

End of application of international humanitarian law

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Abstract

This article provides a systematic overview of the rules governing the end of application of international humanitarian law, or the law of armed conflict. It articulates the general principle that unless there is a good reason of text, principle or policy that warrants an exception, the application of IHL will cease once the conditions that triggered its application in the first place are no longer met. For IHL to apply, its distinct thresholds of application – international armed conflict, belligerent occupation, and non-international armed conflict – must continue to be satisfied at any given point in time. The article also examines situations in which a departure from the general rule is warranted, as well as the factors that need to be taken into account in determining the end of each type of armed conflict. In doing so, the article analyzes terminating processes and events, which generally end the application of IHL (but not necessarily all of it), and transformative processes and events, which end the application of one IHL sub-regime but immediately engage another. Finally, the article briefly looks at the (putative) armed conflict between the US and Al-Qaeda and its seemingly imminent end.

Keywords: IHL, temporal scope of application, end of application, end of armed conflict.

Introduction

The question when international humanitarian law (IHL) starts applying is complex enough;¹ the end of IHL's application perhaps even more so. It is certainly one of those questions to which the

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relevant treaties provide no clear answer. As we will see, while some provisions of the 1949 Geneva Conventions² make reference to specific points in time, such as the cessation of active hostilities or the general close of military operations, they do not do so for the purpose of systematic regulation nor do they indeed define these rather vague terms more precisely. This inherent uncertainty is exacerbated by three further considerations.

First, IHL is not a single, coherent body of law. It had no original designer who thought everything through and tied its loose strands together. Rather, like international law generally, IHL is written on a palimpsest, with layers building upon layers and the new replacing the old, but rarely, if ever, doing so completely. Thus, the Hague law regulating the conduct of hostilities that we still apply today was embedded in the then-customary framework in which ‘war’ was the operative legal concept, rigidly opposed to peace. The various waves of Geneva law then built upon that, with the 1949 Conventions and the 1977 Additional Protocols in particular redefining the thresholds of IHL’s applicability. And we can then add to this mix the judicial gloss of these thresholds, set out mainly by international criminal courts and tribunals, the developments of customary law that they precipitated, and further developments in state practice in the post-9/11 global arena.

Second, and relatedly, even the factual and objective thresholds of modern IHL are fragmented. One cannot truly speak of the end of application of IHL in general terms, but only of the end of application in the separate cases of international armed conflict (IAC), belligerent occupation, and non-international armed conflict (NIAC). Furthermore, while some IHL rules apply all the time, i.e. even outside armed conflict and occupation (e.g. the obligation to disseminate IHL, mark cultural objects, etc.), as we will see, the application of others might have started with an armed conflict but need not have ended with the armed conflict (e.g. the

professor at the University of Michigan Law School. I would like to thank Sarah Cleveland, Ashley Deeks, Jean-Marie Henckaerts, Wolff Heintschel von Heinegg, Dino Kritsiotis, Jelena Pejic, Marco Sassòli, Michael Schmitt, Sandesh Sivakumaran, and Elizabeth Wilmshurst for their most helpful comments.

¹ Generally on classification of armed conflicts see Marko Milanovic & Vidan Hadzi-Vidanovic, ‘A Taxonomy of Armed Conflict,’ in C. Henderson & Nigel White (eds.), *Research Handbook on International Conflict and Security Law*, Elgar, 2013, p. 256, pre-print draft available on SSRN at <http://ssrn.com/abstract=1988915>, on which some parts of the following discussion draw heavily.

² Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field 12 August 1949, 75 UNTS 31 (‘GC I’); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked members of the Armed Forces at Sea, 12 August 1949, 75 UNTS 85 (‘GC II’); Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (‘GC III’); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (‘GC IV’).

obligation to investigate and prosecute grave breaches that occurred in an IAC). And while the development of the substantive customary law of NIACs was frequently based on analogies to IACs, the structural differences between the two types of conflicts may have bearing on the temporal scope of IHL's application and render such analogies more difficult.

Third, our interpretation of the thresholds of application and IHL's temporal scope will inevitably depend on how, within a particular professional setting (e.g. as domestic or international judges, government officials, military legal advisors, humanitarian activists, or academics), we weigh a number of competing, and evolving, policy considerations. In other words, an analysis of the end of IHL's application by any given actor is influenced by whether that actor ultimately *wants* IHL to continue applying, in light of the consequences of continuation or termination. Thus, for example, in Geneva in 1949 most of the humanitarian community (including the ICRC) advocated for a broad applicability of IHL, particularly when it came to hitherto almost unregulated NIACs. Most states, on the other hand, wanted to both heighten the threshold for IHL application in case of NIACs and reduce the substantive scope of IHL rules applicable in NIACs, because they sought to preserve their own freedom to suppress rebellion and internal strife as they saw fit.³ Today, however, the dovish humanitarians might *not* want IHL to apply expansively, since they may see it as a departure from concurrently (and if need be extraterritorially) applicable IHRL. Yet now States might precisely want IHL to apply, since they would see it as *empowering* rather than constraining them, e.g. with regard to targeted killings and preventive detention, allowing them to avoid the more demanding rules of IHRL.⁴

In yet other situations that calculus may work out differently, e.g. with regard to the question whether the occupation of Gaza has ended, a question which turns mainly on whether the continued application of IHL is seen as desirable or not. Similarly, an international criminal tribunal may want to take a very generous approach to IHL's continued application since its own jurisdiction could depend on the existence of armed conflict as a contextual element. The *consequences* of the end of IHL's applicability, whether they concern the scope of the parties' rights and obligations or individual criminal responsibility, will inevitably be taken into account. This is not to say that even if inevitable such result-oriented thinking is necessarily fully

³ See generally S. Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 30 *et seq.*

⁴ See M. Milanovic and V. Hadzi-Vidanovic, above note 1, pp. 305-308.

conscious and deliberate. For what it is worth, this article will strive to weigh the various relevant considerations as transparently as possible.

The article is structured as follows. It will first provide a brief overview of the changes that IHL underwent through the years – to the extent they are relevant to understand the conditions for its end of application – and will set out the general principle governing this process. It will then look at which point different IHL rules cease to apply in international armed conflicts, belligerent occupation, and non-international armed conflicts. It subsequently examines the transformative processes that end the application of one IHL sub-regime (IAC or NIAC) but initiate the application of another. It will finish by looking at the (impending) end of the conflict between the United States and Al-Qaeda, one of the most current and controversial issues of contemporary IHL.

Brief historical overview and the general principle on end of application

Before we can examine the end of application of modern IHL, we need to take a brief look at the past, as well as the evolution of the thresholds of the beginning of IHL's application which are dealt with in more detail elsewhere in this special issue.⁵ As noted above, the operative concept in customary international law before the 1949 Geneva reform (and perhaps for some time thereafter)⁶ was 'war.' In classical international law, war was not defined merely as a factual situation involving hostilities between two states, but was a legal condition whose initiation and end brought about a host of consequences in the relations between the belligerents among themselves and with third states. War and peace categorically excluded each other, as did the law of war and the law of peace.⁷ War was generally regarded as abrogating all peacetime treaties between the belligerents and triggered the application of the rules on neutrality for non-belligerents. It was also both formal and subjective, requiring not merely the objective existence of hostilities but also the expression of an *animus belligerendi*. This subjective *animus* could be proven, or not, by reference to criteria such as the severance of diplomatic relations between

⁵ [REF].

⁶ The applicability thresholds of the treaties did not immediately crystallize into custom, and due to the fluid nature of customary law it is difficult to pinpoint the exact time at which this crystallization occurred.

⁷ See generally J. Kleffner, "Scope of Application of International Humanitarian Law" in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, Oxford University Press, Oxford, 2013 (3rd ed.) 43, p. 44; M. Milanovic and V Hadzi-Vidanovic, above note 1, pp. 258-264.

belligerents, the existence of a declaration of war or of a notification of the state of war to neutral powers, or the recognition of the state of war by these neutral powers.

This in turn opened the way to situations of widespread and protracted fighting in which the states concerned for political reasons refused to recognise the existence of war. A gap opened up between a common sense, factual understanding of ‘war’ and one derived from the niceties of the law of nations, a gap to be exploited when it served state interests. It not only introduced a large degree of uncertainty with regard to the rights of private citizens, but more importantly created a major obstacle to the application of any humanitarian rules of the law of war. All a state had to do to avoid the law of war was to deny the existence of war *in the technical legal sense*, no matter how much blood was being shed in a very real sense.⁸ It was precisely the rigidity of the law of peace/law of war framework and the strict consequences that followed the transition from one to the other that provided the incentive for states to avoid recognizing the existence of war. This led some scholars of the period to argue for the legal recognition of a third, middle category between war and peace – a *status mixtus*.⁹ Others, in turn, wanted to objectivize war.¹⁰ But what the humanitarian lawyers may have wanted and what states thought to be in their interest was not necessarily one and the same. Rather than bringing some resolution, the controversies on the legal nature of war brought even more uncertainty.¹¹

Since ‘war’ was a formal business it also needed to be formally terminated. While hostilities could be interrupted through an agreed-upon truce or cease fire, or a more comprehensive armistice, the end of war generally required a peace treaty.¹² It was only upon the conclusion of such a treaty that normal relations between the parties could resume and their earlier peacetime treaties could be revived.

