

The notion of “protracted armed conflict” in the Rome Statute and the termination of armed conflicts under international law: An analysis of select issues

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Abstract

Legal controversies and disagreements have arisen about the timing and duration of numerous contemporary armed conflicts, not least regarding how to discern precisely when those conflicts began and when they ended (if indeed they have ended). The existence of several long-running conflicts – some stretching across decades – and the corresponding suffering that they entail accentuate the stakes of these debates. To help shed light on some select aspects of the duration of contemporary wars, this article analyzes two sets of legal issues: first, the notion of “protracted armed conflict” as formulated in a war-crimes-related provision of the Rome Statute of the International Criminal Court, and second, the rules, principles and standards laid down in international humanitarian law and international criminal law pertaining to when armed conflicts have come to an end. The upshot of the

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analysis is that under existing international law, there is no general category of “protracted armed conflict”; that the question of whether to pursue such a category raises numerous challenges; and that several dimensions of the law concerning the end of armed conflict are unsettled.

Keywords: protracted armed conflict, end of armed conflict, non-international armed conflict, temporal scope of armed conflict, International Criminal Court, war crimes.

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How might time matter when it comes to the legal aspects of armed conflict? Does, and should, international humanitarian law (IHL) treat relatively longer armed conflicts differently than their shorter counterparts? Might some armed conflicts come into existence only once hostilities have existed for a sufficiently long period? In respect of conflicts extending over relatively long periods, should the legal framework be adjusted with a view to enhancing and expanding the scale and scope of protective commitments, perhaps by shifting from IHL-based norms to norms rooted in other fields, such as international human rights law (IHRL)? Who would benefit, and who would lose, from such an approach, and who should be in a position to determine whether or not it is adopted?

This issue of the *Review*, which focuses on “Protracted Armed Conflict”, examines such topics as the impacts of long-duration armed conflicts on affected populations and strategies for humanitarian action in respect of such contexts.¹ At the outset, it bears emphasizing that, at least from this author’s perspective, the long duration of an armed conflict—including a military occupation—may not be invoked as a legal basis to exclude the application of IHL.² Yet that

1 The call for papers for this issue of the *Review* states in part: “As of 2016, some 20 ICRC [International Committee of the Red Cross] delegations were operating in protracted crises and around two thirds of the ICRC’s budget was spent in protracted conflicts. Prolonged humanitarian action in conflicts of various kinds means that the traditional binary paradigm of relief and development is giving way to policies adapted to address needs when people are struggling to survive in conflicts that last for decades. In 2015, the ICRC cut the word ‘emergency’ from its annual appeal in recognition of the fact that its work is often a mix of both urgent and long-term programming. The ICRC is by no means alone in this effort. The protracted conflicts seen today attract a large humanitarian sector.” ICRC, “Protracted Armed Conflict”, June 2017, available at: www.icrc.org/en/international-review/article/protracted-armed-conflict (all internet references were accessed in April 2020).

2 For instance, in relation to “prolonged occupation”, see International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Separate Opinion of Judge Elaraby (Advisory Opinion), *ICJ Reports 2004*, p. 255 (“A prolonged occupation strains and stretches the applicable rules, however, the law of belligerent occupation must be fully respected regardless of the duration of the occupation”); ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Separate Opinion of Judge Koroma (Advisory Opinion), *ICJ Reports 2004*, p. 206 (“While it is understandable that a prolonged occupation would engender resistance, it is nonetheless incumbent on all parties to the conflict to respect [IHL] at all times”). Despite their potential salience, debates regarding “prolonged occupation” are outside of the scope of this article. For discussion of that notion, see, for example, Iain Scobbie, “International Law and the Prolonged Occupation of Palestine”, United Nations Roundtable on Legal Aspects of the Question of Palestine, The Hague, 20–22 May 2015, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2611130; Vaïos Koutroulis, “The Application of International Humanitarian Law and International Human Rights Law in Situation[s] of Prolonged Occupation: Only a Matter of Time?”, *International*

contention only begins to bring into view the array of pressing concerns and associated legal dimensions regarding the duration of contemporary wars.

In this article, I seek to help inform discussions around “protracted armed conflict” by exploring two sets of legal questions concerning the timing and duration of contemporary wars. In doing so, I do not attempt to exhaustively canvass the vast range of potential legal issues that might arise in relation to armed conflicts of a long duration, however “long” might be defined. Instead, I zoom in on two sets of what might be characterized as somewhat technical legal issues. Firstly, I examine whether – under IHL and, especially, international criminal law (ICL) of war crimes – only non-international armed conflicts whose hostilities have taken place over a sufficiently long period may be characterized as “protracted armed conflict” in the sense of a provision of the Rome Statute of the International Criminal Court (ICC). I focus on such non-international armed conflicts because, so far as I am aware, it is only in relation to those conflicts that the term “protracted armed conflict” has been laid down in an IHL-related treaty. Moreover, I am not aware of the term having (purportedly) crystallized into a (separate) notion under customary international law. Secondly, I evaluate whether IHL and ICL of war crimes lay down sufficiently clear rules, principles and standards to discern when contemporary armed conflicts have come to an end – in other words, whether the law allows us to reliably detect when conflicts, including relatively long-duration conflicts, have ended. These two sets of questions are connected in various ways. Perhaps most obviously, discerning the end of an armed conflict that is deemed to be “protracted” turns – as with all armed conflicts – on an assessment of the international legal framework applicable in relation to the end of the conflict. To help flesh out why this all matters, at various points in the article I attempt to draw attention to some legal interests that might be at stake in the continuing applicability (or not) of IHL. I conclude by highlighting several challenging questions that arise when assessing whether or not “protracted armed conflict” should be developed into a (sub) category of armed conflict under international law.

“Protracted armed conflict”

In respect of war but also more broadly, time matters in no small part because humans’ experiences and understandings of the world are fundamentally structured, organized and conceived through notions of temporality. For example, to help comprehend our experiences, we often divide periods into discrete temporal units such as minutes, days, months, years or decades. Yet despite the centrality of time, its flow and its delineation, and despite some apparent recent

headway by scientists into better understanding its nature and its workings,³ we still grasp remarkably little about the foundational properties and conceptual frameworks that pertain to time.

International humanitarian law and temporality

Irrespective of our individual and collective deficiencies in understanding temporality more broadly, it seems indisputable that time matters in many diverse and impactful respects concerning war and the law that seeks to govern it. Indeed, in many ways, international law structures and organizes our experiences and understandings of armed conflict, not least regarding what periods we do and do not consider to validly count as “wartime”.⁴

In turn, with a legally recognized period of armed conflict come (it has been argued) not only the constraints but also the “enabling arrangements”⁵ of IHL and, as applicable, other relevant fields of international law.⁶ For its part, IHL is somewhat frequently characterized as seeking to infuse at least a modicum of humanitarian concern into the cruelties of war. Yet in several respects IHL might also be seen as legitimizing certain presumptions of dangerousness of perceived adversaries and perhaps even of perceived adversary populations. Those presumptions help lay the normative groundwork for IHL to be interpreted and applied in ways that, it might be said, at least tolerate certain manifestations of often extensive violence and other coercive measures that may result in levels of death, destruction and suffering which, while not unlimited, would nevertheless be impermissible under other potentially relevant fields of international law.⁷ Meanwhile, as it does in respect of time, the formulation, interpretation and application of IHL also helps delineate other connected dimensions of war: what

3 See, for example, Dean Buonomano, *Your Brain Is a Time Machine: The Neuroscience and Physics of Time*, W. W. Norton, New York, 2017; Richard A. Muller, *Now: The Physics of Time*, W. W. Norton, New York, 2016.

4 See generally Mary L. Dudziak, *War Time: An Idea, Its History, Its Consequences*, Oxford University Press, New York, 2012.

5 See Dino Kritsiotis, “War and Armed Conflict: The Parameters of Enquiry”, in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict*, Routledge, Abingdon, 2016, p. 8.

6 To be certain, several IHL provisions are also applicable in respect of “peacetime”; see, for example, Art. 2 (1) common to the four Geneva Conventions (Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II); Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III); Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV)); Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 21 October 1950) (AP I), Arts 6(1), 18 (7), 60(2).

7 See, for example, Dustin A. Lewis, Gabriella Blum and Naz K. Modirzadeh, *Indefinite War: Unsettled International Law on the End of Armed Conflict*, Harvard Law School Program on International Law and Armed Conflict, Cambridge, February 2017, p. 1, available at: <https://dash.harvard.edu/handle/1/30455582>.

situations amount to armed conflicts in the first place, how far wars extend spatially, and which individuals, entities and objects merit, or do not merit, various kinds and degrees of legal protection, as well as which individuals and entities are responsible for respecting which legal norms.

