

# The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and It's a Good Thing, Too: A Response to Chang

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## *Abstract*

In his Article “Enemy Status and Military Detention in the War Against Al-Qaeda,” Karl Chang addresses one of the most critical problems in contemporary international law: the scope of a state’s detention authority in non-international armed conflict (NIAC). Some have argued that detention in NIAC is governed solely by the rules of international humanitarian law (IHL) applicable in international armed conflict (IAC), particularly the Fourth Geneva Convention’s provisions concerning the detention of civilians. Others claim that because conventional IHL does not regulate detention in NIAC, the scope of detention must be determined solely by reference to national law and international human rights law (IHRL). And still others have taken the position that IHL, national law, and IHRL are *all* relevant to determining the scope of detention in NIAC.

Chang, by contrast, looks to a completely different source of law: the law of neutrality. He rejects the idea that the scope of detention in NIAC is determined by the distinction between “combatants” and “civilians,” which is essential to all of the approaches mentioned above. Instead, he argues that “the legal limit on military detention is ‘enemy,’ a concept that has been defined in the law of neutrality.” Indeed, in his view, “[t]he framework of duties and immunities in neutrality law gives an overarching international law framework for U.S. military operations against al-Qaeda. . . .”

This is a unique thesis. *De lege ferenda*, the law as it ought to be, the Article makes an intriguing case for the relevance of neutrality law’s distinction between friend and enemy. But *de lege lata*, the law as it is, the Article is deeply problematic. Properly understood, the law of neutrality either does not apply to whatever NIAC exists between the United States and al-Qaeda or applies in a symmetrical manner that, if states took it seriously, would effectively cripple the United States’ counterterrorism efforts against al-Qaeda.

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## INTRODUCTION

In his Article “Enemy Status and Military Detention in the War Against Al-Qaeda,” Karl Chang addresses one of the most critical problems in contemporary international law: the scope of a state’s detention authority in non-international armed conflict (NIAC).<sup>1</sup> Conventional international humanitarian law (IHL) applicable in such conflict—Common Article 3 of the Geneva Conventions and the Second Additional Protocol—is silent concerning detention; it simply requires individuals who are detained to be treated humanely.<sup>2</sup> Scholars have thus turned to a variety of legal sources to address the detention issue. Some scholars have argued that detention in NIAC is governed solely by the rules of IHL applicable in international armed conflict (IAC), particularly the Fourth Geneva Convention’s

1. Karl S. Chang, *Enemy Status and Military Detention in the War Against Al-Qaeda*, 47 TEX. INT’L L.J. 1 (2011).

2. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 3(1), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) art. 4(1), June 8, 1977, 1125 U.N.T.S. 3.

provisions concerning the detention of civilians.<sup>3</sup> Others claim that because conventional IHL does not regulate detention in NIAC, the scope of detention must be determined solely by reference to national law and international human rights law (IHRL).<sup>4</sup> And still others have taken the position that IHL, national law, and IHRL are *all* relevant to determining the scope of detention in NIAC.<sup>5</sup>

Chang, by contrast, looks to a completely different source of law: the law of neutrality. He rejects the idea that the scope of detention in NIAC is determined by the distinction between “combatants” and “civilians,”<sup>6</sup> which is essential to all of the approaches mentioned above. Instead, he argues that “the legal limit on military detention is ‘enemy,’ a concept that has been defined in the law of neutrality.”<sup>7</sup> Indeed, in his view, “[t]he framework of duties and immunities in neutrality law gives an overarching international law framework for U.S. military operations against al-Qaeda . . . .”<sup>8</sup>

This is a unique thesis. No scholar<sup>9</sup> or state<sup>10</sup> has ever taken the position that the law of neutrality *applies* to a transnational NIAC involving a terrorist group like al-Qaeda, much less that it provides the “overarching international law framework” for that type of conflict. That is both the strength of Chang’s Article and its greatest weakness. *De lege ferenda*, the law as it ought to be, the Article makes an intriguing case for the relevance of neutrality law’s distinction between friend and enemy. But *de lege lata*, the law as it is, the Article is deeply problematic. Properly understood, the law of neutrality either does not apply to whatever NIAC exists between the United States and al-Qaeda or applies in a symmetrical manner that, if states took it seriously, would effectively cripple the United States’ counterterrorism efforts against al-Qaeda.

This Response is divided into three sections. Part I criticizes Chang’s assertion that the law of neutrality applies to the conflict between the United States and al-Qaeda, explaining why neutrality law would apply only if the United States or third states recognized al-Qaeda as a legitimate belligerent, a status that the United States would desperately want to avoid. Part II demonstrates that the power to detain is far more limited under the law of neutrality than Chang believes and that permitting

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3. *E.g.*, Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT’L L. 48, 50 (2009) (“IHL in international armed conflict—and the Fourth Geneva Convention in particular—is directly relevant because it establishes an outer boundary of permissive action.”).

4. *E.g.*, UNIV. CTR. FOR INT’L HUMANITARIAN LAW, REPORT OF THE EXPERT MEETING ON THE SUPERVISION OF THE LAWFULNESS OF DETENTION DURING ARMED CONFLICT 3 (2004), available at [http://www.adh-geneve.ch/docs/expert-meetings/2004/4rapport\\_detention.pdf](http://www.adh-geneve.ch/docs/expert-meetings/2004/4rapport_detention.pdf) (explaining that in non-international armed conflict “only national law is relevant, as well as international human rights law”).

5. *E.g.*, Els Debuf, *Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict*, 91 INT’L REV. RED CROSS 859, 860 (2009), available at <http://www.icrc.org/eng/assets/files/other/irrc-876-expert-meeting.pdf> (“In situations of NIAC, the relevant bodies of law for questions of internment are threefold: international humanitarian law . . . , international human rights law (IHRL) and each State’s domestic law.”).

6. Chang, *supra* note 1, at 21–25.

7. *Id.* at 25.

8. *Id.* at 33.

9. One scholar has argued that the law of neutrality *should* be used for that purpose. See generally Tess Bridgeman, Note, *The Law of Neutrality and the Conflict with Al Qaeda*, 85 N.Y.U. L. REV. 1186 (2010).

10. Claus Kress, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15 J. CONFLICT & SECURITY L. 245, 267 (2010).

states to declare neutrality would undermine the United States' counterterrorism efforts. Finally, Part III explains why, contrary to Chang's claim, the law of neutrality no longer determines the limits of the *jus ad bellum*, its rules having been effectively supplanted by the U.N. Charter's prohibition on the use of force.

## I. NEUTRALITY IN NON-INTERNATIONAL ARMED CONFLICT

The central thesis of Chang's Article emerges most clearly in the following paragraph:

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.<sup>11</sup>

This thesis is based on two interrelated assumptions: (1) that neutrality law applies to the armed conflict against al-Qaeda—which Chang categorizes as a NIAC<sup>12</sup>—even though only one of the participants in that conflict, the United States, is a recognized belligerent; and (2) that, because only one of the participants in the conflict against al-Qaeda is a recognized belligerent, the law of neutrality applies asymmetrically, prohibiting neutral states from assisting al-Qaeda but permitting them to assist the United States. Both assumptions, however, are problematic. As this Part demonstrates, the law of neutrality applies only to conflicts in which both parties are recognized as legitimate belligerents and always applies symmetrically.

### A. *When the Law of Neutrality Applies*

Chang correctly recognizes that the law of neutrality is capable of applying to at least one kind of non-international armed conflict: a civil war.<sup>13</sup> But he fails to understand the critical distinction in international law between an insurgency and a belligerency, so he mistakenly assumes that the law of neutrality applies to both

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11. Chang, *supra* note 1, at 40.

12. *Id.* at 36. The idea that there is a global NIAC between the United States and al-Qaeda is legally questionable and has been consistently rejected by states other than the United States, including those that have been attacked by al-Qaeda. See Andreas Paulus & Mindia Vashakmadze, *Asymmetrical War and the Notion of Armed Conflict—A Tentative Conceptualization*, 91 INT'L REV. RED CROSS 95, 119 (2009), available at <http://www.icrc.org/eng/assets/files/other/irrc-873-paulus-vashakmadze.pdf> (“[I]t appears insufficient to identify a single, globally operating non-state movement as a transnational group to render the IHL of a non-international armed conflict applicable. For that, a geographically defined group with a quasi-military organization would be required, not a loose ‘terrorism franchise.’”); Kress, *supra* note 10, at 266 (noting that the view that such an armed conflict exists “does not seem to have been endorsed by other States”). It is thus not surprising that Chang cites only U.S. sources in defense of his categorization of the conflict. See Chang, *supra* note 1, at 36 n.195 (citing *Hamdan* and *Gherebi*). That issue is not directly relevant to my argument, however, so I will accept the existence of a global NIAC between the United States and al-Qaeda for the purposes of this Response.

13. Chang, *supra* note 1, at 36–37.

kinds of non-international armed conflict. That confusion is evident in the following excerpt, which needs to be quoted in full:

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. Under international law, when a civil war occurs in a country, other states must 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. 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.

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. Helping the state against the insurgents is permissible; helping the insurgents against the state violates international law.<sup>14</sup>

The first part of this quote, concerning the recognition of belligerency, is unobjectionable. But the second part, concerning the relationship between insurgency and the law of neutrality, is incorrect.

### 1. Insurgency

To begin with, it is worth noting that Chang may well overstate the extent to which international law permits third states to treat insurgents and a government asymmetrically. It is commonly assumed that, prior to the recognition of insurgents as belligerents, international law prohibits a third state from assisting insurgents but permits it to help the government neutralize the insurgent threat.<sup>15</sup> That assumption is far from uncontroversial, however, “because there have been a number of cases where the legitimacy of the government requesting the assistance was subject to doubt (e.g., Afghanistan, Vietnam). There is thus a growing tendency to consider the assistance given to parties to a civil war, even in the form of an ‘intervention by invitation,’ as being generally inadmissible.”<sup>16</sup> Nor is such controversy particularly new. Lauterpacht, for example, insisted in 1947 that a third state’s right to favor the government over insurgents was limited to “the duty not to grant to the insurgents premature recognition as a government, and not to permit foreign territory to become a basis of operations against the lawful government.”<sup>17</sup> Beyond that, he

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14. *Id.*

15. See, e.g., Detlev F. Vagts, *The Traditional Legal Concept of Neutrality in a Changing Environment*, 14 AM. U. INT’L L. REV. 83, 90–91 (1998) (noting, with regard to insurgency, that “[n]o rule prevented a country from providing assistance to a government that asked for help in putting down a rebellion against its lawful authority,” while “[g]iving aid to rebels not recognized as belligerents violated the sovereign rights of the lawful state”).

