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Articles

Note

The University of Texas School of Law

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ARTICLES

NOTE

In the rapidly expanding discipline of international law, the *Texas International Law Journal* helps readers stay abreast of recent developments and new scholarship by providing access to leading international legal, theoretical, and policy analysis. The *Journal* publishes academic articles, essays, and student notes in the areas of public and private international law, international legal theory, the law of international organizations, comparative and foreign law, and domestic laws with significant international implications. The editors and staff aim to fulfill these needs by concentrating on groundbreaking articles that will be useful to both practitioners and scholars. We hope you enjoy this latest issue.

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1. E. Ernest Goldstein, *Thank You Fidel! Or How the International Law Society and the* Texas International Law Journal *Were Born*, 30 TEX. INT'L L.J. 223 (1995).

United States, and former coeditor in chief of the *American Journal of International Law*; **the Honorable Richard J. Goldstone**, former member of the Constitutional Court of South Africa and former chief prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda; **the Honorable Dalia Dorner**, former Associate Justice of the Supreme Court of Israel; **Robert Reich**, professor of public policy at the University of California, Berkeley, former U.S. Secretary of Labor, and former director of public policy for the Federal Trade Commission; **Joseph Jova**, former U.S. ambassador to Mexico; **Andreas Lowenfeld**, professor at New York University School of Law and leading international law scholar; **Dean Rusk**, U.S. Secretary of State under Presidents Kennedy and Johnson; **Ewell "Pat" Murphy**, former chairman of the American Bar Association's Section of International Law and respected attorney in the field of international business transactions; **Walter S. Surrey**, former chairman of the National Council for U.S.-China Trade and former president of the American Society of International Law; and **W. Michael Reisman**, professor at Yale Law School and honorary editor of the *American Journal of International Law*.

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

KARL S. CHANG*

Abstract

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

SUMMARY

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INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10. *Al-Bihani*, 590 F.3d at 874 (stating that support is "independently sufficient to satisfy the standard" for detention); Hatim v. Gates, 632 F.3d 720, 721 (D.C. Cir. 2011) (same); Al-Madhwani v. Obama, 642 F.3d 1071, 1077 (D.C. Cir. 2011) ("[T]he 'command structure' test employed by the district court 'is *sufficient* to show that person is part of al Qaeda' but 'is not *necessary*.'" (quoting Uthman v. Obama, 637 F.3d 400, 403 (D.C. Cir. 2011))). *See also infra* note 337 and accompanying text.

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

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

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

I. "COMBATANTS" AND MILITARY DETENTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Analogizing the Enemy to Lawful Combatants

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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40. *See* Lieber Code, *supra* note 21, art. 57 ("So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity he is a belligerent . . . ."); W. Hays Parks, *Combatants*, *in* 85 INTERNATIONAL LAW STUDIES 247, 269 (Michael N. Schmitt ed., 2009) (discussing the requirement of "right authority").

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

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

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

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

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

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

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

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

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

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

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

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

50. Members of organized resistance movements need only "belong" to a party to the conflict. GC III, *supra* note 23, art. 4(A)(2). Participants in a *levée en masse* are "[i]nhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units." *Id.* art. 4(A)(6). These persons need only carry arms openly and respect the laws and customs of war to receive prisoner of war status. Howard Levie, *Prisoners of War in International Armed Conflict*, 59 INT'L L. STUD. SERIES U.S. NAVAL WAR C. 1, 65 (1977).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Those Taking a Direct Part in Hostilities

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

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

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

63. *See id.* art. 51 ("Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities."); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 13, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II] ("Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities."); Rome Statute of the International Criminal Court art. 8(2)(b)(i), July 17, 1998, U.N. DOC. A/CONF.183/9 (defining as a war crime "intentionally directing attacks against . . . individual civilians not taking direct part in hostilities").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

90. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Why Limit Detention to "Combatants"?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

116. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Neutrality Law as a Framework in International Law

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

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

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

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

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

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

1. Neutral Immunity

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

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

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

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

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

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

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

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

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

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

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

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

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

140. *See* Respect for Human Rights in Armed Conflicts, G.A. Res. 2444, (XXIII), § 1(c), U.N. GAOR, 23rd Sess., Supp. No. 18, U.N. Doc. A/7433, at 50 (Dec. 19, 1968) ("That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the

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

2. Neutral Duties

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

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

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

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

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

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

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

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

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

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

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

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

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against the other . . . ."); *see also* The Three Friends, 166 U.S. 1, 52 (1897) ("Neutrality, strictly speaking, consists in abstinence from any participation in a public, private or civil war, and in impartiality of conduct toward both parties . . . ."); ARMY FIELD MANUAL 27-10, *supra* note 20, para. 512 ("[N]eutrality on the part of a State not a party to the war has consisted in . . . preventing, tolerating, and regulating certain acts on its own part, by its nationals, and by the belligerents."); Michael Bothe, *The Law of Neutrality*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 571, 571 (Dieter Fleck ed., 2d ed. 2008) ("The duty of non-participation means, above all, that the [neutral] state must abstain from supporting a party to the conflict."); OFFICE OF THE JUDGE ADVOCATE GEN., LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS (Can.), para. 1304(2) (2003), *available at* http://www.forces.gc.ca/jag/publications/op-do-eng.asp ("A neutral State may not support any of the parties to the conflict."); FED. MINISTRY OF DEF. OF THE FED. REPUBLIC OF GER., HUMANITARIAN LAW IN ARMED CONFLICTS: MANUAL para. 1110 (1992), *available at* www.humanitaeres-voelkerrecht.de/ManualZD v15.2pdf ("A neutral state may not support any of the parties to the conflict.").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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material support to the insurgency").

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Neutrality Law and Individuals

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

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

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

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

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

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

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

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

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

182. 4 WILLIAM BLACKSTONE, COMMENTARIES 68.

183. *Id.*

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

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

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

4. Neutrality Law and Military Operations Against Terrorist Groups

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Neutrality Law as a Framework in Domestic Law

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

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

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

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

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

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

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

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

1. Neutrality Law and the 2001 AUMF

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

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

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

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

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

221. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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231. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Neutrality Law and the Federal Courts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. USING NEUTRALITY LAW TO DEFINE THE ENEMY

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

A. Enemy Status in General

1. Enemy Status and Military Detention

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

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

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

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

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

2. What Does It Mean to Be an Enemy?

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

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

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

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

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

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

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

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

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

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

B. Hostile Acts

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

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

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

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

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

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

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

1. Hostile Purpose

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Action

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

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1075 (D.C. Cir. 2011).

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

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

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

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

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

What kinds of acts are hostile?

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

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

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

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

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

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

302. *Id.*

303. *Id.*

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

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

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

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

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

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

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

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

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

C. *Acts in Favor of a Belligerent*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Allegiance

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

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

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applied to carrying dispatches or troops).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

336. *See* Bensayah v. Obama, No. 08-5537, slip. op. at 11–12 (D.C. Cir. June 28, 2010) (opining that in light of the largely unknown and amorphous structure of al-Qaeda, the determination of whether someone is part of al-Qaeda "must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Substantial Assistance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Support in Breach of a Duty

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

372. *See supra* note 342.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. In Sum

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

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

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

384. 18 U.S.C. § 2339A(b)(1) (2009).

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

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

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

CONCLUSION

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

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

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

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

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

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

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

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

Untangling Belligerency from Neutrality in the Conflict with Al-Qaeda

REBECCA INGBER*

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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SUMMARY

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 legislation[6]—faces an uphill battle. Yet

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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 overturned[7]). 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-Qaeda[9]—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

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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

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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]

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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

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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 indispensible 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 exceptions[25]—individuals in armed conflict fall within one of two categories: belligerent[26] or civilian.[27] At the heart of the inquiry here is

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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, pmbl. (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 persons[31] 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

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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 interment 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

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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]

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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 end[50] or necessitate

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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

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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 components[59]—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

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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

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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 dictafying 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

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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

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'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]

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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

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"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 force[99]—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

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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. DINSTEIN, 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.

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122. DINSTEIN, 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 *jus 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.*, Khairkhwa 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 hostilities[141]—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

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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 practice[149] 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

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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.... [It] 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

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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" tests[170] 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

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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.

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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 power[176]—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

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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 entirely[192]—laws intended specifically to address such acts and the proper treatment of the individuals

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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.

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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.

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

KEVIN JON HELLER*

Abstract

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

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

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

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SUMMARY

INTRODUCTION

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

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

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

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

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

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

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

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

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

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

6. Chang, *supra* note 1, at 21–25.

7. *Id.* at 25.

8. *Id.* at 33.

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

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

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

I. NEUTRALITY IN NON-INTERNATIONAL ARMED CONFLICT

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

> In the United States' armed conflict against al-Qaeda, friendly states and persons have neutral duties under international law toward the United States. These states and persons must refrain from participating in or supporting al-Qaeda's hostilities against the United States if they wish to maintain their neutral immunities. On the other hand, since al-Qaeda is not a state or a recognized belligerent under international law, friendly states and persons lack neutral duties with respect to al-Qaeda. They may participate in and support U.S. military operations against al-Qaeda without adverse consequences in international law.[11]

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

A. *When the Law of Neutrality Applies*

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

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

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

13. Chang, *supra* note 1, at 36–37.

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

> In general, neutrality law only applies in full to international armed conflict or special cases in which civil wars are tantamount to international armed conflict. Under international law, when a civil war occurs in a country, other states must decide whether to recognize the insurgent group as a belligerent, that is, a legitimate contender. If a state decides to recognize the insurgents as belligerents, it applies the international armed conflict rules of neutrality to that civil war. That state commits to be neutral between the government and the insurgents and to treat both as if they were sovereign states fighting against one another.
>
> However, in cases where insurgents are not recognized as belligerents, (for example, because the insurgents do not control enough territory), neutrality law is partially applicable. Other states have neutral duties with respect to the state, but not with respect to the insurgents. Helping the state against the insurgents is permissible; helping the insurgents against the state violates international law.[14]

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

1. Insurgency

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

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14. *Id.*

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

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

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

believed, "any unilateral and extended grant of advantages to the lawful government amounts, even prior to the recognition of the belligerency of the insurgents, to interference and to a denial of the right of the nation to decide for itself . . . the nature and the form of its government."[18]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27. *See id.* at 48 ("The Neutrality Acts were intended to reflect views on international law and enacted pursuant to Congress' power to define and punish offences against the law of nations.").

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

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

because their *main purpose* is to carry out the obligations imposed upon the United States while occupying a position of neutrality toward belligerents, *our laws* were intended *also to prevent* offenses against friendly powers whether such powers should or should not be engaged in war or in attempting to suppress revolt."[30]

2. Belligerency

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

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

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

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

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

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

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

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

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

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

United States formally "recognized the existence of a civil war between Spain and her colonies."[36] The Supreme Court then held in *The Santissima Trinidad* that "[e]ach party is, therefore, deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights."[37]

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

B. The Effect of Neutrality

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

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

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

37. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

50. *Id.*

"they also concede to their enemy the *status* of a belligerent for all *international* purposes."[51] The declaration had its intended effect.[52]

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

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

II. THE RIGHTS AND DUTIES OF BELLIGERENTS AND NEUTRALS

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

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51. *Id.* (citation omitted).

52. *Id.*

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

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

55. *Id.* at 194.

56. *Id.*

57. *Id.* at 195.

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

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

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

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

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

A. Rights and Duties of Belligerents

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

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

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

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

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

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

specifically recognized as unneutral conduct."[65] The expression "provision of money," however, fails to distinguish between *gifts* and *loans* to a belligerent. That is a critical distinction. Although neutral subjects who gratuitously give money to belligerents violate their neutral duties,[66] it is not unneutral service for a neutral subject to provide *loans* to a belligerent. As Castren says, "the neutral character of the subject of a neutral State residing in neutral territory is maintained even if he makes money loans to belligerents."[67] Indeed, Article 18 of Hague Convention V specifically recognizes that "loans made to one of the belligerents" do not qualify as "'acts' in favour of a belligerent" as long as "the person who . . . makes the loans lives neither in the territory of the other party nor in the territory occupied by him, and that the supplies do not come from these territories."[68] Article 18 is a specific exception[69] to Article 17(b)'s rule that a neutral subject loses his neutral status if he "commits acts in favor of a belligerent";[70] unfortunately, Chang cites only Article 17(b).[71]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Chang's discussion of the relationship between a "hostile purpose" and unneutral service is also overbroad. Chang believes that a hostile purpose on the part of a neutral subject can transform an otherwise legitimate commercial transaction into unneutral service. He claims, for example, that "[e]ven though a neutral might have other purposes for his conduct (such as earning money), the dangerous result of the conduct allowed an attribution or imputation of hostile intent."[78] He also approvingly cites scholars who describe the difference "between knowingly aiding the enemy with pecuniary motives and purposefully aiding the enemy with warlike motives as 'hairsplitting' and 'scarcely traceable.'"[79] But Chang's comments wrongly assume that "hostile intent" refers to the mental state of the neutral subject, when in fact it refers solely to the objective nature of the neutral subject's act. As Tucker points out with regard to the duties of neutral states, any act that is consistent with neutral duties is *by definition* not motivated by hostile intent, even if the neutral subjectively intends for that act to promote the goals of one of the belligerents:

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

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

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

78. Chang, *supra* note 1, at 66; *see also id.* at 56 ("Even otherwise innocuous acts, if committed for the purpose of waging war, are hostile acts that render a neutral liable to treatment as an enemy.").

79. *Id.* at 59.

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

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

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

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

A final example of Chang's tendency to inflate the concept of enemy is his claim that, analogizing to the "state practice of formally declaring war," a declaration that was "a formal expression of a group or person's intent to join al-Qaeda's war against the United States could be a hostile verbal act sufficient to acquire an enemy status."[84] In defense of that proposition, he cites[85] *Chaplinsky*, a Supreme Court case that deals with the criminalization of fighting words,[86] and *Gompers*, a Supreme Court case involving labor leaders who were charged with contempt for violating an injunction prohibiting a boycott.[87] He then makes the more specific claim that, "[f]or example, someone who has signed a martyr's will or made a videotape in preparation of an attack could acquire enemy status because these are not mere expressions of opinion or sympathy, but firm commitments to participate in hostilities,"[88] citing a newspaper article in the *Telegraph*, a newspaper article from the *Washington Post*, and the government's criminal complaint in a terrorism case in the District Court of Oregon.[89] None of those sources have anything to do with the law of neutrality—which is not surprising, because the law of neutrality does not support either claim. On the contrary, as Kotzsch notes, "any declaration of war on the part of the seditious party is bare of any relevance in international law," because "[m]aterial war" is determined "by facts alone."[90] Wright agrees, adding that insurgents, "not being recognized states, have no power to convert a state of peace into a state of war, so their declaration or recognition of war would have no legal effect."[91]

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

83. *See supra* notes 66–71 and accompanying text.
84. Chang, *supra* note 1, at 57.
85. *Id.* at 57 n.309.
86. Chaplinsky v. N.H., 315 U.S. 568, 568–74 (1942).
87. Gompers v. Buck's Stove and Range Co., 221 U.S. 418, 418–20 (1911).
88. Chang, *supra* note 1, at 57.
89. *Id.* at 57 n.310.
90. KOTZSCH, *supra* note 20, at 231.
91. *Id.* (quoting Quincy Wright, *When Does War Exist?*, 26 AM. J. INT'L L. 362, 366 (1932)).

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

B. Rights and Duties of Neutrals

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

1. Territory

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

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

93. *Id.* at 54.

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

95. *Id.*

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

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

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

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

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

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

2. Assistance

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

3. Duties Toward Neutral Subjects

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

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101. *Id.*

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

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

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

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

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

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

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

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

(1) The neutral state would have no obligation to prevent its subjects from providing war materials to al-Qaeda.[110] Article 7 of Hague Convention V specifically provides that "[a] neutral Power is not called upon to prevent the export or transport, on behalf of one or other of the belligerents, of arms, munitions of war, or, in general, of anything which can be of use to an army or a fleet."[111] This was, in fact, the United States' position during World War I.[112] Some scholars suggest that customary international law has supplanted Article 7,[113] recognizing the increased control that states exercise over private trading by their subjects, but that remains a decidedly minority position.[114]

(2) The neutral state would have no obligation to prevent its subjects from loaning money to al-Qaeda. As Castren says, because "the neutral character of the subject of a neutral State residing in neutral territory is maintained even if he makes money loans to belligerents, it is clear that the government of the neutral State need not prohibit or prevent such activities."[115] The same rule would apply to loans made by alien persons or corporations,[116] as well as to gifts from neutral subjects.[117]

(3) The neutral state would have no obligation to prevent its subjects from transporting to al-Qaeda, "in the way of trade, enemy troops, and the like, and enemy despatches."[118]

(4) Although the neutral state would be required to prevent its subjects from using neutral territory as a base of al-Qaeda military operations against the United States,[119] it would have no obligation to prevent its subjects from

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

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

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

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

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

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

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

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

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

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

119. *See* Lauterpacht, *Revolutionary*, *supra* note 109, at 127 ("[A neutral state] must prevent [its citizens] from committing such acts as would result in the neutral territory becoming directly a base for the

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

(5) The neutral state would have no obligation to prevent its subjects from propagandizing on behalf of al-Qaeda.[122]

(6) The neutral state would have no obligation to prevent its subjects from providing intelligence to al-Qaeda "by means of letter, telephone, telegram or in any other way,"[123] as long as it did not permit its subjects to create "actual centres of espionage."[124]

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

4. Detention

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

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

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military operations of either party").

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

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

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

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

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

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

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

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

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

C. Resolution 1373

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

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

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

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

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

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

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

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

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

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

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

Chang acknowledges Resolution 1373 in his Article,[138] but he does not recognize the extent to which it is incompatible with his argument that the law of neutrality governs the relationship between the United States, al-Qaeda, and third states. It is true that "since al-Qaeda is not a state or a recognized belligerent under international law, friendly states and persons lack neutral duties with respect to al-Qaeda. They may participate in and support U.S. military operations against al-Qaeda without adverse consequences in international law."[139] But that statement is true *only because Resolution 1373 modifies the law of neutrality*. In the absence of Resolution 1373, the law of neutrality would require states to treat al-Qaeda and the United States impartially. The law of neutrality is thus the last area of law that the United States would want to govern its conflict with al-Qaeda.

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

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

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

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

136. *Id.*

137. *Id.*

138. *See* Chang, *supra* note 1, at 68 n.363 (citing Security Council Resolution 1904, S.C. Res. 1904, U.N. Doc. S/RES/1904, para. 1(c), which recalled and reaffirmed Resolution 1373 and previous Security Council resolutions).

139. *Id.* at 40.

140. *See supra* notes 31–33 and accompanying text.

141. *See* Bridgeman, *supra* note 9, at 1190 ("In sharp contrast to previous conflicts between states and nonstate actors, the geographic distinction between belligerent and neutral territory is highly unstable in the conflict with al Qaeda."). This is not to imply, of course, that al-Qaeda groups never control territory. Counterexamples would likely include al-Qaeda in Afghanistan and the Yemeni group Al-Qaeda in the Arabian Peninsula.

neutrals in pursuit of their enemies."[142] There are, however, two problems with his argument. First, he overstates the extent to which the law of neutrality permits a forcible response to violations of neutrality. Second, and more fundamentally, Chang's claim that the *jus ad bellum* is determined by the law of neutrality ignores the fact that the adoption of the U.N. Charter has rendered the law of neutrality's rules governing the use of force essentially obsolete.

A. Forcible Reprisals and the Law of Neutrality

To assess Chang's position on the relationship between the law of neutrality and the *jus ad bellum*, we need to distinguish between two different kinds of violations of neutrality: (1) situations in which the neutral state affirmatively supports one of the belligerents to a conflict, and (2) situations in which a neutral state is unable or unwilling to prevent a belligerent from using its territory to harm the other belligerent. A forcible response in the first situation is directed at the neutral state itself, whereas a forcible response in the second situation is directed at the belligerent and only collaterally affects the neutral state. As a result, the legal rules governing the use of force differ.

With regard to the first situation, Chang argues that "[n]eutrality law requires that neutrals refrain from participating in hostilities and materially supporting one side in the prosecution of the war. To the extent that neutrals fail to fulfill those duties, they lose the right to be immune from the military operations of the belligerents."[143] That is literally true, but it obscures the difference between hostile acts and "mere violations" of neutrality.[144] Participating in hostilities alongside a belligerent immediately brings neutral status to an end, and the neutral state is thereafter considered to have declared war against the other belligerent.[145] The aggrieved belligerent is then obviously free to use military force against the formerly neutral state. By contrast, "materially supporting" a belligerent short of engaging in hostilities against the other belligerent does not end neutral status. As Oppenheim says, in such situations, "the condition of neutrality continues to exist between a neutral and a belligerent in spite of a violation of neutrality."[146] The aggrieved belligerent is still free to use force against the neutral state, but doing so requires it to declare war against the neutral.[147] The aggrieved belligerent also remains free—unlike in the context of hostilities—to either overlook the violation of neutrality or seek reparations for it, in which case the neutral state maintains its neutral status.[148]

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142. Chang, *supra* note 1, at 41.

143. *Id.* at 32.

144. *See* OPPENHEIM 6th, *supra* note 20, § 358, at 613 (distinguishing between a "mere violation of neutrality" and "a declaration of war or hostilities").

145. *See id.* § 358, at 613 ("Hostilities are acts of war and bring neutrality to an end."); *see also id.* § 320, at 546 ("Hostilities by a neutral are acts of force performed for the purpose of attacking a belligerent. They are acts of war, and they create a condition of war between such neutral and the belligerent concerned.").

146. *Id.* § 358, at 613.

147. *See id.* § 359, at 614 ("If the violation is only slight and unimportant, the offended State will often merely complain. If, on the other hand, the violation is very substantial and grave, the offended State will perhaps at once declare that it considers itself at war with the offender.").

148. *Id.*

This may seem to be a distinction without a difference, but it is actually not. Situations in which states directly participate in hostilities against the United States alongside al-Qaeda (such as Afghanistan during the Taliban era) are far less common than situations in which a state covertly provides al-Qaeda with financial, material, or logistical support.[149] Because such support does not automatically end neutrality, the United States would be entitled to use force against the states that provide it only by officially declaring war on them: "[I]t is not the violation which brings neutrality to an end, but the determination of the offended party."[150] The United States is no longer in the business of officially declaring war, and it seems unlikely that it would want to suffer the reputational costs involved in officially declaring war on each and every al-Qaeda-supporting state against whom it wanted to use even limited military force.

That said, the second *jus ad bellum* situation is likely to be far more common in the conflict with al-Qaeda: where the United States wants to use military force against members of al-Qaeda on neutral territory, not against the neutral state itself. Here Chang argues that "[i]f a neutral state is unwilling or unable to fulfill its duty to prevent its jurisdiction from being used by one belligerent for military purposes, then the neutral state forfeits its right to be inviolable from the operations of the other belligerent."[151] He also adopts a very expansive understanding of what constitutes a "military operation" that a neutral is bound to prevent on its territory, one that includes not only the launching of organized "hostile expeditions," but also "recruiting, transporting troops or supplies, or stationing communications relays."[152]

That interpretation of the law of neutrality is significantly overbroad. Castren states the general rule:

> As belligerents are not allowed to conduct hostilities in neutral territory, a neutral State need normally not tolerate there measures connected with *hostilities*. The only exception to this is that, when a neutral Power does not desire to repel a violation of its territory or if it is incapable of doing so, the other belligerent side may take countermeasures there, which the neutral State may not then prevent.[153]

As the quote indicates, not all violations of neutral territory permit a forcible response—only those that involve "hostilities." That is a critical limitation, because we have already seen that the law of neutrality distinguishes between hostilities and "mere" violations of neutrality. The distinction may be blurry at the margins, but it is clear that "hostilities" involve actual military operations, as opposed to activities that simply support such operations. That requirement is embraced by a variety of scholars. McDougal, for example, limits forcible reprisal to situations in which the

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149. The coalition between the Taliban and al-Qaeda while the former was the government of Afghanistan is perhaps the only example of a state directly participating with al-Qaeda against the United States. *See* Bridgeman, *supra* note 9, at 1188 (noting that the United States invaded Afghanistan "to fight al Qaeda and the Taliban" and that after 2002 Afghanistan became a co-belligerent of the United States fighting against al Qaeda and the Taliban).

150. OPPENHEIM 6th, *supra* note 20, § 358, at 613.

151. Chang, *supra* note 1, at 38.

152. *Id.*

153. CASTREN, *supra* note 46, at 487 (emphasis added).

neutral is unwilling or unable "to prevent hostile acts of the opposing belligerent."[154] Similarly, Oppenheim says that self-defense is limited to situations of "extreme necessity," in which a belligerent is using neutral territory "as a base for military operations" whose launch is "imminent."[155]

It is not surprising that the law of neutrality limits forcible reprisals to situations in which belligerents are using neutral territory to launch actual military operations. The idea that a belligerent is entitled to engage only in *proportionate* responses to a neutral state's violation of its duty of impartiality is at the heart of the law of neutrality,[156] as no less an authority than James Madison emphasized in 1808:

> As the right to retaliate results merely from the wrong suffered, it cannot, in the nature of things, extend beyond the extent of the suffering. There may often be a difficulty in applying this rule with exactness, and a reasonable latitude may be allowable on that consideration. But a manifest and extravagant departure from the rule can find no apology.[157]

Given the law of neutrality's emphasis on hostilities and proportionality, Chang is on firm ground when he claims that the United States would be entitled to use force on neutral territory to prevent al-Qaeda from launching a hostile expedition against it.[158] But there is no support in the law of neutrality for his idea that the United States could use such force to end recruitment, transport, or communications on behalf of al-Qaeda. Such activities do not involve hostilities—nor their imminent threat—and a forcible response to them would necessarily be disproportionate.

B. Force and the U.N. Charter

Chang's overbroad argument concerning forcible reprisals under the law of neutrality masks an even deeper problem: his failure to acknowledge that the law of neutrality has been fundamentally transformed by the U.N. Charter, which prohibits the "use of force against the territorial integrity or political independence of any state,"[159] subject only to "the inherent right of individual or collective self-defense"[160] in response to "an armed attack."[161] As Bothe summarizes, the U.N. Charter's prohibition on the use of force imposes significant limits on the availability of reprisals for violations of neutrality:

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154. MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER 406 (1994).

155. OPPENHEIM 6th, *supra* note 20, § 326, at 559.

156. *See, e.g.*, Walter L. Williams, Jr., *Neutrality in Modern Armed Conflicts: A Survey of the Developing Law*, 90 MIL. L. REV. 9, 40 (1980) ("Regardless of the reasons, the neutral's failure to perform its duty authorizes the opposing belligerent to take proportionate preventive action against the unlawful belligerent activity, including action within neutral territory.").

157. Letter from James Madison to David Erskine (Mar. 25, 1806), *in* 3 AMERICAN STATE PAPERS 211 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832), *quoted in Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, with Comment*, 33 AM. J. INT'L L. 167, 400 (Supp. 1939).

158. Chang, *supra* note 1, at 50.

159. U.N. Charter art. 2, para. 4.

160. *Id.* art. 51. Chang acknowledges the right of self-defense, *see* Chang, *supra* note 1, at 28 n.143, but he does not examine the relationship between the U.N. Charter's prohibition on the use of force and the law of neutrality.

161. U.N. Charter art. 51.

> According to traditional international law, reprisals could have involved the use of military force against the state violating the law. In this respect, the Charter of the United Nations requires a differentiated view. Armed reprisals are generally unlawful. As a consequence, a reaction against violations of neutrality which would involve the use of force against another state is permissible only where the violation of the law triggering that reaction itself constitutes an illegal armed attack.[162]

This limitation on reprisals affects both of the situations discussed above: (1) where the neutral state affirmatively supports one of the belligerents to a conflict, and (2) where a neutral state is unable or unwilling to prevent a belligerent from using its territory to harm the other belligerent.

1. State Support

As noted earlier, although the basis for the response differed, a belligerent was entitled to use force against a neutral state that either engaged in hostilities alongside its opposing belligerent or provided that belligerent with material support. The U.N. Charter's prohibition on the use of force has fundamentally altered that legal regime. Engaging in hostilities still justifies a forcible response, because such hostilities would qualify as an "armed attack" under Article 51 of the U.N. Charter. But material support no longer justifies an armed response, because it does not qualify as an armed attack:

> If a State violates the law of neutrality by rendering assistance to one of the belligerents (unneutral services), reprisals against that State are certainly permissible. Under traditional international law, it would have been legal to disregard the neutral status completely and to attack the neutral State. This, however, is no longer true. An unneutral service is not an armed attack, and it thus does not trigger a right of self-defence against the neutral State. Hence, the *ius contra bellum* excludes a reaction which would be legal under the traditional law of neutrality.[163]

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162. Bothe, *supra* note 16, at 581; *see also* Kress, *supra* note 10, at 251–52 (noting that, in light of Article 51 of the U.N. Charter, "forcible action taken in self-defence can no longer be justified by a mere reference to the traditional law of neutrality," because self-defense "presupposes that B's conduct carried out from within the territory of C amounts in and of itself to an armed attack against A"); *cf.* Wolf Heintschel von Heinegg, *Visit, Search, Diversion and Capture in Naval Warfare*, 30 CANADIAN Y.B. INT'L L. 89, 131 (1992) (noting that unneutral service does not give rise to the right of self-defense under the U.N. Charter, because it "is not an armed attack").

163. Michael Bothe, *Neutrality in Naval Warfare: What Is Left of Traditional International Law*, *in* HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 387, 396 (Astrid J.M. Delissen & Gerard J. Tanja et al. eds., 1991); *see also* Christopher Greenwood, *Scope of Application of Humanitarian Law*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW, *supra* note 16, at 45, 58 ("A state not originally party to an armed conflict will only commit an act of war, and thus risk making itself a party to the conflict, by giving direct support to the military operations of one of the belligerents. Financial, political, and intelligence support will not have such an effect."); von Heinegg, *supra* note 162, at 131 ("It seems that unneutral service performed by a non-belligerent state would not be sufficient to justify the use of force against that state, since unneutral service is not an armed attack.").

Indeed, the aggrieved belligerent will not be able to forcibly respond to a neutral state that provides unneutral services even if the Security Council has deemed the recipient of those services the aggressor. As Bothe points out, "[i]llegal support for an aggressor . . . is not necessarily equivalent to an armed attack. Therefore, the victim of aggression reacting to a non-neutral service in favour of the aggressor is still subject to the prohibition of the use of force."[164]

2. State Unwillingness or Inability

The U.N. Charter also affects the use of force against a belligerent who takes advantage of a neutral state's unwillingness or inability to prevent its territory from being used as a base for military operations—the situation more relevant to attacks on a non-state actor like al-Qaeda. It is no longer clear whether such uses of force are ever permissible in the Charter era, given the International Court of Justice's (I.C.J.) insistence in the *Nicaragua* case that an attack by a non-state actor qualifies as an "armed attack" within the meaning of Article 51 only if the attack is somehow imputable to a state.[165] The requirement of imputability—which was reaffirmed by the I.C.J. in the *Palestinian Wall* advisory opinion[166] and in *DRC v. Uganda*[167]—excludes the use of self-defense against attacks by a non-state actor when a state is simply unwilling or unable to prevent the non-state actor from using its territory.

It is an open question whether imputability is still required by customary international law. Indeed, whether the *jus ad bellum* permits self-defense in "unwilling" and "unable" situations is a particularly controversial issue. A complete analysis of that question is well beyond the scope of this Response. Suffice it to say that, as Ruys points out, it is impossible to unequivocally claim that the *Nicaragua* requirement no longer applies:

> In the end, we must admit that this is an area which is characterized by significant legal uncertainty. *De lege lata*, the only thing that can be said about proportionate trans-border measures of self-defence against attacks by non-State actors in cases falling below the *Nicaragua* threshold is that they are 'not unambiguously illegal'. *De lege ferenda,* we believe that customary law is evolving towards a different application of Article 51 UN Charter in relation to defensive action *against* a State—viz. coercive action that directly targets the State's military or infrastructure—and defensive action *within* a State—viz. recourse to force against a non-State group present within the territory of another State.[168]

Regardless of which position is correct, it is impossible to discuss forcible reprisal under the law of neutrality in isolation from the U.N. Charter's prohibition

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164. *See* Bothe, *supra* note 16, at 581.

165. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits Judgment, 1986 I.C.J. 14, para. 195 (June 27).

166. *See* TOM RUYS, "ARMED ATTACK" AND ARTICLE 51 OF THE UN CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 475–76 (2011) (explaining that three judges' criticisms of the majority's "State-centric reading of Article 51" in the I.C.J.'s *Palestinian Wall* advisory opinion indicate that the opinion created a "*limitative* effect, implying that 'armed attack' must in principle emanate from a State").

167. *Id.* at 482–83.

168. *Id.* at 531.

on the use of force. If customary international law still limits "armed attacks" to attacks by a non-state actor that are imputable to a state, Article 51 is considerably narrower than the law of neutrality. If customary law has evolved beyond the *Nicaragua* test, the regimes are essentially coterminous: the law of neutrality conditions forcible reprisal on a non-state actor being engaged in "hostilities";[169] the U.N. Charter conditions self-defense on an "armed attack."[170] Either way, however, the use of force against a non-state actor like al-Qaeda is now regulated by the U.N. Charter, not by the law of neutrality.[171]

CONCLUSION

At various points in his Article, Chang criticizes "mechanically"[172] applying IHL's "direct participation standard developed in the context of professional militaries . . . to military operations against terrorist or insurgent groups"[173] and decries as "absurd"[174] the idea of applying "the concept of 'combatant' to situations to which it does not apply and for purposes for which it was not intended."[175] Unfortunately, Chang's equally mechanical attempt to apply the law of neutrality to the United States' conflict with al-Qaeda leads to results that are no less absurd. The law of neutrality does not apply to insurgencies; it applies only to international armed conflicts, whether between states or between a state and an insurgent group that has been recognized as a legitimate belligerent. And when the law of neutrality does apply, it applies symmetrically: each belligerent has the same rights, and neutral states owe the same duties to both belligerents.

For both of those reasons, the United States is very fortunate that the law of neutrality does not, in fact, provide "an overarching international law framework for U.S. military operations against al-Qaeda."[176] If it did, members of al-Qaeda would possess the combatant's privilege; the United States would be required to grant members of al-Qaeda POW status; and states would be able to declare neutrality in the conflict, prohibiting them from assisting the United States' military operations against al-Qaeda in any way and rendering their territory and airspace inviolable. The United States would also have a limited ability to respond to violations of neutrality with military force. The law of neutrality is thus the *last* legal regime the United States would want governing its conflict with al-Qaeda.

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169. *See supra* notes 153–157.

170. *See supra* notes 159–162.

171. *See* Kress, *supra* note 10, at 267 (noting that if a violation of neutrality involves sufficient hostilities, the availability of self-defense under the Charter in such situations means that "the neutrality argument is not needed any longer because the non-international armed conflict would then in any event have spilled over to the territory of the State concerned").

172. Chang, *supra* note 1, at 20.

173. *Id.*

174. *Id.* at 73.

175. *Id.*

176. *Id.* at 33.

Reconciling Universal Jurisdiction with Equality Before the Law

ARIEL ZEMACH*

Abstract

This Article concerns the relationship between the doctrine of universal jurisdiction and the principle of equality before the law. While inequality before the law always presents a challenge to the legitimacy of a criminal justice system, it has an especially devastating effect on universal jurisdiction's claim to legitimacy. At the same time, the exercise of universal jurisdiction lends itself to discrimination and arbitrariness far more readily than regular domestic prosecutions.

This Article proposes a reform in the international law of universal jurisdiction that would ameliorate, as far as possible, the problem of inequality before the law in the exercise of universal jurisdiction. This reform introduces limitations on the liberty of states to "choose their battles" in the enforcement of international criminal law. The proposed reform assigns a pivotal role to the International Criminal Court ("ICC"). It sets forth a mechanism by which the ICC would designate particular states to exercise universal jurisdiction over crimes relating to a particular situation. Such designation would be a precondition for a state's liberty to exercise universal jurisdiction. The legal regime advocated here would thus replace the existing norm of international law that allows *any* state to exercise universal jurisdiction over core international crimes. This Article demonstrates that the proposed designation mechanism would constitute, in and of itself, a substantial guarantee of equality before the law in the exercise of universal jurisdiction.

This Article then proceeds to propose prosecutorial guidelines that, under the proposed reform, a state would be required to apply in its exercise of universal jurisdiction. Finally, it sets forth a mechanism that would allow the ICC Prosecutor to monitor the compatibility of a state's exercise of universal jurisdiction with the principle of equality before the law. This international oversight mechanism is tailored with a view to minimizing, as far as possible, both sovereignty and economic costs for the state exercising universal jurisdiction.

Far from limiting the reach of universal jurisdiction, the proposed reform would enhance the fight against impunity by diffusing current objections to the exercise of

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universal jurisdiction *in absentia*, thereby facilitating the assertion of such jurisdiction by states.

SUMMARY

INTRODUCTION

Universal jurisdiction "holds out the promise of greater justice."[1] Yet even prominent proponents of universal jurisdiction concede that "this weapon against impunity is potentially beset by incoherence, confusion, and, at times, uneven justice."[2] This statement seems far too kind, as uneven justice is currently an inherent feature of the practice of universal jurisdiction. Equality before the law—a fundamental principle of criminal law[3] and a human right protected under both customary and conventional international human rights law[4]—is currently absent from the exercise of universal jurisdiction worldwide. The legal literature to date does not contain an inquiry into possible avenues of reconciling universal jurisdiction with the principle of equality before the law. This Article takes up that task.

Universal jurisdiction is "criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction."[5] Universal jurisdiction thus departs from all other types of criminal jurisdiction recognized under international law, which are grounded in some concrete nexus between the forum state and the crime.[6] Universal jurisdiction finds basis in the especially heinous characteristics of

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1. PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 24 (Stephen Macedo ed., 2001), *available at* http://lapa.princeton.edu/hosteddocs/unive_jur.pdf [hereinafter PRINCETON PRINCIPLES]. An assembly of prominent international law scholars from around the world drafted the Princeton Principles on Universal Jurisdiction for the purpose of aiding legislators, judges, and government officials in interpreting and applying international law. *Id.* at 11–12.

2. *Id.*

3. *See* ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES: SELECTIVITY AND THE INTERNATIONAL CRIMINAL LAW REGIME 195 (2005) (arguing that equality before the law "is by no means exhaustive of the critical principles that ought to be applied to the law, but it is an immensely important one").

4. *See* Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, para. 605 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf (recognizing "a firmly established principle of international law of equality before the law, which encompasses the requirement that there should be no discrimination in the enforcement or application of the law"); International Covenant on Civil and Political Rights arts. 14, 26, Dec. 19, 1966, 999 U.N.T.S. 171, 177, 179 (Article 14 of the Covenant states "[a]ll persons shall be equal before the courts and tribunals . . . ." Article 26 explicitly provides that "[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

5. PRINCETON PRINCIPLES, *supra* note 1, at 28; Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes Against Humanity and War Crimes, Justitia et Pace Inst. of Int'l Law, 17th sess., at 2 (Aug. 26, 2005), http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf [hereinafter Resolution of Inst. of Int'l Law] (defining universal jurisdiction as criminal jurisdiction "irrespective of the place of commission of the crime and regardless of any link of active or passive nationality, or other grounds of jurisdiction recognized by international law").

6. *See* Fausto Pocar & Magali Maystre, *The Principle of Complementarity: A Means Towards a More Pragmatic Enforcement of the Goal Pursued by Universal Jurisdiction?*, *in* COMPLEMENTARITY AND THE EXERCISE OF UNIVERSAL JURISDICTION FOR CORE INTERNATIONAL CRIMES 247, 262–63 (Morten Bergsmo ed., 2010), *available at* http://www.fichl.org/fileadmin/fichl/documents/FICHL_7_web.pdf ("[W]hile other forms of extra-territorial jurisdiction are grounded in some nexus between the forum state and the crime, universal jurisdiction requires no such nexus."); Jonathan H. Marks, *Mending the Web:*

some crimes, which are so harmful that they offend the international community as a whole.[7] While the boundaries of the category of crimes subject to universal jurisdiction are not entirely clear,[8] it is widely agreed that this category includes, *inter alia*, war crimes, crimes against humanity, and genocide.[9] Such acts are prohibited under international criminal law, and I shall term them "core international crimes."[10]

Universal Jurisdiction, Humanitarian Intervention and the Abrogation of Immunity by the Security Council, 42 COLUM. J. TRANSNAT'L L. 445, 450 (2004) ("The crimes over which a national court ordinarily exercises criminal jurisdiction are . . . crimes committed in its territory (territorial jurisdiction), crimes committed abroad by its nationals (national or active personality jurisdiction), crimes committed against its nationals (passive personality), or crimes that are committed against or threaten its national interests (protective jurisdiction).").

7. *See* Florian Jessberger, Wolfgang Kaleck & Andreas Schueller, *Concurring Criminal Jurisdictions Under Int'l Law*, *in* COMPLEMENTARITY AND THE EXERCISE OF UNIVERSAL JURISDICTION FOR CORE INTERNATIONAL CRIMES 233, 236 (Morten Bergsmo ed., 2010), *available at* http://www.fichl.org/fileadmin/fichl/documents/FICHL_7_web.pdf (contending that the principle of universal jurisdiction "recognizes the authority of each state to prosecute especially 'heinous' crimes, which due to their specific characteristics, affect the international community as a whole"); Pocar & Maystre, *supra* note 6, at 263 (outlining one of the traditional rationales for universal jurisdiction that certain crimes "are so harmful, that they constitute a profound attack not just on the immediate victims or to the state community to which victims are related, but on the international community as a whole"); Marks, *supra* note 6, at 465 (arguing that universal jurisdiction is based on the view that the commission of serious international crimes "poses a potential threat to all states and thus all states have an interest in prosecuting the wrongdoer . . . . [E]ach state is deemed to have a common interest in the international legal and social order and in international peace and security"). Similarly, in the *Eichmann* case, the Supreme Court of Israel determined that war crimes may be subject to the exercise of universal jurisdiction as "all civilized states have a very real interest in the punishment of war crimes." Eichmann v. Attorney General for Israel, 36 I.L.R. 5 (Isr. D.C. Jer. 1961), aff'd 36 I.L.R. 277, 294 (Isr. S. Ct. 1962) (quoting Willard B. Cowles, *Universality in Jurisdiction over War Crimes*, 33 CALIF. L. REV. 177, 217 (1945)). The Court explained that international crimes "can undermine the foundations of the international community as a whole and impair its very stability." *Eichmann*, 36 I.L.R. 277, 294 [1962] (Isr.). Some national courts also have held that all states have a legitimate interest in prosecuting certain heinous crimes on the basis of universal jurisdiction as such crimes offend the "moral interests" of the international community as a whole. *See* Polyukhovich v. Commonwealth, (1991) 172 CLR 501, 663 (Austl.) (concluding that the principle of universal jurisdiction applies "where conduct, because of its magnitude, affects the moral interests of humanity and thus assumes the status of a crime in international law"); *see also* Demjanjuk v. Petrovsky, 776 F.2d 571, 582 (6th Cir. 1985) (holding "[t]his 'universality principle' is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people").

8. Marks, *supra* note 6, at 451 (observing "there is some debate about the crimes giving rise to universal jurisdiction").

9. Antonio Cassese, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. INT'L CRIM. JUST. 589, 592 (2003) [hereinafter Cassese, *Is the Bell Tolling for Universality?*] (subscribing to the view that states are allowed to assert universal jurisdiction over genocide, crimes against humanity, war crimes, and torture, and citing national case-law supporting this proposition); *see also* PRINCETON PRINCIPLES, *supra* note 1, at 29 ("[S]erious crimes under international law include: . . . (3) war crimes; . . . (5) crimes against humanity; (6) genocide . . . ."); Resolution of Inst. of Int'l Law, *supra* note 5, para. 3(a) ("Universal jurisdiction may be exercised over crimes identified by international law as falling within that jurisdiction in matters such as genocide, crimes against humanity, grave breaches of the 1949 Geneva Conventions for the protection of war victims or other serious violations of international humanitarian law committed in international or non-international armed conflict."); Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, paras. 61–63 (Feb. 14, 2002) [hereinafter Arrest Warrant Case] (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal) (concluding that states may exercise universal jurisdiction over genocide, crimes against humanity, and war crimes).

10. *See* Henry J. Steiner, *Three Cheers for Universal Jurisdiction—Or Is It Only Two?*, 5 THEORETICAL INQUIRIES L. 199, 204 (2004) ("The norms associated with universal jurisdiction generally describe conduct that is universally condemned and that is defined by international law. That is, the

Inequality before the law is closely related to a host of other concerns that arise in relation to political abuse or otherwise imprudent exercise of universal jurisdiction. Such concerns relate to international relations, the principle of equality among sovereigns, and the fairness of criminal proceedings. Cherif Bassiouni has observed, "If used in a politically motivated manner or simply to vex and harass leaders of other states, universal jurisdiction could disrupt world order and deprive individuals of their basic rights."[11] As noted by commentators, the likelihood that domestic courts exercising universal jurisdiction will become a means of furthering the political agenda of the country in which they sit or of particular interested groups within that country "is high since the crimes involved are often committed in the context of protracted political and military conflicts in which the interests of third countries, including the one exercising universal jurisdiction, are usually involved."[12] In view of this reality, the former President of the International Court of Justice ("ICJ"), Judge Guillaume, contended that permitting states to assert pure universal jurisdiction would "encourage the arbitrary for the benefit of the powerful, purportedly acting as agent for an ill-defined 'international community.' Contrary to what is advocated by certain publicists, such a development would represent not an advance in the law but a step backward."[13]

The profound inequalities most likely to arise in the exercise of universal jurisdiction do not merely concern its use by states as a political weapon aimed at shaming and denouncing other states or influencing their policies in various areas of international relations.[14] The inequalities also include states' reluctance to exercise universal jurisdiction "when citizens of allied and/or powerful nations are involved."[15]

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norms constitute international crimes.").

11. M. Cherif Bassiouni, *The History of Universal Jurisdiction and Its Place in International Law*, *in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 39, 39 (Stephen Macedo ed., 2004) [hereinafter Bassiouni, *The History of Universal Jurisdiction*]; *see also* Marks, *supra* note 6, at 473–74 ("Any universal system . . . must not allow legal principles to be used as weapons to settle political scores. . . . It would be ironic if a doctrine designed to transcend the political process turns into a means to pursue political enemies rather than universal justice.") (quoting Henry Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF. 86, 88, 92 (2001)).

12. Gabriel Bottini, *Universal Jurisdiction After the Creation of the International Criminal Court*, 36 N.Y.U. J. INT'L L. & POL. 503, 555 (2004). Indeed, commenting on the Belgian law on universal jurisdiction, Belgium's Foreign Minister Louis Michel acknowledged that "the noble cause that prompted the parliament to adopt this law was hit with abuse and manipulated for political ends." Bottini, *supra*, at 554–55 (quoting *Belgium Amends War Crimes Law*, BBC NEWS, Aug. 1, 2001, http://news.bbc.co.uk/2/hi/europe/3116975.stm).

13. Arrest Warrant Case, *supra* note 9, para. 15 (separate opinion of President Guillaume).

14. *See* Madeline H. Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L. REV. 337, 354 (2001) ("[C]riminal trials for war crimes, genocide, and crimes against humanity do not exist in isolation from those other aspects of interstate relations . . . . [S]tates may exercise universal jurisdiction as a means of gaining advantage over their opponents in interstate conflict.").

15. Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998–2008*, 30 MICH. J. INT'L L. 927, 973 (2009); *see also* Katherine Gallagher, *Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture*, 7 J. INT'L CRIM. JUST. 1087, 1115 (2009) ("[P]articularly when the target-defendants are from powerful countries, the results do not necessarily bode well for those who favour accountability . . . over impunity."); Tanaz Moghadam, *Revitalizing Universal Jurisdiction: Lessons from Hybrid Tribunals Applied to the Case of Hissène Habré*, 39 COLUM. HUM. RTS. L. REV. 471, 486 (2008) ("Heads of state or other high-ranking officials targeted by universal jurisdiction cases can deter their own prosecution by exerting powerful political pressure. As a result, states with a statutory basis (or legal obligation) to detain, extradite, or

Commentators have observed that such reluctance has been exemplified by the refusal of German and French authorities to commence an investigation under the principle of universal jurisdiction regarding the role of high-level U.S. officials in the torture of detainees under U.S. control in Iraq and elsewhere.[16] Since 1994, more than thirty individuals have been tried in national courts on the basis of universal jurisdiction.[17] None of them was a national of a Western country.[18] Indeed, inequality of individuals before the law in the exercise of universal jurisdiction has much to do with a de facto inequality of sovereigns. It has been observed that, "In practice, universal jurisdiction appears inconsistent with the notion of sovereign equality among states .... Currently, universal jurisdiction is generally exercised by powerful countries over acts that occurred in developing countries and that were committed by persons from such countries."[19]

This Article proposes a reform in the international law of universal jurisdiction that would introduce to its practice the principle of equality before the law. However, the reach of this reform extends far beyond equality concerns. A reform in the law of universal jurisdiction undertaken with a view to minimizing inequality before the law as far as realistically possible also would have the broader effect of largely depoliticizing the exercise of universal jurisdiction, thereby resolving the bulk of concerns that currently arise with regard to the exercise of universal jurisdiction. Through the enhancement of the principle of equality before the law, the proposed reform would significantly reduce the risk of the exercise of universal jurisdiction becoming "a wildfire, uncontrolled in its application and destructive of orderly legal processes."[20]

This Article begins by providing a full account of the threat to the legitimacy of universal jurisdiction posed by inequality before the law. Part I of this Article demonstrates that universal jurisdiction's claim to legitimacy suffers from inherent weaknesses that can be overcome only through observance of the principle of equality before the law. Such weaknesses concern the unavailability of a sound democratic basis for the exercise of universal jurisdiction and the absence of a

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prosecute those suspected of relevant crimes frequently refuse to do so for fear of political reprisals.").

16. Gallagher, *supra* note 15, at 1106 (observing that the decision of the German prosecutor not to investigate complaints submitted against Donald Rumsfeld and other high-ranking U.S. officials "must be regarded as a political, rather than purely legal, decision"); Bottini, *supra* note 12, at 558–59 (pointing to the reluctance of European states to exercise universal jurisdiction over U.S. officials, Bottini observed, "It is when ... the accused is the national of a powerful country, and often when he is also a current or former member of the government of this state ... that the inability of universal jurisdiction to bring accused persons to justice is more striking, even if the prosecuting state is a developed one").

17. For a review of the exercise of universal jurisdiction worldwide since 1994, see Joseph Rikhof, *Fewer Places to Hide? The Impact of Domestic War Crimes Prosecutions on International Impunity*, *in* COMPLEMENTARITY AND THE EXERCISE OF UNIVERSAL JURISDICTION FOR CORE INTERNATIONAL CRIMES 7, 45–64 (Morten Bergsmo ed., 2010).

18. *See id.* (listing prosecutions based on universal jurisdiction. Though Rikhof also notes the Dutch prosecutions of two Dutch nationals, these cases are better understood as nationality-based exercises of jurisdiction). Investigations launched in Spain, on the basis of universal jurisdiction, against U.S., Chinese, and Israeli officials were followed by Spanish legislation that significantly limited the exercise of universal jurisdiction. *Id.*; *see* Cedrik Ryngaert, *Complementarity in Universality Cases: Legal-Systemic and Legal Policy Considerations*, *in* COMPLEMENTARITY AND THE EXERCISE OF UNIVERSAL JURISDICTION FOR CORE INTERNATIONAL CRIMES 165, 196 (Morten Bergsmo ed., 2010) (observing "Spain's political authorities quickly caved in to foreign concerns").

19. Bottini, *supra* note 12, at 555–56.

20. Bassiouni, *The History of Universal Jurisdiction*, *supra* note 11, at 63.

concrete legitimizing linkage between the crime and the state exercising universal jurisdiction. Hence, while inequality before the law always presents a challenge to the legitimacy of a criminal justice system, it has an especially devastating effect on universal jurisdiction's claim to legitimacy. At the same time, Part I shows that the exercise of universal jurisdiction lends itself to discrimination and arbitrariness far more readily than regular domestic prosecution. The extraordinary vulnerability of the principle of equality before the law is currently an inherent feature of the exercise of universal jurisdiction even where a state invokes universal jurisdiction in good faith, rather than as a means of promoting its political agenda.

Part I also argues that equality concerns regarding the operations of the International Criminal Court ("ICC") are far less acute than those arising from the exercise of universal jurisdiction by the various states. The reform proposed here for the enhancement of equality before the law will therefore only address the latter.

This Article sets forth a model of international involvement in a state's exercise of universal jurisdiction, which would ameliorate, as far as possible, the problem of inequality among potential defendants worldwide. The proposed reform assigns a pivotal role to the ICC. Part II sets forth a mechanism by which the ICC would designate particular states to exercise universal jurisdiction over core international crimes relating to a particular situation. Such designation (i.e., a referral of a situation by the ICC to a state) would be a precondition for a state's liberty to exercise universal jurisdiction. The legal regime advocated here would thus replace the existing norm of international law, which allows *any* state to exercise universal jurisdiction over perpetrators of core international crimes.

The distinction between a particular *case* and a *situation*, which underlies the criminal process in the ICC,[21] also informs the exercise of national universal jurisdiction under the model advanced here. The ICC would refer a particular situation, not a particular defendant or a particular case, to a state. Situations are defined in terms of temporal and territorial parameters[22] ("e.g., the armed conflict in the territory of the former Yugoslavia between 1991 and 1995 or the crisis situation in the territory of Rwanda after 6 April 1994"),[23] while "[c]ases are specific incidents during which one or more 'international crimes' seem to have been committed."[24] The liberty of a state to exercise universal jurisdiction would not extend beyond a situation referred to it by the ICC.

Part II demonstrates that the proposed referral mechanism would constitute, in and of itself, a substantial guarantee of equality before the law in the exercise of universal jurisdiction. It divests a state of the opportunity to single out another state of its choosing, subjecting the nationals of the latter to the exercise of universal jurisdiction as a means of promoting political ends. The referral mechanism also would externalize the political costs of prosecution away from the state exercising

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21. *See infra* note 94.

22. Situation in the Democratic Republic of the Congo, Case No. ICC-01/04, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5 and VPRS6, para. 65 (Jan. 17 2006), public redacted version *available at* http://www.icc-cpi.int/iccdocs/doc/doc183441.PDF [hereinafter Situation in the Democratic Republic of the Congo].

23. Héctor Olásolo, *The Lack of Attention to the Distinction Between Situations and Cases in National Laws on Co-operation with the International Criminal Court with Particular Reference to the Spanish Case*, 20 LEIDEN J. INT'L. L. 193, 194 (2007).

24. Situation in the Democratic Republic of the Congo, *supra* note 22, at 194.

universal jurisdiction and onto the ICC as a representative of the international community as a whole, and thereby significantly reduce—though not completely negate—states' hesitancy to exercise universal jurisdiction over nationals of allied or powerful states.

Yet, the referral mechanism, standing alone, does not fully resolve equality concerns arising with regard to the exercise of universal jurisdiction. It needs to be complemented by substantive norms of international law that would guide the prosecutorial policy of a state in exercising its universal jurisdiction. Allison Danner has urged the ICC Prosecutor to articulate prosecutorial guidelines that will shape and constrain his discretionary decisions as an essential guarantee of the principle of equality before the law.[25] Such a guarantee is equally—if not more—essential in the context of the exercise of universal jurisdiction by a national criminal justice system. Part III therefore attempts to set forth prosecutorial guidelines that, under the legal regime proposed here, a state would be required to apply in its exercise of universal jurisdiction.

Part IV proceeds to set forth a mechanism that would allow the ICC Prosecutor to monitor the compatibility of a designated state's exercise of universal jurisdiction with the principle of equality before the law. This international oversight mechanism is tailored with a view to minimizing, as far as possible, both sovereignty and economic costs for the designated state.

The involvement of ICC organs in the exercise of universal jurisdiction by states, which lies at the heart of the legal regime proposed here, brings to mind the doctrine of "proactive complementarity," which has recently gained ground in the literature and has been adopted by the ICC Prosecutor.[26] Under this doctrine, the powers and roles of ICC organs extend beyond those explicitly stipulated in the Rome Statute of the International Criminal Court ("Rome Statute")[27] and encompass, *inter alia*, soliciting states to prosecute on their own perpetrators of international crimes and assisting such states in exercising their jurisdiction. Yet, while the powers and roles of ICC organs under the doctrine of proactive complementarity are considered to be *implied* in the provisions of the Rome Statute,[28] this cannot be said of the referral mechanism presented here. In departure from current theories of proactive complementarity, the referral mechanism presented here limits the liberties to exercise universal jurisdiction conferred upon states under both existing customary international law[29] and certain treaties.[30] Such

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25. Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 538, 541–42 (2003).

26. *See infra* notes 139–140 and accompanying text.

27. Rome Statute of the International Criminal Court arts. 34–48, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

28. *See infra* note 140 and accompanying text.

29. *See supra* notes 5–9 and accompanying text.

30. *See, e.g.*, Roger O'Keefe, *The Grave Breaches Regime and Universal Jurisdiction*, 7 J. INT'L CRIM. JUST. 811, 811 (2009) ("The grave breaches provisions of the 1949 Geneva Conventions ... constituted the first treaty-based embodiment of an unconditional universal jurisdiction applicable to all states parties. They also amounted to the first multilateral recognition by states of universal jurisdiction over war crimes."); Yoram Dinstein, *International Criminal Law*, 20 ISR. L. REV. 206, 215 (1985) (observing that the "grave breaches" provisions common to the Geneva Conventions established universal jurisdiction over war crimes); Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 146–47, Aug. 12, 1949, 6 U.S.T. 3616, 75 U.N.T.S. 287, 386 (laying out the "grave breaches" provisions); I JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY

limitation is by no means implied in the provisions of the Rome Statute. Hence, the reform of the law of universal jurisdiction proposed here requires international legislation, preferably in the form of an amendment to the Rome Statute.

This Article does not view a reduction in the overall exercise of universal jurisdiction as the price of equality. Far from limiting the reach of universal jurisdiction, the reform proposed here would enhance the fight against impunity through a more effective and more frequent exercise of such jurisdiction. It would perform this function mainly by diffusing the main objections to the exercise of universal jurisdiction *in absentia*. It is widely agreed that:

> Universal jurisdiction *in absentia* can be roughly defined as the conducting of an investigation, the issuing of an arrest warrant, and/or the bringing of criminal charges based on the principle of universal jurisdiction when the defendant is not present in the territory of the acting state. This definition does not include adjudication of the case.[31]

Part V demonstrates that the exercise of universal jurisdiction *in absentia* is essential for the effective enforcement of international criminal law. Yet, most states are currently reluctant to pursue such practice. Underlying such reluctance are concerns that *in absentia* assertions "would permit a particular state to act[] as 'policeman' of the world,"[32] and thereby "create a chaotic and arbitrary method of enforcing international law."[33] The proposed reform addresses and resolves such concerns, thereby facilitating the exercise of universal jurisdiction *in absentia*. In fact, the referral mechanism proposed here largely turns on the exercise of universal jurisdiction *in absentia* by the designated state.

Finally, Part VI examines whether the universal jurisdiction laws of certain European states, which allow private actors to assume the role of prosecutors, are consonant with the principle of equality before the law.

Ian Brownlie has recently lamented that "[p]olitical considerations, power, and patronage will continue to determine who is to be tried for international crimes and who not."[34] This Article does not attempt to present a magic formula that would prove Brownlie wrong. It does not purport to defeat *realpolitik*. It does aim to alleviate the acute problem of inequality before the law in the exercise of universal jurisdiction *as much as possible*.

INTERNATIONAL HUMANITARIAN LAW 607 (2005) ("[I]n addition to the Geneva Convention ... a number of other treaties oblige States party to provide for universal jurisdiction over certain crimes .... These are, in particular, the Convention against Torture, the Inter-American Convention on Forced Disappearances, the Convention on the Safety of UN Personnel and the Second Protocol to the Hague Convention for the Protection of Cultural Property.").

31. Anthony J. Colangelo, *The New Universal Jurisdiction: In Absentia Signaling Over Clearly Defined Crimes*, 36 GEO. J. INT'L L. 537, 543 (2005).

32. LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 175–76 n.62 (2003) (quoting an expert opinion submitted by Professor John Dugard to a Dutch court, which addressed the objections to the exercise of universal jurisdiction *in absentia*).

33. Colangelo, *supra* note 31, at 550 (addressing arguments against the exercise of universal jurisdiction *in absentia*).

34. IAN BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW 575 (6th ed. 2003).

I. INEQUALITY BEFORE THE LAW AND UNIVERSAL JURISDICTION'S CLAIM TO LEGITIMACY

A. *The Vulnerability of the Principle of Equality Before the Law in the Exercise of Universal Jurisdiction*

The exercise of universal jurisdiction is inherently more disposed to arbitrariness than ordinary law enforcement. This feature of universal jurisdiction primarily arises from the breadth of prosecutorial discretion. A state prosecutor enjoys a broader discretion when engaged in the exercise of universal jurisdiction than when engaging in ordinary law enforcement. Allison Danner has observed, "Even in domestic systems that vest prosecutors with significant discretion, there is a clear assumption that the most serious crimes, like murder, will be fully prosecuted."[35] Such an assumption pertains neither to the prosecution of international crimes by international tribunals[36] nor to the exercise of universal jurisdiction by a state.[37] Louise Arbour, the former prosecutor in the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), thus noted that the challenge the ICC Prosecutor will confront is actually "to choose from many meritorious complaints the appropriate ones for international intervention, rather than to weed out weak or frivolous ones."[38] Similarly, a state wishing to exercise universal jurisdiction is currently free to pick and choose which armed conflict to address and which acts of violence within such conflict to prosecute. Such extremely broad discretion is especially amenable to abuse. Allison Danner's observation regarding the operations of the ICC equally applies to the exercise of universal jurisdiction by a national court:

> That any prosecutions in an international forum will necessarily involve only a few accused rather than the many that might have been pursued does highlight the principal problem posed by discretion: it can be used in a way that produces arbitrary or—even worse—discriminatory results. As one commentator has noted, discretion "makes easy the arbitrary, the discriminatory and the oppressive. It produces inequality of treatment."[39]

Closely related, the exercise of universal jurisdiction is characterized by the absence of a strong incentive for a state to pursue a practice of non-arbitrary

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35. Danner, *supra* note 25, at 521.

36. Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583, 610–11 (2007) [hereinafter Greenawalt, *Justice Without Politics?*] ("The everyday tradeoffs faced by domestic justice systems have no real analogy in the context of international criminal tribunals, in which a handful of prosecutors appearing before a handful of judges seek justice for mass atrocities committed by countless perpetrators. The numbers speak for themselves . . . . The Rwandan justice system has held in custody over 100,000 suspects at one time or another, yet in eleven years of operation, the ICTR has tried just twenty-two genocidaires . . . .").

37. *See* Danner, *supra* note 25, at 521 ("In the international context, the vast majority of the crimes committed are, by definition, extremely serious; yet not all can be pursued.").

38. Louise Arbour, *Statement to the Preparatory Commission on the Establishment of an International Criminal Court*, 1997 ICTY Y.B. 229, 232, U.N. Sales No. E.99.III.P.2. (1997), *quoted in* Danner, *supra* note 25, at 519–20.

39. Danner, *supra* note 25, at 519–20 (quoting Charles D. Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 429 (1960)).

prosecutions. The unique linkage between a state and crimes committed within its territory represents a certain guarantee for the non-arbitrary prosecution of such crimes. The interest of a state in maintaining law and order within its territory presents the state with a strong incentive to prioritize prosecutorial efforts according to the gravity of the crimes concerned. Moreover, this interest may often outweigh a broad range of foreign policy considerations that are inconsistent with the principle of equality before the law (e.g., inhibitions on the part of a state to engage in prosecutions of foreign figures that may jeopardize foreign relations). Clearly, ordinary law enforcement in the various states is also vulnerable to varying degrees of arbitrariness. Yet, the unique interest a state has in regulating conduct and enforcing law and order within its borders provides an anchor that ensures that prosecutorial practices do not stray too far from the principle of equality before the law. Simply put, states cannot afford a practice of arbitrary law enforcement across the board when it comes to domestic crimes, that is, when a state's interest in maintaining internal law and order is at stake.

Such an anchor is absent, however, where a state turns to the exercise of universal jurisdiction. The exercise of universal jurisdiction is not premised on any concrete linkage between the prosecuting state and the crime.[40] No special state interest provides a guarantee, however limited, that the enforcement of international criminal norms be non-discriminatory.[41] Under such circumstances, the exercise of prosecutorial discretion is more susceptible to considerations that have no place in the enforcement of criminal law, such as a broad range of foreign policy considerations (e.g., satisfaction or dissatisfaction with the foreign policy of a certain foreign government or the political positions of a certain public figure; reluctance to compromise relations with allied and/or powerful states).

B. *The Destructive Effect of Inequality Before the Law on the Legitimacy of Universal Jurisdiction*

Some commentators are not troubled by discriminatory prosecutorial policies of states exercising universal jurisdiction, so long as defendants are afforded a fair trial.[42] This view ignores, however, the destructive effect inequality before the law has on the legitimacy of universal jurisdiction. "Legitimacy" has been defined as "a quality that leads people (or states) to accept authority—independent of coercion, self-interest, or rational persuasion—because of a general sense that the authority is justified."[43] This definition is also used here. Simply put, "'legitimacy' refers to the justification of authority."[44]

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40. *See supra* note 6 and accompanying text.

41. *Cf.* Jessberger, Kaleck & Schueller, *supra* note 7, at 238 ("While third states [exercising universal jurisdiction] act in the interest of and, thus, as agents of the international community as a whole, the territorial state primarily pursues its own interests by prosecuting alleged offenders.").

42. *See, e.g.*, Colangelo, *supra* note 31, at 565 n.116 ("[I]t is far from clear that the possibility of states employing universal jurisdiction *in absentia* for 'political' reasons necessarily conflicts with the purposes of international criminal law. . . . If the accused is found guilty under a fair trial procedure, he is one more international criminal who will not escape with impunity for failure of the national or territorial state to prosecute."); Marks, *supra* note 6, at 474 ("[I]f there is a genuine case to be answered by a serving governmental official who is alleged to have committed serious international crimes, the motive for the prosecution should not ordinarily be the principal concern.").

43. Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for*

While inequality before the law *always* presents a challenge to the legitimacy of a criminal justice system, it has an especially devastating effect on universal jurisdiction's claim to legitimacy. Fritz Mann noted that "in essence criminal jurisdiction is determined . . . by the closeness of a State's connection with, or the intimacy and legitimacy of its interests in, the facts in issue."[45] As one commentator put it, "Typically, this evaluation of appropriateness has meant a form of nexus analysis. The central question has been whether the conduct to be regulated is sufficiently linked to the legitimate interests of the state claiming jurisdiction to warrant recognition of jurisdiction."[46] While legitimate state interests underlying more traditional types of jurisdiction turn on some form of concrete linkage between the criminal conduct and the prosecuting state, such interests are absent in the case of universal jurisdiction.[47] In the case of universal jurisdiction, the necessary legitimizing linkage turns on the nature of the crimes that are, in the words of Justice Jackson's statement at Nuremberg, "so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated."[48] An argument invoking such threat to the international community as a whole as a legitimizing linkage supporting universal jurisdiction loses credibility where states exercising such jurisdiction over certain atrocities readily ignore other equally atrocious crimes "where it [is] considered politically expedient to do so."[49]

The absence of equality before the law renders universal jurisdiction especially vulnerable to a legitimacy challenge also because it may not rely on a democratic basis of legitimacy. Addressing the legitimacy challenge facing the ICC, Allison Danner observed, "Conferral of power on officials by means of democratic elections provides the most familiar basis for legitimacy in liberal states. Almost by definition, however, international institutions—and especially international courts—depend on alternative bases for their legitimacy."[50] The democratic difficulty that inheres in the operations of international criminal courts also exists where a state that has no concrete linkage to the crime steps into the shoes of the international criminal court by exercising universal jurisdiction. Commentators have thus observed that, in exercising universal jurisdiction, courts and prosecutors "are completely unaccountable to the citizens of the nation whose fate they are ruling upon."[51] There is no "democratic linkage" between a national court exercising universal jurisdiction

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International Environmental Law?, 93 AM. J. INT'L L. 596, 600–03 (1999); *see also* Danner, *supra* note 25, at 535 (adopting Bodansky's definition).

44. Bodansky, *supra* note 43, at 601; *see also* Danner, *supra* note 25, at 535 ("By legitimacy, I mean justification for the exercise of authority.").

45. FRITZ A. MANN, STUDIES IN INTERNATIONAL LAW 80 (1973).

46. Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS. 13, 49 (2001).

47. *See supra* notes 5–6 and accompanying text.

48. 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 98–99 (1947), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-II.pdf.

49. CRYER, *supra* note 3, at 198 ("International criminal law is more susceptible to claims of unfair selectivity than domestic law. This is not just because international criminal law is more selectively enforced than domestic law (although it is). Arguments about selectivity strike at the rhetoric of international criminal law and its institutions.").

50. Danner, *supra* note 25, at 535; *see also* Bodansky, *supra* note 43, at 599 ("[D]emocracy has become *the* touchstone of legitimacy in the modern world.").

51. Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 DAEDALUS 47, 51 (Winter 2003).

and the individuals over whom it would exercise authority.[52] The dependence of international courts on "alternative bases for their legitimacy"[53] equally applies, then, to the exercise of universal jurisdiction by states. It seems that the legitimacy of such prosecutions can only come from the virtues of the criminal process itself, that is, its fairness, which largely turns on the principle of equality before the law.[54] Indeed, one commentator addressing the legitimacy of international institutions has observed that "authority can be legitimate because it involves procedures considered to be fair. Both judicial and administrative authority have traditionally been legitimated, at least in part, in procedural terms."[55] This applies to the exercise of universal jurisdiction by states as well. In view of the lack of a sound democratic basis for the legitimacy of universal jurisdiction, the absence of equality before the law would have an especially devastating effect on any claim for such legitimacy.

C. *The Unfairness Attached to Inequality Before the Law in the Exercise of Universal Jurisdiction*

To say that selective prosecutions are unfair amounts to a tautology. Yet, the unfairness inherent to *all* selective prosecutions seems to be aggravated where prosecutions are predicated on universal jurisdiction.

The exercise of universal jurisdiction concerns the punishment of international crimes. In prosecuting the perpetrators of international crimes we often punish individuals for crimes essentially committed by a collective.[56] Immi Talgren has observed that, "contrary to most national criminality which is understood to constitute social deviation, acts addressed as international crimes can, in some circumstances, be constituted in terms of conforming to a norm. As a result, the refusal to commit such acts could be considered as socially deviating behavior."[57] A perpetrator of an international crime "is likely to belong to a collective, sharing

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52. Madeline Morris, *The Democratic Dilemma of the International Criminal Court*, 5 BUFF. CRIM. L. REV. 591, 596 (2001–02). Addressing the democratic difficulty with regard to the exercise of ICC jurisdiction over the nationals of states not parties to the Rome Statute, Madeline Morris observed: "For nationals of states that are parties to the ICC treaty, their representation comes through their own governments' consent to the Treaty, and continues through their governments' participation in the Assembly of States Parties. What, then, about non-party states? What is the democratic basis for the ICC's power as applied to populations whose states have *not* consented on their behalf? Here, the ICC's claim to democratic legitimacy breaks down. There is no democratic linkage between the ICC and those non-party nationals over whom it would exercise authority." *Id.* Such concerns equally apply to the exercise of universal jurisdiction by a national court.

53. Danner, *supra* note 25, at 535.

54. *See* ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 127 (1995) (explaining the legitimacy of a norm "depends on the extent to which the norm (1) emanates from a fair and accepted procedure, (2) is applied equally and without invidious discrimination, and (3) does not offend minimum standards of fairness and equity").

55. Bodansky, *supra* note 43, at 612; *see also* David A. Wirth, *Reexamining Decision-Making Processes in International Environmental Law*, 79 IOWA L. REV. 769, 798 (1994) ("Apart from any nexus with substantive law, procedural integrity is itself an important source of authority and legitimacy for international law.").

56. *See* Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 60 (2007) ("Collective crimes frequently evolve from collective pathologies.").

57. Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT'L L. 561, 575 (2002).

group values, possibly the same nationalistic ideology. In such a situation, the offender may be less likely to break the group values than the criminal norms."[58] Other commentators share this view.[59] Michael Reisman argues that in view of the collective dimension of international crimes, punishing the individual perpetrators of such crimes raises serious fairness concerns, as such perpetrators "may not have had the moral choice that is central to our notion of criminal responsibility."[60]

The prosecution of international crimes is nevertheless largely premised on the suppression of the collective identity of the individual perpetrators. International criminal law does not recognize the collective dimension of international crimes as a mitigating factor in the sentencing decision.[61] In the wake of atrocities, the collective disappears and the individual perpetrators stand before the court alone.

Yet, while the collective disappears when we blame an individual for crimes essentially committed by a collective, the collective is very likely to resurface when a state exercising universal jurisdiction selects the targets for prosecution. We saw that considerations of political convenience—that is, considerations that pertain to the national or ethnic affiliation of perpetrators—currently determine which perpetrator of international crimes is selected for prosecution from a vast category of suspected perpetrators worldwide.[62] Hence, the collective affiliation of the individual standing trial is first suppressed, and then reemerges, all to the detriment of that individual. Maintaining a strict separation between the individual and the collective for the purpose of attributing guilt to the individual on the one hand, and discriminating against the individual on the basis of his collective affiliation in selecting the targets of prosecution on the other hand, seems particularly unfair.

D. Equality Concerns Regarding the Operations of the ICC

The unique vulnerability of the principle of equality before the law with regard to the prosecution of international crimes is not limited to the exercise of universal

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58. *Id.* at 573.

59. *See, e.g.*, Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 59 (2002) ("But individual autonomy in the context of dictatorship or mass violence may not be the same in the context of ordinary crime. Unlike ordinary criminals, who violate social norms by committing crimes, individuals who are swept up in mass violence do not step outside the prevailing moral framework. Rather, they succumb to intense social pressure. While this does not relieve such individuals of moral agency or responsibility, it does make them more difficult to judge."); George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1504, 1539 (2002) (observing that "entire bodies of people, in particular the nations of which we are a part, can be guilty for the crimes actually carried out by a few," and arguing that "the guilt of the German nation as a whole should mitigate the guilt of particular criminals like Eichmann, who is guilty to be sure, but guilty like so many others of a collective crime.").

60. W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 75, 77 (1996).

61. On the contrary, it seems that persons convicted of international crimes are far more radically stigmatized than ordinary criminals. A special kind of reprehension is involved here. Commentators thus have observed, "the critical and unifying point with respect to core international crimes that fall within the remit of universal jurisdiction is that the perpetrators are considered *hostes humani generis* or the enemies of all mankind." Pocar & Maystre, *supra* note 6, at 266; *see also* M. Cherif Bassiouni, *International Crimes: The Ratione Materiae of International Criminal Law*, *in* INTERNATIONAL CRIMINAL LAW: MULTILATERAL AND BILATERAL ENFORCEMENT MECHANISMS 129, 162 (M. Cherif Bassionni ed., 2008) ("In other words, a state exercising universal jurisdiction carries out an *actio popularis* against persons who are *hostis humani generis*.").

62. *See supra* notes 16–19 and accompanying text.

jurisdiction by a state. It also extends to the operations of the ICC. The ICC's institutional dependence on rich and powerful states renders it inherently more susceptible to political pressures than national courts and prosecutors engaged in the ordinary exercise of domestic criminal law based on territorial jurisdiction. Predicting that "[p]oliticization certainly will affect the ICC,"[63] Mark Drumbl observed:

> [I]n order for the ICC as an institution to maintain resource support, it is incentivized to investigate wrongdoers in politically powerless places . . . . There is little chance the ICC will investigate claims of war crimes in Afghanistan or torture in Iraq allegedly committed, for example, by Australian or British troops. A decision whether or not to investigate or prosecute will be as contoured by concerns over how that decision will affect the ICC's political standing, funding, and support among states as it will by the seriousness of those allegations.[64]

Such concerns arguably find support in the approach taken by the ICTY Prosecutor toward the aerial bombardment campaign pursued by NATO forces against Serbia in the course of the Kosovo conflict. The ICTY Prosecutor decided not to initiate an investigation relying on a report submitted to her by an ICTY internal inquiry committee.[65] After reviewing all of the major allegations against NATO, the committee stated, "In all cases either the law is not sufficiently clear or investigations are unlikely to result in the acquisition of sufficient evidence to substantiate charges against high level accused or against lower accused for particularly heinous offences."[66]

The report has been sharply criticized by commentators, contending that the report was biased toward NATO, "hardly consistent with the Prosecutor's duty of impartiality and independence."[67] Contrasting the committee's assertion that further proceedings are unwarranted given the unclear state of the law with the willingness demonstrated by the ICTY Prosecutor in prior cases to employ criminal proceedings as a means of clarifying humanitarian law,[68] Robert Cryer observed, "the report leaves the impression that it was prepared to the Prosecutor's order, that being to ensure that the issue went away."[69]

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63. Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 585 (2005).

64. *Id.* at 586–87. *See also* DAVID CHUTER, WAR CRIMES: CONFRONTING ATROCITY IN THE MODERN WORLD 132 (2003) (The ICC "is unlikely to take up . . . invitations offered to . . . investigate the activities of the rich Western states . . . and it will [be] hard . . . to convince the majority of states . . . that it is not just another instrument of Western domination.").

65. INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA, FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA para. 91 (June 8, 2000), *reprinted in* 39 ILM 1257 (2000), *available at* http://www.icty.org/sid/10052.

66. *Id.* para. 90.

67. Paolo Benvenuti, *The ICTY Prosecutor and the Review of the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 12 EUR. J. INT'L L. 503, 507 (2001); *see also* Michael Mandel, *Politics and Human Rights in International Criminal Law: Our Case Against NATO and the Lessons to Be Learned from It*, 25 FORDHAM INT'L L.J. 95, 96–97 (2001) (criticizing the failure of the prosecutor "to charge NATO leaders for the crimes they committed in the bombing campaign").

68. CRYER, *supra* note 3, at 217.

69. *Id.* at 218.

Moreover, the ICC Prosecutor has a broad discretion not only regarding whether to initiate an investigation into a situation on his own accord, but also regarding whether to investigate where the U.N. Security Council or a state refers a situation to him.[70] Hence, the Prosecutor may refuse to investigate a situation referred to him on the basis that it is not in "the interests of justice,"[71] a term that has been aptly described as "elastic."[72] Once an investigation into a situation has been initiated, the ICC Prosecutor's discretion in selecting cases for prosecution is far broader than the discretion afforded to national prosecutors in the enforcement of domestic law and order.[73] We have seen that the broader prosecutorial discretion is, the greater the vulnerability of the principle of equality before the law.[74]

It has been observed, however, that "in contrast with both Nuremberg and the ad hoc tribunals, the judicial oversight of the Prosecutor of the International Criminal Court . . . in the selection of cases is considerably more robust."[75] Indeed, the ICC Pre-Trial Chamber is afforded extensive powers to review both decisions of the Prosecutor to initiate investigations into situations on his own accord and decisions of the Prosecutor not to investigate situations referred to him by either a state or the Security Council.[76] Once an investigation has been initiated, the Pre-Trial Chamber has broad powers to review a decision of the Prosecutor to indict a suspected perpetrator.[77] The Pre-Trial Chamber also is empowered to review a decision of the Prosecutor not to prosecute alleged perpetrators whose crimes were the subject of investigation.[78] Robert Cryer has observed that "this level of oversight is quite unprecedented, and provides more than adequate protection against arbitrary action by the Prosecutor."[79]

The ICC Prosecutor is also sensitive to legitimacy concerns and "has gone out of the way to show transparency."[80] The Prosecutor has thus issued statements explaining his decisions to prosecute certain suspects and not others.[81] Such statements "assist[] in understanding how his discretion is being exercised."[82] Similarly, with regard to the selection of *situations* to be investigated, the Prosecutor has explained why he has decided not to proceed further with respect to the conduct of foreign troops in Iraq and alleged atrocities committed in Venezuela.[83] Cryer thus observed that "the ICC is considerably less open to criticism on the basis of selectivity than previous Tribunals or many States' practice in this area."[84]

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70. *Id.* at 225 (citing Rome Statute, *supra* note 27, art. 53).

71. Rome Statute, *supra* note 27, art. 53(1)(c).

72. Danner, *supra* note 25, at 542.

73. *See supra* notes 35–36 and accompanying text.

74. *See supra* text accompanying note 39.

75. William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731, 734 (2008).

76. Rome Statute, *supra* note 27, arts. 15, 53(3); CRYER, *supra* note 3, at 225–26.

77. Rome Statute, *supra* note 27, arts. 19, 61.

78. *Id.* art. 53(2)–(3).

79. CRYER, *supra* note 3, at 226.

80. *Id.*

81. Schabas, *supra* note 75, at 735, 738.

82. *Id.* at 735.

83. *Id.* at 735, 739; ICC Chief Prosecutor, Statement on Communications Concerning Iraq from the Office of the Prosecutor (Feb. 9, 2006), http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

84. CRYER, *supra* note 3, at 229.

It seems, then, that equality concerns regarding the operations of the ICC are far less acute than those arising with regard to the exercise of universal jurisdiction by the various states. The reform proposed here for the enhancement of equality before the law will therefore only address the latter.

II. LIMITING THE LIBERTY OF STATES TO "CHOOSE THEIR BATTLES" IN THE ENFORCEMENT OF INTERNATIONAL CRIMINAL LAW

A. *The Decision of the ICJ in* Congo v. Belgium

In *Congo v. Belgium*, the ICJ determined that the customary norm providing for head-of-state immunity precluded Belgium from initiating criminal proceedings against the foreign minister of Congo.[85] However, several of the judges also addressed the permissibility of the exercise of universal jurisdiction *in absentia* under international law. A Joint Separate Opinion filed by judges Higgins, Kooijmans, and Buergenthal observed that universal jurisdiction may be exercised *in absentia*.[86] However, the judges proceeded to observe that a state exercising universal jurisdiction *in absentia* "must also ensure that certain safeguards are in place. They are absolutely essential to prevent abuse and to ensure that the rejection of impunity does not jeopardize stable relations between States."[87] Hence, the Joint Separate Opinion provides that a state wishing to assert universal jurisdiction *in absentia* "must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned."[88] Moreover, the charges "may only be laid by a prosecutor or *juge d'instruction* who acts in full independence, without links to or control by the government of that State."[89]

Most importantly for the purpose of the argument advanced here, the Joint Separate Opinion recognized that certain limitations must be placed on a state's power to choose which cases involving core international crimes are the object of its exercise of universal jurisdiction. Hence, the Joint Separate Opinion asserts that there must exist "some special circumstances that do require the exercise of an international criminal jurisdiction and [these must be] brought to the attention of the prosecutor or *juge d'instruction*. For example, persons related to the victims of the case will have requested the commencement of legal proceedings."[90] Commenting on this requirement, Anthony Colangelo observed:

> [The Joint Separate Opinion]... attempts to depoliticize universal jurisdiction in absentia assertions by requiring "special circumstances"—or a source external to the state prosecutor's office, such as the victim's family—to request commencement of the proceedings. By divesting the state of the power to assert universal jurisdiction in absentia on its own, the

85. Arrest Warrant Case, *supra* note 9, paras 51–58, 70.

86. Arrest Warrant Case, *supra* note 9, para. 59 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

> safeguard intends to divorce political motivations of the state from the initiation of the jurisdictional claim. Hence, investigations and prosecutions may not be used as strategic tools against states hostile to the state asserting jurisdiction.[91]

I submit, however, that a requirement that the exercise of universal jurisdiction be initiated by victims or their relatives does not provide a guarantee against the abuse of universal jurisdiction for political ends. On the contrary, such a requirement may only increase the risk of such abuse. The initiation of the exercise of universal jurisdiction *in absentia* at the request of victims or their relatives inherently involves the phenomenon of "forum shopping," by which victims or their relatives would select a state whose treatment of the case is most likely to further their purposes. Hence, the selection of a forum state by victims is likely to result from an assessment of the former's political motivations. Moreover, the Joint Separate Opinion affords a state extremely broad discretion to select *which complaints* filed by victims or their relatives warrant the commencement of an investigation. Such a legal regime does not really "divorce political motivations of the state from the initiation of the jurisdictional claim."[92]

The language of the Joint Separate Opinion indicates that the "special circumstances" that justify the exercise of universal jurisdiction are not limited to victims' initiatives.[93] Arguably, such "special circumstances" also exist whenever an entity external to a state (e.g., an NGO or an individual who witnessed the atrocities) requests that the state exercise universal jurisdiction over a particular case and presents evidence supporting such a request. However, it seems that politicization concerns that arise with regard to the selection of a forum state by victims apply equally here.

In conclusion, while the Joint Separate Opinion recognized the need for certain limitations on the liberty of states to choose the objects of their exercise of universal jurisdiction, the limitation stipulated in the Joint Separate Opinion does not amount to an effective guarantee of the principle of equality before the law. A legal regime providing for such guarantee is proposed below.

B. A Proposed Referral Mechanism

The reform advanced in this Article largely turns on the involvement of ICC organs in the exercise of universal jurisdiction by states. Such involvement would primarily take the form of a mechanism by which the ICC would designate particular states to exercise universal jurisdiction over crimes relating to a particular situation. Such a designation (i.e., referral of a situation by the ICC to a state) would be a precondition for a state's liberty to exercise universal jurisdiction. This legal regime departs from current customary international law, which allows *any* state to exercise universal jurisdiction over perpetrators of core international crimes.

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91. Colangelo, *supra* note 31, at 561.

92. *Id.*

93. Arrest Warrant Case, *supra* note 9, para. 59 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

The distinction between a particular *case* and a *situation*, which underlies the criminal process in the ICC,[94] also informs the exercise of national universal jurisdiction under the model advanced here. The ICC would refer a particular situation, not a particular defendant or a particular case, to a state. Situations are defined in terms of temporal and territorial parameters ("e.g., the armed conflict in the territory of the former Yugoslavia between 1991 and 1995 or the crisis situation in the territory of Rwanda after 6 April 1994").[95] "Cases are specific incidents during which one or more 'international crimes' seem to have been committed."[96] The liberty of a state to exercise universal jurisdiction would not extend beyond a situation referred to it by the ICC. I shall refer to a state designated by the ICC to exercise universal jurisdiction over a particular situation as a "Designated State."

I submit that the proposed referral mechanism would go as far as possible to alleviate the problem of inequality before the law in the exercise of universal jurisdiction. The application of the principle of equality before the law in the exercise of universal jurisdiction is currently hindered by two types of political considerations. The first type, which I term "active political considerations," concerns the use of universal jurisdiction as a vehicle for advancing political ends (e.g., shaming and denouncing the perpetrators' state of nationality or using universal jurisdiction as a bargaining chip in order to influence future policies of the perpetrators' state, or to extract concessions in various areas of international relations). The second type, which I term "passive political considerations," concerns the reluctance of states to exercise universal jurisdiction over nationals of their allies or of powerful states, fearing the political repercussions of such action.[97]

The referral mechanism proposed here would significantly reduce the risk that universal jurisdiction would be exercised on the basis of active political considerations. It does not allow a state the opportunity to single out another state of its choosing, subjecting the nationals of the latter to the exercise of universal jurisdiction as a means of promoting political ends.

The referral mechanism also would reduce—though not completely negate—the inhibiting effect that passive political considerations have on state practice with regard to the exercise of universal jurisdiction. The referral mechanism would externalize the political costs of prosecution away from the state exercising universal jurisdiction and onto the ICC as a representative of the international community as a whole. Advocating a policy of "proactive complementarity," by which the ICC Prosecutor would actively encourage the perpetrators' state of nationality to initiate criminal proceedings against them, William Burke-White observes that "[b]y appearing to force the hand of national governments to prosecute international crimes, the ICC may be able to assume some of the political costs associated with

94. COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 600 (Otto Triffterer ed., 2008) [hereinafter Triffterer Commentary] ("The drafting history of the ICC Statute makes it clear that the term 'situations' that may be referred to the Prosecutor by a State Party or the Security Council was deliberately used to exclude the referral of individual cases for investigation."); Schabas, *supra* note 75, at 734 ("[I]t is necessary to divide the [criminal] process into two distinct stages, involving first the identification of 'situations' and subsequently that of 'cases.' Prior to issuance of an arrest warrant, the Court must be properly seized of the 'situation.'").

95. *See supra* notes 22–23.

96. Situation in the Democratic Republic of the Congo, *supra* note 22, at 194.

97. *See supra* notes 14–19 and accompanying text.

domestic prosecutions and thereby make it easier for the national government to act."[98] Burke-White elaborates:

> [T]he [ICC Office of the Prosecutor (OTP)] may seek to externalize the political costs of prosecution away from national governments to free them of the political pressures that might previously have prevented them from acting. When a state is unable to prosecute because of extreme political pressure from domestic groups or other powerful states, the OTP may be able to reduce the political costs of domestic action for the state by making clear to domestic and international audiences that, if national prosecutions do not unfold, international intervention will follow.[99]

The referral mechanism also would externalize the political costs of prosecution, albeit not through the threat of ICC prosecution. Notwithstanding its theoretical foundation in international law, the exercise of universal jurisdiction is often perceived by states whose nationals are prosecuted as a provocative and condescending—if not hostile—measure. Such perceptions largely emanate from the immensely broad discretion states currently enjoy in choosing the situations that would be subject to the exercise of universal jurisdiction. The referral mechanism would diminish such perceptions, as it would be evident to all that the Designated State did not initiate its exercise of universal jurisdiction over the particular situation of its own accord but, rather, the situation was assigned to it by the ICC. This would diminish the potential tension between the state exercising universal jurisdiction and the state whose nationals are prosecuted. The referral mechanism also would enhance the international legitimacy of the exercise of universal jurisdiction, as it would underscore the role of a state exercising universal jurisdiction as *an agent of the international community*.[100]

The reluctance of states to exercise universal jurisdiction over the nationals of allied or powerful states is a matter of degree and varies from one situation to the next. In many—though not all—cases, the combination of the international legitimacy conferred upon the exercise of universal jurisdiction through the referral mechanism and the externalization of political costs away from the Designated State and onto the ICC is likely to significantly diminish the reluctance of states to prosecute the nationals of allied or powerful states under the principle of universal jurisdiction.

Moreover, powerful states that currently would easily dismiss foreign criminal proceedings initiated against their nationals on the basis of universal jurisdiction as provocative and politically motivated likely would be more bothered by the prospect

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98. William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L.J. 53, 70 (2008).

99. *Id.* at 93.

100. *See* Christopher K. Hall, *The Role of Universal Jurisdiction in the International Criminal Court Complementarity System*, *in* COMPLEMENTARITY AND THE EXERCISE OF UNIVERSAL JURISDICTION FOR CORE INTERNATIONAL CRIMES 201, 203 (Morten Bergsmo ed., 2010) ("When a national court is exercising jurisdiction over conduct amounting to crimes under international law . . . the court is really acting as an agent of the international community enforcing international law."); Leila Nadya Sadat, *Universal Jurisdiction, National Amnesties, and Truth Commissions: Reconciling the Irreconcilable*, *in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 191, 208 (Stephen Macedo ed., 2004) ("[T]he national court exercising universal jurisdiction has a dual role: to apply and interpret national law and to effectively sit as a court of the international community, applying international legal norms.").

of foreign criminal proceedings that are dubbed legitimate by the international community. That, in turn, may provide an incentive to such powerful states to initiate their own domestic criminal proceedings as a means of avoiding the adverse consequences of foreign proceedings.

The proposed referral mechanism partly draws on the rules governing the referral of cases from the ICTY and the International Criminal Tribunal for Rwanda ("ICTR") to national courts. Under Rule 11 *bis* of the ICTY Rules of Procedure and Evidence ("ICTY Rule 11"), having asserted jurisdiction over a particular case and upon confirming an indictment, the Tribunal may refer the case to a competent national jurisdiction.[101] Cases may be transferred to the country where the crime was committed, the country where the accused was arrested, or any other country with jurisdiction that is "willing and adequately prepared to accept such a case."[102] The latter provision "is a catchall allowing the Tribunal to consider transferring cases to countries that have adopted . . . universal jurisdiction laws."[103]

The organ entrusted with ICTY referrals is the Referral Bench.[104] This chamber, which shares many of the characteristics of a Trial Chamber, is appointed by the president of the Tribunal and consists of three Permanent Judges selected from the Trial Chambers.[105] The Referral Bench may refer a case to a competent national jurisdiction on its own motion or at the request of the Prosecutor.[106] A similar—though not identical—referral mechanism is set forth in a parallel provision of the ICTR Rules of Procedure and Evidence.[107] Olympia Bekou has observed that "the rationale behind the adoption of ICTY Rule 11 can be seen primarily in the Tribunal's limited life-span."[108] ICTY Rule 11 was enacted as part of the ICTY's Completion Strategy to finish all initial trials within the time framework dictated by U.N. Security Council Resolutions.[109]

Drawing on the referral mechanism set forth in ICTY Rule 11, I propose to entrust the referral of situations to national jurisdictions to an ICC Referral Bench consisting of three Trial Chamber judges appointed by the President of the ICC. The Referral Bench would examine the possibility of referring a situation to a particular state at the request of the ICC Prosecutor.

Notwithstanding the role of the Referral Bench, the task of selecting a Designated State would be primarily entrusted to the ICC Prosecutor. Delineating

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101. ICTY, Rules of Procedure and Evidence, R. 11 *bis*, U.N. Doc. IT/32/Rev.44 (Dec. 10, 2009) [hereinafter ICTY Rules].

102. *Id.*

103. George H. Norris, Note, *Closer to Justice: Transferring Cases from the International Criminal Court*, 19 MINN. J. INT'L L. 201, 209 (2010); *see also* Olympia Bekou, *Rule 11* bis*: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence*, 33 FORDHAM INT'L L.J. 723, 758 (2010) (Rule 11 *bis* (A)(iii) "leaves open the possibility of referrals to states which have no link to either the alleged crime(s) or the accused . . . . In short, trial may occur in any state under Rule 11 *bis*(A)(iii) so long as a willing and capable forum is available.").

104. ICTY Rules, *supra* note 101, R. 11 *bis* (A).

105. *Id.* R. 11 *bis* (B).

106. *Id.*

107. ICTR, Rules of Procedure and Evidence, R. 11 *bis* (Mar. 14, 2008), http://www.unictr.org/Portals/0/English%5CLegal%5CROP%5C100209.pdf [hereinafter ICTR Rules]; Norris, *supra* note 103, at 209–216.

108. Bekou, *supra* note 103, at 726.

109. *Id.* at 726, 732–33; Norris, *supra* note 103, at 209 ("As part of its Completion Strategy to finish all of its initial trials, the [ICTR] added the authority to transfer cases to competent national jurisdictions.").

the contours of the procedure for the selection of a Designated State, I draw on the procedure stipulated in the Rome Statute regarding the selection of states in which perpetrators convicted by the ICC serve their sentences. Article 103(1)(a) of the Rome Statute provides that "[a] sentence of imprisonment shall be served in a State designated by the Court from a list of States which have indicated to the Court their willingness to accept sentenced persons."[110] Pursuant to the ICC Rules of Procedure and Evidence,[111] "[t]he potential State of enforcement, which may also be a non-State Party, will communicate to the Court its wish to be placed on the list. In case the declaration of the State is unconditional, the Presidency . . . will instruct the Registrar to include that State on the list."[112] In fact, Article 103(1) of the Rome Statute provides for a system of double-consent.[113] Under such a system, "[f]irst, the State of enforcement must have consented to its being placed on [the] list of candidate States . . . . Secondly, the State of enforcement has to accept its designation by the Court to enforce the sentence in the individual case."[114]

Applying the double-consent system to the exercise of universal jurisdiction, the ICC Prosecutor would form a list of states that indicate their willingness to exercise universal jurisdiction over situations referred to them by the ICC. The referral process would be triggered once the ICC Prosecutor identifies, on the basis of information available from any source, a situation in which there is a reasonable basis to believe that one or more core international crimes have been committed.[115] The ICC Prosecutor would then approach one or more of the states included in the list with a request to assume the role of Designated State over that situation. States included in the Prosecutor's list would not be under an obligation to assume the role of a Designated State. Once a state has accepted the Prosecutor's request to exercise universal jurisdiction over a particular situation the Referral Bench would be asked to confirm its designation.

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110. Rome Statute, *supra* note 27, art. 103(1)(a).

