

ARTICLE

When Terrorists Govern:
Protecting Civilians in Conflicts with State-Building Armed Groups

Mara R. Revkin*

* Ph.D. Candidate in Political Science, Yale University. J.D., Yale Law School. I am grateful to Oona Hathaway, Harold Koh, and Ryan Goodman for encouraging me to write this article. For guidance on my fieldwork in Iraq and Turkey, I thank Elisabeth Wood and Ellen Lust. The research for this article was conducted during a fellowship with the Abdallah S. Kamel Center for the Study of Islamic Law and Civilization at Yale Law School, where I benefited from conversations with the Center's directors, Owen Fiss and Anthony Kronman. Diane Marie Amann, Joshua Andresen, Melissa Durkee, Jonathan Petkun, and participants in the 2017 ASIL Research Forum offered valuable suggestions on an earlier draft. I am especially appreciative of careful editing and thoughtful comments by Kendall Howell, Neha Sabharwal, Christopher Izant, Drew Domina, Azfer Khan, Tom Ewing, Pamela Gaulin, Alexander Cottingham, Caterine Morton, Kwame Newton, Jillian Rafferty, and Shira Shamir of the Harvard National Security Journal throughout the editorial process.

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Abstract

Many existing U.S. counter-terrorism policies, including those governing targeting and detention, rely on an empirical assumption that terrorist groups are primarily military organizations. This assumption may be appropriate in the case of al-Qaeda, but it fails to describe terrorist groups that engage not only in warfare but also in governance and state-building such as the Islamic State, a self-declared “caliphate” that—at the height of its expansion in 2014—claimed sovereignty over an estimated 34,000 square miles and 10 million civilians. This Article identifies a category of “state-building” terrorist groups that can be distinguished by the following characteristics: (1) the presence of a non-military wing analogous to a civilian bureaucracy that provides services, including food, electricity, and healthcare to the governed population; (2) dual-use institutions that simultaneously perform military and civilian functions; and (3) a degree of coercive control over civilians that creates observational equivalence between victims and supporters of the group. As a result of these characteristics, existing U.S. targeting doctrines that were designed with primarily military groups such as al-Qaeda in mind, tend to penalize civilians when applied to state-building terrorist groups that govern people and territory. This argument is supported by archival Islamic State documents, social media data generated by users in or near Islamic State-controlled areas of Syria and Iraq, interviews with former Islamic State combatants and civilian employees, and original data on the targeting of 11 different *zakāt* offices on 19 different occasions. These *zakāt* offices, which are located in densely populated urban areas, simultaneously collect taxes (a war-sustaining activity) and distribute cash assistance and food to civilians (a humanitarian activity), and illustrate the costs of targeting dual-use institutions that perform both military and civilian functions. The Article concludes with targeting recommendations that take into consideration the structural vulnerability of civilians living in areas controlled and governed by terrorist groups while still allowing governments to prosecute civilians who aid such groups under domestic material support laws.

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I. Introduction

Many existing U.S. counter-terrorism policies, including those governing targeting and detention, rely on an empirical assumption that terrorist groups are primarily military organizations. According to this logic, which is central to a post-September 11th counter-terrorism paradigm that was heavily influenced by and remains oriented around the threat posed by al-Qaeda, all members of terrorist groups are presumptively combatants, and all of their activities are military or war-sustaining in nature. This assumption may be appropriate for the case of al-Qaeda, but it fails to describe terrorist groups that engage not only in warfare but also in governance and state-building. An important contemporary case of the latter is the Islamic State, a self-declared “caliphate” that—at the height of its expansion in 2014—claimed sovereignty over an estimated 35,000 square miles and ten million civilians,¹ whom it refers to as to as *al-nās* (“the people”)² or *al-ri’āya* (literally, “the flock”).³

This Article identifies a category of terrorist groups that engage in “state-building,” defined as the creation of administrative and coercive institutions designed to govern people and resources within a defined territory.⁴ Examples of state-building terrorist groups include the Islamic State, the Taliban, the Irish Republican Army (IRA), and the Revolutionary Armed Forces of Colombia (FARC), among others. Given the absence of a definitional consensus on the meaning of “terrorism” in international law,⁵ this Article defines “terrorist groups” as entities that are legally designated as such by states, focusing on a particular subset of terrorist groups that are engaged in armed conflict with the United States and therefore implicate international humanitarian law (IHL) and customary international law. Among the various armed groups that engage in terrorism, state-building terrorist groups can be distinguished from others by the following characteristics: (1) the presence of a non-military wing analogous to a civilian bureaucracy that provides services, including food, electricity, and healthcare, to the governed population; (2) dual-use institutions that simultaneously perform

¹ Jean-Charles Brisard & Damien Martinez, *Islamic State: The Economy-Based Terrorist Funding*, REUTERS (Oct. 2014), <http://www.gdr-elsj.eu/wp-content/uploads/2015/11/Islamic-State.pdf> [<https://perma.cc/5WFT-MC8F>]; *The Growing Strategic Threat of ISIS: Hearing Before the H. Comm. on Foreign Affairs*, 114th Cong. 12 (2015) (statement of Rick Brennan, Jr., Ph.D., Senior Political Scientist, RAND Corp.), <https://www.gpo.gov/fdsys/pkg/CHRG-114hhrg93284/pdf/CHRG-114hhrg93284.pdf> [<https://perma.cc/H7HN-2JUR>].

² See Islamic State, *الدولة الإسلامية توزع البنزين مجاناً على الناس* (The Islamic State Distributes Free Benzene to the People) (May 8, 2014), <https://justpaste.it/g49u> [<https://perma.cc/B6M8-9VP2>].

³ See Islamic State, *وثيقة المدينة: الطبعة الثانية* (Charter of the City: Second Edition) (2016), https://archive.org/details/wth_mm.

⁴ I adapt this definition from that of Sean Yom. See SEAN YOM, FROM RESILIENCE TO REVOLUTION: HOW FOREIGN INTERVENTIONS DESTABILIZE THE MIDDLE EAST 3 (2016).

⁵ DUSTIN A. LEWIS, NAZ K. MODIRZADEH & GABRIELLA BLUM, HARV. L. SCH. PROGRAM ON INT’L L. AND ARMED CONFLICT, MEDICAL CARE IN ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW AND STATE RESPONSES TO TERRORISM 22 (2015), https://dash.harvard.edu/bitstream/handle/1/22508590/HLS_PILAC_Medical_Care_in_Armed_Conflict_IHL_and_State_Responses_to_Terrorism_September_2015.pdf?sequence=1 [<https://perma.cc/Z5U2-7YNV>].

military and civilian functions; and (3) a degree of coercive control over civilians that creates observational equivalence⁶ between victims and supporters of the group. As a result of these characteristics, targeting doctrines that were designed with primarily military groups such as al-Qaeda in mind tend to penalize civilians when applied to state-building terrorist groups that govern people and territory.

The increasing rate of civilian casualties over the course of the U.S.-led campaign against the Islamic State, which reached an all-time high of 1,200 in the month of March 2017,⁷ calls for scrutiny of current targeting policies, particularly in light of concerns that President Donald Trump's Administration was seeking to "dismantle or bypass" restrictions on targeting.⁸ In addition to the possibility that current targeting policies are violating IHL,⁹ anecdotal evidence suggests that these policies are counter-productively impacting Iraqi and Syrian public opinion toward the United States in ways that may ultimately increase support for the Islamic State and other insurgent groups. As Belkis Wille, the Iraq researcher for Human Rights Watch, described the mood in refugee camps near Mosul, "Remarkably, when I interview families at camps who have just fled the fighting, the first thing they complain about is not the three horrific years they spent under ISIS, or the last months of no food or clean water, but the American airstrikes."¹⁰ The evidence presented in this Article, which was collected over the course of five months of fieldwork in southern Turkey and Iraq, includes primary source documents produced by the Islamic State, social media data generated by internet users in or near Islamic State-controlled areas of Syria and Iraq, interviews with former Islamic State combatants and civilian employees, and original data on the targeting of 11 Islamic State *zakāt* offices on 19 different occasions.¹¹ These *zakāt* offices,

⁶ In the natural and social sciences, "observational equivalence" refers to a situation in which two or more entities are indistinguishable on the basis of their observable characteristics when in fact they may be different for unobserved reasons. See, e.g., GARY KING, ROBERT KEOHANE & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* 59–60 (1994).

⁷ See Jared Malsin, *Civilian Casualties from American Airstrikes in the War Against ISIS Are At An All-Time High*, TIME (Mar. 26, 2017), <http://time.com/4713476/isis-syria-iraq-casualties-us-airstrikes/> [<https://perma.cc/4JDG-D289>].

⁸ Oona Hathaway, *Why the Spike in Civilian Casualties of U.S. Military Action?*, NEWSWEEK (Mar. 28, 2017), <http://www.newsweek.com/why-spike-civilian-casualties-us-military-action-575266> [<https://perma.cc/SR8Q-KFUL>].

⁹ *Iraq: Civilians Killed by Airstrikes in Their Homes after They Were Told Not to Flee Mosul*, AMNESTY INT'L (Mar. 28, 2017), <https://www.amnesty.org/en/latest/news/2017/03/iraq-civilians-killed-by-airstrikes-in-their-homes-after-they-were-told-not-to-flee-mosul/> [<https://perma.cc/J8LN-33XY>].

¹⁰ Samuel Oakford, *Trump's Air War Has Already Killed More Than 2,000 Civilians*, DAILY BEAST (Jul. 17, 2017), <http://www.thedailybeast.com/president-trumps-air-war-kills-12-civilians-per-day> [<https://perma.cc/X8KW-Z2GL>].

¹¹ *Zakāt*, the third of five Pillars of Islam, refers to a mandatory charitable contribution traditionally levied at a rate of 2.5 percent of a Muslim's income and assets that is functionally similar to an income tax. Natana DeLong-Bas, *The Five Pillars of Islam*, OXFORD BIBLIOGRAPHIES IN ISLAMIC STUD. (Dec. 14, 2009), <http://www.oxfordbibliographies.com/view/document/obo-9780195390155/obo-9780195390155-0062.xml> [<https://perma.cc/VH9V-XYDL>]. *Zakāt* is considered to be a universal obligation on all Muslims with sufficient means. *Id.* The Islamic State has established *zakāt* offices throughout its territory in Iraq and Syria that are responsible both for

which are located in densely populated areas and simultaneously collect taxes (a war-sustaining activity) and distribute cash assistance and food to impoverished civilians (a humanitarian activity), illustrate the potential costs of targeting dual-use institutions that simultaneously perform military and civilian functions.

Part II presents a brief history of the current U.S. counter-terrorism paradigm since its origins in the aftermath of the September 11th attacks to argue that this paradigm has failed to adapt to important changes in the landscape of global terrorism since 2001, including the rise of “state-building” terrorist groups. Part III generates typologies to illustrate how state-building terrorist groups differ from two other types of terrorist groups—(1) non-territorial and (2) territorial but non-governing—in ways that have important implications for the targeting of personnel and objects. Parts IV and V present primary-source evidence in support of the argument that existing targeting policies designed for al-Qaeda and other primarily military terrorist groups tend to penalize civilians when applied to state-building terrorist groups such as the Islamic State. Part VI offers targeting recommendations that take into consideration the structural vulnerability of civilians living in areas controlled and governed by state-building terrorist groups while still allowing governments to prosecute civilians who aid such groups under domestic material support laws. The Appendix describes the methodology and sources of data upon which the Article is based.

II. A Brief History of the Current U.S. Counter-Terrorism Paradigm and Its Divergence from Realities on the Ground

A. *Origins of the Current U.S. Counter-Terrorism Paradigm*

Shortly after the September 11th attacks, former President George W. Bush declared the beginning of the “war on terror” in a speech before Congress.¹² Although al-Qaeda did not formally claim responsibility for the attacks until April 2002,¹³ the group was identified as a “prime suspect” by September 17,¹⁴ and was assumed to be the perpetrator by the time of the President’s statement on September 20: “Our war on terror begins with [al-Qaeda], but it does not end there. It will not

collecting *zakāt* in the form of cash or food and redistributing these resources to the poor. See Mara Revkin, What Explains Taxation by Resource-Rich Rebels? New Data from the Islamic State in Syria (Oct. 22, 2017) (presented at the Annual Meeting of the American Political Science Association on Sept. 3, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3023317 [<https://perma.cc/S9SY-4MMR>].

¹² *Text: President Bush Addresses the Nation*, WASH. POST (Sept. 20, 2001), http://www.washingtonpost.com/wp-srv/nation/specials/attacked/transcripts/bushaddress_092001.html [<https://perma.cc/AJU5-MSG2>] [hereinafter *Bush Address*] (text of President George W. Bush’s address to a joint session of Congress).

¹³ *Al Qaeda Claims Responsibility for September 11*, CNN (Apr. 15, 2002), <http://www.cnn.com/2002/WORLD/asiapcf/central/04/15/alzawahiri.transcript/> [<https://perma.cc/3WDD-P8FE>].

¹⁴ Todd Purdum, *After the Attacks: The White House; Bush Warns of a Wrathful, Shadowy and Inventive War*, N.Y. TIMES (Sept. 17, 2001), <https://nyti.ms/2F6gAai>.

end until every terrorist group of global reach has been found, stopped and defeated.”¹⁵ Although the President framed the “war on terror” as broader than mere retaliation against al-Qaeda, in reality, the speech inaugurated a new counter-terrorism paradigm designed almost exclusively around the group that—in this historical moment—was perceived as the greatest threat to U.S. national security and global stability. The domestic legal basis for the “war on terror” was established with the 2001 Authorization for Use of Military Force (AUMF), which authorized the President to:

[U]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States¹⁶

Although al-Qaeda is not named in the text of the 2001 AUMF, over time, President Bush’s Administration and later that of President Barack Obama interpreted the language to apply not only to al-Qaeda but also to its “associated forces” for both detention and targeting purposes. In May 2013, President Obama clarified that the Administration was continuing to rely on the 2001 AUMF to take “lethal, targeted action against al Qaeda and its associated forces, including with remotely piloted aircraft commonly referred to as drones.”¹⁷ The Obama Administration articulated a two-part test for determining whether or not a given group was an “associated force” of al-Qaeda and therefore covered by the 2001 AUMF: the group must be “(1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) . . . a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners.”¹⁸ The term “associated forces” has been interpreted expansively to include the Islamic State (operating in Syria, Iraq, and Libya) and more recently al-Shabaab in Somalia, although neither of these groups was in existence at the time the 2001 AUMF was signed into law.¹⁹ In 2013, President Obama acknowledged that the twelve-year-old AUMF was outdated and pledged to work with Congress “to refine, and ultimately repeal” it.²⁰ Nonetheless, the 2001 AUMF remains in effect under the Administration of President Donald Trump, despite growing

¹⁵ *Bush Address*, *supra* note 12.

¹⁶ Authorization for Use of Military Force, S.J. Res. 23, 107th Cong., 115 Stat. 224 (2001).

¹⁷ Barack Obama, Remarks by the President at the National Defense University (May 23, 2013), (transcript available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> [<https://perma.cc/826W-XKNT>]).

¹⁸ Jeh Johnson, Gen. Counsel, U.S. Dep’t of Def., Speech at the Oxford Union, Univ. of Oxford: The Conflict Against Al Qaeda and its Affiliates: How Will It End? (Nov. 30, 2012) (transcript available at <https://www.lawfareblog.com/jeh-johnson-speech-oxford-union> [<https://perma.cc/H979-6VD9>]).

¹⁹ Charlie Savage, Eric Schmitt & Mark Mazzetti, *Obama Expands War with Al Qaeda to Include Shabab in Somalia*, N.Y. TIMES (Nov. 27, 2016), <https://nyti.ms/2k9Mw3a>.

