the legal status of conflicting parties, not from the difference of the degree of organization.

⁹⁵ *Haradinaj case*, para.89.

⁹⁶ This conclusion would have some relevance especially on the U.S.'s ongoing use of

This conclusion does not mean that there is an absence of legal protection for the population in Gaza and southern Israel. They are still protected by international human rights law,⁹⁷ international criminal law, and their respective domestic and military laws.

Based on the conclusions in the ILA Report, “[t]he distinction that appears to remain important is between an armed conflict—of whatever type—and peace.”⁹⁸ Depending on whether IHL applies or not, the category of persons who can be legally targeted and who can be prosecuted as a war criminal will change. We should not forget that this is the real issue/question regarding the legal protection of the Israeli and the Palestinian people, which is more than a mere academic question.

force in Afghanistan and Pakistan. The U.S. Government finds itself involved in “the armed conflict with al-Qaeda, the Taliban and associated forces”, but it does not specify the nature of armed conflict. See Harold H. Koh, “The Obama Administration and International Law”, Annual Meeting of the American Society of International Law 25 March, 2010. <http://www.state.gov/s/l/releases/remarks/139119.htm> (accessed 6 April 2010)

⁹⁷ Regarding human rights obligation of Israel, see Kretzmer, *op.cit.*, pp.177-186.

⁹⁸ *ILA Report*, p.24.

Table 1 Sequence of Events (*Boškoski* case, from January to late September 2001)

Main parties to the conflict: Former Yugoslav Republic of Macedonia (FYROM) Security Forces, the National Liberation Army (NLA)

The day when the situation turned into armed conflict: - (from January 2001)

Time	Incidents, Killed/Injured, Weapons used, etc.
Jan.	- At least 4 police officers killed (for January and February) - 2 attacks on police stations by armed Albanian Groups - Use of grenades, automatic weapons, hand rocket-launcher, hand grenades. etc.
Feb.	- Increase in FYROM military presence - Armed NLA group kidnapped a team of journalists - Army border patrol came under attack - At least 3 incidents in Tanuševci, some NLA members wounded. etc.
Mar.	- Conflict continued in Tanuševci, and spread to other areas. - 10 army members killed. - A number of policemen, NLA fighters and civilians injured (for March and April) - State Advisor attacked. - The President issued a number of decisions on the use of the security forces. - Army reserves and police reserves mobilized. - UNSC issued Presidential Statement. - Call for cease fire. - The army launched an offensive from 25-31 Mar. - UNSC passed Res. 1345. - Use of small arms, light mortars, rocket propelled grenades, large caliber weapons, projectiles and hand grenades, T-55 tanks, mortars, helicopter gunships. etc.
Apr.	- EU President condemned the attack in a statement. - 5 incidents of violence - 4 police officers and members of army killed - A mosque was reportedly subjected to attack. - 16 businesses and a number of homes were damaged, looted or burned. - 10 army members killed, number of policemen, NLA fighters and civilians injured (for March and April), etc.
May	- “Militants” entered villages - A mortar attack on an army checkpoint - Ambush of 2 FYROM soldiers - Use of heavy weaponry - Government was said to be considering a declaration of state of war - Civilians evacuated. - Violent incidents in many areas. - Death of a number of NLA, FYROM forces, civilians - A working group to gather evidence on war crimes established. etc.
Jun.	- Continuation and increase in the frequency of offensive attacks both by the Macedonian forces and the NLA and an expansion in the geographic scope of areas of fighting - A large number of civilians left Aračinovo - KFOR forces reported to have detained 19 suspected NLA members - Brigades mobilized to full military formation - Cease-fire declared, not lasted. etc.