111. Rules of Procedure and Evidence Adopted by the Assembly of States Parties, R. 200, ICC-ASP/1/3 (Sept. 3–10, 2002), *available at* http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf [hereinafter ICC Rules of Procedure and Evidence].

112. Claus Kress & Goran Sluiter, *Imprisonment*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1787 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002); ICC Rules of Procedure and Evidence, *supra* note 111, R. 200.

113. Kress & Sluiter, *supra* note 112, at 1787.

114. *Id.*; Rome Statute, *supra* note 27, art. 103(1)(c) ("A State designated in a particular case shall promptly inform the Court whether it accepts the Court's designation.").

115. I draw on Article 53(1)(a) of the Rome Statute, which provides that "in deciding whether to initiate an investigation [into a situation], the Prosecutor shall consider whether the information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed." Rome Statute, *supra* note 27, art. 53(1)(a). Having received information suggesting the occurrence of crimes within the jurisdiction of the Court, the Prosecutor is thus required to conduct a preliminary examination regarding "the seriousness of the information received." *Id.* art. 15(2). Examination on the part of the ICC Prosecutor also would be required under the model proposed here, prior to referring a situation to a Designated State. Yet, such an examination may be quite brief. Indeed, the ICC Prosecutor decided to initiate an investigation into the situation in Libya five days after the situation had been referred to the ICC by the U.N. Security Council. *See, e.g.*, S.C. Res. 1970, para. 4, U.N. Doc. S/RES/1970 (Feb. 26, 2011) (referring the situation to the ICC on February 26, 2011); Press Release, Office of the Prosecutor, ICC Prosecutor to Open an Investigation in Libya (March 2, 2011), *available at* http://www.icc-cpi.int/NR/exeres/3EEE2E2A-2618-4D66-8ECB-C95BECCC300C.htm (announcing that the ICC Prosecutor decided to initiate an investigation into the situation in Libya on March 3, 2011, five days after the situation had been referred to the ICC by the U.N. Security Council).

The Referral Bench would examine whether referring a particular situation to the prospective Designated State would render the principle of equality before the law especially vulnerable. It is obvious, for instance, that it would be inappropriate to refer a situation that concerns an inter-state armed conflict to a state that is either a close ally or a foe of one of the warring parties. Moreover, the Referral Bench would have to ascertain that the prospective Designated State is indeed adequately prepared to accept the designation. In other words, the Bench would have to inquire whether the legislative scheme in place in the prospective Designated State authorizes its courts to exercise universal jurisdiction over the atrocities in question and to impose adequate penalties.[116]

Most situations would require the designation of more than one state. The number of Designated States to which a particular situation is referred would be determined by the ICC Prosecutor who would also coordinate the division of labor among Designated States and between such states and the ICC.[117]

The referral mechanism proposed here departs from the one set forth in ICTY Rule 11 in three significant manners.[118] First, the former provides for the referral of *situations* to national courts whereas the latter concerns the referral of *cases*. Second, ICTY Rule 11 lacks the main distinguishing mark of the legal regime set forth in this Article, namely, a limitation on the liberty of states to "choose their battles" in the enforcement of international criminal law. ICTY Rule 11 only concerns the referral of cases over which the ICTY already has asserted *its own jurisdiction*, conducted an investigation of the case in question, and confirmed an indictment.[119] States remained free to exercise universal jurisdiction over any case that was not initially subject to ICTY proceedings.[120] By contrast, under the referral mechanism proposed here, a

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116. Such inquiry was also incumbent upon the ICTY and ICTR in determining whether to refer a particular case to a national court under Rule 11 *bis*. In considering the Prosecutor's requests to transfer cases to several European states, the ICTR carefully examined whether the laws of such states provide for universal jurisdiction over the crimes in question. The ICTR refused to refer a genocide case to Norway on the grounds that Norwegian law does not explicitly address the crime of genocide. Prosecutor v. Bagaragaza, Case No. ICTR-2005-86-AR11*bis*, Decision on Rule 11 *bis* Appeal, paras. 17–18 (Aug. 30, 2006); Norris, *supra* note 103, at 210–12. *See also* Bekou, *supra* note 103, at 758 (observing that under Rule 11 *bis* "a state must have jurisdiction over the crimes charged and be willing and capable to receive the indictment").

117. It may be noted that in a policy paper issued by the ICC Prosecutor, the Prosecutor envisages an informal and pragmatic consultation process between the Prosecutor and interested states. The policy paper states that "in a case where multiple States have jurisdiction over the crime in question the Prosecutor should consult with those States best able to exercise jurisdiction . . . with a view to ensuring that jurisdiction is taken by the State best able to do so." OFFICE OF THE PROSECUTOR, INT'L CRIM. CT., PAPER ON SOME POLICY ISSUES BEFORE THE OFFICE OF THE PROSECUTOR 5 (Sept. 7, 2003) [hereinafter ICC POLICY PAPER].

118. Some commentators have argued that a referral mechanism modeled on ICTY Rule 11 *bis* should be incorporated into the ICC system. *See, e.g.*, Pocar & Maystre, *supra* note 6, at 300 (observing "the ICC may be entitled by amendment to its Statute to make use of referral procedures to national courts of states that have adopted national legislation on universal jurisdiction, as experienced by the ICTY and the ICTR under Rule 11 *bis* of their Rules of Procedure and Evidence"); Norris, *supra* note 103, at 202 (arguing "the ICC should add a transfer mechanism to shift cases back to courts of national jurisdiction, modeled on a similar rule adopted by the International Criminal Tribunal for Rwanda").

119. *See* ICTY Rules, *supra* note 101, R. 11 *bis* (A) ("If an indictment has been confirmed . . . the President may designate a Trial Chamber which shall determine whether the case should be referred to the authorities of a State . . . ."); R. 47 (B) ("The Prosecutor, if satisfied in the course of an investigation that there is sufficient evidence . . . shall prepare and forward to the Registrar an indictment.").

120. *See* Colangelo, *supra* note 31, at 552–554 (describing instances in which states exercised universal jurisdiction over crimes in the former Yugoslavia, including when the ICTY declined to prosecute).

state would be divested of all powers to exercise universal jurisdiction, unless it has been designated by the ICC to exercise universal jurisdiction over a particular situation.

A legal regime that requires the ICC to examine each specific case for the purpose of its referral to a state exercising universal jurisdiction seems to be precluded by the scarcity of resources available to the ICC.[121] Note that under ICTY Rule 11, the Tribunal refers a particular case to a state only after concluding its own investigation of the case.[122] Even if the ICC Prosecutor is only required to conduct a preliminary examination prior to referring a specific case to a state, its capacity to process specific cases for the purpose of their referral might be limited to a few cases annually. A legal regime that provides for the referral of *specific cases* from the ICC to states, and prohibits states from exercising universal jurisdiction over cases not referred to them, would thus significantly limit the reach of universal jurisdiction and compromise the fight against impunity.

A third significant difference between the referral mechanism proposed here and the one set forth in ICTY Rule 11 concerns the fundamental aims of such mechanism: should it preclude the exercise of universal jurisdiction by any state whose legal system does not provide sufficient guarantees of a fair trial? Such a screening process was one of the features of the ICTY referral regime. The ICTY Referral Bench was authorized to order the referral of cases to national jurisdictions only after being satisfied that "the accused would receive a fair trial."[123] Such assessment concerned "a number of issues such as the composition of the court, trial without undue delay, the right to choose one's counsel, adequate time and facilities for the preparation of a defence, the right to attend trial and examine witnesses, witness availability and protection, and pretrial detention on remand."[124]

In contrast with the ICTY referral regime, under the referral mechanism proposed here, the Referral Bench would not examine whether the fundamental characteristics of a state's legal system provide reasonable guarantees of a fair trial. In other words, the referral mechanism would not represent a *legal bar* to the exercise of universal jurisdiction by a relatively broad category of states whose legal systems do not meet international due process standards.

While all states are required to comply with minimal fair trial standards guaranteed to defendants under customary human rights law, such compliance is not currently a precondition to the legal capacity of a state to investigate and prosecute, whether in the exercise of universal jurisdiction[125] or on the basis of more traditional jurisdictional doctrines (e.g., territorial jurisdiction). A norm of international law that employs the referral mechanism as a human-rights-oriented screening

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121. *See, e.g.*, Burke-White, *supra* note 98, at 66 ("The limited resources provided by the [Assembly of States Parties] mean that, at present, the [Office of the Prosecutor] is only able to undertake three simultaneous investigations, and it is unlikely that its capacity will expand in any meaningful way in the near future .... The Court's Chambers also face similar resource constraints. At present, it is anticipated that the Chambers will be able to undertake at most two trials per year ....").

122. *See supra* note 119.

123. ICTY Rules, *supra* note 101, R. 11 *bis* (B).

124. Bekou, *supra* note 103, at 770 (emphasis omitted).

125. Rod Rastan, *Complementarity: Contest or Collaboration?*, *in* COMPLEMENTARITY AND THE EXERCISE OF UNIVERSAL JURISDICTION FOR CORE INTERNATIONAL CRIMES 83, 124 (Morten Bergsmo ed., 2010) ("As the United Nations War Crimes Commission declared, 'the right to punish war crimes ... is possessed by any independent State whatsoever.'").

mechanism would create two categories of states under international law: states that have the legal capacity to exercise universal jurisdiction on the one hand, and states that, given the fundamental characteristics of their legal system, do not have such capacity on the other hand. Tailoring a realistic reform in the law of universal jurisdiction, one cannot overlook the fact that "universal jurisdiction is presented as a European imperialist construct in other corners of the world."[126] Such perceptions emanate from a reality in which the operation of universal jurisdiction "usually involves one or more developed countries prosecuting crimes that occurred in less developed countries."[127] A referral regime that is tantamount to a rule of international law limiting the exercise of universal jurisdiction to democracies is likely to exacerbate such resentment and evoke fierce opposition in those "other corners of the world," which would prevent it from acquiring the status of customary law.[128] ICTY Rule 11 itself does not point to the contrary, as that provision was enacted by the *judges* of the ICTY.[129]

Moreover, I submit that the referral regime advocated here goes a long way to ensure that defendants prosecuted under a doctrine of universal jurisdiction receive a fair trial, even if this issue is not considered by the Referral Bench. Oliver Wendell Holmes wrote that "[t]he life of the law has not been logic: it has been experience."[130] A review of the exercise of universal jurisdiction worldwide over the past two decades suggests that states that do not abide by international due process standards have not shown any interest in the exercise of universal jurisdiction over nationals of a non-rival state.[131] The exercise of universal jurisdiction is an expensive enterprise.[132] The odds that a state that does not abide by international due process norms would volunteer to exercise universal jurisdiction without being able to pick and choose the subjects of such exercise of jurisdiction—that is, without being able to use universal jurisdiction as a means of promoting its political agenda—seem slim. Only states that are committed to human rights are likely to accept the burden attached to the role of a Designated State under the terms of the referral mechanism proposed here.

Furthermore, I submit that fair trial concerns arising with regard to the exercise of universal jurisdiction may be effectively addressed through "pragmatic accountability" mechanisms.[133] Elaborating on the notion of pragmatic accountability in the context of the Rome Statute, Allison Danner observed that the ICC "remains

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126. Ryngaert, *supra* note 18, at 197; *see also* Moghadam, *supra* note 15, at 484–85 ("Universal jurisdiction is currently applied in most cases by courts in countries of the 'global north' against perpetrators from the 'global south' .... This North-South divide 'implies a degree of neocolonialism,' calling universal jurisdiction into question as an 'illegitimate system of law that results in courts from developed countries pursuing dictators and war criminals from developing countries, but not the reverse.'").

127. Bottini, *supra* note 12, at 555.

128. For the manner in which the proposed referral regime may acquire the status of customary international law, see *infra* notes 148–151 and accompanying text.

129. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 339–40 (2d ed., 2008).

130. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (Boston, Little, Brown, & Co. 1881).

131. For an extensive review of war crimes proceedings based on universal jurisdiction, see Rikhof, *supra* note 17, at 45–64.

132. REYDAMS, *supra* note 32, at 108 ("[A]n investigation into (international) crimes committed abroad requires extraordinary resources."); Bottini, *supra* note 12, at 556.

133. Allison Danner coined the term "pragmatic accountability" in an attempt "to capture its informal, commonsense, and dynamic qualities." Danner, *supra* note 25, at 525.

heavily dependent on state cooperation in order to investigate its cases, arrest its suspects, and imprison the individuals it convicts."[134] Hence, where the ICC Prosecutor's exercise of his discretionary powers is flawed, states "have the ability to call him 'to account' for his discretionary acts" by ceasing to cooperate with the Prosecutor.[135] Those features of pragmatic accountability equally pertain to the exercise of universal jurisdiction by a state.[136] The ability of a state exercising universal jurisdiction to conduct an effective investigation would depend, in many cases, on the cooperation of other states. More importantly, the referral mechanism proposed here largely turns on the exercise of universal jurisdiction *in absentia* by the designated state. The ability of a state exercising universal jurisdiction *in absentia* to bring suspected perpetrators to justice and to punish them inherently depends on the willingness of other states—either the state where the suspect resides or states where he visits—to arrest and extradite the suspect to the state exercising universal jurisdiction. Current customary international law does not require states to extradite perpetrators of international crimes to a state that wishes to prosecute them—whether in the exercise of universal jurisdiction or under any other type of criminal jurisdiction—where it is not likely that the suspected perpetrator is afforded a fair trial or where there is reason to believe that such extradition would otherwise jeopardize the suspect's human rights.[137] Indeed, a state may be *bound* by a human rights treaty to refuse extradition under such circumstances.[138] The reform proposed here would not revise the state of international law on this point.

Hence, pragmatic accountability mechanisms—the refusal of other states to cooperate with the investigative efforts of a Designated State that does not abide by international due process standards or to surrender a suspected perpetrator to such state—would significantly diminish the risk that the exercise of universal jurisdiction results in serious violations of a suspected perpetrator's fair trial rights.

Where pragmatic accountability mechanisms preclude an effective exercise of universal jurisdiction by one of the Designated States to which a situation was referred, it may require the ICC Prosecutor to have additional states assume the role of a Designated State. While pragmatic accountability mechanisms are likely to yield the same results as a rule of international law that disqualifies certain states from

134. *Id.* at 527.

135. *Id.* at 525.

136. *Id.* at 526 ("[P]ragmatic accountability is not limited to international institutions.").

137. *See* John Dugard & Christine Van Der Wyngaert, *Reconciling Extradition with Human Rights*, 92 AM. J. INT'L L. 187, 195–96 (1998) ("There is a wealth of scholarly writing in support of . . . the notion that human rights considerations should be taken into account in the extradition process. More important, the three premier nongovernmental international law associations—the Institute of International Law, the International Law Association and the International Association of Penal Law—have approved reports recommending that both executive and judicial authorities should refuse extradition where there is a real risk that a fugitive's human rights will be violated in the requesting state. The American Law Institute's *Restatement (Third) of the Foreign Relations Law of the United States* also recognizes that extradition 'is generally refused if the requested state has reason to believe that extradition is requested for purposes of persecution . . . or if there is substantial ground for believing that the person sought will not receive a fair trial in the requesting state.'"); Combating Terrorism and Respect for Human Rights, EUR. PARL. ASS. RES. 1271, para. 8 (Jan. 24, 2002), *available at* http://assembly.coe.int/Documents/AdoptedText/ta02/eres1271.htm (resolving that member states "should under no circumstances extradite persons who risk being subjected to ill-treatment in violation of Article 3 of the European Convention on Human Rights or being subjected to a trial which does not respect the fundamental principles of a fair trial, or, in a period of conflict, to standards which fall below those enshrined in the Geneva Convention").

138. Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) 439, 468–69 (1989).

exercising universal jurisdiction, only the latter offends the principle of equality of sovereigns.

The proposed reform also draws, to some extent, on the doctrine of "proactive complementarity," which recently has gained ground in the literature and has been adopted by the ICC Prosecutor.[139] Under this doctrine, the powers and roles of the ICC Prosecutor extend beyond those explicitly stipulated in the Rome Statute.[140] Inherent in the Office of the Prosecutor are various powers necessary in order to ensure the effective and fair enforcement of international criminal law worldwide.[141] Hence, William Burke-White has observed that the ICC Prosecutor has the powers to pressure and encourage a state in which a crime within ICC jurisdiction has occurred ("territorial state") or the perpetrators' state of nationality to exercise its own jurisdiction over the perpetrators, as well as to assist such states in the performance of this task.[142] Other commentators applying the doctrine of "proactive complementarity" asserted that the ICC Prosecutor may also solicit states that do not have a concrete linkage to an international crime to exercise their universal jurisdiction.[143] According to this view, the ICC Prosecutor may also coordinate the division of labor among various states that wish to exercise universal jurisdiction as well as the division of labor between such states and the ICC.[144]

Yet, while the powers and roles of the ICC Prosecutor under the doctrine of proactive complementarity are considered to be *implied* in the provisions of the Rome Statute,[145] this cannot be said of the proposed referral mechanism. In departure from current theories of proactive complementarity, the referral

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139. Burke-White, *supra* note 98, at 56–58; Cedric Ryngaert, *The International Criminal Court and Universal Jurisdiction: A Fraught Relationship?*, 12 NEW CRIM. L. REV. 498, 508 (2009); INT'L CRIM. CT., PROSECUTORIAL STRATEGY 2009–2012 5 (2010) [hereinafter ICC PROSECUTORIAL STRATEGY] (The ICC Prosecutor embraced "the positive complementarity concept, i.e., a proactive policy of cooperation aimed at promoting national proceedings. The positive approach to complementarity means that the Office will encourage genuine national proceedings where possible . . . relying on its various networks of cooperation.").

140. Burke-White, *supra* note 98, at 80 ("Though encouraging national jurisdictions to undertake prosecutions is not affirmatively referenced in the Statute, it furthers the Rome System's overall purpose of ending impunity. . . . Interpreting the Rome Statute in light of this object and purpose leads to a broad construction of the Prosecutor's specific powers and suggests that leeway should be given to the Prosecutor to utilize not only his enumerated powers but also the stature and broader potential of his Office to help bring about an end to impunity.").

141. *Id.* at 80–81.

142. *Id.* at 56–58 (urging the OTP "to implement a policy of proactive complementarity that utilizes the full range of legal and political levers of influence available to the Court to encourage and at times even assist national governments in prosecuting international crimes themselves. . . . [as] [s]uch a policy could produce a virtuous circle in which the Court stimulates the exercise of domestic jurisdiction through the threat of international intervention"); *see also* Ryngaert, *supra* note 139, at 508 (advocating a positive complementarity approach, according to which "[t]he Prosecutor does not merely step in when national remedies are deficient (classic complementarity); on the contrary, he behaves *proactively* so as to ensure that national states assume their responsibility").

143. Ryngaert, *supra* note 139, at 498 ("It is proposed that the ICC Prosecutor encourage certain 'bystander' states that can provide an effective forum to investigate and prosecute atrocity cases, at least if the territorial state, or the state of nationality, proves unable and unwilling to do so.").

144. *Id.* at 508–09 ("Under this more 'managerial' concept of complementarity, the ICC Office of the Prosecutor aims for an efficient distribution of tasks geared towards preventing impunity for international crimes . . . . The ICC and bystander states . . . have to decide on a division of tasks between them, with the ICC focusing on the more important offenders, and bystander states on lesser offenders. Clear guidance and management should obviously be provided by the ICC lest bystander states go it alone.").

145. *See supra* notes 140–141 and accompanying text.

mechanism presented here limits the liberties to exercise universal jurisdiction currently conferred upon states under both existing customary international law[146] and certain treaties.[147] This limitation is by no means implied in the provisions of the Rome Statute. Hence, the proposed reform requires international legislation, preferably in the form of an amendment to the Rome Statute.[148] Such legislation is likely to develop into customary international law binding on all states, as the Rome Statute is a *law-making treaty* (as opposed to a *treaty-contract*),[149] to which the majority of states are parties.[150] As observed by Ian Brownlie, law-making treaties "are in principle binding only on parties, but the number of parties, the explicit acceptance of rules of law, and, in some cases, the declaratory nature of the provisions produce a strong law-creating effect at least as great as the general practice considered sufficient to support a customary rule."[151] The history of universal jurisdiction over the past two decades also indicates that an amendment to the Rome Statute would be the most effective means of advancing the proposed reform, as universal jurisdiction over core international crimes has been practiced almost exclusively by states that are now parties to the Statute.[152]

The purview of the proposed referral regime would not correspond with the ICC's own adjudicative jurisdiction. Under the terms of the Rome Statute, where the U.N. Security Council does not refer a situation to the ICC, the ICC's adjudicative jurisdiction is confined to crimes committed in the territory of a state party to the Rome Statute or by a national of a state party to the Statute.[153] Such limitations would not apply to the ICC's power to refer situations to Designated States, which would extend to all situations worldwide regardless of the place of commission of the crimes or the nationality of the suspects. Yet, the difficulties precluding the grant of universal jurisdiction to the ICC do not necessarily pertain to the proposed referral regime.

The Rome Statute drew much criticism for exposing suspected perpetrators of international crimes to the adjudicative powers of a *new judicial authority* even, in some cases, without the consent of the perpetrators' state of nationality.[154] Such legal

146. *See supra* notes 5–9 and accompanying text.

147. *See supra* note 30 and accompanying text.

148. Fausto Pocar and Magali Maystre have noted that "a discussion among States Parties [to the Rome Statute] to promote a more harmonized approach towards universal jurisdiction would also be welcome. Indeed, the Assembly of States Parties, in consultation with its members, could develop common criteria or guidelines to improve the implementation of universal jurisdiction." Pocar & Maystre, *supra* note 6, at 299.

149. Akbar Rasulov, *Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?*, 14 EUR. J. INT'L L. 141, 159 (2003) (observing that humanitarian treaties are a subclass of law-making treaties). For the distinction between law-making treaties and treaty-contracts, see BROWNLIE, *supra* note 34, at 11–13, and TIMOTHY HILLIER, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 17 (1999).

150. The States Parties to the Rome Statute, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/Menus/ASP/states+parties (last visited Nov. 4, 2011).

151. BROWNLIE, *supra* note 34, at 12.

152. *See* Rikhof, *supra* note 17, at 45–65 (listing countries that have initiated war crimes proceedings based on universal jurisdiction).

153. Rome Statute, *supra* note 27, art. 12.

154. *See, e.g.*, Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 LAW & CONTEMP. PROBS. 13, 66 (2001) ("The dilemma underlying the debate about ICC jurisdiction over non-party nationals stems primarily from the conflicting needs for the ICC to have sufficient jurisdictional powers to bring to justice perpetrators of genocide, war crimes, and crimes against humanity, and, simultaneously, for states to retain appropriate discretion regarding methods of dispute settlement when

development, it was argued, would undermine the principle of state sovereignty.[155] Such criticism, pronounced by some of the participants at the Rome Conference, resulted in a compromise embodied in the current limitations on ICC jurisdiction.[156] By contrast, the proposed referral mechanism would not subject suspected perpetrators of international crimes to the adjudicative powers of any judicial authority that is not currently authorized under international law to try such individuals. The proposed reform would not confer upon states any judicial power that states do not currently possess under existing customary and conventional international law.[157] Rather, it would allow only a Designated State to do what *any* state can do under existing international law.[158]

III. PROSECUTORIAL GUIDELINES FOR THE EXERCISE OF UNIVERSAL JURISDICTION

In exercising universal jurisdiction, the Designated State would be duty-bound to respect the "firmly established principle of international law of equality before the law, which encompasses the requirement that there should be no discrimination in the enforcement or application of the law."[159] Allison Danner has urged the ICC Prosecutor to articulate prosecutorial guidelines that will shape and constrain his discretionary decisions, providing an essential guarantee of the principle of equality before the law.[160] Such a guarantee is equally—if not more—essential in the context of the exercise of universal jurisdiction by a national criminal justice system in view of the unique vulnerability of the principle of equality before the law under such circumstances. This Part therefore attempts to set forth prosecutorial guidelines that, under the legal regime proposed here, a Designated State would be required to apply in its exercise of universal jurisdiction. For this purpose, I first turn to the prosecutorial policies of the ICC Prosecutor.

The ICC Prosecutor has circulated several policy papers in which he sets forth the criteria for prioritizing both situations and cases in view of the limited resources available to the ICC. Such criteria also have been pronounced in the Regulations of

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the lawfulness of their official acts is in dispute.").

155. *Id.* ("Fundamental principles of international law reserve to states the right to resolve their disputes by such mechanisms as they find most suitable, limited by such obligations as they have agreed to by treaty or become bound to by custom. The resolution of interstate disputes by the ICC through the mechanism of criminal prosecutions is not a method that non-parties to the ICC Treaty have agreed by treaty to or become bound to by custom. Thus, the very treaty that would establish a new court to enforce international law may itself breach important international legal principles.").

156. Leila Nadya Sadat, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 413 (2000) (observing that the ICC was denied universal jurisdiction "as a concession to the sovereignty of States"); Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64 LAW & CONTEMP. PROBS. 67, 77 (2001) (reviewing the legislative history of the Rome Statute and observing that the ICC was denied universal jurisdiction "as a politically expedient concession to the sovereignty of states in order to garner broad support for the statute").

157. *See supra* notes 5–9, 30 and accompanying text.

158. *See supra* notes 5–9 and accompanying text.

159. Prosecutor v. Delalic, *supra* note 4, para. 605.

160. Danner, *supra* note 25, at 538 ("In light of the fears of partiality with regard to the ICC, the Prosecutor can best ensure the consistency and perceived fairness of his discretionary decision making through the consistent application of *ex ante* standards.").

the Office of the Prosecutor[161] ("ICC Prosecutor Regulations") as well as in numerous statements issued by the Prosecutor.

A. The Gravity Criterion

The gravity of the criminal activity attributed to suspected perpetrators is obviously the main factor guiding a prosecutor in the selection of cases for prosecution. This view was also taken by the ICC Prosecutor. A "Prosecutorial Strategy" paper published by the Office of the Prosecutor in September 2006 stated that in selecting cases, "the Office adopted a policy of focusing its efforts on the most serious crimes and on those who bear the greatest responsibility for these crimes .... [C]ases inside the situation are selected according to their gravity."[162] The Prosecutor has since repeatedly emphasized that "[t]he gravity of the crimes is central to the process of case selection."[163]

In its most recent Prosecutorial Strategy paper, the ICC Prosecutor announced that "the Office will select for prosecution those situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organized the alleged crimes."[164] This position "relies principally on a logic that appears to equate the seniority of the perpetrator with the gravity of the crime."[165] Indeed, commentators have observed that "something of a consensus has emerged that the ICC Prosecutor should negotiate the inherent limitations of prosecutorial capacity by focusing investigations and prosecutions on those culpable individuals who occupied the highest levels of political or military authority."[166] It should be noted, however, that the position taken by the ICC Prosecutor does not entirely preclude the prosecution of perpetrators down the chain of command. According to the Prosecutor, "In some cases the focus of an investigation by the Office of the Prosecutor may go wider than high-ranking officers, if investigation of certain type[s] of crimes or those officers lower down the chain of command is necessary for the whole case."[167] This position has been approved by the ICC Appeals Chamber.[168]

I submit that, as a general rule, the gravity criterion would require a Designated State to afford priority to the prosecution of high-ranking perpetrators where the

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161. Regulations of the Office of the Prosecutor, ICC-BD/05-01-09 29, 33 (April 23, 2009).

162. INT'L CRIM. CT., OFFICE OF THE PROSECUTOR, REPORT ON PROSECUTORIAL STRATEGY at 5 (Sept. 14, 2006) [hereinafter REPORT ON PROSECUTORIAL STRATEGY (2006)].

163. Statement of the Prosecutor of the International Criminal Court, Mr. Luis Moreno-Ocampo to the UN Security Council pursuant to UNSCR 1593 (2005), (June, 14 2006) at 2. For an extensive review of the ICC Prosecutor's statements regarding the gravity criterion, see Schabas, *supra* note 75, at 737–40.

164. ICC PROSECUTORIAL STRATEGY, *supra* note 139, at 5–6; *see also* ICC POLICY PAPER, *supra* note 117, at 7 ("[T]he Office of the Prosecutor should focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organization allegedly responsible for the crimes.").

165. Greenawalt, *Justice Without Politics?*, *supra* note 36, at 631.

166. *Id.* at 627; *see also* M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, *in* POST-CONFLICT JUSTICE 3, 27 (2002) ("As a matter of policy, international prosecutions should be limited to leaders, policy-makers and senior executors."); Danner, *supra* note 25, at 543 ("That the international justice forum should be reserved for high-level perpetrators has gained wide acceptance.").

167. ICC POLICY PAPER, *supra* note 117, at 7.

168. Situation in the Democratic Republic of the Congo, *supra* note 22, paras. 73–79 (overturning the holding of the Pre-Trial Chamber that only the most senior leaders of the situation under investigation should be tried before the Court).

absence of such prosecution on the part of the Designated State would spell impunity to such senior officials. However, it is very likely that a proper division of labor between the Designated State and the ICC as well as among several Designated States would enable a Designated State to allocate some of the resources available to its criminal justice system to the prosecution of perpetrators down the chain of command.

Assessing gravity for the purpose of selecting *situations* to be investigated, the ICC Prosecutor has adhered to a single-factor quantitative test of gravity (i.e., the number of victims).[169] The ICC Prosecutor also seems to attribute great importance to the quantitative dimension in determining which high-ranking officials are selected for prosecution. Upon issuing the five arrest warrants against the leaders of the Lord's Resistance Army (LRA)—a Ugandan rebel organization—the Prosecutor released a statement pointing mainly to the quantitative test as the basis of his decision to focus investigative and prosecutorial efforts on crimes perpetrated by the rebel forces rather than on those perpetrated by government forces.[170] However, both the Pre-Trial Chamber and the Prosecutor have observed that "the gravity of a given case should not be assessed only from a quantitative perspective, i.e., by considering the number of victims; rather, the qualitative dimension of the crime should also be taken into consideration when assessing the gravity of a given case."[171]

According to ICC Prosecutor Regulations and policy papers published by the ICC Prosecutor, factors relevant to assessing gravity for the purpose of selecting *cases* for prosecution include: a) the scale of the crimes; b) the nature of the crimes; c) the manner of commission of the crimes; d) the impact of the crimes.[172] The application of these factors recently has been approved by the Pre-Trial Chamber,[173] which observed that in assessing the gravity of the crime both the Prosecutor and the Court should look to "the extent of damage caused, in particular, the harm caused to victims and their families, the nature of the unlawful behavior and the means employed to execute the crime."[174]

Some commentators have criticized the approach taken by the ICC Prosecutor in assessing gravity, advocating the adoption of a flexible qualitative test of gravity.[175]

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169. Kevin J. Heller, *Situational Gravity Under the Rome Statute*, *in* FUTURE DIRECTIONS IN INTERNATIONAL JUSTICE 3 (Carsten Stahn & Larissa van den Herek eds., 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1270369 ("[I]n practice, the number of victims is the *only* factor that has played a significant role in the OTP's situational gravity determinations . . . .").

170. Statement of Luis Moreno-Ocampo, Chief Prosecutor on the Uganda Arrest Warrants, International Criminal Court, The Hague (October 14, 2005) at 2–3 ("The criteria [*sic*] for selection of the first case was gravity. We analyzed the gravity of all crimes in Northern Uganda committed by the LRA and Ugandan forces. Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF. We therefore started with an investigation of the LRA.").

171. Prosecutor v. Abu Garda, Case No. ICC-02/05-02/09, Decision on the Confirmation of Charges, para. 31 (Feb. 8, 2010) (stating agreement with the Prosecutor's view).

172. Regulations of the Office of the Prosecutor, *supra* note 161, Reg. 29; ICC PROSECUTORIAL STRATEGY, *supra* note 139, at 6; REPORT ON PROSECUTORIAL STRATEGY (2006), *supra* note 162, para. 2(b).

173. Prosecutor v. Abu Garda, *supra* note 171, para. 31.

174. *Id.* para. 32.

175. *See, e.g.*, Schabas, *supra* note 75, at 747–48 (finding the Prosecutor's quantitative approach to determinations of gravity "flawed"); Heller, *supra* note 169, at 3 (arguing that the OTP should "de-emphasize" the quantitative approach and focus on specific qualitative factors).

Applying such a test, William Schabas pointed to an additional dimension of gravity that inheres in *state crimes* but is absent from crimes committed by rebel groups. Schabas elaborated:

> Even assuming that the Ugandan People's Defence Forces have killed significantly fewer innocent civilians than the Lord's Resistance Army, is not the fact that the crimes are attributable to the state germane to the gravity of the case? . . . We need not totally dismiss the relevance of the relative numbers of victims in order to appreciate the need to consider other factors, such as the fact that crimes are committed by individuals acting on behalf of the state, as contributing to the objective gravity of the crime.[176]

A flexible qualitative test of gravity may also require determining which of the warring parties is fighting an *aggressive war* for the purpose of assessing the gravity of international crimes. Schabas thus observed with regard to accusations of British war crimes in Iraq:

> Even if it is admitted that wilful killing attributable to British forces only concerns 15 or 20 victims, surely the fact that this results from an aggressive war that has brought the deaths of hundreds of thousands of Iraqi civilians is germane to the gravity determination. . . . Is aggressive war not, at the very least, an aggravating factor of relevance to the assessment of gravity?[177]

Commentators supporting the flexible qualitative test of gravity also have suggested that the ICC Prosecutor consider the "systematicity" of the crimes—that is, the question of whether or not the misconduct in question was highly organized[178]—as well as the extent of worldwide "social alarm" over the particular type of crimes in question.[179]

Yet, the flexible qualitative test of gravity suffers from serious difficulties, which largely pertain to the principle of equality before the law. As observed by Mark Osiel, such a test, "with its greater indeterminacy in how to handle any given situation, allows more opportunity for political manipulation."[180] Factors such as social alarm, state responsibility for the crimes, and the number of victims "will often point in different directions, requiring a weighting of each . . . . [P]artisan considerations, extraneous to the law, will surely lead many to highlight one factor and downplay another, depending on whether we regard the state in question as friend or foe."[181] Making a closely related point, Osiel observes that "[s]ocial alarm is also readily susceptible to distortion by way of the so-called 'CNN effect' or 'Al Jazeera effect.' The mass media tend to highlight certain international crimes over

176. Schabas, *supra* note 75, at 747–48; *see also* Heller, *supra* note 169, at 14–16 (distinguishing between state and rebel crime).

177. Schabas, *supra* note 75, at 748.

178. Heller, *supra* note 169, at 4.

179. *Id.* at 9.

180. Mark Osiel, *How Should the ICC Office of the Prosecutor Choose Its Cases? The Multiple Meanings of "Situational Gravity,"* THE HAGUE JUSTICE PORTAL 5 (Mar. 5, 2009), http://www.haguejusticeportal.net/eCache/DEF/10/344.html.

181. *Id.* at 4–5.

others."[182] Clearly, the data on numbers of victims of international crimes are more reliable than the data on the extent of social alarm generated by such crimes.

An approach that requires a determination of which of the parties is fighting an aggressive war is also readily open to a charge of political manipulation. Indeed, commenting on the prosecutorial policy of the ICC Prosecutor, Human Rights Watch observed, "objective criteria to assess whether certain cases merit investigation or prosecution [are] important to ensure that prosecutions before the ICC do not appear selective."[183]

In view of the weaknesses of the flexible qualitative test of gravity, I submit that the gravity criterion, as applied by the ICC Prosecutor, also should be applied to the exercise of universal jurisdiction by a Designated State.

The gravity criterion does not preclude the Designated State from prioritizing investigations of cases primarily according to the availability of perpetrators for prosecution. Focusing investigative efforts on suspects who are already in the hands of the Designated State or may be readily extradited to it, rather than on those who are not within the reach of the Designated State, does not violate the principle of equality before the law. Indeed, rejecting a defendant's selective prosecution claim in the *Landzo* case, the ICTY has explicitly approved the prioritization of cases according to the availability of perpetrators for trial.[184]

Furthermore, given its limited resources, a Designated State often would have to focus its investigative and prosecutorial efforts on relatively few individuals within a large group of suspects who are similarly situated in terms of the gravity criterion and the evidence against them. In other words, in its exercise of universal jurisdiction the Designated State would rarely be able to treat all similarly situated individuals alike.[185] However, a random selection of individuals from a group of similarly situated individuals for investigation and prosecution does not necessarily violate the principle of equality before the law.[186]

B. "Good-Faith" Political Considerations

To what extent may prosecutorial discretion concerning the perpetrators of international crimes transcend traditional criminal justice considerations, which turn

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182. *Id.* at 6.

183. *The Selection of Situations and Cases for Trial before the International Criminal Court*, HUMAN RIGHTS WATCH 4 (Oct. 26, 2006), http://www.hrw.org/en/news/2006/10/26/selection-situations-and-cases-trial-international-criminal-court.

184. *See* Prosecutor v. Delalic, *supra* note 4, para. 616 (The ICTY held that the Prosecutor's decision to withdraw the indictments against fourteen other defendants, but continue proceedings against Landzo, was not discriminatory as "all of the fourteen accused against whom charges were withdrawn . . . unlike Landzo, had not been arrested and were not in the custody of the Tribunal.").

185. *See* Steiner, *supra* note 10, at 217 ("[C]riminal justice following massive violations in large conflicts will always have a somewhat arbitrary character. It will be impossible to prosecute, or even imagine prosecuting, 'all' who participated in criminal events.").

186. *See* R v. Inland Revenue Commissioners, *ex parte* Mead and Cook, [1993] 1 All ER 772, 783–84 (holding the law only requires that the prosecution's decisions "be taken in good faith for the purpose of fulfilling the Revenue's objective of collecting taxes and not for some ulterior, extraneous or improper purpose, such as the pursuit of some racialist bias, political vendetta or corrupt motive"). The defendant, accused of tax fraud, argued that the prosecution was required "to treat all dishonest taxpayers guilty of similar offenses in like manner: either all must be prosecuted or none." The English court rejected this contention as "impracticable." *Id.*

on the gravity of the criminal conduct and the personal circumstances of the perpetrator? Much of the legal discourse on this question has been channeled to Article 53 of the Rome Statute,[187] which allows the ICC Prosecutor to decline to investigate or prosecute an otherwise admissible case where the Prosecutor concludes that such investigation or prosecution "is not in the interests of justice."[188] The ICC Prosecutor has recognized that the "interests of justice" recognized by Article 53 are necessarily "broader than criminal justice in a narrow sense."[189] The legal discourse on the nature and scope of "interests of justice" that may appropriately be considered by the ICC Prosecutor also seems to pertain to the prosecutorial practices of a state exercising universal jurisdiction.

Pointing to the difficulties arising with regard to the notion of an "apolitical" ICC, Alexander Greenawalt draws a distinction between legitimate and illegitimate political considerations.[190] Greenawalt notes the argument that "[s]ome political considerations are by definition illegitimate and should play no role in the decisionmaking of legal actors involved in war crimes prosecutions. For example, the fact that a government involved in genocide may have friendly relations or economic ties with a government that sits on the U.N. Security Council is not a valid reason to forego investigation or prosecution."[191] The same proscription against "politicization" may not apply, however, "to extra-legal considerations of historical or political context that are concerned not with illicit motives but with promoting the tribunal's own institutional goals."[192] Other commentators share this view.[193]

One such good-faith consideration addressing the decisions of the ICC Prosecutor concerns the prospects of "securing state cooperation for the Court's actions."[194] The cooperation of the state in which the crimes were committed or the

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187. *See* Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions, and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 488 (2003) ("Article 53(1)(b) specifically juxtaposes the traditional criminal justice considerations—the gravity of the crime and the interests of the victims—with the broader notion of 'interests of justice' and clearly indicates that the latter might trump the former."); Heller, *supra* note 169, at 2 (The OTP "has argued that its investigative decisions have been driven solely by an objective assessment of the gravity of the various situations, as required by Article 53(1)(b) of the Rome Statute.").

188. *See* Rome Statute, *supra* note 27, art. 53(1)(c) (stating the ICC Prosecutor may decline to investigate an otherwise admissible case when, "[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice"); *id.* art. 53(2)(c) (stating the ICC Prosecutor may determine after investigation that "[a] prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime").

189. OFFICE OF THE PROSECUTOR, INT'L. CRIM. CT., POLICY PAPER ON THE INTERESTS OF JUSTICE 8 (Sept. 2007), *available at* http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf [hereinafter INTERESTS OF JUSTICE PAPER].

190. Greenawalt, *Justice Without Politics?*, *supra* note 36, at 613 ("The difficulty here derives in part from imprecision in the use of the word 'political' itself.").

191. *Id.*

192. *Id.*

193. Giulio M. Gallarotti & Arik Y. Preis, *Politics, International Justice, and the United States: Toward a Permanent International Criminal Court*, 4 UCLA J. INT'L & FOREIGN AFF. 1, 31 (1999) ("[T]hat the ICC allows various points of entry for politics may actually facilitate the attainment of even the most sacred of the ICC's mandates—the promotion of retribution and reconciliation in ways that preserve order and stability in the international community."); Danner, *supra* note 25, at 530–31 (asserting that the ICC Prosecutor may need to "be sensitive to the political implications of his prosecutorial decision making, especially on the regions involved in the ICC's cases. . . . [as] [t]his dynamic can enhance the effectiveness of the Court").

194. James A. Goldston, *More Candor about Criteria: The Exercise of Discretion by the Prosecutor of*

perpetrators' home state is often essential for the effective operation of the ICC, both in the investigation stage and with regard to the surrender of suspects to the ICC.[195] This is also true with regard to the exercise of universal jurisdiction by a state. Such considerations would often guide the ICC Prosecutor or a Designated State to direct investigatory efforts—regardless of the gravity criterion—at perpetrators who are not affiliated with government forces but, rather, with rebel groups.

Moreover, a strict application of the gravity criterion might require a prosecuting authority to focus its investigatory and prosecutorial efforts on atrocities committed by one party to an armed conflict, leaving perpetrators of international crimes belonging to the other party to the conflict unprosecuted. Such result is likely to antagonize the population of the party with which the prosecuted perpetrators are affiliated and exacerbate reluctance to cooperate with such investigatory or prosecutorial efforts. Commenting on the policy of the ICTY Prosecutor—which initiated proceedings against both Serbian and Bosnian Perpetrators—Greenawalt thus observed, "a policy which emphasized the gravity of crimes without regard to broader political sensitivities"[196] could have resulted in an outcome that would have been "deeply unfortunate, however fair-minded the principles that produced it."[197] Greenawalt submits that such policy likely would have resulted in the prosecution of only Serbian perpetrators "without ever reaching Croat and Muslim crimes"[198] and thereby "would . . . have seriously deprived the tribunal of credibility among Serbs."[199]

A policy focusing on prosecuting all parties to a conflict at the expense of the gravity criterion was rejected by the ICTY in the *Landzo* case.[200] Landzo—a Bosnian perpetrator of war crimes tried by the ICTY—argued that "he was singled out for prosecution simply because he was the only person the Prosecutor's office could find to 'represent' the Bosnian Muslims. He was, it is said, prosecuted to give an appearance of 'evenhandedness' to the Prosecutor's policy."[201] Concluding that Landzo had failed to prove this factual contention,[202] the Tribunal observed that the Prosecutor is duty-bound to exercise her prosecutorial discretion in a manner compatible with the principle of equality before the law.[203] The Tribunal did not hesitate to determine that a policy of selective prosecution as described by Landzo would have violated this principle.[204]

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the International Criminal Court, 8 J. INT'L CRIM. JUST. 383, 396 (2010) ("Notwithstanding the command of the Statute, and the idealistic posture of the OTP position paper, can the ICC Prosecutor help but take into consideration his dependence on states for his own effectiveness in deciding whether, when and whom to charge?").

195. *See id.* at 394–96 (discussing the Prosecutor's dependence on state cooperation in carrying out ICC investigations and suggesting that "securing custody of the accused was a paramount consideration" in deciding whether or not to charge a suspect).

196. Greenawalt, *Justice Without Politics?*, *supra* note 36, at 648.

197. *Id.* at 648–49.

198. *Id.* at 648 (asserting that Croat and Muslim crimes, "while often hideously grim, were not as large-scale or, at least in the apparent case of the Bosnian Government, did not involve the same degree of high-level sponsorship and planning" as did the Serb-perpetrated offenses).

199. *Id.* at 649.

200. Prosecutor v. Delalic, *supra* note 4.

201. *Id.* para. 612.

202. *Id.* para. 615.

203. *Id.* para. 605.

204. *Id.*

The bulk of the debate in the legal literature regarding the appropriateness of good-faith political considerations in the enforcement of international criminal law has concerned national amnesties.[205] Should the international community defer to such amnesties in the interests of facilitating transition to democracy, facilitating the termination of an internal armed conflict, or promoting national reconciliation? National amnesties are often unconditional.[206] However, as some amnesties are conditional, they are accompanied by "alternative justice measures," such as Truth Commissions that grant individualized amnesties in exchange for public confessions of the crimes (e.g., the Truth and Reconciliation Commission created by South Africa upon the termination of the apartheid regime).[207]

National amnesties to perpetrators of international crimes have often been granted in transitional situations in which "former oppressors refuse to share power unless guaranteed that they will escape criminal" prosecutions.[208] A frequent argument invoked in favor of international deference to such national amnesties "maintains that non-prosecutorial alternatives may be justified as a compromise necessary to facilitate political transition to a more just society that rebukes the evils of the past."[209] This justification also would pertain to amnesties granted to perpetrators of international crimes with a view to end an internal armed conflict and promote national reconciliation. It reflects the view that "the ultimate goal, peace and future justice, is certainly an equally important moral good as the prevention of impunity."[210] Some commentators present the interest at stake as one of "international peace and security," the maintenance of which is one of the objectives of international criminal law.[211]

Other commentators adamantly oppose international deference to national amnesties, noting "the moral repugnancy of turning a blind eye to the commission of

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205. *See* Steiner, *supra* note 10, at 220–21 ("The status of amnesties under international law remains much disputed, caught up in the large debate over the possibility of achieving an end to violence through one or another form of amnesty or impunity, at the cost of personal accountability for crimes.").

206. *See* Sadat, *supra* note 100, at 197 (noting the amnesties afforded by El Salvador to perpetrators of state crimes, with a view to facilitating transition to democracy).

207. *See* Audrey P. Chapman & Hugo van der Merwe, *Introduction: Assessing the South African Transitional Justice Model*, *in* TRUTH AND RECONCILIATION IN SOUTH AFRICA: DID THE TRC DELIVER? 1, 8–11 (Audrey P. Chapman & Hugo van der Merwe eds., 2008) (discussing the powers of the Truth and Reconciliation Commission).

208. Rajeev Bhargava, *Restoring Decency to Barbaric Societies*, *in* TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 48 (Robert I. Rotberg & Dennis Thompson eds., 2000).

209. Greenawalt, *Justice Without Politics?*, *supra* note 36, at 615; *see also* Neha Jain, *Between the Scylla and Charybdis of Prosecution and Reconciliation: The Khmer Rouge Trials and the Promise of International Criminal Justice*, 20 DUKE J. COMP. & INT'L L. 247, 266–67 (2010) (In "fragile and post-conflict societies . . . unless non-prosecutorial alternatives such as amnesties or truth commissions are employed, the country may never be able to transition towards peace and stability.").

210. Jain, *supra* note 209, at 267; *see also* Greenawalt, *Justice Without Politics?*, *supra* note 36, at 615 ("Justice is sacrificed, but only for the sake of greater future justice or other equivalent moral goods."); Amy Gutmann & Dennis Thompson, *The Moral Foundations of Truth Commissions*, *in* TRUTH V. JUSTICE: THE MORALITY OF TRUTH COMMISSIONS 23 (Robert I. Rotberg & Dennis Thompson eds., 2000) ("The stability of a political regime itself is not a moral good or a sufficient reason to sacrifice justice for individuals. A stable regime can be unacceptably repressive. Social stability counts as morally relevant only when it is part of what justice (or some other moral good) either now requires (because justice calls for ending or avoiding a socially devastating civil war), or because social stability is necessary to promote justice in the future, or because social stability is supportive of some equivalent moral good.").

