

# VALOR'S VICES: AGAINST A STATE DUTY TO RISK FORCES IN ARMED CONFLICT

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## INTRODUCTION

Suppose that state forces have entered an urban area within the state's nominal political control, but effectively controlled by a terrorist group with a history of civilian attacks and cross-border shelling. State forces have entered for the purpose of stopping these attacks. During this incursion, members of the non-state armed group have shot at state soldiers from within an apartment dwelling overlooking a key thoroughfare. The state has previously warned civilian residents of the dwelling to evacuate. Receiving new fire from inside the dwelling and not wishing to be pinned down, the commander calls in air support. That stops the hostile fire, but also kills civilians who remain inside. Has the state violated legal and ethical norms that govern the conduct of hostilities?

The traditional answer under international humanitarian law (IHL) would be: "It depends." States bind themselves to follow core principles, including the rules of distinction and proportionality. In the example above, the state has complied with the principle of distinction, which holds that a state may only target combatants.<sup>1</sup> The answer is less certain regarding proportionality, which requires that civilian harm be proportionate to the military advantage obtained in the attack.<sup>2</sup> If the military advantage is significant and the losses are small, the attack would meet the

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1. See Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, Part IV, Art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I] (stating the duty of conflicting parties to distinguish between civilian populations and combatants); see also STEPHEN L. CARTER, *THE VIOLENCE OF PEACE: AMERICA'S WARS IN THE AGE OF OBAMA* 58, 58 (2011) (referring to principle of "discrimination" that bars targeting of noncombatants); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 8 (2d ed. 2010) (noting that the International Court of Justice has affirmed that there will be a distinction between combatants and non-combatants in order to protect the civilian population); Int'l Inst. Humanitarian L., *Manual on the Law of Non-International Armed Conflict* art. 1.2.2 (Michael N. Schmitt, Charles H.B. Garraway & Yoram Dinstein, Drafting Committee 2006) [hereinafter Manual] (citation omitted) (describing the principle of distinction as the "foundation" of LOAC).

2. See Additional Protocol I, *supra* note 1, Arts. 52 & 57 (discussing precautionary actions that soldiers must take).

proportionality test. If the military advantage is small and the losses large, the opposite result would apply.

Some prominent scholars, including Michael Walzer, Avishai Margalit, and David Luban, have recently argued that this context-specific analysis fails to adequately protect civilians. For these scholars, military ethics should subject the state to further duties when it uses air power to minimize the risk to its own troops. Under what I call the “duty to risk,” the state has a categorical duty to risk its own forces.<sup>3</sup> In the example that opened this piece, a state would have an affirmative obligation to mount a ground assault on the apartment dwelling, even when IHL would not require this decision.

I argue that advocates of the duty to risk misconceive both IHL and military ethics. Principles of IHL and military ethics encourage sound temporal judgment and efficient signaling among parties to armed conflict. Temporal judgment recognizes that human beings fail to make decisions that are consistent over time. Those decisions have two primary flaws. One is myopia, which entails the failure to consider long-term costs.<sup>4</sup> The other is hindsight bias, which narrows harm’s perceived causes and naively attributes to one party the absolute power to prevent harm.<sup>5</sup> Violations of

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3. See MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS*, 155–56 (1977) (stating that IHL proportionality is insufficient and that instead, attacker must “minimize [harm to civilians] . . . accepting costs to himself”); Paul W. Kahn, *The Paradox of Riskless Warfare*, 22 PHIL. & PUB. POL’Y Q. 2, 4 (Summer 2002) (claiming that “[w]ithout the imposition of mutual risk, warfare is not war at all”); David Luban, *Risk Taking and Force Protection*, in READING WALZER (Itzak Benhaji & Naomi Sussman eds., forthcoming 2013), available at <http://ssrn.com/abstract=1855263> (last visited Nov. 20, 2012) [hereinafter *Risk Taking*] (analyzing Walzer’s argument that soldiers must act to safeguard civilians); Avishai Margalit & Michael Walzer, *Israel: Civilians and Combatants*, N.Y. REV. BOOKS (May 14, 2009), <http://www.nybooks.com/articles/archives/2009/may/14/israel-civilians-combatants/> (last visited Nov. 20, 2012) (reviewing Asa Kasher & Amos Yadlin, *Assassination and Preventative Killing*, 25 SAIS REV. 41 (2005)). Since much of this chapter critiques Luban’s account, I should note my great respect for Luban’s work in the areas of legal ethics and international criminal law. See, e.g., DAVID LUBAN, *The Torture Lawyers of Washington*, in LEGAL ETHICS AND HUMAN DIGNITY, 162, 176–80, 200–02 (2007) (analyzing flaws in Justice Department legal memoranda authorizing enhanced interrogation techniques such as waterboarding); DAVID LUBAN ET AL., *INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW* 14–15 (2010) (discussing legal principles that predicate punishment on fair notice that conduct violates international norms).

4. See Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *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); Daniel Read, *Intertemporal Choice*, in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING 424, 428–29 (Derek J. Koehler & Nigel Harvey eds., 2004) (noting the tendency of individuals to prefer “smaller-sooner reward”); cf. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 245–49 (2011) (noting that even expert planners often base time estimates for completion of a project on their current enthusiasm and fail to consider less vivid factors that hinder a project over time, such as personal crises, bureaucratic interference, or conflicts with other goals).

5. See Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, in BEHAVIORAL LAW AND ECONOMICS, *supra* note 4, at 95 (noting that maxims such as “hindsight . . . is ‘20/20’” indicate that “[l]earning how the story ends . . . [distorts] our perception of what could have

the principles of distinction and proportionality reflect myopia, since they erode discipline within armed forces and stoke resentments, which prolong conflicts.<sup>6</sup> Duties exceeding IHL requirements may reflect hindsight bias, which blunts the decisiveness commanders need. The effects of unconstrained hindsight bias are particularly problematic in the counterinsurgency (COIN) context, where those effects usually limit only the state and not-violent non-state actors.<sup>7</sup>

IHL rules also promote efficient signaling among parties to an armed conflict.<sup>8</sup> Current rules check aggressors, including violent non-state actors, because an aggressor knows that the principles of distinction and proportionality do not undermine a victim's right of self-defense. In contrast, recognition of a duty to risk would encourage aggression by imposing significant new operational restrictions on self-defense rights. The consequence would be more aggressive moves, particularly by non-state actors, with increased risk of harm to civilians.

In sum, the duty to risk maximizes hindsight bias, imposing what amounts to strict liability on states for civilian losses. The duty to risk also skews incentives for both states and non-state actors, discouraging technological innovations that can minimize harm to civilians, and

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been predicted"); Neal J. Roesse, *Twisted Pair: Counterfactual Thinking and the Hindsight Bias*, in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING, *supra* note 4, at 258, 260–61 (stating hindsight bias is “the tendency to believe that an event was predictable before it occurred, even though for the perceiver it was not”).

6. See Leslie Green, *What Is—Why Is There—the Law of War?*, in THE LAW OF ARMED CONFLICT: INTO THE NEXT MILLENNIUM 141, 148 (Michael N. Schmitt & Leslie C. Green, eds. 1998) (Vol. 71, US Naval War College International Law Studies) (noting Roman leaders' appreciation of the “permanent benefits [of] . . . a moderate use of conquest; and a just apprehension lest the desolation which we reflect on the enemy's country . . . may be retaliated on our own”) (quoting EDWARD GIBBON, DECLINE AND FALL OF THE ROMAN EMPIRE 421 (1909)); see generally Peter Margulies, *The Fog of War Reform: Change and Structure in the Law of Armed Conflict After September 11*, 95 MARQUETTE L. REV. 1417 (2012) (discussing roots of law of war in temporal judgment and signaling).

7. See Laurie R. Blank, *Finding Facts But Missing the Law: The Goldstone Report, Gaza and Lawfare*, 43 CASE W. RES. J. INT'L L. 279, 288–89 (2010) (criticizing factual and legal errors in Goldstone Report, which containing disputed and partially repudiated criticisms of Israeli Defense Force's 2008–09 incursion into the Gaza Strip to stop persistent rocket attacks); Chris Jenks & Geoffrey Corn, *Siren Song: The Implications of the Goldstone Report on International Criminal Law*, 7 BERKELEY J. INT'L L. (2011), 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” which requires “evaluation of targeting decisions . . . through the perspective of the military commander at the time the judgment at issue was made”).

8. See ERIC A. POSNER, LAW AND SOCIAL NORMS 18–20 (2000) (discussing signaling in public and private law); Robert Jervis, *Deterrence and Perception*, 7 INT'L SECURITY 3, 6–7 (1982–1983) (noting that in international affairs, misunderstood signals about intentions can lead to war); Michael Spence, *Signaling in Retrospect and the Informational Structure of Markets*, 92 AM. ECON. REV. 434, 436–38 (2002) (discussing signaling in markets).

promoting aggression by non-state actors that compounds violence. Neither consequence harmonizes with IHL or military ethics.

As an alternative, I suggest a structural approach to COIN. This approach pivots around the relationship between a violent non-state actor and at-risk civilians. It affords greater protection beyond IHL to civilians located within the shifting sphere of operations of terrorist networks and less protection to civilians in territories, such as Gaza, that terrorist groups effectively control. The approach also promotes the development of new technology that spares civilians, heightened legal-and-senior official deliberation over options for avoiding civilian casualties, and cooperation with international investigations. Such measures can reduce civilian losses without the perverse incentives that the duty to risk would establish.

#### I. CIVILIAN HARM AND THE RATIONALE OF THE DUTY TO RISK

An armed conflict “necessarily places civilians in danger.”<sup>9</sup> Some states and violent non-state actors target civilians. In addition, the use of air power against military targets may harm civilians, particularly when a party to a conflict locates those targets in civilian areas.<sup>10</sup>

The law of armed conflict deals with these concerns in two important ways. The principle of distinction refers to a party’s obligation to target combatants and refrain from targeting civilians not participating in hostilities.<sup>11</sup> The proportionality principle requires that attackers avoid excessive collateral harm in achieving a military advantage.<sup>12</sup>

While the law of armed conflict bars the targeting of civilians and limits the collateral harm that civilians experience, some commentators say that more is required. Focusing their complaints on the use of air power that limits risk to an attacking state’s own forces, commentators have criticized

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9. WALZER, *supra* note 3, at 156.

10. Cf. 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 MILLENIUM*, *supra* note 6, at 389, 394 (providing history of recent efforts to spare civilians through development of IHL); see also GARY SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR* 51 (2010) (noting enhanced destructive power of armaments, including machine guns and air power); Michael N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VA. J. INT’L L. 795, 796–800 (2010) [hereinafter *Military Necessity*] (describing efforts to harmonize IHL with destructive technology).

11. SOLIS, *supra* note 10, at 254 (defining distinction in terms of duty to take reasonable steps in assessing the legitimacy of a target) (citation omitted).

