

NOTES

THE LAW OF NEUTRALITY AND THE CONFLICT WITH AL QAEDA

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Many aspects of the United States's armed conflict with al Qaeda and associated forces have been intensely debated by legal scholars and policymakers, yet one important question has thus far been almost completely ignored: Where, if at all, does the law of neutrality fit into the legal framework governing the conduct of this armed conflict? I argue that neutrality is one of several principles that ensure the completeness of the modern law of armed conflict (LOAC) framework. Neutrality is particularly important in achieving geographic completeness of the legal regime. The 1949 Geneva Conventions (GCs) that form the bedrock of our LOAC framework were written against the background understanding that neutrality would operate wherever GC protections did not apply. In sharp contrast to most wars, the geographic distinction between belligerent and neutral territory is highly unstable in the conflict with al Qaeda. Ironically, at the point in modern warfare when the law of neutrality may be most important, it is being ignored.

The Obama administration has begun to apply analogous provisions of the LOAC rules developed in inter-state wars to its current conflicts—a recognition that this conflict, like all others, should be waged according to a complete legal regime. To date, however, the United States has not recognized the role of neutrality in its conflict with al Qaeda. This Note begins to fill that gap. While arguing that the law of neutrality is more important in this conflict than many others due to the conflict's global nature, this Note concludes that recognizing neutrality will only be a partial solution. Neutrality instructs, however, that the LOAC rules themselves may be applicable almost globally because of the asymmetrical nature of the conflict. I argue that the central purpose of recognizing neutrality in our current conflicts is to avoid selectively applying parts of a comprehensive legal system, thereby leaving legal black holes in which some individuals have no protection. What matters most is that the intended fundamental feature of the LOAC regime—its completeness—is not abandoned each time a new form of conflict is recognized.

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INTRODUCTION

While many aspects of the United States's conflict with al Qaeda and associated forces¹ have been intensely debated by legal scholars and policymakers, one important question has thus far been almost completely ignored: Where, if at all, does the law of neutrality² fit into the legal framework governing the conduct of this armed conflict? I argue that neutrality, the body of laws regulating the coexistence of states at war and those at peace, is one of several principles³ that

¹ This Note does not express a view on the United States's choice to address transnational terrorism using a war model as opposed to a criminal law model. However, it operates on the basis that the United States has considered itself to be at war with al Qaeda and associated organizations since September 11, 2001. See Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, The Obama Administration and International Law, Address Before the Annual Meeting of the American Society of International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm> (last visited Apr. 14, 2010) [hereinafter Koh Speech] (“[T]he United States is in an armed conflict with al-Qaeda, as well as the Taliban and associated forces, in response to the horrific 9/11 attacks, and may use force consistent with its inherent right to self-defense under international law.”).

² Neutrality is defined as “the attitude of impartiality adopted by third States towards belligerents and recognized by belligerents . . . creating rights and duties between the impartial States and the belligerents.” 2 L. OPPENHEIM, INTERNATIONAL LAW § 293 (H. Lauterpacht ed., 8th ed. 1952). See *infra* Section II.A for a discussion of neutral rights and duties.

³ Other principles ensuring completeness include the Martens Clause, which states: [I]n cases not included in the Regulations [of the law of armed conflict] . . . populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience. Convention with Respect to the Laws and Customs of War on Land (1899 Hague Convention II), July 29, 1899, 32 Stat. 1803, 1805, 187 Consol. T.S. 429, 431, reprinted in THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 (James Brown Scott, ed., 1915); see also Antonio Cassese, *The Martens Clause: A Half Loaf or Simply Pie in the Sky?*, 11 EUR. J. INT'L L. 187, 187–88 (2000). Similar provisions appear in many later law of armed conflict (LOAC) codifications. See, e.g., 1907 Hague Convention (IV) Respecting the Laws and Customs of War on Land, pmbl., reprinted in ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 45 (2d ed. 1989); Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 63, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 62, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GC II]; Geneva Convention Relative to the Treatment of Prisoners of War art. 142, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 158, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV]. Geneva Convention Common Article 2 is another LOAC provision aimed at achieving comprehensiveness, stating:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

ensure the completeness of the modern law of armed conflict (LOAC) framework.⁴ In particular, neutrality is important in achieving geographic (or territorial) completeness of the legal regime: The 1949 Geneva Conventions (GCs) that form the bedrock of our LOAC framework⁵ were written against the background understanding that neutrality would operate wherever GC protections did not apply (i.e., beyond the physical location of the fighting in states involved in the conflict).⁶ Outside of belligerent territory, the laws of neutrality operate. Neutral territory has been of little importance in recent armed conflicts,⁷ but is more relevant in today's conflict with al Qaeda.

This Note argues that neutrality has become increasingly important because the conflict with al Qaeda presents a highly atypical geographical scenario in which fighting more often occurs outside of the territory of the initial belligerents.⁸ Only two belligerent territories can readily be identified⁹: (1) U.S. territory, the locus of armed conflict since the September 11, 2001, attacks, and (2) Afghanistan, which became belligerent territory when the United States invaded in 2001 to fight al Qaeda and the Taliban.¹⁰ Thus, most of the globe is neutral

GC I, *supra*, art. 2. Some argue that international human rights law is another important gap-filler that complements the laws of armed conflict during war. *See, e.g.*, INT'L COMM. OF THE RED CROSS, INTERNATIONAL HUMANITARIAN LAW AND OTHER LEGAL REGIMES: INTERPLAY IN SITUATIONS OF VIOLENCE (2003) (describing expert debate regarding relationship between human rights law and laws of armed conflict).

⁴ I use LOAC to refer to the set of laws, both customary and treaty-based, that govern the conduct of hostilities during armed conflict. This set of laws is also commonly referred to as international humanitarian law.

⁵ *See* GC I, *supra* note 3, art. 49; GC II, *supra* note 3, art. 50; GC III, *supra* note 3, art. 129; GC IV, *supra* note 3, art. 146.

⁶ *See infra* Part II.A (describing legal content of neutrality).

⁷ Neutral territory was primarily relevant when the occasional spy was found in a neutral country or in rare instances in which troops were forced into a neutral state to avoid capitulating to the enemy. *See, e.g.*, *Ex parte* Toscano, 208 F. 938, 940–41 (S.D. Cal. 1913); *cf. infra* Part II.C.1.

⁸ *See, e.g.*, HELEN DUFFY, THE 'WAR ON TERROR' AND THE FRAMEWORK OF INTERNATIONAL LAW 332 (2005) (“[The war] has been executed in large part on the international stage, characterised by an increased exercise in military and/or law enforcement powers by states beyond their national boundaries.”).

⁹ It could be argued that Iraq is a third belligerent state in the conflict with al Qaeda since the United States has been engaged in military operations against al Qaeda there. *See* Archive of U.S. News & World Report Articles on al Qaeda in Iraq, http://www.usnews.com/topics/organizations/al_qaeda_in_iraq (last visited Sept. 7, 2010). Whether there are two or three belligerent territories does not affect the analysis in this Note.

¹⁰ The Taliban, with which the United States is still engaged in armed conflict, has been entirely independent of the Government of Afghanistan since mid-2002. Since the Taliban fell, Afghanistan has become a co-belligerent of the United States, fighting alongside the United States against the Taliban and al Qaeda. The internal conflict within Afghanistan is

territory¹¹ where, in theory, the laws of neutrality apply.¹² This has practical importance because the laws of neutrality trigger certain rights and duties of neutral states. For example, neutral states have neither a right nor a duty to militarily detain civilians,¹³ must intern combatants according to rules closely resembling those constraining belligerent powers, and may not otherwise participate in the conflict without risking retaliation and losing their neutral status.¹⁴

In practice, however, the United States is waging a global war against al Qaeda.¹⁵ The geographic spread of the conflict has significant legal implications. Every time a state cooperates militarily with the United States, for example by detaining or transferring a suspected al Qaeda member,¹⁶ that state arguably becomes a co-

treated as distinct from the conflict with al Qaeda (waged beyond Afghanistan and not necessarily including the Taliban) in this Note.

¹¹ This is because while most states recognize a state of armed conflict in Afghanistan and Iraq, (1) most states do not recognize an official “war” against a terrorist organization (viewing it instead as a criminal matter), see DUFFY, *supra* note 8, at 253–55, and (2) al Qaeda does not have statehood or sovereign territory.

¹² This slightly oversimplifies neutral rights and duties, as some rules of neutrality apply irrespective of territory (such as the prohibition on neutrals sharing intelligence with belligerents) or on the high seas. Part II.A, *infra*, discusses the relevant rules of neutrality in greater detail.

¹³ Importantly, and as exploited by the Bush administration, the Geneva Conventions do not apply to civilians detained in neutral territory. See *infra* notes 40–47 and accompanying text. Many individuals associated with al Qaeda are arguably civilians under traditional LOAC rules. See *infra* notes 76–80 and accompanying text (describing combatant and civilian statuses as mutually exclusive legal categories).

¹⁴ See *infra* Part II (explaining neutral rights and duties and describing rules for detention in neutral territory).

¹⁵ See, e.g., Ari Fleischer, Press Secretary, The White House, Press Gaggle (Nov. 5, 2002), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=47444>. Then White House Press Secretary Fleischer stated:

[T]he war on terrorism is not a traditional war . . . in the sense that there is one known battlefield or one known nation or one known region. The President has made clear that we will fight the war on terrorism wherever we need to fight the war on terrorism. The terrorists don’t recognize any borders or nation. . . . [K]nown political boundaries, which previously existed in traditional wars do not exist in the war on terrorism.

Id.; accord Anthony Dworkin, *The Yemen Strike: The War on Terrorism Goes Global*, CRIMES OF WAR PROJECT, NOV. 14, 2002, <http://www.crimesofwar.org/onnews/news-yemen.html> (“[The targeted] killing shows that the military approach . . . is going global. . . . The rationale [is] that the whole world represents a battlefield. . . . National Security Advisor Condoleezza Rice [said], ‘We’re in a new kind of war, and we’ve made it very clear that this new kind of war be fought on different battlefields.’”).

¹⁶ See *infra* note 101 (providing example of individuals detained outside of Afghanistan and subsequently transferred there for military detention). States in which suspected al Qaeda members have been apprehended before being sent to the Guantánamo Bay Naval Facility include Bosnia-Herzegovina, Egypt, Gambia, Mauritania, Pakistan, and Thailand. HENRY J. STEINER ET AL., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 404 (3d ed. 2008).

belligerent of the United States in the conflict.¹⁷ 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.¹⁸

An expected response to the argument that we must pay attention to neutrality in the conflict with al Qaeda is that application of traditional rules is absurd in such an atypical conflict. After all, does it seem plausible for a state to be concerned about losing neutrality vis-à-vis a terrorist organization? Or, if a neutral state must disarm and intern suspected combatants,¹⁹ but it cannot reliably distinguish between civilians and combatants, can the neutral state be expected to fulfill its obligation?

From these examples, it is tempting to conclude summarily that traditional LOAC rules, such as neutrality, should not apply to this type of conflict and should be abandoned. However, I argue that it is dangerous to abandon existing rules in new conflicts or selectively apply some LOAC principles without reference to the overall framework.²⁰ The notion that LOAC rules were not developed with this par-

¹⁷ The term “co-belligerent” is understood to be synonymous with “ally.” See MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 440, 444 (1982) (using “allied” synonymously with “co-belligerent”); OSCAR M. UHLER ET AL., *COMMENTARY, IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR* 49 (Jean S. Pictet ed., 1958) [hereinafter *PICTET COMMENTARY*] (same). A neutral state may become a co-belligerent by (1) choosing to join one side or the other in a conflict; or (2) violating its duty of nonparticipation in the conflict by aiding the military operations of one side or the other. See *infra* Part II.A (explaining neutral duty of noncooperation in conflict and co-belligerency as result of violation of this duty).

¹⁸ Al Qaeda is not attempting to seize any particular territory through its hostile actions and is operating globally. Likewise, the United States is pursuing al Qaeda globally. See *supra* note 15 (discussing global dimension of conflict with al Qaeda).

¹⁹ See *infra* Part II.A (describing rules neutral states are obligated to follow when combatants are found in their territory). The term “combatant” is not used in LOAC treaty provisions regulating conflicts that are not of a traditional inter-state nature; these provisions specify few rules regarding detention. I use the term “combatant” by way of analogy to the rules governing inter-state armed conflicts. See *infra* note 77 and accompanying text (defining combatant).

²⁰ See, e.g., DUFFY, *supra* note 8, at 448 (“Selectivity is the antithesis of universality, and is itself a slight on the legality principle. . . . Another form of selectivity arises in the ‘pick and choose’ approach to which particular areas of law, or particular rules therein, are acknowledged as applicable, in accordance with the policy agenda of the moment.”). Duffy provides the example of “targeted killing of suspected al-Qaeda operatives, where [international humanitarian law] standards are invoked to justify targeting which would be lawful outside armed conflict, but not accepted as applicable to protect similarly situated persons in the event that they are detained.” *Id.* at 448–49. Most scholars arguing against selectivity call for parallel application of international human rights law. See *infra* note 29. I argue simply that an existing element of the law applicable only in times of armed conflict, the law of neutrality, also plays an important role in shoring up the protectiveness of the LOAC framework.

ticular type of conflict in mind, and therefore simply do not apply,²¹ can lead to gaping holes in the rule of law. This is particularly troubling in a legal regime that was intended to be as universal as possible—leaving no person beyond the protection of the law—in order to achieve humanitarian goals.

