

Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda

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Abstract

The legal architecture for the conflict with al-Qaeda and the Taliban has been the subject of extensive scrutiny through two presidential administrations, a decade of litigation, and multiple acts of Congress. All three branches of the federal government have to date defined the framework as one of armed conflict, and have looked to the laws of war as support for expansive authorities concerning the use of force, including detention. Yet the laws of war do not merely contemplate broad state authority; they also provide critical and non-derogable constraints on that authority. Nevertheless considerable debate rages on with respect to whether and to what extent the international laws of war inform and constrain the U.S. government's conduct in this conflict.

This Article provides a survey of the legal architecture currently governing the conflict with al-Qaeda and the Taliban, and—considering that operating framework—presents a defense of critical law of war constraints on state action. It responds to Karl Chang's Article, "Enemy Status and Military Detention in the War Against Al-Qaeda," which proposes a broad legal theory of detention based on the law of neutrality and divorced from core protective law of war constraints. In responding to this and other calls for broad authority, this Article supports the complex though crucial practice of applying *jus in bello* principles, such as the principle of distinction between belligerents and civilians, to modern armed conflicts such as that with al-Qaeda and the Taliban. To the extent the U.S. government and other states rely on an armed conflict paradigm to support broad authorities, they must likewise constrain themselves in accordance with the international legal regimes governing such conflicts.

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INTRODUCTION

There have been many attempts over the last decade to provide legal justification for a broad system of detention authority in the conflict with al-Qaeda and the Taliban. The U.S. government, Congress, and the Supreme Court have construed state action in this conflict in “law of war”¹ terms, sanctioning long-term preventive detention of captured al-Qaeda and Taliban belligerents in accordance with “longstanding law-of-war principles.”² Despite the flexibility in this framework,

1. Multiple terms exist to describe the fields of law relevant to armed conflict, such as “laws of war” (LOW), “law of armed conflict” (LOAC), and “international humanitarian law” (IHL), in addition to *jus in bello* and *jus ad bellum*. Although authorities may differ somewhat on the use of these terms, I employ the term “laws of war” in this paper to encompass both the concepts of *jus ad bellum*—the law governing the resort to force against other states or entities—and *jus in bello*—the law governing the conduct of hostilities within armed conflict. Neutrality law also may be considered a component of the “laws of war.” I use “law of armed conflict” and *jus in bello* interchangeably.

2. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 629–31 (2006) (applying Common Article 3 of the Geneva Conventions to the conflict with al-Qaeda); *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (noting that Congress’s 2001 Authorization for Use of Military Force (AUMF) includes authority to detain for the duration of the relevant conflict “based on longstanding law-of-war principles”); Respondents’ Memorandum Regarding the Government’s Detention Authority Relative to the Detainees Held at Guantanamo Bay at 1, *In re Guantanamo Bay Detainee Litigation*, 577 F. Supp. 2d 312 (D.D.C. 2008) (Misc. No. 08-442) (Mar. 13, 2009) [hereinafter March 13 Filing] (“The detention authority conferred by the AUMF is necessarily informed by principles of the laws of war.”); National Defense Authorization

some legal commentators and government officials have nevertheless over the years pressed for broader and broader interpretation of the state's authority. The Supreme Court has dismissed some of these more aggressive efforts, holding, for example, that Common Article 3 of the Geneva Conventions provides some minimum baseline of protection to detainees in the conflict with al-Qaeda.³ However, after having laid the foundation for the framework and certain basic principles, the Court's intervention has become increasingly rare in recent years. The overarching legal architecture for this conflict is thus fairly well settled today and moored to recognized legal principles in the laws of war,⁴ but there is significant work that remains in determining its application and the outer contours of the framework. Yet in seeking to demarcate these outer limits, Karl Chang proposes a new framework altogether, and it is one that yet again attempts to broaden the sphere of lawful state action in this conflict.

In "Enemy Status and Military Detention in the War Against Al-Qaeda," Karl Chang contends that the appropriate international law framework for determining the scope of the U.S. government's detention authority in the conflict with al-Qaeda is found primarily not in the law of armed conflict but rather in the historic law of neutrality. In his attempt to resolve unsettled questions regarding the government's authority under both international and domestic law, particularly the 2001 Congressional Authorization for Use of Military Force (2001 AUMF), Chang eschews reliance on the belligerent-civilian distinction currently employed by the government and drawn from the law of armed conflict. Instead, Chang argues that the contours of military detention should be constructed predominantly around a determination of who is the "enemy," which he views as defined by the law of neutrality.

Chang demonstrates creativity and ambition in seeking a new angle on one of the thorniest legal issues in the area of national security law that the U.S. government has faced in the past decade. He paints an effective and insightful picture of the incredibly difficult questions states and scholars are grappling with in ascertaining the nature of the "enemy" and the outer contours of military detention authority within modern armed conflict against non-state actors. And he rightfully highlights a spate of recent judicial decisions rejecting but failing to replace the proposed limits on the government's detention authority,⁵ decisions that in my view could muddy rather than clarify the government's authority. While I admire Chang's ultimate goal of achieving a workable system for detention in the conflict with al-Qaeda, I believe his approach is fundamentally flawed. Any attempt to overhaul the legal framework now entrenched through two presidencies and a decade of litigation—not to mention recently enacted legislation⁶—faces an uphill battle. Yet

Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021 (2011) (affirming the authority of the U.S. Armed Forces to detain individuals "under the law of war without trial until the end of hostilities . . .").

3. *Hamdan*, 548 U.S. at 629–31.

4. I do not address in this Article whether a law of war framework was or continues to be the most appropriate framework for addressing the conflict with al-Qaeda. It is the framework under which the U.S. executive branch, legislature, and the courts are currently operating, and thus this Article assumes that fundamental starting point. Nevertheless, whether the current law of war architecture will continue to be appropriate and the extent to which the U.S. government will be able to turn away from this framework are critical and worthwhile questions that merit further exploration.

5. Karl S. Chang, *Enemy Status and Military Detention in the War Against Al-Qaeda*, 47 TEX. INT'L L.J. 1, 5–6 nn.7–12 (2012).

6. National Defense Authorization Act for Fiscal Year 2012 § 1021.

in seeking to craft a detention regime around the law of neutrality, Chang makes critical errors. First, Chang's proposed framework does not resolve the problem he is trying to address. He argues both that the law of war approach of the government and certain courts is overly restrictive and analytically unsound, and that the broad approach taken recently by the D.C. Circuit requires new legal constraints. Yet he fails to establish fatal legal flaws with the law of war approach and overstates its practical problems (for example, by emphasizing judicial opinions that have since been overturned⁷). And his proposed replacement framework does not present the clear limits he seeks. Moreover, in proposing "enemy status" as the proper constraint on the government's detention authority in place of a regime that requires distinction between belligerents and civilians, Chang sets up a false choice. In fact, both of these constraints already operate to bind the government's authority, and a broad view of the former certainly cannot displace the requirements of the latter.

Second, in seeking to address what he views as analytic problems in the current framework, Chang proposes a solution that is itself analytically flawed. Chang misconstrues neutrality law and the repercussions that flow from violations of that law. To inform his broad views on how neutrality law shapes the legal framework for detention, Chang toggles between domestic and international law; obligations on states versus individuals; and conflicts between states and those between states and non-state actors. Chang derides current approaches for their reliance on analogy, yet himself seems to pick and choose century-old examples from a body of law and practice that was designed for relations between neutral and belligerent states, and then asserts with insufficient explanation that these often unrelated pieces can be pulled together to inform an extraordinarily broad scope of detention authority in modern conflict. But perhaps most problematic is that he fails to draw a clear line to distinguish between mere violations of neutrality and acts of belligerency: where this line is drawn is the most significant question the Article should answer, and yet it never truly addresses it.

Third, in the name of crafting a new, limited framework for detention, Chang's approach disregards the very principles embodied in the laws of war that states have developed to regulate—and cabin—the scope of the state's authority in armed conflict. Neutrality law appeals to Chang because, as he suggests, its "focus is broader than 'fighting' or 'combat'" and reaches into a party's indirect participation and material support.⁸ But in relying so heavily on this body of law as the primary limit on the state's authority, Chang seems to abandon many of the laws and principles that actually do speak to the questions he seeks to answer. Chang does not address the principles states have developed to regulate *jus ad bellum*, to which states must look to determine when force may be lawfully employed against states or organized armed groups. And with respect to the *jus in bello* rules governing who can be militarily detained *within* an armed conflict, Chang proposes that a state may detain just about anyone as long as the military deems it necessary to do so—including "senior government officials," "former members of enemy armed forces," "material supporters," "enemy persons present on their home territory at the outbreak of hostilities," "enemy civilians . . . regardless of whether they have participated in the armed conflict," and perhaps even citizens who have provided

7. Chang, *supra* note 5, at 12.

8. *Id.* at 31–32.

unwitting support for al-Qaeda⁹—and fails to address critical *jus in bello* principles that regulate state action toward belligerents and civilians. Chang provides no persuasive reason to depart so dramatically from these bedrock principles and proposes a broad approach to detention authority that reaches beyond what the laws of war would permit.

Not surprisingly, perhaps, the neutrality law practice of the nineteenth and early-twentieth centuries is not the panacea Chang professes it to be. Nevertheless, as I explore further below, there may be useful principles that Chang or other scholars might draw from state practice during that time period—in particular, how states distinguished between mere violations of neutrality and other acts that rose to the level of belligerency. These principles could inform aspects of how states assess the legal contours of conflict with non-state organized armed groups as well as membership in these groups in the current conflict. The answer to the critical question Chang does not reach—namely, where was the historic line between mere violations of neutrality and acts of belligerency?—is one of the most relevant insights we might draw from neutrality practice. Review of the case law and literature on which Chang relies suggests that the answer would likely further support—rather than contravene—the current law of war constraints that Chang and others eschew.

In Part I, I provide an overview of the bodies of international law—neutrality law, *jus ad bellum*, and *jus in bello*—necessary to understand the current conflict, as well as a survey of the domestic case law and unsettled issues in military detention authority. In Part II, I address the application of neutrality law to the conflict with al-Qaeda. I assess Chang’s proposed framework for determining the nature of the “enemy,” and explain how Chang misapplies the laws of neutrality. In particular, he does not answer the one critical question his Article should explain: when do a state or entity’s acts render it an “enemy” such that *jus in bello* takes effect? In Part III, I explain how reduction of the *jus in bello* principles to that of military necessity is inconsistent with the law, and I propose a defense of the tricky but essential continued practice of distinguishing between civilians and belligerents. I conclude that principles and practice drawn from neutrality law may shed some insight on current questions regarding the state’s legal authority in armed conflict, but that a framework based on the laws developed to govern relations with neutral states cannot simply supplant the laws developed to inform and constrain actions between and against belligerents. To the contrary, neutrality law—to the extent it has continued vitality—is triggered by the existence of armed conflict and operates alongside and in complement to the laws of war that govern actions within and leading to that conflict.¹⁰

The United States’ credibility in modern armed conflict turns in large part on its fidelity to recognized legal authorities and constraints. The trend in the U.S. federal

9. *Id.* at 17–18; *see also id.* at 18 n.86 (citing support for the proposition that a state may detain as prisoners of war “political leaders, journalists, local authorities, clergymen, and teachers”). His proposed framework would further suggest that the state could detain—as long as the military deemed it necessary—civilians who work in munitions factories, or for that matter any German citizen during World War II, or American citizens who *unknowingly* but unlawfully send money to a charity that has a military wing or that sends food to al-Qaeda fighters. *See id.* at 68 (“The underlying legal principle here is that when a person breaches a duty, whether he does so knowingly or purposefully matters little to whether we should hold him responsible for that action.”).

10. *See infra* notes 99–101 and accompanying text.

courts of late has been to defer broadly to the government's authority in this realm. Ultimately, however, whether or not there is extensive judicial oversight, the United States must conform its actions with the international laws of war. In fact, the broad deference that the courts are at present willing to afford the executive branch makes it all the more incumbent on the government—as the last word in many cases due either to judicial deference or non-justiciability—to draw its own careful distinctions and to review the legality of its decision making in these arenas.¹¹ The United States' respect for and compliance with the laws of war are essential for the well-being of our troops, for the continued cooperation and good will of our allies, and for our legitimacy in seeking to enforce compliance by others. They may also be critical to maintaining the current good will and deference of the federal courts.

I. BACKGROUND ON THE LAWS OF WAR AND NEUTRALITY

A. *The Laws of War: Jus ad Bellum and Jus in Bello*

It is useful at the outset to provide a brief survey of the bodies of law that are necessary to understand the current conflict and Chang's proposed legal framework.

The ultimate question that Chang seeks to answer in his Article is: whom may the state militarily detain in any given armed conflict? This question breaks down into an essential two-part inquiry. In its simplest terms, the Step One question is: does an armed conflict exist between the relevant parties (or "enemies" under Chang's rubric)? Once that question is answered in the affirmative, the Step Two question is: within the confines of that armed conflict, whom among the "enemy" party may the state detain?

Step One: The Geneva Conventions recognize two distinct categories of armed conflict: conflicts between states, termed international armed conflicts (IACs),¹² and non-international armed conflicts (NIACs),¹³ which include civil wars and, according to the U.S. Supreme Court, transnational conflicts between states and non-state actors, such as the conflict between the United States and al-Qaeda.¹⁴ The authority

11. See, e.g., Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1695–96 (2011) (book review) ("Officials within the executive branch often face constitutional questions that the federal courts would treat as nonjusticiable on political question or other grounds. But that does not license them to ignore the questions, or to answer them without regard to the law. Instead, they 'must make a conscious decision to obey the Constitution whether or not their acts can be challenged in a court of law and then must conform their actions to these principled determinations.'" (quoting *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 618 (2007) (Kennedy, J., concurring))).

12. Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 2, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea art. 2, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 2, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. Article 2, common to all four Geneva Conventions, states that the Conventions apply to any armed conflicts between "two or more of the High Contracting Parties." GC I–IV, *supra*, art. 2 [hereinafter CA 2].

13. GC I–IV, *supra* note 12, art. 3 [hereinafter CA 3] (applying the provisions of Article 3, common to all four Geneva Conventions, to armed conflicts "not of an international character").

14. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 629–32 (2006) (relying on the "literal meaning" of "conflict not of an international character" from Common Article 3 to apply that article to any conflict

to wage war or use force against other states or armed forces—*jus ad bellum*—is governed in the modern era by a complicated international legal regime, which includes both custom and treaty law, most notably the U.N. Charter. In fact, the use of force against or in the territory of another state is generally prohibited under the modern regime with certain exceptions, such as self-defense in the case of an armed attack.¹⁵ Whether hostilities have risen to the level of “armed conflict” is itself a fraught concept and generally outside the scope of this Article.¹⁶ But, once an armed conflict exists between states, the “enemy” is made up not only of the opposing belligerent state’s armed forces but also as a general matter the civilian population of that state.¹⁷ In a NIAC or other conflict that includes a non-state organized armed group, these questions become more complicated. The “enemy” can be a murky concept when operating against non-state actors with unclear boundaries or alliances. Nevertheless, as a general matter, in order to resort to military force against an actor or other target in a particular conflict, the state must ascertain which entity or entities are the “enemy” against whom it is engaged in that conflict.

Step Two: A state’s lawful actions toward its “enemies” within armed conflict are further constrained by *jus in bello*, the law governing the conduct of hostilities, which includes the customary international law principles of military necessity,¹⁸

that “does not involve a clash between nations” and stating that “Common Article 3 . . . affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory ‘Power’ who are involved in a conflict ‘in the territory of’ a signatory”).

15. U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”); *id.* art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations . . .”). Historically, states also could resort to force to prevent violations of their neutrality by belligerents. *See, e.g.*, Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land art. 10, Oct. 18, 1907, 36 Stat. 2310, 1 Bevans 654 [hereinafter Hague V] (“The fact of a neutral Power resisting, even by force, attempts to violate its neutrality cannot be regarded as a hostile act.”). How this operates in the post-Charter world is controversial. *See infra* note 55.