This was still the relevant framework as the Second World War started, but its aftermath saw the addition of more layers to the palimpsest of international law. First, even though the

⁸ M. Milanovic & V. Hadzi-Vidanovic, 2011, above note 1, p. 260. Perhaps most notoriously with regard to the Manchurian crisis and the Sino-Japanese conflict in the 1930s, in which both Japan and China for various political reasons denied the existence of a state of war – see more A. Carty and R.A. Smith, *Sir Gerald Fitzmaurice and the World Crisis: a Legal Adviser in the Foreign Office 1932-1945*, Martinus Nijhoff, The Hague, 2000, pp. 41 et seq.

⁹ See G. Schwarzenberger, “Jus Pacis ac Belli?”, *American Journal of International Law*, Vol. 37, No. 3, 1943, p. 470; P. C. Jessup, “Should International Law Recognize an Intermediate Status between Peace and War?”, *American Journal of International Law*, Vol. 98, 1954, p. 100

¹⁰ See J.L. Brierly, “International Law and Resort to Armed Force”, *The Cambridge Law Journal*, Vol. 4, Issue 3, November 1932, p. 308; T.S. Woolsey, “The Beginning of a War”, *Yale Law Journal*, Vol. 9, 1900, p. 153.

¹¹ M. Milanovic & V. Hadzi-Vidanovic, 2011, above note 1, pp. 260-261.

¹² See J. Kleffner, above note 7, p. 62.

recourse to war as an instrument of national policy was already outlawed under the terms of the 1928 Kellogg-Briand Pact, the adoption of the UN Charter and its general prohibition on the use of *force* (not just ‘war’) truly created the *jus ad bellum* as separate from the *jus in bello*. Second, the applicability of the 1949 Geneva Conventions was generally detached from the formal concept of war. Common Article 2 (CA2) introduced the concept of international armed conflict (IAC),¹³ which was designed as an objective, factual replacement for the narrower concept of ‘war’ while retaining its predecessor’s inter-state nature.

The 1949 Geneva Conventions also introduced the first systematic regulation of internal conflicts, through the concept of non-international armed conflict (NIAC) under Common Article 3 of the Conventions (CA3). At the time of the Conventions’ adoption, the NIAC threshold brought about only the application of CA3 itself and its purely humanitarian provisions protecting persons not taking part in hostilities or rendered *hors de combat*. That was the sum total of the conventional law of armed conflicts as it applied to NIACs in 1949; for example it contained no rules on the conduct of hostilities analogous to IACs.

Over time, however, through the adoption of the 1977 Additional Protocols, and the evolution of customary law, the law of armed conflict coalesced around the two factual thresholds set out in the 1949 Conventions. Not only is the CA2 threshold also valid for the application of API rules,¹⁴ but it also became the threshold for application of the customary ‘Hague law’ on the conduct of hostilities. This was also the case with the CA3 NIAC threshold, whereas the gaps in the regulation of NIACs were filled mainly through custom. The 1949 Geneva Conventions’ thresholds of application thus became the thresholds for the application of customary IHL more generally. The obsolescence of the concept of traditional concept of “war” became almost complete, with states simply no longer declaring war against one another or formally expressing their view that war exists. Similarly, the distinctions between cease-fires, armistices and peace treaties gradually blurred, with peace treaties in particular becoming

¹³ CA2(1) hence provides that: ‘In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war *or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them*’ (emphasis added).

¹⁴ See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (‘AP I’), Art. 1(3).

increasingly rare,¹⁵ and conflicts frequently ending with less formal instruments such as armistices, unilateral or joint declarations or simply *de facto*.

But as the law of war was being rewritten into the law of armed conflict, the concept of “war” was still not abandoned formally even if it was abandoned in fact as a condition for IHL applicability. Looking at the IHL palimpsest, one issue that arises is whether the concept of “war” still has any relevance for our modern debates. Notably, Common Article 2 of the 1949 Geneva Conventions explicitly provides that they “shall apply to all cases of declared war,” thus making it possible for the Conventions (and the relevant custom) to *begin* applying before a single shot has been fired. But conversely, will their application *end* only with the end of the war in the formal, technical legal sense, once a state of war commenced on top of a plain international armed conflict? Just consider a scenario of war with hostilities long having come to an end, yet without a peace treaty or any kind of formal instrument normalizing in full the relations between the parties.

Some authors, most notably Yoram Dinstein, still give significance to war as a legal concept.¹⁶ Most, however, and here I include myself, would argue that the main point of the 1949 Geneva reform was precisely to do away with the subjectivity and formalism of war, and make the thresholds of application objective and factual, with this tendency only being strengthened in the intervening years.¹⁷ Having said that, the possibility of the ‘old’ law still having an influence cannot be conclusively excluded, especially because the concept of war transgressed the boundaries between the *jus ad bellum* and the *jus in bello*. However, that influence is likely to be minimal. In the case of a ‘war’ in which hostilities have *de facto* ended with permanence and finality even in the absence of a formal conclusion of peace, as a matter of the *jus ad bellum* any residual right to resume hostilities would be precluded by the UN Charter prohibition on the use

¹⁵ See generally H. Levie, ‘The Nature and Scope of the Armistice Agreement,’ *American Journal of International Law*, Vol. 50, 1956, p. 880; R. Baxter, ‘Armistices and Other Forms of Suspension of Hostilities,’ in *Recueil des Cours*, Vol. 149, 1976, p. 357; J. Kleffner, above note 7, at 65-66

¹⁶ See generally Y. Dinstein, *War, Aggression, and Self-Defence*, Cambridge University Press, Cambridge, 2011 (5th ed.). Dinstein focuses mostly on the continued relevance of the concept of war for the purpose of the *jus ad bellum*.

¹⁷ On the marginalization of the concept of ‘war’ see especially D. Kritsiotis, ‘Topographies of Force,’ in M. Schmitt and J. Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines*, Martinus Nijhoff, The Hague, 2007, p. 29.

of force,¹⁸ while in the absence of actual hostilities or prisoners of war or protected persons in the hands of the adversary IHL would have little or nothing to regulate.¹⁹

Rules governing the beginning and end of the application of IHL are both customary and conventional in nature. With regard to the conventional rules, of relevance to the temporal application of IHL are also some general issues of the law of treaties with regard to entry into force and withdrawal. While the Geneva Conventions have achieved practically universal adoption, the general rules on entry into force are of particular relevance for newly formed states, who can become parties to treaties through accession or (automatic?) succession.²⁰ On the other hand, it is perhaps surprising that both the Geneva Conventions and their Additional Protocols contain explicit provisions permitting their denunciation.²¹ No state party has ever denounced one of these treaties, and the inevitable political fallout would render this highly unlikely in the future. The denunciation provisions also contain explicit safeguards²² that would render any denunciation ineffective with regard to situations arising from an existing armed conflict or with regard to protected persons already in captivity. The key legal safeguard, however, is the fact that most of the rules in the Conventions and the Protocols have achieved customary status, and would accordingly bind the denouncing state in any event. In the discussion to follow I will

¹⁸ See J. Kleffner, above note 7, p. 66, *contra* Y. Dinstein, above note 16, pp. 59-61, 324.

¹⁹ The paradigmatic example of such a conflict would be the 1950-1953 Korean War. The hostilities in that conflict ended with the 27 July 1953 armistice, but no peace treaty was signed thereafter. Even if despite the lack of hostilities and the long passage of time the failure of the parties to agree to a peace treaty maintained the formal state of war, and thus an IAC, the effect of the Charter-based *jus ad bellum* rules would be to preclude a use of force even if the provisions of the armistice were breached. In other words, any resort of force would need to be justified under self-defence or Security Council authorization within the Charter framework – see, e.g., E. Simon, ‘The Operation of the Korean Armistice Agreement,’ *Military Law Review*, Vol. 47, 2007, p. 105. For arguments that the 1953 armistice did, in fact, terminate the state of war, see, e.g., Y. Dinstein, above note 16, pp. 43-44. W. Heintschel von Heinegg, ‘Factors in War to Peace Transitions,’ *Harvard Journal of Law & Public Policy*, Vol. 27 Issue 3, Summer 2004, pp. 843, 849-854.