Unfortunately, the incarnadine spectacle of many contemporary armed conflicts – so often marked as they are by extensive death, destruction, upheaval, austerity, subjugation and despair – extends for years, even decades.⁸ *The War Report: Armed Conflicts in 2017*, edited by Annyssa Bellal, identifies fifty-five armed conflicts that occurred, in the view of the authors, at least at some point in 2017. The vast majority of the eleven listed military occupations have apparently existed for decades, including occupations of Azerbaijan by Armenia, of Cyprus by Turkey, of Lebanon by Israel, of Moldova by Russia, of Palestine by Israel, of Syria by Israel, and of Western Sahara by Morocco.⁹ Several of the thirty-eight non-international armed conflicts that Bellal characterizes as having occurred in 2017 are of what might be characterized as a long duration.¹⁰ For instance, at least two of those conflicts – Colombia versus the National Liberation Army and the Philippines versus the New People’s Army – apparently extend back to the 1960s. Certain others – including, under their currently listed configurations, Afghanistan and the United States versus the Quetta Shura Taliban, and the Democratic Republic of the Congo with the support of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo versus the Democratic Forces for the Liberation of Rwanda – are seemingly at least a decade and a half old. Among the six situations characterized in *The War Report* as “active” international armed conflicts, three are said to have existed since at least 2014: India versus Pakistan; an international coalition (Belgium, Canada, Denmark, France, Germany, Italy, Jordan, Morocco, the Netherlands,

8 I borrow the phrase “incarnadine spectacle” from Tom J. Farer, “Humanitarian Law and Armed Conflicts: Toward the Definition of ‘International Armed Conflict’”, *Columbia Law Review*, Vol. 71, No. 1, 1971, p. 37. While Farer was referring to situations of “internal war”, I use the phrase to refer to any type of armed conflict.

9 See Annyssa Bellal (ed.), *The War Report: Armed Conflicts in 2017*, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, 2018, p. 30. Other military occupations identified by the authors of *The War Report* were the occupations of Eritrea by Ethiopia, of Georgia by Russia, of Syria by Turkey, and of Ukraine by Russia. At least some ongoing or recent conflicts of a relatively long duration – including Transnistria in Moldova, Abkhazia and South Ossetia in Georgia, and Nagorno-Karabakh in Azerbaijan – are, or at least recently were, said to be susceptible to the label of “frozen conflicts.” See Thomas D. Grant, “Frozen Conflicts and International Law”, *Cornell International Law Journal*, Vol. 50, No. 3, 2017, pp. 371, 377–399. Grant assesses that “frozen conflicts share certain characteristics: (1) armed hostilities have taken place, parties to which include a State and separatists in the State’s territory; (2) a change in effective control of territory has resulted from the armed hostilities; (3) the State and the separatists are divided by lines of separation that have effective stability; (4) adopted instruments have given the lines of separation (qualified) juridical stability; (5) the separatists make a self-determination claim on which they base a putative State; (6) no State recognizes the putative State; (7) a settlement process involving outside parties has been sporadic and inconclusive”. *Ibid.*, p. 390 (citation omitted). The term “frozen conflicts” seems to be anchored in “diplomatic vocabulary”. Marc Weller, “Settling Self-Determination Conflicts: Recent Developments”, *European Journal of International Law*, Vol. 20, No. 1, 2009, p. 137. At least for now, the expression, it has been said, “remains, at best, at the edges of legal discourse”. T. D. Grant, above, p. 413.

10 A. Bellal, above note 9, pp. 30–31.

Saudi Arabia, Turkey, the United Arab Emirates, the United Kingdom and the United States) versus Syria; and Ukraine versus Russia.¹¹

International criminal law of war crimes in respect of non-international armed conflict: Delineating “protracted armed violence” and “protracted armed conflict”

Close observers of the cascade of recent jurisprudence flowing from international criminal tribunals may have spotted a particular area in which time might matter in respect of war – namely, the provision concerning “protracted armed conflict” laid down in the 1998 Rome Statute of the ICC.¹² That provision concerns twelve sets of war crimes in respect of non-international armed conflict. (There are two main general categories, or classifications, of armed conflict broadly recognized in contemporary IHL: international armed conflict and non-international armed conflict.¹³) Since coming into force, that provision has been addressed, somewhat unevenly, by certain ICC chambers as well as by commentators.¹⁴

Stepping back for a moment, it might be useful to observe that the adjective “protracted” means – in its everyday usage – lengthened, extended or prolonged *in time*.¹⁵ The basic notion is, at least in certain key respects, relative and subjective, raising questions as to what durations, and in relation to what types of contexts, the label should or should not attach.

Perhaps the best legal starting point is not necessarily the relevant text of the Rome Statute itself but rather the International Criminal Tribunal for the former Yugoslavia (ICTY) jurisprudence from which the notion of “protracted armed conflict” in Article 8(2)(f) of the Rome Statute has been said to be

11 *Ibid.*, pp. 29–30. The other three identified “active” international armed conflicts are listed as Egypt versus Libya, Israel versus Syria, and Turkey versus Iraq, all of which are characterized as forming “a series of short-lived international armed conflicts”. *Ibid.*, p. 29.

12 Rome Statute of the International Criminal Court, 2187 UNTS 90, 17 July 1998 (entered into force 1 July 2002) (Rome Statute), Art. 8(2)(f).

13 See, for example, ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), paras 201 ff., available at: <https://ihl-databases.icrc.org/ihl/full/GCI-commentary>; Andrew Clapham, “The Concept of International Armed Conflict”, and Lindsay Moir, “The Concept of Non-International Armed Conflict”, in Andrew Clapham, Paola Gaeta, and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015; Jann K. Kleffner, “Scope of Application of International Humanitarian Law”, in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013; Dapo Akande, “Classification of Armed Conflicts: Relevant Legal Concepts”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012. For a succinct essay concerning why classification may – and may not – matter under contemporary international law, see Elizabeth Wilmshurst, “Conclusions”, in E. Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012.

14 For a sketch of ICC jurisprudence, see below notes 41–46 and corresponding text. For a succinct overview of scholarly commentary, see Sylvain Vité, “Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations”, *International Review of the Red Cross*, Vol. 91, No. 873, 2009, pp. 80–83. See also Lindsay Moir, “The Concept of Non-International Armed Conflict”, in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 13, pp. 410–411, paras 53–56.

15 At the time of writing, the definition of “protracted” given in the *Oxford English Dictionary Online* is “[l]engthened, extended, prolonged ... [i]n time”.

“derived”.¹⁶ To situate that jurisprudence, however, a quick overview of the underlying treaty provisions concerning the concept of non-international armed conflict might be of value. For its part, Article 3 common to the four 1949 Geneva Conventions expressly applies “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”.¹⁷ This negative formulation – phrased as applying in the case of armed conflict *not* of an international character – represents something of a compromise text that covered a division of opinions at the time of drafting.¹⁸ On its terms, the 1977 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II) “develops and supplements [Common Article 3] without modifying its existing conditions of application”.¹⁹ Under Article 1(1), AP II shall expressly

apply to all armed conflicts which are not covered by Article 1 of [Additional Protocol I (AP I); that is, all international armed conflicts as recognized at least under AP I] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement [AP II].²⁰

Article 1(2) of AP II provides that the “Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”

From some of the Tribunal’s earliest jurisprudence onwards, ICTY chambers have held that a non-international (or “internal”) “armed conflict exists whenever there is ... *protracted armed violence* between governmental authorities and organized armed groups or between such groups within a State”.²¹ To make

16 ICTY, *Prosecutor v. Ljube Bošković and Johan Tarčulovski*, Case No. IT-04-82-T, Judgment (Trial Chamber II), 10 July 2008, para. 197: “[I]t is noted that during the drafting of Article 8(2)(f) of the [Rome Statute] covering ‘other’ serious violations of the laws and customs of war applicable in non-international armed conflict, delegates rejected a proposal to introduce the threshold of applicability of [AP] II to the section, and instead accepted a proposal to include in the chapeau the test of ‘protracted armed conflict’, as derived from the Appeals Chamber’s decision in *Tadić*” (citations omitted).

17 See also Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249 UNTS 240, 14 May 1954 (entered into force 7 August 1956), Art. 19(1). Even though it is often called “Common Article 3”, while otherwise identical to the corresponding language in Geneva Conventions I, III and IV, the language of the first sentence of Article 3(2) of GC II, due to the nature of that instrument, adds “shipwrecked” to the category of persons – in addition to the “wounded” and “sick” – who “shall be collected and cared for”.

18 See T. J. Farer, above note 8, p. 50.

19 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978), Art. 1(1).

20 *Ibid.*, Art. 1(1).

