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Peter Margulies

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Networks in Non-International Armed Conflicts: Crossing Borders and Defining “Organized Armed Group”

*Peter Margulies**

I. INTRODUCTION

As Al Qaeda has dispersed, the precise definition of an “organized armed group” (OAG) under the law of armed conflict (LOAC) has become increasingly vital. The United States currently targets certain members of Al Qaeda and affiliated organizations not only in Afghanistan, but also in other countries.¹ However, while the elements of Al Qaeda that were present in Afghanistan immediately after September 11 presumably constituted an OAG, it is less clear that supposed affiliates outside Afghan-

* Professor of Law, Roger Williams University. I thank Laurie Blank, Geoff Corn and Rebecca Ingher for comments on a previous draft.

1. See John O. Brennan, Assistant to the President for Homeland Security and Counterterrorism, Remarks at the Harvard Law School Program on Law and Security: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-st-rengthening-our-security-adhering-our-values-an>; see also Harold Hongju Koh, Legal Adviser, U.S. Department of State, Address at the Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>; cf. Robert M. Chesney, *Beyond the Battlefield, Beyond Al Qaeda: The Destabilizing Legal Architecture of Counterterrorism*, __ MICHIGAN LAW REVIEW (forthcoming 2013), available at <http://ssrn.com/abstract=2138623>, at 14–16 (discussing dilemmas in cross-border targeting decisions).

istan are part of the *same* OAG. The issue raises the stakes of targeting decisions. If affiliated groups are part of an OAG under the Al Qaeda “umbrella,” then arguably the United States has the right to target them wherever they are.² But if groups outside Afghanistan are *not* part of Al Qaeda, then targeting them requires a separate armed conflict and a separate *jus ad bellum* justification for the use of force.³ Formulating and applying the OAG criteria is therefore an essential enterprise.

This article responds to the high-stakes challenge with a pragmatic approach⁴ along two axes. First, it argues for a broad interpretation of the definition of “organized armed group” framed by the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v. Tadic*.⁵ In practice, while the language of the definition appears to be narrow, case law and scholarship have often expanded the concept. Second, the article shows that terrorist groups generally, and Al Qaeda in particular, reveal a surprising degree of organization. Some of this organization takes unconventional forms, dictated by the special circumstances of terrorist networks. Yet terrorist groups actually have many of the same organizational needs as States, including the pervasive need to control agency costs. Moreover, Al Qaeda exists in a synergistic relationship with many regional groups, providing training and influencing their choice of targets. Strategic influence of this type is a sufficient justification for targeting affiliates.

This article proceeds in two parts. Part I outlines the lessons of case law and commentary regarding the definition of OAG. This part suggests

2. If the State in which the group is currently located is willing and able to deal with the threat, the United States should defer to that State’s efforts. See Ashley S. Deeks, “Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense, 52 VIRGINIA JOURNAL OF INTERNATIONAL LAW 483, 499–503 (2012) (exploring “unwilling or unable” test based on law of neutrality); cf. Karl S. Chang, *Enemy Status and Military Detention in the War Against Al-Qaeda*, 47 TEXAS INTERNATIONAL LAW JOURNAL 1, 25–36 (2011) (consulting neutrality law to define “enemy” who can be targeted or detained); Rebecca Ingber, *Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda*, 47 TEXAS INTERNATIONAL LAW JOURNAL 75 (2011) (cautioning that neutrality law does not provide useful guide for detention of non-State actors in non-international armed conflicts (NIACs)).

3. See YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 204–11 (4th ed. 2005).

4. See generally MICHAEL J. GLENNON, THE FOG OF LAW: PRAGMATISM, SECURITY, AND INTERNATIONAL LAW 20 (2010) (recommending “broader and more flexible interpretive method”).

5. See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

that the language used may seem narrow, but has often been interpreted in a more flexible fashion. Part II discusses the status as OAGs of terrorist groups in general and Al Qaeda in particular. It concludes that such groups often possess the degree of organization required for recognition under the laws of armed conflict. Furthermore, Al Qaeda as a network often exercises strategic influence on its affiliates that justifies targeting.

II. ORGANIZING THE CASE LAW ON OAGS

Both case law and evolving trends on the ground have precipitated the problem of trans-regional conflicts and organized armed groups. State conflicts with organized non-State actors are considered conflicts not of an international character (NIACs).⁶ At least at first blush, one would assume that a NIAC can take place only on the territory of a single State; if the territory of more than one State is involved, it seems incongruous to deny the “international character” of the conflict.⁷ Moreover, treaties and case law have required that at least one party to an armed conflict be an OAG. Additional Protocol II (AP II) defines OAG in a narrow way. According to AP II, OAGs must be “under responsible command, [and] exercise such control over a part of [a State’s] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”⁸

6. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 628–32 (2006).

7. See INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY ARMED CONFLICTS 10 (2011), available at <http://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-LOAC-challenges-report-11-5-1-2-en.pdf> [hereinafter IHL CHALLENGES] (discussing “multinational NIACs [in which] . . . multinational armed forces are fighting alongside the armed forces of a ‘host’ state—in its territory—against one or more organized armed groups” as well as “transnational” conflict between “Al Qaeda and its ‘affiliates’ and ‘adherents’ and the United States”); see generally Kenneth Watkin, “*Small Wars*”: *The Legal Challenges*, in NON-INTERNATIONAL ARMED CONFLICT IN THE TWENTY-FIRST CENTURY 3 (Kenneth Watkin & Andrew J. Norris eds., 2012) (Vol. 88, U.S. Naval War College International Law Studies) (discussing dilemmas in conflicts against non-State actors); cf. Geoffrey Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A “Principled” Approach to the Regulation of Counter-Terror Combat Operations*, 42 ISRAEL LAW REVIEW 1, 10–12 (2009) (arguing that NIAC concept does not fit well in analyzing conflicts involving global terrorist network such as Al Qaeda and suggesting “transnational armed conflict” as a superior alternative).

8. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, art. 1(1), June 8, 1977, 1125 U.N.T.S. 609.

Some groups, like Hamas in Gaza or the now-defunct Liberation Tigers of Tamil Eelam (LTTE) of Sri Lanka, might meet this definition, but a network such as Al Qaeda will not. Al Qaeda's dispersion therefore makes precise definition a priority.