16. Oppenheim’s treatise on international law defines “war” as follows: “War is a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases.” 2 LASSA F. L. OPPENHEIM, INTERNATIONAL LAW: DISPUTES, WAR AND NEUTRALITY § 54, at 202 (Hersch Lauterpacht ed., 7th ed. 1952) [hereinafter OPPENHEIM 7th]. Over the years, as states engaged their armed forces in various capacities and against different types of entities, scholars and states alike have begun to speak in terms of “armed conflict,” though this concept is no less difficult to define. There is no treaty-based definition of what constitutes an armed conflict. With respect to NIAC, decisions of the International Criminal Tribunal for the Former Yugoslavia (ICTY) have suggested that key factors are whether the violence at issue is “protracted” and whether the non-state actor involved is sufficiently “organized.” *See, e.g.*, Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (“[A]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”).

17. *See* OPPENHEIM 7th, *supra* note 16, § 88, at 270 (“The general rule with regard to *individuals* is that subjects of the belligerents bear enemy character . . .”).

18. The American Military Tribunal at Nuremberg defined “military necessity” as follows: “Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money.” United States v. List (*The Hostage Case*), 11 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 1230, 1253 (1948). *See also* DEP’T OF THE ARMY, FM 27-10:

humanity,¹⁹ distinction,²⁰ and proportionality,²¹ as well as treaty obligations, in particular, those codified in the 1949 Geneva Conventions and the 1977 Protocols, to the extent the Protocols apply.²² Historically, military necessity was construed as a

THE LAW OF LAND WARFARE para. 3(a) (1956) (amended 1976) [hereinafter U.S. ARMY FIELD MANUAL 27-10] (“The prohibitory effect of the law of war is not minimized by ‘military necessity,’ which has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible. Military necessity has been generally rejected as a defense for acts forbidden by the customary and conventional laws of war inasmuch as the latter have been developed and framed with consideration for the concept of military necessity.”).

19. The principle of humanity prohibits the infliction of unnecessary suffering during armed conflict. *E.g.*, ARMY FIELD MANUAL 27-10, *supra* note 18, para. 3(a) (“The law of war places limits on the exercise of a belligerent’s power . . . and requires that belligerents refrain from employing any kind or degree of violence which is not actually necessary for military purposes and that they conduct hostilities with regard for the principles of humanity and chivalry.”); JOINT DOCTRINE & CONCEPTS CTR., U.K. MINISTRY OF DEF., THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT para. 2.4 (2004) [hereinafter U.K. JOINT SERVICE MANUAL] (“Humanity forbids the infliction of suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes.”).

20. The principle of distinction requires that states distinguish between civilians and belligerents and mandates that civilians and civilian objects may not be the object of attack. The principle derives from the St. Petersburg Declaration of 1868, which stated that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.” Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, pmbl., Dec. 11, 1868, 18 Martens Nouveau Recueil (ser. 1) 474, 138 Consol. T.S. 297 [hereinafter St. Petersburg Declaration]. The principle is applicable in both international and non-international armed conflicts, and it is set forth in a number of treaties, national law of war manuals, and other texts. *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, June 8, 1977, 1124 U.N.T.S. 3 [hereinafter AP I] (“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants”); *id.* art. 51(1)–(2) (“The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations The civilian population as such, as well as individual civilians, shall not be the object of attack.”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 13(1)–(2), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II] (same); ARMY FIELD MANUAL 27-10, *supra* note 18, para. 40(a) (“Customary international law prohibits the launching of attacks (including bombardment) against either the civilian population as such or individual civilians as such.”); CANADIAN OFFICE OF THE JUDGE ADVOCATE GEN., LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS § 204 (2001) [hereinafter 2001 CANADIAN MANUAL] (“The principle of distinction imposes an obligation on commanders to distinguish between legitimate targets and civilian objects and the civilian population.”); U.K. JOINT SERVICE MANUAL, *supra* note 19, para. 2.5.1 (“The principle of distinction, sometimes referred to as the principle of discrimination or identification, separates combatants from non-combatants and legitimate military targets from civilian objects.”). *See also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8) (calling the principle of distinction one of the “cardinal principles” of IHL, “aimed at the protection of the civilian population and civilian objects”).

21. The principle of proportionality requires that the losses caused by an attack not be excessive in relation to the expected military advantage. *E.g.*, ARMY FIELD MANUAL 27-10, *supra* note 18, para. 41 (“[L]oss of life and damage to property incident to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. Those who plan or decide upon an attack, therefore, must take all reasonable steps to ensure not only that the objectives are identified as military objectives or defended places . . . but also that these objectives may be attacked without probable losses in lives and damage to property disproportionate to the military advantage anticipated.”); U.K. JOINT SERVICE MANUAL, *supra* note 19, para. 2.6 (“[T]he losses resulting from a military action should not be excessive in relation to the expected military advantage.”); 2001 CANADIAN MANUAL, *supra* note 20, § 204(4) (“[C]ollateral civilian damage arising from military operations must not be excessive in relation to the direct and concrete military advantage anticipated from such operations.”).

22. The United States has signed but not ratified both AP I and AP II. The government recently announced that it follows Article 75 of AP I, which governs treatment of detainees in IAC, out of a sense

broadly permissive concept that, if it were to “prevail completely,” would impose “no limitation of any kind . . . on the freedom of action of belligerent states: *à la guerre comme à la guerre*.”²³ But far from acting as the sole constraint on state action in armed conflict, the principle of military necessity in fact operates alongside and in tension with the principle of humanity. These two concepts together act as the principal framing guideposts for the laws of armed conflict and are integrated in the operational principles of distinction and proportionality.²⁴

Historically, it has been a fairly well-settled principle in international law that— with certain strictly defined exceptions²⁵—individuals in armed conflict fall within one of two categories: belligerent²⁶ or civilian.²⁷ At the heart of the inquiry here is

of legal obligation. Fact Sheet: New Actions on Guantánamo and Detainee Policy (March 7, 2011), <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy>. Since the Reagan Administration, the U.S. government has announced that it is seeking advice and consent to ratify AP II, and, under the Obama Administration, “[a]n extensive interagency review concluded that United States military practice is already consistent with the Protocol’s provisions.” *Id.*; see RONALD REAGAN, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE PROTOCOL II ADDITIONAL TO THE GENEVA CONVENTIONS OF AUGUST 12, 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NONINTERNATIONAL ARMED CONFLICTS, CONCLUDED AT GENEVA ON JUNE 10, 1977, S. TREATY DOC. NO. 100-2, at iii-v (1987) (transmitting AP II for the advice and consent of the Senate to ratify).

23. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 16 (2004) [hereinafter *DINSTEIN, CONDUCT*].

24. *See id.* (“LOIAC in its entirety is predicated on a subtle equilibrium between two diametrically opposed impulses: military necessity and humanitarian considerations.”); 2001 CANADIAN MANUAL, *supra* note 20, §§ 202–204 (“The principle of proportionality establishes a link between the concepts of military necessity and humanity.”); St. Petersburg Declaration, *supra* note 20, pmb1. (discussing the point at which “the necessities of war ought to yield to the requirements of humanity”); *id.* para. 2 (“[T]he only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy . . .”).

25. Exceptions include individuals who rise up as part of a *levée en masse*. *See* GC III, *supra* note 12, art. 4(A)(6) (providing prisoner of war (POW) treatment for “[i]nhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces”). Religious and medical personnel, though members of the armed forces, also merit certain protections from attack and detention. *See* GC I, *supra* note 12, arts. 24, 28 (establishing specific rules for medical and religious personnel who “shall be respected and protected in all circumstances,” may not be detained as prisoners of war, and may be “retained only in so far as the state of health, the spiritual needs and the number of prisoners of war require”).

26. I use the term “belligerent” rather than “combatant” because I agree with Chang that use of the latter risks confusion with the category of individuals who enjoy combatant immunity. Chang, *supra* note 5, at 7–8 (discussing combatant privileges). “Combatant” also has been used to describe the fighting members of the armed forces in contradistinction to religious and medical personnel. *E.g.*, Knut Ipsen, *Combatants and Non-Combatants*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 79, 79–82 (Dieter Fleck ed., 2d ed. 2008).

27. *See, e.g.*, AP I, *supra* note 20, art. 50 (defining “civilians” as “any person who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention” (listing individuals eligible for POW status) or Article 43 of AP I (defining the armed forces to a conflict)); *DINSTEIN, CONDUCT*, *supra* note 23, at 27 (noting that the law of international armed conflict “posits a fundamental principle of distinction between combatants and non-combatants (civilians)”); Nils Melzer, Int’l Comm. of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 90 INT’L REV. OF THE RED CROSS 991, 997–98 (2008) (“While treaty IHL predating Additional Protocol I does not expressly define civilians, the terminology used in the Hague Regulations (H IV R) and the four Geneva Conventions (GC I–IV) nevertheless suggests that the concepts of civilian, of armed forces, and of *levée en masse* are mutually exclusive, and that every person involved in, or affected by, the conduct of hostilities falls into one of these three categories.”); *id.* at 1003 (“As the wording and logic of Article 3 common to the Geneva Conventions GC I–IV and Additional

the principle of distinction, which mandates that the parties to a conflict distinguish at all times between belligerents and the civilian population.²⁸ Much discussion of the principle of distinction focuses on the prohibition against targeting civilians, yet its significance in detention and other matters is evident both in the treaty law admonishments to distinguish the civilian population “at all times”²⁹ and in the clearly differentiated regimes in IAC for belligerent detention and civilian internment. As a general matter, in a traditional IAC, states may target or detain until the end of active hostilities members of the opposing armed forces other than religious or medical personnel.³⁰ States may *intern* civilian protected persons³¹ only if they pose a genuine and individualized threat such that “the security of the Detaining Power makes [such internment] absolutely necessary”³² and only if specific procedural safeguards are maintained.³³ The text of the Fourth Geneva Convention (GC IV), and the Commentary to it, make clear that such internment is intended to be “exceptional” and requires a real threat to the state’s security on an individual level.³⁴ In fact, the Commentary to GC IV notes that the “strict conditions” for

Protocol II (AP II) reveals, civilians, armed forces, and organized armed groups of the parties to the conflict are mutually exclusive categories also in non-international armed conflict.”). This distinction has a long pedigree. For example, Article 22(2) of the Brussels Declaration of 1874 and Article 29 of the Fourth Hague Convention of 1907 “refer to ‘civilians’ in contradistinction to ‘soldiers’” and note that “the categories of ‘civilian’ and ‘armed forces’ are clearly used as mutually exclusive in all four [Geneva] Conventions.” *Id.* at 998 n.11 (“None of these instruments suggests the existence of additional categories of persons who would qualify neither as civilians, nor as members of the armed forces or as participants in a *levée en masse*”).

28. *See supra* note 20.

29. *Id.*

30. *See, e.g.*, GC III, *supra* note 12, art. 4 (allowing for the detention of members of the opposing armed forces but excluding the holding of medical personnel and chaplains as POWs); *id.* art. 118 (“Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”).

31. “Protected persons” are “those who, at a given moment and in any manner whatsoever, find themselves, in the case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.” GC IV, *supra* note 12, art. 4. Those protected by other provisions of the Geneva Conventions, such as prisoners of war, are not covered nor are nationals of a neutral state while that state has normal diplomatic representation with the detaining power. *Id.* The Third Geneva Convention also contemplates detention and prisoner of war status for certain civilians captured while accompanying the armed forces. *See* GC III, *supra* note 12, art. 4(A)(4) (categorizing as prisoners of war civilians who accompany the armed forces without actually being members thereof).

32. GC IV, *supra* note 12, art. 42; *see also* IV THE GENEVA CONVENTIONS OF 12 AUGUST 1949 art. 42 (Jean S. Pictet ed., 1958) [hereinafter GC IV Commentary] (“Subversive activity carried on inside the territory of a Party to the conflict or actions which are of direct assistance to an enemy Power both threaten the security of the country; a belligerent may intern people or place them in assigned residence if it has serious and legitimate reason to think that they are members of organizations whose object is to cause disturbances, or that they may seriously prejudice its security by other means, such as sabotage or espionage To justify recourse to such measures the State must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.”). In cases of occupation, the standard is “imperative reasons of security.” GC IV, *supra* note 12, art. 78.

33. *See, e.g.*, GC IV, *supra* note 12, art. 43 (mandating immediate reconsideration of the basis for internment by a court or administrative board and regular, at least semi-annual, review of that decision); Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT’L L. 48, 49 (2009) (“IHL conditions the authority to detain on compliance with procedural guarantees and humane treatment of detainees.”).

34. GC IV, *supra* note 12, art. 42 (allowing internment of protected persons “only if the security of the Detaining Power makes it absolutely necessary”); GC IV Commentary, *supra* note 32, art. 42(1) (“To justify recourse to [internment or assigned residence] the State must have good reason to think that the

civilian internment embodied in that Convention were enacted “to put an end to” the very “abuse” of the Second World War that Chang cites as authority, namely, the internment of individuals based on “the mere fact of being an enemy subject.”³⁵ Finally, civilians may not be targeted unless and for such time as they directly participate in hostilities.³⁶ In other words, a major objective of the laws of war is to protect civilians, non-combatants,³⁷ and others who are *hors de combat*³⁸ from the brutalities of war, including both attack and long-term detention.

In a NIAC or other conflict including a non-state actor, the Step Two inquiry is once again more complicated than it is in a conflict between states. While the baseline *jus in bello* principles continue to apply, the specific treaty provisions governing NIAC offer states much less guidance with respect to who is a belligerent and thus who may be detained or targeted and under what process.³⁹ It often may be difficult to distinguish between civilians and belligerents, for example, when dealing with a non-state actor who does not wear a uniform or otherwise distinguish himself from the civilian population. But despite this difficulty, a state must continue to distinguish in its use of force between civilians and belligerents.⁴⁰ As I discuss further

person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security. The Convention stresses the exceptional character of measures of internment and assigned residence by making their application subject to strict conditions Henceforward only absolute necessity, based on the requirements of state security, can justify recourse to these two measures, and only then if security cannot be safeguarded by other, less severe means. All considerations not on this basis are strictly excluded.”).

35. Compare GC IV Commentary, *supra* note 32, art. 42(1) (“[T]he mere fact that a person is a subject of an enemy Power cannot be considered as threatening the security of the country where he is living; it is not therefore a valid reason for interning him or placing him in assigned residence.”), with Chang, *supra* note 5, at 18 n.84 and accompanying text (citing the World War II Enemy Alien Control Program, he states “[b]elligerents can detain enemy persons present on their home territory at the outbreak of hostilities”).

36. AP I, *supra* note 20, art. 51(2)–(3).

37. Ipsen, *supra* note 26, at 79–82.

38. A person may be *hors de combat* if he is wounded, surrenders, or is in the power of an adverse party. AP I, *supra* note 20, art. 41(2).

39. Both Common Article 3 and AP II contemplate internment in NIAC of individuals who may not have taken part in hostilities, but they offer little guidance as to how to distinguish between civilians and belligerents. See CA 3, *supra* note 13, para. 1 (lacking the detail of the rest of GC III and GC IV, which apply respectively to POWs and civilians in IAC); AP II, *supra* note 20, at parts II–III (outlining protections for civilians and those detained or interned but not how to classify these groups). Indeed, there are some who have argued that in NIAC, all non-state actors are civilians, the detention or internment of whom must be done in accordance with the terms of GC IV. See, e.g., John Bellinger & Vijay Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT’L L. 201, 213–21 (2011) (describing the difficulty in determining “who is subject to detention in conflicts with nonstate actors” and noting that some scholars and courts have suggested that fighters who do not qualify for POW status should be treated as civilians in accordance with GC IV).

