Artificial Intelligence, Targeting, and the Enduring Uncertainty of Membership in an Organized Armed Group

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I. INTRODUCTION

Artificial intelligence ("AI") promises to revolutionize warfare.[1] Indeed, as AI is increasingly embedded in weapons systems, it may prove to be as destabilizing to statecraft and warfare as the development of the atomic bomb eighty years ago.[2] But few military applications of AI have sparked as much public concern and debate[3] as the prospect of deploying weapons or weapons systems that are able to autonomously identify, select, and attack targets on the battlefield. Such AI-powered lethal autonomous weapons systems ("LAWS") portend so-called killer robots that may stalk the seas, skies, or steppes to identify and attack enemy military objectives without the intervention of a

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[1] *See, e.g.*, Kenneth Payne, *Artificial Intelligence: A Revolution in Strategic Affairs*, SURVIVAL, Oct.–Nov. 2018 at 7, 8. AI is a broad and often loosely used term that may refer to narrow AI, general AI, or artificial super intelligence. KELLEY M. SAYLER, DEFENSE PRIMER: EMERGING TECHNOLOGIES 1 (Cong. Research Serv., CRS Report for Congress Order Code IF11105, Jan. 6, 2026), *available at* https://www.congress.gov/crs-product/IF11105 [https://perma.cc/PRF8-5JDF]. This chapter is focused on the integration of narrow AI, whether it is developed on the backbone of a rules-based or machine-learning system, in either a mimetic or symbiotic role.

[2] *See, e.g.*, Payne, *supra* note 1, at 8.

[3] PAUL SCHARRE, ARMY OF NONE 145 (2018) ("We have two intuitions when it comes to autonomous systems . . . The first intuition is that autonomous systems are reliable and introduce greater precision . . . However, we have another instinct when it comes to autonomous systems, and that is one of robots run amok, autonomous systems that slip out of human control and result in disastrous outcomes . . . Both of our intuitions are correct."). To date, much of the legal and ethical debate surrounding LAWS has focused on whether the systems are lawful or ethical *per se*, and whether they could be designed and deployed in compliance with IHL's cardinal principles of distinction, proportionality, military necessity, and humanity. *E.g.*, Duncan B. Hollis, *Autonomous Legal Reasoning in International Humanitarian Law*, 30 TEMP. INT'L & COMPAR. L.J. 1, 1–2 (2016) ("States and scholars are increasingly attentive to the international legal issues raised by the autonomous aspects of weapon systems. So far, this attention has emphasized functional issues, asking if existing IHL can serve its regulatory function given the capacities autonomous systems have (or may develop)."); Gary Brown, *Out of the Loop*, 30 TEMP. INT'L & COMPAR. L.J. 43, 43 (2016) ("There has been considerable discussion of and consternation over the possibility of developing autonomous weapon systems (AWS). Some of the rhetoric has been splendidly excessive—'killer robots,' 'the end of the human race,' etc. Although many of the objections come from individuals with legal backgrounds, they go beyond legal concerns to discuss the morality or ethics of autonomous machines taking human life.'").

human being.[4] These systems will not be pre-programmed to attack a specific object or person. Rather, AI-powered LAWS' "software [will] . . . initiate[] the engagement of a target and determine[] how and when the attack will take place, and the weapon system [will do] this by applying the kinds of thought process that a human decision-maker would use, including . . . adapting . . . behavior to suit changing circumstances."[5] Indeed, "[s]oon, autonomous and intelligent platforms will be able to manoeuvre faster and employ force with more precision than those operated by humans."[6] To some, this future of AI-driven targeting and engagement is a nightmare that must be stopped through new international legal regulation.[7] To others, this future promises enhanced compliance with international humanitarian law ("IHL").[8]

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[4] *E.g.*, YORAM DINSTEIN & ARNE WILLY DAHL, OSLO MANUAL ON SELECT TOPICS OF THE LAW OF ARMED CONFLICT 33 (2020) ("[A] 'highly automated' weapon system is a system that, once activated, is capable of identifying and engaging a target without further human input, while being constrained by algorithms that determine its responses by imposing rules of engagement and setting mission parameters which limit its ability to act independently."). *But see* United States, The Autonomy Aspect of Lethal Autonomous Weapon Systems, Submission to the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons System, ¶ 5, U.N. Doc. CCW/GGE.1/2025/WP.6 (Sep. 2, 2025) ("[W]eapons that identify, select, and engage targets, without further operator intervention after activation, have been utilized for many years by States.").

[5] Bill Boothby, *AI Warfare and the Law*, 104 INT'L L. STUD. 1, 42 (2025).

[6] Payne, *supra* note 1, at 9.

[7] *E.g.*, BONNIE DOCHERTY, HUM. RTS. WATCH & INT'L HUM. RTS. CLINIC, MIND THE GAP: THE LACK OF ACCOUNTABILITY FOR KILLER ROBOTS, (Apr. 9, 2015), https://www.hrw.org/sites/default/files/reports/arms0415_ForUpload_0.pdf [https://perma.cc/XF7B-JV8X].

[8] *See, e.g.*, Australia et al., Draft articles on autonomous weapon systems – prohibitions and other regulatory measures on the basis of international humanitarian law, Submission to the Group of Governmental Experts on Emerging Technologies in the Area of Lethal Autonomous Weapons System, at 1, U.N. Doc. CCW/GGE.1/2023/WP.4/Rev.2 (May 15, 2023) (noting that AI-powered systems "could be used to improve the protection of civilians," while acknowledging that there are risks for their misuse in armed conflict); Jacob Kellenberger & Philip Spoerri, *International Humanitarian Law and New Weapons Technologies, 34th Round Table on Current Issues of International Humanitarian Law, San Remo, Sep. 8–10, 2011*, 94 INT'L REV. RED CROSS 809, 812–13 ("A robot could be programmed to behave more ethically and far more cautiously on the battlefield than a human being."); Brown, *supra* note 3, at 43 (suggesting that "machines might be better suited to the task[s of warfare] than humans anyway"); Payne, *supra* note 1, at 18 ("[H]umans frequently fudge the [rationale for using lethal or destructive force against a target] in the moment, reaching judgements about appropriate norms retrospectively. But in specifying rules of engagement for an AI system beforehand, such fudging would be impossible, and no 'expert system' specification would be able to account for all possible contingencies."). *But see* Bryan Jack, *Future of Warfare and Law Series – The Law and LAWS*, LIEBER INST. W. POINT (Nov. 7, 2025), https://lieber.westpoint.edu/law-and-laws [https://perma.cc/E9ZQ-YZZJ] ("[N]ear-future LAWS will not be 100 percent effective at avoiding unanticipated collateral damage, ensuring the concrete and direct military advantage to be gained is not outweighed by the anticipated collateral damage, and distinguishing military objects from civilian persons and objects. In other words, the LAWS we employ will be imperfect."); Joanna L D Wilson, *AI, War, and (in)Humanity: The Role of Human Emotions in Military Decision-making*, HUMANITARIAN L. & POL'Y (Feb. 20, 2025), https://blogs.icrc.org/law-and-policy/2025/02/20/ai-war-and-in-humanity-the-role-of-human-emotions-in-military-decision-making [https://perma.cc/4DA2-BRRZ] (arguing that "[w]ar is not, and should never be, easy. Military decision-making is, and ought to be, difficult. To this end, the enduring presence of human emotions is vital").

Assuming that AI-enabled LAWS will continue to be developed and that they will be deployed against human targets,[9] this Article considers whether targeting law is specified sufficiently that such systems could reliably operate in compliance with IHL. This Article suggests that, insofar as AI-powered LAWS are deployed against non-State organized armed groups, IHL and targeting law are insufficiently defined to ensure discrimination between lawful individual targets and protected civilians. It focuses on the especially difficult and important challenge of identifying lawful targets on the basis of alleged membership in a non-State organized armed group ("OAG"), due to the absence of a precise definition of "membership" under IHL. This Article also emphasizes the consequent discretionary space within IHL for parties to an armed conflict to interpret the parameters of "membership" in an OAG.[10] By taking the United States' disparate pre- and post-9/11 approaches to "membership" in an OAG as a case study, this Article highlights the deleterious consequences for the protection of civilians under IHL that result from that body of law's failure to resolve the criteria of OAG membership for targeting and other purposes. To be sure, this defect is not a new challenge—nor is it peculiar to AI-powered LAWS. However, the unpredictability of AI-powered systems and the potentially revolutionary consequences of the use of AI and other emerging technologies in warfare in terms of reach, lethality, and speed argue for renewed urgency in resolving that defect[11]—and resolving it in a manner that promotes both the protection of civilians and enhanced IHL compliance, generally.

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[9] David Hambling, *Ukraine's AI Drones Seek and Attack Russian Forces without Human Oversight*, FORBES (Oct. 17, 2023, at 11:54 EDT), https://www.forbes.com/sites/davidhambling/2023/10/17/ukraines-ai-drones-seek-and-attack-russian-forces-without-human-oversight [https://perma.cc/EWR8-4XMX] ("Ukrainian developers have confirmed that their drones are now carrying out autonomous strikes on Russian forces without a human operator. This is the first time such drones are known to have been used, as UN allegations about autonomous attacks in Libya in 2020 remain unproven."); Letter dated 8 March 2021 from the Panel of Experts on Libya established pursuant to Security Council resolution 1973 (2011) addressed to the President of the Security Council, S/2021/229, ¶ 63 (alleging that on March 27, 2020, "[l]ogistics convoys and retreating [Haftar Affiliated Forces] were subsequently hunted down and remotely engaged by the unmanned combat aerial vehicles or the lethal autonomous weapons systems such as the STM Kargu-2 (see annex 30) and other loitering munitions").

[10] Recent armed conflicts—including the so-called Global War on Terror (GWOT), the Russia-Ukraine War, and the Israel-Hamas War—point to the immediacy of closing discretionary interpretive space in IHL. Each of those armed conflicts have demonstrated the wide-reaching and lethal consequences that may result from the interpretive discretion embedded in mainstream IHL, as well as those of potentially heterodox interpretations of IHL. And each indicates inadequacies in the specificity of existing IHL related to targeting law—inadequacies that may have direr consequences for civilians when exposed to LAWS during armed conflict. *E.g.*, Samuel Bendett & David Kirichenko, *Ukraine Symposium – The Continuing Autonomous Arms Race*, LIEBER INST. W. POINT (Feb. 19, 2025), https://lieber.westpoint.edu/continuing-autonomous-arms-race [https://perma.cc/NR47-7J6R] ("The true cost of this war laboratory is often borne by civilians, who may suffer the most devastating consequences of relentless innovation on the battlefield. One of the biggest challenges for regulators in Ukraine and the West is developing autonomous systems that comply with international law while facing an enemy that operates without restrictions. Yet the pace of battlefield innovation is moving so quickly that regulators have a hard time legislating to keep up with the realities on the ground.").

[11] SCHARRE, *supra* note 3, at 190 ("The key difference between semi-, supervised, and fully autonomous weapons is [the] amount of damage the system can cause until the next opportunity for

This Article proceeds in four parts. Part II describes AI-powered LAWS in general. Part III provides a summary view of targeting law, highlighting the interpretative space within targeting law that allows parties to an armed conflict to arrive at divergent, but arguably equally lawful, implementations of the law. Part IV contrasts the United States' pre- and post-9/11 interpretations of OAG membership. This contrast illustrates the discretion States enjoy under existing IHL to rebalance humanity and military necessity when engaged in an armed conflict with an OAG. It is this discretionary space that makes the development and deployment of AI-powered LAWS so concerning in light of the current state of IHL. Finally, Part V suggests that the indeterminacy of membership in an OAG under existing IHL poses a substantial problem for IHL and a critical challenge to the lawful operationalization of AI-powered LAWS. This Part proposes that a restrictive, formal approach to assigning OAG membership may best promote IHL's underlying protective purpose. It suggests that efforts to expand the scope of OAG membership may both reflect a fundamental misunderstanding of the degree to which OAGs comply with the requirements of distinction, and a worrying trend of pushing IHL's application below the threshold of non-international armed conflict ("NIAC") into realms more appropriately governed by international human rights law and relevant domestic law. Alternatively, this part suggests that, if the widespread assumption that OAGs refuse to distinguish themselves is accurate, such behavior may reflect poorly structured incentives for IHL that legal reform could correct. Ultimately, it cautions against the United States relying on data collected by its remote-warfare platforms during its Global War on Terror ("GWOT") as training data for AI-powered LAWS due to the likely replication and propagation of targeting mistakes embedded in that data.

I. LETHAL AUTONOMOUS WEAPONS SYSTEM

Lethal autonomous weapons systems are weapons systems that are "programmed to apply human-like reasoning to determine whether an object or person is a target, whether it should be attacked, and if so, how and when."[12] Essentially, AI-powered LAWS are devices that rely on a computer to process input from a suite of sensors to identify and attack targets without human intervention after activation.

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a human to intervene. In semi- or supervised autonomous weapons . . . the human is a natural fail-safe against accidents, a circuit breaker if things go wrong. . . . In fully autonomous weapons, there is no human to intervene and halt the system's operation. A failure that might cause a single unfortunate incident with a semiautonomous weapon could cause far greater damage if it occurred in a fully autonomous weapon."); *id.* at 193 ("Fully autonomous weapons would be a fundamental paradigm shift in warfare. In deploying fully autonomous weapons, militaries would be introducing onto the battlefield a highly lethal system that they cannot control or recall once launched. . . . In the event of failures, the damage fully autonomous weapons could cause would be limited only by the weapons' range, endurance, ability to sense targets, and magazine capacity.").

[12] DINSTEIN & DAHL, *supra* note 4, at 38; *see also* Autonomy in Weapon Systems 21, Washington Headquarters Services (2023), DoD Directive 3000.09 (defining lethal autonomous weapons systems as "weapons system[s] that, once activated, can select and engage targets without further intervention by a human operator"); Draft articles on autonomous weapon systems – prohibitions and other regulatory measures on the basis of international humanitarian law ("IHL"), Annex III, 7 ¶ 7, U.N. Doc. CCW/GGE.1/2023/WP.4/Rev.2 (May 15, 2023).

