"Until They Are Effectively Destroyed": The U.S. Approach on the Temporal Scope of Armed Conflicts with Terrorist Organizations

Christian Schaller*

Introduction

In an immediate reaction to the attacks of September 11, 2001, President George W. Bush declared that America's "war on terror" had begun with al Qaeda but would not end there. In his view, this war would not be finished "until every terrorist group of global reach has been found, stopped, and defeated."[1] What President Bush called the "war on terror" has evolved into a permanent military campaign in which the United States has been trying to eliminate jihadist groups and their networks in various regions of the world, including al Qaeda, its branches, and the Islamic State in Iraq and Syria (ISIS, also known as IS, ISIL, or Daesh). Both the Obama administration and the Trump administration framed the fight against these actors as a state of armed conflict to ensure that U.S. forces can operate with sufficient legal authority. The Biden administration is unlikely to take a fundamentally different stance on the matter. The question of how this state of armed conflict will come to an end, which has been raised occasionally but has not yet been answered persuasively, is closely entangled with questions of U.S. domestic law and policy. However, the present article will address the issue from the perspective of international law, focusing on the concept of non-international armed conflict (NIAC). International treaty law does not tell us under which conditions a NIAC ceases to exist, and international jurisprudence on the matter is scarce. Different approaches and theories have therefore been developed by practitioners and scholars to determine the end of such conflicts in general. The standard employed by the United States in the counterterrorism context deviates significantly from these approaches and theories. According to the U.S. position, an armed conflict with a terrorist organization ends when the organization's operational capacity is degraded and its supporting networks are dismantled to such an extent that the organization is effectively destroyed and will no longer be able to attempt or launch a strategic attack against the United States. The present article analyzes the legal and practical implications of this doctrine. In particular, it will argue that the doctrine lacks conceptual clarity and coherence and is problematic from a humanitarian perspective. From a strategic point of view, however, the most important aspect is that the doctrine gives political decision

* Dr. Christian Schaller, Deputy Head, Global Issues Division, Stiftung Wissenschaft und Politik (SWP), German Institute for International and Security Affairs, Berlin.

1. Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2 Pub. Papers 1140, 1141 (Sept. 20, 2001).

makers and military commanders considerably more flexibility to justify continuous detention and direct targeting operations than those approaches discussed in the literature.

I. THE U.S. LEGAL POSITION ON THE END OF ARMED CONFLICTS WITH TERRORIST ORGANIZATIONS: THE EFFECTIVE-DESTRUCTION DOCTRINE

The law of armed conflict, also known as International Humanitarian Law ("IHL"), enables States to take action that would not be allowed in a peacetime environment where international human rights law applies without modification. Most notably, States enjoy greater legal leeway to target, capture, and detain individuals in an armed conflict than in situations not amounting to an armed conflict. Another characteristic feature of IHL is its tolerance for collateral civilian casualties. Governments facing criticism regarding the legality of an operation therefore often claim that their forces are deployed in the geographical and temporal context of an armed conflict. This is particularly the case in situations where States take cross-border action against terrorist groups. Claus Kreß noted that "States seem to be more interested in availing themselves of the wider powers they can derive from the application of the law of non-international armed conflict . . . than they are concerned by the restraining effect of the ensuing obligations."[2] In the aftermath of 9/11, the law of armed conflict has become an important source of authority for the United States to justify operations against terrorist structures in Afghanistan and other places. In a nutshell, the official position of both the Obama administration and the Trump administration may be summarized as follows: (1) because the United States is in an armed conflict with several terrorist organizations (according to the official position, the applicable legal regime is the law of non-international armed conflict), it has the authority to conduct military operations against them without having to demonstrate in every case that the respective mission is covered by the right to self-defense; (2) in this ongoing armed conflict, which is not defined by any geographic borders, the United States may also carry out military operations beyond "hot" battlefields; and (3) the law of armed conflict allows the use of lethal force against identified individual members of such groups as well as against individuals directly participating in hostilities.[3]

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2. Claus Kreß, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 J. CONFLICT & SECURITY L. 245, 260 (2010).

3. *See, e.g.*, THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (unclassified version, 2016), https://perma.cc/FQ6H-NDDN [hereinafter 2016 REPORT ON LEGAL AND POLICY FRAMEWORKS]; THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (unclassified version, 2018), https://perma.cc/K6CF-CR48 [hereinafter 2018 Report on Legal and Policy Frameworks]; THE WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (unclassified version, 2020), https://perma.cc/E7J3-V78H [hereinafter 2020 Report on Legal and Policy Frameworks].

Assuming that it is possible to frame the campaign against al Qaeda, ISIS, and other terrorist groups in theaters like Afghanistan, Iraq, Libya, Somalia, Syria, or Yemen as an ongoing armed conflict[4] (or more plausibly as several armed conflicts), a crucial question remains unanswered: Under which conditions does an armed conflict that involves such groups cease to exist as a matter of international law?

By announcing in December 2014 that "our combat mission in Afghanistan is ending, and the longest war in American history is coming to a responsible conclusion,"[5] President Obama sent a political message. But he did not put an end to the armed conflict in terms of the applicability of IHL. Unilateral statements by the conflict parties may provide important evidence that a conflict is over. Due to the factual nature of the concept of armed conflict under IHL, however, it is essential to evaluate how the situation on the ground actually develops. Even a peace agreement between the conflict parties is not sufficient in itself (as will be explained in section II below) to terminate a state of armed conflict unless it is effectively implemented. For example, the *Agreement for Bringing Peace to Afghanistan between the Taliban and the United States* signed on February 29, 2020,[6] which does not even bear the characteristic features of a full-fledged ceasefire or peace agreement,[7] did not, as such, have a direct effect on the classification of the situation in Afghanistan as far as IHL is concerned.

While the Trump administration seemed to put some hope in the agreement concluded with the Taliban, the armed conflict with al Qaeda is not open to any peaceful settlement. In 2012, Jeh Johnson (at the time, he was General Counsel of the U.S. Department of Defense) held an address at the Oxford Union in which he addressed the question of how this conflict will end.[8] In particular, he explained:

> I am aware of studies that suggest that many 'terrorist' organizations eventually denounce terrorism and violence, and seek to address their grievances through some form of reconciliation or participation in a political process. Al Qaeda is not in that category. Al Qaeda's radical and absurd goals have included global domination through a violent Islamic caliphate, terrorizing the United States and other western nations from retreating from the world stage, and the destruction of Israel. There is no compromise or political bargain that can be struck with those who pursue such aims.[9]

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4. *See, e.g.*, U.S. DEPARTMENT OF DEFENSE, ANNUAL REPORT ON CIVILIAN CASUALTIES IN CONNECTION WITH UNITED STATES MILITARY OPERATIONS IN 2019, at 5 (unclassified version, 2020), https://perma.cc/EHU4-K84N.

