OVERVIEW: INTERNATIONAL HUMANITARIAN LAW
PROVISIONS CONCERNING THE END OF NON-INTERNATIONAL ARMED CONFLICT

INTRODUCTION

This section outlines IHL provisions concerning the end of non-international armed conflict (NIAC) and the cessation of (a portion of) IHL in relation to NIAC. (Section 4 addresses international armed conflicts.) To lay the groundwork, we first sketch relevant international-legal concepts, with a focus on the legal criteria to determine the existence of a NIAC. We then identify, in outline form, IHL treaty provisions concerning the end of NIACs and the cessation of application of (a portion of) IHL in relation to those conflicts. We highlight, next, the possible roles of peace agreements as well as the formulation, by an international criminal tribunal, of a test whereby IHL of NIAC applies until “a peaceful settlement is achieved.”

Finally, a table summarizes relevant IHL-of-NIAC treaty provisions and salient formulations drawn from international bodies.

CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT

Recognition of Belligerency

Prior to the advent of Common Article 3 of the four Geneva Conventions of 1949, international law already provided for the recognition of belligerency to a civil war between a state and a rebel group. A primary effect of the recognition of...
belligerency by a third state is to bring the rules of neutrality to apply in the relations between that third state and the parties to the armed conflict (not only in relation to the government of the state but also in relation to the rebels). There are, however, relatively few, if any, recognitions of belligerency in contemporary practice, and commentators disagree on whether the concept has been, effectively, extinguished in international law.250

IHL Treaty Provisions concerning the Existence (or Not) of a Non-International Armed Conflict

Common Article 3 of 1949 expressly applies “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”251 Subsequently, states adopted this formulation or incorporated it by reference in certain treaties that regulate NIAC.252 In none of those treaties, however,

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249. Article 2 Protocol to the Convention on Duties and Rights of States in the Event of Civil Strife (providing that “[t]he provisions of Article 1 shall cease to be applicable for a Contracting State only when it has recognized the belligerency of the rebels, in which event the rules of neutrality shall be applied”); Article 1(3) Convention on Duties and Rights of States in the Event of Civil Strife, 134 L.N.T.S. 45, entered into force May 21, 1929, 46 Stat. 2749; 2 Bevans 694; 134 LNTS 45 (providing that “[t]he Contracting States bind themselves to observe the following rules with regard to civil strife in another one of them: ... To forbid the traffic in arms and war material, except when intended for the Government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied”).

250. Compare Crawford, Insurgency, supra note 248, at ¶ 5 (arguing that, “[d]espite the existence of such guidelines [as the 1863 Instructions for the Government of Armies of the United States in the Field (General Order No 100), otherwise known as the “Lieber Code,” and the Institute of International Law’s 1900 ‘Responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d’émeute ou de guerre civile’) regarding recognition of belligerency, the doctrine was almost never invoked, and eventually fell into desuetude”) with Akande, Classification, supra note 107, at 50 (arguing that, “though there seem to have been no instances since the Boer War (1899–1902) in which a belligerent government has expressly recognized the belligerency of an insurgent group, there seem to have been instances of third States recognizing belligerency of insurgents operating in other countries. Also it should be remembered that even in the nineteenth century ‘most instances of recognition of belligerency...concerned implied recognition, usually by declarations of neutrality or acquiescence in confiscation of contraband or in blockade maintained by one of the belligerents’ and there have been blockades instituted in non-international armed conflicts since 1949. These blockades may be regarded as implicit recognitions of belligerency and thus internationalizing the conflict. Finally as Professor Scobbie argues, persuasively, with regard to Gaza, non-application of a doctrine of customary international law does not suffice to extinguish it. There is no concept of desuetude with regard to custom”) (citations omitted).

251. Common Article 3 (chapeau) GCs I–IV. Note that, while otherwise identical to GCs I, III, and IV, the language of Article 3(2) of GC II, due to the nature of that instrument, adds “shipwrecked” to the category of persons—in addition to the “wounded” and “sick”—who “shall be collected and cared for.”

252. See Article 19(1) 1954 Cultural Property Conv.
did states (further) define the concept of an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”

AP II purports to “develop[] and supplement[]” Common Article 3 and to do so “without modifying [Common Article 3’s] existing conditions of application.”

With respect to AP II’s material scope of application, Article 1(1) of AP II establishes that the protocol

shall apply to all armed conflicts which are not covered by [Article 1 of AP I—that is, conflicts defined in Article 1 of AP I as being international in character] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Article 1(2) of AP II establishes, with respect to the scope of application ratione materiae, that the protocol “shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.” Article 1(2) of Protocol II of the CCW establishes those exclusions in terms of that instrument’s material scope of application.

Unlike with respect to Common Article 3, states have not universally contracted into AP II. Nonetheless, as a matter of international law, NIACs that do not fall under AP II are governed at least by Common Article 3 and applicable customary IHL rules. Where applicable, the ICC’s Statute may impose (additional) obligations in relation to situations meeting the relevant threshold of application for a NIAC established in that instrument. Finally, as briefly referenced above, where applicable, additional conventions—concerning, for example, cultural property, certain weapons, protective emblems, or explosive remnants of war—may impose obligations in relation to NIAC.