21 ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Appeals Chamber), 2 October 1995 (*Tadić* Jurisdiction), para. 70 (emphasis added). See, further, the cases cited in ICTY, *Bošković and Tarčulovski*, above note 16, para. 175, fn. 703. Certain ICC chambers have also adopted this definition: see, for example, ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Judgment Pursuant to Article 74

that determination and thus to establish that a non-international armed conflict subject to the Tribunal's relevant war crimes jurisdiction exists (or existed), ICTY chambers have held that it is necessary to establish two constitutive elements: (1) that hostilities are (or were) sufficiently *intense*, and (2) that a non-State party is (or was) sufficiently *organized*.²² The emphasis on "protracted armed violence" in the ICTY jurisprudence was meant in part, at least initially, to help distinguish a situation of armed conflict of an "internal" or non-international character – or of a "mixed" character – from situations such as "banditry, unorganized and short-lived insurrections, or terrorist activities, which" – it was held – "are not subject to [IHL]".²³ This approach seems to track in general the aim of Article 1(2) of AP II to distinguish between certain situations of violence which may be characterized as non-international armed conflicts falling under that instrument, and others which may not. For their part, ICTY chambers generally have not further required that the other material conditions listed in Article 1(1) of AP II must also be established in order for the Tribunal to exercise war crimes jurisdiction over a non-international armed conflict.²⁴ Recall that this provision of AP II

of the Statute: Public with Annexes I, II, and A to F (Trial Chamber III), 21 March 2016, para. 128 (*Bemba* Trial Judgment); reversed on other grounds in ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08 A, Judgment on the Appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute" (Appeals Chamber), 8 June 2018.

22 See, e.g., ICTY, *Boškoski and Tarčulovski*, above note 16, paras 175–206.

23 ICTY, *Prosecutor v. Duško Tadić*, Case No. IT-94-1-T, Opinion and Judgment (Trial Chamber), 7 May 1997, para. 562: "The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law" (citation omitted). See further, for example, ICTY, *Boškoski and Tarčulovski*, above note 16, para. 175, fn. 706 and corresponding text. Regarding acts of terrorism in relation to the "protracted armed violence" aspect(s) in the jurisprudence of the ICTY, see *ibid.*, para. 190: "[T]he Chamber considers that while isolated acts of terrorism may not reach the threshold of armed conflict, when there is protracted violence of this type, especially where they require the engagement of the armed forces in hostilities, such acts are relevant to assessing the level of intensity with regard to the existence of an armed conflict."

24 See ICTY, *Boškoski and Tarčulovski*, above note 16, para. 197: "While the jurisprudence of the Tribunal requires an armed group to have 'some degree of organisation', the warring parties do not necessarily need to be as organised as the armed forces of a State. Neither does the degree of organisation for an armed group to a conflict to which Common Article 3 applies need [to] be at the level of organisation required for parties to Additional Protocol II armed conflicts, which must have responsible command, and exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol. Additional Protocol II requires a higher standard than Common Article 3 for establishment of an armed conflict. It follows that the degree of organisation required to engage in 'protracted violence' is lower than the degree of organisation required to carry out 'sustained and concerted military operations'. In this respect, it is noted that during the drafting of Article 8(2)(f) of the Rome Statute of the International Criminal Court covering 'other' serious violations of the laws and customs of war applicable in non-international armed conflict, delegates rejected a proposal to introduce the threshold of applicability of Additional Protocol II to the section, and instead accepted a proposal to include in the chapeau the test of 'protracted armed conflict', as derived from the Appeals Chamber's decision in *Tadić*. This indicates that the latter test was considered to be distinct from, and a lower threshold than, the test under Additional Protocol II. This difference in the required degree of organisation is logical in view of the more detailed rules of international humanitarian law that apply in Additional Protocol II conflicts, which mean that 'there must be some degree of stability in the control of even a modest area of land for

concerns the capacity of a non-State party to exercise such control over a part of the contracting State’s territory so as to enable that non-State party to carry out sustained and concerted military operations and to implement AP II. In summary, relevant ICTY jurisprudence arguably folds the “protracted armed violence” dimension into the assessment concerning the intensity of hostilities as a constitutive element of a non-international armed conflict.²⁵

Thus, the “protracted armed violence” aspect – as elaborated in ICTY jurisprudence – might entail countervailing dimensions. The thumbnail version is that on its face the key textual formulation requires armed violence to be sufficiently long, but in jurisprudence that duration dimension is often incorporated into a broader analysis of the intensity of hostilities as but one criterion concerning the existence (or not) of a non-international armed conflict.

Scholars Marco Sassòli and Julia Grignon have critiqued the part of the ICTY’s formulation which – at least on its terms – requires that armed violence must be of a minimally long duration before the hostilities may give rise to categorization as a non-international armed conflict that is capable of falling within part of the Tribunal’s war crimes jurisdiction. Their critiques concern several overlapping sets of issues. For example, this “protracted” dimension is said to be subjective in nature.²⁶ This contention seemingly implies that, at least from a legal policy perspective, it would be imprudent to make the existence of a non-international armed conflict dependent on such an unverifiable abstraction. Perhaps from this perspective, it might be far from clear whether, for instance, the thirty-hour period of violent clashes at the La Tablada military base in Argentina on 23–24 January 1989 – clashes that the Inter-American Commission of Human Rights considered to have “triggered application of the provisions of Common Article 3, as well as other rules relevant to the conduct of internal hostilities”²⁷ – would qualify (assuming that the other conditions of jurisdiction were satisfied) as sufficiently “protracted” to fall under the ICTY’s war crimes jurisdiction. Moreover, in light of the retrospective nature of criminal prosecutions, the “protracted armed violence” formulation has been said to raise a concern as to whether or not an individual accused of a war crime may validly be held to have been operating under an understanding that an armed conflict

them to be capable of effectively applying the rules of the Protocol’. By contrast, Common Article 3 reflects basic humanitarian protections, and a party to an armed conflict only needs a minimal degree of organisation to ensure their application” (citations omitted).

- 25 See, for example, ICTY, *Boškoški and Tarčulovski*, above note 16, para. 177: “Various indicative factors have been taken into account by Trial Chambers to assess the ‘intensity’ of the conflict. These include ... *the spread of clashes over territory and over a period of time*” (emphasis added; citations omitted).
- 26 Marco Sassòli and Julia Grignon, “Les limites du droit international pénal et de la justice pénale internationale dans la mise en œuvre du droit international humanitaire”, in Abdelwahab Biad and Paul Tavernier (eds), *Le droit international humanitaire face aux défis du xxi^e siècle*, Bruylant, Brussels, 2012, p. 145 (“[s]ubjectif par essence”).
- 27 Inter-American Commission of Human Rights, *Juan Carlos Abella v. Argentina*, Case No. 11.137, Report No. 55/97, 1 November 1997, para. 156.

falling within the ICTY's war crimes jurisdiction existed on, say, the first – or the second, or the thirtieth – day of the armed violence.²⁸ This line of criticism thus concerns the principle of legality. In addition, at least from the viewpoint of certain victims of armed conflict, a requirement that armed violence be “protracted” may raise a concern that victims of the first acts of violence might not be fully protected, at least in the sense of international criminal responsibility for war crimes.²⁹ Furthermore, outside the context of implementing IHL through ICL, the introduction of the notion of “protracted” armed violence has been said to pose a similar problem at least in respect of victims and of humanitarian organizations: it is unimaginable, it has been argued, not only that those victims have to wait a certain amount of time before they can know if they are or are not protected by IHL, but also that those humanitarian organizations may not know if they can invoke IHL, for example to obtain humanitarian access.³⁰ Having elaborated these considerations, Sassòli and Grignon have identified at least some benefits to the approach whereby “protracted armed violence” is evaluated by ICTY chambers – even if somewhat counter-textually – primarily in terms of an intensity-of-hostilities criterion, not (or at least not primarily) in terms of a standalone duration-of-armed-violence criterion.³¹

Moving on to the ICC, Article 8 of the Rome Statute concerns war crimes falling within the Court's jurisdiction.³² Article 8(2)(a–b) of the Rome Statute concerns such war crimes in respect of international armed conflict, while Article 8(2)(c–f) concerns such war crimes in respect of non-international armed conflict.³³ Article 8(2)(c) lays down – in its sub-provisions, (i–iv) – four sets of war crimes concerning “serious violations” of Common Article 3 that fall under the Court's jurisdiction “[i]n the case of an armed conflict not of an international character”.³⁴ Similar to the distinguishing effect of Article 1(2) of AP II

28 See M. Sassòli and J. Grignon, above note 26, p. 145.

29 *Ibid.*

30 *Ibid.*, p. 146: “Il n'est pas imaginable qu'elles doivent attendre un certain laps de temps avant de pouvoir savoir si elles sont protégées par, ou si elles peuvent invoquer le droit international humanitaire.”

31 *Ibid.* See also Marco Sassòli, “Humanitarian Law and International Criminal Law”, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, p. 119 (“Similarly, while it is today accepted in [ICL] that armed violence must be protracted to constitute a (non-international) armed conflict, such a standard is not useful for parties, fighters, victims and humanitarian organizations at the outbreak of a conflict. It is not imaginable that they must wait and see how it develops before they know whether they must comply with IHL, are protected by it, should have been complying with it from the beginning, or may invoke it” (citations omitted)) and fn. 39 (“One may therefore welcome that an ICTY [Trial Chamber] recently interpreted the term ‘protracted’ as referring more to the intensity of the armed violence than to its duration” (citation omitted)).