16. Michael Bothe, *The Law of Neutrality*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 571, 579–80 (Dieter Fleck ed., 2d ed. 2009).

17. HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 233 (1947).

believed, “any unilateral and extended grant of advantages to the lawful government amounts, even prior to the recognition of the belligerency of the insurgents, to interference and to a denial of the right of the nation to decide for itself . . . the nature and the form of its government.”<sup>18</sup>

It is unclear, in short, to what extent third states are entitled to intervene in an insurgency on the government’s behalf. But the more important point is that, contrary to Chang’s assertion, the answer to that question has nothing to do with the law of neutrality. If insurgents are not recognized as belligerents, states have no neutral duties at all (much less duties that somehow apply asymmetrically), because the law of neutrality simply does not apply. As Tucker says:

It should be observed that operation of the international law of neutrality presupposes, and is dependent upon, the recognition of insurgents in a civil war as belligerents. Prior to such recognition—whether by the parent state or by third states—there can be no condition of belligerency, hence no neutrality in the sense of international law.<sup>19</sup>

This rule is uncontroversial.<sup>20</sup> In fact, the United States has *itself* taken the position that, as a matter of *international* law, the law of neutrality does not apply to insurgencies. When revolutionary violence flared in Brazil in 1930, the United States prohibited the export of arms to the rebels but not to the Brazilian government.<sup>21</sup> Secretary of State Stimson defended that asymmetrical treatment by specifically arguing that, “[u]ntil belligerency is recognized . . . and the duty of neutrality arises, all the humane predispositions towards stability of government, the preservation of international amity, and the protection of established intercourse between nations are in favor of the existing government.”<sup>22</sup>

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18. *Id.*; see also Quincy Wright, *The American Civil War*, in *THE INTERNATIONAL LAW OF CIVIL WAR* 30, 106–07 (1971) (Richard A. Falk ed., 1971) (arguing that, although it is controversial “whether civil strife of sufficient magnitude to constitute insurgency, but not recognized as belligerency, imposes an obligation upon each foreign state to treat the hostile factions impartially,” in his view “practice and juristic opinion, with some exceptions, have favored impartiality and nonintervention in the interest of localization of hostilities, nonescalation, and national self-determination”).

19. ROBERT W. TUCKER, *THE LAW OF WAR AND NEUTRALITY AT SEA* 200 n.8 (1955).

20. See, e.g., LOTHAR KOTZSCH, *THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW* 232 (1956) (“Recognition of a state of insurgency does not bring the law of neutrality into operation. That is, the recognizing State is not bound to apply it.”); STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* 260 (2005) (“[T]his general legal bias in favor of governments against insurgents—in the absence of recognition of belligerency—was already widely accepted in state practice in the nineteenth century. If, on the other hand, the conflict was a civil war in the strict sense of the term, then the law of neutrality would apply . . .”); 2 LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* § 311a, at 532 (Hersch Lauterpacht ed., 6th ed. 1940) [hereinafter OPPENHEIM 6th] (“[R]ecognition of belligerency alone brings about the operation of rules of neutrality as between the parties to the civil war and foreign States.”); Note, *International Law and Military Operations Against Insurgents in Neutral Territory*, 68 *COLUM. L. REV.* 1127, 1128 n.4 (1968) (“Strictly speaking, neutrality is a concept which applies only to international warfare, and its status in a civil war in which the rebels have not been recognized as belligerents is highly doubtful.”); cf. Quincy Wright, *The Present Status of Neutrality*, 34 *AM. J. INT’L L.* 391, 393 (1940) (noting, with regard to third states that assist the government to quell an insurgency, that “the word neutrality is hardly appropriate”).

21. LAUTERPACHT, *supra* note 17, at 231.

22. *Id.* (quoting Henry L. Stimson, U.S. Sec’y of State, *The United States and the Other American Republics*, Address Before the Council on Foreign Relations (Feb. 6, 1931), in 9 *FOREIGN AFF.*, no. 3, Apr. 1931 at i, xiii).

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This does not mean states are prohibited from adopting a position of neutrality in relation to an insurgency. What it means is that the decision to remain neutral in such a situation is a *political act*, not a *legal one*:

Recognition of insurgency creates a factual relation in the meaning that legal rights and duties as between insurgents and outside States exist only insofar as they are expressly conceded and agreed upon for reasons of convenience, of humanity, or of economic interest. . . . Subject to such freedom of action States may go very far in imposing upon themselves restraints indistinguishable in substance from the duties of neutrality and in conceding to the contesting parties rights usually associated with belligerency proper.<sup>23</sup>

Differently put, although international law does not require all states to remain neutral with regard to insurgencies, individual states remain free to impose neutral-like duties on themselves as a matter of *municipal law*. As Tucker says, we must distinguish between “the operation of the law of neutrality as determined by international law and the operation of municipal neutrality laws. The latter may be applied to situations other than war in the sense of international law.”<sup>24</sup>

Unfortunately, Chang fails to recognize this distinction, as indicated by the sources he provides for his claim that “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.”<sup>25</sup> Both cites—an 1895 opinion by the U.S. Attorney General and a 1915 decision by the District of California—refer specifically to municipal neutrality laws, not to international law.<sup>26</sup> Had the United States enacted those statutes to give effect to its international obligations, as Chang believes,<sup>27</sup> the difference would be irrelevant. But that is not the case: as scholars have long acknowledged, U.S. neutrality laws routinely went beyond what international law required,<sup>28</sup> often declaring neutral duties “enforceable in cases of mere insurgency in which recognition of belligerency was refused.”<sup>29</sup> In fact, the quote from the Attorney General’s opinion that Chang uses itself acknowledges that the Neutrality Acts did not reflect international law: “While called neutrality laws,

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23. *Id.* at 277; see also Bothe, *supra* note 16, at 579 (“States not parties to a conflict which has not reached the threshold of application of the law of neutrality are not neutral in the legal sense, i.e. they are not bound by the particular duties of the law of neutrality.”); cf. KOTZSCH, *supra* note 20, at 233 (“[W]hile the recognition of belligerency gives rise to definite rights and obligations under international law, insurgency does not.”).

24. TUCKER, *supra* note 19, at 200 n.8; see also OPPENHEIM 6th, *supra* note 20, § 311a, at 532 (“Although recognition of belligerency alone brings about the operation of rules of neutrality as between the parties to the civil war and foreign States, the application of municipal neutrality laws is independent of such recognition.”).

25. Chang, *supra* note 1, at 37.

26. See *id.* at 37–38 n.203 (citing International Law—Cuban Insurrection—Executive, 21 Op. Att’y Gen. 267, 270 (1895); United States v. Blair-Murdock Co., 228 F. 77, 78–79 (C.D. Cal. 1915)).

27. See *id.* at 48 (“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.”).

28. See, e.g., TUCKER, *supra* note 19, at 200 n.8 (citing the 1937 Neutrality Act as an example of a municipal law that applied the law of neutrality to “situations other than war in the sense of international law”).

29. OPPENHEIM 6th, *supra* note 20, § 311a, at 532.

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.”<sup>30</sup>

## 2. Belligerency

Although the law of neutrality did not apply to insurgencies under international law, the legal landscape changed significantly if an insurgency developed into a belligerency. According to Lauterpacht—and echoed by the Supreme Court in *The Prize Cases*<sup>31</sup>—a state of belligerency existed if four conditions were satisfied: (1) a general armed conflict was taking place within the state; (2) the insurgents controlled a significant portion of national territory; (3) the insurgents respected the laws of war and engaged in hostilities through organized armed forces under responsible command; and (4) the hostilities affected third states to the point that they needed to adopt a position concerning the legal status of those hostilities.<sup>32</sup> Once those conditions were satisfied—an objective question—third states had both “the right and the duty to grant recognition of belligerency.”<sup>33</sup>

Such recognition had two important effects. First, it meant that the insurgents were entitled to be treated by third states as legitimate belligerents, with the same rights and privileges as the government that they intended to overthrow. As Oppenheim points out:

There is no doubt that a foreign State commits an international delinquency by assisting insurgents in spite of being at peace with the legitimate Government. But matters are different after recognition. The insurgents are then a belligerent Power, and the civil war is then real war.<sup>34</sup>

This position is uncontroversial among scholars,<sup>35</sup> and it has long been the position of the Supreme Court, as well. In the early 19th century, for example, the

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30. Chang, *supra* note 1, at 37–38 n.203 (emphasis added) (quoting International Law—Cuban Insurrection—Executive, 21 Op. Att’y Gen. 267, 270 (1895)).

31. See *The Prize Cases*, 67 U.S. (2 Black) 635, 666–67 (1863) (“When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a war. . . . [T]he parties to a civil war usually concede to each other belligerent rights.”).

32. LAUTERPACHT, *supra* note 17, at 175–76.

33. OPPENHEIM 6th, *supra* note 20, § 76, at 197; see also LAUTERPACHT, *supra* note 17, at 175 (“The essence of [belligerency] is that recognition is not in the nature of a grant of a favour or a matter of unfettered political discretion, but a duty imposed by the facts of the situation.”); KOTZSCH, *supra* note 20, at 225 (“Under modern international law such guerrilla activities are deemed to become legitimate belligerency from the moment that they acquire the characteristics of a material war.”); cf. *The Prize Cases*, 67 U.S. (2 Black) at 666–67 (noting that once the “party in rebellion” achieved the factual conditions of belligerency, “the world acknowledges them as belligerents, and the contest a war”).

