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Tethering the Law of Armed Conflict to Operational Practice: “Organized Armed Group” Membership in the Age of ISIS

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Tethering the Law of Armed Conflict to Operational Practice: “Organized Armed Group” Membership in the Age of ISIS

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The views expressed here are personal views and do not necessarily reflect those of the Department of Defense, the United States Army, the United States Military Academy, or any other department or agency of the United States Government. The analysis presented stems from academic research of publicly available resources, not from protected operational information.

2018]	“ORGANIZED ARMED GROUP” MEMBERSHIP	335
INTRODUCTION		335
I. STATUS-BASED TARGETING OF “OTHER” ORGANIZED ARMED GROUPS IN A NON-INTERNATIONAL ARMED CONFLICT		338
A. <i>What is an “Organized Armed Group” (OAG)?</i>		338
B. <i>Contemporary Example of an OAG: ISIS</i>		342
C. <i>Consequence of Being a Member of an OAG</i>		345
II. SURVEYING THE FIELD: APPROACHES TO DETERMINING MEMBERSHIP IN AN OAG		347
A. <i>Continuous Combat Function (CCF)</i>		347
B. <i>Conduct-Link-Intent Test</i>		349
C. <i>Structural Membership</i>		350
III. WHAT OAG MEMBERSHIP DETERMINATION APPROACH BEST WORKS ON THE CONTEMPORARY NIAC BATTLEFIELD		354
A. <i>The CCF and the Danger of Good Intentions</i>		355
B. <i>The Need for Targeting Flexibility</i>		358
C. <i>If You Play the Game . . . Live With the Consequences</i>		360
CONCLUSION		361

INTRODUCTION

It is mid-June 2017 and the United States continues its long campaign in Syria and Iraq against the powerful non-State actor known as ISIS.¹ The war is going badly for ISIS as their greatest prize in Iraq, the large city of Mosul, is on the verge of being re-taken by the Iraqi military.² In an attempt to escape being trapped in Mosul, ISIS members are fleeing west towards Raqqah, Syria—the *de facto* capital of their so-called “caliphate.”³

¹ The fact that the United States is currently involved in combat in Syria against ISIS is indisputable. See Christopher M. Blanchard and Carla E. Humud, *The Islamic State and U.S. Policy*, CRS REPORT 7-5700, R43612, 2 (Feb. 2017), <https://fas.org/sgp/crs/mideast/R43612.pdf>. Noting:

the Islamic State (IS, aka the Islamic State of Iraq and the Levant, ISIL/ISIS, or the Arabic acronym Da’esh) is a transnational Sunni Islamist insurgent and terrorist group that controls large areas of Iraq and Syria, has affiliates in several other countries, has attracted a network of global supporters, and disrupts international security with its campaigns of violence and terrorism.

Id.

² Mosul was re-taken by Iraqi forces on 10 July 2017. See John Bacon, *Iraqi forces have fully retaken Mosul, U.S. backed coalition confirms*, USA TODAY (July 10, 2017), <https://www.usatoday.com/story/news/world/2017/07/10/iraqi-forces-have-retaken-mosul-u-s-backed-coalition-confirms/465022001/>.

³ See, e.g., Owen Holdaway, *On the Ground in Raqqa, Capital of Islamic State’s Caliphate*, THE

The following hypothetical is illustrative of a likely scenario faced by the United States and coalition forces. As the ISIS exodus towards Raqqa is ongoing, the United States receives intelligence that a senior ISIS Military Commander, one they have been pursuing for the last two years, will be traveling the next day in a white car from Mosul to Raqqa. This ISIS Commander is known to be actively directing combat actions against the U.S. and Coalition Forces, Iraqi and Syrian government officials, and most troubling, at civilians who show resistance to ISIS. The source of the intelligence, who has proven to be extremely reliable in the past, has also shared that the ISIS Commander severely limits his travel in vehicles to minimize his risk of being targeted by U.S. aircraft. Additionally, tracking the ISIS Commander has become difficult as he has taken to giving orders to his subordinates in clandestine ways, primarily through encrypted phone messages which the U.S. has not yet unlocked. Thus, the ISIS Commander's decision to travel presents an extraordinary opportunity for the U.S. and Coalition Forces.⁴

But there is a complication. During the planning process, the U.S. receives additional intelligence that there will be a second white car traveling with the ISIS Commander driven by his brother. While the U.S. does not have extensive information on the brother, they do know that he identifies himself on social media as an ISIS member who has pledged an oath of loyalty to the group and its leader, Abu Bakr al Baghdadi. Further, he is known as one of the "public faces" of ISIS as he regularly makes videos advertising the group's violent efforts to establish the caliphate and highlighting their most recent military exploits. However, aside from this information, there are no indications that the brother actually carries out hostile activities in support of ISIS. With the window for a strike approaching, and with no way of knowing who is in each car, the planning cell must quickly decide whether to call off the strike or target both vehicles.

Although the above scenario is fictional,⁵ the targeting dilemma presented is real. While most agree that status-based targeting of organized armed groups (OAG) in a non-international armed conflict (NIAC) is permissible,⁶ what

JERUSALEM POST (Oct. 9, 2017), <http://www.jpost.com/Middle-East/ISIS-Threat/On-the-ground-in-Raqqa-capital-of-Islamic-States-caliphate-507014>.

⁴ On September 10th, 2014, President Obama announced that combat efforts in Iraq and Syria would be joined by a Coalition of over 60 nations, providing various means of support to the combat effort. See Kathleen McInnis, *Coalition Contributions to Countering the Islamic State*, CRS REPORT R44135, 24 (Aug. 2016), <https://fas.org/sgp/crs/natsec/R44135.pdf>.

⁵ If there are any similarities between this scenario and actual operations in Syria, they are coincidental.

⁶ See, e.g., U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL ¶ 5.8.3 (2016) [hereinafter DOD LAW OF WAR MANUAL] ("Like members of an enemy State's armed forces, individuals who are formally or functionally part of a non-State armed group engaged in hostilities may be made the object of attack because they likewise share in their group's hostile intent" (citing *Al-Adahi v. Obama*, 613 F. 3d 1102, 1108 (D.C. Cir. 2010)); INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 7, at 27–28 (Nils Melzer ed., 2009), <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> [hereinafter ICRC INTERPRETIVE GUIDANCE] (discussing how members of organized armed groups in a non-international armed conflict lose protections against

remains unsettled is when an individual is a targetable member of such a group. Thus, in the hypothetical vignette, the difficulty is not in deciding whether the U.S. can target the ISIS Commander, but rather whether the brother is also a targetable member of ISIS. Answering this question is important for ensuring State actors, engaged in hostilities with non-State armed groups during a NIAC, are capable of complying with the principle of distinction⁷ as well as with their general obligation to protect civilians in the area of hostilities.⁸

There are various legally defensible views on how best to answer this question. Yet, in determining which approach is most reasonable, it is worth noting that the “challenging and complex circumstances of contemporary warfare”⁹ require targeting guidance that is easily communicated to the State’s armed forces. An approach that is impractical in application will not foster compliance and will create greater risk for the civilian population in these conflicts.

Therefore, in order to strengthen “the implementation of the principle of distinction”¹⁰ in an era of increasingly powerful non-State actors and concomitant violent NIACs,¹¹ this article seeks to find a targeting approach that is both legal and practical to implement.

The article begins with a background section discussing OAGs, such as ISIS, and the consequences of membership in such a group. A survey of the various methods of determining OAG membership, and the practical applicability of each approach to ISIS, follows. Based upon this comparison, the article concludes that more restrictive membership criteria create an unworkable paradigm that does not match the realities of the modern battlefield. Instead, an expansive understanding

direct attack); see also Michael N. Schmitt, *The Status of Opposition Fighters in a Non-International Armed Conflict*, 88 INT’L L. STUD. 119, 137 (2012) (“there is no LOAC prohibition on attacking members of organized armed groups at any time. . . .”).

⁷ See Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I) art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (stating that parties to the conflict must “distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”).

⁸ See *id.* art. 51(2) (“The civilian population as such, as well as individual civilians, shall not be the object of attack.”); Protocol Additional to the Geneva Conventions of August 1949, and Relating to the Protection of Victims of Non-International Armed Conflict (Protocol II) art. 13, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II] (“Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.”).

While the United States has not ratified AP I or AP II, many portions of the protocol are considered customary international law, including the protection of civilians during conflict and the principle of distinction. See generally Michael J. Matheson, *Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U.J. INT’L L. & POL’Y 419 (1987).

⁹ ICRC INTERPRETIVE GUIDANCE, *supra* note 6.

¹⁰ *Id.* at 6.

¹¹ See, e.g., Shane Reeves, *What Happens When States No Longer Govern?*, LAWFARE (Feb. 13, 2017), <https://www.lawfareblog.com/what-happens-when-states-no-longer-govern>.

of who qualifies as a member of an OAG is not only practical, but necessary for providing underlying support for the principle of distinction in non-international armed conflicts.

I.

