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Post-Conflict Law (*Jus Post Bellum*)– A Legal Order with Defined Scope of Action After an Armed Conflict

Abstract

Is it possible to determine the exact times when post-conflict law will enact and terminate? How do transitional justice and post-conflict law differ from each other? To what extent is it acceptable to use the same operational framework of post-conflict law after international and non-international armed conflicts? What is the main problem that post-conflict law faces when military occupation ends? – answering these questions is the basic task of this article. In order to fulfill the latter, there is presented a discussion on the following topics relevant to international law: on drawing the line between international humanitarian law and post-conflict law – in the context of determining the moment of enactment of post-conflict law; on the challenges related to the definition of the term "peace" and simultaneously achieving the goals set by the basic principles of post-conflict law – in the context of determining the moment of termination of post-conflict law; on the concept of transitional justice, its legal burden and scope of interest – in the context of the separation of the mentioned doctrine from post-conflict law; on the protection of the civilian population with the same standard by the international humanitarian law, the same responsibility imposed on war criminals, the same application of international human rights law and the same involvement of international organizations in the implementation of the basic principles of post-conflict law irrespective of the type of armed conflict – in the context of establishing a uniform framework of post-conflict law applicable after both types of armed conflict; on the relationship between the occupier and the occupied parties during the period of military occupation – in the context of the post-occupation legal order.

Key words: post-conflict law, international armed conflict, non-international armed conflict, military occupation, armistice agreement, peace agreement, ceasefire agreement, capitulation, transitional justice, post-conflict legal order.

Introduction

Post-conflict law, while fulfilling its main task, in particular, in the process of terminating armed conflict and establishing and maintaining peace, faces many moral, legal and practical challenges. The determination of the moments of enactment and termination of it, as a certain legal order, is characterized by a number of problematic aspects. In discussing the scope of

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post-conflict law, in addition to the question of when it enacts and terminates, it is also necessary to distinguish it from the doctrine of transitional justice, as they share many common features. In addition, it should be noted that there are already some theories, on the one hand, on the development of such a framework and approaches of post-conflict law, which can be used in the same way after both an international armed conflict without occupation and a non-international armed conflict, and on the other hand, on the problematic nature of the relationship between the former occupying party and the population of the former occupied territory after the termination of an international armed conflict that is accompanied by occupation.

An important obstacle to the consideration of post-conflict law as a legal order with a defined scope of action is that, despite the growing need, there are still no specific international legal norms that would bring measures to be taken after the end of an armed conflict into a unified framework. Furthermore, the mentioned topic is very new and needs to be processed at the academic level.

The purpose of this article is to discuss the scope of post-conflict law and the main features of the legal order established after the end of the armed conflict, that is why it is divided into the following two chapters: the first chapter presents a discussion on the terms of action of post-conflict law, as well as on the separation of the actions of it and transitional justice; the second chapter talks about the essential features of post-conflict law considering the armed conflict that preceded it.

Chapter 1. The Scope of Post-Conflict Law

1.1. The Timeframes of Post-Conflict Law

1.1.1. When Does Post-Conflict Law Enact? – JUS IN BELLO v. JUS POST BELLUM

According to the opinion existing in the scientific literature, post-conflict law enacts immediately after the cessation of international humanitarian law,[2] which is achieved differently in cases of international armed conflict without military occupation, international armed conflict accompanied by it, and non-international armed conflict.

According to the Common Article 2 of Geneva Conventions of 12 August 1949 “for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field”, “for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea”, “Relative to the Treatment of Prisoners of War” and “Relative to the Protection of Civilian Persons in Time of War” (hereafter “the 1949 Geneva Conventions”), international

[2] *Kleffner J. K.*, Towards a Functional Conceptualization of the Temporal Scope of Jus Post Bellum, Jus Post Bellum: Mapping the Normative Foundations, *Stahn C.*, *Easterday J. S.*, *Iverson J.* (*eds.*), Oxford, 2014, 289.

armed conflict may arise between two or more state.[3] In addition, the International Criminal Tribunal for the former Yugoslavia (hereinafter "ICTY") explained in the *Tadić* case that an international armed conflict means "a resort to armed force between States."[4] In practice, the termination of an international armed conflict and the replacement of international humanitarian law with post-conflict law is carried out by such means as the conclusion of an armistice, peace or ceasefire agreement, or the declaration of capitulation.[5] In order to see the overall picture better, it is appropriate to review each of them briefly.

An armistice agreement may aim at a cessation of hostilities without time limit[6] everywhere or only between separate units or in a specific area.[7] Thus, there can be distinguished general and local armistice agreements.[8] Also, the hostilities based on the armistice will be stopped as soon as the competent agencies and military units are officially and timely informed about the signing of this type of agreement or from the moment of time provided by the armistice agreement.[9] Any serious violation may give a party the reason for denunciation of the armistice agreement,[10] provided that there will be respected the conditions for the exercise of the right to self-defense stipulated by the UN Charter.[11] If a private person violates the terms of the armistice agreement on his own initiative, the injured party will have the right to demand the punishment of the perpetrator or, if necessary, compensation for the damage caused.[12] Finally, regarding armistice agreements, it should be noted that conditions of armistice should not create a regime so different from the 1949 Geneva Conventions as to harm the legal status of protected persons.[13]

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[3] The Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, Article 2; The Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, Article 2; The Convention Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Article 2; The Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Article 2.

