

THE END OF ARMED CONFLICT, THE END OF PARTICIPATION IN ARMED CONFLICT, AND THE END OF HOSTILITIES: IMPLICATIONS FOR DETENTION OPERATIONS UNDER THE 2001 AUMF

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I. INTRODUCTION

Pursuant to the 2001 Authorization for Use of Military Force (AUMF)¹, the U.S. has been involved in a “war” against Al Qaeda, the Taliban and associated forces.² However, disagreement exists on how to classify these military operations for the purposes of applying international humanitarian law. Views differ on whether there is a) one transnational non-international armed conflict (NIAC) against Al Qaeda, the Taliban and associated forces, b) one formerly international armed conflict (IAC), now a NIAC, against the Taliban in Afghanistan,

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1. Act of Sept. 18, 2001, Pub. L. No. 107-40, § 1, 115 Stat. 224.

2. President Barack Obama, Remarks at the National Defense University (May 23, 2013), <https://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> (“Under domestic law, and international law, the United States is at war with al Qaeda, the Taliban, and their associated forces.”). The US Department of Justice has also explained that the U.S. is in a non-international armed conflict against Al Qaeda and its associated forces, and that any U.S. operation would be part of this conflict, even if it took place away from the zone of active hostilities. *See* DEP’T OF JUSTICE WHITE PAPER, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR ORGANIZATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE (2013), http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf [hereinafter DOJ WHITE PAPER].

and a transnational NIAC against Al Qaeda and associated forces, wherever they may be,³ or c) no transnational NIAC but rather *distinct* NIACs against the Taliban, Al Qaeda, and associated forces in Afghanistan, Iraq, Syria, and other countries.⁴

Accepting a narrow or wide geographic scope of armed conflict has implications for the international law applicable to the U.S.'s operations against these groups. In scenario a), active hostilities *somewhere* in the world in connection to the transnational NIAC might be considered justification for the continued application of international humanitarian law (IHL)—or the law of armed conflict—to operations *wherever* they are deemed connected to the transnational conflict⁵ In scenarios b) and c), continued active hostilities against Al Qaeda or other associated forces in Afghanistan or elsewhere would have no direct bearing on the legal framework governing operations against the Taliban, and vice versa.

For the purposes of applying international humanitarian law, classifying any situation as an armed conflict should be based on the facts on the ground and not on any country's subjective judgment or political statement. At some point, the facts on the ground may reveal that, as a matter of international law, a) one or more armed conflicts have ended, b) the U.S. is no longer a party to the armed conflict(s), or c) hostilities in the armed conflict(s) have ended. Any of these determinations, in turn, will have implications for the release of persons detained in connection with the "war" against Al Qaeda, the Taliban and associated forces, as will be explored below. As of October 17, 2016, 60 persons remained detained in Guantanamo Bay under the

3. The U.S. Dep't of Justice has explained that the U.S. is in a non-international armed conflict against Al Qaeda and its associated forces, and that any U.S. operation would be part of this conflict, even if it took place away from the zone of active hostilities. See DOJ WHITE PAPER, *supra* note 2, at 3-5.

4. See 31st International Conference of the Red Cross and Red Crescent, Nov. 28–Dec. 1, 2011, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, at 9-11, I.C.R.C. Doc. 31IC/11/5.1.2 (Oct. 2011).

5. U.S. POLICY STANDARDS AND PROCEDURES FOR THE USE OF FORCE IN COUNTERTERRORISM OPERATIONS OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (May 22, 2013), http://www.whitehouse.gov/sites/default/files/uploads/2013.05.23_fact_sheet_on_ppg.pdf (setting out standards for the use of force "outside areas of active hostilities").

2001 AUMF.⁶ Of these detainees, 46 are neither eligible for transfer nor facing any process before military commissions.⁷

II. THE END OF ARMED CONFLICT, THE END OF PARTICIPATION IN AN ARMED CONFLICT, AND THE END OF HOSTILITIES

When considering whether IHL requires the release of persons detained in connection with the “war” against Al Qaeda, the Taliban and associated forces, one should distinguish between the end of hostilities on the one hand and the end of armed conflict or “general close of military operations” on the other, as the former may be considered to have ceased before the latter. In the case of an armed conflict involving two or more parties fighting alongside each other, it is also possible that one party may no longer be participating in the conflict while the armed conflict will continue between other parties. Under IHL, each of these three different scenarios can trigger the release of persons detained pursuant to the 2001 AUMF, and are particularly relevant for the remaining Guantanamo detainees that are neither eligible for transfer nor facing any process before military commissions. The end of armed conflict, the end of participation in an armed conflict, or the end of hostilities will not only dictate the release of persons who are held in relation to the armed conflict without criminal prosecution, but will also trigger a shift in the international legal regime governing any subsequent capture and detention operations. Before examining these three scenarios, it is important to note the differences between international and non-international armed conflicts, as these are governed by different sets of IHL rules.

6. Charlie Savage, *‘Guantánamo Diary’ Writer Is Sent Home to Mauritania*, N.Y. TIMES (Oct. 17, 2016), <http://www.nytimes.com/2016/10/18/us/guantnamo-diary-writer-mohamedou-ould-slahi.html> (noting that the latest transfer reduces the number of remaining detainees to 60). The remaining detainees are held there “as informed by the law of war, and consistent with applicable domestic and international law for such detentions.” DEPT OF DEF., PLAN FOR CLOSING THE GUANTANAMO BAY DETENTION FACILITY 6 (Feb. 23, 2016), http://www.defense.gov/Portals/1/Documents/pubs/GTMO_Closure_Plan_0216.pdf.

7. DEPT OF DEF., PLAN FOR CLOSING THE GUANTANAMO BAY DETENTION FACILITY 5 (Feb. 23, 2016), http://www.defense.gov/Portals/1/Documents/pubs/GTMO_Closure_Plan_0216.pdf. According to President Obama’s “Plan for Closing the Guantanamo Bay Detention Facility,” those who “remain designated for continued detention and who are not candidates for U.S. prosecution or detention or transfer to a foreign country” may be relocated to a facility in the United States. *Id.* at 6.

A. International Armed Conflict: Definition

Before the adoption of the Geneva Conventions in 1949, States commonly insisted that IHL should only apply in cases of a declaration of war or where there was evidence of States' intention to initiate a state of war,⁸ regardless of the existence of actual hostilities. The Geneva Conventions of 1949 brought the belief that the application of IHL should be based on a factual assessment, and the new terminology "armed conflict" replaced the concept of "war."⁹

Today, an IAC exists when two or more States resort to armed force against each other. These are 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."¹⁰ Jean Pictet's commentary to the Conventions explains that States' political desire to avoid the label of "war" is irrelevant to determining whether an international armed conflict exists. Instead, "any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of a state of war," further noting that how long the conflict lasts or how much slaughter takes place makes no difference to determining the existence

8. See Quincy Wright, *When Does War Exist?*, 26 AM. J. INT'L L. 362, 362–68; see also Louise Arimatsu, *Beginning of IHL Application: Overview and Challenges*, PROC. OF THE BRUGES COLLOQUIUM, Autumn 2013, at 71, 73, https://coleurope.eu/sites/default/files/uploads/page/collegium_43_webversie.pdf.

9. INT'L COMM. OF THE RED CROSS, COMMENTARY OF 2016 TO THE FIRST GENEVA CONVENTION, art. 2, para. 193 (Mar. 22, 2016), <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518>.

10. See Geneva Convention Common Art. 2, Aug. 12, 1949, 75 U.N.T.S. 970–73 [hereinafter Common Article 2]. Additional Protocol I to the Geneva Conventions, which also applies to IAC, adds to this definition armed conflicts in which peoples exercise their right to self-determination by fighting against colonial domination, alien occupation, or racist regimes. See Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) arts. 1(4), 96(3), June 8, 1977) 1125 U.N.T.S. 17512 [hereinafter Protocol I]. Adding this language into the definition of IAC led to controversy during negotiations. Those in favor recognized that wars of liberation are of an international character, consistent with various instruments and bodies of the United Nations. INT'L COMM. OF THE RED CROSS, COMMENTARY OF 1987 TO PROTOCOL I OF THE GENEVA CONVENTIONS, ¶ 66, <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/1a13044f3bbb5b8ec12563fb0066f226/7125d4cb d57a70ddc12563cd0042f793>.

of an international armed conflict.¹¹ The International Criminal Tribunal for the Former Yugoslavia (ICTY) takes a similar approach, finding an international armed conflict whenever States resort to force between themselves.¹² This low threshold of violence ensures early protection of those persons who would be covered by the Geneva Conventions.¹³

In an IAC, IHL is generally understood to apply to the entire territory of the parties to the conflict,¹⁴ but not in the territory of neutral or non-belligerent States (with certain narrow exceptions).¹⁵ Article 49 of Additional Protocol I (AP I), however, adds that the Protocol applies to “all attacks in whatever territory conducted [...]”¹⁶ suggesting that IHL would also apply to attacks on non-belligerent territory. As explained by International Committee of the Red Cross (ICRC) legal adviser Tristan Ferraro,

11. INT’L COMM. OF THE RED CROSS, COMMENTARY TO THE FIRST GENEVA CONVENTION 32 (Jean Pictet ed., 1952) [hereinafter GENEVA CONVENTION I COMMENTARY]. The ICRC Commentaries to the 1949 Geneva Conventions and 1977 Additional Protocols offer guidance and clarification on how to interpret their provisions, mainly on the basis of the work of Diplomatic Conferences and other preparatory work. In *Hamdan v. Rumsfeld*, the U.S. Supreme Court wrote: “The International Committee of the Red Cross is referred to by name in several provisions of the 1949 Geneva Conventions and is the body that drafted and published the official commentary to the Conventions. Though not binding law, the commentary is, as the parties recognize, relevant in interpreting the Conventions’ provisions.” 548 U.S. 557, 691 n.48 (2006). See also FRANÇOIS BUGNION, THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND THE PROTECTION OF WAR VICTIMS 916–18 (2003); INT’L COMM. OF THE RED CROSS, HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW? (Mar. 2008), <https://icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> [hereinafter “Armed Conflict Opinion Paper”].

12. Prosecutor v. Tadic, Case No. IT-94-1, Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

13. For instance, the protections in the Third Geneva Convention for prisoners of war. See Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

14. Tadic, *supra* note 12, at para. 70.

15. See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 4, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 5, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Third Geneva Convention, *supra* note 13, at art. 4(B)(2); Protocol I, *supra* note 10, at art. 19.

16. Protocol I, *supra* note 10.

most of the protections conferred by IHL to persons affected by the IAC are not based on territorial considerations. Any other interpretation would entail a manifestly absurd and unreasonable result since it would suffice for instance to transfer detainees outside the territory of belligerents to deprive them of the protection given by IHL.¹⁷

Nevertheless, extending the application of IHL to non-belligerent territories would potentially expose more civilians to collateral damage.

B. Non-International Armed Conflict: Definition

Non-international armed conflict is less clearly defined under international treaty law. Vague definitions can be found in Common Article 3 to the four Geneva Conventions of 1949 and Article 1 of Additional Protocol II (AP II).¹⁸ The classification of a situation as a NIAC does not affect a State's right under its domestic law to prosecute rebels for their acts of hostilities.¹⁹ As will be shown below, the most

17. Tristan Ferraro, *The Geographic Reach of IHL: The Law and Current Challenges*, PROC. OF THE BRUGES COLLOQUIUM, Autumn 2013, at 105, 108, https://coleurope.eu/sites/default/files/uploads/page/collegium_43_webversie.pdf.

18. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, art. 1, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II].

19. Geneva Convention Common Art. 3, Aug. 12, 1949, 75 U.N.T.S. 970–73 [hereinafter Common Article 3]. (“The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”); *see also id.* at article 3(1) (“Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.”). The Commentary to article 3 explains:

Article 3 resembles the rest of the Convention in that it is only concerned with the individual and the physical treatment to which he is entitled as a human being . . . without regard to his other qualities. It does not affect the legal or political treatment which he may receive as a result of his behaviour.

INT'L COMM. OF THE RED CROSS, COMMENTARY: IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 44 (Jean Pictet ed., 1958) [hereinafter GENEVA CONVENTION IV COMMENTARY]. The Commentary to Article 3(1) of Protocol II says:

All mention of parties to the conflict had been deleted from the text, precisely so as not to give any semblance of recognition to any sort of international status of the insurgent party . . . Thus

prevalent definitions of NIAC share two common criteria: an intensity of fighting and a certain level of organization of armed groups.²⁰

Under Common Article 3, “armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties” include armed conflicts in which one or more non-state armed groups are fighting, either between themselves or against government armed forces. They require a higher intensity of fighting than an IAC. According to D. Schindler, hostilities must be conducted by a “force of arms” that exhibits intensity to a sufficient degree to compel the government to use its armed forces, and not merely its police forces.²¹ Additionally, the hostilities conducted by the armed group must be of a “collective character” and additionally must have a minimum level of organization, which includes a responsible command and a capacity to meet minimal humanitarian requirements.²² The collective character can be understood as requiring coordination.²³

The ICTY’s commentary in *Tadic* is the leading authority on classifying a NIAC, and bears remarkable similarity to Schindler’s commentary regarding NIAC classification. In this case, the ICTY held that a NIAC under Common Article 3 must meet the following two cumulative criteria: (1) the non-state armed group must possess organized armed forces that are under a certain command structure and have the capacity to sustain military operations;²⁴ and (2) the

it is perfectly clear that the application of international humanitarian law in situations of non-international armed conflict has no effect whatever on the qualification of relations between the parties.

INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS para. 4499 (Yves Sandoz et al. eds., 1987) [hereinafter ADDITIONAL PROTOCOLS COMMENTARY].

20. For more on the definition of a NIAC, see Armed Conflict Opinion Paper, *supra* note 11, at 3–5. For a survey of possible views to the contrary, see Michael J. Adams and Ryan Goodman, *De Facto and De Jure Non-international Armed Conflicts: Is It Time to Topple Tadić?*, JUST SECURITY (Oct. 13, 2016), <https://www.justsecurity.org/33533/de-facto-de-jure-non-international-armed-conflicts-time-topple-tadic/>.

21. Dietrich Schindler, *The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols*, 163 COLLECTED COURSES OF THE HAGUE ACAD. OF INT’L L., 117, 146–47 (1979).

