

The Fog of War Reform: Change and Structure in the Law of Armed Conflict After September 11

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THE FOG OF WAR REFORM: CHANGE AND STRUCTURE IN THE LAW OF ARMED CONFLICT AFTER SEPTEMBER 11

PETER MARGULIES*

Salim Hamdan's conviction in a military commission for material support of Al Qaeda separates utilitarians, who generally defer to state power, from protective theorists, who seek to shield civilians by curbing official discretion. Utilitarians view military commissions as efficient means for trying suspected terrorists. Protective theorists criticize the amorphous nature of material support charges.

The clash between utilitarians and protective theorists colors other issues, including "enhanced" interrogation and limits on targeting. Protective theorists merit praise for their scrutiny of interrogation. In contrast, utilitarians have trivialized interrogation abuses. However, protective theorists' scrutiny of states is burdened by hindsight bias. Failing to recognize the challenges faced by states, protective theorists have ignored the risk to civilians posed by changes such as the International Committee of the Red Cross' Guidance on Direct Participation in Hostilities that create a "revolving door" shielding bomb makers for terrorist groups.

To move beyond the utilitarian-protective debate, this piece advances a structural approach informed by two values: a linear time horizon and holistic signaling. Drawing on cognitive studies of humans' flawed temporal judgment and the Framers' work on institutional design, a linear time horizon curbs both myopia that infects officials and hindsight bias that plagues the protective model. Holistic signaling requires the United States to support the law of armed conflict, even (or especially) when adversaries such as Al Qaeda reject that framework. Applying the structural test, a state can use a sliding scale of imminence and necessity to justify targeting Al Qaeda-affiliated terrorists in states unwilling or unable to apprehend them. However, the material support charges against Hamdan signal a troubling turn to victors' justice.

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I. INTRODUCTION

Driving Osama bin Laden was not a Broadway play. Years before the Al Qaeda leader entered the compound in Abbottabad, Pakistan, that became his last residence, a Yemeni national, Salim Hamdan, acted as his driver, doubling as bodyguard and weapons broker. Hamdan knew the general purpose of Al Qaeda's plots but did not aid a particular conspiracy. Yet, during the American intervention in Afghanistan after September 11, 2001, United States forces took custody of Hamdan, eventually charging him with material support of a terrorist group, which Congress in 2006 made a crime triable before a military commission.¹ International law and the Constitution's Ex Post Facto Clause would make his 2008 conviction problematic,² unless his conduct violated the common law of war.³

As Hamdan's case illustrates, September 11 intensified conflict over changes in international humanitarian law (IHL) that states and nongovernmental organizations (NGOs) had been debating since the Cold War and the twilight of European colonialism.⁴ In the immediate aftermath of the September 11 attacks, the Bush administration asserted that suspected terrorists were not even entitled to protection under IHL, otherwise known as the "law of war" or the "law of armed conflict" (LOAC).⁵ IHL's leading NGO, the International Committee of the Red

1. See *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1259, 1274 (C.M.C.R. 2011). Congress had acted after the Supreme Court struck down the presidential order unilaterally establishing military commissions. *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006).

2. See U.S. CONST. art. I, § 10, cl. 1; see also DAVID LUBAN ET AL., *INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW* 14–15 (2010) (discussing basic principles of criminal law, including (1) legality, which states that a person cannot be convicted for conduct that is not unlawful, (2) fair notice, and (3) that no criminal law be applied retroactively).

3. In June 2011, a military court upheld his conviction. See *Hamdan*, 801 F. Supp. 2d at 1254. Earning credit for time served, he was released in January 2009. *Id.* at 1260.

4. See John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 AM. J. INT'L L. 201, 201–04 (2011); Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT'L L. 795, 796 (2010); Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy* 1–2 (Harv. U. Program on Humanitarian Pol'y & Conflict Res., Occasional Paper Series, No. 2, Winter 2005) [hereinafter Watkin, *Warriors Without Rights*], available at <http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper2.pdf>.

5. See Memorandum from Alberto R. Gonzales to the President (Jan. 25, 2002), in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* 118, 118–19 (Karen J. Greenberg & Joshua L. Dratel eds., 2005). Bush administration officials also sought to preclude federal courts from reviewing the legality of detentions. See PETER MARGULIES, *LAW'S DETOUR: JUSTICE*

Cross (ICRC), also entered the change game, proposing curbs on the targeting of nominal civilians who participate in hostilities.⁶ Both the Bush administration and ICRC efforts failed to command a consensus among stakeholders. Exploring the reasons for that failure, and the probability of change on other fronts, requires a structural theory of LOAC, which I offer in this Article.

The course of change in the law has been unsteady because of the role of non-state actors. When states were the primary actors in armed conflicts, reciprocity helped assure cooperation.⁷ States were repeat players in armed conflicts,⁸ and therefore had an incentive to regard such conflicts as prisoner's dilemma games with infinite iterations. In such games, today's defection by one party is promptly punished by the offended party. Because the original offender knows that defecting from the accepted framework will not yield a net return, timely retaliation restores the normative equilibrium.⁹

Reciprocity has less of a hold on non-state actors. While certain rebel groups may see themselves as aspiring repeat players,¹⁰ terrorist

DISPLACED IN THE BUSH ADMINISTRATION 54–57 (2010); *see also* KAREN GREENBERG, THE LEAST WORST PLACE: GUANTANAMO'S FIRST 100 DAYS 45–47 (2009) (describing post-September 11 government legal opinions concluding that Guantanamo detentions would not be subject to judicial review). The Supreme Court pushed back in a series of cases, culminating in *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (striking down habeas corpus-stripping provisions of Military Commissions Act of 2006).

6. *See* NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 33–36 (2009) [hereinafter ICRC GUIDANCE], available at http://www.aco.nato.int/resources/20/Legal%20Conference/ICRC_002_0990.pdf.

7. *See* MARK OSIEL, THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR 33 (2009) (stating that, in LOAC, “reciprocity was long considered a crucial method of deterring war crime”); Eric A. Posner, *Boumediene and the Uncertain March of Judicial Cosmopolitanism*, in CATO SUPREME COURT REVIEW: 2007–2008, at 23, 37 (2008) (asserting that reciprocity enforces norms on treatment of prisoners of war and that a party to a conflict treats captives from its adversary's forces well to encourage the same treatment of its captured forces); *cf.* Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT'L L.J. 365, 397 (2009) (discussing importance of reciprocity in Fourth Hague Convention of 1907).

8. *See* Watts, *supra* note 7, at 401.

9. *See* Robert O. Keohane, *Reciprocity in International Relations*, 40 INT'L ORG. 1, 6–8 (1986); Eric A. Posner, *International Law: A Welfarist Approach*, 73 U. CHI. L. REV. 487, 506 (2006) [hereinafter Posner, *Welfarist Approach*].

10. *See* Audie Klotz, *Norms Reconstituting Interests: Global Racial Equality and U.S. Sanctions Against South Africa*, 49 INT'L ORG. 451, 463 (1995) (discussing the collaboration between the African National Congress and Dr. Martin Luther King, Jr., to call for international sanctions on South Africa); *see also* Watkin, *Warriors Without Rights*, *supra* note 4, at 36 (discussing certain groups' concern about international opinion).

networks such as Al Qaeda envision an ideal dominion in the indefinite future untouched by reciprocity's mundane demands.¹¹

Violent non-state actors such as terrorist networks reject the transparency that LOAC seeks to promote. For example, LOAC has traditionally required that individuals participating in hostilities wear insignias that set them apart from civilians.¹² Consider a group that orders a suicide bombing on a crowded bus. The bomber has violated the insignia requirement; moreover, the bus bombing also violates the principle of distinction, another traditional requirement of LOAC, which requires a party to an armed conflict to target only those individuals who participate in the conflict.¹³ Such violations complicate compliance for states whose nationals are the planned victims of attacks. State compliance with the principle of distinction is difficult when members of organized armed groups do not wear insignias. Moreover, uncertainty about the time and place of the next terrorist attack tempts

11. See ROBERT A. PAPE, *DYING TO WIN: THE STRATEGIC LOGIC OF SUICIDE TERRORISM* 121–22 (2005) (quoting Ayman al-Zawahiri, Osama bin Laden's longtime second in command and successor, as envisioning "restoration of the caliphate"); cf. BRUCE HOFFMAN, *INSIDE TERRORISM* 169 (1998) ("[T]errorists . . . live in the future . . . for that distant—yet imperceptibly close—point in time when they will assuredly triumph over their enemies and attain the ultimate realization of their political destiny.").

12. See Geneva Convention Relative to the Treatment of Prisoners of War, art. 4(A)(2)(b), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]. In controversial moves that leading states have not fully accepted, the 1977 Additional Protocol I to the Geneva Conventions allowed non-state actors "fighting against colonial domination and alien occupation and against racist régimes" to assert lawful authority for their efforts, and it also allowed parties engaged in nonconventional warfare to refuse to wear distinguishing insignia or carry arms openly until the time immediately preceding an attack. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 1(4), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. The United States has declined to ratify Additional Protocol I because of concerns about these provisions, but it considers other provisions of Protocol I to be customary international law that binds both states and individuals. See Michael J. Matheson, Remarks, *Session One: The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 419, 420 (1987); cf. Michael A. Newton, *Exceptional Engagement: Protocol I and a World United Against Terrorism*, 45 TEX. INT'L L.J. 323, 344–47 (2009) (discussing political agendas that contributed to enactment of Protocol I).

13. See Additional Protocol I, *supra* note 12, art. 48; see also STEPHEN L. CARTER, *THE VIOLENCE OF PEACE: AMERICA'S WARS IN THE AGE OF OBAMA* 58 (2011) (referring to principle of "discrimination" that bars targeting noncombatants); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 89 (2d ed. 2010); MICHAEL N. SCHMITT ET AL., *INT'L INST. OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* § 1.2.2 (2006) (describing principle of distinction as the "foundation" of LOAC).

states to engage in coercive interrogation techniques that violate LOAC.¹⁴

Two schools of thought have sought to cope with reciprocity's declining influence. Many NGOs favor what this Article calls the protective approach. The protective approach emerged from a concern with shielding civilians that is part and parcel of core LOAC principles, such as distinction.¹⁵ From this widely shared point of origin, however, followers of the protective paradigm soon waded into greater controversy. The protective agenda entails easing limits on non-state organized armed groups and imposing new constraints on states. For example, the protective paradigm allows groups to act without distinguishing insignias until the very brink of an armed attack.¹⁶ NGOs pursuing the protective paradigm have also sought to limit states' ability to target non-state actors that participate in violence.¹⁷ The protective agenda would allow organized armed groups to maximize the information asymmetries they currently enjoy,¹⁸ without undertaking the burdens that states must accept. Unfortunately, the protective paradigm's partisans fail to recognize that allowing non-state actors to free ride in this fashion only *enhances* the risk to civilians.

14. See OSIEL, *supra* note 7, at 57; see also Additional Protocol I, *supra* note 12, art. 75 (barring torture and "violence" directed at detainees); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, arts. 3(1)(a), (c), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention] (barring torture, cruelty, and "humiliating and degrading treatment").

15. See Additional Protocol I, *supra* note 12, art. 51(5)(b) (requiring proportionality by barring attacks causing collateral damage to civilians that are "excessive in relation to the concrete and direct military advantage anticipated"); SCHMITT ET AL., *supra* note 13, § 2.1.1.4 (explaining that the rule of proportionality is derived from the principle of distinction).

16. See Additional Protocol I, *supra* note 12, art. 44(3).

17. See ICRC GUIDANCE, *supra* note 6, at 33–36. For disagreement with the ICRC's position, see Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697, 699 (2010) [hereinafter Schmitt, *Deconstructing Direct Participation in Hostilities*] (criticizing the ICRC's guidance as failing "to fully appreciate the operational complexity of modern warfare"); and Kenneth Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC "Direct Participation in Hostilities" Interpretive Guidance*, 42 N.Y.U. J. INT'L L. & POL. 641, 643–44 (2010) [hereinafter Watkin, *Opportunity Lost*] (criticizing the ICRC's guidance as creating asymmetries favoring non-state actors over states); see also *infra* notes 233–241 (arguing that ICRC guidance is not viable as a change to LOAC).

18. Information asymmetries are gaps that favor one party. See, e.g., Cary Coglianese et al., *Seeking Truth for Power: Informational Strategy and Regulatory Policymaking*, 89 MINN. L. REV. 277, 280 (2004) (stating "information asymmetries between producers and consumers [are] widely accepted as justifying certain kinds of regulatory interventions").

For a convenient bookend to the protective paradigm, consider what I call the utilitarian perspective. While utilitarians recognize the peril of non-state actors' free riding, they propose an overbroad remedy: loosening all state constraints not required by reciprocity. Utilitarians rely on the leaders of strong democracies, particularly the United States, to arrive at the greatest good for the greatest possible number.¹⁹ Competing internal actors, such as courts, or external stakeholders, such as NGOs, lack the information to provide useful alternatives.²⁰ Unfortunately, utilitarians' certitude blinds them to the United States' stake in a world order that depends on LOAC's norms.

Rules sought by both the protective and utilitarian schools have been highly unstable in application and acceptance. Attempts to ease limits on armed non-state actors have been greeted with skepticism by strong states, which have tended to believe that such changes would put civilians, as well as their own forces, at greater risk.²¹ However, the utilitarians' proposed changes have fared no better. Efforts to create a gap in the applicability of IHL to suspected terrorists have roiled both rule of law constituencies abroad and institutions at home, such as the courts and the military.²² More recent efforts to try suspected terrorists

19. See generally Posner, *Welfarist Approach*, *supra* note 9, at 490–91.

20. See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 26 (2010) [hereinafter POSNER & VERMEULE, *EXECUTIVE UNBOUND*]; ERIC A. POSNER, *THE PERILS OF GLOBAL LEGALISM* 62–64 (2009) (asserting that NGOs are largely irrelevant to operative global norms, which states set); ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 274–75 (2007) [hereinafter POSNER & VERMEULE, *TERROR IN THE BALANCE*] (arguing that legal curbs on national security strategy are futile and inefficient); JOHN YOO, *WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR* 106 (2006) (arguing that legal restrictions can slow down intelligence efforts and put national security at risk). *But see* Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 66 (2011) (criticizing Posner and Vermeule as too readily dismissing constraints); Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 785–88 (2011) (arguing against undue deference to executive branch). An early collaborator of Posner's, Harvard's Jack Goldsmith, has most recently combined lingering wariness about the efficacy of international institutions with a recognition of the utility of constraints. Compare JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 211 (2005) (expressing skepticism about NGOs' agendas and states' interests), with Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1835 (2009) (discussing accounts of international and constitutional law as coordinated games in which parties decline short-term benefits to realize gains over time).

21. See Newton, *supra* note 12, at 343–47.

22. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 630–31 (2006) (defining non-international

in military commissions for material support of terrorism have also triggered controversy.²³

Explaining the failure of these innovations requires a structural model of LOAC, in which changes develop in a two-level game.²⁴ One level involves domestic institutions, including the executive branch, the military, and the courts. On the second level, strong states, including the United States and its European allies, interact with NGOs. Strong states usually seek utilitarian changes, while NGOs such as the ICRC advance a protective agenda. Leaders that persuade domestic stakeholders in Level 1 will also find common ground with NGOs in Level 2. In contrast, state initiatives that lack domestic institutional support will face unified NGO opposition. By the same token, NGOs that fail to elicit support from Level 1 stakeholders will face unified opposition from strong democracies and splintering within their own coalition. Interaction at both levels turns on two values: linear time horizons and holistic signaling.

A linear time horizon, focused on by both the Founders and modern cognitive psychologists, requires rational discounting of present and long-term risks and understanding of both immediate and long-term causes.²⁵ Unfortunately, this ideal is difficult to attain for both individuals and organizations. Each skews time horizons, unduly discounting anything beyond the present and immediate future.²⁶

armed conflict governed by Geneva Common Article 3's constraints as including any conflict not between nations, including United States' conflict with Al Qaeda); Deborah Pearlstein, *Justice Stevens and the Expert Executive*, 99 GEO. L.J. 1301, 1310–11 (2011) [hereinafter Pearlstein, *Justice Stevens*] (discussing factors that drove Justice Stevens' plurality opinion in *Hamdan*).

23. See David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5, 24–31 (2005) (retracing early American history of military commissions and finding persistent ambiguity about authority for creating them, particularly through unilateral executive action).

24. See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 436 (1988).

25. I use the term "linear" metaphorically here, to convey a norm that approximates the discounting of a rational actor. Graphing this function would actually require a curve. See Philip Streich & Jack S. Levy, *Time Horizons, Discounting, and Intertemporal Choice*, 51 J. CONFLICT RESOL. 199, 201–03 & fig.1 (2007) (graphing rational discount function).

26. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, in BEHAVIORAL LAW AND ECONOMICS 13, 45–46 (Cass R. Sunstein ed., 2000) (noting tendency to inappropriately discount future costs); David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q.J. ECON. 443, 443–44 (1997) (stating that "commitment mechanisms" such as savings plans are tools that correct for the tendency to unduly discount the future); George Loewenstein et al., *Projection Bias in Predicting Future Utility*, 118 Q.J.

Cognitive psychologists call this flaw myopia or presentism. Cognitive flaws also distort perceptions of the past through myopia's rearview mirror: hindsight bias. In hindsight bias, people focus on the immediately apparent causes of harm, particularly if that harm is graphic and vivid. Longer-term causes get short shrift.²⁷

Just as individuals use savings accounts as a hedge against myopia and maxims like "hindsight is 20/20" to ward off hindsight bias, states and organizations develop structural features to deal with flaws in temporal judgment. Hamilton viewed judicial review as a crucial safeguard against rule by the "humors" of the moment,²⁸ and courts since the Founding Era have sought to harmonize statutes, the Constitution, and international law, including the law of war.²⁹ To preserve temporal balance, Level 1 institutions such as domestic courts have long upheld what I call "identification norms." These core norms ensure that government uses reliable criteria to apply its power. Violations engender arbitrary results and undermine courts' integrity. Since the Founding Era, courts have protected identification norms in wartime cases involving property³⁰ and persons.³¹ NGOs have consistently sought to reinforce this understanding. Courts also have forged doctrines, including official immunities,³² standing,³³ and the

ECON. 1209, 1228 (2003) (explaining the consequences of hyperbolic discounting); Daniel Read, *Intertemporal Choice*, in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 424, 428–29 (Derek J. Koehler & Nigel Harvey eds., 2007) (noting tendency of individuals to prefer "smaller-sooner reward"); Streich & Levy, *supra* note 25, at 205 ("[T]he value of a reward drops significantly in the immediate future, so that individuals are very impatient with regard to short time delays" (citation omitted)).

27. See Baruch Fischhoff, *For Those Condemned to Study the Past: Heuristics and Biases in Hindsight*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 335, 345 (Daniel Kahneman et al. eds., 1982) (explaining that individuals can find a large number of predictors for an event with almost any desired correlation); George Loewenstein & Erik Angner, *Predicting and Indulging Changing Preferences*, in TIME AND DECISION: ECONOMIC AND PSYCHOLOGICAL PERSPECTIVES ON INTERTEMPORAL CHOICE 351, 372 (George Loewenstein et al. eds., 2003) (defining hindsight bias as a situation where "people project their own current knowledge on themselves in the past").

28. See THE FEDERALIST NO. 78, at 428 (Alexander Hamilton) (E.H. Scott ed., 1898).

29. See David Golove, *The Supreme Court, the War on Terror, and the American Just War Constitutional Tradition*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 561, 561–62 (David L. Sloss et al. eds., 2011).

30. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 120–21 (1804).

31. See *Boumediene v. Bush*, 553 U.S. 723, 771 (2008).

32. See *Arrest Warrant of 11 April 2000* ¶¶ 51–53, Dem. Rep. Congo v. Belg., 2002 I.C.J. 3 (Feb. 14, 2002) (analyzing official immunity under international law). *But see id.* ¶ 61 (holding that officials do not have immunity in international tribunals, which consider charges of torture or violation of other fundamental norms). See generally LUBAN ET AL., *supra* note

political question doctrine,³⁴ that curb hindsight bias by limiting judicial second-guessing of executive action in wartime.

A linear time horizon alone is insufficient to support the structure of LOAC; the second element is what I call holistic signaling.³⁵ In a world of imperfect information, a party sends a signal to provide data about its intentions and capabilities, limiting the risk of misunderstanding or mistrust. For example, the white flag of surrender gained acceptance because a party accepting surrender requires assurance that those inviting capture are not luring in their attacker to get a better shot and a party inviting capture must know that it will not be slaughtered where it stands. Since neither side knows the precise intent of the other, bloodshed would continue without a symbol that bridges the gap.

Holistic signaling reveals a party's commitment to habits that facilitate multilateral cooperation. Strong states with a stake in the global system must send signals on LOAC that are consistent with their wishes for the system as a whole.³⁶ Holistic signals are important even (or perhaps especially) when some parties will decline to reciprocate. This divorce from reciprocity and tangible benefits leads utilitarians, who raised awareness of the signaling lexicon,³⁷ to view holistic signaling as an afterthought. However, utilitarians fail to understand that an audience of other states, NGOs, and international public opinion that perceives strong states as free riders will no longer look to those states for leadership.

To examine the prospects for change in LOAC, we need to assess the time horizons and signaling capabilities of states, NGOs, and non-state actors. States start out with an edge in the time horizon category

2, at 265–95 (analyzing current law of official immunity).

33. See *Baker v. Carr*, 369 U.S. 186, 204 (1962); see also *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 14–35 (D.D.C. 2010) (holding that father lacked standing to bring suit in challenge to alleged targeting of Anwar Al-Aulaqi, whom the United States regarded as the leader of Al Qaeda in Arabian Peninsula).

34. *Baker*, 369 U.S. at 217; see also *Al-Aulaqi*, 727 F. Supp. 2d at 9–10, 52 (holding that legality of targeting United States citizen allegedly engaged in terrorist acts abroad is political question textually committed to other branches). See generally Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1392–1400 (2009) (discussing factors triggering judicial deference to executive determinations).

35. See OSIEL, *supra* note 7, at 312–14 (using compliance with LOAC to signal faith in the system); see also ERIC A. POSNER, *LAW AND SOCIAL NORMS* 18–23 (2000) (discussing signaling in everyday contexts).

36. See ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* 212–13 (2008).

37. See POSNER, *supra* note 35, at 18–27.

because their existence over time in a fixed space lends stability.³⁸ To gain additional perspectives and correct for myopia, they can develop deliberative bodies such as courts and participate in international institutions.³⁹ States' need to exist in a stable territory over time also provides a substantial incentive to respect the comparable needs of other states. States signal their commitment to reciprocity in armed conflict through signals, such as requiring their forces to wear uniforms. However, even democratic states find their time horizon and signaling skewed in times of crises.

