# Enemy Status and Military Detention in the War Against Al-Qaeda

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*Abstract*

This Article presents "enemy" as a concept for defining the legal limits on military detention in the United States' campaign against al-Qaeda. Existing frameworks have sought to define the government's military detention authority in terms of "combatant," a concept drawn from *jus in bello*—international law governing how enemies fight one another. Although helpful for informing who may be detained under the government's war powers, "combatant" is not the correct legal concept for defining the limits of that authority. Instead, the correct legal concept is "enemy," a concept that has been defined in the international law of neutrality—a species of *jus ad bellum*. Unlike *jus in bello*, which specifies the relations between opposing belligerents, neutrality law specifies the relations between belligerents and neutrals—those outside the conflict. Neutrality law explains when non-hostile persons, organizations, and states forfeit their neutral immunity and acquire enemy status. Neutrality law's role in defining who belligerents may treat as enemies in war is important not only as a matter of international law, but also domestic law. Interpreting the war powers conferred by Congress to be informed by the framework of duties and immunities in neutrality law balances, on the one hand, giving the President the full range of authority necessary to wage war successfully and, on the other, ensuring that the President uses the powers Congress grants only for the war that Congress has authorized. Lastly, this Article uses neutrality law's framework of duties and immunities to describe who may be detained as an enemy in the ongoing war against al-Qaeda.

SUMMARY

INTRODUCTION .....2

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I. "COMBATANTS" AND MILITARY DETENTION ..... 6
A. *Using "Combatant" to Construe the Government's Detention Authority* ..... 6
1. Analogizing the Enemy to Lawful Combatants ..... 9
2. Those Taking a Direct Part in Hostilities ..... 15
B. *"Combatant" as a Limit on the Government's Detention Authority* ..... 21
1. Why Limit Detention to "Combatants"? ..... 21

II. NEUTRALITY LAW AS A FRAMEWORK FOR THE GOVERNMENT'S WAR POWERS ..... 25
A. *Neutrality Law as a Framework in International Law* ..... 25
1. Neutral Immunity ..... 26
2. Neutral Duties ..... 28
3. Neutrality Law and Individuals ..... 34
4. Neutrality Law and Military Operations Against Terrorist Groups ..... 35
5. Neutral Duties and "Armed Conflict" in a Material Sense ..... 40
B. *Neutrality Law as a Framework in Domestic Law* ..... 41
1. Neutrality Law and the 2001 AUMF ..... 42
2. Neutrality Law and the Federal Courts ..... 46

III. USING NEUTRALITY LAW TO DEFINE THE ENEMY ..... 50
A. *Enemy Status in General* ..... 50
1. Enemy Status and Military Detention ..... 50
2. What Does It Mean to Be an Enemy? ..... 51
B. *Hostile Acts* ..... 52
1. Hostile Purpose ..... 53
2. Action ..... 55
C. *Acts in Favor of a Belligerent* ..... 58
1. Allegiance ..... 60
2. Substantial Assistance ..... 66
3. Support in Breach of a Duty ..... 68
D. *In Sum* ..... 72

CONCLUSION ..... 73

## INTRODUCTION

Consider a hypothetical. Marwan Balawi is a citizen of Yemen detained at the U.S. Naval Station at Guantanamo Bay, Cuba. After fighting in the Afghan-Soviet War in the 1980s, he returned to Yemen and became a local construction magnate servicing contracts of foreign oil companies. Inspired by the September 11, 2001, attacks, he reconnected with old war comrades. Mr. Balawi first came to the attention of the U.S. government because captured Yemeni al-Qaeda fighters in Afghanistan and Iraq identified him in interrogations as their "al-Qaeda recruiter." Based on information from these interrogations, intelligence analysts assessed that Mr. Balawi was al-Qaeda's top recruiter in Yemen and that incapacitating him would

significantly slow al-Qaeda's stream of Yemeni recruits. In early 2004, Yemen, at the request of the United States, seized Mr. Balawi and transferred him to U.S. custody. Although before his capture intelligence analysts assessed Mr. Balawi as holding a senior leadership position within al-Qaeda, his own statements in custody, corroborated by documents seized at one of his homes, show this judgment to be incorrect. Despite Mr. Balawi's longtime dealings with senior al-Qaeda leaders, he has rejected their requests to join the al-Qaeda organization. Although Mr. Balawi occupied a central node in al-Qaeda's transnational terrorist network, he worked as a freelancer. He is not a member of al-Qaeda or another terrorist group, but nonetheless has used his charismatic sermons, influence with local tribes, and wealth to bring scores of young, angry men for training and further indoctrination at al-Qaeda terrorist training camps. Based on this extensive support to al-Qaeda's war effort against the United States, in 2005, a Combatant Status Review Tribunal convened by the Department of Defense determined that Mr. Balawi was an enemy combatant and thus subject to military detention.[1]

Is it lawful for the U.S. military to hold Marwan Balawi? His military detention tests existing understandings of the government's war powers.

From the perspective of international law, Mr. Balawi's military detention raises questions because he does not look like a "combatant." He bought plane tickets, made introductions, negotiated with tribal leaders, and preached to naïve youths for al-Qaeda, all far from theaters of active military operations. Based on these "support" and "facilitation" activities, intelligence analysts and military commanders view Balawi as "high threat" and a "force multiplier"—far more dangerous than the untrained youths he recruits. However, in the view of many international law scholars, these "support" activities make him neither a "combatant" nor someone taking direct part in hostilities against the United States.

From the perspective of domestic law, Mr. Balawi's military detention raises questions because the government relies on a statute, the Authorization for Use of Military Force (2001 AUMF) enacted seven days after the attacks on September 11, 2001, as the legal authority to prosecute its military campaign against al-Qaeda. This statute authorizes the President to use:

> all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[2]

But how does Mr. Balawi fall within the 2001 AUMF? He is not a citizen of any nation targeted by the 2001 AUMF. He is not a member of any relevant organizations, and he joined al-Qaeda's fight against the United States well after

1. *See* Paul Wolfowitz, Deputy Sec'y of Def., Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* http://www.defense.gov/news/jul2004/d20040707review.pdf (defining "enemy combatant" to include "an individual who was part of or supporting Taliban or al Qaeda forces or associated forces that are engaged in hostilities against the United States or its coalition partners").

2. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

September 18, 2001. Although military commanders regard Mr. Balawi's detention as a necessary and appropriate incident to defeating al-Qaeda, he appears to fall outside the list of targets explicitly listed in the 2001 AUMF. Does the 2001 AUMF reach those who are somehow constructively part of an organization targeted by the 2001 AUMF, although they are not members in fact? The 2001 AUMF explicitly targets those who aided the terrorist attacks that occurred on September 11, 2001, but can it also reach those who aid later al-Qaeda attacks?

The military detention of Mr. Balawi presents the question of the limits of the government's war powers under domestic and international law. How far from the September 11, 2001, attacks does the 2001 AUMF reach? How far from fighting on a battlefield does military detention authority reach? These questions are increasingly important.

First, the United States is increasingly confronted with enemies, like Mr. Balawi, whose connection to the September 11 attacks and, thus the 2001 AUMF, is indirect at best. This has resulted from the passage of time. But more significantly, this has resulted from al-Qaeda's adaptations. Under pressure from the government, al-Qaeda dispersed—becoming less formal and more decentralized.[3] Al-Qaeda's transformation from an organization towards a movement or network challenges both a focus in domestic law on the "organization" that conducted the September 11 attacks and a focus in international law on "organized" armed groups.

Second, there is not a generally accepted theory for understanding the limits of the detention power granted by the 2001 AUMF. The branches of the U.S. government seem to have agreed upon the general standard that should be applied to construe the government's detention authority. In defending habeas petitions brought by detainees held at Guantanamo Bay, Cuba, both the Bush and Obama Administrations have asserted similar detention standards with prongs relating to those who are "part of" or "support" enemy forces.[4] Congress, in the Military

3. *See* JAMES J.F. FOREST ET AL., COMBATING TERRORISM CTR., U.S. MILITARY ACAD., HARMONY AND DISHARMONY: EXPLOITING AL-QA'IDA'S ORGANIZATIONAL VULNERABILITIES 8–9 (2006), *available at* http://www.ctc.usma.edu/posts/harmony-and-disharmony-exploiting-al-qaidas-organizational-vulnerabilities (explaining that al-Qaeda transformed from a hierarchy into a decentralized network after much of its senior leadership was killed or captured); Robert Gates, Sec'y of Def., Dep't of Def. News Briefing with Secretary Gates from the Pentagon (June 26, 2008) ("[Al-Qaeda has] metastasized, and it's spread to other places, like al Qaeda in North Africa, the Maghreb, and al Qaeda in the Levant, and so on. And these groups, as best we can tell, have a fair amount of independence. They get inspiration, they get sometimes guidance, probably some training, probably some money from the al Qaeda leadership, but it's not—my impression is it's not as centralized a movement as it was, say, in 2001. But in some ways, the fact that it has spread in the way that it has, in my view, makes it perhaps more dangerous."), *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4252; Thom Shanker, *Insurgents Set Aside Rivalries on Afghan Border*, N.Y. TIMES, Dec. 29, 2010, at A1 (explaining that intelligence officials assessed that al-Qaeda and associated terrorist groups operate as a "loose federation [that] was not managed by a traditional military command-and-control system, but was more akin to a social network of relationships"); JOHN ROLLINS, CONG. RESEARCH SERV., R41070, AL QAEDA AND AFFILIATES: HISTORICAL PERSPECTIVE, GLOBAL PRESENCE, AND IMPLICATIONS FOR U.S. POLICY (2011) ("Out of necessity, due to pressures from the security community, in the ensuing years [al-Qaeda] has transformed [from a hierarchical corporation] into a diffuse global network and philosophical movement composed of dispersed nodes with varying degrees of independence.").

4. Respondents' Memorandum Regarding the Government's Detention Authority Relative to the Detainees Held at Guantanamo Bay at 2, *In re* Guantanamo Bay Detainee Litigation, 577 F. Supp. 2d 312 (D.D.C. 2008) (Misc. No. 08-442) (Mar. 13, 2009) [hereinafter March 13 Filing]; Respondents' Memorandum in Support of the Government's Definition of Enemy Combatant at 4, Hamlily v. Bush, 2008 WL 4833121 (D.D.C. Jan. 7, 2009) (No. 05-0763).

Commissions Acts of 2006 and 2009, has similarly defined the enemy subject to military jurisdiction and punishment.[5] The D.C. Circuit and the Supreme Court seem to have largely accepted the detention standards offered by the government.[6]

Despite this apparent consensus around a detention standard, it remains unclear what the outer bounds of the detention standard are or how these outer bounds are ascertained. D.C. district court judges have expressed concern about the detention standard being overbroad, capturing even the "little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities."[7] D.C. district court judges have purported to use the international laws of war as a limit on the detention standard. They have asserted that the "support" prong lacks foundation in international law[8] and that in order to be "part of" an enemy group, one must fall within its command structure.[9] Using common sense arguments, the D.C. Circuit has rejected these limits,[10] but it has declined to replace them.[11] Moreover, members of

5. *See* Military Commissions Act of 2006, § 948a(1)(A)(i) (2006), amended by Military Commissions Act of 2009, 10 U.S.C. § 948(a) (2009) (defining "unlawful enemy combatant" as "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States"); Military Commissions Act of 2009, §§ 948a(7), 948b(a), 948c (defining "unprivileged enemy belligerent" as an individual who has engaged in or has purposefully and materially supported hostilities against the United States or its coalition partners and declaring that such an individual is subject to trial by military commission). The Military Commissions Acts lack explicit provisions conferring pre-trial detention authority. *See also* Al-Bihani v. Obama, 590 F.3d 866, 872 (D.C. Cir. 2010) (holding that an individual was lawfully detained if he was "part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners"). Pending bills relating to detention authority under the 2001 AUMF propose similar definitions.

6. Hamdi v. Rumsfeld, 542 U.S. 507, 527 (2004) (plurality opinion); *Al-Bihani*, 590 F.3d at 874 (D.C. Cir. 2010).

7. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 475 (D.D.C. 2005); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2049 (2005) (noting an "outpouring of academic literature raising concerns . . . in particular, about the absence of principled limits on Executive power to identify, target, detain, and try terrorists").

8. *See, e.g.*, Gherebi v. Obama, 609 F. Supp. 2d 43, 70 (D.D.C. 2009) ("Indeed, the Court shares the petitioners' distaste for the government's reliance on the term 'support' at all, laden as it is with references to domestic criminal law rather than the laws of war that actually restrict the President's discretion in this area."); Hamlily v. Obama, 616 F. Supp. 2d 63, 76 (D.D.C. 2009) ("Detaining an individual who 'substantially supports' such an organization, but is not part of it, is simply not authorized by the AUMF itself or by the law of war."); Hatim v. Obama, 677 F. Supp. 2d 1, 7 (D.D.C. 2010) ("[T]he government seeks to justify the detention of those who 'substantially supported' enemy forces by importing principles of domestic criminal law."). *See also* Allison M. Danner, *Defining Unlawful Enemy Combatant: A Centripetal Story*, 43 TEX. INT'L L.J. 1, 6 (2007) (asserting that the concept of "material support . . . has no precedent in the international law of war but does have a close analogue to a provision of the U.S. federal criminal code"); David Mortlock, *Definite Detention: The Scope of the President's Authority to Detain Enemy Combatants*, 4 HARV. L. & POL'Y REV. 375, 404 (2010) ("International law, as adopted by the United States, permits the United States to detain all members of al Qaeda and the Taliban, whether or not they participate in combat, but not those individuals who merely provide support for the organizations.").

9. *See, e.g.*, *Gherebi*, 609 F. Supp. 2d at 70 ("[T]he government's 'substantial support' standard . . . is not meant to encompass individuals outside the military command structure.").

10. *Al-Bihani*, 590 F.3d at 874 (stating that support is "independently sufficient to satisfy the standard" for detention); Hatim v. Gates, 632 F.3d 720, 721 (D.C. Cir. 2011) (same); Al-Madhwani v. Obama, 642 F.3d 1071, 1077 (D.C. Cir. 2011) ("[T]he 'command structure' test employed by the district court 'is *sufficient* to show that person is part of al Qaeda' but 'is not *necessary*.'" (quoting Uthman v. Obama, 637 F.3d 400, 403 (D.C. Cir. 2011))). *See also infra* note 336 and accompanying text.

11. *See Al-Bihani*, 590 F.3d at 874 ("We have no occasion here to explore the outer bounds of what

the D.C. Circuit have sharply critiqued the use of international law by the federal courts to limit the government's detention authority.[12]

This Article presents the concept of "enemy," which has been developed in the law of neutrality, as a way of resolving this apparent clash between domestic and international law and as a theory for understanding the limits on military detention under the 2001 AUMF. The concept of "enemy" is more consistent with the broad scope of the military detention permissible under the law of war, better explains the general detention standard that the branches of government seem to have settled upon, and answers the critique that international law should not be used to limit the government's detention authority. Part I critiques existing approaches to defining the U.S. government's military detention authority, which have sought to use the concept of "combatant" in the law of war. Part II explains how neutrality law operates as a framework in international and domestic law for defining the limits of the government's war powers in its campaign against al-Qaeda. Part III uses that framework to explain who may be subject to military detention as an enemy.

## I. "COMBATANTS" AND MILITARY DETENTION

In Part I, I explain existing approaches for construing the government's military detention authority, which have been based on different ways of defining who is a "combatant" under the law of war. Although combatant-based approaches yield insights into the scope of the government's detention authority, "combatant" has never been intended as a strict limit in international law on who may be detained in war. "Combatant" approaches to construing the government's military detention authority against al-Qaeda have nonetheless persisted because of concerns based in U.S. domestic law.

### *A. Using "Combatant" to Construe the Government's Detention Authority*

The Bush Administration first used the term "enemy combatant" in March 2002:

> [T]he people who are in Guantanamo are there because they're enemy combatants seized in a war, a war on terrorism. Most of them probably—I don't know the exact legal term, but they are not normal combatants in the sense of being in uniform. There's a lot that's very unique about this conflict. Some of them are in fact criminals. They're not only enemy combatants, they're people who are guilty of being involved probably or possibly in serious crimes of terrorism.[13]

constitutes sufficient support or indicia of membership to meet the detention standard."); Bensayah v. Obama, 610 F.3d 718, 725 (D.C. Cir. 2010) ("[I]t is impossible to provide an exhaustive list of criteria for determining whether an individual is 'part of' al Qaeda.").

12. *See Al-Bihani*, 590 F.3d at 871 (rejecting the premise "that Congress intended the international laws of war to act as extra-textual limiting principles for the President's war powers under the AUMF"); *see generally* Al-Bihani v. Obama, 619 F.3d 1, 1–9 (D.C. Cir. 2010) (Brown, J., concurring in the denial of rehearing en banc); *id.* at 9–53 (Kavanaugh, J., concurring in the denial of rehearing en banc).

13. *The NewsHour with Jim Lehrer*, (PBS television broadcast Mar. 21, 2002) (Transcript #7292).

The Obama Administration has declined to use the term "enemy combatant."[14] Although "enemy combatant" can be understood colloquially to mean "somebody who is combating,"[15] the Bush Administration had important legal reasons for characterizing Guantanamo detainees as "enemy combatants." By calling them "combatants," the Bush Administration sought to justify their military detention as lawful under U.S. law, which generally prohibits detention without criminal trial.[16] As "enemy combatants," detainees at Guantanamo would be similar to the hundreds of thousands of German and Italian prisoners of war held in the United States during World War II without legal controversy.[17] Moreover, classifying the detainees as "enemy combatants" would give the President the power to try them outside the regular criminal courts by military commission for violations of the law of war.[18]

By describing the Guantanamo detainees as "enemy combatants," the Bush Administration invoked authorities under U.S. domestic law, like detention without charge and trial by military commission. However, the Bush Administration also invoked a fundamental concept in international law, specifically, the law of war—the body of international law that governs how warring parties fight.[19] The law of war distinguishes between combatants and civilians:

> The enemy population is divided in war into two general classes, known as the *armed forces* and the *peaceful population*. Both classes have distinct rights, duties, and disabilities, and no person can belong to both classes at one and the same time.[20]

The law of war establishes a framework to separate combatants and civilians. Combatants have the legal right to engage in warlike acts against the enemy without penalties under the enemy state's domestic law.[21] A combatant can kill enemy

14. *See* March 13 Filing, *supra* note 4, at 2 (using the phrase "individuals captured in connection with armed conflicts and counterterrorism operations" rather than "enemy combatants"). In the Military Commission Act of 2009, Congress changed the term used in the Military Commission Act of 2006 from "unlawful enemy combatant" to "unprivileged enemy belligerent."

15. Transcript of Oral Argument at 5, Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (No. 03-6696).

16. United States v. Salerno, 481 U.S. 739, 749 (1987) (agreeing that a "'general rule' of substantive due process [is] that the government may not detain a person prior to a judgment of guilt in a criminal trial").

17. *See In re* Territo, 156 F.2d 142, 145–46 (9th Cir. 1946) (noting the presence of "many thousands" of prisoners of war brought to the United States "merely for safe keeping under the restraint of the Army"); John Brown Mason, *German Prisoners of War in the United States*, 39 AM. J. INT'L L. 198, 198 (1945) (noting, in 1945, that "over three hundred thousand Germans" were being held in the United States); Martin Tollefson, *Enemy Prisoners of War*, 32 IOWA L. REV. 51, 51 (1946) (tallying the number of German, Italian, and Japanese prisoners of war held in the United States during World War II at 435,788).

18. *See In re* Yamashita, 327 U.S. 1, 11 (1946) ("The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war.").

19. Dep't of Def., Directive 2311.01E, DoD Law of War Program, para. 3.1, (2006) (defining the law of war as "[t]hat part of international law that regulates the conduct of armed hostilities").

20. WAR DEP'T, RULES OF LAND WARFARE para. 8 (1940); WAR DEP'T, RULES OF LAND WARFARE para. 8 (1934); WAR DEP'T, RULES OF LAND WARFARE para. 29 (1914); *see also* DEP'T OF THE ARMY, THE LAW OF LAND WARFARE para. 60 (1956) [hereinafter ARMY FIELD MANUAL 27-10] (dividing the enemy population into "prisoners of war" and "the civilian population," and noting that "[p]ersons in each of the foregoing categories have distinct rights, duties, and disabilities").

21. *See* War Dep't, Instructions for the Gov't of Armies of the United States in the Field, General

soldiers without being guilty of murder. A combatant can capture and detain without being guilty of kidnapping. A combatant can destroy enemy property without being liable for torts.[22] Moreover, when captured, a combatant is entitled to a variety of other privileges during detention.[23]

However, a combatant's privileges come with duties. Combatants must distinguish themselves from civilians, by, for example, identifying themselves upon capture.[24] They must discriminate in their use of force by refraining from attacking peaceful civilians and civilian objects.[25] Moreover, combatants have disabilities; principally, they may be the objects of attack by other combatants.[26] Civilians, on the other hand, may not be made the object of attack.[27] However, civilians must abstain from aiding, abetting, or participating in the fighting.[28]

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Orders No. 100, § III, art. 57 (1863) [hereinafter Lieber Code] ("[K]illing, wounding, or other warlike acts [of a combatant] are not individual crimes or offenses . . . ."); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) art. 43(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] ("[C]ombatants . . . have the right to participate directly in hostilities."). The combatant's privilege can be inferred from provisions of the Geneva Convention (III) Relative to the Treatment of Prisoners of War (GC III). *See* United States v. Lindh, 212 F. Supp. 2d 541, 553 (E.D. Va. 2002) (interpreting articles 87 and 99 of the GC III to "make clear that a belligerent in a war cannot prosecute the soldiers of its foes for the soldiers' lawful acts of war"); United States v. Khadr, 717 F. Supp. 2d. 1215, 1222 n.7 (Ct. Mil. Comm'n Rev. 2007) (same); United States v. Pineda, 2006 WL 785287 at *6–8 (D.D.C. Mar. 23, 2006) (same); Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 442 n.38 (2004) (noting that "combatant immunity" can be inferred from GC III articles 82, 87, and 88).

22. *See* Freeland v. Williams, 131 U.S. 405, 416 (1889) ("[F]or an act done in accordance with the usages of civilized warfare, under and by military authority of either party, no civil liability attached to the officers or soldiers who acted under such authority.").

23. *See, e.g.*, Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 43, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III] (requiring the Detaining Power to "recognize promotions in rank which have been accorded to prisoners of war"); *id.* art. 60 (requiring that the Detaining Power give prisoners of war a monthly advance of pay); *id.* art. 72 (explaining that prisoners of war are entitled to receive, *inter alia*, sports outfits and musical instruments by mail).

24. *Id.* art. 17 (providing that a prisoner of war is required to provide "surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information" to his captors).

25. W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 514 (2003).

26. *See* ARMY FIELD MANUAL 27-10, *supra* note 20, para. 40 ("Military objectives—i.e[.], combatants . . . are permissible objects of attack (including bombardment)."); 10 U.S.C. § 950p(a)(1) (2009) (defining "military objective" to include "combatants").

27. *See* ARMY FIELD MANUAL 27-10, *supra* note 20, para. 25 ("[C]ivilians must not be made the object of attack directed exclusively against them."). Civilians may incidentally be killed in military operations.

28. *See* 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1246 (1950) (providing judgment in the matter of United States v. List) ("[T]he rule is established that a civilian who aids, abets, or participates in the fighting is liable to punishment as a war criminal under the laws of war."); 10 U.S.C. § 904 (2006) (making punishable by court-martial aiding the enemy or, without proper authority, supporting the enemy in various ways). Persons authorized by their government to accompany their armed forces fall outside this proscription. Even though, for many purposes, including under domestic law, they would be classified as "civilians," they are classified as prisoners of war under the Geneva Conventions. *See* GC III, *supra* note 23, art. 4(A)(4) (including as POWs persons who have received authorization to accompany the armed forces); *cf.* Christian Damson (United States) v. Germany, 7 R.I.A.A. 184, 198 (Nat'l Comm'rs 1925) (holding that a civilian employee of the U.S. government whose activities were "directly in furtherance of a military operation" was not a "civilian" for the purposes of the Treaty of Berlin).

The law of war's system of duties for combatants (refrain from targeting peaceful civilians and distinguish themselves from peaceful civilians) and for civilians (abstain from the fighting) separates the fighters and the peaceful population. This separation reduces the unnecessary suffering in war.[29]

Enemy persons in the United States' war against al-Qaeda reject the law of war's paradigm of combatants and civilians. They violate the duties of civilian status by engaging in acts of warfare. They also violate the duties of combatant status by deliberately seeking to blend in with peaceful civilians[30] and by attacking peaceful civilians.[31] Thus, enemy persons in the armed conflict with al-Qaeda fall into a nebulous and controversial legal category known as "unlawful combatant" or "unprivileged belligerent."[32]

The fact that enemy persons in this conflict are neither proper combatants nor peaceful civilians allows two approaches to defining them. Some start from the premise that these "unlawful combatants" are a type of combatant, for example, a combatant who is violating combatant duties to distinguish himself from the peaceful population. Using the law of war's test for determining when someone is entitled to be a combatant in the first instance, the U.S. government defines the enemy by analogizing enemy forces to categories of lawful combatants. Others start from the premise that these "unprivileged belligerents" are a type of civilian, that is, a civilian who is violating civilian duties to abstain from the fighting. They define enemy forces by using the law of war's test for when civilians forfeit their civilian immunity.

### 1. Analogizing the Enemy to Lawful Combatants

One approach to defining the enemy in the war against al-Qaeda analogizes enemy persons to categories of lawful combatants.[33] This approach, which I call the "analogizing approach," works from the provisions of the Geneva Conventions that establish who is entitled to receive the privileges of prisoner of war (POW) status.

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29. *See* J.M. SPAIGHT, WAR RIGHTS ON LAND 37 (1911) ("The separation of armies and peaceful inhabitants into two distinct classes is perhaps the greatest triumph of International Law. Its effect in mitigating the evils of war has been incalculable."); 2 HENRY WAGNER HALLECK, INTERNATIONAL LAW 22 (G. Sherston Baker ed., 4th ed. 1908) ("This system has greatly mitigated the evils of war . . . .").

30. *See, e.g.*, Taliban 2009 Rules and Regulations Booklet Seized by Coalition Forces on 15 July 2009 Ivo Sangin Valley, para. 63 (2009), *available at* http://www.pbs.org/wgbh/pages/frontline/obamaswar/etc/mullahomar.pdf ("The Mujahidin should always have the same uniform as the locals because it will be difficult for the enemy to recognize them . . . .").

31. *See, e.g.*, NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 47 (2004) [hereinafter THE 9/11 COMMISSION REPORT] (quoting Bin Laden as saying, "We do not have to differentiate between military or civilian. As far as we are concerned [Americans] are all targets").

32. *See, e.g.*, Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy*, PROGRAM ON HUMANITARIAN POL'Y AND CONFLICT RES., HARV. U. OCCASIONAL PAPER SERIES, Winter 2005 at 5–6 (describing "illegitimate warriors" and listing various synonyms).

33. *Cf., e.g.*, March 13 Filing, *supra* note 4, at 1 ("The President also has the authority under the AUMF to detain in this armed conflict those persons whose relationship to al-Qaida or the Taliban would, in appropriately analogous circumstances in a traditional international armed conflict, render them detainable.").

The law of war sets requirements to qualify as a combatant; these are embodied in the requirements for POW status in the Geneva Conventions.[34] Many, especially judges, have used these qualifications to inform the scope of the government's military detention authority in the war against al-Qaeda.[35]

The qualifications of combatants help construe detention authority. After all, if a person qualifies for the privileges of POW status, then he may be subject to its disabilities, namely detention.[36] But the qualifications tell us more. As the Supreme Court explained in *Ex parte Quirin*, "Our Government, by thus defining lawful belligerents entitled to be treated as prisoners of war, has recognized that there is a class of unlawful belligerents not entitled to that privilege, including those who, though combatants, do not wear 'fixed and distinctive emblems.'"[37]

In addition to defining a class of persons who may be detained, the qualifications also imply the existence of a category of persons who fails to qualify for the privileges of POW status, but is nonetheless subject to its disabilities, like detention.[38] Indeed, otherwise, by failing to qualify for combatant privileges (for example, by removing their fixed and distinctive emblems), groups could immunize their members from capture and detention. Thus, although these persons are not entitled to POW privileges, just as "[l]awful combatants are subject to capture and detention as prisoners of war by opposing military forces," these "[u]nlawful combatants are likewise subject to capture and detention."[39]

The *Quirin* court had an insight: the category of lawful combatant implies the existence of a category of unlawful combatant. Courts, in seeking to define the

34. GC III, *supra* note 23, art. 4.

35. *See, e.g.*, Bradley & Goldsmith, *supra* note 7, at 2114 ("[L]aw-of-war criteria for combatancy . . . can provide guidance on what type of association with al Qaeda suffices for inclusion within the 'organization' for purposes of the AUMF . . . ."); Gherebi v. Obama, 609 F. Supp. 2d 43, 68 (D.D.C. 2009) ("[T]he criteria set forth in Article 4 of the Third Geneva Convention and Article 43 of Additional Protocol I should inform the Court's assessment as to whether an individual qualifies as a member of the 'armed forces' of an enemy organization like al-Qaeda."); Hamlily v. Obama, 616 F. Supp. 2d 63, 75 (D.D.C. 2009) (citing for comparison "Third Geneva Convention, art. 4(A)" before determining that the "key inquiry" is "whether the individual functions or participates within or under the command structure of the organization—*i.e.*, whether he receives and executes orders or directions"); Al-Marri v. Pucciarelli, 534 F.3d 213, 227–28 (4th Cir. 2008) (Motz, J., concurring) (citing the Third and Fourth Geneva Conventions and explaining that "American courts have repeatedly looked to these careful distinctions made in the law of war in identifying which individuals fit within the 'legal category' of 'enemy combatant' under our Constitution").

36. *See* GC III, *supra* note 23, art. 21 ("The Detaining Power may subject prisoners of war to internment."); *In re* Territo, 156 F.2d 142, 145–46 (9th Cir. 1946) (concluding that detention was valid because petitioner was a legitimate prisoner of war).

37. *Ex parte* Quirin, 317 U.S. 1, 35 (1942).

38. Justice Souter in *Hamdi* and the majority opinion in *Ex parte Milligan* seemed to reject the existence of this category entirely. *See* Hamdi v. Rumsfeld, 542 U.S. 507, 549 (2004) (Souter, J., concurring) (rejecting the government's argument that a Taliban detainee could be held under the law of war on the grounds that the government did not grant the detainee prisoner of war status under the Third Geneva Convention); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 131 (1866) ("If he cannot enjoy the immunities attaching to the character of a prisoner of war, how can he be subject to their pains and penalties?").