34. OPPENHEIM 6th, *supra* note 20, § 298, at 522.

35. See, e.g., LAUTERPACHT, *supra* note 17, at 175 (“Given the required conditions of belligerency as laid down by international law, the contesting parties are legally entitled to be treated as if they are engaged in a war waged by two sovereign States.”); Yair M. Lootsteen, *The Concept of Belligerency in International Law*, 166 MIL. L. REV. 109, 109 (2000) (“Traditionally, upon recognition of the status of belligerency, third party States . . . treated the two parties to the conflict as equals—each sovereign in its respective areas of control.”); ANTHONY CULLEN, *THE CONCEPT OF NON-INTERNATIONAL ARMED*

United States formally “recognized the existence of a civil war between Spain and her colonies.”<sup>36</sup> The Supreme Court then held in *The Santissima Trinidad* that “[e]ach 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.”<sup>37</sup>

Second, once third states recognized that the insurgency had developed into a belligerency involving two coequal belligerents, they were then—and *only* then—entitled to declare themselves neutral in relation to the conflict. This is also an uncontroversial position; Vagts speaks for numerous scholars when he says, with regard to civil war, that “[t]he traditional law of neutrality takes hold in these situations only in the event that the contending force attains a level of power that causes other nations to recognize it as a belligerent.”<sup>38</sup> It is also the position of the Supreme Court, as it specifically held in *The Prize Cases* that “[t]he condition of neutrality cannot exist unless there be two belligerent parties.”<sup>39</sup> Indeed, the Supreme Court added that, in light of that requirement, formal recognition of belligerency was not required—the mere act of declaring neutrality was sufficient to transform an insurgency into a belligerency.<sup>40</sup>

### B. *The Effect of Neutrality*

Chang does not simply claim that the law of neutrality applies to insurgencies. He also claims that neutrality law applies *asymmetrically* to insurgencies—that “[h]elping the state against the insurgents is permissible; helping the insurgents against the state violates international law.”<sup>41</sup> This is a curious understanding of what it means to be neutral, so it is not surprising that it finds no support either in international law or in Supreme Court jurisprudence, both of which make clear that a state that declares itself neutral must avoid favoring either side to the conflict. In terms of the former, Lauterpacht states the accepted rule: “[O]nce civil war on a larger scale has broken out, the lawful government cannot properly rely, for the purpose of the conduct of war, on the fact that it is the lawful authority. To do so

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CONFLICT IN INTERNATIONAL HUMANITARIAN LAW 20 (2010) (“When recognised as belligerents, parties to an internal conflict were, under traditional international law, to be treated in essentially the same way as states at war.”).

36. *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 337 (1822).

37. *Id.*

38. Vagts, *supra* note 15, at 90; *see also* OPPENHEIM 6th, *supra* note 20, § 298, at 521 (“As civil war becomes real war through a recognition of the insurgents as a belligerent Power . . . , [f]oreign States can either become a party to the war or remain neutral, and in the latter case all the duties and rights of neutrality devolve upon them.”); TUCKER, *supra* note 19, at 200 n.8 (“Of course, once the parent state recognizes the insurgents as belligerents, or once third states so recognize the insurgents independent from any act of recognition by the parent state, the civil war is transformed into an international war, and the rules of neutrality come into force.”); ELIZABETH CHADWICK, TRADITIONAL NEUTRALITY REVISITED: LAW, THEORY, AND CASE STUDIES 186 (2002) (“[N]eutrality law pre-supposed a war between sovereign entities and the equal treatment of sovereign belligerents by neutral third-states.”); Lootsteen, *supra* note 35, at 109 (“Traditionally, upon recognition of the status of belligerency, third party States assumed the obligations of neutrality regarding the internal conflict . . .”).

39. *The Prize Cases*, 67 U.S. (2 Black) 635, 669 (1863).

40. *Id.*; *see also* CULLEN, *supra* note 35, at 16 (“Recognition of belligerency could furthermore be implicitly bestowed by a declaration of neutrality by a state whose interests are affected by the situation.”).

41. Chang, *supra* note 1, at 37.

would mean in effect to invite the help of other States and to ask them to abandon impartiality.”<sup>42</sup> In terms of the latter, the Supreme Court held in *The Santissima Trinidad* that, once the United States had “avowed a determination to remain neutral” in a civil war—in that case, between Spain and its colonies—“[w]e cannot interfere to the prejudice of either belligerent without making ourselves a party to the contest, and departing from the posture of neutrality.”<sup>43</sup>

Loss of its privileged position under international law was not the only cost of recognition for a government. Because the law of neutrality applied only to conflicts in which both parties were recognized as legitimate belligerents, the insurgents were entitled, upon recognition of belligerency, to the same rights as the government’s armed forces.<sup>44</sup> That meant two things. First, like government soldiers, insurgents were then entitled to the combatant’s privilege, “a limited license to take life and cause destruction”<sup>45</sup> that prohibited the government from prosecuting them upon capture for acts consistent with the laws of war.<sup>46</sup> Second, insurgents were equally entitled to prisoner of war (POW) status upon capture.<sup>47</sup> Once Britain and other states recognized the Civil War as a belligerency, for example, the United States (grudgingly) treated captured Confederate soldiers as POWs.<sup>48</sup>

A government engaged in a recognized belligerency, it is important to note, was *required* to extend these belligerent rights to insurgents. “[I]f the lawful government were to claim belligerent rights whilst denying them to the insurgents, such illogical and one-sided conduct would invalidate its continued recognition as a belligerent.”<sup>49</sup> That was not simply a hypothetical possibility. During the Civil War, the United States claimed the right to ignore sentences imposed by Confederate prize courts.<sup>50</sup> In response, the British Law Officers convinced the Crown to issue a declaration that it would refuse to acknowledge the United States’ belligerent rights until such time as

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42. LAUTERPACHT, *supra* note 17, at 232; *see also* OPPENHEIM 6th, *supra* note 20, § 293, at 515 (“[A]ll States which do not expressly declare the contrary by word or action are supposed to be neutral, and the rights and duties arising from neutrality come into existence, and remain in existence, through the mere fact of a State taking up an attitude of impartiality, in not being drawn into the war by the belligerents.”); Bothe, *supra* note 16, at 572 (“In more general terms, impartiality means that the neutral state must apply the specific measures it takes on the basis of the rights and duties deriving from its neutral status in a substantially equal way between the parties to the conflict.”).

43. *The Santissima Trinidad*, 20 U.S. (7 Wheat.) 283, 337 (1822).

44. *See, e.g.*, Lootsteen, *supra* note 35, at 114 (“While not conferring statehood, proper recognition of belligerency grants the rebels substantive protections under the laws of war.”).

45. David Kaye & Steven A. Solomon, *The Second Review Conference on Conventional Weapons*, 96 AM. J. INT’L L. 922, 926 n.27 (2002).

46. Dieter Fleck, *The Law of Non-International Armed Conflicts*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, *supra* note 16, at 613; *cf.* ERIK CASTREN, THE PRESENT LAW OF WAR AND NEUTRALITY 446 (1954) (“A citizen of a neutral State who serves in the armed forces of an opposing belligerent must therefore be regarded as a lawful combatant, to whom, upon detention, the rights of a prisoner of war must be granted.”).

47. *See* Lootsteen, *supra* note 35, at 109–10 (“Traditionally, upon recognition of the status of belligerency . . . [c]aptured members of the rebel armed forces, as well as soldiers of the incumbent government, were entitled to prisoner of war status.”).

48. *Id.* at 115 (“It was the recognition of the Confederate *de facto* belligerency, among other factors, that also brought Lincoln to acknowledge that captured Confederate soldiers should be afforded prisoner of war status, even though the Civil War was not of an international character.”).

49. LAUTERPACHT, *supra* note 17, at 200.

50. *Id.*

“they also concede to their enemy the *status* of a belligerent for all *international* purposes.”<sup>51</sup> The declaration had its intended effect.<sup>52</sup>

Because recognition of belligerency by third states—whether formally or through a declaration of neutrality—meant that insurgents were entitled to the same rights and privileges as the government, a state normally went to great lengths to avoid such recognition.<sup>53</sup> In practice, that required a state to forego asserting belligerent rights for itself because third states would view such an assertion as an implicit acknowledgment that the insurgency had developed into a belligerency.<sup>54</sup> The classic example here is a blockade, which is an act that is permissible only in international armed conflict.<sup>55</sup> As Lauterpacht notes, “[t]he proclamation of a blockade by the lawful government amounts to an assertion of belligerent rights which must be recognized subject to the further consequence that such rights are thus automatically conferred upon the insurgent party.”<sup>56</sup> That was the British response to the Haitian government’s decision to blockade insurgents in 1876,<sup>57</sup> and it was the position taken by the Supreme Court in response to Lincoln’s decision to blockade the Confederacy.<sup>58</sup>

The costs of recognition to a government also explain why a third state committed an international wrong against a government by recognizing belligerency prior to an insurgency satisfying the four factual conditions mentioned above.<sup>59</sup> Such premature recognition represented “an illegal intervention in the domestic affairs of the parent State”<sup>60</sup>—and it did so precisely because it meant that the insurgents were (wrongly) entitled to belligerent rights and that third states could declare neutrality in relation to the conflict.

## II. THE RIGHTS AND DUTIES OF BELLIGERENTS AND NEUTRALS

Given that the law of neutrality applies only when both parties to a conflict are legitimate belligerents, it is difficult to understand why the United States would want that law to govern the conflict with al-Qaeda. If al-Qaeda were a legitimate belligerent, members of the group would be legally entitled to attack U.S. soldiers and military objectives and could not be prosecuted—either in a military commission

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51. *Id.* (citation omitted).

52. *Id.*

53. *See, e.g.*, Lootsteen, *supra* note 35, at 114 (noting that the costs of recognition explain why Britain’s recognition of the Civil War as a belligerency was “much to the chagrin” of Lincoln).