²⁰ Obama, *supra* note 17.

pressure for its repeal and numerous proposals for its replacement with a new, Islamic State-specific AUMF.²¹

It might be argued that the Taliban, another state-building terrorist group that—like the Islamic State—governs territory and people, was as influential as al-Qaeda in the formation of U.S. counter-terrorism policies in the 2000s. Although the Taliban is mentioned in the Bush Administration’s 2002 and 2006 National Security Strategy and in the Obama Administration’s 2010 National Security Strategy, these documents contain a total of forty references to al-Qaeda in comparison with only six references to the Taliban, indicating that both administrations were much more focused on the threat posed by al-Qaeda.²²

Although the U.S. counter-terrorism paradigm and its justificatory legal framework have remained virtually unchanged since 2001, the global landscape of terrorism has been fundamentally transformed by three overarching trends: (1) the weakening of al-Qaeda’s “core” and decentralization of its operations through a network of affiliates; (2) the frequent reconfiguration of alliances and rivalries between different terrorist groups over time; and (3) in the aftermath of the Arab Spring, the rise of a new wave of jihadist groups that saw the overthrow of authoritarian regimes as an opportunity to seize territory and initiate alternative state-building projects based on *shari‘a*. This third development is the primary focus of this Article but it represents just one facet of a broader problem: the

²¹ On June 29, 2017, the House Appropriations Committee approved for the first time an amendment proposed by Democratic Representative Barbara Lee that would repeal the 2001 AUMF. Although unlikely to become law, “it will at least force some debate.” See Robert Chesney, *Repealing the 2001 AUMF? A Surprise Vote by the House Appropriations Committee*, LAWFARE (Jun. 29, 2017), <https://www.lawfareblog.com/repealing-2001-aumf-surprise-vote-house-appropriations-committee> [https://perma.cc/H87D-JW8U]. See also Harold Koh, *The Lawful Way to Fight the Islamic State*, POLITICO (Aug. 29, 2014), <http://www.politico.com/magazine/story/2014/08/the-lawful-way-to-fight-the-islamic-state-110444> [https://perma.cc/S5WA-PP22] (arguing that the Administration “should engage with Congress to develop an ISIL-specific AUMF”). Several members of Congress have released proposals for a new Islamic State-specific AUMF in recent years, including H.R.J. Res. ___, 115th Cong. (2017) (draft by Representative Eliot Engel (D-NY)); S.J. Res. 43, 115th Cong. (2017) (sponsored by Senators Tim Kaine (D-VA) and Jeff Flake (R-AZ)); H.R.J. Res. 100, 115th Cong. (2017) (sponsored by Representative Adam Schiff (D-CA) and others); S.J. Res. 31, 115th Cong. (2017) and H.J. Res. 89, 115th Cong. (2017) (sponsored, respectively, by Senator Todd Young (R-IN) and Representative Jim Banks (R-IN)); H.R. Con. Res. 2, 115th Cong. (2017) (sponsored by Representative Tom Cole (R-OK) and Representative Scott Taylor (R-VA)); and S.J. Res. 29, 114th Cong. (2016) (sponsored by Senator Mitch McConnell (R-KY)). See, e.g., *ISIS AUMF Proposals in 115th Congress (2017-18)*, JUST SEC. (Jun. 19, 2017), <https://www.justsecurity.org/wp-content/uploads/2017/06/Just-Security-AUMF-Chart-June-19-2017fin.pdf> [https://perma.cc/54R9-CC92]; *Summary of ISIS AUMF Proposals*, HUMAN RIGHTS FIRST (June 2017), <http://www.humanrightsfirst.org/sites/default/files/ISIS-AUMF-Proposal-Chart.pdf> [https://perma.cc/P2BW-E7BH].

²² See THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 2002), <http://nssarchive.us/NSSR/2002.pdf> [https://perma.cc/4MBN-FM68]; THE WHITE HOUSE, THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Mar. 2006), <http://nssarchive.us/NSSR/2006.pdf> [https://perma.cc/UNC6-ZFB2]; THE WHITE HOUSE, NATIONAL SECURITY STRATEGY (May 2010), <http://nssarchive.us/NSSR/2010.pdf> [https://perma.cc/L4AY-BSNK].

disconnect between an outdated counter-terrorism paradigm and the new realities of global terrorism.

B. *The Decentralization of al-Qaeda*

Since 2001, al-Qaeda has undergone a fundamental transformation from a highly centralized organization with a top-down command structure to a diffuse network of semi-autonomous affiliates with “no clear center of gravity,” according to anonymous senior U.S. government officials.²³ By 2005, much of al-Qaeda’s mid-level leadership had been killed or detained and thousands of lower-ranking operatives had been killed in U.S. counter-terror operations, particularly in Afghanistan.²⁴ By 2007, experts were concluding that “Al-Qaeda central no longer exists”²⁵ and that the organization was “only a shell of its former self.”²⁶ Years before al-Qaeda’s leader, Osama Bin Laden, was killed in 2011 by U.S. Navy Seals in Pakistan, analysts had already begun to describe the group as a “leaderless jihad.”²⁷

Over time, the group has adopted an increasingly decentralized strategy based largely on encouraging and inspiring local “affiliates” to attack Western targets.²⁸ Although al-Qaeda’s own fighting force has been decimated since 2001, its network of affiliates has grown to include al-Qaeda in the Arabian Peninsula (AQAP, based in Yemen), al-Qaeda in the Islamic Maghreb (AQIM, based in Algeria), al-Shabaab (based in Somalia), and al-Qaeda in Iraq (which has since evolved into the Islamic State).²⁹ Accordingly, the most damaging al-Qaeda attacks in recent years have been planned and carried out not by the dwindling “core” leadership responsible for September 11th but by local affiliates or individual “lone wolves”³⁰ inspired by al-Qaeda’s ideology. Although they claim to be acting in the name of al-Qaeda, there is often little to no evidence of a chain-of-command, planning, or coordination by al-Qaeda leadership. Such attacks include the bombing

²³ JOHN ROLLINS, CONG. RES. SERV., R41070, AL QAEDA AND AFFILIATES: HISTORICAL PERSPECTIVE, GLOBAL PRESENCE, AND IMPLICATIONS FOR U.S. POLICY, at ii (2011), <https://fas.org/sgp/crs/terror/R41070.pdf> [<https://perma.cc/MXW3-WMVD>].

²⁴ Anthony N. Celso, *Al Qaeda’s Post-9/11 Organizational Structure and Strategy: The Role of Islamist Regional Affiliates*, 23 MEDITERRANEAN Q. 30, 33 (2012).

²⁵ Eben Kaplan, *The Rise of al-Qaedaism*, COUNCIL FOREIGN REL. (Jul. 18, 2007), <https://www.cfr.org/backgrounder/rise-al-qaedaism> [<https://perma.cc/5WDZ-QAZ8>] (quoting an interview with Fawaz Gergez).

²⁶ Fred Burton & Scott Stewart, *Al Qaeda and the Strategic Threat to the U.S. Homeland*, STRATFOR (Jul. 25, 2007), https://www.stratfor.com/al_qaeda_and_strategic_threat_u_s_homeland [<https://perma.cc/7D3W-KK5T>].

²⁷ *How Jihad Went Freelance*, ECONOMIST (Jan. 31, 2008), <http://www.economist.com/node/10601243> [<https://perma.cc/4Y7J-6H2L>].

²⁸ Celso, *supra* note 24, at 33.

²⁹ R. K. Cragin, *A Recent History of al-Qa’ida*, 57 HIST. J. 803, 807 (2014).

³⁰ Sam Frizell, *Al-Qaeda Leader Calls for Lone-Wolf Attacks on American Homes*, TIME (Sept. 14, 2015), <http://time.com/4033210/al-qaeda-leader-calls-for-lone-wolf-attacks-on-american-homes/> [<https://perma.cc/VL7H-GJRH>].

of two Bali nightclubs in October 2002 (perpetrated by Jemaah Islamiyah),³¹ the detonation of four truck bombs in Istanbul in 2003 (perpetrated by Turkish extremists who approached al-Qaeda for financing after they had already planned the operation independently),³² and the London suicide bombings of July 2005 (perpetrated by four British nationals who had visited Pakistan before the attack but had no direct ties to al-Qaeda).³³ The decentralization and geographical dispersion of al-Qaeda since 2011 has made the group less unified but also less predictable as affiliates and “lone wolves” devise their own operations without organizational oversight.

C. *Shifting Alliances and Rivalries*

A second important development has been the reconfiguration of alliances and rivalries between different terrorist groups over time. Al-Qaeda and the Taliban, its former host in Afghanistan, have drifted apart since 2001. By 2010, analysts and U.S. government officials were observing a “growing rift” and “fissures” between the groups, evidenced by the Taliban’s refusal to provide shelter and assistance to al-Qaeda fighters in the Pakistani border areas,³⁴ and public accusations by al-Qaeda ideologues that the Taliban’s strategy was too “nationalist” (in contrast with al-Qaeda’s transnational ambitions).³⁵ Even one of Osama Bin Laden’s own sons admitted, “[a]lthough Al-Qaeda and the Taliban organizations band together when necessary, they do not love one another.”³⁶

Meanwhile, another important alliance has formed and broken in the years since 2001. The group now known as the Islamic State, which emerged from al-Qaeda in Iraq in the early 2000s (called the “Islamic State in Iraq” (ISI) at that time),³⁷ pledged allegiance to Ayman al-Zawahiri, who succeeded Osama Bin

³¹ *The 12 October 2002 Bali Bombing Plot*, BBC (Oct. 11, 2012), <http://www.bbc.com/news/world-asia-19881138> [<http://perma.cc/773L-86TA>].

³² Karl Vick, *Al-Qaeda’s Hand in Istanbul Plot*, WASH. POST (Feb. 13, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/12/AR2007021201715.html> [<https://perma.cc/S79F-R32K>].

³³ Mark Townsend, *Leak reveals official story of London bombings*, GUARDIAN (Apr. 8, 2006), <https://www.theguardian.com/uk/2006/apr/09/july7.uksecurity> [<https://perma.cc/8DHS-5KPC>].

³⁴ Myra MacDonald, *Fresh Reports Surface of Taliban-al Qaeda Rift*, REUTERS (Mar. 14, 2010), <http://blogs.reuters.com/pakistan/2010/03/14/fresh-reports-surface-of-taliban-al-qaeda-rift/> [<https://perma.cc/QKU6-8XQR>].

³⁵ Vahid Brown, *Al-Qaeda and the Afghan Taliban: “Diametrically Opposed”?*, FOREIGN POL’Y (Oct. 22, 2009), <http://foreignpolicy.com/2009/10/22/al-qaeda-and-the-afghan-taliban-diametrically-opposed/> [<https://perma.cc/TX29-RMSX>]. See also Juha Saarinen, *What is the current relationship between al Qaeda and the Taliban?*, LONDON SCH. ECON. & POL. SCI. (Apr. 22, 2010), <http://blogs.lse.ac.uk/ideas/2010/04/what-is-the-current-relationship-between-al-qaeda-and-the-taliban/> [<https://perma.cc/DNQ2-6DDW>].

³⁶ William Maclean, *Bin Laden’s Son: No “Love” among Qaeda-Taliban*, REUTERS (Jan. 26, 2010), <http://www.reuters.com/article/us-security-afghanistan-binladen-interview/idUSTRE60P4A320100126> [<http://perma.cc/N4RA-UGLZ>].

³⁷ Cameron Glenn, *Timeline: The Rise, Spread and Fall of the Islamic State*, WILSON CTR. (Jul. 5, 2016), <https://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state> [<https://perma.cc/2BZB-29PH>].

Laden to become al-Qaeda's leader in 2011.³⁸ As the Syrian civil war intensified, ISI's leader, Abu Bakr al-Baghdadi, took advantage of the nearby power vacuum to project the group's influence into Syria, where the group rapidly captured territory and helped to establish al-Qaeda's Syrian affiliate, Jabhat al-Nusra in 2013.³⁹ When al-Baghdadi changed his group's name to the "Islamic State in Iraq and the Levant" (ISIL) to reflect its geographical expansion and tried to absorb Jabhat al-Nusra by unilaterally declaring a "merger," al-Zawahiri objected to this power grab in a letter that rejected the merger and reminded al-Baghdadi that his "seat" was in Iraq.⁴⁰ After failed attempts at mediation, al-Qaeda formally dissociated itself from ISIS in February 2014, declaring that "ISIS 'is not a branch of the al-Qaeda group . . . does not have an organizational relationship with it and [al-Qaeda] is not the group responsible for their actions.'" ⁴¹ A few months later, on June 29, 2014, al-Baghdadi declared the establishment of a "caliphate" and again changed the group's name—this time to the "Islamic State," signaling global ambitions beyond Iraq and Syria.⁴² The decision to declare a caliphate was widely criticized by al-Qaeda officials and affiliates as premature and lacking "consultation" with other jihadist groups and scholars.⁴³ In November 2015, after the Islamic State's spokesman gave a speech deriding skeptics of the group for being "tricked by the fatwas of the donkeys and mules of knowledge,"⁴⁴ AQIM and

³⁸ Mustapha Ajbaili, "Al Qaeda in Iraq" Backs Zawahiri to Replace Bin Laden as Global Head of Terrorist Body, AL ARABIYA (May 9, 2011), <https://english.alarabiya.net/articles/2011/05/09/148471.html> [<https://perma.cc/R3WV-UM9Q>].

³⁹ Glenn, *supra* note 37.

⁴⁰ Letter from Ayman al-Zawahiri to the Leaders of the Two Jihadi Groups (May 22, 2013), <http://s3.documentcloud.org/documents/710588/translation-of-ayman-al-zawahiris-letter.pdf> [<https://perma.cc/9NFJ-BJ53>] (translated by Al Jazeera).

⁴¹ Liz Sly, *Al-Qaeda Disavows Any Ties with Radical Islamist ISIS Group in Syria, Iraq*, WASH. POST (Feb. 3, 2014), https://www.washingtonpost.com/world/middle_east/al-qaeda-disavows-any-ties-with-radical-islamist-isis-group-in-syria-iraq/2014/02/03/2c9afc3a-8cef-11e3-98ab-fe5228217bd1_story.html?utm_term=.b4bc6a756515 [<https://perma.cc/JBR7-9KQH>].

⁴² Gabriel Said Reynolds, *Naming An Enemy: Islamic State, IS, ISIL, ISIS, Or Daesh?*, HUFFINGTON POST (Jun. 3, 2016), https://www.huffingtonpost.com/gabriel-said-reynolds/naming-an-enemy-islamic-s_b_10217768.html [<https://perma.cc/3EL6-4WE8>].

⁴³ Shortly after the Islamic State's declaration of a caliphate, a senior al-Qaeda scholar, Abu Mohamed Mohammad al-Maqdisi, rejected it as premature: "All of us [jihadists] look forward to the restoration of the caliphate . . . but whoever rushes something before the time is right will be punished with deprivation of it." Mohamed Mohammad al-Najjar, *المقدسسي ينتقد إعلان "الخلافة" ويهاجم تنظيم الدولة* (al-Maqdisi Criticizes the Announcement of the Declaration of the "Caliphate" and Attacks the Islamic State Organization), AL JAZEERA (Feb. 7, 2014), <http://www.aljazeera.net/home/print/f6451603-4dff-4ca1-9c10-122741d17432/5df7feb1-e050-4a98-9b38-27357611553f> [<https://perma.cc/TKC8-2NVF>]. Al-Qaeda in the Islamic Maghreb (AQIM) issued the following denunciation: "It is obvious for the Muslims and all jihadi organizations that follow the correct method, that the announcement of such a serious step, . . . will not happen but after the expansion of consultation [with other jihadist groups and scholars]." Thomas Joscelyn, *AQIM Rejects Islamic State's Caliphate, Reaffirms Allegiance to Zawahiri*, LONG WAR J. (Jul. 14, 2014), http://www.longwarjournal.org/archives/2014/07/aqim_rejects_islamic.php [<https://perma.cc/KZ83-9TXH>].

⁴⁴ Abu Mohamed al-Adnani, *قُلْ لِلَّذِينَ كَفَرُوا سَعْتٌ لَّيْسَ بِهِمْ عَذَابٌ أَلِيمٌ* (Say to Those Who Disbelieve, "You Will Be Overcome"), AL-HAYAT MEDIA CTR. (Oct. 14, 2015), <https://web.archive.org/web/20160126203143/https://justpaste.it/oawf> [<https://perma.cc/XC5A-62MZ>]. See also Adam Taylor, *The Dispute between al-Qaeda and the Islamic State Has Devolved*

AQAP issued a joint video statement accusing the Islamic State of “deviation and misguidance.”⁴⁵ Although the feud between al-Qaeda and the Islamic State has been bitter, it is not necessarily permanent. In April 2017, Iraqi Vice President Ayad Allawi reported hearing of “discussions and dialogue” between the two groups about the possibility of restoring their former alliance.⁴⁶

Since 2001, alliances and rivalries between different terrorist groups have undergone frequent and dramatic reconfigurations. The changing relationships described above call into question the continued relevance of a counter-terror framework that remains oriented around “al-Qaeda and associated forces” and does not acknowledge the instability and impermanence of inter-group relationships over time.

D. *The Rise of State-Building Terrorist Groups*

A third transformative development, and one that is the primary focus of this Article, is the rise of “state-building” terrorist groups that aspire to govern people and territory. Although the current counter-terrorism paradigm is designed around the assumption that terrorist groups are primarily military organizations, that assumption is contradicted by the empirical realities of a new generation of terrorist groups with state-like ambitions for sovereignty. Since the Arab Spring began in 2011, authoritarian governments in Egypt, Libya, Tunisia, and Yemen have been overthrown by revolutionary movements (although Egypt’s 2013 military coup has led to the resurgence of authoritarianism in that country).⁴⁷ In Syria, the embattled government of Bashar al-Assad has managed to retain power at the cost of a deadly civil war that has become increasingly internationalized over time. In all of these countries, political instability has created opportunities for non-state actors—both domestic and foreign—to challenge state monopolies on power. In war-torn Syria and neighboring Iraq, where a nascent democracy has periodically faced protests condemning public-sector corruption, ineffective service provision, and preferential treatment of the Shi’ite majority (which controls the government), the Islamic State has exploited these grievances to recruit supporters and seize territory. In Egypt’s Sinai Peninsula, Salafi groups took advantage of local frustration with the corruption and inefficiency of government courts to establish their own independent judiciaries in the immediate aftermath of the 2011

to *Name-Calling*, WASH. POST (Nov. 2, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/11/02/the-dispute-between-al-qaeda-and-the-islamic-state-has-devolved-to-name-calling/?utm_term=.b9e4771ec811 [<https://perma.cc/9AAQ-DN8B>].

⁴⁵ Taylor, *supra* note 44.

