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DIVERSE STAKES AND
STAKEHOLDERS

INTRODUCTION

Read through an international-law lens, perhaps the most significant stakes in whether an armed conflict continues to exist or has ended concern the international-legal parameters pertaining to:

- Starving, detaining, and killing an enemy;
- Incidentally killing civilians who are not directly participating in hostilities;
- Destroying an adversary’s property and damaging the natural environment;
- Occupying foreign lands;
- Protecting individual civilians and the civilian population; and
- Allowing access for humanitarian organizations.

Many other legal stakes might arise as well, as might myriad moral, social, economic, and political concerns.

Political leaders, military commanders and forces, civilian populations, prosecutors, and humanitarians might each have their own interests in the continuation—or the end—of a conflict and in the corresponding continuation—or termination—of the application of the international-legal framework of armed conflict.  

At times those interests may overlap. But at other times they may diverge, sometimes significantly.

STAKEHOLDERS

Political Leaders

Political leaders may have a mixed set of incentives concerning the continued existence or end of an armed conflict. For instance, on one hand, adopting an IHL framework may allow political leaders to fight with greater powers and resources, because the recognition of an armed conflict may make the invocation of emergency

45. See Milanovic, End of IHL Application, supra note 13, at 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).

authorities more palatable to domestic constituencies. Yet, on the other hand, political leaders might shy away from recognizing that an armed conflict exists, because doing so might, for example, be interpreted as conferring legitimacy on the adverse party.

**Armed Forces**

The clarity and discernibility of the scope and applicability of international law pertaining to armed conflict might implicate members of the armed forces in significant ways. Indeed, the content of the international-legal parameters pertaining to armed forces—whether those rules are conceived as guiding, empowering, constraining, or protecting them—might turn directly on the existence (or not) of an armed conflict.

Perhaps most importantly in this context, in general, the conduct-of-hostilities rules under IHL permit—or, at least, tolerate—more lawful death and destruction compared to the rules governing the use of lethal force against persons under IHRL or domestic law-enforcement frameworks.\(^46\) In addition, certain other measures that armed forces might take in attempting to secure victory—such as capturing and detaining enemy forces, seizing or destroying property, and controlling territory and populations—might be lawful in war but not at any other time. In these senses, the longer the armed conflict continues, the longer the armed forces may have access to extraordinary legal provisions.

Discerning a fighter’s status under international law might also be important with respect to conferring on that fighter prisoner-of-war (POW) status upon capture, as well as to the operation of the so-called “belligerent’s privilege.” Pursuant to the latter, under IHL qualifying combatants “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.”\(^47\) (Both POW status and the belligerent’s privilege are formulated under IHL treaty provisions only in relation to IACs, not in relation to NIACs.) Moreover, with few exceptions (such as with respect to riot control agents\(^48\)), armed forces may use a broader array of weapons in armed conflict than in other situations.\(^49\)

Despite the high stakes for armed forces in ascertaining the existence of an armed conflict, in certain circumstances, the moment when armed violence qualifies—or ceases to qualify—as an armed conflict under international law may be discernible only after the fact.\(^50\) In the meantime, uncertainty as to the applicable law may prevail, including for armed forces.

\(^{46}\) See generally ICRC, *Use of Force*, supra note 3.


\(^{49}\) For these and other reasons, it might also be vital for peacekeepers and troops involved in peace-enforcement operations to know whether IHL applies in relation to their conduct. See Venturini, *Temporal Scope*, supra note 13, at 62–63.