40. See, e.g., AP II, *supra* note 20, art. 13(1)–(2) (requiring the parties to a NIAC to distinguish between civilians and belligerents in their military operations). AP II applies by its terms to conflicts within the territory of a High Contracting Party between its armed forces and organized armed groups. *Id.* art. 1. But the United States has stated an intention to apply AP II to all conflicts covered by Common Article 3, and the Supreme Court has applied Common Article 3 to the conflict with al-Qaeda. REAGAN, *supra* note 22, at viii (“We are therefore recommending that U.S. ratification be subject to an understanding declaring that the United States will apply the Protocol to all conflicts covered by Article 3 common to the 1949 Conventions.”); Hamdan v. Rumsfeld, 548 U.S. 557, 630–41 (2006). AP II contemplates a civilian population, as well as “internment” and “detention,” and thus a distinction

below, a state can be guided in this process by an understanding of how states historically have addressed these questions in the IAC context and of the broader principles undergirding these rules.⁴¹ Moreover, it may well be that in certain NIACs—for example, when facing an amorphous armed force that arguably has only a military wing—these Step One and Two inquiries begin to converge; nevertheless, the obligations on states to constrain their actions in accordance with both sets of principles remain.

B. *Neutrality Law*

In contrast to the law of armed conflict, the international law of neutrality predominantly addresses the rights and responsibilities of states that are *not* “enemies” of one another, and developed historically to regulate the conduct between neutral and belligerent states during international armed conflict. As a general matter, states that are not party to a particular conflict may understandably wish to avoid the consequences of war and may, to the extent neutrality law continues to apply, choose to adopt “neutral” status. As a corollary to their right to be left alone, the law of neutrality imposes upon such states the duties of non-participation and impartiality.⁴² These principles are articulated in the Hague Conventions of 1907, in particular, Hague V and XIII, which represent the last comprehensive codification of this body of law.⁴³ Among the key rules neutrality law imposes on states are the following: (1) neither neutral nor belligerent states may permit movement of troops or war supplies across the territory of a neutral state, though belligerent warships may pass through a neutral’s territorial waters, (2) a corps of combatants or recruiting agencies may not form on neutral territory, and (3) a neutral state must not furnish military supplies to a belligerent.⁴⁴

between the two, though as with Common Article 3 it is far less detailed than its sister treaty addressing IAC, AP I. AP II, *supra* note 20, arts. 5, 13.

41. See, e.g., U.K. JOINT SERVICE MANUAL, *supra* note 19, para. 15.5 (“While it is not always easy to determine the exact content of the customary international law applicable in non-international armed conflicts, guidance can be derived from the basic principles of military necessity, humanity, distinction, and proportionality”); Curtis Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2114 (2005) (“[L]aw-of-war criteria for combatancy are designed to determine when a person’s association with or activity related to a party to an armed conflict justifies subjecting that person to the consequences of combatant status under the laws of war. These criteria thus can provide guidance on what type of association with al-Qaeda suffices for inclusion within the “organization” for purposes of the AUMF.”). See also *infra* note 69.

42. See, e.g., Michael Bothe, *The Law of Neutrality*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 485, 485 (Dieter Fleck ed., 1995) (“The duty of non-participation means, above all, that the state must abstain from supporting a party to the conflict[,]” which includes a defense of that neutrality against others who may seek to use the state’s resources.); *id.* at 485–86 (“The duty of 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 as between the parties to the conflict. . . .”).

43. Hague V, *supra* note 15; Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 36 Stat. 2415, 1 Bevans 723 [hereinafter Hague XIII]; e.g., Bothe, *supra* note 42, at 487 (“There has, however, been no comprehensive codification of the law of neutrality since the Hague Conventions of 1907.”).

44. Hague V, *supra* note 15, arts. 2, 4–5; Hague XIII, *supra* note 43, arts. 6, 10; see also YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 25–26 (4th ed. 2005) [hereinafter DINSTEIN, WAR] (discussing “characteristic rules” of the laws of neutrality).

As a body of law that developed to govern relationships between states, the international laws of neutrality did not generally impose specific obligations on individuals. Moreover, as Chang notes, and as the Hague rules make explicit, a neutral state was not responsible for many actions of private individual citizens or residents despite the fact that such acts—had they been undertaken by the state—may have otherwise violated the state’s neutrality.⁴⁵ For example, an individual might cross the state’s borders to join the armed forces of a belligerent state or export arms to a belligerent state without implicating the origin state’s neutrality.⁴⁶ The neutral state might separately choose to impose domestic restrictions on its own citizens and residents in order to curb their assistance to belligerents; but if the neutral state chose to do so, neutrality law required that any such restrictions “be impartially applied . . . to both belligerents.”⁴⁷ Nevertheless, pockets of neutrality law and practice have applied specifically to individuals. The prize courts, which Chang touches on in his Article, adjudicated questions regarding vessels captured at sea that were, for example, accused of carrying contraband in violation of neutrality, and the repercussions that flowed from such activities.⁴⁸

Under the traditional view, when neutral states take actions that are seen as favoring one belligerent state party to a conflict and therefore violating neutrality, the offended state may take action according to the nature of the violation.⁴⁹ However, such violations do not necessarily bring neutrality to an end⁵⁰ or necessitate

45. See, e.g., ROBERT TUCKER, *THE LAW OF WAR AND NEUTRALITY AT SEA* 209 (U.S. Naval War College ed., 1955) (“It is one of the principal characteristics of the traditional system of neutrality that whereas the neutral state is under the strict obligation to abstain from furnishing belligerents with certain goods and services it is normally under no obligation to prevent its subjects from undertaking to perform these same acts of assistance.”). Tucker notes that, for example, the export of war materials by private individuals is permitted, though warships are not, as the state is obliged to prevent its territory turning into a base of operations for belligerents. *Id.* at 209 n.30.

46. Hague V, *supra* note 15, arts. 6–7; see also MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 548 (1959) (While a “neutral state itself is bound . . . not to supply war material to any belligerent, . . . the neutral state is not called upon to prohibit the commercial relations of persons and companies inside its jurisdiction with the belligerent states, even though this involves the supply of war material to the latter . . .”).

47. Hague V, *supra* note 15, art. 9.

48. See, e.g., TUCKER, *supra* note 45, at 105 n.35 (describing the role of the prize courts).

49. See, e.g., OPPENHEIM 7th, *supra* note 16, § 359, at 753 (“Violations of neutrality . . . may at once be repulsed, and the offended party may require the offender to make reparation, and, if this is refused, may take such measures as he thinks adequate to exact the necessary reparation.”).

50. See, e.g., *id.* § 358, at 752 (“Mere violation of neutrality must not be confused with the ending of neutrality, for neither a violation on the part of a neutral nor a mere violation on the part of a belligerent *ipso facto* brings neutrality to an end. If correctly viewed, the condition of neutrality continues to exist between a neutral and a belligerent in spite of a violation of neutrality. A violation of neutrality is nothing more than a breach of a duty deriving from the condition of neutrality. . . . Even in an extreme case, in which the violation of neutrality is so great that the offended party considers war the only adequate measure in answer to it, it is not the violation which brings neutrality to an end, but the determination of the offended party. But this applies only to mere violations of neutrality, and not to a declaration of war or hostilities. Hostilities are acts of war and bring neutrality to an end; and a declaration of war brings neutrality to an end even before the outbreak of hostilities.”); Bothe, *supra* note 42, at 492–94 (“[B]reaches of single duties of neutrality by the state alone [do not] necessarily result in that state becoming a party to the conflict. . . . Support of the aggressor is illegal not only under the law of neutrality, but also under the law prohibiting use of force. Illegal support for an aggressor, however, 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.”).

that the violator has become the “enemy” of either belligerent.⁵¹ And such violations often do not permit the use of force in return, particularly in the post-U.N. Charter world.⁵² In fact, states negotiating the details of neutrality law in its heyday constructed elaborate regimes for redressing violations that fell far short of declaring war at any particular instance and included remedies such as financial compensation.⁵³ The law of neutrality itself did not traditionally articulate when a state or individual gave up its neutral status and became a belligerent (or “enemy,” depending on perspective); it simply acknowledged that, once a state or individual became a belligerent, it could no longer avail itself of its prior neutrality.⁵⁴

The laws surrounding armed conflict have evolved considerably since the 1907 Hague Conventions, and there is a wide range of views about what remains of neutrality law in the post-U.N. Charter world.⁵⁵ Moreover, neutrality law is traditionally an inter-state concept, and the extent to which it operates at all in *non-international* armed conflict is unclear.⁵⁶ Nevertheless, principles derived from

51. See, e.g., Bothe, *supra* note 42, at 493 (“Only where a hitherto neutral state participates to a significant extent in hostilities is there a change in status.”).

52. See, e.g., *id.* at 494 (“[I]t is not necessarily legal to attack a state violating the law of neutrality and to make it, by that attack, a party to the conflict.”). Such issues today involve not only neutrality law but obligations under the U.N. Charter. *Id.* at 493–94.

53. See, e.g., GREENSPAN, *supra* note 46, at 584 (Remedies for breach of neutrality included “protest to the power concerned, demand for compensation, retaliatory action in the nature of reprisals, and, in the ultimate resort, declaration of war.”). In the Alabama Claims Arbitration of 1872, for example, Great Britain was held liable to the United States for \$15,500,000 for violations of neutrality arising out of Confederate use of British ports. *Id.* at 584 n.219.

54. See, e.g., TUCKER, *supra* note 45, at 259 (“A state may abstain from active participation in a war while at the same time abandoning many of the duties imposed upon non-participants by the law of neutrality. In abandoning its duties the neutral state thereby surrenders its right to demand from belligerents that behavior it would otherwise be entitled to claim. The offended belligerent may demand appropriate measures of redress and—should it so desire—resort to reprisals against the offending neutral. But as long as the belligerent refrains from attacking the neutral, and the neutral refrains from directly joining in the hostilities by attacking one of the belligerents, a status of neutrality is maintained.”); DINSTEIN, WAR, *supra* note 44, at 25 (“The laws of neutrality are operative only so long as the neutral State retains its neutral status. Once that State becomes immersed in the hostilities, the laws of neutrality cease being applicable, and the laws of warfare take their place.”); Hague V, *supra* note 15, art. 17 (“A neutral [person] cannot avail himself of his neutrality . . . [i]f he commits hostile acts against a belligerent [or] [i]f he commits acts in favor of a belligerent. . . .”).

55. See, e.g., Ashley S. Deeks, “Unwilling or Unable”: *Toward a Normative Framework for Extra-Territorial Self-Defense*, 52 VA. J. INT’L L. (forthcoming 2012) (manuscript at 17 n.33), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1971326 (noting the “claim [by some] that neutrality law is dead in the post-Charter era[.]” but arguing that “[t]he better view is that neutrality law remains relevant and applicable, at least to international armed conflicts”); Bothe, *supra* note 42, at 487–89 (The Hague rules “of 1907 have in part been rendered obsolete by later practice. . . . [N]eutrality during armed conflicts is permissible and possible. . . . [but] the duty of non-participation as well as that of impartiality may be restricted by decisions of the Security Council.”); DINSTEIN, WAR, *supra* note 44, at 163 (“Neutrality as a policy . . . is far from *passé*, even under the law of the U.N. Charter.”). In some areas, for example, maritime law, neutrality law appears to have a greater continued vitality than in others.

56. See, e.g., Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 261 (July 8) (“The Court finds that . . . the principle of neutrality, whatever its content . . . is applicable (subject to the relevant provisions of the United Nations Charter), to all international armed conflict.”); Tess Bridgeman, Note, *The Law of Neutrality and the Conflict With al-Qaeda*, 85 N.Y.U. L. REV. 1186, 1213–14 (2010) (making a policy-based, rather than formalistic, argument for the application of neutrality law, “at least in ‘internationalized-NIACs,’” because “the protectiveness of the [law of armed conflict] framework would be undermined if traditional rules ceased to apply just because of the novelty or uniqueness of a conflict”). There is at least significant historical precedent for invoking neutrality in the face of another state’s internal civil war. See, e.g., GREENSPAN, *supra* note 46, at 584 (discussing Great

neutrality law may inform the scope of state action, for example, in addressing certain aspects of the geographic scope of the conflict and the kinds of actions states may take on the territories of non-belligerents.⁵⁷ In addition, some scholars have suggested that once an armed conflict exists between two belligerent parties, neutrality principles and practice may offer some guidance in determining when a third state or force has so thrown in its lot with one of the parties to the conflict that it has in essence entered the conflict alongside that party.⁵⁸

C. *The Current Conflict: Domestic and International Law Issues*

In the current conflict—which since 2001 has been characterized at different points as having both IAC and NIAC components⁵⁹—the U.S. government has interpreted the 2001 AUMF to include the use of force against al-Qaeda, the Taliban, and associated forces.⁶⁰ With respect to the initial *jus ad bellum* of the current conflict, the United States relied on a theory of self-defense to justify its use of force against al-Qaeda and the Taliban after the attacks of September 11, 2001.⁶¹ Both the executive branch and the federal courts have agreed that a state of armed conflict of some form has existed between the United States and al-Qaeda and Taliban forces.⁶² Unpacking the term “associated forces” is therefore where much of

Britain’s declaration and violation of neutrality during the American Civil War).

57. See, e.g., Bridgeman, *supra* note 56, at 1187–96 (interpreting neutrality law as providing geographic constraints on the United States’ conflict with al-Qaeda, and thus affording a more complete and protective legal regime); Deeks, *supra* note 55 (manuscript at 16) (analyzing the “unwilling or unable” test for when a state may use force on another state’s territory in response to an armed attack by a non-state actor, and sourcing the test’s pedigree to neutrality law).

58. See, e.g., *infra* note 66 and accompanying text.

59. President Bush initially declared the entire conflict to be an IAC, though he determined that the Taliban and al-Qaeda forces as a group were not to receive POW treatment based on an argument that they did not follow the laws of war. Memorandum from George W. Bush, President of the United States, to Vice-President of the United States et al., Humane Treatment of Taliban and al Qaeda Detainees (Feb. 7, 2002) [hereinafter Memorandum from George W. Bush, Humane Treatment of Taliban and al Qaeda Detainees], http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf. The Supreme Court later applied Common Article 3—applicable in NIAC—to the conflict, at least with respect to al-Qaeda forces. *Hamdan v. Rumsfeld*, 548 U.S. 557, 629–31 (2006).

60. E.g., March 13 Filing, *supra* note 2, at 2 (asserting that under the 2001 AUMF “[t]he President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners”). Congress recently affirmed this authority in the 2012 National Defense Authorization Act. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021 (2011).

61. See, e.g., Letter from John Negroponte, U.S. Representative to the U.N., to U.N. Sec. Council President (Oct. 7, 2001), http://www.bits.de/public/documents/US_Terrorist_Attacks/negroponte.htm (invoking the United States’ “inherent right of individual and collective self-defense” against al-Qaeda and the Taliban following the attacks of September 11, 2001). Al-Qaeda, for its part, declared war against the United States in several statements in the 1990s and had engaged in several attacks on U.S. interests prior to September 11, 2001. See, e.g., NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT §§ 2.1, 2.4 (2004), available at http://www.9-11commission.gov/report/911Report_Ch2.htm (detailing Osama bin Laden’s statements against the United States).