[4] See citation: The Prosecutor v. Dusko Tadic, [1995] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY (IT-94-1-A), §70.

[5] *Kleffner J. K.*, Towards a Functional Conceptualization of the Temporal Scope of Jus Post Bellum, Jus Post Bellum: Mapping the Normative Foundations, *Stahn C.*, *Easterday J. S.*, *Iverson J.* (*eds.*), Oxford, 2014, 290; *Kleffner J. K.*, Scope of Application of International Humanitarian Law, The Handbook of International Humanitarian Law, *Fleck D.* (*ed.*), 3rd ed., Oxford, 2013, 65-70.

[6] *Kleffner J. K.*, Scope of Application of International Humanitarian Law, The Handbook of International Humanitarian Law, *Fleck D.* (*ed.*), 3rd ed., Oxford, 2013, 65.

[7] The Annex to the Convention IV respecting the Laws and Customs of War on Land: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Article 37.

[8] Ibid.

[9] Ibid, Article 38.

[10] Ibid, Article 40.

[11] The Charter of the United Nations, San Francisco, 26 June 1945, Article 51.

[12] The Annex to the Convention IV respecting the Laws and Customs of War on Land: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Article 41.

[13] *Kleffner J. K.*, Scope of Application of International Humanitarian Law, The Handbook of International Humanitarian Law, *Fleck D.* (*ed.*), 3rd ed., Oxford, 2013, 68; The Convention for the Amelioration of the

A peace agreement, unlike an armistice agreement, ensures a complete and final termination of an armed conflict.[14] There are two types of peace agreement: first, the *strictu senso* peace agreement, which is concluded between the state parties to the international armed conflict in written form by the head of the state or another specially authorized person, officially completes the state of war and restores friendly relations; and second, a conventional peace agreement, which is concluded between state and non-state actors, or only between non-state actors which are parties to a non-international armed conflict, officially completes the state of war.[15] Peace agreements cover such issues as: the consequences of armed conflict, the measures to be taken to prevent the recurrence of armed conflict, and the procedural and institutional aspects of the implementation of the terms of the peace agreement and monitoring of their fulfillment.[16]

As for the ceasefire agreement, the parties to the armed conflict often resort to it in the modern era to end active hostilities. The term "ceasefire" is usually defined in these categories of the agreements and includes "commitment by parties to end all acts of aggression on land, at sea, or in the air, as well as any other activities that undermine the spirit of a ceasefire or ongoing peace talks."[17] This types of agreements include the following basic criteria: geographic scope, parties, date and time when arrangements come into force, period of ceasefire and sequencing considerations.[18] However, the ceasefire regime most often regulates such issues as: a cessation or suspension of hostilities, separation/withdrawal of forces, an exchange of information on weapons and combatants, opening channels of communication between conflict parties, facilitation of humanitarian access, handover of public or strategic infrastructure, full or partial demobilization, disarmament and reintegration.[19]

The term "capitulation" is defined by the International Committee of the Red Cross as an act that leads to the cessation of active hostilities.[20] Also, it is declared unilaterally or on the basis of an agreement,[21] and according to the Article 35(1) of the Hague Regulations "on the Laws and Customs of War on Land" (hereafter "Hague Regulations"), the rules of military honor

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Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, Article 6; The Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, Article 6; The Convention Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Article 6; The Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Article 7.

[14] *Kleffner J. K.*, Scope of Application of International Humanitarian Law, The Handbook of International Humanitarian Law, *Fleck D.* (*ed.*), 3rd ed., Oxford, 2013, 68.

[15] Ibid, 69.

[16] Ibid.

[17] See citation: *Forster R.*, Ceasefire Arrangements, PA-X Peace Agreement Database, Edinburgh, 2019, 2.

[18] Ibid, 2-3.

[19] Ibid, 3-4.

[20] *Verri P.*, Dictionary of the International Law of Armed Conflict, Geneva, 1992, 29.

[21] *Kleffner J. K.*, Scope of Application of International Humanitarian Law, The Handbook of International Humanitarian Law, *Fleck D.* (*ed.*), 3rd ed., Oxford, 2013, 68.

must be taken into account during its announcement.[22] There is made a distinction between partial (limited to only a certain part of the armed forces) and full (applies to the armed forces of the party to the armed conflict as a whole) capitulation.[23] According to the Article 35(2) of the Hague Regulations, it must be performed in good faith by the parties to the armed conflict.[24] The issue of imposing responsibility on violators of capitulation conditions may be raised by the opposing party.[25]