211. Goldston, *supra* note 194, at 397–98 ("It has been suggested that, in view of the Rome Statute's objective to end impunity in the interest of peace and security, the very decision whether to prosecute requires the Prosecutor to consider the impact of his decision on the prospects for peace.").

atrocities."[212] These opponents attribute little weight to the argument that insistence upon criminal justice may hinder national reconciliation, observing that "there is . . . little proof that amnesties promote reconciliation whereas criminal trials provoke relapses,"[213] and that "in practice, the impact of any charging decision on conflict resolution is hard to discern in retrospect, let alone forecast in advance."[214]

It is widely agreed that "where jurisdiction is universal, a State cannot deprive another State of its jurisdiction to prosecute the offender by the grant of amnesty."[215] However, it remains unclear whether a state granting amnesty to perpetrators of international crimes violates current customary international law, or whether such grant of amnesty may be appropriately considered by the international community in the enforcement of international criminal law.[216] Importantly, it was observed:

> The Rome Statute for the International Criminal Court . . . is silent both as to any duty to prosecute and with regard to amnesties. Although the issue was raised during the Rome Conference at which the Statute was adopted, no clear consensus developed among the delegates as to how the question should be resolved.[217]

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212. Sadat, *supra* note 100, at 205; *see also* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2550 (1991) ("The argument that amnesty laws may be necessary to mend social divisions falsely assumes that such laws are the only means of achieving reconciliation. There are other means. Further, amnesty laws can be used to promote national reconciliation, provided they do not cover atrocious crimes which international law requires states to punish.").

213. Sadat, *supra* note 100, at 206.

214. Goldston, *supra* note 194, at 398. Goldston elaborates, "By way of comparative reference, the experience of the ICTY may be illustrative. On 25 July 1995, when the ICTY Prosecutor first indicted Radovan Karadzic, it was criticized as a provocative act likely to prolong the Bosnian War. In retrospect, some have suggested that the indictment helped bring about an end to the conflict by de-legitimizing the Bosnian Serb political leader and sidelining him from active political life." *Id.*

215. Prosecutor v. Kallon, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction, para. 67 (Mar. 13, 2004). The Special Court for Sierra Leone explained that "a State cannot bring into oblivion and forgetfulness a crime, such as a crime against international law, which other States are entitled to keep alive and remember." *Id.*

216. In *Almonacid-Arellano v. Chile*, the Inter-American Court of Human Rights concluded that "States cannot neglect their duty to investigate, identify, and punish those persons responsible for crimes against humanity by enforcing amnesty laws or any other similar domestic provisions. Consequently, crimes against humanity are crimes which cannot be susceptible to amnesty." Inter-Am. Ct. H.R. (ser. C) para. 114 (Sept. 26, 2006), *available at* http://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf; *see also* Leila Nadya Sadat, *Exile, Amnesty and International Law*, 81 NORTE DAME L. REV. 955, 1021–22 (2006) (suggesting that "a prohibition against the grant of blanket amnesties for the commission of *jus cogens* crimes may now have crystallized as a matter of general customary international law"). Similarly, U.N. Secretary-General Kofi Annan observed, "the UN has consistently maintained the position that amnesty cannot be granted in respect of international crimes such as genocide, crimes against humanity, or violations of international humanitarian law." U.N. Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, para. 22, U.N. Doc. S/2000/915 (Oct. 4, 2000). The Secretary-General therefore asserted that peace agreements should "reject any endorsement of amnesty" for such crimes. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, para. 10, U.N. Doc. S/2004/915 (Aug. 3, 2004). By contrast, in *Prosecutor v. Kallon*, the Special Court for Sierra Leone subscribed to the view that "there is not yet any general obligation for States to refrain from amnesty laws [on core international crimes]. Consequently, if a State passes any such law, it does not breach a customary rule." Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction, para. 71 (Mar. 13, 2004) (quoting Cassese, INTERNATIONAL CRIMINAL LAW, *supra* note 129, at 315).

217. Sadat, *supra* note 100, at 204; *see also* Greenawalt, *Justice Without Politics?*, *supra* note 36, at 617 ("[T]he question about amnesty was one which the delegates to the Rome Conference both explicitly

Rome Conference Chair Philippe Kirsch has thus described the result of the Rome negotiations on this point—the "interests of justice" provision—as a decision to settle for "creative ambiguity."[218] Hence, "the question was purposely left open by the drafters: while the Statute does not condone the use of amnesties by its terms, presumably the prosecutor has the power to accept them if doing so would be 'in the interests of justice.'"[219] Some commentators have noted that the experience of the Rome Conference negotiations suggests that "customary international law has not yet crystallized on this point."[220]

The extent to which one would be receptive to good-faith political considerations depends on the weight one attributes to the principle of equality before the law. Any admission of considerations that are "broader than criminal justice in a narrow sense,"[221] i.e., any consideration that transcends the circumstances of the crime and offender at hand, erodes the principle of equality before the law to some extent. An unqualified resort to good-faith political considerations would completely undermine this principle. Part I has demonstrated the extent to which universal jurisdiction's claim to legitimacy depends on the observance of the principle of equality before the law. In view of the analysis presented in Part I, I submit that universal jurisdiction's claim to legitimacy cannot survive the introduction of good-faith political considerations beyond extremely rare situations.

Indeed, the recognition that good-faith political considerations pose a significant threat to the legitimacy of international criminal law seems to underlie the unreceptive approach toward such considerations so far taken by the ICC Prosecutor. The position of the ICC Prosecutor toward good-faith political considerations has been termed "an idealistic posture."[222] In a recent speech marking the ICC's ten-year anniversary, Luis Moreno-Ocampo, the ICC Prosecutor, emphasized that "as the Prosecutor, my duty is to apply the law without political considerations. I cannot adjust to political considerations."[223] The Prosecutor clearly rejected the view that the interest in "securing state cooperation for the Court's actions"[224] may be considered in selecting cases for prosecution. In a 2006 policy paper, the Prosecutor asserted that his duty of independence "goes beyond not seeking or acting on instructions. It also means the selection is not influenced by the presumed wishes of any external source, nor the importance of the cooperation of any party, or the quality of cooperation provided."[225]

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considered and failed to resolve.").

218. Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 521–22 (1999) (quoting conversation with Mr. Kirsch).

219. Sadat, *supra* note 100, at 204.

220. *Id.*; *see also* Greenawalt, *Justice Without Politics?*, *supra* note 36, at 618 ("Given the moral arguments invoked to support amnesties, the deliberate silence of the Rome Statute, and the lack of any clear prohibition under international law, a number of observers have maintained that the ICC and national amnesty laws may be compatible, at least in some circumstances.").

221. INTERESTS OF JUSTICE PAPER, *supra* note 189, at 8.

222. Goldston, *supra* note 194, at 396.

223. Luis Moreno-Ocampo, Prosecutor, Int'l Criminal Court, Speech at the London School of Economics: The Tenth Anniversary of the ICC and Challenges for the Future: Implementing the Law (Oct. 8, 2008), *available at* http://www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20081007LuisMorenoOcampo.pdf.

224. Goldston, *supra* note 194, at 396.

225. *Id.* (quoting OFFICE OF THE PROSECUTOR, INT'L. CRIM. CT. CRITERIA FOR SELECTION OF SITUATIONS AND CASES 3 (June 2006) (unpublished draft policy paper)).

In September 2007, the Office of the Prosecutor issued a position paper regarding the application of the "Interests of Justice" provision. While acknowledging that the "interests of justice" recognized by Article 53 of the Rome Statute are necessarily "broader than criminal justice in a narrow sense,"[226] the paper emphasizes that there must be a "presumption in favour of investigation or prosecution" with respect to otherwise admissible cases.[227] The paper also states, arguably with a view to national amnesties, that the application of the Interests of Justice provision "will naturally be guided by the objects and purposes of the Statute—namely the prevention of serious crimes of concern to the international community *through ending impunity*."[228] Turning a cold shoulder to the argument that "peace and reconciliation" considerations should be taken into account in the exercise of prosecutorial discretion, the paper stated that "there is a difference between the concepts of the interests of justice and the interests of peace."[229] The Prosecutor emphasized that "the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions,"[230] namely, the U.N. Security Council.[231] As noted by one commentator, "This comment is directed at those who contend that sometimes international prosecution should stand aside in favour of peace processes."[232] Finally, a prosecutorial strategy paper published by the Office of the Prosecutor in 2010 stated that the Office would "increase its dialogue with peace mediators . . . to ensure . . . that peace and political agreements exclude amnesties for Rome Statute crimes . . . ."[233] It was thus observed that, "While the need for national reconciliation and the provision of alternative justice mechanisms is certainly acknowledged as a possible interpretation of [the Prosecutor's] mandate, the ICC Prosecutor has thus far been steadfast in refusing to bow to purely political constraints . . . ."[234]

To be sure, the ICC Prosecutor's stance with regard to national amnesties does not rest solely on the principle of equality before the law. As noted by Alexander Greenawalt, "If the ICC were to defer to amnesties or nonpunitive mechanisms whenever a state so requested, the very mission of the Court as a supranational institution designed to hold states in check would disappear."[235]

I submit that the power to decide whether good-faith political considerations preclude or otherwise influence the exercise of universal jurisdiction by a Designated State should primarily rest with the ICC Prosecutor, who would make such decisions on a "situation-by-situation" basis. In view of the clearly unreceptive approach taken

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226. INTERESTS OF JUSTICE PAPER, *supra* note 189, at 8.

227. *Id.* at 1.

228. *Id.* (emphasis added).

229. *Id.*

230. *Id.* at 9.

231. *See id.* at 8 ("The Statute recognizes a role for the UN Security Council to defer ICC action where it considers it necessary for the maintenance of international peace and security."); *see also* Goldston, *supra* note 194, at 398 ("[P]rimary responsibility for broader matters of international peace and security rests with the UN Security Council.").

232. Schabas, *supra* note 75, at 749.

233. ICC PROSECUTORIAL STRATEGY, *supra* note 139, at 12.

234. Jain, *supra* note 209, at 259–60.

235. Alexander K.A. Greenawalt, *Complementarity in Crisis: Uganda, Alternative Justice, and the International Criminal Court*, 50 VA. J. INT'L L. 107, 145 (2009) [hereinafter Greenawalt, *Complementarity in Crisis*].

by the ICC Prosecutor toward good-faith political considerations, it seems that entrusting this decision to the Prosecutor would ensure that the adverse effect of such considerations on the principle of equality before the law remains marginal. Divesting the Designated State of the power to decide whether to defer to national amnesties also would ensure that it does not invoke such amnesties as a pretext to refrain from prosecutions that are politically inconvenient to the Designated State.

C. *Universal Jurisdiction and Exemplary Prosecutions*

Alexander Greenawalt observed, "In contrast to the division provoked by the amnesty debate, there appears to be broad agreement that transitional states facing mass atrocities may adopt a policy of targeted, highly selective prosecutions which leave the vast majority of criminals unprosecuted."[236] Indeed, even the most adamant opponents to international deference to blanket amnesties concede that a state directly affected by atrocities may fulfill its international obligations through a program of "exemplary" prosecutions (i.e., prosecutions focusing on a relatively small portion of the category of suspected perpetrators).[237] According to this approach, such measures warrant international deference regarding the situation as a whole. Once the state directly affected by atrocities has resorted to exemplary prosecutions, no further prosecutorial efforts are required on the part of the international community. This position also was taken by the ICC Prosecutor, whose "public pronouncements confirm his willingness to accept domestic prosecutorial efforts that are far from comprehensive."[238]

It seems, then, that the prevailing view in the international legal community distinguishes between two categories of perpetrators of international crimes who were *not prosecuted* by their state of nationality: one category consists of perpetrators whose state of nationality pursued exemplary prosecutions (against others), and the other category consists of perpetrators whose state had not taken such measures. Only those belonging to the latter category may be vulnerable to prosecutions either by the ICC or by a state exercising universal jurisdiction. By contrast, in the former category, both the ICC and states wishing to exercise universal jurisdiction must defer to the judgment made by the perpetrators' home state that further prosecutions are unwarranted.

But does not such distinction seriously undermine, in and of itself, the principle of equality before the law? Does it not constitute, per se, a discriminatory criterion in selecting the subjects of the exercise of universal jurisdiction? The most plausible argument for answering this question in the negative turns on the "legitimizing

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236. Greenawalt, *Justice Without Politics?*, *supra* note 36, at 620.

237. M. Cherif Bassiouni, *Proposed Guiding Principles for Combating Impunity*, *in* POST-CONFLICT JUSTICE 255, 261 (M. Cherif Bassiouni ed., 2002) ("[U]se of 'exemplary trials' is accepted in principle in virtually all legal systems and is therefore consistent with general principles of law."); *see also* Orentlicher, *supra* note 212, at 2598 ("[T]he demands of justice and political stability are best reconciled through a program of prosecutions that has defined limits. To the extent that the purpose of prosecutions is to vindicate the authority of the law and deter repetition of recent crimes, it is not necessary that a transitional government prosecute all who participated in a previous system of violations."); Robinson, *supra* note 187, at 494 ("There is *practical*, *legal*, and *moral* justification for dealing with lesser offenders through truth commissions and conditional amnesties, whereas the persons most responsible—i.e., planners, leaders, and those committing the most notorious crimes—should still be held criminally accountable.").

238. Greenawalt, *Complementarity in Crisis*, *supra* note 235, at 142.

linkage" that supports both ICC adjudication and the exercise of universal jurisdiction by a state.

The legitimizing linkage between the international community and international crimes largely concerns the undermining of the international order. The international community as a whole has an interest in vindicating, through criminal justice, the international order undermined by atrocities.[239] Yet, the vindication of the international order does not necessarily require that *all* perpetrators be punished. Where the prosecutorial efforts of the perpetrators' state of nationality meet a certain threshold, the international community's interest in vindicating the international order is fulfilled.[240] Once the international order has been vindicated, the legitimizing linkage between the international community as a whole and the crime is severed.

Consider a murder committed in the course of a bank robbery. Such a crime may not legitimately be the object of the exercise of universal jurisdiction as it does not threaten the international order.[241] In the absence of this threat, there is no legitimizing linkage between the crime and the international community. Hence, it can hardly be argued that a state's exercise of universal jurisdiction over war criminals, but not over common murderers, violates the principle of equality before the law.

Once exemplary prosecutions of war crimes meet a certain threshold, and thus sever the legitimizing linkage between the international community and the crime, the difference between a war criminal and a common murderer fades. Hence, for the purposes of the exercise of universal jurisdiction, a distinction between war criminals whose state of nationality pursued exemplary prosecutions (against others) and war criminals whose state has not taken such measures does not offend the principle of equality before the law, just as a distinction between war criminals and common criminals does not offend this principle.

Whether exemplary prosecutions meet the required threshold for international deference would seem to depend on the number and seniority of the perpetrators prosecuted, and on the scale and nature of the atrocities (the number of victims, the number of perpetrators, etc.). For instance, national exemplary prosecutions

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239. *See* Eichmann v. Attorney General for Israel, 136 I.L.R. 5 (Isr. D.C. Jer. 1961), aff'd 36 I.L.R. 277, 296 (Isr. S. Ct. 1962) (finding that a state may exercise universal jurisdiction over international crimes because "such acts can undermine the foundations of the international community as a whole and impair its very stability"). In *Pinochet*, Lord Millett explained that crimes subject to universal jurisdiction "must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order." R v Bow St. Metro. Stipendiary Magistrate and others, *ex parte* Pinochet Ugarte (No 3), [2000] 1 AC 147 (H.L.) 275 (Isr.) (Millett, dissenting).

240. Orentlicher, *supra* note 212, at 2598 ("To the extent that the purpose of prosecutions is to vindicate the authority of the law and deter repetition of recent crimes, it is not necessary that a transitional government prosecute all who participated in a previous system of violations. These and other objectives served by post-transition prosecutions can be accomplished with exemplary trials. . . .").

241. *See* Steiner, *supra* note 10, at 208 ("Universal jurisdiction is not thought to embrace prosecution for crimes that may be universally condemned by state systems but that are not international crimes—common crimes like murder or rape, for example."); *see also* Cassese, *Is the Bell Tolling for Universality?*, *supra* note 9, at 591 ("It stands to reason that if, say, a Pakistani engages in robbery in Karachi against other Pakistanis, a French court may not institute criminal proceedings against him .... [N]o French interest has been affected by the Pakistani robbery. Why then should a court sitting in Paris step in and bring the offender to trial? As far as 'ordinary criminal offences' are concerned, one could therefore be content with traditional criteria, chiefly territoriality and (active) nationality.").

targeting only low-ranking perpetrators, which are clearly pursued in order to shield the leaders most responsible for the atrocities from international prosecution, should not preclude the exercise of universal jurisdiction by the Designated State.[242]

I submit that the broad discretion inherent in determining whether exemplary prosecutions preclude the exercise of universal jurisdiction should be vested in the ICC Prosecutor. This would ensure that the Designated State does not invoke exemplary prosecutions that clearly do not meet the required threshold for international deference as a pretext to refrain from prosecutions that are politically inconvenient to the Designated State.

Closely related, a decision on the part of a Designated State that exemplary prosecutions undertaken by the perpetrators' state of nationality do not suffice to warrant international deference would likely impose, in and of itself, significant political costs upon the former in terms of its relations with the latter.[243] Vesting the discretion to make such decisions in the ICC Prosecutor would thus externalize some of the political costs attached to the exercise of universal jurisdiction away from the Designated State and onto the ICC Prosecutor, thereby encouraging states to assume the role of a Designated State.

D. The Principle of Subsidiarity

The question of international deference to exemplary prosecutions undertaken by a perpetrator's home state is closely related to the principle of subsidiarity. This principle holds that the jurisdictional claim of a state invoking universal jurisdiction yields to genuine and effective assertion of jurisdiction either by the state in which the crime was committed or by the perpetrator's home state[244] (I shall hereafter refer to both such states as a "Directly Affected State"). In *Congo v. Belgium*, the principle of subsidiarity was recognized by ICJ judges Higgins, Kooijmans, and Buergenthal.[245] Similarly, in an attempt to pinpoint the *lex lata* of universal jurisdiction, the Commission of the Institute of International Law concluded:

> Any State having custody over an alleged offender should, before commencing a trial on the basis of universal jurisdiction, ask the State where the crime was committed or the State of nationality of the person

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242. Orentlicher, *supra* note 212, at 2598 (observing that exemplary prosecutions are acceptable "provided the criteria used to select defendants do not vitiate the justifying aims of prosecutions by, for example, cynically targeting scapegoats").

243. Jo Stigen, *The Relationship Between the Principle of Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, *in* COMPLEMENTARITY AND THE EXERCISE OF UNIVERSAL JURISDICTION FOR CORE INTERNATIONAL CRIMES 133, 158 (Morten Bergsmo ed., 2010) ("[A] horizontal scrutiny between states of the adequacy of their respective proceedings ... is quite different from the vertical scrutiny exercised by the ICC." Such scrutiny "can also make the application of universal jurisdiction more intrusive.").

244. *See* Cassese, *Is the Bell Tolling for Universality?*, *supra* note 9, at 593. ("[I]t would seem that at least at the level of customary international law, universal jurisdiction may only be exercised to *substitute for other countries* that would be in a better position to prosecute the offender, but for some reason do not .... These countries are the territorial state or the state of active nationality: they may stake out a sort of 'primary claim' to jurisdiction, on account of their strong link with the offence or the offender. In other words, under customary international law universal jurisdiction may only be triggered if those other states fail to act, or else have legal systems so inept or corrupt that they are unlikely to do justice. Universality only operates, then, as a *default* jurisdiction.").

245. Arrest Warrant Case, *supra* note 9, para. 59 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

> concerned whether it is prepared to prosecute that person, unless these States are manifestly unwilling or unable to do so.[246]

Some commentators have opined that the principle of subsidiarity has yet to acquire the status of customary international law.[247] However, even those commentators agree that this principle is in the process of emerging[248] and that states should follow the principle of subsidiarity as a matter of policy.[249] It is also clear that "less than genuine proceedings" undertaken by a Directly Affected State should not preclude the exercise of universal jurisdiction.[250]

Hence, even where exemplary prosecutions do not preclude the exercise of universal jurisdiction over a *situation* as a whole (e.g., over an entire internal armed conflict), the exercise of universal jurisdiction over a *particular case* within such a situation may nevertheless be precluded in view of genuine and effective investigative or prosecutorial efforts on the part of the Directly Affected State regarding *that case*.

I subscribe to the position taken by Claus Kress that "an international judicial organ rather than the state [exercising universal jurisdiction] should be entrusted with the power to make the decision as to whether another state was or is unwilling or unable to conduct the criminal proceedings in a given case where such a decision is necessary to apply the subsidiarity principle."[251] The reasons for entrusting the ICC Prosecutor with the decision of whether exemplary prosecutions preclude the exercise of universal jurisdiction over a situation as a whole[252] equally apply to the principle of subsidiarity. Indeed, Jo Stigen has observed that "having one state assessing the genuineness of the proceedings of another state might more easily create friction than when such assessment is made by an international arbiter."[253] Moreover, "One may also ask whether the forum state will have the required expertise and resources to conduct an in-depth evaluation of another state's proceedings, involving highly complex considerations."[254] Hence, it should be for the ICC Prosecutor to determine whether the investigation or prosecution of a particular case by the Directly Affected State is indeed genuine and effective.

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246. Resolution of Inst. of Int'l Law, *supra* note 5, para. 3(c).

247. *See* Stigen, *supra* note 243, at 141 ("There is too little state practice to conclude that international law currently attaches a subsidiarity principle to universal jurisdiction."); Jessberger, Kaleck & Schueller, *supra* note 7, at 237 ("[U]nder international law, a state which practices universal jurisdiction . . . is under no legal obligation to accord priority in respect of investigation and prosecution to the state where the criminal acts were committed.").

248. Stigen, *supra* note 243, at 134 ("[A] subsidiarity principle for universal jurisdiction, requiring the forum state to first offer the case to the territorial state and the suspect's home state, is in the process of being developed."); Jessberger, Kaleck & Schueller, *supra* note 7, at 238 ("State practice accompanied by what appears to be an emerging sense of *opinio juris* indicates that states consider a prosecutorial effort by the territorial state to foreclose the possibility of a prosecution by states with universal jurisdiction.").

249. Jessberger, Kaleck & Schueller, *supra* note 7, at 238.

250. Stigen, *supra* note 243, at 144.

251. Claus Kress, *Universal Jurisdiction Over International Crimes and the Institut de Droit International*, 4 J. INT'L CRIM. JUST. 561, 584–85 (2006).

252. *See supra* note 243 and accompanying text.

253. Stigen, *supra* note 243, at 157.

254. *Id.*

There seems to be broad agreement among commentators that the principle of subsidiarity should not apply at the initial investigative stage.[255] This position also finds support in the Joint Separate Opinion in *Congo v. Belgium*, which only calls for the application of the subsidiarity principle where a state contemplates *prosecuting* a particular suspect on the basis of universal jurisdiction.[256] According to this view, to which I subscribe, "investigations can be initiated simultaneously in different countries and the results and evidentiary material collected be shared in legal assistance to the forum state of prosecution."[257]

IV. MONITORING THE EXERCISE OF UNIVERSAL JURISDICTION BY A DESIGNATED STATE

While the referral regime constitutes, in and of itself, a substantial guarantee of the principle of equality in the exercise of universal jurisdiction, this Part explores the possibility of complementing it with a mechanism that provides for international oversight of the exercise of universal jurisdiction by a Designated State.

A. *A Selective Prosecution Defense?*

Both national courts and the ICTY in the *Landzo* case have recognized, in principle, a defense of selective prosecution available to a defendant in the face of a discriminatory prosecution.[258] One way of addressing the practice of discriminatory prosecution by a state exercising universal jurisdiction would be to allow defendants the opportunity to bring before the ICC or another international tribunal a selective prosecution challenge to domestic proceedings. This would essentially confer upon an international tribunal appellate review powers over domestic criminal proceedings. National and international jurisprudence does not resolve the question of whether or not a defendant's successful assertion of a selective prosecution defense may result in a dismissal of the indictment even where the charges against the defendant are of great gravity.[259] Closely related, however, is the ICTR Appeals Chamber's holding in *Prosecutor v. Barayagwiza* that "egregious" conduct on the part of the ICTR Prosecutor, which gravely violates the defendant's human rights, may require a dismissal of the indictment with prejudice to the Prosecutor even where the crimes attributed to the defendant are extremely grave.[260]

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255. Jessberger, Kaleck & Schueller, *supra* note 7, at 239 ("It is difficult to assert that the principle of subsidiarity already applies at the initial investigative stage." (citing Kress, *supra* note 251, at 580)). However, according to the position taken by Spanish and German Courts, "as long as a state investigates and is thus exercising its jurisdiction based on the territoriality principle, third states are prevented to exercise their jurisdiction based on the principle of universality." *Id.* at 234.

256. Arrest Warrant Case, *supra* note 9, para. 59 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

257. Jessberger, Kaleck & Schueller, *supra* note 7, at 239.

258. United States v. Armstrong, 517 U.S. 456, 456 (1996); R v. Inland Revenue Commissioners, *ex parte* Mead and Cook, [1993] 1 All ER 772, 773; Prosecutor v. Delalic, *supra* note 4, paras. 605–07.

259. Armstrong, 517 U.S. at 461 n.2 ("[W]e have never determined whether dismissal of the indictment, or some other sanction, is the proper remedy if a court determines that a defendant has been the victim of prosecution on the basis of his race."); *see also* Prosecutor v. Delalic, *supra* note 4, para. 596–619.

260. Prosecutor v. Barayagwiza, Case No. ICTR-97-19-DP, Appeals Decision, para. 106 (Nov. 3, 1999).

Arguably, some states would not be opposed to the introduction of a new norm of international law allowing defendants prosecuted under universal jurisdiction such an avenue of action. This prediction finds support in the willingness of European states to submit to judicial review exercised by the European Court of Human Rights ("ECHR") with regard to criminal proceedings held before domestic courts.[261] Indeed, the ECHR often instructs member states of the Council of Europe to set aside criminal convictions resulting from domestic proceedings where, in the view of the Court, such proceedings do not represent a fair trial.[262]

More importantly, in the case of *Congo v. Belgium*, Belgium agreed to subject its exercise of universal jurisdiction to ICJ judicial review, and repealed criminal proceedings against the foreign minister of Congo once the ICJ determined that such proceedings were inconsonant with the rules of customary international law.[263] Indeed, the Princeton Principles on Universal Jurisdiction envisage some form of ICJ judicial review over the exercise of universal jurisdiction. The Princeton Principles provide that, "Consistent with international law and the Charter of the United Nations states should settle their disputes arising out of the exercise of universal jurisdiction by all available means of peaceful settlement of disputes and *in particular by submitting the dispute to the International Court of Justice.*"[264]

Yet, the enforcement of criminal law is one of the core features of sovereignty. There are strong indications that the vast majority of states would view the power of an international court to determine, through the exercise of appellate review, the outcome of criminal proceedings held before their courts as an unacceptable intrusion on their sovereignty.

The Rome Conference negotiations regarding ICC oversight over imprisonment conditions provide an instructive analogy. As noted above, the Rome Statute sets forth a procedure for the designation of states in which perpetrators convicted by the ICC serve their sentence.[265] Article 106(1) of the Rome Statute provides, "The enforcement of a sentence of imprisonment shall be subject to the supervision of the Court, and shall be consistent with widely accepted international treaty standards governing treatment of prisoners."[266] Addressing the extent of the supervisory powers afforded to the Court under the Statute, Claus Kress and Goran Sluiter reviewed the legislative history of Article 106(1):

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261. *See, e.g.*, Heaney and McGuinness v. Ireland, 33 Eur. Ct. H.R. 12 (2001) (concerning right to be silent and right against self-incrimination); Imbrioscia v. Switzerland, 17 Eur. Ct. H.R. 441 (1994) (concerning the presence of legal counsel at pre-trial police interrogations); *see also* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 32, Nov. 4, 1950, 213 U.N.T.S. 222 (vesting the ECHR with jurisdiction over "all matters concerning the interpretation and application of the Convention and the Protocols thereto"); *id.* art. 34 (permitting applications to the Court from anyone claiming violation of right under the convention); *id.* art. 44 (providing that the ECHR's judgments are final).

262. *See, e.g.*, Condron v. United Kingdom, 31 E.H.R.R. 1, 23–26 (2001) (setting aside conviction due to judge's improper jury direction); Beckles v. United Kingdom, 33 E.H.R.R. 13, 68 (2003) (granting damages where a jury was misdirected by the judge).

263. REYDAMS, *supra* note 32, at 116.

264. PRINCETON PRINCIPLES, *supra* note 1, at 36 (emphasis added).

265. *See supra* notes 110–114 and accompanying text.

266. Rome Statute, *supra* note 27, art. 106(1).

> At the opening of the Rome Conference, Article 96 of the Draft Statute ... presented the alternative between a strong supervisory power of the ICC, including the right to modify the national conditions of imprisonment and/or to transfer the prisoner to another State of enforcement, and a supervisory power in a rather token form. In the course of the Rome negotiations, the idea of giving the ICC the power to order the State of enforcement to modify the conditions of detention met with firm opposition by a considerable number of delegations.[267]

The proposal to afford the ICC the power to order the modification of the conditions of imprisonment was thus rejected[268] and the participants of the Conference opted for a more modest monitoring mechanism, which will be reviewed below. This aspect of the Rome Conference negotiations seems to suggest that a rule conferring upon an international tribunal appellate review powers over domestic criminal proceedings, or otherwise allowing direct international intervention in such proceedings, would be rejected by the bulk of the international community.

Moreover, an opportunity to bring before an international tribunal a selective prosecution challenge to domestic proceedings, even if available to defendants prosecuted under a doctrine of universal jurisdiction, would do little to resolve equality concerns threatening the legitimacy of universal jurisdiction. It is important to distinguish between "legal" and "broader legitimacy/rule of law-based"[269] definitions of discriminatory prosecution. In *United States v. Armstrong*, the U.S. Supreme Court held that "in order to prove a selective-prosecution claim, the claimant must demonstrate that the prosecutorial policy had a discriminatory effect and was motivated by a discriminatory purpose."[270] The Court further held that to establish a discriminatory effect of prosecution in a racial discrimination case, the defendant must show that similarly situated individuals of a different race were not prosecuted.[271] In *Landzo*, the ICTY Appeals Chamber subscribed to this view. Citing *Armstrong*, the Tribunal held that a defendant advancing a selective prosecution claim must meet two requirements: "(i) establishing an unlawful or improper (including discriminatory) motive for the prosecution and (ii) establishing that other similarly situated persons were not prosecuted."[272] Importantly, the ICTY took the view that discriminatory motive may not be inferred from discriminatory effect.[273] Addressing the *Armstrong* holding Yoav Sapir observed that "the requirement to prove discriminatory intent has rendered equal protection challenges almost impossible. It is hardly ever the case that a defendant can prove that a prosecutor had an actual intent to discriminate against her on the basis of her

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267. Kress & Sluiter, *supra* note 112, at 1799.

268. *Id.* at 1806 ("[T]he genesis of Article 106 makes it crystal clear that the ICC should not be given the power to order the modification of a condition of imprisonment.").

269. CRYER, *supra* note 3, at 194.

270. *Armstrong*, 517 U.S. at 457.

271. *Id.*

272. Prosecutor v. Delalic, *supra* note 4, paras. 610–11; *see also* Jain, *supra* note 209, at 283 (highlighting the required comparison "between individuals who are similarly situated").

273. Prosecutor v. Delalic, *supra* note 4, para. 615 ("Given the failure of Landzo to adduce any evidence to establish that the Prosecution had a discriminatory or otherwise unlawful or improper motive in indicting or continuing to prosecute him, it is not strictly necessary to have reference to the additional question of whether there were other similarly situated persons who were not prosecuted or against whom prosecutions were discontinued.").

race."[274] This observation equally applies to any type of discrimination based on collective affiliation. It seems, then, that under the current construction of a selective prosecution defense in international law the possibility of a successful assertion of such a defense is little more than theoretical.

However, as noted by Robert Cryer, "the relatively narrow legal limits placed on prosecutorial discretion do not exhaust the ways in which selectivity is used to critique international criminal law. A broader legitimacy/rule of law-based evaluation can be made of international criminal law."[275] Where it is evident that prosecutorial practices pursued under a doctrine of universal jurisdiction have a discriminatory effect (that is, where the selection of perpetrators for prosecution cannot be reconciled with the gravity criterion), such practices present a threat to the legitimacy of universal jurisdiction even if defendants are unable to prove a discriminatory intent on the part of the prosecuting authorities.

B. An International Monitoring Mechanism

While most states are not likely to subject criminal proceedings held before their courts to a selective prosecution challenge before an international tribunal, there is good reason to believe they would be more receptive to the introduction of *an international monitoring mechanism* accompanied by a power, vested in the ICC Prosecutor, to revoke the designation of a Designated State that does not abide by the principle of equality before the law.

I return to the Rome Conference negotiations on the question of the ICC's supervisory powers regarding imprisonment conditions of persons convicted by the ICC. While the states participating in the Rome Conference have clearly decided not to give the ICC the power to modify the conditions of imprisonment in national prisons, those states agreed to the introduction of an ICC monitoring mechanism accompanied by a power vested in the ICC to revoke the designation of the custodial state. Reviewing the Rome negotiations concerning ICC powers to oversight detention conditions, Claus Kress and Goran Sluiter observed:

> [T]he instrument of "change in designation of the State of enforcement" turned out to be the key to a compromise solution. It was realized that the power of the ICC to transfer the prisoner to another State of enforcement could be . . . an appropriate instrument in the hands of the ICC to react to an unacceptable treatment of the prisoner. Those delegations which had preferred to give to the ICC the power to order a modification of the national conditions of detention no longer insisted on that proposal, on the understanding that the ICC would be given a broad power of change in designation.[276]

Hence, in the December 1999 session of the U.N. Preparatory Commission for the International Criminal Court ("Preparatory Commission") the signatories to the

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274. Yoav Sapir, *Neither Intent Nor Impact: A Critique of the Racially Based Selective Prosecution Jurisprudence and a Reform Proposal*, 19 HARV. BLACKLETTER L.J. 127, 128 (2003).

275. CRYER, *supra* note 3, at 194.

276. Kress & Sluiter, *supra* note 112, at 1800.

Rome Statute accepted "without difficulty"[277] France's proposal to afford the ICC considerable monitoring powers regarding imprisonment conditions.[278] Rule 211(1)(b) of the ICC Rules of Procedure and Evidence ("RPE"), enacted by the Preparatory Commission, authorizes the Presidency of the Court to "request any information, report or expert opinion" about the conditions of imprisonment "from the State of enforcement or from any reliable sources."[279] The Presidency also may delegate a judge or a staff member of the Court to supervise the conditions of detention.[280] Where the information available to the Court reveals an unacceptable treatment of the prisoner, the Court is authorized, under Article 104(1) of the Rome Statute, to revoke the designation of the State of Enforcement by ordering the transfer of the sentenced person to a prison of another state.[281]

The willingness of states to accept ICC monitoring of domestic prison conditions provides a more general insight regarding situations in which a state is designated by an international court to perform a law enforcement function *on behalf of the international community*. In those situations, international monitoring of the law enforcement function is not perceived by states as putting the designated state "on trial," or as an otherwise unacceptable offense to the designated state, even where such monitoring may result in the revocation of that state's designation. The prospect of such measures is not likely to deter a state acting in good faith from accepting a designation to perform a law enforcement activity on behalf of the international community. This informs my proposal for international monitoring of the exercise of universal jurisdiction by a Designated State.

The cornerstone of the monitoring mechanism proposed here would be a duty of a Designated State to submit to the ICC Prosecutor periodical reports specifying its investigatory and charging decisions (i.e., decisions whether or not to investigate a particular crime and whether or not to prosecute a particular suspect) and briefly indicating the reasons for such decisions.[282] The reports also should be published so that they are amenable to scrutiny by the media, NGOs, victims, and other actors of civil society. I submit that the duty to submit such reports, in and of itself, would go a long way in ensuring that Designated States exercise their universal jurisdiction in conformity with the gravity criterion.

Having received the periodical reports, the ICC Prosecutor would be authorized to ask the Designated State for additional information.[283] This additional material

277. *Id.*

278. *Id.*

279. ICC Rules of Procedure and Evidence, *supra* note 111, R. 211(1)(b).

280. *See id.* R. 211(1)(c) ("[T]he Presidency may . . . delegate a judge . . . or a member of the staff of the Court who will be responsible . . . for meeting the sentenced person and hearing his or her views, without the presence of national authorities.").

281. Rome Statute, *supra* note 27, art. 104(1) ("The Court may, at any time, decide to transfer a sentenced person to a prison of another State."); Kress & Sluiter, *supra* note 112, at 1806.

282. The proposed reporting regime partly draws on the one set forth in the Rome Statute and the ICC Rules of Procedure and Evidence, which provide that when the ICC Prosecutor, having completed the investigation, concludes that there is not a sufficient basis for a prosecution, he must report this decision in writing to the Pre-Trial Chamber and—in case of investigation on referral—to the State Party or the U.N. Security Council making the referral. Rome Statute, *supra* note 27, art. 53(2). The report also must explain the *reasons* for the Prosecutor's decision not to prosecute. Giuliano Turone, *Powers and Duties of the Prosecutor*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1175 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002); ICC Rules of Procedure and Evidence, *supra* note 111, R. 106(2).

283. This reporting scheme is analogous to the one set forth in the Rome Statute concerning the

may include the investigation files of the individuals mentioned in the periodical reports as well as any other relevant material in the possession of the state. The ICC Prosecutor also would be able to request the state to provide, in specific cases, a more elaborate and thorough explanation as to why it decided not to investigate or prosecute in view of the evidence available.

The possibility of such an inquiry commenced by the ICC Prosecutor, if not adequately qualified, may deter states from assuming the role of a Designated State. This potential inhibition could arise from both the additional burden imposed on the Designated State's prosecutorial system in providing the ICC Prosecutor with the requested additional information and the impression, which may stem from a request for additional information, that the Designated State itself is put on trial. In order to alleviate such concerns, the threshold for a request for additional information, submitted to the Designated State by the ICC Prosecutor, should be a demanding one. A request for additional information should be issued only where the ICC Prosecutor concludes, in view of the periodical reports as well as information received from other governments, NGOs, or any other source, that there is a *reasonable ground to believe* that the exercise of universal jurisdiction by the Designated State suffers from one of the following flaws (which I shall term "inequality flaws"):

1. The Designated State exercises universal jurisdiction in a manner *clearly inconsistent* with the gravity criterion.

2. Within a group of individuals who are considered—in view of the gravity criterion and evidentiary materials—similarly situated suspects, the rate of prosecutions of individuals of one collective affiliation is *grossly disproportionate* to the rate of prosecutions of individuals of another collective affiliation. Such disproportionality clearly demonstrates that the Designated State does not select individuals for prosecution regardless of collective affiliation.

Having reviewed the additional information provided by the Designated State, the Prosecutor would determine whether its exercise of universal jurisdiction indeed suffers from inequality flaws. A finding on the part of the ICC Prosecutor that a Designated State's exercise of universal jurisdiction suffers from inequality flaws would be followed by recommendations on the part of the Prosecutor. The Prosecutor would be authorized to recommend that the Designated State strictly observe the gravity criterion in its future prosecutorial practice where he finds that this has not previously been the case. The Prosecutor also would be authorized to recommend that the state ensures, in its future exercise of universal jurisdiction, that the selection of individuals for prosecution within a group of similarly situated

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powers of the Pre-Trial Chamber to review a decision of the ICC Prosecutor not to prosecute a suspect or not to investigate a situation. *See* Rome Statute, *supra* note 27, art. 53(3)(a) ("At the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor . . . not to proceed . . . ."). In reviewing the decision of the Prosecutor, the Chamber "may request the Prosecutor to transmit the information or documents in his or her possession, or summaries thereof, that the Chamber considers necessary for the conduct of the review." *See* ICC Rules of Procedure and Evidence, *supra* note 111, R. 107, para. 2. Hence, in exercising its review powers, "The Chamber is thus not restricted to the written record of the investigation and the reasons advanced for the Prosecutor's decision." Triffterer Commentary, *supra* note 94, at 1074.

suspects is indeed conducted randomly, regardless of collective affiliation. Where the Designated State does not act upon the Prosecutor's recommendations, the Prosecutor would have the power to revoke the designation of that state as the state exercising universal jurisdiction over the situation at hand and designate another state for this purpose.

V. UNIVERSAL JURISDICTION *IN ABSENTIA*

The referral mechanism proposed here would significantly enhance the fight against impunity by diffusing current objections to the exercise of universal jurisdiction *in absentia*, and thereby facilitating the assertion of such jurisdiction by states.

It is widely agreed that "universal jurisdiction *in absentia* can be roughly defined as the conducting of an investigation, the issuing of an arrest warrant, and/or the bringing of criminal charges based on the principle of universal jurisdiction when the defendant is not present in the territory of the acting state. This definition does not include adjudication of the case."[284] Indeed, in *Congo v. Belgium* three of the ICJ judges explicitly distinguished between universal jurisdiction *in absentia* and trials *in absentia*, observing that "some jurisdictions provide for trial *in absentia*; others do not. If it is said that a person must be within the jurisdiction at the time of the trial itself, that may be a prudent guarantee for the right of fair trial but has little to do with bases of jurisdiction recognized under international law."[285] Hence, the term universal jurisdiction *in absentia*, as used in this Article, excludes trials *in absentia*.

The perpetrators of international crimes often find harbor in a state (typically, their home state) that is unwilling to extradite them to another state exercising universal jurisdiction.[286] Nevertheless, commentators have observed that the exercise of universal jurisdiction *in absentia* is essential for the effective enforcement of international criminal law.[287] First, "universal jurisdiction in absentia serves as a type of punishment of offenders, keeping them in hiding and preventing them from moving freely within the international community."[288] Second, the exercise of universal jurisdiction *in absentia* may, "through a combination of a wake-up call and embarrassment,"[289] induce the state harboring a perpetrator of international crimes to terminate the impunity granted to such perpetrator. Cedrik Ryngaert elaborates:

> [T]he mere initiation of an investigation [by the state exercising universal jurisdiction] ... could set in motion a flurry of investigative and prosecutorial activity in the territorial state. The bystander state's

284. Colangelo, *supra* note 31, at 543.

285. Arrest Warrant Case, *supra* note 9, para. 56 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal).

286. Michael Kirby, *Universal Jurisdiction and Judicial Reluctance: A New "Fourteen Points," in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 240, 251, (Stephen Macedo ed., 2004).

287. Ryan Rabinovitch, *Universal Jurisdiction in Absentia*, 28 FORDHAM INT'L L. J. 500, 519 (2005) ("[T]he recognition of universal jurisdiction *in absentia* would be likely to increase the effectiveness with which international crimes are investigated and prosecuted."); Colangelo, *supra* note 31, at 571 ("By enabling states to conduct investigations and issue arrest warrants in absentia over grave violations of international law, universal jurisdiction in absentia advances the fight against impunity.").

288. Colangelo, *supra* note 31, at 572–73.

289. Ryngaert, *supra* note 18, at 174.

> investigation may indeed bring to light a past that was not particularly bright, and strengthen the hand of progressive domestic powers that want to bring the presumed offenders (often belonging to a former regime) to justice in the territorial state. At the end of the day, that state also wants to maintain its reputation on the international scene.[290]

Commentators often refer to such impact on the state harboring the perpetrators as the "Pinochet effect," pointing to the increased willingness of Chilean authorities as well as other states throughout Latin America to prosecute and punish perpetrators belonging to former dictatorial regimes in the wake of the proceedings undertaken in several European countries against former Chilean dictator Augusto Pinochet under a doctrine of universal jurisdiction.[291]

Third, the exercise of universal jurisdiction *in absentia* is often essential in order to preserve a record and evidence of the crime. Commentators have noted that "if a state forestalls investigations and evidence gathering because the offender is not within its borders, crucial time-sensitive evidence may disappear before a thorough investigation can be conducted and a sound case brought. This delay could wipe out the possibility of conviction and result in an effective grant of impunity."[292] The evidence secured through the investigatory efforts of the state exercising universal jurisdiction *in absentia* would be available to the perpetrator's home state once it resolves to terminate the perpetrator's impunity.[293] It also would be available to a state prosecuting the perpetrator under a doctrine of universal jurisdiction once some future event forces the perpetrator to exit the state harboring him.

Yet, while the bulk of authority favors the view that the exercise of universal jurisdiction *in absentia* is not prohibited under current customary international law,[294]

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290. *Id.* at 173–74; *see also* Naomi Roht-Arriaza, *Universal Jurisdiction: Myths, Realities, and Prospects: The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311, 315–16 (2001) (chronicling the change in views in Chile regarding prosecuting Pinochet "at home"); Rabinovitch, *supra* note 287, at 520 (citing Naomi Roht-Arriaza for the proposition that exercise of jurisdiction *in absentia* can spur the perpetrator's home country to reconsider prosecution).

291. Ryngaert, *supra* note 18, at 174; *see generally* NAOMI ROHT-ARRIAZA, THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS (2005).

292. Colangelo, *supra* note 31, at 576; *see also* Rabinovitch, *supra* note 287, at 525 (proposing the exercise of universal jurisdiction *in absentia* "would increase the likelihood of conviction, since it would facilitate the gathering of evidence and testimony").

293. *See* Kress, *supra* note 251, at 578 (noting that "the state of universal jurisdiction will preserve the evidence secured through investigation").

294. Rabinovitch, *supra* note 287, at 511 ("State practice in recent years has increasingly supported the view that States may exercise universal jurisdiction *in absentia* if they so desire."). Rabinovitch reviews municipal case law that upholds assertions of universal jurisdiction *in absentia*. *Id.* at 515. *See* Colangelo, *supra* note 31, at 548 ("[T]he accused need not be present on the territory of the state when universal jurisdiction is asserted provided that certain safeguards against abuse are followed."); O'Keefe, *supra* note 30, at 830 (noting that if universal jurisdiction is permissible, then "exercise *in absentia* is logically permissible as well"); Resolution of Institute of Int'l Law, *supra* note 5, para. 3(b) ("*Apart from acts of investigation and requests for extradition*, the exercise of universal jurisdiction requires the presence of the alleged offender in the territory of the prosecuting State . . . .") (emphasis added); Kress, *supra* note 251, at 576 (asserting that the Resolution of the Institute of Int'l Law, *supra*, "contains the drafter's view that the power of states to exercise universal jurisdiction includes investigative acts *in absentia*"). In *Congo v. Belgium*, ICJ judges Higgins, Kooijmans, and Buergenthal observed, in their Joint Separate Opinion, that "a State may choose to exercise a universal criminal jurisdiction *in absentia*." Arrest Warrant Case, *supra* note 9, para. 59 (joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal). Judge Koroma subscribed to this view. *Id.* para. 98 (separate opinion of Judge Koroma).

most states are currently reluctant to pursue such practice.[295] Anne-Marie Slaughter has observed that the exercise of universal jurisdiction *in absentia* "is actually quite rare,"[296] pointing to "the desire of many judges to insist on 'universal jurisdiction plus'—the plus provided by some element of one of the more traditional bases of jurisdiction."[297] Under the laws of several states, a perpetrator's mere presence in a state is sufficient basis for the exercise of universal jurisdiction by that state, even where the perpetrator only intended such presence to be brief.[298] I shall term a state whose only connection to the case over which it exercises jurisdiction is the presence of the suspect, "the custodial state."

Underlying state reluctance to exercise universal jurisdiction *in absentia* are legitimacy concerns. Notwithstanding the prevailing rhetoric in the legal literature on universal jurisdiction, some feel that the interest of the international community as a whole in punishing atrocities does not constitute—standing alone—a sufficient legitimizing linkage on which the exercise of universal jurisdiction by a particular state may be premised.[299] The presence requirement adopted by many states "suggest[s] a general discomfort with the notion that States can prosecute anyone for international crimes regardless of any traditional nexus."[300] By insisting on the presence requirement, courts "try to create such a nexus, however thin or after the fact."[301]

Opponents of universal jurisdiction *in absentia* also submit that the presence requirement would reduce the risk that the exercise of universal jurisdiction is abused by states for their own political ends.[302] *In absentia* assertions of jurisdiction, it is argued, "would create a chaotic and arbitrary method of enforcing international law,"[303] a reality that "would permit a particular state to act[] as 'policeman' of the world."[304]

ICJ Judges Guillaume and Rezek disagreed, arguing that customary international law requires the presence of the suspected criminal as a precondition for the exercise of universal jurisdiction. *Id.* para. 15 (separate opinion of President Guillaume); *id.* para. 9 (separate opinion of Judge Rezek).

295. Rabinovitch, *supra* note 287, at 507 ("A majority of the States that have implemented the various conventions establishing universal jurisdiction in their national legislation expressly require the presence of the offender on their territory before asserting jurisdiction.").

