

# A Forever War? Rethinking the Temporal Scope of Non-International Armed Conflict

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## Abstract

How do we know when a Non-International Armed Conflict (NIAC) is over? What does International Humanitarian Law (IHL) say about the end of a NIAC? In practice, identifying the end of a NIAC can prove exceptionally difficult. In part, this is the result of the complex spectrum of factors that contribute to the existence and continuance of NIAC, and in particular the objectives that underpin and propel a NIAC. In addition, the virtual silence of IHL regarding its temporal scope of application adds another layer of complexity to identifying the end of a NIAC. While considerable research has focussed on IHL's threshold of activation, much less attention has been given to its threshold of termination. However, the looming threat of the so-called 'forever war' has stimulated fresh interest in determining when and how NIACs (legally) end. This article provides a forensic examination of the temporal scope of IHL during NIAC, with an exclusive focus on IHL's threshold of termination. It examines two of the leading approaches for determining the temporal scope of NIAC, and argues that neither approach is entirely satisfactory, and as a result, advances and explores a novel alternative - a 'functional approach' for determining IHL's threshold of termination during NIAC.

**Keywords:** non-international armed conflict, international humanitarian law, forever war, temporal scope.

## Introduction

Identifying the end of a Non-International Armed Conflict (NIAC) carries far-reaching legal implications. For International Humanitarian Law (IHL), the 'end of the armed conflict' holds significance for the protections afforded to persons deprived of their liberty; the granting of amnesty for persons who participated in the conflict; and for the clearance, removal or destruction of mines, booby traps, and other explosive remnants of war.<sup>2</sup> Even the denunciation of Additional Protocol II (APII) may hinge on when exactly the 'end of the armed conflict' has arrived.<sup>3</sup> The end of a NIAC will also hold important consequences for the application and interpretation of International Human Rights Law (IHRL), which is modified in a number of ways by the parallel application of IHL during NIAC, perhaps most notably in terms of when and against whom lethal force may be used. The end of a NIAC will also hold jurisdictional significance under International Criminal Law (ICL), as in the absence of an armed conflict there can be no war crime. A range of domestic legal implications may also emerge at the end of a NIAC, such as the termination of detention authority or an obligation to charge or release individuals detained for reasons related to the conflict.<sup>4</sup> Along similar lines, national courts and tribunals may also need to identify the end of a NIAC to assess asylum or subsidiary protection claims,<sup>5</sup> while insurance firms must identify the end of a NIAC to terminate war exclusion

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<sup>2</sup> See Articles 2(2), 6(5), Additional Protocol II. See also, Article 9, *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices* (Protocol II to the 1980 CCW Convention as amended on 3 May 1996) and Article 3, *Protocol on Explosive Remnants of War* (Protocol V to the 1980 Convention, as amended on 28 November 2003).

<sup>3</sup> Article 25, Additional Protocol II.

<sup>4</sup> See for example, *Al Warafi v. Obama*, Civil Action No. 09-2368 (RCL), United States District Court for the District of Columbia, 30 July 2015. See also, *Razak v. Obama*, 174 F. Supp. 3d 300, United States District Court for the District of Columbia, 29 March 2016. See also, *Al-Alwi v. Trump*, Civil Action No. 15-0681 (RCL), United States District Court for the District of Columbia, 21 February 2017.

<sup>5</sup> See discussion on if (and where) an armed conflict remained ongoing in Somalia in, *HH (Somalia) and Others v. Secretary of State for the Home Department*, EWCA Civ 426, United Kingdom: Court of Appeal, 23 April 2010.

clauses.<sup>6</sup> Evidently, the 'end of a NIAC' is of pivotal importance across multiple bodies of international and national law.

In both practical and legal terms, identifying the end of a NIAC is notoriously difficult. There are several reasons for this, but four in particular should be highlighted. First, is the complex spectrum of social, political and economic factors that underpin, propel, protract and ultimately bring NIACs to an end. Indeed, history is replete with NIACs spanning several years and, in some cases, several decades.<sup>7</sup> Second, is IHL's virtual silence regarding its temporal scope of application during NIAC. While conventional IHL speaks of the 'end of hostilities' and the 'end of the conflict', it stops short of providing any guidance on the precise meaning and scope of these expressions, or the relationship between them. Adding further uncertainty to IHL's silence is the lack of any clear or consistent state practice on the end of NIAC. Third, is the broad range of stakeholders that pronounce on the end of NIAC; including governments, military advisors, international organisations, courts and tribunals, humanitarian actors, and human rights defenders. The national interests or organisational mandates that motivate these stakeholder to pronounce on the end of NIAC, invariably influence their determinations in accordance with the specific legal or policy consequences of IHLs continuation or termination.<sup>8</sup> Finally, all of these factors are further compounded by a comparative dearth in legal scrutiny of when and how NIACs end.<sup>9</sup> Indeed, while considerable judicial and academic analysis has focussed on IHL's threshold of activation (when a NIAC legally comes into existence), much less attention has been given to its threshold of termination (when a NIAC legally ends). Notably however, controversial state practice has begun to reverse this sparsity of judicial and academic scrutiny of when and how NIAC's end.<sup>10</sup> Indeed, the looming threat of the so-called 'forever war',<sup>11</sup> characterised by nebulous networks of transnational armed groups and the perpetual applicability of IHL, has given rise to heated debates and stimulated fresh interest in determining when and how NIACs end.<sup>12</sup> While this newfound interest is a welcome development, much uncertainty and little consensus remains.

This article provides a forensic examination of the temporal scope of IHL during NIAC, with an exclusive focus on IHL's threshold of termination. The article is comprised of five sections. The first explores the

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<sup>6</sup> See, Jennings, Christopher, *Insurance Exclusion Clauses: Excluding War Risks and Terror Risks from Insurance Contracts*, Congressional Research Service, 14 June 2001.

<sup>7</sup> The NIAC in Colombia spanned five decades; the 'second' NIAC in Sudan lasted 32 years; while the NIAC in Sri Lanka lasted 27 years. See, respectively, Szesnat, Felicity, Annie R. Bird, *Colombia*, in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts*, Oxford University Press, 2012, pg 204; *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General*, Pursuant to UNSC Res 1564 of 18 September 2004, Geneva, 25 January 2005, pg 18; *Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka*, United Nations Secretary-General, 31 March 2011, pg 1.

<sup>8</sup> Milanovic, Marko, *End of Application of International Humanitarian Law*, 96 International Review of the Red Cross 893, 2014, pg 3.

<sup>9</sup> Notable exceptions include, Venturini, Gabriella, *The Temporal Scope of Application of the Conventions*, in Andrew Clapham, Paola Gaeta, Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, 2015, pg 61; Milanovic, Marko, *End of Application of International Humanitarian Law*, 96 International Review of the Red Cross 893, 2014; Bartels, Rogier, *From Jus In Bello to Jus Post Bellum: When do Non-International Armed Conflicts End?*, in Stahn, Carsten, Jennifer Easterday, Jens Iverson (eds), *Just Post Bellum: Mapping the Normative Foundations*, Oxford University Press 2014, pg 297; Lewis, Dustin, Gabriella Blum, Naz K. Modirzadeh, *Indefinite War: Unsettled International Law on the End of Armed Conflict*, Harvard Law School Program on International Law and Armed Conflict, Legal Briefing, February 2017; Jinks, Derek, *The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts*, Background Paper Prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, 2003.

<sup>10</sup> See for example, Eviatar, Daphne, *We Could Hold them for 100 Years if the Conflict Lasts 100 Years*, Just Security, 17 July 2018.

<sup>11</sup> Also referred to as the 'perpetual war' or 'endless war'. See, Harold H. Koh, Legal Adviser (2009-2013), U.S. Dep't of State, *How to End the Forever War?*, Speech Before the Oxford Union, May 7, 2013. See also, Filkins, Dexter, *The Forever War*, Vintage Books, 2009; Simon, David, *Ending Perpetual War? Constitutional War Termination Powers and the Conflict against Al Qaeda*, 41 Pepperdine Law Review 685, 2014.

<sup>12</sup> See above note 8.

temporal architecture of Common Article 3 (CA3) and Additional Protocol II (APII) to determine what, if anything, IHL has to say about its threshold of termination. The second section will unpack and critically examine two of the leading approaches for determining IHL's threshold of termination during NIAC: the so-called 'peaceful settlement' approach advanced by International Criminal Law; and the 'lasting pacification' approach advanced by the International Committee of the Red Cross (ICRC). While both of these approaches possess advantages and limitations, it is argued that neither produce entirely satisfactory results for determining IHL's threshold of termination during NIAC. As will be discussed, their common ailment is a quest for a single point in time that marks the 'end' of a NIAC, at which point IHL terminates *in toto*. In practice, such an approach invariably results in the over-extension of IHL to factual circumstances that no longer warrant its application, or by the termination of its applicability before comprehensive protection is restored under IHRL. For these reasons, this article argues that such an approach is not fit for purpose, and any pursuit for such a single point in time should be abandoned. In light of this appreciation, the third section revisits the logic that underpins and informs the theory and practice of IHL's temporal scope during NIAC. Following from this analysis, the fourth section develops and proposes an alternative 'functional approach' for determining IHL's threshold of termination during NIAC. This functional approach, considered as such, is predicated on the object and purpose of IHL during NIAC, and is guided by the principle of effectiveness. The fourth section will illustrate the utility of the 'functional approach' over existing approaches by examining its practical application to specific examples from the hostilities regime and protections regimes during NIAC.

The bounds of this article do not permit a detailed exploration of every issue relevant to determining IHL's threshold of termination. Three issues warrant mention here. First, this article will not provide a detailed analysis of who or what is Al-Qaeda, and whether the United States so-called war against Al-Qaeda and its 'associated forces' is ongoing. This is because the focus of this article is on developing a legal and analytical framework for determining IHL's threshold of termination that can be applied to any NIAC. Second, this article will not examine when a 'NIAC ends' byway of metamorphosing into an International Armed Conflict (IAC), a factual and legal process generally referred to as 'internationalisation'.<sup>13</sup> Not only is this issue beyond the scope of the present article, but also the 'internationalisation of NIAC' does not terminate the applicability of IHL *per se*, but rather the applicable rules of IHL undergo a normative transformation from the rules of NIAC to the rules of IAC. Third, this article will not explore when and how 'cyber wars' end. While cyber operations *during* NIAC can certainly be envisioned, the possibility of cyber operations alone amounting to a NIAC is unclear. As a result, the temporal scope of IHL with respect to a 'cyber NIAC' will not be examined.<sup>14</sup>

## 1: The Temporal Architecture of Common Article 3 and Additional Protocol II

The widely accepted general rule is that IHL applies from the initiation of a NIAC through to its cessation.<sup>15</sup> In both practical and legal terms, however, determining the temporal scope of IHL's applicability during NIAC is much more complex than this general rule suggests. In part, this is because the black letter international law of NIAC provides little guidance on this issue. Indeed, the only temporal insight that can be gleaned from CA3 is that its provisions are applicable "at any time and in any place whatsoever" during a NIAC.<sup>16</sup> The Fundamental Guarantees pursuant to APII are equally imprecise, applying "at any time and any place

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<sup>13</sup> For a discussion see, Macak, Kubo, *Internationalized Armed Conflicts in International Law*, Oxford University Press, 2018. See also, Pejic, Jelena, *Status of Armed Conflicts*, in Wilmshurst, Elizabeth, Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge University Press, 2007, pg 89.

