EXECUTIVE SUMMARY

Can we say, definitively, when an armed conflict no longer exists under international law? The short, unsatisfying answer is sometimes: it is clear when some conflicts terminate as a matter of international law, but a decisive determination eludes many others. The lack of fully-settled guidance often matters significantly. That is because international law tolerates, for the most part, far less violent harm, devastation, and suppression in situations other than armed conflicts. Thus, certain measures governed by the laws and customs of war—including killing and capturing the enemy, destroying and seizing enemy property, and occupying foreign territory, all on a possibly large scale—would usually constitute grave violations of peacetime law.

This Legal Briefing details the legal considerations and analyzes the implications of that lack of settled guidance. It delves into the myriad (and often-inconsistent) provisions in treaty law, customary law, and relevant jurisprudence that purport to govern the end of war. Alongside the doctrinal analysis, this Briefing considers the changing concept of war and of what constitutes its end; evaluates diverse interests at stake in the continuation or close of conflict; and contextualizes the essentially political work of those who design the law.

A diverse array of individuals and entities has a stake in the end of armed conflict: from political leaders to military commanders, from civilian populations to neutral states, from asylum seekers to war-crimes courts, from arms-transferring states to human-rights bodies, from state-responsibility compensation mechanisms to humanitarians. Each stakeholder may have their own sets of interests in the continuation or the end of a war and in the corresponding continuation or termination of the applicability of the international-legal framework of armed conflict.

There is considerable fragmentation in the contemporary lex scripta (written or codified law) concerning the end of armed conflict under international humanitarian law (IHL). That fragmentation arises in part because:

- Various IHL treaties lay down different formulations—and certain IHL treaties contain different formulations within a single instrument—concerning relevant duties, rights, authorities, and protections that arise before, at the moment of, or after the termination of the armed conflict;
- Not all states have contracted into the same sets of IHL treaties; and
- Not all end-of-armed-conflict IHL treaty provisions apply, at least as a matter of treaty law, to all international armed conflicts (IACs) and non-international armed conflicts (NIACs), or even to all IACs or to all NIACs.

While customary IHL could, in principle, help resolve that fragmentation and fill in the corresponding gaps, it is far from clear that it does so in practice.

Meanwhile, diverse contemporary scenarios pose challenges to ending, and to discerning the end of, war under the relevant international-legal framework of armed conflict. Examples fall along such lines as not recognizing the existence of an armed conflict in the first place; difficulties in classifying conflicts and identifying parties; not adhering to or unclarity about the status of agreements between adverse
parties; long-term enmity marked by intermittent violence; and state responses to terrorism that blend traditional notions of war and law enforcement.

NIACs are the most common type of contemporary armed conflict. Yet there are fewer IHL provisions and rules concerning how NIACs end compared to IACs. Even for the relatively thicker set of IHL provisions pertaining to IACs, many of the end-of-war formulations are subject to conflicting and wide-ranging interpretations.

Drawing from existing international law and scholarly arguments, we postulate four theories on the end-point of the application of the international-legal framework of armed conflict in relation to NIAC:

- The two-way-ratchet theory: as soon as at least one of the constituent elements of the NIAC—intensity of hostilities or organization of the non-state armed group—ceases to exist;
- The no-more-combat-measures theory: upon the general close of military operations as characterized by the cessation of actions of the armed forces with a view to combat;
- The no-reasonable-risk-of-resumption theory: where there is no reasonable risk of hostilities resuming; and
- The state-of-war-throwback theory: upon the achievement of a peaceful settlement between the formerly-warring parties.

In connection with the end of armed conflict under international law, deprivation of liberty and targeting in direct attack are two of the key stakes that arise in relation to the U.S.'s War on Terror. According to the Obama Administration, the purported armed conflict(s) will persist until a “tipping point” when terrorist organizations' operational capacity is degraded and their supporting networks are dismantled to such an extent that those organizations' forces will have been effectively destroyed and will no longer be able to attempt or launch a strategic attack against the U.S. Yet through recent U.S. jurisprudence, practice, and doctrine, a complicated mixture has arisen: various purported armed conflicts against terrorist organizations interwoven with “direct action” against terrorist threats outside the United States and “areas of active hostilities.” This mixture has made it difficult to ascertain the scope—including the end—of those conflicts.

In all, this Legal Briefing reveals that international law, as it now stands, provides insufficient guidance to precisely discern the end of many armed conflicts as a factual matter (when has the war ended?), as a normative matter (when should the war end?), and as a legal matter (when does the international-legal framework of armed conflict cease to apply in relation to the war?). The current plurality of legal concepts of armed conflict, the sparsity of IHL provisions that instruct the end of application, and the inconsistency among such provisions thwart uniform regulation and frustrate the formulation of a comprehensive notion of when wars can, should, and do end.

Fleshing out the criteria for the end of war is a considerable challenge. Clearly, many of the problems identified in this Briefing are first and foremost strategic and political. Yet, as part of a broader effort to strengthen international law’s claim to guide behavior in relation to war, international lawyers must address the current confusion and inconsistencies that so often surround the end of armed conflict.