⁴⁶ Babak Dehghanpisheh, *Islamic State Seeking Alliance with al Qaeda, Iraqi Vice President Says*, REUTERS (Apr. 17, 2017), <http://www.reuters.com/article/us-mideast-crisis-iraq-islamic-state-idUSKBN17J1DT> [<http://perma.cc/UDS3-4SX2>].

⁴⁷ Nathan Brown & Katie Bentivoglio, *Egypt’s Resurgent Authoritarianism: It’s a Way of Life*, CARNEGIE ENDOWMENT INT’L PEACE (Oct. 9, 2014), <http://carnegieendowment.org/2014/10/09/egypt-s-resurgent-authoritarianism-it-s-way-of-life-pub-56877>.

revolution, creating a situation of competitive legal pluralism.⁴⁸ Since then, a Sinai-based insurgent group, Anṣār Bayt al-Maqdis, has pledged allegiance to the Islamic State and claimed responsibility for dozens of attacks targeting Egyptian government personnel.⁴⁹ Although the group does not yet control territory, it is reportedly attempting to impose its version of *shari‘a* in the city of Rafah by ordering women to cover their faces and stay at home except when accompanied by a male guardian,⁵⁰ and by confiscating cigarettes and other contraband items.⁵¹

These examples reflect a new wave of “state-building” jihadist groups that has emerged in recent years, signaling “an end of al Qaeda’s unipolar global jihad of the past decade and a return to a multipolar jihadosphere.”⁵² This new generation includes the Islamic State and affiliated groups outside of Iraq and Syria that have pledged allegiance to it, such as Anṣār Bayt al-Maqdis.⁵³ It also includes “Ansar al-Sharia” groups in five different countries that share the same name and a common goal of establishing *shari‘a*-based governance but nonetheless operate independently of one another.⁵⁴ State-building terrorist groups differ from groups that do not hold territory or engage in governance in that they rely heavily on civilian employees and on the support and cooperation of the local population. This Article argues that existing counter-terror frameworks designed with al-Qaeda in mind tend to penalize civilians when applied to state-building terrorist groups such as the Islamic State.

E. *The U.S. Counter-Terrorism Paradigm Has Failed to Adapt to New Realities*

Although the global landscape of terrorism has evolved significantly since 2001, the U.S. counter-terrorism paradigm has not kept pace with these changes. In June 2011, President Obama’s official counter-terrorism strategy acknowledged that, “[f]or the past decade, the preponderance of the United States’ [counter-terrorism] effort has been aimed at preventing the recurrence of an attack on the

⁴⁸ Mara Revkin, *Triadic Legal Pluralism in North Sinai: A Case Study of State, Shari‘a, and ‘Urf Courts in Conflict and Cooperation*, 13 UCLA J. ISLAMIC & NEAR E. L. 21 (2014).

⁴⁹ David D. Kirkpatrick, *Militant Group in Egypt Vows Loyalty to ISIS*, N.Y. TIMES (Nov. 10, 2014), <https://nyti.ms/2kcH5RB>.

⁵⁰ Mohamed Abu al-Ayun, *بيت المقدس يخبر المعلمات بين ارتداء النقاب أو إقامة الحد (Bayt al-Maqdis Announces that [Women] Must Wear the Niqab or Face Punishment)*, VETO (Feb. 26, 2017), <http://www.vetogate.com/2601168> [<http://perma.cc/RV78-37YW>].

⁵¹ Ashraf Abdul Ahamid, *قبيلة مصرية تخطف عناصر من داعش وتلاحق آخرين (Egyptian Tribe Kidnaps Members of the Islamic State and Chases Others)* AL ARABIYA (Apr. 17, 2017), goo.gl/eXsxq3 [<https://perma.cc/U8M4-XVR6>].

⁵² Aaron Zelin, *Know Your Ansar al-Sharia*, FOREIGN POL’Y (Sept. 21, 2012), <http://foreignpolicy.com/2012/09/21/know-your-ansar-al-sharia/> [<https://perma.cc/P776-4HTN>].

⁵³ Kirkpatrick, *supra* note 49.

⁵⁴ “Ansaria al-Sharia” groups are present in the following countries: Yemen, Libya, Tunisia, Mali, Egypt, Mauritania, Morocco, and Syria. Of these, only the Yemen-based group has known operational links to al-Qaeda. See Zelin, *supra* note 52.

Homeland directed by [al-Qaeda].”⁵⁵ Although the strategy referred to the importance of adapting to the “next wave” of transnational terrorism,⁵⁶ the legal framework underlying U.S. counter-terror policies has changed little in the years since. Each of the three developments discussed above presents a challenge to the continued viability of laws and policies that were designed around a version of al-Qaeda that no longer exists, and that fail to account for new forms of terrorism.

First, today’s al-Qaeda is far more decentralized and geographically dispersed than the organization that attacked the United States on September 11,⁵⁷ yet the domestic legal basis for counter-terror targeting remains unchanged. The Obama Administration has cited the 2001 AUMF as justification for targeting al-Qaeda affiliates that did not exist at the time of the September 11th attacks, notably al-Shabaab.⁵⁸ In November 2016, the Administration expanded the scope of the 2001 AUMF to cover al-Shabaab in Somalia by deeming the group to be part of the armed conflict against al-Qaeda,⁵⁹ even though al-Shabaab was not formed until 2006,⁶⁰ and did not pledge allegiance to al-Qaeda until 2012.⁶¹ Although al-Shabaab has embraced the rhetoric of global jihad for branding and recruitment purposes,⁶² its actions indicate that its true agenda remains primarily local (demanding the implementation of *shari’a* and expulsion of foreign peacekeepers from its territory, where ninety-five percent of its violent operations have been conducted).⁶³ There is little evidence to suggest that al-Shabaab has ever been genuinely committed to expanding its operations beyond the Horn of Africa, and it has been suggested that the group’s primary motivation for entering into an alliance with al-Qaeda was not to support its attacks on the U.S. and other Western targets, but rather, to extract resources from al-Qaeda—in the form of funding, training, weapons, and “military know-how”—to more effectively pursue its own agenda on Somali soil.⁶⁴ “Stretching” the scope of the 2001 AUMF to cover groups such as

⁵⁵ THE WHITE HOUSE, NATIONAL STRATEGY FOR COUNTERTERRORISM 11 (Jun. 2011), https://obamawhitehouse.archives.gov/sites/default/files/counterterrorism_strategy.pdf [<https://perma.cc/R66S-52LS>].

⁵⁶ *Id.*

⁵⁷ Rollins, *supra* note 23.

⁵⁸ Savage et al., *supra* note 19.

⁵⁹ *Id.*

⁶⁰ STIG J. HANSEN, AL-SHABAAB IN SOMALIA: THE HISTORY AND IDEOLOGY OF A MILITANT ISLAMIST Group 41 (2013).

⁶¹ Katharine Houreld, *Somali Militant Group al-Shabaab Formally Joins al-Qaida*, ASSOC. PRESS (Feb. 9, 2012), <https://www.theguardian.com/world/2012/feb/09/somali-al-shabaab-join-al-qaida> [<https://perma.cc/VK6W-3GUZ>].

⁶² Cody Curran, *Global Ambitions: An Analysis of al Shabaab’s Evolving Rhetoric*, CRITICAL THREATS (Feb. 17, 2011), <https://www.criticalthreats.org/analysis/global-ambitions-an-analysis-of-al-shabaabs-evolving-rhetoric> [<https://perma.cc/GJK9-YQUV>].

⁶³ Caitriona Dowd & Clionadh Raleigh, *The Myth of Global Islamic Terrorism and Local Conflict in Mali and the Sahel*, 112 AFR. AFF. 498, 504 (2013).

⁶⁴ Jeremy Scahill, *The Purge: How Somalia’s Al Shabaab Turned Against Its Own Foreign Fighters*, INTERCEPT (May 19, 2015), <https://theintercept.com/2015/05/19/somalia-al-shabaab-foreign-fighter-cia/> [<https://perma.cc/EZ6S-9XZ7>].

al-Shabaab that postdate the September 11th attacks by many years threatens to undermine the legality and legitimacy of U.S. counter-terror operations.⁶⁵

Second, and related to the first concern, the frequent reconfiguration of alliances between terrorist groups, some of which did not even exist in 2001, poses a challenge to a counter-terrorism framework oriented around al-Qaeda and its “associated forces.” The problem is illustrated by the case of the Islamic State, which originated as an offshoot and ally of al-Qaeda but has since cut ties with the group over ideological and strategic disagreements. In September 2014, the Obama Administration said that both the 2001 AUMF and subsequent Authorization for Use of Military Force Against Iraq Resolution of 2002 provided sufficient legal authority for airstrikes targeting the Islamic State.⁶⁶ But given the official split between al-Qaeda and the Islamic State, the latter no longer satisfies the definition of “associated forces” articulated by the Obama Administration.⁶⁷

Third, the rise of a new generation of “state-building” terrorist groups presents challenges for a counter-terrorism framework that was designed for primarily military groups such as al-Qaeda that do not control territory or govern people. The remainder of this Article will explain why the empirical characteristics of state-building terrorist groups—(1) the presence of a non-military wing analogous to a civilian bureaucracy that provides services, including food, electricity, and healthcare, to the governed population; (2) dual-use institutions that simultaneously perform military and civilian functions; and (3) a degree of coercive control over civilians that creates observational equivalence between victims and supporters of the group—necessitate a rethinking of existing targeting principles.

III. Structural Characteristics of State-Building Terrorist Groups

A. *A Typology of Terrorist Groups*

Scholars of civil war and state formation have long recognized an empirical distinction between armed groups that engage exclusively in warfare and terrorism and those with state-like aspirations to govern people and territory.⁶⁸ Although the latter are not a new phenomenon—early twentieth century examples include the

⁶⁵ Savage et al., *supra* note 19.

⁶⁶ Charlie Savage, *Obama Sees Iraq Resolution as a Legal Basis for Airstrikes, Official Says*, N.Y. TIMES (Sept. 12, 2014), <https://nyti.ms/2uaqLp9>.

⁶⁷ Marty Lederman, “Associated Forces” Has a Legal Meaning . . . but It’s Not “Every Group That Calls Itself al Qaeda,” JUST SEC. (Feb. 4, 2014), <https://www.justsecurity.org/6756/associated-forces-has-legal-meaning-not-every-group-calls-al-qaeda/> [<https://perma.cc/6ST3-3YHD>].

⁶⁸ See Mancur Olson, *Dictatorship, Democracy, and Development*, 87 AM. POL. SCI. REV. 567, 567–68 (1993) (contrasting “roving bandits” that seek primarily to loot the territory in which they operate with “stationary bandits” that build institutions intended for long-term governance of the population).

Irish Republican Army (IRA)⁶⁹ and the Chinese Communist Party⁷⁰—the study of this category of groups is a relatively new area of inquiry and has inspired a growing political science literature on “rebel governance,” which explores the ways in which armed groups use institutions to regulate their relations with civilians.⁷¹ Armed groups that engage in governance and state-building, including terrorist groups, tend to establish institutions that provide services to civilians (e.g., education, healthcare, and electricity) and extract resources from them (e.g., taxation, forced labor, and military conscription). Building on the insights and findings of the rebel governance literature, this Article identifies a category of “state-building” terrorist groups with structural characteristics that have important implications for targeting decisions.

The following typology differentiates between three different types of terrorist groups: (1) non-territorial, (2) territorial but non-governing, and (3) state-building (Table 1). Non-territorial terrorist groups are those that do not control territory and therefore do not have the ability to govern a civilian population. Examples include al-Qaeda and domestic extremist groups such as the contemporary Ku Klux Klan. The second category refers to terrorist groups that control territory but do not engage in governance of civilians, such as Boko Haram in Nigeria and the Lord’s Resistance Army (LRA) in Uganda. Such groups rely primarily on violence and coercion to obtain cooperation from civilians.⁷² The third category refers to groups that both control territory and govern civilians. Examples include the Taliban, the Islamic State, and the FARC in Colombia. Unlike the second category, these state-building terrorist groups generally seek to legitimize their authority to the population by creating institutions that provide public goods and security.

⁶⁹ See FRANK LEDWIDGE, *REBEL LAW: INSURGENTS, COURTS AND JUSTICE IN MODERN CONFLICT* 50 (2017).

⁷⁰ See Marc Opper, *Fighting the People, Fighting for the People: Insurgent Governance and Conflict Outcomes* (2017) (working paper), <https://marcopper.files.wordpress.com/2017/10/05-fighting-the-people-fighting-for-the-people.pdf> [<https://perma.cc/28DA-EZEF>].

⁷¹ See REYKO HUANG, *THE WARTIME ORIGINS OF POSTWAR DEMOCRATIZATION: CIVIL WAR, REBEL GOVERNANCE, AND POLITICAL REGIMES* 8 (2012) (defining “rebel governance” as “a political strategy of rebellion in which rebels forge and manage relations with civilians”); ZACHARIAH MAMPILLY, *REBEL RULERS: INSURGENT GOVERNANCE AND CIVILIAN LIFE DURING WAR* 4 (2011) (defining “rebel governance” as “the range of possibilities for organization, authority, and responsiveness created between guerillas and civilians” (citing Nelson Kasfir, *Dilemmas of Popular Support in Guerrilla War: The National Resistance Army in Uganda, 1981-86*, Paper presented at the Laboratory in Comparative Ethnic Processes (2002)); see also ANA ARJONA, *REBELOCRACY: SOCIAL ORDER IN THE COLOMBIAN CIVIL WAR* 3 (2016) (defining “rebelocracy” as “situations of order where rebels or counter-rebels intervene broadly in civilian affairs).

⁷² See generally Anthony Vinci, *The Strategic Use of Fear by the Lord’s Resistance Army*, 16 *SMALL WARS & INSURGENCIES* 360 (2005).

Table 1. A Typology of Terrorist Groups

	Territorial Control	Governance of Civilians	Examples
1. Non-Territorial			al-Qaeda, KKK
2. Territorial but Non-Governing	X		Boko Haram, LRA
3. State-Building	X	X	Islamic State, Taliban, FARC

B. *Three Characteristics of State-Building Terrorist Groups*

State-building terrorist groups can be further distinguished by three characteristics. First, these groups can be differentiated into military and non-military wings. The non-military wing consists of institutions that maintain order and provide services to the civilian population. For example, the Islamic State employs thousands of personnel in hospitals, schools, municipal offices, and police departments that engage in ordinary law enforcement and crime control activities. These personnel generally do not carry weapons (except for police) and do not necessarily swear oaths of allegiance to the Islamic State. As such, they are analogous to civil servants, bureaucrats, or contractors, rather than combatants. In some cases, they are not even paid by the Islamic State.⁷³ Many of the Islamic State's civilian employees continued to receive salaries and pensions from the Iraqi and Syrian governments for up to a year in areas captured by the group.⁷⁴

Second, state-building terrorist groups tend to operate dual-use institutions that simultaneously perform military and civilian functions. All three categories of terrorist groups utilize assets that an opposing military would classify as "military objectives," defined as objects such as munitions factories and military vehicles that "by their nature, location, purpose or use make an effective contribution to military action" and are therefore lawful targets of direct attack.⁷⁵ The two categories of terrorist groups that control territory (those that are territorial but non-governing as well as those that engage in state-building) operate in areas where civilian objects—"all objects which are not military objectives" and are therefore impermissible targets⁷⁶—are likely to be located in close proximity to military objects.⁷⁷ But, in general, only one category—state-building terrorist groups—is

⁷³ See Isabel Coles, *Despair, Hardship as Iraq Cuts Off Wages in Islamic State Cities*, REUTERS (Oct. 2, 2015), <http://www.reuters.com/article/us-mideast-crisis-iraq-salaries-idUSKCN0RW0V620151002> [http://perma.cc/8Z5N-YT5L].

⁷⁴ *Id.*

⁷⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 52(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

⁷⁶ See *id.* art. 52, ¶(1).

⁷⁷ Although Table 2 draws a distinction between military and civilian objects, it is important to note that a civilian object can be "used in such a way that it loses its civilian character and qualifies as a military objective." See *Rule 10. Civilian objects are protected against attack, unless and for such time as they are military objectives*, ICRC IHL DATABASE: CUSTOMARY IHL, <https://ihl->

characterized by the presence of many dual-use objects and institutions that cannot easily be classified as either military or civilian (Table 2).

Table 2. A Typology of Objects Associated with Different Categories of Terrorist Groups

	Military Objects	Civilian Objects	Dual-Use Objects
1. Non-Territorial	X		
2. Territorial but Non-Governing	X	X	
3. State-Building	X	X	X

For example, the Islamic State operates *zakāt* offices that are responsible both for the collection of mandatory charitable contributions (functionally equivalent to taxes) from civilians and the distribution of welfare benefits in the form of food donations and cash assistance to the poor.⁷⁸ *Zakāt* refers to a system of almsgiving that is the third of the Five Pillars of Islam and therefore obligatory on all Muslims with financial means.⁷⁹ Traditionally, *zakāt* has been imposed on savings and income at a rate of 2.5 percent, as specified in several of the *hadith* (sayings of the Prophet transcribed by his followers).⁸⁰ *Zakāt* may be paid in the form of cash or other possessions such as livestock or agricultural produce.⁸¹ According to an official Islamic State video describing the institution of *zakāt*, anyone who denies the obligation to pay *zakāt* is a *kāfir* (“unbeliever”), and anyone who “resist[s] its payment with force” is guilty of apostasy from Islam.⁸² Since apostasy is a capital crime in the Islamic State’s legal system, civilians can in theory be executed for refusing to pay *zakāt*.⁸³

According to the Islamic State, revenue obtained through the collection of *zakāt* can be spent on the following: (1) “The poor who live in absolute poverty and do not have enough to survive”; (2) “The poor who don’t ask others for financial help and can’t meet their basic needs”; (3) “Those working to collect [*zakāt*]”; (4) “To win the hearts of new Muslims or those considering Islam;” (5) “To set free

databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule10 [https://perma.cc/6G5B-7PNJ] (last visited Dec. 29, 2017).