A. *The High Stakes of LOAC Definitions*

Much hinges on the breadth of the definition of a NIAC. A narrow definition subjects State forces to the more rigorous demands of international human rights law (IHRL), which permits the use of deadly force only when an individual poses a concrete, imminent threat to the life of a law enforcement officer or other individuals.⁹ The European Court of Human Rights has defined such threats narrowly, second-guessing the use of lethal force by law enforcement even when the target was a pair of known terrorists whom authorities rightly believed had planted an explosive device to be triggered in the near future.¹⁰ Under IHRL, terrorists have a greater opportunity to operate with impunity. Applying LOAC, in contrast, diminishes the non-State actor's room to maneuver. It allows States to target individuals whom it believes to be performing a continuous combat function (CCF).¹¹ Even narrow definitions of CCF recognize that an individual who

9. See *McCann v. United Kingdom*, App. No. 18984/91, 21 Eur. H.R. Rep. 97 (1995); Geoffrey S. Corn, *Extraterritorial Law Enforcement or Transnational Counterterrorist Operations: The Stakes of Two Models*, in NEW BATTLEFIELDS, OLD LAWS: CRITICAL DEBATES ON ASYMMETRIC WARFARE 23, 35 (William C. Banks ed., 2011) (analyzing the relationship between LOAC and law enforcement paradigms); John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AMERICAN JOURNAL OF INTERNATIONAL LAW 201, 210–13 (2011) (same); see also Evan J. Criddle, *Proportionality in Counterinsurgency: A Relational Theory*, 87 NOTRE DAME LAW REVIEW 1073 (2012) (arguing that IHRL paradigm fits most cases involving violence by a State's nationals within a State's own territory); David Luban, *Military Lawyering and the Two Cultures Problem*, 25 LEIDEN JOURNAL OF INTERNATIONAL LAW __ (forthcoming 2013), available at <http://ssrn.com/abstract=2054832> (asserting that law of armed conflict shows insufficient regard for welfare of civilians and that human rights law is superior in this respect); cf. Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICHIGAN LAW REVIEW 1365 (2012) (arguing for functional criteria that transcend distinction between LOAC and IHRL).

10. See *McCann*, App. No. 18984/91 ¶¶ 7–22 (Ryssdal, J., dissenting); cf. Peter Margulies, *Valor's Vices: Against a State Duty to Risk Forces in Armed Conflict*, in SHAPING A GLOBAL LEGAL FRAMEWORK FOR COUNTERINSURGENCY: NEW DIRECTIONS IN ASYMMETRIC WARFARE 87, 99 (William C. Banks ed., Oxford Univ. Press, 2013) (critiquing *McCann*).

11. See HCJ 769/02 *The Public Committee Against Torture in Israel v. The Government of Israel*, ¶ 39 [2006] (Isr.), http://elyon1.court.gov.il/files_eng/02/690/007

performs this role may spend much time in pursuits other than presenting a concrete, imminent threat to the other side. A typical uniformed soldier, for example, may spend time marching, building an encampment or even sleeping. The soldier can be targeted by an enemy State's forces in any and all of these activities.¹² Just as a State can target an opposing State's uniformed forces without a showing that an individual soldier faces a specific, imminent threat, LOAC would allow targeting of a member of an armed group whom the State reasonably believed to be engaged in a CCF.

However, the greater latitude allowed States in targeting terrorists makes human rights advocates blanch at the prospect of higher civilian casualties.¹³ More latitude in targeting may increase the risk of mistakes, in

/A34/02007690.a34.pdf%20 (asserting that fighters who makes themselves regularly available to terrorist groups for acts of violence are directly participating in hostilities for such time as they make themselves available; any interlude between acts of violence is merely "preparation" for further violence). In this analysis, the *PCAT* Court lent a flexible reading to concepts that the International Committee of the Red Cross (ICRC) has defined more narrowly. See NILS MELZER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 54 (2009), available at http://www.aco.nato.int/resources/20/Legal%20Conference/ICRC_002_0990.pdf (arguing that terrorist bomb maker would be immune from targeting when not making bombs); see also Gabor Rona, *US Targeted Killing Policy Unjustified*, JURIST (Feb. 24, 2012), <http://jurist.org/hotline/2012/02/gabor-rona-targeted-killing.php> (criticizing United States' targeting standards as unduly broad); but see Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLITICS 697, 731 (2010) (criticizing narrow reading in ICRC Guidance); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW & POLITICS 641, 661 (2010) (criticizing ICRC's failure to dismantle "revolving door" mechanism for terrorist groups).

12. See MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 143 (1977); but see Gabriella Blum, *The Dispensable Lives of Soldiers*, 2 JOURNAL OF LEGAL ANALYSIS 115, 138–50 (2010) (questioning whether use of lethal force should always be permissible against uniformed combatants).

13. See Jens David Ohlin, *The Duty to Capture*, 97 MINNESOTA LAW REVIEW (forthcoming), available at <http://ssrn.com/abstract=2131720>. Although the definition of an OAG is relevant to targeting decisions, the targeting debate also raises other issues beyond the scope of this article. Compare Kenneth Anderson, *Efficiency In Bello and Ad Bellum: Making the Use of Force Too Easy?*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 374, 391–96 (Claire Finkelstein, Jens David Ohlin & Andrew Altman eds., 2012) (rejecting argument that sophisticated technology behind drones that makes targeted killing easier also undermines practical checks on willingness to wage war); Robert M. Chesney, *Who May Be Killed? Anwar Al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3

which a State erroneously targets innocents or causes collateral damage among civilians.¹⁴ Advocates of greater State latitude will argue that States can and should build in systems that minimize mistakes, such as a lawyer's review and approval of targeting decisions. However, State advocates would add, opponents of State latitude have a bad case of hindsight bias¹⁵ regarding State action. State critics regard all civilian casualties as avoidable, a position that the law of war has never taken. However, proponents of State latitude would argue, critics fail to consider matters from an *ex ante* perspective, involving the incentives for violent non-State actors. When violent non-State actors believe they can operate with impunity, risks to civilians increase.¹⁶ Curbing violent non-State actors thus reduces net risks for civilians.

(2011) (suggesting that targeted killing under certain conditions is consistent with LOAC); Peter Margulies, *The Fog of War Reform: Change and Structure in the Law of Armed Conflict After September 11*, 95 MARQUETTE LAW REVIEW 1417, 1471–77 (2012) (same); Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 JOURNAL OF TRANSNATIONAL LAW & POLICY 237 (2010) (asserting that targeted killing is legal under international law as long as targeting force observes principles of distinction and proportionality), with PHILIP ALSTON, HUMAN RIGHTS COUNCIL, REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS (2010) (arguing that targeted killing in State that is not geographic site of armed conflict violates international law); Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed., 2011); cf. Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, 161 UNIVERSITY OF PENNSYLVANIA LAW REVIEW — (forthcoming 2013), available at <http://ssrn.com/abstract=2049532> (suggesting additional guidelines to regulate targeted killings).

14. *But see* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 131 (2012) (noting involvement of military lawyers in targeting decisions as check on errors); Gregory McNeal, *Are Targeted Killings Unlawful: A Case Study in Empirical Claims Without Empirical Evidence*, in TARGETED KILLINGS, *supra* note 13, at 326, 331–42 (discussing process engaged in by U.S. military prior to authorization of drone strike).

15. *See* Neal J. Roese, *Twisted Pair: Counterfactual Thinking and the Hindsight Bias*, in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 258, 260–61 (Derek J. Koehler & Nigel Harvey eds., 2004) (describing hindsight bias as “tendency to believe that an event was predictable before it occurred, even though for the perceiver it was not” and that harm was avoidable even when it was impossible to prevent).

16. *See* Margulies, *supra* note 10; Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, 47 TEXAS INTERNATIONAL LAW JOURNAL 293 (2012) (suggesting that narrow geographic restrictions on States' ability to target terrorist groups with global operations would grant these groups asymmetric advantage).