According to the Common Article 3 of the 1949 Geneva Conventions, a non-international armed conflict is an armed conflict not of an international character.[26] This provision is complemented by the Article 1 of the Protocol Additional to the 1949 Geneva Conventions, and Relating to the Protection of Victims of Non-International Armed Conflicts, according to which a non-international armed conflict may arise between "armed forces [of the state] 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."[27] However, the ICTY explained in the *Tadić* case that a non-international armed conflict occurs "whenever there is … protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[28] Moreover, on the one hand, by the ICTY both in the *Tadić* case and *Limaj*, *Bala* and *Musliu* case, and on the other hand, by the International Criminal Tribunal for Rwanda (hereafter "ICTR") in the *Akayesu* case, two more criteria necessary for the existence of a non-international armed conflict were named – the intensity of the armed conflict and the organization of the armed group(s).[29] The ICTY explained in the *Boškoski* case and *Tarčulovski* case that the following elements should be taken into account when assessing the intensity of an armed conflict: the seriousness of attacks and the frequency of armed clashes; spread of

[22] The Annex to the Convention IV respecting the Laws and Customs of War on Land: Regulations concerning the Laws and Customs of War on Land, the Hague, 18 October 1907, Article 35(1).

[23] *Verri P.*, Dictionary of the International Law of Armed Conflict, Geneva, 1992, 29.

[24] The Annex to the Convention IV respecting the Laws and Customs of War on Land: Regulations concerning the Laws and Customs of War on Land, the Hague, 18 October 1907, Article 35(2).

[25] *Kleffner J. K.*, Scope of Application of International Humanitarian Law, The Handbook of International Humanitarian Law, *Fleck D.* (*ed.*), 3rd ed., Oxford, 2013, 68.

[26] The Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, Article 3; The Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, Article 3; The Convention Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Article 3; The Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Article 3.

[27] See citation: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, Article 1(1).

[28] See citation: The Prosecutor v. Dusko Tadic, [1995] Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY (IT-94-1-A), §70.

[29] The Prosecutor v. Dusko Tadic, [1997] Judgement of Trial Chamber, ICTY (IT-94-1-T), §562; The Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu, [2005] Judgement of Trial Chamber II, ICTY (IT-03-66-T), §84; Prosecutor v. Jean-Paul Akayesu, [1998] ICTR (ICTR-96-4-T), §620.

clashes in the area and for a certain period of time; increasing the number of government forces and mobilizing them and arming the parties to the conflict; response from the Security Council of the United Nations (hereafter - UN); the number of displaced civilian population from combat zones; type of weapon used; blockading or besieging and bombarding cities; the extent of destruction and the number of casualties caused by bombing or fighting; the number of deployed troops and units; existence and change of front lines between the parties; occupied territories; deployment of government forces in the crisis zone; blockage of roads; ceasefire order and agreement; attempts by representatives of international organizations to mediate and enforce ceasefire agreements.[30] In the *Haradinaj* case, the same tribunal noted that the organization of an armed group includes the following elements: existence of command structure and disciplinary rules and mechanisms in the group; existence of headquarters; the ability of the group to gain access to weapons, other military equipment, recruits, and military training; the ability to plan, coordinate, and execute military operations, including troop movement and logistics; its ability to define a unified military strategy and use military tactics; its ability to speak with one voice, negotiate and conclude ceasefire or peace agreements.[31] According to the opinion existing in the scientific literature, a non-international armed conflict ends when the criteria of the intensity of the armed conflict and the organization of the parties no longer exist.[32]

As for military occupation, this term is presented in the Article 42 of the Hague Regulations, according to which, "territory is considered occupied when it is actually placed under the authority of the hostile army."[33] This definition of the term "military occupation" was also shared by the International Court of Justice (hereafter - ICJ) in its advisory opinion of 9 July 2004 on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory".[34] Also, it should be emphasized that according to the Common Article 2 of the 1949 Geneva Conventions, the mentioned Conventions "shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."[35] According to the International Committee of the Red Cross, the way to end an occupation is usually to withdraw or expel the troops of the occupying state

[30] The Prosecutor v. Ljube Boškoski and Johan Tarčulovski, [2008] Judgement of Trial Chamber, ICTY (IT-04-82-T), §177.

[31] The Prosecutor v. Ramush Haradinaj and others, [2008] Judgement of Trial Chamber, ICTY (IT-04-84-T), §60.

[32] *Bartels R.*, From Jus In Bello to Jus Post Bellum: When do Non-International Armed Conflicts End?, Jus Post Bellum: Mapping the Normative Foundations, *Stahn C.*, *Easterday J. S.*, *Iverson J.* (*eds.*), Oxford, 2014, 309.

[33] See citation: The Annex to the Convention IV respecting the Laws and Customs of War on Land: Regulations concerning the Laws and Customs of War on Land, the Hague, 18 October 1907, Article 42.

[34] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, [2004] Advisory Opinion, ICJ, §78.