39. *Ex parte* Quirin, 317 U.S. at 31; *see* Military Commissions Act of 2006, 10 U.S.C. § 948a(1)–(2), amended by Military Commissions Act of 2009, 10 U.S.C. § 948a (2009) (distinguishing between lawful and unlawful combatants); Dep't of Def., Directive 2310.01E, DoD Detainee Program, paras. E2.1.1.1-E2.1.1.2 (same); Military Commission Act of 2009, 10 U.S.C. § 948a(6)–(7) (distinguishing between privileged belligerents and unprivileged enemy belligerents).

category of "unlawful combatant," have built upon this insight. Going further, courts have defined the category of "unlawful combatant" by analogizing it to lawful combatant. In doing so, courts have taken the qualifications for lawful combatant status and picked one of them as the essential predicate for combatant status more generally, whether lawful or unlawful. For example, state authorization is generally a qualification to be a lawful combatant.[40] State authorization is important because the authority to wage war derives from the right of a state as a sovereign entity in international law.[41] Requiring state authorization also has a humanitarian purpose. Non-state actors commonly violate the law of war, for example, by pillaging and taking no prisoners.[42] A panel of judges in the Fourth Circuit's en banc decision in *Al-Marri v. Pucciarelli* seized upon the criterion of state authorization and concluded that to be an enemy combatant one must be affiliated with the military arm of an enemy government.[43]

Lawful combatant status, however, is possible for persons who are not affiliated with the military arm of a government. For example, members of organized armed groups merely "belonging" to a state that is a party to the armed conflict may be granted POW privileges if these groups fulfill certain criteria, including:

> (a) that of being commanded by a person responsible for his subordinates;
>
> (b) that of having a fixed distinctive sign recognizable at a distance;
>
> (c) that of carrying arms openly;
>
> (d) that of conducting their operations in accordance with the laws and customs of war.[44]

Organized armed groups that fulfill these requirements "have the principal characteristics generally found in armed forces throughout the world, particularly in regard to discipline, hierarchy, responsibility and honour."[45] Such groups have sufficiently accepted the burdens of the Geneva Conventions, and, assuming other requirements are met, can claim its benefits, that is, POW status upon capture.[46] For example, by organizing itself under a responsible command, a group will ensure that

40. *See* Lieber Code, *supra* note 21, 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 . . . ."); W. Hays Parks, *Combatants*, *in* 85 INTERNATIONAL LAW STUDIES 247, 269 (Michael N. Schmitt ed., 2009) (discussing the requirement of "right authority").

41. *See* HUGO GROTIUS, 1 THE RIGHTS OF WAR AND PEACE 60 (A. C. Campbell, trans., 1901) ("[N]o war can lawfully be made but by the sovereign power of each state").

42. FRANCIS LIEBER, GUERRILLA PARTIES: CONSIDERED WITH REFERENCE TO THE LAWS AND USAGES OF WAR 8 (1862) (discussing associations between pillaging and guerilla groups).

43. Al-Marri v. Pucciarelli, 534 F.3d 213, 230 (4th Cir. 2008) (Motz, J., concurring) ("[E]nemy combatant status rests on an individual's affiliation during wartime with the 'military arm of the enemy government.'").

44. GC III, *supra* note 23, art. 4(A)(2).

45. III THE GENEVA CONVENTIONS OF 12 AUGUST 1949 COMMENTARY 58 (Jean S. Pictet ed., A. P. de Heney, trans., 1960) [hereinafter PICTET COMMENTARY].

46. Underlying the Geneva Conventions is a "fundamental principle that warring entities must accept the Conventions' burdens in order to claim their benefits." "Protected Person" Status in Occupied Iraq Under the Fourth Geneva Convention, 28 Op. O.L.C. 1, 23 (2004), *available at* http://www.justice.gov/olc/2004/gc4mar18.pdf.

its members obey the law of war and do not commit atrocities.[47] In a series of opinions on the government's detention authority, which were later rejected by the D.C. Circuit, the D.C. district courts seized upon this criterion.[48] They defined enemy combatants to include those within the command structure of enemy forces and exclude those "outside the military command structure of an enemy organization."[49]

The analogizing approach tries to distill the qualifications for lawful combatant status to a single criterion for combatant status, whether lawful or unlawful. But, which criterion for the privileges of POW status is the one that matters for its disability—detention? The *al-Marri* panel picked affiliation with a state's military forces. The D.C. district courts picked integration into the "command structure" of an organized armed group. But why is one criterion relevant to detention, but not others? Distilling the qualifications for lawful combatant status to a single *sine qua non* of detention is completely arbitrary. The analogizing approach ultimately falls apart under its own logic because no criterion is common to all the categories of POWs recognized by the 1949 Geneva Conventions. Contrary to the *al-Marri* panel, some categories of POWs are not affiliated with the military arm of an enemy government.[50] Contrary to the D.C. district courts, some types of POWs are not within a "command structure."[51] Thus, limiting military detention authority only to those persons falling within a "command structure" or affiliated with the military arm of an enemy government cannot be correct because it excludes from detention persons whom the Geneva Conventions afford POW privileges and thus recognize are subject to detention.

The analogizing approach ultimately collapses under its own logic, but its more basic legal error is that it reads the Geneva Conventions backwards by interpreting restrictions and obligations on state action as sources of legal authority. U.S. federal law, as a basic interpretive principle, seeks to find affirmative authorization for

47. *In re* Yamashita, 327 U.S. 1, 15 (1946) ("[T]he law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates."); Additional Protocol I, *supra* note 21, art. 43(1) (explaining that a military command structure "shall enforce compliance with the rules of international law applicable in armed conflict").

48. *See* Gherebi v. Obama, 609 F. Supp. 2d 43, 68 (D.D.C. 2009) ("Foremost among these basic distinguishing characteristics of an 'armed force' is the notion that the group in question be 'organized . . . under a command responsible . . . for the conduct of its subordinates,' Additional Protocol I, art. 43.1."); Hamlily v. Obama, 616 F. Supp. 2d 63, 75 (D.D.C. 2009) ("The key inquiry, then, is not necessarily whether one self-identifies as a member of the organization . . . but whether the individual functions or participates within or under the command structure of the organization—*i.e.*, whether he receives and executes orders or directions.").

49. *Gherebi*, 609 F. Supp. 2d at 70; *see also* Al-Rabiah v. United States, 658 F. Supp. 2d 11, 19 (D.D.C. 2009) (adopting "command structure" test); Awad v. Obama, 646 F. Supp. 2d 20, 23 (D.D.C. 2009) (same); Mattan v. Obama, 618 F. Supp. 2d 24, 26 (D.D.C. 2009) (same); Hatim v. Obama, 677 F. Supp. 2d 1, 5–6 (D.D.C. 2009) (same).

50. Members of organized resistance movements need only "belong" to a party to the conflict. GC III, *supra* note 23, art. 4(A)(2). Participants in a *levée en masse* are "[i]nhabitants 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." *Id.* art. 4(A)(6). These persons need only carry arms openly and respect the laws and customs of war to receive prisoner of war status. Howard Levie, *Prisoners of War in International Armed Conflict*, 59 INT'L L. STUD. SERIES U.S. NAVAL WAR C. 1, 65 (1977).

51. Persons authorized to accompany the armed forces are not necessarily under a command structure. GC III, *supra* note 23, art. 4(A)(4). Participants in a *levée en masse* need not have a command structure to receive prisoner of war status. *Id.* art. 4(A)(6).

government action.[52] International law, in general, starts from exactly the opposite premise. International law presumes that states are independent entities with free will.[53] International law, in general, is written in terms of restrictions, not authorizations. International law generally says what states may not do instead of what states may do. The law of war relating to the conduct of hostilities, *jus in bello*, follows this traditional model of international law; the law of war "forbids rather than authorizes certain manifestations of force."[54]

Here, the qualifications for lawful combatant status stated in the Geneva Conventions are not intended to give states the authority to detain persons who meet those criteria. The qualifications of combatants are meant as restrictions on state action. The Third Geneva Convention requires states to sort through captured enemies and give POW privileges to detained persons who meet the qualifications.[55] Failing to qualify for POW privileges does not make one immune from detention; it makes one subject to punishment for warlike acts.[56] None of the qualifications for POW privileges in the Geneva Conventions were intended as limits on who can be detained.

As "combatant" migrates from international law to domestic law, its meaning reverses. Restrictions codified in the Geneva Conventions become sources of legal authority justifying Executive Branch action.[57] Restrictions can give some

52. By contrast, the U.S. Constitution establishes a government of "enumerated powers." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819); United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 33 (1812) ("The powers of the general Government are made up of concessions from the several states—whatever is not expressly given to the former, the latter expressly reserve.").

53. *See* The S.S. Lotus, (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, para. 44 (Sept. 7) ("International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.").

54. Richard Baxter, *So-called 'Unprivileged Belligerency': Spies, Guerillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 324 (1951); *e.g.*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS, *supra* note 28, at 1236 ("It cannot be questioned that acts done in time of war under the military authority of an enemy cannot involve any criminal liability on the part of officers or soldiers if the acts are not prohibited by the conventional or customary rules of war."); Additional Protocol I, *supra* note 21, preamble ("[N]othing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations.").

55. *See* Gherebi v. Obama, 609 F. Supp. 2d 43, 65 (D.D.C. 2009) (explaining that the Geneva Conventions and Additional Protocols, "far from 'authorizing' detention in one context but not another, act as restraints on the inherent authority of the state to exercise military force in whatever manner it deems appropriate. . . . The Geneva Conventions restrict the conduct of the President in armed conflicts; they do not enable it.").

56. *See, e.g.*, WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 783 (2d ed., 1920) ("[P]ersons not forming part of the organized forces of a belligerent, or operating under the orders of its established commanders, are not in general recognized as legitimate troops or entitled, when taken, to be treated as prisoners of war, but may upon capture be summarily punished even with death."); 2 LASSA F. L. OPPENHEIM, INTERNATIONAL LAW: DISPUTES, WAR AND NEUTRALITY § 80, at 257 (Hersch Lauterpacht ed., 7th ed. 1952) [hereinafter OPPENHEIM 7th] ("Individuals who are not members of regular forces and who take up arms or commit hostile acts singly and severally are still liable to be treated as war criminals and shot.").

57. For example, in *Hamdi v. Rumsfeld*, the plurality took note of the "clearly established principle of the law of war that detention may last no longer than active hostilities," and reasoned that the government

information about the scope of an authority,[58] but here they provide little guidance as to the outer bounds of who can be detained.

In addition to logical and legal problems, the analogizing approach also suffers from perverse policy consequences. The analogizing approach excludes from detention those very persons whom states, in crafting international law, declined to protect with POW status. This rewards unlawful behavior. The qualifications for POW status are, in part, meant to ensure that groups have agreed to comply with the law of war. The qualifications for POW status encourage groups to accept the burdens of the law of war in order to benefit from its privileges.[59] For example, al-Qaeda is not organized under a "command responsible," but instead is amorphous and decentralized.[60] If falling under a command structure were used not as a requirement for the detainee to qualify for POW privileges, but instead as a requirement for the government to subject a detainee to military detention, then detainees who purposefully remained outside the "command structure" of al-Qaeda would be immune from detention. Khalid Sheikh Mohammed, the planner of the 9/11 attacks, refrained from swearing allegiance to Bin Laden until after the attacks because he wanted to keep his autonomy.[61] Applying a "command structure" requirement would mean that al-Qaeda would benefit from its disorganization. Its lack of organization under a responsible command would thereby immunize many participants in its terrorist attacks from military detention.

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had "the authority to detain for the duration of the relevant conflict," in domestic law. Hamdi v. Rumsfeld, 542 U.S. 507, 520–21 (2004) (plurality opinion).

58. For example, although the text of the Constitution does not affirmatively provide for individual rights to habeas corpus, the Constitution does limit the suspension of the writ of habeas corpus. The Supreme Court has held that "at the absolute minimum, the Suspension Clause protects the writ as it existed in 1789." I.N.S. v. St. Cyr, 533 U.S. 289, 301 (2001) (internal quotes and citations omitted).

59. *See* S. REP. NO. 84-9, at 5 (1955) (noting that the extension of prisoner of war protections in the 1949 Conventions to certain "partisans" would only include those complying with law of war obligations and "does not embrace that type of partisan who performs the role of farmer by day, guerilla by night" who "remain subject to trial and punishment as unlawful belligerents"). The concern that those who reject the obligations of the law of war should not receive its benefits was part of U.S. objections to Additional Protocol I. *See* RONALD REAGAN, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE PROTOCOL II ADDITIONAL TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, CONCLUDED AT GENEVA ON JUNE 10, 1977, S. TREATY DOC. NO. 100-2, at iv (1987) (declining to submit Additional Protocol I to the Senate for advice and consent, in part, because it would "grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war"); *Denied: A Shield For Terrorists*, N.Y. TIMES, Feb. 17, 1987, at A22 (approving of President Reagan's decision declining to seek ratification of Additional Protocol I in part because it contained "possible grounds for giving terrorists the legal status of P.O.W.s [sic]").

60. Bensayah v. Obama, 610 F.3d 718, 725 (D.C. Cir. 2010) (stating that al-Qaeda's structure is largely unknown and amorphous).

61. *See* THE 9/11 COMMISSION REPORT, *supra* note 31, at 150 ("In addition to supervising the planning and preparations for the 9/11 operation, [Khalid Sheikh Mohammed (KSM)] worked with and eventually led al Qaeda's media committee. But KSM states he refused to swear a formal oath of allegiance to Bin Ladin, thereby retaining a last vestige of his cherished autonomy."); Substitution for the Testimony of Khalid Sheikh Mohammed, para. 110, United States v. Moussaoui, 282 F. Supp. 2d. 480 (E.D. Va. 2003) (Def.'s Exhibit 941) ("Sheikh Mohammed said he attempted to postpone swearing bayat as long as possible to ensure that he remained free to plan operations however he chose, but he eventually took the oath after the 9/11 attacks, when he was told that the refusal of such a senior and accomplished al Qaeda leader to swear bayat set a bad example for the group's rank and file.").

2. Those Taking a Direct Part in Hostilities

The analogizing approach attempts to match al-Qaeda, the Taliban, and associated terrorist groups to categories of lawful combatants in the Geneva Conventions. The opposite approach accepts that enemy persons do not qualify as "combatants" under international law. This approach assumes that all persons who are not "[lawful] combatants" are instead civilians.[62] Under the law of war, when civilians take direct part in hostilities, they forfeit their civilian protections and may be the objects of attack, just like combatants.[63] Thus, this approach, which I call the "direct participation approach," focuses on whether a person has forfeited his civilian immunity by taking direct part in hostilities.[64]

Just like the qualifications of combatants, the direct participation in hostilities standard provides some help in construing detention authority. Detention, as a "milder measure" than killing, is a lesser-included exercise of the power to attack with deadly force.[65] If a person may be the object of attack, it follows that he may be captured and detained.[66] Otherwise, an inhumane result would occur in which the law allowed persons to be killed but not detained.[67]

62. *See, e.g.*, Additional Protocol I, *supra* note 21, art. 50(1) ("A civilian is any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.").

63. *See id.* art. 51 ("Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."); 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, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II] ("Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities."); Rome Statute of the International Criminal Court art. 8(2)(b)(i), July 17, 1998, U.N. DOC. A/CONF.183/9 (defining as a war crime "intentionally directing attacks against . . . individual civilians not taking direct part in hostilities").

64. *See, e.g.*, Gherebi v. Obama, 609 F. Supp. 2d 43, 63 (D.D.C. 2009) (describing petitioners' argument that direct participation in hostilities is the applicable standard).

65. Moyer v. Peabody, 212 U.S. 78, 84–85 (1909); *see also* WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 420 (4th ed. 1895) ("[A]s the right to hold an enemy prisoner is a mild way of exercising the general rights of violence against his person, a belligerent has not come under an obligation to restrict its use within limits so narrow as those which confine the right to kill.").

66. *See* Hamlily v. Obama, 616 F. Supp. 2d 63, 70 (D.D.C. 2009) ("[T]he government's detention authority covers 'any person who has committed a belligerent act,' which the Court interprets to mean any person who has directly participated in hostilities."); Al-Bihani v. Obama, 590 F.3d 866, 884 (D.C. Cir. 2010) ("Because the 55th Brigade was properly the target of U.S. force in Afghanistan pursuant to the AUMF, it follows that members of the 55th Brigade taken into custody on the battlefield in Afghanistan in the fall of 2001 may be detained 'for the duration of the particular conflict in which they were captured.'"); Hamdi v. Rumsfeld, 542 U.S. 507, 597 (2004) (Thomas, J., dissenting) ("I see no principled distinction between the military operation the plurality condemns today (the holding of an enemy combatant based on the process given Hamdi) from a variety of other military operations" including "bombings and missile strikes."); Al-Bihani v. Obama, 619 F.3d 1, 51 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (arguing that action by President Clinton to kill non-U.S.-citizens abroad suggests that the President possesses at least some lesser included authority under Article II to detain such individuals without congressional authorization).

67. *See* Hague Convention (IV) Respecting the Laws and Customs of War on Land art. 23, Oct. 18, 1907, 36 Stat. 2295, 1 Bevans 631 [hereinafter Hague IV] ("[I]t is especially forbidden . . . (d) to declare that no quarter will be given . . . ."); *see also* Additional Protocol II, *supra* note 63, art. 4(1) ("It is prohibited to order that there shall be no survivors.").

Although the direct participation in hostilities standard helps inform detention authority, its use as a legal limit on military detention is problematic.

First, there are significant methodological problems in using the "direct participation in hostilities" standard. The definition of direct participation in hostilities is unsettled as a matter of international law.[68] To the extent that the meaning of a legal standard remains genuinely disputed, the standard cannot be a binding rule of customary international law.[69] Moreover, the direct participation in hostilities standard, as a targeting standard, is problematic for use in the judicial review of the legality of military detention. "Whether the circumstances warrant a military attack on a foreign target is a 'substantive political judgment[] entrusted expressly to the coordinate branches of government.'"[70] Since federal judges are developing the contours of the government's military detention standard "in a common law fashion,"[71] using the direct participation in hostilities standard as a detention standard would place the judges in the position of developing targeting law[72] and prospectively regulating the conduct of military operations against the enemy.[73]

More significant than these methodological problems is a substantive problem: the direct participation in hostilities standard is meant to limit deadly force, not detention.[74] Direct participation in hostilities entails a loss of civilian immunity, but

68. *See Hamlily*, 616 F. Supp. 2d at 77 (explaining that "the precise scope of the phrase 'direct participation in hostilities' remains unsettled"); NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 6 (2009) (describing the notion of direct participation in hostilities as "one of the most difficult, but as yet unresolved issues of international humanitarian law"); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1123–25 (2008) (describing direct participation as "a contested concept" as regards its substantive and temporal parameters).

69. *See* Flores v. S. Peru Copper Corp., 414 F.3d 233, 255 (2d Cir. 2003) (requiring that "rules of customary international law be clear, definite, and unambiguous"); *cf.* Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."). Moreover, the fact that states have not codified a definition suggests that they cannot agree on what a definition should be or that they view the concept as one that would be ill-advised to codify.

70. El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 845 (D.C. Cir. 2010) (en banc).

71. Al-Bihani v. Obama, 590 F.3d 866, 870 (D.C. Cir. 2010) (observing that the Supreme Court has left "the contours of the substantive and procedural law of detention open for lower courts to shape in a common law fashion").

72. *See* Robert Chesney, *Who May Be Held? Military Detention Through The Habeas Lens*, 52 B.C. L. REV. 769, 851–53 (2011) (contemplating that targeting authority may be "clouded" by judicial limitations on the power to detain).

73. *But see* THE FEDERALIST NO. 78, at 425 (Alexander Hamilton) (explaining that in contrast to the executive and legislative branches, the judiciary "has no influence over either the sword or the purse"); Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (explaining that the "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments," which are not justiciable).

74. *See* Additional Protocol I, *supra* note 21, art. 51, paras. 2–3 (providing that civilians shall not be the object of attack, "unless and for such time as they take direct part in hostilities"). For example, the question of when civilians authorized to accompany the armed forces may be the objects of attack has been debated in the context of direct participation. But, in that debate, there has been no dispute that they would be entitled to prisoner of war status and could be detained for the duration of hostilities. *See* W. Hays Parks, Evolution of Policy and Law Concerning the Role of Civilians and Civilian Contractors Accompanying the Armed Forces 10–11 (Oct. 2005) (unpublished manuscript), *available at*

civilians are not immune from detention.[75] Under the law of war, enemy persons can lawfully be detained, even if they have not taken direct part in hostilities.

Under the law of war, belligerents have very broad discretion to detain enemy persons. Belligerents may lawfully detain any enemy person whom they regard as militarily necessary to detain, even if that person is not a "combatant" in some sense, either by qualifying for POW status or by taking direct part in hostilities.

First, belligerents may detain any person who has taken part in hostilities.[76] The ability of states under the law of war to detain any person who has participated in hostilities is shown in the purpose of war detention, which is to prevent "further participation" in the war.[77] Thus, anyone who has participated may be detained to prevent further participation.[78]

In addition, belligerents can detain all members of enemy armed forces, regardless of whether individual members have participated in hostilities.[79] Belligerents can capture former members of enemy armed forces.[80] Belligerents can detain enemies who are armed.[81] Belligerents can detain persons who materially support enemy forces in the fighting.[82] Belligerents can detain all military-age

http://www.icrc.org/eng/assets/files/other/2005-07-expert-paper-icrc.pdf ("Civilians . . . do not relinquish their entitlement to prisoner of war status.").

75. *See* Additional Protocol I, *supra* note 21, art. 51 (providing for protection of the civilian population from attack, but not detention); Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War Part III arts. 41–43, 79–135, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV] (providing regulations for the treatment of civilian internees).

76. *See In re* Territo, 156 F.2d 142, 145 (9th Cir. 1946) ("[A]ll persons who are active in opposing an army in war may be captured . . . .").

77. *See* WAR DEP'T, RULES OF LAND WARFARE para. 61 (1914) ("The object of internment is solely to prevent prisoners from further participation in the war."); *International Military Tribunal (Nuremberg), Judgment and Sentences*, 41 AM. J. INT'L L. 172, 229 (1947) ("[W]ar captivity is . . . protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.").

78. For example, participants in a *levée en masse* may be detained, even after the uprising has ended. *See* ARMY FIELD MANUAL 27-10, *supra* note 20, para. 65 ("Even if inhabitants who formed the *levée en masse* lay down their arms and return to their normal activities, they may be made prisoners of war.").

79. *Cf.* GC III, *supra* note 23, art. 4(A)(1) (contemplating detention of the members of the armed forces of a party to the conflict without regard to whether they have participated in hostilities); Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 28, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I] (contemplating retention of military medical personnel).

80. *Cf.* GC III, *supra* note 23, art. 4(B)(1) (contemplating detention of persons having belonged to the armed forces of a party to the conflict in occupied territory).

81. Lieber Code, *supra* note 21, art. 15 ("Military necessity . . . allows of the capturing of every armed enemy . . . .").

82. *See* HERBERT C. FOOKS, PRISONERS OF WAR 25 (1924) ("Persons who may now be taken in a campaign are the military persons and those who assist them in some material way."); *see, e.g.*, Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare art. 36, Dec. 1922–Feb. 1923, *available at* http://www1.umn.edu/humanrts/instree/1923a.htm (providing that belligerents may hold as prisoners of war members of aircrews and "every passenger whose conduct during the flight at the end of which he has been arrested has been of a special and active assistance for the enemy"); WAR DEP'T, RULES OF LAND WARFARE para. 46 (1940) ("[P]ersons whose services are of particular use to the hostile army or its government such as the higher civil officials, diplomatic agents, couriers, guides," may be captured and detained); WAR DEP'T, RULES OF LAND WARFARE, para. 47 (1914) ("[T]he following may be made prisoners of war: . . . (c) [p]ersons whose services are of particular use and benefit to the hostile army or its government . . . ."); The King v. Superintendent Of Vine Street Police Station *ex parte* Liebmann, [1916] 1 K.B. 268, 278 (Eng.) (Low, J.) (articulating that persons who were sent by a belligerent

inhabitants of an area during a mass uprising, known as a *levée en masse*.[83] Belligerents can detain enemy persons present on their home territory at the outbreak of hostilities.[84] Belligerents can detain enemy civilians who are "important" to the enemy, including senior government officials.[85] Belligerents can detain enemy civilians for security reasons, regardless of whether they have participated in the armed conflict.[86] The law of war guarantees humane treatment and requires that such detentions be non-punitive.[87] In certain circumstances, the law of war requires periodic review of the necessity of continued detention.[88] However, the law of war

state to another state "for purposes directly helpful to the carrying out of enterprises either actually warlike or eminently calculated to assist the successful prosecution of war" are detainable as prisoners of war); GEORGE B. DAVIS, ELEMENTS OF INTERNATIONAL LAW 314 (1908) ("[A belligerent] may capture all persons who are separated from the mass of non-combatants by . . . their usefulness to him in his war." (quoting HALL, *supra* note 65, at 403–06)).

83. *See* ARMY FIELD MANUAL 27-10, *supra* note 20, para. 65 ("Even if inhabitants who formed the *levee in mass* lay down their arms and return to their normal activities, they may be made prisoners of war."); Levie, *supra* note 50, at 66 (describing an enemy army's authority to detain in relation to a *levée en masse*).

84. GC IV, *supra* note 75, art. 42; *see Brief Overview of World War II Enemy Alien Control Program*, U.S. NAT'L ARCHIVES AND RECORDS ADMIN., http://www.archives.gov/genealogy/immigration/enemy-aliens-overview.html (last visited Aug. 16, 2011) ("By the end of the war, over 31,000 suspected enemy aliens and their families . . . had been interned at . . . facilities throughout the United States."); S. EXEC. REP. NO. 9, at 23 (1955) ("The internment policies and procedures followed by the United States in World War II would comply with Articles 42 and 43."); 50 U.S.C. § 21 (2010) (authorizing the President to detain alien enemies in cases of declared war); Robert M. W. Kempner, *The Enemy Alien Problem in the Present War*, 34 AM. J. INT'L L. 443 (1940) (describing UK, German, and French practices of detaining enemy aliens during World War II).

85. *See* Lieber Code, *supra* note 21, art. 15, ("Military necessity . . . allows of the capturing of . . . every enemy of importance to the hostile government . . . ."); DAVIS, *supra* note 82, at 314 ("[A belligerent] may capture all persons who are separated from the mass of non-combatants by their importance to the enemy's state . . . " (quoting HALL, *supra* note 71, at 420)); OPPENHEIM 7th, *supra* note 56, § 117, at 352 (explaining that enemy government officials "are so important to the enemy State, and they may be so useful to the enemy and so dangerous to the invading forces, that they may certainly be made prisoners of war").

86. *Cf.* GC IV, *supra* note 75, art. 78 (restricting the authority of Occupying Powers to intern protected persons on the basis of "imperative reasons of security"); PICTET COMMENTARY, *supra* note 45, at 368 ("Article 78 relates to people who have not been guilty of any infringement of the penal provisions enacted by the Occupying Power . . . . The persons subjected to these measures are not, in theory, involved in the struggle."); *see, e.g.*, SPAIGHT, *supra* note 29, 304, 310 (contemplating detention of journalists who follow an army for their own purposes "not to weaken the enemy, but to prevent their returning to the hostile camp after examining the position and seeing the forces of the other belligerent"); WAR DEP'T, RULES OF LAND WARFARE para. 76 (1940) ("[A]ll persons who may be harmful to the opposing state while at liberty, such as prominent and influential political leaders, journalists, local authorities, clergymen, and teachers, in case they incite the people to resistance, may be made prisoners of war."). For examples of recent practice of security internment see generally Ashley Deeks, *Security Detention: The International Legal Framework: Administrative Detention in Armed Conflict*, 40 CASE W. RES. J. INT'L L. 403, 414–33 (2009).

87. *See* GC III, *supra* note 23, art. 3 (prohibiting the "[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples"); *see id.* art. 22 (generally prohibiting the internment of prisoners of war in penitentiaries).

88. *See* GC IV, *supra* note 75, art. 43 ("If the internment or placing in assigned residence is maintained, the court of administrative board shall periodically, and at least twice yearly, given consideration to his or her case."); *id.* art. 78 (noting that a decision upheld upon appellate review "shall be subject to periodical review, if possible every six months, by a competent body"). Department of Defense policy is to review periodically the detention of all persons who are not entitled to prisoner of war status, regardless of whether they fall under situations under which periodic review is required by the Fourth Geneva Convention. *See* Dep't of Def., Directive 2310.01E, *supra* note 39, para. 4.8 ("Detainees

does not require the release of captured enemy persons whom belligerents view as necessary to continue to detain.

The law of war has left military detention authority broad for humanitarian reasons. In peacetime, detention without criminal trial is a severe deprivation of liberty. However, in war, detention is one of the more humane measures a belligerent can impose upon his enemy. The law of war has permissive rules on the use of deadly force compared to the civilian context. Peaceful civilians may be killed incidentally so long as their deaths are not excessive in relation to the military advantage to be gained by the attack.[89] Under the law of war, there are circumstances in which a military commander may attack a military objective knowing that peaceful civilians will die.[90] In contrast, "merely a temporary detention which is devoid of all penal character," is humane.[91] Detention under the law of war can be far safer than the battlefield,[92] as the hundreds of thousands of German and Italian prisoners of war who were interned in the United States during World War II and their counterparts fighting in Europe might attest. Moreover, by speeding the end of hostilities, military detention lessens the use of deadly force.[93]

The law of war has left military detention authority broad in order to encourage the use of detention over deadly force. For example, law of war treaties afford a presumption of POW status to persons who have taken part in hostilities and fall into enemy hands in international armed conflict.[94] This presumption is not meant as a disability for detainees. Far from it, this presumption has a humanitarian purpose—to keep war captives alive, at least until their status can be adjudicated. During World War II and in prior wars, persons not entitled to POW status were summarily executed upon capture for participating in hostilities.[95] By presuming that detainees

under DoD control who do not enjoy prisoner of war protections under the law of war shall have the basis for their detention reviewed periodically by a competent authority."); *cf.* Boumediene v. Bush, 553 U.S. 723, 821 (2008) (Roberts, C.J., dissenting) ("In addition, DTA § 1005(d)(1) further requires the Department of Defense to conduct a yearly review of the status of each prisoner.").

89. ARMY FIELD MANUAL 27-10, *supra* note 20, para. 41 ("[L]oss of life and damage to property incidental to attacks must not be out of proportion to the military advantage to be gained.").

90. *Id.*

91. Hamdi v. Rumsfeld 542 U.S. 507, 518 (2004) (plurality opinion) (quoting WINTHROP, *supra* note 56, at 788).

92. *See* GC III, *supra* note 23, art. 19 ("Prisoners of war shall be evacuated, as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger."); GC IV, *supra* note 75, art. 49 ("The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand."); Additional Protocol II, *supra* note 63, art. 5(2)(c) ("[P]laces of internment and detention shall not be located close to the combat zone.").

93. *See* Lieber Code, *supra* note 21, art. 29 ("The more vigorously wars are pursued the better it is for humanity. Sharp wars are brief.").

94. *See, e.g.*, GC III, *supra* note 23, art. 5 (prescribing a presumption that "persons, having committed a belligerent act and having fallen into the hands of the enemy," be afforded prisoner of war status or treatment); Additional Protocol I, *supra* note 21, art. 45, para. 1 ("A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war . . . ."); *see also* FRED BORCH, JUDGE ADVOCATES IN COMBAT 65–66 (2001) (describing how 440 Cuban civilian construction workers captured on Grenada, along with all other Cuban nationals and other persons, were treated as prisoners of war in Operation Urgent Fury).