While crises lead strong states into "states of exception" where norms do not hold,⁴⁰ the standard operating procedures of armed non-state actors reveal pervasive deficits in temporal judgment and signaling. In terrorist networks, for example, the need to preserve secrecy impedes the development of diverse deliberative institutions.⁴¹ Moreover, terrorist networks like Al Qaeda, which seek a new dawn of the caliphate, not the dreary task of administration, have no incentive to signal in ways that conform to LOAC.⁴²

Ironically, NGOs' focus on combating the myopia of states compounds their own time horizon and signaling problems. NGOs strive to uphold identification norms that states sometimes discount. However, NGOs have few institutional checks against myopia's twin, hindsight bias. NGOs' donor base rewards prompt and vigorous criticism of state conduct, but typically discounts the challenges governments face in an uncertain world.⁴³ Hindsight bias and signaling

38. See MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 54 (1977).

39. See Michael N. Schmitt, *Responding to Transnational Terrorism Under the Jus ad Bellum: A Normative Framework*, in *INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES* 157, 174 (Michael N. Schmitt & Jelena Pejic eds., 2007) ("States perform useful functions in the international system; indeed, the global architecture relies on States.").

40. See Adrian Vermeule, *Our Schmittian Administrative Law*, 122 *HARV. L. REV.* 1095, 1096–98 (2009); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 *YALE L.J.* 1011, 1014–18 (2003).

41. See HOFFMAN, *supra* note 11, at 179–80.

42. See Max Abrahms, *What Terrorists Really Want: Terrorist Motives and Counterterrorism Strategy*, *INT'L SECURITY*, Spring 2008, at 78, 85–86 (noting that terrorist organizations do not want compromise).

43. See JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 60 (2007) (critiquing incentive structure of NGOs); Kenneth Anderson, "Accountability" as "Legitimacy": *Global Governance, Global Civil Society and the United Nations*, 36 *BROOK. J. INT'L L.* 841, 842–44 (2011) (same).

take a different turn, however, when strong states intervene to prevent humanitarian catastrophes. Many NGOs urge such intervention despite their concerns about collateral damage and the absence (as in Kosovo) of formal United Nations authorization.⁴⁴ Moreover, some NGOs send subtle pro-intervention signals by downplaying their denunciation of measures, such as targeted killing, that could also be strategically advantageous in humanitarian interventions.

Where state officials face temptations to skew their time horizon and weaken compliance signals, stakeholders at Levels 1 and 2 will resist utilitarian changes. This dynamic stymied proposed utilitarian changes like depriving suspected terrorists of Geneva protections. By the same token, strong states will block protective changes that increase a non-state actor's ability to free ride. The ICRC's proposed limits on states' ability to target individuals, such as bomb makers, have met this fate.

Focusing on differentials in temporal judgment and signaling capacity is also useful for examining emerging problems in LOAC, including determining which crimes are triable by military commissions and the appropriate scope of self-defense. Punishing individuals captured years ago for the freshly enacted war crime of material support would violate the linear time horizon's central tenet—that notice must precede conduct that gives rise to punishment. Similarly, making material support a war crime would send the dangerous signal that war crimes are no different from the ordinary criminal law. A structural approach would allow greater flexibility in targeted killing, including a sliding scale for self-defense based on both the imminence and certainty of a threat.⁴⁵ However, a state would have to observe identification norms and restrict its targeting to fighters for Al Qaeda or associated groups that international organizations have identified as global terrorist threats found in countries that are unwilling or unable to apprehend or target those individuals.

This Article is in six parts. Part II provides a brief primer on continuity and change in LOAC. Part III assesses the virtues and vices

44. See Richard J. Goldstone, *The Role of the International Criminal Court*, in MASS ATROCITY CRIMES: PREVENTING FUTURE OUTRAGES 55, 61 (Robert I. Rotberg ed., 2010) (describing how NATO forces in Kosovo minimized civilian casualties despite heavy bombing campaigns).

45. See Robert Chesney, *Who May Be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, in 13 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 3, 4–5, 19–22, 24 (Michael N. Schmitt et al. eds., 2011) (analyzing justifications for state's use of deadly force to eliminate suspected terrorists).

of the utilitarian and protective approaches to LOAC changes. Part IV introduces the structural approach, including linear time horizon and holistic signaling. Part V compares the temporal judgment and signaling capacities of states, non-state actors, and NGOs, and applies the model to the Bush administration's proposed changes on interrogations and the ICRC's suggested targeting limits. Part VI offers analysis of material support as a war crime and remote targeted killing. Part VII addresses criticisms of the model, including the argument that it privileges Western modes of warfare.

II. A SHORT HISTORY OF CHANGE AND CONTINUITY IN THE LAWS OF ARMED CONFLICT

The law of war is an evolving effort to preserve ways to end hostilities and enforce a bright line between combatants, who can be targeted, and those on the outside (the hors de combat), who are immune.⁴⁶ Bright lines do not stop the bloodshed of war. However, they channel it to prevent unnecessary killing and to limit war's impact. Rules are crucial because more amorphous boundaries would exacerbate information asymmetries. Gaps in information about a party's intentions and capacities impede cooperation in business and politics.⁴⁷ They destroy the potential for cooperation in the already fractious environment of the battlefield.

Illustrating the role and importance of rules, LOAC protects individuals such as civilians, who lack the right to target others; it also protects combatants who wish to leave the fray through surrender to the enemy.⁴⁸ Soldiers will surrender only if they can be assured that they will be treated humanely, and they will fight on beyond the needs of strategy if they cannot be so assured.⁴⁹ Similarly, using the pretense of surrender to kill an adversary constitutes the war crime of perfidy.⁵⁰

46. See WALZER, *supra* note 38, at 18 (discussing distress caused by Henry V's order to kill French captives during the battle of Agincourt, which the English ultimately won, and English knights' refusal to obey order, in part out of concern for "dishonor that . . . would reflect on themselves" (footnote omitted)); Watkin, *Warriors Without Rights*, *supra* note 4, at 64 ("[T]here has always been an obligation to distinguish combatants from civilians.").

47. See Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 271-72 (1984).

48. See 2 PIERINO BELLI, *A TREATISE ON MILITARY MATTERS AND WARFARE* 88 (Herbert C. Nutting trans., 1936) (quoting Cicero).

49. See GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 8-9 (2010) (discussing World War II battle of Iwo Jima).

50. See WALZER, *supra* note 38, at 46 (noting that prisoners of war can seek to escape,

LOAC prohibit perfidy precisely because it produces doubt in a capturing force about the sincerity of a defeated force's attempt to surrender, and thereby discourages a victorious force from honoring that attempt. The result is a spiral toward the wholesale abuse of captives on both sides.

The laws of war that protect captives⁵¹ and prohibit perfidy have long been enforced through reciprocity. Each side knows that it can readily find itself in the position where it must either surrender or accept the surrender of an opponent. Obeying ground rules in these situations gives one's opponent an incentive to do the same. If parties know they will see each other through the course of an armed conflict, or have dealings upon that conflict's resolution, upholding reciprocity is prudent as well as legally and ethically mandatory.

The customary understandings about LOAC is that structured warfare for centuries became inadequate because of the advent of centralized states, the rise of technology, and the increasing prominence of violent non-state actors in the last two hundred years. The mass armies mobilized during the Napoleonic Era supplanted the smaller mercenary units of contending monarchs.⁵² Innovations in arms, including the advent of machine guns and the later rise of air power, deepened the risk of harm to civilians.⁵³ The Lieber Code, drafted during the American Civil War, prioritized military necessity but also acknowledged the "distinction between the private individual belonging to a hostile country and . . . its men in arms," adding that the latter should "be spared in person, property, and honor as much as the exigencies of war will admit."⁵⁴ The 1868 St. Petersburg Declaration

but can be punished if they kill a guard, since those surrendering "committed themselves to stop fighting . . . [and] gave up their right to kill").

51. See NICCOLÒ MACHIAVELLI, FLORENTINE HISTORIES 166–67 (Laura F. Banfield & Harvey C. Mansfield, Jr., trans., 1988) (recounting a cautionary example of a military leader who mistreated captives).

52. See Michael Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and Its Possible Implications for the Law of Armed Conflict*, in THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 389, 394 (Michael N. Schmitt & Leslie C. Green eds., 1998).

53. SOLIS, *supra* note 49, at 51 (discussing developments in weaponry during the nineteenth century); Schmitt, *supra* note 52, at 394; Schmitt, *supra* note 4, at 814–16 (discussing the effect of antipersonnel mines and incendiary and chemical weapons on civilian populations).

54. See Francis Lieber, *Instructions for the Government of Armies of the United States in the Field*, at art. 22 (Apr. 24, 1863), in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3, 6 (Dietrich Schindler & Jiri

adjusted to technological changes by urging “[t]hat the progress of civilization should have the effect of alleviating as much as possible the calamities of war,” and cautioned against “employment of arms which uselessly aggravate . . . suffering[.]”⁵⁵

Parties participating in the Hague Peace Conference of 1899 were also concerned about the prospect of runaway harm to civilians. Their agreement included the Martens Clause, which advised that all persons “remain under the protection and empire of the principles of international law [resulting] . . . from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.”⁵⁶ To make this sentiment more concrete, the 1907 Hague Convention required that combatants act under a fixed command structure, wear insignia that were visible from a distance, and refrain from killing civilians.⁵⁷ The rules on command structure and insignia promoted discipline and prevented perfidy; they also had a prophylactic effect in both warning civilians about the proximity of armed forces and promoting accountability for lapses in discipline that resulted in needless civilian deaths.⁵⁸

The increased use of mass armies also required careful demarcations on the scope of accountability, which separated wrongful decisions to initiate war—the domain of *jus ad bellum*—from the wrongful conduct of war, governed by *jus in bello*. Leaders might order an unjust war to wrest territory or resources from an opponent. However, soldiers on a side that fought an unjust war were nonetheless privileged to fight as long as they themselves did not commit war crimes, such as harming captives or civilians.⁵⁹ This separation of *jus ad bellum* and *jus in bello*

Toman eds., 4th ed. 2004) [hereinafter Lieber Code].

55. See *Preamble* to Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, in *LAWS OF ARMED CONFLICTS*, *supra* note 54, at 91, 92; see also SOLIS, *supra* note 49, at 50 (discussing St. Petersburg Declaration); Schmitt, *supra* note 4, at 799 (same).

56. See *Preamble* to Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex, in *LAWS OF ARMED CONFLICTS*, *supra* note 54, at 60, 61; see also DINSTEIN, *THE CONDUCT OF HOSTILITIES*, *supra* note 13, at 8–9 (discussing Martens Clause); Schmitt, *supra* note 4, at 800 (same).

57. See Watkin, *Warriors Without Rights*, *supra* note 4, at 21.

58. The Hague Conference featured disagreement on the formality required of states in distinguishing their combatants from civilians. *Id.* at 21.

59. See Lieber Code art. 57, *supra* note 54, at 10 (stating that a soldier is privileged belligerent, and hence his killing of other belligerents is not a violation of laws of armed conflict); Robert D. Sloane, *The Cost of Conflation: Preserving the Dualism of Jus ad Bellum and Jus in Bello in the Contemporary Law of War*, 34 *YALE J. INT’L L.* 47, 48–49 (2009); *cf.*

has both procedural and institutional justifications. As a procedural matter, prosecuting foot soldiers in an unjust war would itself be unjust. Going to war is a decision of a national community backed by domestic laws, which an individual cannot control. Penalizing individuals for a community decision over which they had no control would be patently unfair.⁶⁰ Eroding the separation of *jus ad bellum* and *jus in bello* would also have significant institutional consequences in an era of mass armies. The prospect of individual liability for foot soldiers in an unjust war would encourage draft resistance *ex ante*, even if the war turned out to be just. Even just wars can inspire widespread domestic resistance, as the Civil War draft riots demonstrated.⁶¹ Individual liability would exacerbate this problem, impairing the ability of states to make decisions. Furthermore, a state would confront difficulty in *ending* a war, if soldiers on the losing side faced individual liability because of the victor's view that their cause was unjust. Here, too, individuals might hold out, electing to fight on because they had no stake in reconciliation. The separation of *jus ad bellum* and *jus in bello* alleviates both of these problems.

The aftermath of World War II saw further significant developments in both the *jus ad bellum* and *jus in bello*. The Geneva Conventions codified rules on the treatment of captives by barring torture, cruelty, and degrading treatment;⁶² by requiring competent tribunals to determine prisoner of war (POW) status;⁶³ and by providing courts with procedural guarantees for the adjudication of war crimes.⁶⁴ Technological advances continue to be a concern, although the International Court of Justice seemed to recognize that permitting nuclear weapons might actually *discourage* new global conflicts.⁶⁵ The

Eyal Benvenisti, *Rethinking the Divide Between Jus ad Bellum and Jus in Bello in Warfare Against Nonstate Actors*, 34 YALE J. INT'L L. 541, 541 (2009) (suggesting that increasing role of non-state actors has reduced utility of separation).

60. See F.M. Kamm, *Failures of Just War Theory: Terror, Harm, and Justice*, 114 ETHICS 650, 676-77 (2004).

61. See ERIC FONER, *THE FIERY TRIAL: ABRAHAM LINCOLN AND AMERICAN SLAVERY* 256, 259 (2010).

62. See Third Geneva Convention, *supra* note 12, art. 3 (forbidding "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court"). As a matter of customary law, the provisions of this Article also apply to civilians in both international and non-international armed conflicts.

63. *Id.* art. 5.

64. *Id.* art. 3(1)(d).

65. The court formally declined to take a position on the legality of nuclear weapons. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 262

United Nations Charter barred aggressive war, permitting the use of force only in self-defense or on the authorization of the Security Council.⁶⁶

In the last forty years, the rise of non-state actors has prompted new tensions. Drafters of Additional Protocol I to the Geneva Conventions believed that non-state actors “fighting against colonial domination and . . . racist régimes”⁶⁷ had standing to participate in international armed conflict. That innovation challenged the traditional *jus ad bellum* norm of “right authority,” which extends to state actors the sole privilege of conducting hostilities while denying this privilege to non-state actors, whom LOAC has traditionally assumed could obtain a remedy from their states of nationality.⁶⁸ While compelling examples supporting higher status for non-state actors span centuries, from the American colonists at Lexington and Concord to the African National Congress (ANC), the drafters of Additional Protocol I did not provide any criteria for deciding which group among rivals would be found the authentic representative. This definitional vacuum left inter-group violence as the default selection process, risking harm to members of the community that each group purports to represent.

Protocol I yielded additional anomalies. While it codified the principle of distinction that forbids targeting civilians,⁶⁹ it also made

(July 8, 1996); *cf.* OSIEL, *supra* note 7, at 66 (commenting on possible rationales for the court’s decision, including the need to preserve threat of nuclear reprisal as an effective deterrent). *But see* DINSTEIN, *THE CONDUCT OF HOSTILITIES*, *supra* note 13, at 85–86 (criticizing the court for failing to offer clear guidance).

66. *See* U.N. Charter art. 2, para. 4; *cf.* *Corfu Channel, Judgment*, 1949 I.C.J. 4, 34–35 (Apr. 9, 1949) (holding that British mine-sweeping operations within Albanian territorial waters after mine explosions damaged British vessels in “innocent passage” through waters violated Albanian sovereignty, despite multilateral agreements between Britain, France, the Soviet Union, and the United States to coordinate regional mine-sweeping); Jonathan A. Bush, “*The Supreme . . . Crime and Its Origins: The Lost Legislative History of the Crime of Aggressive War*,” 102 COLUM. L. REV. 2324, 2365–66 (2002) (noting Attorney General and chief Nuremberg prosecutor Robert Jackson’s view of aggressor nations as “outlaws from the international community”).

67. *See* Additional Protocol I, *supra* note 12, art. 1(4).

68. *See* Watkin, *Warriors Without Rights*, *supra* note 4, at 17 (describing the long-standing perception that public wars carried out by the “right authority” are legitimate); 3 E. DE Vattel, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* 318 (James Brown Scott ed., Charles G. Fenwick trans., 1916) (1758) (right to make war “belongs solely to the sovereign power” who is best situated to judge circumstances “of the utmost importance to the welfare of the State”); *cf.* SOLIS, *supra* note 49, at 123–25 (discussing the United States’ objection to Additional Protocol I’s protection for non-state actors).

69. *See* Additional Protocol I, *supra* note 12, art. 48.

concessions to irregular forces that severely complicated implementation of that “basic principle.” Article 44(3) shields such forces until they have “engaged in a military deployment preceding the launching of an attack.”⁷⁰ Some countries have construed this language as barring targeting of such forces until “moments immediately prior to an attack.”⁷¹ Because a state’s uniformed forces can be targeted at any time,⁷² this reading creates a marked asymmetry in the targeting options of non-state and state actors. The drafters felt that this tactical advantage would at least encourage non-state actors to shun the most egregious forms of perfidy, where no arms were displayed until the attack was in progress.⁷³ Although some non-state actors may have considered availing themselves of this opportunity, one cannot imagine Al Qaeda operatives following suit.⁷⁴ However, a non-state fighting force without the duty to identify itself will impel states to cut corners on the principle of distinction, shooting first and asking questions about participation in hostilities later. As with even more blatant forms of perfidy, the result is greater risk to those hors de combat.

Because LOAC, like other forms of international law, is increasingly fragmented,⁷⁵ the increasing role of non-state actors has buttressed arguments for giving states more flexibility in the jus ad bellum. For

70. See *id.* art. 44(3)(b); cf. Corri Zoli, *Humanizing Irregular Warfare: Framing Compliance for Nonstate Armed Groups at the Intersection of Security and Legal Analyses*, in *NEW BATTLEFIELDS OLD LAWS: CRITICAL DEBATES ON ASYMMETRIC WARFARE* 190, 197 (William C. Banks ed., 2011) (arguing that provisions of Additional Protocol I lessens the sanctions on violent non-state actors); Newton, *supra* note 12, at 346–47 (same).

71. See Watkin, *Warriors Without Rights*, *supra* note 4, at 33 n.135 (quoting MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICTS* 254 (1982)).

72. See WALZER, *supra* note 38, at 142.

73. See Watkin, *Warriors Without Rights*, *supra* note 4, at 32–33 & n.132 (citing 15 OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE TO ARMED CONFLICTS 454 (1978) (stating the measure gave “the guerrilla fighter an incentive to distinguish himself from the civilian population”)).

74. Cf. SOLIS, *supra* note 49, at 125–29 (discussing the United States’ objection to Additional Protocol I); Newton, *supra* note 12, at 360–61 (suggesting that September 11 made the change obsolete); W. Michael Reisman, *Holding the Center of the Law of Armed Conflict*, 100 AM. J. INT’L L. 852, 858 (2006) (describing incentive argument as one of “doubtful logic”).

75. See Marko Milanović, *Norm Conflict in International Law: Whither Human Rights?*, 20 DUKE J. COMP. & INT’L L. 69, 69 (2009) (discussing tensions between human rights and other sources of international law); Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT’L L. 475, 485 (2008) (rejecting claim that “single regime” can govern international law on regulation and private property).

example, states dealing with ideologically committed terrorist networks have sought to relax the customary requirement of imminent attack as a condition for self-defense. Scholars argued that obliging a state to wait until a terrorist plot approaches consummation was both unrealistic and risky for civilians whom the network plans to target.⁷⁶

These debates have accelerated since September 11. Two opposing developments each reflected an effort to change LOAC. First, in the eighteen months after September 11, Bush administration officials sought to deprive suspected terrorists of protections against coercive interrogation and also sought to establish indefinite detention without judicial review and military commission trials that lacked fundamental guarantees of fairness.⁷⁷ Even more recently, the ICRC proposed that civilians be shielded from targeting even if they have participated in hostilities.⁷⁸ Over the objections of a majority of commentators convened for its study, the ICRC asserted that only civilians with a narrowly defined “continuous combat function” could be targeted at all times. Others could in effect choose the time and place of their vulnerability, even as they planned a return to the fray. Each change threatened to destabilize LOAC.

76. See Oscar Schachter, *The Extra-Territorial Use of Force Against Terrorist Bases*, 11 Hous. J. INT'L L. 309, 316 (1989) (arguing that use of force against terrorist bases was appropriate under international law). After September 11, the United Nations Security Council urged states to use a range of means, including force if necessary, against terrorist groups planning deadly attacks. See S.C. Res. 1373, U.N. Doc. S/RES/1373, at 2 (Sept. 28, 2001); William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 678–79 (2003); Chesney, *supra* note 45, at 5 (outlining the different circumstances where states might find a need to use deadly force); Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT'L L. 244, 244–46 (2011). But see Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, in SHOOTING TO KILL: THE LAW GOVERNING ETHICAL FORCE IN CONTEXT 11 (Simon Bronitt ed., forthcoming 2012), available at <http://ssrn.com/abstract=1501144> (arguing for strict test of self-defense).

77. See MARGULIES, *supra* note 5, at 14–23; CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 138–39 (2007); cf. GOLDSMITH, *supra* note 43, at 106–10 (recounting by Bush administration official who in 2003 sought to modify aggressive legal opinions underlying policies). On military commissions, see Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1259–60 (2002) (criticizing administration's approach).

78. See ICRC GUIDANCE, *supra* note 6, at 34–35, 54 (stating that recruiters, trainers, financiers, and weapons providers should be protected from targeting except for times when they directly participate in hostilities); cf. Watkin, *Opportunity Lost*, *supra* note 17, at 643–44 (describing ICRC's guidance as a proposed change in the law).

III. UTILITARIANS AND PROTECTIVE THEORISTS

The issues prompted by the rise of non-state actors in armed conflicts have attracted two very different normative and descriptive outlooks. One is utilitarian, while the other I call protective. I discuss each in turn.

A. *The Utilitarian View*

The hallmark of utilitarian approaches to LOAC is a reliance on concrete reciprocity as the glue holding together the normative framework.⁷⁹ When a party can retaliate for another party's wrongs—for example, the killing of captives—utilitarians believe that law will accomplish the greatest good for the greatest number. However, utilitarians deride more diffuse brands of reciprocity that supplant specific retaliation with a broader commitment to habits of deliberation. For utilitarians, these intangible commitments are at best pie in the sky, and at worst a dangerous distraction.⁸⁰

79. See Eric A. Posner, *Terrorism and the Laws of War*, 5 CHI. J. INT'L L. 423, 427–30 (2005) (focusing on prospects for enforcing IHL); see also James D. Morrow, *The Institutional Features of the Prisoners of War Treaties*, 55 INT'L ORG. 971, 979–80 (2001) (considering the role of culture and governance as well as reciprocity); cf. POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 20, at 158–59 (deriding much of human rights law as unenforceable because of absence of reciprocity); ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON 58 (2009) (invoking Bentham's utilitarian skepticism about courts as mediating institutions).

