THE SEARCH FOR STATUS: CHARTING THE CONTOURS OF COMBATANT STATUS IN THE AGE OF ISIS

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> *[T]he lawyer must do his duty regardless of dialectical doubts-though with a feeling of humility springing from the knowledge that if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law. He must continue to expound and to elucidate the various aspects of the law of war for the use of armed forces, of governments, and of others.*[1]

I. Introduction

The means of warfare have changed. What were large contests between states have now devolved into several nation–states engaged in enduring conflicts with agile international terrorist organizations. The problem does not end there. Emerging organizations like the Islamic State of Iraq and ash–Sham (ISIS)[2] believe that the flags of modern states "have fallen, and their borders have been destroyed."[3] The intent of ISIS reaches far beyond the desire for territory in

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[1] Hersch Lauterpact, *The Problem of the Revision of the Law of War*, 29 BRITISH YEARBOOK OF INTERNATIONAL LAW 360, 381-82 (1952).

[2] Literally translated from Arabic as *ad-Dawlah al-Islāmīyah fī al-'Irāq wash-Shām* (الدولة الإسلامية في العراق والشام).

[3] Yosef Jabareen, *The Emerging Islamic State: Terror, Territoriality, and the Agenda of Social Transformation,* 58 GEOFORUM 51, 53 (2015) (*citing The Declaration of the Islamic State*, at https://botshikan.wordpress.com/2014/06/30/).

Kurdistan[4] and defeating the Kurdish Peshmerga.[5] Rather, ISIS intends to establish a global caliphate and set the conditions for Armageddon.[6] More specifically, "the state has an obligation to terrorize its enemies—a holy order to scare . . . them with beheadings and crucifixions and enslavement of women and children, because doing so hastens victory and avoids prolonged conflict."[7]

Hersch Lauterpacht foresaw this trend when he made these comments above regarding the then-recently signed 1949 Geneva Conventions.[8] He called the Conventions a revision of a "substantial part of the law of war."[9] Lauterpacht argued that the law must and will change with the currents of political will and the means of warfare.[10]

Today, the currents of political will and the means of warfare have transformed into what has been appropriately termed "transnational armed conflict."[11] However, the law has lagged behind in providing an adequate framework to address the realities of transnational conflict.[12] Most importantly, the law does not have a status to assign actors who are participants in such transnational armed conflicts.[13]

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[4] *Id.* at 52.

[5] The word "Peshmerga" is the Kurdish term used to describe Kurd irregular fighters and literally means "those who face death." *See* Heevie Kurdish Development Organization Information Page, at http://heevie.org/aboutkurdistan.

[6] Graeme Wood, *What ISIS Really Wants and How to Stop It,* THE ATLANTIC (Mar. 2015), http://www.theatlantic.com/features/archive/2015/02/what-isis-really-wants/384980/.

[7] *Id.*

[8] Lauterpacht, *supra* note 1, at 360.

[9] *Id*.

[10] *Id.* at 365-66 (observing that, for example, in relation to the repeal of the intentional practice of targeting civilians in aerial bombardment as "there is no rule firmly grounded in the past on which we can place reliance–for aerial bombardment is a new weapon which raises new problems.").

[11] Geoffrey Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter–Terror Combat Operations,* 42 ISR. L. REV. 46, 50 (2009). The author notes in the introduction that "[t]ransnational armed conflicts have become a reality. The increasing sophistication of terrorist organizations, their increasingly transnational nature, and their development of military strike capabilities, push and will continue to push States to resort to combat power as a means to defend against this threat." *Id*.

[12] *See generally* BEN SAUL, TERRORISM (Hart Publishing Oxford 2012); Tim Krieger & Daniel Meierrieks, *How to Deal with International Terrorism,* 3 UNIVERSITÄT FREIBURG DISCUSSION PAPER SERIES 1 (2014), http://www.wguth.uni-freiburg.de/forschung/data/data/wgsp_dp_2014_03.pdf.

[13] *Id.*

The current international humanitarian legal framework essentially categorizes people involved in armed conflicts as either combatants or civilians.[14] However, transnational terrorist actors attack civilians as a means of belligerency thereby forcing international terrorists into one of two ill-matched categories.[15] As an author from the University of Freiburg stated, "[w]hat is new in the 21st century is the indiscriminate use of terrorist tactics against innocent civilians on a huge scale."[16] Thus, if transnational terrorists attack civilians, then how can they be legally characterized as civilians? This article argues that terrorists are neither combatants nor civilians, suggesting that a new independent category has emerged. To correctly characterize the ever-evolving global insurgent, the international community must adopt the term "transnational belligerent."

This thesis will be presented in four parts. Part one will define the problem of ISIS and focus on how terrorism has been addressed from a Non-International Armed Conflict (NIAC) perspective. Part two will discuss how current international law inadequately addresses the realities of transnational belligerents and how concepts like complementarity are expressions of how the law does not properly address this international threat. Part three will survey international approaches to defining terrorism and the historical underpinnings of belligerency. Part four will analyze the state of the law, propose "transnational belligerency" as a necessary third category under the law, provide a model to analyze transnational belligerents, and finally propose a means to codify the law internationally.

II. Background: ISIS and The Law of Armed Conflict

A. ISIS: Origins and the Global Caliphate

Defining the problem of ISIS is fairly straightforward. As one author noted in March 2014 regarding the rise of ISIS,

> [Islamic State of Iraq and ash–Sham's] portrayal of its own goals in Syria–Iraq indicate that it seeks to establish an Islamic state that can become the core of a new Caliphate that will eventually strive to dominate the rest of the world. Despite their ongoing disagreement with Zawahiri, ISIS abides by Osama bin

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[14] *See generally* ANICÉE VAN ENGELAND, CIVILIAN OR COMBATANT?: A CHALLENGE FOR THE 21ST CENTURY (Oxford Univ. Press 2011) (positing that international humanitarian law was not drafted to rule on war, but rather to protect victims of war—civilians in particular). *Id*. It is important to note that Geneva Convention III identifies "retained personnel" (doctors, clergy, etc.) as a legal status for individuals captured in war.

[15] *See* Jan–Erik Lane, *The New Patterns of Warfare: Terrorism Against Innocent Civilians,* 3 SUVREMENE TEME 6 (2010).

[16] *Id.* at 10.

> Laden's dictum that there are only three choices in Islam: conversion, subjugation, or death.[17]

The issues of internal politics and the disassociation of ISIS from al–Qaeda notwithstanding, ISIS finds its origins in Afghanistan circa 1999.[18] At that time, Abu Mus'ab al–Zarqawi had moved to Afghanistan where he met both Osama bin Ladin and Ayman al–Zawahiri.[19] Though Al Qa'ida had considered itself "jihadis without borders," al–Zarqawi, the man who would eventually establish what is presently ISIS, had a more focused goal of building an establishment.[20]

Al–Zarqawi's caliphate vision (and presently al–Baghdadi's—the current leader of ISIS) is clearly seen in the writings from Osama bin Ladin seized during the Abbattabad raid.[21] Bin Ladin wrote "[W]e are an international organization fighting for the liberation of Palestine and all of the Muslim countries to erect an Islamic caliphate that would rule according to the Shari'ah of Allah."[22] He continues by writing, "It is our desire, and the desire of the brothers in Yemen, to establish the religion and restore the caliphate, to include all the countries of the Islamic world."[23] What is most striking is that historically Al Qa'ida would brutally attack civilians to accomplish this end.[24] ISIS is much the same, but with much greater focus on attacking civilians.

1. Attacking Civilians as a Means of Achieving a Caliphate

In data collated by the Global Terrorism Database, ISIS is credited with 1636 total incidents dating back to 2012 in which they targeted and killed over 334 private citizens equating to nearly 48% of their entire operation.[25] Al Qa'ida is

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[17] Aymenn Jawad al-Tamimi, *The Dawn of the Islamic State of Iraq and Ash-Sham,* 16 CURRENT TRENDS IN ISLAMIST IDEOLOGY 5 (2014).

[18] MUHAMMAD AL–'UBAYDI ET AL., REPORT: THE GROUP THAT CALLS ITSELF A STATE: UNDERSTANDING THE EVOLUTION AND CHALLENGES OF THE ISLAMIC STATE 10 (W. Point Publ'g 2014), https://www.ctc.usma.edu/v2/wp-content/uploads/2014/12/CTC-The-Group-That-Calls-Itself-A-State-December20141.pdf.

[19] *Id.*

[20] *Id.* at 3.

[21] *US Declassifies Osama Bin Laden compound documents,* THE GUARDIAN, http://www.telegraph.co.uk/news/worldnews/al-qaeda/11618234/US-declassifies-Osama-Bin-Laden-compound-documents-live.html (last visited 6 Oct. 2015).

[22] Undated Letter Purportedly Between Osama Bin Ladin to Shaykh Mahmud 13, SOCOM-2012-0000019-HT, https://www.ctc.usma.edu/posts/letters-from-abbottabadbin-ladin-sidelined.

[23] *Id.* at 21.

[24] *See* V. G. JULIE RAJAN, AL QAEDA'S GLOBAL CRISIS: THE ISLAMIC STATE, TAKFIR, AND THE GENOCIDE OF MUSLIMS 57 (Routeledge 2015).

[25] National Consortium for the Study of Terrorism and Responses to Terrorism (START) (2014). Global Terrorism Database Islamic State of Iraq and the Levant, http://www.start.umd.edu/gtd.

credited with eighty incidents, twenty–two of them were civilian targets[26] Al Qa'ida Iraq, purportedly ISIS's predecessor, is credited with 636 incidents, 285 of which are private citizen targets.[27] The targeting of civilians is a consistent practice among transnational belligerent organizations especially among those seeking to establish a caliphate.

Al Shabaab, an organization mainly associated with operations in Somalia, is one such organization seeking to establish a caliphate by primarily targeting civilians.[28] Al–Shabaab is credited with 1739 incidents, 456 of which were attacks against private citizens.[29] Boko Haram also seeks to establish a caliphate in Northern Africa.[30] Boko Haram is credited with 1304 incidents since 2008 with 549 of those attacks aimed at private citizens.[31]

2. ISIS as Global Public Enemy

Transnational belligerents like ISIS, simply by the nature of their stated organizational intentions, should be considered "global public enemies." "Global public enemies" is a concept that has been around for centuries even in the earliest conceptions of global unity.[32] For example, Francisco de Vittoria—regarded by many as the father of international law and founder of just war theory—stated that "[w]hat natural reason has established among all nations is called the *jus gentium*."[33] *Jus gentium* origins were an all–encompassing means of imposing order for the common good of the world. In Vittoria's words, "Since one nation is a part of the whole world . . . if any war should be advantageous to one province

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[26] Global Terrorism Al Qa'ida, http://www.start.umd.edu/gtd.
[27] Global Terrorism Al Qa'ida Iraq Database, http://www.start.umd.edu/gtd.
[28] George Kegoro, *The Object of Al Shabaab Terror: To Set Up a Caliphate in Kenya,* THE WORLD POST, Dec. 16, 2014, http://www.huffingtonpost.com/george-kegoro/al-shabaab-caliphate-kenya_b_6304950.html.
[29] National Consortium for the Study of Terrorism and Responses to Terrorism (START) (2013). Global Terrorism Database Al Shabaab, http://www.start.umd.edu/gtd.
[30] Monica Mark, *Boko Haram's Five–year Battle to Impose Caliphate Kills Thousands,* THE GUARDIAN, May 10, 2014, http://www.theguardian.com/world/2014/may/10/boko-haram-battle-caliphate-kills-thousands.
[31] National Consortium for the Study of Terrorism and Responses to Terrorism (START) (2013). Global Terrorism Database Boko Haram, http://www.start.umd.edu/gtd.
[32] ANTONIO TRUYOL SERRA, THE PRINCIPLES OF POLITICAL AND INTERNATIONAL LAW IN THE WORK OF FRANCISCO DE VITORIA 53 (Ediciones Cultura Hispanica Madrid 1946) (citing *De Indis* 2 (1532)).
[33] *Id.* (explaining that "Vittoria gives the *jus gentium* the character of a *jus inter gentes*, a juridical order binding human groups which are independent as such; he creates, in short, the modern concept of international law").

or nation but injurious to the world . . . it is my belief that, for this very reason, that war is unjust."[34]

Vittoria wrote years later that the "deliberate slaughter of the innocent is never lawful in itself"[35] and, "doubt may arise whether the killing of guiltless persons is lawful when they may be expected to cause danger in the future."[36] Vittoria posited that "evil is not to be done even in order to avoid greater evil" because there are "other available measures of precaution against their future conduct, namely, captivity, exile, etc…"[37] Thus, even in the time of Vittoria, the prospect of those who would inevitably cause harm were considered outlaws and, perhaps more importantly, were severable from the population at large.[38]

The concept of *jus gentium* has grown considerably to include crimes *ergo omnes*—against all—and since World War II (WWII) has grown to further include crimes of "universal jurisdiction."[39] Crimes of universal jurisdiction currently recognized in international law "are slavery, piracy, violations of the law of war, genocide, and torture."[40] Authors argue that "to incorporate acts of terror into the law *jus gentium* would only require the recognition that any incident that is part of a 'widespread or systematic' pattern of violence against civilians is an offense against the law of nations."[41] They continue by arguing that given *sine leges, nullem crimen*—ex post facto—"the prosecution would need to be able to say to an alleged terrorist 'you should have known the rules because the law of terrorism is customary international law.'"[42]

However, an ex post facto approach to prosecution is unrealistic given the status of the law. As is shown below, the international community is far from reaching a consensus on the definition of the term terrorist. Furthermore, the parties to the International Criminal Court (ICC) negotiations intentionally kept

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[34] *Id.* at 56 (citing *De potestate civili* 13 (1528)) (summarizing Vittoria's comments by stating that the words "expressed in this text is [sic] nothing but the application to the world, conceived as a moral unity, of the principle of common good . . .").

[35] *Id*. at 88 (citing *De Jure belli* 35 (1532)). Arguably, this had direct import to terrorists and terrorist acts from a modern point of view. *Id.*

[36] *Id.* at 89 (citing *De Jure belli* 38 (1532)). Interestingly, Serra cites "the children of the enemies, or the adult male civilians who may be mobilized" as examples of those who might cause danger in the future. *Id.*

[37] *Id.*

[38] *See* Santiago Peña, *De La Suprématie Des Institutions Gouvernementales Sur Le Jus Gentium,* 18 REVUE GENERALE DE DROIT 925 (1987) (providing an in–depth discussion of *jus gentium* in the context of the Nov. 6, 1985 police seizure of the Columbian Supreme Court from M–19 guerillas).