Significantly, the notion that AI engages in or replicates human-like reasoning is at least contestable.[13] Indeed, some AIs have demonstrated decidedly inhuman reasoning[14] and the "interior logic of an artificial neural network [one type or method of AI] is presently something of a black box."[15] In one sense, "the mathematics and computer science of how an [AI] works are of relatively little significance to the application of law."[16] After all, the use of LAWS in armed conflict will be subject to IHL, including targeting law.[17] And,

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[13] *See, e.g.*, F. Guerin, *Projection: A Mechanism for Human-like Reasoning in Artificial Intelligence*, 35 J. EXP. & THEOR. A.I. 1269, 1269 (2023) ("A significant weakness of [AI] systems relative to humans is the inability to apply existing knowledge to a new problem, or to a situation that varies from what they were programmed for or trained for (also called transfer ability in some contexts). This causes systems to fail to recognise objects or activities in new settings, or to fail to adapt skills to variations . . . The systems have knowledge, but they are unable to apply it when the situation changes. This problem affects AI systems during learning phases as well as in final deployment phases."); SCHARRE, *supra* note 3, at 180–82 (describing deep neural networks incomprehensible misidentification of "adversarial images" as concrete objects with high degrees of confidence); Payne, *supra* note 1, at 8 ("AI systems . . . do not make decisions in the same way humans would, even if their algorithms are often loosely modeled on human cognition.").

[14] Kelley M. Sayler, Artificial Intelligence and National Security 30 (Cong. Research Serv., CRS Report for Congress Order Code R45178, Nov. 10, 2020), available at https://www.congress.gov/crs-product/R45178 [https://perma.cc/K693-JEYJ] ("In March 2016, the AI company DeepMind created a game-playing algorithm called AlphaGo, which defeated a world-champion Go player, Lee Sedol, four games to one. After the match, Sedol commented that AlphaGo made surprising and innovative moves, and other expert Go players subsequently stated that AlphaGo overturned accumulated wisdom on game play. AI's capacity to produce similarly unconventional results in a military context may provide an advantage in combat, particularly if those results surprise an adversary.").

[15] Payne, *supra* note 1, at 11.

[16] Boothby, *supra* note 5, at 29. On the other hand, the inaccessibility of AI decision making is deeply unnerving. *See e.g.*, Bryan Jack, *Future of Warfare and Law Series – The Law and LAWS*, LIEBER INST. W. POINT, (Nov. 7, 2025), https://lieber.westpoint.edu/law-and-laws [https://perma.cc/E9ZQ-YZZJ] ("[M]any of the scientists and technology experts acknowledged that they do not yet fully understand how future [LAWS], AI-enabled targeting platforms, and other agentic systems capable of executing combat operations without human intervention, will arrive at lethal decisions that can be carried out in compliance with the law of armed conflict.") Even if AI decision making were accessible, it bears emphasizing that artificial neural networks generate probabilistic rather than deterministic results. That type of calculation introduces an identifiable margin of error (that may or may not be better than a human being's) in whatever answer is produced by AIs powered by that method, including any determination that a particular individual is a lawful target. *See id.* ("[Many scientists and technology experts] noted that they do not yet know how precise these [AI-powered] systems will be when they are fielded . . . [N]one of the technical experts in the room were prepared to specify what confidence, precision, or accuracy levels should be expected from LAWS, even ten to fifteen years from now."). LAWS that embed such a margin of error in target identification, selection, and engagement may not be operatable in compliance with IHL. *See* Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, art. 50(1), June 8, 1977, 1125 U.N.T.S. 3, 26 [hereinafter Additional Protocol I] ("In case of doubt whether a person is a civilian, that person shall be considered to be a civilian."); *id.* art. 52(3) ("In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used."); Charles Trumbull, *Future of Warfare and Law Series – Addressing Uncertainty in the Use of Autonomous Weapons Systems*, LIEBER INST. W. POINT (Nov. 5, 2025), https://lieber.westpoint.edu/addressing-uncertainty-use-autonomous-weapons-systems [https://perma.cc/EK9K-QFN5].

[17] Additional Protocol I, *supra* note 16, art. 36 ("In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to

as a matter of law, the application of IHL to the circumstances at hand must be part of a system's decision making.[18] From this perspective, "what matters much more is the tasks for which AI will be employed and the qualities that it will need to demonstrate if it is to be capable of performing those tasks in accordance with applicable law."[19]

Nevertheless, the specific compliance (or not) of the use of an AI-powered LAWS in an attack with targeting law will depend on its instruction or training in IHL, its ability to align its decision making with that instruction or training,[20] and its capacity to apply its instruction or training to the actual circumstances that it encounters on the battlefield[21] prior to identifying and attacking a target.[22] Necessarily, one factor influencing an AI's compliance with targeting law will be the degree to which applicable IHL and targeting law is reducible to

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determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party."); DINSTEIN & DAHL, *supra* note 4, r.38 ¶ 6. Indeed, customary IHL prohibits the deployment of weapons systems—including LAWS—that do not or are unable to comply with the requirements of IHL. *See* Regulations Respecting the Laws and Customs of War on Land art. 22, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539 ("The right of belligerents to adopt means of injuring the enemy is not unlimited."); Brown, *supra* note 3, at 44; *see also* Boothby, *supra* note 5, at 146 ("States do not have an unlimited right to choose AI weapon systems or AI methods of conducting hostilities. . . . AI technologies themselves are also limited in the courses of action that they can be allowed to take. The options between which an AI-enhanced or -enabled weapon system or method of warfare can be permitted to choose must be limited to those that are lawful. Therefore, if constraints cannot be placed on the lessons that machine learning and deep learning associated with these systems are permitted to learn, their employment will constitute a breach of the principle.").

[18] Brown, *supra* note 3, at 44 ("[I]f an autonomous weapon is using deep learning technology itself to determine what should be attacked, and the when and how, and if no human being has been in a position to ensure in advance that the autonomously determined attack will comply with targeting law principles and rules, it must of necessity be for the autonomous system itself to make those determinations.").

[19] *Id.* at 29.

[20] *See, e.g.*, Erez Firt, *Calibrating Machine Behavior: A Challenge for AI Alignment*, 25 ETHICS & INFO. TECH. 41, 41–43 (2023).

[21] SCHARRE, *supra* note 3, at 177 ("War is an atypical condition. Militaries prepare for war, but the usual day-to-day experience of militaries is peacetime. Militaries attempt to prepare for the rigors of war through training, but no amount of training can replicate the violence and chaos of actual combat. This makes it very difficult for militaries to accurately predict the behavior of autonomous systems in war.").

[22] *See also* Boothby, *supra* note 5, at 10 ("AI implies the mechanization of key processes. However, it is important to remember that the AI component in a weapon system or method of warfare consists of a computer program that is applying lessons learned from data fed into it, or that it has acquired, relating to past events in order to inform how it should act when confronted with particular circumstances."); *id.* at 142; Firt, *supra* note 20, at 41–43.

a machine-understandable form,[23] which will presumably be more readily attainable when such rules are well defined.[24]

Even if it is theoretically possible to instruct LAWS' AI in IHL and targeting law such that LAWS will comply with a given interpretation of IHL and targeting law,[25] the interpretive space[26] enjoyed by parties to an armed conflict is likely to lead to disparate outcomes for individuals caught up in hostilities that depend entirely on who is operating or who trained the AI powering the LAWS that is firing at or near them.[27]

In the abstract, these differential outcomes are no different for LAWS than human-operated weapons systems. Non-specific rules or rules that are open to divergent interpretations by parties to an armed conflict create opportunities for such parties to apply different standards when employing lethal or destructive force in the context of hostilities. Consider, for example, Israel's approach to targeting in the recent war against Hamas in Gaza. In the view of many critics, the widespread destruction of seemingly civilian infrastructure and the large number of apparently civilian casualties in Gaza may have resulted from IHL's

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[23] RONALD ARKIN, GOVERNING LETHAL BEHAVIOR: EMBEDDING ETHICS IN A HYBRID DELIBERATIVE/REACTIVE ROBOT ARCHITECTURE 98 (2008). Even "[f]or rule-based systems [presumably, like an IHL-trained AI], deciphering the intricate web of relationships between the various rules that govern a system's behavior and all possible interactions it might have with its environment quickly becomes impossible." SCHARRE, *supra* note 3, at 179. That complexity expands when the rules in question take the form of, in the language of lawyers, standards rather than bright-line rules. However, that challenge potentially may be mitigated by relying on deep learning. *Id.*

[24] *See e.g.*, Kellenberger & Spoerri, *supra* note 8, at 810 ("[A]pplying pre-existing legal rules to a new technology raises the question of whether the rules are sufficiently clear in light of the technology's specific–and perhaps unprecedented–characteristics, as well as with regard to the foreseeable humanitarian impact it may have.").

[25] Payne, *supra* note 1, at 17–18 ("In theory, AI systems will be able to distinguish between combatant and non-combatant, according to parameters established by human handlers.").

[26] *Infra* Part III.

[27] *See* Brianna Rosen, *How to Make Military AI Governance more Robust*, WAR ON THE ROCKS (Aug. 6, 2024), https://warontherocks.com/2024/08/how-to-make-military-ai-governance-more-robust [https://perma.cc/JD82-HFXS] ("Ultimately, the most pernicious myth about military AI is that there is clear agreement on how international law regulates its use, and that existing law is sufficient to ensure responsible use across the full spectrum of AI applications."). *But see* Payne, *supra* note 1, at 8 ("AI systems . . . do not make decisions in the same way humans would, even if their algorithms are often loosely modeled on human cognition."). Compliance will also depend on the data on which the a given LAWS' AI is trained. *Id.* at 9 ("AI systems will allow autonomous decision-making by networked computer agents, enabling extremely rapid sequential action, even in uncertain operating environments. Intelligent machines adept at making inferences on the basis of confused data will soon be on the battlefield. These agents will learn by studying earlier actions, or by observing the parallel actions of other agents in their network."); Bendett & Kirichenko, *supra* note 10 ("Training . . . AI models requires extensive battlefield data, of which both Ukraine and Russia have plenty. Oleksandr Dmitriev, founder of a Ukrainian non-profit that centralizes video feeds from over 15,000 frontline drone crews, told Reuters that since 2022, his system has collected two million hours—equivalent to 228 years—of battlefield footage. This footage trains the model on 'combat tactics, spotting targets, and assessing the effectiveness of weapons systems.'"). If the target selection and verification vignettes used to instruct LAWS' AI in the characteristics of lawful targets reflect biases that have led to repeated mistakes in armed conflicts, those mistakes will become embedded in the AI's human-like reasoning, likely leading to repetition and proliferation of those errors. *Cf.* Oona Hathaway & Azmat Khan, *"Mistakes" in War*, 173 U. PENN. L. REV. 1, 6 (2024).

insufficiently specific rules governing proportionality.[28] Differing interpretations of how to balance concrete and definite military advantage with expected harm to civilians and civilian objects[29]—as well as the absence of clear, universally accepted rules governing the identification of membership in an OAG or civilians directly participating in hostilities[30]—may be in part responsible for the scale of destruction and death in that armed conflict, as well as the controversy surrounding it. The indeterminacy of proportionality may undermine IHL's objective of protecting civilians and the civilian population. It doubtlessly contributes to accountability challenges for seeming violations of IHL. There is every reason to believe that instruction of LAWS' AI in existing, insufficiently well-defined targeting rules will at least replicate these challenges.

But there are at least three aspects of AI-powered LAWS that distinguish them from human-operated systems and give rise to concerns that AI-powered systems will exacerbate the challenges deriving from under-specified targeting law. First, and most fundamentally, deployment of an AI-powered LAWS against human targets will entail a machine rather than a human being deciding to kill. Second, the military utility of LAWS is found in their ability not just to replace humans on a one-for-one basis but to act as a force multiplier, potentially dramatically increasing the speed and scale of target coverage as compared to a human-operated system.[31] Third, as AI-powered LAWS developed and programmed by one party are shared with or exported to other parties, one armed force's interpretation of existing targeting rules may proliferate more or

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[28] *See, e.g.*, Peter C. Combe, *Israel-Hamas 2024 Symposium: Ruminations on the Legal, Policy, and Moral Aspects of Proportionality*, LIEBER INST. W. POINT (Feb. 9, 2024), https://lieber.westpoint.edu/ruminations-legal-policy-moral-aspects-proportionality [https://perma.cc/KX8K-8FFT] (contrasting U.S. and Israeli tolerance for collateral damage); Leonard Rubenstein, *Israel's Rewriting of the Laws of War*, JUST SEC. (Dec. 21, 2023), https://www.justsecurity.org/90789/israels-rewriting-of-the-law-of-war [https://perma.cc/M93N-FCAU] (arguing that "Israel has asserted a theory of justifiable conduct in war that, contrary to this body of law, elevates claims of military necessity in achieving the war's aims over protection of civilians"); Mark Lattimer, *Assessing Israel's Approach to Proportionality in the Conduct of Hostilities in Gaza*, LAWFARE (Nov. 16, 2023, at 16:31 CT), https://www.lawfaremedia.org/article/assessing-israel-s-approach-to-proportionality-in-the-conduct-of-hostilities-in-gaza [https://perma.cc/YAU6-KLN4].

[29] Geoffrey S. Corn, *Proportionality: Can't Live with It but Can't Live without It*, 106 INT'L L. STUD. 515, 517 (2025) ("[H]ow States implement [proportionality] is perhaps the most hotly debated aspect of IHL. The indeterminate nature of [proportionality] allows for its meaning to conform to whatever its reader wants it to mean. This is a consequence of the immense variable related to key provisions of the rule: How do we assess military advantage? What makes an anticipated military advantage 'concrete and direct'? And most problematic of all, what is the meaning of the term 'excessive'?").

[30] *Infra* Part III–Part IV.

[31] The U.S. government has already claimed that AI-powered targeting decision support systems enabled more and faster target coverage in the opening weeks of the U.S.-Israel war on Iran. Tara Copp, Elizabeth Dwoskin, Ian Duncan, *Anthropic's AI Tool Claude Central to U.S. Campaign in Iran, Amid a Bitter Feud*, WASH. POST (Mar. 4, 2026), https://www.washingtonpost.com/technology/2026/03/04/anthropic-ai-iran-campaign [https://perma.cc/6AYU-QCX7].

less invisibly.[32] When employed, these exported LAWS may wittingly or otherwise furnish evidence of State practice concerning the interpretation of IHL, nudging customary IHL in one direction or another at least as it pertains to how particular targeting rules are interpreted. Thus, the export of AI-powered LAWS (or their AI models) may effect a *sotto voce* proliferation of parochial interpretations of IHL and targeting rules[33] in a manner that wags the dog of IHL by the tail of availability, affordability, or technical superiority of particular LAWS.