22. *Id.*

23. See ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 19, at para. 4460.

24. See Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, paras. 561–68 (Int’l Crim. Trib. For the Former Yugoslavia May 7, 1997); see also Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, paras. 84, 90–134 (Int’l Crim. Trib. for the

hostilities must meet a minimum threshold of intensity.²⁵ The ICTY has added that a NIAC exists whenever there is “protracted” armed violence between governmental authorities and non-state armed groups or between such groups within a State,²⁶ and that “protracted” refers “more to the intensity of the armed violence than to its duration.”²⁷ There are no other criteria.²⁸

1. Intensity of Violence

Determining the intensity of the violence requires an assessment of the facts on the ground. Intensity of fighting can be determined by several indicators, including the number, duration, and intensity of armed confrontations, whether the fighting is widespread, the types of weapons and equipment used, the number and caliber of munitions fired, the number of fighters and type of forces participating in the fighting, the number of military and civilian casualties, the extent of material destruction, and the number of civilians fleeing combat zones.²⁹

Former Yugoslavia Nov. 30, 2005) (discussing and applying the two-part test first enumerated in *Tadic*); Prosecutor v. Boskoski, Case No. IT-04-82-T, Judgment, para. 175 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008) (applying the *Tadic* test and noting the importance of the requirement of protracted armed violence in an internal armed conflict when assessing its intensity); Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence (Trial Chamber I), para. 93 (Int'l Crim. Trib. for Rwanda Dec. 6, 1999) (referencing the *Tadic* test and noting that whether a situation is an armed conflict must be decided on a case-by-case basis).

25. See Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, paras. 135–70 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005). See also Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, para. 49 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

26. Prosecutor v. Tadic, Case No. IT-94-1-A, Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

27. Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, para. 49 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

28. Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, para. 170 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005) (“[T]he determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organization of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant.”).

29. Tristan Ferraro, *The Applicability and Application of IHL to Multinational Forces*, 95 INT'L REV. OF THE RED CROSS 561, 576 (2013); Prosecutor v. Boskoski, Case No. IT-04-82-T, Judgment, paras. 175–200 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008). See also Prosecutor v. Haradinaj, Case No.

The threshold of violence in a NIAC must be distinguished from isolated acts of terrorism.³⁰ For example, when the UK ratified AP I, it included an understanding of the term ‘armed conflict’ to exclude isolated acts of terrorism, stating 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.”³¹ Nevertheless, in the *Boskoski* case, the ICTY Trial Chamber explained that while isolated acts of terrorism may not reach the threshold of armed conflict, protracted terrorist acts “are relevant to assessing the level of intensity with regard to the existence of an armed conflict.”³²

2. Level of Organization

In addition to the intensity of violence criterion, the non-state armed group must meet a certain level of organization. Even if the level of violence in a given situation is very high (in a situation of mass riots, for example), a NIAC will not exist unless the armed group has a certain level of organizational structure and capacity. While it is presumed that government forces meet a minimum level of organization,³³ the ICTY has identified five indicators for assessing the level of organization of non-state armed groups: (1) the existence of a hierarchical command structure, (2) the ability of the group to plan and launch coordinated military operations, (3) the capacity to recruit,

IT-04-84-T, para. 49 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008); see also *Prosecutor v. Boskoski*, Case No. IT-04-82-T, Appeals Chamber Judgment, paras. 19–24 (Int’l Crim. Trib. for the Former Yugoslavia May 19, 2010); *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, paras. 168 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); *Prosecutor v. Thomas Lubanga Dyilo*, Judgment, ICC-01/04-01/06, paras. 537–538 (ICC Trial Chamber Mar. 14, 2012).

30. See *Prosecutor v. Delalic, Mucic, Delic and Landzo*, Case No. IT-96-21-T, Judgment, para. 184 (Int’l Trib. for the Former Yugoslavia Nov. 16, 1998).

31. This understanding was memorialized in a reservation by the United Kingdom to Article 1(4) and Article 96(3) to Additional Protocol I. Int’l Comm. of the Red Cross, Treaties, States Parties, and Commentaries, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, United Kingdom of Great Britain and Northern Ireland, INTERNATIONAL COMMITTEE OF THE RED CROSS (July 2, 2002), <https://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument>.

32. *Prosecutor v. Boskoski*, Case No. IT-04-82-T, Judgment, para. 190 (Int’l Crim. Trib. for the Former Yugoslavia July 10, 2008).

33. *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, para. 60 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008)

train and equip combatants, (4) the existence of an internal disciplinary system, and (5) the group's ability to act on behalf of its members.³⁴

3. NIAC under Additional Protocol II

Article 1(1) of AP II³⁵ proposes a stricter definition of NIAC than Common Article 3, in that it only applies to conflicts between the State's own armed forces and dissident armed forces or other non-state armed groups on the territory of the State, and not *between* such armed groups. It also requires that the armed groups exercise "such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."³⁶ The Commentary to AP II recognizes that control over territory can be "relative, for example, when urban centers remain in government hands while rural areas escape their authority"; there needs to be "some degree of stability in the control of even a modest area of land."³⁷

The additional criteria found in AP II do not modify the scope of Common Article 3, which "retains an independent existence."³⁸ It is therefore possible that a conflict will meet the criteria for a Common

34. Tristan Ferraro, *The Applicability and Application of IHL to Multinational Forces*, 95 INT'L REV. OF THE RED CROSS 561, 576–77 (2013); Prosecutor v. Boskoski, Case No. IT-04-82-T, Judgment, paras. 194–206 (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008). See also Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, paras. 94–134 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005).

35. The U.S. is not a party. INT'L COMM. OF THE RED CROSS, TREATIES, STATE PARTIES AND COMMENTARIES: PROTOCOL II (last visited Oct. 5, 2016), https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475.

36. Protocol II, Art. 1(1), *supra* note 18; ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 19, at para. 4460.

37. ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 19, at para. 4467.

38. *Id.* at para. 4454. The Commentary states, Keeping the conditions of application of Common Article 3 as they are, and stipulating that the proposed definition will not apply to that article, meant that the Protocol was conceived as a self-contained instrument, additional to the four Conventions and applicable to all armed conflicts which comply with the definition and are not covered by Common Article 2. Keeping the Protocol separate from Common Article 3 was intended to prevent undercutting the scope of Article 3 itself by laying down precise rules. In this way Common Article 3 retains an independent existence.

Id.

Article 3 NIAC, but not those of AP II. However, any conflict that meets the elements of AP II will also fall within Common Article 3. While Common Article 3 has been described as a mini-Convention³⁹ making the most fundamental IHL rules applicable to NIACs, AP II contains a more elaborate set of rules governing this type of armed conflict.

4. NIAC Under the Rome Statute

Borrowing the term “protracted” from the ICTY, the Rome Statute of the International Criminal Court⁴⁰ appears to confuse the distinction between common Article 3 and AP II NIACs by establishing jurisdiction over war crimes only in “armed conflicts that take place in the territory of a State when there is a *protracted armed conflict* between governmental authorities and organized armed groups or between such groups.”⁴¹ This description apparently falls midway between common Article 3 and AP II NIACs, and arose in the Rome Statute as a result of compromise during treaty negotiations.⁴² As the U.S. is a party to neither AP II nor the Rome Statute, the definition of Common Article 3 elucidated by the ICTY is most relevant to U.S. operations.

NIACs are to be distinguished from lesser forms of violence – in both intensity and group organization – such as internal disturbances and tensions including riots, isolated and sporadic acts of violence and acts of a similar nature.⁴³ The Commentary to Article 1(2)

39. INT’L COMM. OF THE RED CROSS, THE GENEVA CONVENTIONS OF 1949 AND THEIR ADDITIONAL PROTOCOLS (Oct. 29, 2010), <https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm>.

40. The U.S. is not a party. INT’L CRIM. CT., THE STATE PARTIES TO THE ROME STATUTE (last visited Oct. 5, 2016), https://asp.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx.

41. Prosecutor v. Lubanga Dyilo, Decision on the confirmation of charges, ICC-01/04-01/06, paras. 229–37 (Pre-Trial Chamber I Jan. 29, 2007) (emphasis added) (giving an interpretation of this phrase in Article 8(2)(f) of the Rome Statute of the International Criminal Court).

42. See S. Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT’L REV. OF THE RED CROSS 69, 80–83 (2009).

43. Article 1(2) of Additional Protocol II distinguishes these situations from NIACs. Protocol II, *supra* note 18. The Commentary to this provision says, “internal disturbances and tensions may be illustrated by giving a list of examples of such situations without any attempt to be exhaustive: riots, such as demonstrations without a concerted plan from the outset; isolated and sporadic acts of violence, as

AP II explains the difference between internal disturbances and tensions: “there are internal disturbances, without being an armed conflict, when the State uses armed force to maintain order; there are internal tensions, without being internal disturbances, when force is used as a preventive measure to maintain respect for law and order.”⁴⁴

5. NIAC Geographic Scope

While it is accepted that Common Article 3 and AP II apply to the whole territory of the parties to a NIAC,⁴⁵ a NIAC under Common Article 3 can also take place on the territory of a third State that may or may not be participating in the armed conflict.⁴⁶ For instance, a

opposed to military operations carried out by armed forces or armed groups; other acts of a similar nature, including, in particular, large scale arrests of people for their activities or opinions.” ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 19, at 1354. The Commentary to Common Article 3 of the Geneva Conventions distinguishes a NIAC from “a mere act of banditry or an unorganized and short-lived insurrection.” INT’L COMM. OF THE RED CROSS, THE 1949 GENEVA CONVENTIONS: A COMMENTARY 393 (Andrew Clapham et al. eds., 2015).

44. ADDITIONAL PROTOCOLS COMMENTARY *supra* note 19, at paras. 4475–4477. See also Int’l Comm. Of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, May 24–June 12, 1971, *Protection of Victims of Non-International Armed Conflicts*, 79 (Jan. 1971), http://www.loc.gov/rr/frd/Military_Law/pdf/RC-conference_Vol-5.pdf.

45. Assuming the use of force relates to the belligerent relationship between the parties to the NIAC, i.e. that the use of force has a “nexus” with the NIAC. Tristan Ferraro, *Geographic Scope of Application of IHL*, Bruges Colloquium 105, 111 (2012), https://www.coleurope.eu/sites/default/files/uploads/page/collegium_43_webversie.pdf. See also ICTY, Prosecutor v. Tadic, Case No. IT-94-1, Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (“international humanitarian law continues to apply . . . , in the case of internal conflicts, [in] the whole territory under the control of a party, whether or not actual combat takes place there.”).

46. There is some debate over whether this is possible, as the territorial scope of Common Article 3 covers “armed conflict not of an international character, occurring in the territory of one of the High Contracting Parties.” See Common Article 3, *supra* note 19. While this can simply mean that the State on whose territory the conflict is occurring must be a party to the Geneva Convention for Common Article 3 to apply (and today the Geneva Conventions have been universally ratified), some have argued that the scope of Common Article 3 is limited to truly internal conflicts, excluding any situation that crosses the High Contracting Party’s borders. Schmitt, Dinstein, and Garraway in *The Manual on the Law of Non-International Armed Conflict with Commentary* take a strict position on this question of territorial scope, arguing that NIACs do not encompass “conflicts extending to the territory of two or more States.” MICHAEL SCHMIDT ET

NIAC can “spill over” into a neighboring State when government forces are pursuing a non-state armed group from their territory to that of a

AL., *THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY 2* (2006). However, under this interpretation, an IHL vacuum would arise as soon as a border is crossed. Marco Sassòli interprets the language of Common Article 3 as “simply recalling that treaties apply only to their state parties. If such wording meant that conflicts opposing states and organized armed groups and spreading over the territory of several states were not ‘non-international armed conflicts’, there would be a gap in protection, which could not be explained by states’ concerns about their sovereignty.” MARCO SASSÒLI, *TRANSNATIONAL ARMED GROUPS AND INTERNATIONAL HUMANITARIAN LAW 9* (2006). In fact, Articles 1 and 7 of the Statute of the International Criminal Tribunal for Rwanda grant the Tribunal jurisdiction to enforce the law governing NIAC to neighboring countries. *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between January 1, 1994 and December 31, 1994*, S.C. Res. 955, U.N. SCOR, 49th Sess., Annex, 3453d mtg. at 15, art. 1, 7, U.N. Doc. S/Res/955 (1994). See also Derek Jinks, *September 11 and the Laws of War*, 28 *YALE J. INT’L L.* 1, 40–41 (2003) (suggesting that the “not of an international character” limitation of Common Article 3 “renders the provision inapplicable to all armed conflicts with international or transnational dimensions.”). In *Hamdan*, the Supreme Court said: “Although the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of ‘conflict not of an international character,’ i.e., a civil war, see INT’L COMM. OF THE RED CROSS, COMMENTARY TO THE THIRD GENEVA CONVENTIONS 546–47 (J. Preux, ed., 1960) [hereinafter GENEVA CONVENTION III COMMENTARY] 36–37, the commentaries also make clear that the scope of application of the Article must be as wide as possible.” *Hamdan*, *supra* note 11, at 36. In fact, limiting language that would have rendered Common Article 3 applicable “especially [to] cases of civil war, colonial conflicts, or wars of religion,” was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations. *Id.* at 31. The U.S. Department of Justice White Paper on targeted killing of U.S. citizens says: “There is little judicial or other authoritative precedent that speaks directly to the question of the geographic scope of a non-international armed conflict in which one of the parties is a transnational, non-state actor and where the principal theater of operations is not within the territory of the nation that is a party to the conflict. . . . The Department has not found any authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location cannot be part of the original armed conflict, and thus subject to the laws of war governing that conflict, unless the hostilities become sufficiently intense and protracted in the new location.” DEP’T OF JUSTICE, *LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA’IDA OR AN ASSOCIATED FORCE, Applicability of Federal Criminal Laws and the Constitution to Contemplated Lethal Operations Against Shayk Anwar al-Aulaqi*, Op. O.L.C. 25 (2010).

neighboring country (e.g. pursuing ISIL from Iraq into Syria). Another instance is where the armed forces of a State engage in cross-border hostilities against a non-state armed group that is operating in a neighboring State without any State control or support.⁴⁷ Non-state armed groups may also fight each other while crossing contiguous State borders. Moreover, some NIACs will involve States or multinational (UN or regional organization) forces fighting alongside another government's forces against one or more non-state armed groups.⁴⁸ In light of such scenarios, it has been suggested that "the territorial aspect is not a constitutive element of the notion of NIAC, which is distinguished from IAC by the nature or the quality of the parties involved rather than by its limited territorial scope."⁴⁹

Defining the geographic scope of armed conflict is of importance because it will dictate which facts to take into account in determining the existence and end of an armed conflict, and, therefore, the beginning and end of IHL application. In this regard, there is much debate over the classification of the hostilities between the U.S. and Al Qaeda, the Taliban and associated forces since September 11, 2001, in light of their wide geographic reach.