95. *See* Diplomatic Conference of Geneva, 1949, *Final Record of the Diplomatic Conference of Geneva of 1949*, 270–71 (Vol. II-B) (Apr. 21–Aug. 12, 1949) (discussing the motivation for codifying the presumption).

are entitled to POW status in cases of doubt, the law of war encourages detention instead of battlefield justice.[96]

The law of war allows belligerents to detain more individuals than those enemies who have taken direct part in hostilities. Thus, the direct participation in hostilities standard is not a legal limit on military detention. Moreover, it is questionable policy to mechanically apply the direct participation standard developed in the context of professional militaries fighting one another to military operations against terrorist or insurgent groups.[97] In fighting between military forces, the "civilian" (or non-member of military forces) taking direct part in hostilities is an exceptional case. Military forces face enemy military forces—targets who have distinguished themselves from the general population and who represent a far greater threat than the occasional civilian taking direct part in hostilities or the general peaceful population.[98] These underlying premises are entirely different in military operations against terrorist groups. In military operations against terrorist groups, no opponent is a member of a military force. Thus, some read the direct participation standard as applying to restrict every potential use of force against terrorist groups, not just exceptional cases.[99] Second, terrorist groups often fail to distinguish their direct participants from their general supporters. And perhaps most importantly, in the context of armed conflict against terrorist groups, general "support" takes on great significance because such groups lack the authority that legitimate governments have to levy taxes and draw resources.[100] Thus, far from being harmless like the civilian taxpayer, supporters like terrorist financiers can be regarded as more dangerous enemies than the ordinary fighters.[101]

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96. In contrast to this presumption of "combatant" status for detainees, Additional Protocol I to the 1949 Geneva Conventions (a law of war treaty to which the United States is not party) establishes a presumption of "civilian" status for the use of deadly force. *See* Additional Protocol I, *supra* note 21, art. 50, para. 1 ("In case of doubt whether a person is a civilian, that person shall be considered a civilian."); *id.* art. 52, para. 3 ("In case of doubt whether an object which is normally dedicated to civilian purposes . . . is being used to make an effective contribution to military action, it shall be presumed not to be so used."); MICHAEL BOTHE, KARL PARTSCH & WALDEMAR SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 295 n.12 (1982) (comparing the presumptions in Article 50 of Additional Protocol I and Article 5 of the GC III).

97. Although Additional Protocol II (relating to non-international armed conflict) has the same language on direct participation in hostilities as Additional Protocol I (relating to international armed conflict), Additional Protocol II omits Additional Protocol I's definition for who is to be regarded as a civilian and thus subject to the rule's application.

98. *Cf.* Robert W. Gehring, *Loss of Civilian Protections Under the Fourth Geneva Convention and Protocol I*, 90 MIL. L. REV. 49, 58 (1980) ("[O]nce that [opposing] military force is overcome, its supporting civilian population can be controlled without the destruction inherent in further military attacks.").

99. *See* Gherebi v. Obama, 609 F. Supp. 2d 43, 65 (D.D.C. 2009) (describing petitioner's view that, in non-international armed conflict, "every individual associated with the enemy to any degree in such a conflict must be treated as a civilian" to whom the direct participation in hostilities standard would apply).

100. *See* CHRISTOPHER PAUL, COLIN P. CLARKE & BETH GRILL, RAND CORP., VICTORY HAS A THOUSAND FATHERS: SOURCES OF SUCCESS IN COUNTERINSURGENCY 98 (2010), *available at* http://www.rand.org/pubs/monographs/MG964.html (surveying 30 cases of counter-insurgency from 1978 to 2006 and concluding that the "ability of insurgents to replenish and obtain personnel, materiel, financing, intelligence, and sanctuary (tangible support) perfectly predicts success or failure").

101. Prior to the 9/11 attacks, Bin Laden was known in the intelligence community largely as a terrorist financier. *See* THE 9/11 COMMISSION REPORT, *supra* note 31, at 108–09, 342 (noting that "[a]s late as 1997 . . . even the CIA's Counterterrorist Center continued to describe him as an 'extremist financier,'" and that in a 1997 National Intelligence estimate the only reference to Bin Laden was as a "terrorist financier"); *see also id.* at 171 ("Bin Ladin also may have used money to create alliances with

### *B. "Combatant" as a Limit on the Government's Detention Authority*

The law of war establishes a framework separating armed forces and the peaceful population in order to reduce unnecessary suffering in war. Two legal tests enforce this separation and draw the line between combatants and civilians. One test establishes who qualifies as a combatant in the first instance and receives POW privileges in detention.[102] Another test establishes when peaceful civilians have forfeited their immunity from being the object of attack.[103] The two predominant approaches to construing the government's detention authority work from these two tests that police the distinction between "combatants" and "civilians" in the law of war.

Both the analogizing approach and the direct participation approach help inform the government's military detention authority. These tests are indirectly relevant to the government's military detention authority. If someone may be readily analogized to a combatant or is taking direct part in hostilities, then it seems clear that his military detention is a permissible exercise of the government's war powers. Thus, the concept of "combatant" helps inform the scope of the government's detention authority.

Fundamentally, however, these "combatant"-based approaches are indirect methods of construing military detention authority under the law of war. These legal tests were not developed to construe the limits of military detention authority. Using them for that purpose is reasoning from the implications of those tests.

Using these indirect methods of construction to limit military detention authority makes a logical error. If a person qualifies as a POW, then he may be detained. But, if a person fails to qualify as a POW, it does not follow that he is immune from military detention.[104] If a person may be made the object of attack, then the humanitarian principles of the law of war counsel that he may be detained. But, if a person may not be the object of attack, it does not follow that he is immune from detention.[105] The concept of "combatant" is like a one-way ratchet; it can confirm that a person is lawfully subject to military detention, but it has little purchase in determining whether someone must be released.

#### 1. Why Limit Detention to "Combatants"?

Under international law, enemy "civilians"—whether you define such persons as those who do not qualify for POW status or those who have not taken direct part in hostilities—can be detained when militarily necessary. Commentators have

other terrorist organizations. . . . Bin Ladin selectively provided startup funds to new groups or money for specific terrorist operations.").

102. *See supra* Part I(A)(1).

103. *See supra* Part I(A)(2).

104. *See, e.g.*, The Prize Cases, 67 U.S. (2 Black) 635, 673 (1863) (providing that an "insurgent may be killed on the battle-field or by the executioner"); *Ex parte* Quirin, 317 U.S. 1, 31 (1942) (explaining that "[u]nlawful combatants" may be subject to criminal prosecution as well as detention, like lawful combatants).

105. For example, members of armed forces who have surrendered may not be the object of attack, but their detention is lawful. *See* GC III, *supra* note 23, art. 3, para. 1 (requiring humane treatment for "members of armed forces who have laid down their arms").

pointed out that this authority clearly exists under international law.[106] Nonetheless, approaches to defining the government's military detention authority have applied the concept of "combatant" as a limit on detention and excluded enemy "civilians" out of concerns based in U.S. domestic law.

First, constitutional concerns about subjecting civilians to military jurisdiction have led people to define the government's military detention authority in terms of "combatants." The international law of war's distinction between combatants and civilians is matched by a domestic legal tradition of distinguishing between civil and military spheres.[107] In *Ex parte Milligan*, the Supreme Court held unconstitutional the trial by military commission of a U.S. citizen.[108] Later Supreme Court cases have similarly ruled punishment by military tribunals as unconstitutional for inappropriately subjecting U.S. civilians to military jurisdiction.[109] In *Hamdi v. Rumsfeld*, Yasir Hamdi, a U.S. citizen who fought with the Taliban in Afghanistan in 2001, challenged his detention as unlawful based, among other things, on the fact that his military detention was contrary to *Ex parte Milligan*.[110] A plurality of the Supreme Court rejected this argument and relied on the concept of "combatant" to distinguish Hamdi from Milligan.[111] Following this strand of the *Hamdi* plurality, a panel of the Fourth Circuit concluded that, at least for those found within the United States, military detention does not extend to "civilians."[112]

However, limiting military detention to "combatants" and excluding "civilians" is not a necessary inference to draw from *Milligan* and its progeny. First, those cases entail punishment by military authorities, thus they may be distinguished from military detention that is non-punitive in character.[113] Moreover, the Court in

106. *See, e.g.*, Adam Klein and Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT'L SEC. J. 100–11 (2011) (surveying U.S. historical practice of detaining enemy aliens); Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT'L L. 48, 57–58 (2009) (surveying recent U.S. practice of detaining civilians for security reasons).

107. *See* DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776) (complaining that the King "has affected to render the Military independent of and superior to Civil Power"); Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946) ("[T]he boundaries between military and civilian power in which our people have always believed, which responsible military and executive officers had heeded, and which had become part of our political philosophy and institutions . . . ."); Munaf v. Geren, 553 U.S. 674, 700 (2008) ("Our constitutional framework 'requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.'" (quoting Orloff v. Willoughby, 345 U.S. 83, 94 (1953))).

108. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 107 (1866).

109. *See Kahanamoku*, 327 U.S. at 325–26 (Murphy, J., concurring) (explaining that the military trial at issue "plainly lacked constitutional sanction" when tested by the rule in *Ex parte Milligan*); United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955) (holding unconstitutional the military trial of a discharged service member); Reid v. Covert, 354 U.S. 1 (1956) (plurality opinion) (holding unconstitutional the military trial of civilian dependents accompanying members of the armed forces overseas in time of peace).

110. Hamdi v. Rumsfeld, 542 U.S. 507, 521–22 (2004).

111. *Id.*; *see also Ex parte* Quirin, 317 U.S. 1, 45 (1942) (explaining that in *Ex parte Milligan*, "the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent").

112. *See* Al-Marri v. Pucciarelli, 534 F.3d 213, 230 (4th Cir. 2008) (Motz, J., concurring) ("*Quirin*, *Hamdi*, and *Padilla* all emphasize that *Milligan*'s teaching—that our Constitution does not permit the Government to subject *civilians* within the United States to military jurisdiction—remains good law.").

113. *See Hamdi*, 542 U.S. at 592–93 (Thomas, J., dissenting) (arguing that *Milligan* did not control in Hamdi's case because the government did not detain him "in order to punish him"). For an example of how the criminal law context could matter, consider the interpretive rule of lenity. *See* Stephen Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT'L SEC. L. & POL. 295, 339

*Milligan* did not distinguish between enemy combatants and enemy civilians. The military detention of enemy aliens, including "civilians" found within the United States, has been authorized by statute since the founding of the country, and that statute's constitutionality has never been seriously called into question.[114] The Court in *Milligan* emphasized that Milligan was not held as a prisoner of war, that is, as a combatant.[115] It also emphasized that Milligan was not an enemy civilian. The Court in *Milligan* did this by noting that Milligan was not a resident of one of the rebel states,[116] which would have made him the equivalent of an enemy alien during the Civil War.[117]

The second domestic law reason for limiting military detention to "combatants" is the problems that arise with using military necessity as a legal standard. As a general matter, the law of war permits detention of enemy persons whenever militarily necessary. But this creates two problems. First, the military necessity of continued detention would likely not be justiciable in the federal courts. Second, military necessity, standing alone, seems an unworkable legal standard for detention.

Military necessity is problematic as a standard for judicial review.[118] In most cases involving the Guantanamo detainees, the military necessity for the continued detention of the individual would be based on the threat posed by the person and the security conditions in the country to which he would be transferred.[119] Courts have ruled that the threat posed by a person is not susceptible to judicial review.[120]

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(2010) (applying the interpretive rule of lenity to the Military Commissions Acts of 2006 and 2009). Applying an interpretive rule of lenity to the construction of the government's war powers outside the context of criminal law is absurd. *Cf.* President Barack Obama, News Conference by The President (Dec. 22, 2010) http://www.whitehouse.gov/the-press-office/2010/12/22/news-conference-president (explaining that the Administration's practice is to pursue al-Qaeda "aggressively"); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645 (1952) (Jackson, J., concurring) ("I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society.").

114. Johnson v. Eisentrager, 339 U.S. 763, 774 n.6 (1950).

115. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 118 (1866).

116. *Id.*

117. *See, e.g.*, *id.* at 81 (petitioner conceding that the Supreme Court "decided in the Prize Cases that all who live in the enemy's territory are public enemies, without regard to their personal sentiments or conduct"); *see also* Ryan Goodman, *supra* note 106, at 68 ("*Milligan* thus demonstrates the error in assuming that a status prohibition in the criminal trial context readily translates into the same status prohibition for administrative detention.").

118. *See* Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting) ("My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity."). *But see id.* at 234 (Murphy, J., dissenting) ("[L]ike other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.").

119. *See* GUANTANAMO REVIEW TASK FORCE, FINAL REPORT 7 (2010), *available at* www.justice.gov/ag/guantanamo-review-final-report.pdf (explaining that the Task Force evaluated the threat posed by a detainee and the conditions in potential receiving countries).

120. *See* Awad v. Obama, 608 F.3d 1, 11 (D.C. Cir. 2010) ("Whether a detainee would pose a threat to U.S. interests if released is not at issue in habeas corpus proceedings in federal courts . . . ."); *cf.* Ludecke v. Watkins, 335 U.S. 160, 170 (1948) ("It is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit subjects for internment during active hostilities do not lose their potency for mischief . . . . These are matters of political judgment for which judges have neither technical competence nor official responsibility.").

Similarly, courts would likely refrain from second-guessing the ability of the receiving state to mitigate the threat posed by a detainee.[121]

Aside from justiciability concerns, using military necessity as a legal standard also raises substantive concerns.[122] Necessity is unworkable because it seems both too broad and too narrow. A legal review based purely on military necessity might be overly stringent. Is it truly necessary to detain any individual? If any less onerous measure would suffice, then detention is not, strictly speaking, necessary.[123] On the other hand, a pure necessity standard could be frighteningly overbroad. It is conceivable that even a person lacking any association or support to the enemy could be detained under such a standard.[124] Using necessity alone as a legal justification for detention raises the specter of detention based only on potential future support to al-Qaeda or purely for intelligence reasons.[125]

Although military necessity seems an unworkable legal standard, this does not compel the conclusion that military detention is limited to combatants. Just as *Milligan* did not distinguish between enemy combatants and enemy civilians, neither does military necessity distinguish the detention of enemy "civilians" and "combatants." Military necessity underlies the detention of all enemy persons, whether combatant or civilian.[126] In the case of lawful combatants, continued military detention is recognized as generally necessary per se. For example, a member of an enemy armed force, if released, would return to the armed forces and be directed by his military to continue hostilities.[127] But, in certain circumstances, such as in the case of gravely wounded soldiers, the military detention of lawful combatants is

121. *Cf.* Munaf v. Geren, 553 U.S. 674, 702 (2008) ("The Judiciary is not suited to second-guess such determinations—determinations that would require federal courts to pass judgment on foreign justice systems and undermine the Government's ability to speak with one voice in this area.").

122. *See* SPAIGHT, *supra* note 29, at 113 ("There is no conception in International Law more elusive, protean, wholly unsatisfactory, than that of war necessity.").

123. *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 710 (2008) (Breyer, J., dissenting) ("In weighing needs and burdens, we must take account of the possibility that there are reasonable, but less restrictive alternatives. Are there *other* potential measures that might similarly promote the same goals while imposing lesser restrictions?"). *But see* Hamdi v. Rumsfeld, 542 U.S. 507, 597 (2004) (Thomas, J., dissenting) ("[M]any military operations are, in some sense, necessary. But many, if not most, are merely expedient.").

124. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944) (holding that "[p]ressing public necessity may sometimes justify the existence of" legal restrictions based on race); SPAIGHT, *supra* note 29, at 305–06 (criticizing the principle of necessity-based detention described in a contemporary German military manual as "an extremely dangerous one . . . [that] would justify a foreign commander who had landed in Devon or Yorkshire in sending a raiding party to seize and carry off the editor of the *Morning Post* or of *The Times*, or the Archbishop of Canterbury, if these gentlemen had advocated a stern resistance to the invader").

125. *But see Hamdi*, 542 U.S. at 521 (plurality opinion) ("[I]ndefinite detention for the purpose of interrogation is not authorized.").

126. *See* Lieber Code, *supra* note 21, art. 15 (stating that military necessity "allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor"); William Gerald Downey, Jr., *The Law of War and Military Necessity*, 47 AM. J. INT'L L. 251, 257 (1953) ("[T]he capturing of every armed enemy, of every enemy civilian person of importance and of the public property of the enemy are authorized measures.").

127. *Cf.* Gherebi v. Obama, 609 F. Supp. 2d 43, 69 n.19 (D.D.C. 2009) ("[M]any members of the armed forces who, under different circumstances, would be 'fighters' may be assigned to non-combat roles at the time of their apprehension. These individuals are no less a part of the military command structure of the enemy, and may assume (or resume) a combat role at any time because of their integration into that structure.").

recognized to be no longer necessary and the law of war requires their repatriation.[128] Similarly, although as a general rule, the detention of "civilians" in international armed conflict would not be necessary, the law of war allows the detention of civilians when militarily necessary.[129]

## II. NEUTRALITY LAW AS A FRAMEWORK FOR THE GOVERNMENT'S WAR POWERS

In part I, I explained and critiqued existing approaches to construing the government's military detention authority. The Bush Administration sought to assert authority in domestic law to detain without charge and try by military commission, so it called detainees "enemy combatants."[130] As a concept in international law, "combatant" informs whom the government can detain, but "combatant" does not limit detention. International law permits detention of persons who are not "combatants." Nonetheless, "combatant" has persisted as a legal theory for detention out of concerns based in U.S. domestic law.

"Combatant" also has persisted as a construct for detention authority because it makes odd-bedfellows of maximalists and minimalists of government authority. Those eager to assert the government's war powers, seek to label as "combatants" all whom the government detains in the armed conflict with al-Qaeda. Labeling them "combatants" means that these persons have the disabilities of combatants, for example, military trial and liability to attack. On the other hand, those wary of asserting the government's war powers seek to use "combatant" as a legal limit on detention, even when it has never been intended as such. Although maximalists and minimalists would not agree on who is a "combatant," both find it a convenient theory.

Part II offers a different concept and legal framework for construing the limits of the government's military detention authority. Instead of "combatant," the legal limit on military detention is "enemy," a concept that has been defined in the law of neutrality. Part II(A) explains how neutrality law determines, as a matter of international law, who may be treated as an enemy in war. Part II(B) explains the relevance of neutrality law in domestic law to interpreting the scope of the war powers that Congress confers.

### *A. Neutrality Law as a Framework in International Law*

"Combatant" does not limit military detention, either in domestic or international law. Applying "combatant" to limit military detention rests on a false premise: enemy "civilians" are immune from military detention. But there is another false premise here: all of the persons to be excluded from the government's detention authority are "enemy civilians."

128. *See* GC III, *supra* note 23, art. 110 (providing for the direct repatriation of gravely wounded and sick combatants).

129. *See* GC IV, *supra* note 75, art. 42 ("The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.").

130. *See supra* notes 13–18 and accompanying text.

Consider a few of those whom we seek to distinguish from al-Qaeda—the little old lady from Switzerland or the "errant tourist, embedded journalist, or local aid worker."[131] Why are these people immune from the government's detention authority? These people are not "al-Qaeda civilians"—peaceful citizens of an al-Qaeda state abiding by the requirement that they not take direct part in hostilities. Moreover, many of these people are not "civilians" at all. The "errant tourist" might be a combatant. He might be a member of the Swiss Armed Forces with the requisite identity cards to prove his entitlement to POW privileges under the Geneva Conventions.

The reason why the strapping Swiss soldier and his petite grandmother are immune from the U.S. government's war powers has nothing to do with one being a civilian and the other a combatant. Their immunity is not *civilian* in character. Rather, their immunity from U.S. military operations against al-Qaeda, including detention, derives from the fact that they are not enemies. They are not at war with the United States and the United States is not at war with them. The key legal distinction for military detention is not between combatants and civilians, but between enemies and friends. To determine whether someone may properly be subject to military detention under international law, we must first determine whether they have enemy status, a legal inquiry that has been developed in the law of neutrality.

### 1. Neutral Immunity

In international law, war is not just fighting; war is also a legal relationship of hostility.[132] A war between two states is called an "international armed conflict" because it takes place "betwixt nation and nation."[133] War stops the friendly intercourse between these two states; war suspends the binding character of the normal international law and treaties governing relations between them.[134] Instead of peacetime law, the law of war applies between the two states, which are known as belligerents, as *lex specialis* to give binding rules governing their relations.[135]

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131. *Hamdi*, 542 U.S. at 534.

132. *See* 7 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 153 (1906) ("Much confusion may be avoided by bearing in mind the fact that by the term war is meant not the mere employment of force, but the existence of the legal condition of things in which rights are or may be prosecuted by force."); Ludecke v. Watkins, 335 U.S. 160, 166–67 (1948) (distinguishing "the pendency of what is colloquially known as the shooting war" from the legal state of war which "begins when war is declared but is not exhausted when the shooting stops"). *See also infra* note 275 and accompanying text.

133. Hamdan v. Rumsfeld, 548 U.S. 557, 630–31 (2006).

134. *See* Techt v. Hughes, 128 N.E. 185, 193 (N.Y. 1920) ("Friendly intercourse between nations is impossible in war."); WINTHROP, *supra* note 56, at 776–77 (describing the rule of non-intercourse during war); The Rapid, 12 U.S. (8 Cranch) 155, 160–61 (1814) ("In the state of war, nation is known to nation only by their armed exterior; each threatening the other with conquest or annihilation. The individuals who compose the belligerent states exist, as to each other, in a state of utter occlusion. If they meet, it is only in combat."). Although war suspends treaties as a matter of international legal obligation and belligerents may act contrary to their provisions as the necessities of war demand, belligerents need not do so, and U.S. courts will continue to apply treaty provisions if not incompatible with national policy. *See* Clark v. Allen, 331 U.S. 503, 514 (1947) (giving legal effect to a treaty provision with an enemy state after finding "no incompatibility with national policy").

135. *See* C.W. Jenks, *The Conflict of Law-Making Treaties*, 30 BRIT. Y.B. INT'L L. 401, 446 (1953) (discussing "instruments relating to the laws of war which, in the absence of evidence of a contrary intention or other special circumstances, must clearly be regarded as a *leges speciales* in relation to

In addition to rules governing the relations between belligerents, international law also gives rules for the relations between states at war and states at peace. Under international law, states taking no part in the war and remaining friendly with both sides are called neutrals.[136] The citizens of neutral states also are presumed to be at peace with the belligerents.[137] Under a body of international law, known as the law of neutrality, neutral nations and persons have the right to be immune from military operations of belligerents.[138] Neutral immunity is the oldest form of immunity under the law of war.[139]

Neutral immunity differs from the protections afforded enemy civilians under the law of war. Neutral immunity precludes any use of military force against neutrals, while civilian immunity permits humane measures such as detention, when militarily necessary. Neutral immunity rests on a stronger theoretical foundation than civilian immunity. Civilian protections derive from the principle that harming peaceful civilians is unnecessary to military operations.[140] As time has passed,

instruments laying down peace-time norms concerning the same subjects"); *see, e.g.*, Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L/**V**/II.95, doc. 7 rev. para. 161 (1997) ("[T]he Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution of this and other kinds of claims alleging violations of the American Convention in combat situations."); Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 ("In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.").

136. Convention on Maritime Neutrality, Preamble, Feb. 20, 1928, 47 Stat. 1989, 135 L.N.T.S. 187 ("Considering that neutrality is the juridical situation of states which do not take part in the hostilities . . . ."); EMERICH DE VATTEL, THE LAW OF NATIONS 331 (Joseph Chitty & Edward D. Graham eds., 1883) (1758), *available at* http:www.constitution.org/vattel/vattel.txt ("Neutral nations are those who, in time of war, do not take any part in the contest, but remain common friends to both parties, without favouring the arms of the one to the prejudice of the other.").

137. *See* Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land art. 16, Oct. 18, 1907, 36 Stat. 2310, 1 Bevans 654 [hereinafter Hague V] ("The nationals of a State which is not taking part in the war are considered as neutrals.").

138. *See* OPPENHEIM 7th, *supra* note 56, § 318, at 676–77 (stating that belligerents have a duty "to treat neutrals in accordance with their impartiality"). In some instances, neutrality law recognizes that neutrals are unavoidably inconvenienced by belligerent operations. For example, belligerents have the right to stop and search neutral shipping for contraband on the high seas. *See* The Nereide, 13 U.S. (9 Cranch) 388, 427 (1815) ("Belligerents have a full and perfect right to capture enemy goods and articles going to their enemy which are contraband of war. To the exercise of that right the right of search is essential. It is a mean justified by the end.").

139. Older texts describe other types of immunity in the law of war in terms of neutral immunity. *See, e.g.*, Resolutions of the Geneva International Conference, Oct. 26–29, 1863, http://www1.umn.edu/humanrts/instree/1863b.htm ("[I]n time of war the belligerent nations should proclaim the neutrality of ambulances and military hospitals, and that neutrality should likewise be recognized, fully and absolutely, in respect of official medical personnel, voluntary medical personnel, inhabitants of the country who go to the relief of the wounded, and the wounded themselves . . . ."); The Paquete Habana 175 U.S. 677, 701 (1900) (quoting DE CUSSY, PHASES ET CAUSES CELEBRES DU DROIT MARITIME DES NATIONS (1856)) (explaining that enemy "fishing boats are considered as neutral; in law, as in principle, they are not subject either to capture or to confiscation"); Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments art.1, April 15, 1935, 49 Stat. 3267, 167 L.N.T.S. 289 ("The historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents.").

140. *See* Respect for Human Rights in Armed Conflicts, G.A. Res. 2444, (XXIII), § l(c), U.N. GAOR, 23rd Sess., Supp. No. 18, U.N. Doc. A/7433, at 50 (Dec. 19, 1968) ("That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the

attacking peaceful civilians has been recognized as unnecessary to waging war and prohibited.[141] In contrast, neutral immunity is based on the principle that states are equal entities under international law.[142] International law recognizes that states have the right to use force in self-defense.[143] Against enemies, that right is restricted as far as restrictions have been codified or accepted by states in the international laws of war.[144] However, against friends, the right to use force in self-defense must be balanced against the right of those states to live at peace, just as the right of a man to swing his arms ends where another man's nose begins.[145] Thus, states cannot justify the use of force against neutrals solely on the grounds that it is militarily necessary.[146] Civilian protections flow from the principle of limiting unnecessary suffering in war; neutral immunities flow from a sovereign's right to live in peace.

2. Neutral Duties

International law places conditions on a neutral's immunity from a belligerent's military operations. For neutrals to keep their neutral immunity, neutrals must fulfill accompanying neutral duties: refraining from participation in hostilities and remaining impartial between belligerents, that is, not supporting one side over the other in the war.[147]

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effect that the latter be spared as much as possible."); Lieber Code, *supra* note 21, art. 22 ("[T]he unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit."); *Cf. Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 127 (1866) ("As necessity creates the rule, so it limits its duration.").

141. Lieber Code, *supra* note 21, art. 22; HALLECK, *supra* note 29, at 15–16 (1908); OPPENHEIM 7th, *supra* note 56, § 116, at 346 ("[I]n the eighteenth century it became a universally recognised customary rule of the Law of Nations that private enemy individuals should not be killed or attacked."); VATTEL, *supra* note 136, at 351 ("Women, children, feeble old men, and sick persons . . . are enemies who make no resistance; and consequently we have no right to maltreat their persons or use any violence against them, much less to take away their lives.").

142. *See* The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812) (describing the "perfect equality and absolute independence of sovereigns"); U.N. Charter art. 2, para. 1 (providing that the United Nations "is based on the principle of the sovereign equality of all its Members"); Conference on Security and Cooperation in Europe: Final Act, Aug. 1, 1975, 14 I.L.M. 1292, 1293–94, principle I ("[P]articipating States will respect each other's sovereign equality . . . . Within the framework of international law, all the participating States have equal rights and duties. . . . [T]hey also have the right to neutrality."); WHEATON'S ELEMENTS OF INTERNATIONAL LAW 90 (Coleman Phillipson ed., Stevens & Sons, Ltd. 1916) (1863) (explaining that the right of sovereigns to increase their dominion "can be limited in its exercise only by the equal correspondent rights of other States").

143. U.N. Charter art. 51 (recognizing an "inherent right of [states to] individual or collective self-defense").

144. *See* Lieber Code, *supra* note 21, art. 14 ("Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and *which are lawful according to the modern law and usages of war*.") (emphasis added); Annex to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, art. 22, Oct. 18, 1907, 36 Stat. 2777, 1 Bevans 631 ("The right of belligerents to adopt means of injuring the enemy is not unlimited.").

145. Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919) ("Your right to swing your arms ends just where the other man's nose begins.").

146. For example, in World War I, Germany invaded neutral Belgium and attempted to justify this with reference to military necessity (*kriegsraison*), a position that was universally criticized. *See, e.g.*, Elihu Root, President, Opening Address at the Fifteenth Annual Meeting of the American Society of International Law (Apr. 27, 1921), *in* 15 PROC. AM. SOC'Y OF INT'L L. 1, 2–3 (1921) (admonishing Germany).

147. HAROLD REASON PYKE, THE LAW OF CONTRABAND OF WAR 1 (1915) ("[T]he duty to abstain from all real participation in hostilities and from all acts favourable to the success of either belligerent

Many have criticized "support" as having no basis in international law,[148] but the concept of "support" is integral to neutrality law and has been its primary focus. The requirement for neutrals to refrain from participating in hostilities is fairly straightforward. Neutrality law has grappled more with defining those states and persons acting as "accessory belligerents."[149] Neutrality law has sought to determine what kinds of interaction with belligerents are innocuous and what kinds might be viewed as "furnishing belligerents any material assistance for the prosecution of war."[150] This kind of assistance would be legally equivalent to participating in hostilities and inconsistent with neutral status.

The underlying legal principle is simple: under some circumstances, supporting an activity can be tantamount to performing it. Thus, the person who supports the activity can be treated as one who performs it. This is a universal legal principle that is part of international law. International law is not a sterile, hydroponic greenhouse cultivated with only plants grown in The Hague. Rather, international law includes "general principles common to the major legal systems of the world."[151] The principle that, under some circumstances, someone who supports an activity can be held responsible as if he had done it himself, is one such principle.

For example, in municipal jurisdictions worldwide, including the United States, "a person who procures, aids, encourages or otherwise facilitates the commission of a crime is guilty of the same, or of another related crime."[152] The statutes of international criminal tribunals similarly provide for aiding and abetting liability.[153]

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against the other . . . ."); *see also* The Three Friends, 166 U.S. 1, 52 (1897) ("Neutrality, strictly speaking, consists in abstinence from any participation in a public, private or civil war, and in impartiality of conduct toward both parties . . . ."); ARMY FIELD MANUAL 27-10, *supra* note 20, para. 512 ("[N]eutrality on the part of a State not a party to the war has consisted in . . . preventing, tolerating, and regulating certain acts on its own part, by its nationals, and by the belligerents."); Michael Bothe, *The Law of Neutrality*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 571, 571 (Dieter Fleck ed., 2d ed. 2008) ("The duty of non-participation means, above all, that the [neutral] state must abstain from supporting a party to the conflict."); OFFICE OF THE JUDGE ADVOCATE GEN., LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS (Can.), para. 1304(2) (2003), *available at* http://www.forces.gc.ca/jag/publications/op-do-eng.asp ("A neutral State may not support any of the parties to the conflict."); FED. MINISTRY OF DEF. OF THE FED. REPUBLIC OF GER., HUMANITARIAN LAW IN ARMED CONFLICTS: MANUAL para. 1110 (1992), *available at* www.humanitaeres-voelkerrecht.de/ManualZDv15.2pdf ("A neutral state may not support any of the parties to the conflict.").

148. *See* sources cited *supra* note 8.

149. *See* OPPENHEIM 7th, *supra* note 56, § 77, at 253–54 (defining "accessory belligerent" as one that "becomes a belligerent through rendering help" to a "principal belligerent").