²⁰ This was for example an issue in the Ethiopia/Eritrea arbitration; Eritrea had not made a declaration of succession to the Conventions upon its independence in 1993 or thereafter and consistently maintained that it was not bound by them, only acceding to them in 2000, after its conflict with Ethiopia had ended. The Claims Commission found that Eritrea was not a party to the Conventions until its accession, but that most of the Conventions’ rules reflected customary IHL which was indeed binding upon Eritrea – see Eritrea Ethiopia Claims Commission, *Partial Award, Prisoners of War – Eritrea’s Claim 17*, 1 July 2003, paras. 31-42.

²¹ Art. 63 GC I, Art. 62 GC II, Art. 142 GC III, Art. 158 GC IV, Art. 99 AP I; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (‘AP II’), Art. 25.

²² For example, Art. 142(2) GC III provides that: ‘The denunciation shall take effect one year after the notification thereof has been made to the Swiss Federal Council. However, a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release and repatriation of the persons protected by the present Convention have been terminated.’

accordingly disregard any potential issues arising from the general law of treaties, with the caveat that conventional rules that do not reflect custom could potentially be affected.²³

Bearing in mind the evolution of the modern IHL regime, as well as its fragmented nature, we can state at this point the one *general principle* on the end of application of IHL that will form the basis for further discussion: unless there is a good reason of text, principle or policy that warrants an exception, the application of IHL will cease once the conditions that triggered its application in the first place no longer exist. In other words, if a particular situation can no longer be qualified as an IAC, NIAC, or an occupation, the application of IHL will end.²⁴

In the absence of any specific guidance to the contrary, this general principle makes perfect sense in the factual, objective threshold set by the Geneva Conventions. For IHL to apply its thresholds of application must *continue* to be satisfied at any given point in time. In order to elaborate on this general principle we must of course look at the constitutive elements of each threshold, in the context of those particular scenarios in which these elements might be extinguished. We must then establish whether a departure from the general rule is warranted, and whether some rules continue applying even after an armed conflict has ended. We will then observe certain *terminating* processes and events, which generally end the application of IHL (but not necessarily all of it),²⁵ and certain *transformative* processes and events, which end the application of one IHL sub-regime (IAC or NIAC) but immediately engage another.

Let me now deal with each threshold in turn.

International armed conflict

As we have seen, the concept of IAC was crafted as an explicit replacement for the concept of war. As with the concept of war, IAC as defined in CA2 is of an interstate nature, a conflict between two sovereigns. In the words of the authoritative Pictet *Commentary*:

²³ See more R. Kolb and R. Hyde, *An Introduction to the International Law of Armed Conflicts*, Hart Publishing, Oxford, 2008, pp. 104-105.

²⁴ See also D. Jinks, 'The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts,' HPCR Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, January 27-29, 2003, p. 3, available at <http://www.hpcrresearch.org/sites/default/files/publications/Session3.pdf>; J. Kleffner, above note 7, p. 61.

²⁵ Including those rules which also apply in peacetime and those whose application was triggered by the armed conflict but will not cease with the end of armed conflict.

Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of [Common] Article 2, even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, how much slaughter takes place, or how numerous are the participating forces; it suffices for the armed forces of one Power to have captured adversaries falling within the scope of Article 4 [of the Third Geneva Convention]. Even if there has been no fighting, the fact that persons covered by the Convention are detained is sufficient for its application.²⁶

The CA2 threshold is thus remarkably low – all it needs is a difference between two states leading to the intervention of their armed forces.²⁷ Whether Pictet is indeed correct in this, or whether a *de minimis* level of violence needs to occur in order to avoid minor exchanges of firepower between the forces of two states (e.g. a single rifle shot across the border) being classified as IACs, is not the object of my inquiry at this time. Opinions and practice on this point are conflicted.²⁸ Yet, however exactly defined, the IAC threshold is certainly far lower than the NIAC ‘protracted armed violence’ threshold to which I will come momentarily, since the IAC threshold was not subject to the same sovereignty concerns as NIACs. A particular amount of violence may produce an IAC if perpetrated between states, but might not qualify as a NIAC if committed by or against non-state actors.

As we have also seen, the principal distinguishing point between ‘war’ and IAC is the latter’s objective and factual nature. The end of IAC should equally be based on purely factual criteria – what matters is that the hostilities between the two parties have ceased. Because, however, the IAC threshold is relatively easy to satisfy, and because it would be both impractical and open the door to abuse to treat every lull in the fighting as an end to an IAC and each resumption of combat as the start of a new one, hostilities must end with *a degree of stability and permanence* in order for the IAC to be terminated.²⁹ Thus, for example, in the *Gotovina* case the Trial Chamber stated that:

Once the law of armed conflict has become applicable, one should not lightly conclude that its applicability ceases. Otherwise, the participants in an armed conflict may find themselves in a revolving door between applicability and non-applicability, leading to a

²⁶ J. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. III: Geneva Convention Relative to the Treatment of Prisoners of War, ICRC, Geneva, 1960, Art. 2(1), p. 23.

²⁷ M. Milanovic and V. Hadzi-Vidanovic, above note 1, p. 274.

²⁸ See more J. Kleffner, above note 7, pp. 44-45.

²⁹ Cf. Jinks, above note 24, at 3: ‘Given the de facto “armed conflict” regime of the Geneva Conventions, the general applicability of international humanitarian law terminates if active hostilities cease and there is no probability of a resumption of hostilities in the near future.’ See also Kolb and Hyde, above note 23, at 102.

considerable degree of legal uncertainty and confusion. The Trial Chamber will therefore consider whether at any point during the Indictment period the international armed conflict had found a sufficiently general, definitive and effective termination so as to end the applicability of the law of armed conflict. It will consider in particular whether there was a general close of military operations and a general conclusion of peace.³⁰

This is always a factual assessment, which will vary from case to case and the exact time at which the IAC ended may be hard to point out. Agreements concluded by the belligerent parties, however called, unilateral statements by either of them, or resolutions of relevant international organizations, e.g. those of the UN Security Council,³¹ may provide *evidence* that the hostilities have ended with the needed degree of stability and permanence. But it is the *fact* that the hostilities have ended that ultimately matters, not the precise legal nature of the instrument in question.³² Depending on the political and military environment, a cease-fire agreement or an armistice may actually signify the point at which the hostilities have permanently ended, while a formal peace treaty might not be worth the paper it is written on if hostilities continue unabated.

This factual approach is supported by what little we have in the Geneva Conventions regarding the end of their application. Thus, Article 118(1) GC III provides that '[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities.' The repatriation obligation would naturally only be acceptable to states if hostilities had ended more or less permanently. Article 6(2) GC IV, on the other hand, stipulates in the relevant part that '[i]n the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations.' The common provisions on the denunciation of the Geneva Conventions mentioned above refer to yet another point in time when they stipulate that 'a denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded.'³³ Here we have three moments in time: the cessation of active hostilities, the general close of military operations, and the conclusion of peace.

Article 5 GC III and Article 6(4) GCIV, on the other hand, make it clear that the Convention will continue to apply even after the general close of military operations if protected

³⁰ *Prosecutor v. Gotovina*, Trial Chamber Judgment, 15 April 2011, para. 1694.

³¹ Leaving aside the possibility that the Council is through its decisions actually modifying the applicable IHL regime, or indeed that it has the power to do so.

³² See also Kleffner, above note 7, at 61, 70.

³³ Art. 63(3) GC I, Art. 62(3) GC II, Art. 142(3) GC III, Art. 158(3) GC IV.

persons are still in the power of the enemy and they have not been released or repatriated before that time. Article 3(b) of AP I also sets out this principle very clearly:

the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.

It is unclear whether the drafters of the Conventions were making a firm distinction between the ‘cessation of active hostilities’ standard in Article 118(1) GC III and the ‘general close of military operations’ in Article 6(2) GC IV and later in Article 3(b) AP I, i.e. whether the distinction was deliberate or was the consequences of uncoordinated drafting. What is clear is that the primary motivation behind the GC III formula was to depart from the earlier rule set out in Article 20 of the Hague Regulations, under which the obligation to repatriate prisoners of war started only at the (formal) conclusion of peace. This meant that in several instances in which the conflict had *de facto* ended but without a formal peace treaty, or with treaty negotiations taking a very long time, vast numbers of prisoners of war continued to be held without any real need to do so.³⁴ This of course does not mean that the GC III standard necessarily assures swift repatriation in practice, the lengthy repatriation efforts after the 1980-1988 Iran/Iraq war being a case in point. As for the Art. 6(2) GC IV ‘general close of military operations’ formula, the Pictet commentary interprets it as a ‘final end of all fighting between all those concerned.’³⁵ Note that the test is an objective and factual one; as argued above, while an armistice or peace treaty can serve as evidence of the finality of the end of fighting, formal agreements are neither required nor conclusive on the point.³⁶ The *general* close of military operations implies an end of the

³⁴ See J. Pictet, above note 26, Vol. 3: Geneva Convention Relative to the Treatment of Prisoners of War, pp. 541-543.