\(^{50}\) On the international-legal criteria concerning the existence of international armed conflicts, see *infra* Section 4; on the international-legal criteria concerning the existence of non-international armed conflicts, see *infra* Section 5.
Individual Civilians and Civilian Populations

Individual civilians and civilian populations may also have a strong interest in ascertaining when an armed conflict begins and ends. In general, compared to IHRL and domestic law-enforcement regimes regulating peacetime measures, IHL is more tolerant of “incidental” civilian death and destruction of civilian objects, including private property.\(^{51}\) IHL treaties regulating IACs lay down provisions concerning internment of nationals of the enemy state and seizure of the property of such nationals—and those provisions cease to be applicable upon the termination of the relevant conflict.\(^{52}\) Once peace is made in relation to a belligerent occupation, seized private “munitions de guerre” and certain related items must be restored and compensation provided.\(^{53}\) Determining when active hostilities have ceased may also have important consequences for measures to protect civilians from minefields, mines, and booby-traps, as well as from explosive remnants of war.\(^{54}\)

As a practical matter, once the armed conflict has terminated it will often be easier to take steps to bring legal claims for violations and losses related to the conflict to domestic, international, or hybrid tribunals, bodies, commissions, or courts. The existence of a state of war may further affect myriad domestic laws about, for instance, compensation, insurance, frustrations of contracts, and trade restrictions.\(^{55}\)

Somewhat paradoxically, the civilian population or individual members of it may, depending on the circumstances, prefer to argue in favor of extending the application of relevant IHL provisions. Unlike IHRL, IHL clearly binds all parties to an armed conflict, including states and, where relevant, organized non-state armed groups. Moreover, some IHL rules—such as the treaty provisions prohibiting punishment of medical care, irrespective of who benefits from it—might be more protective than analogues established in IHRL or domestic law.\(^{56}\) In addition, several IHL provisions, especially those pertaining to occupied territories, impose positive obligations on the enemy power to address—or, if unable to do so on its own, to allow others to address—the humanitarian needs of the local population.\(^{57}\)

Neutral States and States Not Party to an Armed Conflict

Neutral states and states not party to an armed conflict may have interests in discerning the end of an armed conflict to which the law of neutrality applies.\(^{58}\)

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51. See, e.g., Pejic, Use of Force, supra note 3.
52. See infra Section 4.
53. Id.
54. See infra Sections 4 and 5.
58. Though some of the rules of the law of neutrality are not entirely well settled, the adoption of the
That is because, in general, the rights and duties imposed on those states pursuant to the law of neutrality are extinguished once the armed conflict ends.

The rights and duties of neutral states under the law of neutrality concern a broad set of powers, authorities, and obligations. Consider but two examples. First, a "neutral state is bound to use all means at its disposal to prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to be engaged in acts of war against the party to a conflict."\(^{59}\) And second, "[n]eutral states must intern forces of the parties to the conflict trespassing on neutral territory."\(^{60}\)

**Asylum Seekers**

In certain contexts, the existence of an armed conflict may have implications with respect to asylum or another similar status. EU Directive 2011/95/EU provides one example. That Directive sets out guidance on international protection for refugees or persons eligible for "subsidiary protection."\(^{61}\) 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."

**Arms-Transferring States**

A provision of the Arms Trade Treaty of 2013 (ATT)\(^{62}\) may impliedly impose an obligation on states parties to that instrument to discern the beginning and end of a relevant armed conflict. In particular, Article 6(3) of the ATT prohibits a state party from authorizing a transfer of conventional arms or certain other items if the party "has knowledge at the time of authorization that the arms or items would be used in the commission of ... grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected as such, or other war crimes as defined by international agreements to which it is a Party." The commission of each of these sets of acts may occur only in relation to an armed conflict.

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60. Id. at 565 (citations omitted).


**War-Crimes Courts**

To establish war-crimes jurisdiction, a court—whether at the domestic or the international level—must ascertain when the relevant armed conflict began and when it has ended. That is because a war crime, strictly speaking, may be committed only in connection with an armed conflict.