Ironically, at the point in modern warfare when the law of neutrality may be most important, it is being ignored. In the war with the Taliban and al Qaeda within Afghanistan, the Bush administration initially took the dangerous and highly criticized position that international laws of war were largely inapplicable.²² The Supreme Court overruled that position, finding in *Hamdi v. Rumsfeld* that the LOAC constrain the government's conduct in Afghanistan.²³ The Court later ruled that Common Article 3 of the GCs applies beyond the conflict within Afghanistan, reaffirming that some body of law must apply even to the conduct of a war against a nonstate actor.²⁴

The Obama administration has largely embraced these rulings and extended their application. In a March 13, 2009, brief to the U.S. District Court for the District of Columbia regarding a Guantánamo Bay detainee, the administration announced that its detention authority “is necessarily informed by the principles of the laws of war.”²⁵ Further, the government claimed legal authority to detain “those persons whose relationship to al-Qaida or the Taliban would,

²¹ See, e.g., Response of the United States to Request for Precautionary Measures—Detainees in Guantánamo Bay, Cuba, 41 I.L.M. 1015 (2002) [hereinafter Response of the United States] (claiming that human rights law did not apply to “unlawful enemy combatants” detained at Guantánamo Bay and also that GC IV was not applicable, thus arguably creating a zone of lawlessness); Alberto R. Gonzales, *Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban*, in NATIONAL SECURITY LAW 52 (5th ed. Supp. 2005) (concluding that GC III does not apply).

²² For example, former President Bush's White House Counsel had advised that the GCs were “quaint” and “obsolete.” See Gonzales, *supra* note 21, at 53; see also DUFFY, *supra* note 8, at 445 (noting “disregard for the international rule of law” by the United States and other countries after September 11, 2001).

²³ *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion) (observing that executive branch's authority to detain is necessarily informed by principles of laws of war, at least for purposes of international armed conflict against Taliban).

²⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557, 629–30 (2006) (holding that, at minimum, Common Article 3 of Geneva Conventions constrains authority of Executive to use military commissions that fall below internationally recognized standards). Common Article 3 (so named because it is the third article in all four of the GCs) contains a minimum set of rules of humanitarian treatment that apply in all armed conflicts, including those in which one or more parties are not states (known as “noninternational armed conflicts,” or “NIACs”). See *infra* Part II.D.2 (explaining difference between legal regimes pertaining to inter-state and noninter-state conflicts).

²⁵ *Hamlily v. Obama*, 616 F. Supp. 2d 63, 67 (D.D.C. 2009) (internal citations omitted) (quoting Respondents' Memorandum Regarding the Government's Detention Authority Relative to Detainees Held at Guantamo Bay, at 1, *In re Guantamo Bay Detainee Litig.*, Misc. No. 08-442 (TFH) (D.D.C. Mar. 13, 2009) [hereinafter March 13 Memo]).

in appropriately analogous circumstances in a traditional international armed conflict, render them detainable”²⁶ under the laws of war.²⁷ This marks a dramatic shift from the early stages of the Bush administration²⁸ and surpasses the requirements imposed by the Supreme Court.

The choice to apply traditional LOAC rules by analogy to the conflict with al Qaeda (often a difficult task) is a recognition of the idea that this war, like all others, should be waged according to a complete legal regime that does not allow for holes in the rule of law. To date, however, the United States has not recognized the role of neutrality in the conflict with al Qaeda. This Note begins to fill that remaining gap.

Although the law of neutrality is more important in the conflict with al Qaeda than other modern conflicts due to its global nature, this Note argues that recognizing neutrality will only be a partial solution, as traditional rules of neutrality may no longer provide meaningful protection. It is likely that the LOAC rules themselves are applicable almost globally, or that international human rights law²⁹ or

²⁶ *Id.* (citing March 13 Memo, *supra* note 25); *see also* Gherebi v. Obama, 609 F. Supp. 2d 43, 53 (D.D.C. 2009) (“The government recommends that the Court look to ‘various analogues from traditional armed conflicts’ . . .”).

²⁷ March 13 Memo, *supra* note 25, at 1 (“The laws of war include a series of prohibitions and obligations, which have developed over time and have periodically been codified in treaties such as the Geneva Conventions or become customary international law.”); *see also* Koh Speech, *supra* note 1 (“Those laws of war were designed primarily for traditional armed conflicts among states, not conflicts against a diffuse, difficult-to-identify terrorist enemy, therefore construing what is ‘necessary and appropriate’ under the AUMF requires some ‘translation,’ or analogizing principles from the laws of war governing traditional international conflicts.”).

²⁸ Charlie Savage, *Obama Team Is Divided on Anti-terror Tactics*, N.Y. TIMES, Mar. 28, 2010, at A1 (“In March 2009, the Obama legal team adopted a new position about who was detainable in the war on terrorism—one that showed greater deference to the international laws of war, including the Geneva Conventions, than Mr. Bush had.”).

²⁹ There is much debate regarding the parallel application of international human rights law (IHR) and the LOAC. The United States under President Bush maintained that the LOAC is a *lex specialis* that displaces IHR, which the administration viewed as inapplicable during armed conflict. Many scholars, some courts (including the International Court of Justice), and human rights treaty bodies have applied IHR during war (relying on LOAC as a *lex specialis* only where LOAC rules conflict with IHR norms, rather than being mutually reinforcing). The extraterritorial reach of IHR treaties also remains controversial. *See, e.g.*, Fionnuala Ni Aoláin, *The No-Gaps Approach to Parallel Application in the Context of the War on Terror*, 40 ISR. L. REV. 563, 574, 590 (2007) (concluding that “no matter which specific theory of parallel application is being advanced or is deemed most suitable in a particular context, be that a *lex specialis* primacy approach, a relativist approach, or a complimentary [sic] interpretive approach, it is the defense of parallel application itself which is of most value” because parallel application plugs perceived gaps in legal regulation (internal citations omitted)); David Kretzmer et al., *Introduction to the Symposium on International Humanitarian Law and International Human Rights Law: Exploring Parallel Application*, 40 ISR. L. REV. 306, 306 (2007) (“The [International Court

new rules of neutrality³⁰ should be used to fill gaps in the system. However, the central purpose of recognizing neutrality remains, namely to avoid selectively applying parts of a comprehensive legal system, leaving some individuals without legal protections. What matters most is that the intended fundamental feature of the LOAC regime—its completeness—is not abandoned each time a new form of conflict is recognized.

Part I of this Note argues that the legal framework adopted by the Obama administration, while more robust than the regime that had been applied in the years immediately following the attacks of September 11, 2001, may still contain significant gaps due, in part, to the failure to recognize the law of neutrality. Part II lays out the modern legal content of neutrality, focusing on detention, and argues that these laws can and should apply to the conflict with al Qaeda. This Part shows how an understanding of the law of neutrality is crucial to our conceptualization of the LOAC framework overall. Once neutrality is taken into account, the LOAC framework is revealed to be a dense legal fabric intended to have virtually universal application, in which no individual falls entirely outside of the law.

I argue in Part III that neutrality is fundamental to ensuring that the comprehensive protections intended within the LOAC framework are recognized. However, as I argue in Part IV, in practice it may be difficult to achieve comprehensive legal protection in the conflict with al Qaeda simply by applying the traditional rules of neutrality. This is because some of the structural principles used to vindicate neutral rights have broken down, and because observing traditional neutral duties in today's conflicts poses a heavy burden.

of Justice] has affirmed co-application [of IHR and LOAC regimes] in three separate instances; . . . a number of human rights courts have asserted jurisdiction over armed conflicts, and while state practice on the matter is still not uniform, co-application appears to be the dominant position in the legal literature.”); *see also* Cordula Droegge, *The Interplay Between International Humanitarian Law and International Human Rights in Situations of Armed Conflict*, 40 *ISR. L. REV.* 310, 312 (2007) (“[H]uman rights and humanitarian law share a common ideal, protection of the dignity and integrity of the person, and many of their guarantees are identical . . .”). Regardless of the parallel application question, we must understand the first order question of how *lex specialis* rules triggered by the existence of armed conflict apply in the conflict with al Qaeda, which this Note has attempted to elucidate.

³⁰ *See infra* notes 50–51 and accompanying text regarding the evolving rules of neutrality.

I

LEGAL BLACK HOLES IN TODAY'S ARMED CONFLICTS?

Assuming, as the Obama administration now does, that the LOAC developed in traditional inter-state conflicts should be applied to the conflict with al Qaeda by analogy,³¹ we should see the conflict being prosecuted according to a comprehensive legal framework. However, legal black holes may persist—that is, there may still be areas where the United States has not recognized the application of any law, international or domestic. As explained below, this may result, in part, from a failure to recognize neutrality in general and its interactions with the Geneva Conventions in particular.

One example of a legal black hole that may persist today was expressed in a memorandum from the Office of Legal Counsel (OLC) regarding the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV).³² Article 4 of GC IV defines the category of civilians who qualify as “protected persons.”³³ Protected persons are entitled to rights beyond those guaranteed to other civilians, including, in the case of aliens in belligerent territory during war, the right to leave the belligerent territory,³⁴ to receive medical attention, to practice their religion,³⁵ and not to be transferred to a state that is not a party to GC IV.³⁶

As a general rule, GC IV protects all persons who, “at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”³⁷ There are, however, a few categories of persons to whom GC IV does not apply: GC IV does not require protected person status to be given to individuals already protected by another GC (wounded forces or prisoners of war); nationals of a state not party to the Convention;³⁸ or nationals of a

³¹ March 13 Memo, *supra* note 25, at 2.

³² The four Geneva Conventions were designed to provide protections both for civilians and soldiers during conflict. GC I and GC II detail protections for wounded and sick forces on land and at sea, respectively. GC III covers treatment of prisoners of war, and GC IV covers civilians. *See supra* note 3 and accompanying text.

³³ GC IV, *supra* note 3, art. 4. Part II of GC IV applies to all civilians, whereas Part III provides special protections for “protected persons” as defined in GC IV, art. 4.

³⁴ *Id.* art. 35.

³⁵ *Id.* art. 38.

³⁶ *Id.* art. 45.

³⁷ *Id.* art. 4. In essence, this provision covers all civilians in war zones or occupied territory.

³⁸ Note, however, that nearly all states are now parties to the GCs. *See Int'l Comm. of the Red Cross, International Humanitarian Law - State Parties / Signatories*, <http://www.icrc.org/IHL.NSF/WebSign?ReadForm&id=375&ps=P> (last visited Sept. 6, 2010) (listing state parties to Geneva Convention).

neutral state or co-belligerent state that has normal diplomatic relations with the belligerent state in whose hands they have fallen.³⁹

A March 18, 2004, OLC Memo signed by Jack Goldsmith makes much of the exceptions in GC IV, Article 4, arguing that the protective fabric of the Geneva Conventions contains significant gaps and that certain civilians do *not* need to be treated as persons protected by GC IV if captured in occupied Iraq—that some are beyond the protection of the law.⁴⁰ While acknowledging that authoritative sources, including the Commentary to GCs by the International Committee of the Red Cross (ICRC), have concluded that all persons “in enemy hands must have some status under international law,”⁴¹ Goldsmith rejects this conclusion.⁴² He argues that “[m]any non-POWs ‘in enemy hands’” do not qualify as protected persons under GC IV, including “persons who were not captured in either the ‘territory of a party to the conflict’ or in ‘occupied territory.’”⁴³ This argument leaves these persons in enemy hands without any protection under international law.

A hypothetical situation (based loosely on the recently publicized case of Belkacem Bensayah⁴⁴) may clarify the problem. Consider, for example, an Algerian national considered a civilian under the laws of war since he is not a combatant or engaged in hostilities,⁴⁵ and who has suspected links to al Qaeda members. He is discovered by Bosnian authorities and detained in Bosnia. Bosnia, for the purposes of this hypothetical, is not a “party to the conflict,” nor is it “occupied

³⁹ GC IV, *supra* note 3, art. 4; *see also* Memorandum from the Office of Legal Counsel, “Protected Person” Status in Occupied Iraq Under the Fourth Geneva Convention 8 (Mar. 18, 2004) [hereinafter 2004 OLC Memo] (“GC does not define the term ‘co-belligerent.’”).

⁴⁰ 2004 OLC Memo, *supra* note 39, at 1 (“[A] Qaeda operatives captured in occupied Iraq who are neither citizens nor permanent residents of Iraq are not entitled to ‘protected person’ status.”).

⁴¹ IV PICTET COMMENTARY, *supra* note 17, at 51.

⁴² The 2004 OLC Memo argues:

Some commentators reach this conclusion by endorsing the view, expressed in the ICRC’s Commentary, that “[e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no intermediate status*; nobody in enemy hands can be outside the law.”