62. See, e.g., March 13 Filing, *supra* note 2, at 1 (calling the United States’ conflict with al-Qaeda and the Taliban “a novel type of armed conflict”); *Hamdi v. Rumsfeld*, 542 US 507, 521 (2004) (stating that the United States was engaged in an armed conflict against the Taliban that was not, at that time, “entirely unlike those of the conflicts that informed the development of the law of war”); *Hamdan*, 548 U.S. at 629–31 (holding that Common Article 3, applicable to NIAC, applies in the conflict with al-Qaeda).

the interesting work lies in the Step One “Who are the Parties” inquiry. The government and several federal courts have suggested that the law of war concept of “co-belligerency” informs the scope of the associated forces prong as a matter of domestic law.⁶³ Under the concept of co-belligerency, a state—or organized armed force, in this context—may enter the conflict alongside a belligerent, itself becoming a belligerent and thus a party to the conflict.⁶⁴ Though the contours of the concept remain remarkably undertheorized, courts addressing the associated forces prong have to date included in that category groups that fought alongside al-Qaeda or Taliban forces in hostilities or in joint operations against the United States.⁶⁵ Jack Goldsmith and Curtis Bradley have argued, in their seminal article on the congressional authorization to use force under the 2001 AUMF, that co-belligerents in this conflict include organizations that “participate with al Qaeda in acts of war against the United States [or] systematically provide military resources to al Qaeda.”⁶⁶

With respect to the Step Two inquiry, the U.S. government in the Obama Administration has asserted authority to detain certain individuals based on the 2001 AUMF as informed by the laws of war, most relevantly *jus in bello*.⁶⁷ In asserting the legality of military detention *until the end of hostilities*, the government and the

63. *E.g.*, March 13 Filing, *supra* note 2, at 7 (asserting that “the United States has authority to detain individuals who, in analogous circumstances in a traditional international armed conflict between the armed forces of opposing governments, would be detainable under principles of co-belligerency”); *Hamlily v. Obama*, 616 F. Supp. 2d 63, 70 (D.D.C. 2009) (“The authority also reaches those who were members of ‘associated forces,’ which the Court interprets to mean ‘co-belligerents’ as that term is understood under the law of war.”). *But see* *Al-Bihani v. Obama*, 590 F.3d 866, 873 (D.C. Cir. 2010) (describing as “folly” an “attempt to apply the rules of co-belligerency” to a non-state entity). This concept is particularly important as a domestic law matter in interpreting the scope of the authority Congress authorized in the 2001 AUMF. An archetypal example of co-belligerency is the entrance of Vichy France into the conflict alongside Germany in World War II. The U.S. President did not need to seek additional authorization to use force against this new party as it was considered a co-belligerent of Germany. Bradley & Goldsmith, *supra* note 41, at 2111–12.

64. *See, e.g.*, GREENSPAN, *supra* note 46, at 531 (A co-belligerent state is a “fully fledged belligerent fighting in association with one or more belligerent powers,” citing the example of Italy in World War II, after it aligned itself with the Allies); OPPENHEIM 7th, *supra* note 16, § 77, at 253 & n.1 (noting that “co-belligerents” are “associated with one another for the purpose of the war”).

65. *See, e.g.*, *Khan v. Obama*, 646 F. Supp. 2d 6, 19 (D.D.C. 2009), *aff’d*, 655 F.3d 20 (D.C. Cir. 2011) (holding that “HIG qualifies as an ‘associated force[] . . . engaged in hostilities against the United States or its coalition partners”). Very few judges, if any, have delved into the theory behind this concept, and it is as yet unclear what are the outer contours of the concept of “associated forces” or when a group has become sufficiently entangled in the conflict alongside al-Qaeda or Taliban forces that it is, in essence, a “co-belligerent” of those forces and has entered the armed conflict against the United States. The few judges that have affirmatively upheld detention on an associated forces theory have simply cited the co-belligerency concept, without significant analysis. *See, e.g.*, *Hamlily*, 616 F. Supp. 2d at 65 (holding that “the government has the authority to detain members of ‘associated forces’ as long as those forces would be considered co-belligerents under the law of war”).

66. Bradley & Goldsmith, *supra* note 41, at 2112–13 (drawing on the concepts of neutrality and co-belligerency to inform the scope of the term “organization” in the 2001 AUMF and arguing that the concept of “co-belligerent” should extend to those organizations “that *systematically* violate the laws of neutrality”) (emphasis added).

67. *See, e.g.*, March 13 Filing, *supra* note 2, at 1 (“The detention authority conferred by the AUMF is necessarily informed by principles of the laws of war.”); Harold Koh, Legal Adviser, U.S. Dep’t of State, Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), <http://www.state.gov/s/l/releases/remarks/139119.htm> (“[W]e are resting our detention authority on a domestic statute—the 2001 Authorization for Use of Military Force (AUMF)—as informed by the principles of the laws of war.”).

courts are employing the concept of belligerency and addressing belligerent military detention versus another form of restraint such as civilian internment or criminal justice. Though the precise parameters of the government's detention and targeting authority are a matter of ongoing debate and remain particularly controversial at the outer limits,⁶⁸ as an international law matter the principles of *jus in bello* are essential components in defining the contours of that authority.

The U.S. government under the Obama Administration has described, in the context of the Guantanamo habeas litigation, the functional approach it employs to define the concept of belligerency in this conflict. As I will explore further below, a critical component of the government's stated legal theory for detention is that it looks by "analogy" to the nature of belligerency in IAC in detaining members of al-Qaeda or Taliban forces.⁶⁹ But the government has taken a fairly broad view of what quantum and nature of evidence should be sufficient, at least in a habeas proceeding, to find someone detainable and has challenged rules requiring evidence of fighting or specific executing of orders within a command structure. Instead, the government has in multiple briefs posited that evidence of travel patterns consistent with al-Qaeda or Taliban forces, attendance at al-Qaeda or Taliban training camps, and stays in al-Qaeda or Taliban guesthouses may point to a finding that an individual was part of these forces.⁷⁰

The federal courts have in large part to date coalesced around this approach to the government's authority. As I will discuss in greater detail below, federal judges have not as a general matter in the Guantanamo habeas litigation addressed civilian detention or internment. Instead, the courts have generally followed the government's lead in operating around a functional concept of belligerency in which the presumption is that detention is lawful until the end of hostilities. In fact, the *Hamdi* plurality opinion, upon which much of the current jurisprudence rests, derived the government's authority to detain an individual under the 2001 AUMF from the authority to use force and understood that authority to last "for the duration of the particular conflict," thus contemplating the authority in terms of belligerency and not civilian internment.⁷¹ The courts have repeatedly refused to espouse the more limited standard for detention often proposed by detainee counsel, who have suggested that the state's detention authority in NIAC is limited to those individuals who directly participate in hostilities.⁷² Instead, panels of the D.C. Circuit

68. See, e.g., Bradley & Goldsmith, *supra* note 41, at 2113 ("[E]ven after the terrorist organizations encompassed by the AUMF are identified, a second question arises concerning which individuals are included within such organizations.").

69. See, e.g., March 13 Filing, *supra* note 2, at 1 (asserting authority to detain "those persons whose relationship to al-Qaeda or the Taliban would, in appropriately analogous circumstances in a traditional international armed conflict, render them detainable").

70. See, e.g., Brief for Respondents-Appellants at 28-32, *Uthman v. Obama*, 637 F.3d 400 (D.C. Cir. 2011) (No. 10-5235) (arguing that the site of Uthman's capture, his travel route to Afghanistan, and his stays at al-Qaeda guesthouses were all evidence of his involvement with al-Qaeda).

71. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 ("We conclude that detention of individuals [who fought against the United States in Afghanistan as part of the Taliban] . . . for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."); *id.* at 520 ("It is a clearly established principle of the law of war that detention may last no longer than active hostilities." (citing GC III, *supra* note 12, art. 118) (regarding prisoner-of-war detention))).

72. See, e.g., *Hamlily v. Obama*, 616 F. Supp. 2d 63, 74 (D.D.C. 2009) ("reject[ing] petitioners' argument 'that the laws of war permit a state to detain only individuals who 'directly participate' in

have, in several cases now, found individuals detainable as part of al-Qaeda or Taliban forces based on various constellations of training, guesthouse residence, and travel through Tora Bora at the time of the major battle there with U.S. forces.⁷³ Yet while there is growing consensus among the judges on the D.C. Circuit regarding the nature and quantum of evidence sufficient to uphold detention authority, there is still a great deal of murkiness with respect to the outer contours of the legal architecture for that authority. This is evidenced most starkly by the interplay between the *Al-Bihani* decision of January 2010, in which Judge Brown dismissed international law as irrelevant to the government's detention authority,⁷⁴ and the subsequent denial of *en banc* review in that case, in which seven judges of the court took the unusual step of dictating that part of the panel's reasoning.⁷⁵

Also as yet unsettled are a number of associated questions including the extent to which particular provisions of the Geneva Conventions cabin the authority of the U.S. government,⁷⁶ the extent to which the government's authority extends to "supporters" who are not otherwise properly classified as "part of" enemy forces,⁷⁷ and the scope of the associated forces that are properly considered part of this armed conflict.⁷⁸ And though the courts have generally agreed on a functional theory of membership, it remains unclear how they will distinguish between individuals who are truly operating as "part of" the force and others who may be more akin to "freelancers," who may interact with the force but arguably are not truly members.⁷⁹ In determining membership, the courts have now turned away from requiring proof of action within the "command structure" of the organization,⁸⁰ though there is some

hostilities in non-international armed conflicts." (quoting *Gherebi v. Obama*, 609 F. Supp. 2d 43, 67 (D.C.C. 2009))).

73. See, e.g., *Esmail v. Obama*, 639 F.3d 1075, 1076–77 (D.C. Cir. 2011) (finding detention authorized based on a combination of training, study at an al-Qaeda-connected institute, travel through Tora Bora in December of 2001, and capture alongside men who had participated in the fighting); *Uthman*, 637 F.3d 400, 404 (D.C. Cir. 2011) (finding detention authorized based on recruitment and travel patterns, appearance at an al-Qaeda guesthouse, capture near Tora Bora alongside al-Qaeda members, and an unlikely cover story).

74. See *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010) ("The international laws of war as a whole have not been implemented domestically by Congress and are therefore not a source of authority for U.S. courts.").

75. See *Al-Bihani v. Obama*, 619 F.3d 1, 1 (D.C. Cir. 2010) (order denying rehearing *en banc*) (statement by Chief Judge Sentelle and Circuit Judges Ginsburg, Henderson, Rogers, Tatel, Garland, and Griffith) ("We decline to *en banc* this case to determine the role of international law-of-war principles in interpreting the AUMF because, as the various opinions issued in the case indicate, the panel's discussion of that question is not necessary to the disposition of the merits.").

76. See, e.g., *Al Warafi v. Obama*, 409 F. App'x 360, 361 (D.C. Cir. 2011) (remanding the case for a finding on the issue of whether petitioner would qualify as protected medical personnel under GC I, "assuming arguendo [its] applicability").

77. See, e.g., *Hatim v. Gates*, 632 F.3d 720, 721 (D.C. Cir. 2011) (vacating the district court's grant of the writ of habeas corpus and, despite the lower court's finding that Hatim was not "part of" al-Qaeda or Taliban forces, remanding the case based in part on the district court's failure to decide whether Hatim had purposefully and materially supported those forces).

78. To date, the courts have found in limited instances that a group was an associated force, but they have not shown great interest in fleshing out the outer contours of this concept. See *supra* note 65 and accompanying text.

79. See, e.g., *Salahi v. Obama*, 625 F.3d 745, 751–52 (D.C. Cir. 2010) (quoting *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010)) (noting that membership as part of al-Qaeda must be based on a functional approach but that "the purely independent conduct of a freelancer is not enough" to establish that an individual is "part of" al-Qaida").

80. See, e.g., *id.* ("Evidence that an individual operated within al-Qaida's command structure is

suggestion that such proof might be more important the further an individual is captured from an active battlefield, where—though the courts have not addressed these questions directly—evidence sufficient to establish membership might require a different calculation and shifted presumptions.⁸¹ As I will discuss further below, this is one area where we might draw usefully on principles derived from the prize court cases and subsequent law and practice.⁸² Due to the quite deferential position the courts are now taking on the evidence required to prove functional membership in this current conflict, they have not often had occasion to examine the outer contours of the government's authority in the context of the Guantanamo cases, and, as it turns out, these issues may not make or break the vast majority of those decisions. But whether or not the courts engage these questions in the context of legacy Guantanamo cases, these issues are highly relevant to the U.S. government's and others states' actions going forward, including in both the detention and targeting realms.

This is a conversation that is in many ways still in an incubatory stage. The D.C. Circuit has yet to resolve its understanding of the full scope of the government's authority, and the Supreme Court has yet to decide the merits of a Guantanamo habeas case and may never do so. And, of course, discussions that could have an impact on the contours of the government's authority are happening not only in the courts. They are happening on the front lines and in conversations between states and organizations.⁸³ Unless and until states convene to craft a new convention to settle outstanding questions regarding state action in the kind of conflict in which we now find ourselves, the government, the courts, other states, and commanders in the field together will have to keep muddling through in this common law-type approach.

II. A NEW ROLE FOR THE LAW OF NEUTRALITY?

Despite the broad deference the federal courts are showing the government and despite the government's fairly broad view of its own powers, Chang asserts that

'sufficient but not necessary to show he is 'part of' the organization.'").

81. See, e.g., *id.* (noting that while a lack of evidence that an individual "received and executed orders [is not] dispositive," nevertheless in the instant case, where an individual "is not accused of participating in military action against the United States" but rather alleged to be "'part of' al-Qaida because he swore *bayat* and thereafter provided various services to the organization," the question of whether said individual "performed such services pursuant to al-Qaida orders may well be relevant to determining if he was 'part of' al-Qaida or was instead engaged in the 'purely independent conduct of a freelancer'"). It may well be that as the point of capture or attack moves away from a traditional battlefield, to the extent the law of armed conflict continues to apply, the presumptions may shift away from belligerent status or a military framework or the evidentiary requirement should be greater or more stringently applied. A shifting evidentiary burden may be appropriate, akin to the temporally-linked standard proposed by Matthew Waxman. See Matthew Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1408–12 (2008) (suggesting an increasing standard for continued military detention over time).

82. See *infra* text accompanying notes 114–120 & 171–173.

83. See, e.g., Bellinger & Padmanabhan, *supra* note 39, at 203 (discussing, *inter alia*, meetings between "states that have engaged in counterterrorism and detention operations [in order to] identify applicable international legal rules as well as the areas where further legal development is needed"); see also Melzer, *supra* note 27, at 1–2 (describing how "40 to 50 legal experts from academic, military, governmental, and non-governmental circles" were brought together to participate in their private capacity in a series of expert meetings to "provide recommendations concerning . . . the notion of direct participation in hostilities. . . . in light of the circumstances prevailing in contemporary armed conflicts").

current approaches to the law are overly constrictive of the government's detention authority.⁸⁴ He seeks instead in large part to supplant both the *jus ad bellum* and *jus in bello* approaches that the government and the courts have applied in the current conflict with a new framework derived from the law of neutrality, which he argues would permit a much broader interpretation of the government's authority to detain and, it would seem to follow by implication, to target. For the reasons explained fully below, it may be possible to draw from the historic law of neutrality and practice some insight to help inform the contours of the state's authority in modern armed conflict, and in fact this insight may suggest further rather than fewer constraints on the government's authority. But neutrality law and practice cannot simply supplant the *jus ad bellum* and *jus in bello* principles that operate in armed conflict. It would be both wrong and unlawful to jettison these recognized law of war constraints on the government's detention authority.

A. *The "Enemy" Under Chang's Framework (Step One)*

Chang's proposed detention framework is a complicated one, and it may be useful at the outset to attempt to map it out. In order to detain an individual, under Chang's theory, the state must first establish his or her "enemy status."⁸⁵ This is the Step One explained above. Chang agrees that in an IAC, the determination of enemy status is relatively simple. The enemy generally includes the entirety of a hostile country, including its citizens and residents.⁸⁶ In a NIAC, however, Chang rightfully asserts that this is a more difficult determination.⁸⁷ But rather than draw from principles of *jus ad bellum* governing the right to use force to determine the parties to the conflict, Chang instead looks to the international law of neutrality. "Enemies" under Chang's rubric fall into two categories: (1) "those who have committed hostile acts against the United States" and (2) those who may not *actually* be hostile to the United States "but have sufficiently aided the enemy so that the enemy's hostility may be attributed to them."⁸⁸ Category (1) includes both individuals who have directly participated in hostilities as well as those who have participated indirectly, into which category he seems to include individuals providing "even ordinary goods, like food."⁸⁹ Category (2) is made up of individuals who ally themselves with the belligerent group,⁹⁰ individuals who "substantially aid[] the enemy's war effort";⁹¹ and individuals who provide support to the enemy in breach of a duty not to do so, "whether [they do] so knowingly or purposefully" or not.⁹²

84. Chang, *supra* note 5, at 6.

85. *Id.* at 50–51.