Moreover, State critics often do not acknowledge that while a broader definition of OAG confers advantages on a State in the arena of targeting, with that advantage comes greater accountability for all parties to the NIAC.¹⁷ A State in a NIAC must observe the strictures of the Geneva Conventions' Common Article 3, such as humane treatment of captives.¹⁸ These provisions are generally considered *jus cogens* and therefore non-derogable.¹⁹ OAGs incur the same duties; one purpose of the requirement that a group have a minimum level of organization is that it would be unfair to require a disorganized group to observe LOAC without possessing the structure to do so. Individuals who target civilians can be made to answer for violations of municipal law, such as the prohibition on murder. In contrast, OAGs who target civilians may be prosecuted in international tribunals for crimes against humanity, instead of merely being answerable in the sometimes dysfunctional justice systems of their countries of origin. The targeting advantages reaped by States are thus paid for by greater accountability elsewhere in the LOAC framework.²⁰

B. Unpacking the ICTY Formulation

At first blush, State critics may have an edge in the definitional debate regarding OAG. Some passages in case law have propounded a narrow definition of OAG that requires something approaching the attributes of States.²¹ In *Prosecutor v. Limaj*, the ICTY suggested that to meet its criteria, an OAG should have a headquarters, a unified command and a military

17. See Ohlin, *supra* note 13, at 21–22.

18. See Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

19. IHRL provisions are often subject to derogation. Cf. IHL CHALLENGES, *supra* note 7, at 15 (describing applicability and scope of IHRL, particularly extraterritorial applicability, as “work in progress”).

20. See United Nations Human Rights Council, Report of the Independent International Commission of Inquiry on the Syrian Arab Republic, U.N. DOC. A/HRC/21/50, ¶ 134 (Aug. 16, 2012), available at http://reliefweb.int/sites/reliefweb.int/files/resources/A-HRC-21-50_en.pdf (noting accountability under LOAC of anti-government armed groups in Syria) [hereinafter U.N.H.C.R., *Independent International Commission Report*].

21. See *Prosecutor v. Limaj*, Case No. IT-03-66-T, Trial Chamber Judgment, ¶¶ 113–117 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005) [hereinafter *Limaj*]; cf. Jelena Pejic, *The Protective Scope of Common Article 3: More than Meets the Eye*, 93(881) INTERNATIONAL REVIEW OF THE RED CROSS 189, 191–92 (2011) (noting factors).

police unit that will arrest malefactors.²² Without these attributes, a group is considered to be a criminal band or an assemblage of individuals engaged in civil unrest such as a riot, rather than an OAG.²³ Individuals in such groups cannot be targeted as readily as participants in an armed conflict, but instead are protected by IHRL.

Acts of terrorism sit uneasily within this paradigm. “[I]solated acts of terrorism” probably do not demonstrate the level of organization required for a NIAC.²⁴ Moreover, some commentators have noted that several major nations have addressed significant acts of terrorism through traditional law enforcement means.²⁵

If a terrorist entity can elude definition as an OAG within one State, it can even more readily elude such definition in the regional or global context. The United States confronts extremist organizations with varying degrees of closeness to Al Qaeda in multiple regions. Some have argued that Al Qaeda’s relationship to such groups involves only “very loose ties” typical of a “confederation of like-minded fellow travelers, many of whom are fighting *separate* armed conflicts in different regions of the globe.”²⁶

22. Limaj, *supra* note 21, ¶ 113–17; *see also* Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Trial Chamber Judgment, ¶ 626 (Int’l Crim. Trib. for Rwanda Sept. 2, 1998) (“responsible command” entails “degree of organization [that permits the group] . . . to plan and carry out concerted military operations, and to impose discipline”; group must also “dominate a sufficient part of territory” and “operations must be continuous and planned”).

23. In some cases, a criminal enterprise may be so organized and its violence against State officials so intense that classification as a NIAC is appropriate. *See* Carina Bergal, Note, *The Mexican Drug War: The Case for a Non-International Armed Conflict Classification*, 34 FORDHAM INTERNATIONAL LAW JOURNAL 1042 (2011).

24. *See* Prosecutor v. Boskoski & Tarculovski, Case No. IT-04-82-T, Trial Chamber Judgment, ¶ 190 (Int’l Crim. Trib. for the Former Yugoslavia July 10, 2008) [hereinafter *Boskoski*].

25. *See* INTERNATIONAL LAW ASSOCIATION, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW 25 (2010); *cf.* Kim Lane Scheppele, *The International Standardization of National Security Law*, 4 JOURNAL OF NATIONAL SECURITY LAW & POLICY 437, 451 (2010) (asserting that global counterterrorism measures permit States to disguise substandard governance as counterterrorism); Sudha Setty, *Comparative Perspectives on Specialized Trials for Terrorism*, 63 MAINE LAW REVIEW 131, 153 (2010) (suggesting that counterterrorism policies in United States, United Kingdom and India raise human rights concerns).

26. *See* Jens David Ohlin, *Targeting Co-Belligerents*, in TARGETED KILLINGS, *supra* note 13, at 60, 75 (emphasis added) (noting this view while not necessarily endorsing it); Craig Martin, *Going Medieval: Targeted Killing, Self-Defense and the Jus ad Bellum Regime*, in TARGETED KILLINGS, *supra* note 13, at 223, 245–46 (suggesting that groups with nominal Al

Treaty law and the ICTY jurisprudence actually permit greater flexibility in the definition of OAGs. While AP II applies to some NIACs, other NIACs are governed by Common Article 3, which contains no requirement that a party control territory.²⁷ The International Committee of the Red Cross (ICRC), a group with special competence regarding LOAC, has also signaled that flexibility is important. In one study, the ICRC observed that to be considered an OAG, an entity should merely have a “minimum of organization.”²⁸ That terminology strongly suggests that a rigid, itemized checklist would be counterproductive.²⁹

Moreover, the ICTY jurisprudence is far more flexible than it may appear.³⁰ In *Prosecutor v. Boskoski & Tarculovski*,³¹ a case involving the targeting of civilians by a non-State group, the ICTY noted that terrorist acts could form a pattern that would constitute an armed conflict.³² *Boskoski* can be read as standing for either one or two eminently pragmatic propositions.

Qaeda ties actually have little in common); see also Robin Geiß, *Armed Violence in Fragile States: Low-Intensity Conflicts, Spillover Conflicts, and Sporadic Law Enforcement Operations by Third Parties*, 91(873) INTERNATIONAL REVIEW OF THE RED CROSS 127, 134–35 (March 2009) (global Al Qaeda network structure appears “rather basic” and “rudimentarily organized”); cf. Ohlin, *supra* note 13 (offering more pragmatic view).

27. Ohlin, *supra* note 13, at 11–12; Michael N. Schmitt, *Unmanned Combat Aircraft Systems and International Humanitarian Law: Simplifying the Oft Benighted Debate*, 30 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL 595, 604–06 (2012) (discussing relationship between AP II and Common Article 3); cf. Andreas Paulus & Mindia Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict – A Tentative Conceptualization*, 91(873) INTERNATIONAL REVIEW OF THE RED CROSS 95, 117 (Mar. 2009) (discussing importance of flexibility in definition of an OAG).