54. LAUTERPACHT, *supra* note 17, at 190.

55. *Id.* at 194.

56. *Id.*

57. *Id.* at 195.

58. The Prize Cases, 67 U.S. (2 Black) 635, 670 (1862) (“Whether the President . . . has met with such armed hostile resistance and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents is a question to be decided by *him* . . . . The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed.”).

59. *See, e.g.*, LAUTERPACHT, *supra* note 17, at 176 (“To grant recognition of belligerency when these conditions are absent is to commit an international wrong as against the lawful government.”); OPPENHEIM 6th, *supra* note 20, § 76, at 198 (“In the absence of these conditions recognition of belligerency constitutes illicit interference in the affairs of the State affected by civil disorders . . . .”).

60. KOTZSCH, *supra* note 20, at 223.

or in a federal court—for such attacks unless they violated the laws of war.<sup>61</sup> Members of al-Qaeda would also be entitled to POW status upon capture, and would not lose that status even if they failed to wear a uniform or committed war crimes during combat.<sup>62</sup> Such entitlements, I think it is safe to say, are antithetical to the United States' current approach to the conflict with al-Qaeda.

The issues with Chang's Article, however, go even deeper. This Part addresses two interrelated problems. First, Chang overestimates a belligerent's authority to detain under the law of neutrality. Second, because he incorrectly believes that the duties of a neutral state apply asymmetrically, he fails to consider the numerous ways in which neutrality would complicate the United States' ability to prosecute its conflict with al-Qaeda.

#### A. *Rights and Duties of Belligerents*

According to Chang, “[t]he key legal distinction for military detention is not between combatants and civilians, but between enemies and friends.”<sup>63</sup> There is no question that, in certain circumstances, the law of neutrality permits belligerents to detain the subjects of neutral states who engage in unneutral service to the opposing belligerent.<sup>64</sup> But Chang consistently overstates the extent of those circumstances, ignoring important limitations on the category of “enemy.”

Consider, for example, Chang's discussion of money. According to Chang, “[t]he provision of money by neutral individuals to belligerents has . . . been

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61. See Knut Ipsen, *Combatants and Non-Combatants*, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, *supra* note 16, at 105 (“If during direct participation in hostilities, members of the armed forces (combatants or non-combatants) abide by the international law applicable in international armed conflicts then they cannot be punished, either by their own party to the conflict or by the competent tribunals of the adversary, in the event of their capture.”).

62. See *id.* at 95 (“In principle the breach of rules of international law applicable in armed conflicts does not result in the offenders forfeiting their primary status as combatants. Thus, if they fall into the hands of the adverse party to the conflict they do not forfeit the secondary status of prisoners of war.”). Note, though, that members of al-Qaeda who failed to wear a uniform during combat could be prosecuted for the war crime of perfidy. *Id.* at 93.

63. Chang, *supra* note 1, at 26.

64. See, e.g., INT'L INST. HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA art. 166(b) (1994) [hereinafter SAN REMO MANUAL] (permitting detention of neutral subjects who are crew members of merchant vessels engaged in unneutral service). Chang is correct that the law of neutrality applies to individuals. Chang, *supra* note 1, at 34. He wrongly claims in footnote 177, however, that the D.C. District Court in *Hamlily* and the D.C. Circuit Court in *Al-Bihani* suggested otherwise. Those decisions did not question the applicability of neutrality law to individuals; they questioned whether it was possible to analogize between a non-state actor such as al-Qaeda and a state for purposes of the law of neutrality. See *Hamlily v. Obama*, 616 F. Supp. 2d 63, 76 (D.D.C. 2009) (“[S]upport’ does have some relevance with respect to co-belligerency and the law of neutrality, but these concepts apply only to enemy forces (*i.e.*, states, armed forces). . . .”); *Al-Bihani v. Obama*, 590 F.3d 866, 873 (D.C. Cir. 2010) (“[T]he laws of co-belligerency affording notice of war and the choice to remain neutral have only applied to nation states.”); see also, e.g., Kevin Jon Heller, *D.C. Circuit Rejected Co-Belligerency in Al-Bihani*, OPINIO JURIS (Oct. 17, 2010, 7:30 AM), <http://opiniojuris.org/2010/10/17/dc-circuit-rejects-co-belligerency> (stating that the D.C. Circuit reached a conclusion similar to the author's own that “there was no justification for the government's attempt . . . to import the concept of co-belligerency into non-international armed conflict”). That skepticism was wholly warranted: as we have seen, neutrality law applies to a non-state actor only if it is recognized as a legitimate belligerent—the functional equivalent of a state. There was no suggestion in either *Hamlily* or *Al-Bihani* that the government believed the doctrine of co-belligerency applied to the conflict with al-Qaeda because it was willing to recognize al-Qaeda as a legitimate belligerent.

specifically recognized as unneutral conduct.”<sup>65</sup> The expression “provision of money,” however, fails to distinguish between *gifts* and *loans* to a belligerent. That is a critical distinction. Although neutral subjects who gratuitously give money to belligerents violate their neutral duties,<sup>66</sup> it is not unneutral service for a neutral subject to provide *loans* to a belligerent. As Castren says, “the neutral character of the subject of a neutral State residing in neutral territory is maintained even if he makes money loans to belligerents.”<sup>67</sup> Indeed, Article 18 of Hague Convention V specifically recognizes that “loans made to one of the belligerents” do not qualify as “acts in favour of a belligerent” as long as “the person 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.”<sup>68</sup> Article 18 is a specific exception<sup>69</sup> to Article 17(b)’s rule that a neutral subject loses his neutral status if he “commits acts in favor of a belligerent”;<sup>70</sup> unfortunately, Chang cites only Article 17(b).<sup>71</sup>

Even worse, Chang repeats the mistake he made concerning the applicability of the law of neutrality to insurgencies by citing municipal law in the United States as if it reflected international law. Chang cites two sources in defense of his claim that providing money to belligerents is unneutral service: 18 U.S.C. § 960 and *Jacobsen v. United States*.<sup>72</sup> The federal statute codifies the Neutrality Act of 1794,<sup>73</sup> and *Jacobsen* addresses a conspiracy to violate that Neutrality Act,<sup>74</sup> as Chang’s parenthetical notes.<sup>75</sup> The limitations on private commercial intercourse contained in the Neutrality Acts, however, went well beyond what international law requires<sup>76</sup>—a fact

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65. Chang, *supra* note 1, at 32.

66. See, e.g., 2 LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE § 350, at 740 (Hersch Lauterpacht ed., 7th ed. 1948) [hereinafter OPPENHEIM 7th] (noting that, in terms of money and supplies, neutral subjects must always interact with belligerents “in the ordinary way of commerce”).

67. CASTREN, *supra* note 46, at 478.

68. Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land art. 18, Oct. 18, 1907, 36 Stat. 2310, 1 Bevans 654 [hereinafter Hague V]. The latter condition would rarely be an issue in the conflict with al-Qaeda, given that few al-Qaeda members live in the United States and that the United States does not currently occupy territory abroad.

69. *Id.* art. 18 (“The following acts shall not be considered as committed in favour of one belligerent in the sense of Article 17, letter (b).”).

70. *Id.* art. 17(b).

71. See Chang, *supra* note 1, at 31 n.161. He does, however, mention Article 18 in his discussion of the provision of supplies to a belligerent. *Id.* at 58 n.314, 70 n.370.

72. *Id.* at 32 n. 167. He also cites *United States v. Burr*, which does not explicitly mention the law of neutrality. *United States v. Burr*, 25 F. Cas. 187, 187–201 (1807). Moreover, the quote Chang condenses in his parenthetical, “[f]urnishing money . . . may be considered as providing means [to an armed expedition],” simply clarifies “the terms ‘beginning and setting on foot’ an expedition.” *Id.* at 200.

73. Jules Lobel, *The Rise and Decline of the Neutrality Act: Sovereignty and Congressional War Powers in United States Foreign Policy*, 24 HARV. INT’L L.J. 1, 1 n.2 (1983).

74. *Jacobsen v. United States*, 272 F. 399, 400 (7th Cir. 1920), *cert. denied*, 256 U.S. 703 (1921).

75. Chang, *supra* note 1, at 32 n.167.

76. See, e.g., TUCKER, *supra* note 19, at 201 (noting, using the Neutrality Acts of 1935, 1937, and 1939 as examples, that “the neutral state may desire to place restrictions on the activities of its subjects—particularly with respect to trading with belligerents—in excess of any requirements laid upon the neutral state by international law”); see also OPPENHEIM 6th, *supra* note 20, § 350, at 600–01 (“Of course, a neutral State which is anxious to avoid all controversy and friction can, by his Municipal Law, order his subjects to abstain from furnishing such supplies. . . . But such an attitude is dictated by political prudence, and not by any obligation imposed by International Law . . .”).

that the United States has itself recognized. As Oppenheim points out with regard to the provisions in the Neutrality Act of 1939 that “prohibited loans and commercial credits to belligerent Governments,” the United States never claimed “that these prohibitions, intended as a safeguard against the United States becoming involved in the war, were in any way dictated by International Law.”<sup>77</sup>

Chang’s discussion of the relationship between a “hostile purpose” and unneutral service is also overbroad. Chang believes that a hostile purpose on the part of a neutral subject can transform an otherwise legitimate commercial transaction into unneutral service. He claims, for example, that “[e]ven 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.”<sup>78</sup> He also approvingly cites scholars who describe the difference “between knowingly aiding the enemy with pecuniary motives and purposefully aiding the enemy with warlike motives as ‘hairsplitting’ and ‘scarcely traceable.’”<sup>79</sup> But Chang’s comments wrongly assume that “hostile intent” refers to the mental state of the neutral subject, when in fact it refers solely to the objective nature of the neutral subject’s act. As Tucker points out with regard to the duties of neutral states, any act that is consistent with neutral duties is *by definition* not motivated by hostile intent, even if the neutral subjectively intends for that act to promote the goals of one of the belligerents:

The frequent contention that such [hostile] intent on the part of the neutral state is a violation of the neutral’s duty of impartiality has no foundation, however. The so-called “attitude of impartiality” demanded of neutrals does not refer, in its strict legal meaning, to the *political motives* behind neutral behavior, but to that behavior itself. Hence it may well be that in the exercise of its rights the neutral state both intends to confer and does in fact confer an advantage upon one side. In doing so it does not depart from the duty of impartiality so long as it refrains from discriminating against either belligerent in the actual application of those regulations it is at liberty to enact.<sup>80</sup>

It is perfectly reasonable to argue, *de lege ferenda*, that such “hairsplitting” makes little sense. It does indeed seem strange that a neutral subject who supplies al-Qaeda with war materials would remain a “friend” of the United States as long as he included a proper invoice. The strangeness of the distinction between commerce and gifts to our modern ears, however, simply reflects the fact that the law of neutrality developed in the 18th century,<sup>81</sup> long before international law formally distinguished between lawful and unlawful uses of force.<sup>82</sup> In an era in which the concept of aggression was legally nonexistent and mercantilism was at its apex, there

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77. OPPENHEIM 6th, *supra* note 20, § 352, at 605.