80. The utilitarian treatment of the measured American response to the Cuban Missile Crisis is illustrative. The United States decided on a blockade, rather than an all-out attack recommended by senior military officers, in part because of Attorney General Robert Kennedy's view, ultimately shared by President Kennedy, that the latter course would have lowered the United States' reputation. See ROBERT F. KENNEDY, THIRTEEN DAYS: A MEMOIR OF THE CUBAN MISSILE CRISIS 31 (1969) (recounting Kennedy's passing a note to his brother, the President, after listening to arguments for an air attack on Cuba, that said, "I now know how Tojo felt when he was planning Pearl Harbor"); cf. Peter Margulies, *When to Push the Envelope: Legal Ethics, the Rule of Law, and National Security Strategy*, 30 FORDHAM INT'L L.J. 642, 670–72 (2007) (analyzing American response to missile crisis). The utilitarian account discounted reputational costs and efforts at minimizing violations of international law as drivers of the United States approach and stressed the role of American concessions to Russia, including shutting down a base in Turkey. See GOLDSMITH & POSNER, *supra* note 20, at 178. The utilitarian approach described here is merely one brand of utilitarianism, which other scholars have deployed to address intangible benefits that accrue to states through compliance with international law. See GUZMAN, *supra* note 36, at 212–13 (focusing on role of reputation in ensuring compliance); cf. WALZER, *supra* note 38, at 247–50 (suggesting that "supreme emergency" justified Britain's bombing of German population centers while outcome of World War II and Britain's survival were in doubt); Gabriella Blum, *The Laws of War and the "Lesser Evil,"* 35 YALE J. INT'L L. 1, 40–55 (2010) (suggesting that IHL, after incorporating appropriate institutional and substantive safeguards that considered intangible costs, should recognize "necessity" as basis for violating norms, for

Utilitarians' embrace of concrete reciprocity and their wariness of intangible incentives for compliance dovetails with two related attributes: deference to leaders of strong democracies, such as the United States, that have the military might to retaliate and skepticism about constraints imposed on those leaders by domestic or international law.⁸¹ Utilitarians believe that powerful states and those who run them will promote the general welfare over time, while non-state actors will only hinder beneficial state efforts and, in so doing, exacerbate collective-action problems that only powerful states can manage.⁸² Unfortunately, utilitarians fail to appreciate that the absence of constraints on states also destabilizes LOAC.

Utilitarians have some distinct advantages. First, they have a methodological toolkit that includes concepts like signaling,⁸³ collective-action problems,⁸⁴ and path dependence.⁸⁵ Second, their substantive concerns are perennial issues in LOAC that have only become more pressing with time. Excusing violent non-state actors from compliance with rules governing the wearing of insignia, for example, can lead to more violence, just as utilitarians predict in mourning reciprocity's declining relevance.⁸⁶

However, utilitarians concerned that asymmetries favor terrorists, have tacked to the other extreme in granting strong states too much leeway. In the process, utilitarians misplace their methodological toolkit. Distrusting external constraints, utilitarians place excessive trust

example, when officials were reasonably certain that only torture of suspected terrorist could save thousands of lives).

81. See POSNER & VERMEULE, *EXECUTIVE UNBOUND*, *supra* note 20, at 64–65, 158–59 (expressing skepticism about both domestic judicial review and countries' adherence to international law).

82. See *id.* at 159 (warning about “[a]dvocates of world constitutionalism”).

83. See *id.* at 123 (observing that through “institutional mechanisms that impose heavier costs on ill-motivated actors than on well-motivated ones, the well-motivated executive can credibly signal his good intentions and thus persuade voters” who cannot independently research the issues); *cf.* POSNER, *supra* note 35, at 18–27 (discussing signaling in legal, commercial, and personal relationships).

84. See Posner, *Welfarist Approach*, *supra* note 9, at 495–99 (arguing that humanitarian intervention is often difficult because each country regards human rights elsewhere as public goods that offer no concrete benefit).

85. See VERMEULE, *supra* note 79, at 108–10 (criticizing path-dependence in common law caused when atypical facts form backdrop for decision).

86. *Cf.* Posner, *supra* note 79, at 433–34 (discussing difficulty of reaching agreement with Al Qaeda on ground rules for conflict because of lack of reciprocity and symmetry).

in policymakers' prudence.⁸⁷ Crises have a habit of making prudence seem expendable, as officials demonstrated in the immediate aftermath of 9/11 by seeking drastic modifications of IHL rules regarding detention, interrogation, and trial.⁸⁸ Receiving such unsettling signals, more cautious officials and other stakeholders such as the courts and the military redressed the balance.⁸⁹ Citing the path dependence that utilitarians criticize in other contexts, one of the officials who pushed back in these debates has suggested that the executive's unilateral moves immediately after 9/11 produced a backlash that less extreme initial decisions could have controlled.⁹⁰ In sum, utilitarians—so adept at

87. See POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 20, at 174 (discussing the executive's advantages in foreign affairs).

88. See DAVID COLE & JULES LOBEL, LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR 2–3 (2007); RANETA LAWSON MACK & MICHAEL J. KELLY, EQUAL JUSTICE IN THE BALANCE: AMERICA'S LEGAL RESPONSES TO THE EMERGING TERRORIST THREAT 2–3 (2004); *cf.* MARGULIES, *supra* note 5, at 36–42 (discussing coercive interrogation).

89. See *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (striking down legislation that purported to limit federal courts' jurisdiction over writs of habeas corpus brought by detainees); *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006) (holding that President Bush could not unilaterally establish military commissions); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509–10 (2004) (holding that Congress' passage of Authorization for the Use of Military Force (AUMF) after September 11, 2001, that authorized detention of presumptive United States citizen apprehended in Afghanistan violated due process safeguards); *cf.* MARGULIES, *supra* note 5, at 63, 159–60 (detailing the roles of Jack Goldsmith, who withdrew aggressive opinions written by John Yoo of Justice Department's Office of Legal Counsel, and of State Department officials such as John Bellinger, Matthew Waxman, and Philip Zelikow who fought against the continuation of coercive interrogations); OSIEL, *supra* note 7, at 342–45 (discussing role of military lawyers in contesting policies on interrogation); Gregory S. McNeal, *Organizational Culture, Professional Ethics and Guantánamo*, 42 CASE W. RES. J. INT'L L. 125, 129–34 (2009) (discussing culture of opposition to political influence within military). *But see* Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1820–23 (2007) (criticizing dissent by military officials as posing tension with civilian control).

90. See GOLDSMITH, *supra* note 43, at 139 (arguing that if executive had complied with minimal Geneva Convention requirements in the twenty months after September 11, it would have “avoided the more burdensome procedural . . . requirements that became practically necessary under the pressure of subsequent judicial review”); *cf.* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, at 117–78 (2012) (observing that revelations about abuses by U.S. personnel at Abu Ghraib in April, 2004, influenced U.S. Supreme Court decisions curbing executive power). The executive's role has been contested since the Founding Era; sources consulted by the Framers often favored a more modest role than the one suggested by either utilitarian commentators or subsequent practice. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) (examining Founding Era interpretations of the role of a “commander in chief”); *cf.* David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477, 501–05 (2008)

discerning free riding in others—are free riders in disguise, coveting the prudence that constraints promote in others while rejecting those constraints themselves.

B. The Protective Paradigm

Unlike the utilitarian view, the protective model regards concrete reciprocity as woefully inadequate as a basis for enforceable norms. Protective theorists rightly acknowledge that more diffuse incentives, including a commitment to justice, are necessary for core LOAC goals like establishing a floor for the treatment of captives.⁹¹ However, protective theorists' fervor for imposing constraints on states typically exceeds their commitment to constraining violent non-state actors.⁹² This asymmetry threatens to destabilize LOAC and enhance risks for civilians.

A strength of the protective approach is that it provides an ironclad approach to state obligations once an adversary is in state custody. Advocates of the protective paradigm note that all detainees, including those allegedly from non-state actors such as Al Qaeda, are entitled to the protections of Common Article 3 of the Geneva Convention, including the right to be free from torture and the right to trial with appropriate procedural safeguards.⁹³ Any other result would create a gap favoring states' use of harsh tactics that might appear expedient in the short run, but that would ultimately erode the credibility of a party to a conflict. The protective model is also correct that continued detention of alleged members of Al Qaeda requires ongoing review of a detainee's current dangerousness.⁹⁴ No theorist of the protective

(noting that, by the time of the framing, political and military leadership were often divorced).

91. See Jelena Pejic, "Unlawful/Enemy Combatants:" *Interpretations and Consequences*, in INTERNATIONAL LAW AND ARMED CONFLICT, *supra* note 39, at 335, 348; cf. OSIEL, *supra* note 7, at 368–69 (arguing for a more diffuse form of reciprocity that hinges on maintaining the system of international law).

92. See ICRC GUIDANCE, *supra* note 6, at 53 & n.123 (placing limits on state targeting of violent non-state actors such as bomb makers); Nils Melzer, *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 831, 865–66 (2010) (defending the ICRC's guidance limits on targeting non-state actors, "one causal step" removed from direct hostilities, by comparison to contractors hired by state actors).

93. See Pejic, *supra* note 91, at 339; cf. Bellinger & Padmanabhan, *supra* note 4, at 233–36 (discussing continuing issues regarding detention).

94. See Gabor Rona, *A Bull in a China Shop: The War on Terror and International Law*

approach could ever trivialize legal advice approving coercive interrogation, as utilitarian theorists have done.⁹⁵

However, protective theorists who eagerly speak truth to state power are less interested in addressing the proclivities of violent non-state actors. Portions of Additional Protocol I give those using arms against “colonial domination and . . . racist regimes” leeway to reject wearing identifiable insignia. The drafters of Additional Protocol I made this move even though traditional groups of partisans, like Tito’s guerillas in World War II Yugoslavia, were able to operate effectively by generally complying with a broader version of the insignia requirement.⁹⁶ Protective theorists also pushed for the ICRC changes that allowed violent non-state actors with key combat roles to claim immunity from targeting at most places and times, while subjecting state forces to continuous risk.

in the United States, 39 CAL. W. INT’L L.J. 135, 148–49 (2008) (criticizing Bush administration’s minimalist framework for administrative review of Guantanamo detention). One can also read Rona as questioning whether a state has *any* power to detain civilians participating in terrorism outside of detention for those awaiting deportation or trial. *See id.* Pursuant to the Supreme Court’s decision in *Boumediene v. Bush*, Guantanamo detainees now are entitled to habeas corpus to determine, at the very least, whether they were at the point of capture part of Al Qaeda or associated forces. The Obama administration also has fashioned a more robust administrative process to determine current dangerousness and assess the point-of-capture status of detainees in Afghanistan and elsewhere. *See* Al Alwi v. Obama, 653 F.3d 11, 13–14 (D.C. Cir. 2011) (upholding detention of individual who had received training in Al Qaeda camp and joined Taliban combat unit); *see also* Al Maqaleh v. Gates, 605 F.3d 84, 87 (D.C. Cir. 2010) (holding that U.S. district courts lacked jurisdiction over detainees in Afghanistan); *cf.* Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 770–71 (2011) (analyzing continued questions about scope of habeas authority); Ryan Goodman, *The Detention of Civilians in Armed Conflict*, 103 AM. J. INT’L L. 48, 53–55 (2009) (stating that the law of war permits detention of civilians indirectly assisting combatant groups); Matthew C. Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3 J. NAT’L SECURITY L. & POL’Y 1, 17–23 (2009) (reviewing the possibility of flexibility in administrative detention).

95. *See* Eric Posner & Adrian Vermeule, Op-Ed., *A ‘Torture’ Memo and Its Tortuous Critics*, WALL ST. J., July 6, 2004, at A22 (describing aggressive legal memos as “standard lawyerly fare, routine stuff”).

96. *See* Schmitt, *supra* note 52, at 405. In World War II, allied forces worked closely with partisan fighters who often, but not always, wore identifying items of clothing such as armbands. Pushing the insignia envelope in this fashion poses a tension with traditional LOAC requirements. However, World War II partisans used this tactic primarily to target strategic objectives such as factories and rail lines. Indeed, such attacks were often more precise than the aerial attacks also used by allied forces against the Axis powers, and resulted in fewer civilian casualties, thus promoting the principle of distinction. *See* W. Hays Parks, *Special Forces’ Wear of Non-Standard Uniforms*, 4 CHI. J. INT’L L. 493, 526–36 (2003). Using disguise to facilitate lethal force against opposing forces or civilians is far more problematic.

More to the point, the protective theorists' focus on curbing states reflects an idealized version of warfare that does not match present-day challenges. In an otherwise thoughtful piece, one commentator revealed this skewed vision by offering the example of insurgents' attack on a military base.⁹⁷ The commentator's nominal point—that insurgent attacks on military targets should not, without more, be labeled as terrorism⁹⁸—was undoubtedly correct. However, the use of this particular example was telling. States, particularly strong democracies such as the United States, would be in a fortunate position if the violent groups they have confronted in recent years limited themselves to straightforward attacks on military installations. However, organized armed groups have rarely accepted such limits. More often, they have used disguise to get close to a military target in a fashion that violates LOAC, as the Lebanese group Hezbollah did in its 1983 suicide car-bomb attack on the Marine Corps barracks in Beirut.⁹⁹ Or they have used disguise to facilitate the use of indiscriminate lethal force against civilians, as the 9/11 attackers did. Terrorist networks also embed their infrastructure within civilian arenas to avoid retaliation.¹⁰⁰ While giving conventional insurgents “incentive[s] . . . to respect international humanitarian law”¹⁰¹ is a plausible project, the same enterprise seems quixotic when a group's business plan entails wholesale rejection of LOAC norms.¹⁰² Idealized examples do little to help the victims of such groups' tactics.

Protective theorists' lack of realism about terrorist networks extends to their proposals for addressing the threat posed by Al Qaeda's ability to move across borders. For protective theorists, criminal prosecution is not merely an important tool,¹⁰³ it is the only game in town.¹⁰⁴ Protective

97. See Pejic, *supra* note 91, at 353–54.

98. *Id.* at 354.

99. See William C. Banks, *A Second Nuclear Age?*, 57 SYRACUSE L. REV. 429, 431 (2007).

100. See Samuel Estreicher, *Privileging Asymmetric Warfare? Part I: Defender Duties Under International Humanitarian Law*, 11 CHI. J. INT'L L. 425, 431–37 (2011) (arguing that viewed ex ante, unduly rigid restraints on governments defending civilians from terrorist groups enhance incentives for terrorists to plan attacks and conceal themselves within civilian populations).

101. Pejic, *supra* note 91, at 354.

102. Doubts about the prospects of enticing terrorist networks into the IHL fold do not, however, justify states' abandonment of IHL norms. *Id.* (noting applicability of Geneva Common Article 3 protections against torture and unfair trials).

103. See James J. Benjamin, Jr., *In Pursuit of Justice: Prosecuting Terrorism Cases in the Federal Courts: 2009 Update and Recent Developments*, 42 CASE W. RES. J. INT'L L. 267, 267–

theorists also often view human rights law as paramount, even when tribunals and scholars have viewed IHL as occupying the field.¹⁰⁵ Core norms are the same in both bodies of law regarding the treatment of detainees,¹⁰⁶ but they vary widely regarding state targeting options. The human rights domain generally contemplates the arrest of lawbreakers, including suspected terrorists.¹⁰⁷ The use of lethal force against a suspected terrorist would under human rights law be an extrajudicial execution. When conflict reaches a particular level of intensity, however, requiring the arrest of a fighter and a disposition in a civilian court is impracticable under human rights law.

Protective theorists also, with greater acuity, seek to limit both the geographic scope of armed conflicts and the encroachment on other sovereign states of targeting efforts. For protective theorists, non-international armed conflicts should by definition stay within the territorial confines of a single state.¹⁰⁸ Moreover, targeting terrorist networks in any other state should require that state's consent. Limits of this kind arguably minimize civilian casualties, given that any lawful targeting can include collateral damage to civilians, as long as that damage is proportionate to the military objective achieved. Such limits also protect sovereign prerogatives. However, both of these claims are contestable. Terrorist networks that set up camps in adjacent or remote countries do so to facilitate further attacks on civilians in countries that oppose them.¹⁰⁹ Moreover, remote camps also endanger local civilians, particularly because terrorists frequently kill those they suspect of

68, 270 (2009) (concluding that federal courts can try suspected terrorists efficiently); *see also Prosecuting Terrorists; Civilian and Military Trials for GTMO and Beyond: Hearing Before the Subcomm. on Terrorism, Technology and Homeland Security of the S. Comm. on the Judiciary*, 111th Cong. 24 (2009) (remarks of Sen. Sheldon Whitehouse, D-R.I.) (same).

104. *See* O'Connell, *supra* note 76, at 11 (arguing that drone attacks coordinated by intelligence agents violate international law); *see also* U.N. Human Rights Council, Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Study on Targeted Killings, ¶ 38, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (same).

105. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8); DINSTEIN, *THE CONDUCT OF HOSTILITIES*, *supra* note 13, at 23–25; Schmitt, *supra* note 4, at 821.

106. *See* DINSTEIN, *THE CONDUCT OF HOSTILITIES*, *supra* note 13, at 24.

107. *See* O'Connell, *supra* note 76, at 26.

108. *See id.* at 25–26 (evaluating Pakistan's role in U.S. drone attacks on its citizens).

109. *See* Geoffrey Corn & Eric Talbot Jensen, *Transnational Armed Conflict: A "Principled" Approach to the Regulation of Counter-Terror Combat Operations*, 42 *ISR. L. REV.* 46, 66 (2009).

disloyalty or lack of cooperation.¹¹⁰ Sovereign states unable or unwilling to control terrorist camps within their borders have failed a crucial test of sovereignty, namely preventing harm to other states emanating from their territory. In the face of these concerns, the protective argument seems less like a sustainable principle, and more like a fear of slippery slopes that can be addressed through appropriate safeguards.

IV. A STRUCTURAL VIEW OF LOAC

The difficulties of the utilitarian and protective approaches suggest the need for a structural approach. While utilitarians view unilateral state action as necessary and protective theorists see NGOs as the starting point for innovation, a structural view would look to the sustainability of initiatives rather than their origin. On this account, changes in LOAC result from a two-level game.¹¹¹ Level 1 features dialogue and debate among domestic institutions, including the executive branch, the military, and the courts.¹¹² Level 2 includes interaction among strong states and nongovernmental organizations (NGOs). Utilitarians tend to believe that both games should be over before they start, as state leaders elbow out other domestic institutions and face down transnational interlopers. Protective theorists have their

110. See Lorna McGregor, *Beyond the Time and Space of Peace Talks: Re-Appropriating the Peace Process in Sri Lanka*, 11 INT'L J. PEACE STUD. 39, 45 (2006) (noting that as of 2006, Tamil Tigers (LTTE) of Sri Lanka continued to "assassinate its political opponents, extort taxes, recruit children into its forces, [and] attack the Muslim community within the territory it controls"); see also Erica Chenoweth et al., *Correspondence: What Makes Terrorists Tick*, INT'L SECURITY, Spring 2009, at 180, 185 (noting that LTTE sought dominance among Tamils through killing of members of rival factions); cf. *Algeria Tries to Avert Terrorism During Ramadan*, N.Y. TIMES, Dec. 29, 1997, at A3 (discussing violence by terrorist groups against civilians, as well as government violence in response); Michael Humphrey, *Violence, Voice and Identity in Algeria*, 22 ARAB. STUD. Q. 1, 6 (2000) (same).

111. See Putnam, *supra* note 24, at 436; see also Joel P. Trachtman, *International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law*, 11 CHI. J. INT'L L. 127, 131–34 (2010) (discussing role of domestic politics in state compliance with international law, although leaving aside other institutions such as courts).

112. Students of comparative politics recognize that domestic constituencies can alter foreign policy in unexpected ways. For example, consider the tendency toward irredentism in post-Iron Curtain Eastern Europe, in which states freed from Soviet domination wished to reunite with members of the state's dominant ethnic group in neighboring states. Irredentism can give rise to bitter violence. However, a countervailing factor is the dominant group's fear of immigrants, who could include their fellow ethnics, as well as other members of the second state's population. Political leaders who would otherwise take their country into war over irredentist sentiment must consider this opposing position. See STEPHEN M. SAIDEMAN & R. WILLIAM AYRES, *FOR KIN OR COUNTRY: XENOPHOBIA, NATIONALISM, AND WAR* 40–41 (2008).

own form of tunnel vision: they see the Level 2 game as a one-way affair, with NGOs gradually weaning impulsive states from their irresponsible ways.¹¹³

A structural account would stress that LOAC changes occur because the games are fluid and interoperative, with domestic institutions like courts and the military learning from NGOs. Similarly, NGOs must accommodate unified state positions. Changes in law can start from either level.

New norms can crystallize through state practices with subsequent ratification by an international body. Consider the intervention in Kosovo by members of the North Atlantic Treaty Organization (NATO). NATO's action was problematic under positive international law because the United Nations Security Council had not approved NATO's campaign,¹¹⁴ and NATO's members did not act in self-defense.¹¹⁵ Some NGOs criticized the intervention on these grounds or as leading to disproportionate deaths among civilians.¹¹⁶ However, other NGOs praised NATO's move.¹¹⁷ After the conclusion of NATO's

113. Putnam is ambivalent on this point. Compare Putnam, *supra* note 24, at 429–30 (discussing “policy shift being demanded of . . . [the] country internationally”), with *id.* at 435–36 (acknowledging that in bilateral negotiations between United States and another country, *each side* plays the two-level game). Liberal and constructivist theories of international law tend to be unidirectional in tone if not substance, stressing how transnational actors such as NGOs can influence the policies of the United States and other nations. See Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 897 (1998); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 639–43 (2004); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2602–03 (1997) (book review).

114. See U.N. Charter art. 53.

115. See *Id.* art. 2, para. 4. Critics of humanitarian intervention argued that it would multiply regional conflicts and provide a cover for aggression by stronger countries. See Louis Henkin, *Humanitarian Intervention*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 383, 400 (Louis Henkin & John Lawrence Hargrove eds., 1994). The State Department’s Legal Adviser did not assert that international law authorized the intervention in Kosovo, but found that the decision was “justifiable and legitimate” in light of the circumstances. See David R. Andrews, *The Clinton Administration—David R. Andrews (1997–2000)*, in SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER 113, 125 (Michael P. Scharf & Paul R. Williams eds., 2010).

116. Cf. Sloane, *supra* note 59, at 50–51 (expressing concerns about Kosovo campaign). But see Schmitt, *supra* note 4, at 823 (arguing that use of precision-targeting technology alleviated concerns).

