From jus in bello to jus post bellum: when do non-international armed conflicts end?

Bartels, R.J.

Citation for published version (APA):

General rights
It is not permitted to download or to forward/distribute the text or part of it without the consent of the author(s) and/or copyright holder(s), other than for strictly personal, individual use, unless the work is under an open content license (like Creative Commons).

Disclaimer/Complaints regulations
If you believe that digital publication of certain material infringes any of your rights or (privacy) interests, please let the Library know, stating your reasons. In case of a legitimate complaint, the Library will make the material inaccessible and/or remove it from the website. Please Ask the Library: http://uba.uva.nl/en/contact, or a letter to: Library of the University of Amsterdam, Secretariat, Singel 425, 1012 WP Amsterdam, The Netherlands. You will be contacted as soon as possible.
FROM JUS IN BELLO TO JUS POST BELLUM:
WHEN DO NON-INTERNATIONAL ARMED CONFLICTS END?

Rogier Bartels

Amsterdam Law School Legal Studies Research Paper No. 2014-12
Amsterdam Center for International Law No. 2014-06
From Jus in Bello to Jus Post Bellum: When Do Non-International Armed Conflicts End?

Rogier Bartels
Amsterdam Center for International Law

FROM JUS IN BELLO TO JUS POST BELLUM: WHEN DO NON-INTERNATIONAL ARMED CONFLICTS END?

ROGIER BARTELS*

16.1 Introduction

Jus post bellum literally means ‘law after war’. Logically then, it appears that for jus post bellum to apply, there must first have existed a situation of war and that this war has ended. It is therefore important to determine when wars end. In international law, the term ‘war’1 has been replaced by ‘armed conflict’;2 this term will thus be used in this chapter. According to this literal understanding, jus post bellum would only come into play after classical inter-state wars. However, the modern concept of jus post bellum must apply after all (modern) forms of armed conflict, that is, after international armed conflicts and after non-international armed conflicts.3

In addition, when jus post bellum is taken to refer to the entire process of transition from a situation of war to a situation of peace,4 it is also important to know when armed conflicts end because of the lex specialis principle. Whilst some rules of jus post bellum, the law of peace, or those related to transitional justice may be applicable already during an armed conflict – just as certain provision of jus in bello

---

* Legal Officer (Chambers, Trial Division), International Criminal Court; researcher at the University of Amsterdam and the Netherlands Defence Academy. The views presented in this chapter are the author’s alone and do not necessarily represent the views of the aforementioned institutions.

1 Whilst the humanitarian conventions and treaties prior to 1949 did not specify as such, it was clear that they were applicable during war. They were intended for use in wartime and the meaning of war was evident and did not need to be defined (see Jean S Pictet (ed), Commentary on the Geneva Conventions of 12 August 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (International Committee of the Red Cross 1952) 28).

2 The applicability of the laws of war was subject to formal declarations, e.g. declarations of war and belligerency. Situations in dire need of application of these rules were not regulated by treaty law unless formally recognised by such declarations as being within the scope of the laws of war, thus as an (international) war. This system was replaced by inclusion of the notion of ‘armed conflict’ in the 1949 Geneva Conventions, which addressed the actual situation on the ground. International humanitarian law therefore became applicable on the basis of material aspects of conflict instead of formalities. See Rogier Bartels, ‘Timelines, borderlines and conflicts: The historical evolution of the legal divide between international and non-international armed conflicts’, (2009) 91 International Review of the Red Cross, no. 873, 35.

3 Carsten Stahn, ‘Jus Post Bellum: Mapping the Discipline(s)’ in Carsten Stahn and Jann K Kleffner (eds), Jus Post Bellum: Towards a Law of Transition From Conflict to Peace (T.M.C. Asser Press 2008) 105-06.

4 See section III B of Jens Iverson’s contribution to this volume.
apply in peace time\(^5\) or continue to apply for a certain period after the end of the armed conflict\(^6\) – \textit{jus in bello} has to be considered as the \textit{lex specialis} during times of armed conflict, and thus takes precedence over the realm of rules that (mainly) pertain to \textit{post bellum} situations.\(^7\)

The application of \textit{jus in bello}, or international humanitarian law (IHL), is dependent on the existence of an armed conflict.\(^8\) However, one of the glaring gaps in IHL concerns its very foundation, namely the question of the definition of ‘armed conflict’. IHL does not provide a clear definition to this question for either type of armed conflict, international or non-international.\(^9\) According to Erik Castrén, who was present at the Diplomatic Conference in 1949, a definition was purposely left out for non-international armed conflicts,\(^10\) which has been considered as a “blessing in disguise.”\(^11\) Indeed, a single definition may not encompass all varieties of contemporary armed conflict. On the other hand, a definition appears necessary in order to also ensure an effective extension of humanitarian guarantees in new,

---

\(^7\) On the overlap of various legal regimes prior to, during, and after armed conflicts, see Carsten Stahn, ““Jus ad bellum”, “jus in bello” … “jus post bellum”? – Rethinking the Conception of the Law of Armed Force’ (2007) 17 European Journal of International Law 921. The current contribution does not deal with the question whether \textit{jus post bellum} can be considered to be a branch of (international) law as such, or whether it is made up of components of various branches of international law (on this question, see “Part 1. Foundation and Conceptions of \textit{Jus Post Bellum}” of the present volume). However, even if \textit{jus post bellum} merely consists of components of, e.g., international human rights law, the law specifically created for situations of armed conflict, i.e. IHL, is to be considered the \textit{lex specialis} during such situations of conflict.
\(^8\) Whilst initially, the scope of application of the Geneva Conventions of 1949 and subsequent Additional Protocols of 1977 related only to the application of these treaties, it has become accepted that this scope now governs the application of the whole body of IHL, both of the rest of the treaty rules and customary rules – save of course restrictions based on ratification of concerning treaties. See, inter alia, Article 1 of 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 (Geneva, 10 October 1980), which provides that the Certain Conventional Weapons Convention and its Protocols “apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article 1 of Additional Protocol 1 to these Conventions”; and Articles 18 and 19 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague, 14 May 1954), which deal with the scope of application of the said convention and use language identical to that of Common Articles 2 and 3 of the Geneva Conventions of 1949.
\(^9\) See Pictet (n 1) 32 and 49.
\(^10\) Erik Castrén, \textit{Civil War}, (Suomalainen Tiedeakatemia 1966) 85; see also Pictet (n 1) 49.
contemporary types of armed conflict. Without a clear definition, it is problematic to determine when conflicts start and indeed, when they end.