12. See Additional Protocol I, *supra* note 1, Arts. 52 & 57. Article 57(2)(a)(iii) provides that party to armed conflict should “refrain from . . . any attack which may be expected to cause incidental [harm to civilians] . . . excessive in relation to the concrete and direct military advantage thereof.” The U.S. accepts article 57 as binding customary international law, although it has not ratified AP I. SOLIS, *supra* note 10, at 134.

military campaigns such as NATO's efforts to stop the killings in Kosovo in 1999 and Israel's efforts in 2008–09 to stop Hamas from launching rockets from Gaza into Israeli towns.<sup>13</sup> These scholars, including the great political philosopher Michael Walzer, have argued that, above and beyond the law of armed conflict, an attacker has a duty to risk its own forces to spare civilians on the other side.<sup>14</sup>

The duty to risk argument had its genesis in an example provided by Walzer in his classic book, *Just and Unjust Wars*.<sup>15</sup> Walzer discussed a story from the First World War in which American soldiers advanced to a French town after taking fire from German soldiers concealed within some of the town's dwellings. The American soldiers feared that German troops had hidden in cellars. For each house, the entering soldiers had to decide whether to provide a warning before throwing a grenade down the cellar stairs. If the cellar contained German troops, a warning would give the enemy troops time to attack. However, tossing in a grenade without a warning might kill French civilians who had used the cellar as a hiding place. Walzer's answer, with some modest caveats, was that the soldier must take the risk and issue the warning.<sup>16</sup>

Extrapolating from this anecdote, Walzer and other commentators whom I call protective theorists—so named because of their concern for protecting civilians—have claimed that states must display an “active intention” *not* to kill civilians manifested “through the risks the soldiers themselves accept.”<sup>17</sup> According to the protective theorists, states that do not target civilians and only cause collateral harm that is proportionate to a military goal have nonetheless violated their ethical duties.<sup>18</sup> To satisfy their obligations, states must go one step further and affirmatively risk their own forces.<sup>19</sup>

The duty to risk approach owes much to theories of strict liability. Luban has acknowledged this, analogizing an attack on a military target to

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13. MICHAEL WALZER, ARGUING ABOUT WAR 100, 118 (2004).

14. See, e.g., WALZER *supra* note 3, at 151 (stating that “we draw a circle of rights around civilians, and soldiers are supposed to accept (some) risks in order to save civilian lives.”).

15. *Id.* at 152.

16. *Id.*

17. Margalit & Walzer, *supra* note 3; cf. WALZER, *supra* note 13, at 101 (arguing that conducting hostilities through air power with concomitant reluctance to send in ground troops is immoral); Luban, *Risk Taking*, *supra* note 3, at 24–25 (discussing Walzer and Margalit's account).

18. See Luban, *Risk Taking*, *supra* note 3, at 46 (arguing that the proportionality argument “has weakened the protection of civilians against collateral damage”).

19. Luban concedes that his approach would not require “risk [that] is too great.” *Id.* at 24. However, Luban does not define what he means by “too great,” beyond implying that the soldier would have no duty to warn in the cellar scenario if the soldier *knew* that German soldiers were lurking. *Id.* Elsewhere, Luban argues that soldiers must accept tactical changes yielding increases in risk that are substantially greater than these changes' reductions in risk to civilians. *Id.* at 28.

“ultra-hazardous activities” from civilian life such as blasting or transporting dangerous chemicals.<sup>20</sup> Under this theory, an entity engaging in such hazardous activities is strictly liable for the harms produced, even if the entity was otherwise without fault. While Walzer has denied that there is a categorical bar on harming civilians,<sup>21</sup> the standard he fashioned echoes strict liability. According to Walzer, “due care” in the avoidance of harm to civilians entails more than ensuring that such harm is proportionate to a military objective.<sup>22</sup> Due care, under Walzer’s formulation, entails more than merely *reasonable* care.<sup>23</sup> In tort law, strict liability is the next available gradation after negligence’s requirement of reasonable care.<sup>24</sup> For protective theorists, therefore, strict liability is the rule of choice when assessing collateral harm to civilians.

Unfortunately, the strict liability tenor of the duty to risk ushers in hindsight bias. Because of this inattention to the problem of hindsight bias, the duty to risk upsets IHL’s precious equilibrium between hostile parties. The duty to risk also discourages reforms and palliative measures, including more advanced technology and the use of warnings. Furthermore, the duty to risk concept skews signaling about legal norms, and therefore compounds asymmetries between state and non-state actors. Champions of the duty to risk might have alleviated these concerns if they accurately assessed compliance with current IHL norms. I address these concerns in the next Part of this article.

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20. *Id.* at 25; cf. Charles E. Cantú, *Distinguishing the Concept of Strict Liability for Ultra-Hazardous Activities from Strict Products Liability Under Section 402A of the Restatement (Second) of Torts: Two Parallel Lines of Reasoning That Should Never Meet*, 35 AKRON L. REV. 31, 34–42 (2001) (discussing rationales for strict liability); James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability without Defect*, 66 N.Y.U. L. REV. 1263, 1276 n.54 (1991) (discussing limited scope of strict liability in U.S. courts).

21. See WALZER, *supra* note 3, at 156 (discussing variability in degree of risk to which civilians may be subjected).

22. *Id.* at 156 & n.\*; cf. Adil Ahmad Haque, *Protecting and Respecting Civilians: Correcting the Substantive and Structural Aspects of the Rome Statute*, 14 NEW CRIM. L. REV. 519, 520–21 (2011) (arguing that the Rome Statute, which describes crimes against humanity triable by the International Criminal Court, fails to require adequate care by states in preventing harm to civilians during armed conflict).

23. See WALZER, *supra* note 3, at 157–59 (emphasizing the value of civilian lives in the context of two WWII bombing raids).

24. See Samuel W. Buell, *What is Securities Fraud?*, 61 DUKE L.J. 511, 577 (2011) (discussing gradations of liability). One could argue that theorists espousing the duty to risk merely want a *heightened* standard of reasonableness beyond what proportionality requires, not strict liability *tout court*. However, even this more cabined standard introduces finer gradations into the commander’s calculus. That change increases the risk of hindsight bias that impairs command decisions.

## II. THE DUTY TO RISK AS A THREAT TO IHL'S DELICATE BALANCE

The protective theorists claim that IHL provides insufficient protection for civilians. However, this complaint fails to recognize IHL's careful balance of divergent temporal perspectives and organizational incentives. Viewed in this light, IHL protects civilians more effectively than protective theorists assert. Indeed, the protective theorists' formulation of the duty to risk stems from an incomplete understanding of both time and incentives. IHL and military ethics seek to avoid these vices; the protective view embraces them.

The law of armed conflict and military ethics are each studied in equipoise: They promote both decisive military decisions and the exercise of foresight that saves civilian lives. Decisiveness is vital, since hesitation may needlessly prolong an armed conflict with all the suffering that entails.<sup>25</sup> In the fluid environment of war, delays generate opportunity costs, as a resourceful adversary seizes the initiative. Commanders who relinquish their advantage will not be commanders for long, and an IHL that requires such sacrifice will not elicit compliance. At the same time, foresight is crucial for reinforcing enduring values, such as prevention of harm to civilians. Civilian lives are valuable in and of themselves; their protection is also an important measure of a force's discipline. An undisciplined force cannot prevail in an armed conflict or enforce a lasting peace.<sup>26</sup>

In seeking to balance decisiveness and foresight, IHL confronts the same obstacle faced by any legal framework: pervasive distortions in temporal judgment and ambiguities in signaling. By temporal judgment, I refer to the ability to accurately gauge the short- and long-term consequences of decisions. The absence of temporal judgment leaves the field to biases that impair decisionmaking. For example, myopia stresses the present, weighting short-term risks and benefits over long-term effects.<sup>27</sup> Hindsight bias stresses the recent past, overstating the probability that a party could have prevented a particular harm.<sup>28</sup> In demonstrating the truth

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25. See Michael A. Newton, Keynote Address, *Flying into the Future: Drone Warfare and the Changing Face of Humanitarian Law*, 39 DENVER J. INT'L L. & POL'Y 601, 606 (2011) ("[S]uccessful military operations require that commanders . . . are educated and empowered to make important and accurate decisions.").

26. See MARK OSIEL, *THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR* 312–14 (2009) (discussing IHL's importance to military identity, culture, and discipline).

27. See Jolls et al., *supra* note 4.

28. See Baruch Fischhoff, *For Those Condemned to Study the Past: Heuristics and Biases in Hindsight*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 335, 342 (Daniel Kahneman et al. eds., 1982) ("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 been

of maxims such as “hindsight is 20/20,” people attribute harm to the most recent and vivid causative factor.<sup>29</sup> By the same token, people discount data showing that less vivid, more systemic factors play a central part.<sup>30</sup>

In addition to temporal judgment, IHL promotes efficient signaling about a party’s intentions and general dispositions.<sup>31</sup> In a world of imperfect information, signaling allows a party to send messages about its compliance with norms.<sup>32</sup> Normative systems also signal as to what conduct will create a fair and stable order. Legal systems that send the wrong messages can deepen distrust; in armed conflict, the wrong messages usually lead to needless death.<sup>33</sup>

Signals come in two varieties: operational or holistic.<sup>34</sup> An operational signal seeks to provide information to another party about a particular situation.<sup>35</sup> In contrast, a holistic signal conveys data about the underlying habits and dispositions of the sender.<sup>36</sup> As an example of an operational signal, consider the white flag of surrender. A fighter who flies the flag signals that he will forego hostilities in exchange for being captured, not killed. 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.

Operational signaling turns on reciprocity: Each party to a conflict lives up to the rules because it knows that at some point surrender may serve its tactical or strategic interests.<sup>37</sup> In contrast, holistic signaling does not hinge

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relatively likely, they can do little more than berate themselves for not taking the action that their knowledge seems to have dictated.”); cf. Rachlinski, *supra* note 5, at 95; Roese, *supra* note 5, at 260–61.

29. See Jeffrey J. Rachlinski, *Heuristics, Biases, and Governance*, in BLACKWELL HANDBOOK OF JUDGMENT AND DECISION MAKING, *supra* note 4, at 567, 575–76 (emphasizing how public reaction drives legislation).

30. *Id.* (discussing how public perception of crises and norms is related to the level of drama with which the crises are presented).

31. See POSNER, *supra* note 8, at 18–20; Richard H. McAdams, *Signaling Discount Rates: Law, Norms, and Economic Methodology*, 110 YALE L.J. 625, 674–75 (2001) (reviewing POSNER, *supra* note 8, and discussing reputational alternatives to signaling).

32. For example, an exchange of conciliatory gestures between two warring parties can forge a shared stake in governing institutions. See Matthew Hoddie & Caroline Hartzell, *Signals of Reconciliation: Institution-Building and the Resolution of Civil Wars*, 7 INT’L STUD. REV. 21, 38 (2005).

33. 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*, VA. L. REV. 1, 94–95 (1997) (discussing how crossed signals can yield spiraling tensions between nations, as when one country conducts naval exercises which another perceives as an aggressive move; when the second country responds to the perceived aggression, the first country must retaliate).

34. Margulies, *supra* note 6, at 1454.

35. *Id.*

36. Osiel, *supra* note 26, at 312.

37. *Id.* at 384.



on reciprocity in a narrow sense, but rather on a party's recognition that it participates in a system of shared understandings.<sup>38</sup> A party may not benefit from holistic signaling in the short term if its adversary in an armed conflict does not reciprocate. For example, IHL requires that any party to an armed conflict prevent harm to captured adversaries.<sup>39</sup> Al Qaeda would probably harm captives, even if the United States at all times refrained from doing so. Nevertheless, as the United States discovered when it sought to retreat from this IHL norm in the immediate aftermath of the September 11 attacks, failure to comply with IHL also lowers a party's global reputation, impeding multilateral counterterrorism efforts.<sup>40</sup> Holistic signaling situates a party more favorably in this wider arena.

The core IHL doctrines of distinction and proportionality refine temporal judgment. Distinction bars the intentional killing of civilians; without this bar, nations would act myopically and descend into a Hobbesian war of all against all. However, to stave off the countervailing evil of hindsight bias, distinction rejects strict liability. A party making an attack must show due care in ensuring that a target is a combatant,<sup>41</sup> but distinction does not require absolute certitude. Setting the bar too high would encourage perpetual second-guessing about targeting decisions, allowing hindsight bias to run rampant.

Proportionality shows the same careful balance. On the one hand, a law that failed to require proportionality would encourage myopia by giving free rein to the worst impulses of attacking states. Without some limit on collateral damage, a state would lose the ability to discipline its own forces. Proportionality also hedges against hindsight bias. The principle of proportionality does *not* impose an absolute ceiling on collateral damage. Rather, it creates a sliding scale. As expert commentary attests, "Proportionality is not an exact science and it is impossible to draw in

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38. *Id.* at 384–85 (discussing the relationship between reciprocity and the acknowledgment of shared duties in social contexts).