253. Article 1(1) AP II.
254. See also Article 1(4) CCW Protocol II (providing that “[n]othing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State”).
256. According to the ICJ, the rules of Common Article 3 “constitute a minimum yardstick” in both NIACs and IACs and also reflect “elementary considerations of humanity.” Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 54, 114 (June 27) (citations omitted).
257. Articles 8(2)(c)–(f) ICC Statute. In principle, in a NIAC involving a state party that is not a contracting party to AP II but that is subject to the jurisdiction of the ICC’s Statute, the state would be bound in respect of a relevant NIAC not only by Common Article 3 and customary rules applicable in NIAC but also by relevant provisions of the ICC’s Statute (such as Articles 8(2)(e)(ii) and (iv) of the ICC Statute concerning certain war crimes).
In 1995, the Appeals Chamber of the ICTY held, with respect to the material, temporal, and geographic scope of application of IHL to “internal conflicts”:

[T]hat an [internal] armed conflict exists whenever there is ... protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. [IHL] applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until ..., in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, [IHL] continues to apply in ..., in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict.... Notwithstanding various temporary cease-fire agreements, no general conclusion of peace has brought military operations in the region to a close. These hostilities exceed the intensity requirements applicable to ... internal armed conflicts.

Subsequently, the ICTY and the International Criminal Tribunal for Rwanda (ICTR) have elaborated factors and indicators aimed at ascertaining, in those tribunals’ view, the two cumulative constituent elements necessary to determine the existence of a NIAC: the existence of a sufficiently organized armed group (or groups) and the existence of sufficiently intense hostilities. The most exhaustive such analysis came in the Boškoski Trial Judgment in the ICTY. Building on a long line of ICTY cases, that Trial Chamber identified indicative factors for the “organizational” criterion and for the “intensity” criterion.

What about the “protracted” portion of the ICTY Appeals Chamber’s formulation to determine the existence of a NIAC (that is, “protracted armed violence”)? That “protracted” element—despite “protracted” meaning, in general usage, lengthened, extended, or prolonged in time—appears to have been subsequently interpreted

Protocol V; Article 1(2) AP III.

259. For an overview of the approach to the existence of a NIAC developed in the jurisprudence of the ICTY, the International Criminal Tribunal for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), and the ICC, see Noëlle Quénivet, Applicability Test of Additional Protocol II and Common Article 3 for Crimes in Internal Armed Conflict, in Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies 44–56 (Derek Jinks, Jackson N. Maqgato, and Solon Solomon eds., 2014).


261. See the analysis and citations in *Boškoski*, Trial Judgement, supra note 4, at ¶¶ 177–78, 183, 199–203, 206.

262. **Tadić**, Decision on Interlocutory Appeal, supra note 101, at ¶ 70 (emphasis added).

263. See Protracted adj., OXFORD ENGLISH DICTIONARY (online ed., 2016).
### SUMMARY TABLE
Elements identified in International Criminal Tribunals concerning the existence of a Non-International Armed Conflict

<table>
<thead>
<tr>
<th>Cumulative Criteria</th>
<th>Factors</th>
<th>Example (though neither necessary nor sufficient) indicators</th>
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|                     | The existence of a command structure | • The existence of headquarters  
|                     |                     | • The existence of a general staff or high command  
|                     |                     | • The existence of internal regulations  
|                     |                     | • The issuing of political statements or communiqués  
|                     |                     | • The existence of spokespersons  
|                     |                     | • Identifiable ranks and positions |
| Organization of the Non-State Armed Group(s) | The existence of military (operational) capacity | • The ability to define a unified military strategy  
|                     |                     | • The ability to use military tactics  
|                     |                     | • The ability to carry out large-scale or coordinated military operations  
|                     |                     | • The control of certain territory and territorial division into zones of responsibility |
|                     | The existence of logistical capacity | • The existence of supply chains (to gain access to weapons and other military equipment)  
|                     |                     | • The ability of troop movement  
|                     |                     | • The ability to recruit and train personnel |
|                     | The existence of an internal disciplinary system and the ability to implement IHL | • The existence of disciplinary rules or mechanisms within the group  
|                     |                     | • Training in such rules |
|                     | The ability of the group to speak with one voice | • The capacity to act on behalf of its members in political negotiations  
|                     |                     | • The capacity to conclude cease-fire agreements |
| Intensity of Hostilities | The use of armed forces | • The quantity of troops involved  
| (on the “protracted” characteristic, see the report text) | | • The increase in the number and type (e.g., army, air force, or navy) of government forces and the need for mobilization |
|                     | The attacks | • 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 causalities suffered by the fighting parties |
|                     | The type of actions | • The extent to which towns are besieged or supply routes are blocked  
|                     | | • The closure of roads |
|                     | The type of weapons, ammunition, and other military equipment used by the parties | • Use of heavy weapons, such as tanks and other heavy vehicles |
|                     | Effects on the civilian population | • Number of casualties  
|                     | | • Number of civilians forced to flee from the combat zones  
|                     | | • The extent of destruction |
|                     | Involvement of the U.N. Security Council and other external actors | • Whether resolutions have been passed on the situation  
|                     | | • Whether there were other external actors |
largely as a factor to consider when assessing the intensity-of-hostilities criterion, rather than as an independent criterion.264