5. Press Release, The White House Office of the Press Secretary, Statement by the President on the End of the Combat Mission in Afghanistan (Dec. 28, 2014), https://perma.cc/8G3H-W35N.

6. Agreement for Bringing Peace to Afghanistan between the Islamic Emirate of Afghanistan which is not recognized by the United States as a state and is known as the Taliban and the United States of America, Taliban-U.S., Feb. 29, 2020, U.S. DEP'T OF STATE, https://perma.cc/J4WR-25WK.

7. Beatrice Walton, The U.S.-Taliban Agreement: Not a Ceasefire, or a Peace Agreement, and Other International Law Issues, JUST SECURITY (Mar. 19, 2020), https://perma.cc/CD7E-EY76.

8. Jeh Charles Johnson, Gen. Couns., U.S. Dep't of Def., Speech at the Oxford Union: The Conflict Against Al Qaeda and its Affiliates: How Will It End? (Nov. 30, 2012), https://perma.cc/B753-WD9E.

9. *Id.* at 8.

Instead, he suggested that:

> [. . .] on the present course, there will come a tipping point—a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, such that al Qaeda as we know it, the organization that our Congress authorized the military to pursue in 2001, has been effectively destroyed.[10]

At that point, according to Mr. Johnson, the situation should no longer be considered an armed conflict against al Qaeda and its associated forces. In his view, it should be recognized that further measures against individuals would then be part of a counterterrorism effort for which law enforcement and intelligence services would be responsible.[11] In an address at the 2015 annual meeting of the American Society of International Law, Stephen W. Preston, Mr. Johnson's successor as General Counsel of the Department of Defense, referred to the same standard to show that the United States remains in a legal state of armed conflict with al Qaeda, the Taliban, and associated forces.[12]

The conception outlined by Mr. Johnson has since become an integral component of the U.S. legal and policy frameworks guiding the use of military force and related national security operations. The present article refers to this conception as "effective-destruction doctrine." Under this doctrine, an armed conflict with a terrorist organization will be over when the operational capacity of the organization is degraded and its supporting networks are dismantled to such an extent that the organization "will have been effectively destroyed and will no longer be able to attempt or launch a strategic attack against the United States."[13] During their respective terms, the Obama administration and the Trump administration were convinced that this day had not yet come. According to their assessment, al Qaeda and ISIS continued to pose "a real and profound threat to U.S. national security."[14] By concluding that the United States, as a result, remained in a state of armed conflict against these groups "as a matter of international law,"[15] the Obama administration made clear that the tipping point standard devised by Mr. Johnson, which forms the basis of the effective-destruction doctrine, does not just serve as a yardstick for political or strategic decisions but reflects U.S. legal opinion. The Trump administration adopted this standard without modification.[16]

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10. *Id*. at 8-9.

11. *Id*. at 9.

12. Stephen W. Preston, Gen. Couns., U.S. Dep't of Def., Speech at the Ann. Meeting of the Am. Soc'y of Int'l L.: The Legal Framework for the United States' Use of Military Force Since 9/11 (Apr. 10, 2015), https://perma.cc/R9KL-4WK2.

13. 2016 REPORT ON LEGAL AND POLICY FRAMEWORKS, *supra* note 3, at 11-12.

14. *Id*. at 12*; see also* 2018 REPORT ON LEGAL AND POLICY FRAMEWORKS, *supra* note 3, at 6.

15. 2016 REPORT ON LEGAL AND POLICY FRAMEWORKS, *supra* note 3, at 12.

16. The Trump administration's 2018 and 2020 Reports on Legal and Policy Frameworks do not specifically address the conditions under which armed conflicts with terrorist organizations end.

On March 3, 2021, President Biden transmitted his first *Report on the Legal and Policy Frameworks for the United States' Use of Military Force and Related National Security Operations* to Congress.[17] The unclassified part of the report and an accompanying notification concerning changes in the legal and policy frameworks, which were publicly released on April 4, 2021,[18] do not indicate any deviation from the position of previous administrations on the temporal scope of armed conflicts with terrorist organizations under international law.

As reported by *Foreign Policy*, there is currently an intense debate between senior administration officials over how to end America's "forever war" that started in 2001.[19] A central question in this debate is whether al Qaeda and its offshoots still pose a strategic threat to the United States. According to the magazine, a senior administration official had stated that "[w]e have not declared that we've reached any sort of tipping point in that objective. There are still significant terrorist threats to the homeland and our interests abroad."[20] Jeh Johnson, on the other hand, recently said he believed "that legally and practically the armed conflict that Congress authorized in 2001, insofar as al Qaeda is concerned, is over."[21] In his opinion, core al Qaeda "has been effectively demolished, and its ability to launch a strategic attack against the U.S. like the one in 2001 has been significantly degraded."[22] These statements illustrate that the effective-destruction doctrine has gained some traction in the legal debate within the administration as well as among U.S. security experts.

II. CONTRASTING THE EFFECTIVE-DESTRUCTION DOCTRINE WITH OTHER APPROACHES ON THE TEMPORAL SCOPE OF NON-INTERNATIONAL ARMED CONFLICT

The Geneva Conventions of 1949 (GC I–IV),[23] the Additional Protocols of 1977 (AP I and II),[24] and other IHL treaties contain certain provisions that address

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However, it is explicitly stated in both reports that items or topic areas from prior reports that are not covered in the update report remain unchanged. *See* 2018 REPORT ON LEGAL AND POLICY FRAMEWORKS, *supra* note 3, at 1; 2020 REPORT ON LEGAL AND POLICY FRAMEWORKS, *supra* note 3, at 1.

17. Letter to Congressional Leaders on the Annual Report on Legal and Policy Frameworks Guiding the United States Use of Military Force and Related National Security Operations, 2021 DAILY COMP. PRES. DOC. 197 (Mar. 3, 2021).

18. THE WHITE HOUSE, UNCLASSIFIED ANNEX: REPORT ON THE LEGAL AND POLICY FRAMEWORKS FOR THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (2021), https://perma.cc/H5EH-KKSS; THE WHITE HOUSE, UNCLASSIFIED ANNEX: NOTIFICATION ON THE LEGAL AND POLICY FRAMEWORKS FOR THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS (2021), https://perma.cc/K226-YSBS.

19. Michael Hirsch, *Biden Team Engaged in "Rigorous" Debate Over Ending Forever War*, FOREIGN POLICY (Mar. 12, 2021), https://perma.cc/8CQJ-3HT5.