³⁵ *Ibid.*, Vol. 4: Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 6(2), p. 62.

³⁶ The ICTY Appeals Chamber’s *dictum* in *Tadić* that ‘[i]nternational humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved’ is in my view too insistent, at least implicitly, with regard to the consensual nature of the end of conflict. ICTY, *Prosecutor v. Tadić*, Case No IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70. On the end of IHL application in non-international armed conflicts, see below. What matters is finality *de facto*; plenty of armed conflicts, both international and internal, have ended without any kind of formal agreement or settlement, e.g. the NIAC in Sri-Lanka.

fighting between *all* of the belligerents,³⁷ even though active hostilities may have ceased between some at a much earlier date (consider the 1940 surrender of France while the UK continued fighting, or the different times of the surrender of Germany and Japan during the Second World War).

The ICRC commentary to AP I tried to draw more of a distinction between the ‘general close of military operations’ and the ‘cessation of active hostilities’ formulas. Thus, it held that military operations can be taken more broadly than actual combat as including ‘the movements, manoeuvres and actions of any sort, carried out by the armed forces with a view to combat’ and that ‘[t]he general close of military operations may occur after the “cessation of active hostilities” referred to in Article 118 of the Third Convention: although a ceasefire, even a tacit ceasefire, may be sufficient for that Convention, military operations can often continue after such a ceasefire, even without confrontations.’³⁸ The distinction is also supported by academic commentary.³⁹ However, depending on the circumstances on the ground the distinction may actually be hard to draw, i.e. the cessation of active hostilities and the general close of (combat-oriented) military operations may occur at the same time, or very close to one another.

In sum, we can conclude that an IAC would end with a general close of military operations, with no real likelihood of a resumption in hostilities. The end of the IAC will also end the application of those rules of IHL regulating the conduct of hostilities. It will also end any IHL-granted authority to detain combatants or civilians preventively purely on grounds of security.⁴⁰ However, as we have also seen, some obligations under IHL will survive the end of the armed conflict, and indeed may be triggered by the conflict’s (imminent) end, as with the obligation to repatriate prisoners of war. Persons who remain in the power of the enemy will continue enjoying the protections of IHL until their repatriation or release, including *inter alia* the right of access by the ICRC, even if IHL no longer authorizes their continued detention. They

³⁷ See J. Pictet, above note 26, Vol. 4: Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 6(2), p. 62.

³⁸ See Y. Sandoz *et al.* (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, commentary on Art. 3 (b), paras. 152-153.

³⁹ See, e.g., Jinks, above note 24, at 3; L. Blank, ‘A Square Peg in a Round Hole: Stretching Law of War Detention Too Far,’ *Rutgers Law Review*, Vol. 64, Issue 1, 2011, pp. 1169, 1179-1182; R. Bartels, ‘From *Jus In Bello* to *Jus Post Bellum*: When do Non-International Armed Conflicts End?’, in Carsten Stahn, Jennifer S. Easterday and Jens Iverson (eds.), *Jus Post Bellum: Mapping the Normative Foundations*, Oxford University Press, Oxford, 2014, pp. 297, 300-303.

⁴⁰ See J. Pejic, ‘Terrorist Acts and Groups: A Role for International Law?’, *British Yearbook of International Law*, Vol. 75, 2004, pp., 71, 78 and 81. See more below on the question whether IHL actually grants such authority, or merely sets limits on state action.

will also continue benefiting from fundamental guarantees in Article 75(6) AP I, under which ‘[p]ersons who are arrested, detained or interned *for reasons related to the armed conflict* shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, *even after the end of the armed conflict*’ (emphasis added). These protections would normally be complemented by human rights law, and to the extent that IHL allows any departures from human rights, e.g. by virtue of the *lex specialis* principle, such departures would no longer be permitted with the end of the conflict.⁴¹ Similarly, Article 33(1) AP I provides that ‘[a]s soon as circumstances permit, *and at the latest from the end of active hostilities*, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party’ (emphasis added). This and other obligations with regard to missing and dead persons, e.g. facilitating access to gravesites, will continue applying after the end of the conflict, as would the obligations to investigate and prosecute grave breaches of the Conventions and Protocol I.

There are thus a number of exceptions to the general principle on end of application. The exceptions are not themselves temporally limited, i.e. further passage of time after the end of the conflict cannot by itself terminate the extant obligations. For example, if a state detains a prisoner of war for decades after the conflict, he would still be protected by IHL. The obligation would only terminate if its functional predicate is discharged, e.g. the prisoner is repatriated.

As with IHL generally, this interaction between the general principle and the exceptions thereto strikes a balance between military necessity and considerations of humanity. Clarity and predictability require that the end of a conflict should be presumed lightly. Rules on the conduct of hostilities stop applying only once the hostilities have definitively ended, while the cessation of hostilities will initiate the obligation to repatriate prisoners of war and release any civilian internees, because this is when the obligation can be realistically complied with and the need for such measures ceases. The protective rules on treatment in detention will continue applying while the detention lasts, which is of the greatest importance in cases of delayed repatriation. The need to protect persons deprived of liberty for reasons related to an armed conflict does not end with the conflict itself, nor would say any serious violence against these persons by any less of a war crime. Similarly, the obligation to repress grave breaches can at times be implemented even

⁴¹ The legal effects of *lex specialis* are in my view quite modest; it does no more than allow human rights norms to be interpreted in the light of IHL (and vice versa where appropriate), but does not allow for their displacement in the event of any contradiction between the two. See M. Milanovic, ‘Norm Conflicts, International Humanitarian Law and Human Rights Law,’ in Orna Ben-Naftali ed., *International Humanitarian Law and International Human Rights Law*, Oxford University Press, Oxford, 2011, p. 95.

more effectively in the post-conflict period, as investigations and any prosecutions can take place unhindered by active hostilities.

I will now briefly look at the end of belligerent occupation as a subspecies of or a threshold complementary to IAC.

Belligerent occupation

The end of occupation is again a complex topic, recently examined, for instance, by an expert meeting on occupation convened by the ICRC.⁴² I will now address it only very briefly. As with IACs and NIACs we can start off with the general principle that IHL will normally cease to apply once its threshold of application – here belligerent occupation – is no longer met. If we define occupation as effective control by a state of the territory of another state without the latter's consent,⁴³ it follows that there are two basic modalities through which an occupation can end: loss of control by the occupant, or the occupant being granted valid consent by the displaced sovereign.

This basic position was not spelled out in the 1907 Hague Regulations, but it again follows from the very definition of the concept of occupation in Article 42: 'Territory is considered occupied when it is *actually placed under the authority* of the hostile army. The occupation extends only to the territory *where such authority has been established and can be exercised*' (emphasis added). The inability to exercise authority would consequently terminate the occupation; the difficult question is what factors are to be taken into account in establishing whether the occupant lost control over a territory or a substantial part thereof.

Article 6(3) GC IV provided that in 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.' Article 6(3) GC IV focused on those situations in which the occupation outlives the IAC that

⁴² See T. Ferraro, *Occupation and other Forms of Administration of Foreign Territory*, Expert Meeting Report, ICRC, 2012, pp. 26 ff., available at: <http://www.icrc.org/eng/resources/documents/publication/p4094.htm>. See also Vaios Koutroulis, *Le début et la fin de l'application du droit de l'occupation*, Pedone, Paris, 2010.

⁴³ See generally Y. Dinstein, *The International Law of Belligerent Occupation* (CUP, 2009), at 35.

created it, with the application of most of the Convention ending one year after the factual end of the conflict, and only a number of core humanitarian provisions applying thereafter, and even those only to the extent that the occupying power exercises the functions of government in the occupied territory. The provision was essentially tailor-made for the transformative occupations by the Allies of Germany and Japan after the Second World War, which were extensive, prolonged, followed the unconditional surrender of the Axis powers or *debellatio*, and ended gradually through the creation of new institutions of self-government.⁴⁴

Article 3(b) AP I dropped the one-year limit from GC IV, providing that it would cease to apply ‘in the case of occupied territories, on the termination of the occupation,’ whereas as we have seen above persons still in captivity would continue to be protected by the Protocol.⁴⁵ Whether customary IHL would follow Article 3(b) AP I and displace Article 6(3) GC IV even for states not parties to AP I is a difficult question which I will not address here – suffice it to say that while GC IV’s applicability *qua* treaty remains governed by Article 6(3), it is perfectly possible for treaties to be supplanted by supervening custom, if the existence of the customary rule is indeed established.⁴⁶

Occupation can end through loss of control in a variety of scenarios: unilateral withdrawal; defeat of the occupying forces by the displaced sovereign or other outside intervention; or loss of control due to an insurgency in the occupied territory. The inquiry into loss of control should always be objective, factual, and contextual, taking into account all of the circumstances on a case by case basis, and subject to two basic principles. First, as with IACs and NIACs the end of occupation should not be presumed lightly. In particular, once the occupation is established, the maintenance of occupation might not require overt and frequent displays of military strength by the occupant, especially if the occupation faces little or no resistance and there are no competing authorities on the ground. Second, not every temporary

⁴⁴ See Pictet, above note 26, commentary on Art. 6 GC IV, pp. 62-63. On transformative occupation see also A. Roberts, ‘Transformative Military Occupation: Applying the Laws of War and Human Rights,’ *American Journal of International Law*, Vol. 100, 2006, p. 580.