A few years after the seminal ICTY Appeals Chamber’s decision in Tadić, states—in drafting the portions of the ICC’s Statute pertaining to war crimes committed in relation to a NIAC—used language and concepts seemingly drawn from Common Article 3, from AP II, and from that Tadić decision. Yet, somewhat confusingly, the text of the ICC’s Statute articulates two different sets of formulations in distinguishing NIACs (in which certain war crimes may be committed) from certain other situations (in which war crimes under the ICC’s Statute cannot be committed, due to the lack of existence of a NIAC). According to the ICC’s Statute, those certain other situations—in which NIAC war crimes cannot arise under the ICC’s Statute—are “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.”265 (Recall that AP II expressly distinguishes such situations, to which AP II does not apply, from NIACs under its threshold of application.266 Common Article 3 does not contain that explicit distinction but has been interpreted, at times, as excluding such situations from its scope of application.267 And recall further that, in general, war crimes may be committed only in connection with an armed conflict, whether the conflict is of an international or non-international character.268)

The first set of NIAC war crimes enumerated under the ICC’s Statute consists of certain “serious violations” of Common Article 3. Under the relevant provision of the ICC’s Statute—with that provision mirroring the formulation of a NIAC laid down in Common Article 3—those violations may occur “[i]n the case of an armed conflict not of an international character.”269 The second set of NIAC war crimes enumerated under the ICC’s Statute consists of “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.”270 Confusion might arise, in principle, where the ICC’s Statute distinguishes the NIACs in which this second set of NIAC war crimes under the Court’s jurisdiction may occur from situations of internal disturbances and tensions that do not fall under the ICC’s NIAC war-crimes jurisdiction. Under the ICC’s Statute, this second set of NIAC war crimes may arise only in relation to “armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and

264. See Boškoski, Trial Judgement, supra note 4, at ¶ 175 (stating that “care is needed not to lose sight of the requirement for protracted armed violence in the case of internal armed conflict, when assessing the intensity of the conflict”) (emphasis added); see also id. at ¶ 183 (stating that certain cases examined by the Chamber “demonstrate that national courts have paid particular heed to the intensity, including the protracted nature, of violence which has required the engagement of the armed forces in deciding whether an armed conflict exists”) (emphasis added). See Anthony Cullen, The Concept of Non-International Armed Conflict in International Humanitarian Law 142 (2010); Bartels, When NIACs End, supra note 13, at 312–313.
265. Article 8(2)(d) and (f) ICC Statute. See also supra notes 253–54 and corresponding text.
266. See Article 1(2) AP II.
267. See, e.g., GC I 2016 Commentary, supra note 68, at ¶ 386.
268. See supra note 34.
269. Article 8(2)(c) ICC Statute.
270. Id. at Article 8(2)(e).
organized armed groups or between such groups.”

What did the drafters of the ICC’s Statute mean by “protracted armed conflict” in formulating one of the types of NIAC for which the Court could exercise jurisdiction for war crimes? Did they mean to imply a distinction with the “protracted armed violence” formulation of the ICTY Appeals Chamber in Tadić? As noted above, certain ICTY decisions de-emphasize the temporal portion of the “protracted armed violence” formulation concerning the determination of the existence of a NIAC. Currently, it is difficult to ascertain whether ICC judges are moving in the direction of adopting that approach or, alternatively, might be more prone to distinguishing between the intensity and the protracted characteristics (and requiring the existence of both to find the existence of a NIAC).

In its emerging case law concerning what constitutes sufficient organization of an armed group, as an element that is necessary to establish the existence of a NIAC, ICC judges have utilized an approach that is similar to the ICTY. For instance, in the Lubanga and Katanga cases, the relevant Trial Chambers of the ICC recognized that the ICTY enumerated factors concerning the organization of armed groups are of potential relevance. Those same ICC chambers also recognized (also in line

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271. Article 8(2)(f) (emphasis added).
272. See supra notes 262–64 and corresponding text.
273. Compare Prosecutor v. Jean-Pierre Bemba Gombo, Judgment pursuant to Article 74 of the Statute, ICC Trial Chamber III, ICC-01/05-01/08, Mar. 21, 2016, ¶ 139 [hereinafter, “Bemba, Trial Judgment”] (stating that “[t]he Chamber notes that the concept of ‘protracted conflict’ has not been explicitly defined in the jurisprudence of this Court, but has generally been addressed within the framework of assessing the intensity of the conflict. When assessing whether an armed conflict not of an international character was protracted, however, different chambers of this Court emphasised the duration of the violence as a relevant factor. This corresponds to the approach taken by chambers of the ICTY. The Chamber follows this jurisprudence”) (emphasis added; citations omitted) with Prosecutor v. Germain Katanga, Judgment pursuant to Article 74 of the Statute, ICC Trial Chamber II, ICC-01/04-01/07, Mar. 7, 2014, ¶ 1217 [hereinafter, “Katanga, Trial Judgment”] (stating that, “[w]ith specific reference to its foregoing review of the attacks that followed [the] assault on Bogoro, the Chamber finds that the armed conflict was both protracted and intense owing, inter alia, to its duration and the volume of attacks perpetrated throughout the territory of Ituri from January 2002 to May 2003. Thus, in the Chamber’s view, the evidence before it suffices to fulfil the intensity of the conflict requirement”) (emphasis added; internal citation omitted).
274. Prosecutor v. Thomas Lubanga Dyilo, Judgment pursuant to Article 74 of the Statute, ICC Trial Chamber I, ICC-01/04-01/06-2842, Mar. 14, 2012, ¶ 537 [hereinafter, “Lubanga, Trial Judgment”] (stating that, “[w]hen deciding if a body was an organised armed group (for the purpose of determining whether an armed conflict was not of an international character), the following non-exhaustive list of factors is potentially relevant: the 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. None of these factors are individually determinative. The test, along with these criteria, should be applied flexibly when the Chamber is deciding whether a body was an organised armed group, given the limited requirement in Article 8(2)(f) of the [ICC’s] Statute that the armed group was ‘organized’”) (emphasis added; citations omitted); Katanga, Trial Judgment, supra note 273, at ¶ 1186 (stating that, “[t]he purpose of determining whether an armed conflict was not of an international character, it must be decided whether a body was an organized armed group, and it may be relevant to consider the following non-exhaustive list of factors: the force or group’s internal hierarchy; its command structure and the rules applied within it; 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. None of these factors are individually determinative. Accordingly,
with the ICTY approach) that, for a NIAC to exist in terms of the ICC's Statute, the relevant organized armed groups need not exercise control over territory nor be under responsible command. However, ICC Trial Chamber III, in the Bemba case, adds that the possibility to impose discipline is a factor to be considered.