[39] THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 308 (Erik Luna & Marianne L. Wade eds., Oxford Univ. Press 2012).

[40] *Id.*

[41] *Id.* at 308-09 (referring to the Rome Statute of the International Criminal Court, at art 7., July 17, 1998, 2187 U.N.T.S.90 [hereinafter Rome Statute]).

[42] *Id.*

the term terrorist out of the Rome Statute altogether.[43] Thus, efforts to now somehow include terrorism as incorporated into the ICC prosecutorial scheme would not stand to reason and merely underscores the need to address the greater problem of transnational belligerents. There is a worldwide consensus that intentional transnational belligerent attacks against civilians are reprehensible.[44] This is why protection of civilians has received considerable attention as the Law of Armed Conflict has developed.

B. The Law of Armed Conflict

1. Common Article 2 and International Armed Conflict

Since WWII, the contours of global conflict are interpreted in two basic ways: international armed conflict (IAC) and non–international armed conflict (NIAC). The 1949 Geneva Conventions require that in order to have an IAC, the conflict

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[43] Rome Statute, *supra* note 41.

[44] A recent example of global commitment to the protection of civilians is the Responsibility to Protect (RtoP) Civilians, which states "[e]ach individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity." United Nations, *UN General Assembly Resolution 2005 World Summit Outcome*, A/RES/60/1, Oct. 24, 2005 para 138. The document continues by stating:

> The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII.

Id. para 139.

The concept of RtoP was applied in Operations ODYSSEY DAWN and UNIFIED PROTECTOR in 2011 which authorized:

> Member States that have notified the Secretary-General, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, to take all necessary measures, notwithstanding paragraph 9 of resolution 1970 (2011), to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya.

S.C. Res. 1973, U.N. Doc. S/RES/1973 para. 4 (Mar. 17, 2011).

itself must be between two states as "high contracting parties."[45] The wording from Common Article 2 (CA 2) of the Four Geneva Conventions of 1949 states that the Conventions shall "apply to all cases of declared war or any other armed conflict which may arise between two or more High Contracting Parties, even if the state of war is not recognized by one of them."[46] It is important to note that, though scholars differ on this point, the duration of the conflict is immaterial. The only requirement is that the conflict be "armed."[47]

2. Common Article 3 and Non–International Armed Conflict

A Non–International Armed Conflict (NIAC) is interpreted though the wording of Common Article 3 (CA 3) of the 1949 Geneva Conventions and states in relevant part, that a NIAC is a conflict "not of an international character occurring in the territory of one of the High Contracting Parties."[48] In other words, CA 3 protections only apply to internal conflicts within one of the contracting states. CA 3 was termed as "[a] '[c]onvention in minature' . . . [applicable] to non–international armed conflicts only" and was to be the only Article "applicable to them until such time as a special agreement between the Parties" brought another convention into force.[49]

Thus, CA 3 was intended to deal with internal conflicts resulting in vague and less robust protections. For example, as the Commentaries to the Additional Protocols to the Geneva Conventions state,

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[45] *See generally* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I) art. 2, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (GC II) art. 2, Aug 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War (GC III) art. 2, Aug 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) art. 2, 75 U.N.T.S. 287.

[46] *Id.*

[47] Notably, Jean Pictet's Commentaries to Common Article 2 state:

> Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the Parties denies the existence of the state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place.

COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 23 (Jean S. Pictet ed., Geneva 1960) [hereinafter COMMENTARY III]. For a counter perspective, *see* YORAN DINSTEIN, WAR, AGGRESSION, AND SELF–DEFENSE 11-12 (5th ed. Cambridge Univ. Press 2012).

[48] GCs I-IV, *supra* note 45, art 3.

[49] COMMENTARY III, *supra* note 48, at 34.

> In accordance with the intention of its authors, common Article 3 would cover all armed conflicts not of an international (inter States) character, i.e., in accordance with the ideas prevailing at the time, particularly colonial wars. The main arguments advanced against the mandatory application of the Conventions as a whole to all conflicts were less concerned with the practical impossibility of such a task than with the risk, in conflicts not of an international character, of granting such rebels a degree of recognition *de facto,* or of undermining government action aimed at defending the existing structure of the State.[50]

Consequently, the Geneva Conventions are, as one scholar observed, "mutually exclusive: any armed conflict is either international or non–international, and consequently covered either by CA 2 or CA 3."[51] However, as noted above, the nature of armed conflict has changed but the law has not. The law's stagnation has required scholars and experts to rework and redefine when CA 3 applies and when an "armed conflict" exists.

For example, in 1995, the International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber in *Prosecutor v. Tadić* stated, "[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[52] In so doing, the ICTY Court established the famous two part "Tadić Test" to determine whether an "armed" conflict exists, factoring the intensity of the conflict itself along with the degree of organization of the armed forces participating therein.[53] The court was not confronted with the challenges of transnational belligerency, but rather a civil war. Thus the law continued to develop further in this context especially in larger international judicial bodies like the ICC.

For example, the 1998 ICC Statute at Article 8 states that armed conflicts are ones "that take place in the territory of a State when there is protracted armed

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[50] COMMENTARY ON THE ADDITIONAL PROTOCOLS OF JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 46 (Yves Sandoz et al. eds., 1987), [hereinafter AP COMMENTARIES].

[51] ELS DEBUF, CAPTURED IN WAR: LAWFUL INTERNMENT IN ARMED CONFLICT 124 (Hart Publ'g Oxford 2013).

[52] Prosecutor v. Dusko Tadic, International Criminal Tribunal for the Former Yugoslavia (ICTY), Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 70.

[53] Prosecutor v. Ramush Haradinaj *et. al*, ICTY, Case No. IT-04-84*bis*-T, Trial Chamber II, Retrial Judgment, 29 November 2012, para 400 at, http://www.icty.org/x/cases /haradinaj/tjug/en/121129_judgement_en.pdf ("The Parties have agreed that an 'armed conflict existed in Kosovo at all times relevant to the Indictment . . . .' In doing so, the Chamber will look at (1) the intensity of conflict between the Serbian forces and the KLA in Kosovo and (2) the level or organization of the KLA from Mar. 1–Apr. 21, 1998.").

conflict between governmental authorities and organized armed groups or between such groups."[54] Again, the ICC Statute did not contemplate transnational belligerency. However, in 2006, after the September 11, 2001 attacks, the United States Supreme Court drew a distinction between conflicts which are a "clash between nations" and those which were "not of an international character" with the latter applying to *all* armed conflicts that are not between two nation–states.[55] Thus, the Supreme Court recognized that the term "conflict not of an international nature" is to be interpreted as a contradistinction to a conflict between nations.[56]

Though the threshold of what constitutes an *armed conflict* appears more grounded, there remains considerable debate as to what *non–international* actually means. Some argue consistent with the Court's ruling in *Hamdan* that, "[n]on–international armed conflicts are not defined by geographical boundaries but by the nature of the parties to the conflict."[57] This view would seem to recognize how transnational belligerency has changed warfare overall. However, the majority view remains fixated on the notion that "non-international armed conflict is confined to the territory of a single State, and that spill–over, cross-border or transnational armed conflicts therefore fall outside the scope . . ." of the Law of Armed Conflict (LOAC) as applied to NIACs.[58] The majority no doubt relies on CA 3's applicability as being "in many respects similar to an international war, but take place within the confines of a single country."[59]

Such a territorial restriction regarding NIAC applicability overall seems at odds with the purpose of CA 3. For example, the commentary to the Geneva Conventions provides that CA 3 "does not in any way limit the right of a State to put down rebellion . . ." rather "[i]t merely demands respect for certain rules which are already recognized as essential in all civilized countries."[60] In other words, CA 3 was simply intended to apply humanitarian protections liberally especially in the case of civilians. Consequently, a strict notion of the applicability of CA 3 as being solely within a state's territory leaves a gap which addresses neither the nature of transnational belligerency nor of transnational belligerents. Such a gap has given rise to notions like complementarity as a means to fill those gaps.

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[54] Rome Statute *supra* note 41, art. 8 *et seq*.
[55] Hamdan v. Rumsfeld, 548 U.S. 557, 777 (2006) (emphasis added).
[56] *Id.* at 630.
[57] DEBUF, *supra* note 51, at 129.
[58] YORAM DINSTEIN, CHARLES GARRAWAY & MICHAEL N. SCHMITT, THE MANUAL ON THE LAW OF NON–INTERNATIONAL ARMED CONFLICT, WITH COMMENTARY 3 (Int'l Inst. of Humanitarian Law San Remo 2006), *available at* http://www.iihl.org/iihl/Documents /The%20Manual%20on%20the%20Law%20of%20NIAC.pdf.
[59] COMMENTARY III, *supra* note 47, at 37.
[60] *Id.* at 36.

3. Complementarity and the Shortcomings of Common Article 3 Law

Complementarity as a concept has arguably originated to address the void in NIAC and CA 3 outlined above. The concept of complementarity posits that both LOAC (IHL) and International Humanitarian Rights Law (IHRL) should be read to "complement" each other. Proponents believe that "[c]omplementarity means that human rights law and humanitarian law do not contradict each other but, being based on the same principles and values can influence and reinforce each other mutually."[61]

Supporters argue that the reason complementarity works is because "one can say that human rights law and humanitarian law have in common that they seek to protect people from abusive behaviour [*sic*] by those in whose power they are . . . ."[62] Article 31(3)(c) of the Vienna Convention on the Law of Treaties is often cited as support of complementarity and states in part that nations must account for "any relevant rules of international law applicable in the relations between parties."[63]

Authors often cite to two distinct opinions from the International Court of Justice (ICJ) to expand upon these concepts. First, in what has been termed the Nuclear Weapons case, the ICJ stated that protections provided under the International Covenant on Civil and Political Rights did not "cease in times of war except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency."[64]

As one author astutely observed, the court was not studying the relationship between LOAC and IHRL per se, but rather one "particular IHRL norm, the right to life, and at that, the right to life as it is formulated in Article 6 International Convention on Civil and Political Rights (ICCPR) . . . , and the relevant rules of [LOAC]". [65] Thus, the Court's analysis applied *lex specialis* in terms of increasingly specific rules relative to one norm, which then caused academics to extrapolate the concept to apply to LOAC and IHRL overall.[66]

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[61] Cordula Droege, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict,* 40 ISR. L. REV. 310, 337 (2007).
[62] *Id.* at 341.
[63] Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331.
[64] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226.
[65] Marko Milanović, *Norm Conflicts, International Humanitarian Law and Human Rights Law*, in INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW 99 (Orna Ben–Naftali ed. 2011).
[66] *Id.*

Nevertheless, in 2004 the ICJ carried this notion forward in the Wall case stating,

> As regards the relationship between international humanitarian law [LOAC] and human rights law, there are thus three possible situations: some rights may be exclusively matters of [LOAC]; others may be exclusively matters of [IHRL]; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.[67]

What is important about complementarity as a general concept is that is seeks to fill gaps, especially in terms of NAICs. In other words, what complementarity not surprisingly seeks to do is place law where there is none, namely in the realm of CA 3 and NIACs. As noted above, legal protections in a NIAC are almost exclusively limited to CA 3 alone.

Consequently, especially in terms of belligerent status, the importation and application of alternative bodies of international law is attractive if only for the purpose of avoiding the challenges of a fully renewed international legal dialogue. However, with the exception of the present time, an international legal dialogue is precisely what has taken place each and every time the world has seen significant changes in warfare. Arguably, why complementarity exists at all as a concept is because scholars and experts alike have identified the necessity for more law in this area.

The most significant treaty law has developed following significant changes in warfare. For example, modern conceptions of LOAC (IHL) were put in place after WW II most prominently by the United Nations' Universal Declaration of Human Rights.[68] The Declaration's Preamble underscored that States had the universal duty to protect the "inherent dignity" and "inalienable rights" of all people.[69]

Likewise, on August 12, 1949, the Geneva Conventions were concluded and sixty–one countries had already signed all four Conventions as early as February

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[67] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004, I.C.J. 36.

[68] The U.N. Charter was signed on June 26, 1945 in San Francisco at the conclusion of the United Nations Conference on International Organization, and entered into force on October 24, 1945. *See generally*, BARDO FASSBENDER, THE UNITED NATIONS CHARTER AS THE CONSTITUTION OF THE INTERNATIONAL COMMUNITY (Brill 2009).

[69] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948), pmbl.

12, 1950.[70] The subsequent years following WWII saw little affirmative development of LOAC until the 1977 Additional Protocols (AP) I and II to the Geneva Conventions.[71] The Additional Protocols, especially AP II, were created in response to the increasing pervasiveness of guerilla warfare in Vietnam and in other regional wars.[72] Since that time there has again been no significant development in treaty–based LOAC to address the realities of transnational belligerency.

Some scholars depart from this assertion arguing instead that since 1990, there has been a "revolution in the regulation of armed conflict."[73] Proponents of this position argue that there are three main areas of novel legal development. First, supporters submit that there is an emergence of significant customary international law through bodies like the ICTY Statute's "prohibition on attacks against civilians" and similar laws.[74] Second, complementarity has emerged as a method of gap–filling as outlined above. Finally, proponents support what can be characterized as a "resort to international criminal law" to provide a "useful means by which international humanitarian law may be enforced."[75]

These perspectives are notable, but unfortunately underscore the need to truly define transnational belligerents and transnational belligerency overall. As noted above, international bodies like the ICTY and the ICJ have been forced into a position of creating the law in the context of NIACs due to the absence of more authoritative international law. Thus, their precedent may be expressions of customary law to some degree but are in fact more indicative of a legal vacuum in the area of NIACs rather than firm advancements of the same.

Second, the greatest weakness of complementarity is that, though LOAC and IHRL do share some aspects in common, they are designed with opposing objectives. LOAC is intent on protecting civilians from war or belligerency. IHRL is intent on protecting civilians from their own governments. Finally, any

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[70] COMMENTARY III, *supra* note 47, at 9.

[71] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Jun. 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. *See also* Protocol Additional (II) 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].

[72] *See generally* 4 THE VIETNAM WAR AND INTERNATIONAL LAW: THE CONCLUDING PHASE (Richard A. Falk ed., Princeton Univ. Press 1976). It is important to note the language from AP I art. 1(4) which defined "international armed conflict" as "armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self–determination." *Id.* Thus, the law at the time was focused on post–colonialism and its many issues, not transnational belligerency.