Taken together, the foregoing suggests that the International Committee of the Red Cross ("ICRC") may be correct that the "use of autonomous weapon systems to target human beings should be ruled out."[34] However, assuming that States are unlikely to adopt an international legal prohibition against AI-powered LAWS or their use against human targets before the initial AI-powered LAWS are developed and deployed—if at all—improving the specificity of targeting law and closing the interpretive space available to parties to armed conflicts seems to be both urgently required and a minimally prudent course of action.

II. TARGETING LAW IN GENERAL

Targeting law is the part of IHL that governs who and what may be attacked during an armed conflict,[35] as well as who and what must not be. Targeting law is comprised of the customary fundamental principles of IHL—military necessity, distinction,[36] proportionality, and humanity[37]—as well as the

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[32] The proliferation of parochial interpretations of IHL through the proliferation of LAWS may persist even if their AIs are supposedly customizable or re-trainable. *See* Ezra Klein, *How Afraid of the A.I. Apocalypse Should We Be?*, N.Y. TIMES (Oct. 15, 2025, at 05:03 ET), https://www.nytimes.com/2025/10/15/opinion/ezra-klein-podcast-eliezer-yudkowsky.html [https://perma.cc/G77G-T4AF] (recounting Anthropic's discovery that its AI model not only resisted retraining but engaged in "alignment faking").

[33] *Cf.* Reece Rogers, *AI is Spreading Old Stereotypes to New Languages and Cultures*, WIRED (Apr. 23, 2025, at 12:31 CT), https://www.wired.com/story/ai-bias-spreading-stereotypes-across-languages-and-cultures-margaret-mitchell [https://perma.cc/8E5N-R2R6] ("[P]art of what we're finding [is that generative AI is introducing new stereotypes to different languages and cultures]. The idea of blondes being stupid is not something that's found all over the world, but is found in a lot of the languages that we looked at. When you have all of the data in one shared latent space, then semantic concepts can get transferred across languages. You're risking propagating harmful stereotypes that other people hadn't even thought of.").

[34] Int'l Comm. of the Red Cross, *Position on Autonomous Weapon Systems: ICRC Position and Background Paper*, 102 INT'L REV. RED CROSS 1335, 1336 (2020).

[35] Additional Protocol I, *supra* note 16, art. 49(1) ("'Attacks' means acts of violence against the adversary, whether in offence or in defence."); Int'l Comm. of the Red Cross, *Commentary on Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict. (Protocol I)*, ¶ 1880 (1987), https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-49/commentary/1987 [https://perma.cc/A952-BCGG] [hereinafter Commentary on Additional Protocol I] (last visited Jan. 25, 2026, at 14:00 CT) ("[T]he term 'attack' means 'combat action.'").

[36] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 78 (July 8) (characterizing distinction as a "cardinal principle[]" of IHL).

[37] *Id.* (characterizing humanity as a "cardinal principle[] of IHL).

precautionary principle,[38] and additional customary and treaty-based rules.[39] At its most fundamental, targeting law implements the logic of IHL's status- and conduct-based division of rights, protections, and liabilities in armed conflict.[40] Targeting law limits the use of destructive or lethal force to military objectives, combatants or fighters, or civilians directly participating in hostilities ("DPHing").[41] Indeed, IHL prohibits parties to an armed conflict from attacking[42] civilians (other than those who are DPHing) or civilian objects. And, in cases of doubt, individuals are presumed to be civilians.[43]

Beyond these general standards, the rules of targeting law too often remain indistinct. For example, to preserve armed forces' flexibility to meet unexpected battlefield challenges, IHL accepts a broad and blurry spectrum between members of State armed forces and civilians. Among these are members of OAGs, a category subject to continuous lethal targeting but underdefined in IHL, which affords parties wide discretion in which to determine whether an individual is a member of an OAG, a civilian DPHing, or a protected civilian. This netherworld of targetability creates opportunities for mischief and mistake and expands the scope of the civilian population subject (directly or indirectly) to the lethal liabilities of armed conflict.

A. *Distinction and the Logic of Targeting Law*

Armed conflict is fundamentally a contest of arms between organized parties, which are composed of individuals who contribute to the destruction or defeat of the enemy through the use of violence.[44] Indeed, the existence of an armed conflict presupposes the existence of parties organized sufficiently to

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[38] Additional Protocol I, *supra* note 16, art. 57.

[39] *E.g.*, Boothby, *supra* note 5, at 143 ("The law of targeting is based upon the fundamental customary principles of the law of armed conflict, key among which are humanity, military necessity, and distinction. Targeting law also comprises additional customary rules and treaty law. The treaty-based rules of the law of targeting were codified in 1977 in Additional Protocol I . . . notably but not exclusively in Articles 48 to 67. . . . Many of the [Additional Protocol I] targeting rules are now regarded as customary and thus binding in the terms in which they are written on all States.").

[40] This article's emphasis on distinction is not meant to detract from the importance of the other cardinal principles of IHL to targeting law, nor is it meant to suggest that other relevant customary and treaty-based rules of IHL do not apply to targeting. For a more fulsome discussion of targeting law, see WILLIAM H. BOOTHBY, TARGETING LAW (Oxford Univ. Press, 2012).

[41] *Compare* Additional Protocol I, *supra* note 16, art. 50, *with* Additional Protocol I, *supra* note 16, art. 51.

[42] *Id.* art. 51(2).

[43] *Id.* art. 50(1).

[44] *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, 333 (2011) ("Armed conflict involves the contest between belligerent opponents organized into military units acting to achieve tactical, operational, and strategic objectives. The very purpose of the organized nature of belligerent groups is to ensure that individuals act to achieve these collective military goals.").

exert command and control over the individuals whom participate in hostilities on their behalf and at their behest,[45] their agents.[46]

IHL and targeting law thus divide the world into two discrete categories based on the degree to which they are expected or not to contribute to the military efforts of the parties: combatants and civilians.[47] Combatants are members of the armed forces of a party.[48] Civilians are defined in contradistinction to combatants, meaning anyone who is not a member of the armed forces of a party is a civilian.[49] Individuals with combatant status are liable to, *inter alia*, lethal targeting whenever and wherever they may be during an armed conflict, subject to the geographic and temporal limitations of armed conflict,[50] unless they are *hors de combat*.[51] Civilians, on the other hand, are presumptively immune from direct attack.[52] Civilian objects are likewise defined in contradistinction to military objectives.[53] Underlying this logic is the presumption that combatants are continuous threats to their adversary, that

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[45] *Id.* at 333–34 ("The inherent obligation of members of such [belligerent] groups to obey the orders of military and civilian superiors is consistent with this purpose [of achieving collective military goals]. Command structure, rank, and the duty of obedience all reflect a simple axiom of belligerent groups: members of these groups act as agents of the group leadership to achieve military goals, not as individuals.").

[46] *See, e.g.*, Prosecutor v. Tadić, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) ("[W]e find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."); Prosecutor v. Boskoski, IT-04-82-T, ¶¶ 289–91 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 10, 2008) (emphasizing *inter alia* the existence of a chain of command, an internal disciplinary system, and coordinated operations in determining that the National Liberation Army was sufficiently organized to constitute a party to an armed conflict).

[47] Strictly speaking, the term "combatant" is legally restricted to international armed conflicts ("IACs"). However, the concept of a class of individuals whose role is to participate in hostilities extends to NIACs. *See, e.g.*, Additional Protocol I, *supra* note 16, art. 50 (defining civilians in contradistinction to combatants); *id.*, art. 51 (presumptively immunizing civilians against attack); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 13, 8 June 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II] (presumptively immunizing civilians against attack); Protocol Additional the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Commentary of 1987, ¶ 4789, 8 June 1977, 1125 U.N.T.S. 609 [hereinafter Commentary on Additional Protocol II] ("Those who belong to armed forces or armed groups may be attacked at any time. If a civilian participates directly in hostilities, it is clear that he will not enjoy any protection against attacks for as long as his participation lasts"); Corn & Jenks, *supra* note 44, at 333–34 (2011).

[48] Additional Protocol I, *supra* note 16, art. 43(2); *see also* Convention (III) relative to the Treatment of Prisoners of War, Geneva, arts. 4(A) (1)–(3), (6), 12 August 1949, 6 U.S.T. 3316 [hereinafter Geneva Convention III] (identifying the categories of individuals entitled to POW status who are definitionally not civilians—and, therefore, are combatants—under Additional Protocol I, art. 50(1)).

[49] Additional Protocol I, *supra* note 16, art. 50(1).

[50] *E.g.*, Tadić, IT-94-1 ¶ 68.

[51] Additional Protocol I, *supra* note 16, art. 41(1) ("A person who is recognized or who, in the circumstances, should be recognized to be hors de combat shall not be made the object of attack.").

[52] Additional Protocol I, *supra* note 16, art. 51(3) ("Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.").

[53] Additional Protocol I, *supra* note 16, art. 52 (1).

their nature is to contribute to hostilities. In contrast, civilians—who are not subordinate to the command of the armed forces—are presumptively not a threat, their nature is to not participate in hostilities, and indeed they are expected to refrain from such participation.[54]

Although status under IHL is fixed, the rights, protections, and liabilities of individuals or objects in either the civilian/civilian object or combatant/military objective categories may be perturbed by conduct.[55] Thus, civilians forfeit their immunity from direct attack under IHL and targeting law when they directly participate in hostilities.[56] Roughly analogously, military objectives also include those "objects which by their . . . location . . . or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[57] On the other hand, combatants may engage in conduct that results in their forfeiture of combatant immunity or prisoner-of-war status.[58]

IHL is increasingly understood to authorize the status-like targeting of members of an OAG as if they were combatants.[59] The logic of this approach is compelling: like soldiers, OAG members are viewed as being employed, so to speak, in hostilities; as full-time fighters, they might be regarded as presumptive threats, continuously participating in or available to participate in hostilities[60] at the OAG's direction, regardless of their actual conduct at any given time; and, like members of State armed forces, they are continuously exposed to the lethal liabilities of armed conflict. Significantly, however, OAG members lack public sanction to participate in hostilities. Consequently, unlike members of State armed forces in IACs, they are not combatants *stricto senso* and do not enjoy the rights and privileges—like belligerent privilege—that attach to combatants in an IAC. Thus, OAG members may be continuously targeted, but they do not enjoy prisoner-of-war status upon capture, and they may be prosecuted under ordinary, domestic criminal law for their participation in hostilities during the course of an armed conflict.

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[54] *See* Geoffrey S. Corn et al., *Belligerent Targeting and the Invalidity of a Least Harmful Means Rule*, 89 INT'L L. STUD. 536, 550 (2013) ("[IHL] permits attack, or deliberate targeting of individuals, based not on a manifestation of actual threat, but instead based on the presumptive threat derived from the determination of enemy belligerent status."); YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 41–42 (3d ed. 2016); Additional Protocol I, *supra* note 16, art. 52(3).

[55] Corn et al., *supra* note 54, at 546–47.

[56] Additional Protocol I, *supra* note 16, art. 50(3).

[57] Additional Protocol I, *supra* note 16, art. 52(2).

[58] *E.g.*, *Ex parte Quirin*, 317 U.S. 1, 35 (1942).

[59] *E.g.*, Commentary on Additional Protocol II, *supra* note 47, ¶ 4789 ("Those who belong to armed forces or to organized armed groups may be attacked at any time."); NILS MELZER, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 71–72 (2009).

[60] *E.g.*, CHRIS JENKS ET AL., THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 165 (2012).

While these rules "are relatively straightforward in the abstract[,] their application on the battlefield can be complex."[61] For example, how does a soldier ascertain whether an individual is a member of an opposing armed force and is, therefore, both a presumptive threat and a lawful target? In an IAC, IHL defines combatants as members of an armed force belonging to a party. So, IHL predicates combatant status (aside from situations of *levee en masse*) on the quality of "belonging to," or subordination to, a party to an armed conflict and to an individual's incorporation in a military hierarchy.[62] But it relies on the domestic law of each State to establish the specific parameters by which individuals qualify as members of a State's armed forces.[63] In that way, domestic law provides the ultimate *legal* solution to ascertaining membership in a State armed force and, consequently, combatant status. But an enemy party's domestic regulations are of little practical use to an opposing armed force in the field—and of even less use to a soldier staring down the barrel of their rifle, facing the grave choice to kill or not. Thus, parties to armed conflicts and their members rely on a practical heuristic—informed by IHL—to fulfill their mutual obligations under the principle of distinction and to facilitate the lawful taking of life: soldiers wear uniforms or fixed, distinctive signs that are recognizable at a distance.[64] The utility of that heuristic in IACs is bolstered by IHL's incentive structure, which both promotes the wearing of uniforms (or fixed distinctive signs) and sanctions the failure to do so.

In contrast, despite the legal and lethal significance of OAG membership, IHL neither defines that term nor parameterizes the quality of being a member.[65] The absence of a controlling legal definition of "membership" in IHL means that parties are afforded substantial discretion to determine for

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[61] *E.g.*, Michael Schmitt, *Israel-Hamas 2024 Symposium: The Gospel, Lavender, and the Law of Armed Conflict*, LIEBER INST. W. POINT (June 28, 2024), https://lieber.westpoint.edu/gospel-lavender-law-armed-conflict [https://perma.cc/TCC9-K67U]; Boothby, *supra* note 5, at 151 ("All commentators will agree that a civilian who fires a weapon as part of armed conflict hostilities is taking a direct part therein. It is also generally accepted that tending to the commanding officer's garden on an air base does not amount to DPH. There are, however, numerous kinds of activity between these clear extremes where there are differences of view.").

[62] *See* Commentary on Additional Protocol I, *supra* note 35, ¶¶ 1672, 1676–78.

[63] *See* Int'l Comm. of the Red Cross, *Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, Commentary of 2020* at ¶ 977 (2020), https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-1/commentary/2020 [https://perma.cc/3ZEZ-DAMV] (last visited Feb. 27, 2026, at 18:33 CT) ("The requirements for membership in the armed forces are not prescribed in international law. Rather, it is a matter of domestic regulation.").

[64] *See* Geneva Convention III, *supra* note 48, art. 4(A)(2) (establishing prisoner-of-war status for "[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict . . . provided that [they] . . . hav[e] a fixed distinctive sign recognizable at a distance . . . ."); Regulations Annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land, art. 1 ("The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps [that] . . . have a fixed distinctive emblem recognizable at a distance.").