296. Anne-Marie Slaughter, *Defining the Limits: Universal Jurisdiction and National Courts*, *in* UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 168–69 (Stephen Macedo ed., 2004).

297. *Id.* at 170.

298. For a review of the laws of several states, which require the presence of the suspect as a precondition for the exercise of universal jurisdiction, see REYDAMS, *supra* note 32, at 86–179. For example, under Australian law, "the mere presence (as opposed to residence) of a foreigner is a sufficient basis for jurisdiction over offenses committed abroad." *Id.* at 88. Similarly, under Canadian law, "universal jurisdiction requires the voluntary presence in Canada of a foreign offender." *Id.* at 124–25.

299. *See, e.g.*, REYDAMS, *supra* note 32, at 224 ("The fact is that jurisdiction exercised by a State without its having an objective or legal link with either the offence or the offender erodes the very concept of jurisdiction. Unlimited (hence arbitrary) jurisdiction is a *contradictio in terminis* and runs counter to one of the fundamental goals of international law: a rational distribution of competences among equal sovereigns. Thus, while not violating the non-interference principle, universal jurisdiction *in absentia* contravenes the more fundamental principle of sovereign equality of States, of which non-interference is only one aspect.").

300. Slaughter, *supra* note 296, at 173.

301. *Id.*

302. Rabinovitch, *supra* note 287, at 502, 521–22.

303. Colangelo, *supra* note 31, at 550 (addressing arguments against the exercise of universal jurisdiction *in absentia*).

304. REYDAMS, *supra* note 32, at 175–76 n.62 (citing an expert opinion submitted by Professor John

The reform advanced in this Article provides for the exercise of universal jurisdiction *in absentia* by Designated States while addressing and resolving the concerns that underlie current objections to this practice. The referral mechanism proposed here provides a guarantee against "chaotic and arbitrary" enforcement of international criminal law, which arguably exceeds the one embodied in the presence requirement. The referral mechanism also resolves concerns that universal jurisdiction *in absentia* would allow a state to "act as policeman of the world," as no state would have the power to assert universal jurisdiction over a particular situation on its own initiative. Similarly, the international legitimacy conferred through the referral mechanism upon the exercise of universal jurisdiction by a Designated State seems to exceed the legitimizing effect that stems from a thin and after-the-fact nexus between the perpetrator and a custodial state, which concerns the temporary presence of the former in the territory of the latter at the time of his arrest.

Hence, far from limiting the reach of universal jurisdiction, the reform proposed here would result in a more effective and more frequent exercise of such jurisdiction by facilitating assertions of universal jurisdiction *in absentia*.

The referral mechanism proposed here needs to be complemented by treaty provisions (preferably contained in the treaty establishing the referral regime) that would ensure and facilitate the extradition of perpetrators from a custodial state to the Designated State. Such extradition mechanism may draw, to some extent, on the one contained in the Rome Statute with regard to the surrender of perpetrators to the ICC.[305] The referral regime would not allow an assertion of universal jurisdiction on the part of a custodial, non-designated state, where such assertion relies on the mere presence (as opposed to residence) of the perpetrator in the custodial state. The equality concerns addressed in this Article are by no means confined to the exercise of universal jurisdiction *in absentia*. They apply equally to the exercise of universal jurisdiction by the custodial state, where the presence of the perpetrator in the territory of the custodial state at the time of his arrest does not reflect any significant nexus between the former and the latter (e.g., when the perpetrator was arrested while on a short visit to the custodial state, or while passing through its territory).[306] In such circumstances, there is no reason to circumscribe the jurisdiction conferred upon the Designated State through the referral mechanism in order to accommodate a jurisdictional claim on the part of a custodial state.

Dugard to a Dutch court that addressed the objections to the exercise of universal jurisdiction *in absentia*).

305. Rome Statute, *supra* note 27, arts. 86–92. Such extradition mechanism should not preclude a state in which the suspect stays from refusing an extradition request on the grounds that the suspect is not guaranteed a fair trial in the Designated State. "[T]he possibility cannot be excluded altogether that the duty to surrender a person [to the ICC] may on occasion conflict with a State Party's duty under human rights conventions not to deliver up a person, however remote that possibility may seem at the present moment. With an exception for situations that have been referred to the Court by the Security Council, this conflict cannot be resolved by assuming that the obligations for States Parties under the Statute take precedence over obligations arising out of other treaties." Bert Swart, *Arrest and Surrender*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1639, 1684–85 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., Vol. 2, 2002).

306. Colangelo, *supra* note 31, at 564–65 ("The ability of non-territorial and non-national states to undermine a harboring state's decision to protect those within its territory gives rise to concerns that the non-territorial and non-national states seeking prosecutions will abuse universal jurisdiction toward their own political ends. To be sure, even the usual exercise of universal jurisdiction by a custodial state—for example, universal jurisdiction where the accused is physically present in the state asserting jurisdiction—has been subject to this type of criticism.").

By contrast, when the presence of a perpetrator in a state that is not his state of nationality reflects a significant nexus (e.g., residence or political asylum) between the former and the latter, it is arguable that an assertion of jurisdiction on the part of that state should not be associated with universal jurisdiction. Rather, such jurisdictional claim *closely resembles* an assertion of jurisdiction by the perpetrator's state of nationality based on the principle of active nationality. In such circumstances, the principle of subsidiarity should come into play, affording the right of way to the state in which the perpetrator is present, provided that its assertion of jurisdiction is genuine and effective.

VI. UNIVERSAL JURISDICTION AND PRIVATE PROSECUTORS

Victims of atrocities and their families as well as human rights NGOs assume an exceedingly prominent role in facilitating the exercise of universal jurisdiction by national courts.[307] In some states, however, the involvement of private actors in the exercise of universal jurisdiction by national courts has not been qualified to the facilitation of proceedings initiated by a state prosecutor. Rather, such involvement extended to the initiation of criminal proceedings by the private actors themselves, who essentially assumed the role of "private prosecutors." Such a mechanism obviously allows victims and other private actors "to circumvent the principle of prosecutorial discretion."[308] For instance, under Belgium's Code of Criminal Procedure, prior to its amendment in 2003, victims also were authorized to initiate a criminal case under universal jurisdiction.[309] Addressing this legal regime, Luc Reydams elaborated:

> If the public prosecutor, in the exercise of his discretion, decides not to prosecute, or is still considering his position, the victim may, by making himself a civil party (*constitution de partie civile*), seize an examining magistrate (*juge d'instruction*). This is fundamentally different from the victim's mere complaint, which is little more than a denunciation of the crime: a complaint does not have any procedural consequences, it does not seize a court of law, and the public prosecutor is free not to proceed with the case. An examining magistrate thus seized is bound to start a criminal investigation if he establishes jurisdiction. Not even the Minister of Justice can prevent or end an investigation initiated by a civil party. A court will ultimately determine whether the results of the investigation warrant a trial.[310]

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307. Kaleck, *supra* note 15, at 975 ("Many ... universal jurisdiction cases were initiated and accompanied by victims' groups, human rights organizations, and their respective lawyers .... These groups investigate international crimes often earlier than institutional actors and, due to privileged access to victims' communities, are able to gather information and evidence more efficiently than are state actors. They are often linked to transnational networks and are often better connected to international experts and lawyers than are local prosecutors and judges. For example, in several instances, these groups have notified law enforcement authorities about the current or expected presence of an accused in the forum State.").

308. REYDAMS, *supra* note 32, at 108.

309. *Id.*; Kaleck, *supra* note 15, at 932–34.

310. REYDAMS, *supra* note 32, at 108; *see also* Steiner, *supra* note 10, at 210 ("Through such procedural forms as the Belgian or French *constitution de partie civile*, victims may be able to constitute themselves as a party able to require the prosecutor to initiate a criminal investigation or prosecution and to take part in the criminal proceedings with defined rights of participation.").

Under international pressure, Belgium amended its universal jurisdiction laws in 2003, significantly limiting this capacity of victims to bring private prosecutions.[311] However, similar laws regarding the possibility of private prosecutions exist in France[312] and Spain.[313] In those states, the capacity to assume the role of private prosecutors is not limited to victims and their families. In France, such a role is also available to "established organizations formed to combat racism, sexual violence, child abuse, war crimes, and discrimination."[314] In Spain, "*any* private citizen or organization" may initiate proceedings under universal jurisdiction.[315] It should be emphasized, however, that the opportunity afforded to non-state actors to assume the role of private prosecutors is limited to very few states. The vast majority of states whose laws allow the exercise of universal jurisdiction confer upon the state's prosecution authorities exclusive control over the initiation of criminal proceedings against perpetrators of international crimes.[316]

Proponents of a legal regime allowing the possibility of private prosecutions contend that such mechanism "is important precisely in cases of extraterritorial crimes where the public prosecutor might hesitate to follow up on a complaint for reasons of political expediency."[317] Furthermore, by assuming the role of private prosecutors, victims "give voice to people and communities who have suffered severe and often long-lasting physical, mental, and economic suffering and powerlessness."[318]

While the difficulties that arise with regard to private prosecutions extend beyond equality concerns,[319] only the latter will be addressed here. In contrast with public prosecutors, victims of atrocities who assume the function of private prosecutors are obviously not bound by the principle of equality before the law. Yet, a state's adjudication of private prosecutions in the exercise of universal jurisdiction is not inherently inconsonant with the principle of equality before the law.

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311. Kaleck, *supra* note 15, at 934 ("A sequence of court battles and mounting political struggles eventually led to amending the legislation in April 2003. The amended legislation narrowed victims' access to *partie civile* procedures in universal jurisdiction cases by requiring a writ from the Federal Prosecutor.").

312. REYDAMS, *supra* note 32, at 134–35.

313. *Id.* at 184; Kaleck, *supra* note 15, at 954–55.

314. REYDAMS, *supra* note 32, at 135 (internal citations omitted).

315. *Id.* at 184; *see also* Kaleck, *supra* note 15, at 955 ("Private complaints can be made by victims or by any Spanish citizen acting by way of popular accusation.").

316. *See generally* REYDAMS, *supra* note 32, at 86–211 (reviewing the laws of numerous states that confer upon the state prosecutor exclusive power to commence proceedings based on universal jurisdiction); Kaleck, *supra* note 15, at 940–953 (describing the limitations, such as who can initiate criminal proceedings, in states capable of exercising universal jurisdiction).

317. REYDAMS, *supra* note 32, at 108. *See also* Brent Wible, *"De-Jeopardizing Justice": Domestic Prosecutions for International Crimes and the Need for Transnational Convergence*, 31 DENV. J. INT'L L. & POL'Y 265, 290–91 (2002) ("If adequately constrained so as not to jeopardize political solutions to international problems, private prosecutions may serve an important function on the international level—prosecuting cases that would otherwise receive little diplomatic or prosecutorial attention.").

318. Kaleck, *supra* note 15, at 976.

319. *See* Wible, *supra* note 317, at 290–91 (pointing to the "potentially destructive consequences" of politically motivated private prosecutions, and cautioning that "[w]hen a state divests itself of the sole authority to prosecute politically sensitive international cases, and where private individuals who are not subject to adequate governmental control may institute such cases, the consequences may be undesirable," resulting in a rejection of universal jurisdiction altogether).

In order to preserve the principle of equality before the law, a state exercising universal jurisdiction, which allows private prosecutions, must abide by two requirements. First, it must allow and facilitate free and equal access to its justice system to *anyone* wishing to pursue such prosecution. Second, a state must allocate the investigatory and judicial resources necessary in order to accommodate private prosecutions in a manner that ensures that its exercise of universal jurisdiction does not have a discriminatory effect. In practice, the feasibility of private prosecutions depends on the availability of state resources. Addressing investigations conducted by an examining magistrate in relation to proceedings instituted by private prosecutors, Luc Reydams observed:

> [A]n investigation into (international) crimes committed abroad requires extraordinary resources, e[.]g[.] investigators, translators, and a budget for rogatory missions. What and how many resources will be made available to the investigating magistrate is very much a discretionary decision by the public prosecutor. Consequently, without his significant support, the examining magistrate's investigation will be futile.[320]

Equally important, the adjudication of private prosecutions requires the allocation of a state's limited adjudicative resources (judges, courtrooms, public defense lawyers, etc.).

At the end of the day, the discretion afforded to state authorities to determine—through the allocation of limited investigatory and adjudicative resources—who, among the individuals who are the objects of private prosecutions, actually would be tried is quite similar in breadth to prosecutorial discretion in a system that does not allow private prosecutions. In determining which of the proceedings instituted by private actors go forward, state authorities should be bound by the gravity criterion stipulated in Part III. Obviously, where a state prosecutor initiates prosecutions in addition to those filed by private prosecutors, she also must do so in accordance with the said criterion, in a manner that ensures that the exercise of universal jurisdiction does not have a discriminatory effect.

Importantly, concerns that active or passive political considerations result in states' discriminatory practice of universal jurisdiction also arise with regard to a legal system that allows, in principle, private prosecutions, as state authorities retain the power to determine—through the allocation of investigatory and adjudicative resources—which private prosecutions go forward. Hence, the importance of the referral mechanism proposed here as a guarantee of the principle of equality before the law does not depend on whether or not a state exercising universal jurisdiction allows, in principle, private prosecutions.

CONCLUSION

The principle of universal jurisdiction, as currently applied by states, stands in tension with another principle of international law, namely, the principle of equality before the law. This tension has a destructive effect on universal jurisdiction's claim to legitimacy. However, while certain features of universal jurisdiction render it

320. REYDAMS, *supra* note 32, at 108.

uniquely disposed to discriminatory prosecutorial practices, the risk of such inequality can be significantly reduced.

This Article attempted to present a realistic reform in the law of universal jurisdiction that would alleviate equality concerns as far as possible, while doing the utmost to mitigate possible sovereignty, political, and economic costs imposed on states. The proposed reform would divest a state of the power to pick and choose the subjects of its exercise of universal jurisdiction on the basis of either active or passive political consideration. Rather, a state would have power to exercise universal jurisdiction only over crimes relating to a particular situation referred to it by the ICC. This Article demonstrated that such referral regime would constitute, in and of itself, a substantial guarantee of the principle of equality before the law in the exercise of universal jurisdiction. Equality before the law can be further enhanced through the introduction of prosecutorial guidelines binding upon a state exercising universal jurisdiction, accompanied by a mechanism for international monitoring of prosecutorial practices grounded in universal jurisdiction.

The ICC Prosecutor's Missing Code of Conduct

MILAN MARKOVIC*

Abstract

The intersection between legal ethics and international criminal law has largely been unexamined. This Article addresses the topic by focusing on certain controversial actions taken by the Office of the Prosecutor ("OTP") of the International Criminal Court ("ICC" or "Court") in connection with the *Lubanga* and *Al-Bashir* cases.

Although the ICC has adopted codes of conduct for judges and defense counsel, the OTP has no specific ethics code. This is problematic because the ICC Statute imposes conflicting obligations on the ICC Prosecutor, and, as this Article will show, the Prosecutor has resolved his conflicting obligations in the *Lubanga* and *Al-Bashir* cases in ways that have undermined the ICC's credibility.

A code of conduct cannot eliminate prosecutorial discretion. Nor can it ensure that ICC prosecutors always will act ethically. Nevertheless, this Article argues that the approach of relying on Chambers to determine whether the Prosecutor has acted appropriately has delayed proceedings and provides insufficient guidance to the OTP. A preferable approach would be to provide prospective guidance to the OTP in managing its conflicting duties through a code of conduct. This Article also proposes specific rules that may mitigate some of the conflicts that already have arisen in the ICC's first cases.

SUMMARY

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INTRODUCTION

International criminal trials are different from domestic trials in significant ways: the crimes for which defendants are tried are so heinous that they are of international concern,[1] the procedures used by international criminal tribunals are a hybrid of those found in common law and civil law countries,[2] and the tribunals themselves are staffed by lawyers and judges from a highly diverse group of nations and legal cultures.[3] International criminal trials are also inherently political because

1. *See* Prosecutor v. Katanga, Case No. ICC-01/04-01/07-621, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, para. 49 (June 20, 2008), http://www.icc-cpi.int/iccdocs/doc/doc514860.pdf ("After more than a hundred years of struggle, a permanent international criminal court has finally emerged as a unique symbol of the fight against impunity for the most heinous crimes of international concern."); *see also* Rome Statute of the International Criminal Court, Preamble, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute] ("Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation." (emphasis omitted)).

2. Jens David Ohlin, *Meta-Theory of International Criminal Procedure: Vindicating the Rules of Law*, 14 UCLA J. INT'L L. & FOREIGN AFF. 77, 80–81 (2009).

3. Rep. of the Int'l Tribunal for the Prosecution of Persons Responsible for the Serious Violations of Int'l Humanitarian Law Committed in the Terr. of the Former Yugoslavia Since 1991, paras. 26–30, U.N. Doc. A/65/205-S/2010/413 (July 31, 2010). *See also* Rep. of the Int'l Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Int'l Humanitarian Law Committed in the Terr. of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Terr. of Neighboring States Between 1 Jan. and 31 Dec. 1994, paras. 15–19, U.N. Doc A/65/188-S/2010/408 (July 30, 2010) (showing the composition of the Chambers to include jurists from no fewer than twenty-two different nations).

crimes such as genocide and crimes against humanity often implicate the policies of governments and rebel groups.[4]

Despite the proliferation of international criminal tribunals and the widespread recognition that international criminal trials are different, there has been relatively little analysis of whether the legal actors that comprise these tribunals should be subject to distinctive ethical rules.[5] Existing ethical codes for defense counsel at the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") mirror domestic codes,[6] and codes for prosecutors are brief and abstract.[7] The International Criminal Court ("ICC" or "Court") has adopted basic ethics codes for judges and defense counsel but has yet to promulgate any formal set of ethical rules for ICC prosecutors.[8]

This Article will analyze how the absence of an ethics code for the ICC Prosecutor has impacted the Court's early cases. As this Article will demonstrate, the Prosecutor has conflicting duties under the ICC Statute, and the Prosecutor's decisions as to how to fulfill his statutory obligations have caused "ugly and unhealthy" tensions[9] with the Court's Chambers[10] and have brought controversy to the Court. This Article hopes to begin a dialogue concerning the importance of a code of conduct for the Office of the Prosecutor ("OTP") and suggests specific rules that can help mitigate conflicts such as those that already have arisen in the Court's early cases.

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4. *See* Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 510 (2003) (explaining that the ICC has jurisdiction over "crimes of the utmost seriousness often committed by governments themselves, or with their tacit approval" and describing the cases adjudicated by the ICC as "infused with political implications").

5. Notable exceptions are: Judith A. McMorrow, *Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY*, 30 B.C. INT'L & COMP. L. REV. 139 (2007); Jenia Iontcheva Turner, *Legal Ethics in International Criminal Defense*, 10 CHI. J. INT'L L. 685 (2010) [hereinafter Turner, *Legal Ethics*].

6. *Compare* U.N. Int'l Crim. Tribunal for the Former Yugoslavia, Code of Professional Conduct for Counsel Appearing Before the International Tribunal, IT/125 REV. 3, art. 11 (Aug 6, 2009), http://www.icty.org/x/file/Legal%20Library/Defence/defence_code_of_conduct_july2009_en.pdf, *and* U.N. Int'l Crim. Tribunal for Rwanda, Code of Professional Conduct for Defense Counsel, art. 6 (Mar. 14, 2008), http://www.unictr.org/Portals/0/English/Legal/Defence%20Counsel/English/04-Code%20of%20Conduct%20for%20Defence%20Counsel.pdf, *with* MODEL RULES OF PROF'L CONDUCT R. 1.3 (2006).

7. The ethics codes for ICTR and ICTY Prosecutors are each four pages. *See* U.N. Int'l Crim. Tribunal for Rwanda, Standards of Professional Conduct for Prosecution Counsel, Prosecutor's Regulation No. 2 (1999), http://www.unictr.org/Portals/0/English/Legal/Prosecutor/reg_05.pdf; U.N. Int'l Crim. Tribunal for the Former Yugoslavia, Standards of Professional Conduct for Prosecution Counsel, Reg. No. 2 (Sept. 14, 1999), http://www.icty.org/x/file/Legal%20Library/Miscellaneous/otp_regulation_990914.pdf [hereinafter ICTY Standards]; *see also infra* Part I(C).

8. *See* THE SECRETARIATS OF THE INT'L ASS'N OF PROSECUTORS AND THE COAL. FOR THE INT'L CRIM. CT., CODE OF PROFESSIONAL CONDUCT FOR THE PROSECUTORS OF THE INTERNATIONAL CRIMINAL COURT, http://www.amicc.org/docs/prosecutor.pdf [hereinafter Draft OTP Code] (showing that only a draft code released in 2002 for peer review exists); Int'l Crim. Ct. Office of the Prosecutor, Draft Regulations of the Office of the Prosecutor, Book 2 (2005), http://www.jura.uni-muenchen.de/fakultaet/lehrstuehle/satzger/materialien/istghdrre.pdf (setting out regulations intended to complement the ICC Statute and the Rules of Procedure and Evidence).

9. Marlise Simons, *For International Criminal Court, Frustration and Missteps in First Trial*, N.Y. TIMES, Nov. 22, 2010, at A12 (quoting William Schabas).

10. The Court has three Chambers: a Pre-Trial Chamber, a Trial Chamber, and an Appeals Chamber. ICC Statute, *supra* note 1, art. 39.

Given the diversity of legal backgrounds in the OTP and the Court as a whole, it will be difficult to gather consensus as to what a code of conduct should look like and perhaps even what subjects should be addressed therein. Nevertheless, the enterprise of generating an OTP code of conduct is worthwhile and should be undertaken to provide some prospective guidance to prosecutors as to how to address ethical dilemmas that are likely to arise during international criminal trials.

In Part I, I address the structure of the OTP and the current framework for addressing misconduct by ICC prosecutors. I argue that notwithstanding the existence of certain basic staff rules that are applicable to all ICC staff with fixed-term appointments,[11] there is an urgent need for a code of conduct. This is because OTP lawyers come from diverse legal backgrounds and do not have a shared sense of how to resolve ethical issues, and because the goals of international criminal justice require that OTP attorneys be perceived as ethical. In Part II, I address conflicting duties that have already arisen in the trial of Thomas Lubanga Dyilo ("Lubanga"). These conflicts are (1) the Prosecutor's duty to investigate versus his duty to disclose evidence and (2) his duty to act independently from Chambers versus his duty to obey orders therefrom. Although the Appeals Chamber has issued rulings on these issues, these rulings have not resolved how the Prosecutor should manage his conflicting duties in future cases. I propose specific conduct rules that will make serious disputes concerning disclosure and compliance with Chambers less likely to occur.

In Part III, I focus on the Prosecutor's duty to act impartially versus his duty to secure cooperation from the international community in connection with the investigation and prosecution of ICC defendants. The OTP should not be precluded from speaking publicly about ICC defendants because the OTP must secure the cooperation of the public so that it can carry out its mandate to conduct investigations, prosecute crimes, and secure the presence of defendants before the Court. However, any statements made by the OTP should not be misleading or prejudicial to the defendant. Under the current ICC framework, the OTP's public statements are essentially unregulated.

It is tempting to dismiss some of the OTP's early difficulties as growing pains or even incompetence on the part of the current Prosecutor. However, as this Article will illustrate, the Prosecutor's duties under the ICC Statute are often conflicting or unclear. Without a shared and detailed ethical framework for navigating these conflicts, the OTP could often find itself acting in ways that may be counterproductive to the ICC as a whole.

I. THE OTP AND THE IMPORTANCE OF LEGAL ETHICS

A. *The OTP and Its Current Disciplinary Framework*

The OTP is one of the four organs of the ICC along with Chambers, Registry, and Presidency.[12] Under the ICC Statute, the OTP is responsible for "receiving

11. Staff Rules of the International Criminal Court, Scope and Purpose, ICC-ASP/4/3 (Aug. 25, 2005), http://www.icc-cpi.int/NR/rdonlyres/56F9B14B-B682-4D9C-8762-A25B944FA214/140109/ICCASP43_English.pdf [hereinafter Staff Rules].

12. ICC Statute, *supra* note 1, art. 34.

referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court."[13] The OTP is required to "act independently as a separate organ of the Court."[14] The OTP is led by the Prosecutor, who is elected by an absolute majority of the members of the Assembly of States Parties ("ASP").[15] Luis Moreno-Ocampo of Argentina has been the Prosecutor since the ICC began its day-to-day operations in June of 2003.[16]

The ICC Statute considers the Prosecutor's ethical obligations only in general terms and as a part of his general qualifications. Article 42 states that the Prosecutor must be a person of "high moral character" and be "highly competent in and have extensive practical experience in the prosecution or trial of criminal cases."[17] The Statute also forbids the Prosecutor from "engag[ing] in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence"[18] and "participat[ing] in any matter in which [his or her] impartiality might reasonably be doubted on any ground."[19]

The ICC currently has no specific code of conduct for OTP prosecutors. The International Association of Prosecutors and the Coalition for the International Criminal Court proposed a draft code of conduct for prosecutors ("Draft OTP Code") in 2002,[20] but it has not been adopted.[21] The ICC has adopted a Code of Professional Conduct for Counsel ("Code for Counsel"), but it applies only to "defence counsel, counsel acting for States, *amici curiae* and counsel or legal representatives for victims and witnesses."[22] The ICC also has a Code of Judicial Ethics.[23] Other criminal tribunals have formulated codes of conduct specifically for prosecutors.[24]

Although the ICC lacks a code of conduct for prosecutors, OTP attorneys, including the Prosecutor himself, may be subject to dismissal or sanction if they

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13. *Id.* art. 42(1).

14. *Id.*

15. *Id.* art. 42(2), (4). *See also id.* art. 112 (the ASP is composed of one member from each of the State Parties to the Court).

16. *The Prosecutor*, INT'L CRIM. CT., http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Biographies/The+Prosecutor.htm (last visited June 17, 2011). Prosecutor Moreno-Ocampo's term expires in June 2012. *See* Press Release, Int'l Crim. Ct., Search Committee for ICC Prosecutor Takes Up Work, ICC-ASP-20110207-PR626 (Feb. 8, 2011), http://www.icc-cpi.int/menus/asp/press%20releases/press%20releases%202011/search%20committee%20for%20the%20position%20of%20icc%20prosecutor%20takes%20up%20work?lan=en-GB.

17. ICC Statute, *supra* note 1, art. 42(3).

18. *Id.* art. 42(5).

19. *Id.* art. 42(7).

20. Draft OTP Code, *supra* note 8.

21. *See ICC Activities, Codes of Conduct*, AMERICAN NON-GOVERNMENTAL ORGANIZATIONS COAL. FOR THE INT'L CRIM. CT., http://www.amicc.org/icc_activities.html (scroll down to "Codes of Conduct") (last visited July 17, 2011) (discussing the hope that a draft could be presented for consideration for adoption by the ICC).

22. Code of Professional Conduct for Counsel Appearing Before the International Criminal Court, Res. ICC-ASP/4/Res.1, art. 1 (Dec. 2, 2005), http://www.icc-cpi.int/NR/rdonlyres/BD397ECF-8CA8-44EF-92C6-AB4BEBD55BE2/140121/ICCASP432Res1_English.pdf [hereinafter Code for Counsel].

23. Code of Judicial Ethics, Res. ICC-BD/02-01-05 (Mar. 9, 2005), http://www.icc-cpi.int/NR/rdonlyres/A62EBC0F-D534-438F-A128-D3AC4CFDD644/140141/ICCBD020105_En.pdf.

24. For a discussion of the ICTY's adoption of standards for prosecutors, *see infra* Part I(C).

violate the Staff Rules of the ICC ("Staff Rules").[25] One of the Prosecutor's responsibilities is to determine whether OTP staff members have violated the Staff Rules and what disciplinary measures should be imposed.[26] He is advised in this capacity by the Disciplinary Advisory Board, which can take evidence and make recommendations.[27]

The Staff Rules include provisions concerning independence,[28] confidentiality,[29] and conflicts of interest.[30] These rules are general in scope. For example, Staff Rule 101.6, which concerns conflicts of interest, merely states that "[s]taff members shall abstain from any conduct which may be directly or indirectly in conflict with the discharge of their official duties."[31] Similarly, Staff Rule 101.3(i) states:

> [S]taff members shall ensure that [their personal] views and convictions do not adversely affect their official duties or the interest of the Court. They shall conduct themselves at all times in a manner befitting their status as international civil servants and shall not engage in any activity that is incompatible with the proper discharge of their duties with the Court. They shall avoid any action, in particular any kind of public pronouncement, that may adversely reflect on their status or on the integrity, independence and impartiality that are required by that status.[32]

The Staff Rules are not directed specifically at OTP attorneys[33] and would also appear to be difficult to enforce against OTP attorneys without a normative framework against which conduct can be judged. For example, without clearly articulated standards of what level of "integrity, independence and impartiality" is required of OTP attorneys, it will be difficult to adjudicate whether a particular "public pronouncement" could adversely impact a prosecutor's "integrity" or "status" under the Staff Rules.

In addition, although the Staff Rules nominally apply to all staff holding fixed-term appointments,[34] it is questionable whether they will actually be applied against the Prosecutor or Deputy Prosecutor. The Prosecutor can be disciplined by the Bureau of the Assembly of States Parties ("Bureau of the ASP") with reprimands or fines.[35] The Prosecutor is authorized to reprimand the Deputy Prosecutor; any fine

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25. Staff Rules, *supra* note 11, R. 110.6.

26. *Id.* R. 110.6, 110.7.

27. The Disciplinary Advisory Board consists of three members, one appointed by the Registrar, one appointed by the Prosecutor, and one elected by the staff representative body. *Id.* R. 110.3(a), 110.4(b), (d)–(e).

28. *Id.* R. 101.3(a)–(b).

29. *Id.* R. 101.4.

30. *Id.* R. 101.6.

31. Staff Rules, *supra* note 11, R. 101.6(a).

32. *Id.* R. 101.3(i).

33. *See id.* Scope and Purpose ("These Staff Rules apply to *staff members* of the Court holding a fixed-term appointment." (emphasis added)).

34. *Id.*

35. International Criminal Court Rules of Procedure and Evidence, ICC-ASP/1/3, R. 30(2), 32 (Sept. 9, 2002), http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E886/140164/Rules_of_procedure_and_Evidence_English.pdf [hereinafter ICC Rules]. "The Bureau of the Assembly consists of a President, two Vice-Presidents and 18 members elected by the Assembly for three-year terms." *Bureau of the Assembly*, INT'L CRIM. CT., http://www.icc-cpi.int/Menus/ASP/Bureau (last visited Oct. 29, 2011).

must be recommended by the Prosecutor and approved by an absolute majority of the Bureau of the ASP.[36] Only an absolute majority of the ASP has the power to remove the Prosecutor from office.[37] The same applies to the Deputy Prosecutor, with the additional requirement that the Prosecutor must have recommended removal.[38] To be removed, the Prosecutor or Deputy Prosecutor must have "committed serious misconduct or a serious breach of his or her duties under the Statute . . . or [be] unable to exercise the functions required by this Statute."[39] The ICC Rules of Procedure and Evidence ("ICC Rules") define "serious misconduct" as conduct that is "incompatible with official functions, and causes or is likely to cause serious harm to the proper administration of justice before the Court or the proper internal functioning of the Court."[40] The Prosecutor or Deputy Prosecutor commits a "serious breach of duty" when he or she "has been grossly negligent in the performance of his or her duties or has knowingly acted in contravention of those duties."[41]

The ICC Rules lists several illustrative examples of "serious misconduct" and "serious breach of duty."[42] The ICC Statute and ICC Rules do not specifically define a violation of the Staff Rules as "serious misconduct" or "a serious breach of duty," which tends to suggest that a violation of the Staff Rules alone will not necessarily serve as a basis for the ASP to remove either the Prosecutor or Deputy Prosecutor. The Bureau of the ASP also could impose a reprimand or fine for a violation of the Staff Rules if it determines that the violation constitutes misconduct of "a less serious nature."[43] But this assumes that the ASP and Bureau of the ASP are familiar with the Staff Rules and are actively monitoring the Prosecutor and Deputy Prosecutor's compliance therewith.[44]

Beyond the Staff Rules and general prohibitions against misconduct and breach of duty, OTP attorneys currently operate under no formal ethical constraints in carrying out their day-to-day duties at the Court. As explored in the next section, this is problematic because OTP prosecutors likely will have very different intuitions as to how to fulfill their duties under the ICC Statute.

B. Why Is a Code of Conduct Needed?

Given the existence of disciplinary mechanisms that allow for the removal of OTP attorneys and even the Prosecutor himself, it is perhaps understandable that the

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36. ICC Rules, *supra* note 35, R. 30(3).

37. ICC Statute, *supra* note 1, art. 46(2)(b).

38. *Id.* art. 46(2)(c). The Prosecutor has the authority to reprimand the Deputy Prosecutor, but any fine imposed must be approved by an absolute majority of the Bureau of the Assembly of States Parties. ICC Rules, *supra* note 35, R. 30(3).

39. ICC Statute, *supra* note 1, art. 46(1)(a)–(b).

40. ICC Rules, *supra* note 35, R. 24(1)(a).

41. *Id.* R. 24(2).

42. *Id.* R. 24(1)–(2).

43. ICC Statute, *supra* note 1, art. 47; ICC Rules, *supra* note 35, R. 30, 32.

44. Professor Danner has suggested that the ASP is likely to be divided because of internal policy disputes and that similar bodies have been unable to provide strong oversight over other international legal organizations. *See* Danner, *supra* note 4, at 524 (explaining that the ASP will not be a sufficient mechanism of accountability and "likely will have little impact on a prosecutor who is simply ineffective or demonstrates poor judgment").

OTP has not prioritized formulating a code of conduct. However, disciplinary mechanisms are not a substitute for a fully conceived code of conduct that would govern the day-to-day practice of OTP lawyers. The importance of ethical rules is that they reflect lawyers' respect for the rule of law and consequently can help legitimate their actions. As Professors Hazard and Dondi have suggested, "[I]f the rule of law requires lawyers, lawyers also require rules for their governance. . . . [T]he rules of professional ethics constitute the normative regime to which . . . lawyers look to in assessing the character of a lawyer's participation in the rule of law."[45] Currently observers cannot assess whether OTP attorneys are acting appropriately because of the minimal guidance provided by the ICC Statute concerning the Prosecutor's ethical obligations. An OTP code of conduct would also give other organs of the Court, particularly Chambers, a better sense of how the OTP interprets its obligations.

ICC prosecutors likely require ethical rules more than domestic prosecutors do. The OTP, like the Court as a whole, is composed of individuals from widely divergent backgrounds in terms of nationality and legal culture.[46] There are some obvious advantages to this. The representativeness of the OTP tends to at least somewhat undercut claims that the OTP acts predominately in the interests of powerful nations.[47] OTP attorneys also may be less prone to "groupthink," because they are likely to approach legal problems from different perspectives and legal backgrounds.[48]

Nevertheless, because the ICC system is *sui generis*, one would expect that the OTP would struggle with how to balance its various obligations under the ICC Statute.[49] The OTP cannot draw on a shared legal culture to resolve good faith disputes as to how the Prosecutor should act in a given situation.[50] Domestic ethical codes vary, and there may be disagreements within the OTP as to whether an ethical problem even exists, with some potentially taking the view that the only relevant question is one of litigation strategy.[51] A code of conduct specific to the OTP would

45. GEOFFREY HAZARD & ANGELO DONDI, LEGAL ETHICS: A COMPARATIVE STUDY 2 (2004).

46. The ICC Statute requires, for example, that the Prosecutor and the Deputy Prosecutor be of different nationalities. ICC Statute, *supra* note 1, art. 42(2).

47. The ICC often has been criticized for serving the interests of European countries and acting as a "[c]ourt for Africa." Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT'L L.J. 163, 175 (2011) (quoting HUMAN RIGHTS WATCH, COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT'S FIRST YEAR 44–45 (July 2008), *available at* http://www.hrw.org/sites/default/files/reports/icc0708webwcover.pdf). *See also* Lars Waldorf, *A Mere Pretense of Justice: Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal*, 33 FORDHAM INT'L L.J. 1221, 1275 (2010) (noting that the post-Nuremberg justification of international criminal tribunals rests "on claims that they are more impartial (i.e., more cosmopolitan) than national tribunals and domestic criminal law").

48. For a seminal discussion of lawyers and group dynamics, see Donald Langevoort, *Where Were the Lawyers?*, 46 VAND. L. REV. 76, 105–08 (1993).

49. Professor Byrne has made a similar argument with respect to "the basic choreography of international trial practice." Rosemary Byrne, *The New Public International Lawyer and the Hidden Art of International Trial Practice*, 25 CONN. J. INT'L L. 243, 248 (2010) ("For practitioners, national codes of procedure and evidence reflect, rather than create, deeply rooted conceptions of process. . . . In the international context . . . rules of procedure and evidence have the daunting task of creating, rather than reflecting, a shared and coherent conception of process and professional roles.").

50. *See id.* at 252–53 (noting that "[i]n the international trial, players with divergent training and origins rotate, as do the varied expectations about process, justice, and the respective roles of legal actors").

51. As discussed *infra* Part II(B), an example of this phenomenon is the possible tension between the Prosecutor's duty to obey orders from Chambers and the risk that following those orders will cause him to

provide a common framework for conceptualizing the Prosecutor's obligations under the ICC Statute. In the absence of such a framework, individual OTP attorneys may either follow their domestic codes of conduct (to the extent their home nations have codes of conduct) or merely follow their individual sense of what is ethical. Alternatively, OTP attorneys may simply defer to the instructions of the Prosecutor and Deputy Prosecutor inasmuch as they cannot express any ethical concerns that they may have in terms of a shared OTP code of conduct.

Another reason that a code of conduct would be particularly valuable for the OTP is the natural tendency of prosecutors to sympathize with victims of crimes at the expense of ICC defendants. To be sure, this is a familiar phenomenon in many domestic systems as well.[52] However, as Professor Turner has suggested, the phenomenon may be more pronounced in international criminal trials because the "exceptional severity and magnitude of international crimes tends to magnify the desire to protect victims' interests."[53] What is more, many actors who tend to advocate for protecting defendants' rights against government abuses at the domestic level are among the most vocal advocates for prosecuting defendants at the international level.[54] Even if states and non-governmental organizations may have the ability to act as a check on prosecutorial overreach,[55] they may choose not to act when the Prosecutor's actions are predominately harming the interests of defendants. In addition, the OTP's investigative activities—largely occurring in war-torn regions—occur with minimal oversight from the Court's other organs,[56] and defendants' interests may not be adequately safeguarded during these investigations.[57]

Lastly, international criminal law is not only concerned with prosecuting the guilty but also with contributing to reconciliation at the national level by creating a historical record and educating those who have been affected by crimes of war,[58]

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violate one of his duties under the ICC Statute, thus risking sanction.

52. Turner, *Legal Ethics*, *supra* note 5, at 696.

53. *Id.*

54. *Id.* *See also* Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925, 930 (2008) ("Many traditionally liberal actors (such as non-governmental organizations or academics), who in a national system would vigilantly protect defendants and potential defendants, are among the most strident pro-prosecution voices . . . .").

55. *See* Danner, *supra* note 4, at 525 (noting that "the ICC Prosecutor will be accountable to a variety of entities, including states that are not party to the treaty, and other actors such as NGOs").

56. *See* Michele Caianiello, *Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models*, 36 N.C. J. INT'L L. & COM. REG. 287, 313 (2011) ("[O]nly the prosecutor knows the entirety of the evidence gathered by his office before trial. Judges cannot search in the prosecutors' files to gather more information relevant to a case.").

57. *See id.* at 295–97 (noting that the OTP has several structural advantages over defense counsel during the investigation phase of ICC trials); *see also* Elena Baylis, *Outsourcing Investigations*, 14 UCLA J. INT'L L. & FOREIGN AFF. 121, 145 (2009) ("NGOs and other third parties are rarely directing their efforts at producing compelling exculpatory evidence for international criminal defendants . . . .").

58. *See* Turner, *Legal Ethics*, *supra* note 5, at 696–97 (summarizing that the goals of "compiling an accurate historical record, spreading a message of respect for human rights, promoting peace and reconciliation, and giving voice to victims" have helped shape international criminal proceedings). Such goals generally fall under the rubric of transitional justice. *See* Jean Galbraith, *The Pace of International Criminal Justice*, 31 MICH. J. INT'L L. 79, 90–92 (2010) (describing transitional justice and explaining that "[c]onsiderations of the past, such as recognition of the past atrocities, restitution for victims, and retribution against certain wrongdoers, are important primarily as a means . . . of achieving a peaceful future").

because situations of mass violence are often accompanied by "mass denial."[59] Scholars also have claimed that international criminal trials have the potential to demonstrate to post-conflict societies how to fairly and impartially adjudicate even horrific crimes.[60] These transitional justice goals are important for the ICC in particular because it is concerned only with "the most serious crimes of concern to the international community as a whole"[61] and therefore anticipates that the vast majority of war crimes will be adjudicated in the nations where they occurred.[62] To the extent that the Prosecutor acts in ways that are perceived as unethical—regardless of whether or not his acts can be justified under the ICC Statute—the educative and demonstrative purposes of ICC trials are undermined.[63]

Given the amount of time taken to reach a consensus as to the ICC Statute, the process of formulating and adopting an agreed-upon code of conduct for the OTP may also be controversial and time-consuming.[64] Nevertheless, the ICC has been able to adopt codes of conduct for defense counsel and other non-OTP attorneys who appear before the Court, as well as the Court's judges.[65] Although one can question whether these codes of conduct provide sufficient guidance, ICC prosecutors are the Court's only legal actors that are currently not subject to a discrete set of ethical rules.

In the next section, I explain why the code of conduct should be designed specifically with OTP prosecutors in mind and should not necessarily match the codes of conduct that have been formulated by other international criminal tribunals.

C. *A Detailed Code of Conduct for ICC Prosecutors*

Unlike the ICC, other international criminal tribunals have formulated and adopted codes of conduct for prosecutors.[66] In adopting its own Standards of Professional Conduct ("ICTY Standards") in 1999, the Prosecutor's Office of the

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59. Galbraith, *supra* note 58, at 88.

60. *See* Jane Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT'L L. 251, 262 (2007) ("Accountability proceedings can contribute to strengthening the rule of law in post-conflict societies through their demonstration effects."); *see also* Marieke Wierda, *Comparison of the Legacy of the Special Court for Sierra Leone and the ICC Intervention in Uganda From a Practical Perspective*, 103 AM. SOC'Y INT'L L. PROC. 218, 220–21 (2009) (noting the positive effects that the ICC's involvement in Uganda has had on the domestic legal system).

61. ICC Statute, *supra* note 1, art. 5(1).

62. *See* Philippe Kirsch, *The Role of the International Criminal Court in Enforcing International Criminal Law*, 22 AM. U. INT'L L. REV. 539, 543–44 (2007) (discussing the ICC's role as a "court of last resort").

63. *See* ICTY Standards, *supra* note 7, art. 1 ("[P]rosecutors . . . represent the international community . . . and standards and rules concerning the performance of their important responsibilities should promote principles of fairness and professionalism.").

64. *See* Philippe Kirsch, *Preface to the First Edition* of COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT at xxxvii (Otto Triffterer ed., 2008) (noting that negotiations to establish the ICC began in 1988 and that the ICC Statute was adopted by the United Nations Diplomatic Conference ten years later).

65. *See supra* notes 22–23 and accompanying text.

66. ICTY Standards, *supra* note 7; Code of Professional Conduct for Counsel with the Right of Audience before the Special Court for Sierra Leone (May 14, 2005), http://www.sc-sl.org/LinkClick.aspx?fileticket=IbTonPmXLHk%3d&tabid=176; Int'l Crim. Tribunal for Rwanda, Prosecutor's Regulations no. 2 (Oct. 21, 1999), Standards of Professional Conduct: Prosecution Counsel, http://unictr.org/Portals/0/English/Legal/Prosecutor/reg_05.pdf.

International Criminal Tribunal for the former Yugoslavia ("ICTY") noted the existence of codes of conduct for defense counsel and found that "it is desirable that the standards of professional conduct of prosecution counsel should also be clearly set out and understood."[67] The Prosecutor's Office also specifically established that the ICTY Standards would prevail over inconsistent domestic codes of conduct.[68]

Although the ICC can certainly look to the codes of conduct of other international criminal tribunals, it would be imprudent for the OTP to simply import their standards.[69] The ICC's structure is different from that of *ad hoc* international criminal tribunals such as the ICTY in important ways. For example, the ICTY has a limited mandate to only adjudicate crimes committed in the former Yugoslavia and has been criticized for being unconcerned with outreach and the instilling of the rule of law in the former Yugoslavia.[70] Conversely the ICC is a permanent court[71] that is intended to foster "lasting respect for . . . the enforcement of international justice"[72] and specifically contemplates that the vast majority of war crimes will be prosecuted domestically.[73]

The ICC Prosecutor's role is also unique. The Prosecutor is required, "[i]n order to establish the truth, . . . [to] investigate incriminating and exonerating circumstances equally."[74] The ICTY Prosecutor has no such obligation under the ICTY Statute.[75] More broadly, ICTY prosecutors have been criticized for excessive adversarialism that "gives rise to bitter and sometimes imbalanced contests between the prosecutor and defence counsel that may end up occluding the truth,"[76] whereas the role of the ICC prosecutor is more in accordance with the civil law tradition, which sets as a prosecutor's ultimate goal the establishment of truth.[77]

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67. ICTY Standards, *supra* note 7, art. 1.

68. *Id.* art. 3.

69. This raises the issue of whether the movement of attorneys between the various criminal tribunals may be problematic from the perspective of legal ethics. These attorneys may bring with them useful investigative skills and practical experience but may also inadvertently bring ethical views and practices that do not comport with the ICC's ideals.

70. *See* Mirko Klarin, *The Impact of the ICTY Trials on Public Opinion in the Former Yugoslavia*, 7 J. INT'L CRIM. JUST. 89, 95–96 (2009) (criticizing the ICTY's outreach and noting that the ICTY has not improved the legal systems of the former Yugoslavia); David Tolbert, *The International Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. OF WORLD AFF. 7, 13 (Summer/Fall 2002) (noting that the ICTY's work was subject to "gross distortions" in the former Yugoslavia because of its lack of emphasis on educating the people of the region).

71. ICC Statute, *supra* note 1, art. 1.

72. *Id.* Preamble.

73. *See supra* note 62.

74. ICC Statute, *supra* note 1, art. 54(1)(a).

75. *See* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1080 n.14 (Otto Triffterer ed., 2008) [hereinafter Triffterer] (noting that this requirement is not present in the ICTY Statute).

76. Jerome de Hemptinne, *The Creation of Investigating Chambers at the International Criminal Court: An Option Worth Pursuing?*, 5 J. INT'L CRIM. JUST. 402, 404 (2007). *See also id.* at 408 ("[R]ather than trying to depict the truth as precisely as possible, the [ICTY] prosecutor often seeks above all to win his case, and therefore presents it in a manner that may sometimes seem partial, in both senses of the term.").

77. Triffterer, *supra* note 75, at 1078. *See also* ICC Statute, *supra* note 1, art. 54(1)(a) (identifying the Prosecutor's broad objective as establishing the truth).

Of course, even if the ICC were to adopt a code of conduct that recognizes the unique duties and responsibilities of the ICC Prosecutor, the code of conduct could not eliminate the possibility of good faith disagreements within the OTP as to how to proceed in a given situation. Indeed, because of the differences in legal backgrounds among OTP attorneys, different attorneys may interpret provisions of the code of conduct differently. Nevertheless, if the ICC were to formulate a comprehensive code of conduct, it would serve as a common starting point for ethical deliberation and, if sufficiently specific, would lower the likelihood of major ethical disagreements within the OTP.

The ICTY's standards for prosecutors consist of four pages and contain vague and abstract language.[78] The ICC may wish to consider providing detailed guidance to ICC prosecutors as to how to conceive of their conflicting duties under the ICC Statute in order to ensure that there is some continuity in the practices of the OTP over time.[79] While the Prosecutor should be afforded some latitude to shape the ethics of the OTP, the other organs of the Court would benefit from a clearer sense of which actions are permissible for OTP prosecutors to take and which are not. Indeed, as described in the next sections, if the Prosecutor is afforded too much discretion in determining how to prioritize his duties under the ICC Statute, he may act in ways that, while arguably consistent with the ICC Statute, do not fully take into account the interests of the ICC as a whole. This is illustrated by the Prosecutor's attempts to resolve his conflicting duties to (1) investigate versus disclose evidence; (2) act independently from Chambers versus obey orders therefrom; and (3) bring defendants to justice versus act impartially. The first two conflicts arose in the *Lubanga* trial while the last arose in connection with the Prosecutor's securing of an arrest warrant for Sudanese President Omar Hassan Ahmad Al-Bashir.