[35] The Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, Article 2; The Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, Article 2; The Convention Relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Article 2; The Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Article 2.

from the occupied territory. However, it is possible that the presence of foreign troops does not necessarily mean that the occupation continues. In fact, the transfer of powers to the local government that provides for the full and free exercise of sovereignty will usually end the occupation even if foreign troops continue to exist in the formerly occupied territory with the consent of the local government.[36]

1.1.2. When Does Post-Conflict Law Terminate?

There are two theories regarding the definition of the termination of post-conflict law.[37] In order to cover the issue comprehensively, it is appropriate to briefly review each of them. According to the first theory, post-conflict law will terminate when it achieves the common goal set by its basic principles – the establishment of peace.[38] However, it should also be noted here that the latter is not limited to the absence of an armed conflict, since post-conflict law plays the role of an intermediate link between the end of an armed conflict and the establishment of peace, namely, it regulates the phase after the first one and before the second one.[39] In order to shed more light on such an approach, it is best to define the essence of the term "peace". However, the main challenge here is that there is no established definition of the term in international treaty law, so it is necessary to rely on the opinions of eminent researchers and other relevant sources. One of the prominent researchers of post-conflict law, *Jann K. Kleffner*, based on the report of the UN Secretary General of 23 August 2004,[40] defines "peace" as a combination of a non-violent situation, respect for human rights and the rule of law.[41] In addition, when defining the term "peace", it is also necessary to take into account the indicators used by various intergovernmental and non-governmental organizations for the development of human development, democracy and human security indices.[42] It should be noted that the international non-governmental organization "Economics and Peace Institute", which developed the "Global Peace Index", made a special contribution to the establishment

[36] Occupation and International Humanitarian Law: Questions and Answers (A Series of Questions and Answers by the International Committee of the Red Cross's Legal Team on What Defines Occupation, the Laws that Apply, How People Are Protected, and The International Committee of the Red Cross's Role), <https://www.icrc.org/en/article/occupation-international-humanitarian-law-questions> [30.07.2024].

[37] *Kleffner J. K.*, Towards a Functional Conceptualization of the Temporal Scope of Jus Post Bellum, Jus Post Bellum: Mapping the Normative Foundations, *Stahn C.*, *Easterday J. S.*, *Iverson J.* (*eds.*), Oxford, 2014, 293-295.

[38] Ibid, 293.

[39] Ibid.

[40] United Nations Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General, UN Doc. S/2004/616, 23.08.2004, §6.

[41] *Kleffner J. K.*, Towards a Functional Conceptualization of the Temporal Scope of Jus Post Bellum, Jus Post Bellum: Mapping the Normative Foundations, *Stahn C.*, *Easterday J. S.*, *Iverson J.* (*eds.*), Oxford, 2014, 294.

[42] Ibid; Also see: The Human Development Index of the United Nations Development Programme, <http://hdr.undp.org/en/statistics/hdi/> [30.07.2024]; The Democracy Index of the Economist Intelligence Unit, <http://www.eiu.com/public/topical_report.aspx?campaignid=DemocracyIndex12> [30.07.2024]; The Human Security Index, <http://www.humansecurityindex.org/> [30.07.2024].

of peace criteria.[43] The Index is the world's leading measure of global peace and is based on the most comprehensive data available on trends in peace, its economic value and the development of peaceful societies.[44] It is the high level of reliability in the world regarding the "Global Peace Index" that makes it possible to take into account the three pillars (the level of social security and safety, the extent of ongoing international and non-international armed conflicts, and the degree of militarization) when defining the term "peace".[45] Thus, the elements of peace expressed in the scientific literature and established in practice do not coincide, which may make it difficult to outline the criteria necessary to consider post-conflict law as terminated and, at the same time, peace – established, which are shared in both theory and practice.

As for the second theory, according to it, post-conflict law will terminate when the goals individually set by each of its main principles are fulfilled. However, the main challenge in this case is that each principle of post-conflict law takes a different time to achieve its goals.[46] Thus, to summarize the reasoning presented in the present sub-chapter, it can be said that both theories existing today are characterized by such difficulties that may create an obstacle in practice when determining the exact moment of the termination of post-conflict law.

1.2. The Separation of the Scopes of Post-Conflict Law and Transitional Justice

When defining the scope of post-conflict law, in addition to the moments of its enactment and termination, attention should also be paid to drawing a line with such a neighboring doctrine as transitional justice, because the common features between the latter and post-conflict law may cause the problem of their confusion in practice. In order to avoid such misunderstanding, it is desirable to first define the term "transitional justice" and then distinguish it from post-conflict law.

There are two different opinions on the origin of the doctrine of transitional justice. The international non-governmental organization "International Center for Transitional Justice" sees the beginnings of this concept in the late 80s and early 90s of the last century and links it to the political events taking place in Latin America and Eastern Europe, which were accompanied by the replacement of authoritarian structures with democratic ones.[47] According to *Ruti Teitel*, the theory of transitional justice may have its origins even earlier, namely, from the 70s of the last century.[48]

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[43] Institute for Economics & Peace, <https://www.economicsandpeace.org/about/> [30.07.2024].

[44] Global Peace Index, <https://www.visionofhumanity.org/maps/#/> [30.07.2024].

[45] Ibid.