[73] Sandesh Sivakumaran, *Re-envisaging the International Law of Internal Armed Conflict,* 22 EUR. J. OF INT'L L. 219, 225 (2011).

[74] *Id.* at 228 (citing Tadić, *supra* note 52, paras 220-222).

[75] *Id.* at 232.

full commitment to international criminal law risks creating skewed results, constant reassessment of what crimes apply and an invariable reevaluation of what the definitions of the various crimes actually mean. This is readily apparent in the international dialog over defining terrorism and its acts.

III. What's In a Name? Definitions Range From Terrorist to Guerilla Fighter

As noted above, transnational terrorists have focused almost exclusively on attacks against civilians. However, coherent approaches to the problem of terrorist status is compounded because there is no cohesive definition of what constitutes a terrorist or a terrorist act.[76] Scholars and governments alike typically hold in common that transnational belligerent actors target civilians.[77] International consensus regarding the use of civilians as targets of terrorism is also well supported in studies and literature.

For example, the United States Department of Homeland Security's National Consortium for the Study of Terrorism and Responses to Terrorism (START) reported that in 2013 alone, there were a total of 9707 terrorist attacks resulting in more than 17,800 deaths and more than 32,500 injuries.[78] Furthermore there were an additional 2990 people kidnapped or taken hostage.[79] This data translates to approximately 808.91 attacks resulting in 1,490.2 deaths per month in ninety–three different countries worldwide in 2013.[80] Furthermore, according to the study, "more than half of all targets attacked in 2013 (52.1%) were classified as private citizens, property, or police."[81]

Likewise, the U.S. State Department noted that "[t]errorist violence in 2013 was fueled by sectarian motivations marking a worrisome trend, in particular in Syria, Lebanon, and Pakistan, where victims of violence were primarily among

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[76] *See generally* Johan D. van der Vyver, *Prosecuting Terrorism in International Tribunals*, 24 EMORY INT'L L. REV. 527 (2010).
[77] *Id.* at 529.
[78] U.S. Department of State (DoS) Bureau of Counterterrorism; National Consortium for the Study of Terrorism and Responses to Terrorism (START), *Country Reports on Terrorism 2013: Annex of Statistical Information*, 3 (Apr. 2014) , http://www.state.gov/documents/organization/225043.pdf [hereinafter START Report 2013]. The START is a cooperative effort between the University of Maryland and the DoS and their reports are required to be published annually online pursuant to 22 U.S.C. § 2656f of the Foreign Relations Act, Pub. L. 100-204, 101 Stat 1347 (1987) *as amended by* Pub. L. 108-487, 118 Stat. 3777, Jan. 7, 2011.
[79] *Id.* at 4.
[80] *Id.*
[81] *Id.* at 10.

the civilian populations."[82] Some countries, but not all, have either passed or proposed legislation making civilians central to definitions of terrorism.

A. National Definitions of Terrorism

Kenya proposed anti–terrorism legislation in 2003 proscribing "the use or threat of action where . . . [t]he action used or threatened . . . involves serious violence against a person . . . ."[83] This proposed legislation was in response to the 1998 U.S. Embassy bombing in Nairobi[84] and the Paradise Hotel in Mombasa in 2002.[85] It was not until approximately ten years later—after a tragic attack on Nairobi's Westgate Mall in 2013—that Kenya passed the Prevention of Terrorism Act. The Act criminalizes the "commission of a terrorist act" and defined a terrorist act as "an act or threat of action which involves the use of violence against a person . . . ."[86] However, Kenya's civilian–centered approach to the Prevention of Terrorism Act is not shared by other countries in the Middle East of Africa.

For example, Pakistan has an expansive criminal definition and approach to terrorism which incorporates both act and purpose. Pakistan's Anti–Terrorism Act, 1997 section 6, defines terrorism as an "action" the "use or threat [of which] is designed to coerce and intimidate or overawe the Government or the public" or a section or "sect" of the population which creates "a sense of fear or insecurity in society."[87] Most recently, Pakistan took a more aggressive stance on terrorism through the Protection of Pakistan Ordinance which criminalizes acts intended to wage war against Pakistan or threaten public security.[88] Such acts include, among

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[82] U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON TERRORISM 2013, at 6 (Apr. 2014), http://www.state.gov/documents/organization/225886.pdf.

[83] Charles Lenjo Mwazighe, *Legal Responses to Terrorism: Case Study the Republic of Kenya*, Masters Thesis Navy Postgraduate School, Dec. 2012, 58, http://www .dtic.mil/dtic/tr/fulltext/u2/a574555.pdf (citing *Kenya's Suppression of Terrorism Bill*, 2003, Clause 3). Mwazighe further reviewed several UN Resolutions published between 1997 and 2006 and noted "[n]one of these documents provides a clear definition of terrorism and no globally accepted standard meaning has coalesced." *Id.* at 59.

[84] James C. McKinley, Jr., *Two U.S. Embassies in East Africa Bombed,* N.Y. TIMES, Aug. 8, 1998, http://partners.nytimes.com/library/world/africa/080898africa-bombing.html.

[85] Dexter Filkins, *Terror in Africa: Attacks in Mombasa*, N.Y. TIMES, Nov. 30, 2002, http://www.nytimes.com/2002/11/30/world/terror-africa-attacks-mombasa-kenyans-hunting-clues-bombing-toll-rises-13.html.

[86] Prevention of Terrorism Act, 2012, Republic of Kenya, Oct. 12, 2012, Act No. 30 of 2012, http://www.kenyalaw.org:8181/exist/kenyalex/actview.xql?actid=No. 30 of 2012 &term=terrorism.

[87] Anti–Terrorism Act, 1997, Islamic Republic of Pakistan (پاکستان یـئجمہور یاسـلام), No. F. 9(39)/97-Legis, Aug. 20, 1997, sec. 6 at http://www.na.gov.pk/en/search_content.php, https://www.unodc.org/tldb/showDocument.do?documentUid=7781 &node=docs&cmd=add&country=PAK.

[88] Protection of Pakistan Ordinance No. IX of 2013, Islamic Republic of Pakistan, Oct. 31, 2013, sec 2(i)(1) Schedule of Offenses, http://www.na.gov.pk/uploads/documents/

others, "use of arson, fire-bombs, suicide bombs . . . or other materials capable of exploding or creating bombs employed to kill persons or destroy property."[89]

The Ordinance also allows for "preventive detention" for up to ninety days.[90] As noted above, Pakistani anti–terror laws are not squarely focused on attacks against civilians as the nexus crime. For example, their most recent anti-terror laws focus primarily on attacks on public officials, services, mass transit systems, oil or gas pipelines, and aircraft.[91] Thus, the law focuses in some respects on where civilians may be, but not on them as objects of attack, per se.

Egypt, no stranger to transnational belligerents, has been criticized for a disproportionate degree of criminal liability assigned solely to public officials as terrorist targets. For example, in 2009 the United Nations Special Rapporteur, in discussing criminalization of membership in terrorist organizations in Egypt, advised that future "definitions of terrorist crimes should be confined exclusively…to the use of deadly or serious violence against civilians."[92] The Special Rapporteur continued by noting specifically in the case of Egypt that their laws had arguably wide ranging goals, like criminalization of "any threat or intimidation" and preventing or impeding "public authorities in the performance of their work."[93] The Rapporteur also noted with interest Egypt's criminalization of terrorist "organizations,"[94] a trend which appears to be uniformly applied in other Egyptian criminal statutes.[95]

1383819468_951.pdf.

[89] *Id.* sec. 2(i)(1)(iv).

[90] *Id.* sec. 6, (amended by Ordinance I of 2014, Islamic Republic of Pakistan, Jan. 22, 2014), sec 6, Preventive Detention, at http://www.na.gov.pk/uploads/documents /1391322775_795.pdf.

[91] Protection of Pakistan Ordinance No. IX of 2013, *supra* note 88, sec. 2(i) *et seq*.

[92] Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism**,** *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism–Mission to Egypt* 18, U.N. Doc. A/HRC/13/37/Add.2 (Oct. 14, 2009), http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-37-Add2.pdf.

[93] *Id.* at 7. (Special Rapporteur Egypt).

[94] *Id.* at 8. (Special Rapporteur Egypt) (noting specifically that "[t]he Special Rapporteur during his meetings with Egyptian authorities strongly advised against any wording in the future anti–terrorism law that would define a terrorist organization on the basis of its aim to commit any act legally characterized as terrorist, rather than on the commission of specific acts").

[95] *See e.g.*, Stephen Kalin, *Egypt Plans Blanket Anti–terrorism Law against 'Disrupting Order'*, REUTERS (Nov. 26, 2014), http://www.reuters.com/article/2014/11/26/us-egypt-security-idUSKCN0JA1U520141126.

B. The Lack of International Consistency for Terrorism as Attacks against Civilians

As noted above, many nations affected by terrorism have vastly divergent definitions of terrorism and some do not make attacks against civilians central to their crimes. This is no different from an international legal perspective. For example, the Rome Statute of the International Criminal Court (ICC) seeks to place terrorism as a species of a larger "crime against humanity" rather than criminalize it outright.[96]

Article 7 of the Rome Statute allows for jurisdiction in cases where a group carries out a "widespread or systemic attack against any civilian population" done "pursuant to or in furtherance of State or organizational policy to commit such an attack" under the theory that it is a "crime against humanity."[97] The Rome Statute does include terms such as "murder, extermination, and enslavement . . ." but omits any permutation of terrorism altogether.[98]

The omission of "terrorism" as a separate enumerated offense under the Rome Statute was intentional based on a majority consensus during the conference.[99] The proposed language would have criminalized offenses involving firearms, weapons, or explosives "when used as a means to perpetrate indiscriminate violence involving death or serious bodily injury to persons or groups of persons or populations . . . ."[100]

Notably, the United States opposed inclusion of terrorism as a separate offense. The United States offered that "while that crime had an international dimension, [it] was not itself a sufficient rationale for the crime of terrorism to be placed within the purview of the ICC."[101] The United States was not alone. The 1996 Report of the Preparatory Committee on the Establishment of the International Criminal Court explained,

> There was no general definition of the crime and elaborating such a definition would substantially delay the establishment of the Court: these crimes were often similar to common crimes

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[96] Rome Statute, *supra* note 41, at art. 7.
[97] *Id.*
[98] *Id.*
[99] Aviv Cohen, *Prosecuting Terrorists at the International Criminal Court: Reevaluating an Unused Legal Tool to Combat Terrorism*, 20 MICH. ST. INT'L L. REV. 219, 223 (2012).
[100] *Id.* (citing U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, It., June 15-July 17, 1998, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, p. 21, U.N. Doc. A/CONF.183/2 (Apr. 14, 1998)). It is important to also note that the definition of "acts of terrorism" included "acts of violence against another State directed at persons." *Id.*
[101] CIARA DAMGAARD, INDIVIDUAL CRIMINAL RESPONSIBILITY FOR CORE INTERNATIONAL CRIMES: SELECTED PERTINENT ISSUES 381 (Springer–Verlag Berlin Heidelberg 2008).

> under national law in contrast to the crimes listed in other subparagraphs of article 20; the inclusion of these crimes would impose a substantial burden on the Court and significantly increase its costs while detracting from the other core crimes; these crimes would be more effectively investigated and prosecuted by national authorities under existing international cooperation arrangements for reasons similar to those relating to drug trafficking; and the inclusion of the crimes could lessen the resolve of States to conduct national investigations and prosecutions and politicize the functions of the Court.[102]

Interestingly, the United States, along with nations like Canada, Denmark, Lichtenstein, and Oman, opposed including "terrorism" as a "crime against humanity" as well. The stated rationale for non–inclusion in the larger over–arching definition was because "agreement could not be reached on the definition of terrorism," and that terrorism had "never been categorized as a crime against humanity."[103]

The nations further opined that inclusion of terrorism in the ICC's "crimes against humanity" jurisdiction would risk politicizing the Court and that not all acts of terrorism rose to the level to be considered sufficiently serious to be prosecuted by the ICC.[104] The United States and others also reasoned that national tribunals were better suited to handle terrorism prosecutions than the ICC, and also stated the greater concern that the ICC Statute did not "distinguish between terrorism and the struggle of peoples under foreign or colonial domination for self–determination and independence."[105] However, many national courts have proven either ill–equipped or unable to handle terrorist prosecutions necessitating the creation of ad hoc tribunals.[106]

1. How ad hoc Tribunals Address Civilians as Terrorist Targets

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[102] *Id.* at 382 (citing *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, Supp. No. 22, U.N. Doc. A/51/22 (1996) Vol. I § 106).

[103] *Id.* at 384.

[104] *Id.*

[105] *Id.*

[106] INT'L CRIMINAL TRIBUNAL FOR RWANDA, COMPLEMENTARITY IN ACTION: LESSONS LEARNED FROM THE ICTR PROSECUTOR'S REFERRAL OF INTERNATIONAL CRIMINAL CASES TO NATIONAL JURISDICTIONS FOR TRIAL (2015), http://www.unictr.org/sites/unictr.org/files/legal-library/150210_complementarity_in_action.pdf. The Chief Prosecutor discusses how the ICTR referred eight cases to the Rwandan national court system for prosecution after significant international oversight lasting over a decade to ensure the court had capacity and was operating in compliance with international human rights law. *Id*.

Not unlike the ICC, other tribunal–based international tribunals have defined the term *crimes against humanity* in divergent terms with many not focusing on civilians as central to the definition. A notable exception was the International Military Tribunal (IMT) for the Far East. Termed the Tokyo IMT, Article 5(c) criminalized "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during war . . . ."[107] The definitions contained in the Statute for the International Tribunal for Rwanda (ICTR),[108] Article 3, and the Updated Statute of the International Criminal Tribunal for the Former Yugoslavia[109] (ICTY), Article 5, have nearly identical definitions of *crimes against humanity* with one important exception. The ICTR Statute provides that crimes such as "murder; extermination; enslavement . . ." are proscribed when committed as "part of a widespread or systemic attack against any civilian population."[110]

The ICTY Statute proscribes the same series of crimes "when committed in armed conflict, whether international or internal in character, and directed against any civilian population."[111] Article 2 of the Statute of the Special Court for Sierra Leone (SCSL) grants the power to prosecute an identical list of crimes as those above (murder, extermination, enslavement), when they are committed "as part of a widespread or systematic attack against any civilian population."[112] The common theme in all of the above–listed tribunal–based statutes is that they all criminalize acts directed against a civilian population.