32 Article 8 *bis* of the Rome Statute pertains to the crime of aggression.

33 Article 8(1) of the Rome Statute provides that “[t]he Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes”.

34 Rome Statute, Art. 8(2)(c). The ICC may exercise jurisdiction over that conduct only where the enumerated acts are “committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause”.

concerning which situations do not fall under that Protocol, Article 8(2)(d) of the Rome Statute provides that Article 8(2)(c) “applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”. For its part, Article 8(2)(e) concerns twelve sets of “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law”³⁵ – other, that is, than the four sets of “serious violations” of Common Article 3 laid down in Article 8(2)(c)(i–iv). Under Article 8(2)(f) of the Rome Statute:

Paragraph 2 (e) [of the Statute] applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is *protracted armed conflict* between governmental authorities and organized armed groups or between such groups [emphasis added].

Thus, whereas ICTY jurisprudence concerns protracted armed *violence*,³⁶ this provision of the Rome Statute concerns protracted armed *conflict*. Alongside the English, the other five equally authentic texts³⁷ of the Rome Statute – the Arabic, Chinese, French, Russian and Spanish texts – seem to support the contention that this provision in the second sentence of Article 8(2)(f) may be interpreted, at least on a plain reading of the text, as imposing a requirement that a non-international armed conflict must, for Article 8(2)(f) of the Statute to be applicable, be protracted in the sense of (prolonged) duration.³⁸

In the abstract, three potential conceptual approaches concerning “protracted armed conflict” – as formulated in the Rome Statute – might be drawn. Under the first, the insertion of this notion in the Statute might be considered to give rise to a (*sub*)category of non-international armed conflict. Under the second, it might be considered that a non-international armed conflict as a whole – not (merely) one or more of its constituent elements – must be of a sufficiently long duration, or else the ICC may not exercise jurisdiction over relevant war crimes; pursuant to that approach, the formulation would establish a

35 Many of these twelve sets of violations concern conduct-of-hostilities violations, including those laid down in Article 8(2)(e)(i–iv).

36 See notes 23–25 above and corresponding text.

37 Rome Statute, Art. 128. See also Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980), Art. 33.

38 See relevant parts of the second sentence of Article 8(2)(f) of the Rome Statute (Arabic: “وتتطبق على ... المنازعات المسلحة التي تقع في إقليم دولة عندما يوجد صراع مسلح متطاوّل الأجل”; Chinese: “该项 一定适用于在一国境内发生的武装冲突,如果政府当局与有组织武装集团之间,或这种集团相互之间长期进行武装冲突.”; French: “Il s’applique aux conflits armés qui opposent de manière prolongée ...”; Russian: “Он применяется в отношении вооруженных конфликтов, которые имеют место на территории государства, когда идет длительный вооруженный конфликт ...”; and Spanish: “Se aplica a los conflictos armados que tienen lugar en el territorio de un Estado cuando existe un conflicto armado prolongado ...”).

threshold requiring a minimum duration.³⁹ Finally, under the third approach, the “protracted armed conflict” notion might be considered to be *incorporated* into the analysis concerning one or both of the elements deemed necessary to establish the existence of a non-international armed conflict subject to the relevant war crimes jurisdiction of the Court. As noted above, those elements are (1) the intensity of hostilities and (2) the organization of the non-State party (or parties).

At the time of writing,⁴⁰ ICC jurisprudence concerning the “protracted armed conflict” provision in Article 8(2)(f) points in somewhat different, or at least not entirely coherent, directions. On the one hand, an ICC chamber has at least taken judicial cognisance of the phrase, holding that – unlike Article 8(2)(d) – Article 8(2)(f) requires the existence of a “protracted armed conflict”, which, it was said, “*may* be seen to require a higher or additional threshold to be met”.⁴¹ Yet on the other hand, when evaluating whether a non-international armed conflict exists such that a war crime laid down in Article 8(2)(e) of the Rome Statute falls within the jurisdiction of the Court, it is not necessarily clear that certain ICC chambers have considered that a specific duration of a relevant non-international armed conflict writ large must be established, in some or all cases, as an indispensable condition to exercise such jurisdiction.⁴² Recall that Article 8(2)(e), which lays down certain war crimes, is directly linked to Article 8(2)(f), which concerns the situations of non-international armed conflict in which those war crimes may have been committed. ICC chambers have seemed to align more or less with the third approach, though it is not necessarily clear that they have also excluded the second approach. In other words, much of the relevant ICC jurisprudence seems to criss-cross – or at least not to be at pains to distinguish – between (aspects of) an approach whereby the non-international armed conflict *as a whole* must be of a sufficiently long character, and an approach whereby the “protracted armed conflict” notion is folded into the analysis concerning one or both of the constituent elements considered necessary to establish the existence of a non-international armed conflict in the first place.⁴³ So far as I am aware, no

39 Namely, those laid down in Article 8(2)(e) of the Rome Statute.

40 Research for this article was updated most recently in 2018.

41 ICC, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo (Pre-Trial Chamber II), 15 June 2009, para. 235 (*Bemba* Confirmation of the Charges) (emphasis added).

42 See, for example, *Bemba* Trial Judgment, above note 21, para. 138: “Article 8(2)(f), which is stated to apply to Article 8(2)(e), contains a second sentence additionally requiring that there be a ‘protracted armed conflict’. This is in contrast to Article 8(2)(d), stated to apply to Article 8(2)(c), which does not include such a requirement. The Pre-Trial Chamber, while noting that this difference ‘may be seen to require a higher or additional threshold of intensity to be met’, did ‘not deem it necessary to address this argument, as the period in question covers approximately five months and is therefore to be regarded as “protracted” in any event’. Given that crimes under both Articles 8(2)(c) and 8(2)(e) have been charged in this case, the Chamber notes that the *potential* distinction would only have significance if the Chamber were to reach a conclusion that the conflict in question was not ‘protracted’, and therefore finds it unnecessary to address the difference further at this point” (emphasis added; citations omitted).

43 Consider, for instance, *Bemba* Trial Judgment, above note 21, para. 137 (“The first sentence common to Article 8(2)(d) and 8(2)(f) requires the conflict to reach a level of intensity which exceeds ‘situations of

chamber of the ICC has adopted the first, abstract approach mentioned above, according to which the reference to “protracted armed conflict” in Article 8(2)(f) of the Rome Statute would give rise to a *subcategory* of *protracted non-international armed conflict*. In any event, in ICC jurisprudence as of 2018, the minimum length of a non-international armed conflict found to have fallen under Article 8(2)(e) – and thus to be considered, at least implicitly, to constitute a “protracted armed conflict” in respect of the second sentence of Article 8(2)(f) – is apparently five months.⁴⁴

For their part, ICC chambers appear to have adopted the ICTY’s general conceptual approach (requiring two constitutive elements – namely, intensity of hostilities and organization of the non-State party or parties) to the establishment of the existence of a non-international armed conflict subject to the relevant war crimes jurisdiction.⁴⁵ The jurisprudence of the ICC is not uniform, however, in respect of the level and type of control (if any) that a non-State party must exercise – and for what duration – in order for a situation to qualify as a non-international armed conflict subject to the Court’s relevant war crimes jurisdiction. Some ICC chambers seem, for example, to require the level and type

internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature’. In order to assess the intensity of a conflict, Trial Chambers I and II endorsed the ICTY’s finding that *relevant factors* include ‘the seriousness of attacks and potential increase in armed clashes, their spread over territory and over a period of time, the increase in the number of government forces, the mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations (‘UN’) Security Council, and, if so, whether any resolutions on the matter have been passed’. The Chamber follows the approach of Trial Chambers I and II in this respect” (emphasis added; citations omitted); *ibid.*, para. 140 (“The Chamber considers that *the intensity and ‘protracted armed conflict’ criteria* [n.b.: plural] do not require the violence to be continuous and uninterrupted” (emphasis added)); *ibid.*, para. 139 (“The Chamber notes that the concept of ‘protracted [armed] conflict’ has not been explicitly defined in the jurisprudence of this Court, but has *generally been addressed within the framework of assessing the intensity of the conflict*. When assessing whether an armed conflict not of an international character was protracted, however, different chambers of this Court *emphasised the duration of the violence as a relevant factor*. This corresponds to the approach taken by chambers of the ICTY. The Chamber follows this jurisprudence” (emphasis added; citations omitted)); ICC, *The Prosecutor v. Germain Katanga*, Case No. ICC-01/04-01/07, Jugement rendu en application de l’article 74 du Statut (Pre-Trial Chamber II), 7 March 2014, para. 1217 (“La Chambre se réfère notamment à la présentation qu’elle a précédemment faite des attaques postérieures à celle de Bogoro afin de conclure que le conflit armé était à la fois *prolongé et intense* en raison, notamment, de sa durée et du nombre élevé d’attaques perpétrées sur l’ensemble du territoire de l’Ituri, du mois de janvier 2002 au mois de mai 2003. Aussi, pour elle, les éléments de preuve en sa possession *suffisent à satisfaire l’exigence d’intensité du conflit*” (emphasis added; citation omitted)); *Bemba* Confirmation of the Charges, above note 41, para. 235 (“The Chamber is also mindful that the wording of article 8(2)(f) of the Statute differs from that of article 8(2)(d) of the Statute, which requires the existence of a ‘protracted armed conflict’ and thus *may be seen to require a higher or additional threshold to be met*” (emphasis added)).