⁴⁵ See also R. Kolb and R. Hyde, above note 23, pp. 103-104.

⁴⁶ In the *Wall* case the ICJ did not seem to consider this possibility, finding that due to the passage of time only those provisions of GC IV mentioned in Article 6(3) continued to apply in the occupied Palestinian territory, although the remaining provisions were not really central to the case. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, pp. 136, 185, para. 125. While agreeing with the Court that Article 6(3) GC IV will be the governing framework for states not parties to AP I, such as Israel, Dinstein argues that any outbreak of hostilities in the occupied territory (such as the Palestinian *intifadas*) will reinstate the applicability of the whole of GC IV and restart the time limit in Article 6(3) GC IV - see Y. Dinstein, above note 43, pp. 280-283.

lapse in control would terminate the occupation.⁴⁷ No matter how powerful the occupant, it may be impossible for it to control every single bit of the occupied territory all the time, especially in the case of an insurgency (only consider post-2003 Iraq, or the Nazi occupation of Yugoslavia in the face of partisan resistance). So long as the lapse in control is only temporary or very localized, and so long as the occupant has the full capacity to re-establish its control, the occupation should be considered to be uninterrupted.⁴⁸ Clearly, opinions will differ on the facts of specific cases whether an occupation has ended through loss of control, as with the Israeli withdrawal from Gaza, but the basic principle is I think relatively uncontested.

End of occupation through loss of control has parallels in the extraterritorial applicability of human rights law in the occupied territory – one issue raised before British courts and the European Court of Human Rights in the *Al-Skeini* litigation was whether the UK possessed effective control for the purposes of Article 1 ECHR jurisdiction in Basra, due to the level of sustained insurgency there, and despite the fact that the UK was formally the occupant in Southern Iraq. The House of Lords held that the UK did, in fact, lose effective control for the purposes of Article 1 ECHR even if it formally remained the occupying power for the purpose of IHL,⁴⁹ while the Grand Chamber of the European Court avoided the issue altogether.⁵⁰ The issue of whether the effective control thresholds for occupation and for the application of human rights treaties differ or not remains unresolved.⁵¹

With regard to occupation ending by the occupant obtaining consent, it is generally possible for the displaced sovereign to agree to the presence of the (former) occupier, whether by way of a peace treaty or some other kind of formal or informal agreement.⁵² Note in that regard

⁴⁷ See Y. Dinstein, above note 43, p. 272: ‘A definitive close of the occupation can only follow upon a durable shift of effective control in the territory from the Occupying Power to the restored sovereign (or its allies).’

⁴⁸ See *United States of America v. Wilhelm List et al.*, in Law Reports of Trials of Major War Criminals, Vol. VIII, 1949, pp. 38, 55–6 (holding that the German occupation of partisan-held parts of Yugoslavia did not cease since ‘the Germans could at any time they desired assume physical control of any part’ of Yugoslavia); see also ICTY, *Prosecutor v. Naletilic*, Case No IT-98-34-T, Judgment (Trial Chamber), 31 March 2003, para. 217 (holding that ‘an occupation exists so long as the occupying army has the ‘capacity to send troops within a reasonable time to make the authority of the occupying power felt’).

⁴⁹ *R (on the application of Al-Skeini and others) v Secretary of State for Defence*, [2007] UKHL 26, [2008] AC 153, para. 83 (per Lord Rodger).

⁵⁰ European Court of Human Rights, *Al-Skeini and others v. the United Kingdom*, App. No. 55721/07, Judgment (Grand Chamber), 7 July 2011.

⁵¹ Bearing in mind that the positive obligation to secure or ensure human rights is a flexible one, I would tentatively argue that the two thresholds should be the same – see M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press, Oxford, 2011, pp. 141-147.

⁵² See E. Benvenisti, *The International Law of Occupation*, Oxford University Press, Oxford, 2012 (2nd ed.), pp. 63, 67.

that Article 7 GC IV prohibits special agreements between states parties when these agreements adversely affect the situation of protected persons. However, such agreements are only prohibited in situations in which the Fourth Convention itself applies, and Article 7 does not preclude the general provision of genuine consent by a state to the presence of foreign forces, assuming that a government exists which can validly provide that consent.⁵³ That expression of consent would be subject to the general principle articulated in Article 52 VCLT, which provides that a treaty is void if it is procured by coercion of a state by threat or use of force contrary to the UN Charter.⁵⁴ It is also possible for the government of the displaced sovereign (whose territory may or may not have been occupied in its totality) to change, often at the instigation or at least with the input of the occupant, and then provide consent. Article 47 GC IV makes it clear that any changes in the (local) government of the occupied territory, or any purported annexation of that territory by the occupant, cannot alter the applicability of the law of occupation.⁵⁵ But what of those situations in which the government of the displaced sovereign is wholly destroyed or changed, as was the case in Iraq post-2003? In this respect we can observe at work similar considerations as with the transformative process of the internalization of an IAC into a NIAC, which I will deal with in detail below. What entity has the sufficient capacity and legitimacy to provide meaningful consent on behalf of a state may be a difficult and controversial issue.

Non-international armed conflict

This brings us to the end of application of IHL in NIACs. We have seen that the end of IHL application in IACs and occupation is complex enough. This complexity is exacerbated with regard to NIACs by the structural differences between IACs and NIACs and the almost complete lack of any textual guidance. CA3 says nothing about its end of application, while Article 2(2)

⁵³ Cf. A. Roberts, 'What is a Military Occupation?,' *British Yearbook of International Law* Vol. 97, 1984, pp. 249, 276-279, 287-288.

⁵⁴ For example, for an argument that the 1999 Kumanovo Military Technical Agreement whereby the Federal Republic of Yugoslavia consented to the presence of NATO troops on its territory was possibly vitiated by coercion, with Kosovo thereby constituting an occupied territory, see J. Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo,' *European Journal of International Law*, Vol. 12, Issue 3, 2001, pp. 469, 484. See also Benvenisti, *supra* note 52, chapter 10.

⁵⁵ Art. 47 GCIV provides: 'Protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the present Convention by any change introduced, as the result of the occupation of a territory, into the institutions or government of the said territory, nor by any agreement concluded between the authorities of the occupied territories and the Occupying Power, nor by any annexation by the latter of the whole or part of the occupied territory.'

AP II appears to endorse the general rule that the application of IHL will end with the conflict which initiated it when it provides for the humanitarian exception from the general rule regarding persons who remain in captivity: ‘At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.’ In short, drawing analogies with IACs will be difficult.

As it stands today, NIAC is a plural legal concept, defined differently under different treaty regimes. The basic (non-)definition of NIAC, which encompasses all others, is that in CA3. Its terms were famously elaborated by the ICTY Appeals Chamber in the *Tadic* Interlocutory Decision on Jurisdiction,⁵⁶ which has been widely accepted as reflecting custom. Under *Tadic*, CA3 requires ‘protracted armed violence’ – a threshold of *intensity* and possibly duration, rising above mere riots or disturbances – between a state and an armed non-state actor or between two such non-state actors, which are sufficiently *organized* to conduct hostilities.⁵⁷ On the other hand, the heightened threshold of Article 1(1) AP II, which is only applicable to conflicts involving a state and a non-state actor, but not two such non-state actors, requires the non-state actor to have an organizational structure with a responsible command, control a part of the state’s territory, the ability to conduct sustained and concerted military operations and the ability to implement the Protocol. I will leave aside the question to what extent exactly is the AP II threshold really higher from the customary CA3 one when applied to particular facts.

As with IACs, the termination of NIACs is a factual inquiry, but the intensity and organization thresholds in CA3 and AP II makes that inquiry even less straightforward than in IACs. As we have seen, for IACs to end, the hostilities themselves need to end with a certain degree of permanence or finality. One option would be to treat NIACs in exactly the same way – so long as *some* hostilities continue, so would a NIAC.⁵⁸ This seems to be the implication of the insistence of the ICTY in *Tadic* that IHL applies ‘in the case of internal conflicts, [until] a

⁵⁶ ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995, para. 70.

⁵⁷ According to the ICTY Appeals Chamber, ‘an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.’ ICTY, *Tadic case, Ibid.*, para. 70. For more detailed discussion regarding the elements of the NIAC threshold, see J. Kleffner, above note 7, pp. 49-50; M. Milanovic and V. Hadzi-Vidanovic, above note 10, pp. 282 et seq.