39. See LUBAN, *The Torture Lawyers of Washington*, *supra* note 3 (discussing Article 17 of the Geneva Convention).

40. *Id.* at 176–80, 200–02; cf. ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 212–13 (2008) (discussing holistic signaling about disposition to comply with international law); David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 NW. U. L. REV. 879, 885 (2003); Christopher J. Borgen, *Hearts and Minds and Laws: Legal Compliance and Diplomatic Persuasion*, 50 S. TEX. L. REV. 769, 774–78 (2009) (discussing the United States' struggle to maintain its international legitimacy and reputation following 9/11); see also Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1826–28, 1835 (2009) (discussing international and constitutional law as coordinated games in which parties decline short-term benefits to realize gains over time, such as gains flowing from reputation for fair dealing).

41. See SOLIS, *supra* note 10, at 254 (stating distinction entails "duty to take reasonable steps to determine whether or not a person or object is a legitimate target") (citation omitted).

advance hard and fast rules.”<sup>42</sup> Eschewing the protective theorists’ drift toward strict liability, proportionality requires only that attackers avoid *excessive* collateral harm in achieving a military advantage.<sup>43</sup> IHL does not fault an attacker when military success is less resounding than planned, or harm surpasses diligent estimates.<sup>44</sup> This reading of proportionality recognizes that the “fog of war” forces a gap between reasonable calculations and unpredictable outcomes.

Under this flexible standard, the increased importance of a military objective will justify greater collateral damage.<sup>45</sup> Suppose, for example, that a drone operator reasonably believed that a strike will kill Dr. Ayman al-Zawahiri, who became the leader of Al Qaeda after Osama bin Laden’s death. Even if a strike would also kill ten civilians in Zawahiri’s immediate vicinity, it would be proportionate because of Zawahiri’s centrality to Al Qaeda. In contrast, a strike that killed an Al Qaeda foot soldier and cost ten civilian lives would be disproportionate. A drone operator who reasonably believed that his target was Zawahiri and that only ten civilians would be killed would not face legal sanctions if the target turned out to be someone who closely resembled Zawahiri, or if a substantially larger number of civilians were killed because of factors that the operator could not control.<sup>46</sup>

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42. Manual, *supra* note 1, at 2.1.1.4 cmt. 5.

43. See Additional Protocol I, *supra* note 1, Arts. 52 & 57 (discussing the scope of military attacks and required military precautions).

44. See Manual, *supra* note 1, at 2.1.1.4 cmt. 5 (recognizing potential incidental injuries to civilians).

45. Françoise Hampson, *Military Necessity*, CRIMES OF WAR, <http://www.crimesofwar.org/a-z-guide/military-necessity> (last visited Sept. 30, 2012).

46. See GABRIELLA BLUM & PHILIP B. HEYMANN, LAWS, OUTLAWS & TERRORISTS: LESSONS FROM THE WAR ON TERRORISM 69–91 (2010) (analyzing origins of doctrine, comparative perspective on U.S. and Israel, and legal concerns about targeted killings); Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346, 370 (Benjamin Wittes ed., 2009) (arguing that drone attacks, given appropriate constraints, are consistent with international law of self-defense); William C. Banks & Peter Raven-Hansen, *Targeted Killing and Assassination: The U.S. Legal Framework*, 37 U. RICH. L. REV. 667, 679–81 (2003) (discussing how the president acts on matters of national security without legislative authority); Robert M. Chesney, *Who May Be Killed? Anwar Al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force*, 13 Y.B. INT’L HUMANITARIAN L. 3, 25–28 (2010) (discussing the right to use force in self-defense under Article 51); Michael N. Schmitt, *Drone Attacks under the Jus ad Bellum And Jus in Bello: Clearing the ‘Fog of Law’*, 13 Y.B. INT’L HUMANITARIAN L. 311, 320–21 (2010) (same); see also Harold Hongju Koh, Legal Adviser, U.S. Dep’t of State, Address at the Annual Meeting of the Am. Soc’y of Int’l Law (March 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm> (reiterating administration’s support of IHL). But see U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, *Study on Targeted Killings*, ¶¶ 30–45, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010) (arguing that IHL and international human rights law impose greater restrictions on targeted killing); Mary Ellen O’Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004-2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (Simon Bronitt ed., forthcoming), available at

Military ethics similarly seeks to curb both myopia and hindsight bias. The value of restraint is a recurring theme in military ethics.<sup>47</sup> Military ethics rightly rejects the indiscriminate or disproportionate killing of civilians as an approach that erodes the military as an institution, much like the coercive interrogation of captives.<sup>48</sup> Moreover, as Walzer's cellar story shows, the military has a tradition of valor which contemplates risks to self in order to protect innocents.<sup>49</sup> However, military ethics does not require unbounded valor. Indeed, military ethics requires a commander to limit the risks imposed on those who serve.<sup>50</sup>

This last norm has often been more honored in the breach. The European leaders who sacrificed thousands in World War I's trench warfare to gain a few feet of Belgian real estate were unethical in the most profound sense, issuing commands without regard to the human cost involved. Today's COIN operations thankfully do not involve slaughter on this scale. In any COIN operation, however, leaders must ask whether strategic objectives justify the risk they impose on military personnel. In many situations, these goals will warrant the risks involved. Winning over the hearts and minds of the civilian population is a worthy strategic goal.<sup>51</sup>

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<http://ssrn.com/abstract=1501144> (describing an operation targeting a Taliban leader that resulted in his death and the death of eleven others, including his wife and parents-in-law).

47. Richard T. DeGeorge, *A Code of Ethics for Officers*, in MILITARY ETHICS: REFLECTIONS ON PRINCIPLES—THE PROFESSION OF ARMS, MILITARY LEADERSHIP, ETHICAL PRACTICES, WAR AND MORALITY, EDUCATING THE CITIZEN-SOLDIER 13, 20 (Malham M. Wakin et al. eds., 1987) [hereinafter MILITARY ETHICS].

48. See *id.* at 18–19 (arguing the military's moral legitimacy hinges on restraint rather than indiscriminate killing); Eric A. Posner & Adrian Vermeule, *Should Coercive Interrogation Be Legal?*, 104 MICH. L. REV. 671, 673–74 (2006) (arguing the law limiting coercive interrogation is similar to the international law of self-defense because it prohibits coercive interrogation that is indiscriminate and disproportionate).

49. See Jeffrey K. Walker, *Old Laws and New Wars*, 94 PROCEEDINGS OF ANN. MEETING OF ASIL 312, 313 (Apr. 5–8, 2000) (asserting that the “mark of a valorous officer has been an indifference to personal safety, a scorn for injury or death”).

50. Noel Gayler, *Nuclear Deterrence—Its Moral and Political Implications*, in MILITARY ETHICS, *supra* note 47, at 157, 164–65 (arguing that “wars of attrition” are unethical because they sacrifice soldiers without a reasonable hope of achieving a strategic objective).

51. See Ganesh Sitaraman, *Counterinsurgency, the War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1803 (2009) (noting importance of win-the-population strategy in counterterrorism efforts); Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT'L L.J. 163, 203 (2011) (arguing that the United States should risk more than IHL requires because of its international position and the need to persuade others). Scholars also have written about the importance of winning hearts and minds in the detention and trial of suspected terrorists. See John B. Bellinger III & Vijay M. Padmanabhan, *Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law*, 105 A.J.I.L. 201, 221 (2011) (discussing how foreign governments criticized the Bush administration for its poor policy regarding the detention and trial of detainees); 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, 441, 452 (2009) (arguing that military commission proceedings that are perceived as illegitimate do not mobilize global communities against terrorism).

However, imposing risk on one's own forces in a patently futile pursuit of this goal is unethical.

### III. THE DUTY TO RISK AND THE PERILS OF HINDSIGHT: EXAMPLES FROM THEORY AND PRACTICE

Because the protective theorists have pressed their case for a duty to risk based on examples such as NATO's campaign in Kosovo and the IDF's Operation Cast Lead in Gaza, a closer look at these examples may furnish some clues regarding the soundness of the protective theorists' vision. Advocates of the duty to risk have argued that these examples show that existing concepts like proportionality and distinction fail to adequately protect civilians. Unfortunately, that understanding rests on a misapplication of both principles.

The misunderstanding starts at the level of theory and continues on to practice. Protective theorists mistakenly depict opposing commentators as suggesting that a state may protect its own combatants by imposing greater-than-proportionate civilian casualties.<sup>52</sup> In fact, these scholars *agree* that IHL requires that collateral damage be proportionate to military advantage.<sup>53</sup> These scholars have merely restated the law: As long as a state complies with proportionality, it is under no *additional duty* to risk its own forces to safeguard civilians. Rather than acknowledge this, champions of the duty to risk create a straw man.

Once the straw man has made his appearance, mischaracterizing facts on the ground is inevitable. Advocates of a duty to risk underestimate state forces' compliance with IHL in situations such as Israel's Gaza intervention and NATO's Kosovo campaign. These errors start with the protective theorists' poor grasp of the principle of distinction. Luban underestimates the number of terrorist fighters killed in the Gaza intervention. Discussing an incident in which Israel bombed a police station, Luban asserts that the police officers killed were merely civilians.<sup>54</sup> However, reporting has suggested that these so-called police officers were in fact fighters for

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52. See Margalit & Walzer, *supra* note 3, (discussing the duty to minimize casualties posited by Kasher & Yadlin, *supra* note 3, at 50–51).

53. Kasher & Yadlin, *supra* note 3, at 46; cf. Noam Neuman, *Applying the Rule of Proportionality: Force Protection and Cumulative Assessment in International Law and Morality*, 7 Y.B. INT'L HUMANITARIAN L. 79, 91 (2004) (noting that the term "military advantage" in proportionality analysis includes force protection, since a commander who fails to protect soldiers has fewer soldiers remaining to achieve the next tactical goal).

54. David Luban, *Was the Gaza Campaign Legal?*, 31 ABA NAT'L SECURITY L. REP'T 2, 5 (2009) (asserting that the police are not combatants in Gaza). Luban's more recent work on the duty to risk does not revise this conclusion. See Luban, *Risk Taking*, *supra* note 3, at 5–6 (repeating inflated numbers regarding civilian losses in Gaza campaign).

Hamas,<sup>55</sup> otherwise known as the Islamic Resistance Movement, which the United States and most of Europe have designated as a terrorist organization.<sup>56</sup> Luban's hasty conclusion paralleled the United Nations-sponsored Goldstone Report's flawed analysis of the Gaza police force.<sup>57</sup> The chair of the United Nations team subsequently repudiated assertions in the report that Israeli forces had violated the principle of distinction by targeting civilians.<sup>58</sup> While this acknowledgment of error does not

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55. See Kristen Chick, *In Gaza, Rise of Hamas Military Wing Complicates Reconciliation with Fatah*, CHRISTIAN SCI. MONITOR, Nov. 4, 2010, <http://www.csmonitor.com/World/Middle-East/2010/1104/In-Gaza-rise-of-Hamas-military-wing-complicates-reconciliation-with-Fatah> (quoting veteran member of Al Qassam, Hamas's military wing, as stating that "two-thirds of Hamas policemen are police by day and Al Qassam by night"); Ethan Bronner & Jennifer Medina, *Investigator on Gaza Was Guided By His Past*, N.Y. TIMES, Apr. 20, 2011, at A4 (quoting Hamas spokesperson as acknowledging that most police officers were Hamas fighters); cf. Ellen Knickmeyer, *Hamas Asserts Role in Suicide Attack in Israel*, WASH. POST., Feb. 6, 2008, A14 (reporting claims by Gaza officials that Israeli strike on police station in retaliation for suicide bombing killed police officers and Al Qassam members; statement implied that latter were regularly present in significant numbers at site).