28. See INTERNATIONAL COMMITTEE OF THE RED CROSS, HOW IS THE TERM “ARMED CONFLICT” DEFINED IN INTERNATIONAL HUMANITARIAN LAW? 5 (2008), <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

29. However, the ICRC has also indicated that the criteria mentioned in the ICTY jurisprudence are useful guides. See IHL CHALLENGES, *supra* note 7, at 8 (requiring a “certain level of organization,” which may include, but is not limited to, “the existence of a command structure . . . disciplinary rules . . . headquarters,” and logistical, attack, and negotiating capabilities).

30. See Ohlin, *supra* note 13, at 14 (“legal support for [requiring] centralization is misplaced”); Michael N. Schmitt, *The Status of Opposition Fighters in a Non-International Armed Conflict*, in *Non-International Armed Conflict in the Twenty-First Century* 119, 129 (Kenneth Watkin & Andrew Norris eds., 2012) (Vol. 88, U.S. Naval War College International Law Studies) (arguing that group’s structure “need not be strictly hierarchical or implemented in any formalistic manner”).

31. *Boskoski*, *supra* note 24.

32. *Id.* ¶ 185 (noting that terrorism may be part of NIAC if it is part of “protracted campaign”).

First, OAGs should not be assessed in a vacuum, but on a sliding scale that also includes the other *Tadic* criterion, intensity.³³ Second, the best proof of an OAG is in the operational details of the violence that members of the group have caused. A group's sheer ability to mount sustained terrorist attacks is evidence of a "high level of planning and a coordinated command structure."³⁴

The ICTY's finding that evidence of discipline exists also suggests substantial flexibility in the definition of an OAG. In *Limaj*, for example, the ICTY found that the Kosovo Liberation Army (KLA) was organized even though evidence of discipline was "scant" by the court's own admission.³⁵ Witnesses differed widely on when the military police cited by the tribunal had been established.³⁶ If the military police were a salient symbol of organizational discipline, this divergence in recollection seems odd. Moreover, as the ICTY acknowledged, there was no record of any imposition of discipline among KLA members.³⁷

The *Limaj* court sought to buttress this decidedly equivocal evidence of discipline with a proxy: other nations and entities dealt with the KLA in a way that suggested that they regarded the group as organized,³⁸ although evidence for this point was slim. For example, the ICTY acknowledged that representatives of States and other entities were "sometimes unclear about the KLA's command structure."³⁹ Indeed, one report described the KLA's structure as "a mystery" and "more a matter of diffuse horizontal command."⁴⁰ *Limaj* also noted that the General Staff of the KLA "did not have a consistent . . . location."⁴¹ The Tribunal acknowledged that the authorship and date of the KLA's governing regulations were not apparent

33. *Id.* ¶¶ 182–83; see also Laurie R. Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition*, 46 VANDERBILT JOURNAL OF TRANSNATIONAL LAW __ (forthcoming 2013), available at <http://ssrn.com/abstract=2029989>, at 22–23 (discussing flexibility in ICTY approach); U.N.H.C.R., *Independent International Commission Report*, *supra* note 20, ¶ 134 (asserting that anti-government armed groups in Syria should be considered OAGs that are accountable under LOAC).

34. *Boskaski*, *supra* note 24, ¶ 204.

35. *Limaj*, *supra* note 21, ¶ 116.

36. *Id.* ¶ 113.

37. *Id.* ¶ 116.

38. See *Limaj*, *supra* note 21, ¶¶ 128–29.

39. *Id.* ¶ 131 (citing Austrian Embassy report).

40. *Id.* ¶ 131 (also observing that American diplomat Richard Holbrooke seconded this perception).

41. *Id.* ¶ 104.

on the regulations' face.⁴² Yet the ICTY brushed past these apparent failures of organization, explaining pragmatically that the KLA was "effectively an underground operation, operating in conditions of secrecy out of concern to preserve its leadership" and "under constant threat of military action" by Serbian forces.⁴³ Therefore, it was "no surprise that the organizational structure and the hierarchy of the KLA was confusing."⁴⁴ More than any other factor, the court relied on the KLA's knack for recruiting new followers.⁴⁵ On the basis of this one criterion and modest evidence of others, the court was satisfied that the KLA's fluid and contingent structure did not undermine its classification as an OAG.

Precedent from elsewhere also argues against a narrow definition of organization. Consider *Abella v. Argentina (Tablada Case)*,⁴⁶ involving an attack on an Argentinean army base by rebels, followed by alleged State mistreatment of the attackers that the plaintiffs characterized as a violation of Common Article 3. The Inter-American Commission on Human Rights (IACHR) first ruled that AP II did not limit the situations in which armed conflict existed. The tribunal observed that armed conflicts "not of an international character" that trigger Common Article 3 need not be "large-scale and generalized hostilities or a situation comparable to a civil war in which dissident armed groups exercise control over parts of national territory."⁴⁷ Suggesting the need for flexibility, the IACHR noted that NIACs could also involve "confrontations between *relatively* organized armed forces."⁴⁸ The tribunal's use of the term "relatively" to modify the requirement of an OAG suggests that a narrow or rigid definition would be counterproductive. While the tribunal added that an armed conflict must be something more than "riots, mere acts of banditry or an unorganized and short-lived rebellion,"⁴⁹ its analysis indicated that requiring a significantly more elaborate showing would merely allow parties to escape accountability.

42. *Id.* ¶ 110; *see also id.* ¶ 124 (discussing KLA's lack of communications equipment).

43. *Id.* ¶ 132; *cf.* Daniel Byman & Matthew C. Waxman, *Kosovo and the Great Air Power Debate*, INTERNATIONAL SECURITY, Spring 2000, at 25 (finding that KLA failed to show "that it was capable of holding territory against the Serbian Army"); *id.* at 28 (describing KLA as initially "poorly organized" and as gaining strength only with NATO assistance).

44. Limaj, *supra* note 21, ¶ 132.

45. *Id.* ¶ 118.

46. Juan Carlos Abella v. Argentina, Case 11.137, Inter-American Commission on Human Rights, Report No. 55/97, ¶ 152 (Nov. 18, 1997) [hereinafter *Tablada Case*].

47. *Id.* ¶ 152.

48. *Id.* (emphasis added).

49. *Id.*

Turning to the specific facts, the IACHR found it sufficient that the rebels' attack on the base was "carefully planned, coordinated and executed."⁵⁰

Tribunals have also expansively defined a non-State actor's capacity to comply with LOAC. Terrorist groups generally do not comply with LOAC; often their standard operating procedure involves fundamental violations such as the targeting of civilians. But tribunals have viewed terrorist groups as *able* to comply with LOAC, even if those groups are disinclined to do so.⁵¹ A contrary view would create perverse incentives, allowing a group to free itself from the risk of targeting by increasing its violations of otherwise applicable norms.⁵²

Buttressing this flexible approach, the ICTY has also broadly interpreted the *Tadic* requirement that violence be "protracted." Interpreting the term "protracted" narrowly would again create perverse incentives. Violent non-State actors could strike first and then claim that the conflict was not yet a protracted one, thereby precluding a State from utilizing the full range of responses permissible under LOAC. Instead, the State would be limited to the far narrower repertoire of force permissible under a law enforcement paradigm. To avoid creating this perverse incentive, the ICTY has viewed the term "protracted armed violence" in a pragmatic fashion, as referring generally to the intensity of the violence, not its timing per se.⁵³

III. MORE THAN MEETS THE EYE: THE ORGANIZATION OF TERRORIST NETWORKS

Just as a deeper look at case law suggests that the definition of OAG is more flexible than it initially appears, terrorist groups are more organized

50. *Id.* ¶ 155. While the International Criminal Tribunal for Rwanda set out a narrower standard in *Prosecutor v. Akayesu*, that standard has generally not been followed and "is regarded as exceedingly high." See Geiß, *supra* note 26, at 136 n.40.