[65] According to the ICRC, the absence of a precise definition of OAG membership may reflect the disparate enrollment practices of OAGs. In contrast to State armed forces, "[m]embership in [OAGs] 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; and it is not consistently expressed through uniforms, fixed distinctive signs, or identification cards." MELZER, *supra* note 59, at 32–33.

themselves who among the population of potential enemies is a "member" of an OAG, to define for themselves the parameters of OAG "membership," and to establish the quantum of evidence of membership sufficient to render someone targetable. And, while IHL imposes an obligation on OAGs (and their members) to distinguish themselves, it does not replicate for OAGs the incentive structure that tends to promote State armed forces' donning of uniforms or fixed, distinctive signs—indicia of membership that facilitate targeting. Moreover, it is widely assumed that most OAGs possess "informal and clandestine structures" with "elastic [approaches to] membership [that] render it particularly difficult to distinguish between a non-State party to the conflict and its armed forces."[66] As a result, both legally and practically, the resolution of OAG membership for targeting purposes may often lie in the eye of an attacking force.

B. *The ICRC's Effort to Define Membership in an Organized Armed Group*

More than fifteen years ago, in an effort to respond comprehensively to the legal and practical difficulties of identifying OAG members, as well as to the assumed wide-ranging membership practices of OAGs, the ICRC proposed a test for targetable OAG membership focused on the function a given individual performs for the OAG. The ICRC's continuous combat function ("CCF") test assigns OAG membership when an individual assumes a "continuous combat function" that "corresponds to . . . the conduct of hostilities on behalf of a non-State party to an armed conflict"[67] and that involves their "direct participation in hostilities."[68] This test distinguishes between individuals assuming a continuous combat function and those "civilians who directly participate in hostilities on a merely spontaneous, sporadic, or unorganized basis, or who assume exclusively political, administrative or other non-combat functions [on behalf of the non-State party]."[69] For the ICRC, direct participation in hostilities, whether for CCF or DPH purposes, is determined on the basis that a *specific act*[70] satisfies a cumulative, three-part test that considers the effect of the act on the adversary, the direct causal link between the act and harm to the adversary, and the act's belligerent nexus.[71] So, according to the ICRC, a continuously targetable member of an OAG is one who "joins" the group by performing a *function* that involves acts that directly cause *inter alia* adverse effects to the

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[66] *Id.* at 33.

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] MELZER, *supra* note 59, at 43–45.

[71] *Id.* at 46–64 ("In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria: 1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).").

military operations or capacity of the enemy in support of the member's group. But "recruiters, trainers, financiers and propagandists,"[72] individuals who "purchas[e], smuggl[e], manufactur[e] and maintain[] weapons and other equipment outside specific military operations,"[73] and individuals who "collect[] intelligence other than of a tactical nature"[74] on behalf of a non-state party—all of whom "may continuously contribute to the general war effort of a non-State party"—without actually engaging in hostilities, as the ICRC defines it, are definitionally not targetable members of an OAG.[75]

Notwithstanding its effort to parameterize OAG membership, the ICRC's proposal remains controversial. It has been criticized for being underinclusive, as compared to membership in a State armed force, by excluding from OAG membership cooks and other administrative functions despite the continuous targetability and combatant status of individuals occupying similar jobs in a State's armed force.[76] This line drawing based on the degree of effective contribution to hostilities disregards the analogical rationale—likening OAG members to members of State armed forces—that justifies the continuous targeting of OAG members in the first place. It also disregards the quality of subordination necessary to both combatant status and a group's characterization as an OAG under IHL. Moreover, the ICRC's CCF test incorporates the concept of DPH, thereby incorporating both the uncertainty concerning the degree of participation necessary to constitute direct participation embedded in DPH[77] and its corresponding interpretive space.

Without a controlling definition of OAG membership, parties to an armed conflict enjoy substantial interpretive space to decide for themselves what degree and type of conduct separates peaceable civilians, who may not be targeted directly, from DPHing civilians, who may be targeted only while DPHing, and from OAG members who—although not combatants—may be targeted continuously. In combination with the uncertainty over what conduct amounts to DPH, the uncertainty over OAG membership tends to place a large set of civilians at risk of lethal action that depends largely on the legal interpretations made by a State engaged in an armed conflict with an OAG.

III. UNCERTAIN BELLIGERENTS IN AMERICAN LAW AND PRACTICE

The ICRC's CCF test is not the only, nor even the first, attempt to fill IHL's interpretive gaps when it comes to targeting members of OAGs. For the first 225 years of its history, the United States employed a stable approach to ascertaining targetability while engaging in hostilities. Essentially, the United

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[72] *Id.* at 34.

[73] *Id.* at 35.

[74] *Id.*

[75] MELZER, *supra* note 59, at 34–35, 46.

[76] Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 INT'L L. & POL. 641, 676 (2010).

[77] *See* Boothby, *supra* note 5, at 151.

States discriminated between presumptively non-targetable civilians, temporarily targetable civilians directly participating in hostilities, and continuously targetable individuals based on the existence or not of an agency relationship between an individual and a public or quasi-public authority. Such an agency relationship would be established by the individuals' affiliation with, and authorization to participate in hostilities by, a public or quasi-public authority. Those who were affiliated with and authorized to participate in hostilities by a public or quasi-public authority were treated as individual belligerents; those who did not were treated as civilians or civilians DPHing, depending on their conduct. Under this approach, the rights, duties, privileges, and liabilities of armed conflict ran with an individual's relationship to the armed forces of public or quasi-public authorities. Significantly, the United States applied this approach to hostilities with State actors, as well as non-State actors. So, when a farmer enlisted in the armed forces of the so-called Confederate States of America ("CSA"), he was entitled to participate in lawful armed violence against the United States. Similarly, when a member of a Native American Indian tribe in enmity with the United States attacked U.S. cavalry, he was an enemy soldier who violated no law in killing U.S. soldiers. On the other hand, when a ship without a letter of marque attacked vessels on the high seas, its crew were pirates; a bushwhacker in Kansas was a brigand and marauder; and a member of a tribe in amity with the United States who killed U.S. soldiers, a common murderer. Throughout this period, the U.S. approach to "individual belligerency" was generally reflected in *inter alia* the proceedings of state, federal, and military tribunals, as well as treatises and manuals on the law of land warfare.[78]

However, after the September 11, 2001 terrorist attacks, the United States discarded its historical approach and adopted a more liberal targeting framework that assigned the liabilities of combatants during armed conflict—but not their rights and privileges—to individuals based on whether they were a "part of" or "substantially supported" an OAG.[79] These criteria—embedded in domestic statutes, explicated in judicial proceedings and authoritative statements of U.S. law, and reflected in American battlefield practice—substantially expanded the population of erstwhile civilians exposed to continuous targeting and its consequences.

Both the United States' pre- and post-9/11 frameworks are at least facially defensible given the indeterminate nature of OAG membership under IHL.

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[78] *See* Benjamin R. Farley & James G. Connell, III, Pirates and Patriots: The American Approach to Battlefield Legitimacy from the Founding to Today (manuscript on file with the author).

[79] *See, e.g.*, DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 4.18.4.2 (2023) ("In addition to being part of or substantially supporting a hostile, non-State armed group, other hostile acts can make a person liable to treatment in one or more respects as an unprivileged belligerent under the law of war."); Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (2011) (authorizing the detention of a "person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners"); *see also* 10 U.S.C. § 948a(7) (defining "unprivileged enemy belligerent" as "an individual (other than a privileged belligerent) who . . . has purposefully and materially supported hostilities against the United States or its coalition partners; . . . [or] was part of al Qaeda at the time of the alleged offense under this chapter").

Contrasting the two frameworks, however, points to the inadequacy of IHL's current approach to OAG membership and suggests its deleterious consequences for the protection of civilians—consequences likely to be magnified should AI-powered LAWS be deployed to search for and engage human targets without operator intercession.

A. *The U.S. Approach to Individual Belligerency Before 9/11*

The U.S. individual belligerency framework emphasized formal subordination to an enemy armed force over conduct. It assigned eligibility for individual belligerent status on the basis of (1) affiliation with an enemy; and (2) authorization by a public or quasi-public authority to engage in hostilities. Perfection of individual belligerent status depended on compliance with additional rules, the application of which varied over time and on the nature of the enemy. If all relevant conditions were satisfied, then the individual in question was presumptively a belligerent, entitled to the rights, privileges, protections, and liabilities of the laws of war as they stood at that time. During war,[80] an individual who was not affiliated with or was not authorized to act by a public or quasi-public authority was a civilian. Civilians who actually engaged in hostilities were subject to attack during those hostilities and regarded as criminals if captured. In contrast, an unprivileged belligerent was an erstwhile belligerent (or presumptive belligerent) who engaged in conduct, like sabotage or discarding their uniform to pass through enemy lines, that violated the laws of war in such a manner as to forfeit their belligerent privilege.[81]

The traditional American doctrine of individual belligerency developed during a period in which the international laws of war reached only hostilities between States, non-State actors competent to engage in warfare under international law (like Native American Indian tribes), or recognized belligerents. There was, during most of this period, no such thing as a "non-international armed conflict." States' use of armed force against non-State actors who were not formally, tacitly, or impliedly recognized belligerents comprised armed law enforcement within the framework of States' *sovereign* rights.[82] When States resorted to their *belligerent* rights—by, for example, imposing a blockade[83]—to meet the challenge posed by a non-State actor, such a State impliedly recognized the belligerency of the non-State actor and rendered it a quasi-public authority.

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[80] This part uses the terminology "war" and "laws of war" because those are the terms used in U.S. law and practice during the period in which the United States' doctrine of individual belligerency was developed. "International humanitarian law" and "armed conflict" were not widely adopted in international (and U.S. domestic law) until after World War II, and some U.S. sources continue to use the ancient terminology. As a general matter, "war" referred to either war in the technical or material sense between States, or between a State and an OAG that enjoyed explicit, implicit, or tacit recognition of belligerency; and the "laws of war" referred to the body of law that governs, *inter alia*, the conduct of hostilities between States or between a State and recognized belligerent.

[81] *Ex parte Quirin*, 317 U.S. 1 (1942).

[82] *See Rose v. Himley*, 8 U.S. 241, 272–81 (1808).

[83] *Prize Cases*, 67 U.S. 635, 666–69 (1862); *cf. Rose v. Himely*, 8 U.S. 241, 279 (1808) ("The rights of war may be exercised on the high seas, because war is carried on upon the high seas; but the pacific rights of sovereignty must be exercised within the territory of the sovereign.").

Bona fide members of an enemy armed force were regarded as individual belligerents. That is not to suggest that all hostile individuals encountered on or near the battlefield during this period were considered soldiers. Indeed, the 19th Century embraced a rich, if not always settled taxonomy of armed actors.[84] These categories of armed actors fell along a rough spectrum based on their affiliation with and authorization to participate in hostilities by a public or quasi-public authority. Toward one end of that spectrum, individual belligerents included: soldiers, who were members of the armed forces of State or recognized belligerent; volunteers, militia, partisans, and free corps, who were authorized by the State or recognized belligerent to participate in hostilities[85]; and privateers, who were otherwise private actors authorized by their sovereign to engage in depredations against enemy ships on the high seas.[86] All of these enjoyed the privileges associated with lawful participation in hostilities.[87] In contrast, those categorized in law as brigands, marauders, highwaymen, armed prowlers, *francs tireur*, or pirates were ordinary criminals[88]—and *not* belligerents—because they lacked either affiliation with or authorization to engage in hostilities by a public or quasi-public authority.[89] And, because they

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[84] *See, e.g.*, FRANCIS LIEBER, GUERRILLA PARTIES 9 (1862) (identifying a variety of terms used to describe disparate armed actors who may or may not enjoy belligerent privilege or criminal opprobrium).

[85] *E.g.*, *id.* at 11 (defining "partisans" as "a corps whose object is to injure the enemy by action separate from that of his own army . . . act[ing] chiefly upon the enemy's lines of connection and communication . . . [b]ut part and parcel of the army, and, as such, considered entitled to the privileges of the laws of war"); *id.* at 11–12 ("Free-corps . . . are troops not belonging to the regular army, consisting of volunteers, generally raised by individuals authorized to do so by the government, used for petty war . . . the men composing them were entitled to the benefits of the law of war, and generally received them when taken prisoner.").

[86] *E.g.*, *The Amiable Nancy*, 16 U.S. 546, 559 (1818) (acknowledging that a government may "choose to authorize the employment of privateers in its public wars"); DINSTEIN, *supra* note 54, at 43 ("Privateers . . . were privately owned vessels that were officially authorized by a Belligerent Government . . . to maraud enemy shipping in time of war; as such, privateering amounted to a 'lawful form of pillage.'"); EMER DE VATTEL, THE LAW OF NATIONS 614 (Bela Kapossy & Richard Whatmore, eds., 2008) ("Persons fitting out private ships to cruise against the enemy acquire the property of whatever captures they make, as a compensation for their disbursements, and for the risques they run but they acquire it by grant from the sovereign, who issues out commissions to them."); *see also* U.S. CONST., art. I, § 8, cl. 11 ("Congress shall have Power . . . To . . . grant Letters of Marque."). Indeed, sovereign authorization distinguished privateers from pirates, as a matter of law. LIEBER, *supra* note 84, at 9 ("From the freebooter at sea arose the privateer, for the privateer is a *commissioned* freebooter, or a freebooter taken into the service of his government by the letter of marque.").

[87] LIEBER, *supra* note 84, at 11.

[88] *Cf. id.* at 5–6 ("The term Guerrilla is often inaccurately used, and its application has been particularly confused at the present time. . . . The subject is substantially a new topic in the law of war, and it is besides exposed to the mischievous process, so often employed in our day, of throwing the mantle of a novel term around an old and well-known offence, in the expectation that a legalizing effect will result . . . . We find that self-constituted bands in the South, who destroy the cotton stored by their own neighbors, are styled in the journals of the North as well as those in the South, Guerrillas; while in truth they are, according to the common law—not of war only, but that of every society—simply armed robbers.").

[89] *E.g.*, *id.* at 7–8; *id.* at 9–10 (explaining that freebooters, wherever they may be captured, is exposed to a death sentence because "freebooters are nothing less than armed robbers of the most dangerous

were not belligerents, they were entitled to neither belligerent privilege nor prisoner-of-war status or treatment upon capture.

