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Rymn J Parsons, None

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Rymn J. Parsons*

Introduction

Asserting in the first sentence of an article on international humanitarian law that combatant immunity applies in non-international armed conflict is likely to cause a good many legal scholars to stop reading, right then and there, in utter disbelief. But it does, or at least it did, in some circumstances. Examples go back over several centuries. And what’s past, as Antonio recounts in The Tempest, is prologue.1

This article is about combatant immunity in non-international armed conflicts past and future.2 By looking at how and when combatant immunity was applied in non-international armed conflict, and when and why the practice ceased, we may begin to assess whether there is room—or need—for it again. But the future will not necessarily mirror the past. Armed conflict and international law in the 21st Century are not what they were in prior centuries, and therefore the circumstances in which and the legal basis on which combatant immunity may be applied in future non-international armed conflicts, the how and the why, are likely to be different. Indeed, though combatant immunity in non-international armed conflict may seem like a crumbled relic of customary international law unsuitable for modern times, there are good reasons to re-examine it.

* Captain, Judge Advocate General’s Corps, US Navy; Deputy Force Judge Advocate, Navy Reserve Forces Command (2012-present) and District Counsel, US Army Corps of Engineers, Vicksburg District, Vicksburg, MS (2012-present). The views expressed in this article are the author’s, and do not necessarily reflect the official policy or position of the Navy Reserve Forces Command, the Department of the Navy, the US Army Corps of Engineers, the Department of the Army, the Department of Defense, or the US Government. The author gratefully acknowledges the mentorship of retired Canadian Armed Forces Brigadier General Ken Watkin, a former Charles H. Stockton Professor of International Law at the US Naval War College (2011-2012). Most especially, the author acknowledges the untiring devotion of his wife, Joan Elizabeth.

1 WILLIAM SHAKESPEARE, THE TEMPEST act 2, sc. 1.
2 As to what constitutes non-international armed conflict, see, e.g., INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY 2-4 (2006) [hereinafter MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT]. The San Remo Manual does not address the issue of combatant immunity or prisoner of war status in internal conflicts. Regarding detained persons generally, section 3.6 states that “Any person interned or detained for reasons related to the hostilities must be treated humanely,” an obligation presumably applicable to State forces and to non-State forces. Id., at 50.
In June 2011, military and civilian legal advisors, renowned international scholars, and others gathered at the US Naval War College in Newport, Rhode Island for the conference *Non-international Armed Conflict in the Twenty-first Century.* Papers produced by conference panelists were published, in July 2012, in Volume 88 of the Naval War College International Law Studies series, the highly regarded “Blue Book.” The papers addressed a variety of topics on non-international armed conflict including conflict types and the law pertaining to them, the legal status of actors, means and methods of warfare, detention, and enforcement.

Combatant immunity, however, was little mentioned—outside of repeated references to the proposition that it does not apply in non-international armed conflict—until the last paper, concluding remarks by Yoram Dinstein, Professor Emeritus, Tel Aviv University. Professor Dinstein touched briefly on the notion that the whole *jus in bello* (and thus combatant immunity) comes into play in non-international armed conflict when a state of belligerency is recognized. In doing so he harkened back to tenets of customary international law that are now mostly forgotten. But though they have fallen into disuse, as Dinstein put it, the rules on recognition of belligerency remain relevant, he suggested. And relevant—and still useful—they are.

The purpose of this paper is to re-examine recognition of belligerency in non-international armed conflict and, by looking at civil wars in the 19th and 20th Centuries, come to a better understanding of why recognition of belligerency fell into disuse and why it may be unlikely that the practice will be revived. But even if a revival of recognition of belligerency is impractical or unlikely, there is a legal process that is functionally, albeit unintentionally, equivalent: authorization of collective military intervention by the United Nations Security Council. Issued only when a threat to international peace and security has been

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5 *Id.*, at 408.

6 See discussion, infra, at 9 *et seq.*

7 Dinstein, *supra* note 4, at 409.
found to exist, a UN Security Council resolution authorizing intervention in a non-international armed conflict attests, in practice, to the existence of hostilities that have reached levels of intensity, duration, and internationalization that historically were considered sufficient to bring the whole *jus in bello* into play.  

This article, starting with “Combatant Immunity and Prisoner of War Status,” begins by looking at the general rule that combatant immunity is not afforded to non-State forces in non-international armed conflict.  

We will then examine the thesis that customary international law permits combatant immunity and prisoner of war status to be conferred in high-intensity, long-duration, internationalized non-international armed conflicts in which belligerency is recognized.

The second section, “A Historical Perspective,” will look at how combatant immunity and POW status were sometimes applied in non-international armed conflict. The American Civil War and the

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8 *See discussion, infra, at 32 et seq.*

9 *See, e.g., ANTHONY CULLEN, THE CONCEPT OF NON-INTERNATIONAL ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 21 (2010) [hereinafter CULLEN]. And see discussion, infra, at 9-11. There is no shortage of terms used to describe those fighting against a government: rebels; insurgents, disidents, organized armed groups, fighters, and civilians directly participating in hostilities, to name the most common. The term “non-State forces” will be used in this article not only to distinguish them from forces of a State (and external forces fighting on behalf of the State), but also to suggest the possibility that such forces, having achieved high levels of organization, potency, and effectiveness, may approach, achieve, or exceed parity with State forces, as occurred in a number of civil wars in which belligerency was or could have been recognized.

10 “[H]igh-intensity, long-duration” is intended to convey something equivalent to or greater than “sustained and concerted military operations” in Article I(1) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, reprinted in DOCUMENTS ON THE LAWS OF WAR 483 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) [hereinafter DOCUMENTS ON THE LAWS OF WAR]. What internationalizes non-international armed conflict is an equally important consideration. It may occur by commission (intervention) and by omission (forbearance). Perhaps the most common way non-international armed conflict is internationalized is by participation of a foreign power or powers on behalf of a State. Hans-Peter Gasser remarked that intervention “gives rise to great difficulties in determining what law is applicable.” Hans-Peter Gasser, *Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea, and Lebanon*, 53 AM. U. L. REV. 145, 147 (1983) [hereinafter Gasser]. “The traditional answer,” he wrote, “which makes the situation subject to the rules of non-international armed conflict, clashes with the undeniably international character of this type of relationship.” *Id.* Ways in which NIAC is internationalized include: non-State forces in State A engage in armed conflict with the forces of State A on behalf of State B, (e.g., Viet Cong v. South Viet Nam); and, the forces of State A with the consent of State B, engage in armed conflict with non-State forces in State B. The internationalization of NIAC may convert it to IAC (such as would occur in armed conflict in State B between non-State forces and the forces of State A, if State B withdraws its consent to the presence of State A forces) or may create parallel conflicts (IAC and NIAC), as occurred in Bosnia (Bosnia v. Bosnian Serbs (NIAC) and Bosnia v. Serbia (IAC)) and in Lebanon (Israel v. Hezbollah (NIAC) and Israel v. Lebanon (IAC)). See, e.g., Marko Milanovic, *What Exactly Internationalizes an Internal Armed Conflict?* 2-3 (May 7, 2010), available at http://www.ejiltalk.org/what-exactly-internationalizes-an-internal-armed-conflict/ (last visited March 25, 2013). *See also Gasser, supra, at 147.* In the Tadić Appeal Judgment the International Criminal Tribunal for the Former Yugoslavia put it this way: “(A)n internal armed conflict … may become international … if … some of the participants in the internal armed conflict act on behalf of that other state.” Prosecutor v. Tadić, T-94-1-A, Judgement, July 15, 1999, para. 84.
Spanish Civil War will show how recognition of belligerency reached a zenith and then retreated. The Viet Nam War will show how difficult it is to resolve issues of combatant immunity and prisoner of war status when foreign forces intervene, most especially in conflicts whose legal basis is disputed. Collectively, these cases illustrate, affirmatively, in one case, and obversely, in two others, that recognition of belligerency served a useful purpose and that it—or something similar—could still be useful.

The third section, “Non-International Armed Conflict and Recognition of Belligerency in the 21st Century,” considers non-international armed conflict in a post-9/11 context. The prominence of such conflicts in the 21st Century will be noted. Next we will examine whether Geneva law affects recognition of belligerency, and we will finish by identifying trends pertaining to the application of international humanitarian law to non-international armed conflict.

Finally, “A New Approach” will look at whether authorization of collective military intervention in a non-international armed conflict, pursuant to a UN Security Council resolution, has—or could have—an effect on the applicability of *jus in bello* similar to recognition of belligerency. Impediments will also be considered.

**Combatant Immunity and Prisoner of War Status**

International armed conflict (IAC) is armed conflict between two States. Non-international armed conflict (NIAC) is defined mostly by what it is not, that is, something other than IAC. Combatant
immunity is a legal rule that insulates certain participants in armed conflict from prosecution because of that participation.\textsuperscript{14}

As the law is now interpreted only some participants in armed conflict are immunized: combatants, that is, lawful combatants who upon capture are entitled to prisoner of war (POW) status.\textsuperscript{15} Combatant immunity and POW status were developed in large part to incentivize restraint and to encourage compliance with humanitarian protections, especially in regard to civilians, considerations that are no less relevant to NIAC than they are to IAC.\textsuperscript{16} In general, international humanitarian law (IHL) is interpreted to hold that combatant immunity is not available to non-State forces in NIAC, for the reason that non-State forces are not lawful combatants.\textsuperscript{17} And thus, warlike acts performed by non-State forces, even if compliant with IHL, may constitute crimes under domestic law.\textsuperscript{18}

Non-State forces are sometimes therefore referred to as unlawful combatants: “By definition any person who participates in an internal armed conflict who is not a member of the State’s armed forces is an ‘unlawful combatant’—that is, a person who is not immunized of their warlike acts under international law (citation omitted).”\textsuperscript{19} And it is that very appellation—unlawful combatant—that suggests that

\textsuperscript{14} See, e.g., Geoffrey Corn, Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?, 22 STAN. L. & POL’Y REV. 253, 256 (2011) [hereinafter Corn].

\textsuperscript{15} Combatant immunity may be claimed only by lawful combatants. See Article 43, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 reprinted in DOCUMENTS ON THE LAWS OF WAR, supra note 10, at [hereinafter AP I].

\textsuperscript{16} Corn, supra note 14, at 256. As will be noted later, denying such incentives and encouragement to non-State forces in NIAC not only defeats the desired humanitarian purposes, but may actually produce the opposite effect. See discussion, infra, at 28-31.

\textsuperscript{17} See, e.g., Waldemar A. Solf, The Status of Combatants in Non-International Armed Conflicts under Domestic Law and Transnational Practice, 33 AM. U. L. REV. 53, 54-55 (1983) [hereinafter Solf] (“[T]he rules applicable in international armed conflict omit any reference to the combatants’ privilege and entitlement to prisoner of war status.”). Professor Solf is among those who describe the special status of combatants as a privilege, not an immunity. The lack of citation in the preceding parenthetical quotation suggests the idea that at least to Professor Solf the proposition is sufficiently clear and incontrovertible as to require no support. And see EMILY CRAWFORD, THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT 3, 47 (2010) [hereinafter CRAWFORD].

\textsuperscript{18} Marco Sassoli & Laura Olson, The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Interment of Fighters in Non-International Armed Conflicts, 90 INT’L REV. RED CROSS 599, 616 (2008) [hereinafter Sassoli & Olson]; John P. Cerone, Status of Detainees in Non-International Armed Conflict, and their Protection in the Course of Criminal Proceedings: The Case of Hamdan v. Rumsfeld 2 (July 14, 2006), http://www.asil.org/insights060714.cfm (last visited March 25, 2013). Cerone observes that “non-state combatants in a non-international armed conflict may be prosecuted for all hostile acts, including violation of ordinary domestic law, irrespective of whether they have violated any norms of international law. In addition, they cannot be entitled to prisoner of war status, since such status does not exist in the law of international armed conflict.” The legal status of and detention obligations concerning State forces (and external forces fighting for the State) in the hands of non-State forces is of at least equal importance. The MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT, in section 3.6 (“Persons whose liberty has been restricted”), does not distinguish State forces from non-State forces. MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT, supra note 2.

\textsuperscript{19} CRAWFORD, supra note 17, at 68. “Combatant status and the attendant POW rights are categorically denied to non-State participants in non-international armed conflicts.” Id., at 69.
immunity from punishment is inapt to the circumstances under which internal armed conflict occurs, if not also repugnant to the sovereignty of nations and to the exclusivity of the right to use armed force that States enjoy. But not all NIACs are or were the same, and it should not be presumed that all future NIACs will be the same as, or be substantially similar to, those that have recently taken place or that are now occurring.

POW status is likewise a by-product of lawful belligerency (viz., a result of being a lawful combatant). The concept, as it is generally understood today, is a fairly recent development in the **jus in bello**, insofar as being a protected status is concerned, tracing its origins to Article 1 of the **Regulations Respecting the Laws and Customs of War on Land Annexed to the Hague Convention of 1899**. As reflected by the view of the International Committee of the Red Cross (ICRC), combatant immunity and POW status go hand-in-hand, each being dependent upon and inseparable from the other.