⁷⁸ See Revkin, *supra* note 11.

⁷⁹ See DeLong-Bas, *supra* note 11.

⁸⁰ See, e.g., MUHAMMAD AL-BUKHARI, SUMMARIZED SAHIH AL-BUKHARI 366 (Muhammad Muhsin Khan trans., Maktaba Dar-us-Salam 1996) (Chapter 26 of *The Book of Zakāt* states that “[t]he *Zakāt* is one-fortieth of the lot (i.e. 2.5%)”).

⁸¹ See SEYED KAZEM SADR, THE ECONOMIC SYSTEM OF THE EARLY ISLAMIC PERIOD: INSTITUTIONS AND POLICIES 46 (2016).

⁸² See al-Furqān Media, *And They Gave Zakah*, JIHADODOLOGY (Jun. 17, 2015), <http://jihadology.net/2015/06/17/al-furqan-media-presents-a-new-video-message-from-the-islamic-state-and-they-gave-zakah/> [https://perma.cc/G9EU-TKH6] (at 19 minutes, 16 seconds).

⁸³ See MARA REVKIN, BROOKINGS PROJECT ON U.S. REL. WITH ISLAMIC WORLD, THE LEGAL FOUNDATIONS FOR THE ISLAMIC STATE 17 (Jul. 2016), https://www.brookings.edu/wp-content/uploads/2016/07/Brookings-Analysis-Paper_Mara-Revkin_Web.pdf [https://perma.cc/2VQR-KNTE].

Muslim slaves or liberate Muslim prisoners that were captured by the *kuffar* [unbelievers]”; (6) “Those overburdened by debts”; (7) “The mujahidin and jihad”; and (8) “Travelers in need.”⁸⁴ Of these, only two pertain to actual warfare—(5) and (7)—a third could be interpreted as supporting informational warfare through the indoctrination of new recruits (4), and a fourth indirectly supports warfare by paying the salaries of civilian employees (3). The remaining four areas of spending concern the provision of welfare benefits for debtors, travelers, and the poor.⁸⁵ In January 2016, the Islamic State claimed to have distributed approximately \$3.5 million U.S. dollars to more than 43,000 families in the Syrian provinces of Hama, Deir Ezzor, Hassakah, Aleppo, Raqqa, and Homs during a single month.⁸⁶ Local newspapers,⁸⁷ interviewees,⁸⁸ and archival documents⁸⁹ from Islamic State-controlled areas confirm that the group does provide assistance to the needy—in the form of cash or food—but the amount of the distributions and number of recipients cannot be independently verified. *Zakāt* offices, which simultaneously collect revenue to finance military operations and provide welfare assistance to civilians living in areas controlled by the Islamic State, illustrate the problem of dual-use institutions in IHL. The hybridity of these offices, which are engaged in both war-sustaining and humanitarian activities, poses a challenge for targeting decisions.

The third defining characteristic of state-building terrorist groups is a degree of coercive control over civilians that creates observational equivalence between victims and supporters of the group. The Islamic State routinely coerces or outright forces civilians into performing labor and services. For example, to compensate for the destruction of many of its own vehicles by airstrikes, the Islamic State has forced civilian truck drivers to work for the group in Mosul.⁹⁰ The Islamic State has also forced doctors to provide treatment to its fighters, sometimes at the expense of

⁸⁴ al-Furqān Media, *supra* note 82, at 28 minutes, 38 seconds.

⁸⁵ *Id.*

⁸⁶ See Islamic State, الزكاة (*Zakāt*), AMĀQ NEWS AGENCY (Jan. 22, 2016), <https://pbs.twimg.com/media/CZVkwvEVAAE7IDf.jpg> [<https://perma.cc/TB63-39PX>].

⁸⁷ See داعش يفتح باب التوبة ويوزع زكاة النفط في الرقة (*Daesh [the Islamic State] Opens the Door of Repentance and Distributes Zakāt from Oil [Revenue] in Raqqa*), EREM NEWS (Jul. 11, 2014), <https://www.aremnews.com/news/arab-world/111760> [<https://perma.cc/C2J8-3DUB>].

⁸⁸ See WhatsApp Interview with Karim, Islamic State civilian employee in al-Mayadin, Syria (Feb. 12, 2016) (“At first, we were annoyed by the collection of *zakāt*, but when we saw [the Islamic State] registering the names of the poor and giving them money and food, our admiration for them increased. The money goes back to the people through the services that [the Islamic State] provides.”).

⁸⁹ See Islamic State, جدول أسماء المستحقين للزكاة (*Table of Names of Those Entitled to Zakāt*), <http://www.aymennjawad.org/jawad/pics/large/203.jpg> [<https://perma.cc/WBX4-JJGP>] (document recovered from a *zakāt* office in Manbij, Syria, reporting that 2,502 needy families (12,760 individuals) received a total of \$755,837 in cash assistance over a two-month period in Aleppo, Syria).

⁹⁰ See داعش يرجع ظاهرة السخرة الصدامية على سيارات الحمل في الموصل (*The Islamic State Resurrects the Saddam-Era Phenomenon of Forced Labor on Trucks in Mosul*), AL MASALAH (Jun. 28, 2014), <http://almasalah.com/ar/PrintNewspage.aspx?newsid=33200> [<https://perma.cc/7AAV-5AAA>].

their civilian patients.⁹¹ In one case in Raqqa, a patient died during surgery because the doctor who was operating on him was forced to abandon the procedure to perform a different operation on an injured Islamic State fighter.⁹² In both Libya and Iraq, the Islamic State has reportedly executed doctors for refusing to treat its wounded combatants.⁹³ In another particularly egregious case of forced labor, the Islamic State forced thousands of Yazidi women into sexual slavery and domestic servitude,⁹⁴ some of whom were reportedly killed while being transported in Islamic State vehicles targeted by airstrikes.⁹⁵ Civilians who refuse to work for the Islamic State are often punished harshly. One prominent electrician from Mosul was ordered to oversee the construction of tunnels.⁹⁶ When he threatened to quit, the Islamic State detained him for a week and threatened to abduct his sons.⁹⁷

Forced labor is often imposed as a penalty for civilians who violate the numerous rules of the Islamic State's legal system, in addition to monetary fines and corporal punishments that include public beatings, amputations, and beheadings.⁹⁸ Interviewees from Islamic State-controlled areas of Iraq and Syria reported that the group forced prisoners to perform unpaid labor on construction projects.⁹⁹ In the eastern Syrian province of Deir Ezzor, civilians caught smoking, breaking the fast during Ramadan, and wearing un-Islamic clothing have been sentenced to perform hard labor including digging tunnels or trenches and carrying

⁹¹ See Wissam Youssef, *موصوليون: داعش منع مصابين بأمراض مستعصية من العلاج* (*People of Mosul: Daesh [the Islamic State] is Preventing Patients With Serious Injuries From Receiving Treatment*) AKHBAR AL-AAN (Nov. 26, 2016), goo.gl/pWECfo [<https://perma.cc/E3TS-9ZPE>] (doctors fleeing Mosul reported that the Islamic State was “forcing medical teams to provide necessary services to its fighters who were wounded in the battle over the city and forcing [civilian] patients to leave Mosul hospitals under various pretexts” in order to accommodate these combatants).

⁹² See Jorf News, FACEBOOK (Jun. 18, 2017), <https://www.facebook.com/Jorfnews/posts/645926422273878> [<https://perma.cc/P2K4-6Y8J>] (تنظيم داعش يجبر طبيباً جراحاً على ترك مريضه في غرفة العمليات بمشفى الطب الحديث في مدينة #الرققة، ليجري عملية لأحد مقاتلي التنظيم، ما أدى لوفاة المريض “The organization of Daesh [the Islamic State] is forcing a surgeon to abandon his patient in the operating room in the Hospital of Modern Medicine in the city of Raqqa to conduct an operation for one of the group’s fighters, leading to the death of the [civilian] patient.”)).

⁹³ See, e.g., Jamal La’aribi, *داعش اطلق النار على طبيب هندي بعدما رفض علاجهم* (*Daesh [the Islamic State] Executes an Indian Doctor After He Refused to Treat [Its Fighters]*) AKHBAR AL-AAN (Feb. 23, 2017), goo.gl/s548Nu [<https://perma.cc/HP53-XQMY>]; *أطباء في الموصل 10 داعش يعدم* (*Daesh [the Islamic State] Executes 10 Doctors in Mosul*) DEUTSCHE WELLE (Apr. 8, 2015), goo.gl/ctqWkH [<https://perma.cc/43WA-DR8L>].

⁹⁴ See U.N. Human Rights Council, “*They Came to Destroy*”: *ISIS Crimes Against the Yazidis*, U.N. Doc. A/HRC/32/CRP.2 (Jun. 15, 2016), http://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A_HRC_32_CRP.2_en.pdf [<https://perma.cc/KN7M-8WML>].

⁹⁵ See Sound and Picture (@soundandpic), TWITTER (May 24, 2017, 1:43 PM), <https://twitter.com/soundandpic/status/867435919363772420> [<https://perma.cc/K72D-843Z>].

⁹⁶ See Lauren E. Bohn, *What Has Life under ISIS Rule Been Like for Women?*, THE GROUND TRUTH PROJECT (Jul. 13, 2017), <http://thegroundtruthproject.org/what-has-life-under-isis-rule-been-like-for-women/> [<https://perma.cc/VRV7-GFC9>].

⁹⁷ *Id.*

⁹⁸ See generally Revkin, *supra* note 83.

⁹⁹ See Interviews with Basma, 32, civilian from Aleppo, in Gaziantep, Turkey (Jul. 2015); and with Abdullah, 28, civilian from Deir Ezzor, in Şanlıurfa, Turkey (Feb. 2017).

sandbags and concrete barriers, sometimes near the front lines.¹⁰⁰ Also in Deir Ezzor, detainees were coerced into donating blood for wounded fighters as a condition for their release.¹⁰¹ A Twitter user in the Syrian city of Abu Kamal reported in August 2015, “Daesh [the Islamic State] is forcing several detainees to dig deep trenches around the outskirts of the city in intense heat.”¹⁰² In September 2015, the Islamic State reportedly forced Egyptian detainees to build a prison in the Libyan city of Sirte.¹⁰³ In another incident in July 2015, the Islamic State forced a group of men to clean its headquarters in the Syrian village of al-Sirb after they were caught smoking by the religious police.¹⁰⁴ Since the legality of targeting any particular individual depends not only on his or her status (combatant or civilian) but also on conduct and behavior (civilians lose their protected status when they directly participate in hostilities¹⁰⁵), the Islamic State’s ability to coerce civilians into performing activities that could easily be interpreted as supporting its military operations has important implications for targeting decisions.

These three characteristics of state-building terrorist groups suggest the following categories of membership: (1) members of the group’s military wing (“military personnel”); (2) members of the group’s civilian wing (“civilian employees”); and (3) members of the civilian population being governed (“civilian subjects”). Only the first of these categories is present in all three categories of terrorist groups (Table 3). The categories of “civilian employees” and “civilian subjects” are unique to state-building terrorist groups. Although territorial but non-

¹⁰⁰ See *Daesh Forces the Sons of Besieged Neighborhoods to Dig Trenches and Do Forced Labor*, EUPHRATES POST (May 5, 2016), <http://www.euphratespost.com/?p=402#sthash.xIYyHMGn.dpbs> [<https://perma.cc/G7M7-D3BE>]; see also The Free Euphrates (@FreeEuphrates), TWITTER (Feb. 19, 2017, 7:57 AM), <https://web.archive.org/web/20171224210010/https://twitter.com/FreeEuphrates/status/833193809655762944> [<https://perma.cc/WL9A-NF5L>] (#داعش يسوق المعتقلين لدى جهاز #الحسبة ب #الرفقة إلى العمل) (“#Daesh is forcing detainees arrested by the religious police in #Raqqa to dig trenches and pack sandbags in addition to forced labor, and they are being transferred to the northern front #al-Tabqa”)).

¹⁰¹ See *Daesh is Forcing Prisoners to Donate Blood to Treat the Wounded*, AL HAYAT (Nov. 25, 2014), <http://www.rasd-sy.net/?p=1506> [<https://perma.cc/5XZM-F94Q>].

¹⁰² See ayman ayman (@aymanprince2020), TWITTER (Aug. 18, 2015, 12:33 PM), <https://web.archive.org/web/20160602103409/https://twitter.com/aymanprince2020/status/633723402726035456> [<https://perma.cc/6WRD-NEBP>] تنظيم #داعش يجبر عدد من المعتقلين لديه على حفر خنادق عميقة (“Daesh is forcing a number of detainees to dig deep trenches on the outskirts of the city [of al-Bukamal] without them knowing the reason!”)).

¹⁰³ See Alwasat Libya (@alwasatengnews), TWITTER (Sept. 13, 2015, 9:05 AM), <https://twitter.com/alwasatengnews/status/643047890764582912> [<https://perma.cc/NV8L-CSPP>] (“#ISIS used 12 kidnapped Egyptians as forced labor to build prison in #Sirte. Kidnapped included Coptic Christians”).

¹⁰⁴ See *On Charges of Smoking, the “Hisba” [Religious Police] is Forcing Civilians to Clean Headquarters of the Islamic State in a Village in the Suburbs of al-Hasakah* SYRIAN OBSERVATORY FOR HUMAN RIGHTS (Jul. 29, 2015), goo.gl/wbSiZn.

¹⁰⁵ See *Direct Participation in Hostilities: Questions and Answers*, INT’L COMM. OF RED CROSS (Jun. 2, 2009), <https://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm> [<http://perma.cc/WZ7J-Q64V>].

governing terrorist groups control land, they do not engage in governance of the population therein (“civilian subjects”) and therefore have no need for civilian employees to staff governing institutions.

Table 3. Categories of Membership in Terrorist Groups

	Military Personnel	Civilian Employees	Civilian Subjects
1. Non-Territorial	X		
2. Territorial but Non-Governing	X		
3. State-Building	X	X	X

C. Relevant Literature

In defining a new category of “state-building” terrorist groups and illustrating the empirical implications of this category for existing principles of targeting, this Article contributes to a nascent but growing body of empirical research on IHL.¹⁰⁶ In recent years, there has been considerable progress in the application of empirical research methods to important questions and concerns in international law including the conditions under which international courts are most effective¹⁰⁷ the impact of treaty ratification on human rights violations,¹⁰⁸ the impact of international institutions on trade commitments,¹⁰⁹ the relationship between bilateral investment treaties (BITs) and investment flows between contracting states,¹¹⁰ and the rising costs of peace treaties.¹¹¹ Within the subfield of

¹⁰⁶ See generally James D. Morrow, *When Do States Follow the Laws of War?*, 101 AM. POL. SCI. REV. 559 (2007); Benjamin A. Valentino et al., *Covenants without the Sword: International Law and the Protection of Civilians in Times of War*, 58 WORLD POL. 339 (2006).

¹⁰⁷ See Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229, 1230 (2004) (finding, through an empirical analysis of International Court of Justice decisions, that international courts are most effective when they facilitate coordination by disputants through settlement processes rather than by imposing a solution).

¹⁰⁸ Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L. J. 1935, 1940 (2002) (finding that states that ratify human rights agreements are, counter-intuitively, more likely to violate these agreements than other states, on average).

¹⁰⁹ See Jeffrey Kucik & Eric Reinhardt, *Does Flexibility Promote Cooperation? An Application to the Global Trade Regime*, 62 INT’L. ORG. 477, 479 (2008) (finding that states that take advantage of the World Trade Organization’s flexibility provisions agree, on average, to more and deeper tariff commitments and implement lower tariffs in practice than states that do not use these provisions).

¹¹⁰ See Jason W. Yackee, *Bilateral Investment Treaties, Credible Commitment, and the Rule of (International) Law: Do BITs Promote Foreign Direct Investment?*, 42 L. & SOC. REV. 805, 807 (2008) (finding, after disaggregating 1,000 BITs into “strong” and “weak” treaties, that the stronger BITs are not associated with increased investment). *But see* Tim Büthe & Helen V. Milner, *Bilateral Investment Treaties and Foreign Direct Investment: A Political Analysis*, in THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 198 (Karl P. Sauvant & Lisa E. Sachs eds., 2009) (finding that membership in multilateral and preferential trade agreements results in increased overall foreign direct investment flows into a country).