51. See *Boskoski*, *supra* note 24, ¶¶ 204–5 (pattern of LOAC violations does not support inference that group is unable to comply).

52. *Cf. id.* at 205 (explaining that tribunal "cannot merely infer a lack of organization . . . [because] international humanitarian law was frequently violated by [the group's] members").

53. See *Prosecutor v. Haradinaj*, Case No. IT-04-84-T, Trial Chamber Judgment, ¶ 49 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 3, 2008) (noting the term "protracted armed violence" has been "interpreted in practice... as referring more to the intensity of the armed violence than to its duration"); see also *Tablada Case*, *supra* note 46, ¶ 156 (noting that "brief duration" of attack did not preclude classification as NIAC); *cf.* Paulus & Vashakmadze, *supra* note 27, at 106–07 (arguing that *Tadic* "protracted armed violence" criterion refers to intensity as well as duration).

than their historical image suggests. Although some scholars have viewed earlier acts of terror as the product of individual discontent, they actually involved careful planning.⁵⁴ Today's terrorist groups, including Al Qaeda, also display far more organization than is commonly understood.

A. Terrorist Groups, Organization and Agency Costs

Terrorist groups require organization because they wish to influence actors who are often organized. Terrorist groups play a multi-level game of the kind made famous by Robert Putnam, involving internal and external actors.⁵⁵ Internal actors include people within the organization and within the community that the group purports to represent—Al Qaeda claims to stand for a particular religious vision, while a group like Hamas purports to represent Palestinians and the Kurdistan Workers' Party (PKK) Kurds. External actors include States where the terrorist group is principally located, other States where the group wishes to extend its influence, groups of States such as Western nations or States in the Middle East, international organizations, and other terrorist groups.⁵⁶

Terrorist groups use violence for both expressive and instrumental ends. Violence expresses their commitment to a distinctive vision that the mundane corruption of other parties obscures.⁵⁷ Certain kinds of violence, such as suicide attacks, communicate this commitment in an even clearer form—sending a message about the group's dedication to its cause.⁵⁸ Instrumentally, violence serves as a spoiler, derailing negotiations between States and moderate members of the group's own community.⁵⁹ On occasion, terrorist groups find it expedient to mitigate violence, to avoid alienat-

54. See Bruce Hoffman, *The Myth of Grass Roots Terrorism* (Book Review), 87(3) FOREIGN AFFAIRS 133, 135–36 (2008) (discussing careful organization behind assassination of Austrian Archduke Franz Ferdinand, which precipitated World War I).

55. See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INTERNATIONAL ORGANIZATION 427 (1988).

56. See Max Abrahms, *What Terrorists Really Want: Terrorist Motives and Counterterrorism Strategy*, INTERNATIONAL SECURITY, Spring 2008, at 85–86; Erica Chenoweth et al., *What Makes Terrorists Tick?*, INTERNATIONAL SECURITY, Spring 2009, at 83.

57. See BRUCE HOFFMAN, INSIDE TERRORISM 168–69 (1998).

58. See Abrahms, *supra* note 56, at 85–86.

59. Cf. Andrew H. Kydd & Barbara F. Walter, *The Strategies of Terrorism*, INTERNATIONAL SECURITY, Summer 2006, at 72–75 (explaining incentives for violent extremists to undermine peace negotiations).

ing key constituencies or to gain time to regroup from State pressure.⁶⁰ Managing violence to maximize both expressive and instrumental goals requires organization. Maintaining fidelity to these goals in the face of State pressure and internal disagreement requires a particular agility in organizational form.

Like any other entity, a terrorist group needs some form of discipline. Without discipline, agency costs proliferate, as undisciplined members pursue their own impulses or agendas to the detriment of the organization's goals.⁶¹ However, discipline requires institutional memory, as leaders monitor, document and assess the performance of subordinates. Documentation can be exploited by the group's foes, providing information about operatives and planned attacks. Terrorist groups, including Al Qaeda, grapple with the conflict between uniform messaging and secrecy.

Al Qaeda has coped with this dilemma by cultivating a portfolio approach that maximizes versatility in structure and decision making, as well as in operational plans.⁶² Wise investors use portfolio theory to diversify risk. The careful and prudent investor never entrusts all of her resources to one company or even one sector. Rather, the investor pursues some measure of risk diversification. If one investment fails to bring returns, others can pick up the slack.⁶³

Al Qaeda employs a portfolio approach to operations. Officials have recognized that Al Qaeda needs to be right only once to achieve its expressive and instrumental goals, while security officials must be right every time.⁶⁴ Running several plots simultaneously keeps State adversaries guessing, lodging the initiative with Al Qaeda. Even if the vast majority of attacks are prevented, one catastrophic attack sends the message that Al

60. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2729–30 (2010); cf. Peter Margulies, *Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech*, 63 *HASTINGS LAW JOURNAL* 455, 486–93 (2012) (discussing manipulation of public opinion by terrorist groups).

61. Cf. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 *COLUMBIA LAW REVIEW* 509 (1994) (discussing virtues and risks of working through agents).

62. Cf. Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 *DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW* 429, 433–37 (2010) (distinguishing between “top-down” and “bottom-up” threats).

63. See Lee-Ford Tritt, *The Limitations of an Economic Agency Cost Theory of Trust Law*, 32 *CARDOZO LAW REVIEW* 2579, 2622 (2011).

64. See Frances Fragos Townsend, *The President's Plan, in 10 Ways to Avoid the Next 9/11*, *NEW YORK TIMES*, Sept. 10, 2006, § 4, 13.

Qaeda is still on the map. That message encourages further attacks and distorts government policies. Al Qaeda uses a similar approach to organizational form. It varies its structure as the need requires, equipping its personnel to leverage “evolving relationships” rather than being wed to a particular organizational structure.⁶⁵ Sticking with one organizational form would also give an advantage to Al Qaeda’s adversaries.⁶⁶ Al Qaeda has adopted an approach to structure that minimizes this risk, mixing command decisions with subordinates’ operational initiative. While some have argued that most terrorist acts are the product of independent, grassroots efforts,⁶⁷ that picture is decidedly incomplete. According to terrorism expert Bruce Hoffman, Al Qaeda is a “remarkably agile and flexible organization that exercises both top-down and bottom-up planning and operational capabilities.”⁶⁸

Accounts of terrorist groups as creatures of chaos are inaccurate. It turns out that terrorist groups breed bureaucracy. Like lawful organizations, terrorist groups wrestle with the ubiquitous problem of agency costs. Al Qaeda, like a State military unit, uses personnel drawn from a variety of backgrounds whom it expects to fulfill the group’s mission.⁶⁹ However, operatives may have agendas of their own. For example, they may have an interest in looting civilian property or skimming money from the group and enriching themselves.⁷⁰ Alternatively, terrorist operatives may engage in *more* violence than the group’s leaders find optimal, because the operatives

65. See Reid Sawyer & Michael Foster, *The Resurgent and Persistent Threat of al Qaeda*, 618 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL & SOCIAL SCIENCE 197, 200 (2008).