Ever since IHL became applicable to conflicts that are “not of an international character”, that is with the inclusion of Common Article 3 in the Geneva Conventions of 1949, there has been much debate on what is to be considered a non-international armed conflict (NIAC), and when the threshold of violence has surpassed a situation of mere internal disturbances or riots. The existence of an armed conflict allows States to take more forceful action, such as the use of lethal force against ‘fighters’ and/or against those directly participating in hostilities. On the other hand, courts and tribunals must assess whether in the situations before them, an armed conflict existed, either for jurisdictional matters or to identify the applicable body of law. It is therefore of no surprise that there has been an extensive legal and academic debate, and voluminous case law on what qualifies as an armed conflict, and on when the so-called lower threshold for NIAC has been crossed. The debate has almost solely focused on the start of these armed conflicts, however. In fact, very little has been written on the temporal application of IHL, or indeed, on the end of these armed


13 An independent institute tasked to determine whether the threshold for the application of IHL has been met in particular situations, has been called for (see Sandesh Sivakumaran, ‘How to improve upon the Faulty Regime of Internal Armed Conflicts’ in Antonio Cassese (ed), Realizing Utopia: The Future of International Law (Oxford University Press 2012) 527). The International Committee of the Red Cross (ICRC) has declined to do so in the past (see ICRC, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts Official: Report on the Work of the Conference (ICRC August 1971) paras 195, 212-218). To date, such an institute does not exist and is a long way from ever being founded. If ever there would be such an institute, this would naturally be the body most suited to also determine whether a NIAC has ended.


15 See, for example, the cases at the International Criminal Tribunal for the former Yugoslavia (ICTY) dealing with the question whether war crimes could have been committed in Kosovo and Macedonia, i.e. whether there was a non-international armed conflict at the time of the alleged crimes (e.g. ICTY, Prosecutor v. Fatmir Limaj et al., Case No. IT-03-66-T, Judgement (Trial Chamber), 30 November 2005 (“Limaj Trial Judgement”); ICTY, Prosecutor v. Ramush Haradinaj et al., Case No. IT-04-84-T, Judgement (Trial Chamber), 3 April 2008; and ICTY, Prosecutor v. Ljube Boškoski and Johan Tarčulovski, Judgement (Trial Chamber), Case No. IT-04-82-T, 10 July 2008 (“Boškoski Trial Judgement”). The first case at the International Criminal Court (ICC) addressed the classification of the armed conflict in the Ituri District in eastern Democratic Republic of Congo (ICC, Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, 14 March 2012 (“Lubanga Trial Judgement”). The Inter-American Commission on Human Rights addressed whether a one-day attack on military barracks in Argentina qualified as a non-international armed conflict in the La Tablada case (Inter-AmCHR, Juan Carlos Abella v. Argentina, Case 11.137, Report Nº 55/97, OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997)).
conflicts. When a committee of the International Law Association (ILA) addressed the definition of NIAC in the 2010 Final Report on the Meaning of Armed Conflict in International Law, it did not make any findings on the matter, but it found the end of the temporal scope of application to be a “complicated issue … in need of thorough research.” This chapter is not the thorough research envisaged in this report, but will make a proposal on how to approach the issue of determining the end of NIACs.

To that end, the following two questions will be dealt with: when do armed conflicts end? And when does the application of jus in bello cease? This will be done specifically with a focus on NIACs. Considered first is whether the treaty law provides any guidance as to the end of the application of IHL with respect to NIACs, and whether it is possible to apply the concerning framework for international armed conflict (IAC) to NIAC. Examined next is whether the threshold criteria for the start of a NIAC can be applied to determine the end of such conflicts. The consequences and challenges of such an approach will then be discussed, followed by some concluding remarks.

16.2 Is there guidance to be found in (case) law?

Common Article 3 applies to “case[s] of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties”, but does not refer to any end of the said application; nor, indeed, does it give any guidance as to when these armed conflicts not of an international character may end. Similarly,

---

16 The academic literature in English specifically on this topic consists of only a working paper by Derek Jinks (The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts (HPCR Background Paper 2003)). When addressing the “meaning” of non-international armed conflict, Christine Gray touches upon the issue for two paragraphs, but does not provide a conclusive answer (Christine Gray, ‘The Meaning of Armed Conflict: Non-International Armed Conflict’ in Mary Ellen O’Connell (ed), What is War? An Investigation in the Wake of 9/11 (Martinus Nijhoff Publishers 2012), 88. Even monographs on the law of non-international armed conflicts address the issue of temporal application only very briefly, in passing, or not at all (see respectively, e.g., Sandesh Sivakumaran, The Law of Non-International Armed Conflict (Oxford University Press 2012) 252-4; Anthony Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law (Cambridge University Press 2010) 142-146; and Lindsay Moir, The Law of Internal Armed Conflict (Cambridge University Press 2002).


18 The clarification given by the Tadić Appeals Chamber that “[t]he fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities … indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theatre of combat operations”, refers more to the geographical scope
Additional Protocol II refers to “the end of the conflict”, but does not clarify when this may be. And whilst it refers to “the end of hostilities” in relation to the granting of amnesty for the participation in the armed conflict, this only reflects that “when hostilities have ceased, passions die down and there is a possibility of amnesty.” The ICRC Commentary to Additional Protocol II mentions that as the Protocol’s text does not contain any indication as regards the end of its applicability, “Logically this means that the rules relating to armed confrontation are no longer applicable after the end of hostilities”, whilst the fundamental guarantees granted to persons deprived of their liberty “remain valid at all times and without any restriction in time, until the deprivation or restriction of the liberty of those concerned has come to an end.” However, it is uncertain whether this is a reference to the cessation of active hostilities, usually achieved by a ceasefire agreement, or whether it relates to the general close of hostilities, which would not occur until a peace agreement is reached.

In its seminal decision on jurisdiction in Tadić, the Appeals Chamber of the ICTY held

that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities …, in the case of internal conflicts, [until] a peaceful settlement is achieved.

As mentioned above, the literature does not really tackle the issue of the temporal scope of NIAC. This reference to a peaceful settlement being reached is thus the only
‘substantive’ authoritative statement on the issue. Even so, it is not very specific, of course. Furthermore, it is submitted here that “a peaceful settlement” is too strict a standard for a NIAC to be considered as ended, and that this standard is not supported by the IHL.