Thus, in his pamphlet on guerrilla parties, Francis Lieber emphasized that guerrillas lacked belligerent character under the laws of war because of their irregularity—not in the tactics they employed but in their "origin, [as] either self-constituted or constituted by the call of a single individual, not according to the general law of levy, conscription, or volunteering. . . ."[90] Guerrilla parties were also irregular in their "disconnection with the army, as to its pay, provision, and movements,"[91] and in their impermanency, being "dismissed and called again together at any time."[92] In sum, guerrilla parties *were not* agents of a party to an armed conflict. Their impermanence and disconnection from a party, and the absence of public or quasi-public sanction characterized guerrillas, deprived them of belligerent character, and deprived their members of belligerent status.

Likewise, in Lieber's famed Code, he distinguished "partisans" as "soldiers armed and wearing the uniform of their army, but belonging to a corps which acts detached from the main body for the purpose of making inroads into the territory occupied by the enemy,"[93] from "[m]en, or squads of men, who commit hostilities, . . . without commission, without being part and portion of the organized hostile army, and without sharing continuously in the war."[94] While partisans, "[i]f captured . . . are entitled to all the privileges of the prisoner of war,"[95] such other "men, or squads of men," "are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates."[96] Thus, affiliation with and authorization to participate in hostilities by a public or quasi-public authority distinguished lawful belligerents from non-belligerent criminals.

This framework for discerning between individual belligerents and non-belligerents for purposes of assigning the rights, duties, and liabilities of armed conflict also found expression in decisions by the U.S. Supreme Court. Consider, for example, the Court's decisions in *Ex parte Quirin*[97] and *Ex parte Milligan*.[98] Comparing these two cases, separated by nearly a century, illustrates the consistency of the United States' historical approach to individual belligerency. Doing so also illustrates the decisive quality of affiliation with and authorization

and criminal type, banded together for purposes of booty and common protection"); *id.* at 10 (defining "brigand" as a soldier who "assails the enemy without or against the authority of his own government").

90 *Id.* at 7–8.

91 *Id.* at 8.

92 LIEBER, *supra* note 84, at 8.

93 FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD art. 81 (1863) [hereinafter Lieber Code]

94 *Id.* art. 82.

95 *Id.* art. 81.

96 *Id.* art. 82.

97 *Ex parte Quirin*, 317 U.S. 1 (1942).

98 *Ex parte Milligan*, 71 U.S. 2 (1866).

to participate in hostilities by a public or quasi-public authority on an individual's belligerent character. Each case required the Supreme Court to determine whether the individuals challenging the jurisdiction of a military commission were belligerents and, therefore, amenable to trial by military commission for violations of the laws of war. In each case, the Court answered the question of the petitioners' status by determining whether they were affiliated with and authorized to participate in hostilities by an enemy public or quasi-public authority. If they were so affiliated and authorized, they were belligerents amenable to trial by military commission; otherwise, they were non-belligerents beyond a law-of-war military commission's reach. Thus, the Court found the petitioners in *Quirin* to be subject to trial by military commission because evidence demonstrated both affiliation with and authorization to participate in hostilities by Germany. Milligan, on the other hand, was not susceptible to trial by military commission because he was neither affiliated with the so-called CSA nor authorized by it to participate in hostilities.

In *Quirin*, the Court defined individual enemy belligerents as "*agents* of enemy armies,"[99] who both "associate themselves with military arm of the enemy government"[100] and act hostilely "with [its] aid, guidance and direction."[101] Under the Court's analysis, the *Quirin* petitioners' affiliation with and authorization to participate in hostilities by Germany's armed forces were established by the training, equipage, pay, and transportation that the German armed forces had provided.[102] Separately, their unlawful character was established by their conduct of "passing [U.S.] boundaries [to destroy war industries and supplies] without uniform or other emblem signifying their

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[99] *Quirin*, 317 U.S. at 37 (emphasis added).

[100] *Id.* at 37–38.

[101] *Id.*

[102] *Id.* at 21–22. On July 7, 1942, President Roosevelt issued a proclamation defining enemy belligerents by reference to their affiliation with and authorization to participate in hostilities by an enemy public authority. Proclamation 2561 Denying Certain Enemies Access to the Courts of the United States, 7 Fed. Reg. 5101 (July 7, 1942) ("[A]ll persons . . . who give obedience to or act under the direction of any [nation at war with the United States], and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals."). In U.S. practice, military commissions were military tribunals of limited personal and subject-matter jurisdiction. While military commissions could be established as occupation courts or tribunals for use during martial law, the type of military commission referenced by the President's July 7, 1942 proclamation were limited in personal jurisdiction to enemy belligerents. *See* Articles of War, 41 Stat. 790, art. 15 (1920) ("The provisions of these articles conferring jurisdiction upon courts martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that, by statute or by the law of war may be triable by such military commissions . . . or other military tribunals."); *see also Quirin*, 317 U.S. at 30–31 ("By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations, and also between those who are lawful and unlawful combatants."). Thus, in specifying the reach of the military commissions established by that proclamation, the President articulated the traditional definition of individual belligerency, which turned on an individual's relationship to an enemy public authority.

belligerent status, or by discarding that means of identification after entry."[103] Consequently, they became "unlawful belligerents subject to trial and punishment [by military commission]."[104]

In contrast, the *Milligan* Court rejected the amenability of a hostile individual to trial by military commission because he was neither affiliated with nor authorized to participate in hostilities by a belligerent authority. Lambdin P. Milligan was allegedly a participant in "a secret political organization, armed to oppose the laws, and [that] seeks by stealthy means to introduce the enemies of the country into peaceful communities, there to light the torch of civil war and thus overthrow the power of the United States."[105] While that secret, armed political organization was sympathetic to the CSA, neither it nor Milligan was affiliated with or authorized to act by the CSA. As the *Quirin* Court summarized it, "Milligan, not being a part of or associated with the armed forces of the enemy, was a nonbelligerent, not subject to the law of war . . . ."[106] Had he been an enemy belligerent, his alleged hostile acts could have been "legal acts of hostility against the government,"[107] entitling him to prisoner-of-war status, and "the immunities attaching to the character of a prisoner of war."[108] But, as he was not an enemy belligerent, he was not a prisoner of war following his arrest, and he was therefore excluded from the jurisdiction of a military commission.[109]

Throughout the 19th and early 20th Centuries, other U.S. tribunals approached the question of an individual's belligerent status in a similar manner. Military commissions operating during the United States' counterinsurgency campaign in the Philippines from 1899 through 1902[110] distinguished between belligerents and non-belligerents on the basis of their affiliation with and authorization to act by the revolutionary government of the

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[103] *Quirin*, 317 U.S. at 37.

[104] *Id.* at 38 ("It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.").

[105] *Ex parte Milligan*, 71 U.S. 2, 130 (1866).

[106] *Id.*

[107] *Id.* at 131.

[108] *Id.*

[109] *Id.* ("It is not easy to see how he can be treated as a prisoner of war when he lived in Indiana for the past twenty years, was arrested there, and had not been, during the late troubles, a resident of any of the states in rebellion."). Milligan was also excluded from the jurisdiction of the other species of military commission because Indiana was not under martial law, and because he was not a member of the U.S. armed forces. *See id.* at 107, 121–27.

[110] The Philippine Insurrection grew out of the Spanish-American War, during which Filipino nationalists declared their independence from Spain. Lester Nurick & Roger W. Barrett, *Legality of Guerrilla Forces Under the Laws of War,* 40 AM. J. INT'L L. 563, 574–75 (1946). Following the United States' defeat of Spain, the Spanish Empire ceded the Philippines to the United States. *See* A Treaty of Peace between the United States and Spain, Spain-U.S., Dec. 10, 1898, 30 Stat. 1754. On September 29, 1898, a revolutionary assembly ratified Philippine independence and adopted a constitution, under which the Philippines were declared a republic on January 23, 1899. Nurick & Barrett, *supra* note 110, at 574–75 (Philippine President Aguinaldo declared war on the United States on February 4, 1899); Warner, Barnes & Co. v. United States, 40 Ct. Cl. 1, 8 (1904).

Philippines, a recognized belligerent.[111] Military commissions regarded Filipino fighters "who were regular members of the insurgent army recognized by the Philippine Government and generally complied with the four conditions later expressed in Hague Regulation I" as belligerents.[112] Those who were not or who did not were regarded as non-belligerents and criminals.[113] At the time, General MacArthur explained, harkening back to Lieber, that "[m]en who participate in hostilities without being part of a regularly organized force, and without sharing continuously in its operations, but who do so with intermittent returns to their homes and avocations, divest themselves of the character of soldiers and, if captured, are not entitled to the privileges of prisoners of war."[114]

Similarly, when faced with the conduct of individual Native American Indians,[115] American courts—including the Supreme Court, the U.S. Court of Claims, and district courts—repeatedly relied on an individual's association or not with a tribe in enmity—at war—with the United States to distinguish between belligerents and non-belligerents, between public and private violence. While the status of Native American Indian tribes shifted over time under U.S. law, they were generally regarded as public authorities, competent to engage in war for law-of-war purposes.[116] Native American Indian fighters who belonged

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[111] *Warner, Barnes & Co. v. United States*, 40 Ct. Cl. 1, 9 (1904) (Hostilities between those forces and the United States resulted "in a state of warfare throughout the Philippine Islands . . . which called into action in said islands the troops of the United States to the total number of 126,468 between February 4, 1899, and July 4, 1902."); *id.* at 29 ("Important belligerent rights were conceded to the insurgent forces, and the laws of war were applied to intercourse between them and the United States military forces."); *id.* at 4-5 (The President ordered the occupation and possession of Philippine ports and the collection of tariffs and duties "by virtue of his authority as Commander in Chief of the Army and Navy of the United States during the continuance of the Philippine insurrection, as a war measure made necessary by the state of war existing in said islands as a result of said insurrection."); *id.* at 13 (recording the United States' recognition of a "state of war" with the Filipino insurrectionists).

[112] Nurick & Barrett, *supra* note 110, at 576.

[113] *Id.*

[114] Douglas MacArthur, *General MacArthur's Proclamation*, QUEENSL. TIMES (IPSWICH, QLD.: 1909–1954), Oct. 24, 1944, at 3.

[115] It is important to acknowledge that not all laws of war applied to conflicts between the United States and Native American Indian tribes as a result of racial discrimination and cultural chauvenism embedded in the laws of war at the time. *E.g.*, The Modoc Indian Prisoners,14 Op. Att'ys Gen. 249, 252–53 (1873) ("All the laws and customs of civilized warfare may not be applicable to an armed conflict with the Indian tribes upon our western frontier; but the circumstances attending the assassination of Canby and Thomas are such as to make their murder as much a violation of the laws of savage as of civilized warfare, and the Indians concerned in it fully understood the baseness and treachery of their act."). Nevertheless, when engaged in armed conflict with the United States, Native American Indian tribes were expected to abide by the subset of the laws and usages of war that extended to so-called savage warfare. *Id.* And the United States—in theory and practice, if not universally—both acknowledged their belligerent rights and extended to them the protections afforded by the laws of war.

[116] *E.g.*, Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831); Worcester v. Georgia, 31 U.S. 515, 583 (1832) ("We have recognised in them [Native American Indian Tribes] the right to make war. No one has ever supposed that the Indians could commit treason against the United States. We have punished them for their violation of treaties; but we have inflicted the punishment on them as a nation, and not on individual offenders among them as traitors."); State v. Gut, 13 Minn. 341, 357

to an acknowledged "hostile band" were regarded as privileged belligerents[117] unless they forfeited that privilege by engaging in conduct that violated the laws of war applicable to such hostilities.[118] Their relationship with a tribe or band in enmity with the United States made them enemies; their role as fighters made them belligerents. On the other hand, when a tribe and the United States were at peace, members of the tribe who perpetrated violent acts against the United States or its citizens were regarded as ordinary criminals, both beyond the reach of a military commission's jurisdiction[119] and deprived of immunity for lawful violence perpetrated in the course of an armed conflict. Indeed, federal courts regarded the failure of the United States to treat members of tribes or bands as

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(Minn. 1868) (referring to a Sioux man as an enemy alien at war with the United States); Georgia and the Treaty of Indian Spring, 2 Op. Att'ys Gen. 110, 133 (1828) ("Like all other independent nations, they have the absolute power of war and peace."); The Modoc Indian Prisoners, 14 Op. Att'ys Gen. 249, 253 (1873) ("It is difficult to define exactly the relations of the Indian tribes to the United States; but as they have been recognized as independent communities for treaty-making purposes, and as they frequently carry on organized and protracted wars, they may properly, as it seems to me, be held subject to those rules of warfare which make a negotiation for peace after hostilities possible, and which make perfidy like that in question punishable by military authority."); Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 74–76 (1990) ("When groups of Indians fought in what the Americans perceived as a unified force -- when the fighting was widespread and appeared to be motivated by a group decision -- neither the military nor the civilian authorities of the United States formally held enemy individuals responsible for ordinary acts of destruction committed as part of the fighting."). *But see* DEP'T OF WAR, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 411 (William Winthrop ed., 1901) ("Active hostilities with Indians do not constitute a state of foreign war, the Indian tribes, even where distinct political communities, being subject to the sovereignty of the United States. Warfare inaugurated by Indians is thus a species of domestic rebellion, but it is so far assimilated to foreign war that during its pendency and on its theatre the laws and usages which govern and apply to persons during the existence of a foreign war are to be recognized as in general prevailing and operative.").

[117] For example, while "Captain Jack" of the Modoc Band was tried by military commission for murder in violation of the laws of war, The Modoc Indian Prisoners, 14 Op. Att'y Gen. 249, 250-53 (1873), the rest of the Modoc fighters captured during the Modoc War were accorded prisoner-of-war status, Telegram from Adjutant General Townsend, Oct. 7, 1873, reprinted in War Department, Official Copies of Correspondence Relative to the War with Modoc Indians in 1872–73, 101 (1874) ("It is understood the orders to send all the Modocs to Fort D. A. Russell, as prisoners of war, given the 13th September, 1873, will be executed by General Schofield . . . ."). Both the trial of Captain Jack by military commission and the prisoner-of-war status for the other Modoc indicate that the Modoc were regarded as individual belligerents during the 1872–1873 Modoc War. Winthrop, Military Law, at 838 n. 98; *See* DEP'T OF WAR, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE OF THE ARMY 466–67 (1912).

[118] *E.g.*, The Modoc Indian Prisoners, 14 Op. Att'ys Gen. 249, 250-53 (1873); DEP'T OF WAR, *supra* note 116, at 1071–72, 1072 n.1 (1912) ("[T]he principal offense of the Modoc Indians (tried by military commission in July, 1873), which, as a treacherous killing of an enemy during a truce, was charged as 'murder in violation of the laws of war.'").