86. *Id.* at 52 ("In armed conflict between nations, the question of who is the enemy is easily answered. Hostility is imputed broadly from an enemy government to its citizens and residents. Armed forces, when they invade a hostile country, can, in general, deem all to be enemies.").

87. *Id.*

88. *Id.* Note that in order to come within the 2001 AUMF, Chang asserts, the intention must be "to wage al-Qaeda's war against the United States." *Id.* at 53. He thus hints at the concept of co-belligerency, at least as far as the domestic authorization is concerned.

89. *Id.* at 56.

90. Chang, *supra* note 5, at 60–65. Chang defines this as "joining with or becoming 'part of' an enemy group." *Id.* at 60. He also employs other terms, such as "affiliates," which suggest he may be envisioning a low bar for establishing enemy status. *Id.*

91. *Id.* at 66.

92. *Id.* at 68. Although Chang does not flesh this out, one infers that this approach would deem an

Chang's Step Two, by contrast, is quite simple. Once an individual can be deemed an "enemy," under Chang's framework he may be detained as long as military necessity permits.⁹³ Chang thus eschews the vast majority of *jus in bello* and boils down the four core law of war principles to one—that of military necessity.

Chang reasonably notes the difficulty of ascertaining the contours of the "enemy" in the current conflict.⁹⁴ But his sweeping attempt to resolve this difficulty by asserting that the "enemy" is defined by the laws of neutrality relies on a misinterpretation of how the laws of neutrality traditionally operated, as well as intervening events and law, and results in an overbroad conception of the current conflict.

The most critical question that Chang never answers is: when does a state or other entity's action cross over the line from a mere violation of neutrality to entrance into the conflict as a belligerent? Surely this answer could be useful in determining the contours of the forces against whom we are engaged in the current armed conflict.⁹⁵ Careful exploration of the practice of states during the time periods Chang examines might offer useful insight into how states in those periods viewed the line between neutrality and belligerency with respect to such acts. As I discuss in more detail below, my own review of the literature suggests that the answer will likely be far more nuanced, narrow, and steeped in the political decisions of states than Chang's Article suggests.⁹⁶

B. *Misinterpretations of Neutrality Law*

At the heart of Chang's argument that neutrality law should define the contours of the state's detention authority is a conflation of two distinct concepts: (1) whether certain acts by a state or force amount to a violation of neutrality and (2) whether those acts convert the violator into a belligerent who thus may be lawfully subject to the use of force by the offended party. Chang asserts quite explicitly that neutrality law itself is the *jus ad bellum* governing use of force in this conflict.⁹⁷ This is

"enemy" any individual residing in the United States who provided unwitting support to al-Qaeda. For example, Chang asserts that a neutral person residing in the territory of a belligerent "is deprived of his neutral rights by virtue of his support" because the illegality of the support itself "creates an inference of hostile intent." *Id.* at 70, 71.

93. *Id.* at 51. In Chang's view, military necessity "cannot be stated with much more specificity than that military commanders must have a good reason for detention." *Id.* In addition, he asserts, "this requirement would likely not properly be the subject of judicial review." *Id.*

94. *Id.* at 52.

95. *See supra* note 66.

96. *See, e.g.,* CHARLES G. FENWICK, THE NEUTRALITY LAWS OF THE UNITED STATES 3 (1913) ("[C]ertain acts of friendliness on the part of neutral towards belligerent states, such as the furnishing of war-ships with limited supplies of food, coal, etc., . . . are permitted in spite of the fact that they involve a certain amount of *indirect* assistance to the belligerent. Just where the line is to be drawn between direct and indirect assistance, and accordingly just what acts of friendliness are still permissible on the part of neutrals towards belligerents, has not been determined by any principle but has been worked out synthetically by the practice of nations.").

97. *See, e.g.,* Chang, *supra* note 5, at 41–42 ("Neutrality law draws the proper boundaries of the war in international law and gives the first step in the legal inquiry of whether a foreign national is properly the object of the use of force, including detention in that war. "); *id.* at 41 ("The question of whether force may be used outside of Iraq and Afghanistan is a *jus ad bellum* question. . . . The proper body of law to answer that question is neutrality law . . ."); *id.* at 42 ("Neutrality law first informs the construction of the 2001

incorrect. While becoming a belligerent—either through acts of belligerency or by joining a conflict on behalf of a belligerent—surely precludes a party from asserting neutral immunity, it does not make the converse true. There is simply no support for the view that all violations of neutrality render the violator a belligerent or result in a state of armed conflict between the parties, nor do such violations always (or even usually) permit a use of force in return.⁹⁸

In fact, *jus ad bellum* and the laws governing neutrality are two distinct, though at times overlapping, legal regimes. In a particular case, neutrality law may inform the content of *jus ad bellum*—there may be instances where violations of neutrality principles give rise to a particularized lawful use of force⁹⁹—but the two are hardly coterminous. In addition, whereas neutrality law governs the relations between neutral and belligerent states *in times of armed conflict*, the application of *jus ad bellum* does not presuppose an armed conflict; in fact, it typically governs the question of *entry* into such conflict. Therefore, to the extent neutrality law or practice has any bearing on whether an entity has so aligned itself with a belligerent party as to enter the conflict, it requires a pre-existing armed conflict between at least two parties in order to have any relevance at all.¹⁰⁰ Thus, while neutrality law may provide guidance in determining the contours of co-belligerents who enter the conflict on behalf of al-Qaeda, as Bradley and Goldsmith have argued,¹⁰¹ it certainly cannot be said to define the contours of the “enemy” writ large, and it cannot operate at all in the absence of an already clearly established belligerent.¹⁰²

Though Chang at points acknowledges that mere violations of neutrality are not sufficient to deem the violator the “enemy,”¹⁰³ he persistently makes the leap from violator to “enemy” without providing a substantive or legal explanation. For example, he cites a source that states neutrality law imposes a duty on states to abstain from “furnishing belligerents any material assistance for the prosecution of war.”¹⁰⁴ From this, Chang derives that such “assistance would be legally equivalent to participating in hostilities and inconsistent with neutral status.”¹⁰⁵ By way of

AUMF by explaining who are the initial enemies targeted by the authorization. Neutrality law also informs the construction of the 2001 AUMF by expanding it to implicitly authorize the use of force against neutrals who violate duties of neutrality in relation to the armed conflict and thus forfeit their immunity under neutrality law.”); *id.* at 45 (“All those who are enemies in the war, as defined by the international law of neutrality, also fall within the [2001 AUMF].”); *id.* at 33 (“Neutrality law’s framework of neutral duties and neutral immunities is *jus ad bellum*, meaning that it gives standards for *whether a state can resort to force* against neutrals”) (emphasis in original).

98. See *supra* notes 49–52 and accompanying text.

99. See, e.g., Deeks, *supra* note 55 (manuscript at 19) (“[N]eutrality law permits a belligerent to use force on a neutral state’s territory if the neutral state is unable or unwilling to prevent violations of its neutrality by another belligerent.”).

100. DINSTEN, WAR, *supra* note 44, at 24 (quoting E. CASTRÉN, THE PRESENT LAW OF WAR AND NEUTRALITY, 422–23 (1954)) (“Neutrality ‘presupposes war between some Powers’: it is ‘the position of a state which does not participate in that war.’”); TUCKER, *supra* note 45, at 199–200 (“[T]he rules regulating the behavior of neutrals and belligerents remain strictly dependent for their operation upon the existence of a state of war.”).

101. See *supra* note 66.

102. Chang, by contrast, argues that “duties under neutrality law operate even if no armed conflict exists because such duties fundamentally concern the resort to force, not how force should be used.” Chang, *supra* note 5, at 40.

103. *Id.* at 51.

104. *Id.* at 29 (quoting TUCKER, *supra* note 45, at 202–03 n.14).

105. *Id.*; see also *id.* at 28 (asserting that a neutral loses “immunity from a belligerent’s military operations” if it violates the neutral duty of impartiality between belligerents).

explanation, Chang declares that it is “a universal legal principle that is part of international law” that “the person who supports the activity can be treated as one who performs it.”¹⁰⁶ Chang lays out a quite complicated test involving determinations of “hostile” character and actions that purports to determine when a neutral crosses the threshold.¹⁰⁷ Yet he ultimately makes conclusory statements that certain activity is over the line and other activity is not, seemingly based on instinct, and thus offering little aid for future line-drawing. For example, Chang argues that a hotdog vendor providing food to al-Qaeda members “seems different from someone serving food to al-Qaeda and Taliban fighters on the front lines in Afghanistan” and ascribes the difference to an attribution to the individual of al-Qaeda’s “hostile purposes” based on “our intuitions.”¹⁰⁸ And Chang repeatedly suggests both that material support by one state on behalf of another amounts to a violation of neutrality and that such assistance would render the offender “at war with our institutions.”¹⁰⁹ Yet he offers no illumination on this critical question: when does such a violation rise to such a level that the offender crosses over the line from neutral to belligerent? The reader is left with the inaccurate impression that under traditional principles of neutrality *any* assistance will render a state or force a belligerent. By way of counter-example, the United States itself has provided “massive support” to a belligerent state during armed conflict—most obviously, the support the United States gave to the Allied powers during World War II before itself entering the conflict—without that assistance rendering it a party to the conflict, though such impartial support did amount to a violation of neutrality.¹¹⁰

C. *Misapplication of Neutrality Principles to Individuals*

Chang’s theory is not limited to exploring the contours of when groups become co-belligerents of al-Qaeda. Instead, he proposes that neutrality law governs the determination of when *individuals* may be detainable enemies. He thus must make the leap from law and practice involving state action to fashion a framework that imputes enemy character to individuals and not just states. To do so, he uses historical examples of state actions that he asserts violated neutrality, makes the logical leap described in the last section to attribute to these acts characteristics of belligerency, and then declares that the same activity when taken by an individual is

106. *Id.* at 29.

107. *Id.* at 52–72.

108. Chang, *supra* note 5, at 58.

109. *Id.* at 33 (“[B]y violating the duties of neutrality (whether by participating in hostilities or materially supporting them), these persons forfeit their neutral immunity. They join the armed conflict and become ‘personally at war with our institutions.’” (quoting *Shaughnessy v. United States ex rel. Mezel*, 345 U.S. 206, 223 (1953) (Jackson, J., dissenting))); *id.* at 31 (“Support to a party’s war effort can be legally indistinguishable from engaging in that war effort because it adds men to the ranks or frees up resources for the fight.”).

110. See Bothe, *supra* note 42, at 493 (“[T]he massive support given by the United States to the states at war with Germany did not render the United States a party to the conflict [with Germany and Italy during World War II] until the declaration of war”); DINSTEIN, WAR, *supra* note 44, at 28 (noting that “[l]ong before its entry into the war, the United States abandoned the semblance of traditional neutrality and openly supported the United Kingdom against Nazi Germany,” and that “even in the period preceding” the United States’ abandonment of neutrality, “although in theory the United States was dealing with belligerents on an equal footing,” its policies “latently discriminated between them” and “gravitated towards a preferential treatment of” Great Britain over Germany).

sufficient to render that individual a detainable “enemy.” He cites examples of state action on behalf of other states that neutrality law prohibited—in particular the loaning of money or subsidies from a neutral state to a belligerent one—and draws from this the conclusion that the same status and prohibitions that relate to states would apply to individuals acting alone.¹¹¹ In doing so, he fails to consider contrary evidence that neutrality law did in fact permit individuals to take actions that would have been a violation of a state’s neutrality if taken by a state or construed as state action. For example, while “[t]he Government of a neutral State must not (directly or indirectly) furnish military supplies of whatever type to a belligerent,” the state may permit individuals to export weapons to belligerents as long as the state does not become a base of military operations against one of the belligerents.¹¹² This same rule applies to the furnishing of loans to belligerents—a neutral state is prohibited from making such loans, whereas it need not “prevent its private nationals from making them.”¹¹³

Perhaps the best example Chang cites regarding the applicability of neutrality obligations to individuals are the prize courts and cases of the 1800s. While practice in the prize courts varied over time, as a general matter merchant ships faced penalties under the laws of neutrality for carrying cargo on behalf of belligerents but only affirmatively lost their neutral status for certain more significant acts, such as providing intelligence services in certain circumstances or carrying troops on behalf of a belligerent.¹¹⁴ Such acts were deemed “unneutral service.” Over time, the courts’ jurisprudence developed to include in this category previously neutral vessels that came under the control of belligerent states.¹¹⁵ Such a shift in the vessel’s status was not truly a question of neutrality so much as belligerency—that is, at what point do a vessel’s acts or agency render it a belligerent acting on behalf of an enemy government? This critical determination and the reasoning these courts employed in drawing that line provide insight into how states and certain courts at the turn of the century viewed the line between mere violations of neutrality and enemy status. This might in turn offer useful insight into modern day questions regarding belligerent

111. Chang, *supra* note 5, at 31–32.

112. DINSTEIN, WAR, *supra* note 44, at 27–29; *see also infra* note 129.

113. GREENSPAN, *supra* note 46, at 553.

114. Exploration of these cases suggests that simple violations of neutrality did not necessarily render the actor a non-neutral, but rather that this change of status came about through acts that amounted to belligerency. *E.g.*, Norman Hill, *The Origin of the Law of Unneutral Service*, 23 AM. J. INT’L L. 56, 65 (“[A] neutral vessel thus assisting the enemy in the prosecution of war loses its neutral character and may be treated as an enemy ship.”); George G. Wilson, *Unneutral Service*, in 1 PROCEEDINGS OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION 68, 77 (1904) (noting that “[p]ilotage by a neutral of an enemy vessel” makes that individual an enemy who may be captured and detained); *id.* at 76 (“[T]he forms of unneutral service which have been hitherto most common are: 1. Carriage of enemy dispatches or correspondence. 2. Carriage of enemy persons. 3. Enemy transport service.”). Even carriage of enemy intelligence did not always render the actor a belligerent. *See, e.g.*, 2 LASSA F. L. OPPENHEIM, INTERNATIONAL LAW: DISPUTES, WAR AND NEUTRALITY § 411, at 526 (2d ed. 1912) [hereinafter OPPENHEIM 2nd] (“[T]he postal correspondence of belligerents as well as of neutrals, whatever its official or private character, found on board a vessel on the sea is inviolable, and a vessel may never, therefore, be considered to be rendering unneutral service by carrying amongst her postal correspondence despatches containing intelligence for the enemy.”).

115. *See* Norman Hill, *Recent Development in the Law of Unneutral Service*, 21 AM. J. INT’L L. 490, 490 (1927) (charting a shift in the jurisprudence from early court decisions, which accorded “enemy status only to such enemy-controlled vessels as were carrying belligerent troops or despatches” to later cases where the vessel may have been involved in ordinary commercial activity, but where “the presence of enemy control has been the determining factor and the nature of the act committed has been secondary”).

agents often operating a great distance from the active theater of war or from the belligerent state on whose behalf they act. In particular, the prize cases may be especially relevant to the very difficult questions courts and states are facing today regarding the line to be drawn between the true freelancer and the individual who is “part of” an organized enemy armed force.¹¹⁶

Rather than explore that interesting line-drawing exercise, however, Chang again conflates violations of neutrality with “unneutral” or enemy status, comparing, for example, neutral ships carrying contraband cargo with “enemy ships,” or suggesting that such acts imbued the operator with “hostile purpose.”¹¹⁷ Chang then asserts that the substance of these prize court decisions—the “specific rules”—are not important, and he instead draws from these cases a broad principle that “substantial assistance,” which he does not define, is equivalent to unneutral service, imbuing the actor with enemy status.¹¹⁸ Such leaps have significant consequences. In Chang’s words, this can mean “the authority not only to stop a person’s money transfers to al-Qaeda accounts, but also to hold that person at Guantanamo in military detention.”¹¹⁹

Extensive exploration of the practice of these prize courts is outside the scope of this Response. Interestingly, however, preliminary review of the “specific rules” of these cases suggests that the lines these courts historically drew between neutral and belligerent service were far more nuanced—and might indeed produce a narrower view of belligerency—than Chang’s Article suggests. The sources on which Chang predominantly relies—when describing the acts that render a vessel belligerent—point to concepts that sound quite familiar and resonate in *jus in bello*, like operation under the command of the enemy and direct participation in hostilities, as I will explore further below.¹²⁰ Far from providing support for a more expansive detention authority than that which the government and courts are currently espousing, these cases may in fact provide support for a potentially narrower view of that authority.