56. See HCJ 769/02 Public Committee Against Torture v. Israel, ¶ 39 [2005] (Isr.) [hereinafter "PCAT"], available at [http://elyon1.court.gov.il/files\\_eng/02/690/007/A34/02007690.a34.pdf](http://elyon1.court.gov.il/files_eng/02/690/007/A34/02007690.a34.pdf) (asserting that fighters who make themselves regularly available to terrorist groups for acts of violence are directly participating in hostilities for such time as they make themselves available; any interlude between acts of violence is merely "preparation" for further violence). In formulating targeting rules in this way, the PCAT Court interpreted broadly concepts that the International Committee of the Red Cross (ICRC) has interpreted more narrowly. See NILS MELZER, INT'L COMM. OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW 75–76 (May 2009), available at [http://www.aco.nato.int/resources/20/Legal%20Conference/ICRC\\_002\\_0990.pdf](http://www.aco.nato.int/resources/20/Legal%20Conference/ICRC_002_0990.pdf) (arguing that terrorist bomb maker would be immune from targeting for time not spent making bombs); see also Gabor Rona, *US Targeted Killing Policy Unjustified*, JURIST HOTLINE (Feb. 24, 2012), <http://jurist.org/hotline/2012/02/gabor-rona-targeted-killing.php> (criticizing United States' targeting criteria as unduly broad). But see Michael N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 N.Y.U. J. INT'L L. & POL. 697, 731 (2010) (criticizing narrow view of causation in ICRC Guidance); 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, 661 (2010) (criticizing ICRC's enabling of "revolving door" mechanism for terrorist groups).

57. See United Nations Fact Finding Mission on the Gaza Conflict, *Human Rights in Palestine and Other Occupied Arab Territories*, ¶ 34, at 12, U.N. Doc. A/HRC/12/48 (Sept. 15, 2009), available at [http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC\\_Report.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/docs/UNFFMGC_Report.pdf) [hereinafter Goldstone Report] (examining whether the Gaza police violated international humanitarian law). But see *id.* at para. 34, p. 12 (conceding that, "a great number of the Gaza policemen were recruited among Hamas supporters or members of Palestinian armed groups"). There has been extensive critique of this and similar aspects of the Goldstone Report. See Peter Margulies, *Advising Terrorism: Hybrid Scrutiny, Safe Harbors, and Freedom of Speech*, 63 HASTINGS L.J. 455, 490–91 (2012) (discussing evidence that Gaza police were also Hamas fighters, and that this ruse dovetailed with terrorist groups' tendency to game the system of international law). Cf. Blank, *supra* note 7, at 292 (describing how Hamas and other terrorist groups use putative civilian sites to store ammunition and conduct hostilities); Samuel Estreicher, *Privileging Asymmetric Warfare? Part I: Defender Duties Under International Law*, 11 CHI. J. INT'L L. 425, 435 (2011) (citing evidence that terrorist groups hide operations within civilian populations).

58. See Bronner & Medina, *supra* note 55; cf. Jenks & Corn, *supra* note 7, at 3 (criticizing Goldstone Report for errors of law).

necessarily undercut all of the Goldstone Report's conclusions, it suggests a lack of initial diligence that should prompt skepticism about the Report's methodology and findings.<sup>59</sup>

Similarly, in the Kosovo campaign, while questions arose about particular targeting decisions, most experts agreed that NATO forces had targeted Serbian fighters, and thereby complied with the principle of distinction.<sup>60</sup> Moreover, even critics of the Kosovo campaign acknowledged that NATO forces had exercised caution in order to reduce civilian casualties.<sup>61</sup>

The protective theorists' errors in applying the principle of distinction undermine their case that existing duties fail to protect civilians. Here, the inner workings of the laws of armed conflict are less important than simple arithmetic. Posit a fixed total of casualties of an attack. Suppose that, out of that total, the attackers killed more combatants than their critics claim. As a corollary, the attackers also killed fewer civilians. Elementary math alone thus weakens the protective theorists' case.

In addition, an operation that kills a higher percentage of combatants reaps a larger military advantage. Under proportionality, a greater military advantage justifies increased risk to civilians. Thus, underestimates of compliance with the duty of distinction inevitably yield underestimates of compliance with proportionality.<sup>62</sup>

The protective theorists' estimates of civilian casualties bear out this concern about inflated numbers. Luban, for example, estimated that over

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59. Cf. PETER BERKOWITZ, *ISRAEL AND THE STRUGGLE OVER THE INTERNATIONAL LAWS OF WAR 20–21* (2012) (detailing discrepancies between Report's initial findings and the Israeli Defense Force's comprehensive review).

60. 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) (explaining that the Kosovo campaign had a low civilian-casualty rate due to NATO forces distinguishing between combatants and non-combatants).

61. See Tania Voon, *Pointing the Finger: Civilian Casualties of NATO Bombing in the Kosovo Conflict*, 16 AM. U. INT'L L. REV. 1083, 1098–99 (2001). Consistent with the rationale of the duty to risk, these critics seek to prove their case not with evidence of civilian losses, but with inferences based on the lack of NATO casualties. *Id.* at 1099. Robert D. Sloane has given the subject more cautious treatment, acknowledging the concerns behind the duty to risk while still viewing NATO's campaign as justified. See 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, 96 (2009) (arguing that NATO deployed aircraft "at heights that reduced the risk to its own combatants to zero at the cost of a substantial increase in the risk to Serbia's civilians"). *But see* Schmitt, *Military Necessity*, *supra* note 10, at 823 (observing that precision-targeting mechanisms require time to accurately pinpoint targets, so that targeting at lower altitudes is actually less accurate).

62. See Robert P. Barnidge Jr., *The Principle of Proportionality Under International Humanitarian Law and Operation Cast Lead*, in NEW BATTLEFIELDS, OLD LAWS: CRITICAL DEBATES ON ASYMMETRIC WARFARE 171, 183–84 (William C. Banks ed., 2011) [hereinafter NEW BATTLEFIELDS] (rejecting claims that Israeli forces violated proportionality principle in Gaza intervention, while suggesting that principle is not helpful in practice).

1,000 civilians were dead in Gaza, and perhaps thousands in Kosovo.<sup>63</sup> These numbers, offered without empirical support, are substantially greater than other estimates.<sup>64</sup>

Inflated numbers do not necessarily undermine the protective theorists' argument that IHL offers insufficient protection to civilians. After all, even smaller numbers of civilian deaths surely merit concern. However, fewer civilian losses weaken the case for supplementing IHL with a new strict liability rule.

#### IV. UNINTENDED CONSEQUENCES: THE DUTY TO RISK AS AN IMPEDIMENT TO PRECAUTIONS

The protective theorists' misapprehension of both distinction and proportionality accompanies myopia about attackers' precautions. Under Article 57 of the First Additional Protocol to the Geneva Conventions, states have a duty to take feasible precautions to minimize civilian harm.<sup>65</sup> Many of the military campaigns criticized by protective theorists utilized such precautions, sometimes beyond the "rule of reason" demanded by IHL.<sup>66</sup> However, the duty to risk provides no incentives for such precautions, thus making it less likely that attacking states will implement them.<sup>67</sup>

##### *A. Impeding Precision Weaponry*

A cardinal precaution used in modern military campaigns such as Libya and Kosovo is precision weaponry.<sup>68</sup> Using precision weaponry, forces can target combatants while reducing both risk to their own personnel and collateral harm to civilians.<sup>69</sup> For example, drones have the ability to loiter for long periods, collecting information about life patterns

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63. See Luban, *Risk Taking*, *supra* note 3, at 5–6. Luban plans to change the Kosovo casualty estimate in the published version of his paper. See Comments received from David Luban (Mar. 2, 2012) (on file with the author).

64. See Andreas Laursen, *NATO, the War over Kosovo, and the ICTY Investigation*, 17 AM. U. INT'L L. REV. 765, 767, & n.8 (2002) (citing Human Rights Watch report suggesting that NATO campaign resulted in approximately five hundred civilian deaths); Bronner & Medina, *supra* note 55 (estimating that approximately seven hundred civilians were killed in the Gaza campaign).

65. Additional Protocol I, *supra* note 1, Art. 57.

66. See Schmitt, *Military Necessity*, *supra* note 10, at 828–29 (discussing use of warnings in Gaza campaign).

67. *Id.* at 813–14 (discussing the tension between military necessity and humanity).

68. See Schmitt, *supra* note 46, at 320.

69. *Id.*

that will refine targeting.<sup>70</sup> Bombers today use precision targeting that allows aircraft to fly at high altitudes.<sup>71</sup> At those heights, military personnel are safer, while precision targeting systems have more time to engage.<sup>72</sup> However, protective theorists have not given credit to states for developing precision targeting systems that zero in on combatants and prevent mistaken targeting of civilians or inadvertent collateral damage. Imposing a duty to risk on states would impede the development of precision targeting, since states would have to risk their own personnel in any case. Yet the fine adjustment of incentives is off the protective theorists' radar screen, since they urge strict liability for *any* civilian harm.

### B. Discounting Human Intelligence

The protective theorists would also discourage an attacking state's development of human intelligence assets. Intelligence from informants can help an attacking state zero in on combatants, promoting compliance with the principle of distinction and making harm to civilians less likely.<sup>73</sup> American forces benefited from such intelligence after the Sunni awakening in Iraq.<sup>74</sup> The IDF has relied heavily on intelligence from informants in the West Bank and Gaza.<sup>75</sup> The exploitation of human intelligence in precision targeting can reduce risk to one's own forces. However, if attackers were under an affirmative duty to risk their own forces in any case, incentives would shift. A state with a duty to commit ground troops would soon encounter the urge to escalate those forces if an initial commitment was unproductive. Cultivating human intelligence assets requires patience that commanders often lack when they must commit massive numbers of ground troops. Since more ground troops make for more intense fighting, the result may be more civilians killed.

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70. *Id.* (noting that drones "rely on high resolution imagery . . . transmitted in real time").

71. Schmitt, *Military Necessity*, *supra* note 10, at 823.

72. *Id.*

73. See Aaron M. Drake, *Current U.S. Air Force Drone Operations and Their Conduct in Compliance with International Humanitarian Law—An Overview*, 39 DENV. J. INT'L L. & POL'Y 629, 639 (2011) (discussing role of human intelligence in U.S. Air Force RPA Combat Air Patrol missions).

74. See *Id.* (discussing USAF's use of intelligence during air strikes in Iraq).

75. See Rizek Abdel Jawad, *Hamas Executes 2 Convicted Informants*, BOS. GLOBE (Apr. 16, 2010), [http://articles.boston.com/2010-04-16/news/29317860\\_1\\_hamas-gunmen-gaza-city-palestinian-prisoners](http://articles.boston.com/2010-04-16/news/29317860_1_hamas-gunmen-gaza-city-palestinian-prisoners) (noting that the Hamas government has executed men accused of collaborating with Israel).



*C. Hindering Warnings*

The protective theorists also discourage warnings by attackers. This effect seems particularly perverse, both because warnings save lives and because the duty to risk emerged from Walzer's retelling of the World War I cellar story, which turned on a warning.<sup>76</sup> By comparison, the protective theorists' strict liability approach acts as a disincentive. Further, protective theorists fail to recognize the trade-offs that warnings entail, even though IHL already incorporates these trade-offs.

IHL recognizes that warnings are both a necessary precaution and an element in proportionality analysis.<sup>77</sup> Like other elements of IHL, warnings balance foresight and decisiveness.<sup>78</sup> Consider the question of a warning's specificity. Suppose that a violent non-state actor has located a mobile rocket-launcher on land connected to a civilian dwelling. A state with reliable information about the rocket-launcher could provide a specific warning, cautioning that within twenty-four hours it will attack the rocket-launcher. An attack would be appropriate under the principle of distinction, since the rocket-launcher is an instrumentality of violence used by an opposing force—i.e., a military target.<sup>79</sup> However, once the state supplies this warning, the force controlling the launcher will surely respond by either moving the launcher even closer to the civilian dwelling, or moving it to another location altogether. Either way, the warning will impair the state's ability to achieve its legitimate military objectives.<sup>80</sup>

For this reason, IHL has a more limited requirement for warnings. A state may provide general warnings in advance of an attack,<sup>81</sup> and allow civilians to take precautions based on their knowledge of the situation on the ground. In the rocket-launcher scenario, a civilian resident in the building connected to the launcher site can see the launcher from her window. A general warning advises the civilian that her dwelling will not be a safe place in the near future, and that leaving for a safer location is prudent. Residents in other locations can in turn provide information to the

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76. WALZER, *supra* note 3, at 152.