150. ROBERT TUCKER, THE LAW OF WAR AND NEUTRALITY AT SEA 202–03 n.14 (1955).

151. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(c) (1987); *see* Statute of the International Court of Justice art. 38(1)(c), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993 (including "the general principles of law recognized by civilized nations" as a source of international law); Rome Statute of the International Criminal Court, *supra* note 63, art. 21(1)(c) (including "general principles of law derived by the Court from national laws of legal systems of the world" as a source of law); Thirty Hogsheads of Sugar v. Boyle, 13 U.S. (9 Cranch) 191, 198 (1815) (ascertaining that customary international law includes "resort to the great principles of reason and justice").

152. Thomas M. Franck & Deborah Niedermeyer, *Accommodating Terrorism: An Offence Against the Law of Nations*, 19 ISR. Y.B. HUM. RTS. 75, 99 (1989); *see* 18 U.S.C. § 2(a)–(b) (1951) (making punishable as a principal, "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission" and "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States").

153. *See, e.g.*, Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis [London Charter] art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 ("[A]ccomplices . . .

The principle of support liability is also found as a principle of responsibility in non-criminal contexts. Under tort law, aiding and abetting an action can result in liability for tortious conduct.[154] Aiding and abetting liability also has been found as a principle of state responsibility.[155] U.S. courts have generally found civil aiding and abetting liability reflected in customary international law.[156]

The universal legal principle that "supporters" may, under certain circumstances, be held responsible as principals has long been reflected in the law of neutrality. As Justice Johnson explained in *The Atalanta*:

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are responsible for all acts performed by any persons in execution of such plan."); Charter of the International Military Tribunal for the Far East art. 5, Jan. 19, 1946, *amended* Apr. 26, 1946, T.I.A.S. No. 1589, 4 Bevans 20 (mandating that "[l]eaders, organizers, instigators, and accomplices" committing war crimes or crimes against peace or humanity "are responsible for all acts performed by any persons in execution of such plan"); Rome Statute of the International Criminal Court, *supra* note 63, art. 25, para. 3(c) (deeming a person criminally responsible if that person "[f]or the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission"); Statute of the International Criminal Tribunal for the Former Yugoslavia art. 7, para. 1, May 25, 1993, U.N. Doc. S/RES/827, *available at* http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf ("A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime . . . shall be individually responsible for the crime."); Statute of the International Criminal Tribunal for Rwanda art. 6, para. 1, Nov. 8, 1994, U.N. Doc. S/RES/955, *available at* http://untreaty.un.org/cod/avl/pdf/ha/ictr_EF.pdf ("A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime . . . shall be individually responsible for the crime."); Statute of the Special Tribunal for Lebanon art. 3, para. 1(a), May 30, 2007, *annexed to* S/RES/1757 (2007), *available at* http://www.stl-tsl.org/x/file/TheRegistry/Library/BackgroundDocuments/Statutes/Resolution%201757-Agreement-Statue-EN.pdf (holding a person criminally responsible for crimes if that person "participated as [an] accomplice"); Statute for the Special Court for Sierra Leone art. 6, para. 1, Aug. 14, 2000, U.N. Doc. S/RES/1315 (2000), *available at* http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3d&tabid=176 ("A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime . . . shall be individually responsible for the crime . . . ."); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 29, June 6, 2003, *amended* Oct. 27, 2004, *approved in* G.A. Res. 57/228 B, U.N. Doc. A/RES/57/228 B (May 13, 2003), *available at* http://www.eccc.gov.kh/en/documents/legal/law-establishment-extraordinary-chambers-amended ("Any suspect who planned, instigated, ordered, aided and abetted . . . shall be individually responsible for the crime.").

154. RESTATEMENT (SECOND) OF TORTS § 876 (1979).

155. *See* Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, art. 16, U.N. Doc. A/56/10, GAOR, 56th Sess., Supp. No. 10 (2001) ("A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and (b) The act would be internationally wrongful if committed by that State."); Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), 2007 I.C.J. 43, para. 420 (Feb. 26) (concluding that Article 16 of the ILC's Articles on State Responsibility reflected customary international law).

156. *See* Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009) (concluding that there exists "sufficient international consensus for imposing liability on individuals who *purposefully* aid and abet a violation of international law"); Abecassis v. Wyatt, 704 F. Supp. 2d 623, 654 (S.D. Tex. 2010) (same); *In re* S. African Apartheid Litig., 617 F. Supp. 2d 228, 262 (S.D.N.Y. 2009) ("[C]onclud[ing] that customary international law requires that an aider and abettor know that its actions will substantially assist the perpetrator in the commission of a crime or tort in violation of the law of nations."); Bowoto v. Chevron Corp., 557 F. Supp. 2d 1080, 1090 (N.D. Cal. 2008) ("As to the first contention, this Court has already determined that defendants may be held liable for the violations alleged under a theory of aiding and abetting."). *But see* Doe v. Exxon Mobil Corp., 393 F. Supp. 2d 20, 24 (D.D.C. 2005) ("[D]efendants cannot be held liable for violations of international law on a theory that they aided and abetted the Indonesian military in committing these acts.").

> [L]et us suppose the case of an individual, who voluntarily fills up the ranks of an enemy, *or of one who only enters upon the discharge of those duties in war which would otherwise take men from the ranks*; and the reason will be obvious why he should be treated as a prisoner of war and involved in the fate of a conquered enemy.[157]

Support to a party's war effort can be legally indistinguishable from engaging in that war effort because it adds men to the ranks or frees up resources for the fight.[158] Since war is a zero-sum game, when a person "adds materially to the warlike strength of one belligerent, he makes himself correspondingly the enemy of the other."[159] Materially supporting one belligerent's war effort injures the other side in the war.

Thus, neutrality law has required that neutral states refrain from giving "such assistance and succour to one of the belligerents as is detrimental to the other."[160] A neutral person may not avail himself of his neutrality "[i]f he commits acts in favor of a belligerent."[161] Similarly, neutral ships and aircraft that somehow "make an effective contribution to the enemy's military action" cannot assert their neutral immunity.[162]

That neutrality's focus is broader than "fighting" or "combat" is illustrated by its proscription against giving money to belligerents. Giving money is generally not regarded by international law scholars as direct participation in hostilities because it is inherently indirect and thus would seem to fall into a category of indirect participation or general support to a party's war effort.[163] Money must be used to purchase arms or hire fighters before the money results in harm to a belligerent.[164]

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157. The Atalanta, 16 U.S. (3 Wheat.) 409, 424 (1818) (Johnson, J., dissenting) (emphasis added); *see also* DEMOSTHENES, THE THIRD PHILLIPIC, 9.17–9.18 (341 B.C.) ("[F]or he who makes and devises the means by which I may be captured is at war with me, even though he has not yet hurled a javelin or shot a bolt.").

158. *Cf.* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2725 (2010) ("'Material support' is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends."); Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 698 (7th Cir. 2008) ("The knowing contributors as a whole would have significantly enhanced the risk of terrorist acts . . . .").

159. Young v. United States, 97 U.S. 39, 63 (1877); *see also* The Commercen, 14 U.S. (1 Wheat.) 382, 394 (1816) ("[E]very assistance offered to [enemy armies] must, directly, or indirectly, operate to our injury.").

160. OPPENHEIM 7th, *supra* note 56, § 316, at 675.

161. Hague V, *supra* note 137, art. 17(b); *see also* The Nereide, 13 U.S. (9 Cranch) 388, 438 (1815) ("[A] neutral is bound to a perfect impartiality as to all the belligerents. If he incorporate himself into the measures or policy of either; if he become auxiliary to the enterprizes or acts of either, he forfeits his neutral character . . . .").

162. INT'L INST. OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA arts. 67(f), 70(e) (1994) [hereinafter SAN REMO MANUAL]; Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, *supra* note 82, art. 53(c) ("A neutral private aircraft is liable to capture . . . [i]f it is guilty of assistance to the enemy . . . .").

163. *See* Prosecutor v. Strugar, Case No. IT-01-42-A, Appeals Chamber Judgment, para. 177 (Int'l Crim. Trib. for the Former Yugoslavia July 17, 2008) ("Examples of indirect participation in hostilities include: participating in activities in support of the war or military effort of one of the parties to the conflict . . . .").

164. However, as noted above, the issue of direct participation in hostilities is unsettled law and some view substantially financing terrorist attacks as direct participation in hostilities. *See, e.g.*, James Appathurai, Spokesman, N. Atl. Treaty Org. [NATO], Weekly Press Briefing (Feb. 17, 2009), *available at* http://www.nato.int/docu/speech/2009/s090217a.html (explaining that International Security Assistance Forces are authorized "to take action against narcotics facilities and facilitators where they provide

By contrast, under neutrality law, the provision of money to a belligerent has long been recognized as unneutral conduct. The necessity of money to waging war has been recognized since at least 432 B.C., when King Archidamus advised the Spartans that "war is not an affair of arms, but of money which gives to arms their use."[165] Given money's importance to waging war, the law of neutrality has long recognized that giving money to a belligerent is unneutral conduct that amounts to participation in the war.[166] The provision of money by neutral individuals to belligerents has likewise been specifically recognized as unneutral conduct.[167]

Neutrality law requires that neutrals refrain from participating in hostilities and materially supporting one side in the prosecution of the war.[168] To the extent that neutrals fail to fulfill those duties, they lose the right to be immune from the military operations of the belligerents:

> The rights and duties of neutrality are correlative, and the former cannot be claimed, unless the latter are faithfully performed. If the neutral State fail to fulfil the obligations of neutrality, it cannot claim the privileges and exemptions incident to that condition. The rule is equally applicable to the citizens and subjects of a neutral State. So long as they faithfully perform the duties of neutrality, they are entitled to the rights and immunities of that condition. But for every violation of neutral duties, they are liable to the punishment of being treated in their persons or property as public enemies of the offended belligerent.[169]

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material support to the insurgency").

165. I THUCYDIDES, THE PELOPONNESIAN WAR 53 (Benjamin Jowett, trans. 1881). *See, e.g.*, MARCUS TULLIUS CICERO, *The Fifth Oration of M.T. Cicero Against Marcus Antonius, Otherwise Called the Fifth Philippic*, *in* 4 THE ORATIONS OF MARCUS TULLIUS CICERO § II (C.D. Yonge trans. 1913–21) (describing "money in abundance [as] the sinews of war"); I ALFRED THAYER MAHAN, SEA POWER IN ITS RELATIONS TO THE WAR OF 1812, at 285 (1905) ("Money, credit, is the life of war; lessen it, and vigor flags; destroy it, and resistance dies."); The Prize Cases, 67 U.S. (2 Black) 635, 671–72 (1862) ("Money and wealth, the products of agriculture and commerce, are said to be the sinews of war, and as necessary in its conduct as numbers and physical force.").

166. II CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 848 (1922) ("Again, the loaning of money or the extension of credit by a neutral government to a belligerent amounts to participation in the war, and constitutes, therefore, unneutral conduct."); JAMES BROWN SCOTT, A SURVEY OF INTERNATIONAL RELATIONS BETWEEN THE UNITED STATES AND GERMANY, AUGUST 1, 1914–APRIL 6, 1917, at 118 (1918) ("It is, of course, forbidden by international law for countries as such to lend money to belligerents, for such an act is equivalent to participation in hostilities."); *see* OPPENHEIM 7th, *supra* note 56, § 351, at 743 ("What applies to a loan applies even more strongly to subsidies in money granted to a belligerent by a neutral State. Through the granting of subsidies a neutral State becomes as much the ally of the belligerent as it would by furnishing him with troops."); Philip C. Jessup and Francis Deák, *The Early Development of the Law of Contraband of War I*, 47 POL. SCI. Q. 526, 529 (1932) ("It is perhaps unnecessary to note that under modern doctrines, a state could not fulfill a promise to aid one belligerent with men or money and still remain neutral.").

167. *See, e.g.*, 18 U.S.C. § 960 (2011) (making punishable knowingly "furnish[ing] the money for" an armed expedition against a nation with which "the United States is at peace"); United States v. Burr, 25 F. Cas. 187, 200 (C.C.D. Va. 1807) (No. 14,694) ("Furnishing money . . . may be considered as providing means [to an armed expedition]."); Jacobsen v. United States, 272 F. 399, 404 (7th Cir. 1920), *cert denied*, 256 U.S. 703 (1921) (convictions under neutrality statute in which defendants, *inter alia*, contributed money).

168. *See supra* note 147 and accompanying text.

169. HALLECK, *supra* note 29, at 305.

Neutrality law's framework of neutral duties and neutral immunities is *jus ad bellum*, meaning that it gives standards for *whether a state can resort to force* against neutrals, as opposed to *jus in bello* which restricts *how states use force* against those enemies.

The framework of duties and immunities in neutrality law gives an overarching international law framework for U.S. military operations against al-Qaeda, including detention. The United States is in a legal state of hostility with al-Qaeda and its associates.[170] Al-Qaeda is not a state. The people who make up its loosely affiliated network, under international law, are not the citizens of al-Qaeda, but the citizens of states with which the United States remains at peace.[171] As citizens of neutral states,[172] these persons start with neutral immunity. However, by violating the duties of neutrality (whether by participating in hostilities or materially supporting them), these persons forfeit their neutral immunity.[173] They join the armed conflict and become "personally at war with our institutions."[174] The actions of these persons are not attributed to their states, and thus the United States does not seek recourse against their governments. However, the United States may take measures of self-help to cure these persons' violations of their neutral duties, including, in certain cases, holding these persons as enemies under international law.[175]

170. *See supra* note 2 and accompanying text.

171. *See, e.g.*, Bradley & Goldsmith, *supra* note 7, at 2049 ("[I]nstead of being affiliated with particular states that are at war with the United States, terrorist enemies are predominantly citizens and residents of friendly states or even the United States."); Rosa Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict In the Age of Terror*, 153 U. PA. L. REV. 675, 710 (2004) ("[A]l Qaeda operatives have allegedly included native-born American citizens, as well as British, French, Australian, and German citizens and nationals of various Arab and Muslim states.").

172. Technically, these states are not "neutrals" in the sense that they have the right to be impartial between the United States and al-Qaeda. *See infra* Part II(A)(4). Moreover, some of these states may be characterized as allies or co-belligerents of the United States against al-Qaeda.

173. OPPENHEIM 7th, *supra* note 56, § 88(1), at 270 (stating that neutral persons can acquire enemy status "if they enter the armed forces of a belligerent, or do certain other things in his favour, or commit hostile acts against a belligerent").

174. Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 223 (1953) (Jackson, J., dissenting) ("If due process will permit confinement of resident aliens friendly in fact because of imputed hostility, I should suppose one personally at war with our institutions might be confined, even though his state is not at war with us. In both cases, the underlying consideration is the power of our system of government to defend itself, and changing strategy of attack by infiltration may be met with changed tactics of defense."); *see also* Barack Obama, U.S. President, Remarks by the President on National Security (May 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09 (explaining that detainees held at Guantanamo Bay, Cuba "are people who, in effect, remain at war with the United States"); Letter from Daniel Webster, U.S. Sec'y of State, to Lord Ashburton, Inviolability of National Territory, Case of the "Caroline," *in* THE DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE 104, 108 (1848) [hereinafter letter from Daniel Webster to Lord Ashburton] ("[T]he just interpretation of the modern law of Nations is, that neutral States are bound to be strictly neutral; and that it is a manifest and gross impropriety for individuals to engage in the civil conflicts of other States, and thus to be at war, while their Government is at peace.").

175. *See* CHARLES G. FENWICK, NEUTRALITY LAWS OF THE UNITED STATES 10–11 (1913) ("Beyond the jurisdiction of the state its citizens may commit hostile acts against a belligerent without consequent responsibility in international law devolving upon the neutral state. The remedy of the belligerent in this case is upon the individuals personally who, by their own act, have forfeited the protection of their state."); OPPENHEIM 7th, *supra* note 56, § 88, at 270 ("All measures which are allowed in war against enemy subjects are likewise allowed against such subjects of neutral Powers as have thus acquired enemy character.").

3. Neutrality Law and Individuals

One initial issue is applying neutrality law to individuals. In general, international law deals with the relations between states and does not directly apply to individuals.[176] Following this traditional view of international law, some have questioned whether neutrality law applies directly to individuals.[177] Neutrality law does.[178]

Parts of international law always have regulated individuals directly. International law has regulated directly "the conduct of individuals situated outside domestic boundaries and consequently carrying an international savor."[179] Neutrality law, because it addresses the situations of persons and their relations with foreign governments that are engaged in armed conflicts, involves transnational conduct. And neutrality law often involves conduct on the high seas, for example, the capture of enemy goods during wartime.[180]

International law also defined a sphere where "rules binding individuals for the benefit of other individuals overlapped with the norms of state relationships."[181] These rules were binding on individuals directly because they implicated international relations; offenders could "involve the two [s]tates in a war."[182] If a state declined to punish persons within its jurisdiction who violated these rules, then "[t]he sovereign . . . avow[ed] him[s]elf an accomplice or abettor of his [s]ubject's crime, and [drew] upon his community the calamities of foreign war."[183] Neutrality law applied directly to persons on this theory as well. Warlike acts by citizens of one state against other states could be attributed to their state and might bring their state into a war.[184] Neutrality law recognized the "impropriety and danger of allowing individuals to make war on their own authority, or, by mingling themselves in the

176. Sosa v. Alvarez-Machain, 542 U.S. 692, 714 (2004) (stating that international law covers "the general norms governing the behavior of national states with each other"); Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 817 (D.C. Cir. 1984) (Bork, J., concurring) ("[T]he Law of Nations is primarily a law for the international conduct of States . . . ." (quoting L. OPPENHEIM, I INTERNATIONAL LAW: PEACE § 13, at 19 (H. Lauterpacht ed., 8th ed. 1955)); Banco Nacional De Cuba v. Sabbatino, 376 U.S. 398, 422 (1964) ("The traditional view of international law is that it establishes substantive principles for determining whether one country has wronged another."). *But see* Philip Marshall Brown, *The Individual and International Law*, 18 AM. J. INT'L L. 532, 535–36 (1924) (criticizing the traditional view).

177. *See* Hamlily v. Obama, 616 F. Supp. 2d 63, 76 (D.D.C. 2009) ("[T]he Court can see no plausible reading of the principle of co-belligerency that would encompass individuals."); Al-Bihani v. Obama, 590 F.3d 866, 873 (D.C. Cir. 2010) ("Any attempt to apply the rules of co-belligerency to such a force would be folly, akin to this court ascribing powers of national sovereignty to a local chapter of the Freemasons.").

178. *See, e.g.*, Hague V, *supra* note 137, ch. III (prescribing rights and duties of neutral persons); George Wilson, *Unneutral Service*, 1 PROC. AM. POL. SCI. ASS'N, 68, 69 (1904) ("Neutrality is, however, binding not merely upon the state, but also upon the citizens of the neutral state."); Letter from Daniel Webster to Lord Ashburton, *supra* note 174, at 109 ("By these laws, [Congress] prescribed to the citizens of the United States what it understood to be their duty, as neutrals, according to the law of nations, and the duty, also, which they owed to the interest and honor of their own country.").

179. *Alvarez-Machain*, 542 U.S. at 715.

180. *See, e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (involving the capture of a vessel sailing from a French port to a Danish port in the Caribbean).

181. *Alvarez-Machain*, 542 U.S. at 715.

182. 4 WILLIAM BLACKSTONE, COMMENTARIES 68.

183. *Id.*

184. *Cf.* The Commercen, 14 U.S. (1 Wheat.) 382, 402 (1816) ("[I]f the government adopts the [hostile] act of the individual, and supports it by force, the government itself may be rightfully treated as hostile.").

belligerent operations of other nations, to run the hazard of counteracting the policy or embroiling the relations of their own government."[185]

But neutrality law also recognized that states were not responsible for all the actions of their citizens. Thus, states were not required under neutrality law to prevent absolutely their citizenry or persons in their territory from joining an armed conflict.[186] States might choose to prevent such actions, as a matter of policy.[187] However, under neutrality law, persons could support and join foreign conflicts without implicating the responsibility of their state of nationality or residence.[188] When is a state responsible for the actions of its citizens or residents seeking to wage war against another state? What is "the position of neutral individuals in their relations with the belligerents?"[189] When do neutral persons engaged in intercourse with a belligerent become part of the war? Neutrality law has been the international law that has answered these transnational questions involving states, foreign nationals, and armed conflict.

4. Neutrality Law and Military Operations Against Terrorist Groups

Another threshold issue is applying neutrality law to military operations against terrorist groups or in non-international armed conflict.

International law divides armed conflict into two types—international armed conflict and armed conflict not of an international character (also known as non-international armed conflict). International armed conflict occurs between nations.[190] Non-international armed conflict is everything else, including wars between non-state actors and wars by states against insurgents or terrorists.[191] There are significant

185. Letter from Daniel Webster to Lord Ashburton, *supra* note 174, at 108; United States v. O'Sullivan, 27 F. Cas. 367, 376 (S.D.N.Y. 1851) (quoting same); *see also* Kennett v. Chambers, 55 U.S. (14 How.) 38, 49–50 (1852) ("The intercourse of this country with foreign nations, and its policy in regard to them, are placed by the Constitution of the United States in the hands of the government, and its decisions upon these subjects are obligatory upon every citizen of the Union. He is bound to be at war with the nation against which the war-making power has declared war, and equally bound to commit no act of hostility against a nation with which the government is in amity and friendship. This principle is universally acknowledged by the laws of nations.").

186. *E.g.*, Hague V, *supra* note 137, art. 6 ("The responsibility of a neutral Power is not engaged by the fact of persons crossing the frontier separately to offer their services to one of the belligerents").

187. For example, George Washington issued a proclamation of neutrality in 1793 that forbid U.S. citizens from "committing, aiding, or abetting hostilities" that were ongoing between European states. George Washington, Proclamation of Neutrality (April 22, 1793), *in* ALEXANDER HAMILTON & JAMES MADISON, LETTERS OF PACIFICUS AND HELVIDIUS ON THE PROCLAMATION OF NEUTRALITY OF 1793 (1845).

188. *See* H. Lauterpacht, *Revolutionary Activities of Private Persons Against Foreign States*, 22 AM. J. INT'L L. 105, 127 (1928) ("The law of neutrality, while enjoining upon the state itself absolute impartiality and abstention from assisting either belligerent, does not impose upon it the duty of securing an identical line of conduct on the part of its subjects. They may assist individually one or both belligerents in a variety of ways, as, for instance, by enlisting in their armies, by selling ships, munitions and provisions, by managing for them factories and depots, by transporting their goods and munitions, by supplying them with loans, etc.").

189. Hague V, *supra* note 137, preamble.

190. *See supra* note 133 and accompanying text.

191. *See, e.g.*, The Prize Cases, 67 U.S. (2 Black) 635, 666 (1863) ("But it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents, claims sovereign rights as against the other.").

differences between international armed conflicts and non-international armed conflicts. Non-state actors are far less likely to obey the rules of war than professional militaries. Moreover, states want to prosecute terrorists and insurgents for fighting against them in a way they do not want to prosecute enemy soldiers. Thus, states, in crafting rules for the conduct of hostilities, made the rules for non-international armed conflict different from the rules for international armed conflict.[192] With the exception of Common Article 3 of the Geneva Conventions, which describes fundamental guarantees of humane treatment, the 1949 Geneva Conventions technically do not apply to non-international armed conflict.[193] Customary law of war principles do apply and parties to non-international armed conflict can conclude agreements to bring into force parts of the Geneva Conventions.[194]

The United States' war against al-Qaeda, because it has states on one side and terrorist groups on the other, is a non-international armed conflict.[195] Thus, aside from the fundamental humane treatment guarantees of Common Article 3, the 1949 Geneva Conventions technically do not apply to the armed conflict with al-Qaeda.[196]

As with *jus in bello* law, neutrality law applies differently to non-international armed conflict.

In general, neutrality law only applies in full to international armed conflict or special cases in which civil wars are tantamount to international armed conflict.[197] Under international law, when a civil war occurs in a country, other states must

192. *Compare* Additional Protocol I, *supra* note 21 (relating to international armed conflict), *with* Additional Protocol II, *supra* note 63 (relating to non-international armed conflict). Some rules are present in both Protocols, so the absence of rules from Additional Protocol II, given their presence in Additional Protocol I, is highly suggestive.

193. *See, e.g.*, GC III, *supra* note 23, arts. 2–3; Hamdan v. Rumsfeld, 415 F.3d 33, 44 (D.C. Cir. 2005) (Williams, J., concurring in the judgment and dissenting in part), *rev'd and remanded*, 548 U.S. 557 (2006) ("[A] conflict between a signatory and a non-state actor is a conflict 'not of an international character.' In such a conflict, the signatory is bound to Common Article 3's modest requirements of 'humane[]' treatment and 'the judicial guarantees which are recognized as indispensable by civilized peoples.'").

194. *See* Hague IV, *supra* note 67, preamble (explaining that "in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience"); GC III, *supra* note 23, art. 3 ("The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.").

195. Hamdan v. Rumsfeld, 548 U.S. 557, 630–31 (2006) (interpreting the term "conflict not of an international character" in the Geneva Conventions "in contradistinction to a conflict between nations"). As Judge Walton points out, the Supreme Court is most accurately characterized as holding that the armed conflict with al-Qaeda is at least a non-international armed conflict because the Court explicitly reserved the question of whether Hamdan was entitled to prisoner of war status under the GC III. Gherebi v. Obama, 609 F. Supp. 2d 43, 57 n.8 (D.D.C. 2009). However, the logic of the Supreme Court's reasoning hardly permits another conclusion in the present circumstances. *See id*. (noting that the Supreme Court did not overturn the D.C. Circuit's ruling that the conflict with al-Qaeda was not an international armed conflict, so that, at least within the jurisdiction of the D.C. Circuit, the court was "constrained" to treat the conflict with al-Qaeda as a non-international armed conflict).

196. Moreover, the Fourth Geneva Convention technically does not protect individual citizens of neutral or co-belligerent countries, which would be all of the countries in the world. *See* GC IV, *supra* note 75, art. 4 ("Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.").

197. *See* Bothe, *supra* note 147, at 579 ("The application of the law of neutrality requires the existence of an international armed conflict.").

decide whether to recognize the insurgent group as a belligerent, that is, a legitimate contender. If a state decides to recognize the insurgents as belligerents, it applies the international armed conflict rules of neutrality to that civil war.[198] That state commits to be neutral between the government and the insurgents and to treat both as if they were sovereign states fighting against one another.[199]

However, in cases where insurgents are not recognized as belligerents, (for example, because the insurgents do not control enough territory), neutrality law is partially applicable. Other states have neutral duties with respect to the state, but not with respect to the insurgents.[200] Helping the state against the insurgents is permissible; helping the insurgents against the state violates international law.

Neutral duties apply in this way because neutral duties are "only a phase of the general duty of a state to prevent injurious and offensive acts against friendly countries."[201] Under international law, each state has a duty "to use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace."[202] Otherwise, citizens in one state might cause harm to another state and damage the friendly relations between the countries. Neutrality law is an expression of these duties in wartime; neutrality law tells states how to remain at peace with both sides of an armed conflict. But when there is only one recognized belligerent under international law, the duties under neutrality law, which explain how to remain at peace with that belligerent, continue.[203]

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198. *See* 1 LASSA F. L. OPPENHEIM, INTERNATIONAL LAW: PEACE § 49, at 165 (Hersch Lauterpacht ed., 9th ed. 1992) ("The result of recognition of belligerency is that both the rebels and the parent government are entitled to exercise belligerent rights, and are subject to the obligations imposed on belligerents, and that third states have the rights and obligations of neutrality."); Convention on the Rights and Duties of States in Event of Civil Strife art. 1, Feb. 20, 1928, 46 Stat. 2749, 134 L.N.T.S. 45 (requiring that parties promise, "with regard to civil strife in another of them. . . [t]o forbid the traffic in arms and war material, except when intended for the government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied").

199. *See, e.g.*, The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 337 (1822) ("The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties, and to allow to each the same rights of asylum and hospitality and intercourse. Each party is, therefore, deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights."); Piracy on the High Seas, 3 Op. Att'y Gen. 120, 122 (1836) ("The existence of a civil war between the people of Texas and the authorities and people of the other Mexican States, was recognised by the President of the United States at an early day in the month of November last. Official notice of this fact, and of the President's intention to preserve the neutrality of the United States, was soon after given to the Mexican government.").

200. *See* Neutrality Act, 13 Op. Att'y Gen. 177, 179–80 (1869) (opining that the restrictions in the Neutrality Act applied with respect to aid to unrecognized insurgents, but not with respect to aid to the Spanish Government).

201. Roy Curtis, *Law of Hostile Military Expeditions as Applied by the United States*, 8 AM. J. INT'L L. 1, 1 (1914); *see* George Washington, U.S. President, Washington's Farewell Address to the People of the United States 17 (Sept. 19, 1796) ("The duty of holding a neutral conduct may be inferred, without anything more, from the obligation which justice and humanity impose on every nation, in cases in which it is free to act, to maintain inviolate the relations of peace and amity towards other nations."); INT'L L. ASS'N, HELSINKI PRINCIPLES ON MARITIME NEUTRALITY (1998), *reprinted in* THE LAWS OF ARMED CONFLICTS 1425, § 1.3 (Dietrich Schindler & Jirí Toman eds., 2004) [hereinafter HELSINKI PRINCIPLES] ("The relations between a party to a conflict and the neutral State, are, as a matter of principle, governed by the law of peace.").

202. United States v. Arjona, 120 U.S. 479, 484 (1887).

203. *See* International Law—Cuban Insurrection—Executive, 21 Op. Att'y Gen. 267, 270 (1895)

For example, a neutral state has the duty to prevent belligerents from conducting military operations in its jurisdiction, including recruiting, transporting troops or supplies, or stationing communications relays.[204] If fighters flee onto neutral territory, neutral states must intern them for the duration of hostilities.[205] Similarly, a neutral state cannot allow hostile expeditions to depart its jurisdiction to join an armed conflict.[206] Otherwise, the neutral state's territory would be to the advantage of one side—for example, a safe haven or a base of military operations. If a neutral state is unwilling or unable to fulfill its duty to prevent its jurisdiction from being used by one belligerent for military purposes, then the neutral state forfeits its right to be inviolable from the operations of the other belligerent.[207]

Just as states have a duty to prevent hostile expeditions from departing their territory to join an international armed conflict, states also have a duty to prevent

("While called neutrality laws, because their main purpose is to carry out the obligations imposed upon the United States while occupying a position of neutrality toward belligerents, our laws were intended also to prevent offenses against friendly powers whether such powers should or should not be engaged in war or in attempting to suppress revolt."); United States v. Blair-Murdock Co., 228 F. 77, 78–79 (N.D. Cal. 1915) (explaining that a criminal statute prohibiting persons within the United States from enlisting in foreign services "could be violated as well at a time of universal peace, as it could be at a time of almost general war").

204. *See* Hague V, *supra* note 137, arts. 2–5 (listing the action that belligerents are forbidden to take and the responsibilities of a neutral power with respect to belligerents); Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War arts. 5, 25, Oct. 18, 1907, 36 Stat. 2415, 1 Bevans 723 [hereinafter Hague XIII] (noting that belligerents are forbidden to "use neutral powers and waters as a base . . . against their adversaries" and that a neutral power has the responsibility to "exercise such surveillance . . . to prevent any violation").

205. *See, e.g.*, *Ex parte* Toscano, 208 F. 938, 940 (S.D. Cal. 1913) (applying Hague V to justify the detention by the United States of belligerent persons party to a civil war in Mexico, in which the United States was neutral); Hague V, *supra* note 137, art. 11 ("A neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them . . . ."); Brussels Declaration, Project of an International Declaration Concerning the Laws and Customs of War art. 53, Aug. 27, 1874 ("A neutral [s]tate which receives on this territory troops belonging to the belligerent armies shall intern them . . . .").