20. *Id.*

21. Interview by FOREIGN POLICY with Jeh Johnson, quoted *in* Hirsch, *supra* note 19.

22. *Id.*

23. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S.

temporal aspects of their application.[25] While some provisions of these treaties have to be observed in all circumstances, most rules of IHL are applicable only for such time as an armed conflict exists. Several individual protections continue to apply for a certain period even after the end of the conflict.[26]

However, IHL treaty law does not tell us under which conditions armed conflicts cease to exist in a legal sense. The end of an international armed conflict (IAC) is usually associated with the "general close of military operations"—a term employed in Article 6 GC IV and Article 3(b) AP I to define the scope of application of these instruments.[27] As far as the law of non-international armed conflict is concerned, no similar provision can be found in Additional Protocol II;[28] and Common Article 3 of the Geneva Conventions is also silent on the temporal scope of a NIAC. Nor is there any evidence of an established rule addressing the end of a NIAC under customary IHL. To fill this gap, international courts and the International Committee of the Red Cross (ICRC) have developed their own approaches, and legal scholars have discussed a variety of theories to explain the temporal dimension of armed conflicts for the purpose of the application of IHL. This section will show that the U.S. legal position on the end of armed conflicts with terrorist organizations deviates significantly from these approaches and theories.

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135 [hereinafter GC III]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

24. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

25. For a detailed overview, see Dustin A. Lewis, Gabriella Blum & Naz K. Modirzadeh, *Indefinite War: Unsettled International Law on the End of Armed Conflict* 21–66 (Harvard L. Sch. Program on Int'l L. & Armed Conflict ed., 2017), https://perma.cc/L8RJ-776K.

26. In the event that protected persons have fallen into the power of the enemy during an international armed conflict, the Geneva Conventions and Additional Protocol I shall apply, even after the end of the armed conflict, until the persons' final release, repatriation, or reestablishment. *See* GC I, *supra* note 23, art. 5; GC III, *supra* note 23, art. 5(1); GC IV, *supra* note 23, art. 6(4); AP I, *supra* note 24, arts. 3(b), 75(6). Likewise, at the end of a non-international armed conflict, all persons who have been deprived of their liberty or whose liberty has been restricted for reasons related to such conflict, as well as those arrested after the end of the conflict for the same reasons, shall enjoy protection under Articles 5 and 6 of the Protocol "until the end of such deprivation or restriction of liberty." AP II, *supra* note 24, art. 2(2).

27. *See, e.g.*, Tristan Ferraro & Lindsey Cameron, *Article 2: Application of the Convention*, *in* COMMENTARY ON THE THIRD GENEVA CONVENTION: CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR ¶ 310 (Int'l Comm. of the Red Cross ed., 2020) [hereinafter COMMENTARY ON THE THIRD GENEVA CONVENTION].

28. A proposed amendment to Additional Protocol II according to which its application should have ceased "upon the general cessation of military operations" could not be adopted during the Diplomatic Conference in Geneva. *See* Sylvie-Stoyanka Junod, *Protocol II, Article 2: Personal field of application*, *in* COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUG. 1949 at 1357, 1360 (Int'l Comm. of the Red Cross ed., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS].

A. The ICTY's Peaceful-settlement Standard: Too Strict and Formalistic

In 1995, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) issued a decision on jurisdiction in the *Tadić* case.[29] In this decision, the Chamber held that IHL applied, beyond the cessation of hostilities, in the case of "internal"— which can be understood as meaning non-international— armed conflicts, until "a peaceful settlement is achieved."[30] This particular passage of the *Tadić* formula has become a standard of reference in international criminal jurisprudence.[31] It is unclear, though, what the ICTY and other courts exactly mean when they refer to the standard of a peaceful settlement. According to Gabriella Venturini, the classic method of reaching such a settlement is "through a formal agreement sanctioning the definitive cessation of hostilities."[32] In 2016, for instance, the Government of Colombia and the FARC, after almost five years of negotiations, signed a final peace accord to put an end to the conflict in Colombia. Sometimes, even ceasefire agreements pave the way for a permanent resolution of the conflict.

But the drafters of the Obama administration's *Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations* of December 2016 (hereinafter 2016 *Report on Legal and Policy Frameworks*) made an important point in emphasizing that hostilities against an enemy like al Qaeda "are unconventional and presumably will not come to a conventional end."[33] Radical Islamist organizations like ISIS, which follow a strict Salafist ideology and fight to enforce Sharia law, are highly unlikely to be convinced by political negotiations and to agree to a peaceful settlement.

Apart from that, even in more conventional settings, the approach developed by the ICTY Appeals Chamber does not provide adequate guidance for determining the end of a NIAC. On the one hand, an armed conflict may simply taper off without any kind of agreement.[34] On the other hand, a formal agreement does not necessarily have an impact on the actual conduct of hostilities. With regard to situations of international armed conflict, Marko Milanovic cautioned that a formal peace treaty "might not be worth the paper it is written on if hostilities continue

29. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

30. *Id.* ¶ 70.

31. For references, see Lindsey Cameron, Bruno Demeyere, Jean-Marie Henckaerts, Eve La Haye & Iris Müller, with contributions by Cordula Droege, Robin Geiss & Laurent Gisel, *Article 3: Conflicts Not of an International Character*, *in* COMMENTARY ON THE THIRD GENEVA CONVENTION, *supra* note 27, ¶ 520.

32. Gabriella Venturini, *The Temporal Scope of Application of the Conventions*, *in* THE 1949 GENEVA CONVENTIONS: A COMMENTARY 51, 62 (Andrew Clapham, Paola Gaeta & Marco Sassòli eds., 2015) [hereinafter THE 1949 GENEVA CONVENTIONS].

33. 2016 REPORT ON LEGAL AND POLICY FRAMEWORKS, *supra* note 3, at 11.

34. Rogier Bartels, *From Jus In Bello to Jus Post Bellum: When do Non-International Armed Conflicts End?*, *in* JUS POST BELLUM: MAPPING THE NORMATIVE FOUNDATIONS 297, 303 (Carsten Stahn, Jennifer S. Easterday & Jens Iverson eds., 2014).

unabated."[35] The same is true for NIACs. The conclusion of a formal agreement is therefore neither necessary nor sufficient in itself to end an armed conflict within the meaning of IHL.[36] The ICRC criticizes the *Tadić* formula because it could be interpreted "as introducing a measure of formalism in a determination that should, first and foremost, be driven by facts on the ground."[37] To be clear, a formal agreement may very well constitute the end of a NIAC—but only if it is effectively implemented by the parties and reflects the reality on the ground.[38]

B. Looking at the Facts on the Ground: The Threshold Criteria Test

Consistent with the factual nature of the concept of armed conflict under IHL, it makes more sense to focus on the effectiveness of termination than on any formal criteria. It has therefore been suggested in the academic community that a NIAC may be considered over as a matter of IHL when the conditions under which it came into existence are no longer fulfilled.[39]

A NIAC within the meaning of Common Article 3 of the Geneva Conventions arises whenever there is "protracted armed violence between governmental authorities and organized armed groups or between such groups" (*Tadić* definition).[40] Two criteria must be fulfilled for a situation to fall under this definition: the violence must reach a certain level of intensity, and the armed groups must show a certain degree of organization.[41] Additional Protocol II, which supplements Common Article 3, has a more limited scope. According to Article 1(1) of AP II, the Protocol applies only to NIACs that take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other

35. Marko Milanovic, *The End of Application of International Humanitarian Law*, 96 INT'L REV. RED CROSS 163, 172 (2014).