2004 OLC Memo, *supra* note 39, at 13 n.17.

⁴³ *Id.*

⁴⁴ *See* Savage, *supra* note 27. The article describes Bensayah as “an Algerian man who had been arrested in Bosnia—far from the active combat zone—and was being held without trial by the United States at Guantánamo.” *Id.* “Mr. Bensayah was accused of facilitating the travel of people who wanted to go to Afghanistan to join [a] Qaeda.” *Id.*

⁴⁵ The status of a civilian who is suspected of taking part in hostilities is discussed further *infra* notes 152–54 and accompanying text.

territory.” The OLC Memo argues that he falls into an exception under GC IV, Article 4 by virtue of being captured beyond belligerent or occupied territory, and is therefore entitled to no LOAC protections. Indeed, many individuals held by the United States at Guantánamo Bay were described by the United States as falling into the same legal black hole as our hypothetical detainee in Bosnia.⁴⁶

The glaring error in Goldsmith’s assertion is that the individuals he describes are in fact *not in enemy hands* at all: If they are not in belligerent or occupied territory, they are by definition in *neutral* territory, where they are protected by the law of neutrality. In the example above, if Bosnia wanted to retain its neutrality, it would have certain obligations and duties with respect to the Algerian national, including the duty not to turn him over to the United States military.⁴⁷ Conversely, if Bosnia *did* cooperate militarily with the United States within its territory, it would become a co-belligerent, and the GCs (including Common Article 3 and Article 75 of Additional Protocol I (AP I))⁴⁸ would then apply within Bosnia. Goldsmith’s assertion, then, cannot justify the proposition that the ICRC Commentary is wrong in concluding that there is some protection for *all* persons in the hands of the enemy.

When the protections of the GCs and those provided by the law of neutrality are taken together, it is clear that the GCs do not constitute a narrow set of protections in an otherwise unbounded system. Instead, they form a universal framework in tandem with the law of neutrality, ensuring that all persons have some type of protection under international law.⁴⁹

⁴⁶ See, e.g., Response of the United States, *supra* note 21 (asserting that GCs do not apply to Guantánamo detainees without offering lawful basis for detention).

⁴⁷ See *infra* Part II.A (discussing duties of neutral countries in depth). Note that as a neutral country, Algeria, too, would have the ability to exercise diplomatic protection on the Algerian national’s behalf. See *infra* Part II.A.

⁴⁸ These provisions apply in all NIACs, and provide default rules alongside those in GCs I, II, III, and IV being applied by analogy in the conflict with al Qaeda. See, e.g., GC IV, *supra* note 3, art. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I]. Article 75 of AP I lists “fundamental guarantees” for “persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol.” AP I, *supra*, art. 75. It requires humane treatment, prohibits certain acts, provides protections for women, provides fair trial guarantees for those accused of war crimes and crimes against humanity, etc. *Id.*

⁴⁹ Whether or not that protection is effective in practice is a separate question discussed in Part IV, *infra*.

II THE LAW OF NEUTRALITY IN ARMED CONFLICT

The legal content of neutrality has evolved in fits and spurts since medieval times, when the very idea of neutrality was scorned,⁵⁰ to its heyday around the turn of the nineteenth century when significant efforts were undertaken to codify proliferating laws of neutrality.⁵¹ Despite the development of what sometimes seemed to be elastic rules, the core legal content of neutrality has remained relatively stable. This Part provides a brief overview of the modern content of the law of neutrality, outlines the consequences of violating neutrality, and examines how the law of neutrality informs and interacts with the LOAC regarding military detention. Finally, this Part analyzes two of the most contested aspects of neutrality today—the role of neutrality in the U.N. Charter era and in noninternational armed conflicts—that are relevant to how the law of neutrality might be applied to the United States’s current armed conflicts.

A. *The Modern Legal Content of Neutrality*

Broadly speaking, the law of neutrality regulates the coexistence of states at war and states at peace. Neutrality is traditionally defined as “the attitude of impartiality adopted by third States towards belligerents and recognised by belligerents . . . creating rights and duties between the impartial States and the belligerents.”⁵² This complementary set of rights and duties for belligerent and neutral states forms the core of the law of neutrality. Knowledge of an armed conflict triggers

⁵⁰ When Christian just war theory dominated Medieval Europe, the concept of any state maintaining neutrality toward the belligerent states in a conflict was preposterous, as all states had a moral duty to support the “just” side. STEPHEN C. NEFF, *THE RIGHTS AND DUTIES OF NEUTRALS: A GENERAL HISTORY* 7–9 (2000); see also 5 HERSCH LAUTERPACHT, *Neutrality and Collective Security*, in *INTERNATIONAL LAW* 613, 620 (Sir Elihu Lauterpacht ed., 2004) [hereinafter LAUTERPACHT] (citing Hugo Grotius, *De Jure belli ac pacis*, III, xvii, 3 (“[I]t is the duty of neutrals to do nothing which may strengthen the side which has the worse cause, or which may impede the motions of him who is carrying on a just war . . .”)); 3 E. DE VATTTEL, *THE LAW OF NATIONS* 262 (Charles G. Fenwick ed., Carnegie Institution of Washington 1916) (1758) (“It is lawful and praiseworthy to assist in every way a Nation which is carrying on a just war . . .”).

⁵¹ The dominant positivist approach in the nineteenth century gave rise to attempts to codify the law of neutrality in a set of fixed rules that practitioners could follow, such as the 1907 Hague Conventions. NEFF, *supra* note 50, at 127.

⁵² 2 OPPENHEIM, *supra* note 2, § 293. This definition is also embraced by the U.S. Army Field Manual, which frames neutrality “on the part of a State not a party to the war” as “refraining from all participation in the war, and in preventing, tolerating, and regulating certain acts on its own part, by its nationals, and by the belligerents.” U.S. ARMY, *FIELD MANUAL 27-10: THE LAW OF LAND WARFARE* ¶ 512 (1956) [hereinafter *ARMY FIELD MANUAL*].

neutral rights and duties.⁵³ No declaration of neutrality is required—any state that does not declare war is and remains neutral unless it chooses to become a co-belligerent (i.e., join the war on one side or the other) or otherwise participates in hostilities.⁵⁴ The basic rules of neutrality are binding on all states as customary international law.⁵⁵

Two treaties provide the most comprehensive codification of the law of neutrality: the Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V) and the Hague Convention (XIII) Respecting the Rights and Duties of Neutral Powers in Naval War.⁵⁶ Both treaties were drafted in 1907 and are still in effect. While the LOAC has advanced considerably since 1907,⁵⁷ laws of neutrality have been left largely untouched, giving them a “slightly musty quality,”⁵⁸ in the words of one scholar. Nonetheless, the fundamental rights and duties of neutral states are alive and remain discernible today.

1. *Neutral Rights and Duties Toward Belligerents*

States that remain neutral in a conflict must observe two fundamental duties. First, neutral states must refrain from participating in the conflict. Stated simply, “a neutral should not fight.”⁵⁹ Second, neutral states must treat each of the belligerents impartially. As summarized in Hague V, “[e]very measure of restriction or prohibition taken by a neutral Power . . . must be impartially applied by it to both belligerents.”⁶⁰ Alongside these two primary duties of noncooperation and impartiality, neutral powers are under a third, corollary obligation to prevent belligerents from committing violations of their neutrality

⁵³ 2 OPPENHEIM, *supra* note 2, § 307 (noting that treaty law requires that belligerents notify neutrals of outbreak of war because knowledge of conflict marks commencement of neutrality).

⁵⁴ *Id.*

⁵⁵ *See id.* §§ 307–67 (describing international laws that govern neutrality).

⁵⁶ Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (1907), in ROBERTS & GUELF, *supra* note 3, at 61 [hereinafter Hague V]; Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, Oct. 18, 1907, 2 Malloy 2352 (1910).

⁵⁷ The most notable advances are the Geneva Conventions of 1949 and their Additional Protocols I and II. *See* AP I, *supra* note 48; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Art. 13, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter AP II].

⁵⁸ Detlev F. Vagts, *The Traditional Legal Concept of Neutrality in a Changing Environment*, 14 AM. U. INT'L L. REV. 83, 84 (1998).

⁵⁹ *Id.* at 92.

⁶⁰ Hague V, *supra* note 56, art. 9. This traditionally means a neutral state may continue to engage in commerce with a belligerent state so long as it also retains normal trade relations with the other belligerent state(s).

on their territory.⁶¹ A neutral state's duty to prevent its territory from being used as a base for operations by either side can be onerous—neutral states are required to use force if necessary to protect their neutral rights.⁶²

If neutral states observe these duties, or at least succeed in preventing any significant or systematic violations,⁶³ they enjoy substantial rights vis-à-vis belligerent powers with which they have remained at peace. Neutrals retain the right to continue their normal diplomatic and trade relations with all parties to the conflict.⁶⁴ Most important, “[t]he territory of neutral Powers is inviolable,”⁶⁵ a right that has been enshrined in the U.N. Charter for all states.⁶⁶

2. *Belligerent Rights and Duties Toward Neutrals*

Belligerents likewise have a core set of duties toward neutrals. Hague V spells out several belligerent duties flowing from the primary obligation to refrain from interfering with neutral territory: Belligerents may not move munitions or troops across neutral territory, use neutral territory to “communicat[e] with belligerent forces on land or sea,” or recruit “corps of combatants” on neutral territory.⁶⁷

⁶¹ *Id.* art. 5 (“A neutral Power must not allow any of the acts referred to in Articles 2 to 4 to occur on its territory.”). For example, the United States had a duty during the last major land war near its borders, the Mexican Revolution, to use its own army to prevent “the carrying on of a military expedition from [U.S.] territory against the Republic of Mexico.” *Ex parte Orozco*, 201 F. 106, 110 (W.D. Tex. 1912).

⁶² 2 OPPENHEIM, *supra* note 2, § 296 (“[N]eutral States are under a duty to prevent their territory becoming a theatre of war . . .”).

⁶³ A subset of rules governs how private citizens or companies of neutral states can interact with belligerents during wartime without jeopardizing their state's neutrality. *See id.* § 296a (describing distinct set of rules governing private citizens of neutral states).

⁶⁴ As long as neutral duties are observed, “all intercourse between belligerents and neutrals takes place as before, a condition of peace prevailing between them in spite of the war between the belligerents.” *Id.* § 297; *see also* EDWIN M. BORCHARD, *THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD* § 46, at 112 (1916) (“Neutral aliens are left free to trade with other neutrals or with nationals of the enemy . . .”).

⁶⁵ Hague V, *supra* note 56, art. 1; *see also* ARMY FIELD MANUAL, *supra* note 52, § 512 (“It is the duty of belligerents to respect the territory and rights of neutral States.”). The Hague Convention drafters purposefully put this provision at the “head of the project” because it “consecrates the first and fundamental effect of neutrality during war.” 3 *THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1907*, at 49 (1921).

⁶⁶ 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 . . .”).

⁶⁷ Hague V, *supra* note 56, art. 2–4; *see also* Maj. David A. Willson, *An Army View of Neutrality in Space: Legal Options for Space Negation*, 50 A.F. L. REV. 175, 192 (2001) (“Belligerents are required to respect neutral property and may not move troops or munitions of war onto or across neutral territory.”).

So long as belligerents maintain their duties toward neutrals, they too enjoy significant rights. Belligerents gain the guarantee that neutral territory will not be used to launch attacks or recruit or shelter troops, for example.⁶⁸ They also benefit from the continuance of pre-existing diplomatic and trade relationships discussed above in relation to neutral rights.⁶⁹

B. *The Consequences of Violating Neutrality*

Neutrality may be violated either when a neutral state fails to observe its duties, or when a belligerent state does not fulfill its duties toward neutrals or their nationals.⁷⁰ Violations of neutrality may be grave or slight, triggering different legal consequences in response.⁷¹ The most severe violations of neutral rights by belligerents, such as launching operations or recruiting forces from a neutral state, would trigger the right of the neutral state to use self-defense against the infringing belligerent.

Conversely, allowing passage of troops through neutral territory,⁷² furnishing troops to a belligerent,⁷³ or providing intelligence⁷⁴ are classic examples of violations of neutral duties. When a neutral state severely violates its duties, it risks the consequence of being drawn into the war: A state that significantly and systematically violates its neutral duties—through participation in the conflict or flagrant violations of impartiality—may be treated as a co-belligerent.⁷⁵

⁶⁸ Hague V, *supra* note 56, art. 5.

⁶⁹ See *supra* note 65 and accompanying text.

⁷⁰ 2 OPPENHEIM, *supra* note 2, § 357.

⁷¹ *Id.* § 359 (“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.”); see also Willson, *supra* note 67, at 196 (“Any activity aiding one belligerent and not the other may be perceived as a violation.”).

⁷² 2 OPPENHEIM, *supra* note 2, § 323 (“[A] violation of the duty of impartiality is involved when a neutral allows to a belligerent the passage of troops or the transport of war material or supplies over his territory.”).

⁷³ *Id.* § 321 (“[A neutral state] violates its impartiality by furnishing a belligerent with troops or men-of-war . . .”).