Upon capture by State forces, non-State forces, being unlawful combatants, are not accorded POW status. Rather, non-State forces, whose members are subject to prosecution by the State, may be detained pending adjudication and also, some submit, for reasons of preventative security. Unlawful

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20 The underlying theory is that no State would willingly legitimize forces seeking to overthrow it, or to form a breakaway State. *Crawford*, supra note 17, at 73. Referring back to the terms in which non-State forces are described, it is much easier to imagine why insurgents branded as al-Qaeda and Taliban terrorists would be less deserving of combatant immunity than, for example, soldiers in Lee’s Army of Northern Virginia in the American Civil War. See discussion, infra, at 22 et seq.


23 *Corn*, supra note 14, at 261. And see Geoffrey Corn & Chris Jenks, *Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflict*, 33 U. PA. J. INT’L L. 313, 320 (2011) [hereinafter Corn & Jenks]. Whether the synonymy of combatant immunity and POW status is equally true in NIAC may be somewhat less certain.


25 The burdens associated with prosecuting very large numbers of insurgents in domestic courts should not be underestimated, historically or prospectively. *See*, e.g., Yair M. Lootsteen, *The Concept of Belligerency in International Law*, 166 MIL. L. REV. 109, 125 (2000) [hereinafter Lootsteen]. Modern international judicial standards may make the undertaking even more difficult. Jinks, supra note 25, at 434-435.

27 Sassoli & Olson, supra note 18, at 616. Customary IHL bars arbitrary deprivation of liberty in NIAC and IAC; however, the law applicable to NIAC “is silent on the procedural regulation of internment.” *Id.*, at 618, 621.
combatants are perceived to be undeserving of the superior protections POW status confers.\textsuperscript{28} One view, however, is that those protections are not necessarily superior.\textsuperscript{29}

In 2004, University of Texas Law School Professor Derek Jinks, who was the Naval War College Stockton Professor from 2009 to 2010, argued that the standards of treatment for non-State detainees in NIAC are little different from those accorded to lawful combatants in IAC. He concluded that “[t]he text, structure, and history of the Geneva Conventions strongly support two conclusions: (1) Geneva law protects unlawful combatants; and (2) this protection very closely approximates that accorded POWs.”\textsuperscript{30} Conversely, he suggested, denial of POW status means little by way of difference to the detainee and affords little advantage to the detaining State.\textsuperscript{31}

Combatant immunity is the unique aspect of POW status that distinguishes POWs in IAC from detainees in NIAC, but this fact alone (that combatant immunity is bestowed in IAC only) may not be a sound basis to grant POW status in IAC and deny it in NIAC.\textsuperscript{32} Were combatant immunity conferred on non-State forces for warlike acts that are lawful under IHL, ample room would still exist to prosecute such forces for unlawful acts. As Jinks pointed out:

\begin{quote}
[A]cts of terrorism in the context of armed conflict are always war crimes (citation omitted), as are all attacks directed against the civilian population as such (citation omitted). In addition, violations of the rule of distinction are also war crimes (citation omitted), as are acts of perfidy (citation omitted). The point is that there are no protective consequences associated with POW status for persons who have engaged in terrorism,
\end{quote}


\textsuperscript{29} Jinks, supra note 25. A related, somewhat contrasting view is that there are no clear rules to guide detention in NIAC which, if so, would suggest that POW status is superior. John Bellinger & Vijay Padmanabhan, Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law, 105 Am. J. Int’l L. 201, 204 (2011). Keep in mind, however, the impracticability of prosecuting very large numbers of non-State forces: “If criminal prosecution were legally required for detention of non-State actors, numerous practical difficulties would ensue.” Matthew C. Waxman, Administrative Detention of Terrorists: Why Detain and When?, 3 Nat’l Security L. & Pol’y 1, 11 (2009) (summarizing arguments against use of criminal law in conflicts with terrorists). As previously noted, in high-intensity, long-duration, internationalized NIAC, in which belligerency is recognized, the entire jus in bello comes into play and POW status can be accorded, whether it is superior or substantially similar to the protection afforded non-State forces detained in other NIACs. The point to be underscored here is that while POW status in IAC and detention of non-State forces in NIAC are legally distinguishable, the distinction is one whose difference, in effect, is diminishing, causing POW status to be a less useful differentiating factor between State forces captured in IAC and non-State forces captured in NIAC.

\textsuperscript{30} Jinks, supra note 25, at 375.

\textsuperscript{31} Id., at 368, 375.

\textsuperscript{32} Id., at 422.
attacked civilians, or committed warlike acts without adequately distinguishing themselves from civilians.\textsuperscript{33}

If the bases for detaining POWs in IAC and unlawful combatants in NIAC are not appreciably different, it could be argued that, in NIAC, non-State forces, at least in certain cases, might ought to receive POW status and, correspondingly, combatant immunity. In high-intensity, long-duration, internationalized NIACs State forces and non-State forces may attain a high degree of similarity.\textsuperscript{34} Indeed, non-State forces, in terms of wearing uniforms and conducting military operations, could equal or possibly even exceed State forces in comporting themselves in the manner of lawful combatants. In such situations, that is, in situations in which the contending forces more nearly and intentionally conducted themselves as militaries of warring States, it would seem logical that POW status and combatant immunity should be given to both State and non-State forces. As will be recalled in the next section, non-State forces were given POW status and combatant immunity in certain NIACs, internal conflicts described as “classical” civil wars.\textsuperscript{35}

The question whether combatant immunity and POW status apply in NIAC is not a trivial one for several reasons. Not the least of these is the legal mischief—and human misery—that may arise when a State attempts to define away the existence of a high-intensity, long-duration internal conflict, or even the existence of any armed conflict, as the Soviets purported to do in Afghanistan in the late 1970s and early 1980s.\textsuperscript{36} And further, when States attempt to deal with non-State forces solely under domestic law, experience shows, it may worsen rather than improve respect for humanitarian considerations, a consequence that is no more desirable in NIAC than it is in IAC.\textsuperscript{37}

All of this notwithstanding, it is evident still that combatant immunity and POW status, though integral to \textit{jus in bello} in IAC, are not so in NIAC. But this was not exclusively the case. In NIACs that

\textsuperscript{33} Id., at 437. Such would be prosecutable, as to non-State forces, both under IHL and domestic law.

\textsuperscript{34} The fact that in many recent and ongoing NIACs State and non-State forces have been quite dissimilar is in itself sufficient explanation for why detention distinctions (IAC v. NIAC) continue to be urged, despite the points Jinks makes.

\textsuperscript{35} See discussion, infra, at 9 et seq. In classical civil wars the primary internationalizing component was the division of the State in two, with the rebelling forces pronouncing themselves to be a new State or the rightful State, or otherwise acting like a State. Another internationalizing component was the forbearance of third-party States, on grounds of neutrality, a legal stance having significant strategic consequences, especially in the maritime domain.

\textsuperscript{36} Gasser, supra note10, at 149. The less well regulated an armed conflict is, the more destructive it likely will be.

\textsuperscript{37} See, e.g., Corn, supra note 14, at 292.
were of high intensity and long duration, and had international character or consequences, that is, in cases where NIAC resembled war waged by the armies and navies (and later the air forces) of two States, the contestants sometimes acted, and third-party States sometimes reacted, as if they were obliged (or at least compelled by circumstance) to bestow POW status, and concomitantly combatant immunity, on non-State forces.\(^{38}\) Non-State forces in NIAC were sometimes treated as POWs, as limited as that protection was prior to the 1929 and 1949 Geneva Conventions.\(^{39}\) The basis for doing so was recognition of belligerency.\(^{40}\)

Recognition of belligerency acknowledged the existence of conditions equating NIAC with general war in IAC.\(^{41}\) It also may have reflected the fact that domestic law, for practical reasons, was no longer suitable as the primary legal regime for regulating the conflict, affording humanitarian protections, or addressing accountability. The practice of bestowing combatant immunity in NIACs categorized as civil wars appears to have resulted from exigency and necessity, rather than legal compulsion per se, encouraged to some extent by humanitarian considerations and equally, or more so, by a desire for reciprocity. The heyday of recognition of belligerency was the 19\(^{th}\) Century. It waned in the 20\(^{th}\) Century and by the time of World War II it had all but disappeared.

The next section will look back in history at recognition of belligerency.

### A Historical Perspective

This section will look at how combatant immunity and POW status were sometimes applied in NIAC.

Two examples, the American Civil War and the Spanish Civil War, will be used to illustrate recognition

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\(^{38}\) The duration of a NIAC may have been the factor most influential in motivating States to accept greater legal regulation of internal conflicts. Lindsay Moir, The Law of Internal Armed Conflict 273 (2002) [hereinafter Moir]. The magnitude of a conflict, especially its impact on vital interests of powerful third-party States, may have been most influential in motivating States to recognize belligerency. Cullen, supra note 9, at 17.

\(^{39}\) Alex Peterson, Order Out of Chaos: Domestic Enforcement of the Law of Internal Armed Conflict, 171 Mil. L. Rev. 1 (2002) [hereinafter Peterson].


\(^{41}\) See discussion, infra, at 10 et seq.
of belligerency prior to World War II, as its zenith and its denouement, respectively. A third example, the Viet Nam War, will show how legally complex NIACs have become in the post-World War II period, perhaps due most importantly to the intervention of external forces.

Historically, during high-intensity, long-duration NIACs the contesting parties sometimes regarded each other’s forces as lawful combatants, as in IAC. Acceptance of the notion that a state of belligerency could exist in civil wars was already established by the time of the English Civil Wars (1642-1651). There is evidence that military prisoners on both sides in these wars were held without civil or military trial (other than for war crimes), and were paroled and exchanged.

As historian Barbara Donagan described it, a general consensus prevailed that “the laws of war rather than the laws of the civil State were applicable, and Englishmen confronted each other as ‘lawful enemies’ (citation omitted).” Interestingly, she also noted that the contestants’ views on combatant immunity (or “soldierly immunity,” as she put it) varied but persisted throughout, the temptation to try leading opponents for treason being occasionally irresistible (viz., exacting victor’s justice).

In civil wars combatant immunity and POW status were deemed necessary because the scope and scale of the conflict equated to general war. In respect of civil war Vattel wrote:

When the nation is divided into two absolutely independent parties, who acknowledge no common superior, the State is broken up and war between the two parties falls, in all respects, in the class of public war between two different Nations.

42 Recognition of belligerency resulted in non-State forces being equated to lawful combatants for purposes of combatant immunity and POW status, largely in the same manner and to the same extent as State forces.
43 Recall the differences among rebellion, insurgency, and belligerency. Belligerency connotes a level of violence that warrants both sides being treated as entities at war possessing belligerent rights as in IAC. See, e.g., Rogier Bartels, Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide Between International and Non-International Armed Conflicts, 91 INT’L REV. RED CROSS 35, 48-52 (2009) [hereinafter Bartels]; and see Lootsteen, supra note 26, at 113-115; Moir, supra note 38, at 4. An important consideration to bear in mind is the degree of legal anarchy that results as armed conflict intensifies, which eventually causes domestic law, though still applicable in theory, to be absent in practice. Into this vacuum international law should—and has—pored. See, e.g., Richard R. Baxter, So-Called ‘Unprivileged Belligerency’: Spies, Guerrillas, and Saboteurs, 28 BRIT. Y.B. INT’L L. 323 (1951) [hereinafter Baxter].
46 Donagan, supra note 45, at 1162-1164.
47 See Lootsteen, supra note 26, at 110. Recognition of belligerency in a civil war could be said to presume the existence of a de facto government that is in conflict with a de jure government. Cullen, supra note 9, at 17. See discussion, supra, at 9.
The obligation upon the two parties to observe towards each other the customary laws of war is therefore absolute and indispensable, and the same which the natural law imposes upon all Nations in contests between State and State. As to the evolution of IHL pertaining to civil wars Moir observed: Towards the end of the eighteenth century there had been a distinct move toward the application of the laws of warfare to internal as well as international armed conflict (citation omitted), but this was based almost exclusively on the character of the conflicts and the fact that both were often of a similar magnitude, rather than any overriding humanitarian concern to treat the victims of both equally. Focusing on the character of the conflict Oppenheim remarked that IHL would apply in civil war if a condition of belligerency between the contestants was recognized by others. Lauterpacht identified four criteria for recognition of belligerency in civil war: (1) existence of a state of general war; (2) control and administration by non-State forces of substantial territory; (3) adherence to IHL by non-State forces; and (4) conditions compelling third-party States to do so. Other commentators, citing 19th Century South American, Greek, and US civil wars, reinforced this view of international law. The approach emphasized recognition of belligerency by third-party States.