<sup>14</sup> For a discussion see Rule 23: Characterization as Non-International Armed Conflict, Schmitt, Michael (ed), *Tallinn Manual on the International Law Applicable to Cyber Warfare*, Cambridge University Press, 2013, pg 75.

<sup>15</sup> Jinks, Derek, *The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts*, Background Paper Prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, 2003, pg 2.

<sup>16</sup> Article 3(1), 1949 Geneva Conventions.

whatsoever”.<sup>17</sup> However, APII also refers to the “end of hostilities”,<sup>18</sup> and the “end of the armed conflict”,<sup>19</sup> although stops short of providing insight into the precise meaning of either temporal reference, or the relationship between them. Notably, the protections of APII for persons deprived of their liberty, or whose liberty has been restricted, are entirely divorced from both the ‘end of hostilities’ and the ‘end of the conflict’ and remain applicable “until the end of such deprivation or restriction of liberty”.<sup>20</sup> While the explicit temporal extension of these protections is insightful, as will be discussed later, questions nonetheless remain regarding their temporal scope of application.

During the drafting of APII, the ICRC proposed the Draft Protocol “cease to be applied at the end of hostilities, that is when a general ceasefire is declared”.<sup>21</sup> The proposal was not adopted, which, in hindsight, was arguably for the better as the historical record demonstrates that a ceasefire declaration is in no way synonymous with the end of hostilities. Another proposal was submitted which expressly delineated the ‘beginning and end of application’ for the Draft Protocol: “the present Protocol shall cease to apply upon the general cessation of military operations”.<sup>22</sup> Although this amendment was also not adopted in the final text. Accordingly, the conventional NIAC regime contains only two undefined temporal references - the ‘end of hostilities’ and ‘the end of the armed conflict’ - and it is unclear whether they are synonymous or distinct. The ICRC commentaries suggest that the phrase ‘the end of the armed conflict’ should be understood in the same way as “the end of active hostilities, the point at which military operations on both sides cease.”<sup>23</sup> While the ICRC commentaries suggest the two temporal references are more or less synonymous, it is worth noting that the term ‘active hostilities’ is not contained in APII, although is contained in Additional Protocol I.<sup>24</sup>

## 2: Two Approaches for Determining IHL’s Threshold of Termination During NIAC

A number of approaches have emerged from the silence of IHL that offer normative guidance for determining IHL’s threshold of termination.<sup>25</sup> This article will examine two of those approaches: the ‘peaceful settlement’ approach advanced by ICL, and the ‘lasting pacification’ approach advanced by the ICRC. Both are discussed in turn.

### 2.1 The ‘Peaceful Settlement’ Approach

International Criminal Law advanced the first judicial interpretation of the temporal scope of IHL during NIAC. In *Tadić*, the Appeals Chamber held that “international humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.”<sup>26</sup> The Appeals Chamber further clarified that, “notwithstanding the various temporary ceasefire agreements, no general conclusion of peace has brought military operations in the region to a close. These hostilities exceeded the intensity

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<sup>17</sup> Article 4(2), Additional Protocol II.

<sup>18</sup> Article 6(5), Additional Protocol II.

<sup>19</sup> Article 2(2), Additional Protocol II.

<sup>20</sup> Article 2(2), Additional Protocol II.

<sup>21</sup> ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Documentary Material Submitted by the ICRC, Second Session - Part II, Geneva, 3 May – 3 June 1972, pg 8.

<sup>22</sup> Proposal submitted by the Brazilian delegation, but withdrawn at the Twenty-Ninth meeting of Committee I, on 17 March 1975. See, *Official Records of the Diplomatic Conference 1974-1977*, Vol. IV, ICRC, pg 12.

<sup>23</sup> See, Y Sandoz, C Swinarski, B Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, 1987, pg 1502.

<sup>24</sup> Among other IHL treaties. See, Article 33, Additional Protocol I.

<sup>25</sup> For a collection of approaches and analysis see, Lewis, Dustin, Gabriella Blum, Naz K. Modirzadeh, *Indefinite War: Unsettled International Law on the End of Armed Conflict*, Harvard Law School Program on International Law and Armed Conflict, Legal Briefing, February 2017.

<sup>26</sup> *Prosecutor v. Dusko Tadić aka "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, ICTY, 2 October 1995, para 70.

requirements applicable to both international and internal armed conflicts.”<sup>27</sup> This interpretation makes clear that a temporary ceasefire should not be confused with the achievement of a ‘peaceful settlement’ and, thus, the termination of IHL’s applicability. At the same time, however, the Appeals Chamber links the notion of a ‘peaceful settlement’ to the end of ‘military operations’, which it defines in terms of ‘hostilities’. This begs the question as to whether the absence of hostilities alone is sufficient to qualify as a ‘peaceful settlement’. Moreover, the Appeals Chamber qualified the prevailing hostilities by maintaining that they ‘exceeded’ the intensity requirements for the activation of IHL, which suggest that when the intensity of hostilities falls below the required threshold of activation, the applicability of IHL terminates. This interpretation, however, seems to contradict the Appeals Chamber’s previous and unambiguous pronouncement that IHL “extends beyond the cessation of hostilities ... until ... a peaceful settlement is achieved”.<sup>28</sup> This somewhat confusing ‘peaceful settlement’ approach advanced in *Tadić* was cited with approval by the International Criminal Court (ICC) in Bemba, where the Court clarified, “the meaning of a ‘peaceful settlement’ does not reflect only the mere existence of an agreement to withdraw or a declaration of an intention to cease fire.”<sup>29</sup> While this brief explication provides further insight towards what a peaceful settlement is not, it provides less insight to what it actually is. Thus, the precise meaning and scope of a ‘peaceful settlement’ is of pivotal significance.

What exactly constitutes a ‘peaceful settlement’ is unclear. For example, should the absolute military subjugation of one of the Parties resulting in the complete cessation of all hostilities be understood as a ‘peaceful settlement’? According to the logic in *Tadić*, which effectively severs the concept of a ‘peaceful settlement’ from the concept of ‘hostilities’, this would seem to be answered in the negative.<sup>30</sup> Alternatively, a ‘peaceful settlement’ can also be understood in terms of a formal ‘peace agreement’ between the Parties to a NIAC. Indeed, post-cold war practice indicates that political negotiations culminating in some form of ‘peace agreement’ are the most frequent pathway to the conclusion of a NIAC.<sup>31</sup> Nonetheless, to interpret a ‘peaceful settlement’ in terms of a ‘peace agreement’ is also problematic as it would introduce “a measure of formalism in a determination that should, first and foremost, be driven by facts on the ground”.<sup>32</sup> Indeed, just as the existence of NIAC is determined by the facts of the ground, it is argued so too should the end of a NIAC. Moreover, history demonstrates that reaching a peace agreement does not always result in the cessation of hostilities, let alone the end of the NIAC. For example, the Revolutionary United Front (RUF) and the government of Sierra Leone negotiated and signed two peace accords, neither of which brought an end to hostilities.<sup>33</sup> Along similar lines, neither the 2015 nor the revitalised 2018 peace agreements in South Sudan succeeded in bringing the NIAC to an end.<sup>34</sup> Accordingly, concluding a ‘peace agreement’ cannot be viewed as synonymous with the achievement of a ‘peaceful settlement’ to the NIAC, and thus terminating IHL’s applicability. Perhaps the most problematic aspect of the ‘peaceful settlement’ approach however, is its seeming indifference to the absence of prevailing hostilities, which suggests that the objective conditions that activate IHL in the first instance (threshold of activation) have no bearing on its threshold of termination. This interpretation is

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid.

<sup>29</sup> See, *Prosecutor v Jean-Pierre Bemba Gombo*, Judgment Pursuant to Article 74 of the Rome Statute, ICC-01/05-01/08, International Criminal Court, 21 March 2016, para 141.

<sup>30</sup> Which would arguably produce an absurd result if applied to the end of the NIAC in Sri-Lanka in May of 2009. See note 26 above.

<sup>31</sup> See, Bell, Christine, *On the Law of Peace: Peace Agreements and the Lex Pacificator*, Oxford University Press, 2008, pg 27.

<sup>32</sup> Report of the 32<sup>nd</sup> International Conference of the Red Cross and Red Crescent, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, ICRC, 8-10 December 2015, Geneva, pg 10.

<sup>33</sup> In addition to a number of ceasefire agreements, at least two ‘peace agreements’ were signed by the opposing Parties: the Abidjan Accord on 30 November 1996 and the Lome Peace Accord on 7 July 1999. See, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused)*, Trial Judgment, SCSL-04-15-T, Special Court for Sierra Leone, 2 March 2009, para 19, 41, 44.

<sup>34</sup> See, *Salvaging South Sudan’s Fragile Peace Deal*, International Crises Group, Africa Report N°270, 13 March 2019. See also, *Déjà Vu: Preventing Another Collapse in South Sudan*, International Crises Group, Africa Briefing N°147, 4 November 2019.

difficult to reconcile with the factual nature of NIAC and, therefore, it is questionable whether ICL's 'peaceful settlement' is consistent with the object, purpose and requirements of IHL.<sup>35</sup>

## 2.2 The 'Lasting Pacification' Approach

The International Committee of the Red Cross has proposed its own approach for determining IHL's threshold of termination during NIAC. According to the ICRC, the notion of a 'peaceful settlement' advanced by the ICTY, should be interpreted as "a situation where a factual and lasting pacification of the NIAC has been achieved".<sup>36</sup> It further explains that it is necessary to wait for "the complete cessation of all hostilities – without the real risk of resumption – before assuming that a NIAC has come to an end".<sup>37</sup> This 'lasting pacification' approach separates the 'cessation of hostilities' from the 'end of the armed conflict' by virtue of a 'real risk of resumption test', which, "helps ensure that the determination of the end of a NIAC is based not solely on cessation of hostilities, which may be short lived, but on the evaluation that related military operations of a hostile nature have also ended".<sup>38</sup> The utility of the 'lasting pacification' approach, and how it differs from the 'peaceful settlement' approach, is not immediately clear. In part, this is the result of the lack of clarity surrounding the concept of, and the modalities governing, the 'real risk of resumption test'.