⁷⁴ *Id.* § 356 (noting duty of impartiality requires neutral not to provide information to belligerent concerning war through diplomatic means, and to prevent belligerents from “arrang[ing] the transmission of messages through [cables or wires] laid for that very purpose over neutral territory”); see also Willson, *supra* note 67, at 200 (“Providing military intelligence to a belligerent is a serious breach of neutrality.”).

⁷⁵ See, e.g., 2 OPPENHEIM, *supra* note 2, §§ 357–60 (describing conditions ending neutral status); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2112 (2005) (describing how state can be considered co-belligerent if it violates rights of neutrals). Further, “[p]rior U.S. practice is consistent with the conclusion that a country becomes a co-belligerent when it permits U.S.

C. *Neutrality and Detention in Armed Conflict: A Universal Framework*

With an understanding of the law of neutrality overall, we may now examine how neutrality interacts with other laws applicable during armed conflict. This Section examines the interaction of neutrality and the LOAC in the specific context of detention, a major issue in the conflict with al Qaeda. As a starting point, it is crucial to distinguish between two mutually exclusive categories: civilians and combatants.⁷⁶ Combatants are defined as individuals who constitute the armed forces of the enemy (in the case of a state) or the military component of an organized armed group (in the case of a nonstate actor).⁷⁷ All other individuals are legally civilians.⁷⁸ Only combatants may lawfully be subject to military force. Civilians may lose their immunity from attack only if they directly participate in hostilities.⁷⁹ Participation in hostilities is unlawful for civilians, making civilians who do so subject to prosecution for war crimes. However, even civilians who illegally take up arms do not attain combatant status but remain civilians who are otherwise protected as such.⁸⁰

armed forces to use its territory for purposes of conducting military operations.” 2004 OLC Memo, *supra* note 39, at 8.

⁷⁶ The principle of distinction between combatants and civilians is fundamental to the law of armed conflict. *See, e.g.*, Ryan Goodman, Editorial Comment, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT’L L. 48, 51 (2009) (noting that principle of distinction is “a cornerstone of [international humanitarian law]”).

⁷⁷ *See, e.g.*, INT’L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 32–35 (2009) [hereinafter ICRC INTERPRETIVE GUIDANCE] (discussing criteria for membership in organized armed group); INGRID DETTER, THE LAW OF WAR 132 (2000). As U.S. State Department Legal Adviser Harold Koh explained, the United States considers combatants in the conflict with al Qaeda to include “individuals who are part of an organized armed group like al-Qaeda.” Koh Speech, *supra* note 1. Relevant facts include “whether an individual joined with or became part of al-Qaeda or Taliban forces or associated forces, which can be demonstrated by relevant evidence of formal or functional membership.” *Id.* While this definition is still contested, as Koh notes, “our general approach of looking at ‘functional’ membership in an armed group has been endorsed not only by the federal courts [primarily D.C. District Court judges in habeas hearings of Guantánamo Bay detainees], but also is consistent with the approach taken in the targeting context by the ICRC.” *Id.*

⁷⁸ *See, e.g.*, AP I, *supra* note 48, art. 50 (“A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2), (3) and (6) or the Third Convention and in Article 43 of this Protocol.”).

⁷⁹ AP II, *supra* note 57, art. 13, para. 3 (“Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities.”); *see also* ICRC INTERPRETIVE GUIDANCE, *supra* note 77, at 995 (civilians retain immunity from attack “unless and for such time as” they directly participate in hostilities); Goodman, *supra* note 76, at 51.

⁸⁰ *See* AP II, *supra* note 57, art. 13, para. 3 (providing that civilians enjoy protections “unless and for such time as they take a direct part in hostilities”); Goodman, *supra* note

1. *Detention Within Neutral Territory*

The law of neutrality requires that combatants found in neutral territory be interned and treated humanely.⁸¹ Hague V provides that when belligerent troops cross into a neutral state, that state “shall intern them, as far as possible, at a distance from the theatre of war.”⁸² U.S. practice during the Mexican Revolution provides an early illustration of the operation of these rules. According to its treaty obligations under Hague V, the United States disarmed and interned a group of troops who had sought refuge in neutral U.S. territory after a defeat at the hands of the enemy. The interned combatants petitioned a federal court in California for writs of habeas corpus in *Ex parte Toscano*.⁸³ Denying release, the court explained that the government lawfully based its detention authority on Hague V.⁸⁴ Notably, the court rejected the internees’ argument that the law of neutrality does not apply to internal wars in which no state is a party.⁸⁵

These simple rules for how combatants must be treated if found in neutral territory are still in force and were incorporated in Article 4(B)(2) of the Third Geneva Convention Relative to the Treatment of Prisoners of War (GC III). GC III requires that persons who would be treated as prisoners of war (POWs) if found in belligerent or occupied territory must be given POW status if found in neutral territory and given the protections afforded to all POWs in GC III.⁸⁶

76, at 51 (“Civilians, however, lose their immunity from attack if they directly participate in hostilities [T]hey effectively become ‘unlawful combatants’ for illegally taking up arms. Nevertheless, as a formal matter, [they constitute] a subset of *civilians*, and they otherwise remain protected [for example, by GC IV, AP I, and AP II].” (internal citation omitted) (emphasis in original)).

⁸¹ Hague V, *supra* note 56, art. 12 (providing that neutral state “shall supply the interned with the food, clothing, and relief required by humanity” and “[a]t the conclusion of peace the expenses caused by the internment shall be made good”).

⁸² *Id.* art. 11. However, the neutral state may decide whether to leave officers at liberty. *Id.* Notably, the U.S. Army Field Manual explicitly incorporates each of these provisions in its chapter on neutrality. ARMY FIELD MANUAL, *supra* note 52, §§ 532–38. Provisions on neutrality are also found in scattered other provisions, such as the chapter on commencement of hostilities, which requires notification to neutrals. *See, e.g., id.* § 21.

⁸³ 208 F. 938, 939 (S.D. Cal. 1913).

⁸⁴ *Id.* at 942. The court found Hague V to be a self-executing treaty. *Id.*

⁸⁵ *Id.* at 943–44. Application of Hague V to noninternational armed conflicts is discussed further *infra* subsection II.D.2. The court also rejected their assertion that constitutional due process had been denied: “[H]ere ‘due process of law’ is found in The Hague Treaty, its execution by the President, and the admitted facts which bring petitioners under its operation.” 208 F. at 943.

⁸⁶ GC III, art. 4(B)(2), states:

The following shall likewise be treated as [POWs] under the present Convention: . . . (2) 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 interna-

Neutrality is arguably even more protective for civilians. A neutral state has a duty *not* to detain (or otherwise use military force against) civilians from belligerent states. Indeed, neutral territory is seen as an asylum for “private subjects of the enemy” who are “safe on neutral territory even if they are claimed by a belligerent as having committed war crimes.”⁸⁷ Of course, the duty to protect civilian citizens of a belligerent state does not preclude a neutral state from detaining such individuals pursuant to its domestic criminal or administrative laws.⁸⁸

2. *Detention of Neutral Nationals in Belligerent Territory and the Role of Diplomatic Protection*

Belligerent states also have certain duties and obligations with regard to a neutral state’s citizens found within their territory. Again, these rules treat combatants and civilians separately. If a neutral national joins the armed forces of another state, she may be detained as a combatant alongside other combatants from belligerent states,⁸⁹ and GC III applies, regardless of nationality.⁹⁰

The rules governing treatment of civilians who are neutral nationals found in belligerent territory are more complex. As explained above, GC IV contains rules on treatment of civilians in

tional law, without prejudice to any more favourable treatment which these Powers may choose to give

GC III, *supra* note 3, art. 4(B)(2). This leaves intact the possibility that interned POWs would be given better treatment than the absolute minimums required in Hague V and GC III. *See also* III PICTET COMMENTARY, *supra* note 17, at 70–71 (noting that treatment for interned POWs in GC III, *supra* note 3, art. 4(B)(2), is only *minimum* standard).

⁸⁷ 2 OPPENHEIM, *supra* note 2, § 336 (internal citations omitted). This would not rule out lawful extradition to domestic or international tribunals.

⁸⁸ Detention pursuant to criminal or administrative law is distinct from detention as a war measure. *See, e.g.*, ICRC INTERPRETIVE GUIDANCE, *supra* note 77, at 1046 (“When civilians capture . . . or kill an adversary and in doing so . . . fail to distinguish themselves from the civilian population in order to lead the adversary to believe that they are entitled to civilian protection against direct attack, this may amount to perfidy in violation of customary and treaty [international humanitarian law].” (internal citations omitted)). Note, however, that a state may be required by the U.N. Security Council to take measures *short of force* against civilians involved in terrorist activity. *See infra* notes 122–26 and accompanying text for a discussion of the way in which Security Council resolutions may change, or “qualify,” the default neutral rules explained in this Section.

⁸⁹ *See, e.g.*, Hague V, *supra* note 56, art. 17 (noting that neutral who commits acts in favor of belligerent will no longer be considered neutral); ARMY FIELD MANUAL, *supra* note 52, § 550 (“In such a case, the neutral shall not be more severely treated . . . than a national of the other belligerent State could be for the same act.”).

⁹⁰ GC III defines which individuals are entitled to POW status (or a presumption of POW status until a competent tribunal determines otherwise) without reference to nationality. Fulfilling the criteria listed in GC III, art. 4, such as membership in an armed force of a party to a conflict, not nationality, renders a combatant subject to detention under GC III. GC III, *supra* note 3, art. 4.

belligerent territory. As a default, all civilians who “at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals”⁹¹ are to be treated as protected persons with all of the accompanying benefits.⁹² Protected persons may only be detained in limited circumstances, when the security of the state absolutely requires it, and even then only in accordance with the strict guidelines provided in GC IV.⁹³ A major exception to the rule of protected person status for civilians is that the status is *not* given to nationals of a neutral state or co-belligerent state that has normal diplomatic relations with the belligerent state in whose hands they have fallen.⁹⁴

GC IV relies heavily on diplomatic protection to safeguard the rights of civilians who fall under its exemptions. An overview of the international law of diplomatic protection is therefore necessary to complete our understanding of protections in the LOAC framework. Under international law, a state is responsible for an injury to a foreign national caused by that state’s wrongful act or omission.⁹⁵ Diplomatic protection is the legal mechanism a state may use to protect its nationals who are injured by the wrongful acts of other states and to secure reparation.⁹⁶ Although states may choose to invoke diplomatic protection “through diplomatic action or other means of peaceful settlement,”⁹⁷ it is not required by international law to do so.⁹⁸ In addition, the injured individual is generally required to exhaust local remedies before diplomatic protection may be invoked, although

⁹¹ GC IV, *supra* note 3, art. 4.

⁹² See *supra* notes 34–36 and accompanying text (describing protections).

⁹³ GC IV, *supra* note 3, art. 41 (“[Parties] may not have recourse to any other measure of control [of detainees] more severe than that of assigned residence or internment . . .”).

⁹⁴ *Id.* art. 4. The other major exception is for nationals from states not party to the Convention. However, even in 1949, if a nonsignatory state chose to apply the GCs despite nonratification, the signatory state was also bound to apply it. See GC I, *supra* note 3, art. 2. More important, nearly all states are now parties to the GCs. See *supra* note 38. For a discussion of exceptions, see *supra* notes 38–39 and accompanying text.

⁹⁵ INT’L LAW COMM’N, DRAFT ARTICLES ON DIPLOMATIC PROTECTION WITH COMMENTARIES art. 1 cmt. ¶ 2 (2006). An injury to the national of a state is an injury to the state itself. *Id.* ¶ 3.

⁹⁶ *Id.* ¶ 2.

⁹⁷ *Id.* ¶ 8 (explaining that “[d]iplomatic action” includes, *inter alia*, “protest, request for an inquiry or for negotiations[,] . . . mediation and conciliation to arbitral and judicial dispute settlement”).

⁹⁸ *Id.* art. 2 cmt. ¶ 2 (“A State has the right to exercise diplomatic protection on behalf of a national. It is under no duty or obligation to do so.”); see also *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, 1970 I.C.J. 3, 45 (Feb. 5) (“The State must be viewed as the sole judge to decide whether its protection will be granted, to what extent it is granted, and when it will cease.”).

there are many exceptions to this rule.⁹⁹ If diplomatic protection is invoked, the state responsible for causing injury to a foreign national is then “obliged to cease the wrongful conduct and to make full reparation for the injury caused by the internationally wrongful act.”¹⁰⁰

In the context of an armed conflict governed by the GCs, diplomatic protection would in theory work as follows. Take the only somewhat-hypothetical case of a war between the United States and Afghanistan in which Algeria has remained neutral. “A,” a civilian Algerian national, has been seized by the U.S. military in neutral Bosnia for suspected connection to acts of hostility against the United States. He has been flown to a prison in Afghanistan where he is held in military detention without having been charged with a crime or receiving POW protections.¹⁰¹ Neutral Algeria may exercise diplomatic protection on behalf of A¹⁰² and may choose from a wide range of diplomatic or judicial measures. For example, it may quietly seek A’s release through diplomatic channels, seek to have A treated as a POW if he indeed qualifies for such treatment, demand an apology or compensation, or take stronger counter-measures if the situation worsens over time.