International crimes other than war crimes, such as genocide and crimes against humanity, are typically defined in international treaties and in international customary law such that they need not be committed (though they often are in fact committed) in connection with an armed conflict. While there is significant overlap in the conduct that is proscribed under the Statute of the ICC as crimes against humanity and as war crimes, some forms of conduct may form the basis for a war-crimes prosecution but not for a crimes-against-humanity prosecution (or vice versa). One example is the war crime of declaring that no quarter will be given—that is, declaring that there shall be no survivors. Under the ICC’s Statute, that war crime has no direct crimes-against-humanity analogue. Thus, a state may prefer not to explicitly recognize the existence of an armed conflict to which IHL applies because recognizing the conflict might make it practically (if not necessarily legally) easier for the ICC—or for states with universal-jurisdiction regimes mirroring the relevant parts of the jurisdiction of the ICC—to establish jurisdiction in order to prosecute the state’s armed forces for war crimes even if not for crimes against humanity.

With respect to a war-crimes prosecution, the diverse implicated actors might each have diverging or converging interests in either shrinking or expanding the temporal period of the relevant armed conflict. Consider the different institutional or personal interests of prosecutors; judges; the accused and her defense lawyers; witnesses; survivor-victims and their families; the affected local population; and international society more broadly. For their part, judges presiding over war-crimes courts may have an institutional interest in establishing a continuous, extensive period of armed conflict.

An ICTY Trial Chamber held that, once IHL "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

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63. Unless the relevant armed conflict has not terminated. For example, in establishing the International Criminal Tribunal for the former Yugoslavia (ICTY), the U.N. Security Council reserved to itself the power to determine the end-point of the tribunal's temporal jurisdiction. U.N. Security Council, Res. 827 (1993), ¶ 2 ("Decides hereby to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace") (emphasis added).

64. See supra note 34.

65. Articles 8(2)(b)(xii) and (e)(x) Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter, “ICC Statute”]. Pursuant to Article 8(1) of the ICC’s Statute, “[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.”

66. As explained in Sections 4 and 5, contemporary international-legal concepts of armed conflict—whether of an international or non-international character—are rooted in relatively objective, fact-based criteria, with the possible limited exception of the state-of-war doctrine.
and non-applicability, leading to a considerable degree of legal uncertainty and confusion.\textsuperscript{67} That legal certainty may make it easier to determine the applicable rules and for the Court to establish, perhaps, an uninterrupted period of war-crimes jurisdiction. Yet that certainty might also come at a cost—not least of presuming the applicability of relatively more permissive IHL rules instead of more restrictive provisions established in other international-legal frameworks (especially IHRL) and domestic regimes.\textsuperscript{68}

**Human-Rights Bodies**

IHRL courts and other bodies may also have interests in ascertaining the beginning and end of a relevant armed conflict. (Unlike war-crimes courts, IHRL bodies

\textsuperscript{67.} Prosecutor v. Ante Gotovina \textit{et al.}, Judgement, ICTY Trial Chamber I, IT-06-90-T, Apr. 15, 2011, ¶ 1694 [hereinafter, ”Gotovina, Trial Judgement”]. In adopting this approach, the Trial Chamber was addressing an international armed conflict. Nonetheless, the underlying concern—of a “revolving door between [IHL] applicability and non-applicability, leading to a considerable degree of legal uncertainty and confusion”—would also seem to arise in relation to a non-international armed conflict.

generally address state responsibility, not individual personal responsibility for international crimes.) The basic reason is that IHL might be implicated in relation to a situation where an alleged IHRL violation has a nexus with an armed conflict. In such contexts, identifying the source and content of the applicable legal norm underlying the alleged IHRL violation—as well as the party obliged to fulfill the corresponding obligation—might entail considering not only IHRL but perhaps also IHL.

A fundamental issue concerns the competence of the relevant body: in short, may it adjudicate whether acts and norms falling within its purview are compatible only with relevant IHRL or (also) with IHL? Various international human-rights bodies have taken different approaches to this concern. The Inter-American Commission of Human Rights seems to have adopted, in 1997, one of the most deliberate and direct approaches to ascertaining specific IHL violations in a proceeding of an international-human-rights body. In general, however, international-human-rights bodies have not adopted such a direct approach. Yet there seems to be a trajectory, in both the Inter-American Court of Human Rights and the European Court of Human Rights, at least not to exclude the possibility of considering IHL in interpreting relevant provisions of their respective constitutive instruments.