Jul.	- At least 10 violent incidents - 2 army soldiers, 1 NLA member killed, at least 8 FYROM soldiers and 28 civilians wounded in beginning of July - A body for peaceful solution of the crisis established - Heavy weapons continued to be used. - The number of cease-fire violation increased - Government planned military operations. - NLA exercised control over 39 villages, attacked 93 times. etc.
Aug.	- 5 men killed and 2 wounded in fighting - NLA attacked various positions of the army and the police - NLA began to occupy villages around Tetovo - 10 FYROM soldiers killed in an attack - An attack killed 2 FYROM force members and 11 suspected NLA fighters, left 10 FYROM soldiers injured and 5 civilians. - Ohrid Agreement (cease-fire) -NATO began weapons collection operation. etc.
Sep.	- The number of clashes began to decrease, but sporadic incidents of violence and clashes continued.- UNSC adopted resolution
Oct.	- President declared amnesty. - President wrote to the Prosecutor of the ICTY seeking an investigation.
Nov.	- 3 members of Ministry of Interior killed.
Dec.	- An exchange of fire. - President declared amnesty.
Total Statistics	- Killed: 15 to 24 police officers, 35 to 43 to 60 to 68 army members, 10 civilians. - Injured: 150 to 174 police officers, 119 to 211 to 270 army members, 61 to 75 to 100 civilians - Missing: 20 to 36 civilians - Displaced: 64,000 to 80,000 Macedonian refugees, 70,000 to 86,000 IDPs, 15,000 of whom “micro-displaced” - 6,500 houses damaged - NLA controlled much of mountainous areas, incl. 135 to 140 villages

(Source: *Prosecutor v. Ljube Boškoski*, Trial Chamber Judgement, IT-04-82-T, 10 July 2008, paras.207-249.)

Table 2 Sequence of Events (*Haradinaj* case, from late February to late April 1998)

Main parties to the conflict: Yugoslav Army (VJ), Kosovo Liberation Army (KLA)

The day when the situation turned into armed conflict: 22 April 1998

Date	Incidents, Killed/Injured, Weapons used, etc.
28 Feb.	- 2 major clashes between KLA and Serbian forces. - 26 killed, 54 injured. - 1,500 to 2,000 security forces mobilized -
- 5 Mar.	Armoured vehicles and heavy weapons used.
- 23 Mar.	- Large military presence, high alert, police operation. - Large numbers of women and children fled.
24 Mar.	- An exchange of gunfire at the Haradinaj family compound, 1 police officer, 2 young men killed. 4 police officers injured. - 40 for Kosovo side, Serbian special police mobilized - Many heavy weapons mobilized. - Exchange of fire in other villages
9 Apr.	- Minor incidents (incl. an attack on a police checkpoint by unknowns)
13 Apr.	- 1 policeman injured. - An attack on a police checkpoint by unknowns.
15 Apr.	- Few incidents of unknowns shooting at the police.
22 Apr.	- 20-30 persons attacked police. - Deployment of standby forces. - Extensive shelling by the Serbian police. (The day escalating into armed conflict)
23 Apr.	- Serbian forces fired on villages. - Unprecedented presence of VJ. - VJ clashed with KLA, killing 16. - Prolonged fire from automatic rifles and mortars - Life in bigger towns proceeded normally. - Many civilians left the most affected areas.
24 Apr.	- Unidentified persons attacked a police checkpoint. - A police station was attacked.
25 Apr.	- KLA launched infantry attack.
27 Apr.	- 3 separate clashes between KLA and VJ.
28 Apr.	- Movements of increased number of VJ.
Total	- 1,486 KLA attacks in 1998 excluding December. (according to Stijović)
Statistics	- 196 attacks along the Albanian border and 191 attacks in the rest of Kosovo in 1998. (according to Gajić)

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(Source: Prosecutor v. Ramush Haradinaj, Trial Chamber Judgement, IT-04-84-T, 3 April 2008, paras.90-99.)

Table 3 Sequence of Events (the Gaza Strip, from February to December 2009)

Main parties to the conflict: Hamas, other Palestinian armed groups in the Gaza Strip, Israel Defense Force (IDF)

Time	Killed	Injured	Incidents
Feb	9 Palestinians (incl. 2 children, 5 alleged members of armed factions, 1 unarmed civilian and 1 militant)	24 others, including 17 unarmed civilians	<ul style="list-style-type: none"> - Palestinian factions reportedly fired an estimated 65 rockets and mortars towards Israel - While no Israeli fatalities or injuries were reported as a result of these attacks, some Israeli property sustained damage. - A range of military operations (incl. 37 air strikes, targeting mainly tunnels under the border with Egypt as well as armed militants.) - Various incidents involving opening fire at Palestinians approaching, or present in the proximity of the border fence with Israel. - Opening fire at fishermen sailing beyond the Israeli-imposed limit of three miles from the shore. - A few ground incursions of short duration.
Mar	7 Palestinians (all militants)	19 injured (incl. 9 unarmed civilians, 4 police officers and 6 militants)	<ul style="list-style-type: none"> - An Israeli drone fired a missile. - Israeli troops opened fire on groups of Palestinian farmers. - Israeli patrol boats opened fire on Palestinian fishing boats. - Israeli patrol boats briefly detained 9 Palestinian fishermen, incl. 2 children. - Firing RGBs and mortar shells.
Apr.	2 Palestinians	0	<ul style="list-style-type: none"> - 2 Israeli air strikes. - A cross-border exchange of fire between an Israeli unit and Hamas militants