78. Chang, *supra* note 1, at 66; *see also id.* at 56 (“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.”).

79. *Id.* at 59.

80. TUCKER, *supra* note 19, at 205; *see also id.* at 205 n.20 (“The neutral state may be—in spirit—wholly in sympathy with one side in the conflict, but as long as it *acts* in an impartial manner . . . it fulfills its obligations.”).

81. OPPENHEIM 7th, *supra* note 66, § 288, at 626.

82. *See id.* at 643 (noting that prior to the Kellogg-Briand Pact of 1928, states still had the “unrestricted right” to wage war).

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was no reason to limit the right of neutral subjects to continue to trade with belligerents, aggressor and victim alike, regardless of their political sympathies. Commerce was business as usual, whereas providing direct support threatened to drag the neutral subject into the war, disrupting commercial relations. Hence the rule, *de lege lata*, that commercial intercourse was permissible while non-commercial intercourse was forbidden.<sup>83</sup>

A final example of Chang's tendency to inflate the concept of enemy is his claim that, analogizing to the "state practice of formally declaring war," a declaration that was "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."<sup>84</sup> In defense of that proposition, he cites<sup>85</sup> *Chaplinsky*, a Supreme Court case that deals with the criminalization of fighting words,<sup>86</sup> and *Gompers*, a Supreme Court case involving labor leaders who were charged with contempt for violating an injunction prohibiting a boycott.<sup>87</sup> He then makes the more specific claim that, "[f]or 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,"<sup>88</sup> citing a newspaper article in the *Telegraph*, a newspaper article from the *Washington Post*, and the government's criminal complaint in a terrorism case in the District Court of Oregon.<sup>89</sup> None of those sources have anything to do with the law of neutrality—which is not surprising, because the law of neutrality does not support either claim. On the contrary, as Kotzsch notes, "any declaration of war on the part of the seditious party is bare of any relevance in international law," because "[m]aterial war" is determined "by facts alone."<sup>90</sup> Wright agrees, adding that insurgents, "not being recognized states, have no power to convert a state of peace into a state of war, so their declaration or recognition of war would have no legal effect."<sup>91</sup>

Chang, in short, consistently inflates the category of "enemy" far beyond what a fair reading of the law of neutrality would support. That is problematic in itself, but it also leads Chang to ignore perhaps the most critical question regarding the detention of al-Qaeda members and supporters: Why should the United States rely on the detention authority granted by the law of neutrality instead of on the detention authority granted by IHL? Chang's thesis makes sense only if the former is greater than the latter, but that does not seem to be the case. As we have seen, the category of "enemy" in neutrality law is actually much narrower than Chang assumes (and would apply to al-Qaeda only if the group were recognized as a legitimate belligerent). By contrast, the detention authority in IHL is quite significant. Although a complete examination of the issue is beyond the scope of this Response, it is clear that a state has the authority to detain not only any civilian who directly participates in hostilities, but also any civilian whose indirect participation in

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83. See *supra* notes 66–71 and accompanying text.

84. Chang, *supra* note 1, at 57.

85. *Id.* at 57 n.309.

86. *Chaplinsky v. N.H.*, 315 U.S. 568, 568–74 (1942).

87. *Gompers v. Buck's Stove and Range Co.*, 221 U.S. 418, 418–20 (1911).

88. Chang, *supra* note 1, at 57.

89. *Id.* at 57 n.310.

90. KOTZSCH, *supra* note 20, at 231.

91. *Id.* (quoting Quincy Wright, *When Does War Exist?*, 26 AM. J. INT'L L. 362, 366 (1932)).

hostilities threatens the state's security.<sup>92</sup> The latter category is extremely broad: it "does not imply a direct causal relationship or geographic proximity between the individual's activity and damage inflicted on the enemy"; it "need not occur on a battlefield"; it encompasses "actions which are of direct assistance to an enemy Power," such as providing logistical support; and it includes "members of organizations whose object is to cause disturbances."<sup>93</sup> Are there activities that would render a supporter of al-Qaeda detainable under the law of neutrality but not under IHL? It seems unlikely—and Chang's primary example of such a situation, "giving money to belligerents,"<sup>94</sup> does not help his cause. He claims that although neutrality law treats such gifts as unneutral service, international law scholars treat it as "a category of indirect participation."<sup>95</sup> That is an accurate description of both areas of law, but it does not mean the law of neutrality would permit detention while IHL would not. Indirect participation that threatens state security justifies detention,<sup>96</sup> and it is difficult to imagine that international law would prohibit the United States from considering giving money to al-Qaeda such a threat.

### B. *Rights and Duties of Neutrals*

Because Chang incorrectly assumes that neutral duties would apply asymmetrically to the conflict with al-Qaeda, he never considers how a state declaring neutrality in that conflict would affect the United States' counterterrorism efforts. Such a declaration would, it is safe to say, significantly undermine the effectiveness of such efforts.<sup>97</sup>

#### 1. Territory

If a state declared neutrality in the United States' conflict with al-Qaeda, its duty of impartiality would require it to prevent the United States from making use of its territory. It is a basic principle of the law of neutrality that "a neutral State may not either permanently or temporarily surrender fortifications or portions of its territory nor its sovereign rights to a belligerent," even if "the fortification or territory concerned is far removed from the actual theatre of war."<sup>98</sup> In practice, that would mean that the United States could neither maintain military bases in the neutral state<sup>99</sup> nor penetrate its airspace<sup>100</sup>—the latter even if respecting neutral

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92. Goodman, *supra* note 3, at 53.

93. *Id.* at 54.

94. Chang, *supra* note 1, at 31.

95. *Id.*

96. Goodman, *supra* note 3, at 53.

97. Such a declaration would also, of course, affect al-Qaeda's terrorist activities. In this Section, however, I am specifically concerned with how it would affect the United States.

98. CASTREN, *supra* note 46, at 472 (emphasis omitted); *see also* Bothe, *supra* note 16, at 582 (explaining that belligerents may not use neutral territory for any "military operations, or for transit or similar purposes").

99. *See* OPPENHEIM 6th, *supra* note 20, § 326, at 559 (noting that the duty of impartiality prohibits a neutral state from permitting a belligerent to "occupy a neutral fortress").

100. *See* Bothe, *supra* note 16, at 602 ("As a consequence of the inviolability of neutral airspace, the parties to the conflict are not allowed to penetrate by aircraft or other flight objects the airspace of neutral states.").

territory required “significant detours” by U.S. pilots.<sup>101</sup> Moreover, the neutral state would be obligated to resist violations of its neutral territory by force<sup>102</sup> and to detain any U.S. soldier or pilot that it captured on its territory until the conflict with al-Qaeda was over.<sup>103</sup>

## 2. Assistance

A neutral state’s duty of impartiality would also prohibit it from providing a number of forms of assistance to the United States. First, the neutral state would be prohibited from providing the United States—commercially or gratuitously—with any kind of material that has a military purpose, such as “arms, ammunition, vessels, and military provisions.”<sup>104</sup> Second, the neutral state would not be permitted to lend or give money to the United States for the duration of the conflict, because “[d]uring war, money and particularly foreign exchange are almost as important as war material, which can in its turn be acquired with money and foreign currencies.”<sup>105</sup> That could be a significant problem for the United States, in light of the current debt crisis. Third, and finally, the neutral state would not be permitted to provide the United States with intelligence concerning “war plans and military movements”<sup>106</sup> of al-Qaeda, would not be able to transmit intelligence on the United States’ behalf, and would not be able to permit the United States to establish or maintain “actual centres of espionage”—such as CIA field offices—on its territory.<sup>107</sup>

## 3. Duties Toward Neutral Subjects

In contrast to its duty to avoid assisting the United States, a state that declared neutrality would have very little obligation to prevent its subjects from assisting al-Qaeda.<sup>108</sup> As Lauterpacht says, “[t]here are interests which international law safeguards only to the extent of imposing restrictions upon the freedom of the state’s

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101. *Id.*

102. *See, e.g.,* OPPENHEIM 6th, *supra* note 20, § 326, at 559 (“[A] neutral must even use force to prevent belligerents from occupying any part of his neutral territory.”).

103. *See, e.g.,* PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIVERSITY, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE 314 (Version 2.1 2010), *available at* <http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf> [hereinafter HPCR COMMENTARY] (“In the event a belligerent military aircraft enters neutral airspace . . . the Neutral must use all the means at its disposal to prevent or terminate that violation. If captured, the aircraft and their crews must be interned for the duration of the armed conflict.”).

104. OPPENHEIM 6th, *supra* note 20, § 349, at 599; *cf. CASTREN, supra* note 46, at 474 (“It would seem that it suffices for a State to refrain from delivering to belligerents material which has, exclusively or at least mainly, a military purpose . . .”).