STATUS-BASED TARGETING OF “OTHER” ORGANIZED ARMED GROUPS IN A NON-INTERNATIONAL ARMED CONFLICT

A. *What is an “Organized Armed Group” (OAG)?*

During a NIAC, Common Article 3 to the 1949 Geneva Conventions¹² is applicable to “each Party to the conflict.”¹³ Common Article 3 provides no further guidance on party status, only distinguishing between individuals who are taking an “active part in hostilities” and those who are not.¹⁴ Clarification on who qualifies as a “Party to the conflict” in a NIAC is provided by Article 1(1) of the 1977 Additional Protocol II,¹⁵ which states:

¹² There are roughly twelve “common” articles found in the Geneva Conventions. *See* GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR*, 84–85 (2010). Common Article 3, which is repeated verbatim in all four Geneva Conventions, establishes the “law trigger for application of all treaty and customary international law related to” non-international armed conflicts. *See* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC I]; Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; *see also* GEOFFREY S. CORN, *Legal Classification of Military Operations*, in *U.S. MILITARY OPERATIONS: LAW, POLICY, AND PRACTICE* 74 (Geoffrey S. Corn, et al. eds. 2016).

¹³ *See* GC III, *supra* note 12, art. 3 (“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions . . .”).

¹⁴ *See id.* (“Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely. . .”).

¹⁵ Again, while the U.S. has not ratified Additional Protocol II many of its provisions are considered customary international law. *See, e.g.*, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶¶ 79, 82 (July 8); *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 54, ¶ 218 (June 27); Schmitt, *supra* note 6, at 119 (noting that certain individual provisions of Additional Protocol II are customary); ICRC, *Non-international armed conflict*, in *How Does Law Protect in War?*, [https:// casebook.icrc.org/law/non-international-armed-conflict](https://casebook.icrc.org/law/non-international-armed-conflict) (last visited Oct. 30, 2017) (“The ICRC Study on customary international humanitarian law has confirmed the customary nature of most of the treaty rules applicable in non-international armed conflicts (Art. 3 common to the Conventions and Protocol II in particular).”).

[t]his Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.¹⁶

Thus, Additional Protocol II clearly anticipates non-State groups acting as a party to a NIAC.¹⁷ In particular, the text specifies that, in addition to a State party, other parties to the conflict could include "dissident armed forces" or "other organized armed groups."¹⁸ While it is outside the scope of this article to analyze the "dissident armed forces" language of this provision, it is enough to note this is "the most straightforward category of opposition forces" in a NIAC.¹⁹

In contrast, "other organized armed groups" only qualify as a "Party to the conflict" if they are "under responsible command" and exercising territorial control such that they can "carry out sustained and concerted military operations."²⁰ Providing further granularity on what characterizes "sustained and concerted military operations," Article 1(2) makes Additional Protocol II inapplicable to "internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature."²¹ Relying on this language, the International Criminal Tribunal for the former Yugoslavia (ICTY) defined a NIAC as "protracted armed violence between governmental authorities and organized armed groups."²² Assuming the conflict meets the requisite

¹⁶ AP II, *supra* note 8, at art. 1(1).

¹⁷ Additional Protocol II is not as widely applicable as Common Article 3 since it is only triggered if there is involvement of a State armed group (versus a non-international armed conflict exclusively between non-State actors) and the group opposed to the government controls territory. *Compare* GC III, *supra* note 12, art. 3 with AP II, *supra* note 8, art. 1(1). *See also* YVES SANDOZ ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JULY 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 4447 (1987) [hereinafter COMMENTARY] ("In fact, the Protocol only applies to conflicts of a certain degree of intensity and does not have exactly the same field of application as common Article 3, which applies in all situations of non-international armed conflict."). While these differences "bear on the law that applies to a conflict" it does not alter the status of the participants. Schmitt, *supra* note 6, at 120.

¹⁸ AP II, *supra* note 8, at art. 1(1).

¹⁹ Schmitt, *supra* note 6, at 124. *See id.* 124-26 for an explanation on why "dissident armed forces" are easy to identify. It is also important to note that a civilian that directly participates in the hostilities will forego the protections typically afforded them in a NIAC. *See* AP II, *supra* note 8, at art. 13.3 (noting that civilians are protected "unless and for such time as they take a direct part in hostilities."). *See also* ICRC INTERPRETIVE GUIDANCE, *supra* note 6 at 25 (describing this category as those "who directly participate in hostilities on a merely spontaneous, sporadic or unorganized basis").

²⁰ AP II, *supra* note 8, at art. 1(1).

²¹ *Id.* at art. 1(2).

²² Prosecutor v. Tadic, Case No. IT-94-1, Decision on Defence Motion for Interlocutory Appeal on

intensity,²³ the question then becomes under what conditions a collection of fighters can be labeled an “organized armed group” (OAG)?

There appears to be great flexibility in this determination, as the law of armed conflict (LOAC) accepts a broad definition of an OAG.²⁴ As noted above, Additional Protocol II, Article 1(1) requires the group to be “under responsible command,”²⁵ a phrase “explicatory of the notion of organization.”²⁶ An OAG, according to the Commentary to the Article, should be an “organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a de facto authority.”²⁷ Yet, this does not mean “that there is a hierarchical system of military organization similar to that of regular armed forces.”²⁸ In fact, the International Committee of the Red Cross (ICRC) notes that only minimal organization is necessary.²⁹

While there may not be a “rigid, itemized checklist” of criteria that qualifies a group as an OAG,³⁰ the ICTY does offer helpful factors for making this determination. In the 2005 case of *Limaj*,³¹ the ICTY specifically identified the following factors of the Kosovo Liberation Army as persuasive in determining its status as an OAG: the existence of a general staff and headquarters, designated military zones, adoption of internal regulations, the appointment of a spokesperson, coordinated military actions, recruitment activities, the wearing of

Jurisdiction ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995). Professor Schmitt notes that the ICTY definition of a NIAC thus “created a test combining intensity and organization which has been adopted in the Rome Statute of the International Criminal Court.” Schmitt, *supra* note 6, at 127 (citing Rome Statute of the International Criminal Court art. 8(2)(f), July 17, 1998, 2187 U.N.T.S. 90) (defining a NIAC as taking “place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”). The Tadic definition of a NIAC is generally considered customary international law. *See, e.g.*, International Committee of the Red Cross (ICRC) Opinion Paper, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* 5 Mar. 2008.

²³ *See* Peter Margulies, *Networks in Non-International Armed Conflicts: Crossing Borders and Defining “Organized Armed Groups,”* 89 INT’L L. STUD. 54, 65 (2013) (offering an excellent discussion on how to best interpret the ICTY’s use of the term “protracted armed violence.”).

²⁴ *Id.* at 62.

²⁵ AP II, *supra* note 8, art 1(1).

²⁶ Schmitt, *supra* note 6, at 128.

²⁷ COMMENTARY, *supra* note 17, at 1352, ¶ 4463.

²⁸ *Id.*

²⁹ *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, *HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW?* 5 Mar. 2008, <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> (stating “as to the insurgents, the hostilities are meant to be of a collective character, [i.e.] they have to be carried out not only by single groups. In addition, the insurgents have to exhibit a minimum amount of organisation.”).

³⁰ Margulies, *supra* note 233, at 62.

³¹ *Prosecutor v. Limaj*, Case No. IT-03-66-T, Judgment, 1 90 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005) [hereinafter *Limaj*] at 37, ¶ 90.

uniforms and negotiations with the other side.³² Similarly, in the case of *Haradinaj*,³³ the ICTY again looked at various factors to determine the existence of an organized armed group. These factors included:

the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.³⁴

An analysis of these two ICTY cases indicate that an OAG, at minimum, should exhibit a degree of structure and be able to act in a coordinated fashion.³⁵ More specifically, "a group that is transitory or ad hoc in nature does not qualify; in other words, an organized armed group can never simply consist of those who are engaged in hostilities against the State, *sans plus*. It must be a distinct entity that the other side can label the 'enemy'. . . ."³⁶ However, it is worth highlighting again that the ICTY did not consider any "single factor [as] necessarily determinative" of a group being organized.³⁷

A group that is sufficiently "organized" must also be "armed" to qualify as an OAG. "Logically, a group is armed when it has the capacity to carry out 'attacks'"³⁸ which are defined as "acts of violence against the adversary, whether in offence or in defence."³⁹ Professor Schmitt notes that "[s]uch acts must be based on the *group's* intentions, not those of individual members. This conclusion derives from the fact that while many members of the armed forces have no violent function, the armed forces as a whole are nevertheless 'armed' as a matter of LOAC."⁴⁰ In situations where a group is not directly conducting an attack, but takes action that would be construed as directly participating in hostilities, "it is a reasonable extrapolation to conclude" that the group meets the criteria for being

³² Schmitt, *supra* note 6, at 129 (citing *Limaj*).

³³ Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment, ¶ 60 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008), surveying Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); see also Schmitt, *supra* note 6, at 129.

³⁴ Prosecutor v. Haradinaj, *supra* note 33, at ¶ 60.

³⁵ See Schmitt, *supra* note 6, at 129–30.

³⁶ *Id.* at 129.

³⁷ *Id.* at 129 (citing *Haradinaj*).

³⁸ *Id.* at 131.

³⁹ AP I, *supra* note 7, at art. 49(1).

⁴⁰ See Schmitt, *supra* note 6, at 131. To support this proposition Professor Schmitt draws an analogy to Additional Protocol I Article 43.2 which categorizes "member of the armed forces" as "combatants . . . [who] have the right to participate directly in hostilities," AP I, *supra* note 7, at art. 43.2, "not as individuals who do so participate." Schmitt, *supra* note 6, at n.72. Therefore, it is the group's activities that matter, "not those of select members." *Id.*

“armed.”⁴¹ Examples may include those who collect tactical intelligence to be used by another group in carrying out an attack⁴² or those who provide weapons for use in an immediate attack.⁴³ Thus, similar to the term “organized,” the definition of “armed” does not appear to be narrowly construed.