[46] *Kleffner J. K.*, Towards a Functional Conceptualization of the Temporal Scope of Jus Post Bellum, Jus Post Bellum: Mapping the Normative Foundations, *Stahn C.*, *Easterday J. S.*, *Iverson J.* (*eds.*), Oxford, 2014, 294.

[47] What is Transitional Justice?, International Center for Transitional Justice, 2009, 1, <https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> [30.07.2024].

[48] *Teitel R.*, Transitional Justice Genealogy, Harvard Human Rights Journal, Vol. 16, 2003, 69; *Teitel R.*, Transitional Justice, Oxford, 2000, 3.

According to the "International Center for Transitional Justice", "transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and promotion of possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. In some cases, these transformations happen suddenly; in others, they may take place over many decades."[49] In addition, transitional justice is characterized by six clearly expressed criteria: implementation of criminal prosecution against persons responsible for human rights violations; creation of commissions to establish the truth about committed violations; development of reparations programs to compensate for material and moral damage resulting from violations; ensuring equal access for women to the process of eliminating human rights violations; transformation of military, police, judicial and other state institutions from repressive and corrupt instruments into honest instruments; creation of appropriate memorials in order to preserve information about the victims of human rights violations in the public memory and to prevent such violations in the future.[50]

Transitional justice and post-conflict law can be distinguished from each other by several main criteria, the first of which involves the difference between the definitions of these two concepts. Although transitional justice aims to respond to systematic or large-scale violations of human rights, which is also one of the main goals of post-conflict law, it can take place during the transition of a political regime in general, and its implementation does not require the existence of an armed conflict at all.[51] The same cannot be said about post-conflict law, which directly combines the regulatory norms of the entire process of transition from armed conflict to sustainable peace, and its implementation must be preceded by an armed conflict.[52]

The second criterion distinguishing transitional justice and post-conflict law refers to the difference between their legal burdens. In particular, while transitional justice always connects the issue of human rights protection with the change of political regime, post-conflict law has a fully legal character. The latter is a purely legal concept and political contexts are secondary to it.[53]

The third criterion distinguishing transitional justice and post-conflict law refers to the substantive difference between their areas of interest. In this regard, three special cases of the relationship between post-conflict law and transitional justice can be named: (1) for the post-conflict period, issues that are not related to the change of the regime or the violations of human rights are the concern of post-conflict law, not transitional justice;[54] (2) issues specific

[49] See citation: What is Transitional Justice?, International Center for Transitional Justice, 2009, 1, <https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf> [30.07.2024].

[50] Ibid.

[51] *Iverson J.*, Contrasting the Normative and Historical Foundations of Transitional Justice and Jus post Bellum: Outlining the Matrix of Definitions in Comparative Perspective, Jus Post Bellum: Mapping the Normative Foundations, *Stahn C.*, *Easterday J. S.*, *Iverson J.* (*eds.*), Oxford, 2014, 85.

[52] Ibid.

[53] Ibid, 86.

[54] Ibid, 88.

to the period following the peaceful, non-violent revolution or the change of the regime fall within the scope of transitional justice, and post-conflict law can also be applied to them by analogy rather than directly;[55] (3) instead of transitional justice, post-conflict justice covers the situations where no substantial violations of human rights were committed by the former regime replaced by an armed conflict, the armed conflict took place without large-scale human rights violations, or the regime was not changed within the framework of the armed conflict.[56]

Chapter 2. What is the impact of the type of preceding armed conflict on the scope of post-conflict law?

2.1. The Ability to Apply Post-Conflict Law Equally after International and Non-International Armed Conflicts

Post-conflict law researcher *Kristen E. Boon* notes that over the past half century there has been emerged a theory that the line between international and non-international armed conflicts is gradually shrinking,[57] which in the future is likely to contribute to establish the approaches and standards of post-conflict law that apply equally after both types of armed conflict.[58] In order to better clarify the foundations of the mentioned theory, it is appropriate to briefly discuss the main aspects that contribute to the minimization of the border between international and non-international armed conflicts.

The boundary between international and non-international armed conflicts is primarily reduced[59] by the Protocols Additional to the 1949 Geneva Conventions "Relating to the Protection of Victims of International Armed Conflicts"[60] and "Relating to the Protection of Victims of Non-International Armed Conflicts".[61] In particular, according to the Article 1 of the Additional Protocol "Relating to the Protection of Victims of International Armed Conflicts", the mentioned protocol, *inter alia*, applies to such domestically relevant issues as the people's struggle against colonial oppression, occupation by foreigners and racist regimes.[62] As for the Additional Protocol "Relating to the Protection of Victims of Non-International

[55] Ibid.
[56] Ibid.
[57] *Boon K. E.*, The Application of Jus Post Bellum in Non-International Armed Conflicts, Jus Post Bellum: Mapping the Normative Foundations, *Stahn C.*, *Easterday J. S.*, *Iverson J.* (*eds.*), Oxford, 2014, 262.
[58] Ibid, 265.
[59] *Boon K. E.*, The Application of Jus Post Bellum in Non-International Armed Conflicts, Jus Post Bellum: Mapping the Normative Foundations, *Stahn C.*, *Easterday J. S.*, *Iverson J.* (*eds.*), Oxford, 2014, 262.
[60] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977.
[61] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977.
[62] Ibid; Also see: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, Article 1(4).