105. CASTREN, *supra* note 46, at 477; *see also* Bothe, *supra* note 16, at 584 (noting that the prohibition is absolute and citing financial support given to both belligerents during the Iran-Iraq war as an example). With regard to giving money, *see* OPPENHEIM 6th, *supra* note 20, § 351, at 604 (“Through the granting of subsidies a neutral State becomes as much the ally of the belligerent as it would by furnishing him with troops.”).

106. CASTREN, *supra* note 46, at 479.

107. *Id.* at 483 (emphasis omitted).

108. The same would be true concerning neutral subjects that wanted to assist the United States, but that is not the focus of this Part.

own action without in any way obliging it to exact a similar measure of restraint from its subjects. Indeed, the entire law of neutrality is based on a differentiation of this kind.”<sup>109</sup> Some examples:

- (1) The neutral state would have no obligation to prevent its subjects from providing war materials to al-Qaeda.<sup>110</sup> Article 7 of Hague Convention V specifically provides that “[a] neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet.”<sup>111</sup> This was, in fact, the United States’ position during World War I.<sup>112</sup> Some scholars suggest that customary international law has supplanted Article 7,<sup>113</sup> recognizing the increased control that states exercise over private trading by their subjects, but that remains a decidedly minority position.<sup>114</sup>
- (2) The neutral state would have no obligation to prevent its subjects from loaning money to al-Qaeda. As Castren says, because “the neutral character of the subject of a neutral State residing in neutral territory is maintained even if he makes money loans to belligerents, it is clear that the government of the neutral State need not prohibit or prevent such activities.”<sup>115</sup> The same rule would apply to loans made by alien persons or corporations,<sup>116</sup> as well as to gifts from neutral subjects.<sup>117</sup>
- (3) The neutral state would have no obligation to prevent its subjects from transporting to al-Qaeda, “in the way of trade, enemy troops, and the like, and enemy despatches.”<sup>118</sup>
- (4) Although the neutral state would be required to prevent its subjects from using neutral territory as a base of al-Qaeda military operations against the United States,<sup>119</sup> it would have no obligation to prevent its subjects from

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109. Hersch Lauterpacht, *Revolutionary Activities by Private Persons Against Foreign States*, 22 AM. J. INT’L L. 105, 106 (1928) [hereinafter Lauterpacht, *Revolutionary*].

110. See, e.g., Vagts, *supra* note 15, at 93 (noting that “private merchants of death” in a neutral state may continue trading war materials with the belligerents); OPPENHEIM 6th, *supra* note 20, § 350, at 600 (“In contradistinction to supply to belligerents by neutral States, the supply of such articles by subjects of neutrals is lawful, and neutral States are not, therefore, obliged by their duty of impartiality to prevent it.”).

111. Hague V, *supra* note 68, art. 7.

112. TUCKER, *supra* note 19, at 209.

113. See, e.g., Bothe, *supra* note 16, at 586 (“According to the current state of customary law, the correct view is that a state’s permission to supply war material constitutes a non-neutral service.”).

114. See HPCR COMMENTARY, *supra* note 103, at 319 (noting that “the majority of the Group of Experts has not been able to confirm on the basis of State practice that a modification of the traditional rule relating to the distinction between public and private exports has occurred”); STEPHEN C. NEFF, *THE RIGHTS AND DUTIES OF NEUTRALS: A GENERAL HISTORY* 202 (2000) (“There is . . . no firm authority as yet on this point.”).

115. CASTREN, *supra* note 46, at 478.

116. See *id.* (noting that the rule applies “regardless of whether the lender is a subject of that State or an alien (private individual or corporation) operating in its territory”).

117. See, e.g., *id.* at 479 (“Further, a neutral State need not prohibit individuals in its territory from sending money as a gift to belligerents . . .”); OPPENHEIM 6th, *supra* note 20, § 352, at 605 (“A neutral is not indeed obliged to prevent individual subjects from granting subsidies to belligerents . . .”).

118. OPPENHEIM 6th, *supra* note 20, § 355, at 607.

119. See Lauterpacht, *Revolutionary*, *supra* note 109, 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

leaving the state to join al-Qaeda.<sup>120</sup> It would also have no obligation to prevent nationals of other states from passing through its territory “to enlist, whether they pass singly or in numbers.”<sup>121</sup>

- (5) The neutral state would have no obligation to prevent its subjects from propagandizing on behalf of al-Qaeda.<sup>122</sup>
- (6) The neutral state would have no obligation to prevent its subjects from providing intelligence to al-Qaeda “by means of letter, telephone, telegram or in any other way,”<sup>123</sup> as long as it did not permit its subjects to create “actual centres of espionage.”<sup>124</sup>

To be sure, the neutral state would be free to prohibit such activities as a matter of municipal law—as the United States has consistently done through its Neutrality Acts.<sup>125</sup> Any such domestic prohibitions, however, would have to be applied to al-Qaeda and the United States equally. As Vagts says, “it is unlawful for a neutral to take such actions, that is, to cut off all trade with one party to the conflict, or to make passage over its territory and airspace available to one side.”<sup>126</sup>

#### 4. Detention

A neutral state would also have significant duties regarding the detention of al-Qaeda members that would be anathema to the United States. Most importantly, the neutral state would be prohibited from extraditing to the United States any al-Qaeda fighter or any civilian supporter of al-Qaeda that it found on its territory. Oppenheim states the general rule:

Neutral territory, being outside the region of war, offers an asylum to members of belligerent forces, to the subjects of the belligerents and their

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military operations of either party”).

120. See, e.g., Bothe, *supra* note 16, at 587 (“While the troops of a neutral state may not take part in any war operations . . . , it cannot and is not required to prevent its nationals from entering the service of a party to the conflict on their own initiative and responsibility.”); OPPENHEIM 6th, *supra* note 20, § 332, at 565 (“[A neutral] is required to prevent the organization of a hostile expedition from his territory against either belligerent. . . . The case, however, is different if a number of individuals, not organized into a body under a commander, start in company from a neutral State for the purpose of enlisting with one of the belligerents.”).

121. OPPENHEIM 6th, *supra* note 20, § 331, at 564; see also CASTREN, *supra* note 46, at 482 (“A neutral Power may also permit private individuals to pass *through* its territory for this purpose.”).

122. See, e.g., Lauterpacht, *Revolutionary*, *supra* note 109, at 126 (“In particular, revolutionary propaganda does not fall within the scope of revolutionary acts which a state is bound to prevent.”).

123. CASTREN, *supra* note 46, at 483.

124. *Id.* (emphasis omitted); see also OPPENHEIM 6th, *supra* note 20, § 356(3), at 609 (“But so much is certain, that a belligerent has no right to insist that neutral States should forbid or restrict such employment of their telegraph wires, etc., on the part of his adversary.”).

125. See, e.g., U.S. DEP’T OF STATE, PEACE AND WAR: UNITED STATES FOREIGN POLICY 1931–1941 31 (1943) (stating that in October 1935, President Roosevelt issued an embargo on the export of arms to warring nations Italy and Ethiopia under the authority of the Neutrality Act of 1935); *id.* at 49 (describing a similar arms embargo toward China and Japan based on the Neutrality Act of 1937).

126. Vagts, *supra* note 15, at 89; see also CASTREN, *supra* note 46, at 475 (“If a neutral State prohibits *individuals* from transporting goods needed by the armed forces of the belligerents from or through its territory, *impartiality* must be observed so that prohibitions and restrictions as well as measures necessary to enforce them are applied in the same way in relation to both belligerent sides.”).

property, and to war material belonging to the belligerents. Since, according to the present rules of International Law, the duty of either belligerent to treat neutrals according to their impartiality must—the case of extreme necessity in self-defence excepted—prevent them from violating the territorial supremacy of neutrals, enemy persons and goods are perfectly safe on neutral territory.<sup>127</sup>

The neutral state would have significant freedom to determine how it would treat individuals associated with al-Qaeda whom it found on its territory. Pursuant to Article 11 of Hague Convention V, it would be required to detain al-Qaeda fighters “at a distance from the theatre of war.”<sup>128</sup> But it would have to grant POW status to those detainees,<sup>129</sup> would be free to grant them more favorable treatment than required by POW status,<sup>130</sup> and would be free to grant asylum to individual al-Qaeda fighters who left the group and took refuge on its territory.<sup>131</sup> The neutral state would also have no obligation whatsoever to detain members of al-Qaeda and al-Qaeda supporters who did not engage in hostilities, even if the United States claimed that they had engaged in war crimes.<sup>132</sup>

### C. Resolution 1373

Declarations of neutrality, in short, would significantly undermine the United States’ ability to combat al-Qaeda. Fortunately for the United States, the Security Council enacted Resolution 1373 in the wake of September 11, 2001, which prohibits states from supporting terrorism<sup>133</sup> and requires states to prevent their subjects from supporting it.<sup>134</sup> Resolution 1373 might not completely displace the right of states to declare neutrality in the conflict with al-Qaeda,<sup>135</sup> but it does “qualify the ordinarily

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127. OPPENHEIM 6th, *supra* note 20, § 336, at 579.

128. Hague V, *supra* note 68, art. 11.

129. Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 4(B)(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III] (“The following shall likewise be treated as [POWs] under the present Convention: . . . . The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law.”).

130. *Id.* (noting that the requirement of POW status is “without prejudice to any more favourable treatment which these Powers may choose to give”).

131. *See* OPPENHEIM 6th, *supra* note 20, § 338, at 582 (“A neutral may grant asylum to single soldiers of belligerents who take refuge on his territory . . . .”).

132. *See id.* at 580 (“[P]rivate enemy subjects are safe on neutral territory even if they are claimed by a belligerent as having committed war crimes.”); Bridgeman, *supra* note 9, at 1207 (noting that “Hague V and GC III provide rules governing internment of combatants as POWs, but do not provide for detention of civilians in connection to a conflict in which that state is neutral”).

133. The Resolution requires states to, *inter alia*, “[r]efrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists,” and “[p]revent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens.” S.C. Res. 1373, para. 2(a), (d), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

134. The Resolution requires states to, *inter alia*, “[p]revent and suppress the financing of terrorist acts” and “[c]riminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.” *Id.* para. 1(a), (b).