44 *Bemba* Confirmation of the Charges, above note 41, para. 235: “The Chamber is also mindful that the wording of article 8(2)(f) of the Statute differs from that of article 8(2)(d) of the Statute, which requires the existence of a ‘protracted armed conflict’ and thus may be seen to require a higher or additional threshold to be met – a necessity which is not set out in article 8(2)(d) of the Statute. The argument can be raised as to whether this requirement may nevertheless be applied also in the context of article 8(2)(d) of the Statute. However, irrespective of such a possible interpretative approach, the Chamber does not deem it necessary to address this argument, as *the period in question covers approximately five months and is therefore to be regarded as ‘protracted’ in any event*” (emphasis added).

45 *Bemba* Trial Judgment, above note 21, para. 128.

of control (or at least the capacity to exercise such control) by a non-State party laid down in Article 1(1) of AP II, while certain other chambers seem not to have adopted that approach; moreover, the Court's jurisprudence does not appear to establish whether – and if so, to what extent – the *duration* of such control (or at least the capacity to exercise such control) does or does not matter in this context.⁴⁶

It would seem to be unfair to lay whatever blame is due for today's somewhat confusing, criss-crossing jurisprudential approach at the ICC concerning the phrase “protracted armed conflict” solely at the feet of the Court's judges. The States which drafted that provision in the Rome Statute should not escape their due measure of responsibility.⁴⁷ Regardless, it appears that many (perhaps all) of the criticisms raised by Sassòli and Grignon concerning the notion of “protracted armed violence” in respect of the ICTY

46 Compare *Bemba* Trial Judgment, above note 21, p. 68, fn. 318 (“In this regard, the Chamber notes that at the Conference on the Establishment of the Court, the Bureau's initial proposal for the content of Article 8 (2)(f) was taken from Article 1(1) of Additional Protocol II, which referred to ‘sustained and concerted military operations’. Several delegates were concerned that the use of this provision would set too high a threshold for armed conflicts not of an international character. In the amended text, in addition to other changes, ‘sustained and concerted military operations’ was replaced by the phrase that now constitutes part of Article 8(2)(f), ‘protracted armed conflict’”), with ICC, *Katanga*, above note 43, paras 1209, 1211 (“En ce qui concerne enfin la milice ngiti, parfois appelée FRPI à partir de la fin de l'année 2002, la Chambre entend se référer à l'ensemble de ses constatations factuelles relatives à l'organisation de cette milice avant le mois de février 2003: ... Enfin, les membres de cette milice poursuivaient des objectifs communs et ils ont, *ensemble et sur une longue période, conduit des opérations militaires*. ... Au vu de ces différents éléments de preuve, la Chambre est en mesure de conclure qu'au moins au mois de janvier 2003, chacun de ces groupes, en l'occurrence l'UPC, l'APC ainsi que la milice ngiti, était armé et présentait un *degré d'organisation suffisant*, comme en attestent leur structure et leurs modalités de fonctionnement, leur participation à des opérations militaires et, le cas échéant, aux processus politiques alors mis en œuvre” (emphasis added; citation omitted)); ICC, *The Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges: Redacted Version (Pre-Trial Chamber I), 16 December 2011, para. 103 (“Consistent with the case law of the Chamber, for the purpose of Article 8(2)(f) of the Statute, an organised armed group must have ‘the ability to plan and carry out military operations for a prolonged period of time’” (citations omitted)); ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir: Public Redacted Version (Pre-Trial Chamber I), 4 March 2009, para. 60 (“The Chamber has also highlighted that article 8(2)(f) of the Statute makes reference to ‘protracted armed conflict between [...] organized armed groups’, and that, in the view of the Chamber, this focuses on the need for the organised armed groups in question to have the ability to plan and carry out military operations for a prolonged period of time. In this regard, the Chamber observes that, to date, control over the territory by the relevant organised armed groups has been a key factor in determining whether they had the ability to carry out military operations for a prolonged period of time” (citations omitted; square bracket ellipsis interjection in original)); and ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Décision sur la confirmation des charges: Version publique avec annexe 1 (Pre-Trial Chamber I), 29 January 2007, para. 234 (“La Chambre relève que l'article 8-2-f du Statut fait mention des ‘conflits armés qui opposent [des groupes armés] de manière prolongée’. Selon la Chambre, ces termes mettent l'accent sur la nécessité que les groupes armés en question aient *la capacité de concevoir et mener des opérations militaires pendant une période prolongée*” (emphasis added; square bracket interjection in original).

47 On the drafting history of the provision, see Sandesh Sivakumaran, “Identifying an Armed Conflict not of an International Character”, in Carsten Stahn and Göran Sluiter (eds), *The Emerging Practice of the International Criminal Court*, Brill, Leiden, 2009, pp. 371–373.

jurisprudence may apply just as strongly, if not more so, in respect of the “protracted armed conflict” provision of the Rome Statute.⁴⁸

IHL concerning the end of armed conflict: Key tests, interests and concerns

Broader debates around “protracted armed conflict” might benefit from stepping back to evaluate whether international law supplies sufficient guidance to discern the end of an armed conflict – whether that end is analyzed as a *factual* matter (when does the armed conflict *end?*), as a *legal* matter (when does a relevant portion of the international legal framework of armed conflict *cease to be applicable?*) or as a *normative* matter (when *should* the war end?).⁴⁹ There are areas of overlap as well as of disjuncture between the “protractedness” of armed conflict and the end of armed conflict, and examining those areas may be informative for thinking about questions related to wars spanning a long duration. Perhaps the most obvious connection is that for a “protracted armed conflict” to be terminated, it is necessary (as with any armed conflict) to discern which end-of-armed-conflict test is applicable in relation to it. Thus, the actual length of time of a “protracted armed conflict” necessarily turns in part on interpreting and applying international law pertaining to the end of armed conflict. Moreover, connecting the question of “protractedness” with the question of when armed conflicts end may help to reveal whether arguments in favour of a (sub)category of “protracted armed conflict” – and with it the continuing applicability of IHL – might ultimately lead to a legal situation that gives an illusion of more protection but that, in practice, leads to more death, destruction and suffering that are not unlawful under IHL, in comparison to international human rights law. Finally, a certain *lack* of connection between these two areas may be illuminating: namely that, to date, States and courts have not, so far as I know, invoked the “protracted” character of an armed conflict as a legal element, standard or threshold to discern the end of an armed conflict – or at least the end of applicability of the legal framework of armed conflict to the situation. Rather, as noted above, some international tribunals have discussed “protractedness” in relation to the *onset* of an armed conflict – but only then with respect to certain non-international armed conflicts, and in doing so, more often than not, by collapsing the “extended in time” everyday meaning of “protracted” into one of several factors to establish the element of sufficiently intense hostilities.

In 2017, together with two colleagues, I argued that by and large, international law does not provide enough such guidance concerning the end of war, or at least not in several important respects.⁵⁰ In this section, I highlight select issues pertaining to the termination of an armed conflict under existing

48 See above notes 26–31 and corresponding text.

49 See D. A. Lewis, G. Blum and N. K. Modirzadeh, above note 7.

50 *Ibid.*

international law.⁵¹ I focus on IHL tests and other aspects of the guidance that might be necessary to discern the end of armed conflict, alongside relevant legal interests and concerns from various perspectives.