Notably, only the 1994 ICTR Statute and the 2002 SCSL address the issue of terrorism. Article 4 of the ICTR Statute lists as separate offenses "[v]iolations of Article 3 common to the Geneva Conventions and Additional Protocol II" and includes crimes such as "[t]aking hostages; [a]cts of terrorism; [and] [o]utrages on personal dignity, in particular humiliating and degrading treatment, rape,

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[107] General Headquarters Supreme Commander for the Allied Powers, General Order No. 1 Charter of the International Military Tribunal for the Far East (19 Jan. 1946), http://lib.law.virginia.edu/imtfe/content/page-1-1590.

[108] Statute of the International Criminal Tribunal for Rwanda, U.N. Doc. S/Res/955 (1994); 33 ILM 1598 (1994), http://www.unictr.org/sites/unictr.org/files/legal-library/941108_res955_en.pdf [hereinafter ICTR Statute].

[109] Statute of the International Criminal Tribunal for the Former Yugoslavia. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N.Doc. S/RES/808 (1993); further amended in U.N. Security Council Resolutions 1166 (13 May 1998), 1329 (30 Nov 2000), 1411 (17 May 2002), 1431 (14 Aug. 2002), 1481 (19 May 2003), 1597 (20 Apr. 2005), 1660 (28 Feb. 2006), 1837 (29 Sep. 2008), 1877 (7 July 2009), http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf [hereinafter ICTY Statute].

[110] ICTR Statute, *supra* note 108, art. 3.

[111] ICTY Statute, *supra* note 109, art. 5.

[112] Statute of the Special Court for Sierra Leone (UN Sec/Res 1315 (2000) Aug. 14, 2000, Art. 2, http://www.rscsl.org/Documents/scsl-statute.pdf. The Special Court Statute was entered into force on Jan. 16, 2002 and the Special Court was formed by virtue of a Special Court Agreement between the United Nations and the Government of Sierra Leone on the same date, [hereinafter SCSL Statute]. *Id.*

enforced prostitution and any form of indecent assault."[113] Article 3 of the SCSL Statute includes ostensibly identical language.[114] However, neither statute defines the term *acts of terrorism*.

Nonetheless, Article 4 of the SCSL Statute does grant prosecutorial jurisdiction over other "serious violations of international humanitarian law" and criminalizes "[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities."[115] Again, though terrorism is not specifically defined, the SCSL criminalizes acts directed at civilians in three separate ways. Thus, the SCSL is the closest that a tribunal has come to criminalizing terrorism per se. It is troubling to note that ad hoc tribunals which seek to prosecute terrorists, transnational or otherwise, have failed to address the issue.

An example of such a definitional application in practice is the Special Tribunal for Lebanon (STL).[116] The tribunal was formed as the result of a failed agreement between the United Nations and Lebanon as a means of addressing the terrorist attack against Lebanese Prime Minister Rafik Hariri that took place in Beirut on February 15, 2005.[117] The bomb which claimed Prime Minister Hariri's life also killed his twenty–two person security detail and injured over two hundred other civilians.[118]

Though several attempts were made, no final agreement on a foundational document could be reached.[119] Consequently, the United Nations Security Council, pursuant to its Chapter VII authority, and at the request of the Lebanese government, passed Resolution 1757 forming the tribunal.[120] The STL was authorized only to prosecute those responsible for the attack by interpreting the Criminal Code of Lebanon rather than forming a separate criminal statute.[121]

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[113] ICTR Statute, *supra* note 108, art. 4.
[114] SCSL Statute, *supra* note 112, art. 3.
[115] *Id.* at art. 4.
[116] *See e.g.*, Ben Saul, *Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon invents an International Crime of Transnational Terrorism* 24 LIEDEN J. OF INT'L L.677 (2011); *see also* Kai Ambos, 24 LIEDEN J. OF INT'L L. 655 (2011).
[117] *See* RESEARCH HANDBOOK ON INTERNATIONAL LAW AND TERRORISM 651 (Ben Saul ed., Edward Elgar Publishing Ltd. United Kingdom 2014).
[118] *Id.*
[119] *Id.*
[120] United Nations Security Council Resolution 1757, U.N. Doc. S/REC/1757 (2007), http://www.stl-tsl.org/en/documents/un-documents/un-security-councilresolutions/security-council-resolution-1757 [hereinafter UNSCR 1757].
[121] D. A. Bellemare, *Bringing Terrorists Before International Justice: A View From the Front Lines*, 23 CRIM. L.F. 425, 429 (2012), http://link.springer.com/article/10.1007%2Fs10609-012-9181-5. These are notes for an Address by the Former Chief Prosecutor to the Special Tribunal for Lebanon from 2009-2012. *Id.*

Consequently, there was no United Nations statutory definition of what constituted terrorism.[122] It was not until 2011 that the Appeals Chamber of the STL issued an interlocutory appeal addressing the issue of a definition of terrorism at all.[123] The Appeals Chamber saw the task of defining terrorism under international law as outside of their mandate.[124] Rather they drafted a definition under Article 314 of the Lebanese Criminal Code which was to be interpreted in "consonance with international law." The Chamber defined terrorist acts under the following elements:

> a. the volitional commission of an act;
> b. through means that are liable to create a public danger, and;
> c. the intent of the perpetrator to cause a state of terror.[125]

The Chamber avoided state practice as establishing custom where it stated "the fact that all States of the world punish murder through their legislation does not entail that murder has become an international crime."[126] Thus, "[t]o turn into an international crime, a domestic offense needs to be regarded by the world community as an attack on universal values (such as peace or human rights)," rather than simply criminalized in their statutes.[127]

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[122] UNSCR 1757, *supra* note 120, art. 2(a). The UN stated the tribunal had authorization under "[t]he provisions of the Lebanese Criminal Code relati[ng] to the prosecution and punishment of acts of terrorism, crimes and offences against life and personal integrity, illicit associations and failure to report crime and offenses . . . ." *Id.*

[123] Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL-11-01/I/AC/R176-*bis* (Feb. 16, 2011), http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/appeals-chamber/f0936 [herinafter Interlocutory Decision].

[124] *Id.* at para. 123. The Chamber stated, "As we have previously noted, the text of Article 2 of the Tribunal's Statute makes clear that Lebanese law, not customary international law, should be applied to the substantive crimes to be prosecuted by the Tribunal." *Id.*

[125] *Id.* at para. 147. Murder was addressed Pursuant to Article 547 of the Lebanese Criminal Code. *Id.* at para. 150.

[126] *Id.* at para. 91.

[127] *Id.* The chamber based their rationale on the famous Italian legal scholar Dionisio Anzilotti who wrote:

> [T]he fact that all States of the world punish murder through their legislation does not entail that murder has become an international crime . . . . To turn into an international crime, a domestic offense needs to be regarded by the world community as an attack on universal values (such as peace or human rights), rather than simply criminalized in their statutes.

Id. (quoting D. ANZILOTTI, I CORSO DI DRITTO INTERNAZIONALE 100) (4th ed. CEDAM 1955).

Consequently, the Chamber used the definition from the Lebanese Criminal Code, which provided "[t]errorist acts are all acts intended to cause a state of terror and committed by means liable to create a public danger such as explosive devices, inflammable materials, toxic or corrosive products and infectious or microbial agents. [128] Thus, the Lebanese Tribunal did not address per se international terrorism and those crimes which would otherwise fall under the jurisdiction of other tribunals constituted under the United Nations "*stricto senso*."[129] Consequently, all nations bear the responsibility to prosecute violators of this category of laws, which may be fairly categorized as crimes against humanity, genocide and war crimes.[130] However, as demonstrated by ad hoc tribunals, the over–arching concept of proscribing the systemic act of targeting or attacking civilians by any organized belligerent organization has been met by considerable challenges despite having a strong basis in international law.

2. Prohibitions against Attacking Civilians and the Additional Protocols

As noted above, the most current embodiments of prohibitions against civilians being attacked are Articles 51(2) of AP I[131] and 13(2) of AP II[132] from 1977. Both Protocols contain mirror language which read "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[133] This appears to address the issue head–on.

However, given the time they were drafted and the reasons for them, the above prohibitions are couched in terms of *military operations* and contemplated neither transnational belligerency nor terrorism.[134] The issue then turns to

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[128] Lebanese Criminal Code, art. 314.

[129] Heather Noël Doherty, *Tipping the Scale: Is the Special Tribunal for Lebanon International Enough to Override State Official Immunity?* 43 CASE W. RES J. INT'L L.J. 831, 834 (2014). S*tricto senso* is the legal doctrine that some are considered "enemies of all mankind." *Id.*

[130] *Id.* at 834-35.

[131] AP I, *supra* note 71, at art. 51(2).

[132] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non–International Armed Conflicts art. 13(2), June 10, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

[133] AP I, *supra* note 71, at art. 51(2); AP II, *supra* note 71, at art. 13(2).

[134] *Id.* at art. 13(1). "The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances . . . ." *Id. See also* AP I, *supra* note 71, at art. 51(1).

> The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to

whether terrorism or transnational belligerency may ever be considered *military operations*. In *Prosecutor v. Galić*, the ICTY sought to clarify this issue.[135]

In *Galić*, the ICTY Appeals Chamber stated, in relation to the military seizure of Sarajevo, that "a breach of the prohibition of terror against the civilian population gave rise to individual criminal responsibility pursuant to customary law . . . ."[136] The Appeals Chamber was clearly dealing with a *military operation*. Stanislav Galić was, at the time of the seizure of Sarajevo, a Major General in command of the Sarajevo Romanija Corps and reported directly to the Chief of Staff of the Army of the Serbian Republic.[137]

Galić was indicted on multiple counts for "inflicting terror upon the civilian population" through a shelling and shiping campaign directed at the inhabitants of Sarajevo but not for terrorism as its own enumerated crime.[138] The AP I and AP II prohibitions appear clearly linked to military operations directed toward civilians, operations which in practical effect terrorize civilians, rather than per se terrorist acts directed towards civilians. Both AP I and AP II fall short of proscribing terrorist tactics against civilians. The language from both GC IV and AP II clearly illustrates this point.

For example, Article 33 of GC IV reads in relevant part that "[c]ollective penalties and likewise all measures of intimidation or of terrorism are prohibited."[139] However, similar to *Galić* above, the protections outlined in Article 33 explicitly apply to civilians who "find themselves" in the "hands of" an adversary in an IAC.[140] Hence the protections are very clear but, as noted above, do not apply to NIACs.

Article 4 of AP II does apply in a NIAC to people who "do not take direct part or who have ceased to take direct part in hostilities" as being protected from "violence . . . in particular murder [and] acts of terrorism."[141] Thus, clearly, the focus of these two laws is to prevent a controlling party from terrorizing civilians

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> other applicable rules of international law, shall be observed in all circumstances.

Id.

135 Appeals Chamber, International Criminal Tribunal for Former Yugoslavia, decision of Nov. 30, 2006, IT-98-29-A, at para. 4, http://www.icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf.

136 *Id.* at para. 86.

137 *Id.* at para. 2.

138 *Id.* at para 3. It is important to note that the Appeals Chamber considered both provisions of the Additional Protocols customary international law in order to apply them as criminal provisions under their jurisdiction. *Id.* at para. 81 *et seq*.

139 GC IV, *supra* note 45, art. 33.

140 GC IV, *supra* note 45, art. 4.

141 AP II, *supra* note 71, arts. 4(1), (4)(4)(a), (d).

who may fall under their control.[142] However, as noted above, definitions fall short in the transnational belligerency context in that AP II and CA 3 were designed to address cases of internal rebellion by guerillas, not by transnational terrorist organizations such as ISIS.

This is not surprising considering the origins of the term guerilla.[143] Leo Tolstoy, in describing the how the Spanish forces fought against Napoleon wrote,

> One of the most obvious and advantageous departures from the so–called laws of war is the action of scattered groups against men pressed together in a mass. Such action always occurs in wars that take on a national character. In such actions, instead of two crowds opposing each other, the men disperse, attack singly, run away when attacked by stronger forces, but again attack when opportunity offers. This was done by the guerrillas in Spain, by the mountain tribes in the Caucasus, and by the Russians in 1812. People have called this kind of war "guerrilla warfare" . . . .[144]

Hence the term itself arose out of partisan necessity to fight against occupying forces. This was clear from the AP II Commentary which noted that the Protocol was "the result of a compromise between humanitarian requirements and those of State security, the negotiators also considered it necessary to include a clause safeguarding the inviolability of the national sovereignty of states."[145] Indeed, this impetus was clear when the commentators wrote that "[s]ince the Second World War the type of weapons developed and the widespread use of guerilla warfare as a method of combat have resulted in growing numbers of victims amongst the civilian population" especially in "internal armed conflicts, which are becoming increasingly common."[146]

It is clear to see that the protection of civilians was central to the analysis in 1977 when the Additional Protocols were drafted. The term guerilla, however, addresses belligerency within a very specific factual scenario and does not adequately capture transnational belligerents. Consequently, this incongruence has resulted in states creating additional categories which seek to sufficiently address the reality of transnational belligerents.

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142 AP I, *supra* note 71, at art. 51(2); AP II, *supra* note 71, at art. 13(2).
143 Literally translated from Spanish as "little war."
144 LEO TOLSTOY, 4 THE COMPLETE WORKS OF COUNT TOLSTOY 173 (Leo Weiner trans., J. M. Dent & Co. 1904).
145 AP COMMENTARIES, *supra* note 50, at 1344.
146 *Id.* at 1444.

C. Unlawful Combatants and Belligerents: Similar, But Not Identical

Professor Solis, retired United States Marine Corps Judge Advocate and Adjunct Professor of Law at Georgetown and George Washington Universities, captured this idea best when he commented that "unlawful combatant" is "a *de facto* individual status . . . [which] [j]ust as guerillas and militias are a subset of 'combatant,' unlawful combatants are a subset of 'civilian.'"[147] The term arose out of the Global War on Terror and has created considerable controversy as to whether the United States' use of the classification unlawful combatant or unprivileged belligerent creates a third class of combatant recognized under the law.[148]

1. Unlawful Combatant and Unprivileged Belligerent

The United States's use of the term "unlawful combatant" finds its origins in the *Ex parte Quirin* case. The United Sates Supreme Court reasoned,

> [B]y universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[149]

The Court's distinction at this point in the law's development is important for two reasons. First, it imposed the additional criteria or liability that an unlawful combatant is potentially subject to trial by military tribunal. Second, the Court clearly indicated that through their actions, a combatant may ostensibly waive their legal protections through their actions.