II. CONFLICTING DUTIES AND THE *LUBANGA* TRIAL

Thomas Lubanga Dyilo is a national of the Democratic Republic of the Congo ("DRC") and the alleged founder and commander-in-chief of the *Union des Patriotes Congolais* ("UPC") and the *Forces Patriotiques pour la Libération du Congo* ("FPLC").[80] The Prosecutor charged Mr. Lubanga with war crimes under Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) of the ICC Statute for the enlistment and conscription of children into the UPC and FPLC in connection with the Ituri conflict in the DRC.[81] Mr. Lubanga first appeared before the ICC on March 20, 2006, but his actual trial did not begin until January 26, 2009.[82]

The Trial Chamber was forced to repeatedly delay the start of the *Lubanga* trial because of the Prosecutor's decision to not disclose potentially exculpatory

78. *See, e.g.*, ICTY Standards, *supra* note 7, R. 2(b) (stating that prosecution counsel are expected to "maintain the honour and dignity of the profession and conduct themselves accordingly with proper decorum").

79. In this regard, it is noteworthy how detailed the ICC's other texts are. The ICC Statute has 128 articles and there are 225 rules of evidence and procedure. *See generally* ICC Statute, *supra* note 1; ICC Rules, *supra* note 35.

80. *Lubanga Case*, COAL. FOR THE INT'L CRIM. CT., http://www.coalitionfortheicc.org/?mod=drctimelinelubanga (last visited Oct. 8, 2011); *Thomas Lubanga*, THE HAGUE JUSTICE PORTAL, http://www.haguejusticeportal.net/eCache/DEF/8/156.html (last visited Oct. 8, 2011).

81. *Lubanga Case*, *supra* note 80; *Thomas Lubanga*, *supra* note 80.

82. *Lubanga Case*, *supra* note 80.

documents.[83] The Chamber also stayed the trial after the Prosecutor failed to comply with an order that he disclose the identity of an intermediary who had contacted witnesses on the Prosecutor's behalf.[84]

A. The Delay of the Lubanga *Trial and the Duties of Investigation and Disclosure*

1. The Stay of Proceedings

The Trial Chamber was forced to stay the *Lubanga* trial in June 2008 because of the Prosecutor's non-disclosure of potentially exculpatory documents to the defense.[85] The Prosecutor had obtained the documents from third parties, including the United Nations,[86] pursuant to Article 54(3)(e) of the ICC Statute, which provides:

> The Prosecutor may agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents.[87]

As a result of the confidentiality agreements, the Prosecutor was unable to disclose more than 200 documents that contained potentially exculpatory information,[88] including "evidence indicating that [Lubanga] suffered from a mental condition;" information that he may have acted under duress, compulsion, or in self-defense; and information that he "had insufficient command over people who committed the crimes with which he [was] charged."[89]

In deciding to stay Mr. Lubanga's trial, the Trial Chamber held that (i) the disclosure of exculpatory evidence is a fundamental aspect of a defendant's right to a fair trial; (ii) the Prosecutor had incorrectly used Article 54(3)(e) such that a significant body of exculpatory materials that would otherwise have been disclosed was withheld; and (iii) the Trial Chamber was prevented from determining whether the Prosecutor had violated Mr. Lubanga's right to a fair trial because the Trial Chamber had been unable to inspect the materials on account of the confidentiality agreements.[90] The Trial Chamber concluded that under these circumstances "the trial process [had] been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial"[91] and ordered Mr. Lubanga's release.[92] The Trial Chamber did, however, give leave to the Prosecutor to appeal its judgment and stayed its order to release Mr. Lubanga pending the appeal.[93]

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83. *Id.*

84. *Id.*

85. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1486, Judgment on Appeal of Disclosure Decision, para. 6 (Oct. 21, 2008), http://www.icc-cpi.int/iccdocs/doc/doc578371.pdf.

86. *Id.* para. 21.

87. ICC Statute, *supra* note 1, art. 42(3).

88. Prosecutor v. Lubanga, Judgment on Appeal of Disclosure Decision, *supra* note 85, para. 21.

89. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1401, Decision on Non-Disclosure, para. 22 (June 13, 2008), http://www.icc-cpi.int/iccdocs/doc/doc511249.pdf.

90. *Id.* paras. 92, 94.

91. *Id.* para. 93.

92. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1418, Decision on the Release of Thomas

The Appeals Chamber concurred with the Trial Chamber that Mr. Lubanga's right to a fair trial would be violated if the Prosecutor could withhold potentially exculpatory documents obtained pursuant to Article 54(3)(e).[94] The Appeals Chamber did not order the Prosecutor to disclose the exculpatory documents to the defendant, however, but held that the Prosecutor should disclose the documents to the Trial Chamber so that it could determine whether the documents would need to be provided to the defense.[95] If the Trial Chamber determined that disclosure was required, the Prosecutor would have to seek the consent of the information providers to disclose the documents.[96] If the Prosecutor could not obtain the requisite consents, the Chamber could decide what measures should be taken to preserve a fair trial without the disclosure of the relevant documents.[97] Since the Prosecutor had disclosed some of the potentially exculpatory documents to the Trial Chamber while the appeal was pending, and the information providers had indicated a newfound willingness to allow some of the information contained in the documents to be shared with the defense,[98] the Appeals Chamber, over the objection of one judge, reversed the order to release Mr. Lubanga.[99] By November 2008, the Prosecutor was able to disclose all of the potentially exculpatory documents to the defense, and the Trial Chamber lifted its stay.[100]

2. Confidentiality Agreements and the Duty to Investigate

Although the disclosure dispute did not end the *Lubanga* trial, the Prosecutor clearly over-relied on confidentiality agreements to build his case against Mr. Lubanga. By its express terms, Article 54(3)(e) is supposed to be used to obtain information that can assist the Prosecutor in generating evidence; instead, the Prosecutor used the provision to directly obtain evidence.[101] Fifty-five percent of the materials that the Prosecutor obtained in the DRC investigation had been provided under Article 54(3)(e), and 8,000 documents specific to the *Lubanga* trial were subject to confidentiality agreements.[102] The OTP could not have reasonably

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Lubanga Dyilo, para. 35 (July 2, 2008), http://www.icc-cpi.int/iccdocs/doc/doc522804.pdf.

93. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1417, Decision on Leave to Appeal, para. 32 (July 2, 2008), http://www.icc-cpi.int/iccdocs/doc/doc522803.pdf.

94. Prosecutor v. Lubanga, Judgment on Appeal of Disclosure Decision, *supra* note 85, para. 95.

95. *Id.* para. 3.

96. Prosecutor v. Lubanga, Judgment on Appeal of Disclosure Decision, *supra* note 85, para. 48. *See also* ICC Rules, *supra* note 35, R. 82(1) ("Where material or information is in the possession or control of the Prosecutor which is protected under Article 54, paragraph 3(e), the Prosecutor may not subsequently introduce such material or information into evidence without the prior consent of the provider of the material or information . . . .").

97. Prosecutor v. Lubanga, Judgment on Appeal of Disclosure Decision, *supra* note 85, para. 48

98. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1487, Judgment on Appeal of Release Decision, paras. 41, 44, 45 (Oct. 21, 2008), http://www.icc-cpi.int/iccdocs/doc/doc578365.pdf.

99. *Id.* para. 41.

100. Transcript of Status Conference at 3–4, Prosecutor v. Lubanga, ICC-01/04-01/06-T-98 (Nov. 18, 2008), http://www.icc-cpi.int/iccdocs/doc/doc586028.pdf; Rachel Katzman, *The Non-Disclosure of Confidential Exculpatory Evidence and the Lubanga Proceedings: How the ICC Defense System Affects the Accused's Right to a Fair Trial*, 8 NW. J. INT'L HUM. RTS. 77, 78 (2009).

101. *See* Kai Ambos, *Confidential Investigations (Article 54(3)(e) ICC Statute) vs. Disclosure Obligations: The Lubanga Case and National Law*, 12 NEW CRIM. L. REV. 543, 554–56 (2009) (describing the "irresolvable conflicts" generated when Article 54(3)(e) is used to gather direct evidence).

102. Prosecutor v. Lubanga, Judgment on Appeal of Disclosure Decision, *supra* note 85, para. 32.

expected that none of these documents would have to be disclosed to the defense.[103] Indeed, the ICC Statute takes a broad view of the Prosecutor's duty to disclose evidence:

> [T]he Prosecutor shall . . . disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.[104]

Moreover, the Prosecutor did not appear to take his disclosure obligations sufficiently seriously.[105] The issue of the Prosecutor's failure to provide exculpatory documents obtained on the condition of confidentiality to the defense first arose before the Pre-Trial Chamber in September 2006,[106] and the Trial Chamber suspended the start of the *Lubanga* trial to afford the Prosecutor additional time to obtain the consent of the information providers to disclose the documents.[107] The Prosecutor received permission to disclose the documents to the defense only on the eve of the Appeals Chamber judgment on the issue,[108] suggesting that the Prosecutor may have been less concerned with Mr. Lubanga's right to receive exculpatory information than with the prospect of his release.[109] At a minimum, it appears that the Prosecutor may not fully have sought to persuade information providers to waive confidentiality until Mr. Lubanga's release was imminent.

However, it would be a mistake to dismiss the Prosecutor's decision to use confidentiality agreements as mere prosecutorial overreach. The Prosecutor has described the power to enter into confidentiality agreements with individuals and organizations located in countries where he is investigating as "the core of the Prosecution's ability to fulfill its mandate."[110] The Appeals Chamber has agreed that Article 54(3)(e) was an important investigative tool for the Prosecutor, particularly with respect to investigations in countries such as the DRC that are dangerous for

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103. *See* Heikelina Verrijn Stuart, *The ICC in Trouble*, 6 J. INT'L CRIM. JUST. 409, 414 (2008) ("When the OTP . . . agrees to confidentiality in relation to virtually all provided materials, which are furthermore not obtained for the sole use as [a] springboard to find new evidence, the core role of the judges to guarantee a fair trial and to be the custodian of the custodians, has become moot."). *Cf.* MODEL RULES OF PROF'L CONDUCT R. 3.8 (2006) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice.").

104. ICC Statute, *supra* note 1, art. 67(2). This duty becomes even greater if the Prosecutor intends to use the materials at trial. *See* ICC Rules, *supra* note 35, R. 77 ("The Prosecutor shall . . . permit the defence to inspect any books, documents, photographs and other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the defence or are intended for use by the Prosecutor as evidence for purposes of the confirmation hearing or at trial.").

105. Professor Ambos has suggested that the OTP simply did not give much thought to what documents would have to be disclosed in its haste to collect information with respect to its investigation. Ambos, *supra* note 101, at 551–52.

106. Prosecutor v. Lubanga, Judgment on Appeal of Disclosure Decision, *supra* note 85, para. 86.

107. *Id.* para. 8 (Pikis, J., separate opinion).

108. Katzman, *supra* note 100, at 85.

109. *See also id.* at 97 ("It remains unclear . . . why the OTP and the information providers took so long to reach a viable solution.").

110. Prosecutor v. Lubanga, Judgment on Appeal of Disclosure Decision, *supra* note 85, para. 25 (quoting a submission of the Prosecutor).

the Prosecutor to enter.[111] In fact, the Prosecutor's investigation occurred during an active armed conflict, necessitating reliance on third parties to suggest leads, identify potential witnesses, and directly provide evidence in some cases.[112] Commentators have supported the Prosecutor's view of the central importance of his powers under Article 54(3)(e).[113]

Indeed, it is likely that the OTP will have to continue to rely on information providers, many of whom may expect confidentiality, in future investigations[114] because the OTP does not have the capacity or resources to conduct full, intensive investigations with respect to every conflict before the Court.[115] Nor does it have its own police force.[116] While prosecutors at the *ad hoc* tribunals have been able to obtain access to crime scenes, the OTP cannot even enter certain countries that it is investigating, such as Sudan.[117] For these reasons, the Prosecutor has no choice but to rely on individuals and organizations that are familiar with the region to provide information.

If the Prosecutor cannot provide assurances to information providers, they may refuse to assist him due to safety concerns, which could imperil his ability to gather evidence (whether it happens to be inculpatory or exculpatory to ICC defendants).[118] In particular, the United Nations and human rights groups—such as those that had provided much of the confidential information in the *Lubanga* case[119]—may cease acting as sources of information because they may be subject to reprisals if their assistance to the ICC Prosecutor were to become public. For example, Mona Rishmawi, the Legal Advisor for the Office of the U.N. High Commissioner for Human Rights, has warned that, "[g]iven the nature of the UN operations on the ground, the nature of the crimes within the ICC jurisdiction, and the limited ability of the ICC at this stage to carry out serious witness protection work, [disclosure of

111. *Id.* para. 42. *See also* BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEPT. OF STATE, 2009 HUMAN RIGHTS REPORTS: DEMOCRATIC REPUBLIC OF THE CONGO (2010) (commenting on the DRC's poor human rights record and serious abuses of security forces).

112. *See* Stuart, *supra* note 103, at 414 (describing the difficulties of collecting reliable evidence during an armed conflict); Alex Whiting, *Lead Evidence and Discovery Before the International Criminal Court: The Lubanga Case*, 14 UCLA J. INT'L L. & FOREIGN AFF. 207, 210 (2009) (same).

113. *See, e.g.*, Triffterer, *supra* note 75, at 1086 ("Without ensuring the confidentiality of information, confidence in the integrity of the Prosecutor's work would be quickly undermined and the ability of the Prosecutor to prepare and prosecute cases would grind to a halt."); Whiting, *supra* note 112, at 227–30 (noting that without Article 54(3)(e), witnesses would be reluctant to provide evidence in the midst of ongoing conflicts and the ICC has no direct access to evidence in certain countries).

114. *See* Whiting, *supra* note 112, at 231 (noting that disputes concerning disclosure and confidentiality of information are likely to occur in future cases).

115. *See* Brian D. Lepard, *How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles*, 43 J. MARSHALL L. REV. 553, 556 (2010) ("There is no question, of course, that the Prosecutor, handicapped by limited resources and confronting a myriad of situations throughout the globe that may involve crimes within the Court's jurisdiction, faces challenging dilemmas . . . ."); *see also* Triffterer, *supra* note 75, at 1078 ("It is unlikely that the Prosecutor would be able to perform [his] functions successfully without enlisting the assistance of Governments.").

116. Baylis, *supra* note 57, at 122 ("Lacking its own police force, the ICC depends on state cooperation to conduct its investigations, enforce arrest warrants, and carry out other basic functions.").

117. Whiting, *supra* note 112, at 230.

118. *See* Ambos, *supra* note 101, at 567 (noting that sources of information would "dry up" without Article 54(3)(e)).

119. Whiting, *supra* note 112, at 208.

material obtained under Article 54(3)(e)] could seriously hamper the flow of information."[120]

Although prosecutors in domestic settings are frequently faced with the question of what should be disclosed to the defense—indeed, there is a constitutional rule in the United States that specifies prosecutors' duties in this regard[121]—there simply is not the corresponding need to rely on third parties to suggest leads and identify witnesses. Domestic prosecutors can, along with law enforcement, effectively investigate most crimes that occur within their jurisdiction and directly collect evidence. The demands on the ICC Prosecutor are unique in this regard, and, at least in some circumstances, he should be able to provide assurances of confidentiality to individuals and organizations that assisted him with his investigations.

3. Lingering Questions Concerning the Duties of Disclosure and Investigation

That the Appeals Chamber eventually was called upon to determine whether the Prosecutor fulfilled his disclosure obligations in the *Lubanga* case is unsurprising. Prosecutors at the ICTY and ICTR also have been repeatedly accused of failing to fulfill their disclosure obligations,[122] and these tribunals have spent a great deal of time and energy in resolving disclosure disputes.[123]

Beyond individual trials, however, there is also the danger that in failing to fulfill their disclosure obligations, prosecutors may be advancing a distorted history, jeopardizing what many believe to be an important aspiration of international criminal law.[124] For example, Professor Erlinder has accused the ICTR prosecutors of ignoring Tutsi crimes (particularly those of Rwanda's current president, Paul Kagame) so as to perpetuate the narrative that the Rwandan genocide was a "long-

120. *Discussion*, 6 J. INT'L CRIM. JUST. 763, 772 (2008) (remarks of Mona Rishmawi, Legal Advisor, Office of the U.N. High Commissioner for Human Rights), *quoted in* Katzman, *supra* note 100, at 99. *See also* Ambos, *supra* note 101, at 567 ("[I]f the identity of these informants is revealed—either directly or indirectly by revealing the information they provided—they run a serious risk of being intimidated (or worse).").

121. *See* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution").

122. *See* Jenia Iontcheva Turner, *Defense Perspectives on Law & Politics in International Criminal Trials*, 48 VA. J. INT'L L. 529, 557–58 (2008) [hereinafter Turner, *Defense Perspectives*] (quoting interviews with defense counsel at the ICTY and ICTR that prosecutors are "disdainful" of their obligation to collect exculpatory evidence and that disclosure of any such evidence often occurs too close to trial); *see also* Charmaine de los Reyes, *Revisiting Disclosure Obligations at the ICTR and its Implications for the Rights of the Accused*, 4 CHINESE J. INT'L L. 583, 584 (2005) ("If the ICTR wishes to disassociate itself from misconceptions of its being a victor's court, one step it may take is to reconsider recent jurisprudence on the topic of disclosure and its practical and substantive effect on the accused and the principle of fairness.").

123. Salvatore Zappalà, *The Prosecutor's Duty to Disclose Exculpatory Materials and the Recent Amendment to Rule 68 ICTY RPE*, 2 J. INT'L CRIM. JUST. 620, 623 (2004); Claude Kress, *The Procedural Law of the International Criminal Court: Anatomy of a Unique Compromise*, 1 J. INT'L CRIM. JUST. 603, 610 (2003).

124. *See supra* note 58.

planned conspiracy to kill Tutsi civilians" by the Hutu-dominated army.[125] Whether or not one believes Erlinder's charges, for more than fourteen years the ICTR failed to produce thousands of pages of documents that were produced by the United Nations and a variety of non-governmental organizations that were in Rwanda when the genocide occurred.[126] Some of these documents tended to call into question that there was a longstanding Hutu plot to seize power after the assassination of President Juvenal Habyarimana and massacre Tutsi civilians.[127]

In light of the history of problems with respect to disclosure in international criminal trials, and the ICC's own experience with the *Lubanga* trial, the ICC may wish to re-consider the approach of treating disclosure issues on a case-by-case basis, as opposed to attempting to provide prospective guidance to prosecutors in regarding how to conceive of their disclosure obligations. Specifically in terms of the Prosecutor's conflicting duties of disclosure and investigation, an OTP code of conduct should attempt to strike a balance. The Draft OTP Code, however, states both that the Prosecutor "shall . . . [p]rotect the confidentiality of all information and evidence retained, stored, and secured through investigation by the Prosecutor, or others representing the Prosecutor in the exercise of his or her functions,"[128] and that the Prosecutor shall "ensure that evidence favourable to the accused is disclosed in accordance with the Rules and the requirements of a fair trial."[129] Left unanswered is which duty should take precedence.

The Appeals Chamber's decision clearly states that the duty to disclose must take precedence,[130] and the Prosecutor did eventually disclose all of the documents that he believed to be potentially exculpatory to Mr. Lubanga's defense.[131] However, by the time of the Appeals Chamber's decision, a great deal of reputational harm had already come to the Court. Scholars claimed that Mr. Lubanga could not be given a fair trial because of the Prosecutor's over-reliance on evidence obtained on the condition of confidentiality.[132] Observers in the DRC, particularly in the Ituri region where Mr. Lubanga allegedly committed his crimes, questioned "the professionalism and the ability of the ICC to carry out its mandate" given that the confidentiality problem had arisen early on in the proceedings but nearly ended the trial on the eve of its supposed commencement.[133]

Perhaps of greater significance is that, notwithstanding the Appeals Chamber's decision, it is impossible to know whether Lubanga received all of the documents to

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125. Peter Erlinder, *The UN Security Council* Ad Hoc *Rwanda Tribunal: International Justice or* Juridically-*Constructed "Victor's Impunity"?*, 4 DEPAUL J. SOC. JUST. 131, 148–51 (2010). Professor Erlinder claims, for example, that when Prosecutor Carla Del Ponte attempted to investigate crimes committed by Kagame that she was in effect fired. *Id.* at 161–63.

126. *Id.* at 148–49.

127. *Id.* at 167.

128. Draft OTP Code, *supra* note 8, art. 9(3).

129. *Id.* art. 12(1).

130. Prosecutor v. Lubanga, Judgment on Appeal of Disclosure Decision, *supra* note 85, paras. 2, 44.

131. *See supra* note 100.

132. *See, e.g.*, Stuart, *supra* note 103, at 414 ("When the OTP . . . agrees to confidentiality in relation to virtually all provided materials, which are furthermore not obtained for the sole use as springboard to find new evidence, the core role of the judges to guarantee a fair trial and to be the custodian of the custodians, has become moot."); Ambos, *supra* note 101, at 567–68 ("disclosure of (exculpatory) evidence goes to the heart of an accused's right to a fair trial").

133. *See, e.g.*, *DRC: ICC Suspension a Risk for Ituri Stability*, IRIN AFRICA (June 24, 2008), http://www.irinnews.org/Report.aspx?ReportId=78820 (quoting a human rights lawyer in Kinshasa).

which he is entitled under the ICC Statute.[134] The Prosecutor may have taken a narrow view of what evidence "tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence" under Article 67(2) because so many documents were obtained on the condition of confidentiality.[135] Indeed, of the thousands of documents obtained from information providers on the condition of confidentiality, the Prosecutor determined that only some 200 contained "potentially exculpatory information or information . . . potentially material to the preparation of the defence."[136]

Domestic prosecutors can be subject to disciplinary proceedings[137] and even criminal prosecution when they suppress evidence[138] but there are no equivalent mechanisms to ensure the compliance of ICC prosecutors with their disclosure obligations.[139] In terms of the *Lubanga* trial, it was in the self-interest of the Prosecutor to characterize his decision to over-rely on confidentiality agreements with information providers as a relatively minor threat to the fair trial rights of Mr. Lubanga. The possibility of a fair trial for Mr. Lubanga would have been far more remote if the Prosecutor were to have admitted that he could not disclose a greater number of exculpatory documents. By conceiving of his disclosure obligations narrowly, the Prosecutor also would have been able to save himself the embarrassment of having to inform information providers that he could not honor his promise to preserve the confidentiality of a significant percentage of the materials that they had provided.

Even if the Prosecutor does not over-rely on confidential information in future investigations, this will not mean that defendants will receive all the information to which they are entitled. Because of the nature of the ICC's work, neither the defense nor Chambers can effectively police the OTP's compliance with its disclosure obligations.[140] Defense counsel cannot know what other evidence might be available

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134. *See* Whiting, *supra* note 112, at 231 (noting that prosecutors often err on the side of non-disclosure). *Cf.* Zappala, *supra* note 123, at 623 (noting that changes to ICTY Rules concerning the Prosecutor's disclosure obligations are likely to be ineffective because there is no way to verify whether the Prosecutor fulfills his or her obligations).

135. Even if the Prosecutor did agree that certain materials need to be disclosed, the defense may still be unable to obtain the actual documents if the information provider does not consent. Prosecutor v. Lubanga, Judgment on Appeal of Disclosure Decision, *supra* note 85, para. 48 ("[W]here the material in question was obtained on the condition of confidentiality, the Trial Chamber . . . will have to respect the confidentiality agreement concluded by the Prosecutor under Article 54(3)(e) . . . .").

136. *Id.* paras. 21, 32.

137. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2006).

138. *See* Sara Gurwitch, *When Self-Policing Does Not Work, A Proposal for Policing Prosecutors in Their Obligation to Provide Exculpatory Evidence to the Defense*, 50 SANTA CLARA L. REV. 303, 318–19 (2010) (discussing disciplinary procedures taken against prosecutors, including rare instances of criminal prosecution).

139. *See* Agreement on the Privileges and Immunities of the International Criminal Court, ICC-ASP/1/3, art. 15(1) (September 3, 2002), http://www.icc-cpi.int/NR/rdonlyres/23F24FDC-E9C2-4C43-BE19-A19F5DDE8882/140090/Agreement_on_Priv_and_Imm_120704EN.pdf (stating that the Prosecutor and Deputy Prosecutor enjoy "immunity from legal process of every kind in respect of . . . acts which had been performed by them in their official capacities").

140. The role of Chambers in ensuring the Prosecutor's compliance with his disclosure duties largely appears to be confined to situations where the Prosecutor willingly submits evidence to Chambers so that it may determine whether the evidence "tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence." ICC Statute, *supra* note 1, art. 67(2).

to the OTP because their own ability to gather evidence is highly limited due to non-cooperation from governments and limited budgets for investigatory activities,[141] and because advocacy groups tend to be more focused on bringing accused war criminals to justice than safeguarding their procedural rights.[142] For these reasons, prosecutorial compliance with disclosure obligations is even more crucial than in domestic systems.

This is not to say that the prosecutors in international criminal tribunals deliberately take a narrow view of their disclosure obligations. Prosecutors may simply underestimate the degree to which certain evidence "tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence."[143] For example, social psychology research suggests that prosecutors are "likely to search the case evidence for proof confirming the hypothesis to the detriment of exculpatory evidence."[144] Once a prosecutor forms a personal belief in guilt, "that belief becomes 'sticky' as selective information processing, belief perseverance, and cognitive consistency will prevent the prosecutor from revisiting her conclusion."[145] To extrapolate these concerns to the OTP, by the time that the duty to disclose evidence arises, OTP attorneys already will have investigated and formed a strong belief that the defendant is likely guilty, or else they would not have sought an arrest warrant for the defendant.[146] A review of whether evidence must be disclosed to the defense under the ICC Statute takes place therefore in the context of the OTP's relatively settled view of the defendant's guilt and may lead the OTP to undervalue or simply dismiss evidence that does not cohere with the defendant's guilt.

International criminal court prosecutors may be less likely to fulfill their disclosure obligations than prosecutors in domestic systems because their review of evidence often occurs against a backdrop of the crimes having already been referred to the Court by state parties and/or the United Nations Security Council.[147] Moreover, ICC defendants are charged with crimes that are of "most serious . . . concern to the international community as a whole,"[148] and there is increased pressure on prosecutors to convict and hold defendants responsible.[149] A code of conduct should seek to minimize the likelihood that the Prosecutor will fail to

141. *See* Turner, *Defense Perspectives*, *supra* note 122, at 556 (noting that defense counsel in international criminal tribunals must at times place their own lives in jeopardy to carry out factual investigation and are hampered by a lack of cooperation from governments in terms of evidence-gathering and a lack of funding for investigation from the tribunals).

142. *See supra* note 54.

143. ICC Statute, *supra* note 1, art. 67(2).

144. Alafair Burke, *Prosecutorial Agnosticism*, 8 OHIO J. CRIM. L. 79, 80 (2010).

145. *Id.*

146. *See* Alafair Burke, *Revisiting Prosecutorial Disclosure*, 84 IND. L. J. 481, 495 (2009) [hereinafter Burke, *Revisiting Prosecutorial Disclosure*] ("Because of confirmation bias, [a domestic prosecutor] is likely to search the investigative file for evidence that confirms the defendant's guilt . . . ."); *see also* Ellen Yaroshefsky, *Keynote Address: Enhancing the Justice Mission in the Exercise of Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 343, 352 (2010) (noting that confirmation bias among police and prosecutors helps contribute to wrongful convictions).

147. *See* ICC Statute, *supra* note 1, art. 13(a)–(b) (identifying two means of referral by which the Court may exercise jurisdiction).

148. *Id.* art. 5(1).

149. Robinson, *supra* note 54, at 929.

comply with his disclosure obligations out of a desire, conscious or unconscious, that ICC defendants must not go free.[150]

With these considerations in mind, I propose the following OTP code of conduct rule. The proposed rule, as with others in this Article, is directed at the Prosecutor but would apply to all OTP attorneys and staff.

Draft Conduct Rule Regarding Disclosure Obligations

(1) To the extent disclosure is not otherwise prohibited by the ICC Statute or Rules, the Prosecutor shall ensure that the defense is not denied access to investigatory materials in the possession, custody, or control of the OTP.

(2) Notwithstanding (1) above, the Prosecutor may provide assurances to individuals or organizations providing information on the condition of confidentiality pursuant to Article 54(3)(e) if (i) the Prosecutor determines that the materials cannot be obtained via other means and (ii) the individual or organization would not provide the materials except under the condition of confidentiality.[151]

(3) Prior to offering any assurances under Article 54(3)(e), the Prosecutor shall inform the person or organization providing information of the Prosecutor's duties under Article 67(2) and that such duties shall take precedence over the confidentiality of the information, although the Prosecutor shall not disclose any documents directly to the defense without first receiving consent from the individual or organization providing the information.[152]

(4) If consent cannot be obtained to disclose materials obtained pursuant to Article 54(3)(e), but the materials must be disclosed pursuant to Article 67(2), the Prosecutor shall endeavor to provide the materials to the defense in a summary or redacted form[153] or in some other form ordered by Chambers.[154]

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150. Professor Burke suggests other mechanisms beyond ethical rules that can assist prosecutors in complying with their disclosure duties. For example, she has suggested that prosecutors should be trained to recognize their own cognitive biases and should consider allowing colleagues who are not as familiar with a particular case to determine whether a particular piece of evidence should be disclosed to the defense. Alafair Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WM. & MARY L. REV. 1587, 1617–18, 1621–23 (2006). In light of the history of problems with respect to disclosure in international criminal trials, such measures merit the strong consideration of the OTP.

151. *See* Ambos, *supra* note 101, at 555–56 (arguing that "the Prosecutor should conclude confidentiality agreements only under three conditions: first, there is no other 'normal' way to obtain the respective information; second, the information is absolutely necessary to continue the investigation; and third, the information is only requested to generate new evidence").

152. *See* ICC Rules, *supra* note 35, R. 82(1) ("Where material or information is in the possession or control of the Prosecutor which is protected under Article 54, paragraph 3(e), the Prosecutor may not subsequently introduce such material or information into evidence without the prior consent of the provider of the material or information and adequate prior disclosure to the accused.").

153. The ICC Statute contemplates that materials implicating national security information may be presented in such a form. *See* ICC Statute, *supra* note 1, art. 72(5)(d) (listing "providing summaries or redactions" as an option to resolve cases where a State maintains that disclosure would prejudice its national security interests).

154. *See* Prosecutor v. Lubanga, Judgment on Appeal of Disclosure Decision, *supra* note 85, para. 48 (holding that the Chamber must determine which counter-balancing measures can be taken should a party

> (5) In construing disclosure obligations under Article 67(2), the Prosecutor shall err toward disclosure to the defense. If there is doubt whether a document must be disclosed, the Prosecutor shall consult the relevant Chamber.[155]

If the ICC shares this Article's concerns regarding disclosure in international criminal trials, the proposed rule would be beneficial inasmuch as it discourages both the excessive use of confidentiality agreements and the practice of prosecutors construing their disclosure obligations under Article 67(2) of the ICC Statute narrowly, while still recognizing the importance of the Prosecutor's powers under Article 54(3)(e). Moreover, the proposed rule would warn information providers that information conveyed to the OTP on the condition of confidentiality may nevertheless need to be disclosed so that the information providers can meaningfully assess whether to cooperate with the Prosecutor.

B. The Prosecutor's Duty to Obey Chambers vs. the Duty of Independence

1. The Prosecutor's Refusal to Comply with an Order of the *Lubanga* Trial Chamber

The *Lubanga* Trial Chamber imposed a second indefinite stay on July 8, 2010, after the Prosecutor failed to comply with the Trial Chamber's order to disclose the identity of an intermediary who had introduced witnesses against Mr. Lubanga to the Prosecutor.[156] Defense witnesses' testimony had "put into question" the testimony of prosecution witnesses facilitated by the intermediary, and the Trial Chamber ordered that the intermediary's identity be disclosed to the defense.[157] The Prosecutor refused because of his professed concern that measures had not yet been implemented to protect the intermediary.[158] The Trial Chamber not only ordered a stay in the proceedings[159] but warned the Prosecutor that he could be subject to sanctions under Article 71 of the ICC Statute and Rule 171 of the ICC Rules if he continued to refuse to provide the intermediary's name to the defense team.[160] The Trial Chamber subsequently issued an oral order that Mr. Lubanga be immediately released because in its view Mr. Lubanga's right to a fair trial had been

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not consent to disclosure).

155. *See* ICC Statute, *supra* note 1, art. 67(2) (stating that "the Court shall decide" if there is any doubt about what the Prosecutor must disclose).

156. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2517, Decision on Request for Variation of Time-Limit to Disclose the Identity of Intermediary, paras. 12, 31 (July 8, 2010), http://www.icc-cpi.int/iccdocs/doc/doc906146.pdf; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2582, Judgment on Appeal of Request for Variation of Time-Limit to Disclose the Identity of Intermediary, para. 5 (Oct. 8, 2010), http://www.icc-cpi.int/iccdocs/doc/doc947768.pdf.

157. *See* Prosecutor v. Lubanga, Judgment on Appeal of Request for Variation of Time-Limit to Disclose the Identity of Intermediary, *supra* note 154, paras. 4–5, 7 (detailing the procedural chronology of the Trial Chamber's order).

158. *See id.* paras. 11–12 (quoting the Prosecutor's filings on the date of refusal).

159. *Id.* para. 13.

160. *Id.* para. 17. Rule 171(2) of the ICC's Rules of Procedure and Evidence states that participants in ICC proceedings can be sanctioned for a "deliberate refusal to comply with an oral or written direction by the Court." ICC Rules, *supra* note 35, R. 171(2). The Chamber may impose measures ranging from the interdiction of the offending individual from exercising his or her functions before the Court, as well as fines up to the amount of 2,000 euros a day. *Id.* R. 171(2), (4).

compromised, and he could not be held in preventative custody on the assumption that his trial would resume at some point in the future.[161] The order was stayed pending appeal.[162]

In October 2010, the Appeals Chamber issued a judgment that criticized the Prosecutor for refusing to comply with the order.[163] It held that "[n]o criminal court can operate on the basis that whenever it makes an order in a particular area, it is for the Prosecutor to elect whether or not to implement it, depending on his interpretation of his obligations."[164] The Appeals Chamber explained that all Trial Chamber orders were binding orders that had to be implemented by the Prosecutor, unless they were modified by the Trial Chamber or reversed by the Appeals Chamber.[165] The Appeals Chamber reversed the Trial Chamber's imposition of a stay, however, on the ground that sanctions had not first been imposed on the Prosecutor under Article 71 to ensure his compliance with the Trial Chamber order.[166] Because Mr. Lubanga's release was based on the stay, the Appeals Chamber also reversed the Trial Chamber's order of release.[167]

Although the *Lubanga* trial has now resumed, the disruption in the proceedings was arguably unnecessary.[168] The Draft OTP Code and the ICC's Code for Counsel require attorneys to comply with orders from Chambers.[169] Since the OTP has not formulated a code of conduct, however, the Prosecutor was under no such ethical obligation and the question of whether to obey the *Lubanga* Trial Chamber could be reduced to whether the perceived benefits of non-compliance justified incurring the risk of sanction. The Prosecutor's actions in this regard underscore the importance of ethical rules as providing a possible constraint on this type of gamesmanship.[170]

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161. Press Release, Int'l Crim. Ct., Trial Chamber I Orders the Release of Thomas Lubanga Dyilo-Implementation of the Decision is Pending, ICC-CPI-20100715-PR559 (July 15, 2010), http://www.icc-cpi.int/Menus/Go?id=16d0aad8-501a-46dc-b744-9bdc657c0ac9&lan=en-GB.

162. *Id.*; Prosecutor v. Lubanga, Judgment on Appeal of Request for Variation of Time-Limit to Disclose the Identity of Intermediary, *supra* note 156, para. 17.

163. *See generally* Prosecutor v. Lubanga, Judgment on Appeal of Request for Variation of Time-Limit to Disclose the Identity of Intermediary, *supra* note 156.

164. *Id.* para. 48.

165. *Id.*

166. *Id.* para. 59.

167. *See* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2583, Judgment on Appeal of Decision to Release Thomas Lubanga Dyilo, para. 24 (Oct. 8, 2010), http://www.icc-cpi.int/iccdocs/doc/doc947862.pdf. The Appeals Chamber noted the Trial Chamber's attachment of significance to the length of Mr. Lubanga's detention, but reasoned that the Trial Chamber had made no findings that the detention was no longer necessary for trial or that Mr. Lubanga was detained for an unreasonable period on account of prosecutorial delay. *Id.* para. 25.

168. *See* Kevin Jon Heller, *I Think It's Time to Remove Moreno-Ocampo*, OPINIO JURIS (July 9, 2010, 8:23 AM), http://opiniojuris.org/2010/07/09/i-think-its-time-to-remove-moreno-ocampo (asserting that Moreno-Ocampo's misuse of confidentiality agreements caused "unwarranted delay" in the trial).

169. Draft OTP Code, *supra* note 8, art. 14(7); Code for Counsel, *supra* note 22, art. 7(3). *See also* ICC Rules, *supra* note 27, R. 25(1)(a)(ii) (defining misconduct to include failing to comply with directions from a presiding judge).

170. *See* HAZARD & DONDI, *supra* note 45, at 8 (suggesting that ethical rules indicate to lawyers "the right thing to do"); *see also* Geoffrey Hazard & Dana Irwin, *Toward a Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 804 (2009) (noting that protecting the "proper functioning of the legal system" is a central purpose of all ethical rules).

However, even if the ICC had adopted the Draft OTP Code, the Prosecutor may have chosen to disobey the order that he disclose the identity of the intermediary. The Prosecutor justified his conduct to the Appeals Chamber by claiming that:

> The Prosecutor is sensitive to its obligations to comply with the Chamber's instructions. However, it also has an independent statutory obligation to protect persons put at risk on account of the Prosecutor's actions. It should not comply, or be asked to comply, with an order that may require it to violate the separate statutory obligation by subjecting the person to a foreseeable risk.[171]

The Prosecutor was arguably correct to claim that he faced a choice between obeying the Trial Chamber and fulfilling his obligations under the ICC Statute because the Statute specifically contemplates that "the Prosecutor shall . . . respect the rights, interests, and personal circumstances of victims and witnesses" and furthermore may take "measures . . . to ensure the confidentiality of information and the protection of any person . . . ."[172] The OTP also has the overarching duty to "act independently as a separate organ of the Court."[173] In the Prosecutor's view, if he had complied with the Trial Chamber's order, he would have placed the intermediary's life in danger.

If the Draft OTP Code had been adopted, the Prosecutor still would have been faced with the same ethical dilemma. Although the Draft OTP Code requires prosecutors to comply with Trial Chamber orders,[174] it also provides that a prosecutor shall "[c]onduct his or her investigations with the goal of . . . ensuring confidentiality [and] fully respecting the rights of all persons under the Statute."[175] What may appear initially as audacious conduct by the Prosecutor, on closer examination could be seen as a genuine disagreement as to whether the Prosecutor's duty to obey orders from Chambers should be absolute or whether the Prosecutor could exercise his independence and refuse to comply with orders that conflict with his statutory duties.

This is not to suggest that the Prosecutor acted properly in violating the Trial Chamber's order, particularly where the obligation to protect potential witnesses appears to lie primarily with other organs of the ICC and may be subordinate to Mr. Lubanga's right to a fair trial.[176] For example, Article 64(2) of the ICC Statute states

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171. Prosecutor v. Lubanga, Judgment on Appeal of Request for Variation of Time-Limit to Disclose the Identity of Intermediary, *supra* note 156, para. 12.

172. ICC Statute, *supra* note 1, art. 54(1)(a), 54(3)(f). In addition, Article 68(1) states that measures to protect the "safety, physical and psychological well-being, dignity, and privacy of victims and witnesses" shall be taken by the Prosecutor "particularly during the investigation and prosecution of . . . crimes." *Id.* art. 68(1).

173. *Id.* art. 42(1).

174. Draft OTP Code, *supra* note 8, art. 14(7).

175. *Id.* art. 8(4).

176. *See* Prosecutor v. Lubanga, Judgment on Appeal of Request for Variation of Time-Limit to Disclose the Identity of Intermediary, *supra* note 156, paras. 50–51 (holding that it is ultimately the job of the Trial Chamber to deal with matters such as witness and victim protection); *see also* Kevin Jon Heller, *The OTP's Supposed "Independent Statutory Obligation" to Protect Witnesses*, OPINIO JURIS (July 9, 2010, 8:41 PM), http://opiniojuris.org/2010/07/09/the-otps-non-existent-independent-statutory-obligation-to-protect-witnesses (arguing that the ICC Statute permits, but does not require, the Prosecutor to protect the confidentiality of persons whereas the Trial Chamber is required to take measures to protect witnesses that are not prejudicial to a defendant's right to a fair trial).

that it is the Trial Chamber that ensures "due regard for the protection of victims and witnesses," and under Article 68(1), the Prosecutor's ability to take measures to protect the safety of victims and witnesses "shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial."[177] However, one can certainly disagree with the Prosecutor's conduct in this instance and still accept the broader principle that, since the OTP and Chambers are independent organs of the Court, the Trial Chamber should not be able to cause the Prosecutor to violate his duties under the ICC Statute.[178]

2. Obedience and Independence

It is tempting to believe that the OTP will never again refuse to comply with a Trial Chamber order. The Appeals Chamber's judgment makes clear that "when there is a conflict between the Prosecutor's perception of his duties and the orders of the Trial Chamber, the Trial Chamber's orders must prevail."[179] However, the Prosecutor has never disputed that he had a duty to comply with orders from Chambers.[180] Rather, the Prosecutor's position was that he could violate a Trial Chamber order if he was willing to be held in contempt.[181] The Prosecutor's brinkmanship was rewarded when the Appeals Chamber overturned the Trial Chamber's decision to release Lubanga.[182] Unfortunately, the Prosecutor's "victory" seems to have undermined the ICC's credibility,[183] and galvanized Lubanga's supporters,[184] making it less likely that the *Lubanga* trial will foster reconciliation in the DRC or further other transitional justice goals.

The Appeals Chamber's judgment cannot ensure that the Prosecutor will hereafter obey all future orders from Chambers, particularly if the Prosecutor is willing to be held in contempt for failing to comply with orders.[185] What is needed is

177. ICC Statute, *supra* note 1, art. 64(2), 68(1).

178. This conflict does not appear as frequently in domestic systems because, unlike the ICC Prosecutor, domestic prosecutors are employees of a state and, as such, are not expected to have the same degree of independence. *See* Danner, *supra* note 4, at 537 ("Unlike the close linkage between prosecutors and the executive in some domestic systems, the ICC Prosecutor is designed to be politically independent of governments. The purpose of this independence is to divorce him from any political objective other than fulfilling the mandate of the court."). Domestic prosecutors also can be dismissed much more easily.

179. Prosecutor v. Lubanga, Judgment on Appeal of Request for Variation of Time-Limit to Disclose the Identity of Intermediary, *supra* note 156, para. 48.

180. *See id.* para. 32 ("[T]he Prosecutor contends that he did not refuse to comply with the orders of the Court but instead exercised rights available to him as a party.").

181. *See id.* para. 34 (noting that the Prosecutor had argued that the Trial Chamber should have cited him for contempt or imposed other remedies instead of ordering the release of Mr. Lubanga).

182. *Id.* para. 62.

183. *See* Michael Steen, *War Crimes Court Set to Free Congo Warlord*, FIN. TIMES, July 15, 2010, at 7 ("Human rights groups had said the long-delayed Lubanga case was perhaps a final chance for the ICC to prove that it could be an efficient forum to try serious war crime allegations.").

184. *See* Olivia Bueno, *Kabila's Visit Highlights Tension Over Lubanga Trial*, LUBANGATRIAL.ORG (Sept. 24, 2010), http://www.lubangatrial.org/2010/09/24/kabila%E2%80%99s-visit-highlights-tension-over-lubanga-trial ("According to Congolese activists, the UPC is calling for the unconditional liberation of Lubanga following the Trial Chamber's July 15, 2010 ruling.").

185. In this regard, it is noteworthy that the Appeals Chamber's judgment concerned only whether the Prosecutor had been justified in refusing to disclose the intermediary's name out of concern for the intermediary's safety. Prosecutor v. Lubanga, Judgment on Appeal of Request for Variation of Time-

an ethical commitment on the part of the Prosecutor to obey all orders from Chambers, regardless of the Prosecutor's other obligations.[186] For example, the ICC's Code for Counsel provides that "[c]ounsel shall comply at all times with . . . rulings as to conduct and procedure as may be made by the Court."[187] A similar code of conduct rule for OTP attorneys would help to ensure that ICC proceedings are not again delayed as a result of the Prosecutor's refusal to follow orders from Chambers. However, a potential pitfall might be that the Prosecutor would be ethically required to follow all orders, even orders that are manifestly unjust or clearly cause him to violate the ICC Statute.

The notion that the OTP code of conduct should ever allow the Prosecutor to violate orders from Chambers could well prove controversial. The drafters of the OTP Code of Conduct may be wary of giving the Prosecutor this power. However, given that the OTP and Chambers are independent organs of the Court with separate statutory responsibilities, there may indeed be some circumstances under which the Prosecutor should be able to disobey orders that fundamentally infringe on his duties under the ICC Statute. Such a view of the Prosecutor's role would be consistent with the position that attorneys should generally be prepared to disobey lawful orders and risk sanction in order to promote broader goals of justice.[188]

One can conceive of a situation where the ICC Statute arguably requires that the Prosecutor violate an order from the Trial Chamber. For example, Article 42(7) of the ICC Statute provides that the Prosecutor shall not "participate in any matter in which [his] impartiality might reasonably be doubted on any ground."[189] However, the Trial Chamber is not required to excuse the Prosecutor from the proceedings.[190] Consequently, the Prosecutor could request to be disqualified from a particular case because of a personal conflict of interest,[191] but his request could be rebuffed by the Trial Chamber.[192] The Prosecutor would then have to choose either to obey the direction of the Trial Chamber and continue to participate in the proceedings or refuse to do so pursuant to his statutory obligation under Article 42(7). Under these

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Limit to Disclose the Identity of Intermediary, *supra* note 156, para. 5.

186. The code of conduct could reflect the view of the Appeals Chamber that "[i]rrespective of whatever duties the Prosecutor may have, he is obliged to comply with the orders of the Trial Chamber." Prosecutor v. Lubanga, Judgment on Appeal of Request for Variation of Time-Limit to Disclose the Identity of Intermediary, *supra* note 156, para. 54.

187. Code for Counsel, *supra* note 22, art. 7(3).

188. *See, e.g.*, William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217, 238–39 (1997) (discussing films that show that "[p]opular respect for law may *require* lawyers to violate the positive law"); Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259, 310–11 (1995) (describing the archetype of the moral individualist who "pursue[s] any legal ends that [he or she] believe[s] to be morally right, by any means that meet the same criterion"). One can certainly construe the Prosecutor's refusal to release the intermediary's name to the defense as emblematic of the moral individualist insofar as the Prosecutor sought to protect the intermediary regardless of the costs to the OTP.

189. ICC Statute, *supra* note 1, art. 42(7).

190. *See id.* art. 42(6) (stating that the Prosecutor "may" be excused by the Presidency).

191. *Id.*

192. One would expect, of course, that the Trial Chamber would allow the Prosecutor to recuse himself from acting in a particular case, but if the Prosecutor raised the issue at a relatively late juncture, it is certainly conceivable that the Chamber would deny a request in order to not delay the trial. Such a decision, like the Trial Chamber's order to disclose the identity of the intermediary, could not be appealed without leave of the Trial Chamber. *See generally id.* art. 82(1)(d) (stating that an appeal of a Trial Chamber "decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" can be pursued with approval of the Trial Chamber).

circumstances, it would not seem unreasonable for the Prosecutor to incur the risk of sanction rather than taint the proceedings with his participation.[193]

In domestic practice as well, lawyers also are occasionally forced to choose between following ethical obligations and obeying court orders. In the United States, for example, attorneys are generally forbidden from revealing "information relating to the representation of a client."[194] Similarly, in Canada, a lawyer is required "to hold in strict confidence all information acquired in the course of the professional relationship concerning the business and affairs of the client," whereas in Japan, an attorney shall not "disclose or utilize, without any good reason, confidential information of a client which is obtained in the course of his or her practice."[195] However, a judge may order a lawyer to disclose information he or she receives from the client, and it is unclear whether the lawyer may refuse to provide this information.[196] Courts have differed on this issue.[197] Whereas attorneys in domestic settings can draw on their countries' legal traditions and may be able to seek guidance from professional associations and ethics experts to help resolve ethical dilemmas of this type, this is not a practical option for OTP attorneys because the ICC is *sui generis*.