Applying the “organized” and “armed” criteria to a contemporary organization is helpful for illustrating the parameters of an OAG. Perhaps no current non-State actor is more relevant to this exercise than ISIS. Therefore, an application of the OAG criteria to ISIS follows.

B. Contemporary Example of an OAG: ISIS

ISIS’s ideological and organizational roots are traced to disenfranchised Sunnis who, led by Abu Musab al Zarqawi, grouped together to fight the U.S. and the newly established Iraqi government from 2002-2006.⁴⁴ Though Zarqawi was killed by U.S. forces in 2006, the group continued their violent activities, eventually evolving into ISIS.⁴⁵ “By early 2013, the group was conducting dozens of deadly attacks a month inside Iraq and had begun operations in neighboring Syria.”⁴⁶ In June 2014, ISIS declared their intent to re-form a caliphate across large swaths of land in the Middle East, claimed Raqqa, Syria as their capital, and named Abu Bakr al Baghdadi (a former U.S. detainee) as caliph and imam.⁴⁷ Heavily armed—as evidenced by their ability to conduct sustained military operations against the U.S. and Coalition partners⁴⁸—ISIS has gone about establishing their caliphate through force, abductions, sexual slavery, beheadings, and public executions.⁴⁹ While recent battlefield losses have significantly shrunk

⁴¹ Schmitt, *supra* note 6, at 131 (explaining that “to the extent that acts constituting direct participation render individual civilians subject to attack” it can be concluded that “a group with a purpose of directly participating in hostilities” is also armed).

⁴² *See id.*

⁴³ *See* ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 55–56 (stating that “[t]he delivery by a civilian truck driver of ammunition to an active firing position at the front line would almost certainly have to be regarded as an integral part of ongoing combat operations and, therefore, as direct participation in hostilities” (citation omitted)).

⁴⁴ Blanchard & Humud, *supra* note 1, at 18.

⁴⁵ *Id.* *See also* Howard Shatz and Erin-Elizabeth Johnson, *The Islamic State We Knew: Insights Before the Resurgence and Their Implications*, RAND CORPORATION, 5–6 (2015), https://www.rand.org/pubs/research_reports/RR1267.html.

⁴⁶ Blanchard & Humud, *supra* note 1, at 18.

⁴⁷ *See id.*

⁴⁸ *See, e.g.*, Tom O’Connor, *War in Iraq: Islamic State Collapses as Military Kills ISIS Commander in West Mosul*, NEWSWEEK (May 10, 2017), <http://www.newsweek.com/war-iraq-islamic-state-military-kill-isis-commander-mosul-607055> (discussing a recent combat operation where ISIS used suicide bombers and sniper fire against the U.S. and its coalition partners); Jeremy Wilson, Jeremy Bender & Armin Rosen, *These are the weapons Islamic State fighters are using to terrify the Middle East*, BUSINESS INSIDER (Jan. 17, 2016), <http://www.businessinsider.com/isis-military-equipment-arsenal-2016> (discussing heavy weaponry possessed by ISIS including tanks, armored vehicle, self-propelled artillery, rocket launchers, as well as other equipment).

⁴⁹ Office of the UN High Comm’r for Human Rights (OHCHR) and UN Assistance Mission for Iraq

the area under ISIS dominance,⁵⁰ the group continues to control territory and govern a small group of civilians under a strict version of Sharia law.⁵¹

The ISIS organizational structure is built around five main pillars: security, sharia, military, administration, and media.⁵² Emphasis on each of these pillars allows ISIS to gain, and then maintain, control of territory.⁵³ In describing the sophisticated organization of ISIS, a RAND study notes that “[t]he group was (and is) bureaucratic and hierarchical. Lower-level units reported to upper-level units, and units shared a basic structure in which upper-level emirs were responsible for security, sharia, military, and administration in a particular geographic area.”⁵⁴ Further, “[t]hese emirs worked with departments or committees and managed a layer of sector emirs and specialized emirs at lower levels. This structure created a bench of personnel knowledgeable about managing a terrorist group that intended to become a State.”⁵⁵

As part of this organizational structure, individuals pledge an oath to ISIS and specifically to its leader, Abu Bakr al Baghdadi.⁵⁶ The oath of allegiance,

(UNAMI), Report on the Protection of Civilians in the Armed Conflict in Iraq: 1 May – 31 October 2015, at 8-20 (Jan. 19, 2016), <http://reliefweb.int/report/iraq/report-protection-civilians-armed-conflict-iraq-1-may-31-october-2015-enar> [hereinafter Report on the Protection of Civilians in the Armed Conflict in Iraq]. See also Shatz & Johnson, *supra* note 455, at 3.

⁵⁰ For a map of the areas within Iraq and Syria controlled by ISIS at the time of writing, see Blanchard & Humud, *supra* note 1, at Fig. 1.

⁵¹ See, e.g., *id.* at 26 (“The ideology of the Islamic State organization can be described as a uniquely hardline version of violent jihadist-Salafism—the group and its supporters are willing to use violence in an armed struggle to establish what they view as an ideal society based on their understanding of Sunni Islam.”); Shatz & Johnson, *supra* note 45, at 2 (“Clandestine campaigns of assassination and intimidation have been part of the group’s playbook for more than a decade.”).

⁵² See Blanchard & Humud, *supra* note 1, at 10.

⁵³ For example, the RAND report describes the methodical process ISIS follows to gain control of territory:

establish an intelligence and security apparatus, target key opponents, and establish extortion and other criminal revenue-raising practices; establish administrative and finance functions and lay the foundation for command and control, recruiting, and logistics; establish a sharia network, building relations with local religious leaders; establish a media and information function; [and] establish military cells to conduct attacks.

Shatz & Johnson, *supra* note 45, at 10 (citing Pat Ryan, *AQI in Mosul: Don’t Count Them Out*, AL SAHWA (Dec. 15, 2009)).

⁵⁴ Shatz & Johnson, *supra* note 45, at 2.

⁵⁵ *Id.*

⁵⁶ See Reem Makhoul & Mark Scheffler, *Pledging Allegiance to ISIS: Real Oath or Empty Symbolism?*, WALL ST. J. (Nov. 13, 2014), <http://www.wsj.com/video/pledging-allegiance-to-isis-real-oath-or-empty-symbolism/7B2650B8-A534-4E97-B59F-0BF57BBB7AE9.html>; see also Blanchard & Humud, *supra* note 1, at 21 (“Since 2014, some armed groups have recognized the Islamic State caliphate and pledged loyalty to Abu Bakr al Baghdadi.”), and Priyanka Boghani, *What a Pledge of Allegiance to ISIS Means*, FRONTLINE (Nov. 12, 2014), <https://www.pbs.org/wgbh/frontline/article/what-a-pledge-of-allegiance-to-isis-means/> (discussing

called *bay'ah*, is common to the Islamic world. This “[o]ath of allegiance to a leader,” is an “[u]nwritten pact given on behalf of the subjects by leading members of the tribe with the understanding that, as long as the leader abides by certain responsibilities towards his subjects, they are to maintain their allegiance to him.”⁵⁷ In the case of ISIS, when individuals and groups pledge *bay'ah* to the terrorist group, they are pledging an allegiance to the claim by ISIS that it can use any means necessary to reestablish the caliphate and that Abu Bakr al Baghdadi is “the caliph and imam (leader of the world’s Muslims).”⁵⁸ To dishonor the oath to ISIS and al Baghdadi will result in punishment.⁵⁹

ISIS membership also requires vetting and mentoring from an established member.⁶⁰ During this vetting and indoctrination process, aspiring members are required to study selected books, publications, and fatwas provided by ISIS.⁶¹ Upon completion of this initial phase, all potential members must attend Sharia Camp, followed later by military camp.⁶² ISIS then assigns its members to various roles, all contributing to the overall mission of the group to establish their caliphate by whatever means necessary. If accepted into ISIS, members are expected to plan, coordinate, and carry out military actions against all those outside of the group including State military forces, State government officials and civilians.⁶³ As the excerpts from the RAND article evidence, even if an ISIS

various terrorists groups from outside of Iraq and Syria pledging allegiance to ISIS and al-Baghdadi).

⁵⁷ Oxford Islamic Studies Online, Oxford University Press, at <http://www.oxfordislamicstudies.com/article/opr/t125/e316>.

⁵⁸ Blanchard & Humud, *supra* note 1, at 18 (“In June 2014, Islamic State leaders declared their reestablishment of the caliphate . . . demanded the support of believing Muslims, and named Abu Bakr al Baghdadi as caliph and imam . . .”). See also Thomas Joscelyn & Caleb Weiss, *Islamic State recognizes oath of allegiance from jihadists in Mali*, FDD’S LONG WAR JOURNAL (Oct. 31, 2016), <https://www.longwarjournal.org/archives/2016/10/islamic-state-recognizes-oath-of-allegiance-from-jihadists-in-west-africa.php>.

⁵⁹ Makhoul & Scheffler, *supra* note 566 (“Breaking a pledge is a considered a great sin and even if ISIS doesn’t punish you, God will.”).