36. Cameron et al., *supra* note 31, ¶ 524.

37. Int'l Comm. of the Red Cross, 32nd International Conference of the Red Cross and Red Crescent: International Humanitarian Law and the Challenges of Contemporary Armed Conflicts 10 (2015), https://perma.cc/FXC2-LHMN [hereinafter Int'l Comm. of the Red Cross, Challenges of Contemporary Armed Conflicts].

38. Jann K. Kleffner, *Peace Treaties*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ONLINE ED. ¶ 10 (Anne Peters ed., 2021).

39. *See, e.g.*, Bartels, *supra* note 34, at 303; Christian Schaller, *The Temporal Scope of the Laws of Armed Conflict in Multinational Military Operations*, *in* THE "LEGAL PLURIVERSE" SURROUNDING MULTINATIONAL MILITARY OPERATIONS 49, 62 (Robin Geiß & Heike Krieger eds., 2020); *see also* International Law Association Committee on Use of Force (2005–2010), Final Report on the Meaning of Armed Conflict in International Law 30 (2010), https://perma.cc/C5EP-FXE5; College of Europe & Int'l Comm. of the Red Cross, *Scope of Application of International Humanitarian Law: Proceedings of the 13th Bruges Colloquium (2012)*, 43 COLLEGIUM 1, 101 (2013) [hereinafter College of Europe & Int'l Comm. of the Red Cross, *Scope of Application of International Humanitarian Law*]; Lewis et al., *supra* note 25, at 97–99 ("two-way-ratchet theory").

40. Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). This definition has been widely recited in national and international jurisprudence, military manuals, and a variety of other legal and interpretive documents.

41. Because there is no general consensus on the exact degree of intensity and organization necessary to turn a situation into a NIAC, the ICTY identified a number of indicative factors that provide some guidance. For an overview, see Lindsay Moir, *The Concept of Non-International Armed Conflict*, *in* THE 1949 GENEVA CONVENTIONS, *supra* note 32, at 391, 404–13.

organized armed groups which, under responsible command, exercise such territorial control as to enable them to carry out sustained and concerted military operations and to implement the Protocol. Situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, are generally not regarded as armed conflicts under IHL.[42]

With regard to NIACs covered by Additional Protocol II, it can be argued that the Protocol becomes inapplicable already when the territorial control exercised by the non-State party falls below the level necessary for carrying out sustained and concerted military operations and for implementing the Protocol. As far as the end of a NIAC in the sense of Common Article 3 of the Geneva Conventions is concerned, the proponents of a threshold criteria test argue that the conflict terminates when either the intensity of violence or the degree of organization of the parties has dropped below a critical threshold.

Hence, applying the threshold criteria test means that a NIAC between two parties would cease to exist when at least one party no longer meets the requisite level of organization. This would be the case if an armed group is not able anymore to participate in protracted collective hostilities of a certain intensity—for example, if the group is deprived of its leadership, suffers from internal anarchy and decay, or loses its combat infrastructure due to arrests, killing, or defection of fighters. A particularly important component of organization is the element of responsible command.[43] This does not require a hierarchical system of military organization similar to that of regular armed forces.[44] But if the group lacks a structure in which some persons have the factual power to control the acts of their fellow fighters and to plan and coordinate military operations, it is difficult to argue that the relationship between these persons is still sufficiently organized to make them party to a NIAC.

Moreover, according to such a threshold criteria test, the end of a NIAC may also be diagnosed if the intensity of the confrontation drops below the level of protracted armed violence.[45] Attention should be paid to a possible decline in the gravity, frequency, duration, and geographic spread of armed violence. Especially a noticeable decrease in material destruction and in the number of casualties may warrant the assumption that the fighting has lost its original intensity. It is important to stress that, in the logic of a threshold criteria test, the end of a NIAC would not presuppose a total absence of violence.[46] Terrorists, sectarian groups, and organized criminals often benefit from the State's failure to maintain law and order during and after an armed conflict. It is thus not unusual that there

42. AP II, *supra* note 24, art. 1(2).

43. For a detailed discussion of this element, see SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 174–76 (2012). For a different view with regard to NIACs within the meaning of Article 8(2)(f) of the Rome Statute, see *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06-2842, Judgment, ¶ 536 (Mar. 14, 2012).

44. Sylvie-Stoyanka Junod, *Protocol II, Article 1: Material field of application*, *in* COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 28, at 1347, 1352.

45. Milanovic, *supra* note 35, at 180.

46. Cameron et al., *supra* note 31, ¶¶ 523, 528.

is an atmosphere of general insecurity and instability in the post-conflict phase. The decisive question is whether violent acts committed in this environment are attributable to the conflict parties (excluding isolated acts by individuals) and whether they are sufficiently protracted to constitute a NIAC (excluding sporadic acts of violence). According to the threshold criteria test, isolated and sporadic acts of violence would not be sufficient to keep a withering NIAC alive. To the extent that the old conflict between the original parties flares up or additional parties emerge and start a new conflict, IHL will start to apply again. The situations in Afghanistan, Iraq, and Libya, for instance, illustrate how difficult it is to draw a line between, on the one hand, hostilities that are directly related to one or more existing armed conflicts and, on the other hand, incidental acts of unorganized violence that are more or less a by-product of these conflicts.

C. The Problem of Volatility of Armed Conflict

Sometimes, armed conflicts terminate with the complete defeat of one side or the conclusion of a peace agreement. More often, however, confrontations drag on for a long time without any concrete outcome.[47] Depending on the circumstances of the case, it can be rather difficult to ascertain whether a noticeable decline in the intensity of violence at a given point in time means the end of the armed conflict. This problem arises, in particular, if hostilities are interrupted for some time and then flare up again. Many armed conflicts are "on-and-off affairs" where periods of relative calm alternate with periods of intense organized battles.[48] Afghanistan, for example, due to its climate, has seasonal periods, colloquially known as "fighting seasons", in which hostilities become more intense. Sometimes, armed conflicts are also interrupted by an unstable ceasefire or become frozen in the aftermath of an intervention. Moreover, it is not unusual for NIACs that the intensity of the hostilities decreases gradually and slowly. John Bellinger and Vijay Padmanabhan alluded to the problem that a proliferation of non-State groups operating in the same setting under separate commands could lead to a situation in which low-intensity hostilities continue for generations.[49] It is therefore important to clarify in each case whether a decline in hostile action already indicates the end of the conflict or is merely an interlude. The more volatile the situation, the more difficult it is to make a reliable determination.