In my view, it would be preferable for an OTP code of conduct to specify under what circumstances prosecutors may refuse to comply with orders from Chambers and risk sanction so that the ICC can better anticipate when ethical dilemmas may arise that could delay and jeopardize proceedings. One of the reasons that the Prosecutor's refusal to comply with the Trial Chamber's order to disclose the identity of the intermediary was so controversial in the *Lubanga* case was that the Trial Chamber had not encroached on the Prosecutor's responsibilities. Witness safety is equally a matter of concern for Chambers and the Registry under the ICC Statute.[198] To the extent one accepts the premise that the Prosecutor should be able to refuse to obey some orders from Chambers, the Prosecutor's discretion to do so should be limited to instances where Chambers is infringing on the OTP's independence or truly causing him to violate his other statutory duties.

I propose the following rule:

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193. This is particularly the case if one keeps in mind the broader goals of international criminal justice. *See generally supra* Part I(B).

194. MODEL RULES OF PROF'L CONDUCT. R. 1.6(a) (2006).

195. HAZARD & DONDI, *supra* note 45, at 205 (citations omitted).

196. In the United States, the operative rule is found in MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 12 (2006) ("Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules.").

197. *See* People v. Belge, 372 N.Y.S.2d 798, 803 (N.Y. Sup. Ct. 1979), *aff'd* 41 N.Y.S.2d 60 (1976) (holding that a lawyer cannot be charged for failing to disclose the location of a murder victim where he learned of the location from his client). *But see* Matter of Doe, 20 N.Y.S.2d 996, 999 (N.Y. Sup. Ct. 1979) (holding that a lawyer was required to answer a grand jury question concerning the location of his client where he learned of the location from the client).

198. Prosecutor v. Lubanga, Judgment on Appeal of Request for Variation of Time-Limit to Disclose the Identity of Intermediary, *supra* note 156, para. 50 (noting that the Trial Chamber must ensure that the trial is conducted with "due regard for the protection of victims and witnesses"). *See also* ICC Statute, *supra* note 1, art. 68(1) ("The Court shall take appropriate measures to protect the safety . . . of victims and witnesses.") and art. 43(6) (outlining the Registrar's duty to provide "protective measures and security arrangements" for witnesses and "victims who appear before the Court").

Draft Conduct Rule Regarding Duty to Chambers

(1) The Prosecutor shall have a duty to comply with orders from Chambers.[199]

(2) In a situation where the Prosecutor reasonably believes that an order from Chambers would cause the Prosecutor to violate one of his or her duties under the ICC Statute, the Prosecutor shall explain, in writing, the duty that he or she is being asked to violate and seek reconsideration of that order.

(3) If the Prosecutor is unable to have an order from Chambers modified or vacated, and the order cannot be appealed, the Prosecutor shall comply with the order unless the Prosecutor reasonably believes that the order encroaches on his or her full authority over the proper management and administration of the OTP.[200]

(4) If the Prosecutor cannot comply with an order pursuant to (3) above, the Prosecutor may withdraw from the proceedings or take such other measures as he or she deems necessary after consultation with the Presidency.[201]

The proposed rule would not have permitted the Prosecutor to refuse to disclose the identity of the intermediary in the *Lubanga* case because the Prosecutor's obligation to protect the intermediary was permissive, not mandatory,[202] and the ICC Statute does not confer the responsibility to protect witnesses and victims on the OTP alone.[203] The proposed rule would, however, potentially allow the Prosecutor to refuse to obey an order that he participate in a case in which his impartiality might reasonably be questioned because complying with such an order would both cause the Prosecutor to violate the ICC Statute and would encroach on the Prosecutor's "management and administration of the OTP."[204]

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199. Code for Counsel, *supra* note 22, art. 7(3).

200. *See* ICC Statute, *supra* note 1, art. 42(2) ("The Prosecutor shall have full authority over the management and administration of the Office.").

201. The Presidency is composed of three judges of the Court and has three main responsibilities: "judicial/legal functions, administration and external relations." *The Presidency*, INT'L CRIM. CT., http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Presidency. The Presidency is currently composed of Judges Song, Diarra, and Kaul. *Id.*

202. *See* ICC Statute, *supra* note 1, art. 54(3)(f) ("The Prosecutor *may* take necessary measures . . . to ensure the confidentiality of information, the protection of any person or the preservation of evidence." (emphasis added)).

203. *See, e.g.*, *id.* art. 68 ("The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.").

204. *Id.* art. 42(2). Another potential example, taken from recent cases in New York, would be if the Trial Chamber ordered the Prosecutor to assign an individual of a particular religion or nationality to the prosecution team. *See* Jason Mazzone, *Judge Baer and Grutter v. Bollinger*, BALKINIZATION (Oct. 29, 2010, 9:10 PM), http://balkin.blogspot.com/2010/10/judge-baer-and-grutter-v-bollinger.html (reporting that in two separate cases Judge Baer required at least one minority and one woman co-counsel for a class action suit). Such an order also would violate the Prosecutor's independence as well as interfere with his management of the OTP.

III. THE OTP'S PUBLIC STATEMENTS: THE DUTY OF IMPARTIALITY AND THE DUTY TO PROSECUTE

The OTP has made several controversial public statements in the course of the ICC's early cases. In this section, I will explore the inherent tension between the Prosecutor's duty of impartiality, which is illustrated by his obligation to seek the truth,[205] "investigate incriminating and exonerating circumstances equally,"[206] and "[f]ully respect the rights of persons arising under the Statute[,]"[207] with his duty to "[t]ake appropriate measures to ensure the effective . . . prosecution of crimes."[208] This conflict is illustrated by certain controversial comments made by the Prosecutor in advocating for the arrest of Sudanese President Omar Hassan Ahmad Al-Bashir ("Al-Bashir").

A. Darfur and the Prosecutor's Editorial

On July 14, 2008, the Prosecutor sought to obtain an arrest warrant for Sudanese President Al-Bashir for crimes committed in the Darfur region of Sudan from March 2003 to July 2008.[209] The Pre-Trial Chamber granted the arrest warrant with respect to crimes against humanity and war crimes but rejected the Prosecutor's application with respect to genocide.[210]

The Appeals Chamber reversed the Pre-Trial Chamber's decision, holding that the Pre-Trial Chamber had misapplied the correct standard of proof required for an arrest warrant under Article 58(1) of the ICC Statute.[211] Article 58(1) states, *inter alia*, that an arrest warrant will be issued where "[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court."[212] In the view of the Appeals Chamber, the Pre-Trial Chamber had erred in construing "reasonable grounds to believe" in the context of genocide to require that the Prosecutor demonstrate that the only conclusion that could be drawn from the Prosecutor's evidence was that Mr. Al-Bashir had acted with genocidal intent.[213] The Pre-Trial Chamber subsequently issued an arrest warrant against Al-Bashir for genocide as well as crimes against humanity and war crimes.[214]

A few days later, the Prosecutor authored an editorial for the *Guardian* entitled *Now End This Darfur Denial*.[215] The editorial made several controversial claims. For

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205. ICC Statute, *supra* note 1, art. 54(1)(a).

206. *Id.*

207. *Id.* art. 54(1)(c).

208. *Id.* art. 54(1)(b).

209. Prosecutor v. Al-Bashir, Case No. ICC-02/05-01/09-73, Judgment on Appeal Against Decision on Warrant of Arrest, para. 2 (Feb. 3, 2010), http://www.icc-cpi.int/iccdocs/doc/doc817795.pdf.

210. *Id.* para. 3.

211. *Id.* paras. 41–42.

212. ICC Statute, *supra* note 1, art. 58(1)(a).

213. Prosecutor v. Al-Bashir, Judgment on Appeal Against Decision on Warrant of Arrest, *supra* note 209, para. 39.

214. Press Release, Int'l Crim. Ct., Pre-Trial Chamber I Issues a Second Warrant of Arrest Against Omar Al Bashir for Counts of Genocide, ICC-CPI-20100712-PR557 (July 12, 2010), http://www.icc-cpi.int/Menus/Go?id=1f037bee-e5a7-4421-ab24-d050d84cd347&lan=en-GB.

215. Luis Moreno-Ocampo, *Now End This Darfur Denial*, GUARDIAN, July 15, 2010, at 33.

example, it claimed that the Pre-Trial Chamber had found that "Bashir's forces have raped on a mass scale in Darfur" and "deliberately inflict[ed] on the Fur, Masalit and Zaghawa ethnic groups living conditions calculated to bring about their physical destruction."[216] Of course, the Pre-Trial Chamber made no such "finding" whatsoever because the only question before it was whether the Prosecutor had satisfied his burden under Article 58(1) to demonstrate that there were "reasonable grounds" to believe that Mr. Al-Bashir had committed the crimes in question so that an arrest warrant should be issued.[217] This is a far lesser showing than the "beyond reasonable doubt" standard that the Prosecutor would have to satisfy to prove that Al-Bashir actually committed these crimes.[218] As Professor Schabas has suggested, the Prosecutor's editorial was highly misleading inasmuch as some *Guardian* readers might reasonably believe that the Court had found Al-Bashir guilty.[219] Professor Heller has gone so far as to claim that the editorial demonstrated such poor judgment that the ASP should have considered removing the Prosecutor from office.[220]

This was not the first time that a member of the OTP has made controversial public statements concerning a pending case. The Trial Chamber had previously strongly criticized Béatrice Le Fraper du Hellen, the head of the OTP's Jurisdiction, Complementarity and Cooperation Division, for an interview that she had given to an internet website.[221] Ms. Le Fraper du Hellen had claimed that the witnesses who had been identified by intermediaries in the *Lubanga* trial were highly credible,[222] that the defense was "fishing for arguments" in seeking to discern the identity of certain intermediaries,[223] and that Mr. Lubanga would be "going away for a long time."[224] The Trial Chamber criticized the OTP's conduct but did not impose formal sanctions.[225]

In its decision, the Trial Chamber expressed concern that public statements were essentially unregulated by the ICC Statute framework[226] and reminded the OTP that "the public needs to be able to trust the published statements of those involved in [a] case .... It is important that in media statements there is a clear and accurate description as to whether issues that are reported have been decided or are still

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216. *Id.* Under the ICC Statute, if the Prosecutor's claims are proven true, Mr. Al-Bashir would be guilty of genocide. *See* ICC Statute, *supra* note 1, art. 6(c) ("'Genocide' means ... [d]eliberately inflicting on [a] group conditions of life calculated to bring about its physical destruction in whole or in part.").

217. Kevin Jon Heller, *The Remarkable Arrogance of the ICC Prosecutor*, OPINIO JURIS (July 20, 2010, 9:33 AM), http://opiniojuris.org/2010/07/20/the-remarkable-arrogance-of-the-icc-prosecutor.

218. ICC Statute, *supra* note 1, art. 66(3).

219. Heller, *supra* note 217 (quoting William Schabas).

220. *See id.* (detailing the Prosecutor's misleading statements in the editorial and his refusal to comply with the Trial Chamber in the *Lubanga* case and suggesting that "if things don't get better in a hurry, the Assembly of States Parties needs to consider removing him"). *See also* Joshua Rozenberg, *ICC Prosecutors Should Not Be Grandstanding in Their Own Cases*, GUARDIAN, Aug. 18, 2010, *available at* http://www.guardian.co.uk/law/2010/aug/18/luis-moreno-ocampo-omar-bashir ("If Moreno-Ocampo had spent less time grandstanding and more time in court, he may have concluded his first case by now.").

221. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-2433, Decision on the Press Interview with Ms Le Fraper du Hellen, paras. 1, 53 (May 12, 2010), http://www.icc-cpi.int/iccdocs/doc/doc870208.pdf.

222. *Id.* para. 6.

223. *Id.* para. 5.

224. *Id.* para. 8.

225. *Id.* para. 53.

226. *Id.* para. 34.

unresolved."[227] The Prosecutor published his misleading Darfur editorial less than two months after the Trial Chamber's admonishment of Ms. Le Fraper du Hellen.

The OTP obviously should not misrepresent the nature of the Court's work or seek to inflame public opinion against defendants. This would seem to follow from the duty to seek the truth[228] and to "[f]ully respect the rights of persons arising under the [ICC] Statute,"[229] which includes the right of Mr. Al-Bashir and other defendants to "be presumed innocent until proved guilty before the Court."[230] Nevertheless, as noted by the Trial Chamber, the ICC Statute does not regulate public statements by the OTP,[231] and there are no specific prohibitions that prevent the Prosecutor from making inflammatory and potentially misleading remarks about defendants. Moreover, the OTP's actions should be seen in context. In terms of Ms. Le Fraper du Hellen's comments, if one accepts that part of the function of international criminal justice is to educate and create a historical record,[232] then it is understandable that the OTP would want to publicly fight accusations that it was engaged in wrongdoing in the *Lubanga* case by relying on allegedly unreliable intermediaries to assist in the gathering of evidence.[233]

The Darfur editorial too can be somewhat justified because the ICC Statute requires the Prosecutor to "[t]ake appropriate measures to ensure the effective . . . prosecution of crimes,"[234] which includes ensuring that perpetrators of these crimes are brought to justice.[235] Bringing Al-Bashir to justice has proven exceedingly difficult as state parties to the ICC have refused to enforce the Court's arrest warrant.[236] Indeed, the African Union halted all cooperation with the ICC as a result of the ICC's decision to issue an arrest warrant for Mr. Al-Bashir.[237] Consequently, the Prosecutor's strident editorial could be seen as part of an effort of "naming and shaming" other nations to bring Mr. Al-Bashir to justice.[238] This does not excuse

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227. Prosecutor v. Lubanga, Decision on the Press Interview with Ms Le Fraper du Hellen, *supra* note 221, para. 39.

228. ICC Statute, *supra* note 1, art. 54(1)(a).

229. *Id.* art. 54(1)(c).

230. *Id.* art. 66(1).

231. Prosecutor v. Lubanga, Decision on the Press Interview with Ms Le Fraper du Hellen, *supra* note 221, para. 34.

232. *See supra* note 58.

233. *See* Prosecutor v. Lubanga, Decision on the Press Interview with Ms Fraper du Hellen, *supra* note 221, para. 49. Ms. Fraper du Hellen's comment that Mr. Lubanga would be "going away for a long time," *id.* para. 8, is much more problematic inasmuch as it could be seen to imply that Mr. Lubanga would not receive a fair and impartial trial.

234. ICC Statute, *supra* note 1, art. 54(1)(b).

235. Triffterer, *supra* note 75, at 1081.

236. *See, e.g.*, Alan Cowell, *Sudan Leader Travels Despite Warrant*, NY TIMES, Aug. 27, 2010, *available at* http://www.nytimes.com/2010/08/28/world/africa/28sudan.html (describing an example of Kenya disregarding the international warrant); *African Union Refuses to Cooperate with Bashir Arrest Warrant*, AMNESTY INTERNATIONAL (July 6, 2009), http://www.amnesty.org/en/news-and-updates/african-union-refuses-cooperate-bashir-arrest-warrant-20090706 (describing the African Union's refusal to cooperate).

237. *African Union in Rift with Court*, BBC NEWS (July 3, 2009), http://news.bbc.co.uk/2/hi/8133925.stm.

238. "Naming and shaming" is an example of bottom-up human rights advocacy practiced by non-state actors (chiefly non-governmental organizations). *See* David Tolbert & Andrew Solomon, *United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies*, 19 HARV. HUM. RTS. J. 29, 55–57 (2006). It should be noted that "naming and shaming" has not been particularly effective when applied

misleading the public as to the nature of the Court's work, but in light of the lack of guidance offered by the ICC Statute as to what type of public statements, if any, prosecutors may make about pending cases, it is not surprising that the OTP used its discretion to aggressively lobby through the media for Mr. Al-Bashir's capture.

B. *Possible Approaches Concerning Extrajudicial Speech*

Given the criticism that the OTP has faced for the Darfur editorial and the Le Fraper du Hellen interview, the OTP code of conduct should provide guidance as to what type of public comments prosecutors may make. The Draft OTP Code seems to disfavor any public pronouncements by OTP attorneys:

> Prosecutors shall . . . [a]void making public comments outside the courtroom including, inter alia, speaking to the media about the merits of particular cases or the guilt or innocence of certain accused before judgment by the Court, and making any public statements regarding the character, credibility, reputation, or record of an accused.[239]

One possible problem with the proposed rule is that it does not depend on the phase of a given case. If a defendant is at-large, like Mr. Al-Bashir is, it is unrealistic to expect the OTP to "avoid making public comments." Compliance with the rule could be contrary to the Prosecutor's obligation to "[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes."[240] Moreover, the credibility of the entire Court may suffer if the OTP is precluded from responding to misrepresentations about the OTP's work. In this regard, the Draft OTP Code would create an asymmetry because ICC defense attorneys would be able to make public statements concerning pending cases as long as the statements do not bring the Court into disrepute,[241] whereas the Prosecutor would be unable to respond publicly to even baseless accusations and distortions.

In the United States, the Model Rules of Professional Conduct ("Model Rules") suggest a different approach. Model Rule 3.6 forbids lawyers from making "any extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding."[242] Prosecutors specifically are required to "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused" pursuant to Model Rule 3.8.[243] Because these Rules are primarily concerned with prejudice and harm to the defendant, however, prosecutors can publicly convey such

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against Sudan. *See* Anonymous, *Ensuring a Responsibility to Protect: Lessons from Darfur*, 14 No. 2 HUM. RTS. BRIEF 26, 27 (2007) ("The traditional tactic of 'naming and shaming' used by Human Rights Watch, Amnesty International, and the UN . . . among others, has proved to be largely ineffective to persuade Sudan to end its abuses.").

239. Draft OTP Code, *supra* note 8, art. 17(1).

240. ICC Statute, *supra* note 1, art. 54(1)(b).

241. *See* Code for Counsel, *supra* note 22, art. 24(1) (stating that "[c]ounsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute").

242. MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (2006).

243. *Id.* R. 3.8(f).

information as the allegations involved,[244] information that is a matter of public record,[245] and the current status of an investigation.[246] Prosecutors also are permitted to warn of dangers associated with the accused and, if the accused has not been apprehended, provide information necessary to aid in apprehension of that person.[247] The Model Rules permit these types of comments even though "a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused."[248] The rationale is that the "public has a right to know about threats to its safety and measures aimed at assuring security."[249]

Furthermore, under the Model Rules, attorneys are permitted to respond to prejudicial statements made by opposing parties as long as the statements are limited to counteracting adverse publicity on the proceedings.[250] Such statements are permissible because of the recognition that "[w]hen prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding."[251]

Obviously U.S. rules concerning extrajudicial speech by prosecutors and other attorneys may not seem an ideal fit for an international criminal tribunal, particularly one that is a hybrid of common and civil law traditions. Nevertheless, the Model Rules' approach attempts to balance respect for the rights of defendants with prosecutors' interest in effective prosecution and could serve as a useful starting point for any deliberations concerning the OTP's responsibilities when making extrajudicial statements.

To fulfill his duty to "[t]ake appropriate measures to ensure the effective investigation and prosecution of crimes,"[252] the Prosecutor likely will need to publicize crimes that are of "most serious concern to the international community as a whole"[253] so as to obtain cooperation with his investigations and to ensure the appearance of defendants before the Court. Moreover, it would seem counter-productive to prohibit the Prosecutor from responding to allegations that prosecutions are meritless, particularly because of the importance of having the ICC's work perceived as legitimate by societies that have been affected by the crimes that the OTP is prosecuting.[254]

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244. *Id.* R. 3.6(b)(1).

245. *Id.* R. 3.6(b)(2).

246. *See id.* R. 3.6(b)(4) ("[A] lawyer may state the scheduling or result of any step in the litigation . . . .").

247. *See* MODEL RULES OF PROF'L CONDUCT R. 3.6(b)(6) (2006) ("[A] lawyer may state . . . a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest . . . .").

248. *See id.* R. 3.8 cmt. 5 (noting that Model Rule 3.8, which governs prosecutors specifically, does not restrict statements that could be made pursuant to Model Rule 3.6(b), which governs lawyers and publicity generally).

249. *Id.* R. 3.6 cmt. 1.

250. *Id.* R. 3.6(c).

251. *Id.* R. 3.6 cmt. 7.

252. ICC Statute, *supra* note 1, art. 54(1)(b).

253. *Id.* art. 5(1).

254. *See supra* Part I(B); *see also* Turner, *Legal Ethics*, *supra* note 5, at 694 (noting that international criminal trials aspire to promote peace and reconciliation).

One potential concern—acknowledged in the commentary to Model Rule 3.8—is that "a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused."[255] This would be of particular concern for the ICC. Defendants at the ICC are not charged with mere violations of criminal law—they are accused of "crimes of concern to the international community as a whole"[256]—and public statements by the Prosecutor might bring even more condemnation to ICC defendants, who are presumed innocent under the ICC Statute until proven guilty by the Prosecutor.[257] Given the high-profile nature of the Prosecutor's work, his statements are bound to have a lasting effect on the perception of the accused even if the Prosecutor ultimately fails to convict him or her.

Nevertheless, the mere fact that certain types of statements may bring condemnation to ICC defendants would seem to be a poor reason to entirely prohibit the Prosecutor from making any public statements concerning ICC defendants and cases. As a practical matter, the "public condemnation of the accused" may be inevitable when the charges at issue involve crimes such as genocide. Moreover, given that it will ultimately be ICC judges who adjudicate the guilt of ICC defendants, not the public, the risk of prejudice from any public statements made by the Prosecutor also is lessened, although perhaps not entirely eliminated.[258]

Finally, the Prosecutor, like defense counsel, also should avoid making any public statements that would bring the Court into disrepute.[259] The duty to avoid making such statements is especially significant if one accepts that ICC trials should have a "demonstration effect" on societies seeking to further the rule of law.[260] The Prosecutor's misleading claims concerning the Pre-Trial Chamber's findings against Mr. Al-Bashir arguably would have violated such a provision because they tended to suggest that the Court had adjudicated Mr. Al-Bashir's guilt without Mr. Al-Bashir having appeared before the Court.

I propose the following draft rule, which seeks to balance the Prosecutor's duty of impartiality with his need to obtain assistance from the public regarding the investigation and prosecution of crimes:

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255. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 5 (2006).

256. ICC Statute, *supra* note 1, art. 5(1).

257. *Id.* art. 66(1)–(2).

258. *See* Jonathan M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, 1816–17 (1995) (suggesting that prohibitions against extrajudicial speech by attorneys arose out of concerns relating to finding neutral jurors).

259. *See* Code for Counsel, *supra* note 22, art. 24(1) ("Counsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute."). The Prosecutor arguably should have a higher duty because of his role in the search "to establish the truth." ICC Statute, *supra* note 1, art. 54(1). *See also* Triffterer, *supra* note 75, at 1078 ("Article 54 sets the goal as an effort to establish the truth."); ICTY Standards, *supra* note 7, art. 1 ("[T]he duties and responsibilities of the Prosecutor differ from, and are broader than, those of defense counsel."). The Draft OTP Code goes beyond the prohibition in the Code for Counsel as it requires the Prosecutor to "[t]ake *all necessary steps* to ensure that his or her actions do not bring proceedings before the Court into disrepute." Draft OTP Code, *supra* note 8, art. 7(8) (emphasis added).

260. *See* Stromseth, *supra* note 60, at 262 (suggesting that the "demonstration effects" of criminal trials can "build public confidence that justice can be fair").

Draft Conduct Rule Regarding Extrajudicial Statements

(1) The Prosecutor shall be prohibited from making statements that are prejudicial to ongoing proceedings or bring the Court into disrepute.[261]

(2) The Prosecutor also shall avoid making public comments outside of the courtroom including, *inter alia*, speaking to the media about the merits of particular cases or the guilt or innocence of certain accused before judgment by the Court, and making any public statements regarding the character, credibility, reputation, or record of an accused or any witness.[262]

(3) Notwithstanding (2) above, the Prosecutor may provide factual information concerning: (i) the charges facing the accused to the extent that such statements are necessary to inform the public of the nature and extent of the Prosecutor's action[263] and are intended to aid in the investigation of crimes or to encourage compliance with arrest warrants issued by the Pre-Trial Chamber or (ii) the merits of a particular case when provided in response to publicity that tends to undermine the perception of the Office of the Prosecutor if such adverse publicity was not initiated by the Prosecutor and the statement made pursuant to this paragraph is limited to such information as is necessary to mitigate the recent adverse publicity.[264]

Although some segments of the ICC may prefer a presumptive ban on extrajudicial speech, the rule proposed here would have precluded the Prosecutor from misstating the nature of the Pre-Trial Chamber's findings concerning Mr. Al-Bashir's alleged crimes while still allowing him to make public statements that could mitigate misimpressions about the OTP's work and encourage compliance with the Al-Bashir warrant.

CONCLUSION

This Article has sought to argue that legal ethics are of central importance to international criminal law. Although the ICC has adopted codes of conduct for judges and defense counsel, no such code of conduct exists for the OTP. This is regrettable, and some of the OTP's most controversial actions—from its over-reliance on confidentiality agreements, to its refusal to comply with orders from the *Lubanga* Trial Chamber and the Prosecutor's decision to publish an editorial concerning Sudanese President Al-Bashir—can be attributed in part to the absence of an ethical framework for ICC prosecutors.

A code of conduct cannot and should not eliminate prosecutorial discretion. However, the ethical dilemmas discussed in this Article are familiar in domestic

261. Code for Counsel, *supra* note 22, art. 24(1).

262. *Cf. id.* ("Counsel shall take all necessary steps to ensure that his or her actions or those of counsel's assistants or staff are not prejudicial to the ongoing proceedings and do not bring the Court into disrepute.").

263. MODEL RULES OF PROF'L CONDUCT R. 3.8(f) (2006).

264. MODEL RULES OF PROF'L CONDUCT R. 3.6(c) (2006).

contexts, and the OTP should have addressed them in the course of developing an OTP code of conduct prior to the commencement of the ICC's first trials.[265] The current state of affairs, where the Appeals Chamber has been called upon to determine what the Prosecutor's obligations should be, is unsustainable and has brought unfortunate controversy to the Court. Nor has the Appeals Chamber fully resolved the Prosecutor's conflicting duties of (i) investigation and disclosure and (ii) independence and compliance with Chambers. The OTP's public statements remain entirely unregulated.

Although the rules proposed in this Article need not be incorporated directly into an OTP code of conduct, there is strong reason to believe that the OTP requires specific rules that go beyond the abstract standards reflected, for example, in the Draft OTP Code and ICTY Standards for Prosecutors. The diversity of legal backgrounds in the OTP, the high profile nature and permanence of its work, and the belief that prosecutions should serve some educative purpose suggest that very specific rules of conduct are needed to create clear expectations for OTP attorneys that may differ markedly from the expectations in domestic systems. A code of conduct will not eliminate the possibility of the OTP taking controversial actions in the future. Nevertheless, if developed in concert with other organs of the Court, it can help to establish relatively clear norms of conduct and provide some prospective guidance as to how ICC prosecutors should address instances of conflicting duties in the future.

For international criminal law to achieve all of its objectives, prosecutors at international criminal tribunals like the ICC must pay greater attention to the ethical dimensions of their actions. Thus far, by engaging in questionable acts such as refusing to comply with orders and misrepresenting actions taken by the Court, the OTP's actions have undermined the Court's early work. The ICC cannot further the rule of law without demanding that its employees not only advocate respect for the rule of law, but embody it.

265. Professor Whiting has suggested that the disclosure issue was particularly foreseeable. *See* Whiting, *supra* note 112, at 209 ("[O]ne of the most remarkable aspects of this story was its inevitability. The conflict that arose between the Prosecution's right to obtain confidential 'lead' evidence pursuant to Article 54(3)(e) and its responsibility to disclose potentially exculpatory evidence under Article 67(2) is built right into the Statute of the ICC . . . .").

Reforming Egypt's Constitution: Hope for Egyptian Democracy?

JAMES FEUILLE*

Abstract

In this Note, I discuss the recent constitutional reforms passed in Egypt on March 19, 2011, which followed former President Hosni Mubarak's resignation. I attempt to compare the reforms made in Egypt to constitutional reforms made in Benin, Mali, and other post-dictatorial African nations during the 1990s because of similarity in these countries' constitutional structures. All of these countries, including Egypt, had dictatorial presidents in one-party parliamentary systems with socialist underpinnings. I recognize that Egypt's Islamic social foundations will most likely have a dramatic effect on its constitution moving forward and discuss how to minimize those effects. However, I believe that by comparing how democracy has progressed in other post-dictatorial, socialist African nations, we may gain some understanding of how Egypt's democracy should, and hopefully will, develop in the future.

SUMMARY

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* J.D. candidate at The University of Texas School of Law (2012); B.A. in History, The University of Texas at Austin (2009). I would like to thank Professor Inga Markovits for her help and expertise in developing this Note. I would also like to thank my wife for her encouragement these past three years.

INTRODUCTION: A CHANGING EGYPT

Beginning on January 25, 2011, Egyptians began protesting against Hosni Mubarak, the Egyptian president since 1981.[1] After eighteen days of protests, Mubarak stepped down as Egypt's president.[2] The Egyptian people were "fed up with high levels of poverty, corruption and unemployment" and determined that serious constitutional changes needed to occur.[3] After days of skirmishes between anti-and pro-Mubarak protesters, even Mubarak recognized the need for such changes.[4]

Despite Mubarak relinquishing some executive powers to his newly appointed vice-president, discharging his cabinet, and promising constitutional reform in a national address, protesters called for Mubarak's immediate resignation.[5] After the leadership of the National Democratic Party—Egypt's dominant and essentially governing party—stepped down, Mubarak finally ceded control to Egypt's Supreme Council of the Armed Forces (SCAF).[6] The SCAF quickly held a referendum on March 19, 2011, passing nine amendments to the current constitution.[7] Elections for the lower house of Parliament occurred in November and December of 2011, ending with moderate and more conservative Islamist parties winning a majority of the seats.[8] Multi-stage elections for the upper house of Parliament began in January 2012 and are scheduled to end in February.[9] These step-by-step elections are scheduled to conclude with a presidential election scheduled for June 2012.[10]

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1. *Egypt Protests: Key Moments in Unrest*, BBC NEWS (Feb. 11, 2011), http://www.bbc.co.uk/news/world-middle-east-12425375; *Egypt Profile: Timeline*, BBC NEWS (Aug. 3, 2011), http://news.bbc.co.uk/2/hi/middle_east/790978.stm.

2. *Egypt Protests: Key Moments in Unrest*, *supra* note 1.

3. *Id.*; *Morning Edition: Protestors Demand Changes to Egypt's Constitution*, NPR (Feb. 8, 2011), http://www.npr.org/2011/02/08/133583987/Egypts-Constitution.

4. *See Egypt Protests: Key Moments in Unrest*, *supra* note 1 (explaining that Mubarak asked newly appointed Vice-President Omar Suleiman to "open dialogue with all political parties on constitutional reform").

5. *Id.*; Michael Winter, *Mubarak Resigns; Israelis Worried About Peace Treaty*, USA TODAY (Feb. 11, 2011), http://content.usatoday.com/communities/ondeadline/post/2011/02/military-vows-free-election-offers-conditional-end-to-emergency-law/1.

6. Winter, *supra* note 5.

7. *Egypt Approves Constitutional Changes*, AL JAZEERA (Mar. 20, 2011), http://www.aljazeera.com/news/middleeast/2011/03/201132016411997 3176.html.

8. *Runoff Races to Further Shape Makeup of Egyptian Parliament*, CNN (Dec. 4, 2011), http://articles.cnn.com/2011-12-04/middleeast/world_meast_egypt-elections_1_runoff-races-parliament-egyptians.

9. *Egyptians Vote in Upper House Elections*, AL JAZEERA (Jan. 30, 2012), http://www.aljazeera.com/news/middleeast/2012/01/201212954104627 18.html; Ahmed A. Namatalla, *Egypt Parliamentary Elections Schedule Shortened, Ahram Reports*, BLOOMBERG (Jan. 1, 2012), http://www.bloomberg.com/news/2012-01-02/egypt-parliamentary-elections-schedule-shortened-ahram-reports.html.

10. *Runoff Races to Further Shape Makeup of Egyptian Parliament*, *supra* note 8.

This Note discusses the history of the Egyptian constitution, the previous constitutional impediments to democracy, the 2011 amendments, and how effectively those amendments address Egypt's constitutional issues in comparison with how other African nations reformed their constitutions in the 1990s. Specific African nations were chosen because before undergoing reform these countries' had socialist constitutions, had previously been subject to the rule of a dictatorial president in a semi-presidential system, and effectively had single-party political systems.[11] This Note also discusses what can be considered the ultimate limitation on any comparison of Egypt with sub-Saharan Africa: the effect that the Muslim Brotherhood, and Islam, could have on Egypt's constitution moving forward.

After looking to other African nations for how to effectively initiate democracy in a post-dictatorial society, this Note makes a couple of suggestions. Egypt should follow Benin's example by granting to the Supreme Constitutional Court enough authority to protect and enforce its new constitution. Egypt must also follow Malawi's example in creating a system of accountability within the constitution and the government that is able to address and protect civil liberties. Further, Egypt could mitigate the overpowering effect the Muslim Brotherhood may have on any future government by adopting a full parliamentary system, as suggested by one prominent professor, Bruce Ackerman. Lastly, and perhaps most importantly, a comparison with various successful African democracies emphasizes that Egypt, and its people, must be willing to truly commit to whatever results a democracy may lead to—no matter who disagrees with those results.

I. THE HISTORY OF EGYPT'S SOCIALIST CONSTITUTION

A. *Nasser's Constitution*

In 1952, Gamal Abdel Nasser and the Free Officers carried out an almost bloodless coup d'état.[12] This revolution abandoned the 1923 constitution, which had essentially formed a constitutional monarchy.[13] The 1923 constitution had created an elected parliament, known as the "Chamber of Deputies," as well as a cabinet headed by a prime minister.[14] The 1923 constitution extended suffrage to all adult males—with the exception of brief periods when land ownership was required—while citizens enjoyed the freedoms of speech, of press, to form political parties, and

11. *See infra* Section III; *see also Bureau of African Affairs, Background Note: Benin*, U.S. DEP'T OF STATE (July 18, 2011), http://www.state.gov/r/pa/ei/bgn/6761.htm#history ("The last of [a series of coups] brought to power Major Mathieu Kerekou as the head of a regime professing strict Marxist-Leninist principles. The Revolutionary Party of the People of Benin (PRPB) remained in complete power until the beginning of the 1990s."); *Bureau of African Affairs, Background Note: Malawi*, U.S. DEP'T OF STATE (Sept. 28, 2011), http://www.state.gov/r/pa/ei/bgn/7231.htm#history ("Malawi adopted a new constitution and became a one-party state with Dr. Banda as its first president. . . . After fully consolidating his power, Banda was named President for Life of Malawi . . . in 1971. The parliamentary wing of [Banda's party] helped keep Malawi under authoritarian control until the 1990s.").

12. GLENN E. PERRY, THE HISTORY OF EGYPT 89–90 (Frank W. Thackery & John E. Finding eds., 2004); *see also* Selma Botman, *The Liberal Age, 1923–1952*, *in* 2 THE CAMBRIDGE HISTORY OF EGYPT: MODERN EGYPT FROM 1517 TO THE END OF THE TWENTIETH CENTURY 306–07 (M. W. Daly ed., 1998) ("[T]he Free Officers staged a bloodless coup d'état on July 23, 1952 . . . .").

13. PERRY, *supra* note 12, at 76, 89–90.

14. *Id.* at 76.

even, to contest elections.[15] However, two main aspects of the 1923 constitution thwarted democracy in Egypt: intermittent British interference in Egyptian politics and policymaking, and the king's overwhelming power.[16] The king was able to single-handedly disband Parliament, appoint up to two-fifths of the Senate, and veto any of Parliament's bills.[17] Furthermore, King Fu'ad, and later his son, King Faruq, frequently ignored or even abrogated the constitution.[18] By the time Nasser and the Free Officers declared Egypt a republic in 1953,[19] a new constitution was long overdue.

In 1956, Nasser established a new constitution that would remain the underpinnings of the current constitution despite his successor enacting a new constitution in 1971. Nasser's constitution was reminiscent of most socialist constitutions,[20] promising a welfare state that would provide:

> [t]he eradication of all aspects of imperialism; [t]he extinction of feudalism; [t]he eradication of monopolies, and the control of capitalistic influence over the system of Government; [t]he establishment of a strong national army; [t]he establishment of social justice; [and] [t]he establishment of a sound democratic society.[21]

Nasser's constitution strove for the eradication of the "control of capitalistic influence" over the government by providing for a state-run economy[22] and a national welfare system.[23] It also attempted to live up to its promise of establishing "social justice" by guaranteeing freedom of religion,[24] freedoms of press and of speech,[25] freedom of association,[26] and free elections.[27] However, these promises would not be met. From 1956 to 2011, if a "sound democratic society" existed in Egypt, it was unrecognizable.

While Article 47 of Nasser's constitution stated that "Egyptians have the right to set up associations," it qualified that right by saying it was "subject to the provisions prescribed by law."[28] This qualification allowed Nasser to ban all political

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15. *Id.* at 75–76.

16. *Id.* at 76; Botman, *supra* note 12, at 307.

17. PERRY, *supra* note 12, at 76.

18. *Id.*

19. SUSAN MUADDI DARRAJ, HOSNI MUBARAK 40 (2007).

20. *See* Inga Markovits, *Constitution Making After National Catastrophes: Germany in 1949 and 1990*, 49 WM. & MARY L. REV. 1307, 1330 (2008) (discussing that state guarantees "are reminiscent of socialist constitutions, which tended to include long lists of promises supposedly ensured by the specific structures of the socialist state"); Emin S. Toro, *Of Courts and Rights: Constitutionalism in Post-Communist Albania*, 25 N.C.J. INT'L L. & COM. REG. 485, 487 (2000) (explaining that traditional socialist constitutions contain "lengthy lists of fundamental rights").

21. CONSTITUTION OF THE REPUBLIC OF EGYPT, 16 Jan. 1956, pmbl.

22. *Id.*; *see also id.* arts. 7, 9, 12 (stating that the "economy will be planned in accordance with the principles of social justice;" declaring that "[c]apital will be at the service of the national economy;" and establishing a limit on land ownership, in order to "eliminate the emergence of feudalism").

23. *See id.* art. 21 (guaranteeing "State aid in cases of old age, sickness and inability to work").

24. *Id.* art. 43.

25. *Id.* arts. 44–45.

26. *Id.* art. 47.

27. CONSTITUTION OF THE REPUBLIC OF EGYPT, 16 Jan. 1956, art. 61.

28. *Id.* art. 47.

parties.[29] Nasser would spend years oppressing the Muslim Brotherhood, though he could not fully outlaw the Brotherhood because of its status as a religious organization.[30] However, early and often, Nasser used his police powers[31] to imprison Brotherhood members and, for all intents and purposes, prohibited any Brotherhood activities that could be seen as political.[32]

Nasser also ignored his promise to establish a democratic society in other ways. While Nasser's constitution provided six-year terms for the president,[33] it did not provide term limits, essentially permitting a presidency for life. Furthermore, while Nasser was "re-elected" several times during his reign and was indeed extremely popular, he was unopposed in each election, and the National Union, which replaced political parties, prevented any potential candidates from running.[34] After Nasser's death from a heart attack in 1971, Anwar Sadat enacted a new constitution and reversed many of Nasser's policies, but did not reverse Egypt's socialist and dictatorial underpinnings.[35]

B. Sadat's Constitution

While Sadat purported to enact a new constitution in 1971, he used Nasser's constitution as a foundation. Sadat's constitution, on its face, held on to many of the socialist constitutional tendencies. The preamble, like Nasser's, begins with general promises of justice, social progress, freedom from exploitation, national development, and "freedom and humanity."[36]

Sadat tempered the quasi-socialist language in the 1971 constitution. For example, Article 3 recognized that the sovereignty and authority of the government came from the people,[37] instead of the state (which is more typical of socialist constitutions and was the case in Nasser's constitution).[38] Additionally, the 1971 constitution alluded to Sadat's desire to liberalize the economy by removing Nasser's declaration that the "economy will be planned in accordance with the principles of social justice which aim at promoting national productivity and raising the standard of living."[39] Instead, the 1971 constitution simply stated that the economy would be "based on the development of economic activity, social justice, guarantee of different

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29. *See* PERRY, *supra* note 12, at 92 (describing the events that led Nasser to ban political parties).

30. *Id.*

31. *See* CONSTITUTION OF THE REPUBLIC OF EGYPT, 16 Jan. 1956, art. 138 ("The President of the Republic issues police regulations and all regulations required for the execution of laws.").

32. *See* PERRY, *supra* note 12, at 92–93 (describing that after one member's "barely failed" attempt to assassinate Nasser during a speech in October 1954, police imprisoned thousands of members and executed six); JAMES JANKOWSKI, NASSER'S EGYPT, ARAB NATIONALISM, AND THE UNITED ARAB REPUBLIC 21 (2002) (stating that a ban on political parties was extended to the Muslim Brotherhood in January 1954).

33. CONSTITUTION OF THE REPUBLIC OF EGYPT, 16 Jan. 1956, art. 122.

34. *See* DEREK HOPWOOD, EGYPT 1945–90: POLITICS AND SOCIETY 88–89 (3rd ed. 1991) (detailing Nasser's popularity and attempts to exclude other groups from political power).

35. PERRY, *supra* note 12, at 109–13.

36. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, proclamation.

37. *Id.* art. 3.

38. CONSTITUTION OF THE REPUBLIC OF EGYPT, 16 Jan. 1956, art. 2.

39. *Id.* art. 7.

forms of property and the preservation of worker's rights."[40] Admittedly, Article 3 of the 1971 constitution is not the most capitalistic statement, but it is still a definite sign of liberalization when compared with Nasser's complete control over the economy.[41] Sadat implemented capitalist policies in an effort to save Egypt's sinking economy.[42]

Sadat's constitution even opened the door for a more open democracy by explicitly declaring that "[t]he political system of the Arab Republic of Egypt is a multiparty system."[43] However, Sadat again limited that statement with the qualification that "[p]olitical parties are regulated by law."[44] This qualification essentially allowed Sadat to control who could form a party and what parties were allowed to take part in elections, and to ensure that political opposition would remain minimal and easily brushed aside, if it existed at all.[45] These reforms did nothing to change the fact that the National Democratic Party (NDP), Sadat's party, would continue to dominate parliamentary elections, and Sadat would continue to run unopposed in presidential elections, since "[v]arious kinds of . . . vote rigging guaranteed that."[46] However, Sadat's 1971 constitution did have a limit on presidential power—a two-term re-election limit.[47]

Beginning in 1977, after Sadat's reforms had failed to provide economic growth for the poorest Egyptians, his popularity began to wane.[48] As his popularity declined, Sadat became increasingly dictatorial. Sadat began to change the constitution to his liking through Article 152 of the 1971 constitution, which allowed Sadat to propose amendments through referendum.[49] Vote rigging continued and referenda typically resulted in 99.96 percent "yes" votes.[50] Sadat's first target was the two-term limit originally set forth in the 1971 constitution, abolishing any sort of term limits whatsoever.[51] He went on to use his powers under Article 141 of the constitution, which permitted him to appoint or remove the Prime Minister without any approval from Parliament,[52] leading him to assume the office himself.[53] Lastly, Sadat began imprisoning any and all dissidents, from Islamists to Coptic Christians, which was a

40. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 4.

41. *See, e.g.*, PERRY, *supra* note 12, at 100–01 (describing Nasser's Land Reform Act of 1952, his nationalization of British and French property in 1956, and the nationalization of Bank Misr in 1960, which became the National Bank of Egypt).

42. *Id.* at 123–24.

43. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 5.

44. *Id.*

45. *See* PERRY, *supra* note 12, at 124–25 (describing Sadat's various means of suppressing opposing political factions); ALAA AL-DIN ARAFAT, THE MUBARAK LEADERSHIP AND FUTURE OF DEMOCRACY IN EGYPT 18–19 (2009) (describing how the political party system in Egypt was used "to contain and moderate dissent" rather than to create an open, democratic system).

46. PERRY, *supra* note 12, at 125.

47. *Id.* at 126.

48. *Id.* at 125–26.

49. *Id.* at 126; CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 152.

50. PERRY, *supra* note 12, at 126.

51. *Id.*

52. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 141.

53. PERRY, *supra* note 12, at 126.

key factor leading to his assassination in 1981.[54] After Sadat's assassination, then-Vice-President Mubarak ascended to the presidency.[55]

II. EGYPT'S RECENT AMENDMENTS

First looked upon as a mere placeholder,[56] Mubarak would later take advantage of the fact that term limits were removed from the constitution under Sadat and eventually hold on to Egypt's presidency for three decades.[57] Mubarak's presidency was, for a short while, slightly more liberal than Sadat's presidency.[58] Political parties were tolerated to an extent.[59] Even Muslim Brotherhood members began running for Parliament as independents in 1984,[60] and free expression was growing in the form of opposition publications.[61] Nevertheless, the government would routinely censor and confiscate these books or articles.[62] Licenses to publish were extremely difficult to obtain.[63] While a moderate Islamist party had been allowed to form, the Muslim Brotherhood continued to be oppressed, and many members were imprisoned.[64]

Most importantly, Mubarak's emergency powers under Article 148 were continuously renewed during his thirty years as president by the NDP-dominated parliament.[65] Mubarak used Sadat's Article 152 referendum power together with rigged elections to amend the constitution in his favor.[66] Because of Article 148's emergency powers and Article 152's referendum power, Mubarak added Article 179 to the constitution.[67] Article 179 (the Terror Article) provided:

> The State shall seek to safeguard public security and discipline to counter dangers of terror. The law shall, under the supervision of the Judiciary, regulate special provisions related to evidence and investigation procedures required to counter those dangers. The procedure stipulated in paragraph 1 of Articles 41 and 44 and paragraph 2 of Article 45 of the Constitution shall in no way preclude such counter-terror action.

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54. *Id.* at 126–27.

55. *Id.* at 129.

56. *Id.*

57. *See* Marwa Awad, *Egypt's Constitution Committee Meets Army Saturday*, REUTERS (Feb. 24, 2011), http://af.reuters.com/article/topNews/idAFJOE71N0EQ20110224 (referring to "legal mechanisms which kept Hosni Mubarak and his ruling party in power for 30 years").

58. PERRY, *supra* note 12, at 132.

59. *Id.*

60. *Id.*

61. *Id.* at 134.

62. *Id.*

63. PERRY, *supra* note 12, at 134.

64. *Id.* at 132–35.

65. *Id.* at 134–35; *see* CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 148 ("The President of the Republic shall proclaim a state of emergency in the manner prescribed by the law.").

66. *See* CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 152 ("The President of the Republic may call a referendum of the people on important matters affecting the supreme interest of the country.").

67. *Id.* arts. 148, 152, 179.

The President may refer any terror crime to any judicial body stipulated in the Constitution or the law.[68]

Mubarak's emergency powers allowed the police to detain citizens for up to a month—indefinitely renewable—without any official charges.[69] Mubarak was able to use the Terror Article to imprison dissidents in the media, in other political parties, and in Islamist organizations.[70] Furthermore, the emergency powers make a gathering of five or more illegal, thus prohibiting freedom of assembly.[71]

Another impediment to democracy was the inability of the Supreme Constitutional Court (SCC) to have any impact on lawmaking or constitutional growth. The 1971 constitution created the SCC as an independent body[72] and granted some protections for that independence by giving its judges irrevocable status as members of the SCC.[73] The SCC was even granted authority to interpret the constitution.[74] However, SCC judges were appointed by the president.[75] In 2001, Mubarak appointed a man closely associated with his regime, Fathi Naguib, to be chief justice.[76] Naguib then increased the number of judges by fifty percent by appointing five new justices.[77] The SCC, never holding much power, became even more of a rubber stamp for Mubarak.[78]

While Mubarak's Egypt was much more liberal than Nasser's and Sadat's in some ways, presidential power to silence dissidents had not decreased in the slightest since Nasser. Indeed, during Mubarak's reign, his dictatorship strengthened as he was able to slowly amend the constitution in order to give the appearance of

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68. *Id.* art. 179 (emphasis added).