We must note that in addition to the protections specified here, states also have many *primary* obligations toward civilian foreign nationals which are generally stronger than those provided by protected person status under GC IV.¹⁰³ Several sources of law govern the relationship between a state and foreign nationals within its territory, including treaties with the state of the foreign national, cus-

⁹⁹ INT’L LAW COMM’N, *supra* note 95, arts. 14–15. Exceptions include when local remedies are obviously futile, offer no reasonable prospect of success, provide no reasonable possibility of effective redress, or the injured person is manifestly precluded from pursuing local remedies. *Id.*

¹⁰⁰ *Id.*, Diplomatic Protection, cmt. ¶ 1 (referring to Articles 28, 30, 31, 34–37 of ILC Articles on Responsibility of States for Intentionally Wrongful Acts).

¹⁰¹ A less hypothetical example is presented by *Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009), which describes prisoners captured outside Afghanistan but detained at Bagram Airbase in Afghanistan. *See also* Charlie Savage, *Judge Rules Some Prisoners at Bagram Have Right of Habeas Corpus*, N.Y. TIMES, Apr. 3, 2009, at A14 (“The three detainees—two Yemenis and a Tunisian—say that they were captured outside Afghanistan and taken to Bagram The importance of Bagram as a holding site for terrorism suspects captured outside Afghanistan and Iraq has increased under the Obama Administration.”).

¹⁰² For the purpose of explaining diplomatic protection, I leave aside the claim Bosnia may make against the United States for conducting military operations within its territory (which could give rise even to the right to use military force in self defense), unless Bosnia gave prior consent to the operation, which would likely make Bosnia a co-belligerent of the United States in the conflict.

¹⁰³ *See supra* notes 34–36 and accompanying text (regarding benefits of protected person status).

tomary international law, and the state's domestic laws.¹⁰⁴ International human rights laws provide additional primary obligations that protect foreign nationals.¹⁰⁵ Overall, during war, belligerent states must generally provide neutral nationals the protections of their own domestic laws,¹⁰⁶ or greater protections if domestic laws fall below certain "minimum standards,"¹⁰⁷ both of which are generally more robust than the protections provided by the LOAC.

Because of the strong primary obligations belligerent states owe to neutral nationals, and because neutral states retain normal diplomatic relations with belligerents, diplomatic protection is in theory a wide-ranging and robust mechanism for protecting neutral nationals who find themselves in belligerent territory during conflict.

3. *A Universal Framework*

Read in light of the structural principles of neutrality and diplomatic protection, the Geneva Conventions leave no significant gaps in protection in the LOAC framework. The universal framework created in the wake of World War II incorporates the layers of international law that were created over centuries and remain in effect.¹⁰⁸ It may be conceptualized either in terms of geographic territory or in terms of individual status.

First, in terms of geographic territory, the continuum of protections is as follows: GC IV applies to civilians in belligerent or occupied territory, except for nationals of neutral or co-belligerent states that have normal diplomatic representation within that territory. For those

¹⁰⁴ See BORCHARD, *supra* note 64, § 20, at 38 (describing various sources of "law of aliens," including treaties and municipal legislation).

¹⁰⁵ See STEINER ET AL., *supra* note 16, at 401–02 (describing additional protection from human rights law even when international humanitarian law applies).

¹⁰⁶ See BORCHARD, *supra* note 64, § 46, at 113 (explaining that "person and property" of neutrals may be subject to seizure but only if "no greater burden is imposed upon [neutrals] than upon nationals").

¹⁰⁷ Historically, there was debate over whether the international law on protection of aliens requires an obligation of national treatment—that is, *equal* treatment of nationals and aliens—or establishes a minimum standard of treatment of aliens (regardless of a state's treatment of its own nationals) below which a state cannot go without incurring international responsibility. The modern consensus is that international law requires application of minimum standards. See Edwin Borchard, *The "Minimum Standard" of the Treatment of Aliens*, 33 AM. SOC'Y INT'L L. PROC. 51, 53, 60–61 (1939). Some argue that human rights law establishes more protective international standards. See STEINER ET AL., *supra* note 16, at 92 (noting "methodological problems in developing a minimum international standard" and use of human rights treaties to establish baselines of treatment). For our purposes, potential differences in content of international "minimum standards" and national treatment are peripheral, as both are protective of aliens and neither regime has historically been seen to leave neutral nationals in belligerent territory outside of the law.

¹⁰⁸ This includes, for example, the Hague Conventions of 1907, discussed *supra* note 56 and accompanying text, and customary international law.

individuals, diplomatic protection is the international legal means of vindicating their rights. Absent normal diplomatic relations, in belligerent and occupied territory GC IV applies even to neutral and co-belligerent nationals. Common Article 3 and AP I, Article 75 apply as well.

Outside of belligerent or occupied territory (i.e., in neutral territory), the law of neutrality governs. 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. Civilians in neutral territory are still protected by the law of neutrality, however, because any military action taken against them would violate the neutral state's duties of noncooperation and impartiality.

Second, conceptualizing the Geneva Conventions, the law of neutrality, and the principle of diplomatic protection together as a whole, the protective fabric is, for the most part, universal in regard to individual status as well: GC III requires that POW protections, or more favorable treatment, must be applied to any combatant who qualifies for POW status as defined in GC III, art. 4, regardless of whether the combatant is found in neutral or belligerent territory. Again, POW status is to be accorded in case of doubt. For civilians, where the protections of GC IV, Common Article 3, and Article 75 of AP I end, the law of neutrality (upheld through diplomatic protection) begins, and vice versa.

D. Modern Dilemmas and the Resilience of Neutrality

The fundamental principles of neutrality have remained remarkably resilient despite rearrangements of the legal frameworks governing the use of force and the conduct of hostilities in the twentieth century. However, the circumstances of neutrality's application continue to be contested. Two of the most salient threats to applying neutrality today are the rise of the U.N. collective security regime and the predominance of noninternational armed conflicts (NIACs) in which application of laws developed to constrain inter-state conflict is murky. Both of these issues must be addressed in determining how, if at all, neutrality applies to the conflicts in which the United States is engaged today.

1. Neutrality in the Collective Security Era

Some scholars argue that neutrality became obsolete as a legal concept with the establishment of the U.N. Charter, if not the League of Nations Covenant decades earlier, and that it is incompatible with

twentieth century collective security arrangements.¹⁰⁹ According to this view, neutrality seems inconsistent with this new world order in which cooperation by all states is required in combating aggression. International institutions, not individual states, now decide which side is just when conflicts arise and require concerted action against aggressors, leaving no room for impartiality. No U.N. member state may be neutral against an aggressor once the aggressor is identified by the U.N.¹¹⁰ When the U.N. Security Council authorizes an enforcement action under Chapter VII of the U.N. Charter,¹¹¹ it is the duty of all member states to cooperate in repelling the aggressor and to come to the aid of the aggrieved state(s).¹¹² While language expressly declaring an end to neutrality was not adopted when proposed, the Charter does require member states to “give the United Nations every assistance in any action it takes” and to “refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.”¹¹³

The idea that neutrality cannot have survived the U.N. Charter may be compelling normatively, but it has not been borne out legally or in practice.¹¹⁴ Careful treatments by prominent scholars conclude that neutrality did not die with the birth of collective security regimes.¹¹⁵ Rather, the ability of U.N. members to exercise neutrality was merely “qualified”¹¹⁶ whenever the Security Council required

¹⁰⁹ See NEFF, *supra* note 50, at 218 (discussing this view but concluding that “the League of Nations Covenant, and the UN Charter failed to kill neutrality”).

¹¹⁰ See, e.g., Dietrich Schindler, *Neutrality and Morality: Developments in Switzerland and in the International Community*, 14 AM. U. INT’L L. REV. 155, 162 (1998) (“The end of the Cold War ended the privileged position of neutrals. . . . It was impossible to remain neutral between the international community as a whole and a single aggressor state.”).

¹¹¹ U.N. Charter, *supra* note 66, art. 39 (providing for determination of breach of peace or act of aggression); *id.* at art. 41 (authorizing measures short of force); *id.* at art. 42 (authorizing use of force).

¹¹² U.N. Charter, *supra* note 66, arts. 43, 49; NEFF, *supra* note 50, at 193–95.

¹¹³ U.N. Charter, *supra* note 66, art. 2, para. 5.

¹¹⁴ A few inter-state conflicts in the Charter era seemed to indicate collective security could trump traditional neutrality. For example, India and Austria allowed the United States to refuel on way to the theater of war in 1990 Iraq war, which would have violated the Hague Rules of 1923 on aerial warfare. NEFF, *supra* note 50, at 193. Further, the U.N. Security Council “has never considered its freedom of action to be constrained by a duty to respect the traditional rights of neutrals.” *Id.* at 194.

¹¹⁵ NEFF, *supra* note 50, at 218; see also 2 OPPENHEIM, *supra* note 2, § 292 (describing role of neutrality in modern conflicts).

¹¹⁶ The principle of “imperfect” or “qualified” neutrality, as opposed to “perfect” or “absolute” neutrality, has been dynamic. Oppenheim explains, “The neutrality of a State was qualified if it remained neutral on the whole, but actively or passively, directly or indirectly, gave some kind of assistance to one of the belligerents in consequence of an obligation entered into by a treaty previous to the war” 2 OPPENHEIM, *supra* note 2, § 305. This distinction was “of great practical importance in former times,” but by the latter half of the nineteenth century, “it became controversial,” and any assistance to one of the

action by member states.¹¹⁷ While obligations imposed by the Security Council may qualify member states' ability to remain strictly neutral in certain circumstances,¹¹⁸ neutrality remains a viable legal and practical option in the modern era even in most circumstances in which the Security Council has acted.¹¹⁹ Indeed, the drafters of the GCs, writing after the U.N. Charter was ratified, recognized the continued vitality of neutrality, which operates as a meaningful legal concept throughout the GCs.¹²⁰ Over half a century after the creation of the U.N.

belligerents, whether by virtue of a prior treaty or no, may have constituted a violation of neutrality. *Id.*; see also 5 LAUTERPACHT, *supra* note 50, at 619 (“[I]nternational law in the hundred years preceding the Covenant rejected the idea of qualified neutrality.”).

¹¹⁷ 5 LAUTERPACHT, *supra* note 50, at 619 (“There is nothing to prevent a State from giving up in a treaty some of its rights, including the right to be treated in an impartial manner when engaged in a war undertaken in breach of the terms of the treaty. The Covenant constitutes such a treaty.”).

¹¹⁸ Four distinct circumstances in which Security Council actions may affect neutrality can be identified. First, neutrality clearly remains in the period before the Security Council has identified an aggressor. States have a duty *not* to use force during this period unless it can be justified as self-defense. 2 OPPENHEIM, *supra* note 2, § 292h. This is also the case when the Security Council is unable to reach an agreement on whether aggression has occurred. *Id.* Second, and more importantly, the law of neutrality remains in effect when the Security Council fails to act. The U.N. collective security system has unfortunately never fulfilled the lofty objectives set out in its Charter, and most conflicts are not the subject of Chapter VII peace enforcement actions. See, e.g., *id.* (“[When the Security Council is] unable to reach decisions as to the enforcement action to be taken . . . there is no legal obligation upon the Members to relinquish their neutrality . . .”). Third, even when the Security Council does act, it is important to distinguish between actions that require use of force and nonmilitary Chapter VII actions such as the imposition of economic sanctions which do not affect states' neutrality. *Id.* § 292e (noting that neutrality remains “in all cases in which the Security Council has confined the participation of all or some Members in the enforcement action to measures not amounting to war”). Fourth, even if the Security Council does authorize force, formal neutrality does not always cease to be a legal option for most states. This is because “the Charter does not lay down—as it may well have done—that the determination of a State as an aggressor shall automatically be followed by a general war against it . . .” *Id.* § 292g. Enforcement measures could entail a specific blockade at an identified port, for example. *Id.* § 292f. Thus, “it is only in so far as [member states] have in fact taken the action required of them that they must be considered to have ceased altogether to be neutral.” *Id.* That is, if the Security Council authorizes limited enforcement actions to be carried out by only a small subset of states, neutral status remains viable for all but the few states involved in the specific enforcement action. *Id.* § 292g.

¹¹⁹ Further, in practice, most states desire to stay out of most armed conflicts. “As long as a significant tendency in this direction exists in international affairs,” explains Neff, “international law can scarcely avoid taking account of it.” NEFF, *supra* note 50, at 196.