⁵⁸ Cf. S. Sivakumaran, above note 3, pp. 252-254. See also Jinks, above note 24, pp. 7-8.

peaceful settlement is achieved.⁵⁹ This makes perfect sense from the standpoint of an international criminal tribunal which wants to stabilize its jurisdiction and catch within it as many perpetrators of war crimes as possible. Thus, for instance, with respect to the non-international armed conflict between Serbia and the Kosovo Liberation Army in 1998, the first Trial Chamber judgment in the *Haradinaj* case found that ‘since according to the *Tadić* test an internal armed conflict continues until a peaceful settlement is achieved, and since there is no evidence of such a settlement during the indictment period, there is no need for the Trial Chamber to explore the oscillating intensity of the armed conflict in the remainder of the indictment period.’⁶⁰ The Tribunal’s task was accordingly much easier.

Another option, however, and to me more logical from a purely IHL standpoint, would be to take into account the heightened NIAC intensity threshold when compared to IACs, since this is where the analogy with IACs may be at a breaking point. Any resumption of hostilities between states would in any event reconstitute an IAC, and it therefore makes sense to wait for the complete end of all hostilities for the IAC to be terminated. In NIACs, by contrast, it could be enough for the hostilities to fall below the threshold of ‘protracted armed violence’ with a certain degree of permanence and stability so as to enable us to establish that the hostilities have, in fact, ended. As with IACs, once the threshold is met there should be a presumption that it continues to be met absent strong evidence to the contrary – as a matter of policy, a NIAC which peters in and out of existence on a daily basis would be undesirable. But unlike with IACs, in NIACs the hostilities would not need to end altogether. What would matter is whether the intensity of the hostilities or the organization of the non-state actor factually eroded to such an extent that the threshold is no longer met.⁶¹ For example, looking at the post-2003 conflict in Iraq, which involved the new Iraqi government and its foreign allies on one side, and several organized armed groups on the other, it could be argued that this NIAC (or set of NIACs) ended at some point in late 2009, as the capacity of insurgent groups was degraded and the level of armed violence decreased (even if the violence never ended completely). In August 2010, the US military ended its combat troops from Iraq. But after a period of relative calm, violence rapidly

⁵⁹ See above note 36.

⁶⁰ ICTY, *Prosecutor v. Haradinaj et al*, Case No IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, para. 100. The issue was not revisited in the subsequent litigation in *Haradinaj*, as the parties agreed on the scope of the armed conflict when the case was re-tried.

⁶¹ See also R. Bartels, above note 39, pp. 303 et seq (arguing that the organization element is of special relevance in the context of the end of NIAC, and providing an overview of the ICTY jurisprudence on factors and indicators of the intensity and organization criteria).

escalated in 2012 and 2013, as armed groups such as the Islamic State of Iraq and the Levant (ISIS) regrouped and reorganized, and a new NIAC was initiated.

As with IACs, NIACs can end through an agreement between the parties, a stalemate, or one of the parties' defeat and surrender, but again the only legally relevant question would be whether the threshold continues to be satisfied. Similarly, AP II NIACs could end or transform into simple CA3 NIACs if the non-state actor fighting the state becomes so structurally compromised that it no longer has control over territory, or the ability to conduct sustained and concerted military operations or implement the Protocol. The disadvantage of this approach is the greater likelihood of multiple transitions between peace and NIAC.

For an example of a NIAC ending through the complete defeat of an adversary we need only look at the Sri Lanka conflict. An example of a NIAC petering out would be post-2007 surge Iraq. Again, the inquiry is purely factual. In some cases it will be relatively easy to determine the exact moment when the conflict ended, especially when there is a peace agreement (as long as the agreement is, in fact, observed). In others, it might be exceedingly difficult to pinpoint the exact time when the hostilities fell below the 'protracted armed violence' threshold, with Iraq again being a case in point.

Note again how diverging policy considerations can influence the contextual determination of whether the NIAC has ended, depending on the identity and the goals of the actor making the determination. For example, the end of the conflict would signal the end of any authority to detain individuals preventively and the resumption of the normal human rights regime (to the extent that IHL was actually capable of displacing it). If the actor making the determination cares about the possible arbitrary exercise of state power, it might be inclined to see the end of the NIAC more quickly. If, on the other hand, it cares about the arbitrary exercise of power by the non-state actor, which *is* bound by IHL but probably not by human rights law, then that calculus may turn out differently.

Transformation: internationalization (NIAC→IAC) and internalization (IAC→NIAC)

Until now we have looked at terminative events or processes, which end the application of IHL. But we also need to examine transformative processes, which end the application of one IHL sub-regime but start another.⁶²

Let us first look at internationalization, one of the most controversial topics of modern IHL. In my view, the concept of internationalization is only legally useful if it is defined as the transformation of a *prima facie* NIAC into an IAC, thereby applying to this conflict the more comprehensive IAC legal regime.⁶³ The most important of these legal consequences is the grant, in principle, of combatant immunity and potential prisoner of war status to combatants on both sides of the conflict. As for the mechanism of internationalization, we have seen that under CA2 IACs are defined as differences leading to the use of armed force *between two states*. Accordingly, there are two basic ways of internationalizing a NIAC. First, a *prima facie* NIAC can be subsumed under the *existing* CA2 definition. In other words, what at first glance looks like a conflict between a state and a non-state actor is on a deeper look actually a conflict between two states. This can either happen because a third state exercises control over a non-state actor at some point during a NIAC, with the most controversial issue here being what test or standard of control is to be applied, or because a non-state actor involved in a NIAC emerges as a state during the conflict – a rare occurrence, but one that we can perhaps observe with regard to some of the conflicts in the former Yugoslavia.

Secondly, a NIAC can be internationalized through the *redefinition* of IAC in terms of its party structure. In these cases a treaty or customary rule changes the CA2 definition so as to potentially include some non-state parties. Internationalization under this heading would clearly require proof of a specific rule to that effect. One such rule can be found in Article 1(4) AP I (self-determination conflicts against colonial, occupying or racist regimes), subject to a declaration under Article 96(3) AP I, while another possible candidate is the customary doctrine of the recognition of belligerency which has fallen into disuse, but perhaps not desuetude.⁶⁴

⁶² This section incorporates much of the discussion in M. Milanovic & V. Hadzi-Vidanovic, above note 1, pp. 292-293.

⁶³ Note that one can use the term internationalized armed conflict in a different, descriptive sense, as any NIAC in which there is some type of foreign intervention. This is again, *not* how I will be using the term, in order to maximize both its utility and precision.

⁶⁴ For more on the mechanisms of internationalization, see M. Milanovic and V. Hadzi-Vidanovic, above note 1, pp. 292-302.

The second transformative process is internalization, or de-internationalization, and it again flows from the inter-state CA2 definition.⁶⁵ It is easy to say that IACs are fought between states and statehood may even be uncontested in a given case, but who gets to *represent* the state may turn out to be a very difficult issue. Not only is this question important for the initial qualification of a conflict, but it may also prove to be crucial for its requalification or transition from one type to another. Consider all those conflicts during which some kind of regime change takes place, whether in Afghanistan, Libya, Iraq, or the Côte d'Ivoire. In all of these conflicts we had some form of foreign intervention coupled with a reversal of roles between a government and a rebel group, with a new government extending its invitation to the intervening state or states to assist it in fighting the former government.

What is at stake here is a process of transformation from an IAC into a NIAC. Looking at the competing policy considerations, we can see what is *not* enough for such internalization to occur. That the incumbent government of a country is defeated cannot by itself transform the conflict, nor can the establishment of a proxy government by the victors, as this would allow them to effectively strip by force the protections granted in IACs to the remaining combatants of the defeated state, depriving them of combatant immunity and POW status. Similarly, that a rebel group is recognized as the new legitimate government of the country cannot of itself transform the character of the conflict, as this would again allow the intervening states to unilaterally do what they will by installing their own proxies as the new state government.

In my view, both considerations of policy and recent practice support a rule consisting of the following three elements: a conflict would transform from an IAC into a NIAC only when (1) the old regime has lost control over most of the country, and the likelihood of it regaining such control in the short to medium term is small or none (negative element); (2) the new regime has established control over most of the country, and is legitimized in an inclusive process that makes it broadly representative of the people (positive element); and (3) the new regime achieves broad, although not necessarily universal, international recognition (external element). None of these elements is enough by itself, but jointly they take into account both questions of legitimacy and factual developments on the ground while providing safeguards against abuse by an intervening power. With regard to both the positive and the negative elements, the degree of

⁶⁵ Ibid, pp. 281-282.

control would be looked at holistically, taking into account not just troops on the ground but also direction over state institutions more generally, its economic assets, the media, or the nature of the internal legitimizing process (e.g. reasonably free and fair elections, or some other representative process, such as the convening of the Loya Jirga (grand tribal assembly) in Afghanistan). The external element would depend not just on bilateral state action but also on the decisions and conduct of the relevant international and regional organizations.