The 'real risk of resumption' test lends itself to various interpretations. On one hand, the test could be construed narrowly to include only prevailing 'military operations of a hostile nature', thereby excluding all non-hostile military operations. During NIAC, however, the distinction between 'hostilities' and 'military operations of a hostile nature' is not immediately clear, although presumably it excludes military operations of a non-hostile nature.<sup>39</sup> Moreover, neither the concept of 'hostilities' nor 'military operations' is defined in conventional IHL. According to the ICRC, military operations are "all movements and acts related to hostilities that are undertaken by armed forces" which should be distinguished from other "ideological, political or religious campaigns".<sup>40</sup> Thus, one of the challenges with the 'lasting pacification' approach is distinguishing between hostile and non-hostile military operations, both of which must be distinguished from the conduct of hostilities. Presumably, so-called 'non-hostile military operations' during NIAC may include reconnaissance operations, the establishment of military checkpoints, house searches for weapons caches, or troop drawback. While the conventional NIAC regime does not expressly regulate these activities, they are intimately related to the conduct of hostilities, and therefore their continued existence arguably represents a 'real risk' for the resumption of hostilities.

On the other hand, the 'real risk of resumption' test could be construed broadly to include the underlying motives or objectives that underpin and propel a NIAC. For example, if the underlying motives propelling a NIAC were longstanding minority grievances that engendered a call to arms with the objective of territorial secession, although the territorial incumbent swiftly suppressed hostilities, it is reasonable to argue that a 'real risk' of hostilities resuming would remain until these grievances were effectively addressed or secession achieved. However, this factual scenario - the absence of hostilities, albeit the continued existence of organized armed groups - is not *per se* incompatible with the 'real risk of resumption' test.<sup>41</sup>

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<sup>35</sup> In support see, Bartels, Rogier, *From Jus In Bello to Jus Post Bellum: When do Non-International Armed Conflicts End?*, in Stahn, Carsten, Jennifer Easterday, Jens Iverson (eds), *Just Post Bellum: Mapping the Normative Foundations*, Oxford University Press 2014, pg 301.

<sup>36</sup> Report of the 32<sup>nd</sup> International Conference of the Red Cross and Red Crescent, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, ICRC, 8-10 December 2015, Geneva, pg 10.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid., pg 11. See also, Jinks, Derek, *The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts*, Background Paper Prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, 2003, pg 5.

<sup>39</sup> For one approach see, Daragh Murray et al., *Practitioners' Guide to Human Rights Law in Armed Conflict*, Oxford University Press, 2016, pg 88.

<sup>40</sup> Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, pg 600.

<sup>41</sup> Report of the 32<sup>nd</sup> International Conference of the Red Cross and Red Crescent, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, ICRC, 8-10 December 2015, Geneva, pg 10.

This would seem to suggest that the underlying motives or objectives of the NIAC have been effectively addressed; otherwise, it is unclear how an organized armed group with demonstrated capacity, proven combat experience and outstanding grievances is not indicative of a 'real risk' of hostilities resuming. This broad interpretation of the 'real risk of resumption' test could extend considerably (and possibly unnecessarily) the applicability of IHL during NIAC. Moreover, to place emphasis on the motives or objectives that underpin and propel a NIAC when determining IHL's threshold of termination inserts a highly subjective element into a determination that should be driven primarily by the objective facts on the ground.<sup>42</sup>

Accordingly, it seems that the ICRC's 'lasting pacification' approach is not altogether different from the ICTY's 'peaceful settlement' approach, as both approaches are contingent on factors above and beyond the cessation of hostilities. One of the principle distinctions between the two is the factual nature of the ICRC test as opposed to the more formal peaceful settlement approach of ICL. While this shift towards a more factual based approach is a welcome development, the 'lasting pacification' of a NIAC, characterised by a complete cessation of hostilities and no real risk of their resumption, may prove too remote in time to justify the continued applicability of IHL *in toto*.

### 3. The Temporal Scope of IHL in Theory and Practice

As the foregoing analysis has revealed, while both the 'peaceful statement' approach and the 'lasting pacification' approach possess certain advantages and limitations, neither produce entirely satisfactory results. In effect, both approaches suffer from a common ailment: the search for a single point in time that signals the 'end of a NIAC', and at which the applicability of IHL would terminate *in toto*. It is argued that such an approach is inherently problematic and not fit for purpose.

The notion that IHL is applicable only during situations of armed conflict is not entirely accurate. A number of IHL's obligations are equally applicable both during and outside situations of armed conflict, such as the obligations to respect and ensure respect for IHL;<sup>43</sup> provide instruction in IHL to members of armed forces;<sup>44</sup> review the legality of new weapons;<sup>45</sup> take appropriate measures for the safeguarding of cultural property;<sup>46</sup> and the adequate marking of medical units,<sup>47</sup> or installations containing dangerous forces.<sup>48</sup> Of course, a number of IHL obligations are applicable only during NIAC, principal among them being the rules

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<sup>42</sup> For these reasons, it is not surprising that notions of motive and objectives are both viewed as irrelevant for determining the existence of a NIAC. See, Sivakumaran, Sandesh, *The Law of Non-International Armed Conflict*, Oxford University Press, 2012, pg 182; Dinstein, Yoram, *Non-International Armed Conflicts in International Law*, Cambridge University Press, 2014, pg 17.

<sup>43</sup> See Rule 139: *Respect for International Humanitarian Law*, and related practice/commentary, ICRC Customary International Humanitarian Law Database (hereinafter ICRC Database).

<sup>44</sup> See, Article 19, Additional Protocol II; Rule 142: *Instruction in International Humanitarian Law within Armed Forces*, and related practice/commentary, ICRC Database .

<sup>45</sup> See Article 36, Additional Protocol I. See also, ICRC, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare: Measures to Implement Article 36 of Additional Protocol I of 1977*, ICRC, 2006; United States Department of Defense, *Law of War Manual*, Office of the General Council of the Department of Defense, 2015, pg 96.

<sup>46</sup> For a selection of obligations 'in times of peace', see the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Article 3 (safeguarding of cultural property), Article 6 (distinctive marking of cultural property), Article 18 (application of the convention). For obligations 'during an armed conflict' see, Article 10 (identification and control). For obligations that activate "as soon as any High Contracting Party is engaged in an armed conflict", see Article 2, Annexed Regulations for the Execution of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

<sup>47</sup> See, Article 18, Additional Protocol I. For the protections of medical units during NIAC see, Article 11, Additional Protocol II; Rule 28: *Medical Units*, and related practice/commentary, ICRC Database .

<sup>48</sup> See Article 56(7), Additional Protocol II; Article 15, Additional Protocol II. See also, Rule 42: *Works and Installations Containing Dangerous Forces*, and related practice/commentary, ICRC Database .

regulating the conduct and consequences of hostilities.<sup>49</sup> However, not every obligation activated during the conduct of hostilities will necessarily terminate with the cessation of hostilities. The protections afforded to persons deprived of their liberty, individuals subject to criminal procedures, and displaced persons are notable examples of obligations that remain applicable after the cessation of hostilities.<sup>50</sup> Moreover, certain obligations may only be activated following the cessation of hostilities, which in effect are the “post-conflict obligations” of IHL,<sup>51</sup> such as the obligations to identify and clear explosive remnants of war;<sup>52</sup> the various obligations with respect to the missing or dead;<sup>53</sup> and the obligation to investigate and prosecute alleged IHL violations, and provide any necessary reparations for such violations.<sup>54</sup> Evidently, a number of IHL obligations are applicable in peacetime, with some only during an armed conflict, while others arise only once hostilities have ended. Properly understood, certain IHL obligations are applicable *ante bellum*, *in bello* and *post bellum*.<sup>55</sup> Thus, neither the ‘end of hostilities’ nor the ‘end of NIAC’ necessarily equate to the termination of IHL’s applicability. Accordingly, any endeavour to identify a single point in time that effectively signals the end of IHL’s applicability *in toto* should be abandoned.

#### 4. A Functional Approach to the Temporal Scope of IHL during NIAC

An alternative to the ‘peaceful settlement and ‘lasting pacification’ approaches is a functional approach, which is predicated on the idea that the temporal scope of IHL must be interpreted in a manner that gives effect to its object and purpose during NIAC. The functional approach draws a general distinction between the applicability of IHL and the application of IHL during NIAC.<sup>56</sup> The applicability of IHL refers to its activation in the first instance, which means that IHL is generally applicable in the territory(ies) of the state Party(ies) to a NIAC. Importantly, however, the application of IHL refers to the operationalization of its particular rules to specific factual circumstances. Thus, while applicability necessarily precedes application, the former does not necessarily equate to the latter.<sup>57</sup> Once applicability has been established, each rule of IHL is activated by factual necessity and governed by the principle of effectiveness.<sup>58</sup> For example, if an individual is captured and detained on the battlefield by a Party to the NIAC, the rules of IHL regulating detention activate immediately (factual necessity), and remain operable until the conditions that gave rise to their activation no longer exist (effectiveness). Thus, it is the principle of effectiveness that will determine IHL’s temporal scope during NIAC, and in particular its threshold of termination.

The functional approach proposed here draws a general distinction between the ‘hostilities regime’ and the ‘protections regime’ when determining IHL’s threshold of termination during NIAC. The ‘hostilities regime’ refers to the IHL rules that regulate the conduct of hostilities between the Parties to a NIAC, the majority of which are found in customary IHL. The ‘protections regime’ refers to the conventional and customary rules

<sup>49</sup> For NIAC, the majority are contained within customary IHL. See generally, Chapter 1: The Principle of Distinction, and related rules, practice/commentary, ICRC Database .

<sup>50</sup> See respectively, Article 5, 6, and 17, Additional Protocol II.

<sup>51</sup> Mack, Michelle, Jelena Pejic, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, ICRC, Geneva, 2008, pg 24, 26.

<sup>52</sup> See generally, *Protocol on Explosive Remnants of War*, Protocol V to the 1980 Convention, United Nations, 28 November 2003.

<sup>53</sup> Article 8, Additional Protocol II; Rule 112: *Search for and Collection of the Dead*, and related practice/commentary, ICRC Database ; Rule 117: *Accounting for Missing Persons*, and related practice/commentary, ICRC Database .

<sup>54</sup> Rule 158: Prosecution of War Crimes, and related practice/commentary, ICRC Database . See also, Rule 150: *Reparation*, and related practice/commentary, ICRC Database ; Rule 161: International Cooperation in Criminal Proceedings, and related practice/commentary, ICRC Database .

<sup>55</sup> According to the US Manual on the Law of War, “Certain duties that have arisen during hostilities may continue after hostilities have ended, and certain new duties arise at the end of hostilities”. United States Department of Defense, *Law of War Manual*, Office of the General Council of the Department of Defense, 2015, pg 94.

<sup>56</sup> On this distinction see, Kolb, Robert, Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, Hart Publishing, 2008, pg 94.

<sup>57</sup> Ibid.