77. See DINSTEIN, *supra* note 1, at 144 (stating that effective advance warnings must be given prior to attacks against civilians).

78. *Id.*

79. See Schmitt, *Military Necessity*, *supra* note 10, at 829.

80. See DINSTEIN, *supra* note 1, at 144 (noting that "desire to achieve surprise may frequently preclude warnings . . . or instigate warnings that are too vague to alert the civilian population to the impending peril").

81. See INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 687, ¶ 2225 (Yves Sandoz et al. eds., 1987) (stating that "warnings may also have a general character").

fleeing resident about the safety level in those areas. While some civilians, such as the aged and infirm, may have greater difficulty in moving, a general warning provided sufficiently far in advance can facilitate efforts at relocation for these individuals as well. As long as the attacker targets only legitimate military objectives such as the rocket-launcher, residents will still have many safe places available. Residents who remain after such warnings are no different from workers in munitions factories: They have notice that the decision to stay will increase their risk.<sup>82</sup> Collateral harm to this group, while regrettable, will not be a violation of the proportionality principle.

Protective theorists, caught up in hindsight bias, have not even acknowledged the warnings the IDF provided in the Gaza campaign. Warnings are irrelevant if, like the protective theorists, one imposes a strict liability standard on civilian harm. Under a strict liability view, the reasonableness of precautions does not matter. Any harm is by definition the responsibility of the attacker. Consistent with this rationale, the United Nations' Goldstone Report faulted the IDF's extensive warnings to civilians in Gaza<sup>83</sup> because many civilians did not comply.<sup>84</sup> However, an attacker's warnings should be judged by whether their specificity is adequate in light of legitimate military objectives. Assessing warnings based on civilian compliance is unfair, since an attacker has no ability to control the civilian population's response.

Moreover, assessing warnings from the perspective of hindsight is also unwise. Warnings of appropriate specificity and comprehensiveness that do not trigger full compliance are nevertheless far superior to warnings that are amorphous and inconsistent. However, because the duty to risk requires risk to a state's own forces even when the state provides effective warnings, the duty discourages this vital precaution.

To see how the duty of risk discourages warnings, one must consider the trade-offs that warnings engender. As noted above, warnings provide information not only to civilians, but also to the enemy.<sup>85</sup> Even under current law, therefore, an attacking state has some incentive to "skate by"

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82. See DINSTEIN, *supra* note 1, at 136 (noting that "importance of a munitions factory is often so critical that . . . casualties among the labourers may reach very high levels without coming under the rubric of 'excessive'" under the proportionality principle); Michael N. Schmitt, *Human Shields in International Humanitarian Law*, 47 COLUM. J. TRANSNAT'L L. 292, 331 (2009) (citing commentators for view that while at defense plant, workers are "not entitled to the full benefits of civilian status").

83. See Barry A. Feinstein, *Proportionality and War Crimes in Gaza under the Laws of Armed Conflict*, 36 RUTGERS L. REC. 224, 242–43 (2009) (discussing IDF's reliance on warnings); Amos N. Guiora, *Proportionality "Re-Configured"*, 31 A.B.A. NAT'L SECURITY L. REP. 9, 13 (Jan./Feb. 2009) (noting that IDF provided at least 250,000 warnings during Gaza campaign).

84. See Blank, *supra* note 7, at 296–99 (discussing the effectiveness of civilian warnings under the Goldstone Report).

85. See *supra* pp. 17–18 for further discussion on the use of warnings.

with warnings as minimalist as possible. In this respect, military organizations subject to the law of war mimic the conduct of other regulated organizations. When regulated entities feel that a legal regime injures their competitiveness without providing corresponding benefits, those entities drag their feet, sabotaging regulation through dilatory tactics and defiance.<sup>86</sup> Imposing a duty to risk further reduces a state's stake incentive to warn, encouraging it to do the legal minimum, or even take a risk that champions of the duty to risk would not embrace: sinking beneath the floor of required humanitarian protection.<sup>87</sup> Few messages are more counterproductive.

In an additional layer of irony, the duty to risk's essential indifference to warnings in contexts like the Gaza intervention illustrates an inconsistency with its embrace of warnings in the World War I cellar scenario. Walzer's evaluation of the latter hinges on the soldier's issuing a warning before throwing a grenade down the cellar stairs.<sup>88</sup> The inescapable corollary of Walzer's view is that a soldier who issued a warning but received no response would be free under both IHL and military ethics to use his grenade. Unfortunately, neither Walzer nor Luban explain why warnings are inadequate in the larger context of Gaza. In both contexts, warnings will not be completely effective in preventing harm to civilians. In the cellar scenario, for example, civilians might be too afraid to reveal themselves, or might be the captives of German soldiers who are also hiding in the cellar. Yet Walzer and Luban do not argue that the silence that would greet a warning in these situations required *additional steps*, such as the soldier's blind descent down the cellar stairs. To be consistent, the protective theorists would have to impose even more exacting duties on the World War I soldier. They reject this step, apparently conceding that both law and ethics cannot require unbounded valor. However, they fail to provide a uniform rationale for rejecting this further expansion of duties on the cellar stairs, while requiring it in contexts like Gaza.

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86. See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* 37–38 (1992) (noting “it is often irrational for firms to comply with laws when the costs of compliance are less than the benefits”); Robert A. Kagan, Dorothy Thornton & Neil Gunningham, *Explaining Corporate Environmental Performance: How Does Regulation Matter?*, 37 *LAW & SOC'Y REV.* 51, 73–74 (2003) (tracing lack of efficacy of legal sanctions without buy-in of regulated entities); cf. Peter Margulies, *Judging Myopia in Hindsight: Bivens Actions, National Security Decisions, and the Rule of Law*, 96 *IOWA L. REV.* 195, 214–18 (2010) (viewing government officials subject to liability for damages as regulated entities who can either vindicate or frustrate regulation's goals).

87. The law of war has long fashioned norms based on informed predictions that forces would otherwise willfully disobey related rules. For example, consider the crime of perfidy or “false flag,” which involves feigning surrender to kill more of the enemy. Perfidy is outlawed because without this prohibition, an attacking force would disregard even genuine efforts at surrender, thereby undermining humanitarian safeguards. See SOLIS, *supra* note 10, at 421.

88. WALZER, *supra* note 3, at 152.

*D. The Incoherence and Unmanageability of the Duty to Risk*

This failure of consistency points to the protective theorists' lack of a coherent prescription for the amount of valor they would require. Luban, perhaps recognizing this problem, suggests a metric that he calls the risk-transfer ratio.<sup>89</sup> Under one reading of this ratio, military ethics would bar tactics that result in heightened risk to civilians but produce smaller increments of safety for soldiers.<sup>90</sup>

In easy situations, this prescription is sensible. For example, it would fit the cellar scenario, where a soldier could issue a warning that would appreciably lower risks to civilians with only a modest diminution of his own safety.<sup>91</sup> Arguably, Luban's ratio would also permit bombing of a classic military target such as a munitions factory, where another alternative such as a covert ground assault behind enemy lines would subject soldiers to far greater risk while producing at best equal reductions in risk to civilians. However, Luban's ratio runs out of steam when dealing with more difficult situations. On occasion, Luban notes, soldiers might have to endure greater risks to spare civilians from harm.<sup>92</sup> In some situations, Luban may well be correct; however, the devil is in the details. Luban acknowledges that "[h]ow much extra risk soldiers must shoulder is . . . not a question susceptible to precise answers, or for that matter general answers."<sup>93</sup> Despite this vagueness, Luban is not reticent about attaching blame to soldiers who fail to meet his standards. Commanders who fail to calibrate the risk-transfer ratio in particular operations to Luban's fine-grained specifications will presumably violate ethical norms, IHL, or both. The shifting implementation of the risk-transfer ratio assures that commanders will be wrong far more often than they are right. Luban fails to address how commanders could cope with these uncertain conditions. His failure to offer a consistent standard is a recipe for hindsight bias.

V. THE DUTY TO RISK AND THE INTERACTION OF IHL AND INTERNATIONAL HUMAN RIGHTS LAW

Broken down into its component parts, the case for the duty to risk thus turns on incoherent tests and stories selectively retold. This section takes up

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89. See Luban, *Risk Taking*, *supra* note 3, at 20 n.20.

90. *Id.*

91. *Cf.* Neuman, *supra* note 53, at 109 (arguing morality requires that commanders expose soldiers to some greater risks to safeguard civilians, even when this choice is not dictated by principle of proportionality).

92. *Id.* at 28 (asserting that soldiers should on occasion subject themselves to somewhat greater risk than would otherwise be the case to avoid risk to civilians).

93. Luban, *Risk Taking*, *supra* note 3, at 28.

one of the latter. Using an idiosyncratic hypothetical, protective theorists argue that their opponents would improperly provide less protection to enemy civilians than to a state's own nationals. However, this argument ignores nuances in the interaction of IHL and international human rights law (IHRL).

To contend that the law requires protection for enemy civilians that matches the protection a state affords its own civilian citizens, Margalit and Walzer posit Lebanese villagers who join Hezbollah's efforts to take an Israeli town.<sup>94</sup> They argue that these villagers are entitled to the same regard as Israeli civilians taken hostage by Hezbollah.<sup>95</sup> This argument ignores the collaboration between the Lebanese villagers and Hezbollah. Margalit and Walzer acknowledge that the Lebanese villagers might wish to take over Israeli land. If the villagers' acquisitive motivation drives their role in a cross-border attack, they lose their immunity from attack. The villagers are not involuntary human shields, but direct participants in hostilities,<sup>96</sup> helping to clear out Israelis from the town to make it "safe" for the invaders. The principle of distinction might well permit targeting of such individuals who had knowingly crossed the border of another state in operational support of an invading force. At the very least, proportionality would analogize the acquisitive civilians to munitions workers, who do not count as civilians in proportionality estimates involving attacks on weapons factories.

The protective theorists' insistence that a state owes the same minimum duties to both its own nationals and those acting at the direction of a hostile party also suggests an unduly rigid view of the separation of human rights law and IHL. When IHL applies, the best view is that it preempts the field—it is *lex specialis*, as commentators have suggested, displacing other fields of law.<sup>97</sup> When conflict reaches a level of frequency and intensity that moves beyond the capability of ordinary law enforcement, the law of armed conflict should govern.<sup>98</sup> Moreover, IHL should govern

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94. See Margalit & Walzer, *supra* note 3.

95. *Id.*

96. See SOLIS, *supra* note 10, at 503–04 (defining a lawful target as anyone, whether a civilian or combatant, who "takes up arms against an opponent combatant"); Eric Talbot Jensen, *Direct Participation in Hostilities: A Concept Broad Enough for Today's Targeting Decisions*, in NEW BATTLEFIELDS, *supra* note 62, at 85, 91–93. One can read Margalit and Walzer's vaguely phrased hypothetical as describing the Lebanese villagers as hostages of Hezbollah. If the villagers were in fact *involuntary* human shields, a state would have to include harm to this group in assessing proportionality.

97. See Evan J. Criddle, *Proportionality in Counterinsurgency: A Relational Theory*, 87 NOTRE DAME L. REV. 1073, 1075–76 n.9 (2012) (defining the concept of *lex specialis*).