¹¹¹ Tanisha M. Fazal, *The Demise of Peace Treaties in Interstate War*, 67 INT’L. ORG. 695, 696 (2013) (arguing that the emergence of the modern canon of the law of war has raised the costs of

empirical IHL scholarship, previous work has explored the effects of treaty ratification on civilian casualties¹¹² and other determinants of state compliance with the laws of war.¹¹³ However, all of these studies are concerned with inter-state warfare, and there has been almost no empirical research on aspects of IHL that concern non-state actors in non-international armed conflicts. Similarly, the effects of counter-terrorism laws and policies remain poorly understood,¹¹⁴ although numerous journalists, analysts, and lawyers have theorized that torture and extra-territorial detention have negative externalities for U.S. national security.¹¹⁵ It has also been suggested that U.S. drone strikes and airstrikes, when they harm civilian bystanders and infrastructure, increase local support for terrorist groups,¹¹⁶ and that concerns about the legality of drone strikes have undermined intelligence sharing

admitting to being in a state of war and has therefore contributed to a decrease in the rate at which interstate conflicts have ended with a formal peace treaty).

¹¹² See Benjamin Valentino, Paul Huth & Sarah Croco, *Covenants Without the Sword: International Law and the Protection of Civilians in Times of War*, 58 WORLD POL. 339, 368 (2006) (finding, through statistical analysis of interstate wars from 1900 to 2003, no evidence that signatories to the Hague Convention of 1907 or Geneva Conventions of 1949 killed fewer civilians than did non-signatories, and arguing that strategic incentives overwhelmed any restraining pressures attributable to the treaties).

¹¹³ See, e.g., Tanisha M. Fazal & Brooke C. Greene, *A Particular Difference: European Identity and Civilian Targeting*, 45 BRIT. J. POL. SCI. 829, 843 (2014) (finding that civilian targeting, and non-compliance with the laws of war more generally, is significantly more likely in European versus non-European interstate conflicts than in other types of interstate conflicts); James D. Morrow, *When Do States Follow the Laws of War?* 101 AM. POL. SCI. REV. 559, 570 (2007) (finding that democracies are more likely to comply with the laws of war than are authoritarian states); Alyssa K. Prorok & Benjamin J. Appel, *Democratic Third Parties and Civilian Targeting in Interstate War*, 58 J. CONFLICT RESOL. 713, 731 (2014) (finding, with a dataset on interstate wars from 1990 to 2003, that democratic third parties play a role in inducing compliance with IHL).

¹¹⁴ One exception is a recent pilot survey on the impact, including “chilling effect,” of counter-terrorism measures on humanitarian assistance, one of the first empirical studies in this area. JESSICA S. BURNISKE & NAZ K. MODIRZADEH, HARV. L. SCH. PROGRAM ON INT’L L. AND ARMED CONFLICT, COUNTERTERRORISM AND HUMANITARIAN ENGAGEMENT PROJECT, PILOT EMPIRICAL SURVEY STUDY ON THE IMPACT OF COUNTERTERRORISM MEASURES ON HUMANITARIAN ACTION (Mar. 2017), <http://blogs.harvard.edu/pilac/files/2017/03/Pilot-Empirical-Survey-Study-2017.pdf> [https://perma.cc/3GHX-334V].

¹¹⁵ See, e.g., Thérèse Postel, *How Guantanamo Bay's Existence Helps Al-Qaeda Recruit More Terrorists*, ATLANTIC (Apr. 12, 2013), <https://www.theatlantic.com/international/archive/2013/04/how-guantanamo-bays-existence-helps-al-qaeda-recruit-more-terrorists/274956/> [https://perma.cc/34UQ-4EE5]; Amy Goodman, *Lawyer for Tortured Detainees: U.S. Created ISIS Through Misguided Detention, Interrogation Policies*, DEMOCRACY NOW (June 5, 2017), https://www.democracynow.org/2017/6/5/lawyer_for_tortured_detainees_us_created [https://perma.cc/J4LP-BRN7].

¹¹⁶ Ed Pilkington & Ewen MacAskill, *Obama's Drone War a 'Recruitment Tool' for ISIS, Say US Air Force Whistleblowers*, GUARDIAN (Nov. 18, 2015), <https://www.theguardian.com/world/2015/nov/18/obama-drone-war-isis-recruitment-tool-air-force-whistleblowers> [https://perma.cc/N66N-35VJ]. See also Joshua Andresen, *Putting Lethal Force on the Table: How Drones Change the Alternative Space of War and Counterterrorism*, 8 HARV. NAT’L SEC. J. 426, 461 (2017).

with U.S. allies.¹¹⁷ However, with a few exceptions,¹¹⁸ these causal claims have yet to be persuasively substantiated with data.

This Article contributes to an emerging empirical literature on the relationship between IHL and non-state actors by addressing the questions: How are state-building terrorist groups different from other types of terrorist groups, and what are the implications of these differences for the targeting of personnel and objects? One reason for the scarcity of empirical research on the inner workings of terrorist groups—and the resulting implications for IHL—is that collecting data on these groups raises security, legal, and ethical concerns for researchers. First, traveling to and conducting research in conflict areas where terrorist groups operate poses obvious security risks. Second, the United States government and Supreme Court have defined the crime of “material support” for terrorism broadly,¹¹⁹ and it is possible—although unlikely—that researchers who communicate directly with members of terrorist organizations and publish the findings of those interviews could be prosecuted for indirectly helping these groups spread their messages. This is particularly true if the researcher conducts interviews in a foreign language and translates the responses into English, since “translation” has been identified as a type of service that potentially falls within the scope of the material support definition.¹²⁰ Third, interviewing members of terrorist groups or civilians who have had contact with such groups inevitably exposes these persons to risks and therefore raises important research ethics concerns.¹²¹ These risks include, for current or former members of terrorist groups, the possibility of physical harm or prosecution if compromising information disclosed during an interview is inadvertently disclosed to others by the researcher or confiscated by government authorities who might use it for counter-terrorism purposes. Although these challenges make it difficult for researchers to obtain information about clandestine and illegal

¹¹⁷ See Holger Stark, *Drone Killing Debate: Germany Limits Information Exchange with US Intelligence*, SPIEGEL ONLINE INT’L (May 17, 2011), <http://www.spiegel.de/international/germany/drone-killing-debate-germany-limits-information-exchange-with-us-intelligence-a-762873-2.html> [https://perma.cc/8Y4M-U2Q6].

¹¹⁸ See Jason Lyall, *Bombing to Lose? Airpower and the Dynamics of Violence in Counterinsurgency Wars* (Mar. 27, 2015) (unpublished manuscript), https://www.du.edu/korbel/sie/media/documents/research_seminar_papers/lyall-airstrikes-apr2015.pdf [https://perma.cc/JLC2-TGQJ] (finding that “insurgent organizations step up their violence after air operations to maintain their reputations for resolve in the eyes of local populations”). See also Luke Condra & Jacob Shapiro, *Who Takes the Blame? The Strategic Effects of Collateral Damage*, 56 AM. J. POL. SCI. 167, 175 (2012) (finding that “Coalition-caused civilian casualties in *t-1* are positively associated with incidents of insurgent violence in period *t*”).

¹¹⁹ See *Holder v. Humanitarian L. Project*, 561 U.S. 1, 11–13 (2010) (holding that humanitarian assistance may fall within 18 U.S.C. § 2339B’s definition of material aid as “training,” “expert advice or assistance,” “service,” and “personnel” based on the principle that assistance could help to “legitimate” a recipient terrorist organization).

¹²⁰ See Andrew F. March, *“Material Support for Terrorism” Laws and Threats to Middle East Studies*, PROJECT ON MID. E. POL. SCI. (Mar. 13, 2017), <https://pomeps.org/2017/03/13/material-support-for-terrorism-laws-and-threats-to-middle-east-studies-2/> [https://perma.cc/XM7P-F4A8].

¹²¹ Ann-Sophie Hemmingsen, *Salafi Jihadism: Relying on Fieldwork to Study Unorganized and Clandestine Phenomena*, 34 ETHNIC RACIAL STUD. 1201, 1208 (2011).

organizations, including terrorist groups, they are not insurmountable.¹²² Data collection in conflict areas is both possible and necessary for evidence-based policies. The arguments advanced in this Article are supported by original data collected over the course of five months of fieldwork in Turkey and Iraq, including in Mosul, conducted for the author's dissertation. The Appendix discusses the research methodology and sources of data in greater detail.

IV. Implications of State-Building Terrorist Groups for the Targeting of Personnel

Current legal frameworks and policies governing the targeting of personnel in armed conflicts were not designed to account for the unique characteristics of state-building terrorist groups and, in particular, their reliance on civilian employees. The following sections use original data collected by the author on the Islamic State to support this Article's argument that existing doctrines of lethal targeting tend to penalize civilians when applied to state-building terrorist groups. Specifically, the application of these doctrines to a group such as the Islamic State can result in the mischaracterization of civilian employees and other civilian residents of territory controlled by the group as military personnel who can be targeted under IHL.

As a threshold issue, this Article focuses on the targeting of Islamic State personnel and objects in the group's core territories of Iraq and Syria. The United States is currently engaged in armed conflict with the Islamic State in both of these countries. The classification of the conflict—as either an international armed conflict (IAC), a non-international armed conflict (NIAC), or a combination of both—is important because IACs and NIACs are governed by different international legal frameworks. IACs refer to conflicts between state parties and are governed by the four Geneva Conventions of 1949 and the Additional Protocol I.¹²³ NIACs refer to armed conflicts in which one or more non-state armed groups are involved and are governed by Article 3 common to the four Geneva Conventions (Common Article 3).¹²⁴ A subset of NIACs—those in which an armed group is under “responsible command” and “exercise[s] such control over a part of [the state party's] territory as to enable [the group] to carry out sustained and concerted military operations,” as the Islamic State does—trigger the application of

¹²² Lorne L. Dawson & Amaranth Amarasingam, *Talking to Foreign Fighters: Insights into the Motivations for Hijrah to Syria and Iraq*, 40 *STUD. CONFLICT TERRORISM* 191, 191 (2017) (noting that “little of the discussion of foreign fighters in Syria and Iraq is informed by primary data derived from talking with the foreign fighters” but demonstrating that such research is possible by presenting “some initial findings from interviews with twenty foreign fighters in Syria”).

¹²³ *Protocols I and II Additional to the Geneva Conventions*, INT'L COMM. OF RED CROSS (Jan. 1, 2009), <https://www.icrc.org/eng/resources/documents/misc/additional-protocols-1977.htm> [<https://perma.cc/2NEF-8FDD>].

¹²⁴ *Non-International Armed Conflict*, INT'L COMM. OF RED CROSS (Oct. 1, 2017), <https://casebook.icrc.org/glossary/non-international-armed-conflict> [<https://perma.cc/U86R-JXH2>].

Additional Protocol II, which supplements Common Article 3 with additional protections for victims of armed conflict.¹²⁵

Since Iraq has consented to the United States' use of force against the Islamic State within its territory, the classification of that part of the conflict as a NIAC is relatively straightforward.¹²⁶ The classification of the conflict in Syria is considerably more complicated for reasons that are beyond the scope of this article.¹²⁷ Some scholars have interpreted the International Committee of the Red Cross (ICRC)'s 2016 Commentary on the First Geneva Convention to support the conclusion that both an IAC and NIAC are present in Syria due to the U.S. use of force without the consent of the Syrian government, although critics of this interpretation argue that non-consensual intervention does not necessarily trigger an IAC.¹²⁸ Given the fluidity of the Syrian conflict, this Article does not take a position on its classification. Regardless of the disputed existence of an IAC in Syria, the following discussion of the characteristics of state-building terrorist groups and corresponding implications for targeting is relevant for U.S. operations in its NIAC with the Islamic State.

A. *Civilian Employees of State-Building Terrorist Groups are Entitled to Protection*

The current counter-terrorism paradigm relies on a problematic assumption that terrorist groups are primarily military organizations. In developing principles of detention and targeting for operations against al-Qaeda, the U.S. government took the position that “[al-Qaeda] is an organized armed group, a military

¹²⁵ See generally Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

¹²⁶ Adil Haque, *The United States is at War with Syria (According to the ICRC's New Geneva Convention Commentary)*, EJIL: TALK! (Apr. 8, 2016), <https://www.ejiltalk.org/the-united-states-is-at-war-with-syria-according-to-the-icrcs-new-geneva-convention-commentary/> [<https://perma.cc/QN2Q-E73J>].

¹²⁷ Jonathan Horowitz, *Untangling the Web of Actors in Syria and Additional Complexities of Classifying Armed Conflicts*, JUST SEC. (Oct. 25, 2016), <https://www.justsecurity.org/33838/untangling-web-actors-syria-additional-complexities-classifying-armed-conflicts/> [<https://perma.cc/39JY-P7BN>].

¹²⁸ See, e.g., Haque, *supra* note 126 (arguing that “according to the ICRC’s approach, the United States is both in a NIAC with ISIL and in an IAC with Syria”); Ryan Goodman, *Is the United States Already in an “International Armed Conflict” with Syria?*, JUST SEC. (Oct. 11, 2016), <https://www.justsecurity.org/33477/united-states-international-armed-conflict-syria/> [<https://perma.cc/ASS2-9PLF>] (arguing that three “groundbreaking events”—the United States’ enforcement of no-fly zones, its support for Turkey’s ground invasion of towns in northern Syria, and its direct bombing of Syrian military forces—“cross the line of an international armed conflict”); cf. Deborah Pearlstein, *A Syrian IAC?* OPINIO JURIS (Oct. 14, 2016), <http://opiniojuris.org/2016/10/14/a-syrian-iac/> [<https://perma.cc/9Z4S-6YR2>] (arguing that “current evidence of an IAC is ambiguous at best”); Kenneth Watkins, *The ICRC Updated Commentaries: Reconciling Form and Substance, Part II*, JUST SEC. (Aug. 30, 2016), <https://www.justsecurity.org/32608/icrc-updated-commentaries-reconciling-form-substance-part-ii/> [<https://perma.cc/YH9H-CVN2>] (arguing that “[n]ot all breaches of sovereignty necessarily mean there is ‘automatically’ an armed conflict between the States involved”).

organization, through and through, with no ‘civilian’ wing, and that therefore membership in [al-Qaeda] is analogous to being an enlistee in the U.S. armed forces, making one targetable on that ground alone.”¹²⁹ In its Brief in Opposition to certiorari in the *al-Bihani* case, the government argued the following against the petitioner’s claim that al-Bihani, a Yemeni citizen who admitted to joining al-Qaeda but claimed to have only worked as a cook, should be considered a “civilian contractor” of the group: “Unlike a sovereign nation with a civilian population, [al-Qaeda] is a terrorist organization engaged in an armed conflict with the United States, and it has no ‘non-military’ wing.”¹³⁰ According to this view, anyone working for al-Qaeda in any capacity—regardless of the nature of the work performed—is a combatant for purposes of detention, and by implication, targeting. This is true even of administrative and service-providing personnel such as cleaners, drivers, and cooks like al-Bihani, because their designation as combatants is status- rather than conduct-based. In December of 2016, the U.S. government again asserted its ability to target members of armed groups based on formal membership regardless of their functional role: “[A]n individual who is formally or functionally a member of an armed group against which the United States is engaged in an armed conflict is generally targetable.”¹³¹

The U.S. position that formal membership alone is sufficient grounds for targeting diverges from that of the ICRC, which maintains that functional membership is a requirement for targeting.¹³² Nonetheless, the ICRC appears to assume, like the United States, that all “members” of armed groups, including those that engage in terrorism, are combatants, although the ICRC acknowledges that civilians may play supporting roles as non-members. This assumption is embedded in the ICRC’s definition of “membership” in an armed group: “[T]he decisive criterion for individual membership . . . is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities.”¹³³ Individuals who are engaged full-time in the preparation, execution, or command of activities amounting to direct participation in hostilities are said to assume “a continuous combat function.”¹³⁴ In contrast, individuals who merely accompany or support an organized armed group continuously, but whose function does not involve direct participation in hostilities, “are not members of that group within the meaning of IHL.”¹³⁵ This definition of membership is appropriate for organizations

¹²⁹ Marty Lederman, *Are All “Members” of ISIL Targetable?*, JUST SEC. (Apr. 9, 2016), <https://www.justsecurity.org/30508/members-isil-targetable/> [<https://perma.cc/MN8S-JD2K>].

¹³⁰ See Brief for Respondents in Opposition, *Al-Bihani v. Obama*, 132 S. Ct. 2739 (2012) (No. 10-1383), 2011 WL 5892317 at *9.

¹³¹ The White House, Report on the Legal and Policy Frameworks Guiding the United States Use of Military Force and Related National Security Operations (Dec. 2016), https://www.justsecurity.org/wp-content/uploads/2016/12/framework.Report_Final.pdf [<https://perma.cc/3RHY-Y8J8>].

¹³² INT’L COMM. OF RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 25 (Nils Melzer ed., 2009) [hereinafter ICRC INTERPRETIVE GUIDANCE].

¹³³ *Id.* at 33.

¹³⁴ *Id.* at 34.

¹³⁵ *Id.*

such as al-Qaeda, but does not reflect the full range of personnel employed by state-building terrorist groups that can be differentiated into military and civilian wings. Such civilian wings are staffed by employees who do not participate in hostilities but nonetheless are sufficiently integrated into the group's structure to be considered "members."