Yair Lootsteen, more recently, suggested the following:

(1) Satisfaction of the four belligerency criteria (civil war within a state, beyond the scope of mere local unrest; occupation by insurgents of a substantial part of the territory of the state; a measure of orderly administration by that group in the areas it controls; and observance of the rules of the laws of war by the rebel forces, acting under responsible authority);

48 Bartels, supra note 43, at 47. Belligerency would be recognized when a NIAC possessed “the material characteristics of conventional warfare between two sovereign states.” CULLEN, supra note 9, at 15.
49 MOIR, supra note 38, at 3.
50 Bartels, supra note 43, at 47-48. Recognition, a discretionary act, could also come from the State. MOIR, supra note 38, at 5. Recognition of belligerency does not equate to political recognition of a government or State. Id. For additional material on recognition of belligerency see CULLEN, supra note 9, at 7, n. 2.
51 CULLEN, supra note 9, at 19. And see Lindsay Moir, The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949, 47 INT’L & COMP. L.Q. 337, 344 (1998) [hereinafter Moir]; RICHARD FALK, THE INTERNATIONAL LAW OF CIVIL WAR (1971); Richard Falk, Janus Tormented: The International Law of Internal War, in INTERNATIONAL ASPECTS OF CIVIL STRIFE (1964). It has been argued that the Lauterpacht criteria are objective, that is, that their fulfillment rendered recognition of belligerency obligatory. The more common view is that recognition of belligerency was (and is) wholly discretionary. CULLEN, supra note 9, at 21.
52 Abi-Saab, supra note 11, at 210; accord Moir, supra note 51. Both the United States and Great Britain recognized belligerency in a number of anti-colonial civil wars in South American starting in 1815. MOIR, supra note 38, at 6-7.
(2) Tacit or explicit recognition by the de jure government of the insurgents’ belligerency; and

(3) The armed conflict is not one in which a people are fighting against colonial domination, alien occupation or a racist regime, in the exercise of their right to self-determination.53

This approach emphasizes recognition of belligerency by the State. Both approaches allowed all concerned to recognize—or to refuse to recognize—belligerency as they saw fit, having no legal compulsion to do so and no legal consequence for failing to do so. And thus it could be said that belligerency was recognized only by unanimity, a fragile and unwieldy state of affairs.54

And so it was that when war was waged at very high levels of intensity within a State, by large and highly-organized forces on both sides, producing international consequences, a state of belligerency could be and on some occasions was recognized, of which the American Civil War is a prime example. Nonetheless, the practice of giving international recognition to belligerency within a State declined precipitously between the Boer War and the Spanish Civil War, and seems to have lain dormant ever since.55 This may have occurred because of the fact that recognition of belligerency triggered the law of neutrality, precluding intervention and creating other conditions and constraints vis-à-vis the exercise of belligerent rights that were unpalatable to third-party States.56

The American Civil War

The American Civil War (1861-1865), fought by large armies and having a significant naval component, lasted longer than expected and reached an unforeseen level of intensity. Both sides were unready to deal

53 Lootsteen, supra note 26, at 141. Note: The third criterion excludes NIACs converted by AP I into IACs. The second criterion, in contrast with Oppenheim, emphasizes internal over external recognition. If a State recognizes the existence of a condition of belligerency involving non-State forces, that alone may be sufficient as between the two sides to bestow combatant immunity and POW status. As this article suggests, an internal armed conflict is not internationalized until both sides and third-party States recognize the existence of a condition of belligerency. And only when a high-intensity, long-duration NIAC was internationalized did the whole jus in bello become applicable.

54 Recognition was purely discretionary, done mostly on the basis of reciprocity. Moir, supra note 38, at 18.

55 The Boer War may have the distinction of being the last internal conflict in which belligerency was recognized. Id., at 19, n. 75. It, too, had a very complex legal character. See, e.g., Fred R. Van Hartesveldt, The Boer War: Historiography and Annotated Bibliography (2000) (hereinafter Van Hartesveldt) and Frank McDonough, The Boer War: A Struggle for Mastery in South Africa?, 29 Hist. Rev. 8 (1996). Van Hartesveldt indicates that the 1899 Hague Convention may not have applied, but was followed. Van Hartesveldt at 32; Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, reprinted in Documents on the Laws of War, supra note 10, at 69.

56 Moir, supra note 38, at 7-8. A declaration of neutrality, as Great Britain issued during the American Civil War, was tantamount to recognition of belligerency. Id., at 9. And see Cullen, supra note 9, at 16-17 and Dinstein, supra note 4, at 409.
with large numbers of captured enemy soldiers, which they called prisoners of war.\textsuperscript{57} Prisoner of war protections, in law or fact, were not then what they are (or purport to be) today; conditions in prison camps on both sides were notoriously deplorable. Union records indicate that some 96,000 or more prisoners of war were confined by the Union Army, while the Union paroled 329,963 prisoners and the Confederacy paroled 152,015.\textsuperscript{58}

The American Civil War greatly influenced how IHL was perceived to apply in NIAC.\textsuperscript{59} It is said to have shaped an American view of the time—that NIAC and IAC should be governed by similar standards—and a European view—that IHL applies in NIAC only when belligerency is recognized.\textsuperscript{60} One commentator concluded:

State practice and \textit{opinio juris} were fairly uniform in accepting that the laws of war applied only in the case of the insurgents having been recognized as belligerents. Even those writers advocating that humanitarian law should always apply to civil war seem to have tied their idea closely to the status of belligerency.\textsuperscript{61}

Belligerency between the Union and the Confederacy was recognized by France and Great Britain and, arguably, by the Union \textit{inter alia} by imposition of a naval blockade on the South.\textsuperscript{62}

Perhaps the greatest contribution of the American Civil War to IHL is the venerable Lieber Code, the \textit{Instructions for the Government of Armies of the United States in the Field}.\textsuperscript{63} It is more than a little ironic that the first modern compilation of IHL was assembled expressly for a NIAC.\textsuperscript{64} Contemporaneous European thought was that the Lieber Code applied only to civil war, that it was an example of how a

\textsuperscript{57} Bartels, \textit{supra} note 43, at 53; Lootsteen, \textit{supra} note 26, at 115. Holding prisoners of war and referring to them as such, by a \textit{de jure} government, may constitute \textit{de facto} recognition of belligerency. Dinstein, \textit{supra} note 4, at 409. The US Supreme Court, in Williams v. Bruffy (1877), referred to “the treatment of captives as prisoners of war” as a “concession made to the Confederate government in its military character.” \textit{Cullen, supra} note 9, at 16 (quoting 96 U.S. at 186).


\textsuperscript{59} The idea that IHL applied in civil wars did not originate with the American Civil War. Lootsteen, \textit{supra} note 26, at 115, n. 30.

\textsuperscript{60} Moir, \textit{supra} note 51, at 345. The European view persisted up to the Spanish Civil War and still survives, in hibernation; the American view never gained ascendance, but endures.

\textsuperscript{61} \textit{Id.}, at 350.

\textsuperscript{62} Lootsteen, \textit{supra} note 26, at 114-115. Recognition of belligerency by third-party States is a strong indication that an internal conflict has international character.

\textsuperscript{63} The Lieber Code, containing some 157 articles, was initially promulgated as Number 100 of the General Orders of the Adjutant General’s Office. The promulgating order of April 24, 1863 states that the instructions were “approved by the President of the United States.” U.S. Department of War, Instructions for the Government of the Armies of the United States in the Field, General Orders No. 100, April 24, 1863 [hereinafter Lieber Code].

\textsuperscript{64} Bartels, \textit{supra} note 43, at 53.
codification of laws pertaining to IAC could be assembled for NIAC. Although the Lieber Code does not define lawful combatants according to 21st Century standards, it has articles addressing prisoners of war. Article 67 states:

The law of nations allows every sovereign government to make war upon another sovereign state, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant (emphasis added). The apparent nod to the Confederacy in this article expands marginally the notion that POW status was properly bestowed on State forces only.

Further, in the section on insurrection, civil war, and rebellion, the Lieber Code apprehends circumstances in which “humanity induces the adoption of the rules of regular warfare toward rebels.” Article 153 states:

Treating captured rebels as prisoners of war, exchanging them, concluding of cartels, capitulations, or other warlike agreements with them … or doing any other act sanctioned or demanded by the law and usages of public war between sovereign belligerents, neither proves nor establishes an acknowledgement of the rebellious people, or of the government which they may have erected, as a public or sovereign power. Nor does the adoption of the rules of war toward rebels imply an engagement with them extending beyond the limits of these rules.

In such circumstances only “the leaders of the rebellion or chief rebels” could be tried for treason, not, apparently, prisoners of war generally.

The effect of the Lieber Code has been much analyzed, but whatever uncertainty there may be as to its accuracy or comprehensiveness as a statement of customary international law, it stands, in relation to the American Civil War and, by analogy, to civil wars that preceded and followed it, as emblematic of the idea that above a certain threshold of violence, IHL must of necessity apply in NIAC. This includes

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65 Abi-Saab, supra note 11, at 210.
66 Crawford, supra note 17, at 49.
67 Lieber Code, supra note 63, art. 67.
68 Id., art. 152; and see Bartels, supra note 37, at 54.
69 Lieber Code, supra note 63, art. 153.
70 Id., art. 154.
POW status for forces fielded by a rebel government, with a concomitant combatant immunity pertaining to all but the leaders of the rebellion.\textsuperscript{71}

The American Civil War, in its military character and international dimensions, demonstrated forcefully why customary international law permitted recognition of belligerency. As seen in the manner—as regular armies and navies—in which Union and Confederate forces fought one another, and in the manner—as neutrals protecting vital naval and maritime interests—that two of the then most powerful European states, Great Britain and France, held themselves out of it, the American Civil War cried out for—and all concerned recognized—combatant immunity and POW status. Later, the Spanish Civil War was quite different. Here, too, the naval and maritime interests of third-party States played a significant role, though the result was an opposite one.\textsuperscript{72}

Coming not quite a century after the American Civil War, the Spanish Civil War sounded retreat for recognition of belligerency.

\textit{The Spanish Civil War}

The Spanish Civil War (1936-1939) was fought by air, land, and naval forces of the Second Spanish Republic (the Republicans), opposed by an even more powerful rebel coalition (the Nationalists) led by General Francisco Franco. Both sides received extensive external support, the greater favoring the Nationalists. Franco’s forces received appreciable and sustained military assistance from Nazi Germany and Fascist Italy, whose combat forces also operated in support of Franco in Spain and in Spanish waters.\textsuperscript{73} The Republicans received support from the Soviet Union and from international brigades comprised of foreign volunteers.

\textsuperscript{71} See Jinks, \textit{supra} note 25, at 349 (“This protective logic helps explain why states sometimes choose to accord combatant immunity even in civil wars, as the United States did in the Civil War (citation omitted), and why some inter-governmental forces now assign all captured combatants POW status.”).

\textsuperscript{72} Moir, \textit{supra} note 51, at 352-353.

\textsuperscript{73} “From early in 1936, Spanish internal affairs were intimately related to the continental struggle between communism, fascism, and democracy,” \textsc{Norman Paddelford}, \textit{International Law and Diplomacy in the Spanish Civil War} 201 (1939) [hereinafter \textsc{Paddelford}], German aid flowed to the Nationalists almost from the beginning. \textsc{Stephen Tonge}, \textit{The Spanish Civil War} 5, available at http://www.historyhome.co.uk/europe/spaincw.htm (last visited March 25, 2013) [hereinafter \textsc{Tonge}].
The conflict, won by the Nationalists after a bloody struggle, was a heavily internationalized civil war, presaging later proxy wars of the Cold War period. It resulted in a new government—Franco’s dictatorship—coming to power in Spain. Another very important aspect of the conflict was the toll taken on commercial shipping. Some 89 vessels sailing under 13 flags were lost, the vast majority by air attack, but several as a result of action by Nationalist and Republican warships. Closely related in importance was the imposition of naval blockades by both the Nationals and Republicans, an exercise of belligerent rights considered tantamount to de facto recognition of belligerency.

Both the Republicans and Nationalists declared that they would comply with IHL and accord POW status to captured forces of the other side. That is not to say, however, that these prisoners were necessarily humanely treated. America, Great Britain, France, and other nations declined to recognize belligerency, though acutely aware that all-out war was being waged in Spain and on the surrounding seas.

The international community (at least a large portion of Europe) committed itself with varying degrees of fidelity to non-intervention. Leading powers such as Britain and France made a conscious and calculated decision to neither recognize belligerency nor declare neutrality. A desire to protect

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74 In less than a month the Nationalists controlled half the territory of Spain and declared a government purporting to assume the powers of state. Id., at 1. For a discussion of internationalized civil war see Gasser, supra, note 10.

75 See RENATE ECHEGARAY, LA MARINA EN LA GUERRA DE ESPAÑA (1936-1939) (1977) and Robert Whiston, International Naval and Protection Force 1936, available at http://rwhiston.wordpress.com/2010/02/17/#_ftmp5 (last visited March 25, 2013). See also Adam Siegel, International Naval Cooperation during the Spanish Civil War, JOINT FORCE QUARTERLY 82 (Autumn/Winter 2001-2002). The data suggest a concerted effort by the Nationalists to interfere in maritime commerce with the Republicans, an effort in which they were aided by Italian naval forces. TONGE, supra note 73, at 6. Other sources indicate that the naval and maritime aspects of the conflict had appreciable influence on the positions of other States, e.g., Britain and France, regarding recognition of belligerency, specifically that adopting neutrality would permit the Nationalists to exercise belligerent rights over neutral vessels on the high seas. MOIR, supra note 38, at 20.