D. Conflation of Criminality with Detainability

To further flesh out his argument that individuals become belligerents—or in his terms “detainable enemies”—by violating neutrality law, Chang makes yet another category error. He repeatedly conflates acts of criminality with acts that render an individual militarily detainable. For example, he argues that because “facilitating the travel of terrorists is proscribed under international and domestic law,” “[t]ransnational travel facilitation for a terrorist group would constitute ‘substantial support’ sufficient to justify detention.”¹²¹ Under a modern understanding of the laws of war, whether an individual who provided such facilitation to a “terrorist group” would be lawfully detainable would depend on a number of factors, among them the identity of the group itself, the relationship

116. See *supra* notes 79–81 and accompanying text.

117. Chang, *supra* note 5, at 54–55.

118. *Id.* at 68.

119. *Id.* at 51.

120. See *infra* notes 170–172 and accompanying text.

121. Chang, *supra* note 5, at 68.

between the group and the detaining power, and the nature of the individual's relationship to that group. But illegality of the act alone is certainly not the proper criterion for determining military detention authority. Under Chang's approach, anyone who invests money in a country or organization in contravention of U.N. sanctions or violates a state's domestic material support statutes could be subject to military detention as a result.

Examining questions of belligerency and neutrality from the other direction provides another example of just how non-coterminous these bodies of law are. Interestingly, acts that are clearly sufficient to make the individual actor a belligerent do not themselves necessarily amount to violations of neutrality. For example, individuals who volunteer to serve in the armed forces of a belligerent state are clearly enemy belligerents under the laws of war, and yet such volunteering is not proscribed by the international laws of neutrality nor does it violate the neutral duties of the individual's state of origin, as long as the state does not organize an expedition on its territory.¹²²

This is not to say that neutrality law is indifferent to individual conduct. But Chang offers no explanation for when it does speak to individuals or how it would render an individual a belligerent or detainable enemy. For example, the prize cases noted above clearly address private conduct, and the 1907 Hague Conventions codifying the laws of neutrality discuss the neutrality of individuals. But these authorities themselves point to principles of *belligerency* when discussing the acts a state may take against individuals. The Hague law does not, as Chang proposes, suggest that every violation of neutrality turns the individual into a targetable or detainable belligerent. In fact it does not answer the question of the type or quantity of force that a state may use against such an individual, except to say that he cannot assert neutral *immunity* and he cannot be treated worse than the belligerents he has joined.¹²³ Rather, it simply points to the law in place pertaining to belligerents, which is the law of armed conflict: "In such a case, the neutral shall not be more severely treated by the belligerent as against whom he has abandoned his neutrality than a national of the other belligerent State could be for the same act."¹²⁴

E. How Would Chang's Theory Play Out in Practice?

As an example of how these issues play out in Chang's Article, consider how he addresses the concept of material support. Chang proposes that the concept of detainable "enemy" includes indirect participants in the conflict—providers of money certainly but perhaps also those who furnish "even ordinary goods, like food."¹²⁵ These individuals, according to Chang, are enemies who may be detainable as long as military necessity permits.

122. DINSTEN, WAR, *supra* note 44, at 27 ("[T]he laws of neutrality . . . countenance individual initiatives, by nationals and residents of a neutral State, to serve in the armed forces of one of the parties to the conflict. The domestic legislation of the neutral State may penalize such service in a foreign army in wartime, but international law only interdicts the dispatch of organized expeditions. As long as the volunteering proceeds on a purely individual basis, it is not hindered by international law.")

123. Hague V, *supra* note 15, art. 17.

124. *Id.*

125. Chang, *supra* note 5, at 56.

To support his theory, Chang first cites early twentieth-century texts for the proposition that the provision of money from a neutral *state* to a belligerent *state* was considered inconsistent with the former state's obligations of neutrality.¹²⁶ While it is accurate that certain provisions of funds were construed as such violations, the picture is more nuanced than Chang presents and relates in large part to whether the provisions of such funds were considered to violate the neutrality principle of impartiality. From here, Chang assumes that such conduct is sufficient to establish enemy status with no clear framing principles as to where a line might be drawn between a violation of neutrality and a belligerent act.¹²⁷ Chang must then make the leap from neutrality law prohibitions on states regarding material support to the provision of such support by individuals. For this, he conflates domestic and international law, as well as criminality and belligerency. As support for this theory Chang cites examples of U.S. domestic obligations that the state historically imposed to keep *its own citizens* from starting military expeditions on U.S. soil against friendly nations in order to keep private citizens from being able to draw the U.S. government into a war against its will. Chang cites these domestic laws as evidence that such activity was recognized as “unneutral conduct” under international law, and thus rendered the actor a legitimate military target.¹²⁸ Moreover, in order to reach the “indirect” supporters, Chang includes not only those who directly participated in the prohibited expedition but also those who helped prepare for it on U.S. soil.¹²⁹

Municipal laws a state might enact to keep its own population from drawing it into war have little if any relevance to the kinds of activity that would render a—typically alien—individual militarily detainable under international law. A state's domestic laws enacted to restrain the actions of its citizens—whether or not in fulfillment of a neutral obligation—are not an affirmative means to characterize individuals as detainable “enemies” in the armed conflict alongside direct participants. In fact, the very sources Chang cites note that the same conduct, if conducted by individuals outside U.S. soil, would not be seen as a violation of domestic law or international neutrality law,¹³⁰ let alone render an individual militarily detainable. Moreover, Chang does not cite any direct evidence of international law or practice treating material supporters, who are not otherwise members of armed forces, as detainable “enemies.” Instead, the Article relies on sources such as the musings of the dissenting Justice in an 1818 Supreme Court case

126. *Id.* at 32 n.166 and accompanying text.

127. *See id.* at 33 (“Neutrality law's framework of neutral duties and neutral immunities is *ius ad bellum*, meaning it gives standards for *whether a state can resort to force* against neutrals . . .”).

128. *Id.* at 48 nn.259–60 & 32 nn.167–69 and accompanying text.

129. *Id.* at 56 (quoting Roy Curtis, *The Law of Hostile Military Expeditions as Applied by the United State*, 8 AM. J. INT'L L. 1, 21 (1914)). Curtis explains the duty of a neutral state to prevent the departure from its territory of military expeditions—expeditions with “military character” the aim of which is “some attack or invasion of another people or country as a military force.” Curtis, *supra*, at 16. To prevent such expeditions, Curtis explains that the state may also deem unlawful—“at municipal law”—the preparations for the expedition. *Id.* at 21.

130. Curtis notes that there is “no obligation” on the part of the state to punish individuals either for assistance rendered directly to military expeditions departing from other countries and that “contributions made directly to armed forces in a foreign country” are not prohibited, despite the fact that they “may further the hostilities.” Curtis, *supra* note 129, at 23.

regarding the neutrality of cargo and a quote from The Third Philippic by Demosthenes, delivered in 341 B.C.¹³¹

It is likewise not clear, for example, how Chang distinguishes under his framework the infamous “Swiss grandmother” who sends a check to her grandson in al-Qaeda. He asserts without explanation that she is not detainable—not because she is a civilian, but because she is not an “enemy.”¹³² Yet under Chang’s theory, individuals providing material support—including in certain contexts individuals providing *unknowing* support—may properly be deemed “enemies” of the state.¹³³ One can understand Chang’s desire to craft a framework that would not render the Swiss grandmother detainable; yet in his effort to round up material supporters with little explanation for the line-drawing he would employ, she is at risk under his framework after all.¹³⁴ Additionally, Chang’s framework does not account for the fact that organizations often have military and non-military wings; his rubric would seem to categorize as detainable enemies individuals who send money to the charity wing of an organization that also has terroristic goals.¹³⁵ Again, while such activity might well be criminalized,¹³⁶ standing alone it would not likely rise to belligerency. Chang sweeps in an expansive breadth of activities that would, in his framework, constitute acts of war sufficient to bring a group or individual into a conflict, and thus creates a broad category of “enemy” whom, in his view, the government may treat as a belligerent.

Though I disagree with the breadth of Chang’s definition of “enemy,” it is possible nevertheless to identify some overlap in the approach that the government and certain courts have adopted and Chang’s neutrality-derived framework that may merit further exploration. To the extent Chang uses neutrality law to explore the contours of the associated forces concept, as suggested by Bradley and Goldsmith,¹³⁷ his thorough examination of these principles could provide useful fodder for further study. Moreover, Chang’s Article raises interesting questions as to whether we might plumb neutrality law further to determine whether and to what extent states might seek redress for violations of neutrality short of engaging in armed conflict, whether such redresses would be consistent with the U.N. Charter, and whether the 2001 AUMF would extend to such acts as part of the “necessary and appropriate” authority to wage war. Neutrality law may also serve as a limiting principle in a

131. Chang, *supra* note 5, at 30–31 n.157.

132. *Id.* at 26.

133. *See, e.g., id.* at 68 (“[W]hen a person breaches a duty, whether he does so knowingly or purposefully matters little to whether we should hold him responsible for that action.”).

134. With respect to the Swiss soldier in Chang’s hypothetical, on the other hand, I agree with Chang that in this conflict it is his lack of enemy—versus combatant—status that renders him safe from attack. These two hypotheticals are therefore perfect examples of why both enemy *and* belligerent/civilian status are critical factors in determining targeting and detention authority. Additionally, depending on where the Swiss grandmother and soldier are located, principles derived from neutrality law may operate in yet a third dimension of this authority by informing the geographic scope of a state’s ability to act.

135. By contrast, the government has declined to argue, for example, that mere civilians acting within the Taliban bureaucracy would be detainable if they were not part of the military command structure. *See, e.g.,* *Khairkwa v. Obama*, No. 08-1805, 2011 WL 2490960, at *13 (D.D.C. May 27, 2011) (“The government does not dispute that a purely civilian official who had no connection to any military activities would not be subject to detention under the AUMF.”).

136. *See, e.g.,* *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010) (holding constitutional application of material support statute to conduct claimed by petitioners to “‘promot[e] peaceable, lawful conduct’”).

137. *See supra* note 66.

different respect. Neutrality law—or at a minimum principles derived from it—can be useful in determining the geographic scope of a conflict and the kinds of actions states may take on the territories of non-belligerents.¹³⁸ But Chang does not provide a persuasive basis to accept his broad view of the detainable “enemy” under principles of neutrality law or otherwise, and a framework based on neutrality law cannot supplant the fundamental principles of *jus ad bellum* and *jus in bello*.

III. IN DEFENSE OF *JUS IN BELLO* CONSTRAINTS

Establishing the existence of an armed conflict and the nature of the parties to it is a necessary first step in determining the contours of a state’s detention and targeting authority with respect to those parties. Next a state must address its authorities and rules for operating within that conflict, and tailor its targeting and detention actions to the nature of the specific actors it seeks to engage. In a conflict involving non-state actors, these two inquiries may overlap to a significant degree. Nevertheless a state’s use of force against a particular actor must comport with both a *jus ad bellum* and *jus in bello* analysis.

A. *Who May Be Detained? (Step Two)*

In an armed conflict with a non-state actor, in particular an organized armed group that is exclusively military in nature, the questions a state may face in determining the contours of the parties to the conflict and those it faces in identifying “belligerents” within those parties may overlap to a significant degree. Thus it is not illogical that Chang’s Step One analysis reaches over into a Step Two inquiry of whom the state may lawfully target or detain *within* the armed conflict. It would be possible, therefore, at this second step for Chang to address many of the problems with the overbreadth of his first step. Instead, he fails to acknowledge the entirety of the *jus in bello* of the last century and a half, reducing the principles of the laws of war down to one: military necessity.

As discussed in Part I, a state’s acts within armed conflict must comply with *jus in bello*, the law governing the conduct of hostilities, which includes, in particular, applicable provisions of the 1949 Geneva Conventions, their Protocols to the extent they apply, and underlying customary international law principles of military necessity, humanity, proportionality, and distinction.¹³⁹ Reading Chang’s Article, however, one comes away with the impression that military necessity stands alone as the sole constraint on the government’s detention authority within armed conflict. His entire theory of *jus in bello* regarding detention thus boils down to the following sentence: “Belligerents may lawfully detain any enemy person whom they regard as militarily necessary to detain. . . .”¹⁴⁰ This theory fails to account for the principles of humanity and distinction and the unique rules governing civilian internment that states have developed in IAC. By addressing detention alone, it also sidesteps entirely the enormous elephant in the room—the absolute prohibition on targeting of

138. See *supra* note 57 and accompanying text.

139. See *supra* notes 18–22 and accompanying text.

140. Chang, *supra* note 5, at 17.

civilians who do not directly participate in hostilities¹⁴¹—and thus provides an incomplete picture for operators who must grapple with questions of both detention and targeting.

It is to the larger set of law of war principles and texts, however, that the Supreme Court in *Hamdi* looked to imbue the 2001 AUMF with detention authority that was not explicit in the congressional authorization.¹⁴² It cannot be that this is a one-way ratchet, permitting detention as incident to the use of force based on “longstanding law-of-war principles”¹⁴³ without regard to the constraints those principles might impose. There is no reason to believe—and the *Hamdi* Court certainly did not suggest—that Congress, in passing the 2001 AUMF, intended nineteenth- and early twentieth-century neutrality law practice to supplant the 1949 Geneva Conventions, bedrock principles of the laws of war, and other authorities—including the Army’s own Field Manual—in defining the scope of the government’s *jus in bello* authority. Indeed, long-standing canons of interpretation counsel that any ambiguity as to the scope of the 2001 AUMF should be resolved so as *not* to conflict with international law.¹⁴⁴ Moreover, as a matter of international law, which Chang seeks to address, these principles and treaties quite clearly remain fully in force.

B. *Chang’s Critiques of Current Approaches*

In explaining the need for an entirely new legal foundation for detention, Chang derides the frameworks the government, courts, and others have proposed in the context of the Guantanamo and other detainee habeas litigation. One of his major concerns seems to be with their over-reliance on the use of analogy.¹⁴⁵ Yet Chang himself has crafted an entire framework for use of force against individual, non-state actors from a set of laws developed to govern relations between neutral and belligerent states and whose currency in contemporary international law is in dispute. It is therefore odd that Chang would go to such great lengths to disparage a framework for its reliance on analogy.¹⁴⁶ Nevertheless, Chang does provide an

141. See *supra* note 36 and accompanying text.

142. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518–23 (2004).

143. *Id.* at 521.

144. See, e.g., *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 118 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains . . .”).

145. Chang, *supra* note 5, at 12–14. Regarding direct participation in hostilities, Chang states: “[I]t is questionable policy to mechanically apply the direct participation standard developed in the context of professional militaries fighting one another to military operations against terrorist or insurgent groups.” *Id.* at 20. This is a particularly odd statement given that AP II, a treaty intended to apply in NIAC and thus in conflicts involving non-state actors, contains the same prohibition on targeting civilians not directly participating in hostilities as is contained in AP I on IAC. AP II, *supra* note 20, art. 13(2)–(3) (“The civilian population as such, as well as individual civilians, shall not be the object of attack. . . . Civilians shall enjoy the protection afforded by this part, unless and for such time as they take a direct part in hostilities.”); AP I, *supra* note 20, art. 51(2)–(3) (same). See also *supra* note 20.