As opposed to NIACs, for IACs, there is some guidance as to their end. A distinction has to be drawn between declared wars, which are in themselves IACs (“war in the technical sense”),25 and the factual concept of international armed conflict. Declared wars can only be ended by a peace treaty or another “clear indication on the part of the belligerents that they regard the state of war as ended,”26 such as an armistice agreement.27 Greenwood observes with regard to IACs, that “[i]t is not clear whether a formal instrument is needed to terminate an armed conflict which does not amount to war in the formal sense.”28 As ‘armed conflict’ is not a technical, legal concept, but is instead, recognition of the fact that hostilities are taking place, the cessation of active hostilities should therefore be enough to terminate the situation of armed conflict.29 The Geneva Conventions of 1949 give a specific end of their application,30 which is summed up in Article 3 of the 1977 Additional Protocol I to these conventions:

Without prejudice to the provisions which are applicable at all times … the application of the Conventions and of this Protocol shall cease, in the territory of Parties to the conflict, on the general close of military operations and, in the case of occupied territories, on the termination of the occupation, except, in either circumstance, for those persons whose final release, repatriation or re-

---

25 A war can exist in the technical sense when a declaration of war is made without being followed by active hostilities. Such was the case in the Second World War when a number of Latin American States declared war on Germany (see, e.g., Julius Stone, Legal Controls of International Conflict (Rinehart 1954) 306). IHL applies to this kind of situation, including where hostilities do not take place. See Yoram Dinstein, ‘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 On the Occasion of His Eightieth Birthday, (International Law Studies Volume 75, Naval War College 2000), 131-3; and Christopher Greenwood, ‘Scope of Application of Humanitarian Law’, in Dieter Fleck (ed), The Handbook of International Humanitarian Law (2nd Edition, Oxford University Press 2008) 47. See for a contrary view, the ILA Meaning of Armed Conflict Report that contends that nowadays declarations of war do not start armed conflicts or the application of IHL (ILA Meaning of Armed Conflict Report (n 17) 28-32).
26 Greenwood (n 25) 62.
27 Dinstein (n 25) 134-150.
28 Greenwood (n 25) 62.
29 ibid.
30 Article 5 of Geneva Convention I, Article 5 of Geneva Convention III, and Article 6 of Geneva Convention IV.
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.

However, besides the fact that the application of IHL does not end at the same time for all parts of the law, the vague terminology used, namely “general close of military operations”, makes it difficult to define the end of the application of the bulk of IHL for IACs. Indeed, this concept, which codifies customary international law, identifies the end of the application of IHL as the moment that a general and definitive armistice is concluded; or in the absence of such an agreement, when implied mutual consent about the suspension of hostilities is reached, when there is general capitulation by a belligerent, or when the enemy is completely defeated (debellatio) takes place. Ultimately, the main criterion is effectiveness: “[a]n effective and final cessation of hostilities, whether set out in writing or merely de facto,” brings about the end of the applicability of IHL.

The final cessation of hostilities is also hard to define, however. With regard to the Iraq conflict, for example, American president Bush announced that the major combat operations had ended, but in reality, the armed conflict (and the application of IHL) was far from over. Additionally, the application of IHL ends in a situation of occupation, when the occupation ends, which did not happen in Iraq until June 2004, some thirteen months after the said declaration made by Bush.

33 See Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (Hart Publishing 2008), 102; see further Dinstein (n 25) 134-150; and McCoubrey (n 31) 64.
34 Kolb and Hyde (n 33) 102; see for a similar view, McCoubrey (n 31) 66, who holds that “the primary criterion [for the termination of the application of IHL] will be the end of hostilities, but in many other cases the criterion will simply be the end of the situation calling for humanitarian protection to which a treaty [or] provision refers.”
36 Although Article 6(3) of Geneva Convention IV limits the application of the convention to “one year after the general close of military operations,” Additional Protocol I extended the application of IHL to the entire occupation: based on its Article (b), the application of both the Geneva Conventions of 1949 and the Protocol, in case of occupied territories, ceases only with “the termination of the occupation”. The latter is in line with the scope of application of the Hague Regulations and given that almost all substantive rules of occupation law are now considered to be part of customary IHL, the limitation of Article 6(3) of Geneva Convention IV is said to be largely obsolete (Kolb and Hyde (n 33) 103-4).
The question then arises whether it would be possible to apply this IAC framework *mutatis mutandis* to determine the end of a NIAC. Unfortunately, the matter is not that straightforward. First of all, the test whether there is an international armed conflict depends on the factual situation, and not on political statements. Consider the conflict between the Singhalese government of Sri Lanka and the Tamil Tigers (LTTE): a peace agreement was signed between the warring parties in 2002, but the fighting did not cease. It was not until the full-scale military defeat in May 2009 of the LTTE by the government forces, that the armed conflict actually ended. Such a non-international version of *debellatio* is rare, however. For example, in Sierra Leone, two agreements were signed before the Revolutionary United Front was finally defeated and dissolved. It happens that NIACs just taper until they have withered away until no warring parties exist anymore. Often, however, like with the Shining Path in Peru, armed groups continue to exist, but on a smaller scale, thereby forming less of a threat. It is also possible that that only one armed group, or only part of an armed group, becomes a party to the agreement, as was the case with the *Interahamwe* in Rwanda or the *Forces Nationales de Libération* in Burundi.

Secondly, the need for an “effective and final cessation of hostilities” for IACs comports with fact that an IAC starts with the first hostile act (involving two States), which initiates the protection given by IHL, namely when the first (protected) person is affected by an attack. However, the threshold for the existence of a NIAC is

---

37 Only in case of a declaration of war is a political statement (and the subsequent actions required under the concerning national law for such a declaration to take effect) obviously relevant.

38 Even though the organisational level of the LTTE and their control over a substantial part of the Sri Lankan territory was such that the requirements of Additional Protocol II clearly were met, this was a Common Article 3 conflict only, as Sri Lanka has never ratified Additional Protocol II.

39 Since a NIAC involves at least one non-state actor, naturally, a peace treaty is not an option.


41 The Lomé Cease Fire Agreement was followed by the Lomé Peace Agreement, but neither ended the conflict. For a chronology on the Sierra Leone conflict, see the following report: Africa Confidential, *Chronology of Sierra Leone: How diamonds fuelled the conflict* (April 1998).


43 See, inter alia, Pictet (n 1) 32; Sassoli and Bouvier (n 32) 116; Kolb and Hyde (n 33) 101; ICRC, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* (Opinion Paper 2008) 5; Hans-Peter Gasser, ‘International Humanitarian Law: an Introduction’, separate print from *Humanity for All: the International Red Cross and Red Crescent Movement* (Henri Dunant Institute 1993) 24; Éric David, *Principes de droit des conflits armes* (Bruylant 2008) 122. In recent years and as a result of the Global War on Terror, some authors have argued that a certain lower threshold of violence also exists for IAC and that mere incidents, or an isolated confrontation, do not qualify as an IAC (see, e.g.
significantly higher and not all violence reaches this threshold. Similarly, at the end of a NIAC, a certain amount of violence should be considered to be below the armed conflict level.