76 See Dinstein, supra note 4, at 409-410. British and American statements regarding the blockades expressly declined to recognize belligerency. PADDENDORF, supra note 73, at 11.

77 Bartels, supra note 43, at 55-56. Bartels also chronicled the fact that both the White and Red sides in the Finnish Civil War accorded POW status to captured opponents. Id., at 54-55. These conflicts and the American Civil War, Bartels suggests, indicate the extent to which even the contestants perceived a need for IHL to apply. Id., at 56.

78 Compliance with IHL by both sides was spotty. Lootsteen, supra note 26, at 117, n. 39. In The Spanish Civil War: Reaction, Revolution and Revenge, Paul Preston recounts that tens of thousands of prisoners were summarily executed. PAUL PRESTON, THE SPANISH CIVIL WAR: REACTION, REVOLUTION AND REVENGE (2006).

79 Lootsteen, supra note 26, at 115-117. Note: In 1938, Great Britain and France recognized belligerency, but on condition (a condition that was never fulfilled) that all foreign forces be withdrawn. PADDENDORF, supra note 73, at 18. For additional material on recognition of belligerency in this war see MOIR, supra note 38, at 20, n. 76.


81 PADDENDORF, supra note 73, at 3. A non-intervention pact is not implicit recognition of belligerency. Id., at 15.
naval and maritime interests and prerogatives are a primary reason. Germany and Italy were thereby given wide latitude to aid the Nationalists, sacrificing the overmatched Republicans to avoid greater conflict on the Continent.

Because third-party States carefully and calculatedly declined to recognize belligerency under such compelling circumstances, though even Franco called for it, and because the international community did not act as if the contestants’ de facto recognition of belligerency required otherwise, the Spanish Civil War is regarded as the point of time at which the practice was thrown into doubt and disrepute. One commentator observed:

(B)y the time Civil War broke out in Spain in 1936, recognition of belligerency had fallen into such decline that it is difficult to equate the action of any State with the recognition of General Franco’s forces as belligerents despite the proportions of the struggle. Several States (e.g. Germany, Italy and Portugal) recognised Franco’s regime as the de jure government, but it is unclear whether this entailed an implicit recognition of belligerency. The military intervention and aid afforded by those States would certainly have been contrary to the neutrality required by such recognition.

Belligerency has not been expressly recognized since the Boer War. However, neither the Boer War nor the Spanish Civil War was the end of high-intensity, long-duration, internationalized civil war. For example, some twenty years after the Spanish Civil War, half way around the world in Viet Nam, a war, started with a goal of overthrowing colonial domination, would evolve into a long, intense, and highly internationalized civil war.

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82 For example, from Great Britain’s perspective, were belligerency recognized, then British merchant ships would be obliged to acquiesce in the exercise of belligerent rights by Nationalist warships, limiting the Royal Navy’s options. See, e.g., SEBASTIAN BALFOUR & PAUL PRESTON, SPAIN AND THE GREAT POWERS IN THE TWENTIETH CENTURY, 96-118 (1999) [hereinafter BALFOUR & PRESTON].

83 PADDELFORD, supra note 73, at 53.

84 CULLEN, supra note 9, at 22. That belligerency was not recognized by third-party States demonstrates the malleability of the concept and the desire of third-party States to avoid the requirements of neutrality, even when the parties to the conflict clearly recognized belligerency (de facto if not also de jure). General Franco openly asserted that belligerency should have been recognized. PADDELFORD, supra note 73, at 18. And see BALFOUR & PRESTON, supra note 82, at 115 (“The non-intervention policy had essentially become an institutionalized and mutually accepted farce.”).

85 Moir, supra note 51, at 352.

86 Lootsteen, supra note 26, at 133; and see note 55, supra. Writing that “recognition of belligerency has fallen into disuse,” Sassoli and Olson perceive that not only would it still make sense to resort to it in deserving cases, CA 3 actually encourages it. Sassoli & Olson, supra note 18, at 623, and see discussion, infra, at 25 et seq. Common Article 3 may owe much to the Spanish Civil War. “(T)he international community’s experience of the Spanish Civil War, which was in fact heavily internationalized, (citation omitted) … contributed to a political willingness to at least superficially regulate some aspects of civil war.” JAMES STEWART, TOWARDS A SINGLE DEFINITION OF ARMED CONFLICT IN INTERNATIONAL HUMANITARIAN LAW: A CRITIQUE OF INTERNATIONALIZED ARMED CONFLICT, 85 INT’L REV. RED CROSS 313, 317 & 348 (2003) [hereinafter Stewart].
Unlike in the Spanish Civil War, Communist-supported forces would prevail in Viet Nam despite massive intervention by foreign anti-Communist forces. The Viet Nam War stands out as an example of legal complexity and confusion in interpreting and applying the rules as to when is war IAC, when is it NIAC, and when may it be both or change from one to the other.

**The Viet Nam War**

The Viet Nam War (1957-1975) was a continuation of hostilities predating World War II.87 The Agreement on the Cessation of Hostilities in Viet-Nam of July 20, 195488 partitioned the country, placing North Viet Nam and South Viet Nam under the control of the Commander-in-Chief of the People’s Army of Viet-Nam and the Commander-in-Chief of the French Union Forces in Indo-China, respectively, pending an internationally supervised re-unification plebiscite to be conducted in 1956.89 The Agreement prescribed that separate civil administrations, intended to be provisional only, would temporarily govern the territories.90 The plebiscite never took place.

South Viet Nam subsequently declared itself to be the Republic of Vietnam while North Viet Nam declared itself to be the Democratic Republic of Vietnam.91 Fighting resumed, with a coalition of forces from the United States, South Korea, Thailand, Australia, New Zealand, and the Philippines (the “Free World” forces) fighting in support of the South.92 The Soviet Union and China provided military and other aid to the North and to the National Liberation Front (the Viet Cong), a South Vietnamese insurgency.

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87 For a good overview of the history of armed conflict in Viet Nam from World War II to 1956 see Daniel Partan, Legal Aspects of the Vietnam Conflict, in THE VIETNAM WAR AND INTERNATIONAL LAW 200-216 (Richard Falk ed., 1968) [hereinafter Partan].
John Moore, looking farther back, noted that North and South Viet Nam were divided from the 16th to the 18th Centuries in fundamentally the same manner as was done in 1954. John Moore, International Law and the United States Role in Viet Nam: A Reply, in THE VIETNAM WAR AND INTERNATIONAL LAW 401, 415, n. 46 (Richard Falk ed., 1968). Superpower confrontation by proxy was another significant aspect of the conflict, an aspect that contributed to its international character.
89 Agreement on the Cessation of Hostilities in Viet-Nam, supra note 88, art. 14.
90 During the war neither republic was admitted to the United Nations, though not for want of trying. South Viet Nam’s bid was thwarted only by the Soviet Union’s veto. The Socialist Republic of Viet Nam, successor to the Democratic Republic of Vietnam, was admitted to membership in 1977.
Viet Nam was reunified in 1976 following the military victory by North Vietnamese and Viet Cong forces. The vanquished South had been left to defend itself as a result of the 1973 Paris peace accords.\(^{93}\) As to the question of what kind of war was it, and what that meant for combatant immunity and POW status, it was said:

Politically, militarily, and in terms of international law, the Vietnam conflict posed problems of deep complexity. The inherent difficulty of attempting to apply traditional principles of international law to such a legally confusing conflict is well illustrated by the issue of prisoners of war.\(^{94}\)

The legal character of the Viet Nam War — a civil war possibly combining NIAC (South Viet Nam v. Viet Cong) and IAC (South Viet Nam v. North Viet Nam) — was hotly debated.\(^{95}\) The official American Government view—that the conflict was IAC—was laid out in a 1966 Department of State Legal Advisor memo entitled *The Legality of the United States Participation in the Defense of Viet-Nam.*\(^{96}\) A 1975 Army legal history further emphasized the factual and legal complexity:

Most difficult for us, however, was to determine applicable international law for much depended upon the legal characterization of the conflict and the American role in it. The traditional tests of internal conflict in contrast to an international conflict were clearly too imprecise in this situation where the country of Vietnam had been divided, purportedly temporarily, by the Geneva Accords of 1954, and both portions of the country claimed sovereignty and had received some supporting recognition. There were aspects of a civil war within South Vietnam and equally valid aspects of invasion by regular troops from North Vietnam; Free World forces were present at the invitation of the government, asserting the sovereignty of South Vietnam. Attacks on these Free World forces were made by "indigenous" Viet Cong and "foreign" North Vietnamese troops; the line between civilian terrorists and the military insurgents was so blurred as to be indistinguishable; and almost all of the traditional measures - uniform, organization, carrying of arms openly - failed to identify the combatants. Clearly we had a lot of loose ends to pick up before we could be certain of the legal positions we should advocate, and we had few precedents to guide us.\(^{97}\)


\(^{94}\) *George S. Prugh, Law at War: Vietnam 1964-1973 63* (1975) [hereinafter *Prugh*].

\(^{95}\) See generally Richard Falk, *Introduction to The Vietnam War and International Law* 3 (Richard Falk ed., 1968) [hereinafter *Falk Introduction*]. “The parties involved in civil wars with foreign intervention rarely agree on either the facts or their interpretation.” *Gasser* note 10, at 145. “In practice, internal conflicts with foreign intervention are invariably the subject of fierce controversy of a political nature.” *Id*, at 157. “In these circumstances any legal categorization is likely to be unsound.” *Id.*, at 157-58. The idea that NIAC and IAC can occur simultaneously (or horizontally) is not novel. *See Dinstein, supra* note 4, at 414-415.

\(^{96}\) Quincy Wright, *Legal Aspects of the Viet-Nam Situation, in The Vietnam War and International Law* 271 (Richard Falk ed., 1968) [hereinafter *Wright*.] According to Quincy Wright, President Eisenhower stated that had a vote been taken in 1956, a decision to re-unify under the government of North Viet Nam would have received 80% popular support. *Id.*, at 273, n. 7. This suggests that most Vietnamese saw Viet Nam as one country. *Id.*, at 277.

\(^{97}\) *Prugh*, *supra* note 94, at v-vi. In 1965, President Johnson remarked that “the old distinction between civil war and international war has already lost much of its meaning.” *Falk Introduction, supra* note 95, at 4.
This analysis suggests that the contestants applied the legal regimes for IAC and NIAC with imprecise seams and troubling gaps.98

Because the United States held that the war was an IAC,99 it adopted the position that POW status was appropriate, even as to the Viet Cong insurgents,100 while North Viet Nam continued to assert that the war was NIAC and on that basis denied POW status.101 Fundamental differences over interpreting the \textit{Agreement} rendered the discord over the war’s character irresolvable.102

The Viet Nam War may perhaps be better understood not as IAC but rather as internationalized NIAC, a civil war fought for control of a country divided by an international agreement. This is despite the fact that 87 nations recognized the sovereignty of the Republic of Viet Nam and 27 nations recognized the sovereignty of the Democratic Republic of Viet Nam,103 the fact that the “Free World” forces intervened massively on the South’s behalf, and the fact that the North also received extensive military support from outside sources. The 1954 \textit{Agreement} resulted from what could now, under the 1977 Additional Protocol I to the 1949 Geneva Conventions, be labeled IAC, a war waged by the Viet Minh, an indigenous insurgency, against French colonial domination.104 But regardless of whether the conflict that that preceded the \textit{Agreement} was IAC or NIAC, the conflict that arose out of it (the war

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98 The legal status of North Viet Nam and South Viet Nam, as of 1956 and later, remained unsettled. See, e.g., Eliot Hawkins, \textit{An Approach to Issues of International Law Raised by United States Actions in Vietnam, in THE VIETNAM WAR AND INTERNATIONAL LAW} 163 (Richard Falk ed., 1968) [hereinafter Hawkins] (suggesting that both South Viet Nam and North Viet Nam became separate \textit{de facto} states). Whether South Viet Nam was ever a viable state (absent massive US assistance) is open to speculation. Wright, \textit{supra} note 96, at 279-80.

99 The US also held that Viet Nam was but a single state temporarily divided. Partan, \textit{supra} note 87, at 216. Cf. John Moore, \textit{The Lawfulness of Military Assistance to the Republic of Viet-Nam, in THE VIETNAM WAR AND INTERNATIONAL LAW} 238 (Richard Falk ed., 1968) (“[T]here can be no question but that the R.V.N. is a separate international entity.”).