146. Jack Goldsmith, by contrast, proposes employing analogy to determine the contours of the laws of war within NIAC, including neutrality, and the scope of the 2001 AUMF. See Jack Goldsmith, *The D.C. Circuit Has Not Rejected Co-Belligerency*, LAWFARE (Oct. 18, 2010, 10:02 AM), <http://www.lawfareblog.com/2010/10/the-d-c-circuit-has-not-rejected-co-belligerency> [hereinafter Goldsmith, LAWFARE] (“[W]here the laws of war for a non-international armed conflict (NIAC) say little about a matter (such as, perhaps, neutrality), the laws of war for an international armed conflict (IAC), which say quite a lot about neutrality, should apply by analogy to inform the construction of what is ‘necessary and appropriate’ under

effective description of the problems inherent in each standalone approach to defining the contours of belligerency. Yet he does not address the merits of an approach that aggregates these various standalone factors. Such an approach—with which the government and courts are currently attempting to grapple—is far from perfect, but it does not suffer from the critical flaws that Chang identifies with each factor standing alone.

As a substantive matter, Chang criticizes the government's current approach of "analogiz[ing] enemy persons to categories of lawful combatants"¹⁴⁷ and suggests that the government is limiting its detention authority to those individuals who would be granted prisoner of war status under the laws of war.¹⁴⁸ Chang is correct that such rigid line-drawing regarding the government's authority would have the absurd result of allowing fighters to escape detention by disobeying the laws of war. But this inaccurately characterizes the government's declared approach and practice¹⁴⁹ and overlooks the current state of the law being developed by U.S. courts—even those district courts whose limiting principles Chang critiques—as I will explain in greater detail below. In fact, if Chang's portrayal of the government's standard were correct, and the government viewed itself as prohibited from detaining individuals who did not in its view merit POW treatment or status, the standard would exclude every single detainee at Guantanamo—none of whom have received POW status.¹⁵⁰ Yet the government continues to proclaim the lawfulness of such detention. In fact, the government has explicitly asserted that its authority is not limited to those who "abide by the laws of war [or] issue membership cards or uniforms."¹⁵¹ The government certainly has not, in this Administration or the last, construed its authority as Chang characterizes it: limited only to those who merit POW treatment or only to those individuals who have directly participated in hostilities.

As part of his criticism of current approaches, Chang asserts that federal "courts have taken the qualifications for lawful combatant status and picked one of them as the essential predicate for" detention authority.¹⁵² He criticizes, for example, the

the AUMF, both as to what the AUMF authorizes and to the limits of what it authorizes.") (emphasis altered).

147. Chang, *supra* note 5, at 9 (citing March 13 Filing, *supra* note 2).

148. *Id.* at 10 ("[B]y failing to qualify for combatant privileges . . . groups could immunize their members from capture and detention."); *id.* at 14 ("[T]he analogizing approach also suffers from perverse policy consequences. . . . [I]t excludes from detention those very persons whom states, in crafting international law, declined to protect with POW status. This rewards unlawful behavior.").

149. The ICRC cites AP I for the proposition that, even in *international* armed conflict, "the armed forces of a party to the conflict comprise all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates." Melzer, *supra* note 27, at 998 (citing AP I, *supra* note 20, art. 43(1)). It goes on to note that armed forces in an IAC are not just those individuals who follow the POW status rules laid out in GC III, Article 4. Those "requirements constitute conditions for the post-capture entitlement of irregular armed forces to combatant privilege and prisoner-of-war status and are not constitutive elements of the armed forces of a party to a conflict." *Id.* at 999.

150. See, e.g., Memorandum from George W. Bush, Humane Treatment of Taliban and al Qaeda Detainees, *supra* note 59, para. 2(d) ("I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.") I do not take a view in this paper as to whether any detainees at Guantanamo should properly receive POW treatment.

151. March 13 Filing, *supra* note 2, at 6.

152. Chang, *supra* note 5, at 11.

D.C. district courts' early reliance on a "command structure" test in the Guantanamo habeas litigation, under which membership was evidenced by participation within the hierarchy of the organization or the giving or executing of orders.¹⁵³ Chang criticizes this and other attempts to create tests based on particular requirements declaring the analogy approach a failure "because no criterion is common to all the categories of POWs recognized by the 1949 Geneva Conventions."¹⁵⁴ He fails to acknowledge sufficiently, however, the extremely broad and deferential jurisprudence currently coming out of the D.C. Circuit, and he does not address how these tests may work together collectively to form a functional understanding of whom a state may detain.¹⁵⁵ For example, the government is not proposing and the courts are no longer requiring a direct showing that an individual operated within the command structure of al-Qaeda or Taliban forces, though such evidence is highly relevant.¹⁵⁶ While the outer contours of the government's detention standard and the legal architecture remain somewhat murky, there is growing clarity that the courts will accept a great deal of functional evidence with respect to membership and certainly are not restricting themselves in the ways Chang has faulted.¹⁵⁷

Chang also critiques what he calls the "direct participation in hostilities" (DPH) approach.¹⁵⁸ There is something to Chang's assertions that those who propose a strict DPH approach as the *only* standard under which individuals in NIAC may be detained or interned are likely interpreting the law in a way that is not fully consistent with state practice. Nevertheless—as Chang correctly notes—the DPH standard can be useful in informing a state's detention authority, even despite its provenance as a targeting standard. In 2009, the International Committee of the Red Cross (ICRC) released its landmark study, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, which seeks to clarify not only what constitutes DPH such that civilians temporarily lose protection from direct attack, but also what constitutes participation in such a continuous manner that the actor effectively ceases to be a civilian and loses protection against direct attack on a more ongoing basis (thus performing a "continuous combat function").¹⁵⁹ Certain constraints proposed by the ICRC have been hotly contested by states and even by many of the expert participants in the project,¹⁶⁰ but the study nevertheless represented a significant development in the

153. *Id.* at 12 nn.48–49 (citing *Gherebi v. Obama*, 609 F. Supp. 2d 43, 68–70 (D.D.C. 2009)). *See generally* Jack Goldsmith, *Long-Term Terrorist Detention and Our National Security Court* 10 (Brookings Inst., Working Paper No. 5, 2009) ("[P]ersons who receive and execute orders within this command structure are analogous to traditional combatants.").

154. Chang, *supra* note 5, at 12.

155. *See supra* notes 70–73 and accompanying text.

156. *See* Brief for Respondents-Appellees at 21, *Al-Alwi v. Obama*, 653 F.3d 11 (D.C. Cir. 2011) (No. 09-5125) (citing *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010)) ("Although evidence of following or acting under instructions or directions in the command structure of al-Qaida or Taliban forces would normally establish that an individual was 'part of' enemy forces, that is not the sole means of establishing a lawful basis for detention.").

157. *See supra* note 73 and accompanying text.

158. Chang, *supra* note 5, at 15.

159. *See* Melzer, *supra* note 27, at 995 ("In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ('continuous combat function').").

160. *See, e.g.*, Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5, 6 (2010) (noting that many expert participants withdrew their names from the publication so that they would not be regarded as supporting certain

international community with respect to recognition of non-civilian status for certain non-state actors, in particular, members of non-state organized armed groups. In recognizing a functional concept of membership, under which an individual's acts and role within such a group might render him targetable on a permanent basis, the ICRC study thus further enabled states to grapple with a concept of belligerent status for non-state actors. Such discourse on the contours of DPH and "continuous combat function" standards has implications for a state's detention authority because, as Chang notes, the authority to use force typically includes the lesser power to detain.¹⁶¹

Despite its usefulness in this regard, the DPH approach has been maligned to some degree, particularly in the context of the Guantanamo habeas litigation. Chang himself challenges whether the DPH standard is binding on states, based on disputes regarding its outer contours.¹⁶² As with many rules of both domestic and international law, there exists ongoing debate surrounding aspects of the DPH standard. Nevertheless, the core rule that states must distinguish between civilians and belligerents, and must not attack civilians who do not directly participate in hostilities, is uncontroversial and is binding law: it is a norm of customary international law;¹⁶³ it is codified in treaties that the U.S. government has signed, one of which it intends to ratify and with which it has stated it is in full compliance;¹⁶⁴ and it is included in U.S. and allied military manuals.¹⁶⁵ Chang correctly notes the rule's provenance as a targeting standard, and then draws from this the conclusion that it should not be employed in litigation.¹⁶⁶ He warns that "using the direct participation in hostilities standard as a detention standard would place the judges in the position of developing targeting law and prospectively regulating the conduct of military operations against the enemy."¹⁶⁷ Chang does not address how a judge assessing war

controversial aspects of the report's conclusions, in particular the report's balancing of military necessity and humanity); see generally W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769 (2010); Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641 (2010).

161. See, e.g., Goodman, *supra* note 33, at 55 ("[I]t would be absurd to accept an interpretation of IHL that results in a state's possessing the legal authority to kill actor X on purpose but lacking the legal authority to detain actor X.").

162. Chang, *supra* note 5, at 16 (calling the definition of the DPH standard "unsettled as a matter of international law" and stating that, as such, it "cannot be a binding rule of customary international law").

163. Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, 87 INT'L REV. OF THE RED CROSS 175, 198 (2005); see also Schmitt, *supra* note 160, at 12-13 (noting that "it is beyond dispute" that the principle of distinction "constitutes customary international law").

164. See *supra* notes 22 & 145, discussing the U.S. position on AP I and AP II and the treaties' DPH rule.

165. DEP'T OF THE NAVY & DEP'T OF HOMELAND SEC., THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS §§ 8.2.2, 8.10.2.1 (2007) [hereinafter 2007 COMMANDER'S HANDBOOK] (discussing the DPH test and stating that civilians and non-combatants "not taking direct part in hostilities" enjoy protection from attack); U.K. JOINT SERVICE MANUAL, *supra* note 19, para. 2.5.2 ("Civilians may not take a direct part in hostilities and, for so long as they refrain from doing so, are protected from attack."); 2001 CANADIAN MANUAL, *supra* note 20, § 716(2) ("The civilian population as a whole, as well as individual civilians, shall not be the object of attack. Civilians shall enjoy this protection unless and for such time as they take a direct part in hostilities.").

166. Chang, *supra* note 5, at 16.

167. *Id.*

crimes, such as the direct targeting of civilians in contravention of the DPH standard, would avoid exploring the contours of the laws governing targeting. And, like it or not, when judges adjudicating detainee habeas cases draw conclusions as to whether an individual is detainable until the end of hostilities—the standard currently in use in the D.C. Circuit and derived from Supreme Court jurisprudence—they are developing the concept of belligerency,¹⁶⁸ and thus drawing conclusions that may very well bear on the development of targeting law, even if they do not completely define its metes and bounds.¹⁶⁹

Interestingly, as I suggested in Part II, the very prize courts and cases Chang cites for support of his broad theory pointed to these same “command structure” and “DPH” tests¹⁷⁰ to determine whether a vessel had taken on “unneutral service” or “enemy” status.¹⁷¹ The 2007 U.S. Commander’s Handbook on the Law of Naval Operations addresses this question explicitly:

[N]eutral merchant vessels and civil aircraft acquire enemy character and may be treated by a belligerent as enemy warships and military aircraft when . . . either . . . 1. Taking a direct part in the hostilities on the side of

168. The concept that states may detain belligerents in this conflict until the “cessation of active hostilities” is a standard that stems from GC III, Article 118, which states that POWs shall be released without delay after—and thus contemplates detention until—that point. *See* GC III, *supra* note 12, art. 118. The Supreme Court plurality in *Hamdi* drew on the laws of war to inform the Court’s interpretation of the 2001 AUMF and, in so doing, stated: “The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who ‘engaged in an armed conflict against the United States.’ If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of ‘necessary and appropriate force,’ and therefore are authorized by the AUMF.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004).

169. *See, e.g.*, BENJAMIN WITTES, ROBERT CHESNEY & RABEA BENHALIM, *THE EMERGING LAW OF DETENTION: THE GUANTÁNAMO HABEAS CASES AS LAWMAKING* 4–5 (Brookings ed., 2010) (“[T]o the extent that [the Guantanamo detainee habeas] cases establish substantive and procedural rules governing the application of law-of-war detention powers in general, they could end up impacting detentions far beyond those immediately supervised by the federal courts . . . such as . . . the decision to target individuals with lethal force.”). To the extent federal judges are simply deferring to executive decision making, their decisions are less relevant to the substantive development of law of war norms.

170. The “DPH” test applied to merchant vessels as described by Oppenheim also incorporates the temporal element of the modern test. Oppenheim states that a vessel performing unneutral service may only be captured “*in delicto*, that is during the time in which she is rendering the unneutral service concerned or immediately afterwards while she is being chased for having rendered unneutral service.” OPPENHEIM 2nd, *supra* note 114, § 411, at 526–27. After her voyage has been completed or her unneutral service comes to an end, therefore, a neutral vessel “ceases to be *in delicto*” and thus may no longer be captured. *Id.* at 527.

171. *See, e.g., id.* § 411, at 527 (defining as “unneutral service” either taking “direct part in hostilities” or navigating under orders of “the agent of the enemy Government”); TUCKER, *supra* note 45, at 77 (describing the taking of a “direct part in hostilities on the side of an enemy,” acting as an “auxiliary to an enemy’s armed forces,” and “operating directly under enemy orders, employment, or direction,” as the types of activity that would “so identify merchant vessels . . . with the armed forces of an enemy as to expose such vessels to the same treatment as is meted out to enemy warships”); DECLARATION OF LONDON, FEBRUARY 26, 1909: A COLLECTION OF OFFICIAL PAPERS AND DOCUMENTS RELATING TO THE INTERNATIONAL NAVAL CONFERENCE HELD IN LONDON, DECEMBER, 1908–FEBRUARY, 1909 90 (James Brown Scott ed., 1919) (citing Rebecca, [1811] 12 Eng. Rep. 201 (P.C.) (U.K.)) (“A neutral vessel chartered or employed by a belligerent government to carry a cargo on its behalf and acting under the orders of that government or its officers is liable to condemnation as an enemy ship”); Hill, *supra* note 115, at 490 (noting that under the contemporary court practice, in according enemy status to vessels, “the presence of enemy control has been the determining factor and the nature of the act committed has been secondary”).

the enemy [or] 2. Acting in any capacity as a naval or military auxiliary to the enemy's armed forces.¹⁷²

Thus both historical and modern practice and law regarding such vessels provide additional support for the command structure and DPH tests that Chang finds overly restrictive.¹⁷³

None of the proposed solutions to the puzzle of who may be detained in NIAC is perfect. Chang is correct that any one of these approaches—a requirement that an individual play a role in the command structure, or fulfill a continuous combatant function, or directly participate in hostilities—has flaws when employed as a standalone principle.¹⁷⁴ In describing the U.S. government and courts' approaches in so limited a way, Chang easily finds fault with the various definitions employed and dismisses them individually, but he never explains why they cannot collectively provide pieces of the puzzle.¹⁷⁵ He does not address whether a state's detention authority might include each of these components, or at least more than one of them. While he may find legitimate reasons to quibble with any one of these approaches as a standalone standard, Chang is wrong to dismiss the entire exercise. Taken together these components form a picture of the various forms of relationship to a non-state armed force that could be sufficient to effect belligerent status under international law.

172. 2007 COMMANDER'S HANDBOOK, *supra* note 165, § 7.5.1. The San Remo Manual, the result of a collaboration of a group of legal and naval experts and intended as a restatement of the law, contains detailed provisions for when a state may lawfully attack merchant vessels. INT'L INST. OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA intro. (1994) [hereinafter SAN REMO MANUAL]. Chang cites the San Remo Manual for the proposition that "neutral ships and aircraft that somehow 'make an effective contribution to the enemy's military action' cannot assert their neutral immunity." Chang, *supra* note 5, at 31 & n.162, (citing SAN REMO MANUAL, *supra*, arts. 67(f), 70(e)). Interestingly, however, the San Remo Manual also explicitly provides that the parties must observe the principle of distinction. SAN REMO MANUAL, *supra*, art. 39 ("Parties to the conflict shall at all times distinguish between civilians or other protected persons and combatants and between civilian or exempt objects and military objectives."). It also states that civilians who are not part of the crew of the enemy ship or otherwise directly participating in hostilities must be treated in accordance with the Fourth Geneva Convention of 1949. *Id.* arts. 166–67.