As illustrated by the typology presented in Table 1, not all terrorist groups share al-Qaeda's structure. Nonetheless, U.S. counter-terrorism policy has been heavily shaped by the model of al-Qaeda, resulting in a one-size-fits-all targeting framework. The Obama Administration's targeting policies seemed to endorse the view that members of terrorist groups are combatants by definition.¹³⁶ According to a speech by former State Department Legal Adviser Brian Egan, relevant factors for the determination of membership in an "organized armed group" include:

the extent to which the individual performs functions for the benefit of the group that are analogous to those traditionally performed by members of State militaries that are liable to attack; is carrying out or giving orders to others within the group to perform such functions; or has undertaken certain acts that reliably indicate meaningful integration into the group.¹³⁷

The analogy to "state militaries" suggests that this definition does not contemplate the possibility that an armed group might include civilian employees.

The assumption embedded in the current counter-terrorism paradigm—that members of terrorist groups cannot be civilians—may be appropriate for al-Qaeda, but it is inconsistent with the realities of state-building terrorist groups that govern people and territory. The Islamic State presents new dilemmas and challenges for the interpretation of existing targeting principles because the group employs significant numbers of civilian personnel in non-military institutions that provide services to the governed population. As a *de facto* state, the group maintains not only an army but also a complex bureaucracy that collects taxes and provides basic services to civilians.¹³⁸ Employees of the Islamic State's bureaucracy are civilian personnel who generally do not undergo military training, do not carry weapons, and are often not even required to swear allegiance to the Islamic State, according to interviews with Iraqis and Syrians who have worked for this bureaucracy.¹³⁹ In the context of state militaries, the ICRC's view is that "private contractors and employees of a party to an armed conflict who are civilians . . . are entitled to protection against direct attack" unless they relinquish their protected status by

¹³⁶ Lederman, *supra* note 129.

¹³⁷ Brian Egan, Legal Adviser, U.S. Dep't of State, Speech to American Society of International Law: International Law, Legal Diplomacy, and the Counter-ISIL Campaign (Apr. 1, 2016) (transcript available at <https://www.lawfareblog.com/state-department-legal-adviser-brian-egans-speech-asil> [<https://perma.cc/HP6R-9BX4>]).

¹³⁸ Mara Revkin, *Law and Lawfare in the Islamic State*, LAWFARE (Aug. 5, 2016), <https://www.lawfareblog.com/law-and-lawfare-islamic-state> [<https://perma.cc/WC4X-LQVT>].

¹³⁹ See Appendix, Table I, *infra*.

directly participating in hostilities or are effectively incorporated into the state's armed forces by being assigned to perform "a continuous combat function."¹⁴⁰ Similarly, civilian employees of armed groups with state-like bureaucracies are functionally civilians.

An official Islamic State document entitled, "Principles in the Administration of the Islamic State," describes a strategy of capturing and coopting existing institutions and infrastructure.¹⁴¹ Rather than build new institutions from scratch, the Islamic State takes over existing institutions and simply replaces the senior management while allowing lower-level personnel to keep their jobs, thereby "preserving the capabilities that managed projects under previous governments, while taking into account the need to place strict oversights and an administration affiliated with the Islamic State."¹⁴² Interviews with employees of a hospital and municipal service department previously controlled by the Islamic State in Mosul revealed that only the senior managers were required to swear an oath of allegiance.¹⁴³ Former Islamic State combatants, interviewed at a detention facility in Kurdistan, confirmed that the vast majority of civilian employees working in the fields of education, healthcare, sanitation, and other municipal services did not swear an oath of allegiance.¹⁴⁴ Yet they received salaries from the Islamic State, worked in buildings marked with the group's logo, and were clearly a part of its workforce.

The swearing of an oath of allegiance, known as *bay'ah* in Islamic legal terminology, is worth highlighting because it has been cited by U.S. courts as evidence of membership in al-Qaeda.¹⁴⁵ The swearing of an oath is an ineffective test of membership in the Islamic State for two reasons. First, as explained above, the group has a large number of unsworn civilian employees. Second, the Islamic State has in many cases coerced pledges of allegiance that should not be interpreted as genuine expressions of support. For example, the Islamic State published propaganda photographs that purportedly showed tribal leaders in Fallujah pledging allegiance to the group, but an Iraqi commentator concluded, "It is clear from their body language and their facial expressions and the movement of their

¹⁴⁰ ICRC INTERPRETIVE GUIDANCE, *supra* note 132, ch. III. (Private Contractors and Civilian Employees); *see also* JENNIFER ELSEA, CONG. RESEARCH SERV., R40991, PRIVATE SECURITY CONTRACTORS IN IRAQ AND AFGHANISTAN: LEGAL ISSUES 5 (2010).

¹⁴¹ ISLAMIC STATE, "مبادئ في إدارة الدولة الإسلامية" ("PRINCIPLES IN THE ADMINISTRATION OF THE ISLAMIC STATE") 13 (2014), <https://www.scribd.com/document/292084330/Islamic-State-blueprint> [<https://perma.cc/B46W-3DMV> <http://perma.cc/3T8G-KX2B>].

¹⁴² *Id.*

¹⁴³ Interviews with Fares, 59, surgeon, and Ahmed, 44, employee of municipal services department, in Mosul, Iraq (Apr. 2017).

¹⁴⁴ Interviews with Karim, 18, former combatant, and Laith, 18, former combatant, at a detention facility in Kurdistan (Apr. 2017).

¹⁴⁵ Press Release, U.S. Dep't of Just., Al Qaeda Spokesman Sulaiman Abu Ghayth Sentenced in Manhattan Federal Court to Life in Prison for Conspiring to Kill Americans, Providing Material Support to Terrorists (Sept. 23, 2014), <https://www.justice.gov/usao-sdny/pr/al-qaeda-spokesman-sulaiman-abu-ghayth-sentenced-manhattan-federal-court-life-prison> [<https://perma.cc/3YMV-KNMN>].

tongues that they were forced to swear an oath at gunpoint.”¹⁴⁶ Similarly, in Mosul, the Islamic State reportedly used “methods of threat and intimidation” to extract pledges of allegiance from tribal leaders “against their will.”¹⁴⁷

Economic coercion also plays a role in the extraction of cooperation from civilians. In the Syrian city of Abu Kamal, the Islamic State ordered doctors and pharmacists to swear *bay'ah* and make weekly medical missions to the front lines in Iraq.¹⁴⁸ Those who refused were punished with the revocation of their licenses and closure of their businesses.¹⁴⁹ The swearing of an oath, although relevant for determining membership in al-Qaeda, says very little about the nature of a person’s relationship with the Islamic State. This is because the group’s coercive power over civilians living in territory under its control gives rise to observational equivalence between supporters and victims.

The evidence presented above leads to the conclusion that the Islamic State is not only a military organization but also a quasi-state that employs (or forcibly conscripts) large numbers of civilian employees who do not perform any combat functions, much less “continuous” combat functions. Existing principles of targeting should be refined to differentiate between targetable combatants and civilian employees. Although civilian employees may be liable for providing material support for terrorism under domestic criminal laws, they may not be lethally targeted unless they relinquish their protected status by directly participating in hostilities, as discussed in the following section. Differentiating between military and civilian employees of state-building terrorist groups is necessary to prevent the mischaracterization of civilians as combatants.

B. *State-Building Terrorist Groups May Coerce Civilians Into “Directly Participating in Hostilities”*

A bedrock principle of IHL is the requirement of distinction, which ordinarily prohibits the targeting of civilians.¹⁵⁰ However, civilians lose their

¹⁴⁶ داعش يجبر اهالي الفلوجة على مبايعته جبراً (Because of al-Joulani, Daesh [the Islamic State] is Forcing the People of Fallujah to Swear Bay’ah), AYN AL-IRAQI NEWS (Jun. 22, 2017), <http://aynaliraqnews.com/?aa=news&id22=39391> [https://perma.cc/FG6D-VKYN].

¹⁴⁷ داعش يجبر عشائر الموصل على مبايعته رغماً عن انفسهم (Sources: Mosul Tribes Forced to Swear Allegiance to the Islamic State Against Their Will), AL SUMERIA NEWS (Jul. 5, 2014), goo.gl/wtTcQr [https://perma.cc/NDT9-2T5P].

¹⁴⁸ Al-Nateq Network, FACEBOOK (Dec. 15, 2016), <https://www.facebook.com/alnateq2/posts/1310929285647510> [https://perma.cc/GKV5-YK7W] تنظيم الدولة (#داعش) في مدينة #البوكمال وريفها (ولاية الفرات)، يفرض على من يعمل بالمهن الطبية (صيدالة - أطباء) مبايعته والذهاب للخدمة في مناطق #العراق بشكل مناوبات أسبوعية، وكل متخلف عن البيعة تسحب شهادته وتغلق عيادته أو صيدليته (“The [Islamic State] in the city of Abu Kamal ... is requiring medical professionals (pharmacists and doctors) to swear *bay'ah* and to go to Iraq to perform services on a weekly basis, and anyone who refuses to swear *bay'ah* will have his license revoked and his clinic or pharmacy will be closed.”).

¹⁴⁹ *Id.*

¹⁵⁰ Rule 7: The Principle of Distinction between Civilian Objects and Military Objectives, ICRC IHL DATABASE: CUSTOMARY IHL, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule7 [https://perma.cc/LS9K-TGNN] (last visited Dec. 23, 2017).

protected status “for such time as they take a direct part in hostilities” under Article 51(3) of Additional Protocol I.¹⁵¹ The Geneva Conventions did not elaborate on the types of conduct that would constitute direct participation in hostilities, but the ICRC’s interpretive guidance suggests a tripartite test consisting of the following elements: (1) threshold of harm, (2) direct causation, and (3) belligerent nexus.¹⁵² Under this test, a civilian truck driver who delivers ammunition to the front line would be considered a direct participant in hostilities, but one who transports ammunition from a factory to a port far removed from the battlefield would not meet the test of “directly” causing harm.¹⁵³

In the context of IACs, the U.S. Department of Defense (DOD) has enumerated several activities that do not rise to the level of direct participation in hostilities: “general contributions made by citizens to their State’s war effort (e.g., buying war bonds or paying taxes to the government that will ultimately be used to fund the armed forces)”; “police services (e.g., police officers who maintain public order against common criminals during armed conflict)”; and “working in a munitions factory or other factory that is not in geographic or temporal proximity to military operations but that is supplying weapons, materiel, and other goods useful to the armed forces of a State.”¹⁵⁴ As these examples illustrate, targeting decisions depend not only on a person’s status (civilian or combatant) but also on his or her conduct (whether or not a civilian’s behavior amounts to direct participation in hostilities).

This conduct-based test raises concerns when applied to state-building terrorist groups such as the Islamic State because, as argued earlier, a characteristic of these groups is a degree of coercive control over civilians that gives rise to observational equivalence between victims and supporters. To compensate for casualties and defections, the Islamic State has begun to “transfer” civilian employees from administrative jobs in its tax-collecting and service-providing offices to the military, where they are trained for combat and deployed to the battlefield.¹⁵⁵ Such employees can fairly be characterized as civilians directly participating in hostilities and would lose their protected status for so long as they serve in combat roles.

¹⁵¹ Additional Protocol I, *supra* note 75, art. 51(3); *see also* Prosecutor v. Kupreskic, Case No. IT-95-16 ¶ 521 (Jan. 14, 2000) (“The protection of civilians in time of armed conflict . . . is the bedrock of modern humanitarian law.”).

¹⁵² ICRC INTERPRETIVE GUIDANCE, *supra* note 132, at 46.

¹⁵³ *Direct Participation in Hostilities: Questions & Answers*, INT’L COMM. OF RED CROSS (Feb. 6, 2009), <https://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm> [<https://perma.cc/HU82-2L92>] (last visited Dec. 23, 2017).

¹⁵⁴ U.S. DEP’T OF DEF., DOD LAW OF WAR MANUAL § 5.9.3.2 (2016) [hereinafter DOD MANUAL].

¹⁵⁵ Islamic State, *مسؤولي المراكز والمفاصل بالولاية* (To: Officials of the Centers and Sectors in the Province) (Aug. 2015), <http://www.aymennjawad.org/jawad/pics/large/1051.jpg> [<https://perma.cc/R37K-47YG>]; *see also* Islamic State, Transfer List for Nineveh Province (showing transfer of civilian employees from administrative offices to the military), <http://www.aymennjawad.org/jawad/pics/large/1098.jpg> [<https://perma.cc/46ZA-4KNX>] (last visited Dec. 23, 2017).

But in cases where the Islamic State conscripts its civilian subjects, rather than civilian employees, it is far less clear if and how the doctrine should apply. When the Islamic State forces civilian prisoners to dig trenches and build defensive fortifications at the front lines, as has occurred repeatedly in Iraq and Syria,¹⁵⁶ can their conduct be interpreted as direct participation in hostilities, thereby rendering them targetable? What about civilian truck drivers forced by the Islamic State to transport munitions against their will?¹⁵⁷ And in a particularly grotesque example, what is the status of children¹⁵⁸ and mentally handicapped¹⁵⁹ individuals who are involuntarily chained inside explosive-laden vehicles and forced to drive them in suicide operations? Air Force Brigadier General Matt Isler reported seeing such drivers veer off course and hide: “We see [Islamic State] command and control trying to figure out where their [Vehicle-Borne Improvised Explosive Device (VBIED)] driver’s gone, we’ve seen multiple VBIED drivers going AWOL.”¹⁶⁰ As these examples illustrate, the Islamic State’s ability to coerce civilians into directly participating in hostilities against their will has important implications for lethal targeting policies.

V. Implications of State-Building Terrorist Groups for the Targeting of Objects

Customary international law requires that all parties to a conflict distinguish between civilian and military objectives, and that attacks may only be directed against military objectives.¹⁶¹ The application of these principles is relatively straightforward for obviously military assets such as munitions factories and bases, but some objects cannot be easily classified as either military or civilian. State-building terrorist groups present unique difficulties for the classification of objects because such groups are characterized by the presence of large numbers of dual-use objects and institutions that simultaneously perform military and civilian functions.

¹⁵⁶ EUPHRATES POST, *supra* note 100; ayman ayman, *supra* note 102.

¹⁵⁷ AL MASALAH, *supra* note 90.

¹⁵⁸ Eyder Peralta, *ISIS Is Killing, Torturing, Using Children As Suicide Bombers, Says U.N. Report*, NAT’L PUB. RADIO (Feb. 5, 2015), <http://www.npr.org/sections/thetwo-way/2015/02/05/384088459/isis-is-killing-torturing-using-children-as-suicide-bombers-says-u-n-report>.

¹⁵⁹ Florian Neuhof, *Mosul has Become History’s Greatest Hostage Crisis*, DAILY BEAST (Apr. 6, 2017), <http://www.thedailybeast.com/articles/2017/04/06/mosul-has-become-history-s-greatest-hostage-crisis> [https://perma.cc/N2ZT-MBR7].

¹⁶⁰ Thomas Watkins, *IS Forcing Children, Disabled into Suicide Cars: US General*, AGENCE FRANCE-PRESSE (Feb. 23, 2017), <https://www.yahoo.com/news/forcing-children-disabled-suicide-cars-us-general-220917836.html> [https://perma.cc/QR9Z-3V3Z].

¹⁶¹ *Rule 7*, *supra* note 150.

A. *The Legal Basis for Targeting War-Sustaining Objects Is Questionable.*

Dual-use objects belong to an intermediate category of objects that have both military and civilian functions (such as communications infrastructure and modes of transportation).¹⁶² The targeting of dual-use objects is controversial because of the potential for “reverberating” collateral effects on the civilian population.¹⁶³ Such objects may only be attacked so long as the harm to the civilian population is not excessive in comparison with the anticipated military advantage.¹⁶⁴ Some dual-use objects are considered “war-sustaining” because they generate revenue used to fund an enemy’s armed forces.¹⁶⁵ The permissibility of targeting war-sustaining objects under IHL is disputed. Some scholars have argued that war-sustaining objects that generate revenue used to fund an enemy’s armed forces may be targeted, even if some of the revenue is used for non-military purposes related to the governance of civilians, so long as targeting decisions are subject to a proportionality analysis and limiting principles.¹⁶⁶ Others have expressed the concern that expanding the scope of targetable objects to include “war-sustaining” industries and infrastructure leads to “a very steep and slippery slope” with the potential to cause “considerable humanitarian suffering.”¹⁶⁷

Although controversial, the doctrine of war-sustaining objects has been embraced by the U.S. government since at least the late 1980s.¹⁶⁸ In its Military Commissions Act of 2009, the United States adopted criteria that permit an attack on objects that by “their nature, location, purpose, or use, effectively contribute to the war-fighting or war-sustaining capability of an opposing force.”¹⁶⁹ The Obama Administration appeared to endorse this argument by striking banks,¹⁷⁰ “cash

¹⁶² *Rule 8: Definition of Military Objectives*, ICRC IHL DATABASE: CUSTOMARY IHL, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule8 [<https://perma.cc/L8AG-N5BB>] (last visited Dec. 23, 2017).

¹⁶³ Michael N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 YALE HUM. RTS. & DEV. L.J. 143, 168 (1999).

¹⁶⁴ Beth Van Schaack, *Evaluating Proportionality and Long-Term Civilian Harm under the Laws of War*, JUST SEC. (Aug. 29, 2016), <https://www.justsecurity.org/32577/evaluating-proportionality-long-term-civilian-harm-law-war/> [<https://perma.cc/KSG9-Z9VJ>].