As Kretzmer explains, from the perspective of international law:

The uncertainty whether a given situation may indeed be classified as a non-international armed conflict revolves around two questions: (1) evaluation of the facts in a given context, namely whether the intensity of armed violence and degree of organization justify categorizing the situation as one of armed conflict, rather than criminal activity, riots or disturbances; and (2) disagreement on the legal question of whether

47. For more on the typology of NIACs, see Sylvain Vité, *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations*, 91 INT'L REV. OF THE RED CROSS 69 (Mar. 2009); see also 31st International Conference of the Red Cross and Red Crescent, Nov. 28–Dec. 1, 2011, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, at 9–11, I.C.R.C. Doc. 31IC/11/5.1.2 (Oct. 2011).

48. NIAC has been defined to permit this: "When a foreign State extends its military support to the government of a State within which a non-international armed conflict is taking place, the conflict remains non-international in character." SCHMITT ET AL., *supra* note 46. See also NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 101 (2010).

49. Tristan Ferraro, *Geographic Scope of Application of IHL*, Bruges Colloquium 105, 112 (2012), https://www.coleurope.eu/sites/default/files/uploads/page/collegium_43_webversie.pdf.

a transnational conflict between a state and a terrorist group may ever be regarded as a non-international armed conflict.⁵⁰

On the latter question, Melzer has observed that IHL governs relations between the parties in all situations of armed violence that meet the objective criteria for the existence of an armed conflict, regardless of geographical location, and what is decisive is the *nexus* between the acts of violence and the armed conflict.⁵¹ Schmitt has also explained that the “determinative issue would be the degree of nexus” between the group’s actions and the ongoing NIAC.⁵² Lubell has suggested that the threshold of intensity can be reached cumulatively across many borders: “If numerous incidents round the world classified as terrorism could be attributed to the same entity then one could argue that the threshold for conflict has been crossed.”⁵³ Kress has proposed a slightly stricter test, requiring that “the non-State party has established an actual (quasi-)military infrastructure on the territory of the third State’s soil that would enable the non-State party to carry out intensive armed violence also from there.”⁵⁴ But, as Milanovic explains, “the existing legal framework does not seem to allow for a construction as amorphous as a planet-wide NIAC, particularly one in which a loose terrorist network such as Al Qaeda is treated as a single organizational entity and belligerent party.”⁵⁵ The ICRC also “does not share the view that a conflict of global dimensions is, or has been, taking place” but rather adopts—short of a spillover into contiguous territory—a territory-by-territory approach to

50. David Kretzmer, *The Legal Regime Governing the Use of Lethal Force in the Fight Against Terrorism in COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER* 559, 584 (Larissa van den Herik & Nico Schrijver eds., 2013).

51. NILS MELZER, *TARGETED KILLING IN INTERNATIONAL LAW* 261 (Vaughan Lowe, ed. 2008).

52. Michael N. Schmitt, *Charting the Legal Geography of Non-International Armed Conflict*, 90 INT’L L. STUD. 1, 12 (2014).

53. LUBELL, *supra* note 48, at 120.

54. Claus Kress, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 J. CONFLICT & SEC. L. 245, 266 (2010).

55. Marko Milanovic, *The End of Application of International Humanitarian Law*, 96 INT’L REV. OF THE RED CROSS 163, 186 (2014).

classifying the different situations in which the U.S. uses military force.⁵⁶

As seen above, the US Department of Justice has explained that the US is in a NIAC against Al Qaeda and its associated forces, and that any U.S. operation against Al Qaeda would be part of this conflict, even if it took place away from the zone of active hostilities. It has also explained that it “has not found any authority for the proposition that when one of the parties to an armed conflict plans and executes operations from a base in a new nation, an operation to engage the enemy in that location cannot be part of the original armed conflict, and thus subject to the laws of war governing that conflict, unless the hostilities become sufficiently intense and protracted in the new location”.⁵⁷

Classifying a situation as one NIAC that crosses multiple borders clearly remains a matter of contention, and, assuming a transnational NIAC can exist, it is still a matter of debate among experts what combination of elements is required.

Whether or not the fighting against Al Qaeda, the Taliban and associated forces is classified as a transnational NIAC will have consequences for the way in which the end of armed conflict, the end of participation in the armed conflict, or the end of hostilities is determined. In a transnational NIAC, determining the end of armed conflict, the end of participation in the conflict, or the end of hostilities would entail an assessment of the facts on the ground wherever fighting takes place in connection with the conflict. On the other hand, an armed conflict that is seen as geographically limited to one particular country’s borders (possibly with spillover to a neighboring country) would entail assessing facts in this much more limited geographic area.

For the purposes of the analysis that follows on the end of armed conflict, the end of participation in armed conflict, and the end of hostilities, the ongoing debate on how to classify the last several years of U.S. hostilities against the Al Qaeda, the Taliban and associated forces will be set aside.

56. See 32nd International Conference of the Red Cross and Red Crescent, Dec. 8–10, 2015, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, at 9–11, I.C.R.C. Doc. 32IC/15/11 (Oct. 2015).

57. See DOJ WHITE PAPER, *supra* note 2.

C. The End of Armed Conflict

Classifying the end of armed conflict is vital, as it correlates with the end of IHL application and the beginning of obligations under a different international legal framework governing the use of force and deprivation of liberty. As with identifying the existence of an armed conflict, under international law, it is the factual situation, rather than political statements or acts, which determines the end of an armed conflict.

While the existence of a cease-fire or peace agreement may serve as an indicator, an armed conflict will end when its defining factual criteria are no longer met. As will be examined below, for an IAC, there needs to be an end to combat-related maneuvers, while for a NIAC the required threshold of violence or the required level of armed group organization must no longer be met.

As explained by the ICTY in *Gotovina*, the end of an armed conflict should not be determined lightly:

[o]nce 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 considerable degree of legal uncertainty and confusion.⁵⁸

Indeed, identifying the end of an armed conflict will have implications for the release of persons who are detained in relation to the armed conflict without criminal prosecution, but also for the legal regime that governs any subsequent deprivation of liberty. In light of this, a State faced with determining whether a conflict has ended might be influenced by its preference for continuing to apply IHL instead of an international human rights law, or vice versa. As Milanovic discusses:

Diverging policy considerations can influence the contextual determination of whether the NIAC has ended. . . . 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,

58. Prosecutor v. Gotovina, Case No. IT-06-90-T, In Trial Chamber I, para. 1694 (Int'l Crim Trib. for the Former Yugoslavia Apr. 15, 2011).

which *is* bound by IHL but probably not by human rights law, then that calculus may turn out differently.⁵⁹

1. End of International Armed Conflict

The end of IAC is addressed in the Fourth Geneva Convention (GC IV),⁶⁰ which governs the treatment of civilians in international armed conflict. Article 6 states that the Convention applies until the “general close of military operations,”⁶¹ which has been described as the moment when the “last shot has been fired.”⁶² The Commentary to Article 6(2) of GC IV further outlines this, noting that the date of the end of hostilities typically depends on an armistice or capitulation, but that the real difficulty arises when several States are involved on one or both sides of the conflict.⁶³ As such, it “must be agreed that in most cases the general close of military operations will be the final end of all fighting between all those concerned.”⁶⁴ This is further supported by Article 3 of AP I, which notes that the Conventions and Protocol cease to apply “on the general close of military operations, and, in the case of occupied territories, on the termination of the occupation.”⁶⁵ The Commentary to Article 3 of AP I defines military operations as maneuvers carried out by the armed forces with a view to combat; these are distinct from the notion of hostilities.⁶⁶

59. Milanovic, *supra* note 55, at 181.

60. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 42, 78, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

61. This is distinguished from the “cessation of active hostilities” mentioned in the Third and Fourth Geneva Conventions in articles 118 and 133 respectively, which can arise before the general close of military operations. Certain obligations of Occupying Powers will last even beyond the “general close of military operations.” See GENEVA CONVENTION IV COMMENTARY, *supra* note 19, at para. 2.

62. *Id.*

63. *Id.*

64. *Id.*

65. Protocol I, *supra* note 10, at art. 3(b).

66. The Commentary states:

“Military operations” means the movements, manoeuvres and actions of any sort, carried out by the armed forces with a view to combat. “The general close of military operations” is the same expression as that used in Article 6 of the fourth Convention, which, according to the commentary thereon, may be deemed in principle to be at the lime of a general armistice, capitulation or just when the occupation of the whole territory of a Party is

Similarly, the ICTY Appeals Chamber in *Tadic* stated that in IAC, IHL “applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached.”⁶⁷ While agreements between the parties to the conflict, unilateral statements, and resolutions by international organizations such as the UN can serve as evidence of the end of the armed conflict, determining the end of an IAC nevertheless requires a factual assessment of the existence of ongoing military operations.⁶⁸

2. End of Non-International Armed Conflict

While there is no treaty definition of the end of a NIAC, different tests have been proposed for identifying this moment, including (1) the existence of a peaceful settlement; and (2) cessation of the criteria for identifying the existence of a NIAC.

a. Peaceful Settlement

In examining the end of application of IHL, the ICTY has held that IHL will continue to apply in a NIAC until a “peaceful settlement” is reached. In the *Tadic* jurisdiction decision, the Tribunal wrote that IHL

applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until . . . in the case of internal conflicts, a *peaceful settlement is achieved*. Until that moment, IHL continues to apply,

completed, accompanied by the effective cessation of all hostilities, without the necessity of a legal instrument of any kind. . . . The 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.

ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 19, at paras. 152–53. To define the general close of military operations, Derek Jinks refers to the “complete cessation of all aggressive military maneuvers.” Derek Jinks, *The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts* 3 (Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law January 27–29, 2003), <http://hpcrresearch.org/sites/default/files/publications/Session3.pdf>.

67. Prosecutor v. *Tadic*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

68. Milanovic, *supra* note 55, at, 172.

in the case of internal conflicts, to the whole territory under the control of a party, whether or not actual combat takes place there.⁶⁹

This approach was reaffirmed in *Haradinaj*, in which the ICTY Trial Chamber stated that once the intensity threshold is reached for a NIAC, there is no need to assess thereafter the oscillating levels of intensity. In other words, even if the intensity of the violence drops, the situation remains a NIAC until a “peaceful settlement” is reached.⁷⁰

As with the end of an IAC, this approach is only of moderate utility as violence does not necessarily end with a formal settlement. For instance, if violence of the requisite intensity persists despite the conclusion of a ceasefire agreement, then the conflict factually continues to exist and IHL continues to apply.⁷¹ The end of a NIAC should therefore be judged according to the facts on the ground, as described in the alternative approach below.

b. Threshold Criteria for a NIAC

The alternative approach to determining the end of a NIAC is to consider whether one of the cumulative threshold requirements for the existence of a NIAC, i.e. the required level of intensity of hostilities and non-state armed group organization (and the required territorial control in the case of NIACs governed by AP II) is no longer met.⁷² For example, indicators of the end of a NIAC could include the dismantling of an armed group, the disarmament of fighters, the number of civilians returning home, and ceased hostilities.

In light of the concern expressed by the ICTY in the *Gotovina* case referred to above,⁷³ the risk of resumption of hostilities is a

69. Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (emphasis added).

70. Prosecutor v. Haradinaj, Case No. IT-04-84-T, para. 100 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008).

71. SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 253 (2012); JANN K. KLEFFNER, *Human Rights and International Humanitarian Law: General Issues* in THE HANDBOOK OF THE INTERNATIONAL LAW OF MILITARY OPERATIONS 51, 65 (T. Gill & D. Fleck eds., 2010).

72. See Milanovic, *supra* note 55, at 180; R. Bartels, *From Jus in Bello to Jus Post Bellum: When Do Non-International Armed Conflicts End?*, in “JUS POST BELLUM” MAPPING THE NORMATIVE FOUNDATIONS XX, 297 (C. Stahn, J. Easterday & J. Iverson eds., 2014).

73. *Gotovina*, *supra* note 58, at para. 1694.

particularly important factor to assess. In relation to NIACs, Milanovic has written:

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.⁷⁴

The risk of resumption can be evaluated by examining all the facts on the ground, including declarations by all sides, ground maneuvers, steps towards disarmament, demobilization and reintegration, and whether any measures have been taken to reach a peaceful settlement.

D. The End of Participation in an Armed Conflict

In both IAC and NIAC, the end of participation in an armed conflict, which can occur before the end of the armed conflict itself, can also dictate the moment when the party ceasing participation in the conflict must release persons detained in relation to the armed conflict without criminal prosecution.

In recent years many States have provided support to parties to a pre-existing conflict occurring on another State’s territory. Often the territorial State (“host State”) has invited one or more other States (“intervening State”) to support its fight against organized non-state armed groups operating within the host State, as in the case of hostilities against ISIL in Iraq, against Al Qaeda and the Taliban in Afghanistan and against Al Qaeda in other countries. The support provided by the intervening State in a pre-existing NIAC can run a spectrum of assistance such as the following: (1) the provision of funding; (2) training of armed forces or embedding foreign military advisers; (3) sharing intelligence; (4) provision of fuel, military vehicles and equipment, including weapons and ammunition; (5) allowing the use of military bases; and (6) conduct of combat operations.

Depending on the type of support, the intervening State’s actions could transform it into a full-fledged party to the conflict whose actions would be governed by IHL. As will be examined below, it is the State’s *functions* in support of the party to the pre-existing conflict that will determine whether it too is a party to the conflict and is governed by IHL in its operations.⁷⁵ In reverse, if a party ceases to carry out certain functions in an armed conflict, then it may no longer be a party

74. Milanovic, *supra* note 55, at, 180.

75. Tristan Ferraro, *The Applicability and Application of IHL to Multinational Forces*, 95 INT’L REV. OF THE RED CROSS 561, 584 (2013).

to the conflict and its actions no longer be governed by IHL. In such an instance, it would be required to release persons who are detained in relation to the armed conflict without criminal prosecution.

Two approaches can serve as guidance in determining whether a State is participating, or no longer participating, in a pre-existing armed conflict. One is the “support-based approach,” advocated in the context of a pre-existing NIAC, and the second is an approach under the international law of neutrality as it regulates relations between belligerents and non-participating States in IAC.

1. “Support-Based Approach”

According to the “support-based approach,” a State or multilateral forces would become a party to a pre-existing NIAC, and therefore be bound by IHL, when the following four conditions are met: (1) there is a pre-existing NIAC ongoing in the territory in which the State’s forces intervene;⁷⁶ (2) the intervening State’s forces undertake actions related to the conduct of hostilities in the context of the pre-existing NIAC; (3) the intervening State’s forces’ military operations are carried out in support of a party to the pre-existing NIAC; and (4) the State’s actions are undertaken according to an official decision by the concerned State to support a party involved in the pre-existing NIAC.⁷⁷

The first criterion—the existence of a NIAC—was discussed above, in Part I.B. Participation in a *pre-existing* NIAC would not require independently meeting the intensity criterion needed to classify the original NIAC.