			<ul style="list-style-type: none"> - Detonation of an explosive device next to an Israeli foot patrol. - Targeting of a Palestinian boat. - Israeli forces continued firing warning shots at farmers and fishermen. - Palestinian militants fired a number of rockets and mortars.
May	3 Palestinians. 1 child due to UXO	14 Palestinians 4 Palestinians (incl. 3 children)	<ul style="list-style-type: none"> - IAF began a series of airstrikes. - Palestinian militants increased the frequency of rocket and mortar fire. - Several incidents of warning fire to farmers and fishermen.
Jun.	6 Palestinians (incl. 4 alleged militants)	11 Palestinians	<ul style="list-style-type: none"> - Palestinian armed factions fired sporadic rounds of rudimentary rockets and mortar shells. - Israel forces opened fire to farmers and fishermen. - Israeli naval troops damaged two Palestinian fishing boats, confiscated another 2 boats and arrested 6 fishermen.
Jul.	2 Palestinian children	6 Palestinians (incl. 2 militants)	<ul style="list-style-type: none"> - Sporadic launching of rudimentary rockets and mortar shells
Aug.	5 Palestinian civilians (incl. 1 child)	12 people (11 civilians) 3 Palestinian children injured by UXO	<ul style="list-style-type: none"> - Of this month's civilian casualties, 2 deaths and 4 injuries occurred as part of Israeli measures to enforce access restrictions to farming land (at least 20 occasions). - Israel forces resumed airstrikes in Gaza. - Palestinian factions continued to fire sporadic rounds of rudimentary rockets and mortar shells

		1 Israeli soldier	
Sep.	8 Palestinians (incl. 1 boy, 3 are civilians)	18 Palestinians (incl. 2 children, 16 are civilians)	<ul style="list-style-type: none"> - Fire on famers and fishermen (at least 7 occasions towards fishing boats). - 5 deaths and 12 injuries occurred in various incidents involving airstrikes. - Israeli air strikes targeted tunnels under the Rafah-Egyptian border, killing 2 Palestinian civilians and injuring 11 others. - Palestinian factions have continued to fire sporadic rudimentary rockets and mortar shells
Oct.		6 Palestinians	<ul style="list-style-type: none"> - An Israeli airstrike bombarded tunnels under the Gaza-Egypt border. - Number of rudimentary rockets and mortar shells fired by Palestinian factions from Gaza remained relatively low. - 2 separate incidents of access prohibition.
Nov.	1 Palestinian child	16 Palestinians	<ul style="list-style-type: none"> - Israeli forces entered the area and detained 4 youths, all of whom were released 2 days later. - Israeli air strikes destroyed a Palestinian industrial factory, a stone-cutting factory, and damaged three houses. - Rockets and mortar shells from Gaza continued to be sporadically launched by Palestinian factions.
Dec.	4 Palestinian civilians	0	<ul style="list-style-type: none"> - Israeli forces shot and killed a Palestinian near his house. - A number of Palestinian homes were also damaged. An Israeli aircraft opened fire.
Total Statistics	<p>Since the implementation of the “Cast Lead” ceasefires on 18 January 2009 until 31 December 2009, a total of 76 Palestinians and one Israeli were killed, and 154 Palestinians and five Israelis were injured in the context of the Israeli-Palestinian conflict in Gaza and southern Israel. (c.f. 1,440 were killed and 5,380 injured during 3 weeks of the Gaza conflict, according to the</p>		

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	Palestinian Ministry of Health in Gaza.)
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(Source: United Nations Office for the Coordination of Humanitarian Affairs, occupied Palestinian territory, The Humanitarian Monitor, from January to December (monthly reports))