66. See Abdulkader H. Sinno, *Armed Groups’ Organizational Structure and Their Strategic Options*, 93(882) INTERNATIONAL REVIEW OF THE RED CROSS 311, 318 (2011) (noting that networks such as Al Qaeda are less vulnerable to State retaliation because of the mobile and dispersed nature of their leadership).

67. See MARC SAGEMAN, LEADERLESS JIHAD: TERROR NETWORKS IN THE TWENTY-FIRST CENTURY 23–24 (2008).

68. Hoffman, *supra* note 54, at 134.

69. Jacob N. Shapiro & David A. Siegel, *Moral Hazard, Discipline, and the Management of Terrorist Organizations*, 64 WORLD POLITICS 39, 73 (2012); see also John Mueller & Mark G. Stewart, *The Terrorism Delusion: America’s Overwrought Response to September 11*, INTERNATIONAL SECURITY, Summer 2012 (arguing that individual defendants convicted in the United States of terrorism-related crimes were often lacking in competence and judgment); cf. Brahma Chellaney, *Fighting Terrorism in Southern Asia: The Lessons of History*, INTERNATIONAL SECURITY, Winter 2001–02, at 96–97 (noting, as an example of agency costs in counterterrorism, that aid to South Asian governments and non-State groups to fight terrorism has been siphoned off for other purposes).

70. Shapiro & Siegel, *supra* note 69, at 54–55.

have developed habits of violence while leaders sometimes believe that relative restraint enhances the organizational brand.⁷¹ Bureaucratic rules and procedures can help the terrorist group address these problems.

Consider the case of Al Qaeda in Iraq (AQI). AQI was a “cohesive organization with shared personnel across ‘official’ names, institutional memory, embedded management practices, and permanent salaried employees.”⁷² Both AQI and its successor organization, the Islamic State of Iraq (ISI), took steps to enforce discipline among members.⁷³ For example, terrorist groups such as AQI keep copious records of the success and failure of operations, even though maintaining such records greatly enhances the risk that adversaries will obtain custody of this information and use it against these groups.⁷⁴ Groups such as AQI clearly believe that committing rules and communications to writing tightens the organization of the group, making defection or shirking more difficult. AQI required signed pledges by fighters who consented to conditions on various activities.⁷⁵ For example, AQI threatened to expel members who engaged in ordinary criminal conduct, such as looting, which would distract from the group’s ideological agenda.⁷⁶ ISI instituted controls that would bring a glow to the most austere of accountants, decreeing that, “[f]or every amount paid out of [organizational] funds, the recipient is required to provide two signatures . . . one for receiving the money and another one to show how the money was spent.”⁷⁷ Another ISI pronouncement declared that “[a]ll properties, small and large, will be inventoried.”⁷⁸ The ISI also required operatives to upload information on flash drives, to be “sent every week to the [group’s] administrator.”⁷⁹ The proliferation of flash drives and memory sticks obviously ratchets up the risk that some of the information contained in these devices will end up in the hands of the group’s adversaries.⁸⁰ However, ISI apparently determined that the benefits of such a structure to group discipline outweighed those risks.

71. Cf. Mueller & Stewart, *supra* note 69, at 91 (asserting that Muslim population worldwide has been alienated by Al Qaeda’s indiscriminate violence).

72. Shapiro & Siegel, *supra* note 69, at 48 n.32.

73. *Id.* at 47.

74. *Id.*

75. *Id.* at 48.

76. *Id.* at 49–50.

77. *Id.* at 50.

78. Shapiro & Siegel, *supra* note 69.

79. *Id.* at 51.

80. *Id.* at 50.

ISI also kept careful track of all of its operatives, cataloging incoming fighters, ongoing staff and “exiting brothers.”⁸¹ These internal records distinguished between the assignments of new staff, who might be suicide bombers or perform other roles.⁸² This record keeping, like the ban on looting, served strategic and ideological purposes. Operatives in Iraq were often foreign nationals who had entered Iraq because ISI’s practice of violence resonated with their preconceived beliefs or habits.⁸³ Left to their own devices, these recruits might engage in violence “for its own sake.”⁸⁴ However, indiscriminate violence, like looting, could impair the group’s messaging. Record keeping also enhances the propaganda capabilities of terrorist groups. In most groups, claiming credit for an attack is as important as the attack itself.⁸⁵ Claiming credit announces to the world and to other terrorist groups that the organization has “arrived.” Claiming credit for violence also enhances the group’s commitment: a suicide attack, for example, signals the sincerity of the attacker’s beliefs and those of the organization.

One can also view a strategy relying on suicide attacks as a decision about the costs of internal monitoring. Suppose that a terrorist leader orders a conventional (non-suicide) attack. For whatever reason, the attack fizzles. The group’s leadership then could have a difficult time in evaluating the causes for the attack’s failure in a “noisy” environment,⁸⁶ where many factors can impede optimal execution. An attacker who survives a suboptimal attack will likely have many excuses for why the operation failed to go as planned. The leader will need to weigh those excuses before deciding on the staffing for the next attack. A suicide attack dispenses with the excuse-sifting phase, and also gives the suicide operative no exit strategy apart from outright desertion. Since that path leads to disgrace,⁸⁷ a suicide attack

81. *Id.* at 51.

82. *Id.*

83. *Id.* at 52.

84. Shapiro & Siegel, *supra* note 69.

85. *See* Abrahms, *supra* note 56.

86. *See* Shapiro & Siegel, *supra* note 69, at 73.

87. This is a particularly compelling factor when groups also provide social services and cash benefits to operatives’ families. *See* Boim v. Holy Land Foundation for Relief & Development, 549 F.3d 685, 698 (7th Cir. 2008) (noting that Hamas’s social service programs “mak[e] it more costly . . . to defect”); Eli Berman & David D. Laitin, *Religion, Terrorism, and Public Goods: Testing the Club Model*, 92 JOURNAL OF PUBLIC ECONOMICS 1942, 1952, 1955 (2008) (same); *see also* Justin Magouirk, *The Nefarious Helping Hand: Anti-*

is often a good way of ensuring discipline. However, making sure that the operative has sufficient ties to the organization and a “track record” of violence and ideological commitment requires some degree of organization.