16.3 Using the lower threshold criteria

Given the lack of information on the end of NIACs, guidance will now be sought about what the relevant sources have said about the start of NIACs. If a NIAC only starts when organised groups are engaged in fighting of a certain intensity, then logically, the armed conflict ends when these two criteria are no longer present.44

The threshold for so-called ‘Additional Protocol II conflicts’ is higher than that for what can be referred to as ‘Common Article 3 conflicts’. Whilst it is generally accepted that the non-application of IHL “to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature”,45 applies for both Common Article 3 and for Additional Protocol II, the requirements that at least one of the parties is the State and that the armed group that is engaged in fighting with the government must control part of the territory of this State, are specific to Additional Protocol II. Besides the obvious requirement that the concerning State is a party to Additional Protocol II, it is not necessary, for the purposes of this paper, to look into the end of ‘Additional Protocol II conflicts’ specifically, as all Additional Protocol II conflicts are also governed by Common Article 3. Furthermore, whereas the toppling of the government in an ‘Additional Protocol II conflict’ arguably does not lead to the end of the application of Additional Protocol II conflicts’ specifically, as all Additional Protocol II conflicts are also governed by Common Article 3. Furthermore, whereas the toppling of the government in an ‘Additional Protocol II conflict’ arguably does not lead to the end of the application of Additional


44 See for a similar conclusion: ILA Meaning of Armed Conflict Report (n 17) 30. In his think-piece on the temporal application of IHL, Derek Jinks asks the question: “does the applicability of international humanitarian law terminate once the intensity of the fighting passes back below the critical threshold? Or, does it apply until the ‘general close of hostilities’ or the ‘cessation of active hostilities’?” (Jinks (n 16) 7-8). An accused before the ICTY proposed that an intensity and organisation threshold should apply to the case against him, but the Trial Chamber held that the concerning situation qualified as an international armed conflict, and thus did not consider the proposed determination. See the submission by the Markač Defence in: ICTY, Prosecutor v. Ante Gotovina et al., Case No. IT-06-90-T, Defendant Mladen Markač’s Final Trial Brief, 16 July 2010 (redacted version filed on 23 May 2011), paras 31-32, 37, 51; and the Trial Chamber’s rejection of these submissions in: ICTY, Prosecutor v. Ante Gotovina et al., Case No. IT-06-90-T, Judgement (Trial Chamber), 15 April 2011 (“Gotovina Trial Judgement”), para. 1694.

Protocol II, the loss of territorial control by the armed group would. If in such a situation, the criteria of organisation and intensity are still met, a NIAC still exists, in the form of a Common Article 3 conflict.

The ICRC Commentary to the Geneva Conventions lists “convenient criteria” to guide the application of Common Article 3 in practice. However, these have the potential to mislead the application in practice of Common Article 3, given that the criteria were only a compilation of the suggestions made by the delegates at the Diplomatic Conference, which were all rejected. Similarly, the ICTY in Limaj rejected the convenient criteria as being too stringent with regard to the organisational requirement, when it considered whether or not the Kosovo Liberation Army fulfilled the said requirement.

16.3.1 From Tadić to Boškoski

It was this same Tribunal that came up with what today is seen as the definition for ‘armed conflict’. The definition given by the ICTY’s Appeals Chamber in Tadić has

---

46 Compare Sandoz (n 20) 1352.
47 The “convenient criteria” listed are:

1. That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
2. That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and in possession of a part of the national territory.
3. (a) That the de jure Government has recognized the insurgents as belligerents; or
   (b) That it has claimed for itself the rights of a belligerent; or
   (c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
   (d) That the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression.
4. (a) That the insurgents have an organization purporting to have the characteristics of a State.
   (b) That the insurgent civil authority exercises de facto authority over persons within a determinate portion of the national territory.
   (c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.
   (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

Pictet (n 1) 49-50.
48 Sivakumaran (n 13) 526.
49 ICTY, Prosecutor v. Fatmir Limaj et al., Case No. IT-03-66-T, Judgement (Trial Chamber), 30 November 2005 (“Limaj Trial Judgement”), para. 89.
been widely accepted as reflecting custom,\textsuperscript{50} or at least has become custom by now, due to its general acceptance.\textsuperscript{51} When applying the part of the definition relating to NIAC, the Tadić Trial Chamber and the Akayesu Trial Chamber at the ICTR both interpreted the definition as consisting of the following two criteria in order to distinguish a situation of armed conflict from “banditry, unorganized ad short-lived insurrections, or terrorist activities”: namely the intensity of the conflict and the organisation of the parties to the armed conflict.\textsuperscript{52} This approach has been followed subsequently by other chambers at both the ICTY and at the ICTR. The Tribunals in these later judgements concluded that “protracted” refers more to the “intensity” of the violence than to its duration.\textsuperscript{53} This approach is in line with the Inter-American Commission on Human Right’s view in the La Tablada case, when it considered that a 30 hour battle constituted a Common Article 3 conflict.\textsuperscript{54}

In Limaj, the ICTY found that the convenient criteria mentioned in the ICRC Commentary to the Geneva Conventions were not intended by the drafters to be explicit requirements, and therefore proceeded to assess the existence of a NIAC by reference to objective indicative factors of intensity of the fighting and the organisation of the armed group(s), depending on the factors of each case.\textsuperscript{55}

In Haradinaj, the Trial Chamber conducted an elaborate review of the Tribunal’s case law on this matter and listed all the indicative factors that the various chambers had used thus far.\textsuperscript{56} In Boškoski, the Trial Chamber refined it further by giving a similarly detailed overview, but this time, also looked beyond what was earlier stated by the ad hoc tribunals and included case law of other institutions, as