Different tests, interests and stakes

At the outset, two broad, interconnected points might help frame this part of the analysis. First, there is no single, comprehensive test to discern the end of an armed conflict and the applicability of the relevant international legal framework writ large to that conflict. Whether this is seen as more or less beneficial or as more or less detrimental may largely turn on one's perspective. That is in part because, secondly, as elaborated below, at various points and across varying contexts, different sets of actors may disagree as to whether (to seek to continue) to recognize or to terminate a situation of armed conflict—and, correspondingly, whether (to continue) to recognize or to terminate the applicability of (a portion of) the international legal framework of armed conflict in relation to it.⁵²

As to the first point, the contemporary international legal framework pertaining to armed conflict has often been formulated, interpreted and applied in ways that typically focus on different sets of concerns at different levels affecting different sets of actors and interests at different points in an armed conflict. For instance, at what might be termed a macro level, the legal framework focuses in part on general categories—that is, on when either an international armed conflict (including a military occupation) or a non-international armed conflict, considered *as a whole*, terminates. In respect of international armed

51 See also Yoram Dinstein, *War, Aggression and Self-Defence*, 6th ed., Cambridge University Press, Cambridge, 2017, pp. 36–64; Julia Grignon, “The Geneva Conventions and the End of Occupation”, and Gabriella Venturini, “The Temporal Scope of Application of the Conventions”, in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 13; Alice Debarre, “When Does War End?”, *Humanity in War*, 17 December 2015, available at: <https://lawsofarmedconflict.wordpress.com/2015/12/17/when-does-war-end/>; Julia Grignon, *L'applicabilité temporelle du droit international humanitaire*, Schulthess, Zürich, 2014; Marko Milanovic, “The End of Application of International Humanitarian Law”, *International Review of the Red Cross*, Vol. 96, No. 893, 2014; Rogier Bartels, “From *Jus in Bello* to *Jus Post Bellum*: When Do Non-International Armed Conflicts End?”, in Carsten Stahn, Jennifer S. Easterday and Jens Iverson (eds), *Jus Post Bellum*, Oxford University Press, Oxford, 2014; Robert M. Chesney, “Postwar”, *Harvard National Security Journal*, Vol. 5, No. 1, 2014; Tristan Ferraro, “Determining the Beginning and End of an Occupation under International Humanitarian Law”, *International Review of the Red Cross*, Vol. 94, No. 885, 2012; Vaios Koutroulis, *Le début et la fin de l'application du droit de l'occupation*, Pedone, Paris, 2010; Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts*, Hart, Portland, OR, 2008, pp. 99–106; Christine Bell, “Peace Agreements: Their Nature and Legal Status”, *American Journal of International Law*, Vol. 100, No. 2, 2006; Derek Jinks, “The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts”, Background Paper, Program on Humanitarian Policy and Conflict Research, 2003, available at: <https://web.archive.org/web/20170217170439/http://www.hpcrresearch.org/sites/default/files/publications/Session3.pdf>.

52 See M. Milanovic, above note 51, p. 165, explaining that the analysis by an actor of when IHL ceases to apply may be affected “by whether that actor ultimately *wants* IHL to continue applying, in light of the consequences of continuation or termination” (emphasis original). This section draws extensively on D. A. Lewis, G. Blum and N. K. Modirzadeh, above note 7, pp. 13–20.

conflict, for example, different general sets of conflict-terminating temporal formulations have arisen:

- in the territory of the parties to the armed conflict, the application of Geneva Convention IV (GC IV) of 1949 concerning the protection of civilian victims of war – as well as the application of relevant provisions of AP I, at least for contracting States thereto – shall cease “on the general close of military operations”;⁵³ and
- in the whole territory of the warring States, IHL more broadly, at least according to ICTY jurisprudence, shall continue to apply “until a general conclusion of peace is reached”.⁵⁴

Different formulations have also been crafted in respect of military occupations:⁵⁵

- with respect to the application of relevant provisions of GC IV, the third paragraph of Article 6 of that instrument provides that in the case of occupied territory, “the application of [GC IV] shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles of [GC IV]: 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143”; and
- with respect to the application of GC IV and AP I, at least for High Contracting Parties to AP I, Article 3(b) of AP I lays down that both GC IV and AP I “shall cease, ... in the case of occupied territories, on the termination of the occupation”.

In respect of non-international armed conflicts, no treaty provision establishes a general test or sets out another type of temporal formulation pertaining to when the conflict as a whole may terminate and when the applicable legal framework writ large may cease to be applicable in relation to it.⁵⁶ For its part, jurisprudence of the ICTY (and more recently, emerging jurisprudence of the ICC⁵⁷) holds that

53 GC IV, Art. 6, para. 2; AP I, Art. 3(b). That provision of AP I also contains the following savings clause: “except for those persons whose final release, repatriation or re-establishment takes place thereafter. These persons shall continue to benefit from the relevant provisions of the Conventions and of this Protocol until their final release, repatriation or re-establishment.”

54 *Tadić* Jurisdiction, above note 21, para. 70.

55 See the discussion in J. Grignon, “The Geneva Conventions and the End of Occupation”, above note 51, pp. 1584–1585.

56 AP II contemplates that some of its provisions may continue to apply even after the conflict. See AP II, Art. 2(2): “At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted *after the conflict* for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty” (emphasis added).

57 With respect to discerning the end of a non-international armed conflict under its jurisdiction, an ICC Trial Chamber considers “that the intensity and ‘protracted armed conflict’ criteria do not require the violence to be continuous and uninterrupted. Rather, as set out in the first sentence common to Article 8(2)(d) and 8(2)(f) [of the Rome Statute], the essential criterion is that it go beyond ‘isolated or sporadic acts of violence.’” *Bemba* Trial Judgment, above note 21, para. 140. This approach forms part of a broader package of jurisprudence according to which it seems that, at least in the current ICC

IHL of non-international armed conflict “applies ... and extends beyond the cessation of hostilities until ..., in the case of internal [or non-international armed] conflicts, a peaceful settlement is achieved”.⁵⁸ Thus, at least under that jurisprudence, until such “a peaceful settlement is achieved”, the legal framework applicable in relation to non-international armed conflict—both in its so-called protective and enabling dimensions—continues to be applicable.

On balance, that “peaceful settlement” test is arguably impracticable at least in respect of several variants of contemporary non-international armed conflicts, perhaps not least those involving non-State parties that are (also) treated as terrorist entities.⁵⁹ Moreover, in demanding a “peaceful settlement”, the test also seems at variance with a contemporary turn—going back at least to the adoption of Common Articles 2 and 3 of the 1949 Geneva Conventions—toward more factually oriented determinations of the existence (or not) of an armed conflict irrespective of whether a formal (in the sense of political) recognition of the conflict has or has not (also) been made.⁶⁰

At what might be termed a micro level, the international legal framework of armed conflict lays down certain tests and other formulations that concern specific obligations, rights, permissions and other legal interests pertaining to particular sets of individuals, communities, entities and the like at points leading up to, at, or after the end of an armed conflict. Such formulations have arisen, for instance, in respect of:

- certain categories of individuals deprived of liberty;⁶¹

framework, once a non-international armed conflict comes into existence (by going beyond, among other things, “isolated and sporadic acts of violence”), that armed conflict will not terminate until a “peaceful settlement” is reached. *Bemba* Trial Judgment, above note 21, paras 140–141. This appears to remain the case, at least in principle, irrespective of whether, for instance, even an extremely long (relatively speaking) period of cessation of hostilities takes place.

58 *Tadić* Jurisdiction, above note 21, para. 70; *Bemba* Trial Judgment, above note 21, para. 141.

59 For proposals on other potential tests to determine the end of a contemporary non-international armed conflict, including those involving designated “terrorist” entities, see D. A. Lewis, G. Blum and N. K. Modirzadeh, above note 7, pp. 96–103.

60 See ICRC Commentary on GC I, above note 13, paras 491–492.

61 For instance, in respect of international armed conflict, concerning prisoners of war (who shall, under the first sentence of Article 118 of GC III, be “released and repatriated without delay after the cessation of active hostilities”), certain wounded and sick prisoners of war (who “shall be repatriated direct” under the chapeau of Article 110 of GC III), “protected persons” as defined in Article 4 of GC IV (restrictive measures concerning them shall, under the first sentence of Article 46 of GC IV, be “cancelled as soon as possible after the close of hostilities”), interned persons (internment of them shall, under Article 133 of GC IV, “cease as soon as possible after the close of hostilities”) and certain other persons (under Article 75(6) of AP I, relevant persons shall be protected “until final release, repatriation or reestablishment, even after the end of the armed conflict”). See Nathalie Weizmann, “The End of Armed Conflict, the End of Participation in Armed Conflict, and the End of Hostilities: Implications for Detention Operations under the 2001 AUMF”, *Columbia Human Rights Law Review*, Vol. 47, No. 3, 2016; Bettina Scholdan, “‘The End of Active Hostilities’: The Obligation to Release Conflict Internees under International Law”, *Houston Journal of International Law*, Vol. 38, No. 1, 2016; Marco Sassòli, “Release, Accommodation in Neutral Countries, and Repatriation of Prisoners of War”, and Bruce Oswald, “End of Internment”, in A. Clapham, P. Gaeta and M. Sassòli (eds), above note 13; Deborah N. Pearlstein, “Law at the End of War”, in *Minnesota Law Review*, Vol. 99, No. 1, 2014; Deborah N. Pearlstein, “How Wartime Detention Ends”, *Cardozo Law Review*, Vol. 36, No. 2, 2014. For an argument that more or less the same norms will be applicable in respect of persons deprived of liberty irrespective of the existence or not of an armed conflict, see R. M. Chesney, above note 51.