<sup>58</sup> See, Kolb, Robert, Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, Hart Publishing, 2008, pg 86, 94.



of IHL applicable to individuals who do not, or who no longer, directly participate in hostilities, including members of armed forces who have laid down their arms or are otherwise placed *hors de combat*. This distinction is both logical and pragmatic. As a result of their distinct functions, the two regimes will rarely, if ever, terminate simultaneously. For example, while the cessation of hostilities certainly questions the factual necessity for the rules regulating hostilities, it does not question the factual necessity for the protections for individuals deprived of their liberty, subject to criminal procedure, or displaced for reasons related to the NIAC. Thus, while the hostilities may have ended, the need for IHL's protections may nonetheless remain. A separate examination of the hostilities and protections regimes will illustrate the utility of the functional approach for determining IHL's threshold of termination during NIAC.

#### 4.1 The Temporal Scope of the Hostilities Regime

As IHL is a pragmatic and functional legal regime, the temporal scope of the hostilities regime should be interpreted in a manner that gives effect to the function that it performs during NIAC: regulating the conduct and consequences of hostilities. Reduced to the simplicity of a general rule, if hostilities are occurring, then the rules designed to regulate hostilities are applicable.<sup>59</sup> Of course, the practical application of the general rule is invariably more complex. The question that immediately arises is whether the termination of the hostilities regime requires the complete cessation of hostilities, or if a significant reduction in the intensity of hostilities would also suffice.<sup>60</sup>

To require a complete cessation of hostilities before the hostilities regime is terminated aligns with the ICTY's 'peaceful settlement' approach and the ICRC's 'lasting pacification' approach.<sup>61</sup> In practical terms, the complete cessation of hostilities during NIAC is most frequently achieved through political negotiations culminating in a peace agreement or, less frequently, by way of conclusive victory and defeat on the battlefield. However, the 'complete cessation' approach is problematic for at least three reasons. First, it ignores the role and relevance of the 'protracted armed violence' threshold of NIAC, which activates IHL in the first instance.<sup>62</sup> Not every manifestation of armed violence warrants the applicability of IHL. Just as IHL is not applicable to armed violence that has not crossed the threshold of NIAC, nor should it continue to apply to situations of armed violence that no longer meet the threshold of armed conflict. Second, it is not uncommon for varying degrees of residual armed violence to linger long after 'formal' hostilities have ceased, and the continued application of the hostilities regime may exacerbate evanescent violence rather than extinguish it.<sup>63</sup> In addition, it may also render IHL vulnerable to abuse by way of providing a thin veil of legality to otherwise unlawful uses of lethal force against individuals or during situations that are not

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<sup>59</sup> This general rule aligns with the opinion advanced within the ICRC Commentaries that "the rules relating to armed confrontation are no longer applicable after the end of hostilities", which is "when military operations have ceased". See, Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, pg 1360.

<sup>60</sup> cf, Milanovic, Marko, *End of Application of International Humanitarian Law*, 96 International Review of the Red Cross 893, 2014; Bartels, Rogier, *From Jus In Bello to Jus Post Bellum: When do Non-International Armed Conflicts End?*, in Stahn, Carsten, Jennifer Easterday, Jens Iverson (eds), *Just Post Bellum: Mapping the Normative Foundations*, Oxford University Press 2014.

<sup>61</sup> *Prosecutor v. Dusko Tadić aka "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, ICTY, 2 October 1995, para 70; Report of the 32<sup>nd</sup> International Conference of the Red Cross and Red Crescent, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, ICRC, 8-10 December 2015, Geneva, pg 11.

<sup>62</sup> *Prosecutor v. Dusko Tadić aka "Dule"*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, ICTY, 2 October 1995, para 70.

<sup>63</sup> As was the case in Nicaragua in 1994 and Guatemala in 1997. See, respectively, Hartzell, Caroline, *Peace in Stages: The Role of an Implementation Regime in Nicaragua*, in Stedman, Stephen, Donald Rothchild, Elizabeth Cousens (eds), *Ending Civil Wars: The Implementation of Peace Agreements*, Lynne Rienner Publishers, 2002, pg 373; Stanely, William, David Holiday, *Broad Participation, Diffuse Responsibility: Peace Implementation in Guatemala*, in Stedman, Stephen, Donald Rothchild, Elizabeth Cousens (eds), *Ending Civil Wars: The Implementation of Peace Agreements*, Lynne Rienner Publishers, 2002, pg 447.

directly related to the prevailing NIAC.<sup>64</sup> Third, it pays scant regard to the role and relevance of IHRL in regulating armed violence that does not, or no longer, amounts to an armed conflict. The principal argument that underpins the complete cessation approach would be the continued need for IHL protections, which simply cannot be terminated following a sufficient reduction in hostilities. This is a valid concern and, as mentioned above, the functional approach advanced here reasons that the temporal scope of the protections regime is not contingent on the existence of hostilities or the continued applicability of the hostilities regime. Accordingly, considering that a certain intensity of armed violence is necessary to activate IHL in the first instance, it is difficult to accept that the hostilities regime should continue to apply until a complete cessation of hostilities is achieved.

A more logical and functional approach would be for the applicability of the hostilities regime to terminate once hostilities drop below the intensity necessary for the activation of IHL in the first instance.<sup>65</sup> Two important questions arise from this approach that warrant separate analysis. First, how far below the threshold of activation should hostilities fall before the hostilities regime is terminated? Second, how long should hostilities remain at this reduced level before the hostilities regime is terminated? Notably, there are differing opinions with respect to the first question,<sup>66</sup> and it is argued here that the threshold for terminating IHL should correspond to its threshold of activation. This is because the threshold of activation is not arbitrary, but rather is predicated on the inability of the law enforcement regime to effectively respond to the armed violence.<sup>67</sup> As a result, it logically follows that when hostilities fall below this threshold, the rules pursuant to the law enforcement regime are once again capable of responding to the residual armed violence. Put simply, once hostilities fall below the threshold of activation, the factual necessity for the hostilities regime no longer exists, and the applicability of the hostilities regime should be terminated.

Perhaps even more complex is the question of how long hostilities should remain at this reduced level before the hostilities regime is terminated. As no two NIACs are alike, no abstract blueprint exists (nor would suffice) that would offer definitive guidance. This determination can only be made on a case-by-case basis through a careful and comprehensive assessment of the surrounding factual circumstances.<sup>68</sup> To this end, the inverse application of the 'intensity factors' assessed in the threshold of activation may reveal evidence of sufficiently reduced (or at least reducing) hostilities.<sup>69</sup> In practical terms, objective indicators may include a notable reduction in the utilization of military means and methods in pursuit of hostilities;<sup>70</sup> the gradual fading of front lines and zones of operations; the recovery of territorial control; the dismantling of roadblocks and checkpoints; the withdrawal of armed forces and the return of police forces; and the lifting of a state of emergency under IHRL. However, it is important to keep in mind that such factors are indicia only, and their potential significance lies in their collective manifestation. Thus, the existence of one would not suffice to conclude hostilities were adequately reduced for a sufficient amount of time. In

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<sup>64</sup> Lubell, Noam, Nathan Derejko, *A Global Battlefield? Drones and the Geographical Scope of Armed Conflict*, 11 *Journal of International Criminal Justice*, 2013, pg 78

<sup>65</sup> In support, see, Milanovic, Marko, *End of Application of International Humanitarian Law*, 96 *International Review of the Red Cross* 893, 2014, pg 180. For slightly nuanced views see, Bartels, Rogier, *From Jus In Bello to Jus Post Bellum: When do Non-International Armed Conflicts End?*, in Stahn, Carsten, Jennifer Easterday, Jens Iverson (eds), *Just Post Bellum: Mapping the Normative Foundations*, Oxford University Press 2014, pg 310; Venturini, Gabriella, *The Temporal Scope of Application of the Conventions*, in Andrew Clapham, Paola Gaeta, Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, 2015, pg 61.

<sup>66</sup> *cf* Ibid.

<sup>67</sup> For a discussion see, Derejko, Nathan, *Identifying Non-International Armed Conflicts: International Law and Practice*, forthcoming with Cambridge University Press.

<sup>68</sup> For a discussion see, Report of the 32<sup>nd</sup> International Conference of the Red Cross and Red Crescent, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, 8-10 December 2015, Geneva, pg 10-11.

<sup>69</sup> See, Bartels, Rogier, *From Jus In Bello to Jus Post Bellum: When do Non-International Armed Conflicts End?*, in Stahn, Carsten, Jennifer Easterday, Jens Iverson (eds), *Just Post Bellum: Mapping the Normative Foundations*, Oxford University Press 2014, pg 309.

<sup>70</sup> Evidenced by the types of military operations employed (offensive versus defensive), the types of weapons used in military operations, the nature and degree of force used (capture versus kill).

general, what is required is a factual reduction in hostilities with a “degree of stability and permanence”<sup>71</sup> to the extent that the any residual violence is more accurately described as isolated or sporadic, as opposed to collective and coordinated military operations. Importantly, as the approach advanced here does not require hostilities to be completely extinguished before the hostilities regime is terminated, it is imperative to distinguish between organic lulls, or the temporary suspension of hostilities, from hostilities that are factually and sufficiently reduced to warrant this termination.

#### 4.1.1 Organic Lulls and the Temporary Suspension of Hostilities

While a certain intensity of armed violence is required for the existence of a NIAC and the activation of IHL in the first instance, hostilities do not necessarily need to be maintained at this level on a day-to-day basis over the course of the NIAC.<sup>72</sup> This is evident from the material scope of the concept of hostilities: once IHL is activated, there is no quantitative threshold for acts of violence between the Parties to fall within the remit of hostilities - a single bullet from a sniper’s rifle is sufficient.<sup>73</sup> In part, this explains the dynamic nature of hostilities, and their oscillating intensity during NIAC should be viewed as the norm.<sup>74</sup> This is particularly the case with prolonged NIACs, where hostilities can be subject to seasonal ebbs and flows, such as the annual ‘spring offensive’ carried out by the Taliban in Afghanistan.<sup>75</sup> In addition, the fluctuating levels of operational capacity of armed groups, whether as a result of dwindling arms and ammunition, or the death or capture of charismatic leaders or seasoned military commanders, can also produce extended lulls in hostilities while armed groups recover from battlefield losses.

These scenarios underscore the importance of a careful and comprehensive assessment of the surrounding factual circumstances in order to distinguish a mere lull in hostilities, during which the hostilities regime remains applicable, from factually and sufficiently reduced hostilities that warrant the termination of the hostilities regime.<sup>76</sup> In some situations, this may be a straightforward distinction, while in others it may prove incredibly difficult. While no blueprint exists (nor would suffice) to guide this determination, the cautious reasoning of the Trial Chamber in *Gotovina* provides a fair warning against premature termination, “once the law of armed conflict has become applicable, one should not lightly conclude that its applicability ceases. Otherwise the participants ... may find themselves in a revolving door between applicability and non-applicability, leading to a considerable degree of legal uncertainty and confusion.”<sup>77</sup>

In addition to organic lulls in hostilities, the Parties to a NIAC may temporarily suspend hostilities pursuant to a special agreement.<sup>78</sup> This usually takes the form of a ceasefire agreement, which should be distinguished from a peace agreement. No universal definition of, or blueprint for, ceasefire agreements exist under international law and, while their content can vary widely, their common objective is the suspension of hostilities.<sup>79</sup> In practice, a ceasefire agreement can be local, which means it applies to defined

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<sup>71</sup> Milanovic, Marko, *End of Application of International Humanitarian Law*, 96 International Review of the Red Cross 893, 2014, pg 171-172.