**Approach of the Inter-American Human Rights System concerning the Existence (or Not) of a NIAC**

In 1997, in *La Tablada*, the Inter-American Commission of Human Rights found that an attack that lasted around 30 hours and that was directed at a military base in Argentina constituted a non-international armed conflict to which IHL applied. In doing so, the Commission distinguished a NIAC from an internal disturbance based on “the concerted nature of the hostile acts undertaken by the attackers, the direct involvement of governmental armed forces, and the nature and level of violence attending the events in question.”

The fighting at issue in *Tablada* appears to be the shortest duration of hostilities that an international body has characterized as a non-international armed conflict to which IHL applied. Subsequent to *Tablada*, the Inter-American Court of Human Rights has largely demurred on so expressly analyzing and applying IHL.

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since article 8(2)(f) of the [ICC’s] Statute requires only that the armed group be ‘organized’, the Chamber holds that some degree of organisation suffices to establish the existence of an armed conflict and recalls that those factors are to be assessed case-by-case’) (emphasis added; citations omitted).

275. *Lubanga*, Trial Judgment, supra note 274, at ¶ 536 (noting “that Article 8(2)(f) of the [ICC’s] Statute only requires the existence of a ‘protracted’ conflict between ‘organized armed groups’. It does not include the requirement in Additional Protocol II that the armed groups need to ‘exercise such control over a part of [the] territory as to enable them to carry out sustained and concerted military operations’. It is therefore unnecessary for the prosecution to establish that the relevant armed groups exercised control over part of the territory of the State. Furthermore, Article 8(2)(f) [of the ICC’s Statute] does not incorporate the requirement that the organised armed groups were ‘under responsible command’, as set out in Article 1(1) of Additional Protocol II. Instead, the ‘organized armed groups’ must have a sufficient degree of organisation, in order to enable them to carry out protracted armed violence’) (emphasis added; citations omitted); see also Katanga, Trial Judgment, supra note 273, at ¶ 1186 (underscoring “that exertion of control over a part of the territory by the groups concerned is not required. Similarly, article 8(2)(f) [of the ICC’s Statute] does not specify responsible command as envisioned by article 1(1) of Additional Protocol II to the Geneva Conventions”) (emphasis added; citations omitted).


278. Id. The Commission further stated that, “[m]ore particularly[,] the attackers involved carefully planned, coordinated and executed an armed attack, i.e., a military operation, against a quintessential military objective.” Id. The Commission discussed the existence of an armed conflict partly in relation to the existence of “combatants” and the protections owed: “When civilians, such as those who attacked the Tablada base, assume the role of combatants by directly taking part in the fighting […] they thereby become legitimate military targets.” Id. at ¶ 177.

The U.S. Department of Defense’s *Law of War Manual* (Dec. 2016) cites to *Tablada* in relation to the “range of views on what constitutes an ‘armed conflict not of an international character’ for” the purpose of applying the obligations in Common Article 3 of the 1949 Geneva Conventions, as well as in relation to a possible “helpful rule of thumb” to identify activities that are subject to the law of war based on an assessment that “parties are, in fact, engaged in activities that the law of war contemplates (e.g., detention of enemy military personnel without criminal charge, bombardment of military objectives).” LAW OF WAR MANUAL, supra note 44, at § 3.4.2.2 n.74 and n.77.

279. See Shana Tabak, *Armed Conflict and the Inter-American Human Rights System: Application or
IHL Treaty Provisions concerning the End of Conflict in relation to NIAC

IHL Treaty Provisions concerning the End of Obligations That are Established in Common Article 3

Common Article 3 does not contain an express provision concerning what constitutes the termination of an “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties” to which it applies. (During the drafting of AP II, an amendment was proposed that the application of that protocol should cease “upon the general cessation of military operations,” but the delegates did not adopt that proposal.\(^\text{280}\))

Common Article 3—unlike AP II\(^\text{281}\)—does not lay down an express obligation extending beyond the end of the relevant NIAC any of the protections it establishes. To be certain, Common Article 3(1) does expressly provide that “[certain enumerated] acts are and shall remain prohibited at any time.”\(^\text{282}\) Yet, for various reasons—including Common Article 3’s scope of application (limited as it is to situations of NIAC “occurring in the territory of one of the High Contracting Parties”\(^\text{283}\)—it would seem that that “at any time” formulation is best interpreted as meaning “at any time” during an ongoing NIAC to which Common Article 3 applies. The ICRC recently set out a broader interpretation: in its view, some of Common Article 3’s protections continue to bind parties beyond the end of the relevant NIAC.\(^\text{284}\) Yet, in doing so, the ICRC does not appear to have provided a sufficient international-legal justification as to why, once the relevant armed conflict had terminated, Common Article 3 would continue to be applicable.\(^\text{285}\)


\(280. \) See Commentary on the APs, supra note 68, at 1360 (citation omitted).