- certain measures in relation to minefields, mined areas, mines, booby traps and certain other devices⁶² as well as to explosive remnants of war;⁶³ and
- at least in respect of military occupations, the restoration and the fixing of compensation both for seized or destroyed submarine cables⁶⁴ and for seized private *munitions de guerre*.⁶⁵

As to the second framing point for this section (that is, that different actors may not agree on whether to argue for or against the continued existence of an armed conflict), consider just a few of the many examples. Humanitarian actors in general may have stronger bases in IHL than other fields of international law (such as IHRL) to make claims for obtaining and maintaining access to populations in need.⁶⁶ Those actors might therefore be more prone to err on the side of not prematurely terminating an armed conflict, even though not only the protective aspects but also the “enabling” aspects of IHL would continue to be applicable.⁶⁷ Furthermore, to adjudicate war crimes (which, at least by most definitions, may be committed only with a sufficient connection to an armed conflict), courts need to determine the existence of a relevant armed conflict to establish jurisdiction. Those courts might therefore have an institutional interest in holding that a particular situation constituted an uninterrupted period of armed conflict.⁶⁸ Such an approach might help to avoid a purported “revolving door between [IHL] applicability and non-applicability”—a “revolving door” that, according to an ICTY chamber discussing international armed conflict, might lead “to a considerable degree of legal uncertainty and confusion”.⁶⁹ Certainty may come at a cost, however, of presuming the applicability of relatively more permissive IHL rules instead of more restrictive provisions established in other international legal frameworks

62 Protocol on Prohibitions or Restrictions on the Use of Mines, Boobytraps and Other Devices as Amended on 3 May 1996 (Protocol II as amended on 3 May 1996) Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 3 May 1996, 2048 UNTS 133 (entered into force 3 December 1998), Arts 9(2), 10(1) (affixing temporal formulations concerning “the cessation of active hostilities” to obligations in respect of mines, booby traps and certain other devices).

63 Protocol on Explosive Remnants of War to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol V), 28 November 2003, 2399 UNTS 126 (entered into force 12 November 2006), Arts 3(1–3), 4(2) (affixing a number of obligations concerning clearance, removal or destruction of explosive remnants of war, or certain information concerning such activities, to the period “after the cessation of active hostilities”).

64 1907 Hague Regulations, Art. 54: “Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed *when peace is made* [à la paix]” (emphasis added).

65 *Ibid.*, Art. 53, para. 2: “All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed *when peace is made* [à la paix]” (emphasis added).

66 D. A. Lewis, G. Blum and N. K. Modirzadeh, above note 7, pp. 19–20.

67 See ICRC Commentary on GC I, above note 13, paras 398–390.

68 See D. A. Lewis, G. Blum and N. K. Modirzadeh, above note 7, pp. 17–18.

69 ICTY, *Prosecutor v. Ante Gotovina, Ivan Čermak, and Mladen Markač*, Case No. IT-06-90-T, Judgment (Trial Chamber I), 15 April 2011, para. 1694.

and (corresponding) domestic regimes.⁷⁰ Meanwhile, claims for asylum may, in respect of certain contexts, pivot at least in part on the existence or not of a relevant armed conflict.⁷¹ In addition, neutral States or States otherwise not party to an armed conflict may have several interests in the continued existence, or not, of an armed conflict that gives rise to the application of the law of neutrality.⁷²

Furthermore, the approaches that individual civilians and civilian populations might adopt may be difficult to anticipate. On the one hand, it seems clear that civilians would prefer for a war to end as quickly as possible so that the regime of IHL—more tolerant as it is in general (compared to IHRL and domestic law enforcement regimes regulating “peacetime” measures) of “incidental” civilian death and injury and destruction or other harm to civilian objects⁷³—ceases to be applicable. On the other hand, and perhaps somewhat paradoxically, the civilian population or individual members of it may, depending on the circumstances, prefer to argue in favour of extending the application of relevant IHL provisions. For instance, IHL—unlike IHRL⁷⁴—is generally recognized as binding on all parties to armed conflict, including States and, where relevant, non-State parties. Moreover, the scope of some IHL norms might be more protective than analogous provisions established in IHRL or domestic law. One example of seemingly more protective IHL norms concerns IHL treaty provisions that prohibit punishment of those who provide ethically sound medical care, irrespective of who benefits therefrom.⁷⁵

70 See D. A. Lewis, G. Blum and N. K. Modirzadeh, above note 7, pp. 17–18.

71 See *ibid.*, p. 16, noting that “EU Directive 2011/95/EU provides one example. That Directive sets out guidance on international protection for refugees or persons eligible for ‘subsidiary protection.’ Article 2(f) of the Directive establishes that a person eligible for such ‘subsidiary protection’ may include certain third-country nationals or stateless persons who do not qualify for refugee status but who are facing, in certain scenarios, a real risk of ‘suffering serious harm.’ In turn, Article 15(c) of the Directive establishes that such ‘serious harm’ may consist of ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’” (citations omitted).

72 See, for example, *ibid.*, pp. 15–16.

73 See, for example, Jelena Pejic, “Conflict Classification and the Law Applicable to Detention and the Use of Force”, in Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, pp. 104–105: “The principle of proportionality in attack prohibits attacks against legitimate military objectives that may be expected to cause incidental death, injury to persons or damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. *The crucial difference between the relevant [IHL] and human rights rules is that under the former, the principle of proportionality aims to limit incidental (‘collateral’) damage to protected persons and objects, while nevertheless recognizing that an operation may be carried out even if such damage is likely, provided that it is not excessive in relation to the concrete and direct military advantage anticipated.* In contrast, the aim of the principle of proportionality under human rights law is to prevent harm from happening to anyone else except to the person against whom force is being used. Even such a person must be spared lethal force if there is another, non-lethal way of achieving the aim of a law-enforcement operation” (emphasis added; citation omitted).

74 But see, for example, Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law*, Oxford University Press, Oxford, 2017.

75 See AP I, Art. 16(1); AP II, Art. 10(1). See also GC I, Art. 18, para. 3.

In addition, armed forces may also have interests in the termination or the continuation of the applicability of the legal framework of armed conflict.⁷⁶ Perhaps most importantly in this context, in general, conduct-of-hostilities rules under IHL are often conceptualized as permitting—or at least tolerating—more extensive (though not unlimited) lawful death, injury, destruction, damage and other harm compared to the rules governing the use of lethal force against persons under IHRL or domestic law enforcement frameworks.⁷⁷ In addition, certain other measures that armed forces might take in attempting to secure victory might be considered lawful in respect of war but not in respect of other situations. Such measures might include capturing and detaining enemy forces, seizing or destroying property, or controlling territory and populations. Further, discerning a fighter’s status under IHL might also be important with respect to conferring (or not) prisoner-of-war status on that fighter upon capture, as well as in respect of the operation (or not) of the so-called “belligerent’s privilege”.⁷⁸

For their part, political leaders may have their own (perhaps also often mixed) sets of incentives concerning the continued existence or termination of an armed conflict. Adopting a war footing—and thus an IHL framework—may allow them to fight with access to more permissive powers and greater resources.⁷⁹ That might be because, for example, the recognition of an armed conflict may make the invocation of emergency powers more palatable to their constituencies. Yet political leaders might seek to evade recognition that an armed conflict exists because, for example, doing so might be interpreted as conferring legitimacy on the adversary.

Finally, while not the focus here, legal concerns regarding the end of armed conflict might also arise in respect of domestic law. For example, the existence of an armed conflict may (also) implicate diverse domestic laws concerning such issues as compensation, insurance, frustrations of contracts, and trade restrictions.⁸⁰

Over all, it seems that contemporary international law does not provide a single comprehensive normative theory concerning the end of armed conflicts, including those of a relatively long duration.⁸¹ Nor, in turn, does international law arguably provide a sufficient basis from which to understand what connections, if any, can—and should—be drawn between the legal thresholds for the initiation of an armed conflict, the political and strategic articulation of the aims of a war, and the criteria by which we should determine that an armed

76 See D. A. Lewis, G. Blum and N. K. Modirzadeh, above note 7, p. 14.

77 See, for example, *ibid.*, p. 1.

78 According to that privilege, under IHL qualifying fighters “cannot be prosecuted for lawful acts of war in the course of military operations even if their behaviour would constitute a serious crime in peacetime”. Knut Dörmann, “The Legal Situation of ‘Unlawful/Unprivileged Combatants’”, *International Review of the Red Cross*, Vol. 85, No. 849, 2003, p. 45.

79 See D. A. Lewis, G. Blum and N. K. Modirzadeh, above note 7, pp. 13–14.

80 See, for example, Jennifer K. Elsea and Matthew C. Weed, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, Congressional Research Service, 14 April 2014, available at: <https://fas.org/sgp/crs/natsec/RL31133.pdf>, pp. 26–75; Lord McNair and A. D. Watts, *The Legal Effects of War*, 4th ed., Cambridge University Press, Cambridge, 1966, pp. 117–202.