<sup>72</sup> In support see, Cullen, Anthony, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge University Press, 2010, pg 142.

<sup>73</sup> See, Dinstein, Yoram, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press 2<sup>nd</sup> ed, 2010, pg 1; Melzer, Nils, *Targeted Killing in International Law*, Oxford University Press, 2008, pg 275.

<sup>74</sup> See discussion in, *Prosecutor v. Haradinaj et al*, Trial Judgment, Case No IT-04-84-T, ICTY, 3 April 2008, para 100.

<sup>75</sup> For spring 2019 see, *Taliban Announces Spring Offensive amid Afghan Peace Talks*, Al-Jazeera English, 12 April 2019.

<sup>76</sup> The possibility that a prolonged lull results in the gradual fading and eventual end of hostilities should not be readily dismissed. See, Milanovic, Marko, *End of Application of International Humanitarian Law*, 96 International Review of the Red Cross 893, 2014, pg 180.

<sup>77</sup> While the *Gotovina* case dealt with an IAC, the reasoning of the Chamber is equally applicable to NIAC. See, *Prosecutor v. Gotovina et al.*, Trial judgment - Vol. 2, IT-06-90-T, ICTY, 15 April 2011, para 1694.

<sup>78</sup> Which are expressly provided for in Article 3(2), 1949 Geneva Conventions.

<sup>79</sup> Mack, Michelle, Jelena Pejić, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, ICRC, Geneva, 2008, pg 24.

geographical locations for a specified period of time.<sup>80</sup> A local ceasefire does not affect hostilities carrying on outside its geographical or temporal reach and, therefore, would not affect the applicability of the hostilities regime. A ceasefire agreement may also be partial in that not every Party to the NIAC may be included in its terms, and hostilities may prevail between specific Parties without infringing the terms of the ceasefire agreement.<sup>81</sup> Alternatively, a ceasefire agreement can also be general in nature, which means that it is intended to temporarily -albeit comprehensively - suspend hostilities.<sup>82</sup> With increasing frequency, the Security Council demands a ceasefire between the opposing Parties during NIAC and, when accompanied with Chapter VII authority, ceasefire resolutions may entail binding force for the opposing Parties.<sup>83</sup> Whether unilateral, multilateral or externally imposed, a ceasefire agreement should not be viewed as tantamount to the cessation of hostilities thereby warranting the termination of the hostilities regime, but only their temporary suspension, during which the hostilities regime continues to apply.

The continued applicability of IHL during a ceasefire is evident from the text of ceasefire agreements themselves.<sup>84</sup> In practice, ceasefire agreements frequently contain a general commitment by the Parties to respect and ensure respect for IHL,<sup>85</sup> or expressly detail specific acts or violations of IHL that the Parties pledge to abstain from in future hostilities.<sup>86</sup> Moreover, if the applicability of the hostilities regime was to be terminated on the agreement of a ceasefire, the first breach of this agreement might not fall under this regime, and ample practice demonstrates that hostilities often persist following the adoption of a ceasefire agreement. For example, the General Framework Agreement for Peace in Bosnia and Herzegovina was succeeded by 36 unsuccessful ceasefire agreements,<sup>87</sup> while the NIAC in Sierra Leone gave rise to a half-dozen mixture of 'ceasefire agreements' and 'peace accords' before it ended in 2002.<sup>88</sup> At the same time, however, a ceasefire agreement is undoubtedly a pathway to a peace agreement and, thus, potentially the beginning of the end of a NIAC. Nevertheless, it is argued that the existence of a ceasefire agreement - in and of itself - does not terminate the applicability of the hostilities regime.

#### 4.1.2 Identifying the End of Hostilities

Any number of factual scenarios can bring about a sufficient reduction in hostilities during NIAC to

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<sup>80</sup> See, Dinstein, Yoram, *The Initiation, Suspension and Termination of War*, in Michael Schmitt (ed), *International Law across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green*, 75 International Law Studies, 2000, pg 147-148.

<sup>81</sup> This was the case with the February 2016 ceasefire agreement in Syria, which excluded both the Islamic State and Jabhat al-Nusra. See, Joint Statement of the United States and the Russian Federation, as Co-Chairs of the International Syria Support Group (ISSG), *Cessation of Hostilities in Syria*, US Department of State, 22 February 2016. See also, United Nations Security Council Resolution 2268, UN Doc. S/Res/2268, 26 February 2016.

<sup>82</sup> Dinstein, Yoram, *The Initiation, Suspension and Termination of War*, in Michael Schmitt (ed), *International law across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green*, 75 International Law Studies, 2000, pg 148.

<sup>83</sup> For a discussion on the legal nature of Security Council ceasefire resolutions see, Henderson, Christian, Noam Lubell, *The Contemporary Legal Nature of UN Security Council Ceasefire Resolutions*, 26 Leiden Journal of International Law 2, 2013.

<sup>84</sup> Mack, Michelle, Jelena Pejić, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, ICRC, Geneva, 2008, pg 24-5.

<sup>85</sup> See, Mack, Michelle, Jelena Pejić, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, ICRC, Geneva, 2008, pg 25.

<sup>86</sup> *ibid.*

<sup>87</sup> Wahlisch, Martin, *Conflict Termination from a Human Rights Perspective: State Transitions, Power-Sharing, and the Definition of the "Post"*, in Stahn, Carsten, Jennifer Easterday, Jens Iverson (eds), *Jus Post Bellum: Mapping the Normative Foundations*, Oxford University Press 2014, pg 324.

<sup>88</sup> These include the following agreements: 30 November 1996 - Abidjan Accord; 23 October 1997 - Conakry Accord; 24 May 1999 - Ceasefire Agreement; 7 July 1999 - Lome Peace Accord; 10 November 2000 - Ceasefire Agreement; 18 January 2002 - Declaration of cessation of hostilities. See, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused)*, Trial Judgment, SCSL-04-15-T, Special Court for Sierra Leone, 2 March 2009, pg 7, 9, 14.

terminate the hostilities regime.<sup>89</sup> The bounds of this article permit an exploration of three: peace agreements, victory and defeat on the battlefield, and the terminal decline of a non-state Party.

### **Peace Agreements**

The term 'peace agreement' is not defined in International law. Nonetheless, it is understood here as a formal agreement between the opposing Parties that provides a detailed framework for ending a NIAC.<sup>90</sup> While reaching a peace agreement is often heralded as signaling the end of the war and a return to peace, history is awash with examples of hostilities continuing after a peace agreement, in some cases with renewed vigor.<sup>91</sup> For instance, the Parties to the NIAC in Liberia signed upwards of 14 peace agreements before the NIAC finally ended.<sup>92</sup> Indeed, the conclusion of a peace agreement is better understood as evidence of the Parties' *intent* to cease hostilities, and thus the first step of a potentially long and complex 'peace process'.<sup>93</sup>

The modalities of the 'peace process' are usually detailed within the peace agreement and can last anywhere from a matter of months to a number of years.<sup>94</sup> In theory, as the content of a peace agreement provides the "maps and maths"<sup>95</sup> of ceasefire, demobilization and demilitarization in exceptional detail, the agreement may provide invaluable guidance towards identifying both the 'end of hostilities' and the 'end of the armed conflict'. If the terms of a ceasefire agreement are respected throughout the peace process, the NIAC should dismantle according to plan, thereby revealing the most appropriate time for the termination of the hostilities regime.<sup>96</sup> However, theory and practice often diverge and only rarely does a single peace agreement conclude a NIAC. In practice, the modern peace process involves "layers of multiple agreements: renewing and revising agreements that had broken down, extending agreement to new splinter groups or newly elected governments, and addressing new issues or new mutations of the violence".<sup>97</sup> Furthermore, states experiencing multiple NIACs will invariably require multiple peace agreements in order to bring about the cessation of hostilities within their territories.<sup>98</sup> In other cases, the power vacuum created by a peace agreement may embolden other armed groups not party to the peace process, or engender new armed groups from the demobilisation of existing armed groups, which can inflame new NIACs from the smouldering ashes of previous NIACs, as the prevailing situation in Colombia demonstrates.<sup>99</sup>

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<sup>89</sup> For a number of these scenarios, see, Dinstein, Yoram, *Non-International Armed Conflicts in International Law*, Cambridge University Press, 2014, pg 48.

<sup>90</sup> For a sample of definitions see, Bell, Christine, *On the Law of Peace: Peace Agreements and the Lex Pacificator*, Oxford University Press, 2008, pg 47-54.

<sup>91</sup> The NIAC in Sierra Leone gave rise to at least two peace agreements; the Abidjan Accord on 30 November 1996 and the Lome Peace Accord on 7 July 1999. See, *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused)*, Trial Judgment, SCSL-04-15-T, Special Court for Sierra Leone, 2 March 2009, pg 7, 14.

<sup>92</sup> Adebajo, Adekeye, *Liberia: A Warlord's Peace*, in Stedman, Stephen, Donald Rothchild, Elizabeth Cousens (eds), *Ending Civil Wars: The Implementation of Peace Agreements*, Lynne Rienner Publishers, 2002, pg 599.

<sup>93</sup> There is no universal definition of 'peace process' under international law. See, Bell, Christine, *Peace Agreements and Human Rights*, Oxford University Press, 2003, pg 16.

<sup>94</sup> This was the case in Zimbabwe and Bosnia respectively. See, Stedman, Stephen, Donald Rothchild, Elizabeth Cousens (eds), *Ending Civil Wars: The Implementation of Peace Agreements*, Lynne Rienner Publishers, 2002, pg 1-2.

<sup>95</sup> Bell, Christine, *On the Law of Peace: Peace Agreements and the Lex Pacificator*, Oxford University Press, 2008, pg 163.

<sup>96</sup> The peace accord that brought to an end the 12-year NIAC in El Salvador is a prominent example of such structured dismantling. See, Call, Charles, *Assessing El Salvador's Transition from Civil War to Peace*, in Stedman, Stephen, Donald Rothchild, Elizabeth Cousens (eds), *Ending Civil Wars: The Implementation of Peace Agreements*, Lynne Rienner Publishers, 2002, pg 389.

<sup>97</sup> Bell, Christine, *On the Law of Peace: Peace Agreements and the Lex Pacificator*, Oxford University Press, 2008, pg 28.

<sup>98</sup> Sudan is a case in point, where peace agreements existed with respect to the North-South conflict, the East/West conflict and the conflict in Darfur. See, *ibid*.