State-Responsibility Compensation Mechanisms

Two recent examples demonstrate that delimiting the temporal period—including the end—of armed conflict may be relevant for assessing state responsibility in relation to compensation claims. First, as part of the process of awarding tens of billions of dollars in compensation for losses and damages suffered as a result of Iraq’s invasion and occupation of Kuwait, including certain IHL violations, the United Nations Compensation Commission specified the period between Iraq’s invasion of Kuwait and the ceasefire. And second, in adjudicating claims and awarding compensation for damage incurred due to ascertained violations of IHL, the Eritrea-Ethiopia Claims Commission established the temporal framework between the outbreak of hostilities and the termination of armed conflict between Eritrea and Ethiopia.

Humanitarian Actors

Humanitarian actors may also have interests in detecting whether an armed conflict has ended such that IHL no longer applies in relation to the situation. To

69. In particular, in a report concerning an attack on a military base in Argentina, the Commission assessed violations not only of the American Convention on Human Rights but also of Common Article 3 of the Geneva Conventions of 1949. Abella v. Argentina (La Tablada), Case 11.137, Inter-Am.Cm.H.R., Report No 55/97, ¶ 164 (1997) [hereinafter, “La Tablada”]. But compare id. at ¶ 164 (holding that when the ACHR and IHL instruments both apply, Article 29(b) of the American Convention on Human Rights requires the Commission to “take due note of and, where appropriate, give legal effect to applicable humanitarian law rules”) with Las Palermas v. Colombia, Preliminary Objections, Judgment, 2000 Inter-Am. Ct. H.R. (ser. C) No. 67 (Feb. 4, 2000), ¶ 33 (holding that the American Convention on Human Rights “has only given the Court competence to determine whether the acts or the norms of the State are compatible with the convention itself, and not with the 1949 Geneva Conventions”).

70. For an overview of compensation for personal damages in relation to World War II, see Rainer Hofmann, Compensation for Personal Damages Suffered during World War II, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2013).

71. See Venturini, Temporal Scope, supra note 13, at 64 (citations omitted).

72. Id. (citations omitted).
access civilian populations in need, persons involved in principled humanitarian action—often defined in relation to the principles of humanity, impartiality, independence, and neutrality—typically have a much stronger set of claims based in IHL than in IHRL or domestic law. Broadly speaking, in a situation of armed conflict, humanitarian actors may offer their services in accordance with IHL, which contains rules on humanitarian assistance and access to civilian populations affected by armed conflicts. In occupied territories, in general, if all or part of the population is inadequately supplied, there is an obligation of the Occupying Power either to ensure adequate supplies to the population or to agree to and facilitate relief actions. In relation to situations of armed conflict, certain IHL treaty provisions prohibit punishment of humanitarian and other actors who carry out ethically sound medical care, irrespective of who benefits from that care, including wounded and sick enemy fighters hors de combat (out of the fight).

With respect to accountability, under at least the ICC’s Statute it is a war crime in an armed conflict—whether of an international or non-international character—to intentionally direct attacks against a humanitarian assistance mission. Finally, the mandate of some humanitarian organizations, such as the International Committee of the Red Cross (ICRC), are broader in times of conflict than in times of peace.


74. See, e.g., Felix Schwendiann, *The legal framework of humanitarian access in armed conflict*, 93 INT’L REV. RED CROSS 993, 997 (2011) (citing to Articles 3(2) GCs I–IV, 10 and 59(2) GC IV, 70(1) AP I, and 18(1) and (2) AP II).

75. *Id.* at 1001–02.

76. Articles 18(3) GC I, 16(1) AP I, and 10(1) AP II.

77. Articles 8(2)(b)(iii) and 8(2)(e)(iii) ICC Statute, in particular against personnel, installations, material, units, or vehicles involved in such a mission, so long as the mission is in accordance with the Charter of the United Nations and so long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.