\(281. \) AP II extends some of its protective obligations beyond the end of the relevant NIAC. See Articles 2(1) and 25(1) AP II.

\(282. \) Emphasis added.

\(283. \) Emphasis added.

\(284. \) See GC I 2016 Commentary, supra note 68, at ¶ 501 (stating that “[p]ersons protected under common Article 3, even after the end of a [NIAC], continue to benefit from the article’s protection as long as, in consequence of the armed conflict, they are in a situation for which common Article 3 provides protection”).

\(285. \) In principle, such a justification could be grounded, to the extent Common Article 3 is addressed as a matter of treaty law, in, where available, subsequent state practice in the application of Common Article 3 that establishes the agreement of the parties regarding its interpretation. See Article 31(3)(b) VCLT. Where the protective obligations embodied in Common Article 3 are addressed in terms of reflecting customary international law, sufficient state practice and opinio juris would be necessary to evince. Yet the ICRC does not provide sufficient evidence of any such subsequent state practice or opinio juris concerning the extension of the temporal scope of application of Common Article 3 beyond the termination of the relevant NIAC. The ICRC references an analysis of a Commission of Experts convened by the ICRC in 1962. See GC I 2016 Commentary, supra note 68, at ¶ 498. But that analysis is not sufficient to establish a
IHL Treaty Provisions concerning Deprivation of or Restrictions on Liberty for Reasons related to the End of a NIAC

With respect to a NIAC to which it applies, AP II contains provisions that extend the temporal scope of applicability of certain protective obligations beyond the termination of the conflict. Article 2(1) of AP II provides that, “at the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 [of AP II] until the end of such deprivation or restriction of liberty.” The protocol does not, however, define what constitutes “the end of the armed conflict” in the sense of Article 2(1) of AP II. Under Article 25(1) of AP II, “[p]ersons who have been deprived of liberty, or whose liberty has been restricted, for reasons related to the conflict shall nevertheless continue to benefit from the provisions of this Protocol until their final release.”

IHL Treaty Provisions concerning Amnesty in relation to the End of NIAC

With respect to NIACs to which AP II applies, under Article 6(5) of that protocol, “at the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.” The protocol does not define what constitutes “the end of hostilities” in the sense of Article 6(5) of AP II.

IHL Treaty Provisions concerning End-of-NIAC-related Obligations pertaining to Mines, Booby-traps, and Certain Other Devices

As noted above, two provisions in Protocol II of the CCW (as amended) expressly affix temporal formulations—especially “the cessation of active hostilities,” though without defining the phrase—to obligations concerning mines, booby-traps, and certain other devices. In particular, Article 9(2) of that instrument affixes various recording-related obligations to the period “immediately after the cessation of active hostilities.” And Article 10(1) of Protocol II of the CCW (as amended) provides

binding interpretation concerning the extension of the temporal scope of application of certain protections established in Common Article 3 beyond the end of the conflict. The ICRC also references provisions in AP II that extend, where applicable, some of the protective obligations established in AP II beyond the end of the NIAC to which all of AP II applies. But that reference to AP II does not suffice, either—not least because, as noted above, AP II expressly purports to “develop[] and supplement[]” Common Article 3 and to do so “without modifying [Common Article 3’s] existing conditions of application.” Article 1(1) AP II.

286. See generally Scholdan, The End of Active Hostilities, supra note 13.
287. Emphasis added. See COMMENTARY ON THE APs, supra note 68, at 1358 (stating that Article 2(2) of AP II “specifies ratione temporis the legal protection of persons deprived of their liberty, who will continue to enjoy the fundamental guarantees of humane treatment and of judicial guarantees after the end of hostilities, not only if they were already detained, but also if they were arrested after the conflict came to an end. This rule reduces the risk of arbitrary behaviour by the victorious party”) (emphasis added).
288. Emphasis added.
289. Emphasis added.
290. Article 9(2) CCW Protocol II; see supra note 231.
that, “[w]ithout delay after the cessation of active hostilities, all minefields, mined areas, mines, booby-traps and other devices shall be cleared, removed, destroyed or maintained in accordance with” Articles 3(2) and 5 of that instrument.