206. *See* Claims, Fisheries, Navigation of the St. Lawrence; American Lumber on the River St. John, U.S.-Gr. Brit., art. VI, May 8, 1871, 17 Stat. 863 (outlining rules for a neutral government to prevent the fitting out of vessels for warlike uses, the use of ports or waters as a base of naval operations against the other, and the violation of these duties by individuals within the neutral government's jurisdiction); Hague XIII, *supra* note 204, art. 8 (A neutral state must "prevent the fitting out or arming of any vessel within its jurisdiction which it has reason to believe is intended to cruise, or engage in hostile operations, against a Power with which that Government is at peace. It is also bound to display the same vigilance to prevent the departure from its jurisdiction of any vessel intended to cruise, or engage in hostile operations, which had been adapted entirely or partly within the said jurisdiction for use in war."); 18 U.S.C. § 960 (2011) (making criminal hostile expeditions originating within the United States against foreign nations with which the United States is at peace).

207. *See* DEP'T OF THE NAVY, Naval War Pub. No. 1-14M, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 7.3 (2007) ("If the neutral nation is unable or unwilling to enforce effectively its right of inviolability, an aggrieved belligerent may take such acts as are necessary in neutral territory to counter the activities of enemy forces, including warships and military aircraft, making unlawful use of that territory."); ARMY FIELD MANUAL 27-10, *supra* note 20, para. 520 ("Should the neutral State be unable, or fail for any reason, to prevent violations of its neutrality by the troops of one belligerent entering or passing through its territory, the other belligerent may be justified in attacking the enemy forces on this territory."); HELSINKI PRINCIPLES, *supra* note 201, § 2.1 ("If neutral waters are permitted or tolerated by the coastal State to be used for belligerent purposes, the other belligerent may take such action as is necessary and appropriate to terminate such use."); COLEMAN PHILLIPSON, WHEATON'S ELEMENTS OF INTERNATIONAL LAW 641 (5th ed. 1916) ("If a belligerent violates neutral territory, and the neutral State does not or cannot take effective measures to expel them, the other belligerent is entitled to enter the territory and prevent the violation from operating to his disadvantage.").

hostile expeditions from departing their territory to join an existing non-international armed conflict against another state, or even to start such a conflict.[208] Moreover, just as states lose the right for their territory to be inviolable when they are unwilling or unable to fulfill that duty in the context of international armed conflict, states also lose their territorial inviolability in the context of non-international armed conflict.[209]

Helping insurgents wage war against a state has consequences under international law, while helping states against insurgents does not. Helping states fight insurgents does not disturb the friendly relations of states, because the insurgents are not recognized as a state under international law. This aspect of neutrality law—that neutral duties apply during peacetime to prohibit states from supporting private armed groups fighting against other states—finds expression today in prohibitions on supporting transnational terrorism. States that support one another against terrorist groups act consistently with international law. However, a state's material support to terrorist groups fighting against other states may be proscribed as "aggression" under international law.[210]

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208. *See* H. Lauterpacht, *supra* note 188, at 127 ("The nearest approach to what is believed to be the true juridical construction of the state's duty to prevent organized hostile expeditions from proceeding in times of peace against a friendly state will be found in the law of neutrality."); Neutrality Act, 13 Op. Att'y Gen. 177, 179–80 (1869) (opining that the Neutrality Act of 1818 reaches those "who are insurgents or engaged in what would be regarded under our law as levying war against the sovereign power of the nation, though few in number and occupying however small a territory . . . [and therefore,] [t]he statute would apply to the case of an armament prepared in anticipation of an insurrection or revolt in some district or colony which it was intended to excite, and before any hostilities existed").

209. *See* John Bellinger, III, *Legal Issues in the War on Terrorism,* 8 GERMAN L. J. 735, 739 (2007) ("[I]t may be lawful for the targeted state to use military force in self-defense to address" the threat presented when a state is unwilling or unable to prevent "terrorists from using its territory as a base for launching attacks."); Abraham Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 108 (1989) ("The United States in fact supported the legality of a nation attacking a terrorist base from which attacks on its citizens are being launched, if the host country either is unwilling or unable to stop the terrorists from using its territory for that purpose."); Robert Lansing, *Correspondence Between Mexico and the United States Regarding the American Punitive Expedition, 1916*, 10 AM. J. INT'L L. 179, 223 (1916) (justifying the presence of American troops on Mexican territory if "the Mexican Government is unwilling or unable to give this protection [to American lives and property] by preventing its territory from being the rendezvous and refuge of murderers and plunderers"); John Quincy Adams, *The Secretary of State to Don Luis de Onis*, *in* 6 WRITINGS OF JOHN QUINCY ADAMS 386, 390 (Worthington Chauncey Ford ed., 1916) ("By the ordinary laws and usages of nations, the right of pursuing an enemy, who seeks refuge from actual conflict within a neutral territory, is incontestable. But, in this case, the territory of Florida was not even neutral. It was itself, as far as Indian savages possess territorial right, the territory of Indians, with whom the United States were at war. It was their place of abode, and Spain was bound by treaty to restrain them by force from committing hostilities against the United States—an engagement which the commanding officer of Spain in Florida had acknowledged himself unable to fill.").

210. *See* The President's News Conference: Economic Sanctions Against Libya, 1 PUB. PAPERS OF RONALD REAGAN 17, 17 (Jan. 7, 1986), *available at* http://www.reagan.utexas.edu/archives/speeches/1986/10786e.htm ("By providing material support to terrorist groups which attack U.S. citizens, Libya has engaged in armed aggression against the United States under established principles of international law, just as if he had used its own armed forces."); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, para. 172 (June 27) (dissenting opinion of Judge Schwebel) ("Both Nicaragua and the United States agree that the material support by a State of irregulars seeking to overthrow the government of another State amounts not only to unlawful intervention against but armed attack upon the latter State by the former."); G.A. Res. 3314 (XXIX), Annex, art. 3(g), U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631, at 143 (Dec. 14, 1974) (defining aggression to include, under certain circumstances, "[t]he sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed

In the United States' armed conflict against al-Qaeda, friendly states and persons have neutral duties under international law toward the United States. These states and persons must refrain from participating in or supporting al-Qaeda's hostilities against the United States if they wish to maintain their neutral immunities. On the other hand, since al-Qaeda is not a state or a recognized belligerent under international law, friendly states and persons lack neutral duties with respect to al-Qaeda. They may participate in and support U.S. military operations against al-Qaeda without adverse consequences in international law.

5. Neutral Duties and "Armed Conflict" in a Material Sense

Since the duties under neutrality law emanate from duties of states in peaceful relations with one another, neutral duties apply to states at peace. In contrast, the Geneva Conventions explicitly apply only if an armed conflict exists.[211] Indeed, the rules governing how parties to an armed conflict fight only need to govern behavior if people are actually fighting. But, duties under neutrality law operate even if no armed conflict exists because such duties fundamentally concern the resort to force, not how force should be used.

That neutral duties apply in "peacetime" is an important point. Some view the legality of the use of war powers as requiring the existence of an "armed conflict" in the material sense, meaning an ongoing threshold level of violence. For example, the United States has been criticized for using military force against al-Qaeda outside of Iraq and Afghanistan on the grounds that an "armed conflict," as defined in the Geneva Conventions, that is, a threshold degree of ongoing violence, does not exist in the locales outside Afghanistan and Iraq.[212] Under this view, persons captured outside of Afghanistan cannot be subject to military detention. Similarly, dicta in the Supreme Court's plurality opinion in *Hamdi* suggests that the government's military detention authority granted by the 2001 AUMF is somehow tied to the ongoing fighting in Afghanistan.[213]

above, or its substantial involvement therein"); REPERTOIRE OF THE PRACTICE OF THE SECURITY COUNCIL, Ch. XI, 427–28 (1947) (explaining that the United States, the United Kingdom, and Australia expressed the view that "[g]iving support to armed bands formed on [Albania, Bulgaria, Greece, and Yugoslavia] and crossing into the territory of another State, or refusal by any one of the four Governments in spite of the demands of the State concerned to take the necessary measures to deprive such bands of any aid or protection, shall be avoided by the Governments . . . as a threat to the peace within the meaning of the Charter of the United Nations").

211. *See, e.g.*, GC III, *supra* note 23, arts. 2–3 (noting that the "Convention shall apply to all cases of declared war or of any other armed conflict" and "[i]n the case of armed conflict not of an international character").

212. *See* Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, *Study on Targeted Killings*, paras. 46–56, U.N. Doc. No. A/HRC/14/24/Add.6 (May 28, 2010) (discussing the requirements for armed conflict to exist and concluding that "these factors make it problematic for the US to show that—outside the context of the armed conflicts in Afghanistan or Iraq—it is in a transnational non-international armed conflict against al-Qaeda, the Taliban and other associated forces") (internal quotations omitted); Mary Ellen O'Connell, *Combatants and the Combat Zone*, 43 U. RICH. L. REV. 845, 863 (2009) ("Combatants, lawful and unlawful, could be found in Afghanistan, Iraq and Somalia, but not in places where there are no hostilities such as Hamburg, Germany, O'Hare Airport in Chicago, Peoria, Illinois, or Switzerland.").

213. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion) ("Active combat operations against Taliban fighters apparently are ongoing in Afghanistan. . . . The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who 'engaged in an armed conflict against the United States.' If the record establishes that United States troops are still

Predicating the legality of the use of force on the existence of an ongoing level of fighting begs the question of why fighting is lawful in the first place. Why was it lawful for the United States to invade Afghanistan in October 2001? Were the very first detentions unauthorized because there was not enough active combat in Afghanistan? If the U.S. government captures enough Taliban fighters, so that the violence drops below the requisite threshold, must it then release them all?[214]

Just as with the concept of "combatants," people are reversing the Geneva Conventions and interpreting the Conventions to confer authority to use military force instead of interpreting them to restrain the exercise of military force. The purpose of the definition of "armed conflict" in the Geneva Conventions is not to authorize the resort to force, but to ensure that states adhere to the rules of war when fighting is sufficiently intense.[215] Even if states deny that they are fighting a war and claim it is only a "police action," they have to observe the law of war.[216]

The question of whether force may be used outside of Iraq and Afghanistan is a *jus ad bellum* question, not a *jus in bello* question. The proper body of law to answer that question is neutrality law, which teaches that an enemy retains his status as an enemy everywhere,[217] but belligerents must respect the rights of neutrals in pursuit of their enemies. Similarly, the authority to continue to detain enemies does not depend on whether many people are dying in battle. It depends on whether the government has made peace with them.[218]

### *B. Neutrality Law as a Framework in Domestic Law*

Neutrality law explains what foreign nationals must do to keep their neutral immunity in international law from the United States' military operations in its war against al-Qaeda. Neutrality law draws the proper boundaries of the war in

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involved in active combat in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force,' and therefore are authorized by the AUMF.").

214. *See* Al-Bihani v. Obama, 590 F.3d 866, 874 (D.C. Cir. 2010) (rejecting an interpretation of international law in which "the victors would be commanded to constantly refresh the ranks of the fledgling democracy's most likely saboteurs").

215. In fact, the United States viewed the threshold standard for applying Additional Protocol II relating to non-international armed conflict as too narrow; thus President Reagan informed the Senate that Protocol II should apply to all armed conflicts covered by Common Article 3 of the Geneva Conventions, even if they did not meet the threshold laid out in Protocol II. RONALD REAGAN, *supra* note 59, at vii–viii.

216. For example, the Department of Defense's policy is to "comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations." Dep't of Def., Directive 2311.01E, *supra* note 19, para. 4.1.

217. *See* The Commercen, 14 U.S. (1 Wheat.) 382, 394 (1816) ("[An enemy's] force is always hostile to us, be it where it may be."); *id.* at 398–99 (Marshall, C.J., dissenting) ("It has been said, and truly said, by the counsel for the captors, that we were at war with Great Britain in every part of the world. We were enemies everywhere. Her troops in Spain, or elsewhere, as well as her troops in America, were our enemies.").

218. *See* Ludecke v. Watkins, 335 U.S. 160, 170 (1948) ("It is not for us to question a belief by the President that enemy aliens who were justifiably deemed fit subjects for internment during active hostilities do not lose their potency for mischief during the period of confusion and conflict which is characteristic of a state of war even when the guns are silent but the peace of Peace has not come."); Al-Bihani v. Obama, 590 F.3d 866, 874 (D.C. Cir. 2010) ("[R]elease is only required when the fighting stops.").

international law and gives the first step in the legal inquiry of whether a foreign national is properly the object of the use of force, including detention in that war. But neutrality law also matters in domestic law. Neutrality law informs the construction of the 2001 AUMF and provides the proper boundaries of the war that Congress has authorized. And, as a framework whose norms already have been incorporated into domestic law, the framework of duties and immunities in neutrality law can readily be applied by the federal courts as a legal limit on detention.

1. Neutrality Law and the 2001 AUMF

The 2001 AUMF differs from many prior authorizations. Instead of authorizing the use of force against a particular government,[219] the 2001 AUMF authorizes the use of force in general terms against those responsible for the terrorist attacks on September 11, 2001.[220] Neutrality law first informs the construction of the 2001 AUMF by explaining who are the initial enemies targeted by the authorization. Neutrality law also informs the construction of the 2001 AUMF by expanding it to implicitly authorize the use of force against neutrals who violate duties of neutrality in relation to the armed conflict and thus forfeit their immunity under neutrality law.

First, neutrality law explains whom the 2001 AUMF explicitly targets. For example, the 2001 AUMF authorizes the President to use force against nations that "aided" or "harbored" those responsible for the September 11 attacks.[221] Under what circumstances would a person, organization, or nation have sufficiently "aided" or "harbored" the September 11 attacks to fall within this language? The 2001 AUMF itself provides no explanation. The Taliban fall within this language uncontroversially.[222] But consider that some of the September 11 hijackers lived in Germany while planning the attacks.[223] Would the 2001 AUMF authorize the use of force against Germany for harboring or aiding the September 11 attackers?

Neutrality law has dealt with the responsibility of neutral states for aiding and harboring hostile expeditions against another state.[224] Since the text of the 2001 AUMF itself reflects situations that have been dealt with in neutrality law, it is reasonable to interpret ambiguities in the text in light of the traditional rules of

219. *See, e.g.*, Joint Resolution of Dec. 11, 1941, Pub. L. No. 77-331, 55 Stat. 796 (authorizing and directing the President to "employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Government of Germany").

220. Authorization for Use of Military Force, Pub. L. 107-40, §2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

221. *Id.*

222. *See* Al-Bihani v. Obama, 619 F.3d 1, 24 n.8 (D.C. Cir. 2010), *reh'g denied*, (Kavanaugh, J., concurring) ("[T]he Taliban is a permissible target under the AUMF because President Bush determined that the Taliban had harbored al Qaeda in Afghanistan."); Al-Bihani v. Obama, 590 F.3d 866, 873 (D.C. Cir. 2010) ("It is not in dispute that Al Qaeda is the organization responsible for September 11 or that it was harbored by the Taliban in Afghanistan."); *id.* at 883 ("[T]he Taliban 'harbored' al Qaeda, which committed the 9/11 attacks . . . .").

223. *See* THE 9/11 COMMISSION REPORT, *supra* note 31, at 160–69 (describing the activities of the "Hamburg group").

224. *See, e.g.,* Curtis, *supra* note 201, at 5–6 ("[T]he state must admit a direct responsibility when, being in the position of a neutral, the government or its agents render armed assistance or afford pecuniary aid to a belligerent. These are infractions of neutrality."); H. Lauterpacht, *supra* note 188, at 127 ("[A neutral state] must prevent [its citizens] from committing such acts as would result in the neutral territory becoming directly a base for the military operations of either party.").

neutrality law.[225] Under this approach, nations, organizations, and persons, have "aided" or "harbored" the September 11 attackers and thus may be regarded as enemies of the United States within the meaning of the AUMF, when they may be regarded as enemies of the United States under neutrality law.

Construing the 2001 AUMF to be limited by neutrality law is consistent with a longstanding canon of construction known as the *Charming Betsy* canon. As Justice Marshall explained in *Murray v. The Schooner Charming Betsy*:

> [A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral rights, or to affect neutral commerce, further than is warranted by the law of nations as understood in this country.[226]

The *Charming Betsy* canon is rooted in the Constitution's separation of powers. Under the Constitution, Congress has the power to declare war, and can authorize the use of military force,[227] as it did with the 2001 AUMF. If the President uses the 2001 AUMF in a way that fails to respect the law of neutrality, that is, by aggressively violating neutral rights, then aggrieved states might treat such action as a cause for war against the United States.[228] If the President could use the 2001 AUMF to goad other nations into declaring war against the United States, then he could undermine Congress' power to declare war.[229] Interpreting the 2001 AUMF consistent with the law of neutrality ensures that the President uses it for the war against al-Qaeda and not as a pretext for provoking war against other countries or persons who have fulfilled their obligations under international law to stay out of that war.[230]

In addition to explaining who is explicitly and initially an enemy targeted by the 2001 AUMF, neutrality law also informs the 2001 AUMF by explaining who implicitly and subsequently falls within it. At first glance, it is not obvious that the 2001 AUMF should authorize the use of force against a set of implicit targets. The

225. *See* Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att'y Gen. 484, 494 (1940) (interpreting the neutrality statutes "in light of the traditional rules of international law").

226. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

227. U.S. CONST. art. I, § 8 ("Congress shall have power to . . . declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water . . . .").

228. *See, e.g.*, *German Declaration of War Against the United States*, HISTORYPLACE (Dec. 11, 1941), http://www.historyplace.com/worldwar2/timeline/germany-declares.htm ("[The] Government of the United States having violated in the most flagrant manner and in ever increasing measure all rules of neutrality in favor of the adversaries of Germany . . . ."); President Wilson cited German attacks on neutral shipping as grounds for his request that Congress declare war against Germany in World War I. Woodrow Wilson, U.S. President, Address to a Joint Session of Congress Requesting a Declaration of War Against Germany (Apr. 2, 1917), *available at* http://www.presidency.ucsb.edu/ws/index.php ?pid=65366.

229. *Cf.* United States v. Burr, 25 F. Cas. 201, 207 (C.C.D. Va. 1807) (No. 14,694A) ("That a nation may be put in a state of war by the unequivocal aggressions of others, without any act of its own, is a proposition which I am not disposed to controvert.").

230. Neutrality law's limits on the 2001 AUMF do not alter the President's powers to use force outside of congressional authorization. *See, e.g.*, Authorization for Use of Military Force, Pub. L. No. 107-40, preamble, 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).(recognizing that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States").

2001 AUMF outlines broad categories of persons against whom the President may use "necessary and appropriate force."[231] If Congress intended to include those who joined al-Qaeda after the September 11 attacks, it seems as though Congress easily could have done so.[232] The better view, however, is that the 2001 AUMF authorizes the use of force, not only against those falling within its explicit terms, but also against any person, organization, or nation to redress violations of neutrality law relating to the war between al-Qaeda and the United States.

The view that the 2001 AUMF authorizes the use of force against those who have violated neutral duties has a simple premise: the 2001 AUMF authorizes a war. The text of the 2001 AUMF supports this view by recognizing that the United States has suffered an attack and must exercise its national rights of self-defense.[233] It is reasonable to assume that when Congress authorizes war, it does not confer only some of the national war powers, but instead confers "the power to wage war successfully."[234] Thus, in authorizing war against those responsible for the September 11 attacks, Congress included all the "fundamental incident[s] of waging war" necessary to bring that war to a successful conclusion.[235]

The authority to redress violations of neutral duties is a fundamental incident of waging war.[236] Under international law, the authority to redress violations of neutral duties discourages those who would support or join with al-Qaeda, because they too could be treated as an enemy.[237] The authority to redress violations of neutral duties thereby also helps fulfill the purpose of the 2001 AUMF, which is "to prevent any

231. *Id.*

232. *Cf.* United Dominion Indus. v. United States, 532 U.S. 822, 836 (2001) ("The logic that invests the omission with significance is familiar: the mention of some implies the exclusion of others not mentioned." (citing Leatherman v. Tarrant Cnty. Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993))).

233. *See* Authorization for Use of Military Force, preamble (authorizing "the use of United States Armed Forces against those responsible for the recent attacks launched against the United States[ ] [w]hereas . . . acts of treacherous violence . . . render it both necessary and appropriate that the United States exercise its rights to self-defense"); *see also* Permanent Rep. of the U.S. to the U.N., Letter dated Oct. 7, 2001 from the Permanent Rep. of the U.S. to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001) ("In response to [the September 11 attacks], and in accordance with the inherent right of individual and collective self-defense, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States.").

234. Lichter v. United States, 334 U.S. 742, 767 n.9 (1948) (internal quotations and citations omitted).

235. Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004) (plurality opinion); *see also* Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 33 (1801) (explaining that where Congress has authorized the use of force, "[t]here must then be incidents growing out of those acts of hostility specifically authorized, which a fair construction of the acts will authorize likewise").

236. *See* HALLECK, *supra* note 29, at 11 ("Every associate of my enemy is indeed himself my enemy; it matters little whether anyone makes war on me directly, and in his own name, or under the auspices of another; the same rights which war gives me against my principal enemy, it also gives me against all his associates."); HUGO GROTIUS, LAW OF WAR AND PEACE 251 (1901) ("[T]hose who join our enemies, either as allies or subjects, give us a right of defending ourselves against them also."); *cf.* Dias v. The Revenge, 7 F. Cas. 637, 641 (C.C.D. Pa. 1814) ("It is true, that the commission [of a private vessel by the President pursuant to statute] authorizes the capture of vessels belonging in reality to friends, as well as to enemies, if the friend has so conducted himself, as to bear, pro hac vice, the character of a belligerent . . . .").

237. *See* Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 507 (1870) (explaining that the war power "is not limited to victories in the field and the dispersion of the insurgent forces" but also "carries with it inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress").

future acts of international terrorism against the United States by [those responsible for the September 11 attacks]."[238]

Consider the consequences if the 2001 AUMF did not authorize the use of force against all enemies, but only against those explicitly targeted by the authorization. Al-Qaeda, the organization responsible for the September 11 attacks, could immunize itself from the use of force by simply dissolving, with its members reconstituting into a different group. Under attack, al-Qaeda leaders could decide to splinter the organization and place recruits in new groups that would not be vulnerable to targeting under the 2001 AUMF. Unfortunately, this is not a hypothetical concern. Al-Qaeda has become a more diffuse organization after being targeted by the United States.[239] Terrorist groups merge, change names, and split, and it would be naïve to think that they do so without evaluating the consequences.[240] An interpretation of the 2001 AUMF that allowed al-Qaeda, by altering its structure, to evade the reach of the 2001 AUMF, would not be consistent with Congress's intent.[241] Interpreting the 2001 AUMF as informed by neutrality law ensures that al-Qaeda cannot immunize its sustainment personnel from the 2001 AUMF by "outsourcing" its recruiting to freelancers like my hypothetical Mr. Balawi. All those who are enemies in the war, as defined by the international law of neutrality, also fall within the domestic authorization.

Reading the 2001 AUMF to include the redress of violations of neutrality and the use of force against new enemies entering that war is consistent with the Executive's past practice in waging war.[242] For example, during the Vietnam War, President Nixon directed an incursion into Cambodia against insurgent forces to redress the inability of Cambodia to police its border and prevent its territory from being used by North Vietnamese forces as a base of operations.[243] Then-Assistant Attorney General Rehnquist opined that the decision to send forces into Cambodia to redress neutrality violations was not part of "some new and previously unauthorized military venture," but part of the ongoing Vietnam War.[244] In World War II, the United States was not formally at war with the French government and thus Vichy French forces were neutrals.[245] However, Allied forces fought against

238. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

239. *See* sources cited *supra* note 3.

240. *See* Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. & INT'L L. 429, 436 (2010) ("Recently, for example, al Qaeda has tended to rely on affiliate organizations dispersed across several continents—al Qaeda in the Arabian Peninsula, Lashkar-e-Taiba in Pakistan, al-Shabab in Somalia—to provide financial, technical and other forms of support to local franchises."); Daniel Byman, *Al Qaeda's M&A Strategy*, FOREIGN POLICY (Dec. 7, 2010), http://www.foreignpolicy.com/articles/2010/12/07/al_qaedas_m_and_a_strategy (describing al-Qaeda's strategy of recruiting through "franchising" and merging with other organizations).

241. *Cf.* Boumediene v. Bush, 553 U.S. 723, 766 (2008) (stating that a legal test "must not be subject to manipulation by those whose power it is designed to restrain").

242. *Cf.* Medellin v. Texas, 552 U.S. 491, 531 (2008) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, can raise a presumption that the [action] had been [taken] in pursuance of its consent.") (internal citations and quotations omitted).

243. Richard Nixon, U.S. President, Address to the Nation on the Situation in Southeast Asia (Apr. 30, 1970), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=2490.

244. William H. Rehnquist, *The Constitutional Issues—Administration Position*, 45 N.Y.U. L. REV. 628, 639 (1970).

245. *See* DWIGHT D. EISENHOWER, CRUSADE IN EUROPE 86 (1997) ("Vichy France was a neutral

Vichy French forces in North Africa "without legal controversy."[246] The War of 1812 provides yet another example.[247] U.S. forces fought not only against the United Kingdom, against whom war was declared and the use of force explicitly authorized, but also against Native American tribes allied with the United Kingdom.[248]

Although it is proper to interpret the 2001 AUMF to authorize the use of force against neutrals to redress violations of neutral duties, the 2001 AUMF should not be read to give the President the power to declare war against neutral states that violate duties of neutrality. The Constitution confers upon Congress the power to declare war.[249] Declaring war (as opposed to using force to the extent that the state violated neutral duties) would place the United States in a state of hostility with that entire state under international law. Declaring war also would have a variety of far-ranging effects under domestic law.[250] Interpreting the 2001 AUMF to give the President the power to declare war would not seem to be supported by past practice. For example, President Wilson requested a declaration of war against Austria-Hungary, an ally of Germany, after war already had been declared and authorized against Germany.[251] As a matter of international law, no declaration of war against Austria-Hungary was necessary since Germany and Austria-Hungary were allies.

2. Neutrality Law and the Federal Courts

Neutrality law is a framework in international law for determining the relationship between the United States and non-hostile states, organizations, and persons in the war against al-Qaeda. In this way, neutrality law also informs the construction of the 2001 AUMF: Congress has conferred the authority to wage war against certain enemies and against others who violate duties of neutrality in relation to that war. But to be a legal framework for detention, neutrality law must be law

country and during the entire period of the war the United States had maintained diplomatic connection with the French Government.").

246. Bradley & Goldsmith, *supra* note 7, at 2110–11 (2005).

247. *See* An Act Declaring War between the United Kingdom of Great Britain and Ireland and the Dependencies thereof, and the United States of America and their Territories, 2 Stat. 755 (1812) (declaring war and authorizing the use of force against the United Kingdom).

248. *See* ROBERT S. ALLEN, HIS MAJESTY'S INDIAN ALLIES: BRITISH INDIAN POLICY IN THE DEFENCE OF CANADA, 1774–1815, at 121–22 (Diane Mew ed., 1992) (describing the role of certain Native American tribes as participants in the conflict alongside UK forces). Although the role of these tribes in hostilities was acknowledged in the Treaty of Ghent, Congress did not explicitly authorize force against them. *See* Peace and Amity (Treaty of Ghent), U.S.-Gr. Brit., art. IX, Dec. 24, 1814, 8 Stat. 218 ("The United States of America engage to put an end immediately after the ratification of the present Treaty to hostilities with all the Tribes or Nations of Indians with whom they may be at war at the time of such ratification . . . ."). However, it may have been the case that statutory authorization was viewed as unnecessary. *See* Montoya v. United States, 180 U.S. 261, 265 (1901) ("The North American Indians do not, and never have, constituted 'nations' as that word is used by writers upon international law . . . ."); Alire's Case, 1 Ct. Cl. 233, 238 (1865) ("Though we have had many 'Indian wars,' it has been but rarely that Congress, in which the Constitution vests the right to declare war and make peace, has enacted or resolved a formal declaration of hostilities against any tribe or tribes.").

249. U.S. CONST. art. I., § 8, cl. 11.

250. *See* JENNIFER K. ELSEA AND RICHARD F. GRIMMETT, CONG. RESEARCH SERV., RL 31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS, 28–69 (2007) (describing the domestic legal implications of declaring war).

251. Woodrow Wilson, U.S. President, Fifth Annual Message (Dec. 4, 1917), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=29558.

that can be applied by judges.[252] In *Boumediene v. Bush*, the Supreme Court left open the question of what substantive body of law applies to determine who is lawfully detained at Guantanamo Bay, Cuba.[253] Can neutrality law fill that void?

Neutrality law is largely customary international law. There are a few important treaties that codify neutrality law, but most of its rules have been developed through state practice.[254] Some have questioned whether federal judges can apply customary international law without express incorporation by Congress. This view applies "the Supreme Court's 1938 decision in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), which established that there is no federal general common law" to conclude that "international-law norms are not enforceable in federal courts unless the political branches have incorporated the norms into domestic U.S. law."[255] Whatever the merits of this critique with respect to other bodies of international law, it has little force against neutrality law.

First, as discussed above, neutrality law applies domestically as an interpretive principle that informs the construction of the 2001 AUMF.[256] The *Charming Betsy* canon confirms that judges can use neutrality law to construe the 2001 AUMF. Moreover, this is the *Charming Betsy* canon as originally intended. Although "in 1789 there was no concept of international human rights,"[257] and thus using the *Charming Betsy* canon to import international human rights law may be inappropriate, neutrality law was present in 1789. Neutrality law was the substantive law that the *Charming Betsy* canon was originally intended to import, and there is a rich history of its application by judges.[258]

Neutrality law also evades the critique that international law is unincorporated federal common law because norms of neutrality law have been incorporated into

252. For example, Congress has explicitly precluded petitioners in habeas litigation from invoking the Geneva Conventions. Noriega v. Pastrana, 564 F.3d 1290, 1297 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1002 (2010).

253. Boumediene v. Bush, 553 U.S. 723, 798 (2008) ("It bears repeating that our opinion does not address the content of the law that governs petitioners' detention.").

254. *See* Bothe, *supra* note 147, at 573 ("The essential aspects of neutrality have been developed through state practice in modern times.").

255. Al-Bihani v. Obama, 619 F.3d 1, 10 (D.C. Cir. 2010) (Kavanaugh, J., concurring); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 827–31 (1997) (discussing the impact of *Erie Railroad Co. v. Tompkins* on the applicability of customary international law in federal courts). For example, in *Hamdan v. Rumsfeld*, the Supreme Court found that the trial by military commission of Salim Hamdan was unlawful because his military commission did not comport with Common Article 3 of the Geneva Conventions. The Supreme Court did not simply apply the treaty, nor did it say that the norms in the treaty were customary international law. The Supreme Court relied on Congress's incorporation of the customary law of war to apply Common Article 3 of the Geneva Conventions to military commissions. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 636–37 (2006) (Kennedy, J., concurring) ("Congress requires that military commissions like the ones at issue conform to the 'law of war,' 10 U.S.C. § 821.").

256. Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

257. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 813 (D.C. Cir. 1984) (Bork, J., concurring).

258. *See, e.g.*, Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801) (applying the law of capture in an undeclared war between France and the United States); Brown v. United States, 12 U.S. (8 Cranch) 110 (1814) (applying the law of capture in the War of 1812); The Prize Cases, 67 U.S. (2 Black) 635 (1863) (applying the law of capture in the Civil War); The Paquete Habana, 175 U.S. 677 (1900) (applying law of capture in the Spanish-American war).

