INTRODUCTION

UNSETTLED GUIDANCE IN AN ERA OF PERSISTENT CONFLICT

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.¹ To give one concrete example, ascertaining whether conflict in Afghanistan and elsewhere continues is key to determining the legal power of the United States, at least as far as international law goes, to keep holding certain detainees at the Naval Base at Guantánamo Bay, Cuba—a question that has come before U.S. courts repeatedly.²

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. The rules on the conduct of hostilities, for instance, contemplate that the use of lethal force against persons is inherent to waging war.³ By comparison, under law-enforcement principles governed by international human rights law, the use of lethal force may be used only as a last resort and only when other means are ineffective.⁴

1. Sections 4 and 5, infra, sketch the plurality of legal concepts of armed conflict under contemporary international law. In this Legal Briefing, at times we refer to those concepts—such as international armed conflict, a state of war in the legal sense, belligerent occupation, recognition of belligerency, and non-international armed conflict—in their respective technical senses. But at many other points we refer variously to “war” and “armed conflict” as generic terms meant to encapsulate, for ease of reading, the plurality of possibly-relevant technical legal concepts.
2. See infra Section 7.
3. See Jelena Pejic, Conflict Classification and the Law Applicable to Detention and the Use of Force, in INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 105 (Elizabeth Wilmshurst ed., 2012) [hereinafter, “Pejic, Use of Force”] (and further explaining that, while that “body of rules aims to avoid or limit death and other harm, particularly of civilians, [it] recognizes that the very nature of armed conflict is such that loss of life cannot be entirely prevented”). Id. See generally INTERNATIONAL COMMITTEE OF THE RED CROSS, THE USE OF FORCE IN ARMED CONFLICTS: INTERPLAY BETWEEN THE CONDUCT OF HOSTILITIES AND LAW ENFORCEMENT PARADIGMS, Nov. 2013 [hereinafter, “ICRC, Use of Force”].
4. See, e.g., Prosecutor v. Ljube Boškoski and Johan Tarčulovski, Judgement, ICTY Trial Chamber II, IT-
Today, visions of perpetual war mix with knotty factual scenarios and often-unsettled international-legal guidance on the end of armed conflict. Well into its second decade, the United States’ “War on Terror” shows little prospect of abating. In 2009, the U.S. Army envisaged an era of persistent conflict, extending at least from 2016 to 2028. More broadly, contemporary armed conflicts frequently “result in unstable cease-fires, continue at a lower intensity, or are frozen by an armed intervention by outside forces or by the international community. Hostilities, or at least acts of violence with serious humanitarian consequences, often break out again later.”

04-82-T, July 10, 2008, ¶ 178 [hereinafter, “Boškoski, Trial Judgement”] (stating that, “in situations falling short of armed conflict, the State has the right to use force to uphold law and order, including lethal force, but, where applicable, human rights law restricts such usage to what is no more than absolutely necessary and which is strictly proportionate to certain objectives”) (citations omitted). See generally Pejic, Use of Force, supra note 3, at 111 (stating also that “such [other] means must always be available”). Id. See infra Section 3 concerning other legal stakes of the (ongoing) existence (or not) of an armed conflict.