**IHL Treaty Provisions concerning End-of-NIAC-related Obligations pertaining to Explosive Remnants of War**

As noted above, Protocol V of the CCW concerns explosive remnants of war. 291 Certain obligations imposed in that agreement—including with respect to clearance, removal, or destruction of explosive remnants of war 292 and with respect to recording, retaining, and transmission of information 293—arise “after the cessation of active hostilities.” However, Protocol V of the CCW does not define what constitutes “the cessation of active hostilities.” 294

**IHL Treaty Provisions concerning Denunciation or Withdrawal in relation to NIAC**

As noted above, the denunciation provisions in GCs I–IV (which Common Article 3 forms part of) establish formulations concerning the temporal end of application of the relevant convention(s) in accordance with a valid denunciation. 295 However, as emphasized above, to the extent the substantive provisions of the relevant IHL treaty are accepted as representing customary international law, denunciation of or withdrawal from that treaty would not impair the duty of the state to fulfill the obligations to which the state is otherwise subject, including through customary international law. 296 According to the ICJ, the rules of Common Article 3 “constitute a minimum yardstick” in both NIACs and IACs and reflect “elementary considerations of humanity.” 297

Under Article 25(1) of AP II, “[i]n case a High Contracting Party should denounce this Protocol, the denunciation shall only take effect six months after receipt of the instrument of denunciation.” Yet, pursuant to that same article, if, “on the expiry of six months, the denouncing Party is engaged in the situation referred to in [article 1 of AP II], the denunciation shall not take effect before the end of the armed conflict.” 298 As noted above, AP III, which concerns the adoption of an additional protective emblem, including in relation to NIAC, contains similar provisions. 299 As also mentioned above, Article 9(1) of the CCW lays down provisions concerning denunciation. 300

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291. Protocol V of the CCW applies in relation to IACs and NIACs; see Article 1(3) CCW Protocol V.
292. Article 3 CCW Protocol V; see supra note 234.
293. Article 4(2) of the CCW Protocol V; see supra note 235.
294. With respect to the formulation “the cessation of active hostilities” in the sense of Article 118(1) of GC III, concerning release of prisoners of war, see supra Section 4.
295. See supra notes 237–38 and corresponding text.
296. See supra note 236.
297. See supra note 256.
298. Emphasis added.
299. Article 14(1) AP III.
300. See supra note 242 and corresponding text.
PEACE AGREEMENTS AND PEACEFUL SETTLEMENTS

Agreements between the Parties

In relation to NIAC, peace agreements are commonly conceived as agreements concluded, with a view to bringing the conflict to an end, between a non-state party to a NIAC, on one hand, and either one or more states or one or more non-state parties, on the other hand. Such agreements are distinguishable from peace treaties stricto sensu—which, as mentioned above, have a primary function of terminating a “state of war” in the legal sense—because the state-of-war concept is foreign to NIACs.

Christine Bell argues that discerning whether a particular peace agreement constitutes a binding international agreement can be a tautological exercise: “[t]he tautology arises because a claim to international subjectivity ... involves examining what rights, powers, duties, and immunities the actors in question are accorded on the international plane, including whether they are permitted to sign treaties or international agreements.” Yet the primary “evidence of such permission may be the existence of an internationalized peace agreement itself.” As a consequence, “[r]ecognizing peace agreements as international agreements ... seems to require the non-state group and the agreement to ‘bootstrap’ each other into the international legal realm.” For his part, Dinstein avers that a peace accord between an incumbent government and non-state actors does not constitute a treaty and that (contrary to Bell), unless that accord leads to secession, it is not binding on the international-legal plane and the non-state signatories do not become subjects of international law.

ICTY Jurisprudence concerning a “Peaceful Settlement”

In 1995, in Tadić, the ICTY Appeals Chamber held in relation to “internal conflicts” that IHL “applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until ... a peaceful settlement is achieved.” Until that moment, the Court held, IHL “continues to apply in ..., in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.” The ICTY Appeals Chamber also emphasized, more generally, that “the temporal and geographical scope of ... internal ... armed conflicts extends beyond the exact time and place of hostilities.” In 2008, in the original Haradinaj trial judgement, an ICTY Trial Chamber alluded to that
peaceful-settlement test. That Chamber held that, in the circumstances of the case, “since according to the Tadić test an internal armed conflict continues until a peaceful settlement is achieved, and since there is no evidence of such a settlement during the indictment period, there is no need for the Trial Chamber to explore the oscillating intensity of the armed conflict in the remainder of the indictment period.”

The provenance of the term “peaceful settlement,” as used in this Tadić formulation, is unclear. Perhaps it was drawn from or inspired by one prominent historical use of the term “peaceful settlement” that arose in relation to an IAC (not a NIAC) on the Korean Peninsula: The Military Armistice in Korea and Temporary Supplementary Agreement signed on July 27, 1953. By its terms, that agreement aimed to, among other things, “insure a complete cessation of hostilities and of all acts of armed force in Korea until a final peaceful settlement is achieved.”

(Go to date, no such “final peaceful settlement”—at least not in the form of a peace treaty or a final-settlement agreement—has been achieved. 314)

Gabriella Venturini argues that “[t]he classic method of reaching a ‘peaceful settlement’ [in relation to a NIAC] is through a formal agreement sanctioning the definitive cessation of hostilities.” She cites the following as examples of such agreements:

- The Peace Agreement signed by the Government of El Salvador and the Frente Farabundo Martí in Mexico on January 16, 1992;
- The Rome General Peace Agreement of October 4, 1992 between the Frelimo Government of Mozambique and the opposition forces of Renamo;
- The Lomé Peace Agreement of July 7, 1999 between the elected Government of Sierra Leone and the Revolutionary United Front; and

Chamber II, IT-04-84bis-T, Nov. 29, 2012, ¶¶ 3–4, 682–85 (citations omitted) [hereinafter, “Haradinaj, Retrial Judgement”].