100 “It is noteworthy that the importance of providing … [POW-type] treatment to insurgents was recognized during the Algerian conflict and by the United States armed forces in Vietnam (citation omitted).” Watkin, \textit{supra} note 22, at 58. An agency theory was used to link the Viet Cong to the forces of North Viet Nam. Prugh, \textit{supra} note 94, at 63. South Viet Nam remained desirous of prosecuting Viet Cong detainees, but lacked capacity to do so. Id., at 67.

101 Id., at 62-64. Whether non-State forces have the capability and capacity take and hold large numbers of POWs is an important question of fact. An equally important legal question is whether they have to do so, or whether they may instead detain them under CA 3. North Viet Nam’s position raises an interesting issue as to the presumed entitlement to combatant immunity and POW status of the forces of third-party States who intervene in a conflict at the invitation of the \textit{de jure} State. If intervention by external forces is lawful, then they are \textit{ipso facto} lawful combatants, the presumption holds.

102 Hawkins, \textit{supra} note 98, at 186. It is beyond the scope of this paper to resolve the debate any more authoritatively than many others have tried. This paper adopts for illustrative purposes the thesis that the Viet Nam War was an internationalized NIAC. In the future, it is imagined that conflicts of this intensity and duration would arise differently, especially as to foreign intervention, and that the international community would be more likely to recognize such a conflict as an internationalized NIAC, rather than attempt to categorize it as an IAC.

103 Prugh, \textit{supra} note 94, at 61.

104 See Hawkins, \textit{supra} note 98, at 183.
between North Viet Nam and South Viet Nam) was more NIAC than IAC, though in some respects it may have outwardly appeared to be the converse.

North Viet Nam and South Viet Nam, upon the military defeat of the French-directed colonial government, were not two separate States, but rather two competing regimes vying for ascendance over a temporarily divided State, under conditions generally satisfying the objective Lauterpacht and Lootsteen criteria for recognition of belligerency. In respect of the fighting between the Viet Cong insurgents and the intervening “Free World” forces it could be argued that these contestants, by their conduct and by the nature of their military operations, recognized de facto the existence of a state of belligerency between them. But as noted, the US and South Viet Nam held that the conflict was IAC, in which belligerency is presumed (making recognition unnecessary); North Viet Nam considered the conflict to be NIAC and did not recognize a state of belligerency or otherwise apply IHL as in IAC; and, no third-party States are known to have explicitly recognized belligerency.

The legal vagary and discord attending the Viet Nam War spawned a good deal of interest in the internationalization of NIAC, leading the International Committee of the Red Cross, in 1971, to propose that all of IHL be applied to NIACs in which one or more third-party States intervened. The ICRC’s proposal was never adopted. Such a provision would be unwise, it was thought, because it would encourage insurgents “to seek foreign assistance to enhance their legal status.”

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105 See Dinstein, supra note 4, at 414-415 (a NIAC may pit two organized armed groups contending for control of a failed state).
106 The test for recognition of belligerency remained largely the same as at the time of the Spanish Civil War. “Oppenheim’s International Law states: The principles governing recognition of belligerency are essentially the same as those relating to the recognition of States and Governments. Certain conditions of fact, not stigmatized as unlawful by International Law — the Law of Nations does not treat civil war as illegal — create for other states the right and the duty to grant recognition of belligerency. These conditions of fact are: the existence of a civil war accompanied by a state of general hostilities; occupation and a measure of orderly administration of a substantial part of national territory by the insurgents; observance of the rules of warfare on the part of the insurgent forces acting under a responsible authority; the practical necessity for third States to define their attitude to the civil war.61 612 Oppenheim, International Law 249 (7th ed. H. Lauterpacht 1952) (footnotes omitted).” Partan, supra note 87, at 220. One reason for the parties to a NIAC (and even more so for third-party States) not to expressly acknowledge belligerency (or even to dispute the fact) is the non-intervention obligation that would flow from the duties required of neutrals. Id., at 221. See Tom Farer, Intervention in Civil Wars: A Modest Proposal, in THE VIETNAM WAR AND INTERNATIONAL LAW 509, 514 (Richard Falk ed., 1968) (reiterating the duties of neutrals to refrain from intervention); accord Dinstein, supra note 4, at 410-411.
108 Gasser, supra note 10, at 146-47.
109 Id., at 146.
intervention, under United Nations auspices and otherwise, continues to be a common feature of NIAC post-Viet Nam, as is the fact that belligerency is not recognized.

Collectively, the American Civil War, the Spanish Civil War, and the Viet Nam War illustrate by contrast that recognition of belligerency did serve a useful purpose (by bringing the whole *jus in bello* into play in IAC-like conflicts), while non-recognition of belligerency may have exacerbated undesirable humanitarian conditions and possibly produced unintended strategic consequences, as a result of the fact that the actions and reactions of various parties, especially third-party States, proceeded from highly pragmatic, dare one say contrived, legal positions.\(^\text{110}\) And while these cases show how recognition of belligerency reached a high water mark and then dramatically receded, there are still reasons to think that it—or something similar—is still needed.

Our next step will be to look at NIAC and recognition of belligerency in the 21\(^{\text{st}}\) Century.

Non-International Armed Conflict and Recognition of Belligerency in the 21\(^{\text{st}}\) Century

In this section we will consider NIAC after 9/11; how, if at all, Geneva law affects recognition of belligerency; and, other trends pertaining to the application of IHL to NIAC.

Since World War II, high-intensity, long-duration, internationalized NIACs have been—and are—prevalent, and they likely will continue to be.\(^\text{111}\) In the wake of 9/11, NIAC received voluminous attention by legal and national security scholars, policy-makers, and others, of which a great portion focuses on the current threat posed by terrorist organizations.

The terrorist threat is unquestionably a critically important subject, but NIAC in the 21\(^{\text{st}}\) Century has been and will be about more than terrorist organizations. NIAC in the 21\(^{\text{st}}\) Century is also about

\(^{\text{110}}\) It would be very interesting and illuminating, but beyond the scope of this paper, to explore in greater detail why in each of these cases belligerency was or was not recognized. The important point is that recognition of belligerency did fall into disuse and because of that fact, perhaps due to a desire to avoid some of the consequences that recognizing belligerency would produce, a useful and sensible practice has been foregone.

\(^{\text{111}}\) JACK S. LEVY AND WILLIAM R. THOMPSON, CAUSES OF WAR 12 (2010). See also Dinstein, supra note 4, at 416. (“There is no need to belabor the point that NIACs are taking place all over the world with startling frequency and with alarming intensity. NIACs are certainly more common today than IACs, and the trail of devastation that they leave behind is sometimes colossal. Winning domestic peace subsequent to a sanguinary NIAC may take decades.”).
“small” wars that grow to be quite big. In today’s NIAC, foreign forces will very often be involved, sometimes from many countries. Civilian casualties may be expected to be heavy. The duration may be twice or more the length of the World Wars.

The more-than-a-decade-old conflict in Afghanistan is but one example. In very simple terms, it began as IAC involving a US-led coalition under a UN mandate, arrayed against the then Taliban-ruled government of Afghanistan. Following the Taliban’s displacement from power, in 2002, the conflict transformed into NIAC (the Karzai-headed government of Afghanistan v. the Taliban), the Taliban fighters having changed character from State forces to non-State forces, and thus from being lawful combatants to being unlawful combatants, though the circumstances in which the fighting occurred (and in which it continues) may be more similar than different.

Belligerency has not been recognized, although it could be argued, as it was in past NIACs, that the nature and extent of the military operations conducted by the UN-sanctioned, NATO-commanded International Security Assistance Force (ISAF) constituted de facto recognition of belligerency. Though the end of substantial US involvement is in sight, in 2014, the war in Afghanistan remains a significant conflict whose ultimate duration and outcome may not be certain. Indeed, the viability of the Karzai regime without massive, continuous international military assistance is open to question, not altogether unlike the case of South Viet Nam. The continuing conflict, considered by many to be an insurgency and therefore not IAC, could be an existential one for the Afghan State were it left, as South

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112 Watkin, supra note 3.
113 Stewart, supra note 86, at 316. Similarly, NIAC and IAC can occur simultaneously. Id., at 334.
114 See, e.g., Wager, supra note 40, at 9-11.
115 Mississippi-born author Eudora Welty wrote that “(o)ne place understood helps us understand all places better.” Available at http://www.goodreads.com/author/quotes/7973.Eudora_Welty (last visited February 17, 2013). As insightful as this may be, too much should not be made of one example. One of the reasons for taking a historical approach is to remind ourselves that warfare is evolutionary. Recalling Ken Watkin’s opening remarks at the 2011 Naval War College conference, see note 3, supra, NIACs may be “small” wars, but they may also be large, bloody, long wars. What may work well for the former (small internal conflicts), legally speaking, may not be equally appropriate for the latter (big internal conflicts).
117 Id.
118 An interesting question is by whom? By NATO? By the UN? By the States whose forces are operating under ISAF command? The involvement in armed conflict of bodies like NATO and the UN adds another, likely permanent, internationalizing component: a non-State entity lawfully engaged in NIAC as a third-party.
Viet Nam was, to defend itself. A classical civil war may lie in Afghanistan’s future, though it might also be said that one has already been occurring, obscured perhaps by the legal rationale for foreign intervention (viz., contextualization as a campaign in a war against terror) and the trans-boundary elements of the fighting.

Some 50 countries, slightly more than one-quarter of the 193 UN member nations, contributed forces and other support to ISAF.\textsuperscript{119} Without them it would be hard to imagine how the conflict was, is, or could be within the capability and capacity of the Afghan State to prosecute, or one for which its domestic law—or domestic legal institutions—are best suited, or even competent, to govern the legal status of non-State forces. In circumstances such as these, several of which are replicated in other recent NIACs, it is difficult to see why such a heavily internationalized conflict is not right for the application of the entirety of the \textit{jus in bello}.

The modern trend, then, as illustrated by the conflicts in Afghanistan and elsewhere, includes high-intensity, long-duration, heavily internationalized NIACs commenced or continued under UN mandate without explicit recognition of belligerency. Such conflicts, however, whether or not they equate to classical civil wars, display characteristics (of nature and of scope) on which the theory and practice of recognizing belligerency was formulated. But, as noted, belligerency is not being recognized, certainly not explicitly. Tacit or \textit{de facto} recognition may be occurring, but is declined or its implications and obligations are simply ignored.

On the other hand, the contestants in recent NIACs conducted military operations, as did many of their predecessors in preceding centuries, by means of a vigorous exercise of a variety of belligerent rights. By this measure it could be said that belligerency was recognized \textit{de facto}, but ignored or overtly maneuvered around. As long as States are free to deny the existence of NIAC or the existence of a state of belligerency between State and non-State forces, and as long as third-party States can do likewise, the so-called “small” wars, though they may be anything but small, will remain different in legal

contemplation from IAC. Many foreign forces may have intervened and the conflict may have spilled across borders and out onto the seas, but a state of belligerency goes unrecognized, despite the tortuous legal complexities that may arise.\(^{120}\)

In the 21\textsuperscript{st} Century the nature of NIAC continues to evolve. At present, the international community is focused primarily on NIACs involving transnational terrorist organizations and appears to be, despite progressive enlargement of the applicability of IHL to NIAC, disinclined to grant combatant immunity or POW status to non-State forces of that kind.\(^{121}\) But shadowy, scattered terrorist cells are not the only non-State forces engaged in NIAC. NIACs can be (and frequently have been) more than insurgencies; indeed, they can be larger and more destructive than IACs.\(^{122}\)

It is at the threshold at which NIAC transforms from insurgency into IAC-equivalent belligerency that a different legal regime is needed. Commentators, however, have remarked on the fact that relatively little international law pertains to NIAC.\(^{123}\) In the main, the humanitarian law that is applied—customary and conventional law applicable to IAC—is applied by analogy.\(^{124}\)

Some conventional law was created for NIAC. Common Article 3 to the 1949 Geneva Conventions (CA 3) and Additional Protocol II, \textit{Relating to the Protection of Victims of Non-International Armed Conflicts} (AP II), apply to conflicts “not of an international character.”\(^{125}\) But neither of these may apply to high-intensity, long-duration, internationalized NIAC. Also uncertain is whether they would apply in cases in which belligerency is recognized.\(^{126}\)

Common Article 3 and AP II did not exist at the time of the American Civil War or at the time of the Spanish Civil War, and AP II did not exist then or at the time of the Viet Nam War. Common Article

\(^{120}\) Consider, for example, the Spanish Civil War, the Viet Nam War, and the war in Afghanistan

\(^{121}\) See, e.g., Corn, \textit{supra} note 14, at 280.

\(^{122}\) See note 111, \textit{supra}.

\(^{123}\) See, e.g., Sandesh Sivakumaran, \textit{Re-envisioning the International Law of Armed Conflict}, 22 \textit{EUROPEAN J. INT’L L.} 219 (2011) [hereinafter Sivakumaran]. Sivakumaran notes that prior to CA 3 “only internal armed conflicts recognized as reaching the level of belligerency or insurgency were regulated by international law.” \textit{Id.}, at 220.