¹⁶⁵ See Ryan Goodman, *The Obama Administration and Targeting “War-Sustaining” Objects in Noninternational Armed Conflict*, 110 AM. J. INT. LAW 663, 667 (2016).

¹⁶⁶ *Id.* at 677–79.

¹⁶⁷ Kenneth Watkin, *Sustaining the War Effort: Targeting Islamic State Oil Facilities*, JUST SEC. (Oct. 3, 2014), <https://www.justsecurity.org/15890/sustaining-war-effort-targeting-islamic-state-oil-facilities/> [<https://perma.cc/4NPT-7FAZ>].

¹⁶⁸ Emily Chertoff & Zachary Manfredi, *The Al-Mayadeen Prison Bombing and the Problem of War-Sustaining Targets*, LAWFARE (Jul. 6, 2017), <https://www.lawfareblog.com/al-mayadeen-prison-bombing-and-problem-war-sustaining-targets> [<https://perma.cc/A8ML-J27M>].

¹⁶⁹ Military Commission Act of 2009, Pub. L. No. 111-84, § 950p(a)(1), 123 Stat. 2606.

¹⁷⁰ Stephen Kalin, *ISIS Video Shows Destruction from U.S. Airstrike on Mosul Bank*, REUTERS (Jan. 12, 2016), <http://www.reuters.com/article/us-mideast-crisis-usa-cash-idUSKCN0UQ13V20160112> [<http://perma.cc/LJ8H-V6WG>].

collection and distribution point[s],”¹⁷¹ “storage sites where ISIL holds its cash,”¹⁷² as well as oil wells, refineries, and tanker trucks.¹⁷³ The U.S. approach is less restrictive than that of Additional Protocol I’s Article 52(2) because it permits the targeting of objects that only indirectly contribute to military operations. Under Article 52(2), an attack on an armed group’s taxation system would be unlawful, but it might be permissible under the U.S. approach if the destruction of the taxation system—although only indirectly war-sustaining—would offer a definite military advantage.¹⁷⁴

For a non-territorial and non-governing terrorist group such as al-Qaeda, the group’s institutions and infrastructure are, for the most part, unambiguously military in nature. But for state-building terrorist groups like the Islamic State, which simultaneously conducts military operations while governing territory and people, the problems of dual-use and war-sustaining objects are particularly salient. State-building terrorist groups tend to create hybrid institutions that simultaneously perform war-sustaining and service-providing functions. For example, the Islamic State’s *zakāt* offices are responsible both for the collection of taxes from civilians (revenue that is used to finance military operations) and the charitable distribution of cash assistance and food to the poor (humanitarian aid).¹⁷⁵ The U.S.-led Coalition has repeatedly targeted the Islamic State’s *zakāt* offices in Iraq and Syria,¹⁷⁶ but it is unclear whether the military advantage derived from these airstrikes outweighs the potentially significant cost to civilians, as the principle of proportionality requires. Such proportionality assessments would need to take into account several types of civilians likely to be found inside or in close proximity to *zakāt* offices: civilian employees, recipients of charitable distributions, and bystanders. In contrast, proportionality assessments for obviously military objectives such as munitions factories¹⁷⁷ are more straightforward because, under customary

¹⁷¹ Barbara Starr, *US Bombs “Millions” in ISIS Currency Stock*, CNN (Jan. 1, 2016), <http://www.cnn.com/2016/01/11/politics/us-bombs-millions-isis-currency-supply/index.html> [<https://perma.cc/ZE2X-UDAU>].

¹⁷² Barack Obama, Remarks by the President on Progress Against ISIL (Feb. 25, 2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/02/25/remarks-president-progress-against-isil> [<https://perma.cc/H5TS-ZTWN>].

¹⁷³ Roberta Rampton & Jeff Mason, *Obama: Faster Progress Needed Against Islamic State*, REUTERS (Dec. 14, 2015), <http://www.reuters.com/news/world/article/us-mideast-crisis-obama-idUSKBN0TX24F20151214> [<http://perma.cc/MZ9T-9AGQ>].

¹⁷⁴ See Goodman, *supra* note 165, at 664.

¹⁷⁵ Mara Revkin & William McCants, *Experts Weigh In (Part 5): How Does ISIS Approach Islamic Scripture?* BROOKINGS INST. (May 13, 2015), <https://www.brookings.edu/blog/markaz/2015/05/13/experts-weigh-in-part-5-how-does-isis-approach-islamic-scripture/> [<https://perma.cc/8GNJ-7WGF>].

¹⁷⁶ See Appendix, Table II, *infra*, for a list of 19 airstrikes targeting *zakāt* offices.

¹⁷⁷ Representative examples of Islamic State munitions factories targeted by the Coalition include “a massive bomb making factory south of Mosul” and “a vehicle-borne IED factory” near Rawah. See, e.g., Press Release, U.S. Combined Joint Task Force, Operation Inherent Resolve, Airstrikes Destroy Explosives Factory near Mosul, Iraq (Aug. 28, 2016), <http://www.inherentresolve.mil/News/News-Releases/News-Article-View/Article/928390/airstrikes-destroy-explosives-factory-near-mosul-iraq> [<https://perma.cc/9SA3-G22D>]; see also Press Release, U.S. Dep’t of Def., Inherent Resolve Strikes

international law, the presence of civilians within or near these objectives does not render them immune to attack.¹⁷⁸

Data collected by the author for this article indicates that *zakāt* offices have been hit by airstrikes on at least nineteen different occasions in eleven different cities and towns.¹⁷⁹ In another incident, an airstrike targeted the home of a *zakāt* official in Mosul, although this event was excluded from the count of nineteen incidents because the official was targeted outside of the *zakāt* office.¹⁸⁰ Fourteen of these strikes were attributed to the U.S.-led Coalition, one to the Syrian government, and four were unattributed. Destroying such dual-use objects may constitute a definite military advantage by reducing the Islamic State's revenues, but at the expense of civilians who rely on these institutions for food and other humanitarian assistance. Furthermore, if the employees of *zakāt* offices are considered to be civilians—as I argue they should be—then they are entitled to protection and should be taken into account in proportionality assessments.

B. *Targeting Dual-Use Objects of State-Building Terrorist Groups Has Negative Policy Consequences.*

The legal basis for targeting war-sustaining objects such as *zakāt* offices is questionable, but even if we accept the legality of the nineteen airstrikes documented in this paper, they are misguided as a matter of policy. The targeting of *zakāt* offices has been criticized by Iraqi and Syrian civilians who consider them to be civilian institutions that have been captured by the Islamic State but nonetheless continue to perform primarily humanitarian and service-providing functions. Mosul Eye, an anonymous blog based in Mosul, issued the following statement in response to the targeting of three banks and a *zakāt* office on February 13, 2016: “The banks were totally empty of any cash and we still do not understand why the coalition still insists on targeting empty banks. We request that the Coalition issue an explanation for the targeting of ‘civilian’ sites that are not a part of the Islamic State. Rather, these sites are part of the infrastructure of the city of Mosul.”¹⁸¹ The Coalition's official report for February 12 claims that one airstrike

Target ISIS in Syria, Iraq (Sept. 18, 2017), <https://www.defense.gov/News/Article/Article/1314099/inherent-resolve-strikes-target-isis-in-syria-iraq/> [<https://perma.cc/JB6H-SHP7>].

¹⁷⁸ See *Rule 8, supra* note 162 (noting that many military manuals, including that of the United States, “state that the presence of civilians within or near military objectives does not render such objectives immune from attack”).

¹⁷⁹ See Appendix, Table II, *infra*.

¹⁸⁰ @omarsbay86, TWITTER (Apr. 29, 2016, 11:59 AM), <https://twitter.com/omarsbay86/status/726091513130848256> [<https://perma.cc/E9MF-82H6>] (طائرات التحالف الدولي قصفت منطقة الكندي في مدينة الموصل حيث تم استهدفت منزل مسؤول ديوان الزكاة افغاني الجنسية) (“Coalition airplanes bombed the al-Kanadi area in the city of Mosul where they targeted the house of an official of the Diwan of *Zakāt*, an Afghan national.”).

¹⁸¹ Mosul Eye, *Updates*, FACEBOOK (Feb. 14, 2016), <https://www.facebook.com/MosulEye/photos/a.552572524864254.1073741828.55251484487002/2/862720643849439/?type=3> [<https://perma.cc/N9MB-KMTN>].

“destroyed three ISIL fighting positions”¹⁸² and the report for February 13 claims that “two airstrikes struck an ISIL tactical unit and destroyed two ISIL fighting positions and an ISIL armored excavator”¹⁸³—both “near Mosul”—but there is no mention of any strike on economic infrastructure. Aside from the uncertain legality of targeting banks and *zakāt* offices, the discrepancy between the Coalition’s version of events and that reported by residents of Mosul threatens to undermine the credibility and legitimacy of U.S.-led military operations in the eyes of civilians.

The Islamic State has capitalized on the targeting of *zakāt* offices in densely populated areas—and accompanying civilian casualties and collateral damage—to fuel local anger toward the U.S.-led Coalition. After the targeting of a *zakāt* office in the Iraqi city of al-Qa’im on January 31, 2015, the Islamic State released propaganda photographs purporting to show the damage—civilian injuries and property damage—“caused by the [U.S.-led Coalition] airstrike to a group of poor Muslims as they were receiving food aid from the warehouse of the office of *zakāt*.”¹⁸⁴ As these examples illustrate, the targeting of dual-use objects in the context of state-building terrorist groups can lead to the destruction of service-providing and humanitarian institutions such as *zakāt* offices, with negative consequences for public opinion toward counter-insurgents. This finding is consistent with recent scholarship arguing that the use of drones in civilian-populated areas away from active hostilities is associated with “strategic costs and negative secondary effects.”¹⁸⁵

Other dual-use objects include power stations that provide electricity for military purposes (such as munitions factories and training camps) and civilian purposes (hospitals and municipal services). In the context of state-building terrorist groups, the targeting of dual-use objects that are in close spatial proximity to civilian objects such as water sources can have particularly negative externalities for public health. Damage to water treatment infrastructure in Raqqa has been blamed for the spread of illnesses including viral hepatitis, leishmaniasis, gastroenteritis, and pneumonia.¹⁸⁶ Existing targeting frameworks that were designed for non-territorial and non-governing terrorist groups such as al-Qaeda

¹⁸² Press Release, U.S. Combined Joint Task Force, Operation Inherent Resolve, Military Airstrikes Continue Against ISIL in Syria and Iraq (Feb. 13, 2015), <https://web.archive.org/web/20170707050606/http://www.inherentresolve.mil/Portals/14/Documents/Strike%20Releases/2015/02February/13%20Feb%20Strike%20Release.pdf?ver=2017-01-13-131103-280>.

¹⁸³ Press Release, U.S. Combined Joint Task Force, Operation Inherent Resolve, Military Airstrikes Continue Against ISIL in Syria and Iraq (Feb. 14, 2015), <https://web.archive.org/web/20170627203532/http://www.inherentresolve.mil/Portals/14/Documents/Strike%20Releases/2015/02February/14%20Feb%20Strike%20Release.pdf?ver=2017-01-13-131103-403>.

¹⁸⁴ Islamic State, *المكتب الإعلامي لولاية الفرات* (*The Media Department of al-Furat Province*) (Feb. 1, 2015), [https://web.archive.org/web/20150207091401/http://nasher.me/forat/\[https://perma.cc/3R2B-MTUM\]](https://web.archive.org/web/20150207091401/http://nasher.me/forat/[https://perma.cc/3R2B-MTUM]).

¹⁸⁵ See Andresen, *supra* note 116, at 432.

¹⁸⁶ See *الرقعة اليوم: في الأمن والخدمات والصحة* (*Raqqa Today: In Security, Services, and Health*), AYN AL-MADINA (Oct. 4, 2017), goo.gl/SuG3QU [<https://perma.cc/DS6T-MUA3>].

tend to penalize civilians when applied to state-building terrorist groups that govern people and territory.

VI. Recommendations

The current U.S. counter-terrorism paradigm relies heavily on empirical assumptions that apply to some but not all terrorist groups. Specifically, this Article has leveraged evidence from the case of the Islamic State to argue that state-building terrorist groups can be differentiated from other terrorist groups by three characteristics: (1) the presence of a non-military wing analogous to a civilian bureaucracy that provides services to the governed population; (2) dual-use institutions that simultaneously perform military and civilian functions; and (3) a degree of coercive control over civilians that creates observational equivalence between victims and supporters of the group. All three of these characteristics have important implications for the targeting of personnel and objects under the laws of war.

First, unlike al-Qaeda and other terrorist groups that do not control territory or govern people, the Islamic State has developed a complex bureaucracy staffed by civilian employees who provided services to the local population. Although it can plausibly be argued that al-Qaeda “has no ‘civilian’ wing,”¹⁸⁷ the same argument cannot be applied to the Islamic State based on overwhelming evidence of the group’s reliance on “civilian employees” working in administrative and service-providing institutions including schools and hospitals. These civilian employees are entitled to protection under the laws of war and must be taken into account in proportionality assessments, but importantly, they can still be held accountable for aiding the Islamic State under domestic material support laws. Second, state-building terrorist groups like the Islamic State tend to create hybrid institutions that simultaneously perform war-sustaining and service-providing functions. For example, the Islamic State’s *zakāt* offices are responsible both for the collection of taxes from civilians (revenue that is used to finance military operations) and the charitable distribution of cash assistance and food to the poor (humanitarian aid).¹⁸⁸ The U.S.-led Coalition has repeatedly targeted *zakāt* offices in Iraq and Syria,¹⁸⁹ but it is unclear whether the military advantage derived from these airstrikes outweighs the potentially significant cost to civilians, as the principle of proportionality requires. Third, as a result of its control over territory and the means of violence therein, the Islamic State has the ability to coerce civilians into cooperating with the group against their will, including by directly participating in hostilities (for example, in cases where the Islamic State has forced children and mentally handicapped individuals to conduct suicide operations).

These findings suggest the following recommendations. First is the recognition of a new category of “civilian employees” who are “members” of state-

¹⁸⁷ Lederman, *supra* note 129.

¹⁸⁸ Revkin, *supra* note 175.

¹⁸⁹ See Appendix, Table II, *infra*, for a list of 19 airstrikes targeting *zakāt* offices.

building terrorist groups—insofar as they are paid by the group and work within its administrative and service-providing institutions such as schools and municipal departments—but nonetheless maintain their status as civilians and therefore must be taken into account in proportionality assessments. This recommendation balances the legal and moral obligation to protect civilians living in areas governed by terrorist groups—who are extremely vulnerable to coercion and exploitation for reasons discussed in this article—against the legitimate interests of the United States and other governments in countering the threats that these groups pose to national security and global stability. Civilian employees may become targetable if they relinquish their civilian status by directly participating in hostilities, and they may also be prosecuted for aiding terrorist groups under domestic material support laws.

Second, in light of the large number of dual-use and war-sustaining objects present in areas controlled and governed by terrorist groups, the United States should—in cases of doubt as to how an object should be classified—presume that the object is not being used to make an effective contribution to military action.¹⁹⁰ The DOD has taken the position that this presumption is not part of customary international law because “such a rule would shift the burden of determining the precise use of an object from the defender to the attacker.”¹⁹¹ However, I argue that the structural vulnerability of civilians living in areas controlled by state-building terrorist groups warrants a heightened standard of care. Furthermore, the United States should consider adopting a standard of “protective proportionality,” which has been recommended for “objects indispensable to the survival of the civilian population,”¹⁹² as defined in Additional Protocol I.¹⁹³ Examples of such objects include drinking water installations and power plants. It is conceivable that an Islamic State *zakāt* office could fall within the definition if it were providing enough food to civilians to be considered “indispensable” to their survival. At a minimum, even under an ordinary standard of proportionality, the United States should take into account civilian employees of *zakāt* offices in weighing the potential harm against the anticipated military advantage.

Third, in recognition of the Islamic State’s ability to coerce civilians into directly participating in hostilities against their will, the United States should consider the ICRC’s guidance that, in “exceptional situations,” the mental state of civilians may “call into question the belligerent nexus of their conduct,” for example, in cases where civilians are “totally unaware of the role they are playing

¹⁹⁰ *Rule 10: Civilians Objects’ Loss of Protection from Attack*, ICRC IHL DATABASE: CUSTOMARY IHL, INT’L COMM. OF RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule10 [https://perma.cc/D6AG-9U85] (last visited Dec. 23, 2017).

¹⁹¹ Van Schaack, *supra* note 164 (citing DOD MANUAL, *supra* note 154, § 5.5.3.2).

¹⁹² Henry Shue & David Wippman, *Limiting Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions*, 5 CORNELL INT’L L.J. 560, 573 (2002).

¹⁹³ See Additional Protocol I, *supra* note 75, art. 54(2) (“It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as . . . drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive.”).

in the conduct of hostilities . . . or when they are completely deprived of their physical freedom of action.”¹⁹⁴ According to this logic, civilians cannot be regarded as performing a voluntary action and therefore remain protected against direct attack “despite the belligerent nexus of the military operation in which they are being instrumentalized.”¹⁹⁵ In cases where the Islamic State forces civilians, including children and mentally handicapped individuals, to conduct suicide bombings or other operations against their will, such civilians should not be regarded as performing a voluntary action. Although it may be difficult or impossible to inquire into the mental state of civilians directly participating in hostilities, Coalition forces should at least consider the possibility that civilians may have been conscripted against their will, in which case they are likely amenable to surrender.