The second and third criteria in this proposed approach are relevant to determining what type of support qualifies as participation in a pre-existing NIAC. Under the second criterion, “actions related to the conduct of hostilities” would have to go beyond a general contribution to the war effort and have a “direct impact” on the opposing party’s ability to conduct hostilities. Military operations that directly result in damage caused to the opposing party would qualify, as would actions that affect the enemy “only in conjunction with other acts undertaken by the supported party.” Ferraro proposes that actions such as transporting armed forces of the supported party to the front

76. *Id.* at 585 (arguing that the geographical scope would not necessarily be limited to that territory but could extend to related actions in international airspace, the high seas, or to actions taken when the pre-existing NIAC spills over in neighboring countries).

77. *Id.*

line, or providing planes for refueling of jetfighters, would make the supporting forces party to the NIAC. These acts would need to be recurrent over a significant period of time, although a single action entailing a “fundamental role” in the host State’s capacity to carry out military operations could turn the intervening State into a party to the NIAC.

The third criterion requires that the intervening State’s actions be carried out *in support* of a party to the pre-existing NIAC. These are actions designed to support a party “by directly affecting the military capabilities of the adversary or by hampering its military operations.” The support need not be the primary objective; what is important is that they are not acting solely for their own interest or benefit. Finally, the fourth criterion is simply meant to ensure that the support is intentional rather than resulting from a mistake or an act that falls outside the intervening forces’ authority.

2. The “Neutrality Law” Approach

A second framework that can offer guidance on whether a State has become a party to a pre-existing conflict—or has ceased to be a party to an ongoing conflict—is the international law of neutrality,⁷⁸ which regulates relations between belligerent and non-participating States in international armed conflicts.⁷⁹ Neutrality describes “the particular status, as defined by international law, of a State not party to an armed conflict.”⁸⁰ It begins when an international armed conflict

78. Important parts of the customary law of neutrality were codified during the 19th and early 20th centuries in the Paris Declaration of 1856, Hague Convention V of 1907 respecting the rights and duties of neutral powers and persons in case of war on land, and Hague Convention XIII concerning the rights and duties of neutral powers in naval warfare. Some of these rules have become obsolete following subsequent State practice. See MICHAEL BOTHE, *The Law of Neutrality*, in HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 571, 574 (D Fleck ed., 2d ed., 2008); Hague Convention No. V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, The Hague, Oct. 18, 1907, 36 Stat. 2310, 2 AM. J. INT’L L. (SUPP.) 117 [hereinafter Hague Convention V]; Hague Convention No. XIII Concerning the Rights and Duties of Neutral Powers in Naval War, The Hague, Oct. 18, 1907, 36 Stat. 2415, 2 AM. J. INT’L L. (SUPP.) 202 [hereinafter Hague Convention XIII].

79. ERIK CASTRÉN, *THE PRESENT LAW OF WAR AND NEUTRALITY* 422–24 (1954) (“The law of neutrality, to be sure, is not—at least from the point of view of neutral States—part of the law of war if by the latter is meant rules of law relating to the mode of carrying on hostilities.”).

80. BOTHE, *supra* note 78, at 571.

arises,⁸¹ and applies without requiring a specific declaration of neutrality by a State that is not party to the conflict.⁸²

Neutrality brings reciprocal rights and obligations for belligerent and neutral States: belligerents must restrict hostilities to one another, and neutral States must refrain from intervening in the war.⁸³ As a corollary, a neutral State is obligated to defend its rights⁸⁴ (for instance by preventing belligerents from committing violations of its territorial integrity),⁸⁵ to remain *impartial* towards belligerents,⁸⁶ and to *refrain from participating* in the conflict.⁸⁷ Impartiality encompasses a requirement of *non-discrimination* and forbids “differential treatment of the belligerents which in view of the specific problem of the armed conflict is not justified.”⁸⁸ Non-participation in the conflict is understood as abstaining from supporting a party to the conflict.⁸⁹ The UN Charter and legally binding decisions of the Security Council have at times “suspended” the law of neutrality by creating obligations to carry out certain measures that would otherwise be

81. Note that the definition of an international armed conflict for the purpose of applying the law of neutrality has a higher threshold than the definition used to trigger the application of international humanitarian law. The threshold of application of the law of neutrality seems to be higher than that for IHL. Compare BOTHE *supra* note 78, at 578 (stating that for the law of neutrality to apply, an international armed conflict must be of sufficient duration and intensity), with GENEVA CONVENTION I COMMENTARY *supra* note 11, at 32 (noting that under IHL an IAC is simply “any difference arising between two States and leading to the intervention of armed forces”). The International Criminal Tribunal for the Former Yugoslavia has likewise concluded that for the purposes of applying IHL “an armed conflict exists whenever there is a resort to armed force between States.” Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-A, para. 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

82. BOTHE, *supra* note 78, at 579. However, the fact that no declaration is required may lead to uncertainty and debate about the status of a given State. See *id.*

83. CASTRÉN, *supra* note 79, at 439.

84. See *id.* at 440–41, 459.

85. Hague Convention V, *supra* note 78, at art. 1, 5; see also CASTRÉN, *supra* note 78, at 44–41, 459.

86. Hague Convention V, *supra* note 78, at art. 9.

87. *Id.*; see also BOTHE, *supra* note 78, at 571 (“[N]eutrals should have the right to continue their commercial relations with belligerent Powers, but in as much as activities might be said to further warfare they may be branded as interference with war operations.”); CASTRÉN, *supra* note 79, at 426.

88. BOTHE, *supra* note 78, at 571.

89. *Id.*

contrary to the law of neutrality's duties of impartiality and non-participation.⁹⁰

A State violates neutrality by violating its obligation to remain impartial and to not participate in the conflict.⁹¹ For instance, a State would violate neutrality by supplying warships, arms, ammunition, military provisions or other war materials, either directly or indirectly, to a belligerent,⁹² by engaging its own military forces, or by supplying military advisors to a party to the armed conflict.⁹³ Allowing belligerent use of neutral territory as a military base,⁹⁴ the storage of war material⁹⁵ or passage of belligerent troops or munitions in neutral territory, furnishing troops to a belligerent, or providing or transmitting military intelligence on behalf of a belligerent are also examples of violations of neutrality.⁹⁶ This is true even where such assistance is provided to both parties to the armed conflict.⁹⁷

A State also violates its neutrality if it establishes on its territory communication channels for a party to the conflict or places telecommunication installations (such as a military communications system) at the disposal of a belligerent when these installations would not be available to them in normal conditions.⁹⁸

Massive financial support for a party to the conflict, through gifts or loans, also constitutes a violation of neutrality.⁹⁹ To illustrate,

90. *Id.* at 575.

91. *Id.* at 584.

92. Hague Convention XIII, *supra* note 78, at art. 6. This provision should also be applied to land warfare. *See* CASTRÉN, *supra* note 79, at 474; *see also* BOTHE, *supra* note 78, at 584–85.

93. BOTHE, *supra* note 78, at 585. *See also* Hague Convention XIII, *supra* note 78, at art. 6; 2 LASSA F.L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 599 (H. Lauterpacht, ed., 1940); CASTRÉN, *supra* note 79, at 474.

94. CASTRÉN, *supra* note 79, at 472.

95. *Id.* at 474.

96. *Id.* at 479. Tess Bridgeman, Note, *The Law of Neutrality and the Conflict with Al Qaeda*, 85 N.Y.U. L. REV. 1186, 1200 (2010); *see also* OPPENHEIM, *supra* note 89, at 548–50; Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2112 (2005); MORRIS GREENSPAN, THE MODERN LAW OF LAND WARFARE, 541-53 (1959); GEORGE SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 177–91 (6th ed. 1976).

97. OPPENHEIM, *supra* note 93, at 613; *see also* Kevin Jon Heller, *The Law of Neutrality Does Not Apply to the Conflict With Al-Qaeda, and It's a Good Thing, Too: A Response to Chang*, 47 TEX. INT'L L.J. 115, 131 (2005); CASTRÉN, *supra* note 79, at 479, 483.

98. Hague Convention V, *supra* note 78, arts. 3, 8–9.

99. *See* CASTRÉN, *supra* note 79, at 477.

Bothe provides the example of Arab States during the Iran-Iraq conflict, which gave substantial financial support to the war effort in Iraq.¹⁰⁰ Lending or giving money “[is] almost as important as war material, which can in its turn be acquired with money and foreign currencies.”¹⁰¹

Violating neutrality, however, does not necessarily bring an *end* to neutrality. In other words, violating neutrality does not entail the beginning of belligerent status (i.e. becoming a party to the conflict).¹⁰² For instance, during the 2003 invasion of Iraq by the U.S. and UK, certain European States provided assistance that was incompatible with the law of neutrality, however they did not as such become parties to the conflict.¹⁰³

Under the law of neutrality, to become a belligerent, a State would need to (1) declare war (even if this is before the outbreak of hostilities);¹⁰⁴ (2) participate in hostilities to a *significant extent*;¹⁰⁵ or (3) commit *systematic or substantial* violations of its duties of impartiality and non-participation, as described above.¹⁰⁶

100. BOTHE, *supra* note 78, at 584; *see also* OPPENHEIM, *supra* note 93, para. 350; HAGUE CONVENTION V, *supra* note 78, at art. 18 (stating that loans are among the “acts [that] shall not be considered as committed in favour of one belligerent . . . provided that the person who furnishes the supplies or who makes the loans lives neither in the territory of the other party nor in the territory occupied by him, and that the supplies do not come from these territories”). This is an exception to art. 17 on “committing acts in favor of a belligerent.” *Id.* at art. 17.

101. CASTRÉN, *supra* note 79, at 477; BOTHE, *supra* note 78, at 584; OPPENHEIM, *supra* note 93, at para. 351.

102. OPPENHEIM, *supra* note 93, at 534 (“A mere violation does not *ipso facto* bring neutrality to an end.”); *id.* at 613 (“If correctly viewed, the condition of neutrality continues to exist between a neutral and a belligerent in spite of a violation of neutrality.”); CASTRÉN, *supra* note 79, at 422.

103. BOTHE, *supra* note 78, at 572.

104. OPPENHEIM, *supra* note 93, at 613; *see also* BOTHE, *supra* note 78, at 581.

105. BOTHE, *supra* note 78, at 581; OPPENHEIM, *supra* note 93, at 613 (Hostilities are “acts of force performed for the purpose of attacking a belligerent . . . and create a condition of war between such neutral and the belligerent concerned.”); *id.* at 546. However, as seen above, force used to repel a violation by a belligerent does not constitute hostilities that would end a State’s neutrality. *See* HAGUE CONVENTION V, *supra* note 78, at art. 10; OPPENHEIM, *supra* note 93, at 546–47.

106. OPPENHEIM, *supra* note 93, at 359 (“If . . . the violations [are] very substantial and grave, the offended State will perhaps at once declare that it considers itself at war with the offender.”); Bridgeman, *supra* note 96, at 1200; Bradley & Goldsmith, *supra* note 96, at 2112–13.

While significantly participating in hostilities or systematically or substantially violating duties of impartiality and non-participation will transform a neutral State into a belligerent, this does not automatically entail becoming a *co-belligerent* of a party to the armed conflict. Castrén has written that “Fighting against the same enemy does not in itself constitute an alliance.”¹⁰⁷

Instead, only certain *relationships* will render a State a *co-belligerent*. Greenspan has proposed that a *co-belligerent* is a “fully fledged belligerent fighting *in association* with one or more belligerent powers.”¹⁰⁸

According to the UN Special Rapporteur on extrajudicial, summary or arbitrary executions,

Co-belligerency is a concept that applies to international armed conflicts and entails a sovereign State becoming a party to a conflict, either through formal or informal processes. A treaty of alliance may be concluded as a formal process, while an informal process could involve providing *assistance* to or establishing a *common cause* with belligerent forces.¹⁰⁹

In a 2010 article, Tess Bridgeman observed, “Every time a state *cooperates militarily* with the United States, for example by detaining or transferring a suspected al Qaeda member, that state arguably becomes a *co-belligerent* of the United States in the conflict.”¹¹⁰

In sum, the *systematic* or *substantial* supply of war materials, military troops, or financial support would conceivably make a State lose its neutrality and become a belligerent in the conflict. That State’s *association, cooperation, or common cause* with the pre-existing belligerent would make it a *co-belligerent*. This latter step is easily met when the State’s behavior is directed at supporting a particular party to the conflict. However, a State’s association, cooperation or common cause might not so easily be presumed if its significant participation in hostilities is directed *against* a belligerent in the conflict. In such an instance, the State might indeed become a belligerent, but its *co-*

107. CASTRÉN *supra* note 79, at 35.

108. GREENSPAN, *supra* note 96, at 531. *See also* Bradley and Goldsmith, *supra* note 96, at 2112.

109. Special Rapporteur on Extrajudicial, Summary or Arbitrary executions, *Rep. on Extrajudicial, Summary or Arbitrary Executions* (2013), *transmitted by Note of the Secretary-General*, U.N. Doc. A/68/382, para. 60 (Sept. 13, 2013) (emphasis added) http://www.un.org/en/ga/search/view_doc.asp?symbol=A/68/382.

110. Bridgeman, *supra* note 96, at 1189.

belligerency would depend on the existence of some association, cooperation, or common cause with a belligerent in the conflict.

To illustrate, a 2004 Memo of the U.S. Office of Legal Counsel written by then-Assistant Attorney General Jack Goldsmith to provide guidance on whether Al Qaeda operatives captured by U.S. forces in occupied Iraq had “protected person” status under GC IV explained the threshold of hostile activity required for a State to become a belligerent: “Prior U.S. practice is consistent with the conclusion that a country becomes a co-belligerent when it permits U.S. armed forces to use its territory for purposes of conducting military operations.”¹¹¹ It adds:

As for States that did not participate in actual combat operations in Iraq but that subsequently play some role in the occupation of Iraq, we have not located authority or analysis regarding the level of participation in an occupation that suffices to trigger “co-belligerent” status under GC. We believe, however, that mere participation in any aspect of the occupation itself will not always suffice to constitute co-belligerency, especially when a State’s specific contribution has no *direct nexus* with belligerent or hostile activities. For instance, if a State merely assists the Coalition in fulfilling the requirement under article 50(1) of GC to “facilitate the proper working of all institutions devoted to the care and education of children,” it would not be a belligerent. But a State that sends military forces to assist in rounding up Baathist remnants and imposing general security in Iraq, and especially one that participates in hostile activities in Iraq, will engage in conduct properly characterized as belligerent. In sum, the determination whether a State is a “co-belligerent” by virtue of its participation in the occupation of Iraq turns on whether the participation is *closely related to* “hostilities.”¹¹²

The U.S. has been applying the notion of co-belligerency to determine Al Qaeda’s associated forces for the purposes of subjecting them to the

111. “Protected Person” Status in Occupied Iraq Under the Fourth Geneva Convention, 28 Op. O.L.C. 35, 44 (2013), <https://www.justice.gov/sites/default/files/olc/opinions/2004/03/31/op-olc-v028-p0035.pdf>.