[119] *E.g.*, DEP'T OF WAR, *supra* note 116, at 466–67 ("[A] military commission could not legally be convened for the trial of Indians, for violations of the laws of war, on account of thefts, robberies, and murders committed by them upon incursions made into the State of Texas where said Indians . . . were mere raiders, with whose tribe, as such, the United States was not engaged in war, and whose crimes, therefore, were not committed *flagrante bello*.").

prisoners of war as evidence of the absence of armed conflict between the United States and the tribe or band concerned.[120]

In addition to judicial proceedings, the American doctrine of individual belligerency, emphasizing an individual's affiliation with and authorization to participate in hostilities by an enemy public or quasi-public authority, is also consistently reflected in U.S. law-of-war manuals and similar sources. Even before the United States adopted the Lieber Code in 1863, U.S. efforts to resolve the status of individuals encountered on the American Civil War's battlefields reflected the U.S. doctrine of individual belligerency. They assigned rights, duties, and liabilities under the laws of war to individuals on the basis of their affiliation with and authorization by the CSA. For example, on January 1, 1862, Major General H.W. Halleck issued General Order No. 1, Department of the Missouri, which established and defined the jurisdiction of military commissions within that Department.[121] Halleck's order begins from the premise that although the armed forces of the CSA were made up of "rebels and traitors to the Government [of the United States]," the United States' recognition of the CSA's belligerency entitled its armed forces to belligerent status.[122] The order then distinguished among hostile actors the U.S. Army might encounter on the battlefield based on their affiliation or not with, and authorization to participate in hostilities or not by, the armed forces of an enemy public or quasi-public authority. According to Halleck,

> [T]he code of war gives certain exemptions to a soldier regularly in the military service of an enemy it is a well-established principle that insurgents not militarily organized under the laws of the State . . . are not entitled to such exemptions [because] such men are not legitimately in arms and the military name and garb which they have assumed cannot give a military exemption to the crimes which they may commit.[123]

Halleck further underscored the significance of public or quasi-public authorization to engage in hostilities by contrasting "soldiers regularly in the military service of an enemy" with "insurgents, not military organized . . .

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[120] *E.g.*, Salois v. United States, 33 Ct. Cl. 326, 333 (1898) ("If the Government had elected to regard those individuals of a tribe who had joined Sitting Bull as the tribe, and had treated those who remained on the reservation as prisoners of war, and had seized the lands of the Indians in the Black Hills as conquered territory, the courts undoubtedly would be concluded by the executive action and be obliged to hold that the defendants were not in amity."); *cf. Ex parte Bi-a-Lil-Le*, 12 Ariz. 150, 153 (1909) (noting that confinement by the Department of War at the behest of the Department of Interior in combination with punitive conditions rendered detention inconsistent with wartime framework and unjustified by a supposed state of war).

[121] H.R. DOC NO. 55-65, at 247 (1894).

[122] *Id.* at 248–49 ("The fact that those persons who are now carrying on hostilities against the lawful authorities of the United States are rebels and traitors to the Government does not deprive them of any of the rights of war, so far as the military authorities are concerned. In our intercourse with the duly-authorized forces of the so-called Confederate States and in the treatment of prisoners of war taken from such forces we must be governed by the usages and customs of war in like cases.").

[123] *Id.* at 249.

predatory partisans, and guerrilla bands,"[124] to which he assigned the legal status of "freebooters and banditti."[125] Although Lieber would disagree with the particulars of his terminology,[126] Halleck drew a line between those authorized to engage in hostilities (soldiers) and unauthorized or self-constituted forces (guerrillas) consistent with Lieber's contemporaneous pamphlet on guerilla warfare.[127] Those authorized to engage in hostilities by even a rebel government, once recognized as a belligerent, are exempt from prosecution or summary execution, and are entitled to prisoner of war status; those participants in unauthorized or self-constituted forces were subject to "the same punishment which was imposed upon guerrilla bands by Napoleon in Spain, and by Scott in Mexico."[128]

One year later, the U.S. Army adopted the Lieber Code as General Orders No. 100. It specifically tied individual belligerent status to both affiliation with and authorization by a public or quasi-public authority. According to Lieber, "[s]o soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent."[129] Based on the United States' adoption and application of it to that civil war, it is clear that "sovereign government" here included both recognized governments[130] (public authorities) and recognized belligerent non-State actors (quasi-public authorities).[131] And, once affiliated

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[124] *Id.*

[125] *Id.*

[126] FRANCIS LIEBER, GUERRILLA PARTIES CONSIDERED WITH REFERENCE TO THE LAW AND USAGES OF WAR 10–11, 17–18 (1862).

[127] *Cf. id.* at 7–8 ("[I]t is universally understood in this country at the present time that a guerrilla party means an irregular band of armed men, carrying on irregular war . . . . The irregularity of the guerrilla party consists in its origin, for it is either self-constituted or constituted by the call of a single individual, not according to the general law of levy, conscription, or volunteering; it consists in its disconnection with the army, as to its pay, provision, and movements, and it is irregular as to the permanency of the band, which may be dismissed and called again together at any time.").

[128] H.R. DOC NO. 55-65, at 249 (1894).

[129] Lieber Code, *supra* note 93, art. 57; *id.* art. 56 ("A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity."); *id.* art. 57 ("No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies."). *See also United States v. Lindh*, 212 F. Supp. 2d 541, 553 n. 19 (E.D. Va. 2002) (relying on Lieber Code art. 57 to define combatant immunity).

[130] Elsewhere, Lieber took pains to emphasize that application of the laws of war to a rebellion did not imply recognition of the rebels as a government. *See, e.g.*, Lieber Code, *supra* note 93, art. 152 (stating that establishing rules of war in a rebellion does not recognize the rebel government); *id.* art. 153 (stating that treating rebels as prisoners of war did not recognize their government); *id.* art. 154 (stating that treating soldiers as belligerents did not preclude trying their leaders for treason). It was and remains axiomatic under international law that recognition of belligerency does not imply recognition of government or statehood.

[131] Notwithstanding defining "belligerent" by reference to affiliation with "a sovereign government," General Orders No. 100 anticipates the application of the laws and usages of war to rebellion or insurrection. Lieber Code, *supra* note 93, arts. 152–54. The Lieber Code, thus, seemingly—even necessarily—embeds an assumption that the laws and usages of land warfare it restates will apply not only in wars between states but armed conflicts against non-state actors that enjoy recognition of belligerency.

with and authorized by a public or quasi-public authority, "[a belligerent's] killing, wounding, and other warlike acts are not individual crimes or offenses."[132]

In contrast to individual belligerents—to which General Orders No. 100 refers as "belligerents," "prisoners of war," or "public enemies"[133]—Lieber described individuals who were neither affiliated with nor authorized to participate in hostilities by a public or quasi-public authority as "private enemies."[134] Public enemies, entitled to prisoner-of-war status upon capture, included regulars, volunteers, and militia—all of whom were both affiliated with and authorized to participate in hostilities by a public or quasi-public authority.[135] Private enemies, on the other hand, were enemies who lacked *public* character, meaning they were not authorized by a public or quasi-public authority to participate in hostilities. Such individuals would include the citizens of an enemy,[136] whether they engaged in hostilities or not. Thus, whereas "[p]artisans are *soldiers* armed and wearing the uniform of their army" who, upon capture, "are entitled to all the privileges of the prisoner of war,"[137] men without commission by a public authority[138] who commit hostilities are not.[139] Similarly, "armed prowlers," of whatever appellation, "who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying

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[132] *Id.* art. 57; *id.* art. 56 ("A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity."); *id.* art. 57 ("No belligerent has a right to declare that enemies of a certain class, color, or condition, when properly organized as soldiers, will not be treated by him as public enemies."). *See also United States v. Lindh*, 212 F. Supp. 2d 541, 553 n. 19 (E.D. Va. 2002) (relying on Lieber Code Art. 57 to define combatant immunity).

[133] *E.g.*, Lieber Code, *supra* note 93, art. 51 ("If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorized levy 'en masse' to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war.").

[134] *Id.* art. 21 ("The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war."); *id.* art. 22 ("[A]s civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms."); *id.* art. 23 ("Private citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war."); *id.* art. 25 ("In modern regular wars of the Europeans, and their descendants in other portions of the globe, protection of the inoffensive citizen of the hostile country is the rule; privation and disturbance of private relations are the exceptions.")

[135] *Cf.* WAR DEPARTMENT, BUREAU OF MILITARY JUSTICE, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 100 (1865).

[136] *Cf. Ex parte Milligan*, 71 U.S. 2, 131 (1866) (emphasizing Milligan's twenty-year long residence in Indiana, a state that never rose in rebellion).

[137] Liber Code, *supra* note 93, art. 81 (emphasis added); *cf. id.* art. 57 ("So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent").

[138] Excepting members of a *levee en masse*. *Id.* art. 51 (defining a *levy* [sic] *en masse* as the "people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, [who] rise . . . to resist the invader.").

[139] Lieber Code, *supra* note 93, art. 82.

bridges, roads or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war."[140]

The absence of positive authorization from a public or quasi-public authority made all the difference.[141] Individuals who participated in hostilities without such authorization were simply not belligerents. "Men, or squads of men, who commit hostilities, . . . without commission. . . are not public enemies . . . ."[142] Instead, "such men, or squads of men" were subject to summary treatment as mere "highway robbers or pirates."[143]

The Lieber Code's approach to individual belligerency—distinguishing belligerents and non-belligerents, and discriminating between the rights, duties, and liabilities that appertained to each category—on the basis of affiliation with and authorization to participate in hostilities by a public or quasi-public authority was consistently reproduced in U.S. law-of-war manuals throughout the 20th Century.[144]

From a modern perspective, the traditional U.S. framework for individual belligerency may seem both formalistic and relatively restrictive. It discriminated between individuals on the basis of their formal relationship to a public or quasi-public authority. Although it did not immunize private individuals who participated in hostilities from the consequences of their

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[140] *Id.* art. 84.

[141] *E.g.*, WAR DEPARTMENT, *supra* note 135, at 100 ("Where persons not positively shown to have been mustered into the rebel military service, and apparently engaged in an independent border warfare, made a raid from Kentucky into Indiana, and were arrested by the civilian authorities of the latter State for robbery and held to trial as felons—*held*, that a request from the confederate agent . . . that they be treated and exchanged as prisoners of war, should be denied, and that they should be left to have their offence passed upon by the court which had assumed jurisdiction of the case, and by which alone their defence (that they were actually confederate soldiers acting under the orders of their superior officers) could be properly investigated.").

[142] Lieber Code, *supra* note 93, art. 82.

[143] *Id.*

[144] *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1309 (C.M.C.R. 2011) (quoting the War Department's 1914 field manual which replaced the Lieber Code); U.S. ARMY, THE LAW OF LAND WARFARE 1956, FM 27-10, ¶ 80 ("Persons, such as guerrillas and partisans, who take up arms and commit hostile acts without having complied with the conditions prescribed by the laws of war for recognition as belligerents . . . are, when captured by the injured party, not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment."). The 1956 manual defines both "[i]ndividuals [n]ot of [a]rmed [f]orces [w]ho [e]ngage in [h]ostilities" and "[i]ndividuals [n]ot of [a]rmed [f]orces [w]ho [c]ommit [h]ostilities," in contradistinction to the definition of belligerents found in the Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 75 U.N.T.S. 135, which premises individual belligerent status on the individual's affiliation with and authorization to participate in hostilities by a public or quasi-public authority. U.S. ARMY, *supra* note 144, ¶ 61 (individual belligerents include "(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces. (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied . . . . (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power. . . . (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.").

participation,[145] its formalism, strict assignment of the liabilities and duties of armed conflict to individuals on the basis of their status, and deeply embedded presumption that non-belligerents would refrain from participation in hostilities, potentially cabined the degree to which civilians would suffer death or injury as a consequence of an enemy force targeting its belligerent opponents.

B. *The U.S. Approach to Individual Belligerency After 9/11*

Following the 9/11 attacks, the United States abandoned its previously consistent approach to individual belligerency. Instead, it embraced a conduct-based approach to ascertaining OAG membership and assigning status-like continuous targetability that muddied IHL's stark status-conduct divide in warfare, and decoupled the privileges and liabilities of belligerency.[146] It defined OAG membership as consisting of individuals who are either "part of" or "substantially supporting" an OAG,[147] irrespective of their formal or practical subordination to an OAG, and regardless of their actual participation in hostilities.[148] Consequently, it may have both increased the exposure of civilians

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[145] Indeed, as a product of its time, it exposed them to potentially summary execution.

[146] For example, the United States treats individuals who are "analogous to . . . persons authorized to accompany the armed forces" as targetable OAG members, even though such "persons authorized to accompany the armed forces" are definitionally not combatants. *Contrast* DEPARTMENT OF DEFENSE, *supra* note 79, § 4.18.4.1, *with* Additional Protocol 1, *supra* note 16, art. 43, *and* Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 144, art. 4(A)(4). *See also* DEPARTMENT OF DEFENSE, *supra* note 79, § 4.3 ("'Unlawful combatants' or 'unprivileged belligerents' are persons who, by engaging in hostilities, have incurred one or more of the corresponding liabilities of combatant status (e.g., being made the object of attack and subject to detention), but who are not entitled to any of the distinct privileges of combatant status (e.g., combatant immunity and POW status)."); *id.* § 4.19.2 ("Although unprivileged belligerents lack the right to engage in hostilities, international law nevertheless requires that they observe the same duties as lawful combatants during their conduct of hostilities. In addition, unprivileged belligerents are generally subject to the same liabilities to which combatants are subject in the conduct of hostilities; i.e., they may be made the object of attack by enemy combatants. Unprivileged belligerents placed hors de combat, however, may not be made the object of attack, and must be treated humanely.").