Fourth, as a procedural matter, the United States should develop and publicize targeting guidelines that are tailored to the unique characteristics of state-building terrorist groups including the Islamic State. These guidelines should clearly define the categories of objects and persons who are targetable in order to give fair warning to civilians in Islamic State-controlled areas. Civilians cannot be expected to refrain from conduct that renders them targetable, and to avoid targetable locations, if they do not know where the lines between permissible and prohibited behavior lie. This recommendation would directly address civilians’ demands for greater transparency in targeting decisions, as articulated by one influential Mosul-based blogger who wrote: “We request that the Coalition issue an explanation for the targeting of ‘civilian’ sites that are not a part of the Islamic State.”¹⁹⁶ It would also create incentives for civilians to refrain from conduct that would render them targetable and to stay away from targetable objects, which would likely reduce civilian casualties. These targeting guidelines should not only be reported to Congress and subject to public debate but also translated into Arabic, disseminated to local Syrian and Iraqi newspapers, and dropped as leaflets into Islamic State-controlled territories.

VII. Conclusion

The recommendations discussed above, if implemented, would help to bridge the current gap between outdated targeting principles that were designed for al-Qaeda and the realities of the Islamic State and other state-building terrorist groups. They would also help to ensure that civilians are not unjustly penalized for merely living and working (as non-combatants) in an area that happens to be controlled and governed by a terrorist group. Failure to appreciate the ways in which state-building terrorist groups differ from those that do not govern territory and people may result in the mischaracterization of civilians as combatants, and of civilian or dual-use objects as military objectives. Although the Islamic State has been mostly expelled from Iraq and is in the process of retreating to a shrinking

¹⁹⁴ ICRC INTERPRETIVE GUIDANCE, *supra* note 132, at 60.

¹⁹⁵ *Id.*

¹⁹⁶ Mosul Eye, *supra* note 181.

corner of Syria, many analysts predict that the group—which has a long history of adaptation and reinvention—will survive underground and eventually reconstitute itself as an “ISIS 2.0.”¹⁹⁷ Regardless of the future of the Islamic State, as the history of jihadist movements since the Arab Spring has demonstrated, the Islamic State is not the first state-building terrorist group that has threatened the United States and its allies, and it is unlikely to be the last. To ensure the effectiveness and legitimacy of U.S. military operations in Iraq, Syria, and other conflict areas, it is imperative that targeting policies be refined to account for the unique characteristics of state-building terrorist groups.

¹⁹⁷ See, e.g., Michael E. O’Hanlon & Sara Allawi, *How to Avoid an ISIS 2.0 in Iraq*, BROOKINGS INST. (Nov. 21, 2017), <https://www.brookings.edu/blog/markaz/2017/11/21/how-to-avoid-an-isis-2-0-in-iraq/> [<https://perma.cc/8MBK-CM5M>].

Appendix

This Article is informed by five months of field research conducted by the author between July 2015 and April 2017 in the Turkish cities of Antakya, Gaziantep, Reyhanlı, and Şanlıurfa and in the Iraqi cities of Erbil and Mosul.¹⁹⁸ Evidence cited in the Article includes: (1) interviews with key informants who have lived in Islamic State-controlled areas of Syria and Iraq including former Islamic State fighters and civilian employees; (2) social media data generated by individuals living in or near Islamic State-controlled areas; (3) official statements and archival documents produced by the Islamic State; and (4) local Arabic-language newspapers. The second and fourth sources of data were used to assemble a new dataset on the targeting of 11 Islamic State *zakāt* offices on 19 different occasions.

The Article draws on a set of interviews with 159 individuals who have lived in Islamic State-controlled areas of Iraq and Syria. Interviewees were identified through “snowball sampling” and selected on the basis of their personal experiences with the Islamic State. Snowball sampling, also known as chain-referral sampling, is a nonrandom sampling technique in which the researcher begins with a small number of contacts from the target population (in this case, individuals with knowledge of Islamic State institutions and personnel) and leverages those contacts for introductions to other members of the population. Snowball sampling is often the only way to access clandestine populations, including members of armed groups, who tend to be distrustful of outsiders as a result of the illicit nature of their activities.¹⁹⁹ This method is particularly helpful in conflict areas, where attitudes of distrust and suspicion are heightened by fear of violence.²⁰⁰ The 159 interviewees have had a variety of experiences with Islamic State governance: all of them have lived in or traveled through Islamic State-controlled areas; 52 have paid taxes to the Islamic State; 27 have a relative, friend, or neighbor who used an Islamic State court; 41 have a relative, friend, or neighbor who joined the Islamic State; and 18 have been arrested or imprisoned by the Islamic State. I have interviewed 24 former combatants and 21 former civilian employees of the Islamic State including teachers, doctors, engineers, truck drivers, an accountant, a graphic designer, and a cook. Additionally, I have conducted interviews over online messaging applications with 11 Islamic State combatants or employees and eight civilian supporters who, at the time of the interview, were living or fighting in Syria and Iraq (see Appendix Table I).

¹⁹⁸ This research was conducted under Yale Institutional Review Board protocols #1506016040 and #2000020198. I conducted my interviews in Arabic without a translator present. Because of the confidentiality procedures implemented to protect human subjects, interviewees are cited by pseudonyms. Citations indicate the city and the month in which the interview was conducted.

¹⁹⁹ See Nissim Cohen & Tamar Arieli. *Field Research in Conflict Environments: Methodological Challenges and Snowball Sampling*, 48 J. PEACE RES. 423, 425 (2011).

²⁰⁰ *Id.*

A second source of evidence upon which this Article relies is social media data (Twitter and Facebook posts) generated by internet users in or near Islamic State-controlled areas describing events therein. Given the inaccessibility of these areas to researchers, such data provides rare insights into events and experiences that would otherwise be invisible to outsiders. Social media data was collected using the Twitter search API (Application Program Interface) and the Facebook search API for public posts.

Third, the Article cites official documents and statements produced by the Islamic State itself. The Islamic State's bureaucracy has generated a vast number of documents including: (1) several different forms of propaganda directed at both international and local audience; (2) rules, religious edicts, and codes of conduct aimed at regulating the behavior of its own personnel and the civilians they govern; and (3) court verdicts and other rule-enforcing decisions. Some of these documents (particularly propaganda) are widely circulated by Islamic State members or supporters over social media and messaging applications, while other documents not intended for public distribution have been smuggled out of Islamic State-controlled territory by civilians or combatants, either as hard copies or photographs of the originals. Although Islamic State personnel often destroy incriminating documents in territory that they anticipate losing, many archives have been discovered in areas from which the group has retreated.²⁰¹ Given that civilians and combatants involved with the Islamic State are often reluctant to share potentially incriminating information with researchers, these documents are a vital complement to interview data.

Fourth, the Article also relies on evidence from local Arabic-language newspapers that report on events in Islamic State-controlled areas of Syria and Iraq with greater frequency and specificity than Western media outlets. I triangulated between these newspapers and the abovementioned sources of social media data (Twitter and Facebook posts) to assemble a new dataset that documents all known airstrikes targeting 11 Islamic State *zakāt* offices on 19 different occasions (Appendix Table II).²⁰² These *zakāt* offices, which are located in densely populated areas and simultaneously collect taxes (a war-sustaining activity) and distribute cash assistance and food to impoverished civilians (a humanitarian activity), are an example of “dual-use” institutions that simultaneously perform military and civilian functions. Although other Islamic State institutions may be classified as dual-use—for example, factories that produce plastic and cement may be used for military purposes (bomb-making and fortifications) or civilian purposes (water treatment and the repair of damaged infrastructure, and Islamic State “schools”

²⁰¹ Loveday Morris & Mustafa Salim, *A File on Islamic State's "Problem" Foreign Fighters Shows Some are Refusing to Fight*, WASH. POST (Feb. 7, 2017), https://www.washingtonpost.com/world/middle_east/a-file-on-islamic-states-problem-foreign-fighters-shows-some-are-refusing-to-fight/2017/02/06/694cdaa0-e664-11e6-903d-9b11ed7d8d2a_story.html?utm_term=.f019dc2061e0 [https://perma.cc/Q8JW-U947].

²⁰² A folder containing the original source files (social media data and local Arabic-language newspapers) used to assemble the dataset of airstrikes is available at the following link: https://www.dropbox.com/sh/199e6k80nfikk0p/AAD7bfY_8buwgWe0spn2QLuqa?dl=0.

simultaneously provide education and engage in military recruiting and training—this Article focuses on the example of *zakāt* offices because they appear to have been systematically targeted by airstrikes in numerous well-documented incidents. Schools and cement factories have also been targeted,²⁰³ but less frequently.

Although the U.S. Department of Defense (DOD) publishes monthly data on airstrikes conducted against Islamic State targets as part of Operation Inherent Resolve,²⁰⁴ this data is problematic for two reasons. First, the descriptions of targets are too vague to help determine whether the object or institution was exclusively military or dual-use in nature. For example, an “ISIL cash distribution center”²⁰⁵ or “financial facility”²⁰⁶—two ambiguous descriptions that appear frequently in the official airstrike reports—could both refer to a *zakāt* office, which is a dual-use institution by virtue of its simultaneous collection of tax revenue and distribution of cash transfers and food donations to the poor. But these descriptions could just as easily refer to a *dīwān al-jund* (“office of soldiers”), which distributes salaries and weapons to fighters, administers training camps, and oversees the budgeting of military operations²⁰⁷—functions that warrant classification as a military objective. Similarly, “cash storage facilities”²⁰⁸ might refer to *zakāt* offices, banks, or *al-jund* offices—institutions with very different functions that have implications for targeting decisions under IHL. The second concern with the quality of the Pentagon’s data is that independent investigations have found that the U.S. military

²⁰³ See, e.g., *All Feasible Precautions? Civilian Casualties in Anti-ISIS Coalition Airstrikes in Syria*, HUMAN RIGHTS WATCH (Sept. 24, 2017), <https://www.hrw.org/report/2017/09/24/all-feasible-precautions/civilian-casualties-anti-isis-coalition-airstrikes-syria> [<https://perma.cc/QF9X-GS3E>] (describing an incident in which the Coalition bombed a school in the Syrian town of Mansoura that was “believed to be an ISIS intelligence headquarters and weapons storage facility,” although eyewitnesses reported that the school was being used primarily by displaced civilians, and that children played in its courtyard); see also iMMAP, *Iraq: Mosul Response - Explosive Incidents (8-14 January 2017)*, RELIEFWEB (Jan. 14, 2017), <https://reliefweb.int/report/iraq/iraq-mosul-response-explosive-incident-8-14-january-2017> [<https://perma.cc/8C5P-GXBP>].

²⁰⁴ *Strike Releases*, U.S. DEP’T OF DEF., OPERATION INHERENT RESOLVE, <http://www.inherentresolve.mil/News/Strike-Releases/> (last visited Oct. 1, 2017).

²⁰⁵ Press Release, U.S. Dep’t of Def., Strikes Target ISIL Terrorists in Syria, Iraq (Jan. 12, 2016), <https://www.defense.gov/News/Article/Article/642676/strikes-target-isis-terrorists-in-syria-iraq/> [<https://perma.cc/6V85-PD9V>].

²⁰⁶ Press Release, U.S. Dep’t of Def., U.S., Coalition Strikes Continue Against ISIS in Syria, Iraq (Feb. 28, 2017), <https://www.defense.gov/News/Article/Article/1096822/us-coalition-strikes-continue-against-isis-in-syria-iraq/> [<https://perma.cc/FU2A-7PMY>].

²⁰⁷ See Aymenn al-Tamimi, *Archive of Islamic State Administrative Documents*, AYMENN JAWAD AL-TAMIMI’S BLOG (Jan. 11, 2016), <http://www.aymennjawad.org/2016/01/archive-of-islamic-state-administrative-documents-1> (*Specimen 150: Expenses Requests for a Battalion in Sha’aban 1436 AH, Homs province* refers to a budget for military equipment including tents, diesel generators, camouflage nets, and cameras. *Specimen 18D: Note From the General Administration of the Camps* refers to “camps administration” as a sub-division of the *dīwān al-jund*). See also Michael Weiss, *Leaked ISIS Documents Show Internal Chaos*, DAILY BEAST (Aug. 30, 2016), <http://www.thedailybeast.com/leaked-isis-documents-show-internal-chaos> [<https://perma.cc/26LQ-6VVP>] (referring to requests for distribution of overdue salaries by the *dīwān al-jund*).

²⁰⁸ GLENN A. FINE, ACTING INSPECTOR GEN., U.S. DEP’T OF DEF., OPERATION INHERENT RESOLVE: REPORT TO THE UNITED STATES CONGRESS 11 (2016), https://oig.state.gov/system/files/oir_quarterly_march2016_-_a1.pdf [<https://perma.cc/3XFY-BNYG>].

has failed to disclose thousands of lethal airstrikes conducted over several years in Iraq, Syria, and Afghanistan.²⁰⁹ The undercounting of airstrikes and insufficient granularity of data released by the U.S. military necessitated the collection of new data for this article.

Data based on local newspapers and social media posts, upon which this Article relies, may be biased in other ways. For example, anti-American Twitter users may be motivated to fabricate or exaggerate reports of civilian casualties and collateral damage resulting from Coalition airstrikes. But when the same report is corroborated by multiple sources and further supported by photographic evidence, its credibility increases. To the extent possible, the airstrikes documented in this article were corroborated with photographic evidence and a second or third source.²¹⁰ Another precaution taken to guard against the inclusion of erroneous reports in the dataset was to count only those airstrikes for which a primary source (local newspaper or social media post) explicitly identifies the target as a “*zakāt*” office using the Arabic word for *zakāt*, “الزكاة.”

²⁰⁹ Andrew deGrandpre & Shawn Snow, *The U.S. Military’s Stats on Deadly Airstrikes Are Wrong. Thousands Have Gone Unreported*, MILITARY TIMES (Feb. 6, 2017), <https://www.militarytimes.com/news/your-military/2017/02/05/the-u-s-military-s-stats-on-deadly-airstrikes-are-wrong-thousands-have-gone-unreported/> [https://perma.cc/D6AU-TZ6P].

²¹⁰ These second and third sources are marked as “corroborating” in the Dropbox of source files available at: https://www.dropbox.com/sh/199e6k80nfikk0p/AAD7bfY_8buwgWe0spn2QLuqa?dl=0.

Table I. Descriptive Statistics of Interview Data

		Number
Total Interviews		159
Gender	Female	45
	Male	114
Age	<50	110
	>50	49
Interview Location	Antakya, Turkey	7
	Gaziantep, Turkey	41
	Reyhanlı, Turkey	5
	Şanlıurfa, Turkey	38
	Mosul, Iraq	14
	Erbil, Kurdistan	28
	Dohuk, Kurdistan	7
	Internet/Phone	19
Contact with IS	Lived in or traveled through an IS-controlled area	159
	Paid taxes to IS	52
	Have a relative, friend, or neighbor who used an IS court	27
	Have a relative, friend, or neighbor who joined IS	41
	Provided services to IS members (e.g. medical care, cooking)	14
	Arrested, imprisoned, or punished by IS	18
	Former IS combatants	24
	Former IS civilian employees	21
	IS fighters or employees (at time of interview)	11
	Civilians who support IS (at time of interview)	8

Table II. Data on Targeting of Islamic State *Zakāt* Offices in Iraq and Syria²¹¹

Airstrike #	Date	Country	City or Village	Conducted By
1	10/8/2014	Iraq	Gogjali	Unspecified
2	1/31/2015	Iraq	al-Qaim	U.S.-led Coalition
3	3/8/2015	Syria	al-Mayadin	U.S.-led Coalition
4	6/25/2015	Iraq	Hit	U.S.-led Coalition
5	9/3/2015	Iraq	Mosul	U.S.-led Coalition
6	10/22/2015	Syria	Raqqa	Syrian government
7	10/29/2015	Syria	al-Bab	Unspecified
8	11/10/2015	Iraq	Hawija	U.S.-led Coalition
9	11/22/2015	Iraq	al-Jarn	U.S.-led Coalition
10	2/13/2016	Iraq	Mosul	U.S.-led Coalition
11	2/15/2016	Iraq	Mosul	U.S.-led Coalition
12	3/7/2016	Iraq	Mosul	U.S.-led Coalition
13	4/16/2016	Iraq	Tel Afar	Unspecified
14	5/3/2016	Syria	Raqqa	Unspecified
15	5/10/2016	Iraq	Rutba	U.S.-led Coalition
16	11/3/2016	Iraq	Tel Afar	U.S.-led Coalition
17	6/17/2017	Syria	al-Mayadin	U.S.-led Coalition
18	8/24/2017	Syria	Raqqa	U.S.-led Coalition
19	9/29/2017	Iraq	al-Qaim	U.S.-led Coalition

²¹¹ A folder containing the original source files (social media data and local Arabic-language newspapers) used to assemble the dataset of airstrikes is available at the following link: https://www.dropbox.com/sh/199e6k80nfikk0p/AAD7bfY_8buwgWe0spn2QLuqa?dl=0.