D. How to Deal With this Problem

The problem of volatility of armed conflict was specifically addressed by the ICTY Trial Chamber in *Gotovina*.[50] In this case, the Chamber argued that "[o]nce

47. Joakim Kreutz, *How and When Armed Conflicts End: Introducing the UCDP Conflict Termination Dataset*, 47 J. OF PEACE RES. 243, 246 (2010).

48. *Id.* at 244.

49. John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, 229 (2011).

50. Prosecutor v. Gotovina, Case No. IT-06-90-T, Judgment, ¶ 1694 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 15, 2011).

the law of armed conflict has become applicable, one should not lightly conclude that its applicability ceases." Otherwise, as the Trial Chamber warned, the participants in an armed conflict could "find themselves in a revolving door between applicability and non-applicability" of IHL, "leading to a considerable degree of legal uncertainty and confusion."[51] The Trial Chamber therefore considered whether at any point during the indictment period the armed conflict in question had found "a sufficiently general, definitive and effective termination so as to end the applicability of the law of armed conflict."[52]

In view of these considerations, it has been argued in the academic community that, in the interest of practicability and legal certainty, an armed conflict, whether international or non-international, should not be considered over for the purpose of the application of IHL unless the situation had fallen below the relevant qualitative threshold with a degree of stability and permanence and unless the standard of a sufficiently general, definitive, and effective termination was satisfied.[53] While it is relatively easy to formulate such a standard in abstract terms, its operationalization under IHL is much more difficult.

According to an approach that has been described as the "no-more-combat-measures theory",[54] a NIAC may be considered to end with the general close of military operations. The notion of a general close of military operations, which is used in Article 6 GC IV and Article 3(b) AP I to define the scope of application of these instruments, is commonly referred to as the relevant benchmark for determining the end of an IAC.[55] Because there is no similar provision in Additional Protocol II, and Common Article 3 of the Geneva Conventions is also silent on the temporal scope of a NIAC, the proponents of the no-more-combat-measures theory rely on an analogous application of the concept of a general close of military operations to NIACs. The ICRC defines the term "military operations" in the sense of Article 6 GC IV and Article 3(b) AP I as "the movements, manoeuvres and actions of any sort, carried out by the armed forces with a view to combat."[56] The definition also covers actions of a preparatory character, such as maintaining troops on alert, deploying or redeploying troops, or mobilizing reservists.[57] However, it is important to reiterate that the term "military operations" does not necessarily imply the use of armed force. Military operations often continue even though hostilities have already ceased.[58] Therefore, a distinction must be made between the general close of military operations and the cessation of active

51. *Id*.

52. *Id*.

53. *See, e.g*., Milanovic, *supra* note 35, at 171, 180; Cameron et al., *supra* note 31, ¶¶ 526–30; Schaller, *supra* note 39, at 64–67.

54. Lewis et al., *supra* note 25, at 100.

55. *See* Ferraro & Cameron, *supra* note 27, ¶ 310.

56. Bruno Zimmermann, *Protocol I, Article 3: Beginning and End of Application*, *in* COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 28, at 65, 67.

57. Ferraro & Cameron, *supra* note 27, ¶¶ 312–13.

58. *Id*. ¶ 311.

hostilities.[59] Hence, according to the no-more-combat-measures theory, a NIAC will persist, beyond the cessation of hostilities, until the armed forces of the parties cease to take any further actions with a view to combat. If more than two parties are involved, the armed conflict will end only for those parties that refrain from conducting further military operations.

The legal advisers of the ICRC have also developed a specific approach to cope with the problem of uncertainty when determining the end of an armed conflict. They usually evaluate whether there is a reasonable risk that the hostilities will resume in the near future.[60] According to this approach, the condition of a general close of military operations in an IAC is not fulfilled as long as the parties conduct military movements and as long as it can be reasonably expected that the hostilities are likely to resume at any time.[61] With regard to NIACs, it has been held by the authors of the 2020 ICRC Commentary on Geneva Convention III that a lasting cessation of armed confrontations without a real risk of resumption would undoubtedly constitute the end of the conflict.[62] If the parties to an armed conflict maintain battle positions, it is fairly obvious that the fighting could commence any time soon. In armed conflicts of a more asymmetric nature, however, where the parties resort to hit-and-run attacks, pinprick assaults, targeted drone strikes, or cyber operations, it may be particularly difficult to interpret the ups and downs in the intensity of hostilities. As mentioned above, concentrating on temporary lulls in violence might lead to a premature conclusion that the conflict has terminated. Therefore, the ICRC waits for the complete cessation of hostilities between the parties to a NIAC before it examines whether there is a real risk that these hostilities will resume.[63] An ICRC report of 2015 on the challenges of contemporary armed conflicts states that "[i]n the ICRC's practical experience, the cessation of all hostilities between the parties to the conflict and the absence of a real risk of their resumption—based on an overall assessment of the surrounding factual circumstances—have proven to provide the strongest and most reliable indicators that a NIAC has ended."[64] This test does not only focus on the cessation of hostilities. It also includes an appraisal of whether related military operations of a hostile nature have ended.[65] Hence, the ICRC, when determining the end of a particular armed conflict, applies the same standard irrespective of whether the conflict is international or non-international.

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59. *See, e.g.*, Derek Jinks, *The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts* 3 (Harvard Program on Humanitarian Pol'y and Conflict Res. ed., 2004), https://perma.cc/LL3X-DF95. Article 118(1) GC III stipulates that prisoners of war shall be released and repatriated without delay "after the cessation of active hostilities".

60. *See, e.g.*, Int'l Comm. of the Red Cross, Challenges of Contemporary Armed Conflicts, *supra* note 37, at 8–11.

61. Ferraro & Cameron, *supra* note 27, ¶¶ 311, 313.

62. Cameron et al., *supra* note 31, ¶ 525.

63. Int'l Comm. of the Red Cross, Challenges of Contemporary Armed Conflicts, *supra* note 37, at 10–11.

64. *Id.* at 11.