<sup>99</sup> As of 2019, the ICRC has identified five distinct NIACs occurring in Colombia. See, Harnisch, Christoph, *Colombia: Between War and Indifference*, ICRC, 28 March 2019.

Should a peace agreement achieve a factual and lasting cessation of hostilities, the applicability of the hostilities regime should be terminated. Conversely, and irrespective of its legal status or binding effect, a peace agreement may not be worth the paper it's written on if hostilities continued unabated.<sup>100</sup> Importantly, under the functional approach proposed here, hostilities need not be entirely extinguished before the hostilities regime is terminated and, if hostilities are sufficiently reduced during the peace process, the hostilities regime should be terminated. However, the termination of the hostilities regime should not be viewed as terminating the applicability of IHL *in toto*. Indeed, peace agreements will often make reference to the *post bellum* obligations of the respective Parties and detail the specific IHL obligations that continue to apply, or activate after, the cessation of hostilities.<sup>101</sup> Thus, as a general rule, the determining factor is a sufficient and factual reduction in hostilities, as opposed to the formal conclusion of a peace agreement. Put simply, during NIAC, factual circumstances always prevail over formal agreements.

### ***Victory and Defeat on the Battlefield***

A much less frequent pathway to the conclusion of a NIAC is byway of victory and defeat on the battlefield. In September 2008, the Sri Lankan Government launched an unprecedented military offensive resulting in the categorical defeat of the Liberation Tigers of Tamil Eelam (LTTE), which brought to an end the hostilities associated with a NIAC spanning nearly three decades.<sup>102</sup> In effect, the end of this NIAC was the factual equivalent of a *debellatio* during IAC: the complete subjugation of a Party with no hostilities or resistance remaining.<sup>103</sup> When such conclusive victory and defeat prevails on the battlefield, the hostilities regime can be terminated. However, not every battlefield victory produces such conclusive results. The example of Sri Lanka can be contrasted with the situation in Libya after the fall of Sirte and the death of Muammar Qaddafi. According to UN Secretary General's report, the 'declaration of liberation' by the National Transitional Council of Libya in Benghazi on 23 October 2011 "signaled the end of armed hostilities in the country".<sup>104</sup> Indeed, the UN Security Council formally terminated its authorization for civilian protection measures within Libya shortly thereafter, including the associated no-fly zone over Libyan airspace.<sup>105</sup> A few days later, NATO terminated Operation Unified Protector and ceased military operations within Libya.<sup>106</sup> While this series of formal events factually extinguished the IAC between the NATO alliance and Libya, their implications for the concurrent NIAC(s) in Libya were much less clear.

The extent of sufficiently organized and adequately equipped revolutionary brigades presented an immediate challenge to the "consolidation of security" across 'post liberation Libya'.<sup>107</sup> Indeed, it seems that hostilities between various pro-Qaddafi and anti-Qaddafi armed groups were never entirely extinguished

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<sup>100</sup> Milanovic, Marko, *End of Application of International Humanitarian Law*, 96 International Review of the Red Cross 893, 2014, pg 11.

<sup>101</sup> Mack, Michelle, Jelena Pejić, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, ICRC, Geneva, 2008, pg 26.

<sup>102</sup> 27 years, to be exact. See, *Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka*, United Nations Secretary-General, 31 March 2011, pg 1, 4, 7.

<sup>103</sup> According to Dinstein, "*Debellatio* is a situation in which one of the belligerents is utterly defeated, to the point of its total disintegration as a sovereign nation". See, Dinstein, Yoram, *The Initiation, Suspension and Termination of War*, in Michael Schmitt (ed), *International Law across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green*, 75 International Law Studies, 2000, pg 145.

<sup>104</sup> See, the Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2011/727, 22 November 2011, pg 1. For academic analysis, see generally, Johnston, Katie, *Transformations of Conflict Status in Libya*, 17 Journal of Conflict & Security Law 1, 2012.

<sup>105</sup> See, United Nations Security Council Resolution 2016, UN Doc. S/RES/2016, 27 October 2011.

<sup>106</sup> See, North Atlantic Treaty Organization, *Operational Media Update: NATO and Libya*, 25 October 2011.

<sup>107</sup> See, the Report of the Secretary-General on the United Nations Support Mission in Libya, UN Doc. S/2011/727, 22 November 2011, pg 2.

but, rather, persisted to varying degrees across a number of former Qaddafi strongholds.<sup>108</sup> Accordingly, neither the ICTY's 'peaceful settlement' approach nor the ICRC's 'lasting pacification' approach would have been satisfied on the so-called 'Libya liberation day'. Whether these residual hostilities were sufficiently reduced to warrant the termination of the hostilities regime pursuant to the 'functional approach' advance here is open to debate. The principal challenge presented by 'post liberation' Libya is distinguishing between the lingering remnants of the original NIAC, and the rapid emergence of new NIACs between competing revolutionary brigades that were allied only days or weeks before.<sup>109</sup> This situation was further complicated by the emergence of 'post-revolutionary brigades' that functioned as community defense forces against increasing lawlessness across Libya.<sup>110</sup> The complex and multifaceted nature of the armed violence that plagued 'post-liberation' Libya rendered it exceptionally difficult to determine whether the 'original hostilities' were sufficiently reduced to warrant the termination of the hostilities regime and, thus, is perhaps a fair warning against the premature termination of the hostilities regime during NIAC.<sup>111</sup>

While the continued applicability of the hostilities regime in 'post-liberation' Libya may be open to debate, the continued applicability of the protections regime was not. Following the declaration of liberation, an estimated 7,000 people were held in prisons and makeshift detention centres across Libya, a majority of whom were under the control of revolutionary brigades, with no access to due process in the absence of a functioning police force and judiciary.<sup>112</sup> Furthermore, revolutionary brigades continued to carry out arrests and detention of alleged former regime supporters,<sup>113</sup> holding them without charge and in unknown locations for indeterminate periods.<sup>114</sup> At the same time, there remained over 150,000 displaced persons across Libya in need of various forms of humanitarian assistance.<sup>115</sup> Accordingly, the prevailing situation in 'post liberation' Libya is a vivid confirmation that the (possible) termination of the hostilities regime should have no bearing on the continued applicability of the protections regime during NIAC.

### **The Terminal Decline of a Non-State Party**

In part, the threshold of NIAC is predicated on the satisfaction of an organisational requirement.<sup>116</sup> In order to qualify as a Party to a NIAC, armed groups must display a certain degree of organisation, from which flow certain abilities. Accordingly to the ICTY, the overarching theme of this organisational requirement is the ability of armed groups "to engage in an internal armed conflict".<sup>117</sup> As emphasized by the Trial Chamber in

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<sup>108</sup> In particular, Sirte, Bani Walid, and Tripoli. See, *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN Doc. S/2011/727, 22 November 2011, pg 2, 12, 13; *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN Doc. S/2012/129, 1 March 2012, pg 2.

<sup>109</sup> See, *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN Doc. S/2011/727, 22 November 2011, pg 2, 6, 11; *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN Doc. S/2012/129, 1 March 2012, pg 2.

<sup>110</sup> On this issue see, McQuinn, Brian, *After the Fall: Libya's Evolving Armed Groups*, Small Arms Survey, 2012.

<sup>111</sup> See, *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN Doc. S/2011/727, 22 November 2011, pg 2, 6, 11; *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN Doc. S/2012/129, 1 March 2012, pg 2; *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN Doc. S/2012/675, 30 August 2012, pg 2-5.

<sup>112</sup> See, *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN Doc. S/2011/727, 22 November 2011, pg 5.

<sup>113</sup> See, *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN Doc. S/2012/129, 1 March 2012, pg 5.

<sup>114</sup> See, *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN Doc. S/2012/675, 30 August 2012, pg 5.

<sup>115</sup> See, *Report of the Secretary-General on the United Nations Support Mission in Libya*, UN Doc. S/2011/727, 22 November 2011, pg 10.

<sup>116</sup> *Prosecutor v. Dusko Tadić aka "Dule"*, Opinion and Judgment, IT-94-1-T, ICTY, 7 May 1997, para 562.

<sup>117</sup> A similar understanding seems to be emerging in the ICC's jurisprudence. See respectively, *Prosecutor v. Đorđević*, Judgment, IT-05-87/1-T, ICTY, 23 February 2011, para 1578; *Prosecutor v. Limaj et al.*, Trial Judgment, IT-03-66-T, ICTY, 30 November 2005, para 134; *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC-01-04-01/06, International Criminal Court, 29 January 2007, para 234, 237.

*Haradinaj*, “an armed conflict can exist only between Parties that are sufficiently organized to confront each other with military means”.<sup>118</sup> Just as this organisational requirement is of pivotal significance for determining the existence of a NIAC, so too is it for determining its end. Reducing an armed group’s ‘ability to engage’ in NIAC can be achieved by depriving it of the means and methods used in pursuit of hostilities, or by dismantling its organizational structure and attendant operational capacity.

Depriving an armed group of the means and methods of armed conflict would generally entail starving the battlefield of weapons and ammunition through the neutralization of supply lines, the destruction of existing stocks, and targeting military bases, command centres and communication platforms. However, developments in technology, particularly widely accessible mobile networks and social media platforms, have greatly facilitated the ability of armed groups to plan, coordinate and execute military operations via public infrastructure.<sup>119</sup> Moreover, and in contrast to situations of IAC, a state Party to a NIAC may be more reluctant, although not necessarily opposed, to targeting its own communications networks in attempt to prevent armed groups from using these, particularly if the destruction of these networks would inhibit the government’s own communications capacity.

For such reasons, it is unsurprising that targeting priorities during NIAC seem to focus on the organizational structures of armed groups, and key individuals in particular. To this end, state Parties to a NIAC have long since employed so-called “decapitation strategies” that target charismatic leaders and key military commanders during NIAC.<sup>120</sup> Today, decapitation strategies largely manifest as ‘targeted killing’ operations, which have attracted considerable attention in academic debates.<sup>121</sup> While the effectiveness of decapitation strategies is debatable, in theory the removal of key individuals from the battlefield precipitates the collapse of command and control structures, reducing the capacity of an armed group to effectively plan, coordinate and execute military operations.<sup>122</sup> To this end, if and when structurally compromised armed groups are no longer able to maintain the necessary level of hostilities, the threshold for the termination of the hostilities regime may be reached.

In practice, however, the organizational structures and corresponding strategies of armed groups will have varying degrees of resilience and recovery strategies that seek to preserve their ‘ability to engage’ in NIAC. For example, armed groups that exercise territorial control may abandon their frontline positions and retreat to remote or extraterritorial ‘safe havens’ to recover.<sup>123</sup> Such retreats may result in a lull in hostilities as opposed to a factual reduction of hostilities, which underscores the importance of a careful and comprehensive consideration of the surrounding factual circumstances before the hostilities regime is terminated. Armed groups lacking territorial control may be forced to decentralize command and operations or fragment into a network of distinct armed groups. At this juncture, the armed group(s) will be faced with a continuous tradeoff between efficiency and resilience as, beyond merely guaranteeing their survival, there is little military advantage in completely decentralizing operations or fragmenting into a loose network of distinct armed groups during the apex of hostilities.<sup>124</sup> A number of legal issues arise if and when a structurally compromised armed group fragments into a decentralized network.<sup>125</sup> In this scenario, much will depend on the structure of the network itself, including the existence of a military council that

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<sup>118</sup> *Prosecutor v. Haradinaj et al*, Trial Judgment, IT-04-84-T, ICTY, 3 April 2008, para 60.