In 2004 the Court relied on this separate classification of combatants in *Hamdi v. Rumsfeld* to conclude that removing the combatant from hostilities was permissive and, further, that the detainee may be subject to military tribunal when he falls into the unlawful combatant category.[150] The *Hamdi* Court relied heavily

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[147] GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR 207-208 (Cambridge 2010).

[148] *See, e.g.*, John Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law and the Law of Non-International Armed Conflict*, 40 ISRAEL L. REV. 396, 402 (2007).

[149] Ex parte Quirin, 317 U.S. 1, 31 (1942).

[150] Hamdi v. Rumsfeld, 542 U.S. 507, 518 *et seq.* (2004). The court reasoned that detention was "neither revenge, nor punishment, but solely protective custody, the only purpose of

upon his participation as a Taliban fighter against the Northern Alliance to conclude that his participation in hostilities separated him from being a civilian or otherwise lawful combatant and relegated Hamdi's status to that of an "enemy combatant."[151]

The United States presently defines unlawful combatant using the alternative definition of unprivileged belligerent. The Department of Defense (DoD) currently defines an unprivileged belligerent as "[a]n individual who is not entitled to the distinct privileges of combatant status (e.g. combatant immunity), but who by engaging in hostilities has incurred the corresponding liability of combatant status." [152] The DoD proffers two examples of unprivileged belligerency. The first example are those "[i]ndividuals who have forfeited the protections of civilian status by joining or substantially supporting an enemy non–state armed group in the conduct of hostilities."[153] The second example are those "[c]ombatants who have forfeited the privileges of combatant status by engaging in spying, sabotage, or other similar acts behind enemy lines."[154] Most notably, the DoD underscores the entire definition by stating that the "term 'unlawful enemy combatant' used in other DoD regulations is synonymous with the term 'unprivileged belligerent' contained in this directive."[155]

In 2009, the United States re–codified the term unprivileged enemy belligerent as "an individual (other than privileged belligerent) who (A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al–Qaeda at the time of the alleged offense

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which is to prevent the prisoners of war from further participation in combat." *Id.* It is important to note the *Hamdi* Court's reasoning cited *Ex parte Milligan* as authority. In *Milligan*, the Court found that he was not entitled to prisoner of war status, consequently making him subject to trial by military tribunal, specifically because he had not fought and was arrested in his home in Indiana. *Id.* at 521-22 (citing Ex parte Milligan, 71 U.S. 2 (1866)).

[151] *Id.* at 522 n.1. The Court wrote, "[T]he basis asserted for detention by the military is that Hamdi was carrying a weapon against American troops on a foreign battlefield; that is, that he was an enemy combatant.". *Id.*

[152] U.S. DEP'T OF DEF., DIR. 2310.01E, DOD DETAINEE PROGRAM 14, (Aug 19, 2014), http://www.dtic.mil/whs/directives/corres/pdf/231001e.pdf [hereinafter DoD D2310.01E].

[153] *Id.*

[154] *Id.*

[155] *Id.* Consistent with the status of U.S. law at the time, the 2006 version of the same regulation defined "unlawful enemy combatant" as "persons not entitled to combatant immunity, who engage in acts against the United States or its coalition partners in violation of the law and customs of war during and armed conflict." U.S. DEP'T OF DEF., DIR. 2310.01E, DEPARTMENT OF DEFENSE DETAINEE PROGRAM 9 (5 Sep 2006), encl.2, para.E2.1.1.2, http://www.defense.gov/pubs/pdfs/Detainee_Prgm_Dir_2310_9-5-06.pdf.

under this Chapter."[156] The United States defines the term "hostility" as "any conflict subject to the laws of war."[157]

In comparison, Israel, shortly after the September 11, 2001 terrorist attacks, promulgated a law "intended to regulate incarceration of unlawful combatants not entitled to prisoner-of-war status, in a manner conforming with the obligations of the State of Israel" under "international humanitarian law."[158] The Israelis define an unlawful combatant as,

> [a] person who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel, where the conditions prescribed in Article 4 of the Third Geneva Convention of 12th August 1949 with respect to prisoners–of–war and granting prisoner–of–war status in international humanitarian law, do not apply to him.[159]

However, these terms fall short of adequately describing what a combatant, or belligerent, truly is. For example, Judge Wilkinson in *Al–Marri v. Pucciarelli* proposed a definition of enemy combatant describing an enemy as a member of an organization or nation against whom Congress declared war or authorized armed force.[160]

Combatant is defined as a person who knowingly plans or engaged in conduct harming persons or property for the purposes of furthering the military objectives of his government or organization.[161] Here again, these definitions interpret statutory language rather than address the overarching concepts of transnational belligerency or belligerents. However, belligerency in application is precisely what the United States Supreme Court faced in the mid–nineteenth century.

2. Belligerents

After the American Civil War, the Supreme Court was presented with the issue of determining whether the Union was *at war* with the Confederacy or not. The Court in the *Prize* Cases stated,

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[156] Military Commissions Act of 2006, Pub L. No. 109-366, 120 Stat. 2600 (2006), *codified at* 10 U.S.C. §§ 948a *et seq*. as amended by Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190.
[157] *Id.*
[158] Incarceration of Unlawful Combatants Law 5762-2002, para. 1, https://www.icrc.org/applic/ihl/ihl-nat.nsf/0/7A09C457F76A452BC12575C30049A7BD.
[159] *Id.* at para. 2.
[160] Al–Marri v. Pucciarelli, 534 F.3d 230, 323 (4th Cir. 2008) (Wilkinson, J., concurring in part and dissenting in part).
[161] *Id*. at 323-24.

> A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the person[s] who originate [it] and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign the world acknowledges them as belligerents, and the contest a war.[162]

Consequently, the Court made a determination that the war with the South was not an insurrection, but rather a belligerency under international law based on the degree of violence faced by the United States.[163] The South as a whole, including civilians, was considered a public enemy, [164] and was subject to measures like suspension of habeas corpus upon capture for public security concerns.[165] The term belligerency went into disuse until the end of WWII.

The subject of belligerency was a topic of significant import during the negotiations of the 1949 Geneva Conventions.[166] However, as noted above, the conditions of the belligerency were nevertheless couched in terms of an internal armed conflict. Thus, the mere recognition of an opposing belligerent party would transform the conflict from a belligerency into a full blown international armed conflict. For example, Lauterpacht's comments on the subject described the procedures for belligerency recognition as follows:

> [F]irst, there must exist within the State and armed conflict of a general (as distinguished from a purely local) character; secondly, the insurgents must occupy and administer a substantial portion of national territory; thirdly, they must conduct the hostilities in accordance with the rules of war and

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[162] ELLERY C. STOWELL & HENRY F. MUNRO, 2 INTERNATIONAL CASES: ARBITRATIONS AND INCIDENTS ILLUSTRATIVE OF INTERNATIONAL LAW AS PRACTICED BY INDEPENDENT STATES 261 (The Riverside Press Cambridge 1916) [hereinafter WAR AND NEUTRALITY], (citing the Prize Cases, 67 U.S. (2 Black) 635, 666-67 (1862)).

[163] *Prize Cases*, at 670. The Supreme Court stated that "Whether the president . . . in suppressing an insurrection, has met with such armed hostile resistance and a civil war of such alarming proportions as will compel him to accord to them the character of belligerence is a question to be decided by him . . . ." *Id.*

[164] *See, e.g.*, Ford v. Surget, 97 U.S. (7 Otto) 594, 610 (1878). The Court stated that "powers are entitled to remain indifferent spectators of the contest, and to allow impartially to both belligerents the free exercise of those rights which war gives to public enemies against each other . . . ." *Id.* (citing Twiss, Law of Nations (2d ed.) sec. 239. (Sir Travis Twiss D.C.L)).

[165] Presidential Proclamation of September 24, 1862, 13 Stat. 730.

[166] HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 176 (Cambridge Univ. Press 1947).

> through organized armed forces acting under a responsible authority; fourthly, there must exist circumstances which make it necessary for outside states to define their attitude by means of recognition of belligerency.[167]

Thus, States at the time were concerned that international recognition would ostensibly delegitimize their governments and affect their ability to stop insurrections. There was also concern that international "support for the cause of the insurgents" would have a negative impact on the State government.[168] Most importantly, States did not want the insurgency to be given the import of international law. For example, in situations where a third country might send in their forces to support an insurrection, the conflict would necessarily become an international armed conflict. Such a situation would result in a conflict between the rules of both NIAC and IAC being in place simultaneously.[169] Such a situation is present today in debates over the status of individuals: the law of both NIAC and IAC apply, especially in context of categories like unprivileged belligerents. Thus, adoption of an entirely new transnational belligerent category would more adequately capture the challenges of modern combat.

The term unprivileged belligerent currently being used by the DoD illustrates this point.[170] The term itself is often attributed to Richard Baxter where he defined unprivileged belligerents as

> [a] category of persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949 . . . .[171]

The term belligerent, especially in context of entities like ISIS, seems more in line with classical conceptions of belligerency and its recognition. For example, this was a subject of considerable debate at the turn of the 20th Century where, as one author noted, "In modern times the question has arisen whether recognition of a condition midway between belligerency and mere unauthorized and lawless violence might not be given with advantage."[172] The author used

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[167] *Id.*

[168] *Id.* at 254.

[169] *See generally* George H. Aldrich, *The Law of War on Land*, 94 AM. J. INT'L L. 42 (2000).

[170] DoDD 2310.01E, *supra* note 152, at 14.

[171] R.R. Baxter, *So-called "Unprivileged Belligerency": Spies, Guerrillas, and Sabateurs* 28 B.Y.I.L. 323, 328 (1951). Baxter argued that civilians who participated in belligerency placed them on par with spies making them, through their conduct, no longer protected or "privileged" under the law. *Id.*

[172] THOMAS J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 331 (7th ed. MacMillan 1928).

stateless ships that did not hoist "the black flag" as examples of entities which could not be "looked on as regular belligerents, because belligerency and territory [were] inseparably connected."[173] Thus, territorial control, as demonstrated by ISIS, would technically be in line with classical concepts of belligerency.

In fact, the term transnational belligerency as a descriptive term of art is likewise consistent with its Roman origins. For example, the term belligerent derives from the Latin idiom *bellum gerere*, which literally means to "wage war."[174] It was a phrase famously used by Julius Caesar in his commentaries on the Roman wars with Gaul.[175] As previously discussed, it was not until the mid–nineteenth century that the term belligerent achieved a territorial nexus in international law.

For example, as one prominent American legal scholar, Major General Henry W. Halleck, observed in 1861,

> It has already been stated that a war, duly commenced and ratified, is not confined to the Governments or authorities of the belligerent State, but that it makes all the subjects of the one State the legal enemies of each and every subject of the other. This hostile character results from political ties, and not from personal feelings or personal antipathies; their *status* is that of legal hostility, and not of personal enmity.[176]

Halleck comments on the right of a belligerent state to kill an enemy in war by stating that it is "applicable only to such public enemies as make forcible resistance, this right necessarily ceases [as] soon as the enemy lays down his arms and surrenders his person or asks for quarter."[177] This statement is no doubt a precursor to what would later become known as *direct participation of hostilities* discussed below.

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[173] *Id.* at 332.

[174] A LIVY READER: SELECTIONS FROM AB URBE CONDITA 47 (Mary Jaeger ed., Bolchazy-Carducci 2011).

[175] *See* JULIUS CAESAR, CAESAR DE BELLO GALLICO 173 (J. M. Merryweather & C. C. Tancock eds., Longmans, Green & Co. 1897).

[176] HENRY W. HALLECK, 2 RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 1 (3d ed. Kegan Paul, Trench, Trübner, & Co. 1893). Halleck continues by arguing that, "The law of nature gives to a belligerent nation the right to use such force as may be necessary, in order to obtain the object for which the war was undertaken . . ." but that States "have no right to take the lives of non–combatants, or of such public enemies as they can subdue by other means . . . ." *Id.* at 2.

[177] *Id.* at 19.

The significant import of cessation of hostilities upon surrender was also underscored by Halleck when he stated that "Qui merci prie, merci doit avoir"[178] was an old maxim. After such surrender the opposing belligerent had no power over his life, unless new rights are given by some new attempt at resistance.[179] As noted above, the law at the time was fixated on the belligerency of groups of people facing occupiers and those rights afforded to them by nations engaging in war.

However, the law has not yet contemplated what takes place when it is the insurgency or belligerency itself that is transnational, especially when the target is not a state, but rather, its people. Recognition by one state of a belligerent organization quickly becomes irrelevant because there is not just one state that is affected by the belligerency. Rather, as in the case with transnational belligerents like ISIS, every state is affected because all civilians are potentially objects of attack.

3. Lawful Combatants, Civilians and Those who Target Them

International law does not affirmatively define civilian.[180] The draft of the 1977 Additional Protocol II (AP II) to the Geneva Conventions sought to define civilian as "any person who is not a member of armed forces . . . ."[181] A subsequent draft read "a civilian is anyone who is not a member of the armed forces or [a member] of an organized armed group."[182] Neither definition was included in the final version, leaving the term undefined, which resulted in a default negative definition.[183]

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[178] The original text read: "Qui merci prie, merci doit avoir; dites–leur qu'ils ouvrent leur ville et nous laissent entrer dedans: nous les assurons de nous et des nôtres." J. A. BUCHON, 2 COLLECTION DES CHRONIQUES NATIONALES FRANÇAISES 195 (Paris 1824). In 1545, Jean Foissart attributed this quote to the Earl of Derby who made the guarantee to the inhabitants of the captured town of Bergerac, France at the Battle of Auberoche during the Hundred Years War. *Id*.

[179] HALLECK, *supra* note 176, at 19.

[180] For example, the Hague Regulation proscribe "the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended," but provides no definition of civilians. Convention IV Respecting the Law and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land; The Hague, art. 25, Oct. 18, 1907 [hereinafter 1907 Hague Regulations].

[181] THE LAW OF NON–INTERNATIONAL ARMED CONFLICT: PROTOCOL II TO THE 1949 GENEVA CONVENTIONS 449-70 (Howard S. Levie ed., Martinus Nijhoff Publishers 1987) (quoting Draft Additional Protocol II Submitted by the ICRC to the Diplomatic Conference Leading to the Adoption of the Protocols, art. 25, sec. 706).