313. Armistice in Korea, supra note 144. See supra Section 4 concerning the status under international law of armistices.
314. See supra note 144.
315. Venturini, Temporal Scope, supra note 13, at 62.
316. UN Doc. A/46/863-S/23504, Annex I.
318. UN Doc. A/51/796-S/1997/114, Annexes I and II.
320. See Arusha Peace and Reconciliation Agreement for Burundi (2000). Venturini notes, however, that “[t]he Arusha Agreement did not prevent the resumption of hostilities, ending with the Global Ceasefire
Yet, under the rationale that the existence of a NIAC depends on the fact of protracted armed violence between states and organized armed groups or between such groups, Kleffner argues that "the mere adoption of a peace agreement, while indicating a certain intention of the parties to a [NIAC] to end that conflict, does not put an end to the existence of a [NIAC] and the applicability of the international legal framework pertaining to it."321 Thus, with respect to the Tadić formulation that the law of NIAC applies "until ... a peaceful settlement is achieved," Kleffner avers that that formulation "only holds true to the extent that the 'peaceful settlement' is not a matter of mere agreement, but is also an accurate description of the factual situation on the ground."322 More pointedly, Rogier Bartels argues that the formulation is too strict for NIAC and is not supported by IHL.323

In any event, numerous ICTY Trial Chambers and the Appeals Chamber have endorsed the Tadić "until ... a peaceful settlement is achieved" formulation.324 Also, in outlining sequential phases concerning the end of armed conflict in Sierra Leone, the Appeals Chamber of the Special Court for Sierra Leone utilized the "peaceful settlement" formulation—though without reference or citation to the ICTY—in the sense that “[t]he Peace Agreement Phase [which, according to the Appeals Chamber, comes after 'the phase of armed conflict' and which precedes the 'Justice Phase'] signifies the end of the armed conflict by means of a peaceful settlement.”325


322. Id. See also Dinstein, NIACs in International Law, supra note 41, at 48 (giving, as one of the "several basic scenarios" of how a NIAC may come to an unequivocal end, the example whereby "[a] compromise scheme between the conflicting positions of the parties to the NIAC is agreed upon and implemented. An agreement by itself may be the light of a false dawn, so it is implementation that ultimately counts") (emphasis added).

323. Bartels, When NIACs End, supra note 13, at 301. Also, as noted above, Quéguiner characterizes the ICTY Appeals Chamber's formulations concerning the end of armed conflict and the termination of IHL in relation to conflict as an attempt "to shed light — if only a little — on this complex issue." See supra note 244.

324. See Prosecutor v. Dragoljub Kunarac et al., Judgement, ICTY Appeals Chamber, IT-96-23 and IT-96-23/1-A, June 12, 2002, ¶ 57 (citations omitted); Boškoski, Trial Judgement, supra note 4, at ¶ 293 (citations omitted); Haradinaj, Retrial Judgement, supra note 311, at ¶ 396 (citations omitted). Part of that formulation is referenced by Judge Simma, of the ICJ, in his Separate Opinion in Democratic Republic of the Congo v. Uganda. Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, 341 (Dec. 19), ¶ 23 (Sep. Op. Judge Simma). In the section on the difference between internal disturbances (to which IHL does not apply) and "internal armed conflicts" (to which IHL does apply), the U.K. Ministry of Defence's The Joint Service Manual of the Law of Armed Conflict notes and excerpts the Tadić formula, including the "peaceful settlement" formulation. See U.K., JOINT SERVICE MANUAL, supra note 105, at ¶ 15.3.1. Yet it is not clear if thereby that Manual's authors meant necessarily to endorse that approach. As noted above, in a separate part of that Manual (the chapter on "The Applicability of the Law of Armed Conflict"), under the heading of "The Beginning and End of Application," the Manual states that "[t]he law of armed conflict applies from the beginning of an armed conflict until the general close of military operations." See supra note 149 and corresponding text. Note that the paragraph in which this excerpt on the beginning and end of application of the law of armed conflict appears seems to pertain only to IAC standards; but no such express qualification is made, even though this paragraph immediately follows an overview of differences between legal concepts underpinning IACs and NIACs.

325. Prosecutor v. Morris Kallon and Brima Bazzy Kamara, Decision on Challenge to Jurisdiction:
**ICC Jurisprudence**

None of the sources of law that the ICC shall apply “[in the first place]”\(^\text{326}\)—the Court’s Statute, its Elements of Crimes, or its Rules of Procedure and Evidence—contains a provision expressly delimiting at what point the temporal scope of situations of NIAC in respect of which the ICC may exercise jurisdiction terminates. “In the second place,” under the ICC’s Statute, the Court shall apply, “where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict.”\(^\text{327}\) Accordingly, it has fallen to ICC judges to identify and interpret relevant parameters concerning the end of a NIAC falling under the Court’s jurisdiction.