112. *Id.* at 45.

2001 AUMF.¹¹³ Before the US Senate Committee on Armed Services in 2013, Geoffrey Corn testified: “The focus on shared ideology, tactics, and indicia of connection between high-level group leaders therefore seems to emphasize (*sic*) both logical and legitimate intelligence indicators of which offshoots of al Qaeda fall into the category of co-belligerent, and therefore within the scope of the AUMF.”¹¹⁴

Both the “support-based approach” and the “law of neutrality” approach consider that becoming a party to a pre-existing armed conflict requires a certain threshold of activity that is in support of a party to the conflict. As mentioned above, applying these tests in reverse can help determine whether a State has ceased to be a party to an ongoing armed conflict, such that its operations would no longer be governed by IHL and it would have to release persons detained in relation to the armed conflict without criminal prosecution.

E. The End of Hostilities

The end of armed conflict and the end of participation in armed conflict are not the only relevant moments of transition for the release of persons held in connection to the armed conflict. In both IAC and NIAC, the end of hostilities can also dictate the moment of release of persons who are detained in relation to the armed conflict without criminal prosecution, as will be examined below.

The end of hostilities is to be determined by the factual situation on the ground.¹¹⁵ Under IHL, “the close of hostilities’ should

113. Michael Sheehan, Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict, Robert Taylor, Acting General Counsel of the Department of Defense, Major General Michael Nagata, Deputy Director of the Joint Staff for Special Operations and Counterterrorism, Brigadier General Richard Gross, Legal Advisor to the Chairman of the Joint Chiefs of Staff, Joint Statement for the Record the Committee on Armed Services, United States Senate, on Law of Armed Conflict, the Use of Military Force and the 2001 Authorization for Use of Military Force (May 16, 2013), http://www.armed-services.senate.gov/imo/media/doc/Taylor-Sheehan-Nagata-Gross_05-16-133.pdf.

114. Geoffrey S. Corn, Professor of Law, South Texas College of Law, Lieutenant Colonel, U.S. Army (Retired), Statement to the Committee on Armed Services, United States Senate at Hearing Addressing the Law of Armed Conflict, the Use of Military Force, and the 2001 Authorization for Use of Military Force (May 15, 2013), http://www.armed-services.senate.gov/imo/media/doc/Corn_05-16-13.pdf.

115. For instance, the Commentary to Article 133 of the Fourth Geneva Convention indicates that “the close of hostilities’ should be taken to mean a state

be taken to mean a state of fact rather than the legal situation covered by laws or decrees fixing the date of cessation of hostilities.”¹¹⁶

Moreover, the end of hostilities can occur even before the armed conflict has ended. In IAC, GC IV draws a distinction between the “general close of military operations” and the “close of hostilities.”¹¹⁷ Consistent with this, the D.C. Circuit in *Al-Bihani* stated: “That the Conventions use the term “active hostilities” instead of the terms “conflict” or “state of war” found elsewhere in the document is significant. It serves to distinguish the physical violence of war from the official beginning and end of a conflict, because fighting does not necessarily track formal timelines.”¹¹⁸

As for NIAC, the ICTY has written in one of the decisions in the *Tadic* case that IHL “applies from the initiation of such armed conflicts and *extends beyond the cessation of hostilities* until . . . in the case of internal conflicts, a peaceful settlement is achieved.”¹¹⁹ However, if the test for determining the end of a NIAC is whether one of the threshold requirements for the existence of a NIAC is no longer met, then it is very possible that the end of hostilities will coincide with the end of the conflict. Indeed, the Commentary to Article 2(2) of AP II appears to equate the end of active hostilities with the end of military operations: “In principle, measures restricting people's liberty, taken for reasons related to the conflict, (12) should cease *at the end of active hostilities, i.e., when military operations have ceased*, except in cases of penal convictions.”¹²⁰ This may be because the very existence of a NIAC requires a certain intensity of hostilities in the first place.

While IHL offers no precise definition of hostilities or the end of hostilities, some defining elements are proposed below. It can be argued that hostilities have ended when, with some permanence and stability, their defining elements are no longer met.

The UK Joint Service Manual of the Law of Armed Conflict provides that the end of hostilities is a question of fact determined

of fact rather than the legal situation covered by laws or decrees fixing the date of cessation of hostilities.” GENEVA CONVENTION IV COMMENTARY, *supra* note 19 .

116. GENEVA CONVENTION IV COMMENTARY, *supra* note 19

117. See Fourth Geneva Convention, *supra* note 60, at art. 6, 46, 133, 134.

118. *Al-Bihani v. Obama*, 590 F.3d 866, 878–79 (D.C. Cir. 2010).

119. Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (emphasis added). Nils Melzer also writes that the notion of “hostilities” is narrower than “armed conflict.” Melzer, *supra* note 51, at 275–76.

120. ADDITIONAL PROTOCOLS COMMENTARY *supra* note 19, at para. 4493.

when “there is no immediate expectation of their resumption. Cessation is not affected by isolated and sporadic acts of violence.”¹²¹ The ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities defines hostilities as “the (collective) resort by the parties to the conflict to means and methods of injuring the enemy.”¹²² In a separate publication, Nils Melzer writes that the notion of hostilities comprises all violent and non-violent activities specifically designed to support one party to an armed conflict by *directly* causing harm of any quantitative degree to the military operations or military capacity of another party.”¹²³ Examples of such harm would include killing and wounding military personnel, and causing physical or functional harm to military objects, activities restricting or disturbing deployments, logistics and communications, as well as capturing or otherwise exercising control over military personnel, objects and territory to the detriment of the enemy.¹²⁴

F. Applying the Three Tests for End of Armed Conflict, End of Participation in Armed Conflict, and End of Hostilities to U.S. Operations under the 2001 AUMF

At some point, the facts on the ground may reveal that, based on the indicators set out earlier, one or more armed conflicts have ended, the U.S. is no longer a party to one or more armed conflicts, or hostilities have ended in one or more conflicts in which it is engaged under the 2001 AUMF.

First, one or more NIACs would end if the level of organization of non-state armed groups or the intensity of violence between the parties were to fall below the required threshold to find a NIAC under IHL. Steps towards dismantling non-state armed groups, disarmament and reintegration of fighters, and measures taken to reach a peaceful settlement would serve as indicators of the end of a conflict. Assuming the Taliban, Al Qaeda and affiliates have already met the organization criterion for an armed group to be a party to a NIAC, one would need

121. UK Ministry of Defence, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT, JSP 383, para. 8.169, at 205 (2004) (emphasis added) (footnote omitted), https://gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf.

122. NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 43 (2009) [hereinafter DPH GUIDANCE].

123. Melzer, *supra* note 51, at 275-75

124. *Id.* at 276. For a similar description, see also DPH GUIDANCE, *supra* note 122, at 48.

to assess whether any of these groups is sufficiently dismantled, or the level of violence has sufficiently decreased in intensity, to no longer meet the criteria for a NIAC.

Second, according to the “support-based approach,” the U.S. would cease to be a party to an armed conflict if it no longer carried out military operations with a direct impact on the enemy’s conduct of hostilities and in support of a party to the conflict. For instance, funding, training, and providing arms might not constitute participation in the conflict, whereas carrying out combat operations, transporting forces to front lines or directly refueling jetfighters might qualify as participation. If, as President Obama announced for 2015, U.S. combat operations in Afghanistan consist of counterterrorism operations against Al Qaeda and other groups, protection of U.S. forces, assistance to Afghan forces,¹²⁵ and targeting “Taliban members [who] directly threaten the United States and coalition forces in Afghanistan or provide direct support to Al Qaeda,”¹²⁶ then it is difficult to imagine an end to U.S. participation in the conflict(s) in Afghanistan. Nevertheless, if the U.S. implements its plans to gradually withdraw from Afghanistan and maintain only an advisory role, the facts may reveal that the U.S. is no longer a party to one or more conflicts.

Third, the type of violence may evolve such that hostilities have ended in one or more armed conflicts. As suggested above, to qualify as hostilities, the violence must support a party to the conflict and directly cause military harm. As long as U.S. forces continue targeting operations against Al Qaeda, the Taliban and associated forces, it will be difficult to find an end to the hostilities.

Of course, determining any of these “end” events will depend on the position one takes on the existence of a) one transnational NIAC against Al Qaeda, the Taliban and associated forces, b) a NIAC against the Taliban in Afghanistan, and a transnational NIAC against Al Qaeda and associated forces, wherever they may be, or c) no transnational NIAC but rather several distinct NIACs in Afghanistan, Iraq, Syria, and elsewhere against different non-state armed groups.

125. Karen DeYoung and Missy Ryan, *Afghan Mission for U.S. to Continue Under New Authorities*, WASH. POST (Nov. 22, 2014), http://www.washingtonpost.com/world/national-security/white-house-gives-commanders-broader-authority-to-support-afghan-troops/2014/11/22/8741f2fc-724e-11e4-ad12-3734c461eab6_story.html.

126. Mark Mazzetti & Eric Schmitt, *In a Shift, Obama Extends U.S. Role in Afghan Combat*, N.Y. TIMES (Nov. 21, 2014), <http://www.nytimes.com/2014/11/22/us/politics/in-secret-obama-extends-us-role-in-afghan-combat.html>.

For example, if one accepts, under options a) or b), that the threshold of intensity for a NIAC can be reached cumulatively across many borders, then U.S. fighting against Al Qaeda or associated forces in Yemen, Iraq, Syria or elsewhere could contribute to finding that a transnational NIAC still exists in Afghanistan, even if, on its own, the intensity of violence against Al Qaeda in Afghanistan were to fall below the NIAC threshold. If, however, one were to adopt a case-by-case approach (option c) to classifying different situations of violence against different non-state armed groups in different parts of the world, then operations in these different parts of the world would not contribute to the classification of the situation in Afghanistan, and vice versa.

Should any of these “end” events arise, international law will dictate a shift in the international legal framework governing U.S. detention activities. Before exploring this shift in section II of this paper, it is important to distinguish international law definitions of these events from U.S. domestic determinations of equivalent events for the purposes of applying domestic law. The international and domestic legal definitions do not necessarily coincide.

G. The End of “War” and “Hostilities” Under U.S. Domestic Law

U.S. domestic determinations of “war” or “hostilities” (and their termination) are important for ensuring the lawfulness under domestic law of deploying U.S. armed forces into military operations and the exercise of other war powers. As will be seen below, only political acts will amount to such determinations for domestic law purposes.

It is important to note that the end of a war or hostilities for domestic purposes does not necessarily correspond to the end of an armed conflict or hostilities for the purposes of applying IHL. If such a determination were dependent on a domestic political act irrespective of an assessment of the reality on the ground, this would be incompatible with IHL.

1. “War”

The Declare War Clause of the U.S. Constitution¹²⁷ vests in the Congress the power to declare war, while Article II makes the

127. U.S. Const. art. I, § 8, cl. 11.

President the Commander in Chief of the Armed Forces.¹²⁸ Congress otherwise has constitutional authority to make rules governing and regulating land and naval forces, to provide and maintain a Navy, raise and support armies, and make rules concerning captures on land and water, among other powers.¹²⁹ However, the Constitution does not expressly address any power to terminate war. A brief examination of the history of war in the U.S. reveals that the practice of establishing the end of war has shifted over time.

According to David Simon, during the first 100 years of war in the United States, the President negotiated peace treaties with the advice and consent of the Senate.¹³⁰ For instance, the 1795 Treaty of Greenville played a role in the end of the Indian Wars.¹³¹ The Quasi-War with France also ended with the ratification of the 1800 Treaty of Mortefontaine.¹³² The War of 1812 against the UK ended with the signature of the Treaty of Ghent¹³³ in December 1814 and the advice and consent by the Senate in February 1815. The Mexican-American War similarly ended with a peace treaty that was signed after a cease-fire agreement had ended.¹³⁴ The Treaty of Guadalupe Hidalgo¹³⁵ was signed in February 1848, and the Senate provided its advice and consent in March 1848. The Spanish-American War ended with the 1898 Treaty of Paris¹³⁶ and the Senate's advice and consent in early 1899, even though a truce and an armistice had preceded it.¹³⁷

However, a peace treaty did not end the Civil War. Instead, the war was ended by two Presidential proclamations pronounced on different dates for different states.¹³⁸ For the purpose of applying a

128. U.S. Const. art. II.

129. *Id.* at cl. 11-14.

130. This was true except for the U.S. Civil War (1861-1865). See D. Simon, *Ending Perpetual War? Constitutional War Termination Powers and the Conflict Against Al Qaeda*, 41 PEPP. L. REV., 685, 695 (2014).

131. Treaty of Greenville, Aug. 3, 1795, 7 Stat. 49; see also Simon, *supra* note 130, at 696.

132. Treaty of Mortefontaine, U.S.-Fr., Dec. 21, 1801, 8 Stat. 178.

133. Treaty of Peace and Amity, Between His Britannic Majesty and the United States of America (Treaty of Ghent), U.S.-Gr. Brit., art. IX, Dec. 24, 1814, 8 Stat. 218.

134. Simon, *supra* note 130, at 701.

135. Treaty of Guadalupe Hidalgo, July 4, 1848, U.S.-Mex., 9 Stat. 922.

136. Treaty of Paris, U.S.-Sp., Dec. 10, 1898, 30 Stat. 1754.

137. See *Ribas v. Hijo v. United States*, 194 U.S. 315, 323 (1904). See also Simon, *supra* note 130, at 701.

138. The Supreme Court recognized that presidential proclamation could terminate the war in *The Protector*, 79 U.S. 700, 701-02 (1871). In *McElrath v.*

statute of limitations that depended on determining the end of the Civil War, the Supreme Court considered it necessary to “refer to some public act of the political departments of the government to fix the dates.”¹³⁹ The Court found that two proclamations had determined the end of the war for different states: one issued on April 2, 1866, for Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Alabama, Louisiana and Arkansas,¹⁴⁰ and a second issued on August 20, 1866, for Texas.¹⁴¹

For domestic purposes, World War I ended with two resolutions passed by Congress,¹⁴² followed by peace treaties and a presidential proclamation declaring that the war had ended with the second congressional resolution.¹⁴³ Federal court decisions following World War I recognized that war could end through ratification of a peace treaty or presidential proclamation.¹⁴⁴ For instance, in *Citizens Protective League v. Byrnes*,¹⁴⁵ the court wrote that “the period of war has been held to extend to the ratification of the Treaty of Peace or the Proclamation of Peace.” In *The Elqui (ex Selma)*,¹⁴⁶ the court recognized that war ends with “the formal signing of a peace treaty or a proclamation by the sovereign that the war has been officially recognized as being at an end.”