\textsuperscript{51} Compare Cullen (n 16) 137.
\textsuperscript{52} ICTY, Prosecutor v. Dusko Tadić, Case No. IT-94-1-AR72, Judgment (Trial Chamber), 2 October 1995, para. 562; ICTR, Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-T, Judgement (Trial Chamber), 2 September 1998, para. 620.
\textsuperscript{53} See e.g., ICTY, Prosecutor v. Zejnil Delalić et al., Case No. IT-96-21-T, Judgement (Trial Chamber), 16 November 1998 (“Delalić Trial Judgement”), para 184; ICTY, Prosecutor v. Dario Kordić and Mario Cerkez, Case No. IT-95-14/2-A, Judgement (Appeals Chamber), 17 December 2004, para. 341; Limaj Trial Judgement, para. 84, ICTY, Prosecutor v. Ramush Haradinaj et al., Case No. IT-04-84-T, Judgement (Trial Chamber), 3 April 2008 (“Haradinaj First Trial Judgement”), para 38; ICTR, Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T, Judgement (Trial Chamber), para. 248-251.
\textsuperscript{55} Limaj Trial Judgement, para. 86; ICTY, Prosecutor v. Ljube Boškoski and Johan Tarčulovski, Judgement (Trial Chamber), Case No. IT-04-82-T, 10 July 2008 (“Boškoski Trial Judgement”), para. 176.
\textsuperscript{56} Haradinaj First Trial Judgement, paras 39-60.
well as a review of the relevant literature.\textsuperscript{57} This approach by the Boškoski Trial Chamber was confirmed by the Appeals Chamber.\textsuperscript{58} Although the Appeals Chamber was not called upon to discuss the matter, the bench raised the issue of the lower threshold during the Appeals Hearing, showing a clear interest in getting an Appeals Chamber ruling on this matter that, until that moment, had only been dealt with at the trial level.\textsuperscript{59}

So in Boškoski, the ICTY gave a detailed overview of what constitutes the lower threshold of NIAC, and reviewed how the relevant elements of Common Article 3 recognised in Tadić (‘organisation of the armed group’ and ‘intensity’), are to be understood. In doing so, it identified the “factors” to be taken into account when assessing these elements, and identified a number of “indicators” thereof. These factors, as identified by the ICTY, have since been adopted by the ICC Trial Chamber in Lubanga, in the first ICC judgment.\textsuperscript{60} The next sections will further discuss the organisational and intensity criteria and set out the factors and indicators for these criteria as they were identified by the Boškoski Trial Chamber.

\subsection*{16.3.2 Organisation}

The organisational requirement relates only to armed groups. If one side to the conflict is the government, it can be assumed that the government is sufficiently organised to fulfil the threshold. Whilst there are armed groups that are better organised than the government of certain states, the ‘organisational criterion’ should nonetheless focus only on the organisation of the armed groups opposing the government or each other.

For the organisational criterion, in Boškoski the following five factors with various indicators were identified:

1) The existence of a command structure;

\begin{itemize}
\item \textsuperscript{57} Boškoski Trial Judgement, paras 175-206.
\item \textsuperscript{58} ICTY, Prosecutor v. Ljube Boškoski and Johan Tarčulovski, Judgement (Appeals Chamber), Case No. IT-04-82-A, 19 May 2010, paras 19-24.
\item \textsuperscript{59} See Boškoski Transcript Appeals Hearing, AT. 40, 63-64 and 94; Boškoski Appeals Judgement, para. 19.
\item \textsuperscript{60} Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, 14 March 2012 (“Lubanga Trial Judgement”), paras 537-538.
\end{itemize}
Indicators: e.g., the existence of headquarters; a general staff or high command; internal regulations; the issuing of political statements or communiqués; spokespersons; identifiable ranks and positions.

2) The existence of military (operational) capacity;
   Indicators: e.g., the ability to define a unified military strategy; to use military tactics; to carry out (large scale or coordinated) military operations; the control of certain territory, and territorial division into zones of responsibility;

3) The existence of logistical capacity;
   Indicators: e.g., the existence of supply chains (to gain access to weapons and other military equipment); ability for troop movement; ability to recruit and train personnel;

4) The existence of an internal disciplinary system and the ability to implement IHL;
   Indicators: e.g., the existence of disciplinary rules or mechanisms within the group; training;

5) The ability of the group to speak with one voice;
   Indicators: the capacity to act on behalf of its members in political negotiations; the capacity to conclude cease fire agreements.\textsuperscript{61}

16.3.3 Intensity

The factors for the ‘intensity criterion’ refers both to the way that organs of the State, such as the police and military, use force against armed groups, and to the way that armed groups use force against the government (forces) or each other. Whereas both (or all) parties to a NIAC need to be sufficiently organised, the intensity requirement could be fulfilled by the force used by one side only. As with all types of armed conflicts, both international and non-international, it is possible that one side is unable or unwilling to respond to the attacks carried out against it by another party. IHL would nevertheless apply to such situations.

\textsuperscript{61} Boškoski Trial Judgement, paras 194-203.
The factors of the use of such force can be grouped in six categories that all have qualitative and quantitative indicators:

1) The use of armed forces;
   Indicators: e.g., quantity of troops involved; the increase in the number and type (army, air force, navy) of government forces, and need for mobilisation);

2) The attacks;
   Indicators: e.g., the seriousness of attacks and whether there has been an increase in armed clashes; the spread of clashes over territory and over a period of time; damage and casualties suffered by the fighting parties;

3) The type of actions;
   Indicators: e.g., the extent to which towns are besieged or supply routes are blocked; the closure of roads;

4) The type of weapons, ammunition, and other military equipment used by the parties
   Indicators: e.g., use of heavy weapons, such as tanks and other heavy vehicles);

5) Effects on the civilian population;
   Indicators: e.g., number of casualties; number of civilians forced to flee from the combat zones; extend of destruction);

6) Involvement of the United Nations (UN) Security Council and other external actors;
   Indicators: e.g., whether resolutions have been passed on the situation; and whether other external actors.62

16.3.4 Use of the factors outside the context of the former Yugoslavia

The case law identifying the factors described hitherto, all concerned (breakaway) States in the former Yugoslavia. One can wonder then whether the indicators can also

62 ibid, paras 177-178.
be put into a broader perspective, or whether they are only relevant for the identification of NIACs in the Balkans.

The ICTY cases where the existence of a NIAC was an issue, dealt mainly with the fighting in Kosovo and Macedonia. The Boškoski Trial Chamber did, however, assess arguments relied on by other courts in relation to, for example, Peru, Somalia, and Chechnya. Nevertheless, some of the indicators were relevant to the fighting in the former Yugoslavia, such as the type of weaponry, but would not necessarily work for some of the conflicts in central Africa, for example, where only limited heavy weaponry is used, due to a lack thereof, or due to the nature of the terrain. The fact that no use would be made of tanks or the air force, cannot then serve as an indicator in such circumstances. Also, the involvement of the UN Security Council, or lack thereof, naturally cannot be considered an indicator when one of the parties to the conflict is a permanent Council member.

Be that as it may, since the indicators are not determinative, but merely serve indeed to indicate, they can also be applied to many other situations. Using the factors and indicators as put forward by the ICTY, it is clear that the current situation in Syria qualifies as an NIAC – although at that time Kofi Annan, for example, still continued to express his fear that the situation might “descend into a civil war.” Importantly also, as mentioned above, the Lubanga Trial Chamber recently relied on the Boškoski indicators when determining that a NIAC had taken place in Ituri (DRC) during the period of the charges.