⁶⁰ See generally Wissam Abdallah, *What it takes to join the Islamic State*, AL-MONITOR (Aug. 6, 2015), <http://www.al-monitor.com/pulse/politics/2015/08/syria-fighters-join-isis-apply-training-requirements.html> (articulating the intense, detailed and long process for joining ISIS including military training for all members of ISIS, even those who do not ultimately conduct direct attacks); John Graham, *Who Joins ISIS and Why?*, HUFFINGTON POST BLOG, http://www.huffingtonpost.com/john-graham/who-joins-isis-and-why_b_8881810.html (addressing the “great lengths” that ISIS has gone to “to demonstrate to its members and recruits that the world of radical Islam is not just death and destruction but a 24/7 total support structure” as part of the continuing indoctrination of ISIS members); Alessandria Masi, *ISIS Recruiting Westerners: How the “Islamic State” Goes After Non-Muslims and Recent Converts in the West*, IB TIMES (Sept. 8, 2014), <http://www.ibtimes.com/isis-recruiting-westerners-how-islamic-state-goes-after-non-muslims-recent-converts-west-1680076> (describing how ISIS requires the establishment of an in-depth mentor-mentor relationship as part of the vetting process for Westerners who want to join ISIS).

⁶¹ See Abdallah, *supra* note 600.

⁶² *Id.*

⁶³ See generally Blanchard & Humud, *supra* note 1, at 21–25 (describing the various ISIS attacks around the world). See also Report on the Protection of Civilians in the Armed Conflict in Iraq, *supra* note 49.

member operates in a seemingly non-military role, their actions contribute to the overall violent and combative nature of the organization which, again, has the ultimate goal to take over territory through any means.

Based on the above information, ISIS is a hierarchical organization that is well-armed and qualifies as an OAG. Further, the group is currently participating in a number of NIACs⁶⁴ and is thus a “Party to the conflict.” Accordingly, membership in ISIS, if established, results in the adverse consequences described below.

C. Consequence of Being a Member of an OAG

In a NIAC an individual may be a civilian, part of the government’s armed forces,⁶⁵ or a member of an OAG.⁶⁶ These are mutually exclusive categories, meaning members of an OAG are obviously not civilians.⁶⁷ This distinction is not unimportant as the protections extended to civilians by the LOAC will not apply to OAG members.⁶⁸ In particular, whereas civilians are only targetable “for such time as they take a direct part in hostilities,”⁶⁹ OAG members are “analogous to members of the armed forces, and thereby remain targetable even when not participating” in the hostilities.⁷⁰ In other words, a civilian’s *conduct* determines

⁶⁴ See generally David Wallace, Amy McCarthy & Shane R. Reeves, *Trying to Make Sense of the Senseless: Classifying the Syrian War under the Law of Armed Conflict*, 25 MICH. ST. INT’L L. REV. 555 (2017).

⁶⁵ See generally Sean Watts, *Present and Future Conceptions of the Status of Government Forces in Non-International Armed Conflict*, 88 INT’L L. STUD. 145 (2012) (discussing this particular battlefield status).

⁶⁶ See DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.9.2.1 (citing Stephen Pomper, *Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress Through Practice*, 88 INT’L L. STUD. 188, 193 n.22 (2012)).

The U.S. approach has generally been to refrain from classifying those belonging to non-State armed groups as “civilians” to whom this rule would apply. The U.S. approach has been to treat the status of belonging to a hostile, non-State armed group as a separate basis upon which a person is liable to attack, apart from whether he or she has taken a direct part in hostilities.

Id. For a detailed discussion on whether “organized armed groups other than the dissident armed forces comprise groups who are directly participating in hostilities or constitute a separate category of ‘non-civilians,’” see also ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 28; Schmitt, *supra* note 6, at 127.

⁶⁷ See, e.g., DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.9.2.1.

⁶⁸ See Schmitt, *supra* note 6, at 128 (“for if members of an organized armed group are not civilians, the LOAC extending protection to civilians is inapplicable to them.”).

⁶⁹ AP II, *supra* note 8, at art. 13(3).

⁷⁰ Schmitt, *supra* note 6, at 127. See DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.8.3 (“Like members of an enemy State’s armed forces, individuals who are formally or functionally part of a non-State armed group that is engaged in hostilities may be made the object of attack because they likewise share in their group’s hostile intent.”); REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 20

whether they are targetable, whereas a member of an OAG is targetable “at any time during the period of their membership,”⁷¹ and thus is vulnerable to attack due to their status as a member of the group.⁷²

Additionally, as there is no prisoner of war regime or concept of “combatant immunity” in a NIAC,⁷³ an OAG member upon capture “may be put on trial for treason or other crimes, and heavily punished.”⁷⁴ These prosecutions are not restricted to only violations of the LOAC or war crimes, but also “for any acts that violate domestic law” including “attacking members of the armed forces.”⁷⁵ Of course basic rights, such as due process and protection from summary execution, apply to these proceedings,⁷⁶ as an OAG member is treated as any other domestic criminal for their participation in the NIAC.

(Dec. 2016) [hereinafter REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE] (discussing the U.S. approach to targeting individuals in a NIAC).

⁷¹ Schmitt, *supra* note 6, at 132.

⁷² *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.7.1 stating:

Membership in the armed forces or belonging to an armed group makes a person liable to being made the object of attack regardless of whether he or she is taking a direct part in hostilities This is because the *organization’s hostile intent may be imputed to an individual through his or her association with the organization*. Moreover, the individual, as an agent of the group, can be assigned a combat role at any time, even if the individual normally performs other functions for the group. Thus, combatants may be made the object of attack at all times, regardless of the activities in which they are engaged at the time of attack. For example, combatants who are standing in a mess line, engaging in recreational activities, or sleeping remain the lawful object of attack, provided they are not placed *hors de combat*.

See also Rachel E. VanLandingham, *Meaningful Membership: Making War a Bit More Criminal*, 35 CARDOZO L. REV. 79, 105 (2013) (“[B]ecause the belligerent is presumptively hostile at all times, this allows the direct attack of fighters, *once properly identified as such*, at any time during an armed conflict, whether or not they are doing anything related to hostilities at the time. . . .”).

⁷³ *See, e.g.*, UNITED KINGDOM MINISTRY OF DEFENCE, THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 15.6.1 (2004) [hereinafter UK MANUAL] (“The law relating to internal armed conflict does not deal specifically with combatant status. . . .”); DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 17.4.1.1 (discussing how members of a non-State armed group are not afforded combatant immunity).

⁷⁴ Michael N. Schmitt, Charles H.B. Garraway, & Yoram Dinstein, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT WITH COMMENTARY 41 (International Institute of Humanitarian Law, 2006) [hereinafter NIAC MANUAL] (noting “[i]t should be understood, however, that trial and punishment must be based on due process of law”).

⁷⁵ *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 17.4.1.1 (discussing a State’s power to prosecute non-State actors in a NIAC for their actions under domestic law); UK MANUAL, *supra* note 73, at ¶ 15.6.3 (stating “[a] captured member of dissident fighting forces is not legally entitled to prisoner of war status”); *see also* Schmitt, *supra* note 6, at 121 (“[T]here is no prisoner of war regime in the context of a non-international armed conflict.”).

⁷⁶ *See* UK MANUAL, *supra* note 733, at ¶ 15.6.4 (“Nevertheless, the law of non-international armed conflict clearly requires that any person . . . detained by either dissident or government forces must be treated humanely”); NIAC MANUAL, *supra* note 744, at 41; *see also* GC III, *supra* note 122, at art. 3.

The consequences of being a member of ISIS, particularly exposure to status-based targeting and prosecution for engaging in combat operations, are significant. But what makes an individual a targetable member of ISIS? For example, is swearing an oath of loyalty to al Baghdadi, being listed on an authenticated ISIS membership roster, or enforcing the group’s strict form of sharia law in captured territory evidence enough for status-based targeting?⁷⁷ More broadly, what qualifies an individual as a member of an OAG versus simply being affiliated with such a group? There are a number of proposed answers to this question which are discussed in the following section.

II.

SURVEYING THE FIELD: APPROACHES TO DETERMINING MEMBERSHIP IN AN OAG

Again, membership in an OAG makes an individual vulnerable to the consequences associated with such a status.⁷⁸ The LOAC provides minimal guidance on who qualifies as a member of an OAG,⁷⁹ leaving much discretion to States’ armed forces when making these decisions.⁸⁰ In an effort to address this ambiguity, and to clarify the line separating civilian and conflict participant, various approaches to determining OAG membership have emerged.

A. *Continuous Combat Function (CCF)*

The ICRC’s *Interpretive Guidance* offers a narrow interpretation of who qualifies as a member of an OAG. The *Guidance* provides that a non-State party involved in a NIAC, similar to the State party, may have a component that is separate and distinct from the armed faction “such as political and humanitarian wings.”⁸¹ Only those acting as the fighting forces or armed wing of the non-State party are potentially considered members of the OAG and therefore non-civilians.⁸² Furthermore, there “may be various degrees of affiliation with [the non-State] group that do not necessarily amount to ‘membership’ within the

⁷⁷ See generally Report on the Protection of Civilians in the Armed Conflict in Iraq, *supra* note 49, at 5-20.