U.S. domestic law. Neutrality law principles are reflected in statutes such as the Neutrality Acts and the statutes proscribing terrorism.

The Neutrality Acts were intended to reflect views on international law and enacted pursuant to Congress' power to define and punish offences against the law of nations. The Neutrality Acts prohibit individuals within the jurisdiction of the United States from embarking on hostile military expeditions against nations with which the United States remains at peace.[259] These domestic statutes thus fulfill the United States' obligations towards other states under the international law of neutrality.[260] The Neutrality Acts attempt to prevent persons within the jurisdiction of the United States from waging war against other states. In doing so, the Neutrality Acts describe belligerent conduct against other states. By using standards in the Neutrality Acts to determine what acts might make a person an enemy of the United States, courts would be asking no more of others than to adhere to standards that the United States sets for itself with regard to other states.

Similarly, U.S. statutes making punishable terrorist acts incorporate aspects of neutrality law into domestic law. Some have described the U.S. criminal statutes punishing terrorist acts as purely based in domestic criminal law. Consistent with this view, in 1984, Judge Edwards on the D.C. Circuit opined that terrorism was not a violation of international law, explaining that "[w]hile this nation unequivocally condemns all terrorist attacks, that sentiment is not universal."[261]

In fact, U.S. statutes punishing terrorist acts have a basis in international law. First, since Judge Edwards's decision, international law has clearly condemned terrorism. In addition to the treaties combating particular aspects of terrorism (some of which were available for Judge Edwards to consider in 1984),[262] states from every area in the world have since concluded regional conventions to combat terrorism.[263]

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259. *See generally* 18 U.S.C. §§ 956–70.

260. The Three Friends, 166 U.S. 1, 52 (1897) ("The act of 1794, which has been generally recognized as the first instance of municipal legislation in support of the obligations of neutrality, and a remarkable advance in the development of International Law . . . ."); Roy Curtis, *supra* note 201, at 4 ("The legislation of the United States on the subject of expeditions, and the opinions of its executive and diplomatic officers, have been expressly declaratory of an international duty. International complications and dangers demanded the enactment of the neutrality acts. They were passed in response to an international obligation . . . . Whether or not this American practice conforms exactly to the requirements of international law, it is the evidence of America's idea of that law."); *see* CHARLES G. FENWICK, *supra* note 175, at 11 ("Inasmuch as neutrality laws are municipal in character and are binding only within the jurisdiction of the state enacting them, they may be looked upon as embodying the concept of international duty as understood by the individual state, together with such additional restrictions as the state may choose to impose upon its citizens from motives of policy.").

261. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 795 (D.C. Cir. 1984).

262. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Mar. 10, 1988, 1678 U.N.T.S. 304; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Mar. 10 1988, 1678 U.N.T.S. 221; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 178; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105; International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 13075 T.I.A.S. i; International Convention against the Taking of Hostages, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1979); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, 28.2 U.S.T. 1976, 1035 U.N.T.S. 167.

263. *See, e.g.*, Organization of African Unity Convention on the Prevention and Combating of Terrorism, July 14, 1999, 41 U.N.T.S. 2219; Inter-American Convention Against Terrorism, June 3, 2002, 42 I.L.M. 19; South Asian Association for Regional Cooperation Regional Convention on Suppression of

On a more theoretical level, neutrality law has long prohibited private persons setting forth from one country in a hostile expedition against another country, when those two nations were at peace. This conduct is today called transnational terrorism.[264] Terrorist acts against other nations, when planned and supported within the United States, violate the United States' duties towards other countries to ensure that its territory is not used to harm other states. As explained above, terrorist acts against other states, planned and supported from within the United States, can make the United States an accessory belligerent or even guilty of aggression under *jus ad bellum* law. Since terrorism becomes an international matter through these principles of accessory liability, treaties relating to the combating and suppression of terrorism also commonly include "support" or accessory liability in defining terrorist acts[265] and in prescribing the obligations of states to punish terrorism.[266] Against this international backdrop, many states have adopted domestic legislation to fulfill this international obligation not to support terrorism.[267] Similarly, Congress enacted the material support to terrorism statute pursuant to its power to define and punish offenses against the law of nations.[268] Thus, courts can use statutes that define

Terrorism, Nov. 4, 1987, *available at* http://www.unhcr.org/refworld/docid/3dd8ab3a4.html; Arab Convention for the Suppression of Terrorism, Apr. 1998, *available at* http://www.unhcr.org/refworld/docid/3c3ebda84.html; Convention of the Organisation of The Islamic Conference on Combating International Terrorism July 1, 1999, *available at* http://www.unhcr.org/refworld/docid/3de5e6646.html; European Convention on the Suppression of Terrorism Jan. 27, 1977, *available at* http://www.unhcr.org/refworld/docid/3ae6b38914.html; Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, June 4, 1999, *available at* http://www.unhcr.org/refworld/docid/47fdfb290.html.

264. *See* Franck & Niedermeyer, *supra* note 152, at 99–101 (1989) (analyzing neutrality law to conclude that customary international law prohibits one state from providing material support to terrorists against another state).

265. Organization of African Unity Convention on the Prevention and Combating of Terrorism, *supra* note 263, art. 1, para. 3(b); South Asian Association for Regional Cooperation Regional Convention on Suppression of Terrorism, *supra* note 263, art. 1(f); Council Joint Action 2002/475/JHA, European Union Council Framework Decision of 13 June 2002 on Combating Terrorism, art. 2, para. 2(b), 2002 O.J. (L 164) 3, 5.

266. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, *supra* note 262, art. 3, para. 1; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, *supra* note 262, arts. 5, 6; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, *supra* note 262, arts. 3, 5; Convention for the Suppression of Unlawful Seizure of Aircraft, *supra* note 262, art. 2; International Convention for the Suppression of the Financing of Terrorism, *supra* note 262, arts. 4, 5; International Convention against the Taking of Hostages, *supra* note 262, art. 2; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, *supra* note 262, art. 3; Draft 1937 Convention for the Prevention and Punishment of Terrorism, art.3(5), 19 League of Nations O.J. 23 (1938); European Convention on the Suppression of Terrorism, Jan. 27, 1977, art. 1(f), E.T.S. 90.

267. *See* Nikos Passas, *Combating Terrorist Financing: General Report Of The Cleveland Preparatory Colloquium*, 41 CASE W. J. INT'L L. 243, 245 (2009) (noting that Japan, Belgium, Argentina, France, Germany, Italy, Brazil, and Austria all have laws that punish support for terrorism); *Saudi Arabia Issues Fatwa Against Funding Terror*, MIDDLE E. MEDIA RESEARCH INST. (May 10, 2010), http://www.memri.org/report/en/0/0/0/0/0/0/4146.htm (reporting that Saudi Arabia's Senior Clerics Council opined that funding of terrorism and other sorts of facilitation and harboring of terrorists is contrary to Islamic law).

268. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 301(a)(2), 110 Stat. 1214, 1247 (1996) ("[T]he Constitution confers upon Congress the power to punish crimes against the law of nations and to carry out the treaty obligations of the United States, and therefore Congress may by law impose penalties relating to the provision of material support to foreign organizations engaged in terrorist activity . . . .").

unneutral or terrorist conduct to inform what constitutes violations of neutral duties.[269]

## III. USING NEUTRALITY LAW TO DEFINE THE ENEMY

The relationship for understanding the limits of the U.S. government's military detention authority in its campaign against al-Qaeda is not that between peaceful "civilian" al-Qaeda and "combatant" al-Qaeda. The relationship that matters is that between the United States and citizens of countries with which the United States is at peace. The framework of duties and immunities in neutrality law defines that relationship. Moreover, neutrality law has a special role in construing the war powers that Congress confers, and it can be applied by the courts. Part II explained the basic framework of duties and immunities under neutrality law and discussed how it applies in international and domestic law to determine the U.S. government's war powers in its war against al-Qaeda. Part III uses that framework. Part III explains the different ways in which a neutral person can acquire an enemy status and how these bases apply to define the scope of the government's military detention authority in its war against al-Qaeda.

### *A. Enemy Status in General*

#### 1. Enemy Status and Military Detention

At the outset, a few points on the relationship between enemy status and military detention are worth highlighting. First, determining that a neutral person, organization, or state has acquired enemy status is not a prerequisite for a belligerent to take action that can adversely affect that neutral's rights. Neutrality law allows belligerents to take measures in self-help to remedy a neutral's violations of neutral duties without determining that neutral is an enemy. For example, if a neutral supplies war materials to a belligerent, the other belligerent can capture the goods in transit. If a neutral state allows a belligerent to use a border region as a safe haven for military operations, then the other belligerent can attack that safe haven on neutral territory. The offended belligerent can redress violations of neutrality without deeming a neutral an enemy. In many cases, the offended belligerent will "choose to overlook certain offences, rather than unnecessarily increase the number of its enemies."[270] Under neutrality law, the United States may seize money being sent by the little old lady from Switzerland to the charity front for al-Qaeda. The United States may attack, in a neutral state's territory, the terrorist safe houses and camps from which attacks are being prepared and launched.

269. *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 110 (E.D.N.Y. 2005) (stating that statutes enacted pursuant to international law obligations "instance situations where the legislative and executive branches of government agree on what that international law is and agree that we are bound by it").

270. HALLECK, *supra* note 29, at 9. *E.g.*, China sent thousands of "volunteers" to participate in the Korean War. In World War II, the Vichy French forces fought with the Axis Powers. But, in both cases, the United States did not treat those entire countries as hostile, choosing only to use force against those forces participating in the armed conflict.

Second, although determining that a neutral has acquired enemy status is not a prerequisite for taking actions that can adversely affect that neutral's rights, enemy status is a prerequisite for holding a person indefinitely in military detention.[271] Thus, in order to determine who is subject to military detention, we must determine when a neutral has passed from simply violating duties of neutrality and acquired an enemy status. When may the United States not only redress the neutral's violations of neutral duties, but also treat the neutral as an enemy? This means the authority not only to attack al-Qaeda safe houses in Taliban-controlled territory in Afghanistan, but also to attack Taliban-controlled Kabul and remove the Taliban from power. This means the authority not only to stop a person's money transfers to al-Qaeda accounts, but also to hold that person at Guantanamo in military detention.

Third, determining that a person has acquired enemy status is necessary for military detention, but it is not sufficient. For a person's detention to be justified under the law of war, like all exercises of the war power, detention must be militarily necessary. As discussed above, this requirement would likely not properly be the subject of judicial review. Moreover, it cannot be stated with much more specificity than that military commanders must have a good reason for detention, such as preventing future participation in hostilities. However, although judges may be precluded from inquiring into the military necessity of continued detention, this would still be a requirement that the President and subordinate commanders must observe.[272]

2. What Does It Mean to Be an Enemy?

"The enemy is he with whom a nation is at open war."[273] In political science terms, war is the use of force against enemies to achieve political objectives.[274] In international law terms, war is a legal relationship of hostility between two entities.[275] Thus, enemies are those who bear hostile intentions towards one another. This hostility is more than just an ill-feeling; this hostility is an intention to wage war,[276]

271. It can be consistent with neutrality law principles to temporarily detain neutral persons for the purpose of screening them to ascertain whether they have enemy status. The power to detain enemy persons implies the power to capture and search for enemy persons, just as the power to capture enemy property implies the power to stop and search neutral shipping on the high seas and search for contraband. *See* Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 31–32 (1801) ("[W]here there is probable cause to believe the vessel met with at sea, is in the condition of one liable to capture, it is lawful to take her, and subject her to the examination and adjudication of the courts.").

272. *See* Al-Bihani v. Obama, 619 F.3d 1, 11 (Kavanaugh, J., concurring in the denial of rehearing en banc) ("[T]he limited authority of *the Judiciary* to rely on international law to restrict the American war effort does not imply that *the political branches* should ignore or disregard international-law norms.").

273. VATTEL, *supra* note 136, at 321.

274. *See* CARL VON CLAUSEWITZ, ON WAR 75 (Michael Howard & Peter Paret eds. and trans., Princeton Univ. Press 1989) (1832) ("*War is thus an act of force to compel our enemy to do our will*.").

275. HALLECK, *supra* note 29, at 1 ("[War] makes all the subjects of the one State the legal enemies of each and every subject of the other. This hostile character results from political ties, and not from personal feelings or personal antipathies; their *status* is that of legal hostility, and not of personal enmity.").

276. *See* United States v. Burr, 25 F. Cas. 187, 203 (C.C.D. Va. 1807) (No. 14,694) ("War might be levied without a battle, or the actual application of force to the object on which it was designed to act; that a body of men assembled for the purpose of war, and being in a posture of war, do levy war; and from that opinion I have certainly felt no disposition to recede. But the intention is an indispensable ingredient in

that is, to use force to achieve political ends.[277] An enemy's hostile purpose justifies the use of force against him because those with such a purpose will make war against the state if unopposed. This political purpose makes the terrorist or insurgent much more dangerous to the state than the bank robber, and justifies the use of the war power.[278]

In armed conflict between nations, the question of who is the enemy is easily answered. Hostility is imputed broadly from an enemy government to its citizens and residents. Armed forces, when they invade a hostile country, can, in general, deem all to be enemies.[279] However, in armed conflict against a non-state actor, the question of who is the enemy is much more difficult. A more individualized determination of who is the enemy is necessary, since one cannot rely on these broad rules. Although fewer *jus in bello* rules apply within armed conflict against non-state actors, *jus ad bellum* rules play a much larger role in limiting who may be detained in non-international armed conflict.

The core concept underlying "enemy" is a hostile purpose. Under neutrality law, the United States can treat as enemies (and thus detain when militarily necessary) those neutrals who have acted with the purpose of waging war against it. There are two sub-categories: (1) those who act with this purpose in fact, that is, those who have committed hostile acts against the United States and (2) those who have acted in such a way as to acquire this purpose as a matter of law, that is, those who perhaps are not actually hostile to the United States, but have sufficiently aided the enemy so that the enemy's hostility may be attributed to them.

### *B. Hostile Acts*

The most straightforward basis for a neutral to acquire enemy status is if he commits hostile acts against a belligerent.[280] As a theory for holding someone in military detention, committing a hostile act is a simple basis that neatly tailors means to ends: the United States can hold in military detention those who have acted with

the composition of the fact; and if war may be levied without striking the blow, the intention to strike must be plainly proved."); *see also* Roy Curtis, *supra* note 201, at 10–15 (describing what qualifies as a hostile intent); Whether or not the laws of war restrict behavior does not require the explicit intentions of the parties to wage war. YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 14 (4th ed. 2005); Christopher Greenwood, *The Concept of War in Modern International Law*, 36 INT'L & COMP. L. Q. 283, 286 (1987). However, for a party to justify the resort to force against others, it must deem them enemies, either formally or in fact.

277. *See* CLAUSEWITZ, *supra* note 274, at 76 (distinguishing between hostile feelings and hostile intentions).

278. *Cf.* United States v. Salerno, 481 U.S. 739, 748 (1987) ("[I]n times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the Government believes to be dangerous.").

279. At the same time, these rules seemed overbroad, especially when states often had longtime foreign residents who were not truly loyal to their home countries. *See* Robert M. W. Kempner, *The Enemy Alien Problem in the Present War*, 34 AM. J. INT'L L. 443, 458 (1940) (concluding in the context of enemy alien detention in World War II that "it is more important to inquire into the fundamental spiritual loyalties of a person rather than the formal facts concerning his national origin and previous residence").

280. *See* Hague V, *supra* note 137, art. 17 ("A neutral cannot avail himself of his neutrality (a) If he commits hostile acts against a belligerent . . . ."); OPPENHEIM 7th, *supra* note 56, § 88, at 270 (stating that neutral persons can acquire enemy status "if they . . . commit hostile acts against a belligerent").

the purpose of waging war against it.[281] A hostile act has two elements: (1) a hostile purpose and (2) an action.

1. Hostile Purpose

Under neutrality law, the primary element in defining a hostile act was its purpose, that is, whether it was animated by the purpose of waging war.[282] The purpose element means that, in general, acts of violence with no purpose of waging war cannot be considered hostile acts. Every day, people commit mundane acts of violence against the United States. The bank robber who assaults a U.S. marshal does not become an enemy in the war; his purpose is pecuniary, not political.

Moreover, merely an intention to wage any war against the United States is insufficient to bring one within the ambit of the 2001 AUMF. One must intend to wage al-Qaeda's war against the United States.[283] In an international armed conflict, states are deemed to be in one armed conflict when they "are associated together for the purpose of fighting a common enemy and when they are united by engagements with the object of realizing the common aim."[284] Thus, in general, hostile acts against the United States by a person or terrorist group that was not associated with al-Qaeda and did not share any of its objectives would not make that group or person part of the ongoing armed conflict contemplated by the 2001 AUMF.[285] The 2001 AUMF does not authorize a war with every terrorist group on the globe; it authorizes a war against al-Qaeda and associated terrorist groups and individuals who act to further al-Qaeda's political aims.

There are practical and epistemological issues with establishing whether a person has acted with the intent of furthering al-Qaeda's war against the United

281. *Compare* Al-Bihani v. Obama, 590 F.3d 866, 872 (D.C. Cir. 2010) (The government's detention authority includes the power to detain "those who purposefully and materially support such forces in hostilities against U.S. Coalition partners."); *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 450 (D.D.C. 2005) (explaining that the government's detention authority includes the authority to detain "any person who has committed a belligerent act"); Al-Marri v. Pucciarelli, 534 F.3d 213, 261 (4th Cir. 2008) (Traxler, J., concurring) ("When they enter this country 'with hostile purpose,' they are enemy belligerents subject to detention.") (citation omitted); *with* Johnson v. Eisentrager, 339 U.S. 763, 778 (1950) ("[T]hese prisoners were actual enemies, active in the hostile service of an enemy power. There is no fiction about their enmity.").

282. *Cf.* PICTET COMMENTARY, *supra* note 45, at 78 ("[T]he reference in the Convention to 'a belligerent act' relates to the principle which motivated the person who committed it, and not merely the manner in which the act was committed."); Roy Curtis, *supra* note 201, at 11 ("Obviously, it is the purpose toward which the conduct in question is directed that stamps it with an unlawful character. It is the design to invade another country and to attack its government that attaints these otherwise harmless acts.").

283. There are, of course, authorities for using military force apart from the 2001 AUMF, which may be implicated by individuals seeking to wage war against the United States. *See, e.g.*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 324(4), 110 Stat. 1214, 1247 (1996) ("[T]he President should use all necessary means, including covert action and military force, to disrupt, dismantle, and destroy international infrastructure used by international terrorists, including overseas terrorist training facilities and safe havens . . . .").

284. 10 DIGEST OF INTERNATIONAL LAW 29 (Marjorie Whiteman ed., 1968) (quoting the Egyptian Prize Court of Alexandria's decision of November 4, 1950).

285. In some circumstances, persons who commit hostile acts against the United States without sharing a common aim with al-Qaeda can acquire an enemy status in the war under a "support" theory as described below.

States. But, "[t]he state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else."[286]

In determining whether someone has acted with the purpose of furthering al-Qaeda's hostilities against the United States, admissions or expressions of an intention to join that fight are highly relevant.[287] Similarly, information that a person shares al-Qaeda's ideology and goals also would be important.[288]

Neutrality law also has given rules of evidence to help discern a hostile purpose. Neutrality law has governed proceedings that litigated the very question of hostile character—albeit in the context of property. Under neutrality law, belligerents could capture enemy ships and goods.[289] However, neutral persons could file suit and claim that their property was not appropriately deemed hostile and was not to be condemned.[290] In these courts, known as prize courts, the facts being litigated often occurred thousands of miles from the courtroom and suffered from a dearth of evidence, just as in the Guantanamo habeas litigation. In prize courts, the burden of proof was sometimes on the neutral to prove that his cargo was innocent.[291] Similarly, a plurality of the Supreme Court in *Hamdi* suggested that once the government brought forth credible evidence that the petitioner met the detention criteria, "the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria."[292] For example, if credible evidence established that a person was captured fleeing a battle against U.S. forces, (for example, the battle of Tora Bora that occurred when coalition forces attacked Osama Bin Laden's remote mountain stronghold in December of 2001) then it might fall upon him to establish that he was, in fact, an innocuous bystander caught up in the fray.[293]

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286. U.S.P.S. Bd. of Governors v. Aikens, 460 U.S. 711, 716–17 (1983) (quoting Eddington v. Fitzmaurice, 29 Ch. Div. 459, 483 (1885)).

287. *Cf.* Awad v. Obama, 608 F.3d 1, 9 (D.C. Cir. 2010) ("[I]ntention to fight [against U.S. and coalition forces in Afghanistan] is inadequate by itself to make someone 'part of' al Qaeda, but it is nonetheless compelling evidence when, as here, it accompanies additional evidence of conduct consistent with an effectuation of that intent.").

288. *Cf.* Abdah v. Obama, 709 F. Supp. 2d 25, 44 (D.D.C. 2010) (holding that attending an institution "sponsored and led by key Al Qaeda figures," in which "students there were taught Islamic doctrine in a manner twisted to serve the purposes of Al Qaeda" is relevant to whether a person was becoming part of al-Qaeda, and is consistent with a person being lawfully detained); Alsabri v. Obama, 764 F. Supp. 2d 60, 76 (D.D.C. 2011) (quoting *Abdah v. Obama* for the same proposition).

289. Declaration concerning the Laws of Naval War art. 30, Feb. 26, 1909, 208 Consol. T.S. 338 [hereinafter Declaration of London] ("Absolute contraband is liable to capture if it is shown to be destined to territory belonging to or occupied by the enemy, or to the armed forces of the enemy.").

290. *See id.* art. 48 ("A neutral vessel which has been captured may not be destroyed by the captor; she must be taken into such port as is proper for the determination there of all questions concerning the validity of the capture.").

291. La Amistad De Rues, 18 U.S. (5 Wheat.0 385, 392 (1820) ("And, in cases of this nature, where the libellant seeks the aid of a neutral Court to interpose itself against a belligerent capture, on account of a supposed violation of neutrality, we think the bur[d]en of proof rests upon him. To justify a restitution to the original owners, the violation of neutrality should be clearly made out. If it remains doubtful, the Court ought to decline the exercise of its jurisdiction, and leave the property where it finds it."); Declaration of London, *supra* note 289, art. 59 ("In the absence of proof of the neutral character of goods found on board an enemy vessel, they are presumed to be enemy goods.").

292. Hamdi v. Rumsfeld, 542 U.S. 507, 534 (2004) (plurality opinion).

293. *Cf.* Uthman v. Obama, 637 F.3d 400, 404 (D.C. Cir. 2011) ("[M]ost, if not all, of those in the vicinity of Tora Bora on December 15, 2001, were combatants."); *see generally* Esmail v. Obama, 639 F.3d

Another evidentiary rule from neutrality law that assisted in divining a hostile purpose was the inference to be drawn from false documentation. In prize courts, a neutral person ordinarily would prove that his goods were innocent by showing the shipping paperwork that indicated his goods were not bound for a belligerent, but rather for a neutral destination.[294] If the neutral destroyed his paperwork or was captured with multiple sets of papers, neutrality law allowed adverse inferences to be drawn against the neutral claimant.[295] Similarly, in determining whether a detainee has acted with a hostile purpose, demonstrably false cover stories can be highly probative of hostile intentions.[296]

2. Action

In addition to a hostile purpose, neutrality law also has required an act to effectuate that purpose. Merely expressing sympathy for a belligerent was not sufficient to give a neutral an enemy status.[297] Although some states have

1075 (D.C. Cir. 2011).

294. *See* JOSEPH STORY ET AL., NOTES ON THE PRINCIPLES AND PRACTICE OF PRIZE COURTS 17–18 (Frederic Thomas Pratt ed., 1854) ("It is upon the ship's papers and deposition thus taken and transmitted, that the cause is, in the first instance, to be heard and tried. This is not a mere matter of practice or form: it is of the very essence of the administration of prize law . . . . By the law of prize, the evidence to acquit or condemn must, in the first instance, come from the papers and crew of the captured vessel.") (internal citations omitted).

295. *See* The Bermuda, 70 U.S. (3 Wall.) 514, 556 (1866) ("The belligerent has a right to require a frank and *bona fide* conduct on the part of neutrals in the course of their commerce in times of war, and if the latter will make use of fraud and false papers to elude the just rights of belligerents and cloak their own illegal purposes, there is no injustice in applying to them the penalty of confiscation."); The Pizarro, 15 U.S. (2 Wheat.) 227, 241 (1817) ("Concealment, or even spoliation of papers, is not of itself a sufficient ground for condemnation in a prize court. It is, undoubtedly, a very awakening circumstance, calculated to excite the vigilance, and justify the suspicions of the court."); Francis Deak and Philip Jessup, *Early Prize Court Procedure: Part Two*, 82 U. PA. L. REV. 818, 829–31 (1934) ("It is obvious, however, that whenever fraud was discovered, it was a sufficient ground on which the credibility of the evidence was impeached and even if the presumption were rebuttable, the party had a rather difficult task in sustaining the burden of rebuttal. . . . [C]arrying a duplicate set of documents . . . was primarily used when the cargo consisted, in whole or in part, of contraband. One set of the papers then showed neutral destination in order to prevent capture since one neutral may carry goods of a contraband nature to another neutral.").

296. Al-Adahi v. Obama, 613 F.3d 1102, 1107 (D.C. Cir. 2010) (explaining that the "the well-settled principle that false exculpatory statements are evidence—often strong evidence—of guilt" applies to evaluating implausible cover stories offered by Guantanamo detainees); *Uthman*, 637 F.3d at 406 ("Uthman's false explanation is relevant here because, as we have said in another case, 'false exculpatory statements are evidence—often strong evidence—of guilt' . . . ." (quoting *Al-Adahi*, 613 F.3d at 1107)); Al-Madhwani v. Obama, 642 F.3d 1071, 1076 (D.C. Cir. 2011) (finding Al-Madhwani's "implausible narrative" to be a factor demonstrating that he was part of al-Qaeda); Al-Kandari v. United States, 744 F. Supp. 2d 11, 35 (D.D.C. 2010) (finding Al-Kandari's "explanation for his travel and activities" to be implausible and quoting *Al-Adahi v. Obama* as recent precedent counseling that such implausible explanations are relevant as evidence of guilt); *see also* Al-Bihani v. Obama, 594 F. Supp. 2d 35, 38–39 (D.D.C. 2010) (discussing Al-Bihani's attempt to conceal his relationship with the Taliban).

297. *See* Antonio S. de Bustamante, *The Hague Convention Concerning the Rights and Duties of Neutral Powers and Persons in Land Warfare*, 2 AM. J. INT'L L. 95, 112 (1908) ("[E]xpressions of sympathy through the medium of the press are not deemed hostile acts against the belligerents . . . . Spoken or written expressions of opinion cannot be included in the legal category of 'acts' [in favor of a belligerent that would deprive a neutral person of neutral immunity]."); Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2723 (2010) (explaining that the statute proscribing material support to terrorist organizations "does not prohibit independent advocacy or expression of any kind").

criminalized hostile propaganda against other states, international law has not recognized expressions of opinion as hostile acts that a neutral state is bound to prevent from occurring within its territory.[298] Thus, expressing support or sympathy for al-Qaeda would not, by itself, be a hostile act sufficient to violate neutral duties and convert a neutral into a belligerent.[299]

What kinds of acts are hostile?

Under neutrality law, whether a neutral's hostile act "directly" harms a belligerent or "indirectly" harms a belligerent by supporting the other side's war effort makes no difference. Even otherwise innocuous acts, if committed for the purpose of waging war, are hostile acts that render a neutral liable to treatment as an enemy. For example, even ordinary goods, like food, which are not particularly military in nature, acquire a hostile character if destined for use by armed forces.[300] Similarly, under the Neutrality Acts, indirect participants, or those who supported hostile expeditions, are "equally guilty with the member of the expedition."[301] Neutrality law treats indirect participants in hostile expeditions no differently from direct participants because "those who are to be direct participants in the attack or invasion cannot easily be separated from others indirectly concerned."[302] Moreover, "[t]he state would find prevention impossible if it attempted to punish only those who were to engage in the actual fighting," because it would have to wait for indirect participants to turn into direct participants.[303]

Neutrality law's indifference to the direct or indirect character of the hostile act necessary to convert a neutral to an enemy is illustrated by the state practice of declaring war. International law historically allowed neutral states and persons to join in wars.[304] States could declare war and join an armed conflict, thus abandoning their neutrality.[305] The practice of declaring war fell into disuse as states concluded

298. H. Lauterpacht, *supra* note 188, at 129–30; Laurence Preuss, *International Responsibility for Hostile Propaganda Against Foreign States*, 28 AM. J. INT'L L. 649, 668 (1934); *see also* Daphne Barak-Erez and David Scharia, *Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law*, 2 HARV. NAT'L SEC. J. 1, 7–14 (2011) (giving examples of how some states have criminalized hostile propaganda).

299. *See* Barhoumi v. Obama, 609 F.3d 416, 427 (D.C. Cir. 2010) (explaining that the evidence against petitioner showed that he had "more than 'mere sympathy' toward" an al-Qaeda-linked terrorist group); Salahi v. Obama, 710 F. Supp. 2d 1, 16 (D.D.C. 2010), *rev'd on other grounds*, 625 F.3d 745 (D.C. Cir. 2010) (holding Salahi's detention unlawful where "[t]he government has shown that Salahi was an al-Qaida sympathizer"); Sulayman v. Obama, 729 F. Supp. 2d 26, 32 (D.D.C. 2010) ("[T]he government must establish more than 'mere sympathy' for an enemy organization on the part of the detainee . . . .").

300. *See* The Carlos F. Roses, 177 U.S. 655, 675 (1900) ("[B]y the modern law of nations, provisions, while not generally deemed contraband, may become so, although belonging to a neutral, on account of the particular situation of the war, or on account of their destination, as, if destined for military use, for the army or navy of the enemy, or ports of naval or military equipment.").

301. Roy Curtis, *supra* note 201, at 21.

302. *Id.*

303. *Id.*

304. *See* 4 PHILIP C. JESSUP, NEUTRALITY: ITS HISTORY, ECONOMICS AND LAW 209 (1936) ("States have always been at liberty to join in wars when they wished to do so."); 2 L. OPPENHEIM, INTERNATIONAL LAW: WAR AND NEUTRALITY § 315, at 381 (2nd ed. 1912) [hereinafter OPPENHEIM 2nd] ("[T]here is no duty to remain neutral, and no duty for a belligerent to abstain from declaring war against a hitherto neutral State.").

305. A belligerent also could declare war on a neutral. *See* John Delatre Falconbridge, *The Right of a Belligerent to Make War upon a Neutral*, *in* 4 TRANSACTIONS OF THE GROTIUS SOCIETY 204, 206 (1918) (discussing Germany's declaration of war against Belgium in World War I).

treaties that limited their ability to wage aggressive war.[306] Nonetheless, the state practice of formally declaring war illustrates that a neutral can acquire enemy status simply by formally declaring his hostile intentions.