\(^{124}\) Corn, \textit{supra} note 14, at 255; Sivakumaran, \textit{supra} note 123, at 220.


\(^{126}\) Additionally, neither CA 3 nor AP II speaks to combatant immunity or prisoner of war status. Stewart, \textit{supra} note 86, at 320.
3 is generally regarded as being reflective of customary law.\textsuperscript{127} It provides minimum protections to non-State forces such as humane treatment, a prohibition of torture and non-discriminatory treatment, recognition of the right to life, and fair trial guarantees.\textsuperscript{128} The limited scope of CA 3 and its drafting history reflect the then prevailing opinion that IHL does not fully apply to NIAC.\textsuperscript{129}

Fundamentally important to the application of CA 3 is the phrase “not of an international character.” Though not defined, the phrase lies at the heart of the question “What is NIAC?”\textsuperscript{130} The issue is whether internationalized NIAC has “international character” and thus falls outside the scope of CA 3.

Of internationalized NIAC, Hans Gasser, then Legal Advisor to the International Committee of the Red Cross, wrote:

Common Article 3 of the Geneva Conventions and where relevant, Protocol II, apply to the relationship between the established government and the insurgents, the original parties to the conflict. A second relationship, between the insurgents and a foreign state that has been invited by the established government to help it overcome the rebellion, gives rise to great difficulties in determining what law is applicable. The traditional answer, which makes the situation subject to the rules of non-international armed conflict, clashes with the undeniably international character of this type of relationship.\textsuperscript{131}

If CA3 applies only to armed conflict lacking international character, it could be said that high-intensity, long-duration, internationalized NIAC is excluded.\textsuperscript{132} However, if high-intensity, long-duration, internationalized NIAC is likewise excluded by Common Article 2 to the 1949 Geneva Conventions (CA 2), because both parties to the conflict are not States, a serious gap would exist. An internationalized NIAC would be neither a CA 2 nor a CA 3 armed conflict.

\textsuperscript{127} MOIR, supra note 38, at 273; MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT, supra note 2, at 3 (citing International Court of Justice jurisprudence). CA 3 has 189 parties; AP II has 150. Peterson, supra note 39, at 24, n. 127.

\textsuperscript{128} CA 3 was not intended to confer belligerent status on non-State forces in NIAC. Peterson, supra note 39, at 18.

\textsuperscript{129} MOIR, supra note 38, at 23 et seq. Commentary on GC IV, i.e., Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949), seems to indicate that CA 3 was not intended to confer belligerent status on non-State forces. Peterson, supra note 39, at 19, n. 96.

\textsuperscript{130} Stewart, supra note 86, at 318. It cannot be conclusively established whether “international character” always and only means inter-State, or something broader. Returning to the idea that the drafters were aware of recognition of belligerency, the broader interpretation is as persuasive as the narrower would be, perhaps even more. If the drafters were cognizant of recognition of belligerency, then they did not intend CA 3 to cover NIACs to which IHL became applicable due to its international consequences.

\textsuperscript{131} Gasser, supra note 10, at 147.

\textsuperscript{132} One way to interpret “international character,” by virtue of the relation of CA 3 to CA 2, is to hold that it is strictly that which CA 2 covers. Given the fact that no armed conflict has been recognized as an AP II conflict, it is hard to say if “international character” is so limited by CA 2 or whether it is, or may prove to be, more elastic.
As with CA 3, AP II defines itself by reference to that to which it does not apply.\(^{133}\) AP II purports not to modify CA 3 but rather sets a higher bar.\(^{134}\) Neither AP II nor CA 3 expressly make mention of or special allowance for high-intensity, long-duration, internationalized NIAC of the kind for which belligerency was (or could have been) recognized.\(^{135}\) By establishing prescriptive criteria (responsible command, control of territory, and sustained and concerted military operations), and by imposing a qualification as to scale (above the threshold of armed conflict), AP II seemingly excludes only rebellion. If so, it is thereby limited to insurgencies and belligerencies.\(^{136}\)

Uncertainty continues as to what conflicts CA 3 and AP II do cover.\(^{137}\) Non-CA 2/non-CA 3 type belligerencies (internationalized and un-recognized) may thus fall into a special ungoverned category, an arguably undesirable state of affairs given the prevalence of such conflicts.\(^{138}\) Further, it cannot be stated authoritatively what result would be produced if belligerency were recognized, as this has not been done since well before World War II, prior to enactment of CA 3 and AP II.\(^{139}\)

Neither CA 3 nor AP II explicitly allows or bars recognition of belligerency.\(^{140}\) But, since AP II supplements CA 3 (and CA 3 does not apply to armed conflict possessing international character), and since AP II does not apply to conflicts covered by CA 2 or Additional Protocol I, Relating to the Protection of Victims of International Armed Conflicts (AP I), it is difficult say whether and how CA 3

\(^{133}\) Article 1 of AP II provides that it applies to (1) armed conflicts not covered by Additional Protocol I (i.e., IAC); (2) that take place within the territory of a party to the convention; and (3) that involve the State party’s forces and non-State forces that are “under responsible command, [and] exercise such control over a part of … [the State’s] territory as to enable … [the non-State forces] to carry out sustained and concerted military operations and to implement this Protocol.” AP II, supra note 125, art. 1.1.

\(^{134}\) AP II, subject to the criteria enumerated above, applies to any conflict that constitutes armed conflict. AP II, supra note 125, art. 1.2. At least one commentator has suggested that AP II will not apply to any internal conflict in which a state of belligerency exists between State and non-State forces. Peterson, supra note 39, at 21.

\(^{135}\) See note 43, supra.


\(^{137}\) In this instance “ungoverned” means not covered by CA 2 or CA 3.

\(^{138}\) If belligerency is recognized, a NIAC “becomes ‘ex definito’ an armed conflict of an international character,” as to which CA 3 no longer applies. Lootsteen, supra note 26, at 125. Lootsteen argues that the drafters of CA 3 were “cognizant of the doctrine of belligerency and included its occurrence within the article.” Id., at 123. He concludes, however, that the doctrine of belligerency is no longer viable, asserting that “the full body of the laws of war” would therefore be replaced by “the more limited protections” in CA 3. Id., at 127. This may be overstatement. See discussion, infra, at 28.

\(^{140}\) Solf, supra note 17, at 58-59.
and AP II might apply if belligerency were recognized.\textsuperscript{141} Because belligerency was not recognized other than in cases of high-intensity, long-duration, internationalized NIAC, the answer may lie outside of Geneva law altogether (i.e., in customary law on recognition of belligerency).\textsuperscript{142}

Applying the whole \emph{jus in bello} to high-intensity, long-duration, internationalized NIACs under customary international law predates Geneva law, and thus does not depend on Geneva law for its vitality. Conversely, applying the whole \emph{jus in bello} to high-intensity, long-duration, internationalized NIACs does not conflict with Geneva law, so much of which is now considered to be customary international law. And so the question whether high-intensity, long-duration, internationalized NIAC fits within CA 3 or AP II, even if answered in the negative, will not preclude applying the whole \emph{jus in bello} to high-intensity, long-duration, internationalized NIACs in which belligerency is recognized.\textsuperscript{143}

Other trends reflect a variety of efforts to expand the application of IHL to NIAC. One of these could be described as a re-orientation of the focus of international law from States to individuals, manifested in the ascendance of the term “international humanitarian law.”\textsuperscript{144} Geoffrey Corn frames it as a shift in focus from the right type of conflict to the right type of person.\textsuperscript{145}

It may also be, with the possible exception of the law pertaining to combatant status and belligerent occupation, that the law of IAC and the law of NIAC have become “fundamentally analogous.”\textsuperscript{146} Most professional armed forces, as a matter of policy, already apply the IAC regulatory regime to military operations and to detentions in NIAC, except for conferring actual POW status or

\textsuperscript{141} One of the things AP I does is to transform wars to overthrow colonial domination (NIACs by almost any measure) into IACs. AP I, \textit{supra} note 15, art. 1.4.
\textsuperscript{142} Knut Dörmann, \textit{Detention in Non-International Armed Conflicts, in Non-International Armed Conflict in the Twenty-First Century} 347-366 (Kenneth Watkin \\& Andrew J. Norris eds., 2012) (Vol. 88, US Naval War College International Law Studies) [hereinafter Dörmann]. “Due to the paucity of treaty rules, customary IHL plays a more significant role in NIAC than in international armed conflicts (IACs).” \textit{Id.}, at 348.
\textsuperscript{143} None of this suggests that non-State forces are entitled to combatant immunity or POW status. CRAGFORD, \textit{supra} note 17, at 48; LIESBETH ZEGVELD, \textit{ACCOUNTABILITY OF ARMED OPPPOSITION GROUPS IN INTERNATIONAL LAW} 19 (2002) (citing decisions of several international tribunals). Accord Corn, \textit{supra} note 14, at 276. At least one commentator perceives that a movement toward recognizing combatant immunity in NIAC is progressing more rapidly than is the idea that non-State forces in NIAC should be accorded POW status. \textit{Id.}, at 255. How the two may be separated is unclear.
\textsuperscript{144} Corn, \textit{supra} note 14, at 276.
\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{Id.}, at 277 (citing ROBERT KOLB \\& RICHARD HYDE, \textit{AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS} (2008)).
granting combatant immunity.\textsuperscript{147} The similarities in these military practices (applying the same rules and adhering to the same constraints) lend support to the idea, though it remains unpersuasive to many, that the mere existence of armed conflict (NIAC or IAC) justifies international legal regulation.\textsuperscript{148}

Collectively, these and other trends suggest an ongoing “progressive assimilation” of IHL, customary and conventional, into NIAC.\textsuperscript{149} The following principles of IHL are now widely considered customary in NIAC: distinction, the prohibition on indiscriminate attacks, proportionality and military necessity, and the prohibition on causing unnecessary suffering.\textsuperscript{150} There is also a discernible trend of downplaying the differences between IAC and NIAC.\textsuperscript{151} The International Criminal Tribunal for the Former Yugoslavia, for example, has gone so far as to suggest that such differences are now approaching irrelevance.\textsuperscript{152}

Some of these trends, it could also be argued, may be work-arounds for the fact that belligerency is not being recognized in cases in which it could and should be. These efforts would achieve a similar end—applying the whole \textit{jus in bello} to NIAC—that recognizing belligerency would accomplish. To that extent, these trends evince growing support for the objectives that recognition of belligerency used to fulfill: imposing on general war equivalent to IAC the same requirements, constraints, and immunities as in IAC.

As for the differences between State forces and non-State forces, it should be remembered that not all non-State forces are, or will always be, of one size, dimension, or character. Their nature and capabilities vary, as does their ability to control and govern territory and to otherwise comply with IHL.\textsuperscript{153}

\begin{footnotes}
\textsuperscript{147} \textit{Id.}
\textsuperscript{148} \textit{Id.}, at 284.
\textsuperscript{149} CRAWFORD, supra note 17, at 6, 24-25 and 41.
\textsuperscript{150} \textit{Id.}, at 31.
\textsuperscript{151} \textit{Id.}, at 3; \textit{and see} Sassòli & Olson, supra note 18, at 601-602.
\textsuperscript{152} CRAWFORD, supra note 17, at 1.
\textsuperscript{153} Sivakumaran, supra note 123, at 355-356 (comparing non-State forces in Sri Lanka, Columbia, and elsewhere, some of which also have air and naval forces).
\end{footnotes}
In recent combat operations, as was seen in Iraq and Afghanistan, non-State forces often relied heavily on guerrilla and irregular tactics.\(^{154}\) But this phenomenon is not confined to non-State forces.

States, too, by their use of special forces, are increasingly employing indirect means and methods of warfare, as reflected by General Stanley McCrystal’s observation that “(i) it takes a network to defeat a network.”\(^{155}\) Widespread acceptance by States—in IAC and in NIAC—of special forces tactics and other covert and clandestine techniques, suggests that States are willing to tolerate—in themselves, at least—more than a little latitude in applying the criteria governing combatant status.\(^{156}\) The point here is that in 21\(^{st}\) Century NIACs, State forces have increasingly, though by no means exclusively (or even primarily), operated in a manner that causes similarly employed non-State forces to be labeled unlawful combatants. This circumstance makes it harder sometimes to differentiate the one from the other, legally speaking, other than by the fact that State forces enjoy combatant immunity and are entitled to be treated as POWs, while non-State forces are denied those protections.

The closer high-intensity, long-duration, internationalized NIAC is to IAC, and the closer is the manner in which State and non-State forces operate, the more apropos is the idea of universal combatant status.\(^{157}\) This theory is predicated on the principle that the humanitarian function of IHL is as important in NIAC as it is in IAC.\(^{158}\) From a humanitarian perspective, the supposed deterrent function of not granting combatant immunity to non-State forces does not seem to have been very effective in reducing the number or adverse effects of NIACs.