[182] *Id.*

[183] *Id*.

The approach of defining civilians in the negative is no–doubt tied to Jean Pictet, who famously stated,

> Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no* intermediate status; nobody in enemy hands can be outside of the law.[184]

Supporters of the exclusive two–category approach contend that the narrowly–tailored lawful combatant definitions found in GC III taken together with the relatively broad (negative) classifications of civilians or protected persons under GC IV ensure that no one is left without a classification.[185] Thus, a civilian is "any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3), and (6) of the Third Convention and in Article 43 of this protocol."[186] However, at the time the conventions were written, organizations like ISIS did not exist and the nature of warfare has changed despite subsequent attempts to define civilians.[187]

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[184] COMMENTARY IV: INTERNATIONAL COMMITTEE OF THE RED CROSS COMMENTARY, FOURTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 51 (Jean S. Pictet ed. 1958) [hereinafter COMMENTARY IV].

[185] *See generally* Shlomy Zachary, Additional Article*: Between the Geneva Conventions: Where Does the Unlawful Combatant Belong?*, 38 ISR. L. REV. 378 (2005). *See also* Allison M. Danner, *Defining Unlawful Enemy Combatants: A Centripetal Story*, 43 TEX. INT'L L.J. 1 (2007).

[186] AP I, *supra* note 71, at art. 50. GC III Article 4 defines lawful combatants as:

> (A) (1) members of the armed forces of a Party to the conflict including militias, (2) resistance movements operating in or outside of their own territory so long as they are commanded by a person responsible for their subordinates, have a fixed distinctive sign recognizable at a distance, carry arms openly, and conduct operations in accordance with the laws and customs of war, (3) members of regular armed forces professing allegiance to a government, and (6) inhabitants of a non-occupied territory who take up arms in resistance of invasion.

GC III, *supra* note 45. Additional Protocol I art. 43 reads in relevant part that an armed force of a party to a conflict "consists of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates" even where that Party does not recommend the government of the armed force. *Id.* at art. 43.

[187] For example, International Committee of the Red Cross's (ICRC's) 1971 submission to the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts states,

On its face, this logic seems very persuasive especially in the context of captured persons. However, as was the case with the Hague Regulations, nations understand that the nature of combat changes. For example, Fyodor Fyodorovich Martens, the Russian delegate to the Hague Peace Conference of 1899, wrote the Preamble from the Hague Convention which reads,

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.[188]

Termed the Martens Clause, the language was introduced as a compromise between the more powerful super delegates and smaller nations over whether the *francs–tireurs*[189] should be treated like spies and subject to execution upon capture because they did not wear uniforms.[190] The less powerful countries maintained that the *francs–tireurs* were lawful combatants repelling an occupying force.[191] Notably, the Martens Clause is absent from the 1949 Geneva Conventions, though a modified form does appear again in AP I.[192]

> Among those in favor of a definition, there is only a small number who supported a positive definition of the civilian population considered as an entity . . . [for fear that it] created the grave danger that categories not mentioned are considered—*a contrario*—as being licit personal objectives.

ICRC SUBMISSION TO THE CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS III: PROTECTION OF THE CIVILIAN POPULATION AGAINST DANGERS OF HOSTILITIES 17-19, Geneva May 21–Jun. 12, 1971. The proposed definition was "[c]ivilians are those persons who do not form part of the armed forces, nor of organizations attached to them or who do not directly participate in military operations (or: in operations of a military character)." *Id.* at 26.

[188] Convention (II), with respect to the Laws and Customs of War on Land and Its Annex (Hague II) July 29, 1899, 32 Stat. 1803, 1 Bevans 247.

[189] Literally "free shooters," they were non–standard specialized irregular expert riflemen employed by the French during the Franco–Prussian War and did not wear uniforms during combat. PASCAL MELKA, VICTOR HUGO: UN COMBAT POUR LES OPPRIMÉS: ÉTUDE DE SON ÉVOLUTION POLITIQUE, 405-06 (La Compagnie Littéraire 2008).

[190] *See* J. M. SPAIGHT, WAR RIGHTS ON LAND 41-51 (MacMillan & Co. 1911); *see generally* V. V. Pustogarov, *The Martens Clause in International Law*, 1 J. HIST. INT'L L. 125 (1999).

[191] *Id.*

[192] That version reads in relevant part,

The Martens Clause sought to provide protections to otherwise undefined classes of combatants and to encourage parties to act like lawful combatants by distinguishing themselves from the civilian population. Consequently, the 1874 Project of an International Declaration Concerning the Laws and Customs of War, Article 9 stated that "[t]he laws, rights and duties of war apply not only to armies, but also militia and volunteer corps" only where they fulfilled four criteria:

> 1. That they be commanded by a person responsible for his subordinates;
> 2. That they have a fixed distinctive emblem recognized at a distance;
> 3. That they carry arms openly; and
> 4. That they conduct their operations in accordance with the laws and customs of war.[193]

The Declaration specifically noted that "in countries where militia constitute the army, or form part of it, they are included under the denomination 'army.'"[194] Consequently, the 1907 Hague Regulation pays considerable attention to those persons engaged in a *levée en masse*.[195] The law was put in place to protect those

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> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

AP I, *supra* note 71, at art. 1.2.

[193] Project of an International Declaration Concerning the Laws and Customs of War art. 12, Aug. 27, 1874, 4 Martens Nouveau Recueil (ser. 2) 219, http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=125329. The original draft was sent from the Russian government to fifteen delegates meeting in Brussels on July 27, 1874 who sought to make the first international agreement concerning the laws and customs of war. *Id.* It was never entered into force. *Id.*

[194] *Id. See also* THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 283 (Dinah Shelton ed., 1st ed. 2013) (citing Hague II, *supra* note 188). Notably, the same famous four–part test was included in the Hague Conventions of 1899 (Hague II), the 1907 revisions to the same, and also in GC I through GC III. *Id.*

[195] It is important to note that the term *levée en masse* finds its origins in the French Revolution and was used to describe what was ostensibly forced conscription into the French National Army whose forces were assembled to repel invaders from Austria, Prussia, Spain, Britain, Belgium, Piedmont and the Netherlands. *See* GUNTHER E. ROTHENBERG, THE ART OF WARFARE IN THE AGE OF NAPOLEON 95-110 (1980). One of the first examples of a *levée en masse* was declared by the French National Convention on Aug. 23, 1793 where they stated that, "From this moment until that in which the enemy shall have been driven from the soil of the Republic, all Frenchmen are in permanent

"inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops."[196] However, the 1907 Hague Regulation also made the very important caveat that the rules only apply to those forces that have not had time to organize "in accordance with Article 1 . . . ."[197] This is why forces are allowed belligerent status under the circumstances in which "they carry arms openly and if they respect the laws and customs of war."[198] Distinctive emblems, under those limited circumstances, were not required.

However, distinctive emblems were a subject of considerable emphasis even for militia. As a notable scholar of the time, Thomas Hollande, wrote in 1908, "The object of requirement No. 2 [fixed distinctive emblem] is to draw a distinct line between combatants and peaceful inhabitants, by insisting that the former shall wear something in the nature of a uniform" which was not easily taken off.[199] In fact, Holland emphasized that "[t]his [uniform] requirement . . . was not insisted on during the war with South Africa."[200]

Thus, there were very limited circumstances where lawful combatants could waive their status, or non–combatants could alternatively claim prisoner of war

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requisition for the service of the armies." David A. Bell, *When the Levee Breaks: Dissenting from the Draft,* 170 WORLD AFF. 59-64 (2008).

196 1907 Hague Regulations, *supra* note 180, at Annex I, Sec. I, Chap. I, Art. 2.

197 *Id.*

198 *Id.* The 1949 Geneva Conventions use a variation which states:

> Inhabitants of a non–occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

GC I, at art 13(6); GC II, at art. 13(6); GC III, art. 4(6), *supra* note 45. This variation was to denote their status upon capture only.

> The drafters of the 1949 Convention considered, from the outset, that the Convention should specify the categories of protected persons and not merely refer to the Hague Regulations. Article 4 is in a sense the key to the Convention, since it defines the people entitled to be treated as prisoners of war.

COMMENTARY III, *supra* note 47, at 49.

199 THOMAS ERSKINE HOLLAND, K.C., THE LAWS OF WAR ON LAND: WRITTEN AND UNWRITTEN 20 (Oxford Clarendon Press 1908).

200 *Id.* Holland is no doubt referring to the Boer War of 1899 (technically the Second Boer War), where there was considerable debate over the absence of the use of uniforms by the Boer Commandos against the British regular forces, and the subsequent treatment of the commandos. *See* FRANSJOHAN PRETORIUS, LIFE ON COMMANDO DURING THE ANGLO–BOER WAR 1899-1902, 74-75 (Human & Rousseaus 1999).

protections under the law.[201] There was also no legal mechanism which recognized *how* civilians waive their status because the law contemplated combat between regular forces, militia, and civilians, only. It was not until the post–Vietnam era that guerilla fighters were added to the international lexicon in AP I and AP II. Consequently, the development of a means of civilians waiving their status by participating in hostilities is a comparatively new concept.

4. Direct Participation in Hostilities and Waiver of Civilian Status

The proposition that combatants and civilians can waive their status by engaging in unprivileged belligerency is very logical. Nonetheless, the concept of waiver is relatively new and does not fully capture the complexities of transnational belligerents. For example, AP I, in the context of post–Vietnam guerilla warfare, states that civilians may be objects of attack "for such time as they take direct part in hostilities."[202] This test was useful at the time, but does not address belligerents who continuously plan further attacks against civilians.[203]

Common Article 3 of the 1949 Geneva Conventions—arguably the origin of the concept—proscribes attack or inhumane treatment of "Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness [or] wounds . . . ."[204]

The ICRC's Direct Participation in Hostilities (DPH) guidance bases the critical determination not upon a "person's status, function or affiliation, but [rather upon] his or her engagement in specific hostile acts."[205] The DPH calculus is made "regardless of whether the individual is a civilian or a member of the armed forces."[206] The ICRC's view is that "any extension of the concept of direct participation in hostilities beyond specific acts would blur the distinction in IHL between temporary, *activity–based loss of protection* (due to direct participation

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[201] *Id.* Holland did make an important exception for spies, who by virtue of not wearing uniforms, could not "claim to be treated as prisoners of war." *Id.* at 41-46.

[202] AP I, *supra* note 71, at art 51(3).

[203] *See generally* S. Bosc, *The International Humanitarian Law Notion of Direct Participation in Hostilities—A Review of the ICRC Interpretive Guide and Subsequent Debate*, 17 AFR. JOURNALS ONLINE 999 (2014), http://www.ajol.info/index.php/pelj/article/view/107846.

[204] GC I–IV, *supra* note 45, at art. 3.

[205] Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 44 INT'L COMM. OF THE RED CROSS 44 (2009), https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf.

[206] *Id.*

in hostilities), and *continuous, status, or function–based loss of protection* (due to combatant status or continuous combat function)."[207]

Thus, the DPH guidance remains focused on engagement, using language such as: for "such time" as persons are engaged in hostilities. This application creates significant problems in the context of transnational belligerents.[208] For example, as the Israeli Supreme Court observed, "The First Protocol presents a time requirement . . . [where a] civilian . . . loses the protection from attack 'for such time' as he is taking part in those hostilities. If 'such time' has passed—the protection granted to the civilian returns."[209] The Court continued stating that a civilian,

> who has joined a terrorist organization which has become his "home", and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack "for such time" as he is committing the chain of acts.[210]

The Israeli Supreme Court concluded, "Indeed regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility."[211] The Israeli Supreme Court has correctly identified the issue with the guidance, especially in light of current circumstances. The DPH "for such time" test is still locked in outmoded conceptions of occupation forces and classical ideas of surrender, rather than truly addressing the status of transnational belligerents and their actions.

For example, in the mid–eighteenth century, Emerich De Vattel said that in "just war," States have "a right to employ all means which are necessary for its attainment."[212] Vattel stated,

> On an enemy's submitting and laying down his arms, we cannot with justice take away his life. Thus, in a battle, quarter is to be given to those who lay down their arms; and, in a siege, a

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[207] *Id.* at 44-45 (emphasis in original). It is important to note "[d]irect participation means acts of war which by their nature or purpose are likely to cause actual harm" to the enemy. *See also* AP COMMENTARIES, *supra* note 50, at 618.

[208] AP I, *supra* note 71, at art. 51(3).

[209] The Public Committee against Torture in Israel et al. v. The Government of Israel et al., Case No. HCJ 769/02, Judgment 38 (Dec. 11, 2005), http://www.haguejustice portal.net/Docs/NLP/Israel/Targetted_Killings_Supreme_Court_13-12-2006.pdf.

[210] *Id.* at 39.

[211] *Id.*

[212] MONSIEUR DE VATTEL, THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 346 (Translated by Joseph Chitty, Esq., 1859) (1758) (Book III, Chap. VIII).

> garrison offering to capitulate are never to be refused their lives.[213]

Arguably, the "for such time" construct found in DPH is only a reapplication of those concepts for persons surrendering to occupation forces, rather than any substantive rights waiver. This explains why civilians are able to regain their protected status. In other words, under DPH, a civilian is ostensibly surrendering by mere cessation of belligerency which is why they are able to regain their protected status. Such a waiver, and reacquisition of protected status, in the context of ISIS and similar transnational belligerents, simply makes no sense. ISIS seeks to attack civilians—the exact same class of persons in which the law currently places ISIS. This is why a new separate transnational belligerent category is so critical to the development of the law in relation to emerging organizations like ISIS, and why previous attempts to create a separate category have been historically unsuccessful.

IV. Analysis and Proposal

Scholars and experts have attempted to create a separate category, in order to remedy the current shifting status definition issues, without success. These attempts have largely been unsuccessful because they have simply renamed terrorists and attempted to equate their status evenly between the NIAC and IAC categories. For example, in a recent article Professor Corn underscored this trend by defining belligerent as "a member of an armed group who performs the type of function historically performed by lawful combatants who are members of the regular armed forces of a State."[214] Similar logic was used by the drafters of the 2006 Sanremo Manual on Non–International Armed Conflict. The 2006 Sanremo Manual defines fighters as "members of armed forces and dissident armed forces

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[213] *Id.* at 347-48. Vattel makes a critical distinction between besieged enemies who have laid down their arms and those who are "Women, children, feeble old men, and sick persons." *Id.* at 351.