Al-Qaeda has declared war against the United States.[307] Other terrorist groups also may make declarations joining al-Qaeda's war against the United States.[308] Of course, as explained above, mere expressions of sympathy would be insufficient to acquire an enemy status. However, a declaration that was more than speech, but a formal expression of a group or person's intent to join al-Qaeda's war against the United States could be a hostile verbal act sufficient to acquire an enemy status.[309] For example, someone who has signed a martyr's will or made a videotape in preparation of an attack could acquire enemy status because these are not mere expressions of opinion or sympathy, but firm commitments to participate in hostilities.[310]

306. *See, e.g.*, Kellogg-Briand Pact art. 2, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 ("The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means."); U.N. Charter art. 1, para. 1 (identifying, as a purpose of the United Nations, "the suppression of acts of aggression or other breaches of the peace"); Rome Statute of the International Criminal Court, *supra* note 63, art. 5 (providing jurisdiction for the court to hear claims of the crime of aggression, as defined by future amendment); African Union Non-Aggression and Common Defence Pact, preamble, Jan. 31, 2005 (aiming to "put an end to conflicts of any kind" within and among States in Africa).

307. *Bin Laden's Fatwa*, PBS NEWSHOUR (Aug. 1996), http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html (text of Osama bin Laden's fatwa, "Declaration of War against the Americans Occupying the Land of the Two Holy Places"). The United States also has repeatedly expressed its hostile intentions against al-Qaeda. *E.g.*, Barack Obama, U.S. President, Remarks by the President on National Security (May 21, 2009), http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09 ("Now let me be clear: We are indeed at war with al Qaeda and its affiliates."); Barack Obama, U.S. President, Weekly Address (Jan. 2, 2010), http://www.whitehouse.gov/the-press-office/weekly-address-president-obama-outlines-steps-taken-protect-safety-and-security-ame ("[O]ur nation is at war against a far-reaching network of violence and hatred, and we will do whatever it takes to defeat them and defend our country.").

308. *See, e.g.*, *Jaish-e-Mohammed (JEM)*, NAT'L COUNTERTERRORISM CTR., http://www.nctc.gov/site/groups/jem.html (last visited Aug. 10, 2011) ("JEM has openly declared war against the United States."); OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, COUNTRY REPORTS ON TERRORISM 2009, at 235 (2010), *available at* http://www.state.gov/s/ct/rls/crt/2009/140900.htm ("The leaders of [Harakat Ul-Jihad-I-Islami/Bangladesh] signed the February 1998 fatwa sponsored by Usama bin Ladin that declared American civilians legitimate targets for attack.").

309. *Cf.* Chaplinsky v. New Hampshire, 315 U.S. 568, 573–74 (1942) (upholding as constitutional a statute punishing "fighting words" or "verbal acts"); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 439 (1911) (explaining that "verbal acts" are "as much subject to injunction as the use of any other force whereby property is unlawfully damaged").

310. *See, e.g.*, Duncan Gardham, *'British martyr' in New al-Qaeda Video on Web Heightens Concern over UK Attack*, THE TELEGRAPH, (Mar. 2, 2011, 6:35 AM), http://www.telegraph.co.uk/news/uknews/terrorism-in-the-uk/8355679/British-martyr-in-new-al-Qaeda-video-on-web-heightens-concern-over-UK-attack.html (describing a videotape linked to al-Qaeda and the Taliban featuring a British martyr, and noting the "last Britons to appear in similar footage were the July 7 bombers Mohammed Sidique Khan and Shehzad Tanweer, whose suicide videos were released by al-Qaeda in 2005 and 2006"); Chris Dolmetsch, *Times Square Bomber Vows Revenge in Al-Arabiya Video*, WASH. POST (July 14, 2010, 12:00 AM), http://www.washingtonpost.com/wp-dyn/content/article/2010/07/14/AR2010071404860.html (describing release of a propaganda video with footage shot prior to a failed attack); Criminal Complaint at 6–7, United States v. Hawash, No. 03-M-481 (D. Or. Apr. 28, 2003) (describing a martyr's will written in preparation of fighting in Afghanistan against coalition forces).

### C. *Acts in Favor of a Belligerent*

If someone acts with a hostile purpose, that is, with the motive of waging al-Qaeda's war against the United States, he does not pose much in the way of a legal problem under the framework of neutrality law. This is the case, even if his method has, thus far, been to participate in the war indirectly with recruiting and financing as opposed to directly by serving in combat arms. Just as belligerents can treat neutrals as enemies if they act with hostile purpose, so the United States also can treat such persons as enemies in its current armed conflict with al-Qaeda. In fact, sometimes those with this personal hostility will proclaim it.[311] These persons might not contest their enemy status in court.[312]

Neutrality law has not limited enemies to those who, in fact, have acted with hostile purposes against a belligerent. Neutrality law also has provided rules and principles for legally imputing an enemy's hostile purpose to a neutral person, organization, or nation that knowingly supported that enemy.

This is a difficult question in neutrality law, and it is one of attribution. When can the belligerent's hostile purpose be attributed to a neutral through that neutral's actions in support of the belligerent? When has someone acted in such a way that al-Qaeda's hostility to the United States can be attributed to that person, even if that person may not have shared al-Qaeda's hostile intentions towards the United States?

For example, a vendor with an all-beef, halal hotdog stand outside of an al-Qaeda safe house in Pakistan might feed, among others, al-Qaeda members every day for lunch. When he provides food to al-Qaeda members, he may do so knowing that he feeds al-Qaeda members. The hotdog vendor seems different from someone serving food to al-Qaeda and Taliban fighters on the front lines in Afghanistan.[313] In one case, we attribute al-Qaeda's hostile purposes to the individual, while in the other case, our intuitions do not.

Under neutrality law, not all actions by a neutral in support of a belligerent attached an enemy status to the neutral. Indeed, neutrality law sought to allow ordinary commerce and peaceful relations to continue as much as possible between neutrals and belligerents. For example, neutral persons could sell goods to a belligerent, including contraband, that is, war materials.[314] Neutrality law permitted the neutrals to carry contraband goods to belligerents, on the theory that only the goods acquired a hostile character, while the neutral person's purpose remained

311. *See, e.g.*, *Verbatim Transcript of Combatant Status Review Tribunal* at 18, Hearing for ISN 10024 (Mar. 10, 2007) (Khalid Sheikh Mohammed), *available at* http://www.defense.gov/news/transcript_isn10024.pdf (claiming responsibility for a variety of terrorist attacks including the terrorist attacks of September 11, 2001, and the murder of Daniel Pearl); Samir Khan, *I am Proud To Be a Traitor to America*, INSPIRE MAG., Oct. 11, 2010 (proclaiming himself to be a traitor and describing his links to al-Qaeda).

312. *E.g.*, Al Sharbi v. Bush, 601 F. Supp. 2d 317, 318 (D.D.C. 2009) (granting petitioner's request to dismiss a habeas petition filed on his behalf).

313. *Cf.* Al-Bihani v. Obama, 594 F. Supp. 2d 35, 40 (D.D.C. 2009) ("[F]aithfully serving in an al Qaeda affiliated fighting unit that is directly supporting the Taliban by helping to prepare the meals of its entire fighting force is more than sufficient 'support' to meet this Court's definition. After all, as Napoleon himself was fond of pointing out: 'an army marches on its stomach.'").

314. Hague V, *supra* note 137, arts. 17–18 (exempting from acts that would deprive a person of neutral immunity: "[s]upplies furnished or loans made to one of the belligerents, provided that the person who furnishes the supplies or who makes the loans lives neither in the territory of the other party nor in the territory occupied by him, and that the supplies do not come from these territories").

commercial—an *animus vendendi*.[315] However, those who engaged in contraband trade subjected themselves to the risk that their goods and their ship might be captured and confiscated by the opposing belligerent.[316] The belligerent's confiscation of the cargo and vessel from the neutral was permissible under international law and sufficient to remedy the harm to the belligerent.[317] The belligerent could not treat the neutral carrier of contraband as an enemy and detain him as a prisoner of war. On the other hand, if a neutral person acted with the purpose of supporting the belligerent's war effort and not a commercial purpose, the neutral would be committing hostile acts and would acquire an enemy status.[318] Commentators described the distinction between knowingly aiding the enemy with pecuniary motives and purposefully aiding the enemy with warlike motives as "hairsplitting"[319] and "scarcely traceable."[320] Commentators also called for the law to change to more objective criteria.[321]

The problem was not just a practical one of distinguishing between different states of mind by the neutral. For some services that a neutral person might provide to a belligerent, there was not a neatly matching remedy as exists with contraband goods. A neutral's goods could be forfeited as a penalty co-extensive with the harm suffered by the belligerent. The loss of the goods served as a punishment that elegantly matched the harm suffered by the belligerent. However, for providing certain services to a belligerent, such as delivering military communications, confiscating the belligerent's dispatches would be of little punishment and little deterrent to the neutral.[322]

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315. The Rapid, 12 U.S. (8 Cranch) 155, 162 (1814) ("The law of prize is part of the law of nations. In it, a hostile character is attached to trade, independently of the character of the trader who pursues or directs it."); Jecker, Torre, & Co. v. Montgomery, 59 U.S. 110, 113 (1855) (same).

316. N. Pac. Ry. Co. v. Am. Trading Co., 195 U.S. 439, 465 (1904) ("It is legal to export articles which are contraband of war; but the articles and the ship which carries them, are subject to the risk of capture and forfeiture.").

317. The entire ship often would not be condemned unless the contraband cargo exceeded a certain proportion. *See, e.g.*, Declaration of London, *supra* note 289, art. 40 ("A vessel carrying contraband may be condemned if the contraband, reckoned either by value, weight, volume, or freight, forms more than half the cargo.").

318. *See* THOMAS J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 547 (1895) (describing the distinction between *animus vendendi* and *animus belligerendi* as delineated in case law).

319. Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers, 39 Op. Att'y Gen. 484, 495 (1940).

320. The Meteor, 17 F. Cas. 178, 201–02 (D.N.Y. 1866), *rev'd on other grounds*, 26 F. Cas. 1241 (C.C.S.D.N.Y. 1868) ("[T]he test we have applied has not been the extent and character of the preparations, but the intent with which the particular acts are done. . . . The intent is all. The act is open to great suspicions and abuse, and the line may often be scarcely traceable; yet the principle is clear enough. Is the intent one to prepare an article of contraband merchandise, to be sent to the market of a belligerent, subject to the chances of capture and of the market? Or, on the other hand, is it to fit out a vessel which shall leave our port to cruise, immediately or ultimately against the commerce of a friendly nation? The latter we are bound to prevent. The former the belligerent must prevent." (quoting WHEATON'S INTERNATIONAL LAW 562–63 (8th ed.))).

321. *See, e.g.*, Henry Duke, *Mens Rea in Prize Law*, *in* 6 TRANSACTIONS OF THE GROTIUS SOCIETY 99, 104 (1920) ("'Departure from neutrality' is the justification for treating the goods of a neutral as though they were goods of the enemy, and a truer test of liability to capture than the state of mind of the neutral claimant when his ship or goods were seized is to ascertain whether the ship or goods were then engaged upon an errand which enabled the belligerent enemy better to carry on the war.").

322. *See* Norman Hill, *The Origin of the Law of Unneutral Service*, 23 AM. J. INT'L L. 56, 58 (1929) (explaining that a historical change towards a "more lenient penalty" for neutral contraband was not

Thus, neutrality law came to recognize a class of acts known variously as "analogues of contraband," "unneutral service," "hostile aid," and "unneutral conduct."[323] Performing these acts attached an enemy status (that is, they imputed a hostile purpose to a person), regardless of whether they were animated by a hostile purpose or other motives like making money.[324]

> Under some title, and "unneutral service" seems better than any thus far proposed, these acts must be recognized as in a distinct category. Their nature is hostile, because such service should primarily be performed by belligerent agents and agencies. The neutral agent in undertaking the act identifies himself with the belligerent to an extent which makes him liable to the treatment accorded to the belligerent. He is therefore liable to capture as an enemy, and his goods are liable to the treatment accorded to the enemy under similar conditions. The agent may be made a prisoner of war, and the agency may be seized, confiscated, or, in certain instances, so treated as to render it incapable of further rendering unneutral service.[325]

Three different kinds of witting conduct by a neutral allowed a belligerent's hostility to be attributed to that neutral: (1) allying oneself with a belligerent, (2) substantially aiding a belligerent (including taking direct part in hostilities), and (3) aiding a belligerent in breach of a duty not to do so.

1. Allegiance

Allying oneself with an enemy, that is, joining with or becoming "part of" an enemy group, is the most common type of unneutral service. Under neutrality law, allegiance imputes enemy status from one party to another.

If a neutral affiliates himself with a belligerent, he imputes the belligerent's warlike purposes to himself. For example, states enter into treaties of alliance with one another.[326] Other states can assume that states that have promised to be the military allies of its enemies are also its enemies in war.[327] Similarly, terrorist groups also conclude alliance-type agreements with one another,[328] and groups that have

applied to carrying dispatches or troops).

323. *See id.* at 66–67 (detailing the historical etymology of terms such as "unneutral service"); George Wilson, *supra* note 178, at 73–74 (using hypothetical situations to show that unneutral acts exist that fall into neither blockade nor contraband categories).

324. *See* OPPENHEIM 2nd, *supra* note 304, § 412, at 528, ("Now as regards the four kinds of unneutral service which create enemy character, *mens rea* is obviously always in existence, and therefore always presumed to be present.").

325. George Wilson, *supra* note 178, at 77.

326. *E.g.*, North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 ("The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all.").

327. *See* VATTEL, *supra* note 136, at 433 ("In the ordinary and open warlike associations, the war is carried on in the name of all the allies, who are all equally enemies."); *e.g.*, Wilson, *supra* note 251 ("The government of Austria-Hungary is not acting upon its own initiative or in response to the wishes and feelings of its own peoples but as the instrument of another nation.").

328. *See, e.g.*, JOHN ROLLINS, CONG. RESEARCH SERV., R41070, AL QAEDA AND AFFILIATES: HISTORICAL PERSPECTIVE, GLOBAL PRESENCE, AND IMPLICATIONS FOR U.S. POLICY 10 (2011) ("Al Qaeda forces that fled Afghanistan with their Taliban supporters remain active in Pakistan and reportedly have extensive, mutually supportive links with indigenous Pakistani terrorist groups that conduct anti-

done so with al-Qaeda also might be deemed enemies depending on the nature of those relationships.[329]

In addition to imputing hostility from one group to another, allegiance imputes hostility from a group to the individuals who comprise that group. For example, the hostility between governments at war is imputed to their citizens through the allegiance each citizen has to the state.[330] Similarly, persons forfeit their neutral immunity by joining the armed forces of a belligerent. Enlisting in the ranks of the enemy is a common example of the loss of neutral immunity.[331] In most wars, neutral nationals have enlisted the ranks of enemy forces and have been subject to treatment as enemy belligerents.[332] And, neutral vessels employed by a belligerent or acting under its direction or control forfeited their neutral immunity.[333]

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Western and anti-India attacks."); Barhoumi v. Obama, 609 F.3d 416, 425 (D.C. Cir. 2010) ("'While the Khaldan camp was not an al-Qaida facility, Abu Zubaydah had an agreement with bin Ladin to conduct reciprocal recruiting efforts whereby promising trainees at the Khaldan camp . . . could join al-Qaida if desired.'" (quoting declaration by an intelligence analyst)).

329. *See* Bradley & Goldsmith, *supra* note 7, at 2113 ("[T]errorist organizations that act as agents of al Qaeda, participate with al Qaeda in acts of war against the United States . . . are analogous to co-belligerents in a traditional war.").

330. *See* Johnson v. Eisentrager, 339 U.S. 763, 772–73 (1950) ("The alien enemy is bound by an allegiance which commits him to lose no opportunity to forward the cause of our enemy; hence the United States, assuming him to be faithful to his allegiance, regards him as part of the enemy resources. It therefore takes measures to disable him from commission of hostile acts imputed as his intention because they are a duty to his sovereign."); White v. Burnley, 61 U.S. (20 How.) 235, 249 (1857) ("When one nation is at war with another nation, all the subjects or citizens of the one are deemed in hostility to the subjects or citizens of the other . . . .").

331. Hague V, *supra* note 137, art. 17(b) (providing that a neutral person may not avail himself of his neutrality, "[i]f he commits acts in favor of a belligerent, particularly if he voluntarily enlists in the ranks of the armed force of one of the parties"); *see, e.g.*, Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, *supra* note 82, arts. 36–37 (providing that belligerents may hold as prisoners of war members of aircrews and passengers "in the enemy's service"); Declaration of London, *supra* note 289, art. 46 ("A neutral vessel will be condemned and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel: . . . (2) if she is under the orders or control of an agent placed on board by the enemy Government; (3) if she is in the exclusive employment of the enemy Government . . . ."). As to the customary law status of Article 46 of the Declaration of London, *see* OPPENHEIM 7th, *supra* note 56, § 89, at 278 ("As was provided by Article 46 of the unratified Declaration of London (which in this respect was in substance declaratory of existing law) . . . ."); The Commercen, 14 U.S. (1 Wheat.) 382, 393 (1816) ("[I]f a Swedish vessel be engaged in the actual service of Great Britain, or in carrying stores for the exclusive use of the British armies, she must, to all intents and purposes, be deemed a British transport.").

332. OPPENHEIM 7th, *supra* note 56, § 82a, at 261 ("A belligerent is permitted to enlist the subjects of other States, whether allies or neutrals, into its forces, either as combatants or as non-combatants, and hardly a single war occurs in which this is not done. Nor do the alien subjects who thus enlist commit thereby any offence against the rules of International Law; they are in no better and no worse position, as regards the enemy, than the subjects of the State whose forces they have joined.").

333. *See* SAN REMO MANUAL, *supra* note 162, arts. 67(c), 70(c), 13(h), 13(k) (providing that neutral vessels may be attacked if serving under the "exclusive control" of the armed force of the belligerent and "used for the time being on government non-commercial service"); LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS, *supra* note 147, para. 719(3)(c) (Can.) ("Neutral merchant vessels become legitimate targets and may be attacked if they. . . act as auxiliaries to the enemy's armed forces."); JOINT DOCTRINE & CONCEPTS CTR., U.K. MINISTRY OF DEF., THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT, paras. 12.43.1(c), 13.47(c) (2004) ("Merchant vessels flying the flag of neutral states may only be attacked if they fall within the definition of military objectives. They may, depending on the circumstances, become military objectives if they . . . act as auxiliaries to the enemy's armed forces."); DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS,

Based on the neutrality law principle that allegiance imputes hostility, the government would be justified in treating as enemies all those who have become part of hostile groups. Even if these persons are not personally hostile to the United States, the group's hostility to the United States may be imputed to these individuals through their allegiance to the group.[334]

Although allegiance includes the concept of service, that is, acting at the direction or control of the enemy, allegiance is broader. A person can ally himself with an enemy without subordinating his will to the enemy. Neutrality law often dealt with the situation of private, non-state actors that were not formally organized under command structures and were comprised of volunteers. Thus, neutrality law did not require that persons act under the direction or control of the enemy hierarchy to be deemed part of a hostile group.[335] Similarly, in the context of the Guantanamo habeas litigation, the D.C. Circuit has explained that whether a person is "part of" an enemy force is a functional, not formal inquiry,[336] and that evidence that a person acted under the "command structure" of an enemy force is not required.[337]

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*supra* note 207, para. 7.5.1(2) ("Neutral merchant vessels and civil aircraft acquire enemy character and may be treated by a belligerent as enemy warships and military aircraft when engaged in either of the following acts . . . 2. Acting in any capacity as a naval or military auxiliary to the enemy's armed forces."); Convention on Maritime Neutrality, *supra* note 136, art. 12(b) ("The neutral vessel shall be seized and in general subjected to the same treatment as enemy merchantmen . . .[w]hen at the orders or under the direction of an agent placed on board by an enemy government."); Declaration of London, *supra* note 289, art. 46(2)–(3) ("A neutral vessel will be condemned and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel . . . (2) if she is under the orders or control of an agent placed on board by the enemy Government; (3) if she is in the exclusive employment of the enemy Government . . . ."); CHARLES H. STOCKTON, THE LAWS AND USAGES OF WAR AT SEA: A NAVAL WAR CODE art. 16 (Government Printing Office 1900) ("Neutral vessels in the military or naval service of the enemy, or under the control of the enemy for military or naval purposes, are subject to capture or destruction.").

334. *See* Al-Adahi v. Obama, 613 F.3d 1102, 1108 (D.C. Cir. 2010) ("Whatever [Al-Adahi's] motive, the significant points are that al-Qaida was intent on attacking the United States and its allies, that bin Laden had issued a fatwa announcing that every Muslim had a duty to kill Americans, and that Al-Adahi voluntarily affiliated himself with al-Qaida."); Al-Bihani v. Obama, No. 05-2386, 2010 U.S. Dist. LEXIS 107590, at *40 n.6 (D.D.C. Sept. 22, 2010) ("Even assuming that the catalyst behind the petitioner's travel to Afghanistan was to prepare for battle in Chechnya, and not against the United States, this fact has no material effect on whether the government can detain the petitioner. . . . To the contrary, the circuit in Al-Adahi dismissed the significance of a detainee's motive for affiliating himself with al-Qaeda. . . ." (citing *Al-Adahi*, 613 F.3d at 1108)); Al Kandari v. United States, 744 F. Supp. 2d 11, 47 (D.D.C. 2010) ("Though [Al Kandari's] motives for coming to Afghanistan and his activities prior to the Battle of Tora Bora cannot be conclusively determined on the present record, at a minimum it is clear that Al Kandari knew by the time of his stay in Tora Bora that it was more likely than not that he was joining forces with and lending support to al Qaeda and/or the Taliban").

335. *See, e.g.*, Wiborg v. United States, 163 U.S. 632, 653 (1896) (finding correct the district court's charge to the jury as to "what constitutes a military expedition within the meaning of this statute. For the purposes of this case, it is sufficient to say that any combination of men organized here to go to Cuba to make war upon its government, provided with arms and ammunition (we being at peace with Cuba), constitutes a military expedition. It is not necessary that the men shall be drilled, put in uniform, or prepared for efficient service; nor that they shall have been organized as or according to the tactics or rules which relate to what is known as infantry, artillery, or cavalry.").

336. *See* Bensayah v. Obama, No. 08-5537, slip. op. at 11–12 (D.C. Cir. June 28, 2010) (opining that in light of the largely unknown and amorphous structure of al-Qaeda, the determination of whether someone is part of al-Qaeda "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").

337. *See* Al-Madhwani v. Obama, 642 F.3d 1071, 1077 (D.C. Cir. 2011) ("[T]he 'command structure' test employed by the district court 'is *sufficient* to show that person is part of al Qaeda' but 'is not

Apart from serving under the direction and control of the enemy, a person could ally himself with an enemy by sufficiently identifying himself with that enemy. A person could do so by enjoying the privileges of the enemy status, and thus be made "subject to the inconveniences attaching to that character."[338] For example, if a neutral ship joined a belligerent convoy (thereby sharing in the safety afforded by the convoy's warships), the neutral ship could be treated as part of the convoy and as an enemy ship.[339] Similarly, a neutral person who accompanied a group of armed al-Qaeda members also would sufficiently have identified himself with al-Qaeda.[340]

Under neutrality law, identifying with the enemy did not need to involve direct association with an enemy's armed forces. Neutrality law imputed hostility to all residents of enemy territory.[341] Those who reside in a country may be presumed to

*necessary*.'" (quoting Uthman v. Obama, 637 F.3d 400, 403 (D.C. Cir. 2011))); Hatim v. Gates, 632 F.3d 720, 721 (D.C. Cir. 2011) (same); Salahi v. Obama, 625 F.3d 745, 752 (D.C. Cir. 2010) (same); Awad v. Obama, 608 F.3d 1, 11 (D.C. Cir. 2010) (same); Bensayah v. Obama, 610 F.3d 718, 725 (D.C. Cir. 2010) (same).

338. Rogers v. The Amado, 20 F. Cas. 1107, 1109 (E.D. La. 1847) ("[I]f a neutral vessel enjoys the privileges of a foreign character, she must expect, at the same time, to be subject to the inconveniences attaching to that character."); The Commercen, 14 U.S. (1 Wheat.) 382, 396–97 (1816) ("The rule of 1756 prohibits a neutral from engaging in time of war in a trade in which he was prevented from participating in time of peace, because that trade was, by law, exclusively reserved for the vessels of the hostile state. . . . [A] neutral employed in a trade thus reserved by the enemy, to his own vessels, identifies himself with that enemy, and by performing functions exclusively appertaining to the enemy character, assumes that character.").

339. *See* Stewart v. United States (The Schooner Nancy), 27 Ct. Cl. 99, 109 (Ct. Cl. 1892) ("[A] neutral vessel, if captured when actually under the protection of an enemy's vessel of war, is for that reason alone good prize."); The Atalanta, 16 U.S. (3 Wheat.) 409, 423–24 (1818) (Johnson, J., dissenting) ("A convoy is an association for a hostile object. In undertaking it, a nation spreads over the merchant vessel an immunity from search, which belongs only to a national ship; and by joining a convoy, every individual ship puts off her pacific character, and undertakes for the discharge of duties which belong only to the military marine, and adds to the numerical, if not to the real, strength of the convoy. If, then, the association be voluntary, the neutral, in suffering the fate of the whole, has only to regret his own folly in wedding his fortune to theirs; or if involved in the aggression or opposition of the convoying vessel, he shares the fate which the leader of his own choice either was, or would have been made liable to, in case of capture."); LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS, *supra* note 147, para. 869(1)(e) ("Neutral merchant vessels are subject to capture outside neutral waters if they are engaged in any of the following activities . . . sail under convoy of enemy warships or military aircraft . . . ."); THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 333, paras. 13.41(d), 13.47(e) ("Merchant vessels flying the flag of neutral states may only be attacked if they fall within the definition of military objectives. They may, depending on the circumstances, become military objectives if they . . . sail under convoy of enemy warships or military aircraft.").

340. *See* Al-Madhwani v. Obama, 642 F.3d 1071, 1076 (D.C. Cir. 2011) ("Madhwani's association with enemy forces at the moment of his capture constitutes further evidence that he was 'part of' al-Qaida."); Esmail v. Obama, 639 F.3d 1075, 1077 (D.C. Cir. 2011) ("[W]e find it 'highly significant' that Esmail was captured along with two fighters . . . ."); *Uthman*, 637 F.3d at 404–05 (D.C. Cir. 2011) (Uthman was "traveling with a small group of men, two of whom were al Qaeda members and bodyguards for Osama bin Laden and one of whom was a Taliban fighter. . . . [E]vidence of association with other al Qaeda members is itself probative of al Qaeda membership."); Awad v. Obama, 608 F.3d 1, 11 (D.C. Cir. 2010) ("Awad was 'part of' al Qaeda by joining the al Qaeda fighter behind the barricade at the hospital."); Salahi v. Obama, 625 F.3d 745, 752 (D.C. Cir. 2010) (citing *Awad*, 608 F.3d at 3–4, 11, for the proposition that a person who "joined and was accepted by al-Qaida fighters who were engaged in hostilities against Afghan and allied forces. . . could properly be considered 'part of' al-Qaida even if he never formally received or executed any orders").

341. *See* Juragua Iron Co., Ltd. v. United States, 212 U.S. 297, 305–06 (1909) ("[U]nder the recognized rules governing the conduct of a war between two nations, Cuba, being a part of Spain, was enemy's country, and all persons, whatever their nationality, who resided there, were, pending such war, to

owe it allegiance because they have identified with the enemy by enjoying the privileges of residing in his territory.[342]

The war against al-Qaeda presently contains no enemy states, thus the principle that residence in enemy territory confers enemy status has less application.[343] However, there are circumstances in which this principle is relevant. Al-Qaeda, the Taliban, and other enemy groups have a number of facilities, such as guesthouses or training camps, that are foreclosed to the casual passer-by.[344] Persons residing in these facilities may be deemed to have an allegiance with al-Qaeda and thus hostility to the United States.[345] Just as a person enjoying the privileges of residence is legally assumed to owe loyalty to a host nation, persons receiving training, food, shelter, and protection from al-Qaeda can be legally assumed to have taken "some affirmative

be deemed enemies of the United States and of all its people."); Lamar v. Browne, 92 U.S. 187, 194 (1875) ("In war, all residents of enemy country are enemies."); 50 U.S.C. § 21 (2010) (defining alien enemies to include "all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and . . . not actually naturalized"); 50 U.S.C. App. § 2(a) (2010) (defining enemy to include "[a]ny individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory").

342. *See Rogers*, 20 F. Cas. at 1110 ("As the person who has a commercial inhabitancy in the hostile country has the benefits of his situation, so also he must take its disadvantages."); 1 WILLIAM BLACKSTONE, COMMENTARIES 358 (1765) ("[A]llegiance is a debt due from the subject, on an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully.").

343. *Cf.* The Amy Warwick, 1 F. Cas. 799, 804 (D. Mass. 1862) ("In cases which may come within the definition of civil war, there may be only an assemblage of individuals in military array, without political organization or territorial limit; or armed bands may make hostile incursions into a loyal state, or hold divided, contested, or precarious possession of portions of it, as now in Missouri and Kentucky. In such cases, local residence may not create any presumption of hostility.").

344. *Cf.* Al Warafi v. Obama, 704 F. Supp. 2d 32, 42 (D.D.C. 2010) ("It is inconceivable that the Taliban would allow an outsider to stay at their front line camp just to see what the fighting was like. An outsider whose trustworthiness and loyalty are unknown poses a threat to a military camp."); Sulayman v. Obama, 729 F. Supp. 2d 26, 50 (D.D.C. 2010) ("The Court finds that the petitioner's presence at the 'staging area' is by itself highly probative evidence of the petitioner's status as 'part of' the Taliban. Similar to the Court's reasoning regarding the petitioner's stay at Taliban-affiliated guesthouses, the Court simply cannot fathom a situation whereby Taliban fighters would allow an individual to infiltrate their posts near a battle zone unless that person was understood to be a 'part of' the Taliban."); Al-Kandari v. United States, 744 F. Supp. 2d 11, 34 (D.D.C. 2010) ("Similarly, in light of 'Usama Bin Ladin's widely known call for fighters to join him . . . at Tora Bora' and his 'robust operational security procedures,' it is unlikely that Al Kandari, as a noncombatant, would have gone to Tora Bora or would have even been allowed into the area by al Qaeda or Taliban forces, if he had managed to make it there.").

345. Al-Bihani v. Obama, 590 F.3d 866, 873 n.2 (D.C. Cir. 2010) (noting that evidence of training at al-Qaeda training camps and stays at al-Qaeda guesthouses "would seem to overwhelmingly, if not definitively, justify the government's detention"); Al-Adahi v. Obama, 613 F.3d 1102, 1109 (D.C. Cir. 2010) ("[A]ttendance at an al-Qaida military training camp is therefore—to put it mildly—strong evidence that he was part of al-Qaida . . . ."); *Uthman*, 637 F.3d at 406 ("[S]taying at an al Qaeda guesthouse is 'powerful—indeed 'overwhelming'—evidence' that an individual is part of al Qaeda."); *Al-Madhwani*, 642 F.3d at 1076 ("In light of Madhwani's guesthouse and military training camp admissions, his carrying a rifle at the behest of camp superiors, his suspicious movements and implausible narrative and his final capture in the company of at least one known al-Qaida operative, we conclude that a preponderance of the evidence unmistakably showed Madhwani was 'part of' al-Qaida when he was captured."); *Esmail*, 639 F.3d 1076 ("[T]raining at al Farouq or other al Qaeda training camps is compelling evidence that the trainee was part of al Qaeda.").

action to earn that trust and assistance from such a clandestine organization" and be deemed "part of" it.[346]

If allegiance is the sole basis for enemy status, then allegiance must be present in order to justify military detention.[347] If allegiance were severed because a person "quit" al-Qaeda, then al-Qaeda's hostility towards the United States could no longer be imputed from the group to the person.[348] Can al-Qaeda members simply tear up their identity cards on the approach of U.S. forces to avoid capture, or once detained, can they, by quitting al-Qaeda, also release themselves from U.S. military custody?[349]

We can avoid these impractical, but logically compelled, consequences if we remember that giving one's allegiance is a type of conduct.[350] Providing oneself to the organization would be the act upon which enemy status attaches. In this respect, providing oneself to al-Qaeda would be little different from providing al-Qaeda weapons or equipment. Once one acquires enemy status, individual acts of friendship such as taking back those weapons or providing intelligence information to the United States would not legally extinguish it.[351] Giving one's allegiance to al-Qaeda or another hostile group can even occur prior to the group becoming engaged in hostilities with the United States. In such a situation, neutrality law provided that if a neutral severed his allegiance to a belligerent at the outbreak of war, enemy status would not devolve upon him.[352]

346. Anam v. Obama, 696 F. Supp. 2d 1, 16 (D.D.C. 2010).

347. *See, e.g.*, Salahi v. Obama, 625 F.3d 745, 751 (D.C. Cir. 2010) ("[T]he relevant inquiry is whether Salahi was 'part of' al-Qaida *when captured*.") (emphasis added).