173. The Commander's Handbook also emphasizes the principles underlying the law of armed conflict—"military necessity, unnecessary suffering, distinction, and proportionality"—which aid in seeking "to minimize unnecessary suffering and destruction by controlling and mitigating the harmful effects of hostilities through standards of protection to be accorded to combatants, noncombatants, civilians and civilian property." 2007 COMMANDER'S HANDBOOK, *supra* note 165, § 5.3.

174. See, e.g., Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1123 (2008) ("[I]t is easy to dispute the relevance of the direct participation standard as the only relevant criterion for detention in a non-international armed conflict. But the important point for present purposes is that reliance on the direct participation standard as a guide to the boundaries of detention authority would not necessarily preclude use of status in the command structure as a detention trigger.").

175. Chang, *supra* note 5, at 12 ("[W]hy is one criterion relevant to detention, but not others? Distilling the qualifications for lawful combatant status to a single *sine qua non* of detention is completely arbitrary. The analogizing approach ultimately falls apart under its own logic because no criterion is common to all the categories of POWs recognized by the 1949 Geneva Conventions.").

C. *Why Belligerent Status Is So Important*

It should go without saying that it remains critically important—including in this modern conflict—that states continue to abide by the laws of war. It is critical to the mutual well-being of states' armed forces, to the legitimacy of states' actions, and to the continued understanding and cooperation between states. As explained above, it is a fundamental principle of *jus in bello* that states draw distinctions between civilians and belligerents in armed conflict. Though Chang lumps together rules regarding civilians and belligerents with little distinction between the two—in fact, civilian internment forms the international law basis for a large portion of Chang's broad assertion of detention power¹⁷⁶—these categories have very real and distinct implications. First and foremost, the law of armed conflict imposes an absolute prohibition on targeting civilians who are not directly participating in hostilities.¹⁷⁷ Therefore even to the extent Chang relies on ambiguity in the law regarding civilian internment, he can find none in the targeting context. Chang hints at targeting in his conclusion, in which he suggests that a broad theory of detainability is necessary in order to avoid “perverse, inhumane incentives to kill rather than capture.”¹⁷⁸ This argument does not, however, provide a rationale for a lawful theory of detainability beyond those whom a state may lawfully target.

While the scope of Chang's Article might explicitly govern only detention, operators who act on these principles—in particular military commanders in the field—require responsible legal guidance on the contours of enemy forces and how to distinguish between civilians and belligerents in this conflict. Suggesting that such operators may act on military necessity alone would leave them grossly exposed when making decisions regarding the treatment of civilians or potential civilians that could violate the laws of war, in particular, the principles of distinction or proportionality. The following statement in Chang's Article regarding the basis for civilian immunity may shed some light on Chang's thinking on this subject: “Civilian protections derive from the principle that harming peaceful civilians is unnecessary to military operations.”¹⁷⁹ Chang thus relegates all *jus in bello* protections of civilians to a status subordinate to that of military necessity.¹⁸⁰ The statement also flips on its

176. *Id.* at 17 (“[C]ivilians are not immune from detention. Under the law of war, enemy persons can lawfully be detained, even if they have not taken direct part in hostilities. Under the law of war, belligerents have a very broad discretion to detain enemy persons. Belligerents may lawfully detain any enemy person whom they regard as militarily necessary to detain, even if that person is not a ‘combatant’ in some sense, either by qualifying for prisoner of war status or by taking direct part in hostilities.”); *id.* at 18 (“Belligerents can detain enemy civilians who are ‘important’ to the enemy, including senior government officials. Belligerents can detain enemy civilians for security reasons, regardless of whether they have participated in the armed conflict.”).

177. *See supra* notes 163–165 and accompanying text. This does not address issues of civilian collateral damage incident to targeting of military objectives, which must be assessed in accordance with the principle of proportionality. *See supra* note 21.

178. Chang, *supra* note 5, at 73.

179. *Id.* at 27.

180. One potential repercussion of relying on military necessity alone could be the creation of a relatively narrow reading of military necessity that incorporates the other principles. The ICRC, for example, already has begun to propose a controversial interpretation of necessity that would require that states prioritize lesser uses of force when feasible, e.g., capture over kill. Melzer, *supra* note 27, at 1040–44. *See also supra* note 160. A narrow interpretation of military necessity—which Chang suggests would be “overly stringent”—would be a fairly reasonable consequence of presenting military necessity as the sole *jus in bello* constraint on a state's authority. Chang, *supra* note 5, at 24.

head the principle of distinction and the modern understanding of humanitarian considerations in armed conflict: in lieu of the modern view that states undertake to comply with the laws of war largely in the interest of humanity, to protect civilians and those otherwise *hors de combat*, and to protect soldiers from unnecessary suffering, Chang proffers a view that places warfare as the end in itself, in which civilians need not be harmed only if they do not stand in the way of military objectives.

Second, with respect to deprivation of liberty, the law of armed conflict provides very different standards to govern who may be held depending on whether the person holds civilian or belligerent status. Despite Chang's reliance on civilian internment to bolster his theory of broad detainability,¹⁸¹ his Article nevertheless speaks in terms of belligerent detention models and consequences.¹⁸² While, under the rules for international armed conflict, belligerents may be detained until the end of active hostilities,¹⁸³ protected civilians may be interned only for so long as they pose a genuine individualized threat to security, and this initial determination must be reexamined every six months with an eye toward release as soon as possible.¹⁸⁴ Chang does not explain his conflation of the "absolute necess[ity]" standard for civilian internment under GC IV with the concept of "military necessity," which, as he notes, is generally considered an extremely broad standard.¹⁸⁵ But the Commentary to the Geneva Conventions explicitly states that civilian internment is intended to be "exceptional" and based on an individualized assessment of whether the person presents a genuine threat to the state's security, such as through acts of espionage, in contrast to belligerent detention, which does not require any individual assessment of threat.¹⁸⁶ Some have argued that all individuals in NIAC should receive the process afforded to civilians in IAC,¹⁸⁷ while the U.S. government and courts have sought to carve out a concept of belligerent that includes individuals who could be held without these protections and processes until the end of hostilities.¹⁸⁸

Military detention of belligerents until the "cessation of hostilities" is an extreme act, particularly in a conflict of this nature. With respect to the current population at the military facilities at Guantanamo, for example, detention is going on ten years and counting for many, with no clear end in sight.¹⁸⁹ To date, the

181. See, e.g., Chang, *supra* note 5, at 17 ("[C]ivilians are not immune from detention.") (citing GC IV regulations regarding civilian internment).

182. See, e.g., *id.* at 51 (referring to "holding a person indefinitely in military detention," which I take to refer to detention until the end of hostilities, which is not clearly in view at this time); see also *id.* at 18–19 ("However, the law of war does not require the release of captured enemy persons whom belligerents view as necessary to continue to detain.").

183. GC III, *supra* note 12, art. 118 (contemplating authority to detain in stating that "[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities").

184. See, e.g., *supra* notes 31–35 and accompanying text.

185. Chang, *supra* note 5, at 25 ("[T]he law of war allows the detention of civilians when militarily necessary.").

186. See *supra* notes 30–35 and accompanying text.

187. See, e.g., Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INT'L REV. RED CROSS 375, 376–77, 380–81 (2005) (proposing heightened procedures for internment of non-POWs).

188. See *supra* notes 67–73 and accompanying text.

189. See Statement by the President on H.R. 2055 (Dec. 23, 2011), <http://www.whitehouse.gov/the-press-office/2011/12/23/statement-president-hr-2055> ("In this bill, the Congress has once again included provisions that would bar the use of appropriated funds for transfers of Guantanamo detainees into the

government has neither held any of these individuals under the individual threat-based standard for civilian internment nor provided the regular process due such internees.¹⁹⁰ This is not an area where we should so lightly cluster authorities together without rigor in terms of how they are intended to apply.

Third, questions regarding the geographic scope of lawful point of capture in this conflict are inherently controversial, but the law regarding where civilian internees may be apprehended or held is even less well-theorized than that regarding capture and detention of belligerents. Therefore, to the extent Chang is speaking at all to civilians apprehended on territory that is not part of an active combat zone—for example, if he is proposing authority to detain civilian supporters of al-Qaeda captured in, say, Europe—it is not at all clear that a state could employ military internment for such an individual.

Fourth, Chang seems to view the *jus in bello* approaches in use today as overly restrictive, and yet he fails to recognize that a law-of-armed-conflict framework for the kinds of detention he envisions is as deferential as he is going to get. The government has argued for the past decade that the laws of war are the *lex specialis* governing targeting and detention in armed conflict and has in many cases argued that other bodies of law—such as human rights norms or domestic criminal law—are inapplicable. But this position has been controversial.¹⁹¹ Under the government's rationale, the law of armed conflict includes specific rules designed to protect civilians and other individuals from the suffering of war. Because it includes such a detailed protection regime, there is an argument that *jus in bello* may operate in armed conflict as the *lex specialis* that supplants other laws—in particular human rights norms and some domestic laws—that would otherwise protect such individuals. Neutrality law, by contrast, speaks to relationships between belligerents and neutrals and does not purport to provide a protective regime for individuals detained or attacked in armed conflict. But the further the legal rationale for actions within armed conflict moves from a basis in—or attempts to ignore entirely¹⁹²—laws intended specifically to address such acts and the proper treatment of the individuals

United States . . . as well as transfers to the custody or effective control of foreign countries unless certain conditions are met. . . . In approving this bill, I reiterate the objections my Administration has raised regarding these provisions, my intent to interpret and apply them in a manner that avoids constitutional conflicts, and the promise that my Administration will continue to work towards their repeal.”).

190. The President's Executive Order 13567, Periodic Review of Individuals Detained at Guantánamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, applies to a subset of detainees held at Guantanamo and provides for forward-looking regular review of the discretionary reasons for their detention based on the threat of the individual detainee. Exec. Order No. 13567, 76 Fed. Reg. 47, 13277 (Mar. 7, 2011). It includes some of the process requirements laid out in GC IV for civilian internees, but it is not intended to impact the government's detention authority and is fashioned instead as a review of the discretionary exercise of the government's powers. *Id.* (stating that “[i]t does not create any additional or separate source of detention authority, and it does not affect the scope of detention authority under existing law”).

191. *See, e.g.,* Bellinger & Padmanabhan, *supra* note 39, at 219 (“Other scholars and groups completely reject the war paradigm—and with it, IHL—as a means of analyzing detention questions. They contend, instead, that national law, constrained by international human rights law, is the applicable legal framework for detention in a conflict with a nonstate actor. Some of these individuals and groups argue that a state may detain only those whom it plans to prosecute for criminal violations, is criminally prosecuting, or has criminally convicted.”); *id.* at 209–210 & nn.40–44 (discussing the “vibrant” debate surrounding the interaction between human rights law and IHL).

192. *See, e.g.,* Goldsmith, *LAWFARE*, *supra* note 146 (“[I]f the laws of war for NIAC are silent on an issue, the main alternative to arguing by analogy to IAC in interpreting the AUMF is to conclude that the laws of war place no limits whatsoever on the AUMF.”).

involved, the more attenuated and difficult it will be to maintain an argument that this set of legal principles is the *lex specialis* governing that detention or targeting.¹⁹³

D. The Responsibility to Uphold the Laws of War Lies Ultimately with the State

Establishing that the civilian-belligerent distinction is important is the easy part. The next step, determining how to distinguish who is a belligerent, is likely the most difficult question states face with respect to the legal contours of this conflict. There is no perfect answer here. But this difficulty does not remove the obligation on the part of states to draw that distinction. The answer—however complex—cannot be simply to ignore these foundational principles that have governed the evolution of the laws of war over the last century. Chang is correct that the D.C. Circuit has rejected many of the limits district court judges had imposed, per their interpretation of international law, on the government's authority, as well as restrictions proposed by plaintiffs counsel and—at times—the limits of the framework proposed by the government itself.¹⁹⁴ Chang's solution, therefore, is to look to a different body of law for another test, one that in his view might better explain the broad authority some federal courts are currently inclined to grant. But whatever view the courts hold with respect to the justiciability of these cases or the appropriate level of deference to government decision making,¹⁹⁵ the United States itself is bound to continue to accord its actions in armed conflict, including detention practices, with the international laws of war. The current trend of judicial deference only amplifies the importance of the government's own scrupulous review of the legality of its actions. Such rigor is important not only to ensure the conformity of U.S. actions with both domestic and international law, but also may be critical to retaining the trust and deference of the federal courts going forward.

193. See, e.g., Michael N. Schmitt, *Investigating Violations of International Law in Armed Conflict*, 2 HARV. NAT'L SEC. J. 31, 53–54 (2011) (“*Lex specialis* can apply in one of two ways in relation to *lex generalis*. First, the *lex specialis* may directly conflict with the *lex generalis*. In such a case, the *lex specialis* prevails. An example that is presently the subject of much discussion is a purported duty to capture (if possible), rather than kill, enemy combatants and civilians directly participating in hostilities. Human rights law contains precisely such a duty. By contrast, since enemy combatants and directly participating civilians constitute lawful targets under IHL, until they surrender or are otherwise rendered *hors de combat*, it is lawful to kill them even when capture is feasible. In that the action occurs during armed conflict, the *lex specialis* IHL norm supplants the *lex generalis* human rights standard.”) (citations omitted).

194. Chang, *supra* note 5, at 5.

195. It is of course possible that the current level of judicial deference could be somewhat short-lived. In the past, the D.C. Circuit has granted the U.S. government broad authority, only to be overturned by the Supreme Court. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006) (reversing the D.C. Circuit and holding that the military commission convened by order of the President “lack[ed] power to proceed because its structure and procedures violate[d] both the UCMJ and the Geneva Conventions”); *Boumediene v. Bush*, 553 U.S. 723, 798 (2008) (reversing the D.C. Circuit’s determination that the Suspension Clause was inapplicable to petitioners). Whatever one thinks of habeas at Guantanamo—and whatever one thinks of whether it has afforded detainees a robust remedy—it certainly seems plausible that the view at the time that the government was employing a broad and uncabined interpretation of its detention authority had an impact on the Supreme Court’s decision to extend the writ of habeas corpus in *Boumediene*.

CONCLUSION

There is no silver bullet that can resolve all open questions regarding the government's military detention authority in armed conflict. Nevertheless, the historic practice of states and courts in addressing the line between neutrality and belligerency can provide some insight to help inform the modern concept of belligerency both as a matter of *jus ad bellum* and within *jus in bello* at its unsettled outer contours. The results of such an exploration might surprise those who seek in international law a broader military authority for states than the current framework affords. Whatever its efficacy in addressing modern questions, neutrality law does not provide the broad authority Chang asserts in trying to resolve thorny questions regarding the state's authority in modern conflict, and it certainly cannot supplant the entirety of the laws of war that define and constrain that authority.

To be sure, the laws of war were not created for and may not map perfectly onto the conflict at hand. This translation exercise creates difficult ambiguities and potential for gaps in the protection regime, which have been exploited historically by those seeking broad, uncabined authority. Yet there are others who see in this complicated fit another explanation; in their view the armed conflict label is simply too much of a stretch, and states should instead look to domestic laws and human rights norms to determine the appropriate legal framework for this conflict. There may not be a simple answer as to whether the "armed conflict" framework is an appropriate fit. But it cannot be that the laws of war function as a one-way ratchet; those who draw on this paradigm in order to assert broad wartime authorities in this kind of conflict may not simultaneously object that it is a difficult fit and attempt to exploit potential ambiguities that arise in the protection regime as a result. Instead, to the extent the U.S. government and other states rely on an armed conflict paradigm to support broad authorities, they must likewise constrain themselves in accordance with the international legal regimes and principles governing such conflicts.