<sup>119</sup> For a discussion see, Adhami, Wael, *The Strategic Importance of the Internet for Armed Insurgent Groups in Modern Warfare*, 89 *International Review of the Red Cross* 868, 2007.

<sup>120</sup> For a discussion see, Johnston, Patrick, *Does Decapitation Work? Assessing the Effectiveness of Leadership Targeting in Counterinsurgency Campaigns*, 36 *International Security* 4, 2012.

<sup>121</sup> See, Melzer, Nils, *Targeted Killing in International Law*, Oxford University Press, 2008.

<sup>122</sup> See, Price, Bryan, *Targeting Top Terrorists: How Leadership Decapitation Contributes to Counterterrorism*, 36 *International Security* 4, 2012.

<sup>123</sup> Sinno, Abdulkader H, *Armed Groups’ Organizational Structure and their Strategic Options*, 93 *International Review of the Red Cross* 882, June 2011, pg 317.

<sup>124</sup> *Ibid.*, pg 320.

<sup>125</sup> Most notably, clearly identifying the Parties and their respective armed forces becomes increasingly complex. Such factual circumstances may also give rise to competition for resources between armed groups, potentially giving rise to the emergence of a number of distinct NIACs simultaneously occurring within a limited geographic area.



exercises command and control authority, or whether each distinct armed group is vested with its own command and control authority, the nature and degree of the operational relationship between the various armed groups, and whether they have retained (independently or collectively) the 'ability to engage in NIAC'. For the purposes of the present discussion, the decisive criterion is the continued existence of a non-state Party capable of maintaining sufficient hostilities, or whether hostilities gradually diminish to a level that warrants terminating the applicability of the hostilities regime.

Further complexities arise when an armed group, while so structurally compromised that it is no longer able to sustain hostilities, refuses to surrender. This issue arose in the final phase of the Sri Lanka NIAC, during which the LTTE was in "a state of military collapse" and was "severely diminished as a fighting force", although nonetheless engaged in "a fighting withdrawal in an ever diminishing area with its back against the sea".<sup>126</sup> As long as the endeavour conforms to the principles and provisions of IHL, nothing in the conventional or customary NIAC regime prohibits a Party from pursuing the complete destruction of an opposing Party. Indeed, while surrender must be accepted, it need not be elicited. At the same time, however, a NIAC requires two or more opposing Parties collectively engaged in hostilities and, if an armed group is entirely dismantled so that what remains is little more than a mass of individuals engaged in armed violence, the continued applicability of the hostilities regime is questionable. A NIAC cannot exist in the absence of identifiable Parties, and thus cannot be waged against a mass of individuals. Moreover, it is debatable whether individuals acting on their own initiative can produce anything more than isolated or sporadic acts of armed violence, which would be insufficient for maintaining the applicability of the hostilities regime.

A final scenario that requires consideration is when an armed group is so structurally compromised that it is no longer capable of confronting the state's armed forces, and abandons the pursuit of hostilities and retreats to a remote region with little to no government presence, where it embarks on a campaign of criminality and terror against the local civilian population. The Lords Resistance Army (LRA) in Uganda is a prominent example of this scenario, with hostilities no longer occurring between the armed forces of Uganda and the LRA, and the latter severely fragmented, displaced and engaged "primarily in survival mode activities that entail attacking civilians, killing, looting and kidnapping" in neighbouring countries.<sup>127</sup> In this scenario, while it may be safe to conclude that the hostilities regime is no longer applicable, the unknown number of abducted children that remain captive by the LRA is a compelling reason for the continued applicability of the protections regime.<sup>128</sup>

### **The Resulting Temporal Scope of the Hostilities Regime**

The temporal scope of the hostilities regime should be interpreted in a manner that gives effect to the function that it serves: regulating the conduct and consequences of hostilities during NIAC. As a general rule, if hostilities are ongoing, the rules designed to regulate hostilities are applicable. Importantly, however, the termination of the hostilities regime does not require the complete cessation of hostilities but, rather, a sufficient and factual reduction in their intensity to the point where they can be factually described as isolated or sporadic. Once hostilities fall below the threshold of activation with a certain "degree of stability and permanence"<sup>129</sup> the hostilities regime is no longer factually necessary, as any residual armed violence

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<sup>126</sup> See, *Report of the OHCHR Investigation on Sri Lanka*, United Nations Human Rights Council, UN Doc. A/HRC/30/CRP.2, 16 December 2015, pg 19-20.

<sup>127</sup> See, *Report of the Secretary-General on the Activities of the United Nations Regional Office for Central Africa and on the Lord's Resistance Army-Affected Areas*, UN Doc. S/2014/319, 6 May 2014, pg 10.

<sup>128</sup> Considering the uncertain nature and scope of armed groups obligations under IHL, the specific protections afforded to children under IHL simply cannot terminate following the cessation of hostilities. Arieff, Alexis, Lauren Blanchard, Tomas Husted, *The Lord's Resistance Army: The U.S. Response*, Congressional Research Service, 28 September 2015. See also, *See, LRA Abducts 43 Children so far in 2019, Dozens Remain Missing and Presumed in Captivity, Invisible Children*, Press Release, 2 December 2019; *Stolen Children: Abduction and Recruitment in Northern Uganda*, Human Rights Watch, March 2003.

<sup>129</sup> Milanovic, Marko, *End of Application of International Humanitarian Law*, 96 International Review of the Red Cross 893, 2014, pg 171-172.

may be regulated by the law enforcement regime. This determination requires a careful and comprehensive assessment of the prevailing factual circumstances in order to distinguish between a mere lull in hostilities, or the temporary suspension of hostilities, from a factual reduction in hostilities that warrants the termination of the hostilities regime. Finally, the termination of the hostilities regime will have no effect on the applicability of the protections regime.

## 4.2 The Temporal Scope of the Protections Regime

As a result of their distinct functions during NIAC, the temporal scope of the protections and hostilities regimes must be determined separately. This is supported by the *post bellum* IHL obligations, which can remain operable for decades after the end of a NIAC, such as the identification and clearing of explosive remnants of war;<sup>130</sup> accounting for the missing and dead;<sup>131</sup> and the obligation to investigate and prosecute alleged IHL violations and provide any necessary reparations for such violations.<sup>132</sup> Neither the absence of hostilities nor the passage of time diminishes the binding nature or scope of these obligations. Similar to the rules regulating the conduct of hostilities, IHL's protections during NIAC are activated by a factual necessity, and their temporal scope is governed by the principle of effectiveness.<sup>133</sup> This means they must be interpreted in a manner that gives effect to their object and purpose: providing legal protection to the victims of NIAC. In order to demonstrate the utility of the functional approach for determining the temporal scope of protections during NIAC, two areas of protection will be examined: the protections applicable to persons deprived of their liberty and subject to criminal procedure, and the Fundamental Guarantees of APII.

### 4.2.1 Protections Afforded to Persons Deprived of Their Liberty

The provisions regulating detention and criminal procedure under APII provide the most explicit guidance with regard to their temporal scope of application during NIAC. The protections afforded to persons deprived of their liberty, including individuals subject to criminal procedure, are applicable “until the end of such deprivation or restriction of liberty”.<sup>134</sup> The ICRC Commentaries suggest that, “in principle, measures restricting people’s liberty for reasons related to the armed conflict, should cease at the end of the active hostilities, i.e., when military operations have ceased”.<sup>135</sup> The ‘in principle’ qualifier cannot be overstated, as it is neither uncommon nor unlawful to detain individuals for reasons *related* to the NIAC after the cessation of hostilities. In fact, such detention is not only anticipated by the conventional NIAC regime, but may also be required by it.<sup>136</sup> As the legal authority to detain individuals during NIAC is not expressly

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<sup>130</sup> See generally, *Protocol on Explosive Remnants of War*, Protocol V to the 1980 Convention, United Nations, 28 November 2003,

<sup>131</sup> See, Article 8, Additional Protocol II; Rule 112: *Search for and Collection of the Dead*, and related practice/commentary, ICRC Database (hereinafter ICRC Database); Rule 117: *Accounting for Missing Persons*, and related practice/commentary, ICRC Database. For insight into their potential temporal scope, see, ICRC News Release, *Nepal: Nine Years into the Peace Process, Relatives Still in the Dark about the Fate of Their Missing Members*, ICRC, 3 September 2015; ICRC News Release, *Bosnia and Herzegovina: Almost 7000 People Still Missing*, ICRC, 19 November 2015.

<sup>132</sup> See Rule 158: *Prosecution of War Crimes*, and related practice/commentary, ICRC Database; Rule 150: *Reparation*, and related practice/commentary, ICRC Database; Rule 161: *International Cooperation in Criminal Proceedings*, and related practice/commentary, ICRC Database.

<sup>133</sup> See, Kolb, Robert, Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, Hart Publishing, 2008, pg 86, 94.

<sup>134</sup> Article 2(2), Additional Protocol II.

<sup>135</sup> Y Sandoz, C Swinarski, B Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, 1987, pg 1360.