98. See Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 568 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997) (noting "scope and intensity" as criteria for determining applicability of law of armed conflict). One commentator has suggested that the IHL/IHRL dichotomy is

whether the conflict is international, that is, between states, or is noninternational in character. An internal rebellion may be sufficiently intense to qualify as an armed conflict. The International Criminal Tribunal for the Former Yugoslavia (ICTY) decisions take this as a given,<sup>99</sup> and countless nations' experience with civil wars (of which America's was a particularly bloody example) confirms it. If one party to a conflict that is not of an international character attacks, the party attacked must have a right to self-defense under international law governing the use of force. The United Nations Charter, which mentions armed attack but says nothing about the source of that attack, echoes this proposition.<sup>100</sup>

A categorical choice of a law enforcement paradigm over IHL in such contexts would result in confusion for both attackers and defenders, producing a crazy quilt of conflicting obligations. For example, while IHL ties proportionality to military advantage, human rights law requires what commentators call "strict proportionality,"<sup>101</sup> which often entails heightened

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unduly mechanical, and has argued that the law should require the same pragmatic criteria in each, hinging on the nature of the threat and the tailoring of the state's response. See Monica Hakimi, *A Functional Approach to Targeting and Detention*, 110 MICH. L. REV. 1365, 1382–83 (2012) (explaining that the HRL "permits states to derogate from certain obligations, including on targeting and detention, during national emergencies"); cf. 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) (manuscript at 36–37), available at <http://ssrn.com/abstract=2049532> (seeking to distill targeting norms that will bridge IHL-IHRL divide). Another commentator has argued cogently against the functional criteria in *Tadic*, describing the state as a fiduciary with deontologically derived duties to civilians who are: 1) not directly participating in hostilities, and, 2) within its control. Criddle, *supra* note 97, at 1077. Criddle does not specifically address whether the acquisitive foreign nationals in Margalit and Walzer's hypothetical should be viewed as under the attacking state's control. Criddle contends that civilians in Gaza should be viewed as under Israel's control, even though Israel has withdrawn from ongoing military supervision over Gaza, because Israel continues to limit aviation and shipping in Gaza and claims the power to intervene militarily to kill or capture suspected terrorists. *Id.* at 1107–08. This argument parallels the holding of the International Court of Justice in the Israel-Palestinian "wall" case that terrorist attacks from the West Bank did not trigger a right to self-defense by Israel. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 194, ¶ 139 (July 9). This interpretation is inconsistent with both sound policy and the text of the United Nations Charter. The text of Article 51 refers only to attacks "against" a state, and says nothing about the source of those attacks. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* (4th ed. 2005). Jurists and commentators have vigorously criticized the Court's rationale, arguing that it enshrines artificial distinctions. Concurring Opinions of Judge Higgins, 43 ILM at 1058, ¶ 16, and Judge Buergenthal, *id.* at 1078, ¶ 3; 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); Nicholas Rostow, *Wall of Reason: Alan Dershowitz v. the International Court of Justice*, 71 ALB. L. REV. 953, 978–81 (2008); 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).

99. See *Tadic*, No. IT-94-I-I, ¶ 568.

100. See U.N. Charter art. 51 (acknowledging a U.N. member nation's inherent right of self-defense during armed attacks).

101. See Criddle, *supra* note 97, at 1076 (discussing application of HRL's strict proportionality standard).

duties to spare civilians. Human rights law also conditions the use of lethal force on a concrete need for self-defense or defense of others.<sup>102</sup> In contrast, under IHL, one party can target an adversary's combatants—as well as civilians taking a direct part in hostilities—without a specific showing of the need to use lethal force.<sup>103</sup> Under IHL, once a combatant has identified appropriate targets, he may use lethal force whether or not the target has initiated fire.<sup>104</sup>

While both human rights law and IHL bar wanton killing, the two bodies of law have very different default stances that the protective theorists often ignore.<sup>105</sup> The default stance of human rights law is often inappropriate for situations of armed conflict. Consider the Lebanese nationals in Walzer and Margalit's hypothetical who aid Hezbollah's efforts to capture an Israeli town.<sup>106</sup> Under a law enforcement paradigm, individuals who assume control of property owned by another without the owner's consent would be considered trespassers. Law enforcement officials would have the power to evict the trespassers and the discretion to arrest them, but would be permitted to use deadly force only in self-defense.<sup>107</sup> If one of the trespassers fired on law enforcement officers, the officers would be required to exercise due care to avoid harm to others in the group of trespassers who had not initiated fire.<sup>108</sup> These limited state measures suffice in ordinary times. During armed conflict, however, such curbs provide an adversary with incentives to use its own civilians in combat and impede a state's efforts to protect its citizenry.

Rejecting a categorical preference for the law enforcement paradigm over that of the IHL does not preclude resorting to human rights principles in appropriate contexts. Suppose, for example, that terrorist violence is episodic in nature, a state has complete control over a territory, and the number of suspected terrorists is small. Under those conditions, a state should only use lethal force when such force is necessary to protect lives. However, tribunals applying these criteria should guard against hindsight bias. The European Court of Human Rights failed to heed this caveat in *McCann v. United*

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102. SOLIS, *supra* note 10, at 505.

103. *Id.* at 542–44. For a useful discussion of the appropriate interaction of IHL and IHRL, see Jens David Ohlin, *Response to Gabor Rona*, LIEBERCODE BLOG (Jan. 17, 2012, 8:55 AM), <http://www.liebercode.org/2012/01/response-to-gabor-rona.html>.

104. See SOLIS, *supra* note 10, at 542–44 (regarding the five requirements for targeted killing).

105. Cf. Geoffrey S. Corn, *Extraterritorial Law Enforcement or Transnational Counterterrorist Operations: The Stakes of Two Legal Models*, in NEW BATTLEFIELDS, *supra* note 62, at 23, 35 (discussing relationship between IHL and law enforcement paradigms).

106. See discussion *supra* p. 20.

107. See SOLIS, *supra* note 10, at 503–04 (asserting a lawful target for self-defense deadly force is a civilian or combatant who “takes up arms against an opponent combatant”).

108. *Id.*

*Kingdom*, in which British forces tailed three IRA members in the British territory of Gibraltar whom the government correctly suspected were planning to explode a car bomb within approximately 24–48 hours.<sup>109</sup> Security forces used lethal force when the suspects became aware of the surveillance and took action that the officers believed showed the intent to detonate the bomb immediately.<sup>110</sup> The court found that the government failed to pursue alternatives short of deadly force, such as wounding the suspects, and therefore the government had violated the suspects' right to life.<sup>111</sup> Nine judges disagreed, contending that the government had taken adequate precautions in dealing with three concededly dangerous individuals who were executing a terrorist plot, and that the majority's contrary view was marred by hindsight bias.<sup>112</sup> While the dissenters' concerns were apt, the parties conceded that IHRL was the appropriate legal framework. No party argued that IHL governed—which with today's technology would have permitted the government to use a drone to kill the terrorists.

In contrast, IHL would not have required the British forces to follow the *McCann* suspects, at least where the conflict had become more intense than episodic, and where the suspects were operating in an area not wholly under the government's control. IHL recognizes that in those situations, reliance on ordinary law enforcement processes poses unreasonable risks. In an armed conflict, viewing individuals accompanying an invading force as mere trespassers subject to arrest would put the invaded state at a grave disadvantage, given the difficulty of using ordinary law enforcement procedures during a period of intense violence.<sup>113</sup> This result would merely encourage violence against the state, raising the risks of harm to all civilians.

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109. *McCann v. United Kingdom*, App. No. 18984/91, 21 Eur. H.R. Rep. 97, ¶¶ 13–14 (1995).

110. *Id.* ¶ 59–61.

111. *Id.* ¶ 193–212.

112. *Id.* (Ryssdal, J., dissenting) ¶ 7–22.

113. IHRL may also inform evaluation of the adequacy of procedures for the detention of suspected terrorists, even when this detention occurs during an armed conflict. A detainee should be able to seek review from an independent decisionmaker and should be allowed access to representation and relevant evidence. Detailed discussion of detention is beyond the scope of this article; for useful sources, see *al Maqaleh v. Gates*, 605 F.3d 84, 99 (D.C. Cir. 2010) (holding that habeas courts lacked jurisdiction over Afghanistan); *Al-Jedda v. United Kingdom*, 53 Eur. Ct. H.R. 23, 62 (2011) (holding that state violated IHRL by detaining individual in Iraq without judicial review in course of role as part of United Nations-sponsored force); Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authorization for Use of Military Force, Exec. Order No. 13,567, 76 Fed. Reg. 13,277 (Mar. 7, 2011) (providing for administrative review of present dangerousness of detainees); Robert M. Chesney, *Who May Be Held? Military Detention Through the Habeas Lens*, 52 B.C. L. REV. 769, 769–75 (2011) (analyzing continued questions about scope of habeas authority); Matthew C. Waxman, *Administrative Detention of Terrorists: Why Detain, and Detain Whom?*, 3 J. NAT'L SEC. L. & POL'Y 1, 17–23 (2009) (analyzing methods by which governments may and do determine the “subject class” to be detained).



## VI. THE DUTY TO RISK AS FLAWED SIGNALING

If protective theorists allow hindsight bias to distort their assessment, they also fundamentally misunderstand how rules shape the incentives for each party. Historically, the law of armed conflict has promoted signaling between parties to a conflict that reinforce rules of the road.<sup>114</sup> These rules are not random conventions, but norms that stop needless suffering. Unfortunately, some proposed innovations in the law of armed conflict in the last forty years have undermined rules of the road, promoting signaling that instead breeds mistrust and extends violence. The duty to risk, despite its origins in the urge to protect civilians, is yet another installment in this trend.

To appreciate the signaling that the law of armed conflict has historically encouraged, consider the age-old war crime of perfidy. A party that engages in perfidy, or “false flag,” signals surrender while planning to lure in opponents for the kill.<sup>115</sup> Allowing perfidy would send a perverse message, encouraging parties to deceive each other instead of cooperating on ground rules.<sup>116</sup> A legal system that condoned perfidy would also promote needless slaughter, since a risk-averse receiving party would doubt the sincerity of any surrender plea and therefore intensify its attack in all cases.

Some proposed innovations in the law of armed conflict have retreated from this promotion of straightforward signaling. For example, Additional Protocol I to the Geneva Conventions for the first time allowed fighters to pursue hostilities dressed in civilian garb, as long as the fighters revealed themselves at the last possible moment before launching an attack.<sup>117</sup> Billed as a measure to help indigenous people fight off imperial domination,<sup>118</sup> the Additional Protocol I changes have nurtured greater uncertainty about the intent and capacity of civilians. While traditional rules of armed conflict required wearing a uniform or some distinguishing emblem, current norms leave states to puzzle out less reliable distinctions between fighters and

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114. See OSIEL, *supra* note 26, at 312.

115. See Additional Protocol I, *supra* note 1, Art. 37 (prohibiting and defining the act of perfidy).

116. See Blank, *supra* note 7, at 289–92 (describing Hamas’s tactics during the Gaza conflict as perfidy and the problems perfidy presents).

117. See Additional Protocol I, *supra* note 1, Art. 44(3) (outlining how combatants shall “promote the protection of the civilian population”).

118. Michael A. Newton, *Exceptional Engagement: Protocol I and a World United Against Terrorism*, 45 TEX. INT’L L.J. 323, 344–47 (2009) (describing political agendas that contributed to the enactment of Protocol I).

those *hors de combat*.<sup>119</sup> When states are stumped, they resort to the same deadly risk-aversion that drives the rule against perfidy: They shoot first and ask questions later. The result is increased peril for genuine civilians.