65. *Id.*

It might not be sufficient, however, to monitor the conflict parties' actual movements on the ground. In order to evaluate whether there is a risk of resumption of hostilities, the background facts must also be taken into account as far as possible based on objective evidence. The declared or otherwise discernible motives, intentions, and expectations of the parties may be an important indication. For example, in the case of Afghanistan, it was rather obvious in the past that the Taliban during "off-season" always had a clear intent of resuming hostilities on a larger scale as soon as the weather would allow them to continue their attacks.

The decision of an armed opposition group to surrender or disengage from an armed conflict could be prompted, for instance, by internal or external political changes, loss of public support, loss of support from a powerful ally, shortages in financial resources, troops, weapons, and equipment, or simply by a decline in combativeness and morale. An example that illustrates how a large-scale NIAC may terminate with a clear defeat of one side was the civil war between the government of Sri Lanka and the Liberation Tigers of Tamil Eelam (LTTE). This conflict came to an end in May 2009 after many years of intense fighting. An important turn in the course of the conflict had been the break-away from the LTTE of an influential commander and some 5,000 troops in 2004. Ultimately, it was the killing of nearly the entire LTTE leadership that set the seal on the organization's defeat in May 2009.[66]

By contrast, a party that has suffered merely a minor defeat may regroup and, after a certain period of time, carry on with its operations, especially if it still controls a part of the territory and continues to recruit, train, and arm new fighters. In such circumstances, it should not be assumed too quickly that the armed conflict has already come to an end.[67] But how much time must have passed before it can reasonably be concluded that the situation has stabilized and that the crossing of a certain threshold is not just temporary? For how long, in particular, must the intensity of the confrontation fall below the level of protracted armed violence with no risk of resumption in order to warrant the diagnosis that the end of a NIAC has actually been reached? The authors of the 2020 ICRC Commentary on Geneva Convention III emphasized that "[i]t is impossible to state in the abstract how much time without armed confrontations needs to pass to be able to conclude with an acceptable degree of certainty that the situation has stabilized."[68] According to their view, a longer period of observation might be necessary while, in the meantime, IHL would continue to apply.[69]

66. *See* Steven R. Ratner, *Accountability and the Sri Lankan Civil War*, 106 AM. J. INT'L L. 795 (2012).

67. Cameron et al., *supra* note 31, ¶ 523.

68. *Id.* ¶ 526.

69. *Id.*

E. Applying the Effective-destruction Doctrine Instead

The approaches and theories introduced above may provide adequate guidance for determining the end of conventional NIACs, especially when the armed forces of opposition groups operate in patterns similar to those of State military forces. In such scenarios, the withdrawal of troops and accompanying declarations may indicate that the parties do not expect the armed conflict to go into another round. This is particularly obvious if armed forces are completely removed from combat zones. As far as non-State parties are concerned, the most evident signal would be the disarmament and demobilization of their military arm. The civil war in Sierra Leone during the 1990s, for example, had survived a ceasefire and a peace agreement before the Revolutionary United Front (RUF) was finally defeated and dissolved.[70] In January 2002, the conflict was officially declared over by the government following the disarmament and demobilization of more than 75,000 former fighters under the supervision of the UN Mission in Sierra Leone.

The situation is different in NIACs in which States are trying to eliminate threats posed by actors like al Qaeda or ISIS. Such groups, given their radical objectives, are highly unlikely to enter into negotiations, denounce violence, sign instruments of surrender, and voluntarily disarm and demobilize their fighters. The case of the degradation of ISIS in Syria and Iraq in 2017 shows that even after a major military defeat, such organizations may be flexible enough to move their fighters to other countries or morph into an underground network to continue to pursue their violent agenda. This is why the Obama administration concluded that armed conflicts with terrorist groups "are unconventional and presumably will not come to a conventional end."[71]

Moreover, as shown in the previous subsections, it is generally difficult to formulate concise and practicable criteria for determining the end of a NIAC under IHL. The peaceful-settlement standard developed by the ICTY is too strict and formalistic. The threshold criteria test, which finds some support in the academic community, may lead to confusion and legal uncertainty in highly volatile armed conflict situations. Even if it is acknowledged that an armed conflict should not be considered over as a matter of law unless the situation has fallen below the relevant qualitative threshold with a degree of stability and permanence, a fundamental practical problem remains unsolved: Ex post, in a court trial or an academic exercise, with knowledge of the actual timeline, decisive episodes, and turning points of an armed conflict, it may be possible to identify when the conflict came to an end. From a less distanced angle, however, it is hard to ascertain that an apparent decrease in the intensity of the fighting or even a complete cessation of hostilities is not just temporary. Determining that there is also no real risk of resumption of these hostilities involves a considerable degree of subjectivity, projection, and uncertainty. In military practice, this problem could be addressed in the rules of engagement, which are supposed to reflect both the political

70. *See* Bartels, *supra* note 34, at 303.
71. 2016 REPORT ON LEGAL AND POLICY FRAMEWORKS, *supra* note 3, at 11.

considerations underlying the mission as well as the realities on the ground. As far as a de-escalation of the conflict is intended or already apparent, the rules of engagement will probably aim for more restrained use of force. In combatting actors like al Qaeda, however, a de-escalation is usually not the right strategy.

The effective-destruction doctrine, which is part of the U.S. legal and policy frameworks guiding the use of military force and related national security operations, differs from these approaches in one important aspect: It does not focus on the actual course of the hostilities—which means it does not require a peaceful settlement of the armed conflict, nor is it satisfied with a noticeable decrease in the intensity of the fighting or a general close of military operations; and it is not dependent on a risk assessment dealing with the question of whether hostilities are likely to resume at any time. Instead, the tipping point standard that forms the basis of the doctrine pays attention solely to the existence and operational capacity of the relevant group. The following section will discuss what could be meant by the formula that the armed conflict is over when the organization "will have been effectively destroyed and will no longer be able to attempt or launch a strategic attack against the United States."[72]

III. THE EFFECTIVE-DESTRUCTION DOCTRINE: STRATEGIC CONSIDERATIONS

When speculating about the strategic rationale underlying the effective-destruction doctrine, it is helpful to recall that the law of armed conflict serves as an important source of authority for the United States to justify operations against terrorist structures in Afghanistan and other places. The Obama administration's 2016 *Report on Legal and Policy Frameworks*, for instance, underlined that "[i]t is well- and long-established that under the law of armed conflict, States may target specific, identified individual members of an enemy force as well as individuals directly participating in hostilities."[73] Once the armed conflict is over, a much more restrictive set of rules applies to the use of lethal force against an individual under international human rights law.[74] The same is true for detention operations. President Trump's Executive Order 13823 of January 30, 2018, entitled *Protecting America through Lawful Detention of Terrorists*, notes in Section 1(a): "Consistent with long-standing law of war principles and applicable law, the United States may detain certain persons captured in connection with an armed conflict for the duration of the conflict."[75] After the armed conflict has ended, persons being held in relation to the conflict without criminal prosecution must be released and the international legal framework governing subsequent capture and detention operations becomes more restrictive.[76] From a military counterterrorism

72. *Id*. at 11–12.