69. *See* Sadiq Reza, *Endless Emergency: The Case of Egypt*, 10 NEW CRIM. L. REV. 532, 537–38 (2007) (discussing the emergency powers, renewable monthly ad infinitum, which grant the executive the right to "arrest suspects or [persons who are] dangerous to public security and order [and] detain them" without regard to the "provisions of the Criminal Procedure Code," which limits post-arrest detentions) (alteration in original) (quoting Law No. 162 of 1958, (Law Concerning the State of Emergency), *Qanun bi Sha'n Halah al-Tawari'*, 28 Sept. 1958, art. 3).

70. *Id.* at 549–50 ("Workers, political activists, counterrevolutionaries, Communists, homosexuals—all these and more have been targeted by emergency and military powers in modern Egypt.").

71. Mona El-Ghobashy, *Unsettling the Authorities: Constitutional Reform in Egypt*, 226 MIDDLE E. REP. 28, Spring 2003, at 31–32.

72. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 174.

73. *Id.* art. 177.

74. Law No. 48 of 1979 (Law on the Supreme Constitutional Court, as amended by Law No. 168 of 1998), Al-Jarida Al-Rasmiyya, 9 June 1979, art. 25; *see Supreme Constitutional Court*, EGYPT STATE INFO. SERV., http://www.sis.gov.eg/En/Story.aspx?sid=472 (last visited Nov. 11, 2011) (noting that "[t]he SCC is alone responsible for censoring the constitutionality of the laws" and that Article 25 of Law No. 48 of 1979 lists out the Court's responsibilities, including "[t]o censor the constitutionality of the laws and regulations").

75. *See* Tamir Moustafa, *Law Versus the State: The Judicialization of Politics in Egypt*, 28 LAW & SOC. INQUIRY 883, 893–94 (2003) ("New justices on the court were appointed by the president from two candidates, one nominated by the general assembly of the court and the other by the chief justice, but in practice the nominations of the chief justice and the general assembly of the SCC were always the same.").

76. *Id.* at 924.

77. *Id.*

78. *See id.* at 925 ("Over and above whatever substantive effect Naguib has on SCC rulings over the next several years, Mubarak's willingness to assert his power to appoint the chief justice after more than 20 years of ratifying the SCC's own internal selection process is yet another indication that the regime is increasingly intent on aborting its experiment with an independent constitutional court.").

liberalization, while ensuring that his rule could never be challenged through the political system. Mubarak was able to hold on to the presidency for longer than any of his predecessors.[79] Perhaps telling of Mubarak's reign is that over the last twenty years, the time period in which he turned his back on more liberal policies in favor of dictatorial ones, the GDP per capita average annual growth rate was 2.6 percent, compared to 4.1 percent from 1970 to 1990, his liberal period.[80] Mubarak's oppression prompted the uprisings of February 2011, leading to the Supreme Council of the Armed Forces taking control of the country, gathering a constitutional committee, and proposing a total of nine amendments to the country for referendum.[81]

All nine amendments were passed—77 percent of voters[82] voted "yes" to the changes—in possibly the first legitimate referendum since 1956,[83] including the most important amendment, which requires Parliament to write a new constitution.[84] In the meantime, eight other amendments were approved, which will hopefully ensure a more democratic Egypt until a new constitution can be introduced. I discuss these amendments in three subsections below.

A. Disabling Dictatorships

The amendments made to Articles 77 and 139 of the 1971 constitution focus on closing the constitutional hole, so to speak, that allowed Egypt's dictatorships to

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79. *See Egypt Profile: Timeline*, *supra* note 1 (Nasser held the presidency from 1956–70, Saddat from 1970–81, and Mubarak from 1981–2011).

80. *Egypt: Statistics, The Rate of Progress*, UNICEF (Mar. 2, 2010), http://www.unicef.org/infobycountry/egypt_statistics.html#82.

81. *Egypt Approves Constitutional Changes*, AL JAZEERA (Mar. 20, 2011), http://www.aljazeera.com/news/middleeast/2011/03/201132016411997 3176.html.

82. Maggie Michael, *Egypt: Constitution Changes Pass in Referendum*, USA TODAY (Mar. 20, 2011), http://www.usatoday.com/news/topstories/2011-03-19-3552014482_x.htm. However, only 18 million out of the 45 million eligible voters participated in the referendum, with approximately 14 million voting "Yes" to the changes, and approximately 4 million voting "No." The 41 percent turnout, while not fantastic, is impressive, considering many Egyptians had never voted before. *Id.*

83. *Egypt Politics: Keeping the Constitution*, ECONOMIST INTELLIGENCE UNIT (Mar. 21, 2011), http://viewswire.eiu.com/index.asp?layout=VWArticleVW3&article_id=1987898383. Some have called the legitimacy of the referendum into question because of the influence the Army maintained over the process. The Military Council called for a media blackout about the referendum in order to avoid "suggestions or analysis that would affect public opinion positively or negatively with respect to the public referendum on constitutional amendments." *Egypt Military Calls for Media Silence on Referendum Beginning Friday*, ALMASRY ALYOUM (Mar. 17, 2011), http://www.almasryalyoum.com/en/node/360922. Moreover, a poll taken before the referendum actually suggested the amendments would fail, with 57 percent opposing the amendments. *Majority of Egyptians Against Constitutional Amendments, Says Poll*, ALMASRY ALYOUM (Mar. 11, 2011), http://www.almasryalyoum.com/en/node/348851. I have no knowledge as to how the poll was conducted or the accuracy of it.

84. *Constitutional Amendments*, THE EGYPTIAN SUPREME JUDICIAL COMMISSION, art. 189, http://www.referendum.eg/constitutional-amendments/2011-03-11-22-19-08.html (text of the original in Arabic); *Egypt's Amendments: Full Text*, BIKYA MASR (Mar. 18, 2011), http://bikyamasr.com/30772/egypts-amendments-full-text (unofficial English translation) [hereinafter Referendum Amendments]; *see also* EGYPT STATE INFO. SERV., THE 2011 REFERENDUM TO AMEND THE CONSTITUTION, *available at* http://www.sis.gov.eg/VR/referendum.pdf (discussing the amendment to Article 189 to require the promulgation of a new constitution).

perpetuate. Previously, Article 77 limited the presidential term length to six years.[85] However, it conveniently left out any limitation on the amount of terms one president could serve. The amendment to Article 77 institutes a two-term limit for the presidency.[86] This was one of the easier and most important changes made to halt the persistent string of dictators in Egypt.

Article 139 of the 1971 constitution gave the power of appointing a vice-president—and removing the vice-president—to the president.[87] However, it was an optional power, which led to Mubarak waiting to appoint a vice-president until only days before his removal from office.[88] In the past, the vice-president did not have much power in Egyptian politics or much of an ability to check presidential action and authority.[89] However, the amendment to Article 139 now requires the president to appoint a vice-president within sixty days of taking power.[90] Perhaps this will put more of a focus on using the office of vice-president to curb dictatorial action.

B. Facilitating Free Elections

The amendments passed for Articles 75, 76, 88, and 93 were passed in an effort to remove the roadblocks to free elections. The original Article 76 discusses the requirements for a presidential applicant to be accepted as a candidate.[91] It required that an applicant have support from 250 members of the People's Assembly, which has 454 total members.[92] This requirement had essentially guaranteed that Nasser, Sadat, and, finally, Mubarak would not face opponents in any of their presidential elections.[93] Furthermore, the original Article 76 formed the Presidential Elections Committee and charged it with every aspect of the elections: "declar[ing] the initiation of candidature," "supervis[ing] balloting and vote-counting procedures," and even adjudicating all challenges to election results.[94] Unsurprisingly, Mubarak appointees dominated this committee.[95]

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85. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 77.

86. Referendum Amendments, *supra* note 84, art. 77.

87. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 139.

88. *Egypt Protests: Key Moments in Unrest*, *supra* note 1.

89. *See Defiant Mubarak Steps Back, But Not Down*, NPR (Feb. 10, 2011), http://www.npr.org/2011/02/10/133646320/spreading-labor-strikes-jolt-protests-in-egypt (detailing that while Mubarak transferred powers to Omar Suleiman in naming him vice-president, Suleiman is "prevented by the constitution from making recommendations to amend the document, dissolving parliament and firing the Cabinet"); *see also Mubarak Refuses to Step Down, Vows to Pass Powers to Egypt's Vice President*, HUFFINGTON POST (Feb. 10, 2011), http://www.huffingtonpost.com/2011/02/10/mubarak-speech-egypt-vice-president_n_821568.html (noting that the president can transfer powers but such a transfer "does not mean his resignation," and furthermore the vice-president "cannot request constitutional amendments or dissolve parliament").

90. Referendum Amendments, *supra* note 84, art. 139.

91. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 76.

92. *Id.*

93. *See, e.g.*, PERRY, *supra* note 12, at 104, 134 (stating that Mubarak never faced an oppositional candidate since the NDP-dominated People's Assembly "recurrently nominated" Mubarak before each six-year term ended).

94. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 76.

95. Tamir Moustafa, *Amending the Egyptian Constitution: 6 Critical Articles That Test the Military's*

The amendment to Article 76 offers three possibilities for a candidate to be eligible to run for president: (1) the candidate can be supported by thirty members of the People's Assembly or the Shura Council (the upper house); (2) the candidate can gather 30,000 signatures of support from fifteen separate Governorates of Egypt; or (3) the candidate can be a member of a party that holds at least one seat in Parliament.[96] This change likely will provide greater participation in presidential elections, ensuring greater trust in the elections themselves because presidents will no longer be able to run for reelection unopposed for three decades.

The original Article 88 provided the general rules for all elections.[97] It provided that election committees shall be formed from the judiciary in order to supervise balloting and vote counting.[98] However, in the past, because of the usual provision that the judicial committee must act in "accordance with the rules and procedures stipulated by the law,"[99] Article 88 did not effectively guarantee legitimate election results. This essentially guaranteed that there was no oversight of elections because the People's Assembly, with influence from the president, was able to modify the rules and procedures the judicial committee had to follow and thus manufacture election results.[100] The amendment to Article 88 gives greater authority to the judiciary to oversee elections and the elections committee, giving the court the ability to check the Committee's results and ensure that the elections are held in accordance with the constitution.[101]

Formerly, under Article 93, the People's Assembly had the power to determine the validity of a member's election.[102] This allowed the NDP-dominated Assembly to recognize and validate the election of some candidates, while invalidating the election of small-party candidates, independents, Islamists, and, most importantly, Mubarak's critics.[103] The amendment to Article 93 transfers that power to the SCC.[104] This will likely allow a neutral, politically isolated body to make legitimate decisions as to a parliamentary member's election. This further ensures free elections by encouraging independents and small-party candidates to run for election, knowing that, should they win, their election will not be overturned by a biased decision-maker.

Commitment to Democracy, HUFFINGTON POST (Feb. 25, 2011), http://www.huffingtonpost.com/tamir-moustafa/egypt-constitution_b_828479.html.

96. Referendum Amendments, *supra* note 84, art. 76.

97. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 88.

98. *Id.*

99. *Id.*

100. *See id.* (Article 88 of the 1971 constitution states that the law will stipulate procedures for supervising elections. However, the People's Assembly would be able join with the NDP-dominated Shura Council to change the law and, therefore, potentially undermine the legitimacy of elections.).

101. Referendum Amendments, *supra* note 84, art. 88; THE 2011 REFERENDUM TO AMEND THE CONSTITUTION, *supra* note 84, art. 88.

102. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 93.

103. *See id.* (Article 93 of the 1971 constitution states that the People's Assembly is the only authority capable of determining the validity of its members. Therefore, a People's Assembly controlled by the NDP could invalidate the elections of its opposition.).

104. Referendum Amendments, *supra* note 84, art. 93.

C. *Ending Oppression*

Perhaps the most distressing aspect of the 1971 constitution was the president's constitutional authority to oppress the Egyptian people. Article 148 granted the president the ability to declare a state of emergency, which, as discussed above, allowed the president to detain individuals without cause, among other civil rights violations.[105] According to Article 148, a state of emergency was renewable by a majority vote of the People's Assembly.[106] The People's Assembly voted to renew emergency powers for thirty straight years.[107] With the People's Assembly under the president's control and influence, voting to extend the state of emergency was never a suspenseful process.[108]

The amendment to Article 148 eliminates the People's Assembly's power over this decision, and thus eliminates much of the possible influence a president may have.[109] The amended Article 148 requires that any extension of emergency powers must be voted on by a public referendum.[110] This transfer of power, from the NDP-dominated and president-friendly People's Assembly to the actual people of Egypt should ensure that emergency powers will only be granted in a real state of emergency, and that the president will no longer have the ability to detain citizens indefinitely.

Presidential power under Article 148 was truly at its worst when coupled with the power granted to the president under Article 179. Article 179 effectively allowed the president to transfer detainees under Article 148 to a military court for any reason.[111] Article 179 also stated that Articles 41, 44, and 45 of the 1971 constitution—protecting civil liberties, such as freedom from searches without warrants—"shall in no way preclude such counter-terror action" under Article 179.[112] However, in perhaps the most outward showing of commitment to future democracy, the Supreme Council of the Armed Forces proposed the complete removal of Article 179[113]—the article that granted almost unbridled authority to oppress the people of Egypt. The passage of this is indeed a boon for democracy in Egypt, but hopefully it is just the beginning of democratic reforms.

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105. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 148; *see also* Reza, *supra* note 69, at 537–38 (discussing Mubarak's use of the police power to detain people indefinitely).

106. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 148.

107. Reza, *supra* note 69, at 536–37.

108. *Id.*

109. *See* Referendum Amendments, *supra* note 84, art. 148 (stating that renewal of the state of emergency would require a popular referendum, thus minimizing the president's influence over renewal).

110. *Id.*

111. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 179; *Guide to Egypt's Transition: Overview of Egypt's Constitutional Referendum*, CARNEGIE ENDOWMENT FOR INT'L PEACE, http://egyptelections.carnegieendowment.org/2011/03/16/overview-of-egypt's-constitutional-referendum (last visited Dec. 23, 2011).

112. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 179.

113. Referendum Amendments, *supra* note 84, art. 179; Nathan Brown & Michele Dunne, *Egypt's Draft Constitutional Amendments Answer Some Questions and Raise Others*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Mar. 1, 2011), http://carnegieendowment.org/2011/03/01/egypt-s-draft-constitutional-amendments-answer-some-questions-and-raise-others/fr.

III. A COMPARISON WITH OTHER REFORMED AFRICAN CONSTITUTIONS

In order to determine if this revolution and its reformation of the Egyptian constitution will be successful in providing democracy to a previously authoritarian country, I compare these changes with the most critical changes made in other African constitutions that had similar constitutional DNA: socialist tendencies, dictators, and one-party systems.

A. Benin

Benin gained independence from France in 1960.[114] For the next twelve years, several military factions wrestled for power.[115] In 1972, General Mathieu Kerekou seized control over the country and began implementing socialist policies and nationalizing the economy.[116] In 1977, Kerekou introduced the Fundamental Law of the People's Republic of Benin as a constitution.[117] The Fundamental Law established a one-party system under the control of the Military Council of the Revolution, which was led and dominated by Kerekou.[118] Kerekou became a powerful dictator over the next thirteen years, but was unable to build and sustain Benin's economy, leading to protests calling for a greater liberalization of the economy and of politics.[119]

Surprisingly and dissimilarly to Mubarak, Kerekou answered the calls for liberalization on his own and declared a period of democratization.[120] In 1990, a national conference appointed a constitutional commission to draft a new constitution.[121] A national referendum voted in favor of its enactment.[122] First and foremost, the new constitution contained the most obvious and essential article to combat dictatorship: term limits for the president.[123] During the first multiparty elections in Benin, Kerekou was defeated by Nicéphore Soglo in 1991,[124] with 64 percent of the population participating in the second round of presidential elections.[125] Kerekou would indeed cede the presidency to Soglo,[126] a major victory

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114. THE BRITANNICA GUIDE TO AFRICA: THE HISTORY OF WESTERN AFRICA 84 (Amy McKenna ed., 2011) [hereinafter THE HISTORY OF WESTERN AFRICA].

115. *Id.*

116. *See id.* (stating that Kerekou pursued a policy "based on nationalization and state planning of the economy").

117. Arnold Hughes, *The Appeal of Marxism to Africans*, *in* MARXISM'S RETREAT FROM AFRICA 4, 11 (Arnold Hughes ed., 1992); JENNIFER C. SEELY, THE LEGACIES OF TRANSITION GOVERNMENTS IN AFRICA: THE CASES OF BENIN AND TOGO 32 (2009) ("In 1977, the Marxist constitution, or 'Basic Law,' came into force.").

118. VICTOR T. LE VINE, POLITICS IN FRANCOPHONE AFRICA 146 (2004).

119. *See id.* at 145–46 (stating that Kerekou's policies failed to "revitalize the economy" and that Kerekou faced "progressive alienation of all of the constituencies that had initially supported" him).

120. THE HISTORY OF WESTERN AFRICA, *supra* note 114, at 84.

121. SUSANNA D. WING, CONSTRUCTING DEMOCRACY IN TRANSITIONING SOCIETIES OF AFRICA: CONSTITUTIONALISM AND DELIBERATION IN MALI 41 (2008).

122. *Id.*

123. CONSTITUTION OF THE REPUBLIC OF BENIN, 11 Dec. 1990, art. 42.

124. THE HISTORY OF WESTERN AFRICA, *supra* note 114, at 84.

125. WING, *supra* note 121, at 42. First-round participation rates, however, are not available. *Id.*

for the new constitution in and of itself. Another victory came in 2006, when Kerekou and Soglo abstained from campaigning for the presidency because they would be disqualified by the constitution's term limits and age limits.[127]

The 1991 constitution also guaranteed a multiple-party system,[128] free speech and press rights,[129] and, most importantly, granted new and vast powers of oversight to the Constitutional Court of Benin (CCB).[130] The 1991 constitution declares that the CCB is the highest authority on matters of interpreting and judging constitutional law.[131] Further, the 1991 constitution requires the CCB to rule on law or acts that may violate human rights or civil liberties.[132] Perhaps most importantly, the constitution states: "A provision declared unconstitutional may not be promulgated or enforced. The decision of the Constitutional Court shall not be subject to any appeal. They shall be imperative for public authorities and for all civil, military, and jurisdictional authorities."[133] This article expressly states that the president, the parliament, or any other authority must abide by the CCB's rulings on the constitutionality of a matter.

The most important questions to ask of a constitutional court are: Is this court truly independent and does this court have the authority to enact decisions that will be abided by? In the case of Benin, the answer is yes. In *President of the Supreme Court v. President of the Republic*, the CCB's authority was tested when the president attempted to remove the president of the CCB before his term was over.[134] The CCB ruled this action "was against the law," and the president adhered to the court's ruling.[135] If Egypt is to successfully move forward in democracy, it must follow Benin's example and establish an independent court, nominated by the president but approved by the legislature, that has power to check illegitimate and illegal actions by both the president and the legislature.

The amendment to Article 88 of Egypt's constitution does in fact give greater authority to the judiciary in oversight of elections.[136] This is a step in the right direction. However, as Egypt's politicians continue to reform the constitution or write a new one altogether, they need to go further. Egypt's Supreme Constitutional

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126. THE HISTORY OF WESTERN AFRICA, *supra* note 114, at 84.

127. U.N. Office for the Coordination of Humanitarian Affairs, *Benin: Kerekou Says Will Retire Next Year, Will Not Change Constitution to Stay in Power*, IRIN NEWS (July 12, 2005), http://www.irinnews.org/Report.aspx?ReportId=55408.

128. *See* CONSTITUTION OF THE REPUBLIC OF BENIN 11 Dec. 1990, art. 5 (providing that political parties "shall be formed and shall freely exercise their activities"); *cf.* H. Kwasi Prempeh, *Africa's "Constitutionalism Revival": False Start or New Dawn?*, 5 INT'L J. CONST. L. 469, 469 (2007) ("[T]he National Conferences . . . abolished the one-party system . . . and authorized the drafting of a new constitution . . . .").

129. CONSTITUTION OF THE REPUBLIC OF BENIN 11 Dec. 1990, arts. 23–24.

130. *See generally id.* arts. 114–24 (establishing relatively broad-based powers of the constitutional court).

131. *Id.* art. 114 ("The Constitutional Court shall be the highest jurisdiction of the State in constitutional matters. It shall be the judge of the constitutionality of the law and it shall guarantee the fundamental human rights and the public liberties. It shall be the regulatory body for the functioning of institutions and for the activity of public authorities.").

132. *Id.* art. 114.

133. *Id.* art. 124.

134. WING, *supra* note 121, at 43.

135. *Id.*

136. THE 2011 REFERENDUM TO AMEND THE CONSTITUTION, *supra* note 84, art. 88.

Court has been willing to be autonomous in the past, but it needs to be granted the authority to truly be independent and be a court that protects the rights of the Egyptian people, protects the constitution, and has authority to stand up to a president or parliament that is acting unconstitutionally. For Egypt to progress in democracy, it must follow Benin's example. The reforms made to Benin's Constitutional Court have been hailed as essential for human rights and for Benin's transformation into a truly democratic country.[137]

After two decades of free elections, an autonomous and authoritative constitutional court, truly protected liberties, and an improving multi-party system, Benin is now one of the freest nations in Africa. It has a Freedom House ranking of "Free" and individual rankings of two for both civil rights and political rights protection.[138] Additionally, Freedom House bestows upon Benin the title of an "electoral democracy,"[139] which means the state meets these criteria:

> (1) A competitive, multiparty political system;
> (2) Universal adult suffrage for all citizens (with exceptions for restrictions that states may legitimately place on citizens as sanctions for criminal offenses);
> (3) Regularly contested elections conducted in conditions of ballot secrecy, reasonable ballot security, and in the absence of massive voter fraud, and that yield results that are representative of the public will;
> (4) Significant public access of major political parties to the electorate through the media and through generally open political campaigning.[140]

Obviously, no ranking system is perfect. However, that Benin's democracy has progressed so dramatically in only two decades is praiseworthy. Furthermore, as Benin moved towards a more democratic society and a capitalistic economic system, its GDP per capita average annual growth rate from 1990 to 2009 was 1.2 percent.[141] While perhaps not remarkable at first glance, when that number is compared with

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137. *See* Anna Rotman, *Benin's Constitutional Court: An Institutional Model for Guaranteeing Human Rights*, 17 HARV. HUM. RTS. J. 281, 281 (2004) (stating that "[t]he role of the Beninese Constitutional Court in protecting human rights is a 'landmark feature' of Benin's transition to democracy").

138. COUNTRY REPORT: BENIN, FREEDOM HOUSE (2010). The rating range is from one (Most Free) to seven (Not Free). A rating of two in Political Rights is described by Freedom House as: "Countries and territories with a rating of 2 have slightly weaker political rights than those with a rating of 1 because of such factors as some political corruption, limits on the functioning of political parties and opposition groups, and foreign or military influence on politics." A rating of two in Civil Liberties is described as: "Countries and territories with a rating of 2 have slightly weaker civil liberties than those with a rating of 1 because of such factors as some limits on media independence, restrictions on trade union activities, and discrimination against minority groups and women." Furthermore, "[e]ach pair of political rights and civil liberties ratings is averaged to determine an overall status of 'Free,' 'Partly Free,' or 'Not Free.'" *Freedom in the World: Methodology*, FREEDOM HOUSE, http://www.freedomhouse.org/report/freedom-world-2012/methodology.

139. COUNTRY REPORT: BENIN, *supra* note 138.

140. *Freedom in the World: Methodology*, *supra* note 138.

141. *Benin: Statistics, The Rate of Progress*, UNICEF (Mar. 2, 2010), http://www.unicef.org/infobycountry/benin_statistics.html#82.

the 0.3 percent growth rate from 1970 to 1990,[142] it shows that Benin's transition to democracy has also laid the foundation for growth in its economy.

Yet, in Benin, corruption at the local and regional level is still widespread, women still suffer societal discrimination, and journalists can still face criminal charges for libel.[143] The Benin government works to curb corruption through increased corruption trials and a government agency called The Watchdog to Combat Corruption.[144] Women have gradually taken a larger role in politics, with nine women in the eighty-three—member National Assembly, four women in the thirty-member cabinet, and two women in the seven-justice Constitutional Court.[145] Furthermore, judges continue to receive libel cases against journalists but "generally refrain from prosecuting them."[146] Egypt must learn from the lessons of Benin and be prepared to face similar problems that occur in a young democracy by enacting similar measures to fight corruption, end sex discrimination, and promote free speech.

Any comparison of Egypt and Benin is incomplete without recognizing the difference in religious makeup of the two countries. Egypt is predominantly Muslim.[147] Benin, according to the 2002 census, is 27 percent Roman Catholic, 24 percent Muslim, and 17 percent practitioners of Voodoo.[148] Benin's government requires that all religious groups register with the Ministry of the Interior, but there have been no reports to suggest that the government has denied registration to any groups.[149] Generally, the government does not interfere with religion, and private schools are allowed to teach religion, while public schools are not.[150] Egypt, as roughly 90 percent Muslim, and with a constitution that declares Sharia law as the principle source of legislation, likely will have a much harder time establishing such a clean record of religious freedom.

B. Malawi

After Malawi gained independence from the British in 1964, the country went through a period of both political and economic uncertainty during which time Hastings Kamuzu Banda was elected president.[151] Banda was made president-for-life

142. *Id.*

143. *See generally Benin: 2010 Country Reports on Human Rights Practices*, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE (Apr. 8, 2011), http://www.state.gov/g/drl/rls/hrrpt/2010/af/154331.htm (report detailing government corruption, discrimination against women, and repression of journalists in Benin).

144. *Id.* at 11.

145. *Id.* at 10.

146. *Id.* at 7.

147. *Egypt: International Religious Freedom Report 2010*, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE (Nov. 17, 2010), *available at* http://www.state.gov/g/drl/rls/irf/2010/148817.htm.

148. *Benin: International Religious Freedom Report 2010*, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE (Nov. 17, 2010), *available at* http://www.state.gov/g/drl/rls/irf/2010/148662.htm.

149. *Id.*

150. *Id.*

151. THE BRITANNICA GUIDE TO AFRICA: THE HISTORY OF SOUTHERN AFRICA 104–06 (Amy McKenna ed., 1st ed. 2011) [hereinafter THE HISTORY OF SOUTHERN AFRICA].

in 1971, establishing his reign until a new constitution was passed in 1994.[152] While the 1966 constitution of Malawi did not have the traditional markings of a socialist constitution (that is a preamble with lofty goals of protecting rights of equal pay, etc.), it did establish a one-party system;[153] require that, should a second presidential election ever occur, all candidates must be a member of the party to be eligible;[154] and fail to establish term limits for the president.[155]

Under the 1966 constitution, Banda was able to be an oppressive, all-powerful dictator with power to appoint and remove the speaker of the National Assembly,[156] the chief justice of the high court,[157] and even the director of public prosecutions.[158] This appointment authority gave President Banda unchecked power over all three branches of government, and, furthermore, it gave him unheard of police powers through the director of public prosecutions. Banda's Malawi became a police state that "ruthlessly suppressed any opposition."[159] However, in 1992, at the same time that international aid groups began withholding aid to Malawi, two internal opposition groups finally gained a footing to challenge Banda's regime and began calling for a national referendum for constitutional reform.[160] Banda relented and a new constitution was enacted in 1994.[161] After the passage of the new constitution, Banda was defeated in the first free elections in more than three decades.[162]

The constitution of 1994 reacts to nearly three decades of dictatorship by creating "accountability and transparency" in the government.[163] Accordingly, the constitution sets a term limit of two terms for the president.[164] The president of Malawi is also much more accountable to the parliament. Parliament must now approve of appointments of the chief supreme court justice by a two-thirds vote and of his removal by a majority vote.[165] Furthermore, the president can no longer control Parliament by appointing its members, removing others, and dissolving it on a whim.[166] Parliament actually has the authority to override a presidential veto.[167]

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152. *Id.* at 106–07.

153. REPUBLIC OF MALAWI (CONSTITUTION) ACT OF 1966, ch. I, art. 4(2) ("The National Party shall be the Malawi Congress Party.").

154. *Id.* ch. III, art. 10(2).

155. *See id.* ch. III (discussing the presidential office without mentioning any term limits and stating that "the President shall continue in office until another person is elected").

156. *Id.* ch. IV, arts. 25(1), (3)(c).

157. *Id.* ch. VI, arts. 63(1), 64(3).

158. *Id.* ch. V, arts. 56(2), 58(6), 59 (indicating the president has the power to appoint and remove the attorney-general, who has the direct authority over the director of public prosecutions).

159. THE HISTORY OF SOUTHERN AFRICA, *supra* note 151, at 106.

160. *Id.* at 107.

161. *Id.*; George N. Barrie, *The Constitution of Malawi 1995: A Fresh Breeze in Central Africa*, 1997 J. S. AFR. L. 761, 761 (1997) (the constitution was permanently adopted by the National Assembly in 1995).

162. THE HISTORY OF SOUTHERN AFRICA, *supra* note 151, at 107.

163. Barrie, *supra* note 161, at 762.

164. REPUBLIC OF MALAWI (CONSTITUTION) ACT OF 1994, ch. VIII, art. 83(3).

165. *Id.* ch. IX, arts. 111(1), 119(3)(b).

166. *Compare* REPUBLIC OF MALAWI (CONSTITUTION) ACT OF 1966, ch. IV, arts. 19–20, 25, 28, 45 (allowing the president to appoint the speaker of parliament and individually dismiss members of Parliament), *with* REPUBLIC OF MALAWI (CONSTITUTION) ACT OF 1994, ch. VI, arts. 53, 63 (providing for election of the speaker by vote in the National Assembly and establishing a transparent procedure for removing a member from the National Assembly).

The 1994 constitution also provides for impeachment proceedings against the president, which is an enormous step towards a balance of power in a previously authoritarian government.[168]

Overall, the 1994 constitution creates an almost completely new governmental system that provides for checks and balances for all the branches of the Malawian government, but most specifically against the possibility of another dictator. It is interesting to note that in only seventeen years, the constitution already notched a significant victory when it was used to prevent Bakili Muluzi, president from 1994 to 2004, from attempting to amend the constitution to gain another term.[169] The 1994 constitution also provided new protections for a multi-party electoral system.[170] In 1994, ten political parties formed and provided presidential candidates.[171]

Perhaps what is most impressive about Malawi's 1994 constitution is its protection of fundamental rights. The entirety of Chapter IV of the constitution is dedicated to outlining the rights that are protected.[172] These rights range from equality for women to prisoners' rights.[173] Moreover, the 1994 constitution binds every branch of government to protect these rights.[174] What is truly remarkable is the "Ombudsmen" system established by the constitution.[175] This system allows for any person who wishes to seek protection of his or her rights to ask for investigation by an ombudsman into his or her claim.[176] After the investigation, should an ombudsman determine that a violation of rights took place, the ombudsman may request a prosecution, and should none take place, the ombudsman may demand reasons as to why no prosecution occurred.[177] The ombudsmen system is an efficient and practical method of ensuring that rights are protected and wrongs are redressed.

While Malawi's democracy has progressed mightily since the days of Banda, it has not progressed as far as Benin. While Malawi has not yet been designated a "liberal democracy" by Freedom House, it has been designated an "electoral democracy," just as Benin.[178] It currently has a "Partly Free" status according to Freedom House, with ratings of three and four for political rights and civil rights, respectively.[179] Much of this likely has to do with the fact that the 1994 constitution still allows the restriction of some rights—such as privacy rights and freedom of expression—if such limitations "are reasonable, recognized by international human

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167. REPUBLIC OF MALAWI (CONSTITUTION) ACT OF 1994, ch. VI, art. 73.

168. *Id.* ch. VIII, art. 86. For a president to be impeached, he or she must first be indicted in the National Assembly (the lower house of Parliament) by a two-thirds vote. Next, impeachment must be approved by a two-thirds vote of both the National Assembly and the Senate. The constitution provides that indictment and impeachment should occur for serious constitutional and legal violations. *Id.*

169. Prempeh, *supra* note 128, at 488.

170. REPUBLIC OF MALAWI (CONSTITUTION) ACT OF 1994, ch. IV, art. 40.

171. Michael Kirby, *Malawi: The Arrival of Multi-Party Democracy*, 20 COMMONWEALTH L. BULL. 675, 675 (1994).

172. REPUBLIC OF MALAWI (CONSTITUTION) ACT OF 1994, ch. IV, arts. 15–46.

173. *Id.* ch. IV, arts. 24, 42.

174. *Id.* ch. IV, art. 15.

175. *Id.* ch. X, art. 120.

176. *Id.* ch. X, art. 123.

177. *Id.* ch. X, art. 126(c).

178. *Compare* COUNTRY REPORT: MALAWI, FREEDOM HOUSE (2010), *with* COUNTRY REPORT: BENIN, *supra* note 138.

179. COUNTRY REPORT: MALAWI, *supra* note 178.

rights standards and necessary in an open and democratic society."[180] Malawi's economy has also grown as a result of its transition to democracy, albeit very moderately. Malawi's GDP per capita average annual growth rate has gone from -0.1 percent from 1970 to 1990 to 0.5 percent from 1990 to 2010.[181]

Should Egypt advance in democracy, it must continue to amend its constitution in order to provide protection for the political and civil rights that Malawi has protected. Providing an "ombudsmen" system could also help ensure such protection. Overall, it is encouraging to see how quickly Egypt has responded by protecting basic political rights in the months since Mubarak's exit.[182]

C. Brief Examples of Reform from Other African Nations

Since the beginning of the 1990s, nations across Africa have undergone significant constitutional reforms, resulting in a new wave of democracy. Egypt can learn from the nations that have successfully transitioned into free democracies. The Egyptian people must recognize what reforms have worked in other African nations, understand why those reforms were successful, and be committed to seeing those reforms through. Egypt should take note of three improvements that other African nations have made during their constitutional reformations: committing to reform and adhering to the results of those reforms even when the results are initially unpopular, establishing governmental institutions of transparency and accountability, and establishing a more representative form of government in a full-parliamentary system.

Nigeria and Ghana are examples of the commitment necessary to see constitutional reform through. In both countries, the people and the politicians have realized that true democracy does not always mean their side will win, but it requires that they must be committed to the system, even in their defeat.[183] This commitment is evidenced by the populace relying on elections for regime change over the last two decades, instead of resorting to coup d'états as in the past.[184] For their citizens to be willing to seek regime change through elections instead of coup d'états, politicians in Egypt must also be committed to reforming their nation through legal means. In 2005, Kenyans held their president in check by refusing to amend the constitution to reinstall vast presidential power.[185] Egypt must follow this example. Both Egypt's people and its politicians need to commit to democracy and to its protection in the

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180. REPUBLIC OF MALAWI (CONSTITUTION) ACT OF 1994, ch. IV, art. 44(2).

181. *Malawi: Statistics, The Rate of Progress*, UNICEF (Mar. 2, 2010), http://www.unicef.org/infobycountry/malawi_statistics.html#82.

182. *See* James Traub, *Good News: How the Revolution Transformed Egypt's Media*, FOREIGN POL'Y (Apr. 8, 2011), *available at* http://www.foreignpolicy.com/articles/2011/04/08/good_news?page=0,1 (discussing that the media, previously extremely sensitive to the possibility of censorship, already has begun to be critical of those in power and has begun exercising its freedom to speak).

183. *See* H. Kwasi Prempeh, Marbury *in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 TUL. L. REV. 1239, 1277 (2006) (discussing that in countries like Ghana and Nigeria, supervised competitive elections have become a routine manner of changing government as opposed to coup d'états).

184. *Id.*

185. *Kenyans Reject New Constitution*, BBC NEWS (Nov. 22, 2005), http://news.bbc.co.uk/2/hi/4455538.stm.

future. Both need to realize that the temptation to return to an authoritarian government will arise, and both need to have the resolve to reject that temptation.

Egypt must also be willing to create a democracy that promotes accountability and transparency, just as Malawi has.[186] Ghana and Zambia have also been good examples of creating systems of government with accountability. Both have instituted constitutional changes that allow their politicians to be held in check, even their presidents. In Ghana, former President Jerry Rawlings is being held accountable for abuses of power in a criminal trial.[187] In Zambia, former President Frederick Chiluba faced prosecution on corruption charges.[188] Egyptians must be willing to hold their leaders accountable for wrongdoing, and their Egyptian leaders must be willing to hold themselves accountable by providing constitutional rules for monitoring and restricting their own authority.

At least one expert has called for Egypt to completely revamp its constitutional and governmental structure for a true parliamentary system.[189] Other experts have advocated in the past that the current presidential systems of reformed African nations do not go far enough in facilitating a successful democracy in the future.[190] For example, South Africa adopted a full parliamentary government in which the president is elected by members of Parliament with the enactment of its 1996 constitution.[191] This nation has been able to avoid revolt after revolt following elections despite being a nation that has a deeply divided electorate.[192] Parliamentary governments are far more representative of the electorate and generally alleviate potential alienation of the "losing" side.[193] Furthermore, parliamentary systems can develop a general feeling in the electorate that participation is vital and meaningful.[194] As Ackerman states: "A parliamentary system generates a leadership coalition, not a leadership cult, enabling different coalition parties to reach out to different sectors of Egyptian society."[195] Post-apartheid South Africa was able to avoid extreme-reactionary policies and potential revolt by the previously-in-power white population, in large part due to President Nelson Mandela's leadership, but also by adopting a parliamentary system that has yielded slow, yet consistent, progress.[196]

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186. See Section III.B, *supra*, for a discussion of democracy formation in Malawi.

187. H. Kwasi Prempeh, *Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa*, 35 HASTINGS CONST. L.Q. 761, 771–72 (2008).

188. *Id.* at 771.

189. *See generally* Bruce Ackerman, *Parliament to the Rescue*, FOREIGN POL'Y (Mar. 1, 2011), *available at* http://www.foreignpolicy.com/articles/2011/03/01/parliament_to_the_rescue.

190. *See generally*, Muna Ndulo, *The Democratic State in Africa: The Challenges for Institution Building*, 16 NAT'L BLACK L.J. 70 (1998) (finding that electing presidents by parliament, rather than by the citizens directly, better fosters proportionate representation).

191. *Id.* at 92.

192. *See, e.g., id.* at 89–92 (discussing the success of the proportionality representation system within South Africa's deeply divided electorate).

193. *See* Ackerman, *supra* note 189 (stating that in a parliamentary system, "even if [Islamists] win a quarter of the vote, three-quarters of the parliamentary seats would go to more secular rivals").

194. *See* Ndulo, *supra* note 190, at 92 (stating that "it would seem that having a president elected by parliament would foster feeling of greater participation in the election among all citizens of the country as represented by parliament").

195. Ackerman, *supra* note 189.

196. *See Background Note: South Africa*; U.S. DEP'T OF STATE (Oct. 3, 2011), http://www.state.gov/r/pa/ei/bgn/2898.htm (elaborating on Mandela's efforts to quell political violence); *see also* Andrew Reynolds, *Constitutional Engineering in South Africa*, 6 J. OF DEMOCRACY 86, 89–91 (1995)

Perhaps it would be best for democracy in Egypt if Egyptian people embrace a full parliamentary system. It will be more conducive to power-sharing arrangements and ensure that possible dictators are checked before they gain too much power. A full parliamentary system would also avoid the danger that a directly elected president would interpret his election as a mandate to enact any and every one of their pet policies, no matter how detrimental those policies may be to the progress of democracy in Egypt. Lastly, and perhaps most importantly, it may provide the answer for the powerful and persuasive Muslim Brotherhood.

IV. THE ULTIMATE QUALIFICATION: THE MUSLIM BROTHERHOOD

Of course, any comparison of Egypt to other African nations is incomplete without discussing the possible wrench in the cogs of Egypt's transition to democracy: Islam's influence in politics. While there are many Islamist political parties in the region, the Muslim Brotherhood can be seen as the "parent" of these groups and is by far the most influential in Egypt.[197] The Muslim Brotherhood has been an underground opposition movement, but if Egypt is to move forward as a democracy, the Muslim Brotherhood needs to be let into the fray because it holds such a high place of authority with the people of Egypt, even if that authority is religious and not political.[198] For years, the Brotherhood had been the strongest source of opposition to the Mubarak regime.[199] Therefore, its inclusion in the political process and any further amendments to the constitution are necessary, or the Egyptian people will likely view that process as illegitimate. The first step towards its inclusion is to remove the emphasized portion of Article 5 below, which prevents religiously based political parties: "Citizens have the right to establish political parties according to the law and no political activity shall be exercised *nor political parties established on the basis of religion* or discrimination due to gender or race."[200]

For a truly democratic and representative government to be put in place, all views, whether religious or not, must be represented. However, this could be a difficult and dangerous task. The Muslim Brotherhood has been a semi-radical group in the past,[201] and it may not actually advocate for a better democracy, just a

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(discussing the success of the proportionality representation parliamentary system in preventing political unrest).

197. Kristen Stilt, *"Islam is the Solution:" Constitutional Visions of the Egyptian Muslim Brotherhood*, 46 TEX. INT'L L.J. 73, 74 (2010). Other nations have struggled with the Islamist movement's place in politics, including the Islamic Action Front in Jordan, the Party of Justice and Development in Morocco, and the Islamic Constitutional Movement in Kuwait. Nathan L. Brown, Amr Hamzawy & Marina Ottaway, *Islamist Movements and the Democratic Process in the Arab World: Exploring the Gray Zones*, 67 CARNEGIE PAPERS 3–4 (Mar. 2006).

198. *See* Stilt, *supra* note 197, at 74–75, 79–80 (discussing the failure of the Mubarak regime to allow substantial participation by the Muslim Brotherhood and how the exclusion of such an influential force undermines Egyptian politics).

199. *See id.* at 74 (describing the Muslim Brotherhood as the "major opposition 'party'"); Mona El-Naggar, *New Call for Election Boycott in Egypt*, N.Y. TIMES, Sept. 7, 2010, at A4 (describing the Muslim Brotherhood as "the country's single strongest opposition group").

200. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, art. 5 (emphasis added).

201. *See* Robert S. Leiken & Steven Brooke, *The Moderate Muslim Brotherhood*, 86 FOREIGN AFF., Mar–Apr. 2007, at 107, 116 (stating that some of its "positions seem to make them moderates," but also

different set of leaders. In 2007, the Brotherhood released a platform discussing its political goals.[202] This platform does not paint a very democratic picture, advocating that Egypt be both a civil state and an "Islamic state,"[203]—in other words, that the law of Egypt be in "compliance with some notion of Islamic law,"[204] and that the president also be "a leader of the [Egyptian] Muslim community."[205]

The Brotherhood claims that Islamic law can coexist with a democratic process,[206] but to what extent that can actually occur must be decided in the future. The Brotherhood calls for "free and fair" elections,[207] but when it also requires that the president be the leader of the Egyptian Muslim community, that seems to leave out the 10 percent of the Egyptian population that are Coptic Christians.[208] For Egypt to transform into a truly democratic society, the Muslim Brotherhood needs to be involved in both governance and constitution making, but it is also clear that its vision for the future is not necessarily a democratic one. How that dichotomy is solved in the coming months and years will be one of the most interesting pieces of this democracy puzzle.

CONCLUSION: HOPE FOR EGYPT?

Needless to say, Egypt's most recent amendments to the constitution of 1971 have only been a step in the right direction. After decades of dictatorship, censored speech, and oppressed political groups, democratic change may finally be coming to Egypt, but that change has not yet fully come. The amendments made to Articles 77 and 139 of the 1971 constitution complete their task of immediately, if incompletely, solving Egypt's perpetual dictatorship problem. The amendments made to Article 76, 88, and 93 go on to provide for the first free elections Egypt has seen since 1954. Further, the amendments made to Article 148 and 179 do a great deal to dispose of oppressive and uncontrollable dictatorial power. These reforms are great news for Egypt, but they do not do enough.

For Egypt to become a true democracy, the government must deliver a new constitution in accordance with the eighth amendment made on March 19, 2011—the promise to write a new constitution. This amendment calls for the next parliament to write a completely new constitution, but Egypt's politicians should not move too hastily in writing the new constitution. Egypt must take the time to study all the options. Egypt must look at Benin and Malawi (and all the other African nations that blossomed into democracies after years of authoritarian oppression) in order to learn from their successes and from their mistakes.

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that the Brotherhood authorizes jihad in some countries and that Hamas is an offshoot of the Muslim Brotherhood).

202. *See* Stilt, *supra* note 197, at 76 (stating that the platform describes the Brotherhood's "specific goals and beliefs for the place of religion within the structure of the Egyptian legal system").

203. *Id.* at 90. The Brotherhood distinguishes, however, an "Islamic state" from a religious political power, such as is found in Iran. *Id.*

204. *Id.* at 100–01.

205. *Id.* at 101.

206. *See id.* at 100–01 (stating that the Brotherhood wants to bring "all Egyptian laws into compliance with some notion of Islamic law through the democratic legislative process").

207. *Id.* at 100.

208. *See* Ben Gilbert, *Coptic Christians Want a Voice in Egypt's Government*, THE WORLD (Apr. 8 2011), http://www.theworld.org/2011/04/coptic-christians-want-a-voice-in-egypt-government (discussing Coptic Christians' desire for equal treatment by future Egyptian governments).

First and foremost, Egypt should follow Benin's lead and continue to grant new authority to the Supreme Constitutional Court in order to create a court with true independent authority that is able to protect the constitution and the rights of Egyptians. Egypt should also create a system of accountability and transparency as Malawi has, perhaps even adopting the ombudsmen system to protect civil liberties. Furthermore, Egypt should adopt a full parliamentary system, as Professor Ackerman has suggested.[209] In doing so, it will be able to avoid the possibility of another dynamic politician becoming a dictator, and it can form a government that provides checks on the majority party and full representation for any minority parties. In this way, the Muslim Brotherhood could finally have its rightful place in government without becoming overly powerful.

Lastly, Egypt must commit. When elections for the new parliament and president are completed in 2012, and it turns to the task of writing a new constitution, Egypt must commit to growing into a full and thriving democracy. Both the people of Egypt and the politicians of Egypt must be willing to trust whatever constitution comes next and submit to its authority. While some voters worry that these elections are a sham,[210] the people of Egypt and the military must commit to these election results, as some already proclaim they will,[211] in order to validate the new parliament and it's new constitution. The New Democratic Party, the Muslim Brotherhood, the Supreme Council of the Armed Forces, and the citizenry must decide that no matter who is elected or what unpopular policies are created pursuant to the forthcoming constitution, they will not try to circumvent the constitution, but instead will abide by its authority and by the decisions they make now to implement a lasting democracy.[212]

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209. Ackerman, *supra* note 189.

210. *See* David D. Kirkpatrick, *After Second Day of Voting in Egypt, Islamists Offer Challenge to Generals*, N.Y. TIMES, Nov. 30, 2011, at A13 (quoting one Egyptian demonstrator who believes the elections are a sham).

211. *See id.* (quoting Gen. Ibrahim Nassouhy, a member of the ruling Supreme Council of the Armed Forces, saying that the military is "'[b]etting on the Egyptian people,'" while also discussing that "some voters said they hoped an elected Parliament could stand up to the military council, and some activists insisted that the new body would become their most potent tool").

212. The recent parliamentary elections have provided promising results for Egyptian commitment to democracy. The Muslim Brotherhood dominated these elections by winning 73 percent of the seats. *Egypt's New Assembly Elects Muslim Brotherhood Speaker*, BBC NEWS (Jan. 23, 2012), http://www.bbc.co.uk/news/world-middle-east-16677548. Western diplomats remain hopeful that Egypt will be able to continue democratic growth as the Brotherhood leadership and the current military regime have shown signs of willingness to negotiate. David D. Kirkpatrick, *In Egypt, Signs of Accord Between Military Council and Islamists*, N.Y. TIMES, Jan. 22, 2012, at A8. If the Muslim Brotherhood can hold to its promise to "cooperate with everyone" and create a broad coalition with liberal, moderate, and minority parties, Egypt could succeed in building a sustainable democracy. *Id.*; *see also* David D. Kirkpatrick, *Chaotic Start to Egypt's First Freely Elected Parliament*, N.Y. TIMES, Jan. 24, 2012, at A4 (detailing that while the Muslim Brotherhood was able to elect its choice for the speaker of parliament, Saad el-Katatni, in the first meeting of this new parliament, it was not without some resistance from the minority parties, which appears to be a good sign for Egypt going forward).

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