81 See D. A. Lewis, G. Blum and N. K. Modirzadeh, above note 7, p. 105.

conflict has ended.⁸² Fleshing out these criteria might help strengthen international law's claim to guide behaviour in relation to war.

Conclusion

Having analyzed the emerging ICC jurisprudence concerning the notion of “protracted armed conflict” and having raised several issues regarding the end of armed conflicts under IHL, it might be useful to conclude by briefly exploring whether or not “protracted armed conflict” *ought* to be developed into a (sub)category of armed conflict under IHL and ICL of war crimes. In short, should it move from a single war-crimes-related provision of the Rome Statute to a standalone category of armed conflict? In evaluating that question, three sets of preliminary considerations, some with at least seemingly conflicting pulls, might be borne in mind (among no doubt many others): (1) how long a conflict should be in order to count as “protracted”; (2) marking long-term conflicts as differently important; and (3) calibrating legal norms as more or less restrictive or permissive.

Perhaps the initial consideration might be that it is not clear that a principled line is (or lines are) capable of being drawn—with sufficient specificity—concerning what constitutes the particular period(s) that should merit a “protracted armed conflict” designation.

Furthermore, a legal (sub)category propelled by the (relatively) long-duration character of an armed conflict might highlight that time matters differently—and, perhaps, more significantly—than certain other dimensions of an armed conflict, such as geography. Such a (sub)category might (also) mark relatively long conflicts and the suffering associated with them as differently important. The (sub)category might therefore more accurately capture part of the reality—including the long-term suffering—of many existing contemporary armed conflicts, extending as they do into many years, even decades. Yet it ought to be kept in mind that such a (sub)category might thereby function in ways that could make non-protracted wars seem less—not just differently—important. In any event, for those in favour of conceiving of IHL as a single normative system of protection, perhaps especially one that can easily be made known to those who are making difficult life-and-death decisions amid the turmoil of hostilities, the

82 *Ibid.* See also Jens Iverson, “War Aims Matter: Keeping *Jus Contra Bellum* Restrictive While Requiring the Articulation of the Goals of the Use of Force”, *Minnesota Journal of International Law*, Vol. 27, No. 1, 2018; Gabriella Blum, “Prizeless Wars, Invisible Victories: The Modern Goals of Armed Conflict”, *Arizona State Law Journal*, Vol. 49, Special Issue, 2017; Tess Bridgeman, “When Does the Legal Basis for U.S. Forces in Syria Expire? The End Point of the ‘Unwilling or Unable’ Theory of Self-Defense”, *Just Security*, 14 March 2018, available at: www.justsecurity.org/53810/legal-basis-u-s-forces-syria-expire/; Startsun Viktor Nikolaevich and Balkanov Il'ya Vladimirovich, “Indefinite War: Unregulated Field of International Law Pertaining to an Armed Conflict Termination Criteria”, *Journal of Military Law*, No. 3, 2017; Gabriella Blum and David Luban, “Unsatisfying Wars: Degrees of Risk and the *Jus ex Bello*”, *Ethics*, Vol. 125, No. 3, 2015; Gabriella Blum, “The Fog of Victory”, *European Journal of International Law*, Vol. 24, No. 1, 2013.

establishment of another (sub)category of armed conflict might weaken that system’s claims to universality, coherence and discernibility.

Finally, at least in relation to some long-running contemporary armed conflicts, the current legal framework is considered by some to be difficult to discern, interpret or apply. Perhaps from their perspective, a (sub)category of “protracted armed conflict” might have a stabilizing effect concerning those situations, at least in terms of more clearly delineating applicable legal norms – and their accompanying principles, rules and standards – in respect of relevant periods and situations.

Yet concerns may arise here as well. In designing a (sub)category of “protracted armed conflict”, it seems likely that a key fulcrum will concern how to calibrate the tension between the more or less “protective” and the more or less “enabling” aspects of relevant legal norms. Not taking sufficient cognisance of the concerns entailed in adjusting that balance poses several risks, including the potential to effectively extend the “enabling arrangements”⁸³ of IHL without also making sufficient coinciding (or even countervailing) adjustments from a “protection” standpoint. For example, an effort to encompass and address “the humanitarian–development–peace nexus” within a legal (sub)category of “protracted armed conflict” might operate in a way that unintentionally and/or unknowingly extends the applicability of IHL, including its “enabling arrangements”, in lieu of other frameworks – such as IHRL – that might, on the whole, be considered to be more protective of, or otherwise beneficial to, affected populations. Against that backdrop, pursuing a (sub)category of “protracted armed conflict” might present a legal situation that gives an illusion of more protection but which, in practice, leads to more death, destruction and suffering that are not unlawful under IHL.

Thus, in evaluating whether to pursue a (sub)category of “protracted armed conflict”, due consideration should be given to assessing which legal norms should be adjusted – together with the time point(s), if any, at which they should be adjusted – and which legal norms should remain constant irrespective of the length of the conflict. Such a determination, if conducted from as wide, principled and realistic a perspective as possible, would seem to entail a large undertaking, including an overarching assessment of which normative commitments that are entailed in the existing legal framework should matter, and which should not, in respect of the duration of armed conflict (assuming that any such distinction may be drawn in the first place). Moreover, it is not necessarily obvious that utilizing an approach based on the normative “balance” which is often characterized as being at the root of contemporary IHL⁸⁴ – sometimes framed, for instance, as resulting in a “parallelogram of forces” that moulds every norm by working out a compromise between the demands of military necessity

83 D. Kritsiotis, above note 5, p. 8.

84 See Michael N. Schmitt, “Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance”, *Virginia Journal of International Law*, Vol. 50, No. 4, 2010.

and humanitarian considerations⁸⁵ – will necessarily yield results that are more protective of the civilian population; far from it. For example, scholar Vaios Koutroulis demonstrates in respect of occupation that adopting the justificatory framework and normative rationales underlying the contemporary international law of military occupations *might* give rise to a result that is more protective of civilians. But doing so might alternatively result in an approach that instead weighs more heavily (perhaps, at times, much more heavily) in favour of the security interests of the Occupying Power.⁸⁶

Prudently calibrating the normative content pertaining to a (sub)category of “protracted armed conflict” would thus also necessitate assessments of the relationships of other fields of law – not least IHRL – to that (sub)category. This is because, at least in line with the jurisprudence of the International Court of Justice, at a minimum two branches of law – IHL and IHRL – must be taken into consideration in respect of situations of armed conflict.⁸⁷ In turn, determining where the normative line(s) will and should be drawn in respect of a (sub)category of “protracted armed conflict” seems likely to pivot in no small part on which set(s) of background assumptions will be adopted concerning such matters as:

- the scale, scope, feasibility and desirability of IHRL norms compared to their IHL counterparts;
- the extent to which those IHRL and IHL norms are considered binding not only in relation to a relevant State but also in relation to a non-State party to an armed conflict; and
- the geographic scope of applicability of those IHRL and IHL norms.

In addition, the legal framework pertaining to a (sub)category of “protracted armed conflict” might also implicate ICL of war crimes. For example, an assessment might be undertaken as to whether at least certain violations of IHL – including those violations characterized as war crimes – may be committed in respect of an armed conflict of any duration, or whether those violations may be committed only in respect of an armed conflict lasting at least a certain minimal duration.⁸⁸

In sum, it is submitted that under existing international law there is no standalone category of “protracted armed conflict”, that whether to pursue such a

85 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3rd ed., Cambridge University Press, Cambridge, 2016, p. 10, para. 26, arguing that “[e]very single norm of [the law of international armed conflict] is moulded by a parallelogram of forces, working out a compromise formula between the demands of military necessity and humanitarian considerations”.

86 See V. Koutroulis, above note 2, pp. 192–193.

87 See ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *ICJ Reports* 2005, para. 216. See also ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports* 2004, paras 104–106; ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports* 1996, para. 25.

88 For its part, one of the elements of the crime against humanity of enforced disappearance of persons – as laid down in Article 7(1)(i) of the Rome Statute – is that “[t]he perpetrator intended to remove such person or persons from the protection of the law for a prolonged period of time”. ICC, *Elements of Crimes*, Art. 7(1)(i), para. 6 (emphasis added). As to the status of the *Elements of Crimes* in the Rome Statute, see Articles 9(1) and 21(1)(a) of the Statute.

category poses numerous challenging questions, and that several dimensions of the law concerning the end of armed conflict are currently unsettled. Whether this situation is ultimately deemed satisfactory or not may depend in no small part on one’s perspective as to what are, and ought to be, the objectives, norms and parameters of the legal framework applicable to armed conflict. In the meantime, numerous long-running wars continue to devastate populations.