117. See Judith Miller, *NATO’s War Aims; The Test: Getting the Refugees Home*, N.Y. TIMES, Apr. 25, 1999, <http://www.nytimes.com/1999/04/25/weekinreview/the-world-nato-s-war-aims-the-test-getting-the-refugees-home.html?pagewanted=all&src=pm> (quoting

campaign, the Security Council endorsed the terms that Serbia had accepted.¹¹⁸ The Security Council's measure, which required the approval of permanent members such as Russia that had initially opposed the intervention, in effect ratified NATO's efforts. While some continued to view NATO's action as illegal, others viewed it as justified by the exigencies of the situation. Scholars and international organizations argued that the intervention heralded recognition of nations' "responsibility to protect" vulnerable minorities from mass violence.¹¹⁹

The two-level game can predict which initiatives from either source prosper, while others wither on the vine. State initiatives in a utilitarian vein that lack domestic institutional support at Level 1 will trigger unified NGO opposition at Level 2, failing the test of sustainability. The converse applies for NGOs' protective initiatives, which need support from Level 1 stakeholders. Without such support, they encounter unified opposition from strong states and yield fragmentation among NGOs. Contests at both levels hinge on two elements displayed to varying degrees by states, NGOs, and armed non-state actors: linear time horizons and holistic signaling.

A. Linear Time Horizon

While the horizon in humans' sight is fixed by the laws of nature and perspective, individuals' time horizon reveals alarming discontinuities. Perceptions of time display pervasive flaws in human inference and judgment.¹²⁰ Chronic cognitive myopia, sometimes called presentism, is

director of Physicians for Human Rights as asserting that failure to protect refugees from Kosovo conflict might discourage future "intervention to save peoples' [sic] lives").

118. See S.C. Res. 1244, ¶ 3, U.N. Doc. S/RES/1244 (June 10, 1999) (calling for "rapid" and "complete" Serbian withdrawal).

119. See Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect*, 24 WIS. INT'L L.J. 703, 713–15 (2006). However, scholars tend to locate this responsibility in the Security Council, which will often decline to act because of divergent interests among its members. As a consequence, the legal basis for intervention absent Security Council authorization remains uncertain. See Paul R. Williams & Meghan E. Stewart, *Humanitarian Intervention: The New Missing Link in the Fight to Prevent Crimes Against Humanity and Genocide?*, 40 CASE W. RES. J. INT'L L. 97, 105–06 (2007–2008). Nevertheless, a "responsibility to protect" did become more salient in United Nations discourse and operational practice after the Kosovo intervention. See Ian Johnstone, *Law-Making Through the Operational Activities of International Organizations*, 40 GEO. WASH. INT'L L. REV. 87, 94–100 (2008).

120. The following account is based on material in an earlier article. See Peter Margulies, *Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the*

a constant of the human condition: people fixate on short-term factors and neglect the long-term.¹²¹ Perceptions of time track the vantage point of the self-absorbed New Yorker in the Saul Steinberg cartoon: the gap between today and tomorrow is huge, like the artist's rendering of the distance between New York and New Jersey.¹²² The difference between tomorrow and next year is modest, emulating the cartoon's depiction of New Jersey as virtually next door to the Pacific Ocean. In other words, people's temporal discounting function is higher than it should be, with the present getting a disproportionate share of attention.

Some social scientists have refined this model, positing that individuals suffer from "projection bias." In other words, people view current tastes as fixed, underestimating how their tastes will change in the future.¹²³ When a salient or visceral factor, such as hunger, shapes one's current preferences, the individual will overestimate the duration and continued dominance of this state.¹²⁴

Left to the perils of their flawed inferences, individuals make bad decisions. For example, studies have shown that people will decline even manifestly profitable investments because of wariness of relatively modest up-front costs.¹²⁵ Studies also tell us what we already know: people happily engage in self-destructive behaviors such as substance abuse that yield short-term benefits at the price of long-term dangers.¹²⁶

Rule of Law, 96 IOWA L. REV. 195, 204–11 (2010).

121. See Shane Frederick et al., *Time Discounting and Time Preference: A Critical Review*, in TIME AND DECISION, *supra* note 27, at 13, 32–34; see also Loewenstein & Angner, *supra* note 27, at 353–54 (people tend to underestimate the degree of change between current and future tastes, in part because they view current tastes as "objective"); Jolls et al., *supra* note 26, at 45–46; Laibson, *supra* note 26, at 450; Streich & Levy, *supra* note 25, at 205; cf. Drew Fudenberg & David K. Levine, *A Dual-Self Model of Impulse Control*, 96 AM. ECON. REV. 1449, 1457–62 (2006) (discussing saving and consumption patterns); Nira Liberman & Yaacov Trope, *Construal Level Theory of Intertemporal Judgment and Decision*, in TIME AND DECISION, *supra* note 27, at 245, 247–56 (discussing distortions in intertemporal judgment).

122. See Jeanne English Sullivan, *Copyright for Visual Art in the Digital Age: A Modern Adventure in Wonderland*, 14 CARDOZO ARTS & ENT. L.J. 563, 616–17 (1996) (describing Steinberg's cartoon as depiction of New Yorkers' myopic view of the world).

123. See Loewenstein & Angner, *supra* note 27, at 372–73.

124. *Id.* at 370–73.

125. See James J. Choi et al., *\$100 Bills on the Sidewalk: Suboptimal Investment in 401(k) Plans*, 93 REV. ECON. & STAT. 748, 761 (2011) (noting that large cohort of people fail to allocate optimal amount to retirement plans, despite availability of employer match and significant increase in size of asset and that most members of this cohort reveal comparable patterns for other assets and decisions).

126. See, e.g., Drazen Prelec, *Decreasing Impatience: A Criterion for Non-stationary Time Preference and "Hyperbolic" Discounting*, 106 SCANDINAVIAN J. ECON. 511, 513 (2004)

Indeed, as the substance abuse example reveals, sometimes even calculating costs a couple of hours in the future, such as the risks of driving while intoxicated, can overload humans' tattered temporal judgment.

People can remedy these flaws, but only with conscious planning.¹²⁷ Just as the Greek hero Ulysses had his crew bind him to the mast so he could resist the sirens' serenade and continue his journey,¹²⁸ people fashion devices that correct for flaws in temporal judgment. For example, financial planners tell people to set up savings accounts and diversify their portfolios. The purchase of insurance is another hedge that entails people binding themselves in the present to stave off long-term harms. Moreover, presentism is less pronounced in practice and in neural imaging when subjects make decisions on behalf of others, rather than themselves.¹²⁹ Vicarious decisionmaking apparently reduces the emotional content of such decisions, leaving more space for deliberation. This finding suggests that a proxy decisionmaker, at least one without a competing agenda, may better balance present and future costs and benefits.

Because human inference is a creature of both anticipation and memory, distortions in the time horizon also affect perspectives on the past. People impute current knowledge to past selves,¹³⁰ producing what cognitive psychologists call hindsight bias. Because of hindsight bias, people overstate the probability that a party could have prevented a particular harm.¹³¹ Vivid harms color assessment of the acts or omissions

(explaining procrastination).

127. See Laibson, *supra* note 26, at 444.

128. See JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 36 (1979); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1140–45 (1986).

129. See Konstanze Albrecht et al., *What Is for Me Is Not for You: Brain Correlates of Intertemporal Choice for Self and Other*, 6 SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE 218, 218, 224 (2011).

130. See Loewenstein & Angner, *supra* note 27, at 372.

131. See Fischhoff, *supra* note 27, at 342 (“Consider decision makers who have been caught unprepared by some turn of events and who try to see where they went wrong If, in retrospect, the event appears to have seemed relatively likely, they can do little more than berate themselves for not taking the action that their knowledge seems to have dictated.”); see also Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, in BEHAVIORAL LAW AND ECONOMICS, *supra* note 26, at 95, 95 (stating that maxims such as “hindsight . . . is ‘20/20’” indicate that “[l]earning how the story ends . . . [distorts] our perception of what could have been predicted”); Neal J. Roesse, *Twisted Pair: Counterfactual Thinking and the Hindsight Bias*, in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING, *supra* note 26, at 258, 260–61 (hindsight bias is “the tendency to believe that an

preceding the harm.¹³² This “anchoring” of perceptions to vivid past events has broader implications for human inference.¹³³ When a referee at an athletic event sees a player throw a punch, for example, the referee is likely to infer that the player he saw commit the offense bears responsibility for the altercation. In fact, however, that player’s punch could have been the culmination of interactions throughout the game.¹³⁴

Maintaining the habits of deliberation that accompany a linear time horizon has always been central to the laws of war. While leaders and thinkers have agreed for millennia that war may sometimes be necessary, observance of LOAC can cultivate the habits of “moderation” that eventually make peace possible.¹³⁵ In contrast, the failure to observe these rules usually heralds a conflict of wider scope and longer duration.

The law on surrender illustrates the importance of rules in fostering habits of dialogue and deliberation. The law of war has long prohibited

event was predictable before it occurred, even though for the perceiver it was not”).

132. See Jeffrey J. Rachlinski, *Heuristics, Biases, and Governance*, in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING, *supra* note 26, at 567, 575–76 [hereinafter Rachlinski, *Heuristics and Governance*].

133. On anchoring, see Gretchen B. Chapman & Eric J. Johnson, *Anchoring, Activation, and the Construction of Values*, 79 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 115, 144 (1999); Daniel Kahneman et al., *Economic Preferences or Attitude Expressions? An Analysis of Dollar Responses to Public Issues*, in CHOICES, VALUES, AND FRAMES 642, 665–68 (Daniel Kahneman & Amos Tversky eds., 2000); cf. Florian Fessel & Neal J. Roese, *Hindsight Bias, Visual Aids, and Legal Decision Making: Timing Is Everything*, 5 SOC. & PERSONALITY PSYCHOL. COMPASS 180, 181 (2011) (noting that because of hindsight bias, individual who learned that colleague had been fired would remember events that were consistent with this fact, such as colleague’s lateness, as opposed to neutral or inconsistent data, such as positive evaluations or customer good will); Rachlinski, *Heuristics and Governance*, *supra* note 132, at 569 (noting significant increase in subjects’ perceived need to take precautions once researchers told subjects that flood with 10% likelihood of occurrence in given year had actually happened).

134. For an intriguing study of officiating in sports and its relevance to judgments in law, see Mitchell N. Berman, “*Let ‘Em Play*”: *A Study in the Jurisprudence of Sport*, 99 GEO. L.J. 1325, 1330–31 (2011), which supports a meta-rule that would discourage calling fouls late in basketball games and that would rely more on course of dealing among players; see also W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 300 (1998) (discussing the problem of hindsight bias in juries). *But see* CARL T. BOGUS, *WHY LAWSUITS ARE GOOD FOR AMERICA: DISCIPLINED DEMOCRACY, BIG BUSINESS, AND THE COMMON LAW* 3–4 (2001) (arguing that jury verdicts in product liability cases are not excessive); cf. Fischhoff, *supra* note 27, at 348 (noting the tendency of historians to assemble tidy narratives, “with all the relevant details neatly accounted for and the uncertainty surrounding the event prior to its consummation summarily buried”).

135. *The Prize Cases*, 67 U.S. (2 Black) 635, 667 (1863).

killing captives in large part because the short-term expedients that drive this extreme measure can have dire long-term consequences. As one commentator noted centuries ago: “Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals . . . the war will become cruel, horrible, and every day more destructive to the nation.”¹³⁶ Customary international law, such as the immunity of ambassadors and the inviolability of safe conduct pledges, emerged from the same premise of promoting habits of deliberation among nations.¹³⁷

An *ex ante* view that considers incentives for coordination in avoiding needless violence is vital to LOAC.¹³⁸ Changes in the law must reflect realism about parties’ inclination and capacity to take advantage of the incentives provided. Incentives that fail to elicit the conduct envisioned have opportunity costs, discouraging more productive measures. Failing to address those opportunity costs is itself a form of temporal misjudgment.

War, like the other aspects of the political landscape well known to the Framers, requires structures that promote pre-commitment to thought in lieu of hasty action. The Framers understood the need to anchor political deliberation to structure. In justifying judicial review, Alexander Hamilton cautioned against the political branches’ tendency to act on the impulses of the moment.¹³⁹ James Madison, exhibiting an equally refined understanding of the dangers of a distorted time horizon, dryly observed that “indirect and remote considerations . . . will rarely prevail over the immediate interest which one party may find in disregarding the rights of another, or the good of the whole.”¹⁴⁰ LOAC is also an effort to prevent such distortions; as Michael Walzer aptly described them, the laws of war are “constitutionalism in hell.”¹⁴¹

Central to war’s constitutionalism are what I call identification norms. Identification norms include *jus in bello* principles such as

136. *Id.*; see also SOLIS, *supra* note 49, at 8–9, 18 (discussing how soldiers who decline to surrender and continue to fight in the face of certain defeat ratchet up violence).

137. See BELLI, *supra* note 48, at 81 (discussing diplomatic immunity); *cf.* *Sosa v. Alvarez-Machain*, 542 U.S. 692, 723–24 (2004) (noting that diplomatic immunity was regarded in Founding Era as a cornerstone of customary international law).

138. See WALZER, *supra* note 38, at 132 (quoting philosopher Henry Sidgwick on avoiding “the danger of provoking reprisals and of causing bitterness that will long outlast” hostilities).

139. See THE FEDERALIST NO. 78, *supra* note 28, at 428 (Alexander Hamilton).

140. See THE FEDERALIST NO. 10, *supra* note 28, at 56 (James Madison).

141. See WALZER, *supra* note 38, at 47.

distinction, which requires care in distinguishing an adversary's forces from civilians.¹⁴² Criteria for interrogation, detention, and trial of members of an adversary's forces would also fit into this category. Rules barring coercive interrogation, for example, are necessary in part because norms on detention and trial would be meaningless if a party could use coercion to extract an admission that would fit whatever criteria applied.¹⁴³

American courts have long found ways to directly or obliquely accommodate identification norms that inform temporal judgment in armed conflict.¹⁴⁴ By invoking norms that required the government to make careful determinations about persons and property subject to seizure, the Court has ensured that short-term calculations would not overwhelm long-term values. In a landmark early decision that set the interpretive tone, the Court held that the executive, absent clear direction from Congress, could not violate the law of nations by seizing neutral vessels on the high seas.¹⁴⁵ The Court also required that the executive precisely follow Congress's instructions on the appropriate time and place for seizure.¹⁴⁶ In addition, the Court barred the executive from seizing enemy property absent express direction from Congress.¹⁴⁷

142. See Pejic, *supra* note 91, at 342 (rejecting the notion of an "intermediate" category that is neither combatant nor civilian).

143. Identification norms include not only rules governing the use of force on others, but also criteria for how those using force should distinguish themselves. See *supra* note 12 and accompanying text (discussing wearing of insignia); *supra* notes 35–36 and accompanying text (discussing signaling).

144. See Golove, *supra* note 29, at 562–63; David Weissbrodt & Nathaniel H. Nesbitt, *The Role of the United States Supreme Court in Interpreting and Developing Humanitarian Law*, 95 MINN. L. REV. 1339, 1344 (2011) (noting the Supreme Court's recognition of the law of war shortly after the Court's inception).

145. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 72 (1804); see also Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 487 (1998); Ingrid Brunk Wuerth, *Authorizations for the Use of Force, International Law, and the Charming Betsy Canon*, 46 B.C. L. REV. 293, 302 (2005) (explaining the *Charming Betsy* Canon); cf. Peter Margulies, *Judging Terror in the "Zone of Twilight": Exigency, Institutional Equity, and Procedure After September 11*, 84 B.U. L. REV. 383, 402–06 (2004) (arguing that courts should interpret statutes authorizing force as being consistent with international humanitarian law).

146. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177–78 (1804); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, *supra* note 90, at 947.

147. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 115–16 (1814) (ordering relief from official's attempt during War of 1812 to condemn as enemy property cargo on vessel chartered by British company); see also Ingrid Brunk Wuerth, *The President's Power to Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U.

In *Ex parte Milligan*, the Court held that United States citizens who were not belligerents could not be tried in military commissions, at least when civilian courts were open.¹⁴⁸ At the turn of the twentieth century, the Court held that customary international law barred seizure of coastal fishing vessels typically used by civilians for subsistence.¹⁴⁹ In many of these cases, the Court's decision relied on interpretive default rules that Congress could overcome, rather than on categorical declarations. However, these rules still have bite because overcoming inertia triggers costs that Congress is not always ready to bear.¹⁵⁰

The post-September 11 cases have continued this focus on identification norms. In *Boumediene v. Bush*, the Court struck down legislation that stripped Guantanamo detainees of access to habeas corpus, expressly citing the importance of preserving the government's temporal judgment from the "pendular swings" that listing from crisis to crisis can yield.¹⁵¹ The *Boumediene* Court questioned the reliability of

L. REV. 1567, 1597–98 (2004) (discussing *Brown*).

148. 71 U.S. (4 Wall.) 2, 106 (1866).

149. *The Paquete Habana*, 175 U.S. 677, 708 (1900); cf. William S. Dodge, *The Paquete Habana: Customary International Law as Part of Our Law*, in INTERNATIONAL LAW STORIES 175, 195–96 (John E. Noyes et al. eds., 2007) (arguing that *Paquete Habana* decision reflected robust role of customary principles). Utilitarians have singled out *The Paquete Habana* for special criticism, asserting that it offered a stilted and selective account of state practices contributing to customary international law. See GOLDSMITH & POSNER, *supra* note 20, at 71–72 (asserting that Britain had attacked coastal fishing vessels during Crimean War). *But see Paquete Habana*, 175 U.S. at 699–700 (vessels attacked by British-supplied enemy troops and were not intended for subsistence); Peter Margulies, *True Believers at Law: National Security Agendas, the Regulation of Lawyers, and the Separation of Powers*, 68 MD. L. REV. 1, 33–34 (2008) (arguing that British attacks may have stemmed from breakdown of discipline among British and allied forces, not policy decision).

150. See Dodge, *supra* note 149, at 195–96 (arguing that the *Paquete Habana* Court would have been reluctant to permit unilateral executive disregard of customary principles). See generally EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 163–65 (2008) (discussing importance of default rules that allocate burden of overcoming legislative inertia in light of Guantanamo detainees).

151. See *Boumediene v. Bush*, 553 U.S. 723, 742, 771 (2008); cf. Martin S. Flaherty, *Constitutional Resolve in a World Changed Utterly*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 575, 578–80 (David L. Sloss et al. eds., 2011) (discussing robust judicial review in war on terror cases); Jared A. Goldstein, *Habeas Without Rights*, 2007 WIS. L. REV. 1165, 1183–86 (discussing importance of habeas as check on political branches); Stephen Holmes, *In Case of Emergency: Misunderstanding Tradeoffs in the War on Terror*, 97 CALIF. L. REV. 301, 303–05 (2009) (arguing that judicially imposed rules are necessary to compensate for short-sighted executive policies); Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661, 663–67 (2009) (arguing that the Supreme Court has used procedural rulings in terrorism cases to police interaction between the branches); Stephen I. Vladeck, *Boumediene's Quiet Theory: Access to Courts and the Separation of Powers*, 84 NOTRE

administrative processes to adjudicate a detainee's status.¹⁵² The D.C. Circuit's jurisprudence on criteria for detention has required reliable evidence that a detainee is part of Al Qaeda or associated groups, demonstrated through proof of attendance at training camps and association with Al Qaeda or the Taliban in maneuvers in Afghanistan.¹⁵³ Courts have held that targeting decisions by the United States military are political questions.¹⁵⁴ However, a case on the alleged targeting of an American citizen, Anwar al-Aulaqi, whom the government had identified as a leader of Al Qaeda in the Arabian Peninsula, found that the targeting presented a political question only after discussion of the basis for the government's view.¹⁵⁵

The law of war also takes hindsight bias into account. Consider the principle of proportionality, which requires that attackers avoid excessive collateral damage in achieving a military advantage.¹⁵⁶ The principle does not specify any precise ratio of civilian deaths to military success. As a manual by three noted commentators observed, "[P]roportionality is not an exact science and it is impossible to draw in

DAME L. REV. 2107, 2125–35 (2009) (discussing historical background for judicial review). *But see* Aziz Z. Huq, *Against National Security Exceptionalism*, in THE SUPREME COURT REVIEW 225, 225–27 (2010) (questioning impact of post-September 11 court decisions regarding national security measures); Jenny S. Martinez, *Process and Substance in the "War on Terror"*, 108 COLUM. L. REV. 1013, 1015–17 (2008) (same).

152. *Boumediene*, 553 U.S. at 784 (noting that, in an administrative process, "the detainee's opportunity to question witnesses is likely to be more theoretical than real").

153. *See* Al Alwi v. Obama, 653 F.3d 11, 13–14, 17–18 (D.C. Cir. 2011) (upholding detention of individual who had received training in Al Qaeda camp and joined Taliban combat unit); Chesney, *Who May Be Held?*, *supra* note 94, at 845–47; Matthew C. Waxman, *Detention as Targeting: Standards of Certainty and Detention of Suspected Terrorists*, 108 COLUM. L. REV. 1365, 1411–12 (2008); *see also* BENJAMIN WITTES, DETENTION AND DENIAL: THE CASE FOR CANDOR AFTER GUANTÁNAMO 143–44 (2011) (arguing for codification of detention policy); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1087–89 (2008) (discussing dialectic between fairness and efficiency in models of adjudication). *But see* Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict–Criminal Divide*, 33 YALE J. INT'L L. 369, 411–12 (2008) (arguing that administrative detention should be permissible, but that conduct such as participation in a training camp does not constitute a sufficiently serious threat to justify detention).

154. *See* El-Shifa Pharm. Indus. Co. v. United States, 559 F.3d 578, 581 (D.C. Cir. 2009).

155. *See* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 10 (D.D.C. 2010) (describing government's view that al-Aulaqi had been complicit in the shooting of military personnel at Fort Hood and other recent terrorist plots). The court also found, in ruling that al-Aulaqi's father lacked standing, that the alleged target had an adequate opportunity to come forward to contest the government's claims. *See id.* at 17; *cf.* Chesney, *supra* note 45, at 8–11 (analyzing *Al-Aulaqi*).

156. *See* Additional Protocol I, *supra* note 12, arts. 52, 57.

advance hard and fast rules.”¹⁵⁷ Moreover, while the principle requires an attacker to act consistently with “reasonable expectations,” it does not fault an attacker when a military success turns out to be less sweeping than planned or damage exceeds diligent estimates. Only a viewer infected with hindsight bias would penalize attackers because the “fog of war” caused a disparity between reasonable expectations and often unpredictable outcomes.¹⁵⁸

B. Holistic Signaling

Institutions that promote sound temporal judgment would be of little use without the means to communicate those judgments to others. In a world of imperfect information and faulty inference,¹⁵⁹ each party relies on signals that provide otherwise unavailable information about the other’s specific intentions and general dispositions.¹⁶⁰ Signaling is particularly important when a party wants to convey sincerity to others, either to promote a common enterprise or avoid a conflict.¹⁶¹ Signaling that is misunderstood or deceptive undermines common projects and prompts needless friction.¹⁶² The fluid nature and high stakes of armed conflicts combine to make signaling crucial.