Armed Conflicts", it directly refers to non-international, intra-state, armed conflicts.[63] Thus, through the mentioned additional protocols, domestically interesting issues became the subject of international agreement both in cases of international and non-international armed conflicts, and a fundamental commonality emerged between the types of armed conflict.[64]

The boundary between international and non-international armed conflicts is also weakened by the determination of the same responsibility by international criminal law for the perpetrators of war crimes, regardless of the type of armed conflict in which they committed the mentioned crimes.[65] Even the ICTY and ICTR have shown that, according to international law, a person can be tried for war crimes committed within the framework of a non-international armed conflict.[66] This approach was subsequently shared by the Article 8 of the Rome Statute of the International Criminal Court which provides for the imposition of criminal responsibility for those who commit war crimes in non-international armed conflicts.[67]

International and non-international armed conflicts are brought closer to each other by the same application of international human rights law in the case of both of them.[68] However, it is a certain legal problem to define the relationship between international humanitarian law and international human rights law. According to the definition of the International Committee of the Red Cross, these two branches of international law have areas of interest both specific to each of them. For example, international humanitarian law regulates issues such as the conduct of hostilities, combatant and prisoner of war status and the protection of the red cross and red crescent emblems. While international human rights law, among other fundamental rights and freedoms, is also concerned with those that may not necessarily be relevant to armed conflict, in particular, with freedom of expression, freedom of assembly and association, right to participate in elections, etc.[69] On the other hand, both of them aim to protect life, prohibit torture and ill-treatment, establish basic rights for persons referred to criminal justice, protect women and children, and regulate aspects of the rights to food and health.[70] As a result of such an intersection, it is expected that in practice a conflict will arise

[63] *Boon K. E.*, The Application of Jus Post Bellum in Non-International Armed Conflicts, Jus Post Bellum: Mapping the Normative Foundations, *Stahn C.*, *Easterday J. S.*, *Iverson J.* (*eds.*), Oxford, 2014, 263; Also see: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, Article 1(1).

[64] *Boon K. E.*, The Application of Jus Post Bellum in Non-International Armed Conflicts, Jus Post Bellum: Mapping the Normative Foundations, *Stahn C.*, *Easterday J. S.*, *Iverson J.* (*eds.*), Oxford, 2014, 263.

[65] Ibid.

[66] Ibid; Also see: *Schaack B.*, *Slye R. C.*, International Criminal Law and Its Enforcement: Cases and Materials 2nd ed., St. Paul, 2012, 215-216.

[67] The Statute of the International Criminal Court, Rome, 17 July 1998, Article 8(c), (e).

[68] *Boon K. E.*, The Application of Jus Post Bellum in Non-International Armed Conflicts, Jus Post Bellum: Mapping the Normative Foundations, *Stahn C.*, *Easterday J. S.*, *Iverson J.* (*eds.*), Oxford, 2014, 263.

[69] International Humanitarian Law and International Human Rights Law (Similarities and Differences), Advisory Service on International Humanitarian Law, International Committee of the Red Cross, Geneva, 2021, 1.

[70] Ibid.

as to which branch should be given priority in the protection of a particular right during an armed conflict. This problematic issue is discussed by various international mechanisms. The ICJ discussed this issue within three precedents: in its 8 July 1996 Advisory Opinion on "Legality of the Threat or Use of Nuclear Weapons" it was explained that in case of conflict international humanitarian law should prevail;[71] in the 9 July 2004 Advisory Opinion on "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory", it was noted that during an armed conflict, it is necessary to take into account both branches as *lex specialis*;[72] and in the case of "Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)" it was determined that the instruments of international human rights law are used by the state, on the actions committed within the jurisdiction spread beyond its own territory, especially, the military occupation carried out by it.[73] The Inter-American Commission on Human Rights in the case of "Coard et al. v. United States" gave precedence to international humanitarian law in the case of intersectoral conflict,[74] while in the cases of "Juan Carlos Abella v. Argentina" and "Bamaca Velásquez v. Guatemala" explained that the norms of international human rights law apply to non-international armed conflicts in the same way as they apply to international armed conflicts.[75] Finally, the European Court of Human Rights in "Hassan v. the United Kingdom" considered the right to liberty and security in the context of the 1949 Geneva Conventions.[76] Taking into account the mentioned international legal practice, it is possible to consider that international human rights law does not matter in what kind of armed conflict human rights and basic freedoms are being violated. It equally "humanizes" international humanitarian law in the case of international and non-international armed conflicts.[77] Such interaction contributes to the establishment of such approaches in the post-conflict era, which will be equally used in the framework of both international and non-international armed conflicts to identify violations of human rights and basic freedoms and to impose appropriate responsibility.