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\(^{154}\) Guerrilla or irregular warfare has played a significant part in IAC as well as NIAC. In 1951, Richard Baxter wrote: “It must be assumed at the outset that guerilla activities are an inevitable concomitant of hostilities waged by regularly constituted armed forces (citation omitted).” Baxter, \textit{supra} note 43, at 334. Further: “Only a rigid legal formalism could lead to the characterization of the resistance conducted against Germany, Italy, and Japan as a violation of international law.” \textit{Id.}, at 334-335. And finally: “(A) s long as guerilla activities are looked upon as licit and laudable by the [occupied] State on whose behalf they are undertaken and by third parties to the conflict, it is highly unreal to regard them as internationally criminal (citation omitted).” \textit{Id.}, at 337. It could be asked why guerilla warfare in NIAC conducted by non-State forces with all of the same issues as to combatant distinction, should be viewed any differently than it is in IAC.


\(^{156}\) \textit{Watkin, supra} note 22, at 38-40, 48-49.

\(^{157}\) A solution, modeled loosely on the Lieber Code, may be universal conditional immunity for properly constituted/IHL-compliant groups, an immunity that does not admit of an international personality or political legitimacy. \textit{Crawford, supra} note 17, at 162. One of the conditions might be effective control of territory, as would likely occur in civil wars. \textit{Id.}, at 163.

\(^{158}\) \textit{Id.}, at 155.
On the contrary, there has been no shortage of persons willing to take part in bloody internal wars.\footnote{Id., at 158.} Curiously, granting combatant immunity in high-intensity, long-duration, internationalized NIACs may actually encourage restraint and compliance with IHL.\footnote{Id.} Furthermore, granting combatant immunity to qualifying non-State force may also hasten and improve post-conflict accountability and reconciliation.\footnote{RAWFORD, supra note 17, at 159.}

Based on all these trends and circumstances, the directions in which warfare and IHL are headed in the 21\textsuperscript{st} Century are moving NIAC closer to IAC, but a gulf remains at the juncture of combatant immunity and POW status. The gulf, even if it is shrinking, may still be unbridgeable. That is, unless belligerency is recognized.

When belligerency is recognized combatant immunity and POW status have been, and could again be, bestowed on qualifying non-State forces. But this will occur only in high-intensity, long-duration, internationalized NIACs. And while there is good reason to think that high-intensity, long-duration, internationalized NIACs may be a fixture of armed conflict into the foreseeable future, there is no particular reason at present to expect that States, individually, or the international community, collectively, will change course and resume the practice of recognizing belligerency.

In the next section we will examine the idea that belligerency is being objectively established, tantamount to recognition, when the UN Security Council authorizes military intervention to combat a threat to international peace and security.

\section*{A New Approach}

When the intensity, duration, and international character of a NIAC reach levels that cause the UN Security Council to determine that it must authorize collective military action “necessary to maintain or
restore *international* peace or security (emphasis added),” a state of belligerency likely exists.\textsuperscript{162} Indeed, in this context the finding attests to the existence of hostilities that were historically judged sufficient to bring the whole *jus in bello* into play.\textsuperscript{163} The Security Council’s determination in these cases is thus similar in effect to, although it was not intended or designed to replace, the now moribund practice of recognizing belligerency.\textsuperscript{164} And if this is so, combatant immunity and POW status could—and arguably should—be accorded to both State and non-State forces.

What had been a highly subjective, unwieldy, and eventually broken process (i.e., the hit-or-miss process of recognizing belligerency) would be objectified by relying instead on the Security Council’s independent assessment of the key issues, a logical predicate to letting loose a massive foreign intervention.\textsuperscript{165} From the beginning, foreign armed forces intervening under UN mandate would know, and regardless of what transpired before State and non-State forces also would know, what their legal status would be.\textsuperscript{166} This could change, of course, as the conflict evolved, but it would provide clarity and focus, and lessen or obviate legal disputes, at the inception of foreign intervention.

Considering the likelihood that high-intensity, long-duration, internationalized NIACs will be plentiful, and considering the fact that the extent to which these conflicts will be internationalized will expand greatly upon UN-sanctioned intervention, the idea of using objective triggering criteria for applying the whole *jus in bello* in high-intensity, long-duration, internationalized NIAC, as the ICRC previously proposed, merits re-consideration.\textsuperscript{167} And while it cannot be said that the UN Charter was


\textsuperscript{163} See discussion, infra, at 33 et seq.

\textsuperscript{164} This is not to suggest that every authorization for use of all necessary means is necessarily tantamount to recognition of belligerency. In not every instance in which the UN Security Council authorized intervention in NIAC by all necessary means was the conflict one for which it would have been proper to recognize belligerency. Compare the conflict in Haiti in 1994 to the American Civil War (or to the Spanish Civil War or Viet Nam War), for example.


\textsuperscript{166} Views remain divided whether authorization to use all necessary means permits internment. Dӧrmann, *supra* note 142, at 355.

\textsuperscript{167} Gasser, *supra* note 10, at 246.
written with the idea in mind that the Security Council’s power to authorize military intervention in NIAC necessarily entails recognition of belligerency in all cases, the Security Council’s determination that a threat to international security and breach of the peace has arisen, due to a NIAC, provides an objective basis upon which to conclude that the whole *jus in bello* should apply.\(^{168}\) The determination, it might be said, is predicated on the existence of a state of belligerency.

The fact that a threat to international peace and security has arisen, suggests an ongoing armed conflict that has international consequences and international significance, even if, harkening back to the discussion of CA 3, it does not then have international character. International consequences and international significance may not themselves be sufficient to internationalize an internal conflict. They are, however, likely to spur action by individual States, coalitions of States, or the UN or other international organizations that could internationalize the conflict.\(^{169}\)

The UN has thus far authorized collective military intervention by all necessary means or measures in only a small number of countries. Collective military intervention is a UN authority exercised by the Security Council, to redress threats to international peace and security.\(^{170}\) The Council first pronounces the gravity of a threat to international peace and security arising from an internal (or other) conflict.\(^{171}\) It may then authorize collective military intervention, a decision that is binding on all

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\(^{168}\) NIAC, of course, is not the only type of conflict that could lead the Security Council to authorize intervention. Its power to do so extends to all armed conflict. Charter of the United Nations, art. 39, *Law of War Documentary Supplement*, supra note 162, at 165.

\(^{169}\) While it is war between States that the UN Charter prohibits in Article 2(4), the Security Council has seemingly been as interested in (viz., wary of the consequences of) NIAC as it has been in IAC. An excellent overview of the UN Charter’s “two-tiered” or “bifurcated” system of collective security is set forth in Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks* (2002) [hereinafter Franck]. *Id.*, at 3. Franck describes four “seismic” events (i.e., major developments affecting the security geology of the UN Charter, so to speak), one of which is “the ingenuity with which states effectively and dangerously substituted indirect aggression — the export of insurgency and covert meddling in civil wars.” *Id.*, at 34. Franck goes on to argue that the UN Charter is amenable to radical adaptation, to be accomplished by States through “continuous interpretation and adaption through the member states’ individual and collective practice: their actions, voting, and rhetoric.” *Id.*, at 7. The result, it could be said, is that the UN Charter is as state practice does. As it relates to the point of this paper, the importance of state practice, in terms of effectuating a Security Council finding that, in effect, a state of belligerency exists in a NIAC, cannot be overstated. The UN Charter may not speak directly to the issue, but it is malleable enough to accommodate it, if state practice supports it.


\(^{171}\) It cannot necessarily be said that the UN Security Council finds threats to international peace and security only in cases where intense armed conflict is occurring, such as might happen in an internal armed conflict in the nature of an insurgency or belligerency.
Member States.¹⁷² This does not happen often, but it is increasingly the more likely route by which foreign forces will intervene in NIAC, and when they do, they typically do so in large numbers, being drawn from a number of countries.¹⁷³

The Security Council derives this authority from Article 39 of the Charter of the United Nations which provides:

The Security Council shall determine the existence of any threat to peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.¹⁷⁴

Articles 41 and 42 of the Charter state:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures.¹⁷⁵

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.¹⁷⁶

A constraint on this authority is in Article 2(7) of the Charter which provides:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.¹⁷⁷

¹⁷² Charter of the United Nations, arts. 25, 103, LAW OF WAR DOCUMENTARY SUPPLEMENT, supra note 162, at 164, 173. Lootsteen is among those who believe as a practical matter that the State within which a NIAC is occurring must recognize belligerency and act accordingly, because if it does not, combatant immunity and POW status will be denied unless and until other pressures compel it. Lootsteen, supra note 26, at 126.

¹⁷³ See note 119, supra.

¹⁷⁴ Charter of the United Nations, art. 39, LAW OF WAR DOCUMENTARY SUPPLEMENT, supra note 162, at 165.

¹⁷⁵ Charter of the United Nations, art. 41, LAW OF WAR DOCUMENTARY SUPPLEMENT, supra note 162, at 165.

¹⁷⁶ Charter of the United Nations, art. 42, LAW OF WAR DOCUMENTARY SUPPLEMENT, supra note 162, at 165-66. Note that these measures, e.g., blockade, include belligerent acts. It could be said that these measures were never intended to be implemented except by the forces contemplated by Article 43, but UN and state practice has been different, relying on coalitions, not standing forces. This also illustrates the importance of state practice to the interpretation and implementation of the UN Charter. Again, the UN Charter is as state practice does. See FRANCK, supra note 169, at 25-26.

¹⁷⁷ Charter of the United Nations, art. 2(7), LAW OF WAR DOCUMENTARY SUPPLEMENT, supra note 162, at 161. The meaning of the variably interpretable term “domestic jurisdiction” poses its own complications.
As noted in Article 39, the purpose of Security Council action is to “maintain or restore international peace and security,” a phrase repeated in Article 42. By these terms, the Security Council may authorize military intervention only in conflicts of international consequence, since the conflict must first be outside the scope of Article 2(7) and second, it must, by amounting to a breach of the peace, threaten international peace and security. Neither Article 39 nor Article 42 is limited to CA 2-type conflicts.

Since its establishment the Security Council has authorized collective military intervention in high-intensity, long-duration, internationalized conflicts in only a handful of cases, some of which were or later became NIACs. Recent examples of internal conflicts in which the Security Council determined that a NIAC constituted a threat to international peace and security, and thereupon authorized military intervention using all necessary means, include Yugoslavia in the 1990s; the war Afghanistan after the ouster of the Taliban-run government; and the 2011 Libya campaign. Each of these was a high-intensity, long-duration, internationalized internal armed conflict, and all were significantly further internationalized by the UN-sanctioned intervention. Table 1 illustrates some of the most well-known cases.

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178 Charter of the United Nations, art. 39, LAW OF WAR DOCUMENTARY SUPPLEMENT supra note 162, at 165.
179 See FRANCK, supra note 169, at 25.
180 Imagine how the Spanish Civil War or the Viet Nam War might have been different if the Security Council had authorized collective military intervention with all necessary measures. The first issue is on whose side intervention would be authorized, which in turn would appreciably influence the number and alignment of States participating. No Member States could intervene on behalf of or even militarily support the other side.
181 Compared to the others, the Libyan campaign was relatively short. What, exactly, is the temporal dimension of “long-duration” is inexact, but the scope and scale of a conflict can very rapidly magnify, such that it may not take a year or more for a conflict to reach the dimensions of general war.
182 What to include in such a list is open to interpretation. The table is intended to show the relatively few countries, not the number of times, for which an all means or measure resolution was issued. Note, too, that not all of these were NIACs at the time of the resolution; some became NIACs at later points in time. UN Security Council resolutions are available at http://www.un.org/Docs/sc/ under the “Resolutions” link.
Table 1.

United Nations Security Council Resolutions Authorizing All Necessary Means or Measures

<table>
<thead>
<tr>
<th>Resolution No.</th>
<th>Country</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>83</td>
<td>Korea</td>
<td>1950</td>
</tr>
<tr>
<td>678</td>
<td>Iraq</td>
<td>1990</td>
</tr>
<tr>
<td>743</td>
<td>Yugoslavia</td>
<td>1992</td>
</tr>
<tr>
<td>940</td>
<td>Haiti</td>
<td>1994</td>
</tr>
<tr>
<td>1386</td>
<td>Afghanistan</td>
<td>2001</td>
</tr>
<tr>
<td>1973</td>
<td>Libya</td>
<td>2011</td>
</tr>
</tbody>
</table>

Most are relatively recent. Note the absence of several high-intensity, long-duration, internationalized conflicts, Viet Nam, for example, for which no such Security Council resolution was issued. Collective military intervention in NIAC by third-party States, under and within the bounds of a Security Council mandate, will be lawful, overcoming the non-intervention prohibition attending recognition of belligerency.\textsuperscript{183}

A sticky question is whether collective intervention in NIAC under UN authority will by itself internationalize and thereby convert the conflict into one possessing international character within the meaning of CA 3. If it does, the conflict might be placed in an ambiguous context, falling into the gap between CA 2 and CA 3. Avoiding such an undesirable result is even more reason for belligerency to be recognized in high-intensity, long-duration, internationalized NIACs or for some other suitable—and most importantly, objective—triggering mechanism to be emplaced to bring the whole \textit{jus in bello} into play.