135. *See* Bridgeman, *supra* note 9, at 1210 (“[T]he Security Council’s condemnation of terrorism in

applicable rules of neutrality to the extent that they are incompatible” with the Resolution.<sup>136</sup> In particular, “[c]ertain actions short of force that would ordinarily be violations of neutral duties would not only be permitted, but would be required, including a certain amount of cooperation with belligerent states that are attempting to suppress terrorism by military as well as nonmilitary means.”<sup>137</sup>

Chang acknowledges Resolution 1373 in his Article,<sup>138</sup> but he does not recognize the extent to which it is incompatible with his argument that the law of neutrality governs the relationship between the United States, al-Qaeda, and third states. It is true that “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.”<sup>139</sup> But that statement is true *only because Resolution 1373 modifies the law of neutrality*. In the absence of Resolution 1373, the law of neutrality would require states to treat al-Qaeda and the United States impartially. The law of neutrality is thus the last area of law that the United States would want to govern its conflict with al-Qaeda.

### III. THE LAW OF NEUTRALITY AND THE *JUS AD BELLUM*

From a territorial perspective, there is a fundamental difference between traditional non-international conflicts involving insurgents and the current non-international armed conflict between the United States and al-Qaeda. Traditional insurgents often controlled territory; indeed, as noted earlier, they could not be recognized as legitimate belligerents until they had achieved such control, effectively becoming states themselves.<sup>140</sup> Al-Qaeda, by contrast, functions primarily as a transnational non-state actor, planning and executing its attacks from within the territorial boundaries of a number of different states.<sup>141</sup> As a result, the *jus ad bellum*—the law governing the use of force between states—is far more important in the conflict with al-Qaeda than in previous non-international armed conflicts: almost by definition, nearly all uses of force by the United States against al-Qaeda will violate the territorial integrity of other states, requiring legal justification.

In Chang’s view, that justification is provided by the law of neutrality. As he says with regard to when the *jus ad bellum* permits force to be used, “[t]he proper body of law to answer that question is neutrality law, which teaches that an enemy retains his status as an enemy everywhere, but belligerents must respect the rights of

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general and al Qaeda in particular do not preclude states from remaining neutral in the conflict with al Qaeda while complying with their Charter obligations.”).

136. *Id.*

137. *Id.*

138. See Chang, *supra* note 1, at 68 n.363 (citing Security Council Resolution 1904, S.C. Res. 1904, U.N. Doc. S/RES/1904, para. 1(c), which recalled and reaffirmed Resolution 1373 and previous Security Council resolutions).

139. *Id.* at 40.

140. See *supra* notes 31–33 and accompanying text.

141. See Bridgeman, *supra* note 9, at 1190 (“In sharp contrast to previous conflicts between states and nonstate actors, the geographic distinction between belligerent and neutral territory is highly unstable in the conflict with al Qaeda.”). This is not to imply, of course, that al-Qaeda groups never control territory. Counterexamples would likely include al-Qaeda in Afghanistan and the Yemeni group Al-Qaeda in the Arabian Peninsula.

neutrals in pursuit of their enemies.”<sup>142</sup> There are, however, two problems with his argument. First, he overstates the extent to which the law of neutrality permits a forcible response to violations of neutrality. Second, and more fundamentally, Chang’s claim that the *jus ad bellum* is determined by the law of neutrality ignores the fact that the adoption of the U.N. Charter has rendered the law of neutrality’s rules governing the use of force essentially obsolete.

A. *Forcible Reprisals and the Law of Neutrality*

To assess Chang’s position on the relationship between the law of neutrality and the *jus ad bellum*, we need to distinguish between two different kinds of violations of neutrality: (1) situations in which the neutral state affirmatively supports one of the belligerents to a conflict, and (2) situations in which a neutral state is unable or unwilling to prevent a belligerent from using its territory to harm the other belligerent. A forcible response in the first situation is directed at the neutral state itself, whereas a forcible response in the second situation is directed at the belligerent and only collaterally affects the neutral state. As a result, the legal rules governing the use of force differ.

With regard to the first situation, Chang argues that “[n]eutrality law requires that neutrals refrain from participating in hostilities and materially supporting one side in the prosecution of the war. To the extent that neutrals fail to fulfill those duties, they lose the right to be immune from the military operations of the belligerents.”<sup>143</sup> That is literally true, but it obscures the difference between hostile acts and “mere violations” of neutrality.<sup>144</sup> Participating in hostilities alongside a belligerent immediately brings neutral status to an end, and the neutral state is thereafter considered to have declared war against the other belligerent.<sup>145</sup> The aggrieved belligerent is then obviously free to use military force against the formerly neutral state. By contrast, “materially supporting” a belligerent short of engaging in hostilities against the other belligerent does not end neutral status. As Oppenheim says, in such situations, “the condition of neutrality continues to exist between a neutral and a belligerent in spite of a violation of neutrality.”<sup>146</sup> The aggrieved belligerent is still free to use force against the neutral state, but doing so requires it to declare war against the neutral.<sup>147</sup> The aggrieved belligerent also remains free—unlike in the context of hostilities—to either overlook the violation of neutrality or seek reparations for it, in which case the neutral state maintains its neutral status.<sup>148</sup>

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142. Chang, *supra* note 1, at 41.

143. *Id.* at 32.

144. See OPPENHEIM 6th, *supra* note 20, § 358, at 613 (distinguishing between a “mere violation of neutrality” and “a declaration of war or hostilities”).

145. See *id.* § 358, at 613 (“Hostilities are acts of war and bring neutrality to an end.”); see also *id.* § 320, at 546 (“Hostilities by a neutral are acts of force performed for the purpose of attacking a belligerent. They are acts of war, and they create a condition of war between such neutral and the belligerent concerned.”).

146. *Id.* § 358, at 613.

147. See *id.* § 359, at 614 (“If the violation is only slight and unimportant, the offended State will often merely complain. If, on the other hand, the violation is very substantial and grave, the offended State will perhaps at once declare that it considers itself at war with the offender.”).

148. *Id.*

This may seem to be a distinction without a difference, but it is actually not. Situations in which states directly participate in hostilities against the United States alongside al-Qaeda (such as Afghanistan during the Taliban era) are far less common than situations in which a state covertly provides al-Qaeda with financial, material, or logistical support.<sup>149</sup> Because such support does not automatically end neutrality, the United States would be entitled to use force against the states that provide it only by officially declaring war on them: “[I]t is not the violation which brings neutrality to an end, but the determination of the offended party.”<sup>150</sup> The United States is no longer in the business of officially declaring war, and it seems unlikely that it would want to suffer the reputational costs involved in officially declaring war on each and every al-Qaeda-supporting state against whom it wanted to use even limited military force.

That said, the second *jus ad bellum* situation is likely to be far more common in the conflict with al-Qaeda: where the United States wants to use military force against members of al-Qaeda on neutral territory, not against the neutral state itself. Here Chang argues that “[i]f 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.”<sup>151</sup> He also adopts a very expansive understanding of what constitutes a “military operation” that a neutral is bound to prevent on its territory, one that includes not only the launching of organized “hostile expeditions,” but also “recruiting, transporting troops or supplies, or stationing communications relays.”<sup>152</sup>

That interpretation of the law of neutrality is significantly overbroad. Castren states the general rule:

As belligerents are not allowed to conduct hostilities in neutral territory, a neutral State need normally not tolerate there measures connected with *hostilities*. The only exception to this is that, when a neutral Power does not desire to repel a violation of its territory or if it is incapable of doing so, the other belligerent side may take countermeasures there, which the neutral State may not then prevent.<sup>153</sup>

As the quote indicates, not all violations of neutral territory permit a forcible response—only those that involve “hostilities.” That is a critical limitation, because we have already seen that the law of neutrality distinguishes between hostilities and “mere” violations of neutrality. The distinction may be blurry at the margins, but it is clear that “hostilities” involve actual military operations, as opposed to activities that simply support such operations. That requirement is embraced by a variety of scholars. McDougal, for example, limits forcible reprisal to situations in which the

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149. The coalition between the Taliban and al-Qaeda while the former was the government of Afghanistan is perhaps the only example of a state directly participating with al-Qaeda against the United States. See Bridgeman, *supra* note 9, at 1188 (noting that the United States invaded Afghanistan “to fight al Qaeda and the Taliban” and that after 2002 Afghanistan became a co-belligerent of the United States fighting against al Qaeda and the Taliban).

150. OPPENHEIM 6th, *supra* note 20, § 358, at 613.

151. Chang, *supra* note 1, at 38.

152. *Id.*

153. CASTREN, *supra* note 46, at 487 (emphasis added).

neutral is unwilling or unable “to prevent hostile acts of the opposing belligerent.”<sup>154</sup> Similarly, Oppenheim says that self-defense is limited to situations of “extreme necessity,” in which a belligerent is using neutral territory “as a base for military operations” whose launch is “imminent.”<sup>155</sup>

It is not surprising that the law of neutrality limits forcible reprisals to situations in which belligerents are using neutral territory to launch actual military operations. The idea that a belligerent is entitled to engage only in *proportionate* responses to a neutral state’s violation of its duty of impartiality is at the heart of the law of neutrality,<sup>156</sup> as no less an authority than James Madison emphasized in 1808:

As the right to retaliate results merely from the wrong suffered, it cannot, in the nature of things, extend beyond the extent of the suffering. There may often be a difficulty in applying this rule with exactness, and a reasonable latitude may be allowable on that consideration. But a manifest and extravagant departure from the rule can find no apology.<sup>157</sup>

Given the law of neutrality’s emphasis on hostilities and proportionality, Chang is on firm ground when he claims that the United States would be entitled to use force on neutral territory to prevent al-Qaeda from launching a hostile expedition against it.<sup>158</sup> But there is no support in the law of neutrality for his idea that the United States could use such force to end recruitment, transport, or communications on behalf of al-Qaeda. Such activities do not involve hostilities—nor their imminent threat—and a forcible response to them would necessarily be disproportionate.