⁷⁸ See, e.g., DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 17.4.1.1; ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 22 (explaining why individual members of an OAG should not be considered civilians); Schmitt, *supra* note 6, at 127-28 (supporting the Interpretive Guidance’s distinction between civilians and members of an OAG).

⁷⁹ See COMMENTARY, *supra* note 177, at 512 ¶ 1672 (“The term ‘organized’ . . . should be interpreted in the sense that the fighting should have a collective character, be conducted under proper control and according to rules, as opposed to individuals operating in isolation with no corresponding preparation or training.”).

⁸⁰ See VanLandingham, *supra* note 72, at 117.

⁸¹ ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 32.

⁸² *Id.*

meaning of [International Humanitarian Law] IHL.”⁸³ Affiliation may turn on “individual choice . . . involuntary recruitment . . . [or] on more traditional notions of clan or family.”⁸⁴ Thus, according to the *Guidance*, there are a number of individuals affiliated in some capacity with the non-State party that are not members of the OAG.⁸⁵

To help make this nuanced distinction, the *Guidance* notes that the “decisive criteria . . . is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities.”⁸⁶ More specifically, an individual must demonstrate a “continuous combat function” (CCF) to qualify as a member of an OAG.⁸⁷ In outlining the parameters of the concept the *Guidance* states: “[c]ontinuous combat function requires lasting integration into an organized armed group acting as the armed forces of a non-State party to an armed conflict.”⁸⁸

“Lasting integration” through a CCF does not include those “persons comparable to reservists who, after a period of basic training or active membership, leave the armed group and re-integrate into civilian life.”⁸⁹ Additionally, those who “continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities” are

⁸³ *Id.* at 33.

⁸⁴ *Id.*

⁸⁵ *Id.* at 34 (stating “[i]ndividuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, are not members of that group within the meaning of IHL”).

⁸⁶ *Id.* What qualifies as “direct participation in hostilities” is debatable and outside the scope of this article. Compare ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 5-6 (“The Interpretive Guidance provides a legal reading of the notion of ‘direct participation in hostilities’ with a view to strengthening the implementation of the principle distinction.”) with Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC ‘Direct Participation in Hostilities’ Interpretive Guidance*, 42 N.Y.U.J. INT’L L. & POL. 641, 646 (No. 3, 2010) and Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT. SEC. J. 1, 5 (May 2010) (criticizing the Interpretive Guidance legal reading of the term).

⁸⁷ See Schmitt, *supra* note 6, at 132 (“[B]y the *Guidance* standard only those with a continuous combat function may be treated as members of an organized armed group and therefore attackable at any time during the period of their membership.”).

⁸⁸ ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 34. Further clarifying what qualifies as a CCF, the *Guidance* states:

Individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function. An individual recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf can be considered to assume a continuous combat function even before he or she first carries out a hostile act.

Id.

⁸⁹ *Id.*

also not in a CCF.⁹⁰ These individuals, while clearly contributing to the OAG's efforts, are considered civilians.⁹¹ "As civilians, they benefit from protection against direct attack unless and for such time as they directly participate in hostilities, even though their activities or location may increase their exposure to incidental death or injury."⁹²

B. Conduct-Link-Intent Test

Finding the ICRC's *Interpretive Guidance* test too restrictive, but recognizing that "today's enemy groups lack obvious indicia of targetable membership, and the LOAC provides no methodology for its ascertainment,"⁹³ Professor VanLandingham offers an alternative analysis. Making an analogy to criminal law statutes, Professor VanLandingham develops three criteria that an individual must satisfy to qualify for OAG membership.⁹⁴ First, the conduct exhibited by the individual must fall within an express listing of categories of eligible conduct.⁹⁵ This categorization would "help standardize and clarify the identification process, using behavior that has been shown to indicate membership as an analytical start point."⁹⁶ The list of conduct, akin to that provided in a U.S. criminal statute, would "force decision-makers to use a defensible, objective template."⁹⁷

⁹⁰ *Id.*

⁹¹ *Id.* More specifically, according to the *Guidance*, these individuals:

remain civilians assuming support functions, similar to private contractors and civilian employees accompanying State armed forces. Thus, recruiters, trainers, financiers and propagandists may continuously contribute to the general war effort of a non-State party, but they are not members of an organized armed group belonging to that party unless their function additionally includes activities amounting to direct participation in hostilities. The same applies to individuals whose function is limited to the purchasing, smuggling, manufacturing and maintaining of weapons and other equipment outside specific military operations or to the collection of intelligence other than of a tactical nature. Although such persons may accompany organized armed groups and provide substantial support to a party to the conflict, they do not assume continuous combat function and, for the purposes of the principle of distinction, cannot be regarded as members of an organized armed group.

Id.

⁹² ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 35.

⁹³ VanLandingham, *supra* note 72, at 137.

⁹⁴ *Id.* at 125–28.

⁹⁵ *See id.* at 136 ("For example, staying in a known Al-Qaeda guesthouse has been viewed as conduct that indicates Al-Qaeda membership").

⁹⁶ *Id.* at 137.

⁹⁷ *Id.*

Second, an express associative link between the individual's conduct and the OAG is required.⁹⁸ While requiring identification of the conduct-associate link may seem inherent in the eligible conduct list, "carving it out as an express element ensures that purely independent action is not mistakenly included."⁹⁹ Further, an associative link "challenges assumptions that may be present in the type of conduct being analyzed"¹⁰⁰ by requiring decision-makers to explain why the activity has been so labeled. Third, the individual must have the specific intent to further the group's violent ends via group orders, which can be inferred from particular types of conduct.¹⁰¹ Therefore, it is not enough to passively support the OAG, but rather, there must be a willingness to carry out the group's commands.¹⁰²

Application of this conduct-link-intent test would most likely increase the number of individuals considered members of an OAG and, consequently, broaden the population exposed to the consequences of such membership. However, an elements-based analysis of OAG membership that resembles a criminal statute reduces flexibility in making these determinations, particularly for commanders making real-time targeting decisions. Another approach for determining OAG membership, discussed next, is to "treat all armed forces the same."¹⁰³

C. Structural Membership

As both States and non-State actors execute warfare through "the exercise of command, planning, intelligence, and even logistics functions," a structural membership approach argues that there is no reason to distinguish between a State's regular armed forces and "irregular" armed forces.¹⁰⁴ In fact, OAGs

⁹⁸ *See id.* ("For example, the associative link in staying in an Al-Qaeda guesthouse is the assessment that it is indeed such a guesthouse").

⁹⁹ *Id.* at 137.

¹⁰⁰ *Id.*

¹⁰¹ *See id.* at 137-38. This criteria therefore

requires an inquiry into why the individual acted the way he did; for example, why the individual planted an IED, provided transportation, or provided lodging. Was he paid to do so, and therefore the answer is for financial gain to feed his family? Or did he do so out of the desire to see the group achieves its objectives via violent means and because he was asked or told to do so by others in the group.

Id. at 138.

¹⁰² *Id.* (noting that those unwilling to carry out the OAG's command do "not symbolically represent the group.").

¹⁰³ *See generally* Watkin, *supra* note 866, at 690. Brigadier General Watkin retired as the Judge Advocate General of the Canadian Forces in 2010 and wrote his article in response to the ICRC's Interpretive Guidance.

¹⁰⁴ *Id.*

typically “have a membership structure based on more than mere function”¹⁰⁵ as “it is [the] organization which fights as a group.”¹⁰⁶ Therefore, “individuals are simply members of armed forces regardless of which party to a conflict they fight for, the domestic law basis of their enrollment, or whether they wear a uniform.”¹⁰⁷ All that is necessary for the consequences of OAG membership to attach to an individual is whether they are “a member of an organization under a command structure.”¹⁰⁸

Of course, not all individuals sympathetic or affiliated with the group are subject to status-based targeting.¹⁰⁹ One who generically creates propaganda or broadly finances the OAG, without more, is not under command or filling a traditional military role.¹¹⁰ The assumption is, therefore, they are not part of the OAG and are civilians. Again, the key factor “in determining if a person can be attacked is whether the individual is a member of the armed forces . . . under a command responsible for the conduct of its subordinates.”¹¹¹ It is also important to note, from an operational perspective, the Rules of Engagement (ROE) establish left and right parameters on who is within the OAG.¹¹²

There may also be individuals, in the command structure, not subject to the adverse consequences of their membership. For example, those who are exclusively in the role of a spiritual leader or doctor would be comparable to

¹⁰⁵ Schmitt, *supra* note 6, at 132.

¹⁰⁶ Watkin, *supra* note 866, at 691.

¹⁰⁷ *Id.* at 690–691.

¹⁰⁸ *Id.* at 691.

¹⁰⁹ For example, the Israeli Defense Force (IDF) agrees that members of an OAG are subject to status-based targeting and also recognizes that there may be military and non-military wings of a non-State actor. See Michael N. Schmitt & John J. Merriam, *The Tyranny of Context: Israeli Targeting Practices in Legal Perspective*, 37 U. PA. J. INT’L L. 55, 113 (2017). Those who are part of the non-military branch are subject to targeting if they directly participate in hostilities. See *id.* at 113–14. To help clarify what “direct participation in hostilities” includes the IDF maintains a list of activities that meet this definition. See *id.* Of course it is “impossible for the list to contain all possible forms of direct participation. . . . Therefore, if a commander of an Attack Cell believes an individual is directly participating but the activity concerned does not appear on the list, the commander may elevate the matter to higher authorities for authorization to strike.” *Id.*

¹¹⁰ See *id.* at 107 (discussing why the IDF has taken the position that having a role in generating propaganda or promoting morale does not deprive an individual of civilian status).

¹¹¹ See Watkin, *supra* note 866, at 691.

¹¹² Rules of engagement are defined as “[d]irectives issued by competent military authority that delineate the circumstances and limitations under which United States forces will initiate and/or continue combat engagement with other forces encountered.” JOINT CHIEFS OF STAFF, JOINT PUB’N 1-02, DEP’T OF DEF. DICTIONARY OF MILITARY AND ASSOCIATED TERMS 472 (2001). In particular, the ROE “establish fundamental policies and procedures governing the actions to be taken by US commanders” during a military operation. JOINT CHIEFS OF STAFF, INSTR. 3121.01B, THE STANDING RULES OF ENGAGEMENT/STANDING RULES FOR THE USE OF FORCE FOR U.S. FORCES app. A, at 95 (2005). Combining operational requirements, policy, and international law therefore make the ROE more restrictive than the law of armed conflict. Supplemental measures, which “enable commanders to tailor ROE for specific missions,” are the recognized tool to implement restrictions on the use of force for particular “political and military goals that are often unique to the situation.” *Id.* app. A, at 99.

chaplains or medical personnel in a State's armed forces and therefore not targetable.¹¹³ Finally, protections extend to those civilians who "provide services such as selling food under contract or otherwise much like civilian contractors working with regular State armed forces" unless "and for such time as they participate directly in hostilities."¹¹⁴

Focusing on the membership structure is therefore like other targeting principles in that it provides a definitional framework allowing for command discretion. For example, Additional Protocol I, Article 52(2), in regards to targeting military objectives, States "[a]ttacks shall be limited strictly to military objectives."¹¹⁵ The protocol goes on to give broad contours of what is considered a military objective without attempting to provide specific examples.¹¹⁶ Similarly, under this approach, OAG membership, like an individual's status in a regular State armed force, is possible to confirm in a number of ways. Indicia of membership would include "carrying out a combat function" such as being involved in "combat, combat support, and combat service support functions, carrying arms openly, exercising command over the armed group, [or] carrying out planning related to the conduct of hostilities."¹¹⁷ However, "the combat function is not a definitive determinant of whether a person is a member of an armed group, but rather one of a number of factors that can be taken into consideration."¹¹⁸

The *Department of Defense Law of War Manual* provides guidance for U.S. forces to determine membership by offering non-exhaustive lists of both "formal" and "informal" indicators. Formal indicators, also called "direct information" include: "rank, title, style of communication; taking an oath of loyalty to the group or the group's leader; wearing a uniform or other clothing, adornments, or body markings that identify members of the group; or documents

¹¹³ See GC I, *supra* note 12, at art. 24.

Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded and sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances.

Id. While Article 24 is only applicable in an IAC it is valuable for this discussion as it helps establish the status parameters of OAG members.

¹¹⁴ Watkin, *supra* note 86, at 692.

¹¹⁵ AP I, *supra* note 7, at art. 52(2).

¹¹⁶ See *id.* ("In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.").

¹¹⁷ Watkin, *supra* note 86, at 691.

¹¹⁸ *Id.*

issued or belonging to the group that identify the person as a member... .”¹¹⁹
 Informal factors that help determine OAG membership include:

acting at the direction of the group or within its command structure; performing a function for the group that is analogous to a function normally performed by a member of a State’s armed forces; taking a direct part in hostilities, including consideration of the frequency, intensity, and duration of such participation; accessing facilities, such as safehouses, training camps, or bases used by the group that outsiders would not be permitted to access; traveling along specific clandestine routes used by those groups; or traveling with members of the group in remote locations or while the group conducts operations.¹²⁰

Membership, therefore, includes more than just those engaging in an attack or carrying out a combat function.¹²¹ Rather, what is important is whether the individual is “carrying out substantial and continual integrated support functions.”¹²² Or, to put it more simply, an individual who is under command, acting in a traditional military role, is subject to the adverse consequences of being an OAG member—in particular, status-based targeting.¹²³ Recognizing a member of an OAG is often not difficult as these groups consistently distinguish

¹¹⁹ DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.7.3.1. The first set of factors focus on documents illustrating membership, while the second set focuses on direct observation of certain activities that may indicate membership. The Manual makes clear that these lists provide illustrative examples and are not exhaustive.

¹²⁰ *Id.*

¹²¹ *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.7.3 (“individuals who are formally or functionally part of a non-State armed group” are subject to attack); REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE, *supra* note 700, at 20. *See also* Watkin, *supra* note 86, at 691–92 (“Someone who provides logistics support as a member of an organized armed group, including cooks and administrative personnel, can be targeted in the same manner as if that person was a member of regular State armed forces.”)

¹²² *Id.* at 644.

¹²³ *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.8.3; REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE, *supra* note 700, at 29.

To determine whether an individual is “part of” an enemy force, the United States may rely on either a formal or function analysis of the individual’s role in that enemy force (citation omitted). . . . [S]uch a functional analysis may include looking to, among other things, the extent to which that person performs functions for the benefit of the group that are analogous to those traditionally performed by members of a country’s armed forces; whether that person is carrying out or giving orders to others within the group; and whether that person has undertaken certain acts that reliably connote meaningful integration into the group.

Id. ISIS members, for example, who recruit or are involved in logistics are comparable to military recruiters and logisticians and would therefore be considered targetable by the United States. *See* DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.8.3 (“Like members of an enemy State’s armed forces, individuals who are formally or functionally part of a non-State armed group that is engaged in hostilities may be made the object of attack because they likewise share in their group’s hostile intent (citation omitted).”)

themselves from the civilian population.¹²⁴ However, in more difficult situations, intelligence may confirm membership.¹²⁵ Confirmation methods may include human sources, communications intercepts, captured documents, interrogations, as well as a myriad of other available tools.¹²⁶ If it is not possible to make such a determination than that person “shall be considered to be a civilian” and afforded the appropriate protections.¹²⁷

III.

WHAT OAG MEMBERSHIP DETERMINATION APPROACH BEST WORKS ON THE CONTEMPORARY NIAC BATTLEFIELD

This section is not intended to re-hash the debates that immediately followed the 2009 release of the ICRC’s *Interpretive Guidance*.¹²⁸ Instead, the following analysis is offered to illustrate which of the above described approaches best addresses the realities of a contemporary NIAC. In doing so, the hope is to provide clarity as to where the line lies between a civilian and a member of an OAG, therefore decreasing mistakes as to an individual’s battlefield status. Again, applying facts from the current conflicts involving ISIS is illustrative.

¹²⁴ See generally Simon Tomlinson, *From the ‘Afghani robe’ to the suicide bomber’s all-black uniform, how ISIS differentiates between ranks and various outfits*, DAILYMAIL.COM (Sept. 29, 2015, 10:14 AM), <http://www.dailymail.co.uk/news/article-3253113/From-Afghani-robe-suicide-bombers-black-uniform-ISIS-differentiates-ranks-various-outfits.html> (explaining how ISIS has corresponding uniforms for each of its units and describing the various outfits). These groups are often in a command structure, have a “fixed distinctive sign recognizable at a distance,” and carry their arms openly. In an international armed conflict these are all indications of a militia which, if belonging to a Party to the conflict, have met three of the four criteria to be considered combatants. See GC III, *supra* note 12, at art. 4(A)(2). However, rarely, if ever, do these groups comply with the four criteria which is to “conduct their operations in accordance with the laws and customs of war.” *Id.* Regardless, these groups show many characteristics of a State’s regular armed forces. See Schmitt, *supra* note 6, at 132 (“For example, the Red Army, Hamas, Hezbollah, FARC, Tamil Tigers and Kosovo Liberation Army were often distinguishable from the civilian population and operated in a manner not unlike the regular armed forces.”)

¹²⁵ See, e.g., DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.8.3–4; REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE, *supra* note 70, at 20; Watkin, *supra* note 86, at 692.

¹²⁶ See, e.g., REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES’ USE OF MILITARY FORCE, *supra* note 70, at 20 (“the United States considers all available information about a potential target’s current and historical activities to inform an assessment of whether the individual is a lawful target”); Schmitt, *supra* note 6, at 132.

¹²⁷ AP I, *supra* note 7, at art. 50(1). The rule is generally considered customary in both an IAC and NIAC. See Schmitt, *supra* note 6, at 133 (citing 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 23-24 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005.)) However, the United States rejects the Additional Protocol definition of “combatant” as it is viewed as relaxing “the requirements for obtaining the privilege of combatant status” thus undercutting the principle of distinction. DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 4.6.1.2, 4.8.1.4.

¹²⁸ See generally Ryan Goodman & Derek Jinks, *The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law: An Introduction to the Forum*, 42 N.Y.U. J. INT’L L. & POL. 637, 637–640 (2010) (introducing a number of articles written by prominent LOAC and military experts that are critical of the *Interpretive Guidance*).

A. The CCF and the Danger of Good Intentions

The CCF criteria, which sets "a high bar for membership," appears "to afford the civilian population enhanced protection from mistaken attacks" by narrowly interpreting who is an OAG member.¹²⁹ This restrictive interpretation would thus seem to result in additional protections for civilians by severely limiting those who have met membership criteria. However, in fact, the CCF approach potentially puts civilians at greater risk. By contrasting those who serve in combat functions against others closely aligned with the OAG, the CCF criteria creates a category of "members of an organized armed group who do not directly participate in hostilities."¹³⁰ These individuals, in effect, "allow the entire civilian population to become conflated with the enemy, and exposes all civilians to greater risk."¹³¹

A short discussion on the evolution of the definition of "protracted armed violence" illustrates the danger of a narrow view on who qualifies as an OAG member. In the *Haradinaj* case the ICTY found that "protracted armed violence," as used in *Tadić*, was "interpreted in practice... as referring more to the intensity of the armed violence than to its duration."¹³² This interpretation supported an earlier finding that the brief duration of an attack did not preclude a conflict from being characterized as non-international.¹³³ Professor Peter Margulies notes that the ICTY referring "generally to the intensity of the violence, not its timing per se" was a pragmatic decision to avoid creating perverse incentives.¹³⁴ Otherwise, if "violent non-State actors could strike first and then claim that the conflict was not yet a protracted one" States would be precluded "from utilizing the full range of responses permissible under LOAC" limited instead "to the far narrower repertoire of force permissible under a law enforcement paradigm."¹³⁵ Thus, to avoid encouraging this bad behavior, the ICTY adopted a broad interpretation of "protracted armed violence."

¹²⁹ See Schmitt, *supra* note 6, at 132.

¹³⁰ VanLandingham, *supra* note 722, at 126.

In other words, the ICRC's position is that instead of analogizing to the entire composition of a state's military, which includes members who rarely, if ever, fire weapons (such as legal advisors and public affairs officers), its 'continuous combat function' test for belligerent membership in a non-state armed group focuses exclusively on those who engage in either actual combat or in sufficiently hostile activity.

Id.

¹³¹ *Id.* at 131–32.

¹³² See Prosecutor v. Haradinaj, *supra* note 33, at ¶ 49.

¹³³ See Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, ¶ 152 (1997).

¹³⁴ Margulies, *supra* note 23, at 65.

¹³⁵ *Id.*

Similarly, a narrow notion of what makes an individual a targetable member of an OAG creates perverse incentives. By granting “protected civilian status to persons who are an integral part of the combat effectiveness of an OAG,”¹³⁶ individuals are encouraged to straddle the line between civilian and non-civilian. What is the status of an ISIS fighter who transitions for a period of time into a cook?¹³⁷ It is unclear when this individual ceases their combat function and assumes their non-combat function. Of course, if only members of an OAG who perform a CCF are targeted, much of this confusion may disappear. However, this restrictive approach ignores the organizational aspect of an OAG and the inherent agency relationship of these groups with their members.¹³⁸

For example, the nature of ISIS is that the entire organization is a non-State “organized” and “armed” group.¹³⁹ While individuals may join ISIS for any number of reasons,¹⁴⁰ when joining a group whose objectives are to use any level of violence to effectuate their vision, those individuals demonstrate intent to use violent means to assist the group in meeting its objectives.¹⁴¹ ISIS membership thus evidences what VanLandingham defines as an “inherent agency relationship of command [that] demonstrates a submission of self to the central, overarching, violent purpose of the group.”¹⁴² In other words, even those ISIS members not directly involved in combat remain part of the OAG.¹⁴³ Requiring an application of the CCF criteria to every individual ISIS member thus ignores the reality that these individuals are fighting under the command structure of a cohesive group.

Finally, the CCF approach creates an inequity between ISIS members and the State’s armed forces by providing protections for the former that are not available to the latter.¹⁴⁴ Professor Schmitt notes that, in application, a direct attack

¹³⁶ Watkin, *supra* note 86, at 675.

¹³⁷ For a similar example, see generally *id.* at 676.

¹³⁸ See, e.g., DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 5.8.1 (“the individual, as an agent of the group, can be assigned a combat role at any time, even if the individual normally performs other functions for the group.”); *Gherbi v. Obama*, 609 F. Supp. 2d 43, 69 (D.D.C.) (stating “many members of the armed forces who, under different circumstances, would be ‘fighters’ may be assigned to non-combat roles at the time of their apprehension” and that “[t]hese individuals are no less a part of the military command structure of the enemy, and may assume (or resume) a combat role at any time because of their integration into that structure.”). See also VanLandingham, *supra* note 72, at 126. Again, ISIS is a helpful example as that group ensures all members receive military training as they are all expected to be fighters. See *supra* text accompanying notes 60–64.

¹³⁹ See *supra* text accompanying notes 44–64.

¹⁴⁰ See Patrick Tucker, *Why Join ISIS? How Fighters Respond When You Ask Them: A Study Finds that Motivations Vary Widely*, THE ATLANTIC (Dec. 9, 2015), <https://www.theatlantic.com/international/archive/2015/12/why-people-join-isis/419685/> (discussing a study conducted on a non-random sample of ISIS fighters that found that some members join ISIS for status, some for identity or revenge, and some for the thrill of it, among other motivations).

¹⁴¹ VanLandingham, *supra* note 72, at 108.

¹⁴² *Id.*

¹⁴³ See, e.g., *supra* text accompanying notes 44–64.

¹⁴⁴ See Watkin, *supra* note 86, at 693 (“The Interpretive Guidance also adopts a position which clearly disadvantages States in relation to organized armed groups against which they are engaged in armed

on a member "of an organized armed group without a continuous combat function is prohibited (indeed, such an attack would be a war crime since the individual qualifies as a civilian), but a member of the State's armed forces who performs no combat-related duties may be attacked at any time."¹⁴⁵ The ICRC comments on a similar inequity in an international armed conflict (IAC) are analogous:

it would contradict the logic of the principle of distinction to place irregular armed forces under the more protective legal regime afforded to the civilian population merely because they fail to distinguish themselves from that population, to carry their arms openly, or to conduct their operations in accordance with the laws and customs of war. Therefore, even under the terms of the Hague Regulations and the Geneva Conventions, all armed actors showing a sufficient degree of military organization and belonging to a party to the conflict must be regarded as part of the armed forces of that party.¹⁴⁶

Likewise, it makes little sense for an ISIS member to receive protections that are not afforded to the military members of, say the Iraqi or U.S. military, who are not serving in a combat function during a NIAC.

Admittedly, this imbalance is not unique. In a NIAC, a State's armed forces will have a form of combatant immunity while the members of an OAG will not.¹⁴⁷ The United States expressly notes that "the non-State status of the armed group would not render inapplicable the privileges and immunities afforded lawful combatants and other State officials."¹⁴⁸ This difference is a result of the State being a sovereign while a non-State armed group, obviously, is not.¹⁴⁹ The inequity created by the CCF approach, though unfair to a State's armed forces, is therefore not without precedent. However, in contrast to the combatant immunity imbalance, which only adversely affects conflict participants, the CCF approach dangerously blurs the already murky line between civilians and fighters in a NIAC.¹⁵⁰ Both civilians and State armed forces are therefore disadvantaged by the narrow interpretation of OAG membership promoted by the CCF approach.

conflict.").

¹⁴⁵ Schmitt, *supra* note 6, at 132 (discussing how this approach skews the balance between military necessity and humanitarian considerations that undergirds all of LOAC.).

¹⁴⁶ ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 22. Although this interpretation represents the prevailing opinion of ICRC experts some concerns were expressed that this approach could be misunderstood as creating a category of persons protected neither by GC III nor by GC IV *Id.* at 22 fn 17.

¹⁴⁷ *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 17.4.1.1 ("persons belonging to non-State armed groups lack any legal privilege or immunity from prosecution by a State that is engaged in hostilities against that group"); UK MANUAL, *supra* note 73, at ¶ 15.6.3 (discussing consequences for a captured member of a dissident fighting force versus a member of the State's armed forces).

¹⁴⁸ DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 17.4.1.1.

¹⁴⁹ *Id.* at ¶ 17.4.1 ("the principle of the sovereign equality of States is not applicable in armed conflicts between a State and a non-State armed group."). *See also* Schmitt, *supra* note 6, at 133 (noting "the organized armed group lacks any domestic or international legal basis for participation in the conflict.").

¹⁵⁰ *See, e.g.*, DOD LAW OF WAR MANUAL, *supra* note 6, at ¶ 17.5.1.1. (highlighting the difficulty in

Applying the CCF approach to ISIS thus has a number of dangerous consequences. In particular, it diminishes the protections for civilians and promotes inequality between ISIS's members and State armed forces. While the CCF concept was clearly developed with good intentions to avoid interpretations of OAG membership by "abstract affiliation, family ties, or other criteria prone to error, arbitrariness or abuse,"¹⁵¹ in practice it fails to safeguard civilians.¹⁵² As a result, it becomes apparent that a broader approach to determining OAG membership is necessary.

B. *The Need for Targeting Flexibility*

The conduct-link-intent test recognizes, and attempts to address, the problems resulting from the CCF approach to determining OAG membership. Unlike the CCF methodology, when applied to ISIS, this test would easily find that membership alone demonstrates intent to support the group's violent objectives. Both the first and second factors—tests of eligible conduct and associative links to the OAG—are theoretically possible to analyze by those conducting targeting activities against ISIS and could be described in appropriate ROE. Further, satisfying the third criteria—requiring an express finding of an individual's specific intent—is arguably already part of ISIS's strategy. The group often claims or endorses attacks by its "soldiers" "whether or not the individuals in question have been publicly shown to have a demonstrable operational link to, or history with, the organization."¹⁵³

However, this novel approach presents two irreconcilable problems when applied on the modern battlefield. First, creating a criminal law statute-like list of qualifying conduct for OAG membership is inflexible and legalistic. Professor

identifying OAG members during a NIAC); Watkin, *supra* note 86, at 667 (noting that "it is difficult to see how allowing those providing direct support within an organized armed group to be protected by civilian status will actually operate to limit the conflict.").

¹⁵¹ See e.g., ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 33 (reasoning that establishing a continuous combat function is necessary due to the difficulty of distinguishing civilians in a NIAC); Schmitt, *supra* note 6, at 132 (noting that the CCF approach is theoretically justified).

¹⁵² See e.g., Watkin, *supra* note 86, at 675 ("A significant danger is presented to uninvolved civilians by an interpretation that would grant protected civilian status to persons who are an integral part of the combat effectiveness of an organized armed group when their regular force counterparts performing exactly the same function can be targeted."); VanLandingham, *supra* note 72, at 131–32. See generally YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 1 (2004).

Some people, no doubt animated by the noblest humanitarian impulses, would like to see zero-casualty warfare. However, this is an impossible dream. War is not a chess game. Almost by definition, it entails human losses, suffering and pain. As long as it is waged, humanitarian considerations cannot be the sole legal arbiters of the conduct of hostilities.

Id.

¹⁵³ Blanchard & Humud, *supra* note 1, at 7.

VanLandingham pre-emptively addresses this critique and argues that such "perceived loss of flexibility is ...a needed phenomenon to ensure appropriate breadth of membership."¹⁵⁴ Further, she notes that "surely no decision-maker today, when approving the addition of a new name to a targeting list based on the person's actions in relation to a particular group," would refute that the "individual in question does not possess a specific intent to further his terrorist group's violent means and ends by carrying out or giving group orders regarding the same."¹⁵⁵

Yet, in the effort to expand OAG membership by arguing for an express list, targeting decisions are delayed. For example, ISIS consistently changes their routine behavior or conduct specifically to avoid being targeted by an opposing State actor, and issues guidance to its members on how to do so.¹⁵⁶ This behavior would undoubtedly require continual editing of both the categories of eligible conduct as well as any resultant individual targeting lists. These lists are a policy construct, not required by the LOAC, and would act as a limiting factor in the best of circumstances. Further, with ISIS at its peak in 2015 having tens of thousands of fighters,¹⁵⁷ and thousands more coming every month,¹⁵⁸ an element-based approach to targeting, in practical application, is unwieldy. While much of the territory ISIS held is now liberated, and its membership drastically decreased,¹⁵⁹ using an element-based approach to determining OAG membership remains impractical in both the contemporary¹⁶⁰ and future security environment.

The second problem with the conduct-link-intent test is found in the third criteria. Though not nearly as inequitable as the results from the CCF methodology, requiring a finding that an individual has the specific intent to further a group's violent ends provides additional protections for OAG members in comparison to a State's armed forces. Again, a member of a State armed force is targetable by virtue of their status. In comparison, the conduct-link-intent test requires an additional analytical step before targeting of an OAG member. As a

¹⁵⁴ VanLandingham, *supra* note 72, at 138.

¹⁵⁵ *Id.*

¹⁵⁶ See Keligh Baker, *Shave your beard, encrypt your phones and wear western clothes: ISIS issues booklet advising would-be terrorists how to avoid being spotted by Western security agencies*, DAILYMAIL.COM (Jan. 13, 2016, 6:24 PM), <http://www.dailymail.co.uk/news/article-3398424/ISIS-issues-booklet-advising-terrorists-avoid-spotted.html>.

¹⁵⁷ See Daveed Gartenstein-Ross, *How Many Fighters Does the Islamic State Really Have?*, WAR ON THE ROCKS (Feb. 9, 2015), <https://warontherocks.com/2015/02/how-many-fighters-does-the-islamic-state-really-have/> (estimating the number of ISIS fighters as being closer to 100,000 than 30,000).

¹⁵⁸ See *Flow of foreign ISIS recruits much slower now, U.S. says*, CBS NEWS (Apr. 26, 2016, 1:02 PM), <https://www.cbsnews.com/news/less-foreign-isis-recruits/> (reporting that approximately 1,500 foreign fighters came to Iraq and Syria a month in 2015 with the number decreasing to 200 a month in 2016).

¹⁵⁹ See Saphora Smith & Michele Neubert, *ISIS Will Remain A Threat in 2018, Experts Warn*, NBC NEWS (Dec. 27, 2017, 3:17 AM), <https://www.nbcnews.com/storyline/isis-terror/isis-will-remain-threat-2018-experts-warn-n828146>.

¹⁶⁰ *Id.* (noting that ISIS is "far from defeated.")

result, an OAG member is treated more favorably than a member of a State's armed forces through the requirement for establishing specific intent.

C. If You Play the Game . . . Live With the Consequences

In comparison to the CCF approach, in our opinion the conduct-link-intent test better comports with the realities of the modern battlefield. Yet, as noted above, we consider this approach unnecessarily bureaucratic. What becomes apparent is that the broad approach to OAG membership allowed for by the conduct-link-intent test is appropriate as it is “unrealistic to expect government troops not to take measures against rebels simply because they are not involved in an attack.”¹⁶¹ However, what is also obvious is that this formalistic test is burdensome for commanders to implement. The best approach to determining OAG membership is therefore one that has the broad applicability of the conduct-link-intent test, but is also more operationally practical.

Simply treating organized armed groups and a State's armed forces the same accomplishes these goals.¹⁶² First, this approach resolves the inequity and under-inclusivity issues presented by the CCF methodology and, in doing so, “not only reinforces the distinction principle but also recognizes that true civilian participation has to be limited in time and frequency so as not to undermine the protection associated with civilian status.”¹⁶³ Second, it avoids mechanical, and consequently, restrictive tests for OAG membership. With the rise of powerful non-State actors, like ISIS, this straightforward and clear approach addresses the challenges of fighting in a contemporary NIAC by empowering commanders while also protecting civilians.

ISIS—organized, well-financed, and heavily armed—clearly acts and fights like a traditional military organization.¹⁶⁴ Again, not all that are affiliated with ISIS, or sympathetic to their cause, are part of the OAG. But those who are filling traditional military roles in ISIS should be subject to “attack so long as they remain active members of the group, regardless of their function.”¹⁶⁵ Attaching the consequences of OAG membership to some of those in ISIS, and not others, ignores the realities of the modern battlefield.

¹⁶¹ LINDSAY MOIR, *THE LAW OF INTERNAL ARMED CONFLICT* 59 (2002).

¹⁶² Schmitt, *supra* note 6, at 133.

¹⁶³ Watkin, *supra* note 866, at 693.

¹⁶⁴ *See supra* text accompanying notes 44–64.

¹⁶⁵ Schmitt, *supra* note 6, at 133. *See also* VanLandingham, *supra* note 72, at 109 (“armed group membership, typically in a state military, produces a presumption of hostility, thereby making one a lawful target for elimination by opposing forces, even if one is not actually fighting. But this LOAC targeting axiom is not limited to state militaries. It extends to non-state armed groups as well”)

CONCLUSION

So, again, is the brother of the ISIS Commander described in the opening hypothetical vignette targetable? Yes. He has affirmatively proclaimed his loyalty to the group, and his actions as the "public face" of ISIS are arguably no different than those of a Public Affairs Officer serving in a State's armed forces.¹⁶⁶ Clearly, he is under command serving in a traditional military role making him a member of the group. Consequently, he is subject to the adverse consequences of his status, including being a lawful target.

One of the greatest attributes of the LOAC is its "emphasis on being applied equally to all participants."¹⁶⁷ Focusing on the membership structure of an OAG reinforces this aspect of the law. Doing otherwise "creates a bias against State armed forces, making its members much easier to target while imposing on them more exacting criteria when targeting opponents."¹⁶⁸ Additionally, protection of civilians is "one of the main goals of international humanitarian law."¹⁶⁹ Emphasizing function over membership also dangerously blurs the line between civilians and fighters, undercutting this principle. Both of these are untenable results. Of course, any approach to determining membership must also be practical. An expansive understanding of who qualifies as a member of an OAG resolves these outstanding concerns and is necessary in the current conflict environment.

¹⁶⁶ See U.S. Army, *Careers & Jobs Public Affairs Officer (46A)*, GoArmy.com, <https://www.goarmy.com/careers-and-jobs/browse-career-and-job-categories/arts-and-media/public-affairs-officer.html> (last visited Mar. 13, 2018) (describing some of the responsibilities of a Public Affairs Officer as "gain[ing] the support of the American public," "respond to media queries," "develop and execute communication plans," as well as other internal and external communication activities.)

¹⁶⁷ Watkin, *supra* note 86, at 695.

¹⁶⁸ *Id.* at 688, 694 ("In many circumstances, waiting for an act to be carried out may leave security forces with insufficient time to react, thereby actually increasing the risk to civilians")

¹⁶⁹ See ICRC INTERPRETIVE GUIDANCE, *supra* note 6, at 4 ("The protection of civilians is one of the main goals of international humanitarian law.")