157. SCHMITT ET AL., *supra* note 13, § 2.1.1.4 cmt. 5.

158. *Id.* at cmt. 4. Of course proportionality also acknowledges the risk of myopia; its central purpose is to ensure that attackers weigh apparent strategic or tactical advantages against cost to innocents. In the heat of battle, decisionmakers may pay less attention to the latter concern, which is why the principle is necessary.

159. See James D. Fearon & David D. Laitin, *Explaining Interethnic Cooperation*, 90 AM. POL. SCI. REV. 715, 718–19 (1996) (noting that on local level members of one ethnic group usually have ample informal sources for information about those from the same group but little information about members of other groups, making cooperation difficult).

160. See POSNER, *supra* note 35, at 18–20; Richard H. McAdams, *Signaling Discount Rates: Law, Norms, and Economic Methodology*, 110 YALE L.J. 625, 674–75 (2001) (book review).

161. For example, a sincere exchange of conciliatory gestures between two warring factions can help each develop a shared stake in the design and operation of governing institutions. See Matthew Hoddie & Caroline Hartzell, *Signals of Reconciliation: Institution-Building and the Resolution of Civil Wars*, 7 INT’L STUD. REV. 21, 35 (2005) (acknowledging that beneficial spiral results only when parties share desire for reconciliation).

162. See Robert Jervis, *Deterrence and Perception*, INT’L SECURITY, Winter 1982/1983, at 3, 6–7 (suggesting that Germany and Japan both misunderstood signals sent by allied powers before World War II, and that allied powers did not consider how their signals would be perceived); John K. Setear, *Responses to Breach of a Treaty and Rationalist International Relations Theory: The Rules of Release and Remediation in the Law of Treaties and the Law of State Responsibility*, 83 VA. L. REV. 1, 94–95 (1997) (noting that misunderstood signals can produce spiraling tensions between nations, as when one country conducts naval exercises which another interprets as an aggressive move—when the second country acts against the

Signals come in two varieties: transactional or holistic. A transactional signal seeks to provide information to another party about a particular situation. In contrast, a holistic signal, while it may arise in a particular context, tries to convey information about the underlying habits and dispositions of the sender. In LOAC, both kinds of signals are necessary.

As an example of a transactional signal, consider the white flag of surrender. A fighter who flies the white flag is signaling that he will forego hostilities in exchange for being captured instead of being killed. If parties to an armed conflict did not recognize this signal, the attacking party would lack the reassurance that it needs to stop its attack. Moreover, the white flag of surrender is what theorists call a “costly signal.”¹⁶³ The sender incurs opportunity costs, because flying the white flag requires that the sender simultaneously give up the chance to kill more of his opponents. Incurring this cost is a token of the sender’s sincerity.¹⁶⁴ The receiver, who in the heat of battle cannot conduct a more extended analysis of the sender’s sincerity, accepts the white flag as a proxy.

Holistic signaling does not hinge on reciprocity in a narrow sense, but rather on a party’s recognition that it participates in a system of shared understandings.¹⁶⁵ While transactional signaling is bilateral in nature, holistic signaling is multilateral. A party may not benefit from holistic signaling in the short term, if its adversary in an armed conflict does not reciprocate. For example, Al Qaeda would not hesitate to harm captives, even if the United States at all times refrained from doing so. In the real world, however, no conflict is ever purely bilateral. Failure to comply with LOAC yields externalities, as a state’s reputation declines.¹⁶⁶ Multilateral implications are rife in global counterterrorism

perceived aggression, the first country must retaliate).

163. See James D. Fearon, *Signaling Foreign Policy Interests: Tying Hands Versus Sinking Costs*, 41 J. CONFLICT RESOL. 68, 69–71 (1997) (arguing that leaders signal their resolve to enemy states by upping the ante with their base, for example by making statements such as “[t]his will not stand” that would trigger discredit if leader backs down).

164. This principle has long antecedents: Cicero extolled the duty to keep agreements with the enemy and to avoid deceptions such as using a spy to poison an enemy leader. See BELLI, *supra* note 48, at 88.

165. See OSIEL, *supra* note 7, at 384–86; Finnemore & Sikkink, *supra* note 113, at 897; Goodman & Jinks, *supra* note 113, at 642.

166. See GUZMAN, *supra* note 36, at 212–13; Christopher J. Borgen, *Hearts and Minds and Laws: Legal Compliance and Diplomatic Persuasion*, 50 S. TEX. L. REV. 769, 774–78 (2009); David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 NW. U. L. REV. 879, 879, 881–82 n.17 (2003).

efforts. A state combating terrorism needs allies in the ranks of foreign leaders, transnational organizations, and global publics. Holistic signaling yields benefits in this more spacious arena.¹⁶⁷

Major state players, such as the United States, signal not only their own dispositions but their commitment to the overall LOAC framework. This systemic signaling has been a cornerstone of American law since the Founding Era. The Constitution expressly empowers Congress to make laws defining violations of the law of nations¹⁶⁸ and courts to hear cases involving foreign diplomats.¹⁶⁹ Congress in 1789 granted federal courts jurisdiction over torts in violation of the law of nations.¹⁷⁰ The Supreme Court during this period adopted a canon of interpretation to avoid conflicts between legislation and international law.¹⁷¹ These measures went far beyond the narrowly instrumental calculations of those who wished to avoid foreign entanglements.¹⁷² The chief players of the Founding Era also saw the United States, with its distinctive system of judicial review, as a model for governance with global impact.¹⁷³ American innovations that won approval from global audiences could exert a positive influence on customary international law, while heedless decisions could adversely affect the progress of self-governance. By publicly practicing habits of deliberation, the United States sent a message to other states that cultivating such habits is worthwhile. Later leaders like Lincoln and Roosevelt stressed the United States' role in promoting more equitable governance throughout

167. A state conducting counterinsurgency operations elsewhere in the world will also often be prudent to tailor a policy to address concerns of the local population, even if IHL does not require this accommodation. See Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1803 (2009) (discussing importance of winning over populations in counterterrorism efforts); Philip Zelikow, *Legal Policy for a Twilight War*, 30 HOUS. J. INT'L L. 89, 95 (2007) (arguing that legal policy on interrogation and related issues must consider need to attract and retain international allies); cf. Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT'L L.J. 163, 166 (2011) (asking whether, by virtue of its international position and ubiquitous need to persuade, the United States should be held to higher standard).

168. See U.S. CONST. art. I, § 8, cl. 10.

169. *Id.* art. III, § 2.

170. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 712–13 (2004).

171. See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

172. Cf. Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445, 447–48 (2011) (taking instrumental view of statute's purpose, while conceding that little concrete evidence of legislative intent exists).

173. See HANNAH ARENDT, *ON REVOLUTION* 196–97 (1963) (quoting John Adams and James Wilson, and Thomas Paine, who compared the Constitution to examples from antiquity, such as Greece and Rome).

the world.¹⁷⁴ The United States' founding role in the United Nations manifested this same intent.¹⁷⁵

Holistic signaling is in the interest of the United States today in a more tangible respect. Because America has participated in military intervention when nations' commitment to the rule of law breaks down, as in Kosovo and Libya, the United States has a vested interest in enhancing the appeal of the global rule of law so that it can reduce calls for its military capabilities. Moreover, American military personnel developing relationships with their counterparts count on that reputation as a crucial signal of their discipline and professionalism.¹⁷⁶ American defection from global rules—particularly those venerable norms embedded in customary international law—therefore has ruinous consequences not merely for the global system, but for America itself. Because the United States has a stake in the integrity of the international system,¹⁷⁷ it cannot isolate the benefits it may receive from

174. Lincoln described emancipation as “an act of justice” consistent with the “considerate judgment of mankind.” See ABRAHAM LINCOLN, Emancipation Proclamation (Jan. 1, 1863), in 6 COLLECTED WORKS OF ABRAHAM LINCOLN 28, 30 (Roy P. Basler ed., 1953); cf. FONER, *supra* note 61, at 237 (noting Lincoln’s belief that emancipation was “the last best, hope of earth”); Jenny S. Martinez, *Antislavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550, 560–95 (2008) (discussing Britain’s special role in antebellum evolution of international law regarding slavery); see also Mark R. Shulman, *The Four Freedoms: Good Neighbors Make Good Law and Good Policy in a Time of Insecurity*, 77 FORDHAM L. REV. 555, 555–56 (2008) (discussing Franklin Roosevelt’s articulation of freedoms to guide a post-war era, including freedom from want and freedom from fear). America’s role as an example for the world is a durable element of popular constitutionalism, connoting narratives that the public embraces independent of specific judicial approval. See LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 24–25, 45–46 (2004) (discussing public opinion on constitutionality of acts and Jefferson’s approval of public role in “supervising constitutional law”); cf. Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185, 1204 (noting that, in Founding Era debate over Alien and Sedition Acts, “constitutional meaning was hammered out informally through political contestation”); Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1599–1615 (2005) (book review) (analyzing arguments for and against constitutional interpretation by people and elected officials).

175. See Bush, *supra* note 66, at 2388–89 (discussing the United Nations’ endorsement with the United States and other countries of the theory of Crimes Against Peace). Indeed, complaints about “American exceptionalism” when the United States does not ratify certain international agreements or participate in institutions like the International Criminal Court assume that United States participation will encourage other states to embrace these measures. See Koh, *supra* note 113, at 2634.

176. See OSIEL, *supra* note 7, at 299, 312–14.

177. See Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 WASH. U. L. REV. 1117, 1165–73 (2011) (discussing how the statute signals United States’ willingness to cooperate with international law).

defection, and cannot successfully free ride for long on disregard of international norms.

Efforts to promote such free riding in a strong democracy falter because institutions such as courts insulate holistic signaling from executive whim.¹⁷⁸ Courts view certain IHL norms, such as the prohibition on torture, as fundamental to their integrity.¹⁷⁹ Encroachment on those norms is a challenge to their institutional standing.¹⁸⁰ These institutional concerns make courts tacit allies of NGOs and military lawyers committed to upholding IHL.

V. STRUCTURE IN CONTEXT: TIME HORIZONS AND HOLISTIC SIGNALING IN STATES, NON-STATE ACTORS, AND NGOS

Now that we have identified the values of linear time horizon and holistic signaling as crucial, we can assess how players in our two-level game fare under these elements. This Part considers states first. It moves on to non-state actors and NGOs. After this comparison, this Part takes up two proposed innovations: the Bush administration's attempt to deprive suspected terrorists of IHL protections and the ICRC's effort to change rules on targeting non-state actors participating in hostilities.

178. See Trachtman, *supra* note 111, at 130–31 (describing “polyarchy” in domestic players on international law); Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, 67 *LAW & CONTEMP. PROBS.* 195, 210–11 (2004) (describing how disaggregated government entities facilitate the recognition of international law in the United States). *But see* Eric A. Posner, *International Law and the Disaggregated State*, 32 *FLA. ST. U. L. REV.* 797, 800–02 (2005) (questioning whether courts and NGOs have sufficient motivation and cohesion to uphold IHL norms).

179. See *Bram v. United States*, 168 U.S. 532, 542–43 (1897); *R v. Warickshall*, (1783) 168 Eng. Rep. 234 (K.B.) 235; 1 Leach 262. For more context on coercion and abuse of prisoners and detainees, see JOHN T. PARRY, *UNDERSTANDING TORTURE: LAW, VIOLENCE, AND POLITICAL IDENTITY* 142–45 (2010) (discussing Cold War interrogation tactics, conducted with consent of senior officials); Diane Marie Amann, *Guantánamo*, 42 *COLUM. J. TRANSNAT'L L.* 263, 265–66 (2004).

180. The Supreme Court's trenchant observations in its war-on-terror cases demonstrate this institutional commitment. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557, 609 (2006) (noting that defendant in military commission proceeding was charged with general support of Al Qaeda, not specific acts, such as the use of dogs to terrorize detainees, linked to both notorious Civil War military prison commandant Henry Wirz and post-September 11 government policies); see also MARGULIES, *supra* note 5, at 41 (describing use of a dog in the interrogation of Mohammed al-Qahtani); Pearlstein, *Justice Stevens*, *supra* note 22, at 1307–08 (discussing Justice Stevens' view of military honor and best practices, based on his experience in World War II and as a Supreme Court clerk after the war assisting Justice Wiley Rutledge in review of cases alleging United States overreaching in that conflict).

A. Comparing the Actors

1. States: Promise and Disappointment

It should be no surprise that on each axis states are most promising, yet also most disappointing. States can develop institutions that protect a linear time horizon and promote holistic signaling. However, these advantages are not predestined; they must be earned through the continued commitment to deliberation. Temptations to defect from that commitment can easily diminish states' advantages. If, as one scholar has observed, states should enjoy a "rebuttable presumption that [they] will act in accordance with international norms,"¹⁸¹ experience has shown that state critics will often readily carry their burden of proof.

States' initial advantage is constitutive: states by definition exist in space and time in a way that other entities may not. A state policymaker stands for "an entire community" that has developed over time, not merely for an inflated snapshot of instantly aggregated individual preferences. In states, "[o]ver a long period of time, shared experiences and cooperative activity of many different kinds shape a common life."¹⁸² Even in an undemocratic regime, constituencies from the cultural, religious, or business realms may on occasion counter the narrative of the day.¹⁸³

Despite this promise, however, states' track record is mixed, at best. Consider the record of the United States during and since World War II. On the one hand, American policy reflected unusual forbearance. Despite entering the war because of aggression by others, the United States complied with IHL in its treatment of POWs. This commitment preserved the separation of jus ad bellum and jus in bello, and "notably" contrasted with the atrocities committed against American POWs in the Pacific theater.¹⁸⁴ However, other elements of American policy are

181. Schmitt, *supra* note 39, at 174.

182. WALZER, *supra* note 38, at 54. Of course, particular regimes can conduct themselves with utter disregard for the lives of their constituents. *See id.* ("If no common life exists, or if the state doesn't defend the common life that does exist, [the state's] own defense may have no moral justification.")

183. *See* Lionel K. McPherson, *Is Terrorism Distinctively Wrong?*, 117 ETHICS 524, 541-42 (2007) (discussing de facto checks and balances in nondemocracies); *cf.* POSNER & VERMEULE, EXECUTIVE UNBOUND, *supra* note 20, at 178 (noting that even in a dictatorship, "there will almost always be political forces the dictator(s) must be careful to reward or appease, such as the military or security services, mass public opinion, or an elite 'selectorate' that influences the choice of dictators" (footnote omitted)).

184. *See* Morrow, *supra* note 79, at 990.

murkier. While international law is still unclear, the bombings of Hiroshima and Nagasaki had consequences that American and other strategists would not wish to repeat.¹⁸⁵ Scholars have also criticized American rules of engagement in Vietnam as leading to unnecessary civilian deaths.¹⁸⁶ The aftermath of September 11 produced yet more tensions with IHL.¹⁸⁷ If the United States strikes a better balance today,¹⁸⁸ one should acknowledge that this turn was not automatic or foreordained. Other regimes have also revealed a spectrum of responses to the challenges of transnational terrorism, ranging from brutality to nuance.¹⁸⁹

185. *Compare* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 263 (July 8) (declining to rule out use of nuclear weapons in self-defense), with Blum, *Lesser Evil*, *supra* note 80, at 2, 56–57 (arguing that bombings were “indisputably war crimes” under present view of IHL, but that a carefully calibrated utilitarian test might justify decisions if alternatives such as use of conventional bombs would have cost even more civilian lives). On the home front, as well, American officials surrendered to myopia. *See* *Korematsu v. United States*, 323 U.S. 214, 215–18 (1944) (upholding statute that required Japanese-Americans to leave their homes during World War II); *see also Ex parte Endo*, 323 U.S. 283, 285, 294–97 (1944) (helping to end internment program by holding that Congress had not granted the government authority to detain concededly loyal Japanese-Americans); *cf.* Patrick O. Gudridge, *Remember Endo?*, 116 HARV. L. REV. 1933, 1934 (2003) (discussing significance of *Endo*); Joseph Margulies, *Evaluating Crisis Government*, 40 CRIM. L. BULL. 627, 638–39 (2004) (discussing other World War II-era restrictions targeting Asian-Americans and Pacific Islanders, including imposition of martial law in Hawaii).

186. *See* WALZER, *supra* note 38, at 188–90. The United States’ support for authoritarian governments, typically justified on short-term pragmatic grounds, has injured its reputation. *Cf.* DAN SAXON, *TO SAVE HER LIFE: DISAPPEARANCE, DELIVERANCE, AND THE UNITED STATES IN GUATEMALA* 103–05 (2007) (discussing United States backing for abusive regime in Guatemala as bastion against drug cartel); Brian Z. Tamanaha, *Are We Safer from Terrorism? No, but We Can Be*, 28 YALE L. & POL’Y REV. 419, 431–32 (2010) (arguing that United States support for authoritarian regimes in Middle East thwarted efforts to build good will).

187. *See* JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 7–8 (2008).

188. *See* Letter from David H. Petraeus, Gen., U.S. Army, to Multi-National Force-Iraq (May 10, 2007), available at <http://www.humanrightsfirst.org/blog/torture/2009/02/general-petraeus-what-sets-us-apart.asp> (noting crucial role of United States forces’ compliance with legal norms).

189. *Compare* Jon Lee Anderson, *Death of the Tiger: Sri Lanka’s Brutal Victory over Its Tamil Insurgents*, NEW YORKER, Jan. 17, 2011, at 41, 47 (detailing the Sri Lankan government’s campaign against Tamil Tigers, which cost the lives of thousands of civilians), with Julio S. Amador III, *National Security Challenges of the Philippines Under the Aquino Administration: A Human Security Approach* 7–8 (Feb. 1, 2010), available at <http://ssrn.com/abstract=1752622> (discussing the blend of reconciliation and targeted force used by the Philippine government against insurgents).

2. Non-State Actors: Virtue and Vice

Non-state actors lack states' presumptive advantages in temporal judgment and signaling. Some non-state actors can cultivate greater temporal and signaling capacities because they control territory and seek to participate in state governance.¹⁹⁰ Networks such as Al Qaeda, which aspire to transnational reach, have fewer incentives to modify their signaling and temporal judgment. Change is difficult for each non-state group, however, particularly when groups start with a core strategy of inflicting mass casualties on an adversary's civilian population.

Both territorial groups and networks suffer from a paucity of institutions, such as courts or an organized opposition party, that can straighten out time horizons. Non-state actors frequently adapt secrecy as a strategy.¹⁹¹ Secrecy can dilute checks and balances in democratic states¹⁹² and has similar effects on non-state actors. While emerging non-state actors embrace a more transparent and interactive ideal that leverages social media,¹⁹³ groups that insisted on secrecy as a standard operating procedure developed more monolithic institutions that suppressed debate. Sri Lanka's Tamil Tigers, for example, evolved into a cult of personality that acted on a charismatic leader's caprices.¹⁹⁴ Al Qaeda leaders function in a similar echo chamber. When secrecy skews debate, decisionmakers view moderation as betrayal. Targeting moderates creates a positive feedback loop within the group that exacerbates violence.¹⁹⁵

Secrecy also skews non-state actors' signaling. A group that views secrecy and deception as essential will ignore norms that require visible

190. See OSIEL, *supra* note 7, at 283; Klotz, *supra* note 10, at 463–64.

191. See HOFFMAN, *supra* note 11, at 179–80.

192. See *Arar v. Ashcroft*, 585 F.3d 559, 579–80 (2d Cir. 2009) (invoking secrecy as a distinction that may “amount to a special factor counseling hesitation” in expansion of damages claims against government officials for extraordinary rendition).

193. See Blake Hounshell, *The Revolution Will Be Tweeted: Life in the Vanguard of the New Twitter Proletariat*, FOREIGN POL'Y, July/Aug. 2011, at 20, 20.

194. See Anderson, *supra* note 189, at 43.

195. See Andrew H. Kydd & Barbara F. Walter, *The Strategies of Terrorism*, INT'L SECURITY, Summer 2006, at 49, 72–74; see also Abrahms, *supra* note 42, at 85–86 (observing that terrorist groups rarely pursue compromise and typically act as spoilers); cf. ALIZA MARCUS, BLOOD AND BELIEF: THE PKK AND THE KURDISH FIGHT FOR INDEPENDENCE 286–91 (2007) (discussing violence by Kurdistan Workers' Party (PKK)); Anderson, *supra* note 189, at 47 (discussing violence against moderate leaders by Tamil Tigers); Thomas C. Schelling, *What Purposes Can “International Terrorism” Serve?*, in VIOLENCE, TERRORISM, AND JUSTICE 18, 21 (R.G. Frey & Christopher W. Morris eds., 1991) (citing the violent “campaign of militant Palestinians against moderate Palestinian leaders”).

insignia. For many violent non-state actors, concealing a fighter in civilian clothes to gain a lethal advantage is not a war crime—it's a job description.¹⁹⁶ Similarly, while LOAC bars targeting an adversary's civilians, many non-state actors view killing civilians as a useful signal that even those offering attenuated support for a regime are vulnerable. For many non-state actors, targeting civilians signals commitment to the cause to followers, peers, and possible funders.¹⁹⁷ Like the counsels of moderation, a turn to LOAC signaling norms would be a betrayal.

As another demonstration of skewed signaling, violent non-state actors also often view dealings with states and NGOs as further opportunities for strategic advantage. Groups such as the Kurdistan Workers' Party (PKK), Hamas, and Hezbollah regularly use truces and negotiation to prepare for renewed violence.¹⁹⁸ Violent non-state actors divert or leverage humanitarian aid to support future violence.¹⁹⁹ Rwandan genocidaires received aid that subsidized continued operations,²⁰⁰ and the Tamil Tigers channeled food aid from NGOs to families that provided child soldiers.²⁰¹ Non-state actors also use NGOs

196. See PAPE, *supra* note 11, at 62–63 (in operational terms, groups such as Hamas and the Kurdistan Workers' Party (PKK) view suicide bombing as one role among many).

197. See Abrahms, *supra* note 42, at 100.

198. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2729–30 (2010) (justifying restrictions on assistance to foreign terrorist organizations because of organizations' history of manipulating such aid); MARCUS, *supra* note 195, at 286–95; see also Catherine Collins, *Kurd Violence Rises in Turkey, Raising Fears of a Renewed War*, CHI. TRIB., May 18, 2005, at C6 (discussing return to violence by groups associated with PKK after end of truce); Ayla Jean Yackley, *20 Injured in Turkish Resort Bomb*, IRISH TIMES, July 11, 2005, at 11 (noting the explosion of bomb for which militant wing of PKK claimed responsibility, that the bomb injured over 20 people, including at least one critically, and that came after unilateral truce declared by PKK). See generally Peter Margulies, *Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech*, 63 HASTINGS L.J. 455 (2012) (discussing terrorist groups' tendency to game system).