---

63 ibid, paras 181, 196 and 180.
64 The involvement of the UN Security Council should in any case be considered by taking into account the political nature of the Council and the fact that for political or economic reasons the Council might ignore a situation in certain countries, whilst for the same reasons it might be overly interested (and thus involved) in the situation in other countries. Council statements on the possible end of a conflict might similarly result from this.
67 Lubanga Trial Judgment, paras 537-538. The Judgment refers only to a number of the factors. For organisation, it considered these factors as “potentially relevant”.
16.4 Relevance of the factors and indicators for determining the end of a NIAC

The discussion now turns to the relevance of these indicators for identifying the end of a NIAC. As mentioned above, it appears that when the criteria of “intensity” and “organisation” no longer exist, the armed conflict comes to an end. Using the factors and indicators identified earlier, can thus be a useful method to assess the end of the conflict. However, a number of the indicators cannot easily be applied ‘in reverse’, such as the indicator of UN Security Council attention to the situation. Examining the damage caused, might also be more difficult, as it is hard to assess whether there is less damage if few buildings are left standing or if few potential targets remain. The lack of such damage may well be due to these circumstances, rather than as a result of the end of the conflict. As said above, an indicator only serves to ‘indicate’ the existence of an NIAC, and has to be seen in relation to other indicators: if few military objects remain and a prolonged period occurs during which no targets are attacked, this may well be a sign that the conflict has ended.

Furthermore, other indicators need to be adapted. For the indicator of refugee flows from combat zones, for example, one could, rather than the number of civilians fleeing an area, look instead at the number of civilians returning home, i.e. considering their place of residence safe enough to return to. Again, that is not to say that a conflict could never be considered as ended if refugees and or internally displaced persons (IDPs) do not return to their homes as this may be caused by other factors, such as, a changed ethnic composition of the area concerned, lack of

[T]he force or group’s internal hierarchy; the command structure and rules; the extent to which military equipment, including firearms, are available; the force or group’s ability to plan military operations and put them into effect; and the extent, seriousness, and intensity of any military involvement. (Lubanga Trial Judgment, para. 537)

For intensity, the Trial Chamber considered that it should take into account:

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 Security Council, and, if so, whether any resolutions on the matter have been passed. (Lubanga Trial Judgment, para. 538)

68 A drop in the number of strikes carried out, or in the case of an air campaign, the number of sorties flown, could be the result of a decreasing number of military objects that can be legitimately targeted, rather than the result of a diminishing intensity.

corporation by the government and/or measures implemented by the victorious party.\textsuperscript{71} Likewise, instead of looking at the weapons used, an indicator could be the effectiveness of a disarmament programme: the type and amount of weapons handed in vis-à-vis the number of initial fighters or the approximate type and number of weapons initially used.\textsuperscript{72} Similarly, when reservists have been called under arms, their returning home could be used as an indicator that the armed conflict has come to an end.

Whereas the focus appears to be mostly on the intensity requirement when peace agreements, as advocated by the ICTY in \textit{Tadić}, are viewed to be the end of NIACs, the present author considers that between the two criteria, organisation and intensity, the former should be the most relevant for the assessment. The decline in organisation of one or more of the parties to the conflict can result in a security vacuum when the controlling regime, the state, or the rebel force, gives way and the resulting (state) apparatus is not (yet) able to provide for effective security.\textsuperscript{73} Especially then, \textit{jus post bellum} would have an important role to play. It is also the organisational structure of an armed group that is mainly targeted by the opposing party. Whilst targeting the leadership was relatively uncommon in IACs,\textsuperscript{74} it has long been the main goal in NIACs, and appears also the most effective way to bring about the end of the conflict, as was evidenced by the killing of LTTE leader Prabhakaran in 2009, the effects of the air strikes by the Colombian government on the commanders of the Revolutionary Armed Forces of Colombia (FARC), and the (drone) attacks by

\textsuperscript{70} The Balkan conflict serves as an example here. Policies of ethnic cleansing as part of which houses of members of a particular ethnicity were deliberately destructed and persons were forcibly displaced or deported resulted in permanent changes in the ethnic composition of many villages and areas in the former Yugoslavia.
\textsuperscript{71} Croatia, for example, was specifically warned that it was to allow for the return of the Serbian population of the areas that were (re)taken during Operation Storm and Flash (see Security Council Resolution 1009, S/RES/1009 of 10 August 1995). See further on this issue: Karen Hulme, ‘Armed Conflict and the Displaced’, (2005) 17 International Journal of Refugee Law 100. See also, in relation to the Sri Lankan governments problematic policies preventing Tamil IDPs to return home: International Crisis Group, Sri Lanka: Post-War Progress Report (12 September 2011).
\textsuperscript{72} See on disarmament as part of peace building, e.g., Sami Faltas \textit{et al.}, Removing Small Arms from Society: A Review of Weapons Collection and Destruction Programmes (Small Arms Survey, July 2001).
\textsuperscript{73} See on such security problems: Jennifer Hazen (n 42) 157.
\textsuperscript{74} From the US strikes on Libya in 1986 (Operation El Dorado Canyon), which included bombing Muammar Ghaddafi’s residence, onwards, this policy appears to have changed. Attacks on Slobodan Milosević’s residence in 1999 (as part of Operation Allied Force), and on Saddam Hussein’s palace in 2003, are further examples that the previous policy not to target the leadership of the enemy State has now changed. See, inter alia, Catherine Lotrointe, “Targeting Regime Leaders During Armed Hostilities: An Effective Way to Achieve Regime Change?”, in Howard M. Hensel (ed), \textit{The Law of Armed Conflict: Constraints on the Contemporary Use of Military Force} (Ashgate 2007) 21-38.
United States (US) on the Al-Qaeda leadership. Furthermore, intensity or ‘protractededness’ is hard to pinpoint on a specific moment, because a time element – despite claims to the contrary – is still inherent in it. Moreover, small break away fractions of an armed group could continue to carry out attacks, or sectarian violence could continue – or perhaps more likely follow as a result of – the disappearance of the organisational structure of one or more of the fighting parties. Examples include the sectarian violence in Iraq following the US/British occupation and the situation in Libya in the period after the defeat of the Gaddafi regime and forming of the new government by the rebels.