United States, 102 U.S. 426, 438 (1880), the Supreme Court found that the end of the war would be proclaimed by a joint effort of the Congress and the President. Simon, *supra* note 130, at 703.

139. *The Protector*, 79 U.S. at 702.

140. John Woolley and Gerhard Peters, *Proclamation 153: Declaring the Insurrection in Certain Southern States to be at an End*, THE AMERICAN PRESIDENCY PROJECT, (April 2, 1866): <http://www.presidency.ucsb.edu/ws/index.php?pid=71987>.

141. Proclamation No. 4, 14 Stat. 814, 814–17 (1866). *See also* Simon, *supra* note 130, at 703.

142. One resolution ended the war for domestic purposes, and a second resolution ended U.S. belligerency. Knox Porter Resolution, 42 Stat. 105 (July 2, 1921); Simon, *supra* note 130, at 705.

143. Presidential Proclamation Declaring Peace with Germany, 42 Stat. 1944; *see also* Simon, *supra* note 130, at 705.

144. Simon, *supra* note 130, at 707 (citing *Citizens Protective League v. Byrnes*, 64 F. Supp. 233, 234 (D.D.C. 1946); *The Elqui (ex Selma)*, 62 F. Supp. 764, 767 (E.D.N.Y. 1945); *Miller v. Rouse*, 276 F. 715, 716 (S.D.N.Y. 1921)).

145. *Citizens Protective League v. Byrnes*, 64 F. Supp. 233, 234 (D.D.C. 1946).

146. *The Elqui (ex Selma)*, 62 F. Supp. at 767

World War II ended with multiple presidential proclamations and formal peace treaties.¹⁴⁷ In 1948 the Supreme Court in *Ludecke v. Watkins* held that domestic war powers ended when war was terminated by a political act in the form of a peace treaty, congressional legislation, or a presidential proclamation, regardless of whether the hostilities had actually ended.¹⁴⁸ It added: “The political branch of the Government has not brought the war with Germany to an end. . . . These are matters of political judgment for which judges have neither technical competence nor official responsibility.”¹⁴⁹ In the 1952 case of *Jaeger v. Carusi*,¹⁵⁰ the Supreme Court found that the Joint Resolution of October 19, 1951 had terminated the state of war between the United States and Germany. As a result, “the statutory power of the Attorney General to remove petitioner as an enemy alien ended when Congress terminated the war with Germany.” In both *Ludecke* and *Jaeger*, the Court found that the war ended with a political act and that the war-related powers at issue ended when the war ended.

The Korean War ended with an Armistice Agreement signed on July 27, 1953 between the United Nations Command and the Democratic People’s Republic of Korea.¹⁵¹ President Eisenhower announced the Armistice in a speech to the nation the day before.¹⁵²

Through its “power of the purse,” Congress played an important role in limiting, and ultimately ending, the Vietnam War. In 1973, Congress adopted appropriations bills preventing combat

147. Simon, *supra* note 130, at 707 (citing *Citizens Protective League*, 64 F. Supp. at 234; *The Elqui*, 62 F. Supp. at 767; *Miller*, 276 F. at 716).

148. *Ludecke v. Watkins*, 335 U.S. 160, 167–69 (1948) (“War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops. . . . ‘The state of war’ may be terminated by treaty or legislation or Presidential proclamation. Whatever the modes, its termination is a political act.”).

149. *Id.* at 170.

150. 342 U.S. 347, 348 (1952).

151. Lindsay Parrott, *Truce Is Signed, Ending the Fighting in Korea; P.O.W. Exchange Near; Rhee Gets U.S. Pledge; Eisenhower Bids Free World Stay Vigilant*, N. Y. TIMES (Jul. 27, 1953), <http://nytimes.com/learning/general/onthisday/big/0727.html>.

152. Dwight D. Eisenhower, Remarks on the Occasion of the Armistice (Jul. 26, 1953), http://www.eisenhower.archives.gov/research/online_documents/korean_war/Armistice_Draft_1953_07_26.pdf.

activities in Vietnam, Cambodia and Laos.¹⁵³ Not long after the Paris Peace Accords were signed in January 1973, all combat troops were withdrawn from Vietnam.¹⁵⁴ While there is disagreement as to whether acts of Congress ended the war for domestic purposes,¹⁵⁵ the restrictions that Congress imposed played a role in limiting the President's ability to conduct military operations in Vietnam.

In more recent practice, peace has been pronounced informally, without peace treaties, dedicated legislation or presidential proclamations.

On February 27, 1991, President Bush declared on television the suspension of offensive combat operations and conditions for a formal cease-fire in the 1991 Iraq war to expel Iraq from Kuwait.¹⁵⁶ On March 6, 1991, President Bush declared before Congress that the war was over.¹⁵⁷

With respect to the Iraq war that began in March 2003, President Obama announced the end of the American combat mission on August 31, 2010, although some U.S. transitional forces remained to advise and assist Iraqi Security Forces, support Iraqi troops in

153. Even though in 1971 Congress had repealed the Gulf of Tonkin resolution that had authorized the Vietnam War, the President pursued military operations, and Congress continued to grant appropriations for ongoing operations. See Department of State Appropriations Authorization Act, Pub. L. No. 93-126, § 13, 87 Stat. 451 (1973); Continuing Appropriations, 1974, Pub. L. No. 93-124 § 1, 87 Stat. 449 (1973); Continuing Appropriations Resolution of 1974, Pub. L. No. 93-52, § 108, 87 Stat. 130 (1973); Fulbright Amendment to Second Supplemental Appropriations Act of 1973, Pub. L. No. 93-50, § 307, 87 Stat. 99 (1973).

154. This was also the occasion for passing the War Powers Resolution, which aimed to ensure that the President consult Congress before introducing troops into hostilities. THE HISTORY PLACE, THE VIETNAM WAR (last visited Oct. 5, 2016) (timeline of the Vietnam War), <http://www.historyplace.com/unitedstates/vietnam/index-1969.html>.

155. Simon, *supra* note 130, at 714.

156. George H.W. Bush, Remarks on the End of the Gulf War (Feb. 27, 1991), <http://millercenter.org/president/bush/speeches/speech-5530>; Simon, *supra* note 130, at 717.

157. George H.W. Bush, Address Before a Joint Session of Congress on the End of the Gulf War (Mar. 6, 1991), <http://millercenter.org/president/bush/speeches/speech-3430>.

counterterrorism operations and protect U.S. civilians.¹⁵⁸ All U.S. troops had withdrawn from Iraq by December 18, 2011.¹⁵⁹

2. “Hostilities”

The War Powers Resolution¹⁶⁰ (WPR) adopted in 1973 at the end of the Vietnam War limits instances in which the President may introduce armed forces into “hostilities or situations where imminent involvement in hostilities is clearly indicated by the circumstances”:

(c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.¹⁶¹

158. See Barack Obama, President of the U.S., Remarks by the President in Address to the Nation of the End of Combat Operations in Iraq (Aug. 31, 2010), <http://www.whitehouse.gov/the-press-office/2010/08/31/remarks-president-address-nation-end-combat-operations-iraq> (“Operation Iraqi Freedom is over, and the Iraqi people now have lead responsibility for the security of their country.”). Many subsequent speeches also referred to the end of U.S. operations in Iraq. See Barack Obama, Remarks by the President on Ending the War in Iraq (Oct. 21, 2011), <http://www.whitehouse.gov/the-press-office/2011/10/21/remarks-president-ending-war-iraq>; Barack Obama and Michelle Obama, Remarks by the President and First Lady on the End of the War in Iraq (Dec. 14, 2011), <http://www.whitehouse.gov/the-press-office/2011/12/14/remarks-president-and-first-lady-end-war-iraq>; see also Simon, *supra* note 130, at 718.

159. See Barack Obama, Presidential Proclamation: National Day of Honor (Mar. 19, 2012), <http://whitehouse.gov/the-press-office/2012/03/19/presidential-proclamation-national-day-honor>; Letter from Susan Rice, Assistant to the President for National Security Affairs, to John A. Boehner, Speaker of the House of Representatives (Jul. 25, 2014), http://armedservices.house.gov/index.cfm/files/serve?File_id=D6A70EF0-E7ED-4A8B-B39B-9774CE10B7D3.

160. War Powers Resolution, 50 U.S.C. § 1541–1548 (2012)

161. *Id.* at §1541, Sec. 2. But the Department of Justice’s Office of Legal Counsel (OLC) has written that this section “either is incomplete or is not meant to be binding” and that the “WPR was enacted against a background that was ‘replete with instances of presidential uses of military force abroad in the absence of prior congressional approval.’” Congress’s interest in enacting the WPR “was to prevent the United States from being engaged, without express congressional authorization, in major, prolonged conflicts such as the wars in Vietnam and Korea, rather than to prohibit the President from using or threatening to use troops to achieve important diplomatic objectives where the risk of sustained military

While the WPR does not define hostilities, the House Report that accompanied the WPR upon its adoption states: “[t]he word hostilities was substituted for the phrase armed conflict . . . because it was considered to be somewhat broader in scope. In addition to a situation in which fighting has actually begun, hostilities also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. ‘Imminent hostilities’ denotes a situation in which there is a clear potential for either such a state of confrontation or for actual armed conflict.”¹⁶²

A 1975 letter from State Department Legal Adviser Monroe Leigh and Department of Defense General Counsel Martin Hoffmann set out the following understanding of “hostilities”:

a situation in which units of the U.S. armed forces are actively engaged in exchanges of fire with opposing units of hostile forces, and “imminent hostilities” was considered to mean a situation in which there is a serious risk from hostile fire to the safety of United States forces. In our view, neither term necessarily encompasses irregular or infrequent violence which may occur in a particular area.¹⁶³

A 1980 Office of Legal Counsel (OLC) Memo¹⁶⁴ on Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization reiterated the content of the 1975 Leigh-Hoffmann letter and added:

We agree that the term “*hostilities*” should not be read necessarily to include sporadic military or paramilitary attacks on our armed forces stationed abroad. Such situations do not generally involve the full military engagements with which the Resolution is primarily concerned. For the same reason, we also believe that as

conflict was negligible.” Office of Legal Counsel, Deployment of United States Armed Forces into Haiti” Letter Opinion for Four United States Senators 176 (September 27, 1994).

162. H.R. Rep. No. 287, at 7 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2346, 2351.

163. War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation at Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident: Hearings Before the Subcomm. on Int’l Sec. & Scientific Affairs of the H. Comm. on Int’l Relations, 94th Cong. 39 (1975) (Letter from Monroe Leigh, Legal Adviser, Dep’t of State, and Martin R. Hoffmann, Gen. Counsel, Dep’t of Def., to Clement J. Zablocki, Chairman, Subcomm. on Int’l Sec. & Scientific Affairs of the House Comm. on Int’l Relations).

164. Memorandum Opinion from Theodore B. Olson, Office of Legal Counsel, for the Attorney General (Feb. 12, 1980).

a general matter the presence of our armed forces in a foreign country whose government comes under attack by “guerrilla” operations would not trigger the reporting provisions of the War Powers Resolution unless our armed forces were assigned to “command, coordinate, participate in the movement of, or accompany” the forces of the host government in operations against such guerrilla operations.

As State Department Legal Adviser Harold Hongju Koh explained in his testimony on Libya and War Powers before the Senate Foreign Relations Committee in 2011, “the operative, ‘hostilities,’ is an ambiguous standard, which is nowhere defined in the statute. Nor has this standard ever been defined by the courts or by Congress in any subsequent war powers legislation.”¹⁶⁵ Instead, its meaning “has been determined more by interbranch practice than by a narrow parsing of dictionary definitions.”¹⁶⁶ In explaining why U.S. operations in Libya did not amount to hostilities for the purpose of the WPR, Koh invoked a combination of four factors: the limited nature of the mission, the limited exposure of U.S. forces, the low risk of escalation, and the limited military means used.¹⁶⁷ It is important to note, however, that the view that U.S. operations in Libya did not amount to “hostilities” for the purpose of the WPR was subject to some controversy.¹⁶⁸

Definitions of war, hostilities, and their cessation for the purpose of exercising U.S. domestic war powers and applying domestic law do not necessarily coincide with definitions of equivalent terms under IHL. Moreover, determinations of the end of war or hostilities for domestic purposes are typically made by political act. Caution is urged to ensure that the classification of situations of violence for the purpose of applying international humanitarian law is not influenced by sole political acts that may not necessarily reflect the reality on the ground.

165. *Libya and War Powers: Hearing before the S. Comm. on Foreign Relations*, 112th Cong. 14, at 4 (2011) (statement of Harold Hongju Koh, Legal Adviser, Dep’t of State).

166. *Id.* at 5.

167. *Id.* at 7–11.

168. See Charlie Savage, *2 Top Lawyers Lost to Obama in Libya War Policy Debate*, N.Y. TIMES (Jun. 17, 2011), <http://www.nytimes.com/2011/06/18/world/africa/18powers.html>; Bruce Ackerman, *Legal Acrobatics, Illegal War*, N.Y. TIMES (Jun. 20, 2011), <http://www.nytimes.com/2011/06/21/opinion/21Ackerman.html>; Trevor W. Morrison, *Libya, “Hostilities,” the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 63 (2011).

III. CONSEQUENCES FOR DEPRIVATION OF LIBERTY OF THE END OF ARMED CONFLICT, END OF PARTICIPATION IN AN ARMED CONFLICT, AND END OF HOSTILITIES

If one or more armed conflicts are over, the U.S. is no longer a party to one or more conflicts, or hostilities have ended, this will have implications under international law for any deprivation of liberty that the U.S. carries out.