Recently, the Court outlined some of those parameters. In its March 2016 judgment finding Jean-Pierre Bemba Gombo guilty of two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape, and pillaging), Trial Chamber III adopted the “peaceful settlement” formulation articulated in *Tadić* concerning the end of—or, at least, the end of applicability of IHL to—a NIAC.\(^\text{328}\)

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Lomé Accord Amnesty, SCSL Appeals Chamber, SCSL-2004-15-AR72(E) and SCSL-2004-16-AR 72(E)), Mar. 13, 2014, ¶ 18 (and stating that “[o]ne legal consequence of that phase is that international humanitarian law would normally cease to be applicable to any act of violence in the peace period unless, notwithstanding what would have been regarded as a peaceful resolution, one party or both parties, in breach thereof, continued the armed conflict. Presumably, it is in further protection of the peace process that the competence of the Special Court includes in Article 1(1) of the Statute the prosecution of ‘those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.’ Thereby, impunity is denied to any such person, notwithstanding that there had been a peace agreement which constituted some sort of peaceful resolution of the conflict”). *Id.*

326. Article 21(1)(a) ICC Statute.

327. *Id.* at Article 21(1)(b); see also *id.* at Article 21(1)(c) (providing that, “[f]ailing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards”).

328. *Bemba*, Trial Judgment, *supra* note 273, at ¶ 141 (citing to *Tadić*, Decision on Interlocutory Appeal, *supra* note 101, at ¶ 70). That ICC Trial Chamber held that such a “peaceful settlement” does not, contrary to what the defense had argued, “reflect only the mere existence of an agreement to withdraw or a declaration of an intention to cease fire.” *Id.* (citations omitted).
## Summary Table

### IHL Treaty Provisions and Certain International Criminal Tribunals’ Formulations concerning the End of Non-International Armed Conflict

<table>
<thead>
<tr>
<th>Issue</th>
<th>Source or Authority</th>
<th>Provision(s)</th>
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<tr>
<td>Persons deprived of liberty in relation to armed conflict</td>
<td>Common Article 3 to GCs I–IV (1949)</td>
<td>No express temporal provision</td>
</tr>
<tr>
<td></td>
<td>AP II (1977)</td>
<td>“At the end of the armed conflict, all the persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those deprived of their liberty or whose liberty is restricted after the conflict for the same reasons, shall enjoy the protection of Articles 5 and 6 until the end of such deprivation or restriction of liberty.” (Art. 2(1) AP II); “Persons who have been deprived of liberty, or whose liberty has been restricted, for reasons related to the conflict shall nevertheless continue to benefit from the provisions of this Protocol until their final release.” (Art. 25(1) AP II)</td>
</tr>
<tr>
<td>General applicability of IHL and general termination of war-crimes period</td>
<td>ICTY (1995) &amp; ICC (2016)</td>
<td>IHL continues to apply “until … a peaceful settlement is achieved” (ICTY, Tadić, 1995, ¶ 70; endorsed by ICC, Bemba, 2016, ¶ 141)</td>
</tr>
<tr>
<td>Amnesties</td>
<td>AP II (1977)</td>
<td>“At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.” (Art. 6(5) AP II)</td>
</tr>
<tr>
<td>Minefields, mines and booby-traps</td>
<td>CCW Protocol II (as amen. 1996)</td>
<td>Various recording-related obligations to the period “immediately after the cessation of active hostilities” (Art. 3(2) CCW Protocol II); “[w]ithout delay after the cessation of active hostilities, all minefields, mined areas, mines, booby-traps and other devices shall be cleared, removed, destroyed or maintained in accordance with” Articles 3(2) and 5 (Art. 10(1) CCW Protocol)</td>
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<tr>
<td>Explosive remnants of war</td>
<td>CCW Protocol V (2003)</td>
<td>“After the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall mark and clear, remove or destroy explosive remnants of war in affected territories under its control.” (Art. 3(2) CCW Protocol V); “After the cessation of active hostilities and as soon as feasible, each High Contracting Party and party to an armed conflict shall take [certain] following measures in affected territories under its control, to reduce the risks posed by explosive remnants of war” (Art. 3(3) CCW Protocol V); certain Contracting Parties and parties to an armed conflict “shall, without delay after the cessation of active hostilities and as far as practicable, subject to those parties’ legitimate security interests, make available certain information to the party or parties in control of the affected area” (Art. 4(2) CCW Protocol V)</td>
</tr>
<tr>
<td>Denunciation</td>
<td>Common Article 3 to GCs I–IV (1949)</td>
<td>“A denunciation of which notification has been made at a time when the denouncing Power is involved in a conflict shall not take effect until peace has been concluded, and until after operations connected with the release and repatriation of the persons protected by the present Convention have been terminated.” (Articles 61(3)/62(3)/142(3) GCs I–III; see also article 158(3) GC IV)</td>
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<td></td>
<td>AP II (1977)</td>
<td>“If … on the expiry of six months, the denouncing Party is engaged in the situation referred to in Article 1, the denunciation shall not take effect before the end of the armed conflict. Persons who have been deprived of liberty, or whose liberty has been restricted, for reasons related to the conflict shall nevertheless continue to benefit from the provisions of this Protocol until their final release.” (Art. 25(1) AP II)</td>
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<tr>
<td></td>
<td>CCW (1980)</td>
<td>“If … on the expiry of that year the denouncing High Contracting Party is engaged in one of the situations referred to in Article 1, the Party shall continue to be bound by the obligations of this Convention and of the relevant annexed Protocols until the end of the armed conflict or occupation and, in any case, until the termination of operations connected with the final release, repatriation or re-establishment of the person protected by the rules of international law applicable in armed conflict, and in the case of any annexed Protocol containing provisions concerning situations in which peace-keeping, observation or similar functions are performed by United Nations forces or missions in the area concerned, until the termination of those functions.” (Art. 9(2) CCW)</td>
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