The author’s submission that NIACs end when the level of violence and organisation drops below a certain lower threshold, has consequences for the application of IHL and consequently for the protection afforded by IHL. In *Gotovina*, the ICTY held – albeit with regard to IAC – that

> [o]nce the law of armed conflict has become applicable, one should not lightly conclude that its applicability ceases. Otherwise, the participants in an armed conflict may find themselves in a revolving door between applicability and non-applicability, leading to a considerable degree of legal uncertainty and confusion.\(^76\)

This is a very rational finding and when considering the proposed lower threshold with regard to the end of a NIAC, it makes sense that this end-threshold would probably have to be set at a lower level than the threshold that would bring about the start of the conflict. In reality, however, having a threshold for the end of NIAC should not create a gap in protection, nor create the uncertainty envisaged by the *Gotovina* Trial Chamber. Applying the lower threshold to the end of a NIAC actually allows for a smoother transition between the law governing the use of force during armed conflict (conduct of hostilities paradigm) and the law governing force outside situations of armed conflict (law enforcement paradigm). In the discussions leading up to the ICRC’s Interpretive Guidance on Direct Participation in Hostilities,\(^77\) it was already considered that a human rights form of proportionality should govern the

\(^75\) It should be noted that already during the occupation, sectarian violence had erupted.


‘taking out of the game’ of members of armed groups who find themselves away from the combat zone. The guidance submits that in certain situations, the party controlling the concerning territory should aim to ‘capture rather than kill’ members of the opposing party. The example given is that of a military commander of an organised armed group, such as the FARC in Colombia, who visits relatives inside government-controlled territory, for example, to attend a sibling’s birthday party in Bogota. According to the ICRC, and some of the experts, in such a situation, the Colombian government forces should first attempt to arrest the FARC commander, rather than to consider him a target as this would allow for incidental damage to civilians or to civilian objects. As such, it proposes to apply a law enforcement paradigm to such situations.

In light of the matter addressed in the chapter, it makes sense to slowly move towards a law enforcement approach in the end stages of a NIAC. When the intensity of the fighting has decreased, and/or organisational structure of concerning groups has broken down, to such an extent that it would be near or at the lower threshold, it appears that there will not be any “direct participating in hostilities” in the traditional sense. The persons belonging to a (partly or fully broken down) group, are likely to find themselves in a situation as described above, namely where the opposing party control the territory that they find themselves in. The said opposing party should then apply the human rights or law enforcement approach when taking action against these persons. If it is unclear whether or not a situation of armed conflict continues to exist, the attacking party should err on the safe side and apply the least amount of force necessary. This would also make sense from a moral and practical point of view: if the conflict is ending, why would one want to continue killing the opponents, rather than starting to think about process that would bring a lasting peace after the conflict. In addition, when the conflict is ending, it will be easier to bring the persons to justice

78 The commander does not cease to be a target as such.
79 Melzer (n 73) 81.
80 The proposal made in Chapter IX of the Interpretive Guidance is in line with the ruling of the Israeli High Court of Justice, which determined that “a civilian taking a direct part in hostilities cannot be attacked at such time as he is doing so, if a less harmful means can be employed” (Israel High Court of Justice, The Public Committee Against Torture et al. v. The Government of Israel et al., HC J 769/02, Judgment of 13 December 2006, para. 40. However, Chapter IX of the Interpretive Guidance has received fierce criticism (see, for example, Jann K Kleffner, ‘Section IX of the ICRC Interpretive Guidance on Direct Participation in Hostilities: The End of Jus in Bello Proportionality as We Know It?’ (2012) 45 Israel Law Review 35; and W. Hays Parks, ‘Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect’, (2010) 42 New York University Journal of International Law and Politics 769.
that have committed crimes, because the regular rule of law can start to apply again after the conflict. 81 Such taking into account of post conflict considerations would be an example of the – arguable – application of certain jus post bellum principles during armed conflicts; especially, during the end stages of armed conflicts.

The breakdown of an organisational structure of an armed group (which will, amongst other things, be indicated by the inability to carry out military operations) should result in the cessation of the “continuous combat function” of members of that group, thereby limiting the right to target the concerning persons. For those advocating for the so-called “membership approach”, 82 such an approach should not be problematic either. An even further breakdown of the organisational structure should result in the concerning persons ceasing to be ‘members’ at all. After all, there needs to be a group or organisation in order for someone to be a member of it.

16.5 Challenges in applying the threshold criteria

The fight of US against Al-Qaida highlights one of the problems in applying the threshold criteria to determine the end of NIACs. If this is a NIAC, 83 when would this NIAC then end and how can this end be determined? 84 It would be challenging to

81 Notwithstanding the problems associated with setting up rule of law in post-conflict societies.
83 It is open to debate whether this situation can be considered to be a conflict at all (see, e.g., Noam Lubell, Extraterritorial Use of Force against Non-State Actors (Oxford University Press 2010) 96); or whether it should be qualified as an IAC rather than a NIAC (see, e.g., Rogier Bartels, ‘Transnational armed conflict: does it exist?’ in Stéphane Kolanowski (ed), Proceedings of the Bruges Colloquium ‘Scope of Application of International Humanitarian Law’ (College of Europe/ICRC 2013); and Dapo Akande, ‘Classification of Armed Conflicts: Relevant Legal Concepts’ in Elizabeth Wilmhurst (ed), International Law and the Classification of Conflicts (Oxford University Press 2012) 70-8); the view of the US Supreme Court is that this situation constitutes a NIAC, when it ruled in ruled that Common Article 3 was applicable to the fight against Al-Qaida (United States Supreme Court, Hamdan v. Rumsfeld, 548 U.S. 557 (2006), 66-69). Whereas this does not (have to) mean that the conflict is necessarily non-international in character and could merely reflect that Common Article 3 as a minimum applies to all armed conflicts (International Court of Justice, Nicaragua v. United States of America, Judgment, ICJ Reports 1986, para. 187), the US government has taken the view that it is a NIAC (see Marko Milanovic, Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy (Oxford University Press 2011) 377-380).
84 Naturally, the initial ‘declaration’ by Bush on terrorism, resulting in the ‘Global War on Terror’, did not bring about a classical state of war, and did not result in the automatic application of IHL pursuant to Common Article 2 of the Geneva Conventions. It therefore does not need to be concluded by a peace treaty. Whilst the term ‘Global War on Terror’ might not be used anymore by the Obama administration, the new version (‘Overseas Contingency Operations’) still involves the use of armed force against (suspected) Al-Qaida operatives in various countries (other than Afghanistan). If there is
apply the threshold criteria to this situation. Generally, for asymmetric constellations that elude both temporal and spatial boundaries – in other words, challenge the traditional concept of the ‘battlefield’ – it would be rather difficult to delineate or determine with any degree of precision the end of the conflict.\(^85\) The US government itself has held that it “is fighting a war against terrorists of global reach [that][…] will be fought on many fronts against a particularly elusive enemy over an extended period of time.”\(^86\)

According to the ICTY’s case law, IHL applies “to situations of protracted armed violence where hostilities are not necessarily to be characterised as continuous.”\(^87\) The Tribunal’s view of the term ‘protracted’ in relation to NIACs “implies that hostilities need not require, unlike Additional Protocol II, the use of ‘sustained and concerted’ military operations” and that “interruptions in fighting do not suspend” the application of IHL, nor does there “have to be actual combat activities in a particular location for the norms of [IHL] to be applicable”.\(^88\) However, the relevant case law relates to very different situation and not to fighting done in multiple States and even continents.