The exact mix of the three elements will inevitably vary from case to case. Internal and external legitimization will be especially important when the new government is able to wield control in the country only because it is being propped up by its foreign sponsors. The purpose of the formula is to find a solution which will on the one hand prevent foreign interveners from using puppet governments, established by force alone, to claim that the IACs/belligerent occupations have transformed into NIACs or mostly unregulated pacific (or non-belligerent) occupations, yet will, on the other hand, in some cases allow a transition to occur, but do so in line with the rights of all peoples to self-determination, and on the basis of safeguards which will hinder a transition on the basis of pure force (especially when that use of force is *ad bellum* unlawful, as was the case in Iraq).

Obviously, it may be difficult to pinpoint the exact moment of internalization in any given case, and thankfully in most cases it may be unnecessary to do so, but it *is* necessary for us to be aware of the relevant elements and their interplay. And doing so, we must also be aware that the internalization of a conflict has as its consequence a possible reduction of various protections under IHL. While the legal regimes applicable to IACs and NIACs have largely been brought together through the development of custom, significant differences and uncertainties still remain in areas such as grounds for detention, treatment and procedural safeguards in detention, combatant immunity, and status-based targeting. Thus, though transformative processes do not end the application of IHL altogether, their practical consequences should not be underestimated. These practical consequences are probably the most significant with regard to detention which begins before, but continues after, the moment of transformation from one type of conflict to another. The key issue here is the existence or modification of any authority to

detain; while such authority may exist directly under IHL in IACs, it likely requires the intervention of domestic law⁶⁶ in NIACs.⁶⁷

End of the conflict with Al-Qaeda?

This brings us to one of the most vexing questions of contemporary international relations and IHL, that of the existence of an armed conflict between the United States and Al-Qaeda, and its seemingly impending end. In order to analyse this question we must first understand some relatively recent shifts in the underlying legal and political dynamics.

As originally designed, and through most of its history, IHL was seen by states as a system of *limitations* on their sovereignty and freedom of action, particularly so when it comes to the law of non-international armed conflict.⁶⁸ In other words, the *baseline* for international regulation from the classical period onwards was essentially the *Lotus* presumption: states were at liberty to do anything that international law did not expressly prohibit, including the unrestrained freedom to wage war, both against each other and internally. The law of war evolved precisely to impose such restraints, first and foremost in the inter-state context. States resisted the international regulation of internal conflict because of the fear – founded or not – that it would impose limits on how they could deal with rebels, and confer on these rebels some rights in international law. It is this sovereignty-induced concern of states that explains the IAC/NIAC dichotomy in the modern law and the higher thresholds of applicability for NIAC rules, in terms of intensity and organization of the non-state parties. Hence, it was rarely if ever in the interest of a state embroiled in a non-international armed conflict to recognize the

⁶⁶ In the case of cross-border NIACs the domestic law authority need not necessarily come from the law of the state in which the hostilities take place, but could also come from the law of the state exercising powers of detention.

⁶⁷ See esp. in that regard *Serdar Mohammed v. Ministry of Defence* [2014] EWHC 1369 (QB), paras. 239 ff (the High Court of England and Wales finding that IHL in NIAC does not provide for a power to detain, and that any such authority can come from domestic law or other parts of international law, such as Security Council resolutions). See more K. Macak, 'No Legal Basis under IHL for Detention in Non-International Armed Conflicts? A Comment on *Serdar Mohammed v. Ministry of Defence*,' *EJIL: Talk!*, 5 May 2014, at <http://www.ejiltalk.org/no-legal-basis-under-ihl-for-detention-in-non-international-armed-conflicts-a-comment-on-serdar-mohammed-v-ministry-of-defence/>; L. Hill-Cawthorne and D. Akande, 'Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?,' *EJIL: Talk!*, 7 May 2014, at <http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/>.

⁶⁸ M. Milanovic and V. Hadzi-Vidanovic, above note 1, pp. 305-308.

existence of such conflict – it simply *did not want* IHL to apply.⁶⁹ This may explain why, for instance, the United Kingdom consistently denied the existence of a NIAC in Northern Ireland, claiming that the euphemistically termed ‘Troubles’ were an internal of criminal law enforcement despite the fact that the CA3 threshold was arguably reached,⁷⁰ and why it made a declaration regarding Article 1(4) AP I which explicitly excluded acts of terrorism, whether concerted or in isolation, from the scope of armed conflict.⁷¹

Now, however, human rights have gradually replaced, or are in the process of replacing, the idea of unrestrained freedom of action as the baseline for regulation, as much as *culturally* as formally.⁷² Instead of IHL being the only set of limitations on states, a more rigid, demanding and legalistic set of limitations has emerged, particularly in the internal context. States, or at least some states, have accordingly stopped seeing IHL as a *constraining* body of rules whose application they want to avoid in their engagements with non-state actors.⁷³ Rather, they have increasingly started seeing IHL as an *authorizing* body of rules liberating them or derogating from human rights or other constraints, often on the dubious basis of the *lex specialis* principle.⁷⁴ For example, while IHL targeting or detention rules evolved as limitations (e.g. while people will inevitably be killed in wartime, deliberately target civilians is prohibited), they are now seen as permissive rules authorizing departures from human rights (e.g. an enemy fighter may be killed

⁶⁹ See M. Sassòli, ‘Transnational Armed Groups and International Humanitarian Law’, *HPCR Occasional Paper Series*, Winter 2006, No. 6, pp. 7-8.

⁷⁰ S. Haines, ‘Northern Ireland 1968-1998,’ in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, pp. 117, 130-131, 133-136 (reporting that, according to unattributable information given to the author, that various legal advisers within the UK government thought that the NIAC threshold was reached, at least during some periods).

⁷¹ ‘It is the understanding of the United Kingdom that the term “armed conflict” of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation. The United Kingdom will not, in relation to any situation in which it is itself involved, consider itself bound in consequence of any declaration purporting to be made under paragraph 3 of Article 96 unless the United Kingdom shall have expressly recognised that it has been made by a body which is genuinely an authority representing a people engaged in an armed conflict of the type to which Article 1, paragraph 4, applies.’ United Kingdom of Great Britain and Northern Ireland, Declaration 2 July 2002, available at: <http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument>.

⁷² See also D. Kretzmer, ‘Rethinking the Application of IHL in Non-International Armed Conflicts,’ *Israel Law Review*, Vol. 42, 2008, p. 8.

⁷³ Cf. N. Lubell, *Extraterritorial Use of Force against Non-State Actors*, Oxford University Press, Oxford, 2010, pp. 123-124.

⁷⁴ See more M. Milanovic, above note 41. Cf. the *Serdar Mohammed* judgment cited in above note 67.

even if he does not pose an imminent threat; preventive detention for reasons of security is authorized even if human rights law generally prohibits preventive detention).⁷⁵

To see how these dynamics evolved we need only look at US policy post-9/11.⁷⁶ The US government from the outset decided to cast the Al-Qaeda threat and the US response thereto as a ‘war’ for both domestic and international purposes, in order to get the detention and targeting authority that it thought it needed and avoid having its hands tied by any applicable rules of domestic constitutional law as well as international human rights law. The moniker ‘global war on terror’ denoted a supposed single conflict under IHL between the US on one side and Al-Qaeda and its affiliates on the other. Initially, the US characterized this conflict as an IAC, albeit a strange sort of IAC which transcended the Geneva CA2 definition since one of its parties was not a state. In the US government’s view, the CA2 definition did not create ‘field preemption’,⁷⁷ i.e. was not all-encompassing; put in more traditional international legalese, the notion of IAC was wider under customary law. This was a completely ahistorical argument; the notion of IAC was *invented* in Geneva and replaced the equally inter-state notion of war, while there was no evidence that it was redefined either through treaty or through custom in this particular fashion.⁷⁸ The administration also considered that the conflict could not be a NIAC as it transcended the borders of a single state.⁷⁹ In *Hamdan*, the US Supreme Court rejected the government’s arguments and found that the conflict with Al-Qaeda could not be an IAC since it was not inter-state, and in an ambiguous holding apparently qualified it as a NIAC.⁸⁰ The position of both the

⁷⁵ See, for example, J. Bellinger and V. Padmanabhan, ‘Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law’, *American Journal of International Law*, Vol. 105, 2011, p. 201 (repeatedly referring to targeting and detention *authority* under IHL, and identifying gaps of such authority in NIACs, which they feel is needed). See also C. Kress, ‘Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts,’ *Journal of Conflict & Security Law*, Vol. 15 No. 2, 2010, p. 260 (speaking of states ‘availing themselves of the wider powers they can derive from the application of the law of non-international armed conflict (compared with international human rights law) than they are concerned by the restraining effect of the ensuing obligations.’).