### B. Force and the U.N. Charter

Chang’s overbroad argument concerning forcible reprisals under the law of neutrality masks an even deeper problem: his failure to acknowledge that the law of neutrality has been fundamentally transformed by the U.N. Charter, which prohibits the “use of force against the territorial integrity or political independence of any state,”<sup>159</sup> subject only to “the inherent right of individual or collective self-defense”<sup>160</sup> in response to “an armed attack.”<sup>161</sup> As Bothe summarizes, the U.N. Charter’s prohibition on the use of force imposes significant limits on the availability of reprisals for violations of neutrality:

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154. MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER* 406 (1994).

155. OPPENHEIM 6th, *supra* note 20, § 326, at 559.

156. See, e.g., Walter L. Williams, Jr., *Neutrality in Modern Armed Conflicts: A Survey of the Developing Law*, 90 MIL. L. REV. 9, 40 (1980) (“Regardless of the reasons, the neutral’s failure to perform its duty authorizes the opposing belligerent to take proportionate preventive action against the unlawful belligerent activity, including action within neutral territory.”).

157. Letter from James Madison to David Erskine (Mar. 25, 1806), in 3 AMERICAN STATE PAPERS 211 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832), quoted in *Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, with Comment*, 33 AM. J. INT’L L. 167, 400 (Supp. 1939).

158. Chang, *supra* note 1, at 50.

159. U.N. Charter art. 2, para. 4.

160. *Id.* art. 51. Chang acknowledges the right of self-defense, see Chang, *supra* note 1, at 28 n.143, but he does not examine the relationship between the U.N. Charter’s prohibition on the use of force and the law of neutrality.

161. U.N. Charter art. 51.

According to traditional international law, reprisals could have involved the use of military force against the state violating the law. In this respect, the Charter of the United Nations requires a differentiated view. Armed reprisals are generally unlawful. As a consequence, a reaction against violations of neutrality which would involve the use of force against another state is permissible only where the violation of the law triggering that reaction itself constitutes an illegal armed attack.<sup>162</sup>

This limitation on reprisals affects both of the situations discussed above: (1) where the neutral state affirmatively supports one of the belligerents to a conflict, and (2) where a neutral state is unable or unwilling to prevent a belligerent from using its territory to harm the other belligerent.

### 1. State Support

As noted earlier, although the basis for the response differed, a belligerent was entitled to use force against a neutral state that either engaged in hostilities alongside its opposing belligerent or provided that belligerent with material support. The U.N. Charter's prohibition on the use of force has fundamentally altered that legal regime. Engaging in hostilities still justifies a forcible response, because such hostilities would qualify as an "armed attack" under Article 51 of the U.N. Charter. But material support no longer justifies an armed response, because it does not qualify as an armed attack:

If a State violates the law of neutrality by rendering assistance to one of the belligerents (unneutral services), reprisals against that State are certainly permissible. Under traditional international law, it would have been legal to disregard the neutral status completely and to attack the neutral State. This, however, is no longer true. An unneutral service is not an armed attack, and it thus does not trigger a right of self-defence against the neutral State. Hence, the *ius contra bellum* excludes a reaction which would be legal under the traditional law of neutrality.<sup>163</sup>

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162. Bothe, *supra* note 16, at 581; *see also* Kress, *supra* note 10, at 251–52 (noting that, in light of Article 51 of the U.N. Charter, "forcible action taken in self-defence can no longer be justified by a mere reference to the traditional law of neutrality," because self-defence "presupposes that B's conduct carried out from within the territory of C amounts in and of itself to an armed attack against A"); *cf.* Wolf Heintschel von Heinegg, *Visit, Search, Diversion and Capture in Naval Warfare*, 30 CANADIAN Y.B. INT'L L. 89, 131 (1992) (noting that unneutral service does not give rise to the right of self-defence under the U.N. Charter, because it "is not an armed attack").

163. Michael Bothe, *Neutrality in Naval Warfare: What Is Left of Traditional International Law, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD* 387, 396 (Astrid J.M. Delissen & Gerard J. Tanja et al. eds., 1991); *see also* Christopher Greenwood, *Scope of Application of Humanitarian Law, in THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, supra* note 16, at 45, 58 ("A state not originally party to an armed conflict will only commit an act of war, and thus risk making itself a party to the conflict, by giving direct support to the military operations of one of the belligerents. Financial, political, and intelligence support will not have such an effect."); von Heinegg, *supra* note 162, at 131 ("It seems that unneutral service performed by a non-belligerent state would not be sufficient to justify the use of force against that state, since unneutral service is not an armed attack.").

Indeed, the aggrieved belligerent will not be able to forcibly respond to a neutral state that provides unneutral services even if the Security Council has deemed the recipient of those services the aggressor. As Bothe points out, “[i]llegal support for an aggressor . . . is not necessarily equivalent to an armed attack. Therefore, the victim of aggression reacting to a non-neutral service in favour of the aggressor is still subject to the prohibition of the use of force.”<sup>164</sup>

## 2. State Unwillingness or Inability

The U.N. Charter also affects the use of force against a belligerent who takes advantage of a neutral state’s unwillingness or inability to prevent its territory from being used as a base for military operations—the situation more relevant to attacks on a non-state actor like al-Qaeda. It is no longer clear whether such uses of force are ever permissible in the Charter era, given the International Court of Justice’s (I.C.J.) insistence in the *Nicaragua* case that an attack by a non-state actor qualifies as an “armed attack” within the meaning of Article 51 only if the attack is somehow imputable to a state.<sup>165</sup> The requirement of imputability—which was reaffirmed by the I.C.J. in the *Palestinian Wall* advisory opinion<sup>166</sup> and in *DRC v. Uganda*<sup>167</sup>—excludes the use of self-defense against attacks by a non-state actor when a state is simply unwilling or unable to prevent the non-state actor from using its territory.

It is an open question whether imputability is still required by customary international law. Indeed, whether the *jus ad bellum* permits self-defense in “unwilling” and “unable” situations is a particularly controversial issue. A complete analysis of that question is well beyond the scope of this Response. Suffice it to say that, as Ruys points out, it is impossible to unequivocally claim that the *Nicaragua* requirement no longer applies:

In the end, we must admit that this is an area which is characterized by significant legal uncertainty. *De lege lata*, the only thing that can be said about proportionate trans-border measures of self-defence against attacks by non-State actors in cases falling below the *Nicaragua* threshold is that they are ‘not unambiguously illegal’. *De lege ferenda*, we believe that customary law is evolving towards a different application of Article 51 UN Charter in relation to defensive action *against* a State—viz. coercive action that directly targets the State’s military or infrastructure—and defensive action *within* a State—viz. recourse to force against a non-State group present within the territory of another State.<sup>168</sup>

Regardless of which position is correct, it is impossible to discuss forcible reprisal under the law of neutrality in isolation from the U.N. Charter’s prohibition

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164. See Bothe, *supra* note 16, at 581.

165. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits Judgment, 1986 I.C.J. 14, para. 195 (June 27).

166. See TOM RUY, “ARMED ATTACK” AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 475–76 (2011) (explaining that three judges’ criticisms of the majority’s “State-centric reading of Article 51” in the I.C.J.’s *Palestinian Wall* advisory opinion indicate that the opinion created a “limitative effect, implying that ‘armed attack’ must in principle emanate from a State”).

167. *Id.* at 482–83.

168. *Id.* at 531.

on the use of force. If customary international law still limits “armed attacks” to attacks by a non-state actor that are imputable to a state, Article 51 is considerably narrower than the law of neutrality. If customary law has evolved beyond the *Nicaragua* test, the regimes are essentially coterminous: the law of neutrality conditions forcible reprisal on a non-state actor being engaged in “hostilities”;<sup>169</sup> the U.N. Charter conditions self-defense on an “armed attack.”<sup>170</sup> Either way, however, the use of force against a non-state actor like al-Qaeda is now regulated by the U.N. Charter, not by the law of neutrality.<sup>171</sup>

### CONCLUSION

At various points in his Article, Chang criticizes “mechanically”<sup>172</sup> applying IHL’s “direct participation standard developed in the context of professional militaries . . . to military operations against terrorist or insurgent groups”<sup>173</sup> and decries as “absurd”<sup>174</sup> the idea of applying “the concept of ‘combatant’ to situations to which it does not apply and for purposes for which it was not intended.”<sup>175</sup> Unfortunately, Chang’s equally mechanical attempt to apply the law of neutrality to the United States’ conflict with al-Qaeda leads to results that are no less absurd. The law of neutrality does not apply to insurgencies; it applies only to international armed conflicts, whether between states or between a state and an insurgent group that has been recognized as a legitimate belligerent. And when the law of neutrality does apply, it applies symmetrically: each belligerent has the same rights, and neutral states owe the same duties to both belligerents.

For both of those reasons, the United States is very fortunate that the law of neutrality does not, in fact, provide “an overarching international law framework for U.S. military operations against al-Qaeda.”<sup>176</sup> If it did, members of al-Qaeda would possess the combatant’s privilege; the United States would be required to grant members of al-Qaeda POW status; and states would be able to declare neutrality in the conflict, prohibiting them from assisting the United States’ military operations against al-Qaeda in any way and rendering their territory and airspace inviolable. The United States would also have a limited ability to respond to violations of neutrality with military force. The law of neutrality is thus the *last* legal regime the United States would want governing its conflict with al-Qaeda.

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169. See *supra* notes 153–157.

170. See *supra* notes 159–162.

171. See Kress, *supra* note 10, at 267 (noting that if a violation of neutrality involves sufficient hostilities, the availability of self-defense under the Charter in such situations means that “the neutrality argument is not needed any longer because the non-international armed conflict would then in any event have spilled over to the territory of the State concerned”).

172. Chang, *supra* note 1, at 20.

173. *Id.*

174. *Id.* at 73.

175. *Id.*

176. *Id.* at 33.