[214] Geoffrey Corn & Chris Jenks, *Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts*, 313 n.1 U. PA. J. INT'L L 313 (2011). Professor Corn states that terms like "unlawful combatant, unprivileged belligerent, fighter, non–state actor, and non–state opponent" have been offered to explain the law, but that since the term combatant only applies in an IAC:

> All of these terms reflect a common underlying meaning: designation of an individual who, as the result of his relationship with enemy belligerent leadership and function as an enemy belligerent operative, should be treated for purposes of attack authority no differently than a combatant within the meaning of Protocol I.

Id.

or other organized armed groups, or [those] taking active (direct) part in hostilities." [215]

What these trends in terminology demonstrate is the attempt by scholars to apply status–based IAC law onto a NIAC scenario. However, the equivocation between IAC and NIAC law is not what the original drafters of the Geneva Conventions envisioned. For example, CA 3 was a hard–fought compromise, but only because the parties to the conventions were addressing an entirely different threat than the one we presently face from ISIS. More importantly, previous attempts to rename transnational terrorists as non–state actors or otherwise, does not escape the legal reality that irrespective of what name you call them, they are still civilians in a NIAC.[216] As noted above, transnational belligerents like ISIS should not legally belong to the same class of persons that they systemically target and attack.[217]

Consequently, the status of the law has forced a lineage of descriptive terminology, such as fighter, armed opponent, non–state actor, etc., to attempt to place transnational belligerents into a legal construct that has been stagnant since 1977.[218] Even if one considers the 1998 Rome Statue as an update to the law, the term terrorist was still intentionally left out, mainly because terrorists operated in a different manner at that time.[219] This legal disjuncture is clearly demonstrated through complementarity's very existence, a system which seeks to graft the laws from one system upon the laws of war in a CA 3 NIAC.[220]

The DoD definition of unprivileged belligerent also demonstrates that creating new law is necessary. The DoD definition recognizes a way in which civilian status may be waived, but does not adequately answer how such determinations are made, or to which new legal status category the belligerent now belongs.[221] More importantly, the very concept of status waiver places the unprivileged belligerent into a civilian sub–category, which is arguably why previous attempts to create a status using this logic have failed in the past.

The several alternatives in terminology are simply variations of what are all ultimately civilians, because the present law offers no other class in a NIAC.[222] The law needs to be brought up–to–date. However, such an update must answer how to determine what a transnational belligerent is. Transnational belligerents

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[215] MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY & YORAM DINSTEIN, THE MANUAL ON THE LAW OF NON–INTERNATIONAL ARMED CONFLICT WITH COMMENTARY 4 para.1.1.2 (Int'l Inst. of Humanitarian Law 2006).
[216] *See* Hamdan, *supra* note 55.
[217] *See* discussion, *supra* note 40.
[218] *See, e.g.*, AP II, *supra* note 71.
[219] Rome Statute, *supra* note 41. *See also* discussion *supra* note 102.
[220] *See* GC II.B.2, *infra.*
[221] *See* DoDD 2310.01E, *supra* note 152.
[222] COMMENTARY IV, *supra* note 184.

better match classical conceptions of belligerents rather than the post–WW II era Geneva traditions. In fact, the term belligerent in classical approaches accurately captures the nature of transnational belligerents like ISIS. Thus, it is critical to not only to create a new status, but to also define how to identify who belongs in that new status. The Hague approach to determining belligerency would best apply to the challenges we face from ISIS.

A. Proposing a Test for Transnational Belligerents

The Hague tradition is a logical starting point in formulating a new test, because this is where belligerency was initially defined. Hague II had a list of qualifications for belligerent status in the context of a conflict between nations.[223] However, every conflict we have faced in the last several decades has not been a conflict between nations, it has been transnational. More importantly, it is organizations like ISIS who have pushed current conflicts across international borders.[224] In the case of ISIS, the conduct of operations across existing national borders occurs by design.[225] Moreover, the nature of transnational belligerent operations—targeting civilians—makes them a true global public enemy and an international concern in the extreme.[226]

This article proposes the following modified Hague test to determine transnational belligerent status. Parties are transnational belligerents if they:

a) Are directed by a person or groups of persons;
b) Adhere to a cognizable ideology which espouses targeting civilians as central;
c) Engage in continuous operations intended to cause death or bodily harm; and
d) Conduct operations in violation of the laws of war.

Though descriptive, the test resembles that logic found in the Hague tradition and is likewise consistent with more recent developments in international law.[227] The test excludes what has been termed "lone wolf" terrorism because that form

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[223] *See* Hague II, *supra* note 188, at art. 1; *see also* Project of an International Declaration Concerning the Laws and Customs of War, *infra* Appendix A.
[224] *See generally* Jabareen, *supra* note 3.
[225] *See* Wood, *supra* note 6.
[226] *See* discussion, *supra* sec. II(A)(2).
[227] For example, the Commentary to AP I states that "[i]t should not be forgotten that under the terms of Article 85 (Repression of breaches of this Protocol), paragraph 3(a), the willful attack on a civilian population or individual civilians is included among the grave breaches." AP COMMENTARY, *supra* note 50, at 517.

of conduct would be more appropriately handled in a law enforcement context.[228] The test also recognizes that transnational belligerents do little to follow the law of war and avoid any attempt to gain protected combatant status.[229]

The empirical data clearly supports the above conclusion. For example, ISIS, credited with 813 total terrorist incidents, only attacked seventy–five military targets.[230] The remaining categories—NGOs, utilities, police, government, etc.—are attacks against the civilian population. In the case of ISIS, civilian attacks comprise over 92% of their operations.

Of the terrorist groups, Al Shabaab has committed the most incidents against military objectives, at 318, but civilian objectives nevertheless still comprised over 64% of their operations.[231] Boko Haram's attacks against military targets comprised less than 10% of their entire operations, leaving 723 out of 808 total terrorist incidents against civilian objectives.[232] The data clearly shows that transnational belligerents like ISIS seek civilians as their primary objective, and do not follow the law of war. Put another way, if ISIS attacked only military objectives, then one could conclude that they are, in fact, seeking combatant status, but the data yields the opposite conclusion.[233] Nonetheless, the

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[228] *See, e.g.*, GEORGE MICHAEL, LONE WOLF TERROR AND THE RISE OF LEADERLESS RESISTANCE 32-35 (2012).

[229] It is important to make the distinction between lawful combatants (IAC) and transnational belligerents. In the IAC context, the requirement for a commander is for the purpose of enforcing the law. In the NIAC transnational belligerent context, the purpose of a "commander" is for precisely the opposite purpose. For example, the AP I Commentators underscore that under Article 43 (Armed forces) the following preconditions "should all be met to participate in hostilities":

> a) subordination to a 'Party to the conflict' which represents a collective entity which is, at least in part, a subject of international law;
> b) an organization of a military character;
> c) a responsible command exercis[ing] effective control over the members of the organization;
> d) respect for the rules of internal law applicable to armed conflict.
> These four conditions should be fulfilled effectively and in combination in the field.

AP COMMENTARY, *supra* note 50, at 517.

[230] *See* Table B–1 *infra* Appendix B.

[231] *See* Table B–3 *infra* Appendix B.

[232] *See* Table B–4 *infra* Appendix B.

[233] Notably, Article 44 of AP I states that combatants, to distinguish themselves from civilians, when unable to properly distinguish themselves (i.e. distinctive insignia), will not be considered perfidious when they carry their arms openly, during each military engagement, and visibly to the enemy while he is engaged. The position of this paper is: that does not lower the normal four–part privileged combatant test. The clause merely states what will *not* be considered perfidious under certain limited circumstances. *See* AP I, *supra* note 71, at art. 44(3).

transnational belligerent class must first be identified and their characteristics known. The above test is a proposed means to identify this new category. Once the class has been identified, the question becomes what legal procedure should be used to prosecute their actions?

B. Ad Hoc Tribunals and the Allure of Universal Jurisdiction

As outlined above, ad hoc tribunals have sought to address the issue of terrorism with inconsistent results. Although the approaches have differed, one constant remains: ad hoc prosecution is lengthy. For example, the ICTY prosecuted 111 total cases between 1996 and 2015.[234] In contrast, the STL has indicted only five people since 2007 and is now prosecuting them in absentia.[235] The ICC also has had challenges, convicting only two people in twelve years.[236]

Irrespective of the outcome, prosecution of transnational belligerents using a universal jurisdictional model is critical to successfully combating this new threat. Thus, any new status–based prosecutorial model must allow for sufficient regional flexibility to allow states the ability to quickly respond to transnational belligerents. The most successful way to prosecute under the circumstances would be an off–the–shelf international tribunal model that could be implemented at any level.[237]

C. Proposing an Approach to Decentralized Prosecution of Transnational Belligerents

An off–the–shelf model via a multinational tribunal treaty could meet all of these concerns in the short term. Such a treaty would allow for the required flexibility and speed to prosecute transnational belligerents. A tribunal treaty would also allow for nations facing transnational belligerents to have the tools to

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[234] S*ee generally* UN ICTY Judgement List, http://www.icty.org/sections/TheCases/JudgementList.

[235] *See* Decision Relating to the Prosecution Requests of 8 November 2012 and 6 February 2013 for the Filing of an Amended Indictment, STL-11-01, Apr. 24, 2013, at http://www.stl-tsl.org/en/the-cases/stl-11-01/main/filings/orders-and-decisions/pre-trial-judge/f0848; *and* Decision to Hold Trial In Absentia, STL-13-04, Dec. 20, 2013, http://www.stl-tsl.org/en/the-cases/prosecutor-v-merhi-stl-13-04/filings/ordersand decisions/trial-chamber/f0037.

[236] David Davenport, *International Criminal Court: 12 Years, $1 Billion, 2 Convictions*, FORBES (Mar. 12, 2014), http://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/.

[237] Off–the–shelf would mean that there is an international agreement which would have a complete tribunal model, including court procedures, rules, statutes, and laws which could be implemented in any scenario, allowing for a standardized tribunal approach to prosecution outside of permanent courts like the ICC.

face the enemy now. More importantly, such a treaty would serve to memorialize transnational belligerent as a new status under the law and provide a comprehensive baseline for a subsequent Additional Protocol or a new Geneva Convention.

Since transnational belligerents operate on a decentralized attack model, the law must match this threat in a way that increases rather than limits jurisdiction.[238] Such an approach has been considered in the past. For example, as one group of authors observed it in the context of the STL in 2008,

> Moreover, as the short period of time needed for the negotiations indicates, the international criminal tribunals of the recent past now provide so much institutional experience that one can almost speak of the possibility of courts "off the shelf." . . . [T]he Tribunal highlights that even after the coming into force of the Rome Statute, a need for new international tribunals may arise, especially in cases where the ICC has no jurisdiction.[239]

Thus, as terrorism prosecution has developed, there have been several tribunal–based models that have emerged which would yield vast institutional experience. Such experience would serve to create the most successful prosecutorial approach. Furthermore, an off–the–shelf model would allow for prosecutions in a state, regional, multinational, or coalition context through a standardized set of laws. Signatories could agree in advance on what rights should be offered in a treaty–based instrument. Such a treaty would prevent the superimposition of IHRL (i.e., complementarity) on CA 3 conflicts while also providing much–needed updates to LOAC. Most importantly, a new international tribunal treaty would allow the entire model to be legally permissible in a NIAC.

V. Conclusion

Transnational belligerents like ISIS have changed the nature of warfare forever. Consequently, it is they who have created a new status under the law. The law simply has not changed to match the reality that ISIS has placed upon us. Current rules for a NIAC must be updated, because ISIS attacks civilians, and the law still places them in the same civilian category as the people they attack.

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[238] *See generally* Joel Brinkley, *Islamic Terror: Decentralized, Franchised, Global*, 176 WORLD AFF. 43-55 (2013), http://www.worldaffairsjournal.org/article/islamic-terror-decentralized-franchised-global.

[239] Jan Erik Wetzel & Yvonne Mitri, *The Special Tribunal for Lebanon: A Court "Off the Shelf" for a Divided Country*, 7 THE L. & PRAC. OF INT'L COURTS & TRIBUNALS 113 (2008).

Complementarity has attempted to place new law in the NIAC context, but this is not ideal because IHRL seeks different objectives than CA 3 and NIAC law. Ad hoc tribunals have sought to prosecute terrorists but with inconsistent outcomes. The ICC has also attempted the same, but terrorism was intentionally left out of the statute. Moreover, there is no international consensus as to what terrorism means. What everyone can agree on is that intentionally attacking civilians is wrong. Moreover, there needs to be laws in place which allows nations to memorialize transnational belligerents and combat them in the near term. Thus, a new treaty–based off–the–shelf approach to prosecuting this new category of belligerent is a strong means of satisfying that need in a flexible and expeditious way.

Much like Hersch Lauterpacht and Fyodor Martens observed during their time: the law must change. We have faced transnational belligerents for nearly two decades, thousands have died, and we still have no new law. A treaty is a sensible near–term answer. When it comes to updating international humanitarian law, now is our time.

Appendix A

1874 International Declaration

Project of an International Declaration concerning The Laws and Customs of War

27 August 1874

On military authority over hostile territory

Article 1. Territory is considered occupied when it is actually placed under the authority of the hostile army.

The occupation extends only to the territory where such authority has been established and can be exercised.

Art. 2. The authority of the legitimate Power being suspended and having in fact passed into the hands of the occupants, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety.

Art. 3. With this object he shall maintain the laws which were in force in the country in time of peace, and shall not modify, suspend or replace them unless necessary.

Art. 4. The functionaries and employees of every class who consent, on his invitation, to continue their functions, shall enjoy his protection. They shall not be dismissed or subjected to disciplinary punishment unless they fall in fulfilling the obligations undertaken by them, and they shall not be prosecuted unless they betray their trust.

Art. 5. The army of occupation shall only collect the taxes, dues, duties, and tolls imposed for the benefit of the State, or their equivalent, if it is impossible to collect them, and, as far as is possible, in accordance with the existing forms and practice. It shall devote them to defraying the expenses of the administration of the country to the same extent as the legitimate Government was so obligated.

Art. 6. An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and generally, all movable property belonging to the State which may be used for the operations of the war.

Railway plant, land telegraphs, steamers and other ships, apart from cases governed by maritime law, as well as depots of arms and, generally, all kinds of war material, even if belonging to companies or to private persons, are likewise material which may serve for military operations and which cannot be left by the

army of occupation at the disposal of the enemy. Railway plant, land telegraphs, as well as steamers and other ships above mentioned shall be restored and compensation fixed when peace is made.