A. Release from Internment¹⁶⁹ Related to the Armed Conflict

1. In International Armed Conflict

In *Hamdi v. Rumsfeld*,¹⁷⁰ the U.S. Supreme Court explained with respect to the 2001 AUMF, that “we understand Congress’ grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain *for the duration of the relevant conflict*, and our understanding is based on long-standing law-of-war principles.”¹⁷¹ Consistent with *Hamdi*, since at least early 2009, the United States has taken the position that principles derived from IHL governing *international* armed conflicts must inform the interpretation of the detention authority conferred by the AUMF,¹⁷² explaining that the President has the authority under the 2001 AUMF to detain “those persons whose relationship to al-Qaida or the Taliban would, in appropriately analogous circumstances in a traditional international armed conflict, render them detainable.”¹⁷³

169. “Internment” under IHL is defined as deprivation of liberty for security reasons, without criminal prosecution. Jelena Pejic, “*Unlawful/Enemy Combatants*”: *Interpretations and Consequences*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 335, 350 (Michael Schmitt & Jelena Pejic eds., 2007).

170. *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

171. *Id.* at 521.

172. Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 1, *In re Guantanamo Bay Detainee Litigation* (D.D.C. 2009) (Misc. No. 08-442 TFH) (emphasis added), <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf>.

173. The Guantanamo memo states:

The detention authority conferred by the AUMF is necessarily informed by principles of the laws of war The laws of war include a series of prohibitions and obligations, which have developed over time and have periodically been codified in treaties such as the Geneva Conventions or become customary international law The laws of war have evolved primarily

The US has alleged that persons it is holding in relation to the armed conflict(s) are “members” of non-state armed groups, and has been applying the general Third Geneva Convention (GC III) framework to them, albeit without granting the immunity for lawful acts of hostility typically given to detained members of armed forces or militias who meet the criteria for prisoner of war status.¹⁷⁴ Article 118 of GC III requires that prisoners of war who are not facing criminal proceedings or serving a criminal sentence “shall be released and repatriated *without delay* after the *cessation of active hostilities*.”¹⁷⁵ As explained in the Commentary, “[i]n time of war, the internment of captives is justified by a legitimate concern to prevent military personnel from taking up arms once more against the captor State. That reason no longer exists once the fighting is over.”¹⁷⁶ The Commentary adds that the requirement to repatriate without delay after the cessation of active hostilities does not affect the obligation to ensure that repatriation takes place in accordance with humanitarian rules and the Convention.¹⁷⁷

The rules of GC IV and AP I can also inform the release of internees whose deprivation of liberty is governed by the AUMF. Under GC IV, civilians who fulfill the Convention’s nationality criteria and are held for imperative reasons of security¹⁷⁸ shall be released as soon as the reasons which necessitated the internment no longer exist, and at any rate *as soon as possible* after the *close of hostilities*,¹⁷⁹ even

in the context of international armed conflicts between the armed forces of nation states. This body of law, however, is less well-codified with respect to our current, novel type of armed conflict against armed groups such as al-Qaida and the Taliban. Principles derived from law-of-war rules governing international armed conflicts, therefore, must inform the interpretation of the detention authority Congress has authorized for the current armed conflict.

Id. at 1.

174. Respondent’s Memorandum Regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay at 5–6, *In re: Guantanamo Bay Detainee Litigation*, Misc. No. 2008-0442 (D.D.C. memo filed Mar. 13, 2009).

175. Third Geneva Convention, *supra* note 13, at art. 118.

176. GENEVA CONVENTION III COMMENTARY, *supra* note 46.

177. *Id.* at 550.

178. Fourth Geneva Convention, *supra* note 60.

179. Fourth Geneva Convention, *supra* note 60, at art. 132, 133. The commentary states:

though the Convention otherwise continues to apply until the “general close of military operations.”¹⁸⁰ Similar to the rationale for the rule in GC III, the Commentary to Article 133 of GC IV explains: “Since hostilities are the main cause for internment, internment should cease when hostilities cease.”¹⁸¹ The ICRC has identified both GC III and GC IV rules as part of customary international law.¹⁸² The main difference between the rules of GC III and GC IV is that the latter can require release even before the close of hostilities, and entails periodic internment review throughout the person’s internment, among other safeguards.¹⁸³

Article 75(3) of AP I also provides that “[e]xcept in cases of arrest or detention for penal offences, [any person arrested, detained or interned for actions related to the armed conflict] shall be released with the *minimum delay possible* and in any event *as soon as the*

[I]t is as a rule important for civilian internees as for prisoners of war that internment should cease as soon as possible after the close of hostilities However, this does not mean, in spite of the urgent wish thus expressed, that internment can always be brought to an end shortly after the end of active hostilities. The Rapporteurs of the Committee of the Diplomatic Conference which dealt with this question even explained that it did not even mean that no one could be interned after hostilities had ended. The disorganization caused by war may quite possibly involve some delay before the return to normal. What it was wished to avoid, and what this Article will avoid if it is applied in good faith, is the indefinite prolongation of situations such as those of which many prisoners of war in some countries were victim in that they were retained under various provisions in the service of the Detaining Power It should be noted, finally, that this paragraph only repeats, with special application to internment, a principle stated in general fashion in Article 46, according to which restrictive measures taken regarding protected persons are to be cancelled as soon as possible after the close of hostilities.

GENEVA CONVENTION IV COMMENTARY, *supra* note 19.

180. Fourth Geneva Convention, *supra* note 60, at art. 6, 133.

181. GENEVA CONVENTION IV COMMENTARY, *supra* note 19, at 514–515.

182. INT’L COMM. OF THE RED CROSS, ICRC STUDY ON CUSTOMARY IHL, Rule 128 A (“Prisoners of war must be released and repatriated without delay after the cessation of active hostilities.”); Rule 128 B (“Civilian internees must be released as soon as the reasons which necessitated internment no longer exist, but at the latest as soon as possible after the close of active hostilities.”), https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule128.

183. Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT’L REV. OF THE RED CROSS 375, 382 (2005).

circumstances justifying the arrest, detention or internment have ceased to exist" (emphasis added). Although the United States is not a party to AP I, in 2011, the U.S. government indicated that it would "choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict."¹⁸⁴ Article 75 AP I is understood as providing basic protections when more favorable ones under the Geneva Conventions or elsewhere in the Protocol do not apply.¹⁸⁵

Consistent with this, in *Hamdi*, the Supreme Court held that "[i]t is a clearly established principle of the law of war that detention may last no longer than *active hostilities*."¹⁸⁶ In its brief to the Court, the U.S. Government likewise argued, "[i]n time of war, the President, as Commander in Chief, has the authority to capture and detain enemy combatants for the *duration of hostilities*." It added in a footnote that "[b]ecause Hamdi is not serving any criminal punishment, he may be released after the current hostilities end or at any point that the military determines such release is appropriate."¹⁸⁷

Faced with the question of release at the end of hostilities, the U.S. Court of Appeals for the D.C. Circuit in *Al-Bihani* similarly stated: "The Conventions, in short, codify what common sense tells us must be true: release is only required when the fighting stops."¹⁸⁸

2. In Non-International Armed Conflict

The customary IHL rule applicable in NIAC similarly provides that persons deprived of their liberty in relation to a NIAC (and who

184. THE WHITE HOUSE, WHITE HOUSE FACT SHEET: NEW ACTIONS ON GUANTÁNAMO AND DETAINEE POLICY (Mar. 7, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>.

185. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article.

Protocol I, *supra* note 10, at art. 75(1).

186. *Hamdi*, 542 U.S. at 519.

187. Brief for the Respondent at 9, 16, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (emphasis added).

188. *Al-Bihani v. Obama*, 590 F.3d 866, 874–75 (D.C. Cir. 2010).

are not facing penal proceedings or serving a sentence¹⁸⁹) must be released “as soon as the reasons for the deprivation of their liberty cease to exist.”¹⁹⁰ As in the case of an individual interned pursuant to GC IV, this means that a person interned because they posed a certain threat at the time of capture should be released when they no longer pose that threat, even if this occurs before the end of hostilities.¹⁹¹ However, the general rule of IHL is that, at the very latest, “internment must cease *at the end or close of active hostilities* in the armed conflict in relation to which a person was interned.”¹⁹²

AP II does not indicate when it ceases to apply, but the Commentary to Article 2(2) of AP II makes clear that it is logical that “the rules relating to armed confrontation are no longer applicable after the end of hostilities.”¹⁹³ The Commentary then adds, “In principle, measures restricting people’s liberty, taken for reasons related to the conflict, should cease *at the end of active hostilities* . . . except in cases of penal convictions.”¹⁹⁴

3. Protection until Repatriation

In an IAC, an “unjustifiable delay in the repatriation of prisoners of war or civilians” constitutes a grave breach under article 85(4)(b) of AP I.¹⁹⁵ The Commentary to this provision explains: “Only material reasons such as circumstances making transportation impossible or dangerous are acceptable. The intention to use prisoners of war or civilians in one’s power as a means of applying pressure on the adversary, for example, is not acceptable.”¹⁹⁶

189. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 451–456 (Int’l Comm. Red Cross, Cambridge Univ. Press, vol. 1 2009).

190. See *id.* at 451.

191. See Jelena Pejic, *The Protective Scope of Common Article 3: More Than Meets the Eye*, 881 INT’L REV. OF THE RED CROSS 1, 22 (Mar. 2011). See also Jelena Pejic & Cordula Droegge, *The Legal Regime Governing Treatment and Procedural Guarantees for Persons Detained in the Fight Against Terrorism*, in COUNTER-TERRORISM STRATEGIES IN A FRAGMENTED INTERNATIONAL LEGAL ORDER: MEETING THE CHALLENGES 527, 557 (L. Van den Herik and N. Schrijver, eds 2013).

192. See Pejic, *The Protective Scope of Common Article 3: More Than Meets the Eye*, *supra* note 191, at 23. See also Pejic and Droegge, *supra* note 191, at 557.

193. ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 19, at para. 4492.

194. *Id.* at para. 4493.

195. PROTOCOL I, *supra* note 10, at art. 85(4)(b).

196. ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 19, at para. 1001.

In all types of conflict, persons who are held in relation to the conflict and have yet to be released will continue to be protected by IHL until their final release and repatriation, even if this happens after the close of hostilities. In IAC, the Commentary to Art. 5 GC III explains that “the prisoner must continue to be treated as such until such time as he is reinstated in the situation in which he was before being captured.”¹⁹⁷ The Commentary to Article 6(2) GC IV explains that “in the period following the close of military operations conditions are still fairly unsettled and the passions roused by war are still aflame. Hence the necessity for clear rules safeguarding protected persons, most of whom are of course enemy nationals.”¹⁹⁸

In NIAC, Article 2(2) AP II foresees similar protection,¹⁹⁹ while the equivalent under Common Article 3 to the Geneva Conventions was formulated by the 1963 Commission of Experts:

The settling of an internal conflict, dependent on article 3, does not put an end, by itself and of full right, to the application of that article, whatever the form or the conditions of this settlement may be, whether the legal government re-establishes order itself, whether it disappears in favour of a government formed by its adversaries, or whether it concludes an agreement with the other party. The Commission pointed out that the obligations described in article 3 should be respected in all circumstances ... at all times and in all places.’ The Commission therefore considers that the provisions of article 3 remain applicable to situations

197. GENEVA CONVENTION III COMMENTARY, *supra* note 46, at art. 5.

198. GENEVA CONVENTION IV COMMENTARY, *supra* note 19, at art. 6(2).

199. This is particularly relevant in light of the fact that Article 2(2) of Protocol II foresees the possibility that certain persons may have their liberty restricted for security reasons even after the armed conflict. The Commentary to this provision explains:

In principle, measures restricting people's liberty, taken for reasons related to the conflict, should cease at the end of active hostilities, i.e., when military operations have ceased, except in cases of penal convictions. Nevertheless, if such measures were maintained with regard to some persons for security reasons, or if the victorious party were making arrests in order to restore public order and secure its authority, legal protection would continue to be necessary for those against whom such actions were taken.

PROTOCOL II, *supra* note 18, at art. 2.

arising from the conflict and to the participants in that conflict.”²⁰⁰

In both IAC and NIAC, detainees facing penal proceedings or serving a sentence may continue to be deprived of their liberty even after the end of hostilities.²⁰¹

4. Release at the End of Hostilities: Examples of Practice

In both IAC and NIAC, parties to the conflict have typically released internees pursuant to explicit clauses to this effect contained in cease-fire or other agreements concluded at the end of hostilities or armed conflict.

For instance, Article 4 of the January 1973 Protocol to the Agreement on Ending the War and Restoring Peace in Vietnam²⁰² provided that the return of all captured military personnel and civilians “shall be completed within 60 days of the signing of the Agreement.” Article 6 provided that “each party shall return all captured persons . . . without delay and shall facilitate their return and reception.” On February 13, 1973, the New York Times reported that over 140 American prisoners had been released in Hanoi as part of a first phase of repatriation. Similar numbers of prisoners were “to be released at intervals of about 15 days, in proportion to the American withdrawal of troops from South Vietnam.”²⁰³ Between February 12, 1973 and March 11, 1973, the Viet Cong had released 299 American prisoners and was still holding 286.²⁰⁴ The Viet Cong were also

200. Int’l Comm. of the Red Cross, *Humanitarian Aid to the Victims of Internal Conflicts, Meeting of a Commission of Experts in Geneva*, 23 INT’L REV. OF THE RED CROSS, 60, 79-91 at 83.

201. Third Geneva Convention, *supra* note 13, at art. 119; Fourth Geneva Convention, *supra* note 60, at art. 133; ADDITIONAL PROTOCOLS COMMENTARY *supra* note 19, at para. 4493; JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 451-56 (Int’l Comm. Red Cross, Cambridge Univ. Press, vol. 1 2009).

202. Protocol to the Agreement on Ending the War and Restoring Peace in Vietnam Concerning the Return of Captured Military Personnel and Foreign Civilians and Captured and Detained, Jan. 27, 1973, 24 U.S.T. 1, T.I.A.S. No. 7,542.

203. James P. Sterba, *First Prisoner Release Completed*, N.Y. TIMES (Feb. 12, 1972), <http://www.nytimes.com/learning/general/onthisday/big/0212.html>.