199. See *Holder*, 130 S. Ct. at 2727, 2729–30.

200. See FIONA TERRY, *CONDEMNED TO REPEAT?: THE PARADOX OF HUMANITARIAN ACTION* 15–16 (2002) (terming humanitarian aid “potential source for exploitation” by armed groups); Michael Barnett, *Evolution Without Progress? Humanitarianism in a World of Hurt*, 63 INT'L ORG. 621, 651 (2009) (noting that humanitarian group Medecins sans Frontieres (Doctors Without Borders or MSF) withdrew from camps serving genocidal Hutu fighters because “humanitarian assistance was prolonging suffering, not alleviating it”).

201. See Peter Popham, *Tamil Tigers Break UN Pledge on Child Soldiers*, INDEP. (London), Feb. 4, 2000, at 18 (reporting that LTTE only allowed families to receive humanitarian aid if “one or more family members perform a service,” including service as a child soldier); cf. INT'L COMM. OF THE RED CROSS, *INTERNATIONAL HUMANITARIAN LAW AND THE CHALLENGES OF CONTEMPORARY CONFLICTS* 48 (2011), available at <http://www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenge>

and international organizations to mask their commitment to violence. The PKK has used United Nations-supervised refugee camps as sites for recruitment and mobilization,²⁰² while Hamas provided misleading information to U.N. investigators on the percentage of its fighters among casualties in the 2008–2009 Gaza campaign.²⁰³

Again, this depiction does not represent all non-state actors. In the Philippines, for example, a number of Islamic rebel groups have entered into good-faith negotiations, and the government has reciprocated by granting these groups a measure of autonomy.²⁰⁴ The ANC worked with international organizations and NGOs to reform governance in South Africa, and has maintained that commitment.²⁰⁵ Former Irish Republican Army officials entered into a unity government with Protestants in Northern Ireland.²⁰⁶ Mediation efforts, in which both the government and the non-state stakeholders participate in a common project of reconciliation, have had encouraging results. However, these efforts require costly signals from both sides. Governments cannot unilaterally retreat from such shared projects without losing credibility. Similarly, non-state actors that embark on a shared project with the government cannot claim so readily that their adversaries' civilians merit killing.

In other areas, however, terrorists' tactics have been remarkably shortsighted.²⁰⁷ The Tamil Tigers failed in their effort to secure independence, despite a campaign that costs tens of thousands of lives.²⁰⁸ The Algerian terrorist group foundered because it targeted moderates indiscriminately.²⁰⁹ The second *Intifada* badly misread the signals in

s-report-2011-10-31.htm (warning that sweeping attempts to restrict terrorist groups' diversion of humanitarian aid can impede flow of aid to civilians).

202. See *Holder*, 130 S. Ct. at 2729–30.

203. See Ethan Bronner & Jennifer Medina, *Investigator on Gaza Was Guided by His Past*, N.Y. TIMES, Apr. 20, 2011, at A4.

204. See Amador, *supra* note 189, at 6–7.

205. See Klotz, *supra* note 10, at 463–64.

206. See Gary LaFree & Laura Dugan, *Research on Terrorism and Countering Terrorism*, 38 CRIME & JUST. 413, 437 (2009) (discussing how successful negotiations in Northern Ireland ended terrorism there).

207. See Max Abrahms, *Why Terrorism Does Not Work*, INT'L SECURITY, Fall 2006, at 42, 56–60 (arguing that terrorist tactics such as targeting civilians harden positions on the other side, thus frustrating strategic goals). *But see* PAPE, *supra* note 11, at 64–73 (asserting that suicide bombing is successful, based on Hamas strategy that appears less effective in light of later events).

208. See Anderson, *supra* note 189, at 47, 48.

209. See Humphrey, *supra* note 110, at 8–9 (discussing how indiscriminate violence in

Israel, believing that a spate of renewed attacks on civilians would bring Israel back to the negotiating table; Hamas made a similar mistake when Israel withdrew from Gaza.²¹⁰ These episodes show the difficulty of inculcating compliance with LOAC in non-state actors formed in secrecy and committed to violence against civilians.

3. NGOs: The Watchdog's Blind Spot

NGOs have their own problems with temporal judgment and signaling. While they perform an essential function in hedging against states' myopia, this watchdog role carries the burden of hindsight bias. Moreover, despite their role in promoting state compliance with IHL, NGOs often lack the governance structures that would promote comprehensive internal debate about their own proposals. Finally, NGOs, despite the best intentions, often send the wrong signals to violent non-state actors, putting more innocents at risk.

NGOs' central mission is holding in check states' tendency to cut corners. Left to their own devices, states would surely do great violence to LOAC's fabric. NGOs provide an organizational and rhetorical fulcrum for opposing efforts.²¹¹

While NGOs' scrutiny of state practices is salutary, their vantage point sometimes sinks into the overly comfortable recliner of retrospect. For NGOs, hindsight bias is a risk of the trade. Like the basketball referee reacting to the player observed throwing a punch, a state's action anchors the NGO's assessment, crowding out scrutiny of factors that elicited the state's response. In keeping with the limits of the protective model's perspective, NGOs often fail to consider the *ex ante* perspective on changes in rules. They therefore miss the adverse effects of changes that increase protection for violent non-state actors.

Consider the predicament of a military lawyer advising on targeting for a state signatory to the 1977 Additional Protocol I to the Geneva Conventions. Article 44(3) of Additional Protocol I, if it is also customary law applicable to non-international conflicts, provides special protection to non-state actors who depend on secrecy and deception, by stating that in situations where secrecy is a tactical imperative, a combatant need not wear a distinguishing insignia. Moreover, the

Algeria means there are "no borders demarcating safe zones").

210. See Kydd & Walter, *supra* note 195, at 63, 74.

211. See Catherine Powell, *The Role of Transnational Norm Entrepreneurs in the U.S. "War on Terrorism,"* 5 THEORETICAL INQUIRIES L. 47, 49-50 (2004).

combatant must carry arms openly, but only during a “deployment preceding the launching of an attack.” Suppose that a state, in the midst of fighting that has already risen to the intensity of armed conflict,²¹² knows of an imminent catastrophic attack that could cost scores of lives. However, the actual deployment preceding the attack has yet to begin. The state, acting in good faith, targets someone without an insignia whom it believes to be the leader of the planned attack. That person turns out to be a civilian. An NGO would criticize the state for possible violations of the principle of distinction, without recognizing that the dilution of the non-state actor’s duty to identify himself contributed to the state’s mistake. Indeed, in at least one recent episode, NGOs and fact-finders appointed by an international organization inaccurately identified slain combatants as civilians and based criticism of a state on this erroneous determination.²¹³ Such headlong rushes to judgment needlessly disturb the equilibrium on which IHL depends.

212. See, e.g., Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment, ¶ 566 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf> (“[T]he temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities.” (internal citation omitted)); *id.* at ¶ 568 (noting “scope and intensity” as criteria in determining whether Article 3 applied to an armed conflict).

213. Compare United Nations Fact Finding Mission on the Gaza Conflict, Human Rights in Palestine and Other Occupied Arab Territories (*Goldstone Report*), ¶ 34, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009) (asserting that individuals at a targeted police station were not combatants, while acknowledging that many were members of Hamas), with Bronner & Medina, *supra* note 203 (quoting Hamas spokesperson as conceding that individuals at police station were Hamas fighters); see also Laurie R. Blank, *Finding Facts but Missing the Law: The Goldstone Report, Gaza and Lawfare*, 43 CASE W. RES. J. INT’L L. 279, 281–82 (2010) (criticizing factual and legal errors in Goldstone Report); Chris Jenks & Geoffrey Corn, *Siren Song: The Implications of the Goldstone Report on International Criminal Law* 3, available at <http://ssrn.com/abstract=1788542> (noting that Goldstone Report engaged in “*ex post facto* evaluation of targeting decisions . . . in contravention of a long established rule of war crimes liability” that requires “evaluation of targeting decisions . . . through the perspective of the military commander at the time the judgment at issue was made”). NGOs rushed to endorse the Goldstone Report on its initial issuance, despite evidence at the time that the report relied on flawed sources. Compare Press Release, Human Rights Watch, US: Endorse Goldstone Report on Gaza: Promote Justice for Victims on Both Sides (Sept. 28, 2009) (arguing against “[d]ismissal of all or part of the Goldstone report”), with Ellen Knickmeyer, *Hamas Asserts Role in Suicide Bombing*, WASH. POST., Feb. 6, 2008, at A14 (contradicting Goldstone Report by detailing claims by Hamas officials that Israeli attack on police station killed both police officers and members of Hamas’s military wing). The sloppiness of the Goldstone Report undermined more diligent efforts to press for investigation of actual abuses. See Ethan Bronner & Isabel Kershner, *Head of U.N. Panel Regrets Saying Israel Intentionally Killed Gazans*, N.Y. TIMES, Apr. 3, 2011, at 10 (discussing ongoing questions about Israeli forces’ targeting of a flour mill and problems in the Goldstone Report); cf. Isabel Kershner, *Israel Rebukes 2 in Attack on U.N. Complex*, N.Y. TIMES, Feb. 2, 2010, at A4

The NGOs' commitment to ratcheting down identification requirements also sends troubling signals to violent non-state actors. Because of the dilution of these requirements, violent non-state actors enjoy a win-win situation vis-à-vis both the state and moderates within their own community. Violent acts by the state discredit moderates, because extremists can point to state overreaching and say, "I told you so."²¹⁴ Criticism of states by NGOs may chill future counterterrorism efforts, allowing extremists to argue that the concessions urged by moderates are unnecessary.²¹⁵ Even when a state retaliates, terrorist networks can shift their operations to another state and evade capture. In this win-win scenario, violent non-state actors externalize the costs of their actions, allowing them to become free riders on protective changes to LOAC.

NGOs that supply humanitarian aid to populations harmed by ongoing civil or international strife can also send unhelpful signals. International law currently requires that such aid—which often fills a desperate need—be *effective*: NGOs should seek to ensure that aid reaches its intended civilian recipients.²¹⁶ When violent extremists on any side divert aid to fund ongoing violence, aid becomes counterproductive. Many NGOs recognize this problem and try to put in place procedures that minimize diversion.²¹⁷ However, as the aftermath of the Rwandan genocide demonstrated, NGOs often feel pressure from their own funders to be "first on the ground" with assistance, even if extremists divert significant portions of aid.²¹⁸ Indeed,

(discussing Israeli reprimands of senior officers who had directed firing of artillery that hit United Nations compound in Gaza).

214. See Kydd & Walter, *supra* note 195, at 69–70.

215. See *id.* at 62–63 (discussing how states' concessions to terrorist organizations encourage more attacks); LaFree & Dugan, *supra* note 206, at 422 (discussing incentives for heightened violence in terrorist groups).

216. See Fourth Geneva Convention, *supra* note 14, arts. 23(2)(a)–(b) (permitting state corrective measures when state has "serious reasons for fearing" that "consignments may be diverted from their destination" or that controls limiting non-civilian access to aid will "not be effective"). The ICRC Commentary on Article 23 highlights the "danger of misappropriation" of aid, observing that, "It is essential that consignments should be subject to strict and constant supervision from the moment they arrive until they have been distributed." See 4 INT'L COMM. OF THE RED CROSS, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY 182 (Jean S. Pictet ed., 1958).

217. See DANIEL MAXWELL ET AL., PREVENTING CORRUPTION IN HUMANITARIAN ASSISTANCE 2 (2008), available at <https://wikis.uit.tufts.edu/confluence/download/attachment/s/15171916/Preventing+Corruption+in+Humanitarian+Assistance+Report+July+2008.pdf?version=1&modificationDate=1219154461000>.

218. Cf. Taylor B. Seybolt, *Harmonizing the Humanitarian Aid Network: Adaptive*

NGOs sometimes argue that international law bars due diligence.²¹⁹ This stance encourages violent extremists to divert aid, again making extremists free riders on proposed protective changes to legal norms.²²⁰

NGOs' deficits cancel each other out in one realm: humanitarian intervention. In that domain, NGOs' perennial interest in curbing human rights abuses balances its practice of second-guessing strong democracies. While some NGOs have criticized earlier interventions, such as Kosovo,²²¹ others have offered praise,²²² and many have been muted in the criticism of both intervention and tactics that have been helpful in the intervention setting, such as targeted killing.

4. Summary

By establishing time horizon and holistic signaling as overarching norms, we can model sustainable change in LOAC. States, NGOs, and non-state actors all have promise. However, in particular contexts, each reveals grave deficits. Sustainable change hinges on a balance between these three players. Suppose that states believe that NGOs have swung too far toward the protective paradigm in proposing changes that increase a non-state actor's ability to free ride. Those changes will not be sustainable. By the same token, when NGOs and domestic rule of law institutions believe that states have swung too far toward the utilitarian model, those changes will not stand the test of time.

Change in a Complex System, 53 INT'L STUD. Q. 1027, 1041 (2009) (describing wasteful competition among aid groups in Rwanda in 1990s).

219. See Justin Fraterman, *Criminalizing Humanitarian Relief: Are US Material Support for Terrorism Laws Compatible with International Humanitarian Law?* 27 (Working Paper, Jan. 14, 2011), available at <http://ssrn.com/abstract=1750963> (arguing that U.S. prosecution of aid workers for providing material support through humanitarian efforts would violate the United States' obligations and prevent NGOs from fulfilling their obligations under the Geneva Conventions). *But see* Harv. Univ. Program on Humanitarian Policy and Conflict Research, *Humanitarian Action Under Scrutiny: Criminalizing Humanitarian Engagement* 8 (Working Paper, Feb. 2011), available at <http://c0186748.cdn1.cloudfiles.rackspacecloud.com/HPCR%20CHE%202011.pdf> (noting that international law "does not expressly mention a right of humanitarian organizations" to interact with non-state actors). See generally Anderson, *supra* note 43, 843–44 (criticizing NGO practices).

220. See Tamar Meisels, *Combatants—Lawful and Unlawful*, 26 LAW & PHIL. 31, 47–48 (2007).

221. See Paul W. Kahn, *The Paradox of Riskless Warfare*, 22 PHIL. & PUB. POL'Y Q. 2, 2, 4 (2002).

222. See Goldstone, *supra* note 44, at 62.

B. A Tale of Two Bookends: Coercive Interrogation and Direct Participation in Hostilities

Armed with this model, we can now assess two significant post-9/11 proposals for change. The first is the government's effort in the aftermath of the attacks to deprive suspected terrorists of IHL protections against coercive interrogation. The second is the ICRC's guidelines on targeting and direct participation in hostilities. I address each in turn.

1. Post-9/11 Proposed Changes to Interrogation Rules

Utilitarians supported the move after September 11 by the Bush administration to deprive suspected terrorists of legal protections under LOAC. The approach consisted of two steps. First, Bush administration officials argued that Al Qaeda and the Taliban violated IHL because they do not wear insignias, use a fixed command structure, carry arms openly, or refrain from killing civilians.²²³ As a result, officials claimed, Al Qaeda and Taliban members were not entitled to POW status. Second, administration lawyers decided in the months after 9/11 that no detainee qualified for protection under the Geneva Conventions' Common Article 3. According to the administration's lawyers, Common Article 3, which applies to conflicts "not of an international character," only governs conflicts *within* a particular country, such as civil wars. Because Al Qaeda was a transnational organization that the United States was fighting on territory outside the United States, the conflict with Al Qaeda had an international character that precluded application of Common Article 3.²²⁴ In short, Bush

223. See Memorandum from John Yoo, Deputy Assistant Atty. Gen., and Robert J. Delahunty, Special Counsel Dep't of Justice, to William J. Haynes II, Gen. Counsel, Dep't of Def. (Jan. 9, 2002), in *THE TORTURE PAPERS*, *supra* note 5, at 38, 50. *But cf.* John F. Murphy, *Is US Adherence to the Rule of Law in International Affairs Feasible?*, in *INTERNATIONAL LAW AND ARMED CONFLICT*, *supra* note 39, at 197, 216 (offering an alternative view of whether this definition should have been applied to the Taliban, which contained members of the armed force of Afghanistan). Some argued that until the Karzai regime took power in Afghanistan after the United States' intervention, Taliban fighters *were* the armed forces of Afghanistan. Since Afghanistan was a party to the Geneva Conventions, this argument went, Taliban fighters were entitled to POW status, after all. Murphy, *supra*, at 216. Administration lawyers countered this argument by conveniently asserting that Afghanistan was a "failed state," which could not be a party to the Geneva Conventions. See Yoo, *supra*, at 48–52.

224. See Yoo, *supra* note 223, at 46–47. Afghanistan after 9/11 could have been involved in a civil war between the Taliban and pro-United States rebel forces, which would have qualified as a conflict "not of an international character" (NIAC). However, the

administration officials sought to render IHL obsolete.²²⁵ Utilitarians who shared this impatience with constraints supported the government's position.²²⁶

This position encountered difficulties on at least two fronts. First, the administration's argument about POW status missed a step. To determine POW status, the Geneva Convention requires more than an adverse party's categorical determination. A "competent tribunal" must decide if an individual has failed to meet IHL criteria for lawful combatancy.²²⁷ Second, the drafting history and purpose of Common Article 3 demonstrated that this provision established a floor for the treatment of *all* detainees, whatever the classification of the conflict in which they were captured.²²⁸ While utilitarians viewed these points as mere niceties, others viewed them as essential to the rule of law.

The Bush administration's legal maneuvers amounted to a substantial proposed change in IHL that would have allowed leaders of one state to summarily deprive non-state actors of legal protections. The change was suspect under both the time horizon and holistic signaling counts. Domestic courts, while they have generally declined to rule on the propriety of the specific interrogation techniques used by the administration, wisely found that international law supplied a floor for detainee treatment.²²⁹ Without such a floor, governments will overreach, imposing needless harm²³⁰ and corrupting their own institutions. An analysis of holistic signaling buttresses this conclusion. Other states that must work together in counterterrorism efforts will view such results as lacking in legitimacy. Moreover, developing states, including those with repressive governments or fragile democracies, will perceive the United States' action as tacit authorization for their own coercive interrogation

administration's argument that Afghanistan was a "failed state," *id.* at 50, 53–59, dictated the conclusion that the indigenous conflict did not include a party to the Geneva Convention and was therefore not a NIAC subject to Geneva rules.

225. See Gonzales, Memorandum to the President, *supra* note 5, at 119.

226. See POSNER & VERMEULE, *TERROR IN THE BALANCE*, *supra* note 20, at 274 (criticizing opponents of expanded executive power as ignoring substance for process concerns).

227. See Third Geneva Convention, *supra* note 12, art. 5.

228. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 631 (2006). See generally Stephen Ellmann, *The "Rule of Law" and the Military Commission*, 51 N.Y.L. SCH. L. REV. 760, 781–86 (2007) (discussing *Hamdan* decision in light of rule of law).

229. See *Hamdan*, 548 U.S. at 631.

230. See Philip Zelikow, Op-Ed, *A Dubious C.I.A. Shortcut*, N.Y. TIMES, Apr. 24, 2009, at A27 (stating that information from interrogations using "enhanced" techniques was "a critical part of the intelligence flow, but rarely—if ever—affected a 'ticking bomb' situation").

regimes.²³¹ Finally, transnational publics will also doubt the legitimacy of counterterrorism efforts and limit their cooperation.²³²

2. The ICRC's Guidance on Direct Participation in Hostilities

As a bookend to the Bush administration's failed proposal, consider recent guidelines from the ICRC that define who may be targeted as directly participating in hostilities.²³³ The ICRC's guidance adopted a protective approach that gave such participants an "on-off switch." In contrast, under traditional law of war concepts, uniformed state forces can be targeted *at any time*. The ICRC's proposed change disturbed the equilibrium of LOAC, and ultimately put both state forces and civilians at risk.

The ICRC reached its conclusion through a narrow definition of "continuous combat function."²³⁴ Those engaged in such functions can always be targeted. However, others experience a far narrower window of vulnerability. A narrow definition of "continuous combat function" therefore immunizes most non-state participants most of the time. As an example, consider an individual who assembles the explosives used by suicide bombers. According to the ICRC's guidance, this individual could not be targeted as he assembled the bomb, since others would have to deploy it to actually produce harm.²³⁵ Even if the bomb maker's work met this restrictive definition of causation, he could finish his task and evade targeting by passing through a "revolving door" to ordinary

231. Cf. Kim Lane Scheppele, *The International Standardization of National Security Law*, 4 J. NAT'L SECURITY L. & POL'Y 437, 451 (2010) (arguing that global counterterrorism measures allow many states to camouflage their substandard governance as counterterrorism); Sudha Setty, *Comparative Perspectives on Specialized Trials for Terrorism*, 63 ME. L. REV. 131, 149–71 (2010) (analyzing policies in United States, United Kingdom, Israel, and India).

232. Cf. Aziz Z. Huq, *The Signaling Function of Religious Speech in Domestic Counterterrorism*, 89 TEX. L. REV. 833, 835–37 (2011) (arguing that focusing investigative resources on religious speech can be counterproductive); Tom R. Tyler et al., *Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans*, 44 LAW & SOC'Y REV. 365, 366–69 (2010) (discussing positive effects of perception of legitimacy on cooperation with law enforcement in antiterrorism policing).

233. See ICRC GUIDANCE, *supra* note 6, at 33–36.

234. *Id.* at 33.

235. See *id.* at 54 (asserting that the "assembly and storing of an improvised explosive device (IED) . . . do not cause . . . harm directly"); cf. Schmitt, *Deconstructing Direct Participation in Hostilities*, *supra* note 17, at 731 (criticizing narrow view of causation in ICRC Guidance).

life.²³⁶ That tactical interlude would continue until the bomb maker turned again to his task, at a time and place of his choosing.²³⁷

The ICRC's guidance suffers from a time horizon skewed by hindsight bias. The ICRC worried about the possibility of collateral damage if the bomb maker could be targeted at all times. However, the ICRC focused only on the state attack and ignored all contributing events. In particular, the ICRC's guidance failed to reckon with the change's effect on the *ex ante* perspective of the bomb maker and the organized armed group for which he worked. Given an "on-off switch" to regulate his risk, the bomb maker has far less reason to abandon his dubious calling. Moreover, the group supporting his work has stronger incentives to add to the bomb makers' ranks.

In addition to a substantively skewed time horizon, the ICRC displayed poor temporal judgment in its own internal deliberations. Consider the irregular process leading to announcement of the ICRC guidance. The ICRC assembled an international group of experts to provide input. However, when those experts declined to endorse the approach that ICRC officials desired, the ICRC decided to ignore the experts it had consulted.²³⁸ An organization with sounder temporal judgment would have discerned the myopia in elevating a particular outcome over respect for deliberative processes. However, the ICRC apparently did not gain this insight.

The ICRC's signaling was equally flawed. Because terrorist networks that use improvised explosive devices disdain insignias, the bomb maker is aiding and abetting killing through deception, an act of perfidy long condemned by LOAC.²³⁹ Escalating terrorist violence provides political cover for a harsh state response. The ICRC's approach, despite its benevolent aspirations, deepens the cycle of violence.²⁴⁰ While the ICRC acknowledged that it was merely expressing

236. See ICRC GUIDANCE, *supra* note 6, at 44, 70–72; cf. Watkin, *Opportunity Lost*, *supra* note 17, at 661 (criticizing ICRC's enabling of revolving door mechanism).