B. Terrorist Networks and Global Reach

Al Qaeda displays this mix of organizational forms in its relationships with affiliated groups.⁸⁸ While Al Qaeda’s core remains in Pakistan, its lack of geographic proximity to other groups is not necessarily a weakness. Network theory teaches us that physical proximity is less important when knowledge and values can be shared in other ways.⁸⁹

Links between Al Qaeda and regional groups are synergistic along a number of axes. The Taliban/Al Qaeda link has been durable and effective because it combined the embedded localism of the Afghan Taliban with the extreme Islamist network of schools and camps based in Pakistan.⁹⁰ In other situations, regional organizations seek out Al Qaeda when State pressure has weakened the organization.⁹¹ Allied with Al Qaeda, groups can share information on effective strategies and learn from their mistakes.⁹² Al Qaeda has historically welcomed such overtures, since they assist the global group in extending its brand.⁹³ More sophisticated technology, including improvement in transportation and communications, has made it far easier to coordinate activities across regions.⁹⁴

Corruption Campaigns, Social Services Provisions, and Terrorism, 20(3) TERRORISM & POLITICAL VIOLENCE 356, 358 (2008) (discussing Hamas’s provision of social services).

88. For more on the strengths and weaknesses of networks, see Mette Eilstrup-Sangiovanni & Calvert Jones, *Assessing the Dangers of Illicit Networks: Why al-Qaida May Be Less Threatening Than Many Think*, INTERNATIONAL SECURITY, Fall 2008, at 11–33 (2008); see also Chesney, *supra* note 1, at 23–29 (discussing interaction and entropy in Al Qaeda’s relationships with groups in Yemen and Somalia).

89. Stephen R. Borgatti & Rob Cross, *A Relational View of Information Seeking and Learning in Social Networks*, 49 MANAGEMENT SCIENCE 432, 436, 439, 441 (2003).

90. See Paul Staniland, *Organizing Insurgency: Networks, Resources, and Rebellion in South Asia*, INTERNATIONAL SECURITY, Summer 2012, at 171 (Summer 2012).

91. Daniel L. Byman, *Breaking the Bonds Between Al-Qa’ida and Its Affiliate Organizations* 14–15 (Aug. 2012), available at <http://www.brookings.edu/~media/research/files/papers/2012/7/alqaida%20terrorism%20byman/alqaida%20terrorism%20byman.pdf>.

92. *Id.* at 15.

93. *Id.* at 13.

94. See Jeremy Pressman, *Rethinking Transnational Counterterrorism: Beyond a National Framework*, 30(4) THE WASHINGTON QUARTERLY 63, 64 (Autumn 2007).

Examples of this synergy abound. For example, Al Qaeda in the Arabian Peninsula (AQAP), which operates primarily in Yemen, began as a result of “direct orders” from Osama bin Laden to Al Qaeda members on the ground in that region.⁹⁵ Today, AQAP is both more “professional” in its operations and more linked to the Al Qaeda “core.”⁹⁶ In North Africa, Al Qaeda of the Islamic Maghreb (AQIM) enjoys a partnership with Al Qaeda.⁹⁷ Al Qaeda’s current leader, Dr. Ayman al-Zawahiri, announced a “blessed union” with AQIM, leading both groups to focus on attacking French interests.⁹⁸ In Somalia, the terrorist group al Shabab publicly pledged its loyalty to Al Qaeda.⁹⁹ Operatives trained in Afghanistan camps transferred to Somalia to provide training to Shabab members.¹⁰⁰ The two organizations now cooperate on a host of matters, from ideological instruction to advanced tactics.¹⁰¹ Zarqawi’s AQI “willingly merged” with bin Laden’s group, although the latter had been weakened by the erosion of its base in Afghanistan after September 11.¹⁰² Credible evidence indicates that members of Al Qaeda in Iraq have been assigned to “establish cells in other countries.”¹⁰³

Al Qaeda provides training for operations elsewhere. For example, the perpetrators of the London subway suicide attacks obtained training from Al Qaeda branches in Pakistan.¹⁰⁴ Indeed, Al Qaeda provided training in

95. See Leah Farrall, *How Al Qaeda Works: What the Organization’s Subsidiaries Say About Its Strength*, 90 FOREIGN AFFAIRS 128, 132 (2011); cf. Byman, *supra* note 91, at 5–6 (discussing relationship between Al Qaeda and AQAP); Jane Novak, *Arabian Peninsula al Qaeda groups merge*, LONG WAR JOURNAL, Jan. 26, 2009, http://www.longwarjournal.org/archives/2009/01/arabian_peninsula_al.php (same).

96. See Byman, *supra* note 91, at 6.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 7.

101. *Id.*

102. Farrall, *supra* note 95, at 133; cf. Matthew Levitt, *Untangling the Terror Web: Identifying and Counteracting the Phenomenon of Crossover Between Terrorist Groups*, 24(1) SAIS REVIEW 33, 38–39 (Winter–Spring 2004).

103. See Hoffman, *supra* note 54, at 135. The pattern of collaboration with Al Qaeda is not monolithic; members of some groups have broken away. See Byman, *supra* note 91, at 7–8 (discussing Egypt’s Gama al-Islamiya, many of whose members renounced violence after influence of Al Qaeda led to widely criticized 1997 attack on tourists at Luxor).

104. See Hoffman, *supra* note 54, at 138; Anthony N. Celso, *Al Qaeda’s Post-9/11 Organizational Strategy: The Role of Islamist Regional Affiliates*, 23 MEDITERRANEAN QUARTERLY 30, 35 (2012); cf. Pressman, *supra* note 94, at 65 (“[f]undraising, recruitment . . . and training may take place in many countries simultaneously for transnational groups”).

Afghanistan, Pakistan and Yemen to as many as three thousand violent extremists from the United Kingdom, who subsequently returned, “embedd[ed] themselves” in communities and developed plans for further attacks.¹⁰⁵ While discrimination and alienation from the mainstream in the United Kingdom and elsewhere may have facilitated additional recruitment, “much of the terrorist threat in the United Kingdom today stems from deliberate, long-standing subversion by al Qaeda.”¹⁰⁶ Al Qaeda-linked networks released videotaped martyrs’ wills.¹⁰⁷ Other plots, such as the conspiracy to target transatlantic passenger aircraft in 2006, also have ties to Al Qaeda networks in Pakistan or Yemen.¹⁰⁸ Groups such as Hezbollah have global networks that attract financing and recruit new members.¹⁰⁹ Moreover, some terrorist groups have strong links to transnational criminal enterprises that share the proceeds of drug trafficking, kidnapping and prostitution.¹¹⁰

Groups partnering with Al Qaeda buy into a distinctive operational focus. While many groups have local agendas, groups under the Al Qaeda umbrella must agree to pursue attacks on Western interests.¹¹¹ The attacks on Western interests are a signature element of Al Qaeda; perpetuating these attacks allows groups under the Al Qaeda umbrella to “stay on mes-

105. See Hoffman, *supra* note 54, at 138.

106. *Id.*

107. Celso, *supra* note 104, at 35.

108. *Id.*

109. See Levitt, *supra* note 102, at 35. My point here is not that Hezbollah is affiliated with Al Qaeda, but that Al Qaeda may emulate Hezbollah’s worldwide financial activities. See Jonathan M. Winer, *Countering Terrorist Finance: A Work, Mostly in Progress*, 618 ANNALS OF THE AMERICAN ACADEMY OF POLITICAL & SOCIAL SCIENCE 112, 116 (2008) (discussing Al Qaeda’s funding connections in Saudi Arabia).