The indicators for the intensity criterion are thus difficult to apply indeed. Questions come up, such as: Where should the indicators be applied? To certain States or rather to particular geographical areas? And, could the lack of fulfilment of indicators in one State point to possible end of the conflict, whilst at the same time in another State the indicators might be fulfilled?

It is not just the fight with Al-Qaida that poses challenges, however. With a few exceptions, most contemporary NIACs cannot be assessed in isolation. Conflicts such as the one in 2006 between either Israel or Lebanon, or the fighting between the Turkish armed forces and the Kurdish Working Party (PKK) in southern Turkey, as well as in northern Iraq, are not easily qualified as being international or non-international. As such, these situations are subject to debate about the applicable legal framework. Also worth mentioning is the situation in the Great Lake Region, where


\(^87\) Cullen (n 16) 142

\(^88\) ibid; and Delalić Trial Judgement, para 185.
the Lord’s Resistance Army, for example, moves between the territories of multiple States. Similarly difficult is the situation in the Kivus or in Ituri in the Democratic Republic of Congo, where a multitude of groups (which are to various degrees backed by States), in shifting alliances, is engaged in periods of at times intense, but often sporadic and unorganised, fighting. For this/these type of conflict(s), it might be useful to develop a *jus post bellum* approach that distinguishes between geographical areas: those where hostilities are no longer taking place and those where the hostilities are still ongoing.

In these situations, it may be hard to identify the parties and thus with respect to whom the indicators are to be applied. Moreover, when multiple parties are involved, or when several conflicts of both international and non-international nature take place alongside each other, a NIAC may well end, whilst an IAC continues; or the other way around.\(^{89}\) Even though, a part of IHL ceases to apply,\(^{90}\) IHL itself continues to govern the behaviour of at least some of the actors in the concerning area. If the application of *jus in bello* has not ended, can *jus post bellum* then already ‘kick-in’?

Furthermore, IACs can evolve into NIACs. This happened with the conflict in Afghanistan after the Bonn Agreement in 2002, which installed the *Loya Jirga*. There, the multinational forces (ISAF), after the toppling of the Taliban government as part of a US led intervention on the side of the Northern Alliance, assisted the new Afghan government in fighting the Taliban (and associated armed groups). Another example is the 2004 shift from occupation, *inter alia*, by the US of (parts of) Iraq, to a situation

---

89 The non-international armed conflict between Serbia and the Kosovo Liberation Army (KLA), for example, was already ongoing when the NATO bombing on Serbia in the spring of 1999 started an international armed conflict between the participating NATO member States and Serbia. These two armed conflicts existed alongside each other until both ended around the same time in June 1999 when president Milosević accepted the terms of a peace agreement as a result of which NATO ceased its air strikes. One of these terms was, of course, the ending of all Serbian military operations against the KLA in Kosovo. When the actual fighting in Kosovo ceased, the NIC ended. It was therefore the fulfilling of the terms of the peace agreement, which led to end of the violence and thus the required intensity, rather than the peace agreement itself that ended the NIC (for an overview of the timelines and legal qualification of these two conflicts, see the findings of the Trial Chamber in ICTY, *Prosecutor v. Đorđević*, Case No. IT-05-89/1-T, Judgement, 23 February 2011, paras 1531-80). Similarly, the NATO strikes against the Gaddafi regime started an IAC between the participating NATO member States and Libya from 19 March 2011 onwards, whilst the NIC between Gaddafi’s government forces and the National Transitional Council (NTC) was already ongoing. In this situation, the NIC continued after the IAC ended. In addition, when fighting between the government forces and the NTC ceased following the death of Gaddafi, fighting between various armed groups and/or forces of the newly formed government continued (see, for example, BBC, ‘Disarming Libya’s Militias’, 28 September 2012, <http://www.bbc.co.uk/news/world-africa-19744593>).

90 Namely, either the rules of IHL applicable to NIAC or the rules of IHL applicable to IAC.
of assistance to the new Iraqi government in securing Iraq. Similarly, NIACs can evolve into IACs as a result of third State involvement: besides the proxy wars of the cold war era, the Bosnian conflict that motivated the ICTY’s “effective control test” for internationalization of a NIAC being a case in point. Applying the distinction between *jus in bello* and *jus post bellum* too rigidly would therefore not be desirable. Therefore, it may be useful adopt a two-prong approach for *jus post bellum*: one legal framework for after IAC, and another one to follow NIAC.

### 16.6 Concluding remarks

This chapter discussed the hypothesis that non-international armed conflicts do not necessarily end only by virtue of a peace settlement being reached, but rather do so by way of falling below the threshold of organisation and intensity. To assess when non-international armed conflicts end, one could resort to using the factors and indicators for determining the lower threshold for the start of such conflicts, as identified by the ICTY in its voluminous case law. However, these factors and indicators are to be applied on a case-by-case basis as not all of them are adaptable to the specific circumstances in which some conflicts take place.

Indeed, contemporary non-international armed conflicts can be of such a nature that it can be difficult to apply the factors and indicators. These situations also show that it is neither possible, nor desirable, to identify a specific point in time when international humanitarian law ceases to apply, and when *jus post bellum* ‘takes over’; for both can apply, in part, after the cessation of active hostilities.

Some rules of *jus in bello* apply in times of peace and some rules continue to apply after the concerning armed conflict that initially brought the rules into force, has ended. Examples of such rules are those protecting prisoners of war or persons detained in relation to the conflict. Since it is difficult to define a clear-cut moment for *jus post bellum* to take effect, the *jus in bello* and *jus post bellum* frameworks should exist alongside one another in the end-stages of armed conflicts; and after the conflicts have in fact ended. At the very minimum, certain parts of the frameworks

---

should overlap and certain rules should co-exist at these times so as to ensure protection for those affected by the armed conflict, or what results from it.