237. See Watkin, *Opportunity Lost*, *supra* note 17, at 658.

238. See W. Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate, No Expertise, and Legally Incorrect*, 42 N.Y.U. J. INT'L L. & POL. 769, 783–84 (2010) (reporting that ICRC added pivotal section without consulting the experts it had convened, that a majority of experts proceeded to "vigorous[ly]" criticize the section, which was nonetheless included in the final document).

239. See DINSTEIN, *THE CONDUCT OF HOSTILITIES*, *supra* note 13, at 233; Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 341–42 (1952).

240. Cf. Kydd & Walter, *supra* note 195, at 69–70 (describing how provocation by

its own views,²⁴¹ its approach to both substance and process made this disclaimer a self-fulfilling prophecy.

VI. TWO EMERGING ISSUES: DRONES AND NEW WAR CRIMES

Beyond the book-ended issues of coercive interrogation and direct participation in hostilities, newer issues clamor for analysis. To flesh out the structural model, I consider two: remote targeting of suspected terrorists and material support of terrorism as a war crime. This Part discusses each in turn.

A. *The Case of Remote Targeting*

The ICRC's study on direct participation in hostilities only scratches the surface on targeting issues. Adding to controversy is the United States' recent practice of remote targeting. Reports indicate that the United States has targeted at least one individual in Yemen, as well as others in Somalia, usually using unmanned drone aircraft.²⁴² Remote targeting raises difficult questions on the nature of self-defense, the appropriate geographic scope of non-international armed conflict, the limits of sovereignty, and the intensity of violence necessary for persistence of an armed conflict.²⁴³ A structural approach would permit remote targeting, conditioned on observance of identification norms and other limits such as necessity. Proxy compliance of this type is consistent with both time horizon and holistic signaling.

Remote targeting poses tensions with LOAC norms. It typically does not entail a response to the threat of imminent attack, and therefore fails the historic *Caroline* test for self-defense, in which

terrorists pays off when states respond with hostility).

241. See ICRC GUIDANCE, *supra* note 6, at 6.

242. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 10 (D.D.C. 2010).

243. See Chesney, *supra* note 45, at 19–28. Compare Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346, 346–47 (Benjamin Wittes ed., 2009) (arguing that drone attacks, given appropriate constraints, are consistent with international law of self-defense), and Banks & Raven-Hansen, *supra* note 76, at 668 (same), and John C. Dehn & Kevin Jon Heller, Debate, *Targeted Killing: The Case of Anwar al-Aulaqi*, 159 U. PA. L. REV. PENUMBRA 175, 189 (2011) (same), and Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 274–79 (2010) (same), with U.N. Human Rights Council, Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Study on Targeted Killings, ¶¶ 3–4, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (targeted killings generally impermissible), and Dehn & Heller, *supra*, at 183, 196 (same), and O'Connell, *supra* note 76, at 2 (same).

Secretary of State Daniel Webster opined that the threat must be “instant, overwhelming, leaving . . . no moment for deliberation.”²⁴⁴ While scholars have argued that imminence needs to be defined flexibly in the case of ideologically committed fighters,²⁴⁵ other objections to remote targeting persist. By definition, remote targeting occurs within states that are not currently engaged in an international or internal armed conflict involving the targeting state. As the protective theorists fear, authorizing targeting without geographic restraints could lead to “war everywhere.”²⁴⁶ Remote targeting also challenges sovereignty because it may proceed without the consent of the state in which the targeting takes place. Finally, remote targeting raises issues about the intensity of armed conflict. If violence occurs below a particular threshold, states should generally treat it as a law-enforcement matter, not an occasion for military action. A proxy compliance framework addresses each of these concerns.

The self-defense point is best addressed on the time horizon axis. While curbs on myopia often require constraints on the use of force, they do not support unduly rigid limits. Particularly when an actor such as Al Qaeda has a clear track record of violence and has shown no interest in renouncing that strategy, waiting for further attacks to occur is a myopic strategy.²⁴⁷ These attacks may be imminent, or may require

244. Letter from Daniel Webster, U.S. Secretary of State, to Henry Fox, British Minister in Washington (Apr. 24, 1841), available at http://avalon.law.yale.edu/19th_century/br-1842d.asp#web1; cf. James A. Green, *Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense*, 14 CARDOZO J. INT'L & COMP. L. 429, 464–69 (2006) (discussing background and relevance of an early example of anticipatory self-defense). The United Nations Charter arguably codifies the *Caroline* standard. See U.N. Charter art. 2, para. 4.

245. See Schachter, *supra* note 76, at 312.

246. See Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 761 (2004); O'Connell, *supra* note 76, at 26; see also CARTER, *supra* note 13, at 76–77 (stating that drone killings give President “breath-takingly broad” power). But see Michael W. Lewis, *A Different Case for Restraint*, 45 TULSA L. REV. 751, 756 (2010) (book review) (stating that the narrow view of location of armed conflict is not required by international law).

247. See Harold Hongju Koh, Legal Adviser of the U.S. Dep't of State, Keynote Address: The Obama Administration and International Law at 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>; cf. Nicholas Rostow, *The Laws of War and the Killing of Suspected Terrorists: False Starts, Rabbit Holes, and Dead Ends*, 63 RUTGERS L. REV. 1215, 1222–28 (2011) (praising Koh's view that the 9/11 attacks triggered the United States' right of self-defense and targeting in foreign countries, while criticizing opponents of U.S. policy on targeted killing as imposing unworkable standards).

further planning and preparation that access to a remote haven may facilitate. Violence planned in such havens will eventually find its way to targeting states, inducing mass casualties that readily meet LOAC's intensity requirement.²⁴⁸ An unduly strict imminence requirement would force states to choose between two kinds of hindsight bias: (1) the hindsight bias of proponents of a strict imminence requirement, who would criticize a state for the premature use of force, or (2) the hindsight bias of domestic constituencies, who would criticize a state for acting too late. International law cannot retain a critical mass of support if it places states in this precarious position.²⁴⁹

The United Nations Security Council evidently agreed, because resolutions enacted after September 11 transcended the rigidity of Webster's formulation²⁵⁰ and ratified a more flexible conception of self-defense.²⁵¹ Applicable only to proven terrorist threats, this test used the eventual certainty of attack²⁵² as a proxy for Webster's imminence requirement.²⁵³ Using a sliding scale that balances two or more elements

248. See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 566–68 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>.

249. See Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J.L. & PUB. POL'Y 539, 549–56 (2002).

250. See YORAM DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE 249 (4th ed. 2005) (noting that “Webster’s prose was inclined to overstatement”)

251. For example, Security Council Resolution 1373 stipulates that member states should “combat [terrorism] by all means” and “work together . . . to prevent and suppress terrorist attacks.” See S.C. Res. 1373, U.N. Doc. S/RES/1373 pmbl. (Sept. 28, 2001).

252. Cf. Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 44–46 (2003) (discussing problem of intransigence related to ideological commitments of members of terrorist networks).

253. The International Court of Justice has held that the right of self-defense under Article 51 of the United Nations Charter was limited to cases of “armed attack . . . imputable to a foreign State.” See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9, 2004). This interpretation contravenes both the text of the provision and sound policy. The text of Article 51 refers only to attacks “against” a state, and says nothing about the source of those attacks. See DINSTEIN, WAR, AGGRESSION, AND SELF-DEFENCE, *supra* note 250, at 204. Jurists and commentators have vigorously criticized the court’s rationale, arguing that it enshrines artificial distinctions. See *Legal Consequences*, 2004 I.C.J. at 211, ¶ 16 (Higgins, J., concurring); *id.* at 240–41, ¶ 3 (Buergenthal, J., dissenting); Sean D. Murphy, *Self-Defense and the Israeli Wall Advisory Opinion: An Ipse Dixit from the ICJ?*, 99 AM. J. INT’L L. 62, 70–72 (2005); Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 AM. J. INT’L L. 52, 57–59 (2005). For historical background on America’s massive internal conflict, see Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1845–47 (2010), which argues that the Civil War Supreme Court generally viewed the laws of war as prevailing over otherwise

as a proxy for a conjunctive test that analyzes these elements separately is a common jurisprudential move that also has echoes in the criminal law's view of self-defense.²⁵⁴ Indeed, historical sources show ample support for this more pragmatic approach to the *jus ad bellum*.²⁵⁵

A narrower approach to self-defense would also send a dangerous signal to host states that are weak or sympathetic to terrorist networks. The United Nations framework that required states to combat terrorism is vulnerable to hold-out problems. Weak states cannot preserve the monopoly on the use of force that guarantees the public good of security. In such states, contending factions buy off officials to gain immunity from prosecution. Allowing officials to take bribes from terrorist networks²⁵⁶ in exchange for a safe harbor would undermine the post-September 11 United Nations framework. Permitting officials who feel an ideological affinity with terrorist networks to harbor them has the same effect. The United Nations has no readily available means for holding such officials accountable. Remote targeting gives victim states a remedy that is not contingent on host country officials' fickle allegiances.

To signal an overall disposition to observe LOAC, proxy compliance in remote targeting would have to observe a number of stringent conditions. It could proceed only if a host nation for a terrorist network was unable or unwilling to apprehend suspects.²⁵⁷ For countries that

applicable constitutional norms.

254. See Amos N. Guiora, *Self-Defense—From the Wild West to 9/11: Who, What, When*, 41 CORNELL INT'L L.J. 631, 652–53 (2008).

255. See VATTEL, *supra* note 68, at 249 (stating that right to self-defense is “in direct ratio to the degree of probability attending it, and to the seriousness of the evil with which one is threatened”).

256. Terrorist networks certainly have cash on hand, often gained from drug trafficking and other illicit activities. See Phil Williams, *Terrorist Financing and Organized Crime: Nexus, Appropriation, or Transformation?*, in COUNTERING THE FINANCING OF TERRORISM 126, 138–39 (Thomas J. Biersteker & Sue E. Eckert eds., 2008) (detailing the involvement of Tamil Tigers in criminal conduct, including heroin trade, human trafficking, gun-running, and extortion); Eric Talbot Jensen, *Applying a Sovereign Agency Theory of the Law of Armed Conflict*, 12 CHI. J. INT'L L. 685, 704–05 (2012) (discussing non-state actors' involvement in drug trade). See generally HOFFMAN, *supra* note 11, at 27–28 (noting “strategic alliances” between organized crime and terrorist groups).

257. See Karl S. Chang, *Enemy Status and Military Detention in the War Against Al-Qaeda*, 47 TEX. INT'L L.J. 1, 25–36 (2011) (looking to neutrality law to define “enemy” that can be targeted or detained); Ashley S. Deeks, “Unwilling or Unable”: *Toward a Normative Framework for Extraterritorial Self-Defense*, 52 VA. J. INT'L L. 483, 499–503 (2012) (finding authority for targeting decisions in law of neutrality, which authorizes state that has been victimized (“victim state”) by forces that have received sanctuary from another state

possess the monopoly on the use of force inherent in sovereignty and that are willing to use that force to comply with United Nations Security Council resolutions, remote targeting would be off the table. Moreover, remote targeting would only be permissible against fighters belonging or with operational ties to Al Qaeda.²⁵⁸ That limitation ties remote targeting to international²⁵⁹ and domestic²⁶⁰ endorsement of self-defense against terrorism. Other countries contending with terrorists from different groups that have not been the subject of specific Security Council resolutions, such as Israel, Turkey, or Colombia, would not be authorized to remotely target members of those organizations. The targeting state would also have to observe the principle of proportionality.²⁶¹ While judicial review of the targeting decision would not be required,²⁶² a government lawyer using reasonable diligence

(“territorial state”) to cross border of territorial state in order to remove threat); Matthew C. Waxman, *The Structure of Terrorism Threats and the Laws of War*, 20 DUKE J. COMP. & INT’L L. 429, 442 (2010) (quoting John Bellinger, Legal Advisor to the U.S. Sec’y of State, Legal Issues in War on Terrorism, Address Before the London School of Economics (Oct. 31, 2006)); George H. Aldrich, Book Review, 105 AM. J. INT’L L. 167, 170 (2011). *But see* Kevin Jon Heller, *The Law of Neutrality Does Not Apply to the Conflict with Al-Qaeda, and It’s a Good Thing, Too: A Response to Chang*, 47 TEX. INT’L L.J. 115 (2011) (arguing that neutrality law is inappropriate framework because it must be applied symmetrically, which would also bar states from assisting in efforts against Al Qaeda); Rebecca Ingber, *Untangling Belligerency from Neutrality in the Conflict with Al Qaeda*, 47 TEX. INT’L L.J. 75 (2011) (criticizing Chang’s reliance on neutrality law as creating unduly broad capacity to detain).

258. *See* Chesney, *supra* note 45, at 20–22. To be part of Al Qaeda in this sense, a target would have to be part of an operational chain of command with Al Qaeda leadership at the summit. *Id.* at 21.

259. *See* S.C. Res. 1373, U.N. Doc. S/RES/1373 pmb1. (Sept. 28, 2001); DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE, *supra* note 250, at 207–08; *cf.* Mark A. Drumbl, *Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order*, 81 N.C. L. REV. 1, 16–22 (2002) (arguing, in context of United States military intervention in Afghanistan, that the United Nations Security Council resolution should not be viewed as authorizing use of force, but that intervention could be viewed under international law as self-defense against “armed attack”).

260. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2113–14 (2005).

261. *See* HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov’t of Israel ¶ 41 [2005] (Isr.); GABRIELLA BLUM & PHILIP B. HEYMANN, LAWS, OUTLAWS, & TERRORISTS: LESSONS FROM THE WAR ON TERRORISM 91 (2010) (arguing that targeting state’s greater “control over the time, means, and methods of strike mandates . . . a heightened degree of care” in avoiding collateral damage).

262. *Compare* Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 10 (D.D.C. 2010) (discussing basis for government’s alleged targeting decision but ultimately holding that matter constituted political question), *with* Guiora, *supra* note 254, at 672–73 (arguing for judicial review in special court), *and* Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 31 CARDOZO L. REV. 405, 445–50 (2009) (suggesting need for some

would have to sign off on each of these criteria prior to initiation of an attack.²⁶³ These measures, while they do not eliminate the risk of abuse, would signal continued fidelity to the moderate disposition that has guided LOAC.²⁶⁴

While some NGOs will still be skeptical, others will recognize that these same weapons can facilitate humanitarian intervention against abusive state actors. Just as waiting for terrorist networks to strike yields opportunity costs, waiting for world opinion and trade sanctions to alleviate human rights abuses can cause irreparable harm. The Security Council's ratification of NATO's Kosovo intervention confirms this truth. Many NGOs supported the Kosovo intervention,²⁶⁵ sought action to deal with the slaughter in Darfur, and supported action in Libya. Calibrated remote attacks on Al Qaeda fighters signal that strong democracies retain the ability to act against other human rights violators.²⁶⁶ For this reason, remote targeting that complies with identification norms such as the principle of distinction and meets the other requirements discussed above will not prompt uniform opposition from NGOs.²⁶⁷ That lack of unanimity, coupled with tacit support from

procedural safeguards).

263. See SOLIS, *supra* note 49, at 531 (discussing the role of the attorney-advisor).

264. For efforts to reframe targeting law that provide further safeguards, see Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, 161 U. PA. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=2049532> (seeking to formulate targeting criteria that will respect both LOAC and human rights norms); and Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=2042172> (arguing for uniform approach to detention and targeting centering on availability of alternatives to confinement or use of lethal force).

265. See Goldstone, *supra* note 44, at 61 (noting "remarkably low civilian casualty rate" in Kosovo intervention, apparently due to use of precision bombing technology); cf. Edward C. Luck, *Building a Norm: The Responsibility to Protect Experience*, in MASS ATROCITY CRIMES, *supra* note 44, at 108, 110–14 (discussing ebb and flow in evolution of responsibility to protect against atrocities).

266. Cf. Eric Schmitt & Steven Lee Myers, *Sharper Surveillance and NATO Coordination Aided Rebel Advance*, N.Y. TIMES, Aug. 22, 2011, at A9 (discussing use of drones in Libya conflict).

267. NGOs have run the gamut in their responses to targeted killing, with a median response seeking more concrete articulation of targeting criteria. See Gabor Rona, Letter to the Editor, *A Spotlight on Drone Strikes in Pakistan*, N.Y. TIMES, Aug. 19, 2011, at A22; see also Scott Shane, *C.I.A. Is Disputed on Civilian Toll in Drone Strikes*, N.Y. TIMES, Aug. 12, 2011, at A1 (analyzing conflicting reports, including independent experts who believe that precautions for drone strikes have minimized but not eliminated civilian casualties); Scott Wilson, *On Sept. 11, a Challenge for Obama*, WASH. POST, Sept. 11, 2010, at A1 (quoting Tom Malinowski, Washington director of Human Rights Watch, as arguing that Obama administration's overall respect for rule of law and repudiation of torture "legitimizes[d] . . .

domestic institutions such as courts,²⁶⁸ suggests that remote targeting that complies with identification norms will be a sustainable change to LOAC.²⁶⁹

B. Trying Material Support in Military Commissions

It is always fitting to end at a beginning, and Salim Hamdan's material support conviction before a military commission offers a useful final example of the structural approach. From a utilitarian perspective, Hamdan's prosecution was a useful expedient for the government. Hamdan's trial in 2008 was a dry run for bigger trials that have yet to occur, such as the trial of alleged 9/11 mastermind Khalid Shaikh Mohammed.²⁷⁰ More generally, the charge of material support for Al Qaeda did not require heavy lifting by the government, since in both its ordinary criminal law incarnation²⁷¹ and iteration in the Military

pursuing al-Qaeda" through tactics including drone strikes).

268. See *Al-Aulaqi*, 727 F. Supp. 2d at 9.

269. Key human rights activists and scholars now serve in the Obama administration, shaping a policy that both targets suspected terrorists and participates in humanitarian interventions. See Paul Starobin, Op-Ed, *A Moral Flip-Flop? Defining 'War,'* N.Y. TIMES, Aug. 7, 2011, at SR5 (quoting Harold Koh, noted Yale Law scholar on human rights and current legal adviser to the State Department, who has also stated the administration's position supporting drone attacks, as championing intervention in Libya because of need to "prevent[] atrocities," despite tension between ongoing intervention and timetable in War Powers Resolution); Sheryl Gay Stolberg, *Still Crusading, but Now on the Inside*, N.Y. TIMES, Mar. 30, 2011, at A10 (discussing role in Obama administration played by human rights advocate Samantha Power).

270. Some have argued that a more appropriate venue for such prosecutions and for terrorism-related cases generally is a new national security court. See GLENN SULMASY, *THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR* 173–75 (2009); Kevin E. Lunday & Harvey Rishikof, *Due Process Is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 CAL. W. INT'L L.J. 87, 94 (2008). Consideration of that issue is beyond the scope of this Article.

271. See 18 U.S.C. §§ 2339A, 2339B (2006) (prohibiting material support to designated foreign terrorist organizations); *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712, 2731 (2010) (upholding statute); Margulies, *Advising Terrorism*, *supra* note 198 (explaining and defending *Holder*); see also Robert M. Chesney, *Beyond Conspiracy? Anticipatory Prosecution and the Challenge of Unaffiliated Terrorism*, 80 S. CAL. L. REV. 425, 474–86 (2007) (discussing the government's ability to bring anticipatory prosecutions on material support charges); Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 12–18 (2005) (discussing background of statute); Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers for Clients Accused of Terrorist Activity*, 62 MD. L. REV. 173, 189–94 (2003) (discussing statute's ramifications for defense lawyers). For criticisms of *Holder*, see David Cole, *The First Amendment's Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine*, 6 HARV. L. & POL'Y REV. 147, 148–49 (2012) (criticizing *Holder* as unduly narrowing free speech protections); Wadie E. Said, Humanitarian Law Project and the

Commissions Act of 2006 (MCA)²⁷² it does not require specific intent to engage in violence. Despite this utilitarian bonanza, however, Hamdan's conviction raises serious problems under a structural view.

The general material support charged in Hamdan's case²⁷³ skews the time horizon. Identification norms upheld by courts provide that conduct merits punishment only if an individual had notice at the time of the conduct at issue that her acts violated the law. Without the principle of legality, a government can readily make up crimes after the fact to target its opponents. While disregarding this principle in LOAC cases might not spill over into ordinary adjudication in civilian courts, that claim seems both empirically questionable and beside the point: Violations of core norms are problematic even in small doses.²⁷⁴

The MCA's criminalization of material support to Al Qaeda clashes with the principle of legality. Courts cannot look to the MCA itself, because it was enacted years after the conduct at issue took place. Instead, courts have to look at the customs and common law of war. There, however, the record is wanting. The Court of Military Commission Review decision cites three strands of precedent to support its upholding of the material support conviction: the Civil War "bushwhacker" cases,²⁷⁵ the Joint Criminal Enterprise (JCE) theory used by the International Criminal Tribunal for the former Yugoslavia (ICTY),²⁷⁶ and the "membership" cases adjudicated by the Nuremberg tribunals.²⁷⁷ Unfortunately, none of these strands is sturdy enough to bear the weight. Each requires something not present in the material support cases: a nexus with specific LOAC violations involving injury to persons or property.

The bushwhacker cases are most easily distinguished. The bushwhackers were small criminal bands that operated with minimal

Supreme Court's Construction of Terrorism, 2011 BYU L. REV. 1455, 1457–58 (2011) (suggesting that Court's view ignored difficulty of peaceful protest against dictatorial regimes).

272. See 10 U.S.C. § 950t(25) (2006).

273. *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1258–59 (C.M.C.R. 2011) (including acting as bin Laden's driver and bodyguard as well as dealing in weapons).

274. See Stephen I. Vladeck, *On Jurisdictional Elephants and Kangaroo Courts*, 103 NW. U. L. REV. 172, 179–80 (2008) (discussing constitutional problems with trying material support cases in military commissions).

275. See *Hamdan*, 801 F. Supp. 2d at 1279, 1299–1301, 1313.

276. *Id.* at 1284–85.

277. *Id.* at 1306–07.

authorization during the Civil War, robbing and pillaging at will.²⁷⁸ Any member of the group, because of its small size, would have participated directly in the bushwhackers' depredations. None involved a defendant like Hamdan, who performed ministerial tasks several steps removed from the operational planning or execution of a terrorist plot.