¹²⁰ See BOTHE ET AL., *supra* note 17, at 106 (noting that drafters chose language carefully in recognition that “neutrality . . . is still a valid and valuable concept of international law”). See generally GC I, *supra* note 3 (creating role for neutral states and specifying rules for neutral nationals, among other references to neutrality); GC II, *supra* note 3 (same); GC III, *supra* note 3 (same); GC IV, *supra* note 3 (same).

system, the law of neutrality is still on the books and applied by states.¹²¹

The U.N. Security Council condemned the attacks of September 11, 2001, in a resolution that, arguably, implicitly authorized self-defense by the United States in response.¹²² Acting under Chapter VII, Security Council Resolution 1373 subsequently required all states to take certain measures short of force to suppress terrorism.¹²³ It did not, however, authorize global use of force against anyone affiliated with al Qaeda or associated groups, as the conflict with al Qaeda quickly became. In fact, the Security Council criticized the United States's expansive prosecution of the conflict in subsequent resolutions.¹²⁴ Thus, the Security Council's condemnation of terrorism in 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. It does, however, qualify the ordinarily applicable rules of neutrality to the extent that they are incompatible with any of the specific requirements of Security Council resolutions. Certain 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.¹²⁵ The residual laws of neutrality that do not conflict with such

¹²¹ See, e.g., ARMY FIELD MANUAL, *supra* note 52, §§ 512–552; NEFF, *supra* note 50, at 196–99 (noting neutrality practiced in Kuwaiti, Korean, and other recent conflicts; and state recognition of “duty of impartiality”).

¹²² S.C. Res. 1368, ¶ 1, U.N. Doc. S/RES/1368 (Sept. 12, 2001) (determining that September 11, 2001, attacks constituted “threat to international peace and security” and noting “inherent right of individual or collective self-defence in accordance with the Charter”).

¹²³ S.C. Res. 1373, ¶¶ 1(a), 2(a), (c)–(d), (g), U.N. Doc. S/RES/1373 (Sept. 28, 2001) [hereinafter Res. 1373] (requiring states to prevent and suppress terrorist financing; suppress recruitment by terrorist groups; eliminate supply of weapons to terrorists; criminalize terrorism under domestic law and ensure that terrorists are “brought to justice”; prevent terrorists from “using their respective territories” to commit terrorist acts “against other States or their citizens”; “[d]eny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens”; and “[p]revent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents,” among other obligations).

¹²⁴ For example, in 2004 the U.N. Security Council adopted resolutions “[r]eminding States that they must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.” STEINER ET AL., *supra* note 16, at 381 (discussing U.N. Security Council Resolutions 1535 and 1566).

¹²⁵ This would include, for example, cooperating with the United States, a belligerent in the conflict, in efforts to freeze terrorist finances. Other requirements are consistent with unqualified neutrality: preventing the movement of known terrorists and denying safe haven to those planning attacks, for example, are already required under the law of neu-

obligations would be unaffected by the Security Council's actions to date.¹²⁶ Given the Security Council's fairly robust regulation of terrorism, the subset of the law of neutrality unaffected by Security Council action may be much smaller in the conflict with al Qaeda than in other internationalized-NIACs (including, for example, the war in Iraq).

2. *Neutrality and Noninternational Armed Conflicts*

The second modern dilemma, given the development of the law of neutrality in an age primarily concerned with inter-state conflicts,¹²⁷ is the extent to which the law of neutrality applies to NIACs.¹²⁸ Each of the conflicts in which the United States is engaged (the conflict with al Qaeda and the conflicts within Iraq and Afghanistan¹²⁹) qualify as a NIAC because none of the three are strictly inter-state conflicts—that is, in each, at least one party to the conflict is not a state.¹³⁰

trality, which forbids neutral states from allowing passage of troops through their territory or allowing their territory to be used as a base of operations. *See supra* notes 61–62, 72 and accompanying text (discussing duties of neutral states). However, the Security Council-imposed duty of cooperation with the United States in taking actions against known terrorists implicitly qualifies the requirement that states take equivalent action toward U.S. officials, ratcheting down noncooperation requirements.

¹²⁶ If the Security Council did go so far as to require use of force against all known and suspected terrorists, there arguably would be no residual rules of neutrality to apply.

¹²⁷ Inter-state armed conflicts (IACs) are by definition waged between two or more states. They are governed by the GCs in “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” GC I, *supra* note 3, art. 2.

¹²⁸ Conflicts that are not between two or more states are in a distinct legal category of NIACs. If the conflict does not fit into the definition of those governed by the GCs given in Common Article 2, *see id.*, but is instead “not of an international character,” the conflict is governed by Common Article 3 of the GCs and the provisions of the 1977 Additional Protocol II to the Geneva Conventions that have become customary international law. GC I, *supra* note 3, art. 3. Common Article 3 requires each party to the conflict to follow certain minimum standards of conduct regarding, *inter alia*, treatment of civilians and wounded combatants. *Id.* Either all four GCs apply, or Common Article 3 and Additional Protocol II apply. *See, e.g.,* Gabor Rona, *An Appraisal of U.S. Practice Relating to ‘Enemy Combatants,’* 10 Y.B. INT’L HUMANITARIAN L. 232, 249 (2007); *see also* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 108–09 (2004) (summarizing protections and enforcement scheme of Geneva Conventions).

¹²⁹ As of March 2010, the executive branch describes three distinct armed conflicts: [T]he United States finds itself engaged in several armed conflicts. As the President has noted, one conflict, in Iraq, is winding down. He also reminded us that the conflict in Afghanistan is . . . ‘an effort to defend ourselves and all nations from further attacks.’ In the conflict occurring in Afghanistan and elsewhere, we continue to fight the perpetrators of 9/11: a non-state actor, al-Qaeda (as well as the Taliban forces that harbored al-Qaeda).

Koh Speech, *supra* note 1.

¹³⁰ The United States initially characterized the armed conflict with al Qaeda and the Taliban as international in character. *See* Memorandum from Jay S. Bybee, Assistant

Applying the law of neutrality is somewhat more straightforward in the context of the internal NIACs in Iraq and Afghanistan than in the conflict with al Qaeda. The law of neutrality is triggered when a state of armed conflict exists, which in a NIAC occurs when “the contending force attains a level of power that causes other nations to recognize it as a belligerent.”¹³¹ States apply neutrality as soon as they officially recognize, generally through diplomatic channels, the existence of an armed conflict. This has been the case in many past NIACs, including the U.S. Civil War, the Mexican Civil War, and the Spanish Civil War, to name but a few examples.¹³² Thus, recognition of a state of armed conflict with the Taliban in Afghanistan and with insurgent forces in Iraq¹³³ should trigger application of the law of neu-

Attorney General, Office of Legal Counsel, to President George W. Bush (Feb. 7, 2002), available at <http://www.justice.gov/olc/2002/pub-artc4potusdetermination.pdf> (concluding that members of Taliban militia are not entitled to prisoner-of-war status under Geneva Conventions). The Supreme Court subsequently found the al Qaeda component of the conflict to be noninternational in character, *Hamdan v. Rumsfeld*, 548 U.S. 557, 628 (2006), but has not made a similar determination with respect to the conflict with the Taliban. Although the United States has not officially recharacterized the conflict with the Taliban as noninternational, the Taliban has been entirely independent of the government of Afghanistan since mid-2002. Thus, even if the conflict with the Taliban is continuous with that commenced in 2001, it ceased to be an inter-state conflict as traditionally defined.

¹³¹ Vagts, *supra* note 58, at 90; see 2 OPPENHEIM, *supra* note 2, § 298; *id.* § 308 (“As civil war becomes real war through recognition of the insurgents as a belligerent Power, neutrality during a civil war begins for every foreign State from the moment recognition is granted.”).

¹³² See *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 Each party is, therefore, deemed by us a belligerent nation”); *Brig Amy Warwick*, 67 U.S. (2 Black) 635, 636 (1862) (finding U.S. Confederacy to have belligerent status even though Union had not declared war); 2 OPPENHEIM, *supra* note 2, § 293 (“[T]he 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, and not being drawn into the war by the belligerents.”); see also Montgomery Sapone, *Have Rifle With Scope, Will Travel: The Global Economy of Mercenary Violence*, 30 CAL. W. INT’L L.J. 1, 32 (1999) (“The United States need not recognize the belligerent status of the political entity in order for the Act to apply; actual conflict triggers application of the Act.”); *id.* at 33 n.199 (“The U.S. recognition of the belligerent status of insurgents reflects an expansive view of the power of non-State entities to make war. These cases also draw on a U.S. legal doctrine by which actual conditions of conflict, rather than declarations of war, confer belligerent status.”).

¹³³ Each of these conflicts is being waged largely between the United States and Allied forces and a network of insurgents and jihadis within those countries with the aid of a fledgling domestic military in each state. The United States and Allied states are applying the laws of war in both of these internal conflicts. See, e.g., NATO: NATO’s Assistance to Iraq, http://www.nato.int/cps/en/natolive/topics_51978.htm (last visited Aug. 23, 2010) (outlining armed forces training and support provided by NATO to Iraq in accordance with U.N. Security Council Resolution 1546); International Security Assistance Force: Troop Numbers and Contributions, <http://www.isaf.nato.int/en/troop-contributing-nations/index.php> (last visited Aug. 23, 2010).

trality much in the same way as it has applied in earlier internal conflicts.

The questions of whether a state of armed conflict exists and whether law of neutrality applies are more difficult in the conflict with al Qaeda.¹³⁴ Some states may be systematically choosing to ignore neutral rights and duties altogether in the conflict because they do not agree with the U.S. position that there is an “armed conflict” against al Qaeda.¹³⁵ Indeed, if a state views the conflict as a purely criminal matter, the logical conclusion would be that no neutral duties have arisen.

However, a close examination leads to the conclusion that neutrality should apply, at least as a prudential matter, in the conflict with al Qaeda. First, because the United States is in fact using military force in its fight against al Qaeda, states that either allow U.S. military operations within their territory or cooperate militarily, such as through detaining and handing over suspected belligerents, have in effect recognized the existence of armed conflict and have opted into a war paradigm.

Second, as international tribunals have begun to recognize, at least in “internationalized-NIACs” (NIACs taking place across sovereign borders or with significant external participation), the protectiveness of the LOAC framework would be undermined if traditional rules ceased to apply just because of the novelty or uniqueness of a conflict.¹³⁶ Neutrality forms an important part of these traditional

¹³⁴ These questions have generated an extensive literature since 2001. Terrorist violence is viewed by many scholars as criminal, rendering the LOAC inapplicable. *See, e.g.*, DUFFY, *supra* note 8, at 73–143 (detailing criminal legal framework for post-9/11 action against al Qaeda). When viewed within the war paradigm, however, Common Article 3 of the GCs and AP II would apply to the conflict with al Qaeda, as the conflict is not strictly one among states. *See id.* at 249–70 (explaining use of force legal framework). Alternately, provisions of the GCs beyond Common Article 3 could be applied, either because the conflict is viewed as transnational and “internationalized” in character even if not fought exclusively among states, or because Common Article 3 itself explicitly calls for the entire GC framework to be applied if possible. *See* GC I, *supra* note 3, art. 3 (“The Parties to the conflict should further endeavour to bring into force . . . all or part of the other provisions of the present Convention.”).

¹³⁵ *See* DUFFY, *supra* note 8, at 254 (“The view that armed conflict may arise between states and organizations such as al-Qaeda has relatively little support, even in the post September 11 era.”); *see also id.* at 250–55 (dismissing this view of armed conflict between states and al Qaeda but noting evolving meaning of “armed conflict”).

¹³⁶ For example, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) found that, because formal nationality will not always serve as a proxy for allegiance or protection in modern conflicts, making “applicability [of GC IV] dependent on formal bonds and purely legal relations” would defeat the object and purpose of the GCs, which is maximizing protections during war. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶¶ 163–69 (July 15, 1999); *see also* *Prosecutor v. Delalic*, Case No. IT-96-21-A, Appeals Chamber Judgment, ¶ 81 (Feb. 20, 2001) (“[GC

rules, whose very purpose should not be defeated, as the argument goes, by counterproductive adherence to formalism.

Third, and most important from the perspective of whether the United States should choose to recognize and apply neutrality as the primary state actor in the conflict with al Qaeda, the Obama administration has already decided that it will go beyond formalism to apply analogous provisions of traditional LOAC rules to the conflict precisely because of the desire to avoid holes in what could otherwise be a slim legal regime.¹³⁷ Thus, from the U.S. perspective, all three branches of the U.S. government have recognized a state of armed conflict¹³⁸ and the LOAC provide the governing legal framework. Particularly because of the geography and diverse national origins of participants in this conflict, neutrality plays an important role in maintaining completeness of the LOAC framework.¹³⁹

III

WHAT WE GAIN FROM UNDERSTANDING NEUTRALITY

Based on our understanding of the role of neutrality during conflict from Part II, this Part argues that there are significant normative gains from understanding when (and how) to apply neutrality in a modern LOAC framework. One benefit of recognizing neutrality is legitimizing the capacity of states to reject the “with us or against us”¹⁴⁰ paradigm adopted by states seeking military cooperation not required by the U.N. Indeed, neutrality has traditionally played a role in constraining the spread of conflict, allowing states to remain at peace and maintain relatively stable trade relationships, even while their neighbors are at war.¹⁴¹ Equally important, recognizing the law

IV’s] very object could indeed be defeated if undue emphasis were placed on formal legal bonds . . .”).

¹³⁷ See *supra* notes 26–27 and accompanying text.

¹³⁸ See, e.g., Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a–950w and other sections of titles 10, 18, 28, and 42 U.S.C.) (establishing procedures to try al Qaeda and Taliban members in military commissions for law of war violations); *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (2006) (recognizing NIAC and applying Common Article 3); Koh Speech, *supra* note 1 (noting that United States is engaged in armed conflict with nonstate actor al Qaeda and recognizing Obama administration’s commitment to laws of war).