348. *Cf.* Basardh v. Obama, 612 F. Supp. 2d 30, 35 (D.D.C. 2009) (ordering petitioner released when "any ties with the enemy have been severed, and any realistic risk that he could rejoin the enemy has been foreclosed").

349. In international armed conflict, deserters from enemy armed forces may be held as prisoners of war. Levie, *supra* note 50, at 76–77.

350. *See* Hague V, *supra* note 137, art. 17(b) (defining a neutral's "acts in favor of a belligerent" that would deprive him of neutral immunity to include "if he voluntarily enlists in the ranks of the armed force of one of the parties"); 18 U.S.C. § 2339A(b)(1) (2009) (defining providing "material support or resources" to include providing "personnel (1 or more individuals who may be or include oneself)"); *cf.* Halberstam v. Welch, 705 F.2d 472, 485 (D.C. Cir. 1983) ("In a sense, the agreement in a conspiracy may substitute for the 'substantiality' of an aider-abettor's assistance in carrying out the violation, thereby allowing greater temporal or physical distance between the conspirator and the wrongful act.").

351. *Cf.* The Benito Estenger, 176 U.S. 568, 574 (1900) (finding status of enemy "held to be so notwithstanding individual acts of friendship, certainly since there was no open adherence to the Cuban cause, and allegiance could have been shifted with the accidents of war"); *In re* Territo, 156 F.2d 142, 147–48 (1946) (rejecting the argument that because Italy had switched sides in World War II to join the Allies, that Italian prisoners of war had to be released).

352. *See* OPPENHEIM 7th, *supra* note 56, § 88, at 271 ("The acts by which subjects of neutral states lose their neutral, and acquire enemy, character need not necessarily be committed after the outbreak of war. They can, even before the outbreak of war, identify themselves to such a degree with a foreign State that, with the outbreak of war against that State, enemy character devolves upon them, *ipso facto*, unless they at once sever their connection with such State. This, for instance, is the case when a foreign subject, in time of peace, enlists in the armed forces of a State and continues to serve after the outbreak of war."); *Salahi*, 625 F.3d at 750 (D.C. Cir. 2010) (discussing the case of an al-Qaeda member claiming that he quit al-Qaeda prior to his capture, which occurred shortly after the September 11 attacks).

2. Substantial Assistance

Another way hostility could be attributed to a neutral is if that neutral substantially aided the enemy's war effort.[353]

The principle underlying this support was the substantial harm it caused to a belligerent. Even though a neutral might have other purposes for his conduct (such as earning money), the dangerous result of the conduct allowed an attribution or imputation of hostile intent. Substantially contributing to the accomplishment of a result permits the legal conclusion that one desires that result to occur.[354]

Most obviously, under neutrality law, unneutral service includes direct participation in hostilities against a belligerent. Persons who take direct part in hostilities against a belligerent are treated as enemies. Neutral ships and aircraft that take direct part in hostilities are treated as enemies.[355] Direct participation in hostilities is a basis for a neutral to acquire enemy status, regardless of the person's motive in participating in the fighting. For example, the anti-coalition insurgent in Afghanistan may have no association with al-Qaeda and may not share its goals. Nonetheless, by attacking coalition forces in Afghanistan, he takes direct part in hostilities. That action is of substantial aid to al-Qaeda because it directly hinders U.S. forces that pursue al-Qaeda and seek to deny al-Qaeda safe haven in Afghanistan.[356] Thus, this person could be held as an enemy under the 2001 AUMF.

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353. *Cf. Halberstam*, 705 F.2d at 478 ("There is a qualitative difference between proving an agreement to participate in a tortious line of conduct, and proving knowing action that substantially aids tortious conduct. In some situations, the trier of fact cannot reasonably infer an agreement from substantial assistance or encouragement.").

354. *See* RESTATEMENT (SECOND) OF TORTS, § 876 (stating that a person is liable for harm resulting to a third person from the tortious conduct of another, if he "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself"); U.S. Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking, 18 Op. O.L.C. 148, 158 (1994) ("Where a person provides assistance that he or she knows will contribute directly and in an essential manner to a serious criminal act, a court readily may infer a desire to facilitate that act."); United States v. Zafiro, 945 F.2d 881, 887 (7th Cir. 1991) (holding that if a person "knowingly provides essential assistance [to another's action], we can infer that he does want her to succeed, for that is the natural consequence of his deliberate act").

355. *See* Declaration of London, *supra* note 289, art. 46. ("A neutral vessel will be condemned and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel: (1) if she takes a direct part in the hostilities . . . ."); *e.g.*, U.S. NAVY DEP'T, INSTRUCTIONS FOR THE NAVY OF THE UNITED STATES GOVERNING MARITIME WARFARE, para. 40(a) (Government Printing Office 1917) ("A neutral vessel is guilty of direct unneutral service . . . . [i]f she takes a direct part in the hostilities."); Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, *supra* note 82, art. 16. ("No aircraft other than a belligerent military aircraft may take part in hostilities in any form whatever."); DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, *supra* note 207, para. 7.5.1 (2007) ("Neutral merchant vessels and civil aircraft acquire enemy character . . . when . . . [t]aking a direct part in hostilities on the side of the enemy . . . ."); SAN REMO MANUAL, *supra* note 162, arts. 67(b), 70(b) (stating that neutral merchant vessels and neutral civil aircraft that "engage in belligerent acts on behalf of the enemy" may be attacked); U.K. MINISTRY OF DEF., THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 333, paras. 12.43(1)(b), 13.47(b) (2004) (same); LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS, *supra* note 147, para. 719(3)(b) (stating that neutral merchant vessels that "engage in belligerent acts on behalf of the enemy" may be attacked).

356. *See* Barack Obama, U.S. President, Remarks by the President in Address to the Nation on the Way Forward in Afghanistan and Pakistan (Dec. 1, 2009) (explaining that U.S. war aims include "to disrupt, dismantle, and defeat al Qaeda in Afghanistan and Pakistan, and to prevent its capacity to threaten America and our allies in the future").

Apart from direct participation in hostilities, neutrality law also includes provision of intelligence and communications services to a belligerent within the scope of unneutral service. Neutral vessels serving as intelligence and communications vessels for a belligerent lose their neutral immunity.[357] Communication of war information is deemed unneutral service because information can play a vital role in a nation's war effort.[358]

Similarly, neutrality law recognizes that acting as an enemy troop transport is unneutral service. Passenger ships that happened to be carrying a single enemy soldier generally would not forfeit their neutral character. If the ship were stopped, such persons could be removed from the ship and made prisoners of war.[359] However, ships and aircraft that contributed in a substantial way by acting as troop transports would forfeit their neutral character.[360]

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357. *See* Declaration of London, *supra* note 289, art. 46(4) ("A neutral vessel will . . . receive the same treatment as . . . if she were an enemy vessel: . . . (4) if she is exclusively engaged . . . in the transmission of intelligence in the interest of the enemy."); U.S. NAVY DEP'T, INSTRUCTIONS FOR THE NAVY OF THE UNITED STATES GOVERNING MARITIME WARFARE, *supra* note 355, para. 40(d) ("A neutral vessel is guilty of direct unneutral service . . . (d) If she is at the time and exclusively engaged in . . . the transmission of information in the interest of the enemy . . . ."); Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, *supra* note 82, arts. 6(1), 16 ("The wireless transmission, by an enemy or neutral vessel . . . of any military information intended for a belligerent's immediate use, shall be considered a hostile act . . . ."); Convention on Maritime Neutrality, *supra* note 136, art. 12(2)(d) ("Where the sojourn, supplying, and provisioning of belligerent ships in the . . . waters of neutrals are concerned . . . [t]he neutral vessel shall be seized and in general subjected to the same treatment as enemy merchantmen . . . [w]hen actually and exclusively destined . . . for the transmission of information on behalf of the enemy."); SAN REMO MANUAL, *supra* note 162, arts. 67(d), 70(d) (explaining that both neutral merchant vessels and neutral civil aircrafts "may not be attacked unless they . . . are incorporated into or assist the enemy intelligence system"); LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS, *supra* note 147, para. 719(3)(d) ("Neutral merchant vessels become legitimate targets and may be attacked if they . . . are incorporated into or assist the enemy's intelligence system . . . ."); U.K. MINISTRY OF DEF., THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 333, paras. 12.43.1(d), 13.47(d) (finding that neutral civilian aircrafts can be attacked "if they are incorporated into or assist the enemy's intelligence system").

358. *See* The Atalanta, 6 C. Rob. Adm. 440, 441, 455 (1808) ("[I]n the transmission of dispatches may be conveyed the entire plan of a campaign that may defeat all the projects of the other belligerent in that quarter of the world. . . . It is a service, therefore, which, in whatever degree it exists, can only be considered in one character, as an act of the most noxious and hostile nature.").

359. *See* Declaration of London, *supra* note 289, art. 47 ("Any individual embodied in the armed forces of the enemy who is found on board a neutral merchant vessel, may be made a prisoner of war, even though there be no ground for the capture of the vessel . . . .").

360. *See* OPPENHEIM 7th, *supra* note 56, § 408, at 833 (describing various categories of unneutral service of "Carriage of Persons for the Enemy"); Declaration of London, *supra* note 289, art. 46. ("A neutral vessel will be condemned and, in a general way, receive the same treatment as would be applicable to her if she were an enemy merchant vessel . . . if she is exclusively engaged at the time . . . in the transport of enemy troops."); U.S. NAVY DEP'T, INSTRUCTIONS FOR THE NAVY OF THE UNITED STATES GOVERNING MARITIME WARFARE, *supra* note 355, paras. 37(a), 40(d) ("A neutral vessel is guilty of indirect unneutral service—(a) If she is on a voyage specially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy . . ."; "A neutral vessel is guilty of direct unneutral service. . . (d) If she is at the time and exclusively engaged in . . . the transport of enemy troops . . . ."); Convention on Maritime Neutrality, *supra* note 136, art. 12(2)(d) ("The neutral vessel shall be seized . . . (d) When actually and exclusively destined for transporting enemy troops . . . ."); SAN REMO MANUAL, *supra* note 162, arts. 146(b), 153(b) (neutral vessels and aircraft are liable to capture if on a voyage or flight "especially undertaken with a view to the transport of individual passengers who are embodied in the armed forces of the enemy").

How does this apply to the current armed conflict? First, the most important aspect is the principle rather than the specific rules of what belligerents deemed to be substantial assistance, which would vary to some extent from state to state. What is essential or substantial aid in warfare also depends on the mode of fighting. As methods of fighting change, the type of conduct that will be of substantial support also will evolve.[361]

At the same time, transportation, communications, and fighting are still essential to the conduct of hostilities. For example, in the current armed conflict, travel facilitation activities are a significant prerequisite for transnational terrorist operations.[362] Thus, facilitating the travel of terrorists is proscribed under international and domestic law.[363] Transnational travel facilitation for a terrorist group would constitute "substantial support" sufficient to justify detention.

3. Support in Breach of a Duty

Under neutrality law, an enemy's purpose may be attributed to a neutral if the neutral allies himself with that enemy or if he substantially assists that enemy in war. Neutrality law also allows an attribution of hostile purpose if a neutral person supported a belligerent in breach of a duty not to do so.

The underlying legal principle here is that when a person breaches a duty, whether he does so knowingly or purposefully matters little to whether we should hold him responsible for that action. In criminal law, "[w]here carefully planned and calculated conduct is being scrutinized in the context of a criminal prosecution, the perpetrator's knowledge of the anticipated consequences is a sufficient predicate for a finding of criminal intent."[364] In tort law, the person who knowingly breaches a

361. *Cf., e.g.*, Al-Marri v. Pucciarelli, 534 F.3d 213, 319–21 (4th Cir. 2008) (Wilkinson, J., concurring in part and dissenting in part), *cert. granted, dismissed as moot*, Al-Marri v. Spagone, 129 S. Ct. 1545 (2009) (describing how "in order to effectuate its purposes, the law of war has never remained static" but instead has accommodated altered circumstances); Henry Pratt Judson, *Contraband of War*, 1 PROC. AM. POL. SCI. ASS'N 78–79 (1904) (describing how the types of contraband have changed as the methods of warfare have changed).

362. *Cf.* Rux v. Republic of Sudan, 495 F. Supp. 2d 541, 551 (E.D. Va. 2007) (explaining how the provision of passports to al-Qaeda "was critical to Al Qaeda's method of training its operatives in one country and then dispatching them with their materials to other countries to carry out operations or await instructions"); THE 9/11 COMMISSION REPORT, *supra* note 31, at 384 ("For terrorists, travel documents are as important as weapons. Terrorists must travel clandestinely to meet, train, plan, case targets, and gain access to attack. To them, international travel presents great danger, because they must surface to pass through regulated channels, present themselves to border security officials, or attempt to circumvent inspection points.").

363. *See* 18 U.S.C. § 2339A(b) (2009) (defining "material support" to include "the provision of any property, tangible or intangible, or service, including . . . false documentation or identification . . . and transportation"); *cf.* S.C. Res. 1904, U.N. Doc. S/RES/1904, para. 1(b) (Dec. 17, 2009) (deciding that all states shall, *inter alia*, "[p]revent the entry into or transit through their territories" of al-Qaeda-associated individuals); Organization of African Unity Convention on the Prevention and Combating of Terrorism, *supra* note 263, arts. 4–5 (requiring parties to prevent the issuance of visas and travel documents to terrorists and to cooperate with one another regarding the movement and travel documents of terrorists).

364. United States v. United States Gypsum Co. 438 U.S. 422, 423 (1978); Tison v. Ariz., 481 U.S. 137, 150 (1987) ("Traditionally, 'one intends certain consequences when he desires that his acts cause those consequences or knows that those consequences are substantially certain to result from his acts.'" (quoting W. LAFAVE & A. SCOTT, CRIMINAL LAW 196 (1972))); Reynolds v. United States, 98 U.S. 145, 167 (1878) (stating that, in criminal law, "every man is presumed to intend the necessary and legitimate consequences of what he knowingly does").

duty is generally held just as responsible as the person who acted with the desire that those consequences be effectuated.[365]

If a paper company prints and sells banners, signs, and flyers to an animal rights group, we do not infer that the paper company shares the animal rights group's goals, even though the paper company assists the animal rights group in achieving its political goals. No duty prevents the paper company from selling to the animal rights group, so we do not make this attribution. Similarly, the couturier who sells the prostitute a dress is not guilty of prostitution, in part, because there is not much of a duty to report minor offences.[366] On the other hand, the gun dealer who sells a gun to someone knowing that he will use it for murder can be found guilty of murder as an aider and abettor.[367] Unlike minor crimes, there is a greater duty to report felonies, the concealment of which is a crime.[368] The duty of citizens and residents to report crimes is heightened when the public safety is threatened.[369] Moreover, the gun dealer has heightened duties because he is placed in the position of enforcing gun laws. Violating those duties allows an inference that attributes resulting harms to him.

In general, a neutral person's support of the war effort of a belligerent, whether purposeful or incidental, is lawful. Neutral persons who carry contraband to a belligerent do so legally, but at the risk of penalties if caught by the other side—confiscation of goods and possibly their ship. Moreover, even where a neutral person participates in hostilities, such participation is generally lawful. Neutral persons captured serving in the armies of a belligerent have been treated as ordinary prisoners of war.

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365. *See* RESTATEMENT (SECOND) OF TORTS § 8A(b) (1965) ("Intent is not, however, limited to consequences which are desired. If the actor knows that the consequences are certain, or substantially certain, to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result.").

366. *See* Marbury v. Brooks, 20 U.S. (7 Wheat.) 556, 575–76 (1822) ("It may be the duty of a citizen to accuse every offender, and to proclaim every offence which comes to his knowledge; but the law which would punish him in every case for not performing this duty is too harsh for man.").

367. *See* United States v. Fountain, 768 F.2d 790, 798 (7th Cir. 1985) ("Compare the following hypothetical cases. In the first, a shopkeeper sells dresses to a woman whom he knows to be a prostitute. The shopkeeper would not be guilty of aiding and abetting prostitution unless the prosecution could establish the elements of Judge Hand's test. Little would be gained by imposing criminal liability in such a case. Prostitution, anyway a minor crime, would be but trivially deterred, since the prostitute could easily get her clothes from a shopkeeper ignorant of her occupation. In the second case, a man buys a gun from a gun dealer after telling the dealer that he wants it in order to kill his mother-in-law, and he does kill her. The dealer would be guilty of aiding and abetting the murder. This liability would help to deter—and perhaps not trivially given public regulation of the sale of guns—a most serious crime.").

368. *See* 18 U.S.C. § 4 (1948) (making punishable misprision of felony); People v. Lauria, 251 Cal. App. 2d 471, 481 (Cal. App. 2d Dist. 1967) ("The duty to take positive action to dissociate oneself from activities helpful to violations of the criminal law is far stronger and more compelling for felonies than it is for misdemeanors or petty offenses.").

369. 18 U.S.C. § 1071 (1948) (making punishable concealing person for whom arrest warrants have been issued); 18 U.S.C. § 1072 (1948) (making punishable concealing or harboring escaped federal prisoners); 18 U.S.C. § 2382 (1948) (making punishable misprision of treason); 18 U.S.C. § 2339 (2011) (making punishable harboring or concealing terrorists); 18 U.S.C. § 792 (1948) (making punishable harboring or concealing spies); 18 U.S.C. § 757 (1948) (making punishable assisting or harboring escaped prisoners of war or enemy aliens); 18 U.S.C. § 1381 (1948) (making punishable enticing desertion and harboring deserters); 18 U.S.C. § 2388 (1948) (making punishable persons who harbor or conceal persons who interfere with the armed forces during war).

However, sometimes a neutral person's support to a belligerent affirmatively breaches a duty and thus is a basis for acquiring enemy status. For example, in general, when a neutral person sells goods to a belligerent, even war materials, the neutral keeps his neutral status and immunity.[370] However, neutrality law gives an exception when the person lives in the territory of a belligerent and sends supplies from that territory to the other belligerent. In that situation, the neutral person is deprived of his neutral rights by virtue of his support.[371] The reason is that a neutral person residing in a belligerent's territory has duties of loyalty to that belligerent, which attach by virtue of his residence.[372] By aiding the other side and trading with the enemy, he breaches those duties and commits an offense under local law.[373]

The principle that support to a belligerent in breach of a duty can deprive a neutral of his neutral immunity is a limited exception in the context of international armed conflict; this principle applies when a neutral has acquired duties not to support a belligerent. However, this principle has broader application in the context of the war against al-Qaeda, which is a terrorist organization. As explained above, supporting terrorism is contrary to international law.

Moreover, support to al-Qaeda is specifically against international law. Under international law, the United Nations Security Council can decide what measures are necessary to maintain or restore international peace and security.[374] The United Nations Security Council has acted to proscribe support to al-Qaeda. The Security Council has required states to prevent the supply of war materials to al-Qaeda-associated persons.[375] The fact that support to al-Qaeda and associated entities is proscribed under international law alters what could otherwise be the traditional rule permitting the carriage of contraband at the risk of confiscation by the opposing belligerent.[376] Although selling weapons to a country traditionally would be viewed

370. *See* Hague V, *supra* note 137, art. 18 (giving supplies to a belligerent does not make a neutral lose his neutrality "provided that the person who furnishes the supplies or who makes the loans lives neither in the territory of the other party nor in the territory occupied by him, and that the supplies do not come from these territories").

371. *Id.*; JAMES BROWN SCOTT, THE REPORTS TO THE HAGUE CONFERENCES OF 1899 AND 1907, at 557 (1917) ("[I]f a neutral residing in [State] A or the territory occupied by that State were to furnish supplies to [State] B . . . he would by so doing commit an act in favour of B . . . and he would lose in A's eyes his quality as a neutral . . . .").

372. *See supra* note 342.

373. *See* 10 U.S.C. § 904 (2006) ("Any person who—aids, or attempts to aid, the enemy with arms, ammunitions, supplies, money, or other things . . . shall suffer death or such punishment as a court-martial or military commission may direct."); 2 L. OPPENHEIM, INTERNATIONAL LAW: WAR AND NEUTRALITY § 162, at 226 (Ronald F. Roxburgh ed., 3rd ed. 1921) (describing "war treason"); *E.g.*, Fur Trade at Michilimackinac, 1 Op. Att'y Gen. 175, 175 (1814) (opining fur trade with "a place now in the actual possession and under the dominion of Great Britain" to be unlawful); Techt v. Hughes, 229 N.Y. 222, 237 (1920) ("Trade in aid of the enemy's resources, since it tends to prolong the combat, is illegal for everyone within our jurisdiction whether enemy or friend.") (citations omitted).

374. *See* U.N. Charter, arts. 39–42 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.").

375. S.C. Res. 1904, U.N. Doc. S/RES/1904, para. 1(c) (Dec. 17, 2009).

376. *See* Adam Roberts, *The Laws of War in the War on Terror*, 79 INT'L L. STUD. 174, 180–81 (2003) ("[P]articularly when the UN Security Council has given approval to one party, the scope for neutrality may be limited or non-existent."); DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, *supra* note 207, para. 7.2.1 ("When called upon by the Security Council to do so, member nations are obligated to . . . implement[] a Security Council enforcement action, . . . and to refrain

as permissible activity, selling war materials to al-Qaeda is contrary to international law, especially since the Security Council has acted to proscribe it.[377]

The illegality (under international law) of supporting al-Qaeda allows an inference that those who are willing to break that law share al-Qaeda's hostile purposes. In this vein, D.C. district courts also have found tort liability for support to terrorism under a theory of civil conspiracy, reasoning that "sponsorship of terrorist activities inherently involves a conspiracy to commit terrorist attacks."[378] Thus, in general, it would seem that knowledge of the "actual and foreseeable result" of support to al-Qaeda would allow the inference of a hostile purpose so as to render a neutral liable to treatment as an enemy in the current armed conflict.[379]

Just as the illegality of the support to al-Qaeda creates an inference of hostile intent, the support that neutrality law recognizes as lawful to a belligerent does not create an inference of hostile intent. For example, neutrality law excludes "[s]ervices rendered in matters of police or civil administration" from the category of unneutral conduct.[380] Along the same lines, one would properly exclude legal assistance to al-Qaeda defendants from unneutral service. Defense counsel advocating on behalf of their clients would be presumed to be fulfilling their professional duties and would not be presumed to be hostile to the United States.

Neutrality law also explicitly excludes humanitarian aid from the category of unneutral conduct.[381] Under the Geneva Conventions, neutral states and humanitarian organizations may work on behalf of prisoners of war to ensure that they receive humane treatment.[382] Along these same lines, military medical and

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from aiding any nation against whom such action is directed. Consequently, member nations may be obliged to support . . . a result incompatible with the abstention requirement of neutral status."); ARMY FIELD MANUAL 27-10, *supra* note 20, para. 513 (explaining that the "Security Council of the United Nations is authorized . . . to make recommendations, to call for the employment of measures short of force, or to take forcible measures to maintain or restore international peace and security," obligations that have "qualified the rights of States" to remain neutral).

377. *Cf.* Richard Cheney, *United States: Department of Defense Report to Congress on the Conduct of the Persian Gulf War-Appendix on the Role of the Law of War*, 31 I.L.M 612, 637–40 (1992) (describing the U.S. view that U.N. Security Council decisions modified the traditional rules of neutrality in relation to the Persian Gulf War).

378. Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 27 (D.D.C. 1998); Belkin v. Islamic Republic of Iran, 667 F. Supp. 2d 8, 21–22 (D.D.C. 2009); Acosta v. Islamic Republic of Iran, 574 F. Supp. 2d 15, 27 (D.D.C. 2008); Bodoff v. Islamic Republic of Iran, 424 F. Supp. 2d 74, 84 (D.D.C. 2006).

379. Al-Bihani v. Obama, 590 F.3d 866, 873 (D.C. Cir. 2010) (concluding that where the "actual and foreseeable result" of support to the Taliban was "the maintenance of Al Qaeda's safe haven in Afghanistan," such support places that organization's members and supporters "within the AUMF's wide ambit as an organization that harbored Al Qaeda").

380. Hague V, *supra* note 137, art. 18(b).

381. OPPENHEIM 7th, *supra* note 56, § 294, at 655 ("[A]cts of humanity on the part of neutrals and their subjects, such as the sending to military hospitals of doctors, medicine, provisions, dressing material, and the like, and the sending of clothes and money to prisoners of war, can never be construed as acts of partiality, even if these comforts are provided to the wounded and the prisoners of one belligerent only . . . ."); *id*. § 322, at 687 ("[T]here is no violation of neutrality in a neutral allowing surgeons and other non-combatant members of his army invested with a character of inviolability according to the Geneva Convention to enlist, or to remain, in the service of either belligerent."); CHARLES H. STOCKTON, A MANUAL OF INTERNATIONAL LAW FOR THE USE OF NAVAL OFFICERS 235 (2d. ed. 1921) ("Subscriptions and donations of money and material by citizens of a neutral state to relieve suffering and famine in a belligerent state are not inconsistent with neutrality.").

382. *See* GC III, *supra* note 23, arts. 8–9 (explaining that services may be offered by neutral powers

religious personnel are immune from being the object of attack, an immunity that is derived from neutral immunity.[383] Consistent with principles of neutrality law, the material support to terrorism statute excludes "medicine and religious" materials from the definition of material support.[384]

Although neutrality law recognizes that certain categories of aid to a belligerent cannot be used to impute a hostile intent to a neutral, such aid does not preclude enemy status from otherwise attaching. For example, someone who joins al-Qaeda or the Taliban, but who also happens to perform medical work, can be captured just like any other person who is part of an enemy group.[385] Ayman al-Zawahiri, a medical doctor and senior al-Qaeda leader, would not be immune from capture simply because he might tend to wounded fighters.[386]

### *D. In Sum*

Neutrality law provides two bases for acquiring enemy status. First, a neutral person who commits hostile acts against a belligerent becomes that belligerent's enemy in war. His purpose of waging war effectuated by material action makes him an enemy under a primary theory of hostility. Second, a neutral person who commits certain acts in favor of one side of a war becomes an enemy of the other side, even if he lacks a hostile motive. His witting actions in support of an enemy can attribute the enemy's hostile purpose to him. Three kinds of "support" or unneutral service can cause a neutral to acquire enemy status: (1) if he allies himself with an enemy, (2) if he substantially assists an enemy in the war (including both direct participation in hostilities and actions that may not be regarded as direct participation), or (3) if he assists an enemy in breach of a duty not to support that enemy. Once a neutral person has acquired enemy status (that is, crossed the *jus ad bellum* threshold into

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and humanitarian organizations); GC I, *supra* note 79, art. 27 (explaining that the humanitarian assistance of recognized relief societies of neutral countries "[i]n no circumstances shall . . . be considered as interference in the conflict").

383. *See* WINTHROP, *supra* note 56, at 779 (explaining that military medical personnel "enjoy the rights of neutrality, provided they take no active part in the operations of war"); Resolutions of the Geneva International Conference, *supra* note 139, Recommendation (b) (recommending that "in time of war the belligerent nations should proclaim the neutrality of ambulances and military hospitals, and that neutrality should likewise be recognized, fully and absolutely, in respect of official medical personnel, voluntary medical personnel, inhabitants of the country who go to the relief of the wounded, and the wounded themselves"); Vowinckel v. First Fed. Trust Co., 10 F.2d 19, 21 (9th Cir. 1926) (explaining that "Red Cross surgeons and nurses, who are engaged exclusively in ameliorating the condition of the wounded of the armies in the field, and in alleviating the sufferings of mankind in general, are not enemies of the United States in any proper sense of that term"). Although these individuals may be captured and detained, they are entitled to special status if detained by the enemy in international armed conflict. GC I, *supra* note 79, arts. 24, 28; GC III, *supra* note 23, art. 33.

384. 18 U.S.C. § 2339A(b)(1) (2009).

385. *See* Al Warafi v. Obama, 704 F. Supp. 2d 32, 43 (D.D.C. 2010) (upholding detention of a Taliban recruit who served as a medic on an as-needed basis); *cf.* United States v. Farhane, 634 F.3d 127, 141 (2d Cir. 2011) (upholding conviction of a doctor who offered to provide himself to al-Qaeda for material support to a terrorist organization and noting that the defendant "was not prosecuted for performing routine duties as a hospital emergency room physician, treating admitted persons who coincidentally happened to be al Qaeda members").

386. *See, e.g.*, Peter Finn & Joby Warrick, *In Afghanistan Attack, CIA Fell Victim to a Series of Miscalculations About Informant,* WASH. POST (Jan. 16, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/01/15/AR2010011504068.html (describing an al-Qaeda-associated suicide bomber who was a Jordanian doctor).

the war), his detention must be militarily necessary in order to be justified under *jus in bello*.

## CONCLUSION

The observation that the international law of war is ill-suited to the war against al-Qaeda inspires the poets in judges. The law of war becomes an "old wineskin[]"[387] or "Marquess of Queensbury rules" that must be abandoned lest it weaken our national self-defense.[388] But the fault, dear judges, is not in our international law, but in ourselves.[389]

If we apply the concept of "combatant" to situations to which it does not apply and for purposes for which it was not intended, then, we will eventually find absurd results. However, when correctly applied "international law is not a suicide pact" any more than the Constitution.[390] International law has not precluded the detention of enemy persons whom it is militarily necessary to detain, largely because to do so would create perverse, inhumane incentives to kill rather than capture. Thus, the true legal limits on military detention are not found in rules on how we fight our enemies, but in rules that determine who we may justly deem an enemy in the first place.

International law has defined the legal boundaries of war, including who is properly an enemy within it, with the law of neutrality. Neutrality law may seem old and quaint to some. "Established legal doctrine, however, must be consulted for its teaching. Remote in time it may be; irrelevant to the present it is not."[391]

387. Al-Bihani v. Obama, 590 F.3d 866, 882 (D.C. Cir. 2010) (Brown, J., concurring).

388. Al-Marri v. Pucciarelli, 534 F.3d 213, 319 (4th Cir. 2008) (Wilkinson, J., concurring in part and dissenting in part).

389. *Cf.* WILLIAM SHAKESPEARE, THE TRAGEDY OF JULIUS CAESAR act 1, sc. 2 ("The fault, dear Brutus, is not in our stars, But in ourselves, that we are underlings.").

390. Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L.J. 23, 24 (2002) (referencing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963)).

391. Boumediene v. Bush, 553 U.S. 723, 797 (2008).