204. *Viet Cong Call Off Prisoner Exchange*, THE LAKELAND LEDGER (Mar. 11, 1973), http://news.google.com/newspapers?nid=1346&dat=19730311&id=WhpXAAAAIIBAJ&sjid=a_oDAAAAIIBAJ&pg=7080,3198702.

scheduled to release hundreds of Vietnamese prisoners,²⁰⁵ while the Republic of Vietnam took the position that the Viet Cong had violated the security laws of South Vietnam and therefore were subject to trial for their crimes.²⁰⁶

Article 2(1) of the Algiers Peace Agreement concluded between Ethiopia and Eritrea in December 2000 provided that “In fulfilling their obligations under international humanitarian law, including the 1949 Geneva Conventions, and in cooperation with the International Committee of the Red Cross, the parties shall without delay, release and repatriate all prisoners of war. Article 2(2) provided for the release and repatriation or return “to their last place of residence all other persons detained as a result of the armed conflict.”²⁰⁷ But complete release and repatriation was slow to ensue. On 18 February 2002, about 14 months after the Agreement was concluded, the ICRC issued a press release stating:

Since the peace agreement was concluded between Ethiopia and Eritrea in Algiers on 12 December 2000, the ICRC has organized the repatriation of 937 Eritrean and 703 Ethiopian POWs. At the time of the signing of the agreement, the ICRC had registered and was visiting some 2,600 Eritrean POWs in Ethiopia and some 1,000 Ethiopian POWs in Eritrea.... The ICRC...was entrusted by the Algiers agreement with the task of supervising the release and repatriation of POWs and other persons detained in connection with the conflict. The ICRC will continue to facilitate further repatriations and urges the Ethiopian and the Eritrean authorities promptly to release and repatriate all remaining POWs and civilian internees.²⁰⁸

Delays were allegedly due to the unknown whereabouts of one particular Ethiopian POW who had been captured in Eritrea. According to the ICRC, “The [Ethiopian] authorities expressed their concern that solving this issue is a key element in finalising the [POW repatriation] process. We are in a constant dialogue to try and

205. *Id.*

206. GEORGE S. PRUGH, *LAW AT WAR: VIETNAM, 1964-1973*, at 62 (1975).

207. Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Eth.-Eri., art. 2(2), June 18, 2000, 40 I.L.M. 259 (2001).

208. Press Release, Int'l Comm. of the Red Cross, *Eritrea/Ethiopia: prisoners of war and civilians repatriated* (Feb. 18, 2002), <https://www.icrc.org/eng/resources/documents/news-release/2009-and-earlier/59wbgm.htm>

overcome these difficulties, to try and get the necessary information.”²⁰⁹ However, the ICRC did not consider that the delay constituted a violation: “I would not say they are in violation, because it is a process—releasing prisoners of war. . . . The experience we have [is] it takes time. It shouldn’t take too much time, but it does take time.”²¹⁰

The 1953 Panmunjom Armistice Agreement entered into at the end of the Korean war²¹¹ provided: “Within sixty (60) days after this Armistice Agreement becomes effective, each side shall, without offering any hindrance, directly repatriate and hand over in groups all those prisoners of war in its custody who insist on repatriation to the side to which they belonged at the time of capture.”²¹² In the principal prisoner exchange operation entitled “Big Switch” between August and December 1953, the U.S. refused to repatriate thousands of Chinese and North Korean prisoners against their will, as they claimed to have been forced into service for North Korea. North Korea claimed the same with respect to a much smaller number of American prisoners.²¹³ The following question had therefore arisen: does Article 118(1) of GC III, which requires repatriation without delay, oblige a party to use

209. *Eritrea–Ethiopia: ICRC Expresses Concern Over Delay of POWs Repatriation*, IRIN (May 9, 2002), <http://reliefweb.int/report/eritrea/eritrea-ethiopia-icrc-expresses-concern-over-delay-pows-repatriation>.

210. *Id.*

211. Interestingly, none of the Parties to the conflict had ratified the Third Convention at the time of the Korean War (the U.S. only ratified it later, in August 1955), but it nevertheless partially applied, because, at the beginning of the hostilities, the parties to the conflict had stated their intentions of respecting the “principles” of the Geneva Conventions. GENEVA CONVENTION III COMMENTARY, *supra* note 46. The 1929 Convention, relative to the treatment of prisoners of war then in effect for the U.S., stated in Article 75:

When belligerents conclude an armistice convention, they shall normally cause to be included therein provisions concerning the repatriation of prisoners of war. If it has not been possible to insert in that convention such stipulations, the belligerents shall, nevertheless, enter into communication with each other on the question as soon as possible. In any case, the repatriation of prisoners shall be effected as soon as possible after the conclusion of peace.

Geneva Convention relative to the Treatment of Prisoners of War, July 27, 1929, 2 U.S.T. 932.

212. Military Armistice in Korea and Temporary Supplemental Agreement, art. III(51)(a), July 27, 1953, 4 U.S.T. 234, T.I.A.S. 2782.

213. Adam J. Zweiback, *The 21 Turncoat GIs: Nonrepatriations and the Political Culture of the Korean War*, 60 HISTORIAN 345 (1998).

force, if required, to repatriate all its prisoners? Consistent with fundamental rules of IHL prescribing humane treatment and protection, the UN General Assembly adopted a Resolution on December 3, 1952 affirming “that force shall not be used against prisoners of war to prevent or effect their return to their homelands, and that they shall at all times be treated humanely.”²¹⁴

Eventually the UN Neutral Nations Repatriation Commission took responsibility for prisoners who refused repatriation. Paragraph I(1) of the Annex to the Agreement set terms of reference of a Neutral Nations Repatriation Commission “in order to ensure that all prisoners of war have the opportunity to exercise their right to be repatriated following an armistice.”²¹⁵

Similar practice on the release of prisoners can be found in NIAC. Following two earlier attempts to negotiate an end to hostilities, in August 2005, the Government of Indonesia and the Free Aceh Movement entered into a Memorandum of Understanding (MoU) aiming to end the conflict between them. The parties agreed that “political prisoners and detainees held due to the conflict will be released unconditionally as soon as possible and not later than within fifteen days of the signature of this MoU.”²¹⁶ By the end of August 2005, the Indonesian government had released almost 1,500 prisoners,²¹⁷ however there remained disagreement between the parties as to the criminal or political status of 100 prisoners in government hands.²¹⁸

The cease-fire agreement concluded as part of Protocol VI to the October 1992 General Peace Agreement for Mozambique concluded with the Mozambique National Resistance provided that all prisoners being held, except those convicted for ordinary crimes, should be

214. See GENEVA CONVENTION III COMMENTARY, *supra* note 46, at 544.

215. *Agreement on Prisoners of War*, 47 AM. J. INT'L L. 180 (1953).

216. See Memorandum of Understanding Between the Government of the Republic of Indonesia and the Free Aceh Movement, Indon.-Free Aceh Movement, art. 3.1.2, Aug. 15, 2005, <http://www.aceh-mm.org/download/english/Helsinki%20MoU.pdf>.

217. See BBC NEWS, *Aceh Rebels Released from Prison* (Aug. 31, 2005, 9:55AM), <http://news.bbc.co.uk/2/hi/asia-pacific/4199572.stm>. See also KROC INSTITUTE FOR INTERNATIONAL PEACE STUDIES, UNIVERSITY OF NOTRE DAME, PRISONER RELEASE (April 11, 2013), https://peaceaccords.nd.edu/matrix/status/18/prisoner_release (last visited Oct. 27, 2014).

218. See International Crisis Group, *Aceh: So Far, So Good*, 44 ASIA BRIEFING 1, 2–3 (2005), http://crisisgroup.org/~media/Files/asia/south-east-asia/indonesia/b044_aceh_so_far_so_good.pdf. The Free Aceh Movement did not seem to be holding any prisoners.

released by the parties.²¹⁹ In November 1993 the National Resistance declared that it had no prisoners, and a 1994 U.S. State Department report stated that “in 1993 there were no reports of detention of prisoners for national security reasons.”²²⁰

B. Post-Release Transfer and Non-Refoulement

Persons released from internment may need to be returned to their country of origin or transferred to a third country who accepts to receive them. Such transfers are subject to the principle of *non-refoulement*, which prohibits States from transferring persons within their control to the control of another State if there is a real danger that their fundamental rights will be violated after the transfer.²²¹

Under IHL, the principle has been expressed in Article 12 of GC III and Article 45(4) of GC IV. Article 12 of GC III states:

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.²²²

By prohibiting transfers unless the protections under GC III can be assured, this provision grants prisoners of war greater protection than would normally be available through the principle of *non-refoulement*, which prohibits transfers only if a real risk of irreparable harm is present.²²³

219. See UNITED STATES INSTITUTE OF PEACE, PEACE AGREEMENTS DIGITAL COLLECTION: GENERAL PEACE AGREEMENT FOR MOZAMBIQUE (Oct. 4, 1992), http://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/mozambique_1991-92.pdf

220. See U.S. DEP'T OF ST., MOZAMBIQUE HUMAN RIGHTS PRACTICES (Jan. 31, 1994), http://dosfan.lib.uic.edu/ERC/democracy/1993_hrp_report/93hrp_report_africa/Mozambique.html. See also KROC INSTITUTE FOR INTERNATIONAL PEACE STUDIES, UNIVERSITY OF NOTRE DAME, PEACE ACCORDS MATRIX https://peaceaccords.nd.edu/matrix/status/7/prisoner_release (last visited Oct. 23, 2014).

221. There is no single uniform formulation of the principle of *non-refoulement*—it exists variously under international humanitarian law, refugee law, and human rights law (both UN and regional instruments). For a discussion that provides a wide range of sources for this principle, see generally Emanuela-Chiara Gillard, *There's no place like home: states' obligations in relation to transfers of persons*, 90 INT'L REV. OF THE RED CROSS 703 (2008).

222. THIRD GENEVA CONVENTION, *supra* note 13, at art. 12.

223. See *supra* note 221 and accompanying text.

A similar formulation is found in Article 45 of GC IV, which also refers to the specific risk of persecution.²²⁴ While Article 5(4) of AP II does not capture the *non-refoulement* rule, it does require measures to ensure the safety of released persons: “If it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding.”²²⁵ The Commentary to this provision suggests that these safety measures should last “until the released persons have reached an area where they are no longer considered as enemies, or otherwise until they are back home, as the case may be.”²²⁶

Beyond instruments of IHL, Article 33(1) of the 1951 Convention Relating to the Status of Refugees,²²⁷ Article 3(1) of the 1984 Convention Against Torture, Cruel, Inhuman and Other Degrading Treatment and Punishment,²²⁸ and Article 16 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance²²⁹ all reiterate the non-refoulement principle,

224. The Convention states:

Protected persons shall not be transferred to a Power which is not a party to the Convention. . . . Protected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention. . . . In no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.

Fourth Geneva Convention, *supra* note 60, at art. 45.

225. Protocol II, *supra* note 18, at art. 5(4).

226. ADDITIONAL PROTOCOLS COMMENTARY, *supra* note 19, at para. 4596.

227. “No State Party shall expel, return (‘refouler’), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.” Protocol II, *supra* note 18, at art. 5(4).

228. “No State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” G.A. Res. 39/46, U.N. GAOR, 57th Sess., U.N. Doc. A/RES/57/199, at art. 3 (Dec. 10, 1984), <http://www.ohchr.org/Documents/ProfessionalInterest/cat-one.pdf>.

229. “No State Party shall expel, return (‘refouler’), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.” G.A. Res. 61/177, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/177, at art. 16 (Dec. 20, 2006).

which is also considered a component of human rights found in other international human rights instruments.²³⁰

As for U.S. government policy, it is “not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.”²³¹ The United States conditioned its ratification of the Convention Against Torture on a

230. The UN Human Rights Committee has held that the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.

Human Rights Committee General Comment 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant, at para 12, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004). The U.S. has challenged this position. See U.S. DEP'T OF ST., LIST OF ISSUES TO BE TAKEN UP IN CONNECTION WITH THE CONSIDERATION OF THE SECOND AND THIRD PERIODIC REPORTS OF THE UNITED STATES OF AMERICA, <http://www.state.gov/j/drl/rls/70385.htm> (last visited Oct. 5, 2016). General Comment No. 6 of the UN Committee on the Rights of the Child says that States must not transfer children if there are substantial grounds for believing that there is a risk of irreparable harm such as a violation of the right to life or the prohibition of torture, cruel, inhuman or degrading treatment or punishment, the death penalty, arbitrary deprivation of liberty, or under-age recruitment. Committee on the Rights of the Child, General Comment No. 6, Treatment of unaccompanied and separated children outside their country of origin, at 6, U.N. Doc. CRC/GC/2005/6 (June 3, 2005). For other sources of non-refoulement, see U.N. Sub-Commission on the Promotion and Protection of Human Rights, resolution 2005/12, Transfer of persons, 12 August 2005 at para. 3 and 8 (including the danger of “extra-judicial killing” as grounds for applying the non-refoulement principle). The risk of indefinite detention without trial or a flagrant violation of due process standards are also recommended grounds for refraining from transfers. U.N. Sub-Commission on the Promotion and Protection of Human Rights, resolution 2005/12, Transfer of persons, 12 August 2005 at para. 3 and 8. See also the U.N. Working Group on Arbitrary Detention, which in 2007 wrote that States must consider the risk of arbitrary deprivation of liberty when contemplating the transfer of a person, especially in the context of counter-terrorism. Report of the Working Group on Arbitrary Detention, at para. 49, U.N. Doc. A/HRC/4/40, 9 January 2007.

231. Foreign Affairs Reform and Restructuring Act of 1998k, H.R. 1757, 105th Cong. § 1242 (1998), <http://www.4uth.gov.ua/usa/english/laws/majorlaw/hr1757.pdf>

formal understanding that the phrase “where there are substantial grounds for believing that he would be in danger of being subjected to torture” means “if it is more likely than not that he would be tortured.”²³² In addition, the U.S. stated in its most recent report to the Committee Against Torture that:

United States policy is not to transfer any person to a country where it is more likely than not that the person will be tortured or, in appropriate cases, where the person has a well-founded fear of persecution based on a protected ground and would not be disqualified from persecution protection on criminal or security-related grounds.²³³

IV. CONCLUSION

When military operations against Al Qaeda, the Taliban and associated forces die down such that one or more NIACs have ended, the U.S. is no longer participating in one or more NIACs against them, or hostilities have ceased, IHL will require the U.S. to release those alleged members of the Taliban, Al Qaeda and associated forces whom it is holding in connection to the(se) armed conflict(s) and who are not facing any criminal prosecution. These three scenarios are assessed according to distinct tests, each of which must be informed by the facts on the ground. Of course, any of these three moments of transition will also lead to a shift in the legal regime applicable to any new detention or targeting activities, as these would no longer be governed by IHL.

232. *See* Committee Against Torture, Consideration of Reports Submitted by State Parties Under Article 19 of the Convention – Addendum: United States of America, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000).

233. Third to Fifth Periodic Reports of the United States of America to the UN Committee against Torture, at para. 66, U.N. Doc. CAT/C/USA/3-5 (Dec. 4, 2013), http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fUSA%2f3-5&Lang=en.