¹³⁹ See *supra* notes 25–28 and accompanying text (describing March 13 Memo, *supra* note 25).

¹⁴⁰ See Bob Kemper, *U.S. Opens Fronts To Sway Public Opinion*, CHI. TRIB., Nov. 7, 2001 (reporting President George W. Bush’s statement that “[n]o nation can be neutral in this conflict” and that “[y]ou’re either with us” or you’re “against us” in conflict).

¹⁴¹ Neutrality laws proliferated after the recognition of belligerent equality in order to serve the dual purposes of constraining the spread of conflict beyond the original belligerents and maintaining trade despite the frequent eruption of conflict amongst European powers. Lauterpacht explains Vattel’s position that neutral states have the right “not to be

of neutrality and how they might apply plays a vital role in increasing the completeness of our LOAC framework.

Why does completeness matter? As described above, the LOAC framework conceived of in the aftermath of World War II did not contain gaping holes precisely because it was meant to be as protective as possible,¹⁴² leaving no one beyond the reach of the law. As Pictet explains in regard to the GCs as a project, “[i]t must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.”¹⁴³

Let us return to the example of the legal options for a detention regime in the conflict with al Qaeda. If neutrality is not recognized, and detention of suspected belligerents is seen as unbounded so long as it occurs outside of belligerent or occupied territory, the resulting legal black hole may create an invitation to lawlessness.¹⁴⁴

First, if belligerents in the conflict treat the entire globe as a battlefield on which no state may remain neutral, the consequences of such expanded belligerency must be recognized. On this view, all states are either co-belligerents of the United States or enemies because they are harboring or cooperating with al Qaeda. Such a truly global war would trigger application of the GCs virtually everywhere. All suspected belligerents would be presumed to have POW status until a status determination could be made by a legally constituted tribunal, as required by GC III.¹⁴⁵ Likewise, civilians who were definitely suspected of participating in hostilities (a typical scenario in this conflict) could be interned as imperative threats to security, but only

dragged—by force, as frequently happened—into a war by one belligerent insisting that the other was waging an unjust war.” 5 LAUTERPACHT, *supra* note 50, at 621 (internal citation omitted); Bynkershoek was emphatic that, unless obligated by a previous treaty promising cooperation, “it is not [the neutral’s] duty to sit in judgment between his friends who may be fighting each other, and to grant or deny anything to either belligerent through considerations of the relative degree of justice.” *Id.* (quoting 2 BYNKERSHOEK, *QUAESTIONUM JURIS PUBLICI LIBRI DUO* (1737)).

¹⁴² See sources cited *supra* note 136 (concluding object and purpose of GC IV is maximizing protection of civilians in midst of conflict).

¹⁴³ IV PICTET COMMENTARY, *supra* note 17, at 21.

¹⁴⁴ See, e.g., CTR. FOR HUMAN RIGHTS & GLOBAL JUSTICE, *FATE AND WHEREABOUTS UNKNOWN: DETAINEES IN THE “WAR ON TERROR”* (N.Y. Univ. Sch. of Law 2005), *available at* <http://www.chrgj.org/docs/Whereabouts%20Unknown%20Final.pdf> [hereinafter *CHRGJ REPORT*] (detailing instances of enforced disappearances perpetrated by U.S. government with regard to “War on Terror” detainees).

¹⁴⁵ GC III states:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

GC III, *supra* note 3, art. 5.

in accordance with the strict guidelines of GC IV.¹⁴⁶ Our suspected al Qaeda affiliate in Bosnia, a co-belligerent state in this scenario, could potentially be detained pursuant to GC III, if a suspected combatant, or pursuant to GC IV, as a civilian security threat.

The other legal option is to recognize the neutral status of states that choose not to participate militarily in the conflict. Given the reluctance of the United States to apply the full LOAC framework when acting extraterritorially, this may be the more realistic of the two legal options in practice.¹⁴⁷ As we have seen, combatants found in neutral states could still be disarmed and interned,¹⁴⁸ but not handed over to the U.S. military. Our hypothetical Algerian suspected–al Qaeda affiliate found in Bosnia, if suspected of being a combatant operating from neutral territory, should be presumed to be a POW until determined otherwise¹⁴⁹ and disarmed and interned according to Hague V and GC III.¹⁵⁰ Belligerents are obligated not to act from neutral territory, and neutral states are likewise obligated to deny safe

¹⁴⁶ GC IV provides:

Should the Power, in whose hands protected persons may be, consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment, in accordance with the provisions of Articles 42 and 43.

GC IV, *supra* note 3, arts. 41–43. Article 5(1) provides that a protected person in belligerent territory who is “definitely suspected of or engaged in activities hostile to the security of the State” may not claim rights that would “be prejudicial to the security” of the state. *Id.* art. 5(1). Article 5(2) provides that in occupied territory “an individual protected person” detained as a spy, saboteur, or “person under definite suspicion of activity hostile to the security of the Occupying Power,” only gives up “rights of communication” and only when “absolute military security so requires.” *Id.* art. 5(2). Article 5(3) makes clear that “such persons shall nevertheless be treated with humanity” and retain fair trial rights described in GC IV. *Id.* art. 5(3). Moreover, such persons “shall also be granted the full rights and privileges of a protected person under [GC IV] at the earliest date consistent with the security of the State or Occupying Power, as the case may be.” *Id.*

¹⁴⁷ A primary consequence of backing away from application of the GCs is that there are default legal rules operating in territory that is not considered belligerent, and those rules are provided by the law of neutrality (ratcheted down, or “qualified,” to the extent that they conflict with relevant Security Council resolutions).

¹⁴⁸ See *supra* notes 81–85 and accompanying text (explaining Hague V, *supra* note 56, arts. 11–12).

¹⁴⁹ The presumption of POW status until determined otherwise by a competent tribunal applies equally to suspected combatants found in belligerent, occupied, or neutral territory. At Geneva in 1949, the proposed text for the paragraph in GC III article 4(B) on POWs in neutral territory initially contained the following clause: “Should any doubt arise whether persons resisting to the enemy belong to any of the categories enumerated above, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a military tribunal.” IIA FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 387–88 (1949) [hereinafter FINAL RECORD].

¹⁵⁰ See *supra* text accompanying note 59 (discussing duty of noncooperation); *supra* notes 81–86 and accompanying text (discussing duty to disarm and intern combatants).

haven to combatants.¹⁵¹ If, however, he is not a member of any organized armed group (or is otherwise disqualified from POW status) but is simply a civilian suspected of affiliation with a terrorist organization, Bosnia has neither a duty nor a right to detain him except according to its domestic laws and relevant international human rights laws. As explained in Part II, military action against civilians in neutral territory would be a violation of the neutral duty to refrain from participating in the conflict.¹⁵²

In considering this example, it is important to recognize that especially in the conflict with al Qaeda, suspected members of al Qaeda or associated groups found in neutral territory often remain just that—persons *suspected* of taking part in hostilities or otherwise threatening security. While a wide range of law enforcement actions against such individuals are permissible—and sometimes required¹⁵³—when undertaken by neutral states, *military* operations against such persons on behalf of a belligerent power are a violation of neutrality.¹⁵⁴

This principle has important practical consequences in the conflict with al Qaeda. For example, the United States has erroneously subjected civilians to military detention, or worse, through the cooperation of neutral states.¹⁵⁵ Individuals held in secret detention facilities run in neutral states (known as “black sites”) should have been afforded the protections of the GCs¹⁵⁶ insofar as those states ceased to be neutral by cooperating militarily with the United States in the conflict. Alternately, those states could have refused to participate in the

¹⁵¹ This long-standing rule of neutrality was reinforced by the Security Council's requirement that states deny safe haven to known terrorists. *See* Res. 1373, *supra* note 123, ¶ 2(c).

¹⁵² *See supra* note 87 and accompanying text (discussing neutral duties toward civilians).

¹⁵³ *See* Res. 1373, *supra* note 123 (describing counterterrorism requirements imposed by U.N. Security Council under Chapter VII). Such obligations reflect the view of qualified neutrality following Security Council action. *See supra* notes 116–18 and accompanying text.

¹⁵⁴ *See supra* note 87 and accompanying text (discussing duty of neutrals to provide safety to private subjects of belligerent nations).

¹⁵⁵ *See, e.g.*, Declaration of Mohamed Farag Ahmad Bashmilah in Support of Plaintiff's Opposition to the United States' Motion to Dismiss or, in the Alternative, for Summary Judgment, *Mohamed v. Jeppesen Dataplan, Inc.*, No. 5:07-cv-02798 (JW) (N.D. Cal. 2007) (describing rendition from Jordan—as presumably neutral state—to Afghanistan for prolonged detention and torture under American cooperation or control); Amnesty Int'l, *Below the Radar: Secret Flights to Torture and 'Disappearance,'* 7 AI Index AMR 51/051/2006, Apr. 4, 2006, at 7, available at http://www.amnestyusa.org/stoptorture/pdf/below_the_radar_full_report.pdf [hereinafter Amnesty Report] (describing cooperation of many neutral states with U.S. operations).

¹⁵⁶ GC protections may only include the minimal provisions for civilians suspected of taking part in hostilities, *see* GC IV, *supra* note 3, art. 5, but this constitutes legal protection nonetheless.

conflict and followed the law of neutrality. Instead, in part because neutrality was not recognized, these states detained individuals in a zone of lawlessness¹⁵⁷—neither following their neutral duties, *nor* applying the LOAC rules required of states participating militarily in a conflict.

Once we recognize the law of neutrality, we can discern three legal options for the treatment of our Algerian national found in neutral territory: (1) if suspected to be a combatant, he may be interned as required by Hague V and GC III;¹⁵⁸ (2) if the neutral state cooperates militarily such that it becomes a co-belligerent, LOAC must be applied and he may be detained according to GC III or, if not a suspected combatant, he may still be interned but must be given the protections of GC IV; or finally, (3) if the state remains neutral it may detain him pursuant to its own criminal laws and give him the rights that come with any criminal law enforcement operation.¹⁵⁹ These are the only three options that do not create a legal black hole. This means individuals could not be militarily detained in a state otherwise presumed to be neutral without having some protections either under the law of neutrality or LOAC rules.

IV

WHERE NEUTRALITY BREAKS DOWN

With an understanding of the role neutrality plays in filling what would otherwise be gaps in the LOAC framework, one conclusion might be that applying neutrality as intended in 1949 provides all the protection we need. I do not argue, however, that simply paying attention to the role of neutrality will satisfactorily fill the gaps that exist without it. For example, in regard to detention of neutral nationals in belligerent territory, even if the structural principles of neutrality and diplomatic protection were recognized in today's conflicts, their application may no longer provide enough protection to equal protected

¹⁵⁷ See CHRGJ REPORT, *supra* note 144 (describing detention of individuals outside the protection of law); Amnesty Report, *supra* note 155 (same).

¹⁵⁸ Internment in neutral territory would continue until the cessation of hostilities unless, for example, the individual were suspected of an international crime, in which case he could be transferred to a criminal tribunal. Schindler, *supra* note 110, at 170 (“All states, including neutrals, have the obligation to bring persons having committed grave breaches of international humanitarian law before their own courts regardless of their nationality and the place where the breaches were committed.”).

¹⁵⁹ See, e.g., Aoláin, *supra* note 29, at 574 (arguing that “ordinary criminal law” may be entirely sufficient to respond to acts and threats carried out by al Qaeda).

person status.¹⁶⁰ This Part addresses ways in which application of existing precepts of neutrality may sometimes come up short in the conflict with al Qaeda.

A. *Breakdown of Neutrality's Protections*

The framework for protecting neutral nationals in belligerent territory has broken down to such an extent that the exceptions to protected person status in GC IV, Article 4, now create a significant gap in the GC's protective fabric. The original draft of that Article contained no exceptions.¹⁶¹ After intense debate, however, a distinction was made at the 1949 Diplomatic Conference in Geneva between neutrals in occupied territory (who are "protected persons") and those in belligerent territory (who are not), whenever the neutral national's state has normal diplomatic relations with the belligerent state. The basis of the distinction is the supposed effectiveness of diplomatic protection as a functional alternative to "protected person" status in belligerent territory.¹⁶²

The distinction was made over strong dissent. Several delegates at the Diplomatic Conference arguing against any exceptions to GC IV, Article 4, foresaw a breakdown in diplomatic protection as a threat to the comprehensive protection the GCs were intended to provide.¹⁶³ These delegates saw that the possibility that diplomatic representation would provide adequate protection was a legal fiction.¹⁶⁴ Representatives from Belgium and the USSR, for example, objected strenuously that the "pretext" of diplomatic protection should not be relied upon in belligerent territory during war: Neutral nationals should be able to claim definite rights under the Convention, they insisted, just as enemy aliens can.¹⁶⁵ On the other side of the debate, the United States and a few of its allies argued that it would be too onerous to accord protected person status to its entire population of immigrants who had come from countries that remained neutral in a conflict.¹⁶⁶

¹⁶⁰ See *infra* note 173 and accompanying text (providing example in which co-belligerent's diplomatic relations with belligerent state were insufficient to ensure proper protection of its national).