The duty to risk sends perverse signals in a different respect. Both ethical and legal rules on the conduct of war must be consistent with rules governing the use of force. Those rules generally limit the use of force to cases involving self-defense to address an imminent threat.<sup>120</sup> However, *jus in bello* rules that hamper a party's resort to self-defense shift the equilibrium, giving the advantage to an aggressor. Consider a party's contemplation of an unprovoked attack on another. *Jus in bello* restrictions, like distinction and proportionality, preserve self-defense as an option for the party attacked, although they constrain the operational contours of that response. Without this balance, self-defense would be ineffective, giving attackers who violate the *jus ad bellum* an undeserved edge. An effective self-defense option preserves equilibrium because it obligates a prospective aggressor to think twice.<sup>121</sup>

A legal norm that sends this signal about thinking twice before an unprovoked attack will influence any party that fears another party's

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119. See Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy*, HARV. U. PROGRAM ON HUMANITARIAN POL'Y & CONFLICT RES. OCCASIONAL PAPER SERIES, Winter 2005, at 1, 8–10, available at <http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper2.pdf> (discussing history of provisions). The thorny legal issues associated with combat against violent transborder nonstate actors such as Al Qaeda has led some scholars to suggest a third category—transnational armed conflict—that will supplement international and noninternational armed conflict while preserving baseline norms. 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, 53–68 (2009) (arguing that “extending [the] process of determining the fundamental principles of the law applicable to both international and internal armed conflicts to the realm of transnational armed conflicts reflects a logical and necessary evolution of the law.”); Eric Talbot Jensen, *Applying a Sovereign Agency Theory of the Law of Armed Conflict*, 12 *Chi. J. Int'l L.* 685, 707–14 (2012) (outlining related proposal to ensure applicability of baseline norms such as distinction and proportionality).

120. See Koh, *supra* note 46, (citing the United States as an example of a country using force in self-defense consistent with its rights under international law); Anderson, *supra* note 46, at 367 (noting that in the view of the U.S., self-defense may be used against actual use of force, imminent use of force, or a continuing threat).

121. Cf. Michael W. Lewis, *Drones and the Boundaries of the Battlefield*, 47 *TEX. INT'L L.J.* 293, 312 (2012) (suggesting that imposing unduly narrow geographic restrictions on states' ability to target terrorist groups with global operations would grant these groups asymmetric advantage); Michael W. Lewis, *Responses to the Ten Questions*, 37 *WM. MITCHELL L. REV.* 5021, 5029 (2011) (reasoning that IHL cannot be read as imposing strict geographic restrictions because its primary goal of protecting civilians cannot be achieved if groups that target civilians with geographic immunity are rewarded); Michael W. Lewis, *Potential Pitfalls in "Strategic Litigation": How the al-Aulaqi Lawsuit Threatened to Undermine International Humanitarian Law*, 9 *LOY. U. CHI. INT'L L. REV.* 177, 183–84 (2011) (arguing that reading IHL as prohibiting the use of tools of armed conflict outside certain geographic areas would favor non-state terrorist organizations).

capacity for self-defense. Any party—state and non-state actor alike—that controls territory has such a stake. States with a monopoly on force within their territory are also in some fashion accountable to their civilian citizens.<sup>122</sup> Civilians will protest, legally or outside the law, if a state's rash decisions expose them to harm through another party's exercise of the right to self-defense. Some terrorist groups, such as Hamas or the now-defunct Tamil Tigers of Sri Lanka (LTTE), also control territory and are accountable to constituencies within that territory.<sup>123</sup> The accountability of both states and non-state actors will vary. However, try as they might, no state or non-state leader can wholly suppress popular indignation.<sup>124</sup>

Because territorially-rooted parties, state and non-state actor alike, are accountable to people within that territory, they have an incentive to avoid aggressive conduct that will trigger another's right of self-defense. Legal norms' cautionary signal to would-be aggressors thus reduces future violence. Indeed, this is exactly what seems to have happened in Gaza, where the vigorous Israeli response to Hamas's repeated rocket attacks on Israeli towns yielded a lower level of Hamas-initiated violence.<sup>125</sup> In contrast, unduly burdensome restrictions on the right to self-defense encourage aggression.<sup>126</sup>

Champions of a duty to risk ignore the importance of signaling, and thus fail to understand how undue operational restrictions on a state's right of self-defense encourage aggression. Non-state actors will risk their own civilians in violation of their duties under the law of war if they derive a tactical advantage from doing so. Luban notes this phenomenon,<sup>127</sup> but does

122. See Lionel K. McPherson, *Is Terrorism Distinctively Wrong?*, 117 ETHICS 524, 541 (2007) (discussing practical checks and balances in nondemocracies).

123. See Jon Lee Anderson, *Death of the Tiger: Sri Lanka's Brutal Victory over its Tamil Insurgents*, NEW YORKER, Jan. 17, 2011, at 41, 46–47 [hereinafter *Death of the Tiger*] (discussing control exerted by Tamil Tigers).

124. See CHARLES TILLY, THE POLITICS OF COLLECTIVE VIOLENCE 90–91 (2003) (discussing coal riots and other signs of popular opposition in nondemocratic states).

125. See Ethan Bronner, *Israelis Feel Tug of Protests, Reviving the Left's Spirits*, N.Y. TIMES, Aug. 1, 2011, at A4 (noting decrease in terrorist attacks); Joshua Mitnick, *Rocket attacks on Israel: Why Hamas has an interest in keeping Gaza quiet*, CHRISTIAN SCI. MONITOR (Aug. 2, 2010), <http://www.csmonitor.com/World/Middle-East/2010/0802/Rocket-attacks-on-Israel-Why-Hamas-has-an-interest-in-keeping-Gaza-quiet>.

126. Cf. Jensen, *supra* note 96, at 94 (noting that narrow definition of direct participation in hostilities gives edge to violent non-state actors who can shield individuals such as bomb makers); Corri Zoli, *Humanizing Irregular Warfare: Framing Compliance for Nonstate Armed Groups at the Intersection of Security and Legal Analyses*, in NEW BATTLEFIELDS, *supra* note 62, at 190, 197 (arguing that provisions of Additional Protocol I to the Geneva Conventions enhance incentives for violent non-state actors).

127. See Luban, *Risk Taking*, *supra* note 3, at 6 n.9. But see Estreicher, *supra* note 57, at 435–36 (discussing non-state actors' neglect of their duties under IHL).

not recognize the connection between operational restrictions on self-defense and the incentives of aggressors.<sup>128</sup> Addressing this nexus is crucial to both IHL and military ethics.

The duty to risk misapprehends the incentives of violent non-state actors in another sense that is inherent in asymmetric warfare. For non-state actors like Hamas or Al Qaeda with a long track record of disregarding IHL, military victory means something very different than what it does to a member of a state force. A state force wins only if it stops violence directed at the state by defeating an opponent. However, a non-state actor whose principle mode of conducting hostilities entails targeting civilians—either those of a state opponent or moderates from its own community<sup>129</sup>—wins when it kills opponents. For the terrorist, such killing is a symbolic act that expresses solidarity with other terrorist groups.<sup>130</sup>

These asymmetrical incentives affect both proportionality and military ethics. Even protective theorists concede that force protection is at least relevant to determination of military advantage. Exposing forces to targeting by terrorist groups thus presents an exponentially greater risk than the risk taken in combat with an actor that complies with IHL and diminishes military advantage to a greater degree. Under IHL, a state would be free to take this difference into account. Moreover, from the standpoint of military ethics, the decision by a commander to reject a legal course of action and thereby risk exponentially greater numbers of casualties should have a clear strategic justification. Any other decision fails to attach sufficient importance to the lives of state combat personnel. In some situations, a long-term strategic advantage in combat against a non-state actor could justify such a decision, as we shall see. However, the protective

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128. Although Luban fails to address this issue, he claims that imposing a duty to risk will correct for political deficits within states. On this view, if a state has the political will to engage in an intervention, it should persuade the public to tolerate more risk to its own forces. Anything less, Luban suggests, allows intervention too readily. See Luban, *Risk Taking*, *supra* note 3, at 39–40; Kahn, *supra* note 3, at 4. Ken Anderson has criticized this view as trying to reach an illusory level of *ius ad bellum* “efficiency.” See Kenneth Anderson, *Efficiency In Bello and Ad Bellum: Making Use of Force Too Easy?*, in TARGETED KILLINGS: LAW AND MORALITY IN AN ASYMMETRICAL WORLD 374, 387–89 (Claire Finkelstein, Jens David Ohlin, & Andrew Altman eds., 2012) (describing techno-war anxiety that states would use force too readily, because technology makes it so easy and costless; criticizing this view as unduly dismissive of material and institutional constraints that limit warfare).

129. See Thomas C. Schelling, *What Purposes Can “International Terrorism” Serve?*, in VIOLENCE, TERRORISM, & JUSTICE 18, 21 (R.G. Frey & Christopher W. Morris eds., 1991) (citing violent “campaign of militant Palestinians against moderate Palestinian leaders”); Anderson, *Death of the Tiger*, *supra* note 123, at 47 (discussing violence against moderates by Tamil Tigers).

130. Max Abrahms, *What Terrorists Really Want: Terrorist Motives and Counterterrorism Strategy*, 32 INT’L SECURITY 78, 80, 85–86 (2008); cf. Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 44–46 (2003) (discussing intransigence rooted in ideological commitments of members of terrorist networks).

theorists' approach fails to identify such grounds, which in any event would be permissive, not mandatory: States would be *allowed* to make such decisions, but would not be required to do so, because a mandate would skew incentives and favor non-state actors.

Nevertheless, states may well have a duty to risk their forces in particular situations. Compliance with IHL norms like distinction and proportionality may require that a state risk its forces in an engagement with its adversaries or rule out an attack. In Kosovo, NATO commanders refused to attack a bridge used by Serbian forces because an attack would have killed a large number of civilians.<sup>131</sup> Israel has acknowledged that the attack on a U.N. facility during the Gaza campaign failed to comply with IHL.<sup>132</sup> Today's technology, including use of unmanned aerial vehicles (UAVs or drones) with superior reconnaissance and imaging capabilities, might have prevented such harm. Refinements in targeting processes might have also led to a better result. These are the issues that a worthwhile code of military ethics should address, as I suggest in the next section.

## VII. A STRUCTURAL APPROACH

In earlier work I have recommended a structural approach to IHL; this approach, with some modest changes, also seems appropriate here. A structural approach focuses on the distinct roles of the players, including non-state actors and the varied constituencies that speak for states.<sup>133</sup> By promoting dialogue among state constituencies and between certain non-state actors and the civilians those actors purport to champion, a structural approach aims to realign the incentives that the duty to risk distorts.

### A. The Reciprocity Ratio

In determining when military ethics permits the risk of forces to minimize civilian harm beyond what IHL requires, senior COIN commanders should consider the nature of the non-state actor and that actor's relationship to civilians. When a commander knows that a non-state actor values the killing of state forces as much or more than attaining a strategic victory, military ethics would preclude putting state forces in

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131. Jordan J. Paust, *Permissible Self-Defense Targeting and the Death of Bin Laden*, 39 DENV. J. INT'L L. & POL'Y 569, 576 (2011).

132. Isabel Kershner, *Israel Rebukes 2 in Attack on U.N. Complex*, N.Y. TIMES, Feb. 2, 2010, A4.

133. See Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, 67 LAW & CONTEMP. PROBS. 195, 210 (2004) (stating that non-state actors can play a role in international regimes).

harm's way.<sup>134</sup> Moreover, requiring such a sacrifice would skew incentives for non-state actors, encouraging decisions that enhanced the danger to civilians. However, a state may impose rules of engagement entailing a super-proportionality obligation when the relationship between a non-state actor and civilians suggests that over time civilians may reciprocate for this regard by shifting their allegiance to the state.<sup>135</sup> I call this calculation the reciprocity ratio. If Re equals reciprocity, Ri is risk, S is a short-term calculation, and T is a temporal calculation in the intermediate or longer term, then a short-term risk is appropriate when  $ReT \geq RiT$ .

In other words, when there is a likelihood that forces or civilians in time may reciprocate, and that likelihood equals or exceeds the near-term risk to one's own forces, risk is appropriate, since today's risk may result in lowered risk tomorrow. When a probability of reciprocity over time falls below the short-term risk, a state should not undertake super-IHL duties. Moreover, in the latter case, maintaining ordinary proportionality signals to the non-state actor that a state will engage in robust self-defense, thus shaping the non-state actor's *ex ante* calculation on aggressive behavior.