[71] Legality of the Threat or Use of Nuclear Weapons, [1996] Advisory Opinion, ICJ, §25.
[72] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, [2004] Advisory Opinion, ICJ, §106.
[73] Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), [2005] ICJ, §216.
[74] Coard et al. v. United States, [1999] Inter-American Commission on Human Rights, §42.
[75] Juan Carlos Abella v. Argentina, [1997] Inter-American Commission on Human Rights, §160; Bamaca Velásquez v. Guatemala, [2000] Inter-American Commission on Human Rights, §207.
[76] Hassan v. the United Kingdom, [2014] ECtHR, §104.
[77] *Meron T.*, The Humanization of Humanitarian Law, American Journal of International Law, Vol. 94, 2000, 239; *Boon K. E.*, The Application of Jus Post Bellum in Non-International Armed Conflicts, Jus Post Bellum: Mapping the Normative Foundations, *Stahn C.*, *Easterday J. S.*, *Iverson J.* (*eds.*), Oxford, 2014, 264.

Finally, another common feature of international and non-international armed conflicts is the active involvement of international organizations in the process of implementing the basic principles of post-conflict law in the cases of both types of armed conflicts.[78]
Thus, to summarize the reasoning presented in this sub-chapter, it should be noted that the four discussed factors create such a closeness between international and non-international armed conflicts that it is possible to share *Kristen E. Boon*'s theory regarding the similar application of the basic principles of post-conflict law in the future after the end of both types of armed conflicts.

2.2. The Operation of Post-Conflict Law after the End of Military Occupation

According to Article 6 of the Geneva Convention of 12 August 1949 "Relative to the Protection of Civilian Persons in Time of War", occupation is a temporary event and can only last for one year after the end of hostilities.[79] Articles 29 and 47-135 of the same Convention[80] and Article 43 of the Hague Regulations[81] establish that at this time the occupying party is responsible for both the occupied territory and its population. During the period of occupation, the occupying party must observe a number of norms imposed by the Geneva Convention of 12 August 1949 "Relative to the Protection of Civilian Persons in Time of War" and the Hague Regulations to the extent that it performs the functions of the government in the occupied territory.[82] When discussing the rights and duties of the occupying party, it must be noted that it cannot extend its sovereignty to the occupied territory.[83] According to Article 43 of the Hague Regulations, the occupying party is obliged, as far as possible, to maintain and restore the existing public order and security.[84] In addition, the occupying party can, on the one hand, suspend or terminate the current domestic legislation, if it hinders the provision of security or the implementation of international humanitarian law,[85] and, on the other hand, adopt new legal

[78] *Lauterpacht H.*, *Lauterpacht E.*, International Law: Being the Collected Papers of Hersch Lauterpacht, Cambridge, 1970, 136; *Boon K. E.*, The Application of Jus Post Bellum in Non-International Armed Conflicts, Jus Post Bellum: Mapping the Normative Foundations, *Stahn C.*, *Easterday J. S.*, *Iverson J.* (*eds.*), Oxford, 2014, 264.
[79] The Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Article 6.
[80] Ibid, Articles 29, 47-135.
[81] The Annex to the Convention IV respecting the Laws and Customs of War on Land: Regulations concerning the Laws and Customs of War on Land, the Hague, 18 October 1907, Article 43.
[82] *Ronen Y.*, Post-Occupation Law, Jus Post Bellum: Mapping the Normative Foundations, *Stahn C.*, *Easterday J. S.*, *Iverson J.* (*eds.*), Oxford, 2014, 429.
[83] *Gasser H. P.*, *Dörmann K.*, Protection of the Civilian Population, The Handbook of International Humanitarian Law, *Fleck D.* (*ed.*), 3rd ed., Oxford, 2013, 274.
[84] The Annex to the Convention IV respecting the Laws and Customs of War on Land: Regulations concerning the Laws and Customs of War on Land, the Hague, 18 October 1907, Article 43.
[85] Ibid, Article 43; The Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Article 64.

acts, if this is due to military necessity or the obligation to protect public order.[86] It is for these last two reasons that it can also create new administrative bodies.[87]

After the end of the occupation, according to the approach provided by the Geneva Convention of 12 August 1949 "Relative to the Protection of Civilian Persons in Time of War", the economic, social, political and other systems of the occupied territories should continue to function without interference from the occupying party.[88] However, as practice has shown, the realization of such a vision turned out to be associated with many challenges. In particular, after the *laissez-faire* doctrine[89] was replaced by the demand for increased responsibility of the state for human economic and social rights, it became difficult to abandon the economic, social, political and other systems of the territories occupied by the occupier without maintaining certain obligations.[90] As a result, the former occupied territory remains dependent on the former occupying party even after the end of the occupation.[91] As *Yaël Ronen* points out, this type of post-occupational dependence can take many forms: (1) during the occupation, the population of the occupied territory can rely on the services and infrastructure provided by the occupying force to promote employment, education and quality healthcare. The dependence on such services and infrastructure is especially increased by the fact that there is no alternative in the occupied territory; (2) the population of the occupied territory depends on the occupying side for the supply of electricity and natural gas, since the interruption of these resources directly affects the vitality of the society; (3) also, together with the population of the occupied territory, even its economy should be dependent on the occupying party, if the local economy is under the direct influence of the monetary policy of the occupying party; (4) finally, the cessation of livelihoods for the population of the occupied territory and the worsening of the economic situation of the society may be associated with the severing of commercial ties with the occupying party.[92]

Post-conflict law, after the end of occupation, aims to protect the population of the formerly occupied territory from harm that may be inflicted upon it by the sudden severance of ties with the former occupying party. Moreover, at this time, post-conflict law should be focused not on strengthening the above-mentioned dependence, but on facilitating the transition of the former occupied territory to self-sufficiency.[93]

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[86] Ibid.