<sup>136</sup> Article 2(2) of Additional Protocol II explicitly covers deprivation or restriction of liberty that occurred “after the conflict” and, as IHL requires the investigation of alleged violations of its provisions, this would invariably entail the arrest and detention of individuals responsible for these violations. The ICRC commentaries also conclude that, post hostilities, detention can and does persist for a number of reasons. See, Y Sandoz, C Swinarski, B Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, 1987, pg 1360.

provided by conventional IHL applicable during NIAC, neither the ‘end of hostilities’ nor the ‘end of the armed conflict’ terminates the authority to detain individuals, or activates an obligation to release detained individuals.<sup>137</sup> While APII advocates granting amnesty to persons who have participated in the NIAC, it also respects the right of the ‘authorities in power’ to subject individuals to prosecution in accordance with national legislation for criminal offences related to the NIAC, including mere participation in the conflict.<sup>138</sup> Accordingly, the conventional NIAC regime only regulates the process of detention and criminal procedure, and the protections it affords during both “remain valid ... at all times and without any restriction in time, until the deprivation of restriction of the liberty of those concerned has come to an end”.<sup>139</sup>

What is unclear, however, is whether the expression “until the end of such deprivation or restriction of liberty” requires IHL protections to remain applicable for the entire duration of imprisonment following a conviction for offences related to the NIAC. During the drafting of APII, an amendment was submitted for the ICRC Draft Article 2(2), which held that all persons whose liberty has been restricted for reasons related to the NIAC “shall be treated in accordance with the provisions of Article 8 and 10 until released, or until convicted and all rights of appeal are exhausted”.<sup>140</sup> While this amendment suggests that IHL protections would not apply during imprisonment following conviction, it was subsequently withdrawn.<sup>141</sup> During the drafting of APII, the question arose as to whether the provision would cover “persons deprived of their liberty through capture or arrest and who were serving custodial sentences after judicial proceedings”.<sup>142</sup> In response, the ICRC delegate acknowledged that the provision was “lacking in clarity ... [and] ... intended to cover all persons interned without judicial proceedings and persons awaiting trial during the whole period of their detention from the time of their arrest until their release”.<sup>143</sup> However, this explanation does not entirely resolve the issue, and the ICRC Commentaries make it clear that Article 5 covers “both persons being penally prosecuted and those deprived of their liberty for security reasons, without being prosecuted under penal law”, and “applies as soon as a person is deprived of his liberty, until he is released, even if hostilities have ceased in the meantime”.<sup>144</sup>

In practical terms, extending IHL protections for the duration of imprisonment could extend IHL’s applicability for years, possibly decades, after the end of a NIAC. Whether this is an appropriate interpretation of these protections depends on the prevailing factual circumstances. For example, for convictions and imprisonment that occur during the NIAC, IHL protections should be viewed as applicable during imprisonment. This is not only a conventional obligation, but it may also be necessary if IHRL has been modified by way of derogation.<sup>145</sup> In contrast, individuals who are convicted and imprisoned at the hands of a state Party to the NIAC for offences after the cessation of hostilities should benefit from more advanced IHRL legal protections for the duration of their imprisonment, rendering the continued

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<sup>137</sup> Although it may terminate such legal authority or activate such obligations under national law. See above note 3. See also, *Joined Cases of Serdar Mohammed v. Ministry of Defence and Qasim et al. v. Secretary of State for Defence*, United Kingdom High Court of Justice Queen’s Bench Division, Case No. HQ12X03367, 2 May 2014, para 219.

<sup>138</sup> Article 6(5), Additional Protocol II.

<sup>139</sup> Y Sandoz, C Swinarski, B Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, 1987, pg 1360.

<sup>140</sup> See the two amendments proposed by the Canadian delegation. *Official Records of the Diplomatic Conference 1974-1977*, Vol. IV, pg 11, 13. See also, *Draft Additional Protocols to the Geneva Conventions of August 12 1949 with Commentary*, ICRC, Geneva, 1973, pg 134.

<sup>141</sup> See *Official Records of the Diplomatic Conference 1974-1977*, Vol. VIII, CDDH/I/SR.33, pg 348-349.

<sup>142</sup> This was an important question, as Article 2(2), which temporally extends such protections until the end of the conflict, had already been approved by Committee I. See, the comments and questions by the delegate from the United Kingdom, *Official Records of the Diplomatic Conference 1974-1977*, Vol.III, CDDH/I/SR.33, ICRC, pg 344-345.

<sup>143</sup> Comments of the ICRC delegate, *Official Records of the Diplomatic Conference 1974-1977*, Vol.III, CDDH/I/SR.33, ICRC, pg 345.

<sup>144</sup> Y Sandoz, C Swinarski, and B Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, 1987, pg 1386.

<sup>145</sup> Although many of these provisions are also non-derogable human rights provisions, not every state is Party to the ICCPR or other relevant human rights treaties. For a discussion of these issues see, Doswald-Beck, Louise, *Human Rights in Times of Conflict and Terrorism*, Oxford University Press, 2011, pg 253.

application of IHL superfluous.<sup>146</sup> The situation with respect to non-state Parties is altogether different. Where an individual is convicted and imprisoned at the hands of an armed group, whether during or after the cessation of hostilities, it is argued that IHL protections should remain applicable until such persons are released. This is because of the uncertain nature and scope of armed groups' human rights obligations and the potential lacuna of legal protection that would result from the termination of these protections prior to release.<sup>147</sup> Indeed, such an interpretation aligns with the *raison d'être* of the explicit temporal extension given to these protections: the factual necessity of legal protection.<sup>148</sup> Accordingly, the general rule that emerges from the functional approach advanced here is that IHL protections for persons deprived of their liberty or subject to criminal procedure should remain applicable until such persons are released, or until such time as they benefit from equal or more favourable legal protection under IHRL.

#### 4.2.2 The Temporal Scope of Fundamental Guarantees

The temporal scope of Fundamental Guarantees pursuant to APII further demonstrates the utility of the functional approach advanced here. While Fundamental Guarantees are subject to an express temporal extension for individuals deprived of their liberty,<sup>149</sup> outside of this context, they apply to all persons who do not take part in hostilities or have ceased to take part in hostilities "at any time and any place whatsoever" during the NIAC.<sup>150</sup> Pursuant to the orthodox approach, whereby the applicability of IHL terminates *in toto*, the applicability of Fundamental Guarantees would terminate following the cessation of hostilities at the end of the NIAC. Considering the central importance of Fundamental Guarantees during NIAC however, it is argued that a more nuanced approach is required. For example, consider situations characterized by the factual absence of hostilities but where armed groups continue to exercise territorial control, whether by way of retreating forces over a number of days, or over the course of a number of months in accordance with the terms of a peace agreement. Again, considering the uncertain nature and scope of armed groups' human rights obligations, coupled with the potentially reduced scope of the territorial state's positive human rights obligations vis-à-vis individuals located within territory beyond its control and authority,<sup>151</sup> to terminate the applicability of Fundamental Guarantees in such situations would deprive the civilian population in these territories of comprehensive legal protection. Accordingly, in situations where armed groups remain in control of territory following the cessation of hostilities and the termination of the applicability of the hostilities regime, IHL's Fundamental Guarantees should remain applicable. This approach takes into account both the factual necessity that underpins the activation of these protections, as well as the principle of effectiveness that informs their temporal scope. In effect, this interpretation renders IHL's Fundamental Guarantees as the *functional* equivalent of a limited catalogue of human rights obligations for armed groups within the territories under their control. Moreover, it would further ensure the continued possibility of humanitarian access to such territories, as well as the possibility of detention monitoring by the ICRC.<sup>152</sup>

#### The Resulting Scope of the Protections Regime

Pursuant to the functional approach advanced in this article, the temporal scope of IHL's protections must be construed in a manner that gives effect to their object and purpose during NIAC: to provide protection to the victims of NIAC.<sup>153</sup> To this end, the temporal scope of IHL's protections is necessarily independent from

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<sup>146</sup> This is assuming that all derogation measures have terminated, and non-modified IHRL is applicable.

<sup>147</sup> For a discussion if and when armed groups have human rights obligations see, Murray, Daragh, *Human Rights Obligations of Non-State Armed Groups*, Hart Publishing, 2016.

<sup>148</sup> Y Sandoz, C Swinarski, B Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, 1987, pg 1360.

<sup>149</sup> Article 5 of Additional Protocol II

<sup>150</sup> Article 4(2), Additional Protocol II.

<sup>151</sup> See, *Ilascu and Others v. Moldova and Russia*, App. No. 48787/99, European Court of Human Rights, 8 July 2004, para 333.

<sup>152</sup> See, Rule 55: *Access for Humanitarian Relief to Civilians in Need*, and related practice/commentary, ICRC Database .

<sup>153</sup> See, generally, the preamble of Additional Protocol II.

the temporal scope of the hostilities regime. Once activated, IHL protections remain applicable until the conditions that gave rise to their activation no longer exist, or until such time that individuals benefit from equal or more favourable legal protection under IHRL. This approach creates a balance between the temporal scope of IHL protections, and the role and relevance of IHRL during NIAC. This determination can only be made on a case-by-case basis and with a careful assessment of the prevailing factual circumstances and reference to the specific protections under consideration. As a result, the temporal scope of the various protections during NIAC may vary in accordance with prevailing factual circumstances.

## Conclusion

This article provided a forensic examination of IHL's threshold of termination during NIAC. In doing so, it critically examined two of the leading approaches in this regard: the 'peaceful settlement' approach developed by ICL, and the 'lasting pacification' approach developed by the ICRC. It concluded that neither approach provided entirely satisfactory results, finding the common ailment to be the quest for a single point in time that would terminate the applicability of IHL *in toto*. As discussed, any approach based on a single threshold for IHL's termination during NIAC invariably results in the over-extension of IHL to factual circumstances that no longer warrant its application, or by the termination of its applicability before comprehensive protection is restored under IHRL. As a result, it argued that a more nuanced approach to IHL's threshold of termination during NIAC is required.

As IHL is made up of distinct obligations and protections that are activated at varying times and for varying purposes, their temporal scope of applicability inescapably varies. Moreover, given their distinct functions during NIAC, the temporal scope of the hostilities regime and the protections regime should be determined separately, as they will rarely, if ever, terminate simultaneously. To this end, this article developed and advanced a 'functional approach' to determining IHL's threshold of termination during NIAC that distinguishes between the hostilities regime and the protections regime.

The temporal scope of the hostilities regime should be interpreted in a manner that gives effect to the function that it serves: regulating the conduct and consequences of hostilities during NIAC. As a general rule, if hostilities are ongoing, the rules designed to regulate hostilities are applicable. Importantly, the termination of the hostilities regime does not require the complete cessation of hostilities but, rather, a sufficient and factual reduction in their intensity to the point where the residual armed violence can be factually described as isolated or sporadic, and therefore once again regulated by the law enforcement regime. This determination requires a careful and comprehensive assessment of the prevailing factual circumstances in order to distinguish between a mere lull in hostilities, or the temporary suspension of hostilities, from a factual reduction in hostilities that warrants the termination of the hostilities regime. The termination of the hostilities regime will have no effect on the applicability of the protections regime.

The temporal scope of IHL's protections must be construed in a manner that gives effect to the function that it serves during NIAC: to provide legal protection to the victims of NIAC.<sup>154</sup> As a general rule, once activated, IHL protections remain applicable until the objective conditions that gave rise to their activation no longer exist, or until such time that individuals benefit from equal or more favourable legal protection under IHRL. This approach creates a balance between the temporal scope of IHL protections, and the role and relevance of IHRL during NIAC. This determination can only be made on a case-by-case basis and with a careful assessment of the prevailing factual circumstances and reference to the specific protections under consideration. As a result, the temporal scope of the various protections during NIAC may vary in accordance with prevailing factual circumstances.

In sum, neither the 'end of hostilities' nor the 'end of NIAC' will necessarily bring about the termination of IHL *in toto* during NIAC. IHL is a pragmatic and functional legal regime comprised of a diverse range of obligations and protections applicable to specific factual circumstances, and it is these specific factual circumstances, coupled with the object and purpose of the corresponding provisions of IHL, that will determine the temporal scope of IHL during NIAC. Any other approach would be contrary to the very object

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<sup>154</sup> See, generally, the preamble of Additional Protocol II.

and purpose of IHL itself.