[147] DEPARTMENT OF DEFENSE, *supra* note 79, § 4.18.4.1 ("Being part of a non-State armed group may involve formally joining the group or simply participating sufficiently in its activities to be deemed part of it. . . . It may be appropriate to use circumstantial or functional information to assess whether a person is part of a non-State armed group. . . . [N]on-State armed groups may also rely on individuals who are not members of the groups, but who are functionally part of those organizations. . . . These individuals may be regarded as constructively part of the group, even if they are, in fact, not formal members of the group."); U.S. DEPARTMENT OF THE ARMY & U.S. MARINE CORPS, THE COMMANDERS' HANDBOOK ON THE LAW OF LAND WARFARE, FM 6-27/MCTP 11-10C at ¶ 1–65 (Aug. 2019) (defining "unprivileged belligerents" as *inter alia* "[p]ersons who never qualified as combatants but who, by engaging in hostilities (such as joining an armed group), have forfeited one or more of the protections of civilian status"); *id.* ¶ 1–68 ("Unprivileged belligerents may be made the object of attack by enemy combatants."); *see also* 10 U.S.C. § 948a(7) ("The term 'unprivileged enemy belligerent' means an individual (other than a privileged belligerent) who . . . has purposefully and materially supported hostilities against the United States or its coalition partners; or . . . was a part of al Qaeda at the time of the alleged offense under this chapter."). During the course of the so-called Global War on Terror, the United States applied a variety of labels to this quasi-status, including: "unlawful belligerents," "unprivileged belligerents," "unlawful combatants," "unlawful enemy combatants," or "alien unlawful enemy belligerents."

[148] DEPARTMENT OF DEFENSE, *supra* note 79, § 4.18.4.1 ("Being part of a non-State armed group that is engaged in hostilities against a State is a form of engaging in hostilities that makes private

to the harms attending armed conflict and contributed to some of the more concerning, publicly reported mistakes in the GWOT.

The United States has never publicly articulated what conduct-based criteria or rubric it uses to assess OAG membership.[149] But, based on judicial opinions and publicly reported practice, the United States' post-9/11 approach appears quite broad.[150] According to the D.C. Circuit in *Bensayah v. Obama* (a case arising in the context of armed conflict-related detention), membership in an OAG—there, al Qaeda—could be established by an individual "operat[ing] within al Qaeda's formal command structure."[151] But such membership could also be established on the basis of "other indicia that a particular individual is sufficiently involved with the organization to be deemed part of it," while distinguishing actual membership from "the purely independent conduct of a freelancer," which would not amount to membership in an OAG.[152] That analysis appears consistent with the underlying law and logic of IHL. But, according to U.S. courts, conduct that amounts to membership in al Qaeda—at least, for detention-related purposes—includes traveling along a route "consistent with travel patterns of those going to Afghanistan to join the Taliban and al Qaeda,"[153] being captured in an area where al Qaeda was active while in the company of al Qaeda members,[154] staying at an al Qaeda guesthouse and attending a training camp,[155] joining and being accepted by a group of al Qaeda fighters,[156] or using travel arrangements procured by a known al Qaeda

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persons liable to treatment in one or more respects as unprivileged belligerents by that State."); U.S. DEPARTMENT OF THE ARMY & U.S. MARINE CORPS, *supra* note 147, ¶ 1–65 (Aug. 2019) (equating "joining an armed group" with "engaging in hostilities").

149 DEPARTMENT OF DEFENSE, *supra* note 79, § 4.18.4.1 ("Being part of a non-State armed group may involve formally joining it or simply participating sufficiently in its activities to be deemed [by the United States] part of it. . . . It may be appropriate to use circumstantial or functional information to assess whether a person is part of a non-State armed group"); *id.* § 4.18.4.1 ("[Individuals who] participate sufficiently in the activities of the group or support its operations substantially in a way that is analogous to the support that persons authorized to accompany the armed forces provide to the armed force. These individuals may be regarded as constructively part of the group, even if they are, in fact, not formal members of the group."); *see Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010) ("[The determination of membership in an OAG] must be made on a case-by-case basis by using a functional rather formal approach and by focusing upon the actions of the individual in relation to the organization.").

150 *Gul v. Biden*, 573 F. Supp. 3d 148, 159 (D.C. Dist. 2021) ("The functional test [for membership in an OAG] has been applied to wide-ranging behavior . . . ."); *Bensayah*, 610 F.3d at 725 ("[I]t is impossible to provide an exhaustive list of criteria for determining whether an individual is 'part of' al Qaeda. That determination must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization.").

151 *Bensayah*, 610 F.3d at 725.

152 *Id.*

153 *Odah v. United States*, 611 F.3d 3, 16 (D.C. Cir. 2010).

154 *Uthman v. Obama*, 637 F.3d 400, 404 (D.C. Cir. 2011).

155 *Al-Madhwani v. Obama*, 642 F.3d 1071, 1075 (D.C. Cir. 2011).

156 *Awad v. Obama*, 608 F.3d 1, 9 (D.C. Cir. 2010).

affiliate.[157] Several of these factors are obviously attenuated from actual subordination to an OAG's command and control.

As for "substantial support," at least one military judge interpreted the term to be coextensive with conduct amounting to material support for a terrorist organization under domestic U.S. criminal law.[158] In that case, the 9/11 military commission ruled that Mustafa Ahmed Adam Al Hawsawi was a member of al Qaeda for purposes of the tribunal's jurisdiction under the 2009 Military Commissions Act on the basis of his having attended an al Qaeda training camp, participated in al Qaeda's media support service, and disbursed funds in support of al Qaeda-sponsored operations.[159] Material support for terrorism in U.S. criminal law is famously broad, embracing conduct that does not necessarily reflect an individual's subordination to an OAG's command-and-control like the provision of financial services, expert advice, or transportation "in preparation for[] or in carrying out" a violation of a set of offenses defined in U.S. criminal law.[160] Underscoring the breadth of conduct that may be assimilated as membership in an OAG, that military commission also rejected the ICRC's CCF test for determining membership in an OAG because it failed to include individuals who perform "mere war-sustaining activities" within functional OAG membership.[161]

Further, public reporting indicates that, during the course of the GWOT, the United States may have lethally targeted individuals as members of OAGs based on large set of criteria of sometimes dubious probity. For example, the United States has reportedly ascribed OAG membership to and attacked individuals on the basis of their presence at an assessed al Qaeda compound, presence at an assessed al Qaeda training camp, being male of military age in a particular location, presence at a suspicious camp in al-Qaeda-controlled territory, assessed training to join al Qaeda, or being at a militant-controlled rest area.[162] Putting aside the United States' history of erroneously evaluating the relationship of an individual or a camp to al Qaeda,[163] these defining

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157 *Al-Adahi v. Obama*, 616 F.3d 1102, 1106 (D.C. Cir. 2010).

158 *United States v. Mohammad et al.*, AE 502BBBB, Ruling, Defense Motion to Dismiss for Lack of Personal Jurisdiction, at 13, n.40 (Apr. 25, 2018) (citing 18 U.S.C. § 2339A(b)(1)).

159 *Mohammad et al.*, AE 502BBBB, at 12–13.

160 18 U.S.C. § 2339A(b)(1) ("[T]he term 'material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials"). *See also Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010).

161 *Mohammad et al.*, AE 502BBBB, at 14–15.

162 *See* Kevin Jon Heller, *One Hell of a Killing Machine: Signature Strikes and International Law*, 11 J. INT'L CRIM. JUST. 89, 94–103 (2013).

163 *See, e.g.*, ANNE STENERSEN, AL-QAIDA IN AFGHANISTAN 96 (Cambridge Univ. Press, 2017) ("The number of al-Qaida camps in Afghanistan tends to be exaggerated, because training camps have been conflated with non-military installations; because training camps were situated at various locations at various times; and because several of the training camps described as 'al-Qaida camps'

characteristics do not apparently establish a command relationship between an OAG and the individual sufficient to justify targeting on that basis.

C. *Contrasting America's Two Approaches*

Contrasting the United States' pre- and post-9/11 approaches to assigning continuous targetability illustrates the consequences of persistent uncertainty in the meaning of OAG membership under IHL. Consider an individual who attends a training camp operated by an OAG engaged in a NIAC against a State but who never formally joins the OAG. In this hypothetical, neither the OAG nor the individual may regard mere training camp attendance as establishing membership.[164] Despite taking training, the individual never participates in a hostile act directed against the State. The individual returns to their multi-generational home, at which male family members between fifteen and sixty years of age reside.

Grafting the United States' pre-9/11 approach to individual belligerency on to this hypothetical, we would treat—for purposes of assigning the liabilities of armed conflict, alone—the OAG as the United States historically treated quasi-public authorities. The targetability analysis would turn on evaluating OAG membership in the same manner that individual belligerency was historically evaluated. Thus, OAG membership would be assessed by examining whether the individual is both affiliated with and authorized by the group to participate

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were in fact run by other militant groups."); Thomas Kean et al., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 147 n.5 (2004) ("Khaldan and Derunta were terrorist training camps in Afghanistan controlled by Abu Zubaydah. While the camps were not al Qaeda facilities, Abu Zubaydah had an agreement with Bin Ladin to conduct reciprocal recruiting efforts whereby promising trainees at the camps could be invited to join al Qaeda."); CIA Intelligence Assessment, "Countering Misconceptions about Training Camps in Afghanistan," August 16, 2006, *in* SENATE SELECT COMMITTEE ON INTELLIGENCE, EXECUTIVE SUMMARY OF THE REPORT ON THE CENTRAL INTELLIGENCE AGENCY'S DETENTION, AND INTERROGATION PROGRAM at 21 n.60 (2014) ("Khaldan [Training Camp] Not Affiliated with Al-Qa'ida. A common misconception in outside articles is that Khaldan camp was run by al-Qa'ida. Pre-11 September 2001 reporting miscast Abu Zubaydah as a 'senior al-Qa'ida lieutenant,' which led to the inference that the Khaldan camp he was administering was tied to Usama bin Laden. The group's flagship camp, al-Faruq, reportedly was created in the late 1980s so that bin Laden's new organization could have a training infrastructure independent of 'Abdullah Azzam's Maktab al-Khidamat, the nongovernmental organization that supported Khaldan. Al-Qa'ida rejected Abu Zubaydah's request in 1993 to join the group and Khaldan was not overseen by bin Laden's organization. There were relations between the al-Qa'ida camps and Khaldan. Trainees, especially Saudis, who finished basic training at Khaldan were referred to al-Qa'ida camps for advanced courses, and Khaldan staff observed al-Qa'ida training. The two groups, however, did not exchange trainers.").

[164] *See, e.g.*, ANNE STENERSEN, AL-QAIDA IN AFGHANISTAN 37–39 (2017) (describing the availability of al Qaeda-operated training camps and courses to non-members in Afghanistan); *id.* at 46 (describing the predominant presence of non-al Qaeda Uzbeks and Chechens at al Qaeda's al Faruq camp in 1994); *id.* at 96–97 ("Al-Qaida's own training activity at the [Khost] site had been minimal. Al-Qaida had allowed other groups such as Tajiks, Uzbeks, and Chechens, to use the site. Al-Qaida had provided support in the form of a few trainers and logistics."); *id.* at 108 ("Al-Qaida assisted other groups with training in other ways as well. In September 1999, Hassan Mahsum, the leader of the East Turkestan Islamic Movement (ETIM) participated in a thirty-day advanced security course in Kabul. According to an internal document, Hassan Mahsum audited the course in the capacity of being 'Emir of the Turkestani brothers.'").

in hostilities.[165] In this case, attendance at the OAG-operated training camp might suggest affiliation with the group but the absence of any evidence of formally joining the group would suggest otherwise. That would likewise suggest an absence of authorization to participate in hostilities, a conclusion bolstered by the absence in fact of the individual's participation in hostilities. Consequently, the individual would be a civilian, presumptively immune from direct attack. Moreover, other civilians, like the individual's multi-generational family, proximate to the individual at any given time or place would not be exposed to the collateral consequences of attack arising from the individual's presence.

On the other hand, if the State regards training camp attendance as evidence of even presumptive OAG membership—as the United States appears to have—the outcome for the individual and those who may be near them are totally reversed. Because they attended an enemy training, the individual is a member of the OAG unless there is sufficient evidence to vitiate such membership in the eyes of the State. The State may target them continuously unless they are *hors de combat*. Not only does this approach arguably run afoul of IHL's presumption of civilian status,[166] it disregards the necessity of subordination to both combatant status and the existence of an OAG, and it tends to dramatically expand the scope of nominal civilians exposed to the liabilities of armed conflict. For example, although this individual never participates in hostilities, the fact of his training camp attendance causes him to be continuously targetable even though a civilian who does directly participate in hostilities would only be targetable temporarily.[167]

Moreover, this approach may work a cascading erosion of civilian protection. The civilians who may be proximate to the individual would be exposed to the collateral consequences of an attack directed against the individual. Indeed, the individual's male family members may even be suspected of membership in—if not presumed to be members themselves of—the OAG based on their observed, frequent proximity to the individual. That chain of logic may even increase the likelihood that the family home may be attacked.[168] It may also expose a third degree of civilians to the liabilities of armed conflict, like those who find themselves proximate to the male family members now suspected of OAG membership.

This hypothetical may seem overly simplistic but there is reason to believe it is illustrative. Indeed, it is possible, if not probable, that the United States' embrace of an expansive legal approach to OAG membership and the sometimes dubious indicia on which it may have relied to assess such membership resulted or contributed to a seeming pattern of repeated targeting mistakes that the United States made during the GWOT.[169] For example, the United States struck

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[165] *Supra* Part IV.A.

[166] Additional Protocol I, *supra* note 16, art. 50(1).

[167] *Id.* art. 51(3).

[168] *Infra* text accompanying notes 178-82.

[169] *See* Oona Hathaway & Azmat Khan, *"Mistakes" in War*, 173 U. PENN. L. REV. 1, 6 (2024).

a house that it assessed to be an ISIS headquarters in Mosul in September 2015 based, in part, on the observed presence of "7 adult males . . . opening and closing [a] gate for arriving vehicles,"[170] which U.S. analysts interpreted as "indicating some access control."[171] The United States evidently ascribed ISIS membership to these individuals despite the absence of observed weapons[172] because it already suspected the house to be an ISIS facility, because one of the men operated the gate, and because the United States observed no women or children in its limited surveillance of the home.[173] Thus, suspicion that the house was an ISIS facility and separate suspicion that the men were ISIS members may have been regarded as mutually reinforcing and corroborating. Assuming that is correct, then, arguably, a more restrictive approach to OAG membership assignment that required evidence of a formal relationship between the men and the enemy OAG could have avoided the mistake the United States made in this case and saved the lives of four civilians.[174]

The likely deleterious consequences of the United States' post-9/11 adoption of a liberal definition of OAG membership were exacerbated by "'incomplete information or misinterpretation of information,'"[175] likely confirmation bias,[176] or the failure to appreciate cultural or other context—as has been the case with repeated strikes on wedding celebrations in the Middle East and Afghanistan.[177] Together, these may have contributed to "regular and repeated 'mistakes' in U.S. counterterrorism campaigns."[178] To make matters worse, the expansive approach to OAG membership may have not only erroneously exposed civilians to lethal force but provided a post-strike imprimatur of lawfulness on grave mistakes. For example, in May 2023, the United States killed a Syrian farmer, Lotfi Hassan Misto, whom it mistook for a senior al Qaeda leader, in a drone

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[170] U.S. DEP'T OF DEF., CAOC CIVCAS CREDIBILITY ASSESSMENT – 21 SEPTEMBER 2015 at 13–15 (Feb. 13, 2017), https://int.nyt.com/data/documenttools/c-9-20-15-iraq/2688c41b14591157/full.pdf [https://perma.cc/4FP8-E6ZD] (U.S. CENTCOM FOIA Request #38).