5. President Obama withdrew the use of the phrase “global war on terror” and instead defined his Administration’s approach to the relevant U.S. effort as “a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America.” Remarks by the President at the National Defense University, May 23, 2013 (stating that, “[b]eyond Afghanistan, we must define our effort not as a boundless ‘global war on terror,’ but rather as a series of persistent, targeted efforts to dismantle specific networks of violent extremists that threaten America”). Yet other parts of the U.S. government continue to invoke the “war on terror” and to appropriate funding under the “Global War on Terror.” See, e.g., Amer v. Gates, 759 F.3d 317, 328 (4th Cir. 2014) (“Section 2241(e)(2) survives rational-basis review, a ‗deferential‘ standard that asks only whether Congress had a ‗reasonable basis for adopting the classification.‘ That ‘reasonable basis‘ is evident for § 2241(e)(2), as the statute is meant to limit court interference in our nation’s war on terror”) (emphasis added; citations omitted). With respect to appropriations, the “Overseas Contingency Operations/Global War on Terrorism” (OCO/GWOT) designations were first in effect for FY2012 appropriations. See Susan B. Epstein and Lynn M. Williams, Overseas Contingency Operations Funding: Background and Status 5-6, CONG. RES. SERV., Jun. 13, 2016. Funds designated “OCO/GWOT” “are not subject to procedural limits on discretionary spending in congressional budget resolutions, or the statutory discretionary spending limits provided through the Budget Control Act of 2011 (BCA).” Id. at 1 (citations omitted). Having used the OCO/GWOT exemption for the Department of Defense, Congress also adopted this approach for foreign-affairs agencies, with funds being provided under the first foreign-affairs OCO/GWOT appropriation for a wide range of recipient countries, including Yemen, Somalia, Kenya, and the Philippines and for the Global Security Contingency Fund. Id. at 6.


Rare, in short, is the decisive end-point of a contemporary war. Much more common are violent enmities toggling on and off, sometimes over very long periods. An assessment of armed conflicts that existed at least at some point in 2014 (the most recent year analyzed) identified 13 conflicts of an international character and 29 conflicts of a non-international character. In several of those theaters, traditional elements of military, law-enforcement, and peace-keeping operations blended into protean combinations. The resulting amalgams often defied easy classification under international law. Moreover, many measures traditionally reserved for armed conflict are increasingly being directed, especially in response to terrorist threats, at individuals or small groups, not at political collectives. In the process, war seems to lose some of its traditional inter-collective logic. Further, in some domains—not least in the realm of cyber operations—there is vanishingly little consensus among states and commentators on what, exactly, may give rise to an armed conflict in the first place, let alone what marks its end.

Against that backdrop, it is worth exploring a detailed legal analysis and discussing the implications of international law, as it currently stands, not providing sufficient guidance to detect when many armed conflicts end and when the relevant international-legal framework of armed conflict ceases to apply in relation to them. Diverse additional imperatives compel our exploration as well. A starting point to bolster the normative regime is to grasp existing law. Not knowing when wars end risks unwittingly supporting endless wars and thereby sanctioning, if tacitly, unlawful harm. And despite significant recent contributions, calls for further


research and analysis have not been fully heeded.14

**PURPOSE OF THIS LEGAL BRIEFING**

Where does international law give clear direction on when conflicts terminate? Where does it not? Why does it matter? And what could be done in this area to strengthen international law’s claim to guide the behavior of warring parties and to protect affected populations? Answering these questions requires delving 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, an answer to these questions also begs a careful consideration of the changing concept of war and of what constitutes its end; evaluating diverse interests at stake in the continuation or close of conflict; and contextualizing the essentially political work of those who design the law. This Legal Briefing is dedicated to that examination. Our aims are to conduct a pioneering study of international law pertaining to the end of armed conflict and to provide a resource for scholars and practitioners.

**STRUCTURE**

The Legal Briefing is divided into seven sections, in addition to this Introduction and the Conclusion. **Section 2** is a primer on key legal concepts and fields. Section


3 highlights interests of diverse stakeholders. Sections 4 and 5 outline international law concerning the end, respectively, of international armed conflicts and of non-international armed conflicts. Section 6 sketches various scenarios that pose challenges to ending—and discerning the end—of conflict. Section 7 explores such challenges, in particular, concerning the end of the U.S.’s War on Terror. Section 8 puts forward four theories on when the most common form of armed conflict today—non-international armed conflicts—may come to an end. Finally, the Conclusion identifies concerns that international lawyers must address to strengthen international law’s claim to guide behavior in war.

Caveats
The bulk of the research was conducted primarily in English and thus generally does not comprehensively consider secondary sources in other languages. We do not make a claim to an exhaustive treatment of the innumerable international-law concerns regarding the end of armed conflict. To have been truly comprehensive, this study would have needed to be much, much longer and would have required research in many more languages.