The JCE strand is also slender. While JCE is still controversial,²⁷⁹ even on its own terms it does not stretch far enough to reach the conduct here. In *Prosecutor v. Tadic*, the ICTY tied JCE to direct participation in an operation that caused the murder of civilians.²⁸⁰ Tadic participated in the forced removal of men from a village, which was already illegal under international human rights law.²⁸¹ The tribunal merely held that individuals who participated in the forced removal were liable for reasonably foreseeable acts that occurred in the course of the operation.²⁸²

The Court of Military Commission Review's final gambit was the "membership" cases brought before the international Nuremberg Military Tribunal after World War II.²⁸³ This strand is the weakest of all. Prosecutors and tribunals at Nuremberg recognized the due process dangers in criminalizing mere membership and limited the prosecutions accordingly. After initially planning to charge Nazi entities like the Gestapo and SS with being criminal organizations and then charge thousands of individual members, prosecutors became anxious that membership was an unduly amorphous basis for guilt.²⁸⁴ As a result, they largely abandoned their plans, citing membership as the sole charge in only three cases.²⁸⁵ In other cases, defendants were also charged with serious crimes against humanity, usually the killing of civilians. Ten

278. See FRANCIS LIEBER, *GUERRILLA PARTIES CONSIDERED WITH REFERENCE TO THE LAWS AND USAGES OF WAR* 16–17 (1862).

279. See Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 84–86 (2005) (claiming due process problems with JCE doctrine, which in some tribunals has been read to require little in the way of knowledge or intent by defendant).

280. *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶¶ 170–71 (Int'l Crim. Trib. for the Former Yugoslavia July 15, 1999).

281. See *id.* ¶ 178.

282. See *id.* ¶¶ 184, 204.

283. See *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1306–07 (C.M.C.R. 2011).

284. See Jonathan A. Bush, *Lex Americana: Constitutional Due Process and the Nuremberg Defendants*, 45 ST. LOUIS U. L.J. 515, 533–35 (2001).

285. See *id.* at 534 & n.75.

defendants were acquitted of more serious charges and convicted solely of membership offenses.²⁸⁶ Virtually all of those convicted were senior officials in criminal entities—principals rather than foot soldiers.²⁸⁷ Striving to find an analog to Hamdan’s foot-soldier status, the court cited the example of noncommissioned officer Mathias Graf.²⁸⁸ Graf, however, served in a German unit that was directly responsible for the murder of scores of civilians. That unit, in turn, was part of the notorious Einsatzgruppen, which killed hundreds of thousands of noncombatants.²⁸⁹ Even so, the tribunal sentenced Graf to time served.²⁹⁰ In sum, the Nuremberg tribunals provide virtually no support for making a bit player’s service a war crime; indeed, they offer a cautionary tale on the difficulties inherent in this task.²⁹¹

The government has not bolstered its case by arguing in the D.C. Circuit that, regardless of the international law of war, the “U.S. common law of war” authorized trial of material support charges against

286. *Hamdan*, 801 F. Supp. 2d at 1307.

287. For example, Dr. Helmut Poppendick was Chief Physician of Main Race and Settlement Office and Konrad Meyer-Hetling was chief of the planning office and helped craft the plan for deportations of ethnic minorities from German-controlled Eastern Europe. *Id.* at 1307–08. The court also discussed defendants Flick and Steinbrinck, charter members of the quaint group, “Friends of Himmler.” *Id.* at 1308. The court failed to mention that the defendants were not merely friends of the psychopathic head of the SS, but actually bankrolled his infamously lethal organization. See 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 1221 (1952) (“[E]ach of [the defendants] gave to Himmler . . . a blank check.”).

288. *Hamdan*, 801 F. Supp. 2d at 1307.

289. 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW No. 10, at 369–70 (1952) [hereinafter 4 WAR CRIMES TRIALS]; see also CHRISTOPHER R. BROWNING, ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND 18–25 (1992) (recounting detailed history of one typical Einsatzgruppen unit).

290. 4 WAR CRIMES TRIALS, *supra* note 288, at 587.

291. The analysis should be different when a defendant has furnished direct and substantial support to commission of a war crime. For example, material support would be an appropriate charge for an individual who, with advance knowledge of the 9/11 attacks, helped fashion Al Qaeda’s propaganda effort. Given the importance of propaganda to Al Qaeda, it would be both fair and accurate to describe such an individual as a principal in the organization, like the “Friends of Himmler” convicted of membership offenses at Nuremberg. See *United States v. Al Bahlul*, 820 F. Supp. 2d 1141 1159–61, 1264 (C.M.C.R. 2011) (upholding conviction of individual who served as bin Laden’s personal propagandist, at bin Laden’s order produced video urging perfidious attacks on U.S. military targets, and prepared martyrdom wills for two of the September 11 hijackers).

Hamdan in a military commission.²⁹² The “U.S. common law of war” argument does not rely on the Constitution’s Define and Punish Clause, which empowers Congress to “define and punish . . . Offenses against the Law of Nations.”²⁹³ Instead, the government’s new argument relies on Congress’s power under Article I, section 8 to make rules for the army and navy, as well as other textual anchors of Congress’s authority over war.²⁹⁴ However, this pivot to a posited “U.S. common law of war” ignores the Framers’ profound concern with signaling the new republic’s fidelity to international norms.²⁹⁵ Given the Framers’ concern, it would seem incongruous for the Constitution to permit Congress to bypass the requirements of the Define and Punish Clause and authorize military commissions under other provisions.

Supreme Court precedent tells a similar tale. In *Ex Parte Quirin*,²⁹⁶ the Court catalogued the various sources of Congress’s and the President’s power over armed conflict, but then focused primarily on the Define and Punish Clause. Congress, according to the Court, has always viewed the law of war as “part of the law of nations.”²⁹⁷ In *Yamashita v. Styer*,²⁹⁸ the Court reinforced this understanding, noting that in the Articles of War, Congress, pursuant to the Define and Punish Clause, “incorporated . . . by reference”²⁹⁹ the law of war. This body of law, the

292. See Brief for the United States, *Hamdan v. United States*, No. 11-1257, 24–46 (D.C. Circuit Jan. 17, 2012), available at <http://www.lawfareblog.com/wp-content/uploads/2012/01/Hamdan-Brief-for-US-As-Filed.pdf>.

293. U.S. Const., art I, § 8, cl. 10.

294. *Id.* cl. 14; see also *id.* cl. 1 (empowering Congress to “provide for the common Defence”); *id.* cl. 11 (empowering Congress to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”); *id.* cl. 18 (empowering Congress to enact laws “which shall be necessary and proper for carrying into Execution the foregoing Powers”).

295. See THE FEDERALIST NO. 42, *supra* note 28, at 233 (James Madison) (noting that the Define and Punish Clause cured the problem posed by Articles of Confederation, which did not empower the federal government to remedy offenses by individual states or citizens against law of nations, and “consequently le[ft] it in the power of any indiscreet member to embroil the Confederacy with foreign nations”); see also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715–18 (2004) (discussing Framers’ concerns, which were precipitated by incidents involving attacks on foreign diplomats in New York and Philadelphia that violated principle of diplomatic immunity); cf. J. Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 874–80 (2007) (discussing role in Constitution’s enactment of incidents involving attacks on diplomats).

296. 317 U.S. 1 (1942).

297. *Id.* at 27–28.

298. 327 U.S. 1 (1946).

299. *Id.* at 7–8.

Court noted, included the “system of military common law . . . deemed applicable by courts.”³⁰⁰ Stressing this corpus’s international pedigree, the Court observed that the law of war also included international agreements such as the Hague Convention.³⁰¹ Since the Hague Convention imposed new restraints on states in conducting warfare,³⁰² this observation amounted at least to tacit acknowledgment that United States practice regarding the law of war was authoritative not in its own right, but only as it informed interpretation of the “law of nations.” Embracing the government’s “U.S. common law of war” theory would turn this venerable understanding on its head.

Making general material support, such as driving or cooking, into a war crime is also shortsighted because it discourages reconciliation. Barring prosecution for such conduct is a corollary of the separation of *jus ad bellum* and *jus in bello*. This separation paves the way for peace by assuring foot soldiers for a regime that has violated *jus ad bellum* that surrender will not subject them to punitive measures.³⁰³ If individuals in this position face prosecution for war crimes, they have little reason to lay down their arms.³⁰⁴ Bitterness undermines deliberation, igniting a new cycle of violence.

Vindicating the bitter-enders, classifying material support as a war crime signals that war crimes prosecutions are merely a form of victor’s justice. This sentiment erodes LOAC’s legitimacy. To preserve the legitimacy of war crimes prosecutions, a state must demonstrate that it promotes universal norms, not parochial interests.³⁰⁵ While civilian

300. *Id.* at 8.

301. *Id.*

302. See Schmitt, *supra* note 4, at 800; Watkin, *supra* note 4, at 21.

303. See generally Sloane, *supra* note 59, 48–49 (discussing importance of separation).

304. Protective theorists make this point. See Pejic, *supra* note 91, at 354 (quoting Additional Protocol II, art. 6(5), and stating the IHL encourages states to grant the “broadest possible amnesty” at conclusion of hostilities). Successful transitions have frequently taken this turn. See JON ELSTER, CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE 4–22 (2004) (stating that ancient Athenian democrats discovered that imposing sanctions on officials of previous oligarchical regime was counterproductive, while reconciliation provided those officials with a stake in the new regime’s success).

305. Cf. Vijay M. Padmanabhan, *Norm Internalization Through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay*, 31 U. PA. J. INT’L L. 427, 471–90 (2009) (arguing that military commission proceedings that are perceived as illegitimate do not mobilize global communities against terrorism). See generally Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL’Y 591, 613–20 (2002) (arguing that international law supports use of military tribunals).

criminal law targets a vast spectrum of offenses, including violations of health and safety rules and white-collar crimes, war crimes should be defined within a narrower bandwidth that focuses on violence against civilians, or against the wounded, helpless, or deceived. Prosecution of the senior officials, who comprised the bulk of the Nuremberg defendants, passed this test. Prosecution of defendants who conspired to commit specific crimes of violence does as well.³⁰⁶ That clear signaling is necessary to overcome the special stressors that congeal in the fog of war. In contrast, prosecuting people for driving leaders dilutes the opprobrium we appropriately attach to war crimes.³⁰⁷

Finally, criticism by NGOs of this particular use of military commissions does not reflect the hindsight bias that plagues NGOs elsewhere. Hindsight bias is most damaging when it forces a party to incur substantial opportunity costs. For example, limiting a state's ability to target a bomb maker can produce civilian and combatant casualties once the bomb maker's latest creation reaches its intended victims. Hamdan's case does not present this problem because Hamdan's regular service to bin Laden would have made him a person directly participating in hostilities whom an opposing party could target³⁰⁸ or detain.³⁰⁹ Either of these options would have removed

306. A plurality of the Supreme Court asserted that conspiracy charges were not triable in military commissions, even when the defendant had participated in a specific plot. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 598–613 (2006). However, Justice Stevens' opinion also cited examples of conspiracy charges tried before military commissions, including charges against the conspirators in the plot to assassinate President Lincoln. *Id.* at 604–09. Moreover, Justice Kennedy declined to join the four-person plurality that found that conspiracy charges in military commissions were categorically precluded. *Id.* at 655 (Kennedy, J., concurring). Kennedy's absence casts significant doubt on the durability of the plurality opinion's categorical approach.

307. In its June 2011 *Hamdan* decision, the U.S. Court of Military Commission Review cites a passage from a Nuremberg tribunal case that analogizes a convicted defendant to a cook on a pirate vessel. *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1309 (C.M.C.R. 2011) (citing 4 WAR CRIMES TRIALS, *supra* note 288, at 372–73). Here, as well, however, several grains of salt are required. Pirate vessels are basically bushwhackers at sea, and a cook is likely in either context to share in the plunder and the preceding mayhem. Moreover, the Nuremberg case concerned soldiers in the Einsatzgruppen, who as noted earlier were directly responsible for many civilian deaths. Finally, the *Hamdan* court failed to note that the passage is not from an opinion of the tribunal, but from a statement by the prosecutor Telford Taylor. 4 WAR CRIMES TRIALS, *supra* note 289, at 369, 373. Prosecutors' statements may be eloquent (as this one was), but they are not precedent.

308. *See* Bill Boothby, "And for such time as": *The Time Dimension to Direct Participation in Hostilities*, 42 N.Y.U. J. INT'L L. & POL. 741, 753–55 (2010) (discussing membership in an organized armed group as a basis for targeting). Even if Hamdan were not deemed a legitimate target, Osama bin Laden would certainly have been, based on his place

Hamdan from hostilities for the duration of the conflict. The availability of these options reduces the opportunity cost of foregoing a military commission proceeding.

VII. POSSIBLE OBJECTIONS

A model's approach to particular cases can sometimes mask deeper flaws. In this connection, a number of critiques of the structural approach merit response. First, a structural approach that relies heavily on flexibility may be a contradiction in terms. Second, the approach here may unduly elevate the status of NGOs in IHL, at the expense of more formal entities such as transnational tribunals and the United Nations. Finally, the approach here may be Eurocentric, failing to understand the distinctively non-Western virtues of tactics employed by terrorist networks. I discuss each criticism in turn.

A. Structure and Flexibility

One critique might question the flexible nature of the test here. Some distinguished scholars would argue that a structural theory should be more formal,³¹⁰ hinging on express approval of stakeholders. In contrast, the test here has a role for formality, particularly in the general preference for judicial review, but often opts for a more informal approach to observance of time horizon and signaling norms. There is no contradiction, however, in referring to the theory advanced here as structural in nature.

The American constitutional tradition demonstrates that a structural turn does not require rigidity. In structural views of the United States Constitution, courts and commentators have regularly allowed for play in the joints. Formal requirements can give way to pragmatic proxies. For example, executive authority can accrue not only through express legislative consent, but also through a course of dealing over time that includes legislative acquiescence.³¹¹

in the Al Qaeda command structure. If the United States or its allies had successfully targeted bin Laden during Hamdan's service to him, Hamdan's death in the course of this operation would not have violated the proportionality principle.

309. *Al-Bihani v. Obama*, 590 F.3d 866, 869, 881 (D.C. Cir. 2010) (ruling that individual who had participated in training camps and served as regular cook for Al Qaeda forces was detainable), *cert. denied*, 131 S. Ct. 1814 (2011); *cf.* 590 F.3d at 884–85 (Williams, J., concurring) (asserting that IHL appropriately informed decision about detention).

310. *See, e.g.*, Pearlstein, *supra* note 20, at 825.

311. *See Dames & Moore v. Regan*, 453 U.S. 654, 686–88 (1981) (upholding presidential

Moreover, a certain amount of play in the joints promotes structural soundness. Engineers build flexibility into structures like bridges for exactly this reason. As Justice Jackson acknowledged in his landmark concurrence on the separation of powers, maintaining constitutionalism requires a “workable government”³¹² that can respond to the “imperatives of events.”³¹³

In this sense, a measure of flexibility is also consistent with a linear time horizon as parties decide whether to embark on a shared project, such as the governance of armed conflict. A party relatively happy with the status quo at Time 1 may be unwilling to part with any of its options if it worries that constraints will place it at a disadvantage at Time 2. However, allowing some revision at Time 2 defuses these doubts about initial cooperation.

Initial cooperation may also be lacking if change becomes too easy, but the model here addresses that question as well. Change will not occur without uniform approval or acquiescence among domestic stakeholders at Level 1 and a critical mass of approval or acquiescence among NGOs at Level 2. Those conditions promote stable governance and discourage the volatility that could lead back to a Hobbesian state of nature.

negotiation of claims settlement with Iran); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (“[C]ongressional inertia, indifference, or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.”); *Youngstown*, 343 U.S. at 610–11 (Frankfurter, J., concurring) (“[A] systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘executive power’ vested in the President.”); see also WILLIAM C. BANKS & PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 114–15 (1994) (describing “customary national security law” and presidential powers); HAROLD H. BRUFF, BALANCE OF FORCES: SEPARATION OF POWERS LAW IN THE ADMINISTRATIVE STATE 102–05 (2006) (analyzing history of “acquiescence doctrine”); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1705 (2011) (book review) (discussing congressional acquiescence as providing leeway to executive).

312. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. (forthcoming 2012), available at <http://ssrn.com/abstract=1999516> (arguing that historical patterns of legislative acquiescence may supplement constitutional text regarding scope of executive power).

313. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring); cf. *id.* at 638 n.5 (Jackson, J., concurring) (discussing Jefferson’s decision to complete Louisiana Purchase, despite his constitutional doubts).

B. *The Role of NGOs*

Some may also criticize the importance placed on NGOs in this structural vision. Apart from the ICRC, NGOs have no formal role in international law,³¹⁴ so it may seem incongruous to discuss them without providing for more official entities such as transnational tribunals and international organizations. Nonetheless, there are advantages to focusing on NGOs that other approaches keyed to formal actors miss.³¹⁵

NGOs contribute in large measure to the agenda of LOAC and the language used to describe that agenda. They interact with courts through pleadings and help mobilize communities around litigation and other forms of advocacy.³¹⁶ In fulfilling this role, they have a profound influence on the prospects for legal change. Indeed, certain tribunals, including the European Court of Human Rights, have fashioned a jurisprudence that limits counterterrorism initiatives,³¹⁷ tracking NGOs' efforts. That influence is sometimes healthy and sometimes too reminiscent of the hindsight bias that plagues the protective view. In either event, it is a force to be reckoned with.

International organizations also play a role, for example through counterterrorism initiatives such as Security Council Resolutions 1368 and 1373.³¹⁸ These measures, however, derive from the advocacy efforts of major states, including the United States. Because of the veto possessed by the United States and the Council's other permanent members, the Security Council only acts when major states find common ground. Given this reality, looking to a consensus among

314. The ICRC does not have a formal law-making capacity, but engages in humanitarian activities with respect to prisoners of war and civilians affected by armed conflict. *See, e.g.*, Third Geneva Convention, *supra* note 12, art. 9.

315. In this respect, the approach here borrows from criminal law scholarship on pragmatic interactions between courts, prosecutors, and legislatures. *See* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 590–91, 597–98 (2005); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529–68 (2001); *cf.* Chesney, *supra* note 34, at 1385–91 (discussing importance of functional and prudential considerations in national security law).

316. *See* Scott L. Cummings, *The Internationalization of Public Interest Law*, 57 DUKE L.J. 891, 942, 945–49 (2008); Peter Margulies, *The Detainees' Dilemma: The Virtues and Vices of Advocacy Strategies in the War on Terror*, 57 BUFF. L. REV. 347, 358–61 (2009).

317. *See* Al-Jedda v. United Kingdom, App. No. 27021/08, 30 BHRC 637, at 45–62 (Eur. Ct. H.R. July 7, 2011), *available at* <http://www.unhcr.org/refworld/country,,ECHR,,IRQ,,4e25466e2,0.html> (holding that, absent express derogation, state violated human rights law by detaining individual in Iraq in course of role as part of United Nations-sponsored force).

318. *See supra* note 76.

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major states as a structural surrogate for international organizations is a reasonable strategy.

C. Distinction and Essentialism

One might also argue that the norms of IHL, such as the principle of distinction, are a creature of the asymmetry between those states with advanced weaponry and parties without it. Paul Kahn has written that “the asymmetrical capacities of Western . . . forces . . . themselves create the conditions for increasing use of terrorism.”³¹⁹ If there is a cycle of destruction, Kahn added, the West is to blame.³²⁰ Structuring a system to encourage compliance with LOAC, on this view, merely perpetuates inequality.

Unfortunately, this argument is both radically over- and under-inclusive. It is over-inclusive because it disregards the many compelling non-Western approaches that have accomplished change *without* targeting innocents or violating other LOAC norms. From Gandhi to the social-media-driven Arab Spring, non-Western movements have been innovators in nonviolent methods. Treating the targeting of innocents as a hallmark of non-Western practice seems inaccurate as well as invidious.

Moreover, the under-inclusiveness of this argument is also a major problem. Suppose that Western powers decided, as Bush administration officials did in the immediate aftermath of 9/11, that the rules barring coercive interrogation were useless in combating the non-Western terrorist tactics that essentialists so matter-of-factly describe. It would be unacceptable to view this change as a resourceful Western solution to non-Western terrorism. Essentialist logic, however, is helpless to rebut that characterization. Essentialism is at bottom very similar to LOAC violations: once it becomes well ensconced, it quickly pervades the landscape in ways that the originator cannot control. Few arguments would seem more divorced from both sound temporal judgment and holistic signaling.

VIII. CONCLUSION

Non-state actors challenged LOAC framework after September 11. Without reciprocity as a guide, both states and NGOs sought changes.

319. See Kahn, *supra* note 221, at 6.

320. See *id.*

However, criteria for assessing those proposed changes have been elusive.

Contending schools of thought have sought to control the terrain of LOAC. Both the utilitarian and protective turns, however, have fallen short. The utilitarians offer a promising toolkit that accurately identifies certain non-state groups, such as terrorist networks, as free riders on LOAC norms. However, in casting their lot with states, utilitarians leave their toolkit behind and unwisely rely on the sometimes flawed judgment of state leaders. While protective theorists bring to the table a distrust of the state that heads off this tendency, they focus unduly on state policies and fail to acknowledge that asymmetries between states and terrorists on matters such as identification requirements ultimately put civilians at risk.

To remedy these problems, this Article suggests a structural model which views changes to LOAC as a two-level game played within states and between states and NGOs. Under the model, states propose utilitarian changes, which at Level 1 require approval from domestic stakeholders such as the military and the courts. Internal divisions will prompt unified NGO opposition, making a proposed change unsustainable, as the Bush administration discovered with its harsh interrogation policies and effort to remove IHL protections from suspected terrorists. In contrast, a unified state response will often split NGOs at Level 2, paving the way for change. By the same token, NGOs need to cultivate support from Level 1 stakeholders. At both levels, the game hinges on two values: linear time horizons and holistic signaling.

Time horizons seek to curb both shortsighted thinking and its close cousin, hindsight bias. Holistic signaling entails messages of fidelity to LOAC framework and the prospects for continued global cooperation. States can develop institutions such as courts that promote both temporal judgment and holistic signaling but are often tempted toward skewed time horizons during times of crisis. Non-state actors can develop comparable institutions, but the need for secrecy and signaling to other non-state actors often undermines this process. NGOs are vigilant against state backsliding, but that vigilance comes at the price of hindsight bias and a failure to adequately gauge incentives for violent non-state actors.

The structural approach aids in analyzing current LOAC issues. Proposals like the Bush administration's harsh interrogation policies and the ICRC's direct participation in hostilities guidance fail both the signaling and temporal judgment tests. Carefully tailored remote targeting that observes identification norms is an example of sustainable

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change. However, trying material support charges in military commissions is problematic, both undermining the principle of legality and sending ominous signals about victors' justice.

The structural model is far from perfect. It may take too dim a view of non-state actors and give states too much credit. It also may accord NGOs too large a normative role, given their lack of formal status. Others may have models that depict change more accurately or that stress different values. However, stressing a linear time horizon and holistic signaling defuses rhetoric and sharpens deliberation about LOAC changes in the wake of September 11. Those virtues amply reward the effort.