[171] *Id.*

[172] *Id.* at 14 (noting that ISIS "does not obviously brandish weapons to remain from being detected, so the fact weapons were not observed would not have been considered unusual").

[173] *Id.* at 13–15 (noting that the United States captured only 95 minutes of full-motion video of the house, in 15–30 minute increments over three days, before striking it).

[174] *Id.* at 18 (indicating that "more likely than not" four civilians were killed and two were injured in the strike).

[175] Azmat Khan, *Civilian Casualty Files: Hidden Pentagon Records Reveal Patterns of Failure in Deadly Strikes*, N.Y. TIMES (Dec. 18, 2021), https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html [https://perma.cc/3SUZ-AKH4] (quoting CENTCOM Spokesman Capt. Bill Urban).

[176] *Id.* ("Repeatedly the documents point to the psychological phenomenon of 'confirmation bias' — the tendency to search for and interpret information in a way that confirms a pre-existing belief. People streaming toward a fresh bombing site were assumed to be ISIS fighters, not civilian rescuers.").

[177] *E.g.*, Tom Engelhardt, *The U.S. Has Bombed at least Eight Wedding Parties Since 2001*, THE NATION (Dec. 20, 2013), https://www.thenation.com/article/archive/us-has-bombed-least-eight-wedding-parties-2001 [https://perma.cc/8G8S-K7UF].

[178] Hathaway & Khan, *supra* note 27, at 32.

strike.[179] An investigation by the United States' Central Command confirmed that the United States misidentified Misto,[180] a civilian, as an al Qaeda leader. Nevertheless, CENTCOM asserted that the strike that killed Misto "was conducted in compliance with [IHL] as well as Department of Defense and [U.S. Central Command] policies."[181]

Thorough analysis of post-strike civilian casualty reports show the limits of U.S. overhead surveillance and strike platforms, revealing "repeatedly identif[ied] deficiencies in the quality and quantity of video footage guiding intelligence."[182] Reliance on remote warfare, the technical limits of the platforms used for such warfare, and an interpretation of targeting law that relies on indicia of membership in an OAG that may often be ambiguous combine to increase the probability of mistakes that result in the intentional killing of civilians who may be wrongly assessed to be enemy fighters. These mistakes are an ominous portent of a future in which the United States deploys AI-powered LAWS that apply a conduct-based approach to membership that is assessed vastly more quickly and replicated at scale by systems that inherently rely on sensors that are similarly challenged by battlefield conditions. Thus, to the extent that the United States' conduct-based approach to determining membership in an OAG is in part responsible for recurrent targeting mistakes, programming LAWS' AI to apply this same membership test—or training LAWS' AI on the data collected before and during such strikes—is likely to not only recreate but exacerbate such mistakes.[183]

Conversely, however, training AI-powered LAWS to apply the United States' historical approach to individual belligerency may well mitigate the propensity for such systems to replicate and promulgate the mistakes of remote warfare during the GWOT. The United States' pre- and post-9/11 approaches to OAG membership result in widely divergent sets of potentially lawful individual targets. The United States' traditional, formalistic and restrictive approach to individual belligerency would limit the set of potentially lawful individual targets to individuals who are formally enrolled in an OAG, regardless of their individual conduct or the function they perform for an OAG. Essentially, it would treat an OAG as analogous to an enemy State's armed force. Irrespective

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[179] Omar Nezhat, Meg Kelly, Alex Horton, & Imogen Piper, *U.S. Officials Walk Back Claim Drone Strike Killed Senior Al Qaeda Leader*, WASH. POST (May 18, 2023), https://www.washingtonpost.com/world/2023/05/18/pentagon-drone-strike-syria-civilian-al-qaeda [https://perma.cc/2V6D-DC22].

[180] Press Release, U.S. Cent. Command, May 3, 2023 Investigation Findings (May 2, 2024) https://www.centcom.mil/MEDIA/PRESS-RELEASES/Press-Release-View/Article/3763291/may-3-2023-investigation-findings [https://perma.cc/Y9KX-KLDA] ("The investigation determined U.S. forces misidentified the intended Al Qaeda target and that a civilian, Mr. Lutfi Hasan Masto (Masto), was struck and killed instead.").

[181] *Id.*

[182] Khan, *supra* note 175.

[183] SCHARRE, *supra* note 3, at 190

of how the OAG formalizes membership—whether by swearing *bayat*[184] or some other process of incorporation into the OAG—the fact of membership provides the decisive criterion for continuous targetability. And, following this restrictive approach, the secondary consequences of lethal targeting would be limited to civilians unfortunately proximate to an individual the OAG itself regards as a member and who presumably knows they would be targetable on that basis. In contrast, the United States' post-9/11 approach to OAG membership yields a much broader set of targetable individuals—including individuals who neither consider themselves members of an OAG nor are considered to be members by an OAG—and, consequently, exposes a substantially larger set of civilians to the secondary consequences of armed conflict. Regardless, the absence of a conclusive and specific definition of OAG membership in IHL means that both approaches may be admissible,[185] and either could be embedded in the AI powering LAWS deployed to seek out and engage individual enemies in a future armed conflict.

IV. PARTING THOUGHTS

Assuming that AI-powered LAWS are developed and deployed against individual human targets, ensuring their compliance with IHL and targeting law while seeking out and attacking human enemies presents numerous challenges. These range at least from the specificity of targeting law to the ability of AI to be trained to operate in alignment with IHL. At bottom, this author is skeptical of the ability of parties to train AI in a manner that parties to armed conflicts can be confident of their operational compliance with IHL when faced with the chaos of a battlefield. That would suggest that abstaining from their use against human targets is the better course. However, assuming that at least States will develop and deploy anti-personnel AI-powered LAWS, a few parting thoughts are warranted.

A. *IHL Requires Greater Specification*

IHL and targeting law require greater specification. The possibility that either or both the United States' pre- or post-9/11 approaches to identifying OAG members may be lawful under extant IHL underscores the elasticity of the concept. It also suggests the broad interpretive space in which parties to an armed conflict currently operate. Irrespective of the development of AI-powered LAWS, the current underspecified state of IHL and targeting law undermines the protective purpose of IHL and leads to disparate outcomes for individuals caught up in hostilities based not on their behavior but on the identity of their opponent. The prospect of the development and deployment of AI-powered LAWS, and the possibility that such development and deployment will increase

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[184] "Bayat" is an Islamic oath of fealty or allegiance. *See, e.g.*, Salahi v. Obama, 625 F.3d 745, 748 (D.C. Cir. 2010); *cf.* ANNE STENERSEN, AL-QAIDA IN AFGHANISTAN 93 (2017) ("In the spring of 2001, Osama bin Laden publically confirmed that he had pledged an oath of allegiance (*bay'a*) to Mullah Omar.").

[185] It is worth noting that, regardless of the framework adopted, the lawful assessment of membership in an OAG under existing IHL must also comply with the law's presumption of civilian status in cases of doubt. *See* Additional Protocol I, *supra* note 16, art. 50(1).

the exposure of individuals to lethal force, adds urgency to an existing need for improved definition.[186]

Fundamentally, the question of OAG membership is a question of describing the relationship between individuals and an organized armed group. The analogy between a soldier of a State armed force and a continuously targetable OAG member is instructive in this respect. If a soldier is targetable because they belong to a party—because they are agents of that party, subject to its command and control—OAG membership ought to turn on the same quality. In this respect, the United States' formal and relatively restrictive approach to individual belligerency is more consistent with the logic of IHL than either its post-9/11 approach or the ICRC's CCF approach to OAG membership. It is worth noting, however, that none of the three approaches are readily operationalized. Each requires individual-level information that is—absent a panopticon—often unlikely to be available. For example, it may not be practicable to know whether an individual swore an oath to fight for an OAG (under a formal approach), or agreed to and actually became a full-time fighter for an OAG (under a functional approach), or previously attended an OAG's training camp and subsequently repetitiously participated in hostilities on its behalf (under the conduct-based approach). But these challenges are not new to warfare. Historically, they were perhaps best resolved by heuristics like the wearing of a uniform.

B. *IHL's Compliance Incentive Structure Likely Requires Reform*

Of course, refining the legal definition of OAG membership does not resolve the practical challenges associated with discriminating between lawful membership-based targets and protected civilians if OAG members fail to don uniforms or fixed distinctive signs.[187] Although it is widely assumed that OAGs do not or will not adopt uniforms, and even as that assumption provides the explicit point of departure for the ICRC's approach to membership and the implicit point of departure for the United States' post-9/11 approach, the assumption itself may be underexamined. Certainly, some "traditional armed groups" like the Liberation Tigers of Tamil Eelam, or even ISIS in Iraq and Syria before the defeat of the so-called caliphate, have adopted uniforms or at least

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[186] *Cf.* SCHARRE, *supra* note 3, at 191 ("A loss of control of an autonomous weapon would be a far more dangerous situation [than that of a runaway gun]. The destruction unleashed by an autonomous weapon would not be random—it would be targeted. If there were no human to intervene, a single accident could become many, with the system continuing to engage inappropriate targets until it exhausted its ammunition. . . . The consequences to civilians . . . could be disastrous.").

[187] Wearing a uniform does not itself establish an individual's status as a soldier. Int'l Comm. of the Red Cross, *supra* note 63, ¶ 977 ("The requirements for membership in the armed forces are not prescribed in international law. Rather, it is a matter of domestic regulation."). It does provide a relatively reliable indicator. *See* Watkin, *supra* note 76, at 671. It is no great conceptual leap to apply a similar heuristic in determining OAG membership—one that accepts both that the target's identity is unknown and the precise contours of their relationship to the OAG is unknowable. The same would be true for a LAWS deployed to seek out and engage human targets. Indeed, ignorance of or the unknowability of the formalism of membership in an OAG is one of the animating concerns of the ICRC's CCF. But if such precise understanding is irrelevant to combatant status in relationship to a State armed force, it is unclear why it would be necessary to assess membership in the armed force of a non-State actor.

military garb and flags to distinguish themselves from the civilian population.[188] But existing literature does not seem to analyze the degree to which OAGs, as a general matter, do or do not adopt uniforms to distinguish their members from the civilian population.

Given this gap, it is at least possible that the assumed pervasive absence of uniforms among OAGs does not reflect reality. Instead, any absence of uniforms may be evidence that an armed group is insufficiently organized to constitute a party to an armed conflict. Thus, it is possible that both the ICRC's function-based approach to membership in OAGs and the United States' post-9/11 conduct-based approach to membership in OAGs are attempting to solve the wrong problem. Indeed, these approaches may result in the inappropriate application of IHL to situations of *disorganized* or *insufficiently* organized armed violence—situations that ought to be the province of criminal law and rather than the law of armed conflict. Should either of these approaches be embedded in LAWS' AI and then proliferated as other parties adopt them, tragic consequences for civilians may result from an underexamined and potentially inaccurate assumption concerning the behavior of OAGs.

Even if, after studied examination, the assumption proves to be an accurate depiction of the behavior of OAGs, such behavior may reflect IHL's poorly tailored incentive structure for compliance. The absence of combatant immunity or POW status upon capture for members of OAGs has not seemed to diminish their proliferation or the proliferation of NIACs. As currently formulated, IHL simply does not reward OAG members for compliance with the law. Perhaps, it would be more effective and desirable to reward OAGs that adopt uniforms or fixed, distinctive signs that are recognizable at distance by affording members of such groups combatant immunity[189] and POW status upon capture. That might encourage additional OAGs to adopt the practices of "traditional armed groups," which would make the operation of AI-powered LAWS against individuals more practicable and certain, while also improving the protection of peaceable civilians.

Regardless, the current indeterminacy of membership in an OAG under IHL appears likely to expose *bona fide* civilians to substantial risk as AI-powered LAWS are deployed in armed conflicts with OAGs. That is a problem worth solving.

C. *Beware of Accessible Training Data*

Finally, separate and apart from the need to improve the specification of IHL and targeting law, or the likely need to reform IHL's compliance incentive structure, AI-powered LAWS' development will require training data. Twenty-five years of remote warfare has presumably left the United States with substantial amounts of readily accessible data in the form of video footage and civilian casualty reports that could be used to train the LAWS' AI it may develop.

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[188] Gloria Gaggioli, *Targeting Individuals Belonging to an Armed Group*, 51 VAND. J. TRANSNAT'L L. 901, 903 (2018); Watkin, *supra* note 76, at 674.

[189] 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, 280–89 (2011).

But the United States' repeated targeting mistakes during the so-called Global War on Terror, and its seeming propensity to affirm the lawfulness of these strikes even while acknowledging mistake, suggest that this data set would require careful curation before being used to train an AI. Otherwise, the United States would all but be guaranteed to propagate the errors and biases leading to the initial mistakes and to replicate their deleterious outcomes in future armed conflict—and, potentially at greater scale.[190] This potential is even more concerning when one considers the possibility that the United States may export those LAWS (or their underlying AI models) to other States, and that even supposedly retrainable AI models may not actually be retrainable.

V. CONCLUSION

The revolutionary changes in warfare the world has witnessed in recent years—the proliferation of unmanned systems, the ease and affordability of deploying such systems, and the increasingly rapid integration of AI into military systems—is a poor omen for those who fear the advent of killer robots. Indeed, in the year since this journal convened this symposium, the likelihood that LAWS will be developed and deployed seems only more certain. The potential speed, scale, and reach of LAWS' lethal and destructive force underscores the urgency of ensuring that the legal regime governing the conduct of hostilities is sufficiently robust to channel and control that violence, to protect civilians—human beings—from mechanized death. Extant targeting law does not appear to be adequate to the looming challenge. The time for reform and enhanced specification is now.

[190] SCHARRE, *supra* note 3, at 193 ("[AI model f]laws in any one [LAWS] are likely to be replicated in entire squadrons and fleets of autonomous weapons . . . This is fundamentally different from human mistakes, which tend to be idiosyncratic.").