¹⁶¹ IV PICTET COMMENTARY, *supra* note 17, at 48.

¹⁶² IIA FINAL RECORD, *supra* note 149, at 793 (describing debate over distinction).

¹⁶³ Cf. Prosecutor v. Tadic, Case No. IT-94-1-A, Appeals Chamber Judgment, ¶¶ 164–65 (July 15, 1999) (noting ambivalence toward relying on diplomatic protection in GC drafting history and citing lack of diplomatic protection as reason to receive GC protection despite formal nationality requirements).

¹⁶⁴ See IIA FINAL RECORD, *supra* note 149, at 793 (describing legal fictions).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 794 (describing immigration issue in United States and other countries). During most of World War II, for example, if such a rule had been in effect it would have

After all, the United States argued, normal diplomatic relations should create all the protection needed for neutral nationals.¹⁶⁷ The United States's view prevailed. Although the effectiveness of diplomatic protection was questioned at the margins, it was still seen as protective enough in most cases to support the GCs' object and purpose.

Recognizing the growing potential for ineffectiveness of diplomatic protection for neutral nationals in belligerent territory, Pictet's Commentaries endeavor to make protection through diplomatic representation more than legal fiction by insisting that the exceptions to GC IV, Article 4, be applied only when the benefits of diplomatic protection are likely to be realized in practice. Pictet explains that, "[a]ccording to the Rapporteur, . . . normal diplomatic representation is 'that which functions in peace time comprising at least one diplomatic representative accredited to a Ministry of Foreign Affairs.'"¹⁶⁸ However, "this definition . . . does not seem adequate,"¹⁶⁹ according to Pictet. Rather, the definition

must at all events be understood in the widest sense, *as implying that the representations made by the diplomatic representatives will be followed by results* and that satisfactory replies will be given to him. [The representatives must] have sufficient liberty of action and liberty of movement to be able to visit their fellow-countrymen and come to their help when circumstances so require.¹⁷⁰

Today, neutral states are even less likely to effectively invoke diplomatic protection and to prevail in claims against states that violate neutrality in the United States's current conflicts. First, diplomatic protection is largely discretionary in nature, so the individual protections guaranteed to civilians who qualify as "protected persons" are in some ways stronger than the corresponding structural protection for neutral nationals. The strength of individual protections in the GCs reflects a broader trend in international law since World War II toward individual-centered mechanisms for protecting human dignity rather than purely state-centered structures based on national alle-

applied to all nationals of Argentina, Chile, Spain, and Sweden who had settled in the United States, even if they were permanent residents and had American children.

¹⁶⁷ *Id.*

¹⁶⁸ IV PICTET COMMENTARY, *supra* note 17, at 49 (quoting IIA FINAL RECORD, *supra* note 149, at 814).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 49–50 (emphasis added). Pictet concludes with the reminder that "it should be noted that certain States which are bound by the Geneva Conventions do not maintain diplomatic relations among themselves; in case of war, whether one of them is neutral and the other a belligerent or whether they are co-belligerents, their nationals must enjoy full protection under the Convention." *Id.*

giance and reciprocal protection.¹⁷¹ Second, diplomatic protection as a *remedy* may only be exercised after the wrongful act has caused injury to an individual,¹⁷² whereas the rules laid down in GC IV are prophylactic, intended to protect civilians from injury in the first instance. Third, and perhaps most important, the relative strength of the states involved in the conflict with al Qaeda may also erode the effectiveness of diplomatic protection.

Imagine, for example, the diplomatic protest that would come from neutral Somalia if Pakistan, a co-belligerent of the United States in this hypothetical, handed over a suspected Somali al Qaeda operative to the U.S. military for detention. The individual in question may have effectively become purposefully stateless if he had sworn allegiance to al Qaeda, rendering it highly unlikely that his home state, no matter how capable of exercising diplomatic protection, would choose to pursue any remedy for his injury. More important, a militarily or economically weak state would be unlikely to intervene effectively in a manner that would “be followed by results” vis-à-vis U.S. demands.¹⁷³ In such a situation, it seems absurd to assume that diplomatic protection serves as an effective protection mechanism. As some of the drafters of the GCs suggested, applying GC IV to individuals of *all* nationalities when found in belligerent territory is far more likely to be rights-protective than diplomatic protection exercised by the neutral state in question.¹⁷⁴

A second breakdown in the application of neutrality occurs when belligerents, or suspected belligerents, are found in neutral territory

¹⁷¹ See John Cerone, *Jurisdiction and Power: The Intersection of Human Rights Law and the Law of Non-international Armed Conflict in an Extraterritorial Context*, 40 *ISR. L. REV.* 396, 450 (2007) (describing “structural evolution of the international legal system that was consolidated” after WWII, of which “principal structural development . . . was the emergence of the individual human being as a subject of international law, capable of bearing international rights and duties”). Cerone also notes “a progression of humanitarian law instruments that gradually moved from a state-centered focus to an individual-centered focus” and that “diminished requirements of inter-state reciprocity and nationality-based protection, and moved away from inter-state compensation as the exclusive remedy for violations.” *Id.*

¹⁷² *INT’L LAW COMM’N*, *supra* note 95, art. 1 cmt. ¶ 9.

¹⁷³ *IV PICTET COMMENTARY*, *supra* note 17, at 49–50. Even Australia, one of the United States’s most steadfast military allies, has not been able to protect one of its nationals from severe ill-treatment in U.S. military detention, although it did secure his release after years of detention. See, e.g., *The David Hicks Affidavit*, *SYDNEY MORNING HERALD*, Dec. 10, 2004, available at <http://www.smh.com.au/news/World/The-David-Hicks-affidavit/2004/12/10/1102625527396.html> (describing severe abuse of Australian national at Guantánamo Bay).

¹⁷⁴ Recall the consensus that the overall goal of the GCs is to be rights-protective. *IV PICTET COMMENTARY*, *supra* note 17, at 21 (“It must not be forgotten that the Conventions have been drawn up first and foremost to protect individuals, and not to serve State interests.”).

but are not protected as envisioned in Hague V or GC III.¹⁷⁵ Neutral states may not be providing these protections in part because, in this atypical conflict, it can be difficult to determine who should in fact qualify as a combatant and who is merely a civilian suspected of supporting al Qaeda. In addition, in a conflict with no foreseeable end being waged in many resource-strapped nations, some states that find themselves with suspected belligerents on their territory may not have the will or capacity to disarm and intern belligerents until the end of hostilities and wait until the conflict is over for compensation from the belligerents.¹⁷⁶ In many instances, reliance on neutral states to perform their traditional neutral duties toward combatants will be more fiction than reality.

B. Indifference Regarding Breaches of Neutrality

We should also recognize practical reasons why some states may choose to ignore neutral duties in the conflict with al Qaeda (as opposed to the war within Afghanistan or other “internationalized-NIACs”). First, some states cooperating with the United States (such as Pakistan and Yemen) are arguably also already “at war” with al Qaeda and the Taliban.¹⁷⁷ Such states are co-belligerents alongside the United States and should be applying LOAC rules accordingly, rather than observing neutral duties.¹⁷⁸

¹⁷⁵ See *supra* notes 81–86 and accompanying text for a discussion of this neutral duty and an example of its application in a NIAC, specifically the internment of Mexican soldiers by the United States in the Mexican Civil War.

¹⁷⁶ See 2 OPPENHEIM, *supra* note 2, § 339 (providing examples of payments compensating internment after hostilities ended in Franco-German War). In such a situation, if the neutral state did not, or could not, prevent its territory from being used as a base of operations by one side of the conflict, the other side would customarily have the right to pursue its enemy within that neutral state’s territory. See *supra* note 62 and accompanying text (discussing neutral duty to protect territory from being used by belligerent state). Whether this customary rule of neutrality has been altered by the U.N. Charter rule of territorial inviolability, see *supra* note 66, is beyond the scope of this Note.

¹⁷⁷ See, e.g., Orla Guerin, *Pakistan Flag Flies over Former Taliban Stronghold*, BBC, Mar. 3, 2010, available at http://news.bbc.co.uk/2/hi/south_asia/8548319.stm (“The Pakistani army is claiming victory against the Taliban and al-Qaeda in a key area bordering Afghanistan.”); CIA ‘Killed at Qaeda Suspects in Yemen,’ BBC, Nov. 5, 2002, available at <http://news.bbc.co.uk/2/hi/2402479.stm> (“US Defence Secretary Donald Rumsfeld . . . congratulated Yemen on its cooperation with the US in the fight against al-Qaeda. ‘The arrangement has been a good one and it is on-going,’ he said.”); *Yemen: Al Qaeda’s New Staging Ground?*, TIME, Dec. 28, 2009, available at <http://www.time.com/time/world/article/0,8599,1950345,00.html> (“The Yemeni government insists it is doing its utmost in the war against al-Qaeda.”).

¹⁷⁸ Contrast this situation with a more typical scenario: During the Vietnam War, for example, Cambodia had much more to lose by way of a severe violation of its neutral duties and went to great lengths to attempt to retain neutral status. See 2004 OLC Memo,

Second, states may have good reason to be indifferent if they violate neutral duties because there is no incentive to refrain from violations. Al Qaeda arguably has neither the will nor the requisite legal personality to demand compensation for violations of neutral duties, as it cannot exercise diplomatic protection or take other international legal measures in response. More important, it has no territory to infringe and no normal trade relations to interrupt. In addition, U.N. member states are arguably already *required* to take some measures short of force to disrupt al Qaeda operations, making their neutrality qualified, though not obsolete.¹⁷⁹ Finally, al Qaeda does not observe the laws of war, making reciprocity an impossibility in the conflict.¹⁸⁰

CONCLUSION

In sum, we cannot pick and choose which LOAC principles to apply by analogy in atypical conflicts. The laws that have developed over time rely on each other for completeness, and applying a few selectively leaves gaps in a framework intended to be as universal as possible in order to maximize humanitarian protection. Regarding military detention specifically, individuals in neutral territory and neutral nationals in belligerent territory cannot be in a no-man's land outside of LOAC protection. If the United States continues to extend its battlefield globally in the conflict with al Qaeda, existing legal principles dictate that it must apply the LOAC wherever it acts militarily and respect the neutral status of other states by refraining from milita-

supra note 39, at 8 n.11 (discussing U.S. practice in Cambodia during Vietnam War in regard to neutrality).

¹⁷⁹ See *supra* notes 116–18 and accompanying text (describing theory of qualified neutrality when Security Council has acted); *supra* note 123 (describing required counterterrorism measures).

¹⁸⁰ See, e.g., 2004 OLC Memo, *supra* note 39, at 4 (“[A] Qaeda has consistently acted in flagrant defiance of the law of armed conflict.”); Aoláin, *supra* note 29, at 588 (“[T]he United States is on fairly firm ground when it asserts that reciprocity is decisively not part of the *modus operandi* of [transnational terrorist organizations].”). Aoláin argues that “ignoring or minimizing rules” due to lack of reciprocity has a “knock-on effect on the overarching value of reciprocity in multiple inter-state contexts.” *Id.* However, President Obama’s Nobel Prize Acceptance Speech and Harold Koh’s subsequent ASIL speech confirm that the Obama administration is dedicated to applying the LOAC despite the lack of reciprocity. In Koh’s speech, he stated:

Let there be no doubt: the Obama Administration is firmly committed to complying with all applicable law, including the laws of war, in all aspects of these ongoing armed conflicts. As the President reaffirmed in his Nobel Prize Lecture, “Where force is necessary, we have a moral and strategic interest in binding ourselves to certain rules of conduct . . . [.] [E]ven as we confront a vicious adversary that abides by no rules . . . the United States of America must remain a standard bearer in the conduct of war. That is what makes us different from those whom we fight. That is the source of our strength.”

Koh Speech, *supra* note 1.

rily detaining or transferring suspected members of al Qaeda or its associates in neutral territory.

Applying neutrality is not a panacea, however, largely because of breakdowns of some of the assumptions upon which neutrality relies. When such breakdowns occur, legal options include: (1) relying on other legal frameworks to fill each of the gaps (such as international human rights law or possibly international criminal law); (2) creating new treaty-based rules of neutrality to respond to modern dilemmas (such as difficulties of interning combatants in neutral territory); and (3) reading GC IV, Article 4 more broadly to encompass all civilians in the hands of the enemy in order to address the gaps left by relying on diplomatic protection for neutral nationals in belligerent territory.¹⁸¹

Recognizing and correcting for failures in the traditional LOAC regime, being applied by analogy, is in tune with the Obama administration's approach to the United States's conflict with al Qaeda insofar as it identifies international legal principles that must be recognized to avoid creating legal black holes in unconventional situations. This approach achieves the dual goals of recognizing the principles required for completeness within the LOAC framework and, if their application fails, applying complementary rules where necessary to complete the system of legal protections for all individuals during times of conflict.

¹⁸¹ See *supra* note 136 and accompanying text (describing ICTY Appeals Chamber precedent of broader reading of GC IV in order to adapt to modern internationalized-NIACs, based on object and purpose of GCs of achieving maximum protection).