A Security Council determination that a NIAC constitutes a threat to international peace and security, followed by authorization to intervene militarily using all necessary means or measures, is, in

\textsuperscript{183} See Dinstein, \textit{supra} note 4, at 409 (third-party States must display “impartiality” toward the State and to non-State forces if the State has recognized belligerency).
effect, a near equivalent to recognizing belligerency.184 Once foreign forces have intervened in an internal conflict under UN mandate, they should expect to—indeed they likely will—find themselves situated in the conflict as belligerents, conducting belligerent acts and exercising belligerent rights. Whereas express or de facto recognition of belligerency would theretofore have compelled third-party States to remain neutral and not intervene, when intervention is UN-sanctioned, the neutrality bar is lifted.185 Moreover, UN-sanctioned intervention enlarges and internationalizes (or further internationalizes) the conflict, making it one that is even more suitable for full application of IHL.186

Internal conflicts of the kind in which the UN has authorized intervention, conflicts that because of their scope, scale, and character threaten security beyond the borders of a single State—not unlike the American Civil War, the Spanish Civil War, and the Viet Nam War—may not be suitable, when it comes to the accountability of non-State forces, for applying primarily the domestic law of one State only, or for applying only some of the jus in bello.187 Rather, these kinds of conflicts are ones in which belligerency should be recognized by some reliable mechanism. These cases are not run-of-the-mill NIACs at or below the level of insurgency, and when they have garnered UN recognition as conflicts threatening to international peace and security, they should be treated as what they are: armed conflicts with international character.188

It should be acknowledged that the UN, with its intricate political dimensions and procedural complexities (the veto power held by Security Council members, for example) would not necessarily

184 Lootsteen, supra note 26, at 112, n. 18 (discussing the United Nations role in internal armed conflicts). Security Council resolutions would be most useful if by their objective clarity and binding nature they removed the kind of ambiguity and disagreement that prevailed in the Viet Nam War.

185 This creates something of a have-your-cake-and-eat-it-too situation: intervention in an ongoing belligerency does not necessarily depend on consent of the State and does not run afoul of the demands of neutrality. A third-party State can involve itself in a belligerency without violating the non-intervention prohibition that would otherwise apply.

186 See discussion, supra, at 32-33.

187 Keep in mind that it is possible that the scope and scale of NIAC may exceed the scope and scale of IAC.

188 Though the drafters of the UN Charter may have thought otherwise, the Charter, as applied, has been very much concerned with NIAC. “Despite this explanation, it is clear from the drafting history of the Charter's Articles 39, 42, 43, and 51 that the representatives at San Francisco had not intended to authorize a role for the United Nations in civil wars. Rather, Charter Articles 2(4) and 2(7) appear to forbid such intervention. In practice, however, the Congo was but the first of several UN military involvements in precisely those sorts of conflict: in Yemen, Iraq, the former Yugoslavia, Somalia, Haiti, and Sierra Leone.” Franck, supra note 169, at 41. Further: “In its decision in the Tadic appeal, the International Criminal Tribunal for the Former Yugoslavia, referring to evidence that “the practice of the Security Council is rich with cases of civil war or internal strife which it classified as a 'threat to the peace' and dealt with under Chapter VII” concluded “that the 'threat to the peace' of Article 39 may include, as one of its species, internal armed conflicts (citation omitted). This marks recognition of the role of practice in interpreting the Charter, sometimes in radical departure from original intent.” Id., at 42-43.
make an efficient forum for determining in every case whether a conflict had reached a level that belligerency should effectively be recognized. Another not inconsiderable dimension is the reluctance (or even opposition) that States might express over a procedure that takes such a weighty matter out of the hands of the State and puts it into the hands of an inter-governmental organization. This might actually encourage more vetoes in the Security Council by and for those who remain opposed to bestowing combatant immunity and POW status on non-State forces in NIAC.

This could have the detrimental effect of precluding military intervention in cases that call for it. However, given the restraint with which the Security Council has acted in the past to authorize collective military intervention, the likelihood is that any move to reinvigorate recognition of belligerency in high-intensity, long-duration, internationalized NIACs would proceed deliberately and judiciously. And, it should be kept in mind, recognition of belligerency—or equivalent recognition of belligerency by the Security Council—is not permissible in all NIACs, as customary international law provides no foundation for doing so.

Another benefit of equating UN-sanctioned intervention with recognizing belligerency is that more objectivity will be brought to establishing the legal status of an armed conflict, reducing ambiguity and uncertainty over the legal obligations and immunities of all concerned. This may also serve humanitarian purposes. And, setting precedent in respect of Security Council-approved intervention could also have the effect of encouraging broader application of IHL rules in NIACs in which the UN does not authorize intervention.

For example, in 2004, the transformation of the war in Iraq from IAC to NIAC altered the legal rules applying to it, notwithstanding the fact that the security situation did not much change. If IAC rules governed the occupation of Iraq up to that point, it is not evident why they should not have continued to do so thereafter. In that case, as in Afghanistan and Viet Nam, a single legal regime with combatant immunity and POW status for all captured personnel, including the forces of intervening third-party States, made sense and could have benefited all.

189 Lootsteen, supra note 26, at 119.
Equivalent recognition of belligerency could be put into effect by the Security Council by specific reference in a resolution authorizing intervention that as a result of the enumerated circumstances of the conflict, conditions are right for applying, and therefore all intervening forces should adhere to, the whole *jus in bello.* This would include the requirement to provide POW treatment and combatant immunity, except for the commission of war crimes. All States that answer the Security Council’s call should then carry out the mandate and apply the full body of applicable IHL rules.

A pronouncement of this kind by the Security Council, it should initially be expected, may carry little weight. Until practice and *opinio juris* ripen into custom, States will not be obliged to accept the Security Council’s assessment. Rather, States may continue to ignore belligerency and refuse to recognize it, regardless of what the Council perceives or pronounces.

Still, acknowledging a functional equivalency, in NIAC, between recognition of belligerency and Security Council-authorized intervention is a key first step toward building a useful framework on which to base, expand, and refine state practice. If it is true, as Professor Dinstein asserted, that recognition of belligerency may still have utility, the idea of an objective trigger mechanism to bring the whole *jus in bello* to bear merits further study and debate. This could be preferable to other trends and initiatives to expand the applicability of IHL to NIAC, grounded as recognition of belligerency is in long-standing customary international law.

This is not to suggest that every NIAC in which the Security Council authorizes intervention is tantamount to “classical” civil war. As we have seen, the nature of warfare in the 21st Century is not what it was in the 19th Century; the civil wars of tomorrow will likely differ from their forerunners. But despite these differences, high-intensity, long-duration, internationalized NIACs will occur and with some of

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190 Security Council resolutions have been tailored to fit the circumstances, with great variation, demonstrating their elasticity and adaptability. See FRANCK, *supra* note 169, at 28-30.
192 It would certainly be problematic if one or more States refused to recognize belligerency, especially if the Security Council had explicitly done so. This, obviously, is one of several issues with the notion that a Security Council finding that a threat to international security has arisen, in a NIAC, is the functional equivalent of recognizing belligerency. A functional equivalency is not a legal equivalency. Perceiving functional equivalence is thus merely a first step in a process leading to legal equivalence; the distance to be traveled, to reach a point where such a Security Council finding is a formal (and even more tenuously, a binding) recognition of belligerency, will be long and doubtless slow. That the distance will ever be covered is uncertain.
193 The context in which this would occur is: “This expansion of global jurisdiction has not happened at once and, like much legal reform, tends to occur in the guise of ‘legal fictions.’” FRANCK, *supra* note 169, at 43.
these so-called “small” wars will come ample reason to recognize belligerency and bestow combatant immunity and POW status on non-State forces.\textsuperscript{194}

The notion that the Security Council’s actions under the UN Charter are similar in effect to, and can effectively substitute for, the now moribund practice of recognizing belligerency is indisputably novel, but it is also intriguing.\textsuperscript{195} A primary purpose of this paper is to lay a foundation for what could be called a hypothesis of functional equivalency. Testing that hypothesis will require much additional work. For example, it may be helpful to explore even further why the practice of recognizing belligerency fell into disuse, in order to determine whether the causes and conditions underlying this phenomenon still pertain. It would also be helpful to examine how, if at all, the Lauterpacht or Lootsteen criteria have figured into Security Council assessments of the nature and scope of NIACs into which intervention was authorized, and if not, whether and how they should.

\textbf{Conclusion}

As Professor Richard Falk underscored in respect of the Viet Nam War:

\begin{quote}
No contemporary problem of world order is more troublesome for an international lawyer than the analysis of the international law of ‘internal war’ (citation omitted).\textsuperscript{196}
\end{quote}

This article has addressed the question whether and if so when, combatant immunity and POW treatment are available to non-State forces in NIAC. As a matter of law combatant immunity does not apply in NIAC; however, there is an important historically-based qualification. As illustrated by the American Civil War, when internal armed conflict crossed the threshold from insurgency to belligerency, that is, as it passed from low-intensity, short-duration NIAC to high-intensity, long-duration, internationalized NIAC, it acquired a character for which international law was deemed more apt to

\begin{footnotes}
\item[194] Using a Security Council-based approach will serve humanitarian ends; the more that IHL is even-handedly and consistently applied, the better observed will its constraints be.
\item[195] The UN is intended to be a “living institution, equipped with dynamic political, administrative, and juridical organs, competent to interpret their own powers under a flexible constituent instrument in response to new challenges.” \textsc{Franck, supra} note 169, at 30-31.
\item[196] Falk \textit{United States Role, supra} note 107, at 362.
\end{footnotes}
address the accountability of non-State forces.\textsuperscript{197} The practice of recognizing belligerency effectively ended with the Spanish Civil War, but the reasons for applying the whole \textit{jus in bello} in such conflicts are no less compelling today.

Geneva law (CA 3 and AP II) neither authorizes nor prohibits recognition of belligerency and provides neither encouragement nor discouragement for doing so. But there does appear to be a gap between CA 2 and CA 3 into which high-intensity, long-duration, internationalized NIACs will fall. Other modern trends, including what has been called progressive assimilation of IHL into NIAC, along with the fact that there may be no legal requirement or advantage to maintaining the distinction between POW status and detainee protections afforded to unlawful combatants, lend support to the notion that all NIACs, not just the kind of high-intensity, long-duration, internationalized NIACs in which belligerency was or could be recognized, are increasingly being treated the same as IACs for IHL purposes. Another important factor is the apparent likelihood that high-intensity, long-duration, internationalized NIACs will be prevalent, perhaps even more prevalent than IACs. This suggests that it is more important than ever to properly characterize this type of NIAC and the legal rules pertaining to it, alleviating the kind of legal ambiguity and uncertainty seen in Viet Nam, Afghanistan, and other places in which legally complex high-intensity, long-duration, internationalized NIACs occurred.

Action by the UN Security Council to authorize collective military intervention by all necessary means could be an objective trigger mechanism to recognize belligerency in the kinds of high-order internationalized NIACs likely to lie ahead. An advantage to a functional equivalency approach over traditional recognition of belligerency is that a Security Council pronouncement carries weight across the entire international community and could by its greater objectivity eliminate much of the legal contortion, avoidance, and escapism that arise when contestants and their supporters characterize a conflict markedly differently.\textsuperscript{198}

\textsuperscript{197} See Stewart, supra note 86, at 345-48.
\textsuperscript{198} That some States and other entities might prefer to perpetuate this state of affairs must be acknowledged.
Clearly a question that must be addressed is why now, after 60 years of not recognizing belligerency in high-intensity, long-duration, internationalized NIACs, should we do so? Some may argue that taking this tack would be politically untenable, others might say that it would be superfluous or even harmful. The answer may lie in the general trend of the law toward greater concern for humanitarian considerations. To those who desire full application of IHL in NIAC, the proposed approach accomplishes that goal for internal conflicts at the higher end of the spectrum. This would not cover all NIACs, but it is an approach that is fundamentally no different than what the international community was willing to embrace centuries ago. An added advantage would be avoidance in recognized belligerencies of the neutrality-based prohibition on intervention by third-party States.

How the Security Council might operationalize such a new approach is a subject for further research. One consideration, for example, is how Security Council resolutions should be crafted to signal a determination that belligerency is recognized. While it might be argued that merely by prescribing certain measures, blockade, for instance, de facto recognition of belligerency occurs, a more direct and explicit approach would be preferable, to underscore the legal significance and consequences of determination that has been made, and to give clear guidance to the forces taking those measures.

While the focus of recent attention in NIAC has understandably been on terrorist groups, not all NIAC has been or necessarily will continue to be of that kind. When NIAC threatens international peace and security, and when the Security Council finally reaches, as it so infrequently has, a conclusion that it must authorize Member States to intervene with all necessary means, the international character of the conflict is ripe for applying the whole jus in bello. By this method combatant immunity and POW status would again be granted in those NIACs for which they are, were, and will be well-suited.

Combatant immunity in NIAC, you see, has a past and it has a future.