110. See Phil Williams, *Terrorist Financing and Organized Crime: Nexus, Appropriation, or Transformation?*, in COUNTERING THE FINANCING OF TERRORISM 126, 138–39 (Thomas J. Biersteker & Sue E. Eckert eds., Routledge 2008) (describing involvement of LTTE in heroin trade, human trafficking, gun running and extortion).

111. Farrall, *supra* note 95, at 133; cf. Byman, *supra* note 91, at 11 (noting that “common consequence of the embrace of an [Al Qaeda] label is for a group to seek out Western targets within a group’s theater of operations”); Pressman, *supra* note 94, at 65 (discussing proliferation of Osama bin Laden’s strategy of attacks on Western targets). David H. Petraeus, the former Director of the Central Intelligence Agency, recently told congressional committees that Al Qaeda appears to have influenced the targeting of the American diplomatic mission in Benghazi, Libya that resulted in the deaths of Ambassador J. Christopher Stevens and three other Americans. See Eric Schmitt, *Petraeus Says U.S. Tried to Avoid Tipping Off Terrorists After Libya Attack*, NEW YORK TIMES, Nov. 17, 2012, at A10.

sage.”¹¹² Moreover, Al Qaeda insists on specific approval for attacks outside a subsidiary’s regional base.¹¹³ For example, when a Danish newspaper published caricatures of the Prophet Muhammad, Al Qaeda asked its Iraqi branch to carry out attacks on Danish interests.¹¹⁴ U.S. officials believe that Hezbollah operatives played a significant role in the July 2012 attack in Bulgaria on a bus carrying Israeli tourists.¹¹⁵ In addition, Al Qaeda requires certain operational modalities for attacks outside a branch’s region. Al Qaeda pushes suicide attacks and patterned attacks on particular kinds of targets, such as public transportation, government structures and infrastructure.¹¹⁶ This layer of specific operational control demonstrates Al Qaeda’s organizational contours and confirms its existence and functioning as a “united front.”¹¹⁷ Al Qaeda also has structural mechanisms that ensure communication and guidance. It uses information committees that are tied to senior leadership and operational planners.¹¹⁸

A networked approach driven by an anti-Western strategic focus has many advantages for Al Qaeda. Shared ideology lessens the likelihood of deterring the group through ordinary law enforcement or negotiation. Suicide bombers will not blink at the prospect of arrest and trial. Rather, involvement with the legal system confers another opportunity for the attackers to brand themselves as martyrs.¹¹⁹ In addition, networks such as Al Qaeda and its affiliates are far less amenable to negotiation than territory-based groups. Groups that control territory within a single State may on occasion be a party to successful negotiations, as the IRA demonstrated.¹²⁰ Such movements may gain a stake in negotiations, as they seek to ease State pressure on their territorial base.¹²¹ In contrast, the disaggregation of terri-

112. Farrall, *supra* note 95, at 133.

113. *Id.* at 134.

114. *Id.*

115. See Nicholas Kulish, *Despite U.S. Fear Hezbollah Moves Openly in Europe*, NEW YORK TIMES, Aug. 16, 2012, at A1.

116. See Farrall, *supra* note 95, at 135.

117. *Id.* at 133.

118. *Id.* at 135.

119. Cf. Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NORTHWESTERN UNIVERSITY LAW REVIEW 1, 44–46 (2003) (noting intransigence yielded by ideological commitments of members of terrorist networks); Michael A. Newton, *Exceptional Engagement: Protocol I and a World United Against Terrorism*, 45 TEXAS INTERNATIONAL LAW JOURNAL 323, 362 (2009) (noting that terrorist groups are often “undeterred by existing criminal law”).

120. See Pressman, *supra* note 94, at 68–70.

121. *Id.* at 69.

tory and operations in transnational networks mean that those groups lack a “return address.” Since transnational groups can readily shift their operations,¹²² State pressure is not an effective deterrent. The absence of a general deterrent only exacerbates the risk of armed conflict from transnational groups, and makes specific deterrence or incapacitation of the group’s operatives all the more imperative.¹²³

On the basis of this analysis of terrorist and network organization, targeting of an Al Qaeda affiliate is permissible on a showing that Al Qaeda exerts a strategic influence on the targeted group. A State considering targeting members of the Al Qaeda subsidiary should have a reasonable basis for believing that Al Qaeda guides some or all of the group’s choice of targets. Mere subscription to an ideology is not enough—nor is financing, although financing can be one factor contributing to an inference of strategic influence. Policymakers should have a reasonable belief that Al Qaeda has leveraged money, recruits, training or expertise to encourage the affiliate’s targeting of Western interests or moderation in the targeting of Muslim civilians. Ongoing correspondence or exchanges of information about targeting or operations should give rise to an inference that such influence is present. Al Qaeda’s role in the training of an affiliate’s recruits should also have evidentiary significance.¹²⁴ No rigid hierarchy need be shown—indeed, as we have seen, the case law from transnational tribunals has often required less hierarchy than meets the eye.¹²⁵

IV. CONCLUSION

One need not read the modern jurisprudence defining an OAG as being limited to groups with headquarters, fully functioning logistics or ironclad discipline. While the ICTY decisions include language setting out these criteria, the facts of the cases are actually far more ambiguous. In judgments

122. *Id.* at 70.

123. *But see* Eilstrup-Sangiovanni & Jones, *supra* note 88, at 36–37 (noting that network form can create security problems because of looser control by leadership and reliance on local operatives infiltrated by law enforcement, while acknowledging that security issues have not necessarily impaired groups’ abilities to cause massive harm to civilians).

124. *See* Haradinaj, *supra* note 53, ¶ 86 (discussing importance of training).

125. Of course, targeting suspected terrorists is only one aspect of an effective counterterrorism strategy. Aid that reaches needy individuals and groups can help goodwill toward the West and counter the appeal of terrorist groups. *See* Alope Chakravarty, *Feeding Humanity, Starving Terror: The Utility of Aid in a Comprehensive Antiterrorism Financing Strategy*, 32 WESTERN NEW ENGLAND LAW REVIEW 295, 325–29 (2010).

such as *Limaj*, the ICTY found organization when traditional elements were equivocal. The ICTY jurisprudence and the analysis of many commentators point toward a more pragmatic approach.

That said, terrorist organizations often reveal surprisingly strong elements of organization. Like other entities, terrorist groups devise mechanisms to deal with the problem of agency costs. They monitor, assess and document performance of their personnel, and make appropriate changes when needed. These measures exist even when they appear to endanger the groups' security.

The versatile approach to organization that marks terrorist groups within a State also holds true for transnational networks such as Al Qaeda. Al Qaeda operates in a synergistic fashion with regional groups. Many groups have received training from Al Qaeda's core feeder sources of schools and camps, and have sworn allegiance to Al Qaeda to enhance their appeal and access to resources. Direct operational control is rarely present. However, strategic influence, including a focus on targeting Western interests, is common. When such strategic influence can be shown, the definition of an OAG is sufficiently flexible to permit targeting across borders.