[87] The Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Article 64(2).

[88] *Ronen Y.*, Post-Occupation Law, Jus Post Bellum: Mapping the Normative Foundations, *Stahn C.*, *Easterday J. S.*, *Iverson J.* (*eds.*), Oxford, 2014, 429.

[89] Laissez-faire – Policy of minimum governmental interference in the economic affairs of individuals and society. See: Laissez-faire, Britannica, <https://www.britannica.com/money/laissez-faire> [30.07.2024].

[90] *Ronen Y.*, Post-Occupation Law, Jus Post Bellum: Mapping the Normative Foundations, *Stahn C.*, *Easterday J. S.*, *Iverson J.* (*eds.*), Oxford, 2014, 429.

[91] Ibid, 429-431.

[92] Ibid, 431.

[93] Ibid.

Among the many actors participating in this process, a special role is assigned to the future government of the former occupied territory, which must undertake the obligation to provide the population of this territory with the resources previously provided by the occupying party. However, the former occupying party will be seen as an obstacle to the new government of the former occupied territory if it is in its interest to prolong the transition process and delay the liberation of the former occupied territory from its influence.[94]

The international community also plays a special role in providing assistance to the former occupied territory in overcoming dependence on the former occupying party. A clear example of this is Indonesia's simultaneous and immediate withdrawal from Timor-Leste. Although the people of Timor-Leste were fully depended on the services and infrastructure provided by Indonesia, especially in the health sector, the withdrawal of these resources by Indonesia did not significantly harm Timor-Leste, as the country received a vital assistance from the international community.[95]

Conclusion

In conclusion, it should be said that the way to achieve the goal set by this article goes through the following questions: Is it possible to determine the exact times when post-conflict law will enact and terminate? How do transitional justice and post-conflict law differ from each other? To what extent is it acceptable to use the same operational framework of post-conflict law after international and non-international armed conflicts? What is the main problem that post-conflict law faces when military occupation ends? Answering these questions is not easy and needs to be seen in the unified prism of post-conflict law.

By comparing various academic works, international legal acts and court decisions, the following main findings were highlighted:

1. Post-conflict law enacts immediately after the termination of international humanitarian law, which is achieved in different ways in the cases of an international armed conflict without military occupation, an international armed conflict accompanied by it, and a non-international armed conflict. The termination of an international armed conflict conducted without military occupation and the replacement of international humanitarian law with post-conflict law is carried out in practice by such means as the conclusion of an armistice, peace or ceasefire agreements, or the declaration of capitulation. The international armed conflict accompanying the military occupation will terminate and post-conflict law will be enacted when local authorities are given the authority to exercise full and free sovereignty even if foreign troops continue to exist in the former occupied territory with the consent of local authorities. Finally, the termination of a non-international armed conflict and the implementation of post-conflict law will take place when the criteria of the intensity of the armed conflict and the organization of the parties no longer exist.

[94] Ibid, 432.
[95] Ibid, 433.

2. In the scientific literature, there are two approaches to determining the moment of the termination of post-conflict law. According to the first approach, post-conflict law terminates when it achieves the common goal set by its basic principles – the establishment of peace. As for the second approach, according to it, post-conflict law terminates when the goal individually set by each of its main principles is fulfilled.
3. In addition to the moments of enactment and termination of post-conflict law, when defining its scope, special attention should also be paid to drawing a border with such an adjacent field as transitional justice, because the concepts of the latter and post-conflict law are so close to each other that in practice there may be a problem of confusing them. Actually, post-conflict law and transitional justice can be distinguished according to their concepts, legal burdens and areas of interest.
4. Regarding the main characteristics of post-conflict law enacted after the end of the armed conflict conducted without military occupation and the non-international armed conflict, it should be noted that during the last half century, there was formed a theory, according to which the border between international and non-international armed conflicts is gradually decreasing, which in the future will likely contribute to establish a common framework of post-conflict law to be applied equally after the both types of armed conflict.
5. Post-conflict law enacted after the end of the military occupation mainly faces such a problem as the continued dependence of the population of the former occupied territory on the former occupying party, which can be formed in different forms. At this point, post-conflict law should aim to protect the population of the former occupied territory from harm that may be inflicted upon it by the sudden severance of ties with the former occupying party. Moreover, at this time, post-conflict law should be focused not on strengthening the above-mentioned dependence, but on facilitating the transition of the former occupied territory to self-sufficiency.

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