Art. 7. The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

Art. 8. The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences even when State property, shall be treated as private property.

All seizure or destruction of, or willful damage to, institutions of this character, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities.

Who should be recognized as belligerents combatants and non-combatants

Art. 9. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. That they be commanded by a person responsible for his subordinates;
2. That they have a fixed distinctive emblem recognizable at a distance;
3. That they carry arms openly; and
4. That they conduct their operations in accordance with the laws and customs of war.

In countries where militia constitute the army, or form part of it, they are included under the denomination ' army '.

Art. 10. The population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 9, shall be regarded as belligerents if they respect the laws and customs of war.

Art 11. The armed forces of the belligerent parties may consist of combatants and non combatants. In case of capture by the enemy, both shall enjoy the rights of prisoners of war.

Means of injuring the enemy

Art. 12. The laws of war do not recognize in belligerents an unlimited power in the adoption of means of injuring the enemy.

Art. 13. According to this principle are especially ' forbidden ':

(a) Employment of poison or poisoned weapons;
(b) Murder by treachery of individuals belonging to the hostile nation or army;
(c) Murder of an enemy who, having laid down his arms or having no longer means of defense, has surrendered at discretion;
(d) The declaration that no quarter will be given;
(e) The employment of arms, projectiles or material calculated to cause unnecessary suffering, as well as the use of projectiles prohibited by the Declaration of St. Petersburg of 1868;
(f) Making improper use of a flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention;
(g) Any destruction or seizure of the enemy's property that is not imperatively demanded by the necessity of war.

Art. 14. Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country (excepting the provisions of Article 36) are considered permissible.

Sieges and bombardments

Art. 15. Fortified places are alone liable to be besieged. Open towns, agglomerations of dwellings, or villages which are not defended can neither be attacked nor bombarded.

Art. 16. But if a town or fortress, agglomeration of dwellings, or village, is defended, the officer in command of an attacking force must, before commencing a bombardment, except in assault, do all in his power to warn the authorities.

Art. 17. In such cases all necessary steps must be taken to spare, as far as possible, buildings dedicated to art, science, or charitable purposes, hospitals, and places where the sick and wounded are collected provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings by distinctive and visible signs to be communicated to the enemy beforehand

Art. 18. A town taken by assault ought not to be given over to pillage by the victorious troops.

Spies

Art. 19. A person can only be considered a spy when acting clandestinely or on false pretenses he obtains or endeavours to obtain information in the districts occupied by the enemy, with the intention of communicating it to the hostile party.

Art. 20. A spy taken in the act shall be tried and treated according to the laws in force in the army which captures him.

Art. 21. A spy who rejoins the army to which he belongs and who is subsequently captured by the enemy is treated as a prisoner of war and incurs no responsibility for his previous acts.

Art. 22. Soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following should not be considered spies, if they are captured by the enemy: soldiers (and also civilians, carrying out their mission openly) entrusted with the delivery of dispatches intended either for their own army or for the enemy's army. To this class belong likewise, if they are captured, persons sent in balloons for the purpose of carrying dispatches and, generally, of maintaining communications between the different parts of an army or a territory.

Prisoners of war

Art. 23. Prisoners of war are lawful and disarmed enemies.

They are in the power of the hostile Government, but not in that of the individuals or corps who captured them.
They must be humanely treated.
Any act of insubordination justifies the adoption of such measures of severity as may be necessary. All their personal belongings except arms shall remain their property.

Art. 24. Prisoners of war may be interned in a town, fortress, camp, or other place, under obligation not to go beyond certain fixed limits; but they can only be placed in confinement as an indispensable measure of safety.

Art. 25. Prisoners of war may be employed on certain public works which have no direct connection with the operations in the theatre of war and which are not excessive or humiliating to their military rank, if they belong to the army, or to their official or social position, if they do not belong to it.

They may also, subject to such regulations as may be drawn up by the military authorities, undertake private work.

Their wages shall go towards improving their position or shall be paid to them on their release. In this case the cost of maintenance may be deducted from said wages.

Art. 26. Prisoners of war cannot be compelled in any way to take any part whatever in carrying on the operations of the war.

Art. 27. The Government into whose hands prisoners of war have fallen charges itself with their maintenance.
The conditions of such maintenance may be settled by a reciprocal agreement between the belligerent parties.

In the absence of this agreement, and as a general principle, prisoners of war shall be treated as regards food and clothing, on the same footing as the troops of the Government which captured them.

Art. 28. Prisoners of war are subject to the laws and regulations in force in the army in whose power they are.

Arms may be used, after summoning, against a prisoner of war attempting to escape. If recaptured he is liable to disciplinary punishment or subject to a stricter surveillance.

If, after succeeding in escaping, he is again taken prisoner, he is not liable to punishment for his previous acts.

Art. 29. Every prisoner of war is bound to give, if questioned on the subject, his true name and rank, and if he infringes this rule, he is liable to a curtailment of the advantages accorded to the prisoners of war of his class.

Art. 30. The exchange of prisoners of war is regulated by a mutual understanding between the belligerent parties.

Art. 31. Prisoners of war may be set at liberty on parole if the laws of their country allow it, and, in such cases, they are bound, on their personal honour, scrupulously to fulfill, both towards their own Government and the Government by which they were made prisoners, the engagements they have contracted.

In such cases their own Government ought neither to require of nor accept from them any service incompatible with the parole given.

Art. 32. A prisoner of war cannot be compelled to accept his liberty on parole; similarly the hostile Government is not obliged to accede to the request of the prisoner to be set at liberty on parole.

Art. 33. Any prisoner of war liberated on parole and recaptured bearing arms against the Government to which he had pledged his honour may be deprived of the rights accorded to prisoners of war and brought before the courts.

Art. 34. Individuals in the vicinity of armies but not directly forming part of them, such as correspondents, newspaper reporters, sutlers, contractors, etc., can also be made prisoners. These prisoners should however be in possession of a permit issued by the competent authority and of a certificate of identity.

The sick and wounded

Art. 35. The obligations of belligerents with respect to the service of the sick and wounded are governed by the Geneva Convention of 22 August 1864, save such modifications as the latter may undergo.

On the military power with respect to private persons

Art. 36. The population of occupied territory cannot be forced to take part in military operations against its own country.

Art. 37. The population of occupied territory cannot be compelled to swear allegiance to the hostile Power.

Art. 38. Family honour and rights, and the lives and property of persons, as well as their religious convictions and their practice, must be respected.

Private property cannot be confiscated.

Art. 39. Pillage is formally forbidden.

On taxes and requisitions

Art. 40. As private property should be respected, the enemy will demand from communes or inhabitants only such payments and services as are connected with the generally recognized necessities of war, in proportion to the resources of the country, and not implying, with regard to the inhabitants, the obligation of taking part in operations of war against their country.

Art. 41. The enemy in levying contributions, whether as an equivalent for taxes (see Article 5) or for payments that should be made in kind, or as fines, shall proceed, so far as possible, only in accordance with the rules for incidence and assessment in force in the territory occupied.
The civil authorities of the legitimate Government shall lend it their assistance if they have remained at their posts.

Contributions shall be imposed only on the order and on the responsibility of the commander in chief or the superior civil authority established by the enemy in the occupied territory.

For every contribution, a receipt shall be given to the person furnishing it.

Art. 42. Requisitions shall be made only with the authorization of the commander in the territory occupied.
For every requisition indemnity shall be granted or a receipt delivered.

On parlementaires

Art. 43. A person is regarded as a parlementaire who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag, accompanied by a trumpeter (bugler or drummer) or also by a flag-bearer. He shall have a right to inviolability as well as the trumpeter (bugler or drummer) and the flag-bearer who accompany him.

Art. 44. The commander to whom a parlementaire is sent is not in all cases and under all conditions obliged to receive him.

It is lawful for him to take all the necessary steps to prevent the parlementaire taking advantage of his stay within the radius of the enemy's position to the prejudice of the latter, and if the parlementaire has rendered himself guilty of such an abuse of confidence, he has the right to detain him temporarily.

He may likewise declare beforehand that he will not receive parlementaires during a certain period. Parlementaires presenting themselves after such a notification, from the side to which it has been given, forfeit the right of inviolability.

Art. 45. The parlementaire loses his rights of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treason.

Capitulations

Art. 46. The conditions of capitulations are discussed between the Contracting Parties. They must not be contrary to military honour. Once settled by a convention, they must be scrupulously observed by both parties.

Armistices

Art. 47. An armistice suspends military operations by mutual agreement, between the belligerent parties. If its duration is not defined, the belligerent parties may resume operations at any time, provided always that the enemy is warned within the time agreed upon, in accordance with the terms of the armistice.

Art. 48. The armistice may be general or local. The first suspends the military operations of the belligerent States everywhere; the second only between certain fractions of the belligerent armies and within a fixed radius.

Art. 49. An armistice must be officially and without delay notified to the competent authorities and to the troops. Hostilities are suspended immediately after the notification.

Art. 50. It rests with the Contracting Parties to settle, in the terms of the armistice, what communications may be held between the populations.

Art. 51. The violation of the armistice by one of the parties gives the other party the right of denouncing it.

Art. 52. A violation of the terms of the armistice by individuals acting on their own initiative only entitles the injured party to demand the punishment of the offenders or, if necessary, compensation for the losses sustained.

Interned belligerents and wounded cared for by neutrals

Art. 53. A neutral State which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war.
It may keep them in camps and even confine them in fortresses or in places set apart for this purpose.
It shall decide whether officers can be left at liberty on giving their parole not to leave the neutral territory without permission.

Art. 54. In the absence of a special convention, the neutral State shall supply the interned with the food, clothing and relief required by humanity.
At the conclusion of peace the expenses caused by the internment shall be made good.

Art. 55. A neutral State may authorize the passage through its territory of the wounded or sick belonging to the belligerent armies, on condition that the trains bringing them shall carry neither personnel nor material of war.
In such a case, the neutral State is bound to take whatever measures of safety and control are necessary for the purpose.

Art. 56. The Geneva Convention applies to sick and wounded interned in neutral territory.

*****http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=1253.

Appendix B

Target Charts for Organizations Seeking to establish Caliphates

Table B–1 Islamic State Activities Pie Chart:

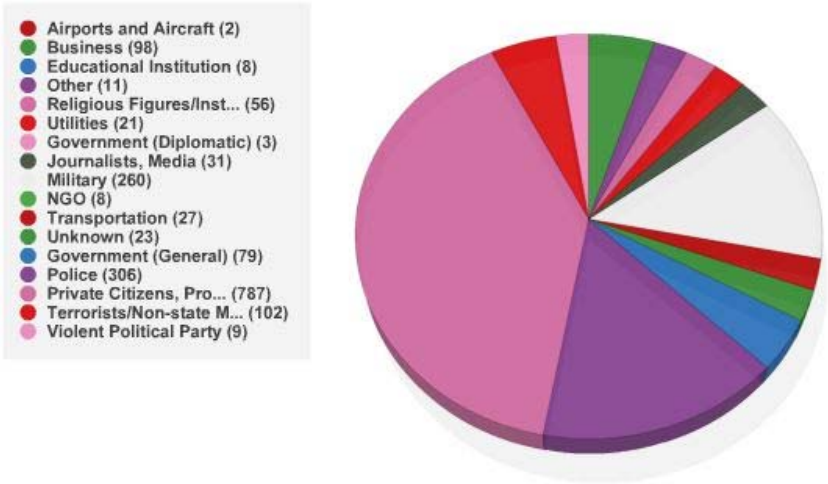


Table B–2 Al Qa'ida Activities Pie Chart:

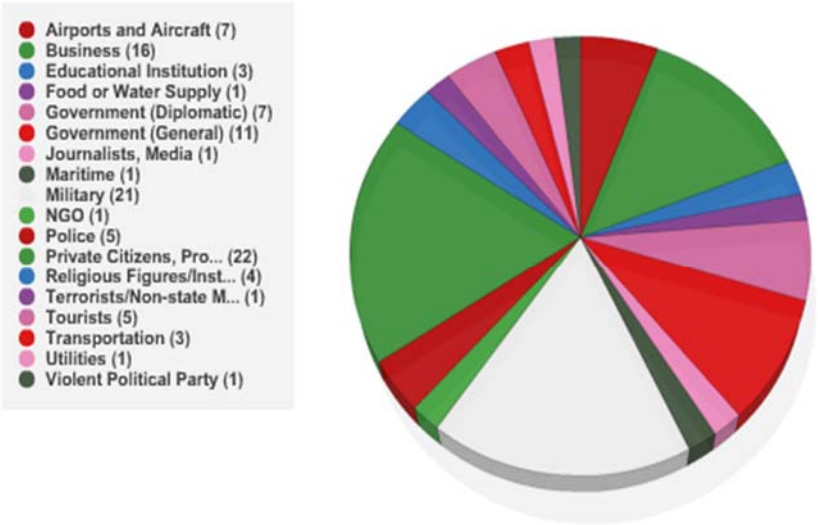
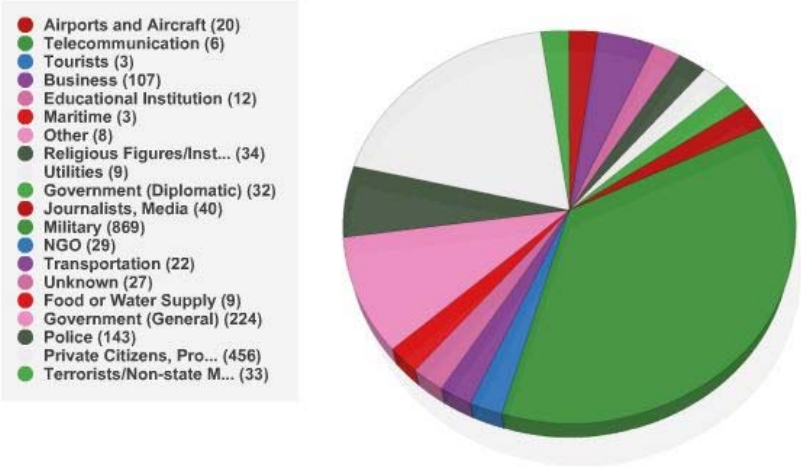


Table B–3 Al Shabaab Activities Pie Chart:Table



B–4 Boko Haram Activities Pie Chart: