

## MEANINGFUL MEMBERSHIP: MAKING WAR A BIT MORE CRIMINAL

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*Should membership in a particular group, by itself, be enough for the government to kill you? This Article starts with the classic lawyer's answer of "it depends," but goes beyond it to answer yes, explain why, and recommend limits. The heart of the matter is found in how the law of armed conflict treats transnational, non-state armed groups such as Al-Qaeda. When such groups are viewed analogously to state militaries, their members are lawfully subject to lethal attack based on their membership status, as distinct from their actual hostile conduct. By comparing this focus on status to federal criminal law's treatment of membership, this Article exposes the current targeting paradigm's dangerous lack of membership criteria. This legal insufficiency exposes the United States to legitimate charges of arbitrary killing.*

*Yet, far from calling for the demise of membership-based targeting in warfare, this Article defends the practice while outlining a vital need for clear legal limits. Its primary contribution is its suggestion that guidelines should be drawn from criminal law's more developed treatment of membership and associational ties as grounds for government action. Specifically, it proposes formally incorporating 18 U.S.C. § 2339B's "conduct plus coordination" model, used to prosecute material support to terrorist organizations, into the wartime membership assessment process. This Article reveals that while the wartime methodology roughly approximates the federal statute's approach, the former is legally insufficient due to its ad hoc nature, unbounded scope, and lack of rigor. To fix these deficiencies in wartime identification, this Article's normative analysis highlights both the utility of adopting the statutory model's categorical method and the necessity of adding a tailored scien-*

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*requirement. Without such limitations, enemy group membership is legally meaningless, and its service as grounds to kill is questionable at best.*

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## INTRODUCTION

It is not a crime under U.S. federal law to be a member of Al-Qaeda. But the law of armed conflict (LOAC) allows one to be killed based solely on that very same membership, both on and (arguably) off the conventional battlefield.<sup>1</sup> Despite the disparate objectives of criminal law and the LOAC and the seemingly contrary effects of terrorist group membership in each, their comparison reveals common ground regarding the service of associational ties as fulcrums for adverse government action. This comparative analysis also highlights that the LOAC lacks clear criteria for determining just who is a member of non-state armed groups, thus allowing the concept of membership to be stretched well beyond its original purpose as a substitute for hostile acts.<sup>2</sup> The result is that the LOAC allows an ambiguous notion of membership to be used in an ad hoc manner as a basis to kill individuals associated with particular groups. This Article examines the current U.S. methodology for determining such membership and recommends ways to add rigor and clarity based on a model informed by criminal law.<sup>3</sup>

Specifically, Part I of this Article describes the federal material support to foreign terrorist organizations statute, 18 U.S.C. § 2339B, as utilizing a conduct plus coordination method to criminalize behavior. Setting the stage with *Scales v. United States*,<sup>4</sup> this Part traces the statute's legislative history to highlight why (and how) its drafters circumvented an outright criminalization of membership in groups such as Al-Qaeda by instead prohibiting specific acts committed in knowing coordination with such groups.<sup>5</sup> Part II discusses the Supreme

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<sup>1</sup> The location of the battlefield has been hotly debated since September 11, 2001; this Article sidesteps the issue and refers to the battlefield as the arena in which the LOAC applies. See generally Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the 'Hot' Conflict Zone*, 161 U. PA. L. REV. 1165 (2013) (adroitly analyzing the various scholarly and policy positions on the boundaries of the conventional and unconventional zone of hostilities).

<sup>2</sup> See generally Robert Chesney, *Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, 112 MICH. L. REV. (forthcoming 2013), available at <http://ssrn.com/abstract=2138623> (arguing that terrorist groups are becoming more fragmented both geographically and internally, making constituent and group identification more difficult).

<sup>3</sup> These recommendations are intended for use by decision-makers, both military commanders and their civilian leaders, as they evaluate the addition of persons to targeting lists for kinetic action. Critically, the proposed methodology should primarily inform the analysts and operators who sift through vast amounts of intelligence to make the initial recommendations. This is an *ex ante*, vice *ex post*, approach (the latter is represented by the analysis used by the federal courts in habeas cases to assess appropriateness of military detention).

<sup>4</sup> 367 U.S. 203 (1961).

<sup>5</sup> See 18 U.S.C. § 2339B (2012).

Court's decision in *Holder v. Humanitarian Law Project*<sup>6</sup> to highlight the breadth of the statute, the capacious nature of the associational link it uses to tie conduct to terrorist groups, and its de facto criminalization of all but the most passive types of group membership.<sup>7</sup>

Part III outlines the LOAC's treatment of membership. It focuses on why the LOAC allows the status of belonging to enemy groups to serve as a substitute for actual hostile conduct for targeting purposes. It also reviews how the United States has been operationalizing such status-based targeting against non-state armed groups, such as Al-Qaeda, and highlights international attempts to define membership in such groups. Part IV compares § 2339B's format with the U.S. membership assessment practices described in Part III, highlighting their similar "conduct plus coordination" approaches. This Part demonstrates that using such a method to categorize individuals as members of enemy groups in armed conflict situations is dangerous because it extends far beyond those who belong to such groups in the sense of formal—and even informal—membership. This Article concludes by recommending critical limitations needed to legally correct such over-inclusiveness, including the incorporation of a specific intent requirement into the LOAC's ambiguous membership assessment model.

## I. THE CRIMINALIZATION OF MEMBERSHIP AND § 2339B

### A. *Freedom of Association and Scales v. United States*

The freedom of association holds a sacrosanct position in the American constitutional firmament.<sup>8</sup> It is primarily protected because of its salutary effects on expressive conduct—behavior critical in an accountable democracy.<sup>9</sup> Additionally, based on the Fifth Amendment's

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<sup>6</sup> 130 S. Ct. 2705 (2010).

<sup>7</sup> *Id.*

<sup>8</sup> The Supreme Court has protected "expressive" and "intimate" associations; the former as a means to protect freedom of speech and assembly, the latter (premised on a Fourteenth Amendment right to privacy) to preserve freedom in associations (such as family and friends) marked by criteria such as selectivity, privacy, and small numbers. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–29 (1984) (outlining intimate versus expressive associations and the constitutional questions and issues involved for each).

<sup>9</sup> *See generally* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 919–20 (1982) (stating that the government bears the burden of proving the specific intent to further the illegal aims of an organization, not merely association with an organization); G. Robert Blakey & Brian J. Murray, *Threats, Free Speech, and the Jurisprudence of the Federal Criminal Law*, 2002 BYU L. REV. 829, 929–30 (2002) (arguing that individual conduct must be the basis of liability, not mere association).

Due Process Clause,<sup>10</sup> U.S. criminal law usually strives to avoid criminalizing mere association by requiring personal culpability for criminal acts.<sup>11</sup> Such deeply rooted values cause understandable consternation regarding targeted drone strikes against sleeping individuals in Yemen simply because they are “members” of Al-Qaeda, without more.<sup>12</sup> Using group membership to indicate illegal or otherwise undesirable conduct is not new. But in the criminal arena, at least, Supreme Court jurisprudence has long provided a bulwark against the criminal prohibition based solely upon group membership. Since the 1960s, this protection has taken the form of a scienter requirement, which protects members who lack the specific intent to further a particular group’s criminal objectives.<sup>13</sup>

The roots of this bulwark are found in national security fears regarding the Communist Party. In the early 1960s, Congress attempted to criminalize communist membership via the Smith Act, which prohibited “the acquisition or holding of knowing membership in any organization which advocates the overthrow of the Government . . . by force or violence.”<sup>14</sup> The Supreme Court, in the game-changing case of *Scales v. United States*,<sup>15</sup> dealt squarely with this membership prong of the Smith Act. It maintained that membership in a group can only be punished if it includes three elements: active membership, knowledge of a group’s illegal objectives, and specific intent to further those objectives.<sup>16</sup> The *Scales* Court, relying primarily on a due process analysis, did not define “active” membership outside of emphasizing that Congress could not have intended to punish that of a “nominal, passive” type.<sup>17</sup> It referred to earlier Court decisions in immigration cases, noting factors such as the voluntariness of joining and attendance at meetings, which indicated that “active membership” was more than membership “in appearance only.”<sup>18</sup>

Despite reading these requirements into the Smith Act, the majority in *Scales* recognized that its holding allowed a greater range of group activity to be criminalized than was previously thought constitutional. Specifically, it cautioned that simply because “individual

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<sup>10</sup> U.S. CONST. amend. V.

<sup>11</sup> See *Claiborne*, 458 U.S. at 919–20.

<sup>12</sup> See *Yemen: American Drone Strike Kills 2*, N.Y. TIMES, Dec. 25, 2012, at A6.

<sup>13</sup> *Scales v. United States*, 367 U.S. 203, 208 (1961).

<sup>14</sup> *Id.* at 205; see also 18 U.S.C. § 2385 (2012) (making it a crime to knowingly or willfully advocate “overthrowing or destroying the government” or to organize associations to advocate the same).

<sup>15</sup> 367 U.S. 203 (1961).

<sup>16</sup> *Id.* at 207–08; see also *United States v. Robel*, 389 U.S. 258, 288 (1967) (holding that an individual may neither be deprived of public employment nor punished for political association unless the three *Scales* elements are present).

<sup>17</sup> *Scales*, 367 U.S. at 208.

<sup>18</sup> *Galvan v. Press*, 347 U.S. 522, 527 (1954).

associational relationships” lacked particular criminal acts did not mean they were immune from prosecution.<sup>19</sup> Acknowledging that the Smith Act’s membership prohibition went beyond traditional liability based on complicity and conspiracy, the *Scales* Court pointed to “an analysis of the relationship between the fact of membership and the underlying substantive illegal conduct” as critical to determining whether the relationship could be the basis of criminal liability.<sup>20</sup> The Court found that membership “as merely an expression of sympathy with” the group’s “criminal enterprise” could not be punished.<sup>21</sup> The limitation of the Smith Act’s reach to “‘active’ members having also a guilty knowledge and intent” would, the Court ruled, prevent the criminalization of membership involving only moral encouragement; its focus was on the “concrete, practical impetus given to a criminal enterprise” by membership, which required more than simply joining such a group.<sup>22</sup>

Key to its decision was the *Scales* Court’s recognition that the Smith Act dealt with organizations possessing both legal and illegal objectives, therefore distinguishing them from pure conspiracies, which—by definition—have only criminal purposes.<sup>23</sup> It acknowledged that “*all* knowing association” with the latter could be prohibited because legitimate political expression or association would not be harmed.<sup>24</sup> The importance of the dual nature of a particular group has since been emphasized in subsequent cases.<sup>25</sup> This reasoning left the door open to potentially criminalizing membership in a particular terrorist group after finding that such a group has no legitimate, lawful objective—that the group is a criminal conspiracy. However, Congress has continued to avoid overtly criminalizing membership in terrorist groups, an issue explored below.<sup>26</sup>

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<sup>19</sup> *Scales*, 367 U.S. at 225–26 (discussing the similarity of the Smith Act’s prohibition to the theories of conspiracy and complicity in criminal law).

<sup>20</sup> *Id.* at 226.

<sup>21</sup> *Id.* at 228.

<sup>22</sup> *Id.* at 227–28 (noting Justice Harlan’s finding that the conspirator’s commitment to act in furtherance of a crime was the type of impetus membership could likewise have if the three elements were present).

<sup>23</sup> *Id.* at 229.

<sup>24</sup> *Id.* (emphasis in original). The Court’s reasoning displayed an instrumentality view of freedom of association—as a means to the ends of First Amendment freedoms of expressions, assembly, and religion—vice value in association as such.

<sup>25</sup> See, e.g., *Elfbrandt v. Russell*, 384 U.S. 11, 15–16 (1966) (invalidating requirement of loyalty oath as term of public employment because it failed to require specific intent to further criminal ends of the particular organization).

<sup>26</sup> This Article sidesteps the extraterritoriality issue regarding the Constitution’s protection outside United States borders as well as its application to non-United States citizens. This Article employs the constitutional treatment of criminal membership as an analogy, transferring the *Scales* scienter requirement into the LOAC context. In that arena, it serves as a means to find the necessary subordination to command, or agency relationship, which animates the LOAC’s use of membership as a proxy for hostile conduct. In this context, it is

B. *Legislative History of § 2339B*

*Scales's* jurisprudential bulwark of protection for the right of free association was challenged by the desire to disable terrorist groups in the 1980s and 1990s. As terrorist groups gained state-like capacities for violence, legislators naturally turned to tools traditionally designed for use against states. The focus shifted away from terrorist activity itself to the wider field of the groups' sustaining activities, such as fundraising and arms acquisition. While a ban on membership in specific terrorist groups was eventually proposed,<sup>27</sup> it was ultimately rejected in § 2339B, which instead bans specific conduct, such as the provision of arms, logistics, and services to groups designated by the Secretary of State as foreign terrorist organizations (FTOs).<sup>28</sup>

This criminalization of general assistance to terrorist groups is analogous to its antecedent, that of criminalizing similar transactions with offensive states: it has long been a crime for those subject to United States jurisdiction to trade with America's enemies during wartime, and even during peacetime, under specific circumstances.<sup>29</sup> Furthermore, it has also long been illegal for Americans to enlist in, earn a commission in, or recruit for a foreign military while in the United States, as well as to launch a military expedition from the United States on behalf of another country, per the federal neutrality laws.<sup>30</sup> Yet these embargo and neutrality measures, exclusively aimed at both economic and military transactions with states, did not lend themselves to use against those engaging in similar conduct vis-à-vis non-state entities.<sup>31</sup>

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irrelevant whether or not the Constitution protects those being targeted, because this Article is not recommending limits on membership determination in order to protect constitutional values; however, similar protective mechanisms translate well into this LOAC context, as described *infra*.

<sup>27</sup> Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 4–18 (2005).

<sup>28</sup> For a terrific discussion regarding 18 U.S.C. § 2339B's mens rea of knowledge instead of purpose as a marked distinction from traditional complicity-like crimes, see Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT'L SECURITY L. & POL'Y 5, 11 (2005).

<sup>29</sup> See 50 U.S.C. § 1701–02, 1705 (2012) (allowing the President to declare emergencies and subsequently impose wide-ranging economic embargoes against particular states and individuals, with criminal sanctions for those that supply such economic assistance); see also Chesney, *supra* note 27, at 4–18 (providing detailed analysis of 18 U.S.C. § 2339B's legislative and executive background, comparing its sweep to traditional state trade embargoes).

<sup>30</sup> 18 U.S.C. § 958 (2012) (criminalizing acceptance of a foreign commission to serve a country against a United States ally); 18 U.S.C. § 959 (2012) (criminalizing enlistment in a foreign service while in the United States, unless the foreign country is at war with a country with which the United States is at war).

<sup>31</sup> See, e.g., *The Antiterrorism and Foreign Mercenary Act: Hearing Before the Subcomm. on Sec. and Terrorism of the S. Comm. on the Judiciary*, 97th Cong. 6 (1982) (statement of Sen. Gordon J. Humphrey) [hereinafter *Antiterrorism Hearing*]. The state-centric nature of these statutes made them inapplicable for use against those aiding non-state groups.

In the 1980s, in reaction to some well-publicized incidents of U.S. citizens providing military training and other logistical support to state sponsors of terrorism (in particular, Libya), Congress considered its first bill criminalizing support to international terrorist organizations.<sup>32</sup> In 1982, Congress considered the Antiterrorism and Foreign Mercenary Act, which criminalized, *inter alia*, service—on behalf of a foreign state, faction, or international terrorist group—in its armed forces or intelligence agency; the Act also criminalized the provision of training, logistical, recruitment, and other types of support to (including recruitment for) the entity's military functions.<sup>33</sup> Interestingly, the proposed legislation did *not* prohibit the provision of money or fundraising for such entities out of concern for the many Americans who monetarily supported the Irish Republican Army.<sup>34</sup> The Act instead focused on the provision of complex services such as military training, which made sense given the impetus behind the proposed statute.<sup>35</sup> While the legislation did not pass for other reasons, it only faced faint resistance because of freedom of association concerns: "Above all, we must be mindful of constitutional rights, such as the freedom to travel and freedom of association."<sup>36</sup>

Two years later, an almost identical Act was proposed by President Reagan, whose spokespersons at one point touted that it would make it "a crime for an American to serve as a member of a terrorist group," only to seem to retreat from this claim later when faced with associational concerns.<sup>37</sup> Yet its language criminalizing service in both

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<sup>32</sup> Chesney, *supra* note 27, at 6 (describing the training of Libyan commando units by former United States special forces members, arranged by former CIA agents, and the so-called "gap" in the law that made prosecution for such acts difficult).

<sup>33</sup> *Antiterrorism Hearing*, *supra* note 31, at 3.

<sup>34</sup> *Id.* at 24–25. Opponents also voiced concern about those sending financial aid to groups opposing apartheid in South Africa. *Id.* at 26.

<sup>35</sup> *Id.* at 24–25, 34 (testimony and statement of Mark Richard, Deputy Assistant Att'y Gen., Department of Justice) ("[T]he bill is directed at a fairly direct rendition of aid and services.").

<sup>36</sup> *Id.* at 10–11 (statement of Rep. Matthew J. Rinaldo) (describing proposed bill making it unlawful "for an American on behalf of a foreign state, faction or international terrorist group named by the President in a proclamation, to: serve in its armed forces or intelligence agency[;] provide training to persons so serving[;] provide any logistical, maintenance or similar support[;] conduct any research, manufacturing or construction project directly related to its military functions[;] or recruit any other person to do any of the above."). The bills were considered late in the session, with over-breadth concerns focused on inadvertently barring legitimate trade with various countries. *See id.* at 16–43 (statements of Mark Richard, Deputy Assistant Att'y Gen., Criminal Division, Department of Justice, and Jeffrey Smith, Assistant Legal Adviser, Law Enforcement and Intelligence, United States Department of State); *see also* Chesney, *supra* note 27, at 8–12 (providing timeline of bill introduction).

<sup>37</sup> *Legislative Initiatives to Curb Domestic and International Terrorism: Hearings Before the Subcomm. on Sec. and Terrorism of S. Comm. on the Judiciary*, 98th Cong. 53, 85 (1984) [hereinafter *Legislative Initiatives Hearing*]. Ms. Toensing's prepared remarks stated, "S. 2626 does not prohibit mere association; it forbids only non-verbal action on behalf of a terrorist group" including "service in or acting in concert with [the organization]." *Id.* at 52 (statement of Victoria Toensing, Deputy Att'y Gen., Federal Bureau of Investigation).

foreign states' and terrorist groups' armed forces demonstrated that criminalizing membership was indeed a key component of the Act. This is clear from the bill's language regarding "service in" an armed force, which traditionally refers to membership in such military organizations.<sup>38</sup> The bill also attempted to wrestle with the often inchoate nature of terrorist groups: it encompassed individuals working "in concert with" terrorist groups, out of admitted recognition of the difficulty of determining membership, or service in, such groups.<sup>39</sup> This phrase was meant to apply to individuals whose association was more "in the nature of affiliation . . . regardless of whether they are 'card carrying members.'"<sup>40</sup> Another administration official described the phrase "in concert" as referring to "a person who acts as if he were a member of a proscribed organization, though he may not have an official membership in that organization; a person who acts as though he were and engages in conduct that is supportive, just as the conduct of an official member of the organization might be supportive."<sup>41</sup>

This bill met with significant resistance, this time largely based on First Amendment concerns.<sup>42</sup> This "particularly ominous piece of legislation" was condemned by civil libertarians as unconstitutional due to its prohibition of otherwise lawful acts in association with a group, without requiring the donor to possess specific intent to further illegal objectives of the group.<sup>43</sup> It also raised concerns that monetary support would be criminal under the act, and it once again failed to become law.<sup>44</sup> While defending the legislation, members of the Reagan administration, rather schizophrenically, responded that the act was "neutral with respect to the membership in a particular group" and "what we are attempting to reach is affirmative acts, providing [sic] of services to these designated groups."<sup>45</sup> Clearly, the administration was

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<sup>38</sup> *Id.* at 29.

<sup>39</sup> *Id.* at 53.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 106.

<sup>42</sup> See generally *Prohibition Against the Training or Support of Terrorist Organizations Act of 1984: Hearing Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 98th Cong. 3 (1984)* [hereinafter *Training Prohibition Hearing*] (claiming the bill was an unconstitutional infringement on the freedom of association, a "blanket prohibition of association with a group having both legal and illegal aims," without requiring a showing of specific intent to further the unlawful aims of the group" (quoting *Elfbrandt v. Russell*, 384 U.S. 11, 15 (1966))).

<sup>43</sup> Gregory Shank, Pail Takagi & Robert Gould, *Editorial: The State of Terrorism*, 25 CRIME & SOC. JUST. J. (1986); see also *Training Prohibition Hearing*, *supra* note 42, at 8 (testimony of Joseph M. Hassett & Jerry Berman, Legislative Counsel, American Civil Liberties Union).

<sup>44</sup> *Legislative Initiatives Hearing*, *supra* note 37, at 148 (statement of Joseph M. Hassett). The legislation was proposed again the following year, in 1985, but failed to make it out of committee. See Chesney, *supra* note 27, at 10.

<sup>45</sup> *Legislative Initiatives Hearing*, *supra* note 37, at 85 (statement of Mark Richard, Deputy Assistant Att'y Gen., Department of Justice).

reacting to membership criticism and trying to sell the draft act as in conformance with *Scales* and its progeny, despite previously touting its very criminalization of membership.<sup>46</sup>

Congress attempted once again to criminally sanction the provision of support to terrorist groups in 1991. This time it added a knowledge element, requiring that the supplier had to know that the support was intended for use in connection with terrorist acts.<sup>47</sup> But it was not until the World Trade Center in New York City was bombed in 1993 that Congress was able to successfully ban material support to terrorism, which it did in 1994 with 18 U.S.C. § 2339A.<sup>48</sup> § 2339A focuses on support of terrorist acts, akin to traditional aiding and abetting crimes, regardless of to whom the support is provided to: “The support must be given in furtherance of the . . . [terrorist act] . . . [such as] provid[ing] lodging to airplane saboteurs, in furtherance of their escape . . . .”<sup>49</sup> However, this statute alone proved insufficient to combat terrorism because it narrowly focused on contributions to actual terrorist acts and did nothing regarding the provision of resources needed by terrorist organizations to commit such acts.

Hence, the U.S. Government then turned to the blunter tool of sanctions, aimed for the first time against an entity other than a state. President Clinton, the first U.S. President to apply sanctions to a terrorist organization<sup>50</sup> rather than a state, did so by using the International Emergency Economic Powers Act (IEEPA) in 1995 to declare sanctions against twelve groups (and eighteen associated individuals) he deemed “Specially Designated Terrorists” due to their role in disrupting the Middle East peace process.<sup>51</sup> In accordance with this statute, the President’s declaration, among other things,

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<sup>46</sup> The Supreme Court, in cases such as *Elfbrandt v. Russell*, 384 U.S. 11 (1966), and *Konigsberg v. State Bar*, 366 U.S. 36 (1961), found that the *Scales* Court’s requirements of active membership, knowledge of illegal objectives, and specific intent to further those objectives must be present before group membership could be used to, respectively, prohibit an individual from holding state office based on membership in the Communist party and deny bar membership based on group affiliation.

<sup>47</sup> Chesney, *supra* note 27, at 11 n.62 (detailing material support bills’ sponsorship in the Senate and noting that the committee hearings did not include discussion of issues regarding support to terrorism).

<sup>48</sup> Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005, 108 Stat. 1796, 2022. Originally, § 2339 was born from unrelated legislation focusing on DNA identification and crime victims’ rights; terrorism-specific language was added following the World Trade Center bombing in 1993. CHARLES DOYLE, CONG. RESEARCH SERV., PUB. NO. R41334, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. 2339A AND 2339B 1 n.3 (2010); U.S. DEP’T OF STATE, PUB. NO. 10136, PATTERNS OF GLOBAL TERRORISM, 1993: THE YEAR IN REVIEW (1994), available at [http://www.fas.org/irp/threat/terror\\_93/year.html](http://www.fas.org/irp/threat/terror_93/year.html).

<sup>49</sup> H.R. REP. NO. 104-383, at 82 (1995).

<sup>50</sup> Exec. Order. No. 12,947, 3 C.F.R. 319 (1996). For a discussion of an analogous approach, including sanctions, against international drug cartels, see 1 SEAN D. MURPHY, UNITED STATES PRACTICE IN INTERNATIONAL LAW 339 (2002).

<sup>51</sup> Chesney, *supra* note 27, at 14.

immediately prohibited U.S. persons from “making or receiving . . . any contribution of funds, goods, or services to or for the benefit of” these groups and individuals, including humanitarian donations.<sup>52</sup> But because this IEEPA statute only authorized embargoes against groups that could be linked to a particular declared emergency, it was considered too narrow in its application. Therefore, the Clinton Administration renewed calls for legislation, modeled after the above-described Antiterrorism and Foreign Mercenary Act from the Reagan years, to criminalize the provision of funds and services to foreign terrorist groups, de-linked from any emergency or sanction-type regime.<sup>53</sup>

### C. *The Model: “Conduct plus Coordination”*

In response to these calls, Congress enacted § 2339B in 1996 as part of the Antiterrorism and Effective Death Penalty Act (AEDPA), and expanded § 2339A’s list of predicate offenses.<sup>54</sup> In light of the Murrah Building bombing in Oklahoma City in 1995 and the World Trade Center bombing in 1993, Congress hoped the new § 2339B would serve a greater preventative function.<sup>55</sup> It therefore designed § 2339B primarily to limit terrorist organizations’ fundraising efforts in the United States,<sup>56</sup> recognizing that such organizations often “operate under the cloak of a humanitarian or charitable exercise, or are wrapped in the blanket of religion.”<sup>57</sup> The interchangeability of funds to humane

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<sup>52</sup> *Id.* (quoting Exec. Order No. 12,947, 3 C.F.R. 319 (1996)).

<sup>53</sup> *Id.*

<sup>54</sup> Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, § 303, 110 Stat. 1214, 1250; *id.* § 323; DOYLE, *supra* note 48, at 1. The original 1996 AEDPA, 18 U.S.C. § 2339B, defined “material support or resources” via reference to § 2339A’s definition, which the AEDPA also amended. As such, “material support or resources,” as originally criminalized by § 2339B when knowingly provided to FTOs, included “currency or other financial securities, financial services, lodging, training, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.” AEDPA § 323(b) (internal quotation marks omitted).

<sup>55</sup> Ironically, though the Oklahoma City bombing was not the work of any FTO, *see Terror Hits Home: The Oklahoma City Bombing*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/history/famous-cases/oklahoma-city-bombing> (last visited Sept. 13, 2013), this terrorist act is cited in the House Report justifying the need for § 2339B. H.R. REP. NO. 104-383, at 37 (1995). The AEDPA was intended to serve a preventive function. *See* AEDPA § 301; Robert Chesney, *The Supreme Court, Material Support, and the Lasting Impact of Holder v. Humanitarian Law Project*, 1 WAKE FOREST L. REV. ONLINE 13, 14 (2010), available at [http://wakeforestlawreview.com/wp-content/uploads/2011/01/Chesney\\_Forum.pdf](http://wakeforestlawreview.com/wp-content/uploads/2011/01/Chesney_Forum.pdf); *see also* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2728 (2010) (stating that this statute is “a preventive measure” which criminalizes “aid that makes . . . attacks more likely to occur”).

<sup>56</sup> H.R. REP. NO. 104-383, at 38.

<sup>57</sup> *Id.* at 43.

causes with funds supporting the same organization's terrorist activities was cited as justification for prohibiting support to the groups regardless of donor intent: "Allowing an individual to supply funds, goods, or services to an organization . . . helps defray the cost to the terrorist organization of running the ostensibly legitimate activities. This, in turn, frees an equal sum that can then be spent on terrorist activities."<sup>58</sup>

However, the drafters went well beyond simply prohibiting the provision of funds to terrorist groups. They created a model that lists numerous types of prohibited conduct, with such activities tied together by the common theme of the provision of some thing (or some service) of value. The model further requires that the prohibited conduct be linked to a group—the link is usually, but not always, fulfilled by the group serving as the recipient of the service or thing of value. In 2001, Congress amended § 2339A via the USA PATRIOT Act, which added "expert advice or assistance" to the types of material support or resources that are prohibited.<sup>59</sup> The list of proscribed types of material support or resources expanded again in 2004, via the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), to include "any property, tangible or intangible, or service," with definitions added for training, expert advice, and assistance, as well as for personnel.<sup>60</sup> This Act also clarified that a violation of § 2339B required "knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in terrorism . . ."<sup>61</sup>

In its current form, § 2339B prohibits the provision (actual, attempted, or conspired) of material support or resources to a group designated by the U.S. Government as an FTO, knowing that such organization has been so designated, engages, or has engaged in terrorism or terrorist activity. The Secretary of State has the authority to designate a foreign organization as an FTO if it either engages in terrorist activity or "retains the capability and intent to engage in terrorist activity or terrorism; and . . . the terrorist activity or terrorism of the organization threatens the security of United States nationals or

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<sup>58</sup> *Id.* at 81.

<sup>59</sup> See Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 805, 115 Stat. 272, 377. This amendment also lengthened the maximum imprisonment to fifteen years or life imprisonment if death results from commission of the offense. *Id.* § 810(d), 115 Stat. at 380.

<sup>60</sup> Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603, 118 Stat. 3638, 3762. The amendments became permanent in the USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 104, 120 Stat. 192, 195 (2006).

<sup>61</sup> Intelligence Reform and Terrorism Prevention Act §§ 3762–63. This clarification of the scienter requirement was added in response to a ruling in the Ninth Circuit, which affirmed the district court's finding that the statute was unconstitutionally vague. *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137 (9th Cir. 2000).

the national security of the United States.”<sup>62</sup> There are currently approximately fifty organizations so designated, including groups such as Al-Qaeda and Hezbollah.<sup>63</sup>

Section 2339B adopts § 2339A’s definition of material support or resources.<sup>64</sup> Regarding personnel, it specifically limits its reach to only those individuals working under an FTO’s “direction or control,” and further provides that “[i]ndividuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control.”<sup>65</sup> Despite the statute’s lack of an overt prohibition on membership in designated groups, its utilization of conduct (in the form of providing services or physical things of value) plus an associative link (usually in the form of a donor/recipient relationship), inherently covers all but the most nominal types of membership, thus achieving the Reagan Administration’s intent to criminalize all membership in terrorist groups, as explained below.

## II. *HOLDER V. HUMANITARIAN LAW PROJECT*

### A. *Elimination of Scales’s Specific Intent Requirement*

§ 2339B cannot be properly understood without considering the impact of the Supreme Court’s 2010 decision in *Holder v. Humanitarian Law Project*.<sup>66</sup> Several domestic organizations and U.S. citizens, led by the non-profit Humanitarian Law Project (HLP),<sup>67</sup> challenged § 2339B

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<sup>62</sup> 8 U.S.C. § 1189(a)(1)(B)–(C) (2012) (internal footnote omitted).

<sup>63</sup> Elise Labott, *First on CNN: Clinton to Remove Iranian Exile Group From Terror List*, CNN.COM (Sept. 21, 2012, 10:50 AM), <http://security.blogs.cnn.com/2012/09/21/clinton-to-de-list-iranian-exile-group-from-terror-list>; *Foreign Terrorist Organizations*, NAT’L COUNTERTERRORISM CENTER, <http://www.nctc.gov/site/other/fto.html> (last updated Jan. 27, 2012).

<sup>64</sup> 18 U.S.C. § 2339A reads, in relevant part:

- (1) the term “material support or resources” means any property . . . or service, including . . . training, expert advice or assistance . . . except medicine or religious materials;
- (2) the term “training” means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and
- (3) the term “expert advice or assistance” means advice or assistance derived from scientific, technical or other specialized knowledge.

18 U.S.C. § 2339A(b)(1)–(3) (2012).

<sup>65</sup> 18 U.S.C. § 2339B(h) (2012).

<sup>66</sup> 130 S. Ct. 2705 (2010).

<sup>67</sup> According to its website, the HLP was “founded in 1985, dedicated to protecting human rights and promoting the peaceful resolution of conflict by using established international

in 1998 as a violation of their First and Fifth Amendment rights.<sup>68</sup> These plaintiffs wanted to assist the lawful political and humanitarian ends of the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), which had both been designated as FTOs by the Secretary of State.<sup>69</sup> They claimed that the statute's language violated their due process rights because it was unconstitutionally vague, and the statute's lack of specific intent to support terrorism violated their freedoms of association and speech.<sup>70</sup> Both the district court and the Ninth Circuit agreed with the plaintiffs on due process grounds, finding the terms "training" and "personnel" impermissibly vague, while also highlighting that because the law potentially criminalized conduct protected by the First Amendment, a higher standard of clarity was required.<sup>71</sup> The Supreme Court disagreed in a 6-3 ruling following twelve years of litigation, finding the statute constitutional as applied.<sup>72</sup>

The Court specifically addressed three constitutional claims in its decision: whether § 2339B's prohibition of four types of material support (training, expert advice and assistance, service, and personnel) violated the Fifth Amendment Due Process Clause due to the terms' impermissible vagueness; whether § 2339B violated the plaintiffs' First Amendment freedom of association; and whether § 2339B violated the plaintiffs' First Amendment freedom of speech.<sup>73</sup> The activities plaintiffs claimed were unconstitutionally prohibited by § 2339B included: "(1) 'train[ing] members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes'; (2) 'engag[ing] in political advocacy on behalf of Kurds who live in Turkey'; and (3)

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human rights laws and humanitarian law." HUMANITARIAN L. PROJECT, <http://hlp.home.igc.org> (last visited Sept. 14, 2013).

<sup>68</sup> *Humanitarian Law Project*, 130 S. Ct. at 2714; *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000).

<sup>69</sup> *Humanitarian Law Project*, 130 S. Ct. at 2713. Both groups were designated FTOs in 1997. See Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52,650 (Oct. 8, 1997).

<sup>70</sup> *Humanitarian Law Project*, 130 S. Ct. at 2716.

<sup>71</sup> *Id.* at 2715-16. Congress added the language "expert advice and assistance" to § 2339A in an effort to clarify "training." USA PATRIOT Act § 805. Congress further clarified the language of § 2339A following constitutional challenges on vagueness grounds. Intelligence Reform and Terrorism Prevention Act §§ 3762-63. For the specific history of these constitutional challenges, see generally *Humanitarian Law Project v. U.S. Dep't of Justice*, 393 F.3d 902 (9th Cir. 2004); *Humanitarian Law Project v. Gonzales*, 380 F. Supp. 2d 1134, 1148-52 (C.D. Cal. 2005), *aff'd*, *Humanitarian Law Project v. Mukasey*, 509 F.3d 1122 (9th Cir. 2007), *aff'd on reh'g*, *Humanitarian Law Project v. Mukasey*, 552 F.3d 916 (9th Cir. 2009), *aff'd in part, rev'd in part, and remanded*, *Humanitarian Law Project*, 130 S. Ct. at 2705; *Humanitarian Law Project v. Ashcroft*, 309 F. Supp. 2d 1185, 1200 (C.D. Cal. 2004).

<sup>72</sup> The Court held that § 2339B "is constitutional as applied to the particular activities plaintiffs have told us they wish to pursue." *Humanitarian Law Project*, 130 S. Ct. at 2712 (emphasis added). Scholars have noted that the Court's as-applied approach is "[t]he key to understanding" Chief Justice Roberts's opinion. See, e.g., Chesney, *supra* note 55, at 15.

<sup>73</sup> *Humanitarian Law Project*, 130 S. Ct. at 2716.

‘teach[ing] PKK members how to petition various representative bodies such as the United Nations for relief.’”<sup>74</sup>

Chief Justice Roberts summarily dealt with the plaintiffs’ claim that § 2339B criminalized mere association with groups such as the PKK and LTTE and therefore violated their First Amendment freedom of association.<sup>75</sup> Contrary to previous Supreme Court decisions, which struck down statutes because of their indiscriminate sweep “across all types of association with . . . groups, without regard to the quality and degree of membership,” the Court in *Humanitarian Law Project* found that a similarly broad associative sweep was not fatal—the Court implied that because the statute criminalized specific types of conduct instead of the status of membership itself, it was therefore more protective of associational rights.<sup>76</sup> But this rationale assumes that membership does not involve the types of conduct prohibited by the statute, an assumption that went unexplored by the Court. Yet the Court, quoting the Ninth Circuit, stated that “the statute does not penalize mere association with a foreign terrorist organization. . . . ‘The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group . . . .’”<sup>77</sup> If one is a member of Hamas *and* (instead of the Court’s *or*) vigorously promoting its political ends, is that not providing a service to the group, with coordination satisfied because of the membership?

The Court’s logic implies that a type of membership in a terrorist groups exists that involves doing nothing of value for the group and, further, that the act of joining does not consist of a transfer of money or other type of prohibited resource or service as defined by § 2339B. As the dissent points out, this lack of understanding of what terrorist group membership actually entails is especially glaring when it comes to speech in the form of advocacy, since “conversations and discussions are a necessary part of *membership* in any organization.”<sup>78</sup> As explained above, the statute’s list of prohibited conduct is sufficiently broad to include the provision of anything of value to a group. Hence, the Court’s reasoning begs the question of whether one can truly be a member of a terrorist group by essentially doing nothing except signing up and privately chatting about its aims. The statute’s list of prohibited conduct includes typical membership activities such as paying dues, recruiting other members, or running a website that is coordinated with other

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<sup>74</sup> *Id.* (alterations in original) (quoting *Mukasey*, 552 F.3d at 921 n.1) (showing that co-petitioners also sought review of the statute as applied to their advocacy for the Tamils in Sri Lanka).

<sup>75</sup> *Id.* at 2730.

<sup>76</sup> *Id.* (quoting *United States v. Robel*, 389 U.S. 258, 262 (1967)).

<sup>77</sup> *Id.* (quoting *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000)).

<sup>78</sup> *Id.* at 2737 (Breyer, J., dissenting) (emphasis in original).

members. The majority sidestepped this issue by refusing to define membership. But if one argues that group membership, particularly in terrorist organizations, typically involves some level of submission to a group's direction and control, it would seem that one has therefore provided personnel in violation of § 2339B. What is the essence of membership in a terrorist group if not to follow the group's direction?<sup>79</sup>

Therefore, the Court in *Humanitarian Law Project* seems to have jettisoned *Scales's* three-prong test for criminal membership. *Humanitarian Law Project's* conclusion that § 2339B only criminalizes membership plus material support, and not membership itself, appears to satisfy *Scales's* active membership component. But the Supreme Court in *Scales*, as discussed earlier in this Article, also required two other elements in order for membership to be constitutionally prohibited: a specific intent to further unlawful ends of a group and knowledge of the group's unlawful objectives.<sup>80</sup> Whereas § 2339B's requirement that an individual know that the recipient group has either been designated as an FTO or has engaged or will engage in terrorism seems to mirror the latter *Scales* requirement, § 2339B does not require the specific intent to further the group's ends.

At the beginning of his opinion, Chief Justice Roberts acknowledged that § 2339B omits this specific intent requirement and refused to read one into the statute.<sup>81</sup> The plaintiffs initially urged the Court to find that § 2339B, at least when applied to speech, contains the *Scales* mens rea requirement that the "defendant intended to further a foreign terrorist organization's illegal activities."<sup>82</sup> The Chief Justice found that Congress clearly concluded that the required mens rea was solely knowledge of an organization's ties to terrorism, without any additional intent to further the group's terrorist conduct.<sup>83</sup> "Congress plainly spoke to the necessary mental state for a violation of § 2339B, and it chose knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities."<sup>84</sup> This refusal to read a purposeful mens rea into the statute prompted the principal objection in Justice Breyer's dissent. He reasoned that use of the word "material" in the phrase "material support" implied intent to further terrorism, arguing that a defendant

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<sup>79</sup> *Id.* at 2730; *Scales v. United States*, 367 U.S. 203, 209 (1961); Chesney, *supra* note 55, at 18 n.30.

<sup>80</sup> *Humanitarian Law Project*, 130 S. Ct. at 2719.

<sup>81</sup> *Id.* at 2717.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* The majority pointed to the plain language of the statute, as well as the fact that both §§ 2339A and C do in fact require intent to further terrorist activity in support of this rejection. *Id.* at 2717-18.

<sup>84</sup> *Id.* at 2717.

would have to either know or intend that “his support bears a significant likelihood of furthering the organization’s terrorist ends.”<sup>85</sup>

As noted in the flurry of scholarship that followed this decision, by refusing to read a specific intent requirement into the statute, any activity, except generic discussions (those not based on any type of training or subject matter expertise) or the provision of medical and religious materials, is prohibited by § 2339B if done in knowing association with a designated group.<sup>86</sup> The required associative link is described below. As long as one’s conduct is in some manner coordinated with or otherwise linked to the designated group, a § 2339B violation has occurred.<sup>87</sup>

### B. *Vagueness Challenge Results in Expansion of Statute’s Reach*

In responding to the plaintiffs’ vagueness challenge, the *Humanitarian Law Project* majority utilized the test articulated in *United States v. Williams*,<sup>88</sup> which requires a statute to “provide a person of ordinary intelligence fair notice of what is prohibited.”<sup>89</sup> The majority emphasized that its analysis was as-applied, and chided the Court of Appeals for engaging in a de facto facial challenge by considering facts not before it.<sup>90</sup> While conceding a heightened standard of vagueness

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<sup>85</sup> *Id.* at 2741 (Breyer, J., dissenting).

<sup>86</sup> See generally David Cole, *The First Amendment’s Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine*, 6 HARV. L. & POL’Y REV. 147 (2012) (attempting to reconcile the *Humanitarian Law Project* decision with First Amendment precedent regarding speech and association); Owen Fiss, *The World We Live In*, 83 TEMP. L. REV. 295 (2011) (lamenting *Humanitarian Law Project*’s effects on advocacy). But see Peter Margulies, *Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech*, 63 HASTINGS L.J. 455 (2012) (framing the Court’s decision as establishing a hybrid scrutiny which allows breathing room for activities by scholars, journalists, and others, despite affiliation with designated groups).

<sup>87</sup> See Cole, *supra* note 86, at 169–71 (discussing the constitutional implications for membership in and association with domestic organizations versus foreign, positing that the *Scales*’s stricter criteria were perhaps due to the Smith Act’s prohibition of membership in a domestic, vice foreign, organization). Since association with and speech in coordination with domestic groups is at the heart of First Amendment protection—domestic groups are more likely to engage in political speech which is politically threatening to the U.S. government—associational freedoms in coordination with domestic groups are due greater protection than those at issue in *Humanitarian Law Project*. However, as Justice Breyer noted in his dissent, the plaintiffs’ contested speech involved speech in the United States directed at the U.S. Congress; that is, political speech as it is traditionally known and therefore deserving, at least according to Justice Breyer, of the strongest of traditional First Amendment protections. *Humanitarian Law Project*, 130 S. Ct. at 2732 (Breyer, J., dissenting).

<sup>88</sup> 553 U.S. 285, 304 (2008).

<sup>89</sup> *Humanitarian Law Project*, 130 S. Ct. at 2718.

<sup>90</sup> *Id.* at 2719. Chief Justice Roberts concluded that the Ninth Circuit conflated plaintiffs’ First Amendment claims with their vagueness ones and that, despite meeting the fair notice requirement, parts of § 2339B remained vague “because they applied to protected speech.” *Id.*

should apply because of the speech and association implications, the majority found the statute's terms sufficiently clear. The terms "training" and "expert advice or assistance" clearly encompassed most of plaintiffs' desired activity, such as their proposals to help FTOs learn to petition international bodies, as well as to train them in international law, thereby providing fair notice.<sup>91</sup> The majority also acknowledged that situations may exist in which the scope of the statute would not be clear, but "hypothetical situations" such as those argued by the plaintiffs were not presented in the as-applied challenge.<sup>92</sup>

The majority had to likewise engage in a dissection and re-arrangement of the statute to reach the plaintiffs' third proposed activity, engagement in political advocacy on behalf of both the Tamils and Kurds, to determine whether the statute was too vague to indicate whether such conduct was prohibited.<sup>93</sup> However, contrasted with the training and expert assistance entailed in teaching the PKK international law and how to petition international bodies, the Court found that this advocacy was clearly *not* prohibited by the material support statute.<sup>94</sup> But the Court had to stretch the category of services to make this finding, as explained below.

#### 1. Services Include Coordinated Acts

The plaintiffs worried that their political advocacy could be considered as personnel or services under the statute, but the statute was too vague to tell.<sup>95</sup> The Chief Justice first turned to the definition of "personnel"<sup>96</sup> and concluded that it was clear from its emphasis on working under the group's direction and control that the term did not encompass *independent* advocacy, which presumably lacked such management by an FTO.<sup>97</sup> This reasoning was similar to the plaintiffs' position that advocacy could be considered "personnel," but the Court noted that it was obvious that if it was independent advocacy, it was not prohibited. This was sufficiently clear to the Court for it to find that the statute's use of the term "personnel" was not impermissibly vague as applied.

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<sup>91</sup> *Id.* at 2720–21.

<sup>92</sup> *Id.* at 2721. There have been no such follow-up challenges in lower courts making different as-applied challenges.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 2721–22.

<sup>95</sup> *Id.* at 2721.

<sup>96</sup> See 18 U.S.C. § 2339B(h) (2012) (stating that only persons who "knowingly provided, attempted to provide, or conspired to provide" aid could be prosecuted as personnel).

<sup>97</sup> *Humanitarian Law Project*, 130 S. Ct. at 2721. Justice Breyer criticizes the distinction between independent and coordinated activity in his dissent as arbitrary. *Id.* at 2737 (Breyer, J., dissenting).

While the statute's qualifier of independent action only textually modifies the provision of personnel and not any other category of support listed in the statute, the Court proceeded to apply it elsewhere. The majority also took the statute's emphasis on FTO direction and control, found only in its definition of personnel, and applied it to the statute's prohibited category of service. By doing so, it concluded that service requires some type of concerted activity, despite the statute's lack of definition of the term.<sup>98</sup> The Chief Justice turned to Webster's Dictionary to find that service ordinarily includes "work commanded or paid for by another," or is an "act done for the benefit or at the command of another."<sup>99</sup>

Turning to statutory construction, Chief Justice Roberts highlighted that § 2339B prohibits the knowing provision of a service to a particular group, and concluded that the use of the word "to" indicates a connection between the FTO and the service provided.<sup>100</sup> Further analyzing the statute's context, the majority reasoned that, outside of personnel and services, none of the prohibited types of material support could logically be supplied independently of a recipient group (lodging and explosives as prime exemplars). Therefore, the type of service criminalized by the statute must not include that performed without a connection to an FTO.<sup>101</sup> The Court found that the statute's explanation of "personnel"—that the term does not include individuals working "entirely independently" of the group—applies to services as well.<sup>102</sup> Services cannot be considered to be supplied "to" an FTO if performed independently, that is, not under the FTO's direction or control.

The majority then proceeded to expand what "under the foreign terrorist organization's direction and control"<sup>103</sup> means by finding that service includes "advocacy performed *in coordination with*, or at the direction of," such a group.<sup>104</sup> This expansion occurred despite the fact that the statute does not include the word "coordination," and the plain meaning of the word implies a broader degree of affiliation than being under one's direction or control. Using the Court's edition of Webster's Dictionary, "coordination" refers to a wider range of activities than control, though the Court did not further elaborate what it meant by "coordination."<sup>105</sup> In fact, Chief Justice Roberts avoided answering the

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<sup>98</sup> *Id.* at 2721 (majority opinion).

<sup>99</sup> *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2075 (1993)).

<sup>100</sup> *Id.* at 2721–22.

<sup>101</sup> *Id.* at 2722.

<sup>102</sup> *Id.* at 2721–22.

<sup>103</sup> *Id.* at 2721 (quoting 18 U.S.C. § 2339B(h) (2012)) (internal quotation marks omitted).

<sup>104</sup> *Id.* at 2722 (emphasis added).

<sup>105</sup> Webster's defines control as "the act or fact of controlling . . . power or authority to guide or manage." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 496 (1993). Webster's defines coordination as "to bring into a common action, movement, or condition." *Id.* at 501.

plaintiffs' question of how much coordination with or direction from an FTO is required for advocacy to qualify as a criminal service under § 2339B.<sup>106</sup>

The majority again utilized the phrase “in coordination with” in its analysis of whether plaintiffs’ proposed training activities (to teach international law to the PKK for dispute resolution purposes and to teach them how to petition bodies such as the United Nations) constituted constitutionally prohibited speech under the statute.<sup>107</sup> It held that “the statute is carefully drawn to cover only a narrow category of speech to, under the direction of, or *in coordination with* foreign groups that the speaker knows to be terrorist organizations.”<sup>108</sup> The Court found that § 2339B is a content-based regulation because whether plaintiffs could speak with the PKK and LTTE without being prosecuted was contingent on what they said.<sup>109</sup> Content mattered because the speech, to be criminal under the statute, had to convey a specific skill or impart advice based upon specialized knowledge.<sup>110</sup> Furthermore, while the Court agreed that § 2339B “may be described as directed at conduct,” as applied to HLP and its co-plaintiffs, the triggering conduct was the communication of a message.<sup>111</sup> This expression was analogous to the communicative conduct at issue in *Cohen v. California* (wearing a jacket bearing an epithet).<sup>112</sup> The majority therefore concluded that strict scrutiny was appropriate.<sup>113</sup>

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Justice Breyer points out in the dissent that “[c]oordination’ with a political group, like membership, involves association.” *Humanitarian Law Project*, 130 S. Ct. at 2733 (Breyer, J., dissenting).

<sup>106</sup> *Humanitarian Law Project*, 130 S. Ct. at 2722. Chief Justice Roberts characterized the plaintiffs’ posited relationships (such as working through an intermediary) as both hypothetical and too general to consider, and deferred ruling for a situation that would offer a “concrete fact situation.” *Id.* (quoting *Zemel v. Rusk*, 381 U.S. 1, 20 (1965)).

<sup>107</sup> *Id.* at 2723. The Court does not revisit the plaintiffs’ third proposed activity (political advocacy for both the PKK and LTTE), presumably because it had already concluded that independent advocacy was plainly not prohibited.

<sup>108</sup> *Id.* (emphasis added).

<sup>109</sup> *Id.* Congress, in its Report supporting the passage of 18 U.S.C. § 2339B as part of the AEDPA, originally concluded that 18 U.S.C. § 2339B was content-neutral and that, therefore, *United States v. O’Brien*, 391 U.S. 367 (1968) provided the proper test when reviewing its First Amendment implications. H.R. REP. NO. 104-383, at 43–45 (1995).

<sup>110</sup> *Humanitarian Law Project*, 130 S. Ct. at 2724; *see also* 18 U.S.C. § 2339B(g)(4) (2012) (showing that the terms in § 2339B are defined in 18 U.S.C. § 2339A).

<sup>111</sup> *Humanitarian Law Project*, 130 S. Ct. at 2724.

<sup>112</sup> *Id.* (citing *Cohen v. California*, 403 U.S. 15, 16 (1971)).

<sup>113</sup> *See id.* Although the opinion does not use the phrase “strict scrutiny” per se, it states that “we are outside of *O’Brien’s* test, and we must [apply] a more demanding standard” (alteration in original) (quoting *Texas v. Johnson*, 491 U.S. 397, 403 (1989) (citation omitted)).

## 2. Statute Clears Hurdle of Strict Scrutiny Regarding Advocacy

The majority proceeded to find that combating terrorism, the government interest behind § 2339B, easily met strict scrutiny's requirement of constituting a compelling interest, as conceded by the plaintiffs.<sup>114</sup> Turning to the second prong of strict scrutiny's doctrinal test, whether § 2339B was narrowly tailored or used the least restrictive means, the argument turned on the breadth of the statute. The plaintiffs argued that since their desired support was connected only to the non-violent, legal activities of the PKK and LTTE, the government interest in combating terrorism could not constitutionally prohibit it; § 2339B's sweep was over-inclusive because it prohibited support, in the form of speech, for activities unrelated to terrorism and therefore was not narrowly tailored.<sup>115</sup> Chief Justice Roberts found this to be an empirical question.<sup>116</sup> He pointed to one of Congress's findings regarding the statute, which rejected the concept that support to an FTO could be limited to only non-terrorist activities: "[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an organization facilitates that conduct.*"<sup>117</sup>

The majority also used Congress's removal of an original exception to § 2339A, one that allowed humanitarian support to persons "not directly involved in" terrorism, as indicating a belief that even "peaceful aid" would have harmful effects and presumably aid terrorism.<sup>118</sup> The majority agreed with Congress's primary finding, stating that "[m]aterial support meant 'to promot[e] peaceable, lawful conduct,' can further terrorism by foreign groups in multiple ways."<sup>119</sup> That is, since material support as defined by the statute and as-applied to the plaintiff's activities could contribute indirectly to terrorism, the majority concluded that the statute was sufficiently tailored to the government's compelling objective of combating terrorism to pass constitutional muster.<sup>120</sup>

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<sup>114</sup> *Id.* at 2722. Strict scrutiny's question, stated simply, requires that any "content discrimination" be "reasonably necessary" to achieve the "compelling state interests." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992).

<sup>115</sup> Chesney, *supra* note 55, at 15.

<sup>116</sup> *Humanitarian Law Project*, 130 S. Ct. at 2724.

<sup>117</sup> *Id.* at 2724 (alteration and emphasis in original) (quoting Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, § 301(a)(7), 110 Stat. 1214, 1250).

<sup>118</sup> *Id.* at 2725. The original version of § 2339A stated that material support "does not include humanitarian assistance to persons not directly involved in such violations." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005, 108 Stat. 1796, 2022. This language was removed when § 2339A was amended in 1996. *See* AEDPA § 323 (amending § 2339A to a form much closer to its current form).

<sup>119</sup> *Humanitarian Law Project*, 130 S. Ct. at 2725 (second alteration in original) (internal citation omitted).

<sup>120</sup> *Id.* Chief Justice Roberts discussed four concepts (fungibility of money, legitimacy to

Finally, the majority's discussion of legitimacy linked the broad reach of this statute's "embargo-style prohibition on a sweeping array of forms of support" most closely to the compelling interest of combatting and preventing terrorism.<sup>121</sup> The majority agreed with Congress on the merits, that regardless of how innocuous support to FTOs seems to be, such as the plaintiffs' international law training, "working in coordination with or at the command of" such groups legitimizes the group.<sup>122</sup> Hence, the majority easily found the requisite nexus between suppression of terrorism and the need to prohibit such activities.<sup>123</sup>

C. Humanitarian Law Project's *Relevancy: "Conduct plus Coordination" (Without Specific Intent)*

*Humanitarian Law Project* is particularly important for constructing an analytical model for membership in the LOAC context because it begins to clarify what type of associational nexus is needed to transform otherwise independent conduct into a prohibited type because of the conduct's link to a particular group. In this vein, the holding does two things: it extends the statute's required group nexus from that type of connection involving direction and control to the broader nexus of coordination, and it explicitly approves the statute's lack of *Scales*'s protective scienter requirement. The latter makes membership criminal outside of the formerly required *Scales* test because § 2339B's "conduct plus coordination" model of determining criminal behavior reaches any reasonable concept of active membership, in addition to conduct with lesser associative ties. In other words, the missing scienter requirement to further a group's illegal ends (terrorism), coupled with the statute's broad list of prohibited activities, makes active membership impossible to engage in without running afoul of § 2339B.

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terrorist operations, international cooperation with regulation, and deference to the other branches) to support the material support statute's premise that any contribution to a terrorist group is harmful, and therefore demonstrate that it was not over-inclusive. *Id.* at 2725–27. Regarding fungibility, the majority noted that the prohibited groups do not erect "firewalls" to prevent comingling of funds and resources. *Id.* at 2725.

<sup>121</sup> Chesney, *supra* note 55, at 17; see also *Humanitarian Law Project*, 130 S. Ct. at 2736 (Breyer, J., dissenting). This legitimacy theory represents one of Justice Breyer's primary disagreements with the majority; he points out that the Court's previous position was that membership could not be prohibited despite any "legitimizing" effect." *Id.*

<sup>122</sup> *Humanitarian Law Project*, 130 S. Ct. at 2725 (majority opinion). The Court found that not only does material support allow an organization to repurpose existing resources, but such support also provides legitimacy that can ease a group's recruiting and fundraising efforts. That is, even seemingly benign assistance to FTOs can have an indirect beneficial effect on the group's terrorist activities, and therefore the statute appropriately prohibits such assistance within the limits set by the First Amendment. *Id.* at 2728–29.

<sup>123</sup> *Id.* at 2729.

The Court's upholding of the statute's framework of criminalizing a long list of activities (conduct) when performed in association with a particular group, allows a wide swath of criminality to turn on broad associational aspects. The level and type of association necessary for the act to become criminal were left at the arguably opaque level of coordination, turning independent acts such as advocacy or recruiting for an FTO into crimes when coordinated with designated terrorist groups.<sup>124</sup> This may be appropriate both constitutionally and practically in a criminal context, but a similar model found in the LOAC poses grave concerns, as discussed in Part IV. First, however, this Article turns to the LOAC model, both its genesis and current incarnation.

### III. THE LAW OF ARMED CONFLICT

#### A. Targeting

The LOAC, as articulated in treaties and customary international law, represents consensus by states regarding limitations on how they will fight and who may be made the deliberate object of attack.<sup>125</sup> The LOAC provides the *lex specialis* for assessing the legality of employing deadly force to incapacitate individuals in the context of armed

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<sup>124</sup> The Court noted that it doubted similar restrictions applied to domestic organizations could survive constitutional muster. *Id.* at 2730.

<sup>125</sup> The primary treaties include the four Geneva Conventions entered into in the aftermath of World War II, Additional Protocols I and II (which supplement the conventions), as well as the Hague Convention (IV) and the International Committee of the Red Cross (ICRC). Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, art. 41 [hereinafter Additional Protocol I], available at <http://www.unhcr.org/refworld/docid/3ae6b36b4.html>; 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 [hereinafter Additional Protocol II], available at <http://www.unhcr.org/refworld/docid/3ae6b37f40.html>; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I], available at <http://www.unhcr.org/refworld/docid/3ae6b3694.html>; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II], available at <http://www.unhcr.org/refworld/docid/3ae6b37927.html>; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III], available at <http://www.unhcr.org/refworld/docid/3ae6b36c8.html>; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV], available at <http://www.unhcr.org/refworld/docid/3ae6b36d2.html>; Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, Oct. 18 1907, 26 Stat. 2277 (1907) [hereinafter Hague Convention], available at <http://www.unhcr.org/refworld/docid/4374cae64.html>.

conflict.<sup>126</sup> In military operational parlance, this process is broadly characterized as targeting, and involves the integration of legal analysis into the decision-making process of the military actor in deciding where, when, and how to apply military force to achieve tactical, operational, and strategic objectives.<sup>127</sup> Targeting law, as a subset of the LOAC, recognizes that there has always been uncertainty in target identification and provides guidance amid this fog.<sup>128</sup> The actual targeting process can be deliberate and extremely complex, or time sensitive and often ad hoc. Regardless of the level of command engaged in the process, or the time available for deliberation, compliance with the LOAC is an axiomatic element of the engagement decision process.

Lawful targeting (attack) of persons, as established by the LOAC, is a superficially simple binary equation involving two categories of potential objects of attack: belligerents (often referred to as combatants), and civilians.<sup>129</sup> In essence, the law is built on the presumption that armed conflict involves those organizationally charged with engaging in hostilities on behalf of a larger entity (traditionally states), while all others are considered civilians.<sup>130</sup> Lawful attack authority flows from

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<sup>126</sup> See Geoffrey Corn & Chris Jenks, *Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts*, 33 U. PA. J. INT'L L. 313, 337 (2011). That the LOAC is made and implemented by states results in the reality that such law will never prohibit that which is necessary for states to actually succeed in conflict. See Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SECURITY J. 5, 6, 11 (2010).

<sup>127</sup> "Targeting is the process of selecting and prioritizing targets and matching the appropriate response to them, taking account of operational requirements and capabilities." James A. Hawkins, Joint Chiefs of Staff, *Joint Publication 2-01.1: Joint Tactics, Techniques, and Procedures for Intelligence Support to Targeting* vii (2003), [http://www.fas.org/irp/doddir/dod/jp2\\_01\\_1.pdf](http://www.fas.org/irp/doddir/dod/jp2_01_1.pdf). "Attacks" are defined in Additional Protocol I as "acts of violence against the adversary, whether in offence or in defence." Additional Protocol I, *supra* note 125, at art. 49(1).

<sup>128</sup> WILLIAM H. BOOTHBY, *THE LAW OF TARGETING* (2012).

<sup>129</sup> The author primarily uses the term "belligerent" or "belligerent operative" instead of "combatant" because the latter often causes confusion. "Combatant" is often generically used to describe individuals engaged in fighting, on behalf of a party to a conflict, and who are not protected from attack. However, in the strictest legal sense, "combatant" is applicable only in international armed conflicts, and only to one subset of fighters. In such conflicts, the term refers only to those members of armed groups who are legally authorized to engage in hostilities and warrant Prisoner of War (POW) protection, which is obtained, *inter alia*, by fulfilling the applicable treaty criteria such as wearing distinctive insignia, being commanded by a person responsible for subordinates, carrying arms openly, and obeying the LOAC. See generally Geneva Convention IV, *supra* note 125, at art. 14; 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, ICRC, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW* 3 (4th ed. 2009), available at <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> (defining generic use of the term "combatant"). See also Additional Protocol I, *supra* note 125, at art. 43(2) (defining combatants as having the legal right to conduct hostilities: "Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.").

<sup>130</sup> See generally Waldemar A. Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, 1 AM. U. J. INT'L L. & POL'Y 117, 118

this binary categorization: a belligerent is a lawful object of attack until unable to fight, be it via wounds, sickness, surrender, or capture.<sup>131</sup> A civilian is presumptively immune from deliberate attack unless and for such time as she engages in hostile action (referred to as “taking a direct part in hostilities”), at which point she too may be targeted, but only while so engaged.<sup>132</sup> Once the discrete participation has concluded, such civilian may not be attacked (though she may be captured).<sup>133</sup>

A fighter’s status as a belligerent equates to her constant targetability by opposing forces; this is informally referred to as status-based targeting.<sup>134</sup> That is, while the LOAC subjects everyone to conduct-based targeting, which is an attack in response to actual hostile behavior, only belligerents can be targeted because of who they are, not what they are doing. Non-combatants, that is, civilians, are instead subject only to conduct-based targeting—they lose protection against direct attack only during their relevant hostile acts.<sup>135</sup> Specifically, conduct-based targeting authorizes direct attacks on civilians when their individual conduct poses an imminent threat to friendly forces, despite

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(1986) (discussing the nature of war, its evolution from medieval times, and the development of humanitarian systems of war that now require a more status-based targeting framework).

<sup>131</sup> *Hors de combat* protects combatants who are prisoners or incapacitated by wounds, sickness, or surrender. See Additional Protocol I, *supra* note 125, at art. 41(2)(a)–(c) (listing those who are *hors de combat* and, therefore, immune from direct attack). *Hors de combat* is recognized as constituting customary international law and applicable in all armed conflicts. See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 159 (2d ed. 2010).

<sup>132</sup> See Bill Boothby, “*And for Such Time s*”: *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT’L L. & POL. 741 (2010) (describing propriety of targeting combatants versus civilians); Additional Protocol I, *supra* note 125, at art. 48, art. 51. However, civilians are not shielded from *indirect* attack. Proportionality, one of the four principles of the modern LOAC, allows incidental loss of life of civilians and damage to civilian property if the civilian losses are not excessive in relation to the anticipated military advantage gained. See *id.* at art. 51.5(b) (codifying the proportionality principle). For detailed discussions of all the LOAC principles, see GARY D. SOLIS, *THE LAW OF ARMED CONFLICT* 251–300 (2010).

<sup>133</sup> This Article focuses on targeting implications of associative status, not detention. Detention under the LOAC is authorized for both belligerents and civilians in certain circumstances (i.e., civilians may be interned during international armed conflict due to their status as an imperative threat to security, but may be targeted for such status only during their “direct participation in hostilities”). See Additional Protocol I, *supra* note 125, at art. 51(b)(3); Geneva Convention IV, *supra* note 125, at art. 42.

<sup>134</sup> See MICHAEL WALZER, *JUST AND UNJUST WARS* 138–45 (4th ed. 2006) (providing moral analysis of why, in just war theory, the “naked soldier” can be targeted despite not posing an immediate threat).

<sup>135</sup> “Hostile acts” are customarily understood as “acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.” INT’L COMM. OF THE RED CROSS, *COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949* ¶ 1942 (Yves Sandoz et al. eds., 1987) [hereinafter *ADDITIONAL PROTOCOL COMMENTARY*], available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Commentary\\_GC\\_Protocols.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf).

an earlier presumption of “inoffensiveness.”<sup>136</sup> Belligerents are accorded the opposite presumption, one of hostility.

Critically, the LOAC requires unknown individuals to be classified as civilians unless they have otherwise been shown to be belligerents.<sup>137</sup> Yet it provides little to no guidance as to the means to identify belligerents. Per the LOAC, civilians do not transform into belligerents by hostile acts; they can be targeted during their hostile conduct but retain their civilian status. So, if pure conduct in the form of hostile acts does not reflect belligerency, what does? Particularly regarding conflicts against non-state armed groups, the LOAC only loosely defines the category of “belligerents” and fails to provide identifying criteria.<sup>138</sup> This lack of guidance for determining who is a belligerent versus a civilian is increasingly straining the LOAC in modern conflicts.<sup>139</sup> The difficulty of identifying today’s non-state belligerents, as well as the changed nature of “membership” in their armed groups, is exerting great stress on the viability and legitimacy of the LOAC’s basic status-based targeting framework. These dynamics are also pushing armed conflict targeting analysis away from a traditional status-based targeting model to individuated and much more conduct-based decision criteria, as discussed later in this Article.<sup>140</sup>

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<sup>136</sup> See, e.g., Corn & Jenks, *supra* note 126, at 356 (explaining the difference between status- and conduct-based targeting and the triggering mechanisms for each); see also ADDITIONAL PROTOCOL COMMENTARY, *supra* note 135, ¶ 1944 (outlining direct participation in hostilities). The specific *jus in bello* which governs targeting today is an amalgamation of treaties and customary international law that combines two schools: the Geneva tradition, which originally focused on the protection of the victims of war, and “Hague Law,” which concerned itself with the means and methods of warfare. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 256 (July 8) [hereinafter Advisory Opinion]; see also DINSTEN, *supra* note 131, at 10–11, 35–37 (highlighting that the LOAC is primarily found in customary international law and discussing the Hague and Geneva LOAC traditions).

<sup>137</sup> See Additional Protocol I, *supra* note 125, at art. 50(1) (“In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”).

<sup>138</sup> See Corn & Jenks, *supra* note 126, at 326–27 (highlighting that Additional Protocol II, which applies to particular non-international armed conflicts, lacks identifying criteria for belligerents).

<sup>139</sup> The 1899 and 1907 Hague Conventions, when listing the qualifications of belligerents, required that belligerents meet the following criteria in order to enjoy the “laws, rights, and duties of war . . . : 1. To be commanded by a person responsible for his subordinates; 2. To have a fixed distinctive emblem recognizable at a distance; 3. To carry arms openly; and 4. To conduct their operations in accordance with the laws and customs of war.” Hague Convention, *supra* note 125, Annex, art. 1. This list was carried into Article 4 of the Third Geneva Convention, which stipulates the criteria for POW status. Geneva Convention III, *supra* note 125, at art. 4. Article 44 of Additional Protocol I controversially eliminates the requirement, at least in international armed conflicts, to carry weapons openly. See Additional Protocol I, *supra* note 125, at art. 44(4). Critically, these criteria do not serve to identify all belligerents; they only classify those who are legally entitled to POW status and combatant immunity (that is, those referred to today as combatants). Outside these qualifications, the LOAC is silent on who is a belligerent versus civilian, leaving undefined the category of a belligerent who is not entitled to POW status and combatant immunity per the above criteria.

<sup>140</sup> See *infra* Part III.D.

### 1. Status-Based Targeting: Distinction plus Necessity

Unlike normal peacetime law enforcement authority to utilize deadly force to subdue a hostile threat, the LOAC in no way limits the targeting of fighters to only those times during which they are fighting or engaging in conduct that qualifies as an imminent threat to the individual making the attack decision. Instead, because the belligerent is presumptively hostile at all times, the law 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. As stated in the U.S. Standing Rules of Engagement (SROE), which are explained in the U.S. Army Operational Law Handbook, “[o]nce a force is declared to be ‘hostile,’ U.S. units may engage it without observing a hostile act or demonstration of hostile intent; i.e., the basis for engagement shifts from conduct to status.”<sup>141</sup> This status-based targeting results from the interaction of the LOAC principles of distinction and military necessity, and remains a vital tool for state militaries, though one that requires extensive prior analytical effort to ensure the target truly is an enemy member.<sup>142</sup>

Distinction, a concept with deep roots in the LOAC, is considered a cardinal principle of customary international law by the International Court of Justice, and “is aimed at the protection of the civilian population and civilian objects.”<sup>143</sup> It requires the division of all persons and objects into one of two categories, either belligerent or civilian, and protects the latter from being objects of attack.<sup>144</sup> As part of both

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<sup>141</sup> JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 75 (Sean Condrone ed., 2011) (defining a Declared Hostile Force (DHF) as “[a]ny civilian, paramilitary, or military force, or terrorist that has been declared hostile by appropriate U.S. authority,” and stating that hostile forces may be engaged upon “without observing a hostile act or demonstration of hostile intent . . . unless surrendering or *hors de combat* due to sickness or wounds”); see also Chairman Joint Chiefs of Staff Instruction 3121.01B, Standing Rules of Engagement for U.S. Forces (2005) at A-2 (stating that “[o]nce a force is declared hostile by appropriate authority, U.S. forces need not observe a hostile act or demonstrated hostile intent before engaging the declared hostile force.”); Geoffrey Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A “Principled” Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISRAEL L. REV. 46, 64–66 (2009).

<sup>142</sup> See DINSTEIN, *supra* note 131, at 103 (discussing the result of adding distinction and military necessity together). The Commentary to Additional Protocol I reinforces the conclusion that combatants are vulnerable to attack because of their status as such: “[t]he Conference considered that all ambiguity should be removed and that it should be explicitly stated that all members of the armed forces (with the above-mentioned exceptions) can participate directly in hostilities, i.e., attack and be attacked.” ADDITIONAL PROTOCOL COMMENTARY, *supra* note 135, ¶ 1677. There are four fundamental LOAC principles: distinction, military necessity, proportionality, and humanity. See JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., *supra* note 141, at 10–13.

<sup>143</sup> Advisory Opinion, *supra* note 136, at 257.

<sup>144</sup> The LOAC’s binary of civilians and belligerents, and associated conduct and status-based targeting, represent an attempt to balance military necessity with humanitarian concerns,

customary international law<sup>145</sup> and treaty law, the principle of distinction is applicable in all armed conflicts, regardless of characterization.<sup>146</sup> As articulated in Article 48 of Additional Protocol I to the Geneva Conventions, “the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>147</sup> Distinction as applied to armed forces prohibits them from making the civilian population and individual citizens the object of attack.<sup>148</sup> However, a civilian can be the direct object of attack, that is, targeted, “for such time as they take a direct part in hostilities.”<sup>149</sup> This exception to the modern LOAC’s grant of non-combatant immunity, based on a civilian’s direct participation in hostilities, has traditionally been a narrow one determined on a case-by-case basis.<sup>150</sup> There is no consensus regarding the full range of activities that qualify as such, nor for that matter on who qualifies as a civilian.<sup>151</sup>

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working in the context that its implementation must be interpreted to not completely tie states’ hands. DINSTEN, *supra* note 131, at 4–5; Schmitt, *supra* note 126, at 6, 11. Whereas the Geneva Conventions are considered to bind all nations due to their accepted nature as customary international law, the Additional Protocols, which have not been ratified by the United States, only partially represent customary international law. However, the relevant principles are considered customary international law by the United States. *See supra* Part I; *see also* JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., *supra* note 141, at 14; Memorandum from W. Hays Parks et al. to John H. McNeill, Assistant Gen. Counsel (Int’l), OSD, in *LAW OF ARMED CONFLICT DOCUMENTARY SUPPLEMENT 234–35* (Andrew D. Gillman & William J. Johnson, eds., 2012).

<sup>145</sup> HENCKAERTS & DOSWALD-BECK, *supra* note 129, ¶ 31.

<sup>146</sup> Additional Protocol I, Article 48, applies this principle to international armed conflicts, whereas Common Article 3 and Additional Protocol II, Article 13(2) apply it to NIACs. Additional Protocol I, *supra* note 125, at art. 48; Additional Protocol II, *supra* note 125, at art. 13(2); Geneva Convention I, *supra* note 125, at art. 3(1); Geneva Convention II, *supra* note 125, at art. 3(1); Geneva Convention III, *supra* note 125, at art. 3(1); Geneva Convention IV, *supra* note 125, at art. 3(1).

<sup>147</sup> Additional Protocol I, *supra* note 125, at art. 48.

<sup>148</sup> *Id.* at art. 51(2) (“The civilian population as such, as well as individual citizens, shall not be the object of attack.”). Article 51 permits civilians and civilian objects to be indirect objects of attack per the principle of proportionality articulated in ¶ 5(b), which allows “incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof,” provided that it is not “excessive in relation to the concrete and direct military advantage anticipated.” *Id.* at art. 51(5)(b).

<sup>149</sup> *Id.* at art. 51(3). Article 13(3), Additional Protocol II, applies this application of distinction to NIACs, and Article 3 common to the 1949 Geneva Conventions calls for humane treatment of those taking no “direct part in [the] hostilities.” *See* Additional Protocol II, *supra* note 125, at art. 13(3); Geneva Convention I, *supra* note 125, at art. 3; Geneva Convention II, *supra* note 125, at art. 3; Geneva Convention III, *supra* note 125, at art. 3; Geneva Convention IV, *supra* note 125, at art. 3(1). The terms “active” and “direct” are viewed synonymously. *See* W. Hays Parks, *Part IX of the ICRC “Direct Participation in Hostilities” Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT’L L. & POL. 769, 772 n.7 (2010).

<sup>150</sup> Schmitt, *supra* note 126, at 25–26.

<sup>151</sup> The difficulty in determining whether a civilian is directly participating in hostilities or not has been exacerbated during the recent conflicts against non-state actors who do not wear

The principle of military necessity allows “that use of force required to accomplish the mission” within the limits of the laws of war.<sup>152</sup> It “justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.”<sup>153</sup> According to the Lieber Code, the first codified state LOAC manual, “[m]ilitary necessity . . . consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”<sup>154</sup> It also provides that “[m]ilitary necessity admits of all destruction of life or limb of armed enemies.”<sup>155</sup> The LOAC’s conclusion that military necessity authorizes the killing of all members of the opposition armed forces echoes the 1868 St. Petersburg Declaration: “That the only legitimate object which States should endeavour to accomplish during war is to weaken the *military* forces of the enemy; [t]hat for this purpose it is sufficient to disable the greatest possible number of men.”<sup>156</sup> Treaty law echoes this sentiment, limiting attacks “strictly to military objectives.”<sup>157</sup>

Treaty law further defines military objects, versus personnel, as those “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 of advantage.”<sup>158</sup> This functional test only applies to objects, not personnel, since the LOAC assumes that it is militarily necessary to attack military personnel and “armed enemies”<sup>159</sup> during

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uniforms or other distinctive insignia, blend into and hide among the civilian population, engage in part time combatancy, and otherwise are organized differently than traditional armies, as well as by the increased use of contractors on the battlefield and technological advances that are changing how parties fight. There have been recent international attempts to formulate finite criteria to determine what constitutes direct participation in hostilities. See *infra* Part III.C.2 (discussing efforts of the International Committee of the Red Cross).

<sup>152</sup> JUDGE ADVOCATE GEN.’S LEGAL CTR. & SCH., *supra* note 141, at 10.

<sup>153</sup> DEP’T OF THE ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE 4 (1956); see also Geoffrey Corn, *Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict*, 1 J. INT’L HUMANITARIAN LEGAL STUD. 52, 55 n.7 (2010).

<sup>154</sup> Francis Lieber, General Orders No. 100, art. 14 (1863), available at [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp).

<sup>155</sup> *Id.* at art. 15.

<sup>156</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, reprinted in THE LAWS OF ARMED CONFLICTS 101, 102 (Dietrich Schindler & Jiří Toman eds., 1988) (emphasis added).

<sup>157</sup> Additional Protocol I, *supra* note 125, at art. 52(2). The principle of military necessity is customary international law and as such is applicable in all types of armed conflict, regardless whether international, non-international, or other. GEOFFREY S. CORN ET AL., THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 103 (2012). Article 43 of Additional Protocol I also indicates that those meeting the combatant definition can be subject to direct attack at any time. See Additional Protocol I, *supra* note 125, at art. 43(2).

<sup>158</sup> Additional Protocol I, *supra* note 125, at art. 52(2).

<sup>159</sup> Lieber, *supra* note 154.

armed conflict regardless of their “effective contribution to military action” at the time.<sup>160</sup> It is their status as members of an armed group, not their conduct, which allows them to be targeted.<sup>161</sup>

It is important to note that status-based targeting evolved in the context of state armies, with their internal organizational ties based on individual soldiers’ relationships to their sovereign.<sup>162</sup> In such a context, the primary animating assumption behind the use of status as a substitute for conduct stems from state armies’ agency relationships among members. It is not only the belligerent’s potential or actual fighting function which drives a belligerent’s targetability under the law of armed conflict; it is the ability to be commanded by his superiors which separates him from civilians and therefore allows status-based targeting. Membership, because of its inherent agency relationship of command, demonstrates a submission of self to the central, overarching, violent purpose of the group. Formal membership in a state army signifies this relationship, and therefore triggered (and continues to trigger) classification as a target in classic state-on-state war.

This focus on a command relationship as the defining feature of the belligerent category was first codified in the 1899 Hague Regulations, and was integral in defining who could be considered a member of non-state armed groups fighting wars of liberation under Additional Protocol I to the Geneva Conventions.<sup>163</sup> “The subordination of the person concerned to a force organized in accordance with the provisions of the Protocol is a fundamental and unconditional requirement of the status of combatant . . . .”<sup>164</sup> One of the reasons for this subordination requirement was the desire to ensure adherence to the LOAC through agency ties to leadership; the latter would be theoretically responsible to maintaining accountability for such adherence. But this subordination requirement is primarily based on the recognition mentioned above—that the soldier symbolically represents the sovereign, and his willingness to be so commanded (or to command) in service of the group’s (sovereign’s) ultimate objectives renders such soldier an inherent threat. In other words, classic soldiers are “malleable”<sup>165</sup> in the sense that the soldier who typically functions as

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<sup>160</sup> Additional Protocol I, *supra* note 125, at art. 52(2).

<sup>161</sup> See Parks, *supra* note 149, at 804. But see NILS MELZER, TARGETED KILLING IN INTERNATIONAL LAW 288–96 (2009) (arguing that this functional test should apply to personnel as well).

<sup>162</sup> Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 J. LEGAL ANALYSIS 115, 119–22 (2010); Corn & Jenks, *supra* note 126, at 333–35.

<sup>163</sup> See ADDITIONAL PROTOCOL COMMENTARY, *supra* note 135, ¶¶ 1664–71 (tracing development of concept of a “belligerent”).

<sup>164</sup> *Id.* ¶ 1739.

<sup>165</sup> Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, in 13 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3, 44 (Michael N. Schmitt ed., 2010).

a cook can be ordered to fight: “In fact, in any army there are numerous important categories of soldiers whose foremost or normal task has little to do with firing weapons. . . . Whether they actually engage in firing weapons is not important. They are entitled to do so . . . .”<sup>166</sup>

In other words, membership in an enemy armed group during armed conflict is the leading indicator of one’s capacity and willingness to fight. It results in a presumption of a continuous and ongoing threat at all times, regardless of the member’s particular functional role; such a role is complemented with a potentially combative one.<sup>167</sup> Key to a member’s potential functional combatancy is his agency relationship with superiors and subordinates in the group; he must be integrated into the group. So, per the LOAC, one’s 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.<sup>168</sup> But this LOAC targeting axiom is not limited to state militaries. It extends to non-state armed groups as well, though with greater nuance based on the difficulty in determining membership, as demonstrated below.

## 2. Conduct-Based Targeting and Direct Participation

In contrast with status-based targeting of belligerents, the LOAC only allows civilians to be targeted when they are directly engaged in hostilities; by definition, they are presumed to be non-participating. That is, only a civilian’s extant hostile conduct, at the time of targeting, can legally justify such an attack. Once a civilian stops engaging in such conduct, he can no longer be targeted. This treatment differs from status-based targeting based on membership, which (as outlined above) allows a belligerent to be attacked regardless of his conduct at the time of targeting. Determining what actions constitute direct participation in hostilities has long been addressed in a “case-by-case fashion,” with states and courts using examples to define it instead of definitional criteria.<sup>169</sup> The commentary to Additional Protocol I, the treaty which most directly outlines direct participation in hostilities, provides that:

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<sup>166</sup> See ADDITIONAL PROTOCOL COMMENTARY, *supra* note 135, ¶ 1677.

<sup>167</sup> This functional combatancy excludes medical and religious personnel, who presumptively never assume a combat role under the modern law of war. CORN ET AL., *supra* note 157, at 172–75.

<sup>168</sup> *But see* Blum, *supra* note 162, at 138–39 (discussing criticisms of status-based targeting).

<sup>169</sup> Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT’L L. & POL. 697, 705 (2010); *see also* Prosecutor v. Strugar, Case No. IT-01-42-A, Appeals Chamber Judgment, ¶ 178 (Int’l Crim. Trib. for the Former Yugoslavia July 17, 2008); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 27–28 (1st ed. 2004); Corn & Jenks, *supra* note 126, at 336; Nils Melzer, ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*

Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces. Thus a civilian who takes part in armed combat, either individually or as part of a group, thereby becomes a legitimate target, though only for as long as he takes part in hostilities.<sup>170</sup>

Examples of such activity, according to military manuals, include “taking up arms or otherwise trying to kill, injure, or capture [an] enemy.”<sup>171</sup> The Israeli Supreme Court provided a representative list of those activities engaged in by civilians in the context of international armed conflict that qualify as directly participating in hostilities: someone “who collects intelligence on the army . . . who transports unlawful combatants to or from the place where hostilities are taking place . . . who operates weapons . . . or supervises their operation, or provides service to them, be the distance from the battlefield as it may. . . .”<sup>172</sup> It also described activities that it did not consider to be direct participation, such as “a person who sells food or medicine to an unlawful combatant . . . [,] a person who aids the unlawful combatants by general strategic analysis, and grants them logistical, general support, including monetary aid. . . . [, or] a person who distributes propaganda supporting those unlawful combatants.”<sup>173</sup>

Traditionally, “a mere contribution to the general war effort (e.g., by supplying foodstuffs to combatants)” is not considered to constitute direct participation in hostilities.<sup>174</sup> If it did, then the principle of distinction would be eviscerated because entire societies are involved at some level in modern war.<sup>175</sup> But direct participation is not limited to acts involving lethal force. The commentary to Additional Protocol I provides that, “to restrict this concept [of direct participation in hostilities] to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly.”<sup>176</sup> So while firing a weapon at enemy

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*Under International Humanitarian Law*, 90 INT’L REV. RED CROSS 991, 994 (2008) [hereinafter *Interpretive Guidance*].

<sup>170</sup> ADDITIONAL PROTOCOL COMMENTARY, *supra* note 135, ¶ 1942. Additional Protocol I, while only applicable to international armed conflicts, provides useful guidance for assessing targetability in NIACs as well.

<sup>171</sup> Boothby, *supra* note 128, at 157.

<sup>172</sup> See Schmitt, *supra* note 169, at 708 (quoting HCJ 769/02 Pub. Comm. Against Torture in Israel v. Gov’t of Israel 57(6) PD 285 ¶ 35 [2006] (Isr.)).

<sup>173</sup> *Id.* at 708.

<sup>174</sup> DINSTEIN, *supra* note 169, at 28.

<sup>175</sup> Prosecutor v. Strugar, Case No. IT-01-42-A, Appeals Chamber Judgment, ¶¶ 176–79 (Int’l Crim. Trib. for the Former Yugoslavia July 17, 2008).

<sup>176</sup> ADDITIONAL PROTOCOL COMMENTARY, *supra* note 135, ¶ 1679 (footnote omitted); see also *id.*, ¶ 1945 (“There should be a clear distinction between direct participation in hostilities

forces on behalf of an armed group is clearly conduct that strips a civilian of immunity from targeting, exactly what other conduct is considered dangerous enough to lift this shield is still undefined in the LOAC. For purposes of this Article, it is the test's focus on combat-like conduct, and not status or even affiliation with an armed group, which is particularly relevant.

### B. *Characterization of the Conflict*

The application of the targeting principles discussed above in the current U.S. struggle against Al-Qaeda and associated groups turns on whether the hostilities constitute an armed conflict.<sup>177</sup> The transnational scope and diffuse nature of these non-state armed groups make the struggle more difficult to squarely fit into the LOAC's traditional categories.<sup>178</sup> It is neither a state-on-state international armed conflict, as envisioned by Article 2 of the four Geneva Conventions nor an Additional Protocol I "international" war of national liberation/self-determination; it is also not a purely internal armed conflict occurring solely within the territory of one state, as envisioned by Additional Protocol II.<sup>179</sup> Rather, per the United States Supreme Court in *Hamdan v. Rumsfeld*,<sup>180</sup> the transnational hostilities between the United States and Al-Qaeda and affiliated non-state belligerent groups are considered a "non-international armed conflict" (NIAC), which is governed by Common Article 3 of the Geneva Conventions and applicable customary international LOAC.<sup>181</sup> This characterization has since been underscored by members of the Obama administration—"[t]he United

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and participation in the war effort. The latter is often required from the population as a whole to various degrees. Without such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless. In fact, in modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context.").

<sup>177</sup> See generally CORN ET AL., *supra* note 157, at 66–82 (discussing the nuances of characterizing hostilities against terrorist groups as armed conflicts); MELZER, *supra* note 161, at 245–48 (discussing the status of an armed conflict as necessary for applying the LOAC).

<sup>178</sup> "Those laws of war were designed primarily for traditional armed conflicts among states, not conflicts against a diffuse, difficult-to-identify terrorist enemy . . ." Harold Hongju Koh, Legal Advisor, U.S. Dep't of State, Address to the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010) (transcript available at <http://www.state.gov/s/l/releases/remarks/139119.htm>).

<sup>179</sup> See generally *Interpretive Guidance*, *supra* note 169, at 994 (highlighting Additional Protocol I's recognition of wars of national liberation and its characterization of such as international armed conflicts).

<sup>180</sup> 548 U.S. 557, 630 (2006).

<sup>181</sup> *Id.* at 631. Article 3 to the Geneva Conventions, by its own terms, applies to conflicts not of an international character; while such conflicts do not require any type of territorial control by the parties, non-state actors must "be identifiable based on objectively verifiable criteria." MELZER, *supra* note 161, at 254.

States government is in an armed conflict against al Qaeda and associated forces, to which the laws of armed conflict apply”<sup>182</sup>—as well as by Congress.<sup>183</sup> Additionally, the United States’ position is that this armed conflict is not geographically limited to only “hot” battlefields: “[W]e are not in a conventional war. Our legal authority is not limited to the battlefields in Afghanistan.”<sup>184</sup> However, this does not appear to be an unbounded view of where lethal operations can occur; administration officials have been careful to admit constraints on the geographic aspect of the armed conflict.<sup>185</sup> Regardless, since the conflict is viewed by the United States as an armed one, the fundamental targeting principles outlined above, as explained below, apply despite the nature of the conflict being one against non-state armed groups operating transnationally.<sup>186</sup>

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<sup>182</sup> Jeh Charles Johnson, Gen. Counsel, U.S. Dep’t of Defense, Address at the Oxford Union: The Conflict Against Al Qaeda and Its Affiliates: How Will It End? (Nov. 30, 2012) [hereinafter Johnson Speech] (transcript available at <http://www.lawfareblog.com/2012/11/jeh-johnson-speech-at-the-oxford-union>); see also Koh, *supra* note 178 (“[A]s a matter of international law, the United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces . . . .”); Harold Hongju Koh, Legal Adviser, Dep’t of State, Keynote Address at the Naval War College: International Law and Armed Conflict in the Obama Administration (June 22, 2011) (presentation available at <http://www.usnwc.edu/getattachment/f53eec9c-1e22-48bb-8fb2-85f6f70b9c9b/The-Honorable-Harold-Koh-slideshow.pdf>) (discussing specific U.S. positions regarding NIAC against Al-Qaeda and associated forces).

<sup>183</sup> Authorization For Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

<sup>184</sup> Eric Holder, U.S. Attorney Gen., Remarks Regarding Targeted Killings, Northwestern University School of Law (Mar. 5, 2012) (transcript available at <http://www.cfr.org/terrorism-and-the-law/holders-speech-targeted-killing-march-2012/p27562>); see also John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, Harvard Law School Program on Law and Security: Strengthening our Security by Adhering to our Values and Laws (Sept. 16, 2011) [hereinafter Brennan Speech] (transcript available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an>).

<sup>185</sup> See, e.g., Brennan Speech, *supra* note 184 (“That does not mean we can use military force whenever we want, wherever we want.”); see also Memorandum from the Dep’t of Justice, Dep’t of Justice White Paper: Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who Is a Senior Operational Leader of Al-Qa’ida or An Associated Force 5 (Nov. 8, 2011) (available at <http://www.fas.org/irp/eprint/doj-lethal.pdf>) (discussing locations where Al-Qaeda has a base of operations and a “significant and organized presence”); Jeh Charles Johnson, Gen. Counsel, Dep’t of Defense, Address at Yale Law School: National Security Law, Lawyers and Lawyering in the Obama Administration (Feb. 22, 2012) (transcript available at <http://www.lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school>) (stating that international legal principles place important limits on the United States’s ability to act unilaterally in foreign territories).

<sup>186</sup> Prosecutor v. Tadić, Case No. IT-94-1-A, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 116, 119 (Int’l Crim. Trib. for the former Yugoslavia Oct. 2, 1995); Schmitt, *supra* note 126, at 18–24 (discussing the existence of organized armed groups belonging to a non-State party to an armed conflict in a NIAC); see also SOLIS, *supra* note 132, at 158 (discussing the application of Common Article 3 and Additional Protocol II to armed opposition groups in NIACs). For a lucid discussion of the triggering mechanisms for the two traditional categories of armed conflict and the evolution of applying the corpus of the LOAC to transnational armed conflicts, see Corn & Jensen, *supra* note 141, at 46.

### 1. Preeminent Type of Armed Conflict Today: NIAC

As mentioned, the triggering mechanism for the LOAC is the state of armed conflict itself, which traditionally encompasses two categories: “international armed conflicts,” which occur between states, and “non-international armed conflicts” (NIACs), traditionally occurring within the territory of one state. The former triggers the entire body of the LOAC.<sup>187</sup> The existence of such interstate, international armed conflict is relatively easy to assess, the relevant criterion being the attribution to a state of a hostile act directed at another state.<sup>188</sup> Interstate hostilities can range from full-scale invasion by one country of another to even minor occurrences of armed violence. However, interstate conflict is not the norm today; non-international conflicts involving states on one side and non-state armed groups on the other dominate today’s armed conflict landscape, but the applicable rules are less clear than in their interstate counterparts.<sup>189</sup>

The threshold for applicability of the LOAC in NIACs, as well as the definition of such a conflict, is murkier than that regarding international armed conflicts. Traditionally, NIACs have been considered synonymous with internal armed conflicts, such as civil wars, involving the state’s military fighting against non-state armed groups. Such conflicts occur wholly within the territory of one state; these are “armed conflicts not of an international character waged between government forces and organized non-State armed groups . . . in which parts of the civilian population are effectively transformed into fighting forces, and in which civilians are also the main victims.”<sup>190</sup> These conflicts are governed by Common Article 3 of the Geneva Conventions (as well as Additional Protocol II) when particular factors are met, such as control of territory by the non-state opposition forces.<sup>191</sup> However, both the nature of modern non-state

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<sup>187</sup> See DINSTEIN, *supra* note 131, at xiii (highlighting that while international laws regulating NIACs generally follow those pertaining to interstate conflicts, there remain dissimilarities).

<sup>188</sup> See generally MELZER, *supra* note 161, at 246, 252 (noting that a state’s specific intention to engage another in armed conflict is also relevant, and that almost any use of force between states can be considered an international armed conflict); see also SOLIS, *supra* note 132, at 152 (emphasizing that while intent is important, singular incidents are insufficient and must be of a protracted nature instead). The concept of international armed conflict is expanded by Additional Protocol I, which controversially recognizes national liberation movements as so characterized. Additional Protocol I, *supra* note 125, at art. 1(4).

<sup>189</sup> See generally CORN ET AL., *supra* note 157, at 103 (discussing the need to ensure transnational armed conflicts are subject to LOAC regulation).

<sup>190</sup> Nils Melzer, ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 5 (2009), available at [http://www.icrc.org/eng/assets/files/other/icrc\\_002\\_0990.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0990.pdf).

<sup>191</sup> See, e.g., Additional Protocol I, *supra* note 125, at 1.

groups and their geographic dispersion have challenged this traditional view of NIAC as occurring only within one party's borders.

So how does one determine whether the LOAC, and therefore the targeting paradigm outlined above, applies to situations of violence involving a state against non-state armed groups such as Al-Qaeda? In 1997, the International Criminal Tribunal for the former Yugoslavia outlined criteria for determining the existence of an armed conflict of a non-international character: intensity of the conflict and the organization of the parties.<sup>192</sup> Regarding the former, the extant violence must be such that typical law enforcement measures are overwhelmed, thus excluding riots and other internal disturbances, which are governed by the domestic law enforcement legal paradigm.<sup>193</sup> In other words, the violence must be of sufficient intensity to prompt military action.<sup>194</sup> The duration of the violence is important, though some argue that even a single instance can trigger the characterization of an armed conflict, if sufficiently intense.<sup>195</sup>

Of particular relevance for this Article's purposes is the second prerequisite for characterizing hostilities between a non-state armed group and a state as a NIAC (thus activating the LOAC). A group of sufficient organization, presumably to implement command and control, must exist in order to mount the level of violence necessary to distinguish the situation from one of a criminal nature. "For non-state actors to move from chaotic violence to being able to challenge the armed forces of a state requires organization, meaning a command structure, training, recruiting ability, communications, and logistical capacity."<sup>196</sup> This organizational requirement for groups to be

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<sup>192</sup> Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 562 (Int'l Crim. Trib. for the former Yugoslavia May 7, 1997), available at <http://www.unhcr.org/refworld/docid/4027812b4.html>; see also Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Judgment, ¶ 625 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998), available at <http://www.unhcr.org/refworld/docid/40278fbb4.html> (using the same criteria of intensity of the fighting and degree of organization of the fighting groups); INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 49-50 (Jean S. Pictet ed., 1952) [hereinafter WOUNDED AND SICK COMMENTARY], available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/GC\\_1949-I.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-I.pdf); Corn & Jenks, *supra* note 126, at 315. *But see* Laurie R. Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition*, 46 VAND. J. TRANSNAT'L L. 693 (arguing that the trigger for non-international law armed conflict classification is less rigid).

<sup>193</sup> Additional Protocol II, *supra* note 125, at art. 1(2); SOLIS, *supra* note 132, at 153.

<sup>194</sup> MELZER, *supra* note 161, at 256.

<sup>195</sup> *Id.* at 257.

<sup>196</sup> See INT'L LAW ASS'N USE OF FORCE COMM., FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 2 (2010), available at <http://www.ila-hq.org/download.cfm/docid/2176DC63-D268-4133-8989A664754F9F87> (identifying two characteristics found with respect to all armed conflicts: (1) the existence of organized armed groups; (2) who are engaged in fighting of some intensity). *But see* CORN ET AL., *supra* note 157, at 76-77 (criticizing the intensity aspect of the International Law Association's report, at least with respect to

considered participating in an armed conflict (versus engaged in purely criminal activity), such that the respective LOAC applies, is reflected throughout the LOAC's treaty law.<sup>197</sup> The assessment of the level of organization required is based upon various factors, such as:

[T]he existence of a command structure and disciplinary rules and mechanisms within the armed group; the existence of headquarters; the ability to procure, transport, and distribute arms; the group's ability to plan, co-ordinate, and carry out military operations, including troop movements and logistics; its ability to negotiate and conclude agreements such as ceasefire or peace accords; and so forth.<sup>198</sup>

Even if a group meets this organizational threshold and engages in violent conduct of such intensity that the situation constitutes NIAC, this latter characterization does not grant the group or its members the combatant privilege; that is, they are not legally entitled to participate in hostilities.<sup>199</sup> Therefore, they can be prosecuted for their hostile acts under domestic law and are not entitled to prisoner of war (POW) status upon capture.<sup>200</sup> States have been reluctant to grant any type of legitimacy to non-state armed groups in NIACs, and therefore have maintained that members of such groups are not entitled to POW status, nor do they have the right to legally engage in hostilities.

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international armed conflicts, asserting that its inclusion is contrary to the Geneva Convention's expansive armed conflict trigger and is inconsistent with state practice).

<sup>197</sup> See MELZER, *supra* note 161, at 255 n.67 (citing examples of references to organized groups throughout the Geneva Conventions and Additional Protocols).

<sup>198</sup> Jelena Pejic, *The Protective Scope of Common Article 3: More Than Meets the Eye*, 881 INT'L REV. OF THE RED CROSS 189, 192 (2011).

<sup>199</sup> *But see* Geoffrey S. Corn, *Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?*, 22 STAN. L. & POL'Y REV. 253 (2011) (arguing that combatant immunity should be cleaved from one's affiliation to a state party's armed forces).

<sup>200</sup> Since nation-states are the authors of the LOAC, both treaty-based and custom-based, they have reserved the "combatants' privilege" to themselves: only armed groups associated with a state may lawfully kill in armed conflict (or those groups with international recognition per Additional Protocol I in wars of national liberation); non-state armed groups engage in hostilities illegally, and are therefore vulnerable to prosecution for these acts, while state actors are immune from prosecution (if the killing is otherwise in accordance with the LOAC). See SOLIS, *supra* note 132, at 159 (discussing the LOAC obligations of non-stated armed groups "to respect the basic humanitarian norms of common Article 3, to not kill outside combat, and to not attack civilians or civilian objects."); *see also* 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 (2010) (discussing the reasons states have attempted to deny recognition of non-state armed groups).

## 2. Non-State Armed Groups, Their Belligerent Constituents, and Organizational Essence as Key to Identification

Once a NIAC is determined to exist,<sup>201</sup> how such groups and their members are characterized has enormous consequences for targeting purposes.<sup>202</sup> There are some scholars, and states, who believe that since state armed forces are the only groups legitimately engaged in NIACs (because they fulfill the requirements set out for combatant immunity and POW status), everyone else is a civilian.<sup>203</sup> Those fighting under George Washington during the Revolutionary War, for example, would be considered civilians because they were not part of a state armed force, and in today's NIAC against Al-Qaeda and associated groups, members of Al-Qaeda would be considered civilians. As such, they would only be targetable when actually fighting or immediately preparing for or egressing from such conduct.<sup>204</sup> This approach, however, is inconsistent with the principle of distinction and the model the LOAC superimposes on war, which is to attempt to limit fighting and the effects of combat to belligerents—those involved in the hostilities—to the greatest extent possible.<sup>205</sup>

Not only does such an erroneous characterization restrict targeting by limiting attacks against Al-Qaeda members to only when they are directly participating in hostilities, but “[s]uch an approach has the

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<sup>201</sup> Today's NIAC against Al-Qaeda and associated groups is likely ending, in no small part because of the groups' loss of requisite organization. See Chesney, *supra* note 2, at 22–25 (describing Al-Qaeda as becoming more decentralized and fragmented).

<sup>202</sup> Schmitt, *supra* note 126, at 18–23 (discussing the existence of organized armed groups belonging to a non-State party to an armed conflict in a NIAC); see also SOLIS, *supra* note 132, at 158 (discussing the application of Common Article 3 and Additional Protocol II to armed opposition groups in NIACs).

<sup>203</sup> See SOLIS, *supra* note 132, at 205, 238 (claiming that members of non-state armed groups are civilians for targeting purposes except if exercising a continuous combat function); see also NOAM LUBELL, *EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS* 148 (2010) (discussing groups who propose this alternative stance of treating all members of non-state armed groups as civilians instead of as belligerents).

<sup>204</sup> Such a restrictive targeting regime against non-state armed groups in NIACs, limited to specific conduct at the time of targeting, is supported by many states and scholars. See CORN ET AL., *supra* note 157, at 170–72 (discussing this as an “unresolved area of the law that is playing itself out on the modern battlefield”); see also HENCKAERTS & DOSWALD-BECK, *supra* note 129, at 34–35 (commenting that treatment of non-state armed groups in NIACs remains unresolved).

<sup>205</sup> “Thus, while members of irregular armed forces failing to fulfill the four requirements may not be entitled to combatant privilege and prisoner-of-war status after capture, it does not follow that any such person must necessarily be excluded from the category of armed forces and regarded as a civilian for the purposes of the conduct of hostilities. On the contrary, 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.” *Interpretive Guidance*, *supra* note 169, at 999 (internal footnotes omitted).

potential to significantly erode the validity of civilian status as a means of protecting those not involved in the conflict.”<sup>206</sup> It threatens civilians because, on a practical level, if civilians are the only category, then all civilians are suspect based on the conduct of those committing belligerent acts. Hence, today, even the International Committee of the Red Cross (ICRC) recognizes that, despite not enjoying the combatant’s privilege to legally kill, members of non-state armed groups participating in armed conflicts are not civilians. “[A]ll 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 . . . .”<sup>207</sup>

If members of non-state armed groups in NIACs are not civilians, they are therefore belligerents and, according to the principles of distinction and necessity, can be lawfully targeted at any time, even when not engaging in fighting and can furthermore be prosecuted for hostile acts.<sup>208</sup> Yet the million-dollar question remains unanswered by the LOAC, except by its emphasis on group organization and command subordination: how should membership in a non-state armed group in a NIAC be determined?<sup>209</sup> Similar to the type of analysis which must be undertaken in order to determine whether an armed group’s activities against a state’s armed forces qualify as an armed conflict (of sufficient organization, and “at least . . . identifiable based on objectively verifiable criteria”),<sup>210</sup> determining membership *in* such organizations should be accomplished in an equally objectively verifiable manner, though that is not the case. While the LOAC provides clues of membership indicia, such as control over or by other members and preparation and training in conjunction with the group, it leaves much discretion to states’ armed forces to determine this membership.<sup>211</sup>

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<sup>206</sup> Watkin, *supra* note 200, at 666.

<sup>207</sup> *Interpretive Guidance*, *supra* note 169, at 999. “In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict . . . .” *Id.* at 1002. This conclusion finds support in the language of Common Article 3 itself, which governs NIACs. It refers to “parties” to the conflict, without definition, and then distinguishes them from persons taking no active part in hostilities, thereby implicitly recognizing civilians and “other[s].” Geneva Convention I, *supra* note 125, at art. 3; Geneva Convention II, *supra* note 125, at art. 3; Geneva Convention III, *supra* note 125, at art. 3; Geneva Convention IV, *supra* note 125, at art. 3.

<sup>208</sup> See Richard R. Baxter, *So-Called “Unprivileged Belligerency”: Spies, Guerrillas, and Saboteurs?*, 1975 MIL. L. REV. 487, 493 (1975) (defining “unlawful belligerents” as “persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949”).

<sup>209</sup> Additional Protocol I, *supra* note 125, at art. 43. Article 43 refers to armed forces as consisting of “all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates.” *Id.*

<sup>210</sup> MELZER, *supra* note 161, at 254. However, even the determination of when an armed conflict exists is not a cut and dry endeavor; it too involves some ambiguity.

<sup>211</sup> ADDITIONAL PROTOCOL COMMENTARY, *supra* note 135, at 512 (“The term

### C. *Who and How: A Functional Approach to Membership*

Despite the LOAC's vagueness regarding how to determine group membership in order to employ status-based targeting, the U.S. position,<sup>212</sup> as well as that of many leading scholars<sup>213</sup> and the ICRC,<sup>214</sup> is that status-based targeting based on membership in non-state armed groups in NIACs is legal. "In this armed conflict, individuals who are part of al-Qaida or its associated forces are legitimate military targets. We have the authority to target them with lethal force . . . ."<sup>215</sup> That is, once membership (being a "part of") is determined, that member can be lawfully targeted while "retreating, hiding, or even eating or showering."<sup>216</sup> Given such drastic consequences, one would hope that a rigorous, and objectively verifiable, process exists for determining such

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'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.").

<sup>212</sup> The U.S. position is consistent with the Commentary to Protocol II, which, when explaining Article 13 regarding distinction in NIACs, states: "Those who belong to armed forces or armed groups may be attacked at any time." INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICTS (PROTOCOL II), 8 June 1977 ¶ 4789 (1977) [hereinafter ADDITIONAL PROTOCOL II COMMENTARY], available at <http://www.icrc.org/ihl.nsf/com/475-760019>.

<sup>213</sup> MELZER, *supra* note 161, at 351.

<sup>214</sup> "In non-international armed conflict, organized armed groups constitute the armed forces," and "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 . . . ." *Interpretive Guidance*, *supra* note 169, at 999, 1002.

<sup>215</sup> John O. Brennan, Assistant to the President for Homeland Sec. and Counterterrorism, Address at the Wilson Center: The Ethics and Efficacy of the President's Counterterrorism Strategy (Apr. 30, 2012) (transcript available at <http://www.wilsoncenter.org/event/the-ethics-and-ethics-us-counterterrorism-strategy>). "As a matter of international law, the United States is in an armed conflict with al-Qaida, the Taliban, and associated forces . . . ." *Id.*; see also Brennan Speech, *supra* note 184 ("Because we are engaged in an armed conflict with al-Qa'ida, the United States takes the legal position that—in accordance with international law—we have the authority to take action against al-Qa'ida and its associated forces without doing a separate self-defense analysis each time."); Holder, *supra* note 184 ("Because the United States is in an armed conflict, we are authorized to take action against enemy belligerents under international law."); Jeh Charles Johnson, Gen. Counsel, U.S. Dep't of Defense, Dean's Lecture at Yale Law School: National Security Law, Lawyers, and Lawyering in the Obama Administration (Feb. 22, 2012) (transcript available at <http://lawfareblog.com/2012/02/jeh-johnson-speech-at-yale-law-school>) ("In an armed conflict, lethal force against known, individual members of the enemy is a long-standing and long-legal practice."); Koh, *supra* note 178 ("But individuals who are part of such an armed group are belligerents and, therefore, lawful targets under international law.").

<sup>216</sup> CORN ET AL., *supra* note 157, at 165; see also Brennan, *supra* note 215 (discussing that the LOAC forms "the outer limits of the authority" for employing lethal force against members of Al-Qaeda and associated forces. Within these limits, the Obama Administration has overlaid a three-part test on top of membership to determine whether to employ lethal force against members outside of "hot" battlefields: imminence of threat, feasibility of capture, and consistency with other LOAC principles).

membership. This Article now turns to a discussion of identification, highlighting both the lack of standard methodology and the uncomfortable distance between such processes and the bases for status-based targeting.

As one scholar puts it, “[i]dentification of members of the ‘enemy’ armed force is a foundational aspect of the targeting process.”<sup>217</sup> As noted previously, the LOAC assumes that one’s membership in an enemy armed group entails a dangerous agency relationship with a superior, and therefore transforms that member into a potential threat; thus, membership can make one targetable even if one’s daily function is not necessarily to fight, but rather to cook or maintain equipment. Since it is the belligerent’s relationship with his leadership, and not simply his actual warlike or non-warlike behavior, which makes it necessary for the opposing party to eliminate him, membership determination must focus on assessing group integration.<sup>218</sup> However, the indicia of such group integration—and, therefore, control by superiors (or over subordinates)—is not always as readily apparent within non-state armed groups as it is in state militaries, with the latter’s uniforms, ranks, and regulations. Put simply, membership in today’s non-state armed groups is difficult to ascertain.<sup>219</sup>

As articulated by Attorney General Eric Holder in the spring of 2012, today’s non-state armed groups do not behave like a traditional military: “wearing uniforms, carrying arms openly, or massing forces in preparation for an attack.”<sup>220</sup> While belligerent identification has posed challenges in past conflicts, the transnational geographic scope of group operations, the methods of fighting (not en masse), as well as the nature of the groups themselves, add heightened complexity to the already-challenging issue of target identification. As Professor Robert Chesney points out, the problem is two-fold: not only do these groups intentionally attempt to obfuscate who belongs on their membership rolls, but their group organizational characteristics are also organically ambiguous.<sup>221</sup> Despite this identification difficulty, there is general agreement that membership can be ascertained for purposes of targeting, though the scope of that membership is controversial.<sup>222</sup>

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<sup>217</sup> Watkin, *supra* note 200, at 648.

<sup>218</sup> Corn & Jenks, *supra* note 126, at 313 n.1.

<sup>219</sup> Schmitt, *supra* note 126, at 5; see also Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility* 4–5 (N.Y. Univ. Pub. Law & Legal Theory Working Paper No. 12-40, 2012), available at <http://ssrn.com/abstract=2129860>; Holder, *supra* note 184.

<sup>220</sup> Holder, *supra* note 184.

<sup>221</sup> See Chesney, *supra* note 2, at \*22 (describing the group’s nature as more of a social network than traditional command-and-control organization, with its organizational ambiguity resulting from the group’s “socio-political landscape”).

<sup>222</sup> The President of the United States, in his 2012 War Powers Resolution Report to Congress, affirmed that the United States is using military force to target members of specific

### 1. The Process of Membership Determination

Today, membership in non-state armed groups like Al-Qaeda is determined, at least as demonstrated by the United States, by a conduct-based analysis that often assumes an agency relationship based on exhibited behavior. In a broad sense, this determinative process resembles § 2339B's "conduct plus coordination" model described earlier, in that non-independent conduct is used to determine liability. Discrete acts that have some type of connection to Al-Qaeda are viewed holistically to determine whether an individual is "part of" the group, versus only supporting it without being a member, though the difference often seems to be one of degree. While of course membership has always, in the strictest sense, pivoted on conduct (that of wearing uniforms, bearing arms openly, attacking in large formation with one's comrades, living in military barracks, etc.), today's assessment of membership in non-state armed groups uses a much wider swath of types of conduct in place of the formal ceremonial acts traditionally used.

Hence, status-based targeting today is actually an expanded version of conduct-based targeting, once removed: it looks to conduct in connection with a group, presumably over a period of time, to label an individual as a member of an armed group. Once labeled, the member is subject to status-based targeting based on that membership classification, regardless of conduct at the time of targeting. However, as alluded to above, the initial conduct used to determine membership in groups such as Al-Qaeda is much broader than that used for conduct-based targeting of civilians.<sup>223</sup> The latter rests on the previously discussed concept of direct participation in hostilities, while the former analyzes all acts, including non-hostile ones, which are linked to the group in question. This conduct is then analyzed to determine if it represents integration into the group sufficient to find membership.

So while the traditional concept of "formal membership" theoretically continues to make one targetable, an assessment of general conduct today is the primary method to determine membership.<sup>224</sup>

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groups. "In a limited number of cases, the U.S. military has taken direct action in Somalia against members of al-Qa'ida, including those who are also members of al-Shabaab, who are engaged in efforts to carry out terrorist attacks against the United States and our interests." Letter from President Barack Obama on the 2012 War Powers Resolution 6-Month Report to Congress (June 15, 2012), *available at* <http://www.whitehouse.gov/the-press-office/2012/06/15/presidential-letter-2012-war-powers-resolution-6-month-report>.

<sup>223</sup> The LOAC does not provide guidance as to what type of conduct to use to determine membership in armed groups; the ICRC and scholars are trying to fill in this gap, some more narrowly than others.

<sup>224</sup> CORN ET AL., *supra* note 157, at 153; *see also* Koh, *supra* note 178 (noting that membership "can be demonstrated by relevant evidence of formal or functional membership");

Termed a “functional analysis” by the ICRC, a description later adopted by U.S. courts and executive branch officials, this analysis primarily looks not to formal ceremonial acts, but rather to indicia of an individual’s role within or for a group:

Membership in these irregularly constituted groups has no basis in domestic law. It is rarely formalized through an act of integration other than taking up a certain function for the group . . . . In practice, the informal and clandestine structures of most organized armed groups and the elastic nature of membership render it particularly difficult to distinguish . . . .<sup>225</sup>

Because of the fluidity of membership in such entities, identification of their constituency rests on intelligence-driven assessments of conduct in order to determine the requisite integration of a particular individual into an organized armed group. While actual fighting (participation in hostilities) is naturally one indicator of armed group membership, it is both over- and under-inclusive. It is over-inclusive because civilians can engage in combat without losing their status as civilians. Their hostile behavior does not, in itself, transform a civilian into a belligerent because such behavior does not necessarily reflect the critical agency relationship with others in the armed group, which is the LOAC justification for status-based targeting. However, combative conduct can, at times, indicate membership; if, for example, it involves expertise known only to group members. Additionally, hostile behavior is under-inclusive as indicating membership because some group members exhibit the critical agency relationship with other group members, yet perform group roles which do not involve combat activities (logistical roles, for example).

While little unclassified data has been released regarding how the United States grapples with membership determinations specifically for targeting purposes, much can be gleaned from assessments in the detention realm.<sup>226</sup> The Guantanamo Bay federal habeas cases, in particular, shine a light on the executive branch’s decision-making process regarding Al-Qaeda membership. Critically, Obama

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NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 150 (2004) (discussing Khalid Sheikh Mohammed, the mastermind of the 9/11 attacks, who refused to swear allegiance to Bin Laden yet fulfilled an instrumental leadership, planning, and operational role in Al-Qaeda).

<sup>225</sup> *Interpretive Guidance*, *supra* note 169, at 1006–07.

<sup>226</sup> The initial membership determination, at least for the U.S. military, is not typically driven by a prior decision to detain versus target for lethal force for many reasons, not the least of which is that detention during armed conflicts includes the authority to detain civilians (if they pose an imperative threat to security) as well as belligerents. During the commission of today’s armed conflict against Al-Qaeda and associated groups, the determination of how to deal with an individual is made after they are identified and classified.

Administration officials have explicitly stated that the U.S. federal courts in the habeas cases have utilized a functional test for determining membership that is similar to what the Administration actually employs and, furthermore, that this same approach is similar to the ICRC's functional test for targeting.<sup>227</sup> Though detention authority under the LOAC is much broader than only belligerents, the courts have focused on belligerency, that is, membership in Al-Qaeda, because of the statutory legal basis for detention: membership in those groups or substantial support to same.<sup>228</sup> Furthermore, almost all the habeas cases have involved the United States arguing for detention based on membership, despite the existence of a second legal basis for detention based on substantial support.

Since hostile acts can be insufficient to determine membership, U.S. federal courts have turned to "the significance of a person's activities in relation to the organization" to determine membership in groups such as Al-Qaeda.<sup>229</sup> Relevant factors in determining group membership may include whether the person is part of a command structure—that is, obeys instructions from other group members or gives such instructions.<sup>230</sup> But since such so-called "chain of command" information is often lacking, membership is also determined by reviewing engagement in activities such as "training with al-Qaeda, or

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<sup>227</sup> See, e.g., Koh, *supra* note 178 ("While we disagree with the International Committee of the Red Cross on some of the particulars, our general approach of looking at 'functional' membership in an armed group *has been endorsed not only by the federal courts*, but also is consistent with the approach taken in the targeting context by the ICRC in its recent study on Direct Participation in Hostilities (DPH).") (emphasis added).

<sup>228</sup> National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b), 125 Stat. 1298, 1562 (2011); Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantanamo Bay, at 2, *In re Guantanamo Bay Detainee Litigation*, Misc. No. 08-442 (TFH) (D.D.C. Mar. 13, 2009), available at <http://www.justice.gov/opa/documents/memo-re-det-auth.pdf>.

<sup>229</sup> JENNIFER K. ELSEA & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R41156, JUDICIAL ACTIVITY CONCERNING ENEMY COMBATANT DETAINEES: MAJOR COURT RULINGS 7 (2012) (quoting several major court cases in the D.C. Circuit, including *Salahi v. Obama*, 625 F.3d 745 (D.C. Cir. 2010), *Bensayah v. Obama*, 610 F.3d 718 (D.C. Cir. 2010), and *Awad v. Obama*, 608 F.3d 1 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011)).

<sup>230</sup> CORN ET AL., *supra* note 157, at 154. The federal courts have allowed "chain of command" evidence to prove membership, but have rejected it as being a required element thereof, instead employing a "totality of the circumstances" approach to membership determination, utilizing an individual's discrete acts. See *Barhoumi v. Obama*, 609 F.3d 416, 424–26 (D.C. Cir. 2010); see also *Bensayah*, 610 F.3d at 725 ("That an individual operates within al Qaeda's formal command structure is surely sufficient but is not necessary to show he is 'part of the organization; there may be other indicia that a particular individual is sufficiently involved with the organization to be deemed part of it . . . ."); *Awad*, 608 F.3d at 11 ("He argues that there must be a specific factual finding that he was part of the 'command structure' of al Qaeda. There is no such requirement under the AUMF.").

taking positions with enemy forces,”<sup>231</sup> attending non-state armed group training camps, or staying in such groups’ guesthouses.<sup>232</sup> Such determinative information is often the product of what is termed a “pattern of life” analysis, a process that reviews a person’s conduct over a period of time to assess association and conduct.<sup>233</sup>

In other words, U.S. federal courts, and the U.S. executive branch, determine membership in Al-Qaeda by employing a “conduct plus coordination” functional test, finding coordinated conduct such as “accompanying the brigade on the battlefield, carrying a brigade-issued weapon, cooking for the unit, and retreating and surrendering under brigade orders” as indicative of membership.<sup>234</sup> Instead of listing finite criteria or types of eligible functions, (such as the list found in § 2339B), the federal courts deciding Guantanamo Bay habeas cases have employed a “totality of the circumstances” approach to determining membership, which has focused on function over form:

[T]here are no settled criteria, for determining who is “part of” the Taliban, al-Qaida, or an associated force. That determination must be made on a case-by-case basis by using a functional rather than formal approach and by focusing on the actions of the individual in relation to the organization. The Court must consider the totality of the evidence to assess the individual’s relationship with the organization.<sup>235</sup>

Conduct that has been used by the United States to determine membership includes traveling along a route to Afghanistan known to be traveled by known members of Al-Qaeda<sup>236</sup> and being a male of military age in the same area as known Al-Qaeda leaders.<sup>237</sup> The latter

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<sup>231</sup> Koh, *supra* note 178 (citing examples of conduct that can indicate group membership, including taking an oath of loyalty, training with the armed force, or taking a position with the armed force).

<sup>232</sup> *Al-Bihani v. Obama*, 590 F.3d 866, 869, 873 n.2 (D.C. Cir. 2010).

<sup>233</sup> See Joint Improvised Explosive Device Defeat Org., *Attack the Network Field Guide: Afghanistan* 21–22 (2011), <http://info.publicintelligence.net/JIEDDO-ATN-FieldGuide.pdf> (discussing observations of an individual’s behaviors and actions over time).

<sup>234</sup> *Al-Bihani*, 590 F.3d at 872–73.

<sup>235</sup> *Khan v. Obama*, 741 F. Supp. 2d 1, 5 (D.D.C. 2010) (alteration in original) (internal citations omitted) (internal quotation marks omitted). See generally Benjamin Wittes, Robert Chesney & Larkin Reynolds, Harvard Law Sch. Nat’l Security Research Comm., *The Emerging Law of Detention 2.0: The Guantanamo Habeas Cases as Lawmaking* (2012), [http://www.brookings.edu/~media/research/files/reports/2011/5/guantanamo%20wittes/05\\_guantanamo\\_wittes\\_chapter\\_3.pdf](http://www.brookings.edu/~media/research/files/reports/2011/5/guantanamo%20wittes/05_guantanamo_wittes_chapter_3.pdf) (providing terrific detail and categorization of the manner in which D.C. district and circuit court judges have made membership determinations in Guantanamo Bay habeas cases; this pertinent quote from Judge Bates in the *Khan* case is utilized in their discussion and this author is grateful that Wittes, Chesney, & Reynolds highlighted it).

<sup>236</sup> *United States v. Al Odah*, 611 F.3d 8, 16 (D.C. Cir. 2010).

<sup>237</sup> See Jo Becker & Scott Shane, *Secret ‘Kill List’ Proves a Test of Obama’s Principles and Will*, N.Y. TIMES, May 29, 2012, at A1 (describing U.S. drone operations and the determination of targets).

example relates to what has been described as the Obama Administration's procedure of counting all military-age males in a strike zone as combatants, since "people in an area of known terrorist activity, or found with a top Qaeda operative, are probably up to no good. . . . [I]nnocent neighbors don't hitchhike rides in the back of trucks headed for the border with guns and bombs."<sup>238</sup>

The U.S. government's approach to determining membership in hostile groups can also be seen in its efforts to dismiss a case against it in 2010; this case dealt with U.S. efforts to kill U.S. citizen Anwar al-Awlaki in Yemen. In support of its proposition that al-Awlaki was a member of Al-Qaeda in the Arabian Peninsula (AQAP), the government highlighted a discrete list of specific acts he committed which were related to AQAP. These included his oath of loyalty to the group's leadership, recruitment of new members, facilitation of training camps, and "an increasingly operational role."<sup>239</sup> This conduct-centric approach is also evident from the individuals targeted for both killing and capturing in Iraq as members of Al-Qaeda during Operation Iraqi Freedom. As gleaned from the various press briefings given during combat operations by the U.S. military command in Iraq, individuals were assessed as being members of Al-Qaeda because of their functional roles, such as that of a "facilitator[]"—described as someone "in charge of moving men, weapons, explosives, and money to allow al Qaeda to continue operations."<sup>240</sup> Another example of a functional role which prompted the U.S. forces to target someone as a member of Al-Qaeda was the role of a "Deputy emir"—an individual such as Abu Mansur, whom U.S. forces targeted and killed in Iraq in 2008 for his role as a "judge" and whose "job was to try to cloak their corrupt ideology with religious sanction."<sup>241</sup>

Viewed from a macro level, these official U.S. statements, actions, and judicial holdings demonstrate that the United States employs a "conduct plus coordination" template to determine group membership in groups such as Al-Qaeda for targeting purposes. This approach is roughly analogous to the template provided in § 2339B to determine material support. It only approximates the material support paradigm

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<sup>238</sup> *Id.* (internal quotation marks omitted).

<sup>239</sup> See Opposition to Plaintiff's Motion for Preliminary Injunction and Memorandum in Support of Defendants' Motion to Dismiss, Exhibit 1: Unclassified Declaration in Support of Formal Claim of State Secrets Privilege by James R. Clapper, Director of National Intelligence, ¶ 14–15, *Al-Aulaqi v. Obama*, No. 10-cv-1469 (JDB) (D.D.C. Sept. 25, 2010), available at <http://www.lawfareblog.com/wp-content/uploads/2010/09/Exhibit-1.pdf>.

<sup>240</sup> See Bill Roggio, *Targeting al Qaeda in Iraq's Network*, THE LONG WAR J. (Apr. 16, 2008), [http://www.longwarjournal.org/archives/2008/04/targeting\\_al\\_qaeda\\_i.php](http://www.longwarjournal.org/archives/2008/04/targeting_al_qaeda_i.php).

<sup>241</sup> Kevin J. Bergner, Major Gen. of the U.S. Army, Press Conference on the Multi-Nat'l Force—Iraq (Apr. 16, 2008) (transcript available at <http://www.globalsecurity.org/military/library/news/2008/04/mil-080416-mnfi-b01.htm>).

because the targeting approach lacks a decreed list of conduct to cabin the analysis, such as that found in the federal statute; instead, it appears to utilize any and all conduct that is tied to Al-Qaeda or associated groups. Furthermore, whereas § 2339B lacks the *Scales* specific intent requirement of furthering the group's illegal goals, the functional test described above seems to be using conduct as circumstantial evidence of this, or at least a very similar, intent to further Al-Qaeda's violent ends.

It is helpful here to use *Scales*'s scienter requirement to clarify the above-described government model of status-based targeting against Al-Qaeda: the command agency relationship which is the core to status-based targeting in the LOAC is tantamount to *Scales*'s specific intent to further a group's illegal objectives. That is, the command relationship is one that requires an intent to serve the group in whatever capacity the group deems necessary in order to further the group's illicit ends. This intent is critical because, without some indication of it, the use of "conduct plus coordination" to determine membership fails to distinguish between those supporting the group who lack this command relationship (who remain civilians and not targetable based on status), and those whose particular group-related conduct is demonstrative of their desire to further the group's violent aims, and are hence targetable group members. The current U.S. approach to ascertaining membership, as described above, infers such a relationship—and, therefore, this intent—from acts, typically repeated, done for and with the group.

## 2. The LOAC's Membership Vacuum and the ICRC's Answer

The above discussions highlight the lack of clarity in the LOAC regarding membership in non-state armed groups that are party to an armed conflict. The ICRC has formulated an approach it deems the most faithful to the LOAC's principles, and as mentioned above, the Obama Administration has stated that its approach is often informed by the ICRC's model when making membership determinations. This particular approach focuses on whether an individual's conduct is analogous to a soldier's in a state's armed force. Specifically, the ICRC's model asks whether an individual fulfills what it calls a "combat function" in relation to a group.<sup>242</sup> If the individual's specific violent acts, of a sufficient intensity or quantity exceeding that of an isolated or sporadic nature, indicate such an analogy, the person is therefore classified as a targetable member; that is, the person is classified as a

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<sup>242</sup> CORN ET AL., *supra* note 157, at 154–56 (highlighting that the United States does not employ this approach exclusively).

belligerent presumed to be a threat and targetable at any time due to such status.

Determining whether an individual's acts are analogous to those performed by a traditional soldier in a state's armed forces is a controversial one. Whereas the United States supports an expansive view of a such a "combat function," some states and the ICRC restrict this role to one involving the direct application of force, such as carrying arms and carrying out attacks, planning for such attacks, and commanding such attacks.<sup>243</sup> 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.<sup>244</sup> The ICRC's "decisive criterion" for membership is "whether a person assumes a continuous combat function for the group involving his or her direct participation in hostilities."<sup>245</sup> This narrow view stems in part from the ICRC's vision of a non-state entity party to the NIAC, which consists both of a political component—comprised of civilians—and a distinct armed branch—comprised of organized, armed individuals who constitute the party's fighting forces in a strictly functional sense.<sup>246</sup> Based on this concept, the ICRC excludes all those who do not regularly and directly participate in the fighting from non-state armed group membership. It does so because it feels these parties to NIAC in general include individuals with varying degrees of group affiliation; they often lack formal integration modalities and possess "informal and clandestine structures."<sup>247</sup>

This group membership ambiguity drives the ICRC's division of a non-state party such as Al-Qaeda into both civilian and belligerent members, and motivates its position that only those who clearly have

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<sup>243</sup> *Id.* at 154. While the Legal Advisor to the State Department has stated that the Administration's method of determining functional membership is consonant with the ICRC approach, it appears this equivalence is one regarding using one's acts and role within a group to determine membership, and does not necessarily equate to a mirroring of which functions qualify. See Koh, *supra* notes 178, 182.

<sup>244</sup> *Interpretive Guidance*, *supra* note 169, at 1007. If this test is accepted without change as the exclusive means for determining membership in a non-state armed group, a disparity would exist between those soldiers in state militaries who function in non-combat type roles, such as legal advisors and public affairs officers, and individuals who perform these tasks for non-state armed groups. The former would be targetable, while the latter would not. Though such particular conduct by itself traditionally has been considered insufficiently hostile to constitute direct participation in hostilities, engagement in such conduct as a member of an armed group changes everything because of the individual's function as an agent for group leadership.

<sup>245</sup> *Id.*

<sup>246</sup> See *id.* at 1006.

<sup>247</sup> *Id.* at 1007.

combat roles within the group are targetable belligerents. While this is an easy and safe position for an humanitarian non-governmental organization to take, the ICRC's approach excludes a wide swath of individuals who are classically considered belligerents under the LOAC because it ignores the agency relationship component, discussed previously, which is the guiding animus behind status-based targeting in the first place.

While the ICRC claims that group integration is paramount to its approach to determining group membership, its exclusive focus on violent combat activity ignores other significant indicators of such integration.<sup>248</sup> Furthermore, the ICRC defines direct participation (its combat activity criterion) in a narrower fashion than is considered to be customary under international law, thus severely restricting who can be considered a member and therefore subject to status-based targeting.<sup>249</sup> This approach therefore excludes individuals who recruit, train, finance, or provide logistical, intelligence, and other support to the group. Such supporters are deemed to be part of the larger party to the conflict and civilians, unless their roles also include one of direct participation in hostilities.<sup>250</sup> Even if individuals have sworn oaths of fealty to such groups, if they only engage in support-type conduct such as recruiting or running propaganda programs, the ICRC does not consider them as belligerents who can be targeted at any time.

The United States eschews this narrow model of “continuous combat function” to determine targetable belligerency status. It instead uses a much broader range of analogous roles in state militaries to indicate group membership. Such activities, widely viewed as combat support, include intelligence gathering, communications support, maintenance, cooking, logistics, provision of legal services, and media relations—that is, all the functions which correspond to individual roles within states' armed forces.<sup>251</sup> But an individual's function itself is insufficient; as the prior Department of Defense's top lawyer stated in

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<sup>248</sup> See *id.* at 995.

<sup>249</sup> While a detailed discussion of the ICRC's definition of direct participation in hostilities is outside the scope of this Article, it includes the three components of: (1) a threshold of harm, which holds that “a specific act must be likely to adversely affect the military operations or military capacity” of the other side or “inflict death, injury or destruction” on those protected against attack; (2) there must be a direct link between the conduct and the harm thus described; and (3) the conduct must be in support of a party to the conflict. *Id.* at 1016. The last component does not require coordination with a group; in fact, such coordination likely transforms the conduct into one indicative of membership instead. For thorough discussions and critiques of the ICRC approach, see Parks, *supra* note 149, at 783–87; Schmitt, *supra* note 126, at 26–27; Schmitt, *supra* note 169, at 709–12; and Watkin, *supra* note 200, at 657–60.

<sup>250</sup> *Interpretive Guidance*, *supra* note 169, at 1008.

<sup>251</sup> See generally CORN ET AL., *supra* note 157, at 154; Parks, *supra* note 149, at 813–20 (discussing the utilization of functions analogous to those performed by members of state militaries to identify membership in non-state armed groups); Schmitt, *supra* note 126, at 23; Watkin, *supra* note 200, at 691.

late 2012, “[o]ur enemy does not include anyone solely in the category of activist, journalist, or propagandist.”<sup>252</sup> It is their group function—that is, nexus to the group—which is central to a belligerency determination. In other words, though the Obama Administration and the military do not overtly phrase it this way, the key must be some indication of specific intent to further the group’s illegal aims by service as a member.<sup>253</sup>

The above discussion demonstrates the lack of agreed-upon methodologies for determining “constructive membership” in non-state armed groups.<sup>254</sup> From a general perspective, the U.S. approach resembles § 2339B’s “conduct plus coordination approach,” because while conduct is paramount, the focus on a group role assumes a group nexus, be it coordination or another undefined type of association. Yet membership involves an inchoate specific intent to further a group’s ends, as manifested in an agency relationship marked by submission to the group—thus separating it from mere support by a non-member civilian. Since the methodology to determine non-state armed group individual membership is ambiguous and lacks guidance from the LOAC, criminal law can help fill in the gap, as highlighted below.

#### IV. PROPOSED FRAMEWORK

##### A. *Virtue of § 2339B: Delineated Conduct*

As reflected in the legislative history of § 2339B and the statutory attempts that preceded it, Americans have long wrestled with how to both value and gauge membership in terrorist groups. Specifically, legislators and law enforcement, starting in the 1980s, debated how to use membership in various terrorist groups as an indicator of, or substitute for, criminal behavior. Criminalizing actual terrorist acts was easy. However, preventing terrorism by focusing on aid to, and participation in, terrorist groups proved more difficult due to constitutional issues involving personal culpability, freedom of association, and freedom of speech. As they struggled to craft preventive

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<sup>252</sup> Johnson Speech, *supra* note 182.

<sup>253</sup> Furthermore, use of these combat support functions alone to indicate membership would ignore the reality that—even with regard to the U.S. military—performance of such roles does not necessarily indicate military membership. Civilian contractors perform almost every type of combat support function, and they can only be targeted when their specific conduct is considered direct participation in hostilities, for such time as they are engaged in that participation. Therefore, something more than the functional role is required to make the requisite group link strong enough to warrant a label of membership.

<sup>254</sup> See Wittes et al., *supra* note 235, at 38 (introducing the phrase “constructive membership”).

counterterrorism criminal measures, legislators realized the insufficiency of long-standing statutes dealing with military service in foreign militaries by U.S. citizens. Focused on maintaining U.S. neutrality, these acts did not prohibit serving in foreign militaries; they only prohibited joining such foreign armed forces while in the United States.<sup>255</sup> To close this gap, the initial, and unsuccessful, precursors to § 2339B criminalized serving in the armed forces of a foreign state, as well as in an international terrorist group’s “armed forces or intelligence agency” and acting in concert with terrorist groups.<sup>256</sup>

These attempts to criminalize service in such foreign terrorist groups (as well as in foreign militaries) proved too vulnerable to First Amendment freedom of association criticisms. The draft statutes’ lack of a specific intent requirement to further the particular group’s unlawful goals, as previously mandated by the Supreme Court in *Scales*, helped prevent their passage. They were perceived as coming too close to impermissibly outlawing group membership outside the three-part model provided in *Scales*, despite the targeted groups’ foreign nature. In fact, these early iterations of what became § 2339B were designed exactly to do just that. The last draft bill not only prohibited membership via prohibiting service in such groups, it extended beyond membership to reach those acting in concert with these groups, specifically out of the recognition of the ambiguous nature of their actual membership. But when criticized, instead of doubling down on such efforts to criminalize membership by pointing to, for example, the primarily illegal objectives of these foreign groups, the drafters of § 2339B shied away from membership. They dropped the prohibition of “service in” while leaving the prohibition on the provision of resources “to” these groups.

The drafters of § 2339B thereby criminalized service *to* groups instead of service *in* them, a significant difference, which sidestepped the constitutional membership issue. Membership became irrelevant; particular conduct in coordination with a designated group mattered instead. By shelving the prohibition of service in a terrorist group (or in a foreign military), the drafters were able to implement a much wider application of the statute to particular conduct done in connection with these groups, regardless of the individual’s membership status. By focusing on conduct, as the Court in *Humanitarian Law Project* carefully emphasized, the statute “does not criminalize mere membership in a designated foreign terrorist organization. It instead

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<sup>255</sup> The Neutrality Acts remain substantively the same: U.S. citizens are free to join the armed forces of foreign militaries. However, there may be citizenship repercussions if they join with the intent to renounce their citizenship.

<sup>256</sup> *Antiterrorism Hearing*, *supra* note 31, at 10 (statement of Rep. Matthew J. Rinaldo); see also *supra* Part I.B (tracing the legislative history of § 2339B).

prohibits providing ‘material support’ to such a group.”<sup>257</sup> Yet, as discussed in Part II of this Article, one practical effect of the statute is the prohibition of active membership in such groups.

That is, § 2339B protects only the most nominal, membership-in-name-only type of association with designated groups. This stems from the statute’s wide-ranging list of prohibited acts, coupled with the ambiguous nature of the prohibited group nexus (coordination, which theoretically encompasses anything short of independent action). The statute prohibits active membership in the sense that belonging to an organization necessarily entails acting under a group’s management, or at least coordinating with a group. The ambiguous group nexus necessary to criminalize the particular conduct, defined by the Court in *Humanitarian Law Project* as coordination with the group, and by the statute as under the FTO’s direction and control, appears to encompass the very integration and organizational ties that group membership always entails.

This de facto criminalization of active membership is not a critique of the statute, although the opinion would have been stronger if the Court had admitted this effect. The statute’s requirement of concrete acts performed in association with a designated group solves at least one of the problems the Supreme Court was wrestling with in *Scales*: prosecution for solely being part of a group without any personal culpability for a particular criminal act other than that of joining the group. Under § 2339B, an actor is culpable by engaging in one of several delineated types of conduct (joining a group is not included in this list), if the conduct is knowingly coordinated with a designated group. Whether one agrees that the statute’s types of prohibited conduct performed in coordination with a particular group *should* be criminal is another question and outside the scope of this Article.

What is of relevance for this discussion of membership determination in non-state armed groups is the statute’s intentional shift away from using membership as a direct proxy for criminal behavior. Its specific “conduct plus coordination” model captures the harmful behavior without needing to tread on the same ground as the *Scales* case, thereby omitting the difficult-to-prove specific intent requirement of furthering a group’s illegal ends. Though for different reasons, namely the fluidity and opaqueness of non-state armed group membership, the United States seems to have adopted a similar approach in identifying individuals for targeting during armed conflict. But just as § 2339B’s model is quite broad, so is the template as applied to LOAC targeting. The following argues that a needed limiting effect can be obtained by incorporating something akin to § 2339B’s

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<sup>257</sup> Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2718 (2010).

delineated list of eligible conduct into LOAC membership determinations, as well as by including the missing *Scales* specific intent requirement.

## B. *Making War a Bit More Criminal*

### 1. Why Status-Based Targeting Remains Appropriate

Given the pivotal role group membership plays in the law of armed conflict's targeting schema, the determination of an individual's membership status in an enemy armed group should utilize clear, consistent criteria. It should not be left undefined, allowing simply any type of association with an armed group to serve as the basis for classification as a member. Yet that is close to where the LOAC leaves membership. The law regulating armed conflict against groups such as Al-Qaeda provides that "[t]hose who belong to armed forces or armed groups may be attacked at any time" while omitting clarifying guidance regarding who so qualifies as "belong[ing]."<sup>258</sup> This omission allows meta-arguments against the characterization of operations against Al-Qaeda as armed conflicts, plus it lends strength to calls for eliminating status-based targeting against such groups, even if the fight against them is properly deemed an armed conflict.

The membership definitional lacuna can be resolved in numerous ways, one of which is to not even attempt to provide criteria for determining membership. Instead, the LOAC could simply render membership meaningless by not allowing it to substitute for actual threatening conduct when dealing with groups with opaque levels of integration. Instead of membership serving as a proxy for threatening behavior, thus allowing attack based on membership status, targeting could instead be restricted to only those individuals who are actually engaging in hostile behavior and only while they are so engaged (including immediate preparatory and concluding behavior). That is, modify targeting law in armed conflict to *prohibit* status-based targeting against non-state armed groups, instead allowing only conduct-based attacks against those directly participating in hostilities, per the strict meaning of that term of art. Yet this solution potentially destabilizes the foundational principle of the law of war—distinction—by merging everyone into one group. If membership is no longer meaningful, then everyone is a civilian, some of whom occasionally engage in combat. This lack of distinction allows the entire civilian population to become

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<sup>258</sup> ADDITIONAL PROTOCOL II COMMENTARY, *supra* note 212, at ¶ 4789 (discussing Article 13 of Additional Protocol II).

conflated with the enemy, and as explicated above in Part IV, exposes all civilians to greater risk.

Furthermore, eliminating status-based targeting *in toto* also ignores the reason why such targeting originally developed: the recognition that individuals are integrated into a hostile group to such an extent that the group exercises control over them or they exercise control over others, or both, and that they symbolically represent their (typically sovereign) leadership in a manner the civilian does not. This agency relationship among armed group constituents allows individuals, upon direction from a superior, to turn from functioning as a cook at one moment to shooting a weapon the next (and conversely, allows certain members to give such orders with expectations that they will be followed). This intra-group relationship belies a common purpose: members of the armed organization share a common goal to use armed force in pursuit of other objectives and will directly contribute to the use of such force upon direction. Regardless of a member's group role (cook or improvised-explosive-device (IED) maker), the "belong[ing] to" component consists of the knowing support of the group's violent methods and goals, exhibited via a willingness to so engage and contribute upon direction from others.<sup>259</sup> The presumption of such a purpose-driven agency relationship among group members historically undergirds status-based targeting. Hence, if non-state armed groups possess this intangible bond among members, analogous to state armed forces, then they should be equally subject to status-based targeting because it represents the LOAC's balancing point between necessity and distinction.

The fact that some non-state armed groups possess this agency glue, at least in today's NIAC against Al-Qaeda and associated groups, is axiomatic: there would be no armed conflict unless the participating groups possessed such a level of organization. As outlined in Part III, the two-prong test for determining a non-interstate armed conflict includes (1) whether the participating group(s) possess sufficient integration, plus (2) whether there is fighting of a sufficiently intense level. Non-state armed groups, despite their transnational, informal, and often networked-based character, fulfill the first prong because they are analogous to state militaries in the organizational sense. They consist of individuals coordinating the acts of others and individuals acting upon such coordination in pursuit of violence. Without such a degree of group cohesiveness, no armed conflict would exist. So despite the difficulty in discerning individual membership, status-based targeting should remain authorized under the LOAC against such non-state

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<sup>259</sup> *Id.*

entities because of the indispensable nature of their members in conducting the conflict.

This affirmation—that status-based targeting against non-state armed groups in a NIAC is an appropriate expression of the LOAC—still leaves unanswered the question of how to consistently and reliably discern individual members in order to conduct such targeting. Progress is being made to answer this question, as demonstrated by the ICRC’s attempt to define such members in a narrow, functional sense (as only those individuals engaged in a combat-type activity on a continual basis). However, the types of triggering combat-type activity provided in the ICRC’s approach consist almost exclusively of hostile martial activity, thereby rendering its model incomplete. Granted, these overtly combative acts allow a relatively easy inference of specific intent to further the group’s violent objectives, and indicate the requisite group agency relationship. Yet this martial myopia fails to appreciate the reality of armed groups’ reliance on supportive, non-hostile functions without which the hostile activity at its core cannot exist, and such an approach fails to comprehensively apply the agency relationship which is the key presumption in status-based targeting.

As a practical matter, the United States has been determining such membership for the last decade-plus during its ongoing engagement against Al-Qaeda; it has, at least operationally, developed informal criteria in order to conduct status-based targeting that considers a much wider spectrum of conduct than the ICRC does to assess membership. This U.S. classification exercise has largely turned into a quasi-functional one based on identifying a wide range of conduct that is performed in some type of association with a named group. Such conduct or group function is often, but not necessarily, analogous to that normally performed by members in a state armed force. Yet the U.S. approach lacks clear boundaries. For example, it appears (at least from open source news accounts) that being a military-age male in the proximity of known Al-Qaeda members during a targeted strike allows these unknown males to be counted as if they were also members, and not as civilians, in the post-attack proportionality analysis (at least as reported regarding drone strikes in Yemen).<sup>260</sup> While such an approach assesses a particular type of conduct (proximity as conduct), there is no functional analysis or assessment of group coordination, just an assumed intent, if that. While the LOAC seems to recognize geographical proximity to military objectives as indicating membership, it should not be the sole factor, as discussed below.<sup>261</sup>

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<sup>260</sup> Becker & Shane, *supra* note 237, at A1.

<sup>261</sup> See, e.g., ADDITIONAL PROTOCOL COMMENTARY, *supra* note 135, ¶ 1735 (observing that when formal indicia of membership are lacking, “being present at a place which is a

2. Fixing the *Humanitarian Law Project* Problem Inherent in Today's Conduct-Based Functional Test for Membership

As extensively discussed in Part IV, the U.S. approach to non-state armed group membership determination for targeting purposes today roughly resembles the criminal paradigm established by § 2339B. It focuses on conduct (training in Al-Qaeda camps, staying in an Al-Qaeda guesthouse, etc.) performed in coordination with a particular group. The coordination component may be manifested through a direct, overt group link such as training in a known terrorist group camp, or it may be assumed, based on the nature of the act itself. For example, if past practice indicates that only individuals who have been trained by Al-Qaeda have the expertise to assemble complex IEDs, then the assembly itself implies the requisite group nexus. Whether direct or inferred, this LOAC membership determination tracks § 2339B's requirement that the action not be taken independently of a particular group.

Yet despite the greater liberty deprivation that results from this enemy membership classification method, it actually reaches farther than § 2339B. It is broader because it is not legally bounded by the discrete list of activities extant in that statute. There is no discrete list of activities, when conducted in coordination with a group, which limits membership eligibility under the United States' implementation of the LOAC. While the cabining effect of providing a discrete list of eligible conduct should not be overstated (this author is hard pressed to see what type of conduct cannot be shoehorned into § 2339B's category of "services"), such a list would provide consistency, at least a veneer of objectivity, and to some extent, clarity as to what type of individual action can lead to a government response. Hence, the formulation of categories of conduct would be a good place to start in order to mitigate potential over-breadth issues with the current U.S. approach to determining belligerency status; that is, classification of persons as targetable members of non-state armed groups with whom the United States is at war. While delineating such a list is beyond the scope of this Article, § 2339B provides a solid launching pad.

Limiting the determination of non-state armed group membership, in the style of § 2339B, to discrete categories of conduct, performed in connection with a group, does not fully solve the over-breadth problem. This is where the concepts from *Humanitarian Law Project* come into play. In the context of determining status-based targeting eligibility, using discrete categories of functional acts to determine membership,

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characteristic or important military objective (command post, fortified position) . . . must lead to the same conclusion").

even restricted to those performed in knowing coordination with an enemy group, is insufficient. Whereas the Supreme Court in that case approved the statute's lack of specific intent to further a group's illegal goals, some type of specific intent is needed when the same model is being reverse-engineered to determine membership in a LOAC context.

Section 2339B's objective is to cut off the provision of things of value to designated groups by disallowing certain acts performed for or to the groups, be it under their direction or control or in coordination with them. While the effect is to criminalize active membership, the reverse is logically not true: a violation of § 2339B does not necessarily indicate active membership because one can perform services in coordination with a group without being a member. This makes the statute's lack of a *Scales* specific intent requirement (intent to further the group's illegal objectives), fatal when used as a means to determine group membership. Hence, while a specific intent requirement appears necessary in the LOAC context to prevent over-breadth, its operationalization is admittedly challenging. That is, how does one ascertain specific intent to further an enemy group's *raison d'être* of violence by receiving and/or taking orders from other group members? A formal symbol of membership such as an oath of allegiance equals circumstantial evidence of such intent, as does the performance of specific acts at the bequest of the group, as well as giving such direction to other members. As difficult as it is in implementation, overtly looking for such intent forces those making the membership determination to link the conduct in question back to the LOAC's original rationale for allowing membership to serve as a proxy for lethal targeting in the first place. It is the agency relationship—a willingness to take or give orders to others in the group to effect the group's objectives—which animates status-based targeting, and must not be de-linked from membership assessments. Today's currently unbounded and undefined U.S. targeting methodology risks such a disconnect.

Taken from another angle, as stated by the State Department Legal Advisor in 2012, enemy membership may be determined not only functionally, but also through formal membership (via swearing allegiance, for example). Whether joining a non-state armed group such as Al-Qaeda, at least from the perspective of that group, can consist merely of swearing *bayyat* (an oath of allegiance), is unclear. The point is that the United States uses such formal indicia as a proxy for membership. The use of formal indicators of group membership to determine targeting eligibility, such as swearing *bayyat*, is less disturbing than the over-breadth of using a pure § 2339B model of "conduct in coordination" with a group. The former is consistent with the LOAC's status-based targeting presumption of agency: the oath is the most concrete example of the member's willingness to follow orders

and engage in the group's violent ends. In other words, the oath, like a U.S. service member's uniform, manifests specific intent to further the group's objectives and willingness to be commanded by superiors in furtherance of those objectives.<sup>262</sup> Determining membership without such manifestation of intent, based purely on functional conduct, risks being overbroad because there may be individuals, analogous to civilian contractors who accompany state armed forces, who perform acts in coordination with particular groups, yet lack the agency relationship that is central to status-based targeting.

Hence, a requirement of specific intent to further the group's violent ends via group orders is vital in determining membership for targeting purposes. Perhaps such specific intent can be, and already is, combined with the conduct: intent to further the group's violent activities can be inferred from particular types of conduct. But without a restrictive list of conduct from which to make this inference, the conduct itself runs the risk of being too tangentially connected to the group to reasonably allow such an inference. How such intent need be shown is outside the scope of this Article, but it must be expressly incorporated into today's analysis of LOAC membership.<sup>263</sup> While there is no overt legal requirement found in the LOAC to determine whether an alleged member of an armed group possesses the specific intent to further the group's pursuit of violence at his superiors' request, this author believes it is inherently required because it is this willingness which makes targeting based on membership legally acceptable.

### 3. Recommendations

In summary, the inchoate methodology currently utilized by the United States to determine membership in groups such as Al-Qaeda needs the following components for legal sufficiency:

- (1) an express listing of categories of eligible conduct;
- (2) an express associative link;
- (3) the incorporation of a specific intent requirement;

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<sup>262</sup> The ICRC would likely argue that such oath of allegiance is insufficient because non-state armed groups such as Al-Qaeda are actually discrete wings of a larger organization. That is, there is a formal "party to the conflict" of which the armed group is only one manifestation; membership in the group in general may not suffice to demonstrate membership in the armed wing. Therefore, whether or not such an oath manifests group subordination depends on whether intelligence demonstrates that this is the case.

<sup>263</sup> Since the LOAC is not criminal law, burdens of proof such as "beyond reasonable doubt" are not wholly applicable. While the degree of certainty with which group membership needs to be determined before someone can be targeted because of such membership is an important topic, it is outside the scope of this Article. This author believes reasonable certainty is appropriate.

particularly one to further the group's pursuit of violence by following and/or giving group orders.

These recommendations are necessary because today's enemy groups lack obvious indicia of targetable membership, and the LOAC provides no methodology for its ascertainment. Since the legality of status-based targeting is based on recognizing individuals who pose a threat because of their group agency relationship, this relationship must be deduced from individual acts. An express categorization of eligible conduct would help standardize and clarify the identification process, using behavior that has been shown to indicate membership as an analytical starting point. For example, staying in a known Al-Qaeda guesthouse has been viewed as conduct that indicates Al-Qaeda membership; providing various services to Al-Qaeda, such as recruiting, has also been viewed as sufficient. Such a listing of discrete acts would formalize and memorialize lessons learned from targeting these groups over the last decade, and provide the first step in a determinative process. Using something akin to § 2339B's list of conduct, for example, would force decision-makers to use a defensible, objective template. It can and should be further tailored to include not only providing a guesthouse or lodging to the group, but also staying in the same. Furthermore, it should be complemented by the full range of hostile acts, such as the following: IED emplacement; weapons usage; the presence of explosive residue on one's body or clothing; command of lethal terrorist operations; and the planning of terrorist attacks.

While this Article's second recommendation, requiring identification of the conduct's associative link to the group, may seem inherent in the eligible conduct, carving it out as an express element ensures that purely independent action is not mistakenly included. Furthermore, it challenges assumptions that may be present in the type of conduct being analyzed. For example, the associative link in staying in an Al-Qaeda guesthouse is the assessment that it is indeed such a guesthouse; those conducting the analysis should be forced to demonstrate why it has been so labeled. When analyzing the discrete act of providing arms to Al-Qaeda, the "to Al-Qaeda" prong must be adequately supported.

However, it is the third recommendation that is the most critical: that of an express finding of an individual's specific intent to contribute to, and further, the group's martial activities by following and/or giving orders in furtherance of such objectives. Such a specific intent is necessary to appropriately limit membership status to those who desire to further the group's objectives via violent means (via an agency relationship), versus those who support the group for various reasons but are not willing to carry out its commands, and therefore do not symbolically represent the group. It attempts to capture the foundation

of status-based targeting, that of the agency relationship, by focusing on the individual's intent. This 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 achieve its objectives via violent means and because he was asked or told to do so by others in the group?

These recommendations may face criticism as being too limiting; maximum flexibility is needed to prosecute military operations against non-state armed groups such as Al-Qaeda. However, these recommendations represent a conceptual framework based on principles already organic to the LOAC. Any perceived loss of flexibility is therefore a needed phenomenon to ensure appropriate breadth of membership. Separately, this type of analytical framework is actually already being used to determine membership; 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 argue that 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.

Furthermore, a failure to admit and explicitly incorporate such limits risks the loss of the moral, and eventually legal, legitimacy for status-based targeting authority all together, particularly given the drive by the ICRC and other groups to severely restrict such authority. By bringing these boundaries to the forefront via a standardized methodology including a framework listing specific acts, an associational link, and a specific intent requirement, this lethal targeting authority can credibly retain its usefulness in NIAC. Nations conducting armed conflict against powerful, non-state organizations such as Al-Qaeda should be able to maintain the legal authority to kill known members of these groups at all times, and not be limited to responding to an individual's immediate hostile conduct. Status-based targeting represents a balance between military necessity and distinction, supporting a speedier end to the conflict itself. Yet it depends on appropriate identification processes so that this balance is not undermined by the targeting of those not integrated into an enemy armed group in the manner the LOAC deems threatening in and of itself.

## CONCLUSION

Applying conventional LOAC principles against unconventional enemies requires analytical rigor.<sup>264</sup> As described in Part III, the LOAC authorizes the targeting of individuals based on their membership in a group due to a presumption of a particular type of agency. It assumes that group membership equals subordination to the group's leadership in pursuit of violent goals, thus opening the door to killing known members at almost any time during armed conflict. Such targeting is not limited to periods of actual hostile conduct because it is the agency relationship itself that is considered threatening. Yet, as Part IV highlights, applying this method of targeting to hostile groups who possess fluid and opaque levels of organization strains the convention itself. The lack of set criteria for determining membership, coupled with the consequence of finding the same, creates an incentive for stretching the concept beyond recognition, thus damaging the LOAC's balancing act between necessity and distinction.

U.S. criminal law can help supply the exactness needed to properly utilize the LOAC's status-based targeting authority in conflicts against non-state armed groups such as Al-Qaeda. As highlighted in Part I, the federal material support to terrorist organizations statute evolved into a schema that prohibits a laundry list of acts when they are performed with a group nexus. Its framework, as demonstrated in Part II's analysis of the Supreme Court opinion approving the statute, effectively includes a de facto prohibition of group membership by barring conduct essential to group membership: that of providing valuable services to the group. Since it lacks a specific intent requirement of furthering the group's unlawful ends, it also bars a far broader range of conduct than that which defines membership. Parts III and IV of this Article point out that the United States utilizes a similar "conduct plus coordination" model to determine membership in enemy armed groups in order to place such members on kill/capture lists, though without an exclusive list of categories of conduct to trigger such classification.

Because of the expansive reach of such an approach, this Article concludes in Part IV by recommending transparency and specificity regarding the types of conduct and associative group links used in such LOAC targeting membership assessments. Critically, this Article also recommends the addition of an express specific intent requirement similar to that impliedly found in U.S. criminal statutes that constitutionally prohibit membership in groups. The requirement that one intends to further a group's illegal ends, as found in *Scales v. United*

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<sup>264</sup> See Johnson Speech, *supra* note 182 (characterizing the armed conflict against Al-Qaeda in conventional/unconventional terms).

*States*, signifies the agency relationship, which is integral to the appropriateness of the LOAC's status-based targeting. Without it, individuals who lack sufficient group integration may more easily be improperly deemed members for targeting purposes. This recommended criterion would remind decision-makers why membership matters, and appropriately cabin it to those the LOAC originally intended. Without such formal changes, current status-based targeting rests on shaky ground, making membership meaningless and raising the risk of erroneous classifications to an impermissibly high level.