73. 2016 REPORT ON LEGAL AND POLICY FRAMEWORKS, *supra* note 3, at 19.

74. *See, e.g*., NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 91–139, 177–221 (2008).

75. Exec. Order No. 13823, 83 Fed. Reg. 4831 (Jan. 30, 2018).

76. Nathalie Weizmann, *The End of Armed Conflict, the End of Participation in Armed Conflict, and the End of Hostilities: Implications for Detention Operations under the 2001 AUMF*, 47 COLUM. HUM. RTS. L. REV. 204, 206, 244–57 (2016).

perspective, it is therefore desirable to keep the window for the application of the law of armed conflict in the fight against al Qaeda, ISIS, and other terrorist groups open as long as possible.

A. Keeping the Window Open for the Application of the Law of Armed Conflict

Some authors have claimed that a NIAC should be considered over when either the intensity of violence or the degree of organization of the parties has dropped below a critical threshold (threshold criteria test, *see* section II above). This theory implies that a State party can keep the conflict alive (and thereby extend the applicability of the law of armed conflict as a source of authority for its military operations) by constantly involving the non-State armed group in hostilities of a certain intensity until the group's level of organization has dropped below the critical threshold. The intensity criterion requires that there are not just isolated and sporadic acts of violence.

The effective-destruction doctrine, however, does not take into account the intensity criterion. Under this doctrine, the window for the application of the law of armed conflict does not close until the operational capacity of the organization is degraded and its supporting networks are dismantled to such an extent that the organization "will have been effectively destroyed and will no longer be able to attempt or launch a strategic attack against the United States."[77]

In contrast, using a standard that focuses on the actual course of hostilities may lead to the assessment that the armed conflict is already over even though the organization still exists. To illustrate this in more concrete terms with a view to direct targeting: if the threshold criteria test is applied, one may eventually conclude that the armed conflict in Afghanistan or elsewhere has come to an end due to the fact that protracted collective hostilities have been replaced by isolated and sporadic violent incidents. It may well be argued that singular drone strikes or Special Forces operations like those that led to the killing of Osama bin Laden or Abu Bakr al-Baghdadi do not per se reach the level of intensity necessary to trigger a NIAC in the first place. As a consequence, where it is assumed, based on the threshold criteria test, that a situation in a particular theater has ceased to exceed the threshold of a NIAC, such isolated and sporadic strikes and operations would not be covered anymore by the law of armed conflict and would therefore be much more difficult to justify under international law.

Applying the effective-destruction doctrine leads to a different result. In the logic of this doctrine, the administration, once it has determined that a certain situation qualifies as an armed conflict, could continue to order targeted operations within the framework of the law of armed conflict for an indefinite time, irrespective of the intensity of the campaign, until it is convinced that the terrorist threat has been completely eliminated. Until then, singular drone strikes or Special Forces operations would fall under the umbrella of the law of armed conflict even

77. 2016 Report on Legal and Policy Frameworks, *supra* note 3, at 11-12.

if they are conducted out of the blue during periods of relative calm when there are no protracted collective hostilities.

The bottom line is that the effective-destruction doctrine provides political decision makers and military commanders with more flexibility to justify continuous detention and direct targeting operations in the fight against al Qaeda, ISIS, and other terrorist organizations.

B. Is the Doctrine Sufficiently Clear and Coherent?

The doctrine, as formulated in the 2016 *Report on Legal and Policy Frameworks*, is based on the assumption that there will no longer be an armed conflict when the organization "will have been effectively destroyed and will no longer be able to attempt or launch a strategic attack against the United States."[78] This wording raises several questions.

First, it is somewhat ambiguous how the two parts of the quoted sentence relate to each other. Do the authors of the doctrine consider the effective destruction of the organization and the loss of the ability to attempt or launch a strategic attack as two distinct conditions both of which must be fulfilled for an armed conflict to end? Such an interpretation is hardly plausible because it is evident that an organization that has been effectively destroyed in the literal sense is not capable anymore of carrying out any attack. In this sense, the loss of strategic-attack capability is just a concomitant of the effective destruction of the organization. Another possible reading is that the organization will be regarded as being effectively destroyed (in a virtual sense) as soon as it has lost its ability to attempt or launch a strategic attack against the United States. This interpretation more closely reflects what Jeh Johnson explained in his 2012 address at the Oxford Union when he spoke of "a tipping point at which so many of the leaders and operatives of al Qaeda and its affiliates have been killed or captured, and the group is no longer able to attempt or launch a strategic attack against the United States, *such that* al Qaeda as we know it . . . has been effectively destroyed" (emphasis added).[79] In that sense, the loss of strategic-attack capability—as a consequence of degrading the organization's operational capacity and dismantling its supporting networks—may be understood as the decisive criterion for determining that the armed conflict has come to an end.

The second question, closely related to this issue, is why the effective-destruction doctrine refers to the concept of *strategic* attack. This concept is used in military studies and military doctrine to describe a particular type of attack designed to achieve national strategic objectives. Strategic attack is therefore usually understood as a component of State warfare. U.S. Air Force doctrine, for instance, considers strategic attack as "an approach to war focused on the adversary's overall system and the most effective way to target

78. *Id.*
79. Johnson, *supra* note 8, at 8–9.

or influence that system."[80] Under this conception, a strategic attack accomplishes such change by affecting "centers of gravity" in the enemy system, which are leverage points that, when affected, create significant change.[81] The doctrine describes centers of gravity as "focal points that hold a system or structure together, draw power from a variety of sources, and provide purpose and direction to that system."[82] Concerning the question of what exactly qualifies as a center of gravity, the doctrine is very broad and unspecific. It lists, among other things, leaders, key production structures, or an enemy's moral strength.[83] A typical feature of a strategic attack is the exploitation of critical vulnerabilities (for example certain places, events, factors, or functions). Moreover, it is assumed that affecting centers of gravity "will yield results disproportionate to the effort expended, that is, they will provide the highest payoff (enemy system change) for the least cost (lives, resources, time, etc.)."[84] According to General Hal M. Hornburg, "strategic attack builds on the notion that it is possible to directly affect enemy sources of strength and will to fight without having to engage in extended attritional campaigns to defeat hostile forces."[85] It is generally possible to apply these characteristics of a strategic attack to attacks of a terrorist character. The attacks of 9/11 may serve as the prototype of a terrorist strategic attack. The same probably applies to the bombing of an U.S. embassy or the shooting down of a government plane. Beyond that, it remains unclear what the term "strategic attack" exactly means in the present context.