⁷⁶ In that regard, see especially K. Anderson, ‘Targeted Killing and Drone Warfare: How We Came to Debate Whether There Is a “Legal Geography of War”’, in Peter Berkowitz, ed., *Future Challenges in National Security and Law*, Hoover Institution, Stanford University, 2011, available at <http://ssrn.com/abstract=1824783>.

⁷⁷ Supreme Court of the United States, *Hamdan v. Rumsfeld*, Government Brief on the Merits, No. 05-184, p. 26, available at <http://www.justice.gov/osg/briefs/2005/3mer/2mer/2005-0184.mer.aa.html>

⁷⁸ See also C. Kress, above note 75, p. 255; M. Sassòli, above note 69, pp. 4-5; Lubell, above note 73, p. 96.

⁷⁹ See J. Pejic, ‘The Protective Scope of Common Article 3: More than Meets the Eye,’ *International Review of the Red Cross*, Vol. 93, Issue 881, March 2011, p. 195.

⁸⁰ See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), p. 630. On the fundamental lack of clarity in the Court’s decision on classification and its several possible interpretations, see M. Milanovic, ‘Lessons for Human Rights and Humanitarian Law in the War on Terror: Comparing *Hamdan* and the Israeli *Targeted Killings* Case,’ *International Review of the Red Cross*, Vol. 89, Issue 866, June 2007, p. 373

Bush and Obama administrations post-*Hamdan* has hence been that the conflict with Al-Qaeda is some sort of single, *global* NIAC, which is territorially unlimited in scope.

Opinions of course differ on whether the idea of such a global NIAC is legally tenable. In my view, even under a flexible interpretation of the IHL framework, which would allow for various kinds of cross-border NIACs, the idea of a global NIAC is an oxymoron. Any NIAC requires the existence of protracted armed violence which by definition has to take place *somewhere*, i.e. has to be localized at least to the territory of one state. That violence can spill over to the territory of another state (which need not necessarily be adjacent to the primary state), but there has to be a *nexus* to the protracted violence in the primary state for IHL to apply to that violence.⁸¹ Thus, while one can safely speak of a NIAC (or NIACs) between the United States and the Taliban and other armed groups in Afghanistan, and while that conflict can spill over into say Pakistan or any other country – and arguably still be regulated by IHL – the existing legal framework does not seem to allow for a construction as amorphous as a planet-wide NIAC,⁸² particularly one in which a loose terrorist network such as Al-Qaeda is treated as a single organizational entity and belligerent party.⁸³ All of the difficulties in squaring the US conflict with Al-Qaeda with the NIAC legal regime stem precisely from the fact that this regime was not designed to regulate anything like it.⁸⁴

In short, Al-Qaeda as a non-state actor was and perhaps still is a party to a NIAC in Afghanistan. Its off-shoots and affiliates have also been involved in other NIACs, as in Iraq or Yemen. But the attacks by Al-Qaeda elsewhere have (thankfully) been so sporadic, and its control over its allied non-state actors so loose, that it would be exceedingly difficult to say that the intensity and organization criteria for a NIAC were satisfied for the purpose of establishing a single armed conflict which is global in scope.⁸⁵ One simply cannot aggregate all terrorist acts motivated by Islamic fundamentalism coupled with professed allegiance to Al-Qaeda all across the world in order to satisfy the two-fold intensity and organization test. Nor does it seem

⁸¹ See also S. Sivakumaran, above note 3, p. 234.

⁸² See Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge, 2010, p. 56: ‘from the vantage point of international law ... a non-international armed conflict cannot possibly assume global dimensions.’

⁸³ See also C. Kress, above note 75, p. 261; J. Pejic, above note 79, p. 196; N. Lubell, above note 73, pp. 114-121.

⁸⁴ For a discussion of the difficulties in applying the IHL detention regime to suspected terrorists, see, e.g. L. Blank, above note 39.

⁸⁵ See also N. Lubell, ‘The War (?) against Al-Qaeda,’ in E. Wilmshurst (ed.), above note 70, pp. 421, 451-452.

justifiable to depart from the *Tadic* criteria in case of Al-Qaeda but continue applying them rigorously to ‘normal,’ common NIACs.

Again, opinions on this issue will differ. But even if the conflict with Al-Qaeda could legally be qualified as a single NIAC, albeit a very unorthodox one, that conflict may well be approaching its end. The degradation that the US military operations have inflicted on the ‘core’ Al-Qaeda organization further threatens to push it below the NIAC organizational threshold, even if the threshold is applied more flexibly. Nor can this be prevented by using the concept of ‘co-belligerency’, which was imported from the law of IAC without much consideration as to whether the analogy can actually be drawn.

US policy-makers are of course well aware that the construction of a NIAC with Al-Qaeda, which is sustained internally because it has broad bi-partisan political appeal, is legally compromised by the continued degradation of core Al-Qaeda and the impending US withdrawal from Afghanistan.⁸⁶ But this does not end the US desire to keep using targeted lethal force, e.g. through drones, when it considers such force to be necessary, nor, even more importantly, does this make the government’s life any easier with respect to those individuals that it still holds in preventive security detention, in Guantanamo or elsewhere, despite efforts to draw such detention to a close.

Its immense political importance notwithstanding, the US ‘war on terror’ or its rebranded NIAC with Al-Qaeda and associated forces is so idiosyncratic and mixed up with parallel questions of US domestic law and policy that we should exercise extreme caution in drawing from it any lessons regarding the end of application of IHL.⁸⁷ As explained above, the better view is that IHL did not even apply in the first place to many situations within this supposedly single conflict. A significant number of individuals were either targeted or detained outside the

⁸⁶ See, e.g., the speech of Jeh Johnson, at the time General Counsel of the U.S. Department of Defense, at the Oxford Union, on ‘The Conflict Against Al Qaeda and its Affiliates: How Will It End?’, 30 November 2012, available at: <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union/> (‘I do believe that on the present course, there will come a tipping point – a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed. At that point, we must be able to say to ourselves that our efforts should no longer be considered an “armed conflict” against al Qaeda and its associated forces.’); Remarks by President Obama at the National Defense University, 23 May 2012, available at: <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> .

⁸⁷ For an excellent discussion of the developments in US law and policy and an argument that the end of the conflict would not necessarily spell the end of any authority to use lethal force, see R. Chesney, ‘Postwar,’ in *Harvard National Security Journal*, (2014, forthcoming), draft available on SSRN at: <http://ssrn.com/abstract=2332228>.

framework of any discrete, localized, legally cognizable NIAC. The individuals who were detained in the context of an actual NIAC, e.g. in Afghanistan, and remain in captivity, would benefit from the protection of IHL. The end of the conflict would spell the end of any preventive detention authority (and such authority probably does not even exist in NIACs for either party),⁸⁸ while the protective rules of IHL regarding treatment and procedural safeguards would continue applying so long as the person remains detained.

Finally, it is important to note that the end of IHL's application does not necessarily leave a regulatory void. This is not the place for any extensive argument about how human rights law would apply to all these situations, especially those unregulated by IHL, but for our present purposes I would simply caution against a dogmatic juxtaposition between 'war' and 'law enforcement.' Not every targeted use of lethal force, nor for that matter every preventive detention, would necessarily be unlawful under the relevant human rights treaties even in the absence of an armed conflict.⁸⁹

Conclusion

We have seen how the approach to the end of IHL's application needs to be objective and factual, as with its beginning – but that is easier said than done. The basic principle is that the end of armed conflict also ends the applicability of those parts of IHL that regulate the conduct of hostilities, while substantial parts of IHL actually survive the armed conflict. And while the end of a conflict should not be presumed lightly, with hostilities having to end with a degree of permanence and stability, any analysis of the ostensibly factual question of whether an IAC, NIAC, or occupation have ended will at least partially be driven by external policy factors and the consequences of any finding regarding termination. Those factors are also significantly influenced by how IHL interacts with other branches of international law, such as international

⁸⁸ In other words, a rebel group fighting a state does not have the *right* in international law to detain the state's soldiers, nor for that matter does it have the *right*, or power, or authority to kill them. It is simply *not unlawful* under IHL for the rebel group to kill combatants if it abides by the targeting rules of IHL, or to detain them, but it must do so in conformity with IHL rules on treatment in detention. The same applies for the state itself, whose authority to kill or detain stems from its own domestic law. See also P. Rowe, 'Is There A Right to Detain Civilians by Foreign Armed Forces during a Non-International Armed Conflict?', *International and Comparative Law Quarterly*, Vol. 61, Issue 03, July 2012, p. 697.

⁸⁹ For a discussion of the need to apply human rights flexibly in an extraterritorial setting and strike a balance between universality and effectiveness, see M. Milanovic, above note 51.

criminal law and human rights law. Accordingly, while the basic rules may be simple to state, they can be very complex to apply in practice, and that, at least, is inevitable.