More importantly, the effective-destruction doctrine does not cover the entire spectrum of armed conflicts potentially occurring in connection with military counterterrorism action. This is particularly problematic in cases in which U.S. forces are deployed abroad with a twofold mission: first and foremost, to prevent a terrorist organization from attacking U.S. centers of gravity and, in addition, to degrade the organization's capacity to conduct terrorist attacks in the region (assuming that such regional attacks are not regarded as strategic attacks against the United States). In such scenarios, the effective-destruction doctrine—as applied with a specific focus on the terrorist organization's strategic-attack capability—could lead to the conclusion that the tipping point is reached and the armed conflict is over as soon as the first objective is achieved. It is difficult to understand, however, why the second part of the mission should not also be covered by the law of armed conflict. A terrorist organization that is not capable anymore of attempting or launching a strategic attack against the United States may still be able to engage in collective hostilities and attack U.S. forces on an operational or tactical level.

80. U.S. AIR FORCE, OPERATIONAL-LEVEL DOCTRINE ANNEX 3-70, STRATEGIC ATTACK, at 5 (2019), https://perma.cc/SHA3-ESQS.

81. *Id.* at 6.

82. *Id.*

83. *Id.*

84. *Id.*

85. Hal M. Hornburg, *Strategic Attack*, 32 JOINT FORCE Q. 62, 64 (2002).

The effective-destruction doctrine in its current version does not address this category of hostilities.

CONCLUSION

In section II of this article, it has been explained that the conditions under which a NIAC ceases to exist as a matter of IHL are not regulated in the Geneva Conventions, Additional Protocols, or any other treaty. Nor is there evidence of an established rule addressing the end of a NIAC under customary IHL. None of the approaches and theories discussed in the literature has so far gained sufficient support in State practice. In fact, there seems to be little sensitivity among States about the legal and practical implications of defining the temporal scope of armed conflicts. Most military manuals simply mention the possibility of concluding peace treaties or other agreements to put an end to the conflict, or they refer to the notion of a general close of military operations to delimit the applicability *ratione temporis* of the Geneva Conventions and Additional Protocol I in cases of IAC.[86] Thus, it is not surprising that the ICRC *Customary IHL Database*[87] is also completely silent on the temporal dimension of the concept of armed conflict.

While the United States is sometimes criticized for certain targeting and detention practices, there is no general discomfort among States about America's claim to be in an ongoing armed conflict with al Qaeda and its affiliates since 9/11. From a humanitarian perspective, it is highly problematic that the United States, based on a unique conception of how armed conflicts with terrorist organizations end, considers itself in a quasi-permanent state of armed conflict. Under such conditions, local populations in the relevant theaters are exposed for a long time to enormous hardship since the law of armed conflict is rather tolerant of incidental civilian death and destruction of civilian objects. Moreover, the approach followed by the United States raises concerns in terms of transparency. Verifying that the operational capacity of a terrorist organization is degraded and its supporting networks are dismantled to such an extent that the organization is effectively destroyed and has lost its ability to attempt or launch a strategic attack against the United States requires profound intelligence. This makes it difficult for those who have no access to such intelligence to see whether, in the U.S. administration's judgment, the armed conflict has come to an end or not. As a consequence, especially the civilian population, individual civilians, and humanitarian actors may have to cope with a considerable degree of legal uncertainty.

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86. *See, e.g.*, Australian Defence Force Headquarters, *Law of Armed Conflict* (ADDP 06.4, May 11, 2006) at para. 3.11–3.12, https://perma.cc/8ZQJ-WJHM; Canada National Defence, Office of the Judge Advocate General, *Law of Armed Conflict at the Operational and Tactical Levels* (Joint Doctrine Manual B-GJ-005-104/FP-021, Aug. 13, 2001) at para. 1105, online: Forum for International Criminal and Humanitarian Law, https://perma.cc/PT6G-WJKH; Bundesministerium der Verteidigung [Federal Ministry of Defence], *Humanitäres Völkerrecht in bewaffneten Konflikten* [International Humanitarian Law in Armed Conflict] (Zentrale Dienstvorschrift A-2141/1, Feb. 2016) at para. 221–238, https://perma.cc/MC9N-26LV (Ger.); U.K. Ministry of Defence, Joint Doctrine and Concepts Centre, The Joint Service Manual of the Law of Armed Conflict (JSP 383, 2004), at para. 3.10, https://perma.cc/R93K-ZNRP.

87. Int'l Comm. of the Red Cross, Customary IHL Database, https://perma.cc/SG6E-CKR9.

Nevertheless, it appears that the international community has got used to the fact that there is no end in sight to the struggle against international terrorism. A sizeable number of States seem to be accepting that it is necessary to be persistent in taking military action against terrorist structures (in addition to a broad spectrum of law enforcement and other non-military counterterrorism efforts). For example, the French Minister of the Armies, Florence Parly, issued a statement in December 2018 in which she insisted that the military campaign against ISIS had to continue until its last pockets were defeated and until the organization and its roots were "wiped of the map."[88] This was a rallying cry in reaction to President Trump's announcement to withdraw troops from Syria. But it reflects a deeper conviction shared by many States that the fight against such organizations and networks must continue until they are effectively destroyed. On the website of the Global Coalition against Daesh, which was formed in 2014 and which currently consists of 83 partner States, it is declared that the Coalition is "committed to degrading and ultimately defeating Daesh."[89] The mission statement continues with a focus on military action: "As long as Daesh remains a significant threat worldwide, the Coalition will continue to capitalize on the momentum that Coalition and partner forces have achieved and apply continuous pressure on the terrorist networks wherever they operate."[90] These statements display a growing readiness among States to avail themselves of the authority provided by the law of armed conflict, no matter how long it will take, to root out terrorist structures. The more States regard the drive against ISIS as described in the Coalition's mission statement as an enduring armed conflict, the more the approach of the United States will gain traction. Over time, such a dynamic could also impact the evolution of the customary international law framework governing armed conflicts with terrorist organizations.

88. On December 20, 2018, the Minister said on Twitter: "Daech est plus affaibli que jamais. Daech est passé à la clandestinité et en mode insurrectionnel dans sa manière de combattre. Daech a perdu plus de 90% de son territoire. Daech n'a plus de logistique comme il a pu en avoir. Mais Daech n'est pas rayé de la carte, ni ses racines d'ailleurs, il faut vaincre militairement de manière définitive les dernières poches de cette organisation terroriste." Florence Parly (@florence_parly), Twitter (Dec. 20, 2018, 3:20 AM), https://perma.cc/3W2A-UQUM.

89. GLOBAL COALITION, https://perma.cc/MU5S-AQEP.

90. Mission, Military Progress, GLOBAL COALITION, https://perma.cc/A72C-ST2W.