Generally, the reciprocity ratio will vary with the relationship between the non-state actor and the civilians it controls. The more civilians the non-state actor controls, and the greater the analogy between that non-state actor and a state, the harder it will be to turn a civilian population against the non-state actor through mere forbearance. The futility of forbearance in turn makes the harm to one's own forces more difficult to justify. Therefore, in fashioning rules of engagement (ROE),<sup>136</sup> commanders should distinguish between what I call territory-based terrorist groups and transnational terrorist networks.

A territory-based non-state actor controls a significant chunk of territory within a state and commands the allegiance of a substantial number of civilians. While exact parameters are difficult to pinpoint without some

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134. This, not a disregard for proportionality as the duty to risk champions would have it, is the best reading of Kasher & Yadlin. Kasher & Yadlin, *supra* note 3.

135. See Blum, *supra* note 46, at 191–92 (noting that the American Counter-Insurgency Manual regards an operation as counterproductive if the collateral damage results in the recruitment of more insurgents); Sitaraman, *supra* note 51, at 1824 (discussing lack of reciprocity in counterinsurgency); cf. Daphne Richmond-Barak, *Nonstate Actors in Armed Conflicts: Issues of Distinction and Reciprocity*, in *NEW BATTLEFIELDS*, *supra* note 62, at 106, 120–22 (arguing that compliance with IHL does not hinge on reciprocity, since state owes duty even to parties that fail to observe IHL, while reserving question of whether reciprocity can affect super-IHL obligations).

136. See Laurie R. Blank, *Rules of Engagement: Law, Strategy, and Leadership*, in *ASPECTS OF LEADERSHIP: ETHICS, LAW AND SPIRITUALITY* (forthcoming 2012) (manuscript at 1), available at <http://ssrn.com/abstract=1872505> (explaining that Rules of Engagement “distill law, strategy and policy into tactical instructions for Marines, soldiers, airmen and sailors regarding when and against whom they can use force”).

measure of arbitrariness, such a group would generally feature at least: (1) fifty square miles of contiguous territory; (2) ten thousand civilians under control within that territory; and, (3) two-thirds of civilians within the location either tacitly or actively supporting the group. Hamas and the now-defunct LTTE are examples of territory-based groups.<sup>137</sup> The territory-based group has a greater ability to enlist the population it controls in its various activities through the provision of social services that inspire community loyalty.<sup>138</sup> A state confronting a territory-based non-state actor should decide that, consistent with proportionality, it need not lower civilian deaths below the proportionality threshold. Eschewing a lower ROE standard treats the group the way it wishes to be treated—as a state. States that start wars know that doing so puts their own civilians at risk. That is one aspect of the “right authority” of states<sup>139</sup>—they act as a clearinghouse for citizen inputs.<sup>140</sup> The “clearinghouse” nature of states makes them an appropriate party to wars, which could dissolve into chaos if civilian groups too readily engage in warfare. Thus, a state fighting a territory-based terrorist group may seek to extract concessions from that group just as it would from a state—through ROE, in which proportionality is both a ceiling and a floor.

With network-based groups such as Al Qaeda, the calculus for ROE is different. There, the group may have only an instrumental and short-term need for the community where it is currently located. Community anger at the group may not be a disincentive to future violence, since the group quickly exits, moving on to greener pastures if attacks on a state elicit robust self-defense measures at its present location. Here, state attackers

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137. See MICHAEL P. ARENA & BRUCE A. ARRIGO, *THE TERRORIST IDENTITY: EXPLAINING THE TERRORIST THREAT* 83–87, 91–95 (2006) (providing an overview of Hamas and LTTE organizations).

138. See generally *Humanitarian Law Project v. Holder*, 130 S. Ct. 2705, 2725–26 (2010) (noting that terrorist groups like Hamas assume state-like functions such as provision of social services to cement civilian constituencies’ loyalty); *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 698 (7th Cir. 2008) (noting that Hamas’s social service programs “mak[e] it more costly . . . to defect” from the group); Eli Berman & David D. Laitin, *Religion, Terrorism, and Public Goods: Testing the Club Model*, 92 J. PUB. ECON. 1942, 1952, 1955 (2008) (same); see also Justin Magouirk, *The Nefarious Helping Hand: Anti-Corruption Campaigns, Social Services Provisions, and Terrorism*, 20 *TERRORISM & POL. VIOLENCE* 356, 358 (2008) (discussing Hamas’s provision of social services); Margulies, *supra* note 57, at 484–85 (discussing the nexus between social services and terrorist recruitment).

139. See *Watkin*, *supra* note 119, at 17; EMMERICH DE Vattel, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW*, Bk. 3, Ch. 15, § 223 (1758) (right to make war “solely belongs to the sovereign power” who is best situated to judge “circumstances of the utmost importance to the safety of the state”).

140. See McPherson, *supra* note 122, at 541; cf. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 178 (2010) (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”) (citation omitted).

should be careful to avoid civilian casualties, and set ROE at super-proportionality levels. Indeed, a showing of restraint may win hearts and minds in a way that is far more difficult with a community that identifies deeply with a territory-based group.

### *B. Most Precise Available Weaponry*

Military ethics should require the use of weapons of the maximum precision practically available to that state. A state like the United States should endeavor to use such weapons, even when estimated collateral harm from an attack without such sophisticated systems would satisfy the proportionality principle.<sup>141</sup> This does not mean that a state must rush weapons onto the battlefield that have not been fully tested, or must commit to across-the-board use of weapons that are expensive because the newness of the weapon limits economies of scale. However, a nation should use its best efforts to bring new technology on-line when that technology will improve targeting and reduce collateral damage. While one might be concerned that such a requirement might actually discourage the development of precision weapons, since states that developed such weapons would then be subject to heightened ethical requirements, that fear seems misplaced. Enough strategic incentives exist to develop such weapons even if their dissemination results in the imposition of new ethical burdens. Moreover, the precision imperative is consistent with the reciprocity ratio discussed above. Nationals whose hearts and minds are up for grabs will doubtless have a rough idea of the technological capacities of a country seeking to suppress an insurgency. Particularly when that country is the United States, nationals may well have an exaggerated idea of the counterinsurgency's technological strengths. Failure to exploit the technological edge available would result in a loss of credibility.

### *C. Tailoring Force for Utilization Against Dual-Use Objectives*

Modern warfare has often seen disputes about attacks on dual-use targets, such as power plants and communications centers. On one hand, dual-use facilities that assist one party's ability to use force are clearly

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141. See Michael N. Schmitt, *Precision Attack and International Humanitarian Law*, 859 INT'L REV. OF THE RED CROSS 445, 457 (Sept. 2005) (discussing the many benefits of precision strikes); see also Additional Protocol I, *supra* note 1, Art. 57(2)(a)(i) (precision may be factor in definition of "feasible" precautions taken to ensure targeting military as opposed to civilian targets and (ii) in minimizing incidental civilian harm); INT'L COMM. OF THE RED CROSS, *supra* note 56, 681-82 ¶ 2198 (standard is interpreted according to "common sense and good faith"); SOLIS, *supra* note 10, at 533-34 (discussing precision weaponry).



military objectives.<sup>142</sup> On the other hand, complete destruction of these facilities can cost the lives of civilians who work at these sites, and can also impede a civilian population's ability to recover after a conflict concludes. To solve this dilemma, military ethics, if not IHL, should require the least amount of force necessary to achieve an immediate military advantage when the attacking state can readily repeat this level of force because of its own superior technology and military might.

With power plants or similar targets, tailoring the use of force may entail an attack that will temporarily halt the target's functioning without totally destroying the facility. For example, an attacking force may disable broadcast transmissions through cyberattacks or attacks on wiring.<sup>143</sup> Attacks may still have short-term costs for civilians who depend on goods that the target provides, such as electricity. However, the tailoring of force to function will spare civilians working at or near the targets. It would force an attacking state to assume the burden of repeating this attack if a conflict lasts longer than anticipated. But this burden seems reasonable as a matter of ethics, if not IHL, when the attacking state has a clear technological edge and greater military resources.

#### D. Legal Deliberation

Similarly, COIN should include a process imperative. While proportionality has traditionally been a case-by-case inquiry, carefully designed systems can squeeze out much of the human error that often afflicts such determinations.<sup>144</sup> The comprehensive integration of military lawyers into the targeting process will assist with this task. For example, during the Kosovo campaign, the United States Joint Staff developed a matrix that rated a target's military value and classified projected collateral harm in gradations of high, medium, and low, as well as other variables, such as the probability that a bomb or missile would miss its target, and the effect on civilians if this event occurred.<sup>145</sup> Since a miss would obviously

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142. See U.N. Int'l Criminal Tribunal for the former Yugoslavia, Final Rep. to the Prosecutor by the Comm. Established to Review the NATO Bombing Campaign Against the Fed. Republic of Yugoslavia ¶¶ 73, 75 (ICTY June 13, 2000), available at <http://www.icty.org/sid/10052> (finding that television station was appropriate target to the extent that NATO forces reasonably believed that station's facilities were used as "radio relay stations and transmitters to support the activities" of the Serbian military) (quoting Amnesty International Report, *NATO/Federal Republic of Yugoslavia: Violations of the Laws of War by NATO during Operation Allied Force* 42 (June 2000)).

143. See Schmitt, *supra* note 141, at 451–52.

144. See Neuman, *supra* note 53, at 98 (noting that a case-by-case approach to proportionality will generally result in a larger number of civilian casualties over the long range).

145. See SOLIS, *supra* note 10, at 533; cf. JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 130–31 (2012) (noting that involvement of military lawyers in

have a greater effect on civilians in a densely-populated area, the United States military took this risk into account as well, requiring a correspondingly greater military justification for an attack in that context.<sup>146</sup> Moreover, any particularly sensitive targets, including dual-use targets such as power plants, should require approval from senior military or civilian leadership.<sup>147</sup> The requirements of proportionality clearly informed these judgments, but the methodical and analytical approach reflected an ethical and strategic commitment beyond proportionality's dictates. Moreover, an attacker should strive for a balance between planned and unplanned targets.<sup>148</sup> Whenever possible, a state should develop a list of targets in advance to permit the careful review that eliminates mistakes. Human intelligence and other resources can be collected and synthesized at this stage.

#### *E. Duty of Investigation*

A nation should undertake as a matter of both IHL and ethics to promptly and comprehensively investigate plausible reports of avoidable civilian losses. Even where a nation has few or no ground troops and does not systematically violate IHL, it may commit IHL violations in particular situations. Prompt investigation will address such problems. Investigation has both *ex ante* and *ex post* uses. First, *ex ante*, the prospect of investigation will ensure that commanders make decisions that comply with IHL. Second, *ex post*, investigation will uncover mistakes that have occurred, and supply an information base for future improvements. It will also flag commanders who have violated IHL and encourage commanders who comply with the law of armed conflict.

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targeting decisions reaps strategic benefits through enhanced perception of legitimacy); Gregory S. McNeal, *New Approaches to Reducing and Mitigating Harm to Civilians*, in *SHAPING A GLOBAL FRAMEWORK FOR COUNTERINSURGENCY: NEW DIRECTIONS IN ASYMMETRIC WARFARE* (William C. Banks ed., Oxford University Press, forthcoming 2013), available at <http://ssrn.com/abstract=2020042> (providing comprehensive account of current U.S. practice). Two scholars have argued that targeted killing of a U.S. citizen abroad might require somewhat more robust procedural safeguards. See Richard Murphy & Afsheen John Radsan, *Due Process and Targeted Killing of Terrorists*, 32 *CARDOZO L. REV.* 405, 450 (2009) (suggesting the need for some procedural check); cf. *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 14–35, 52 (D.D.C. 2010) (holding that father lacked standing to bring suit challenging alleged targeting of Anwar Al-Aulaqi, whom United States regarded as leader of Al Qaeda in Arabian Peninsula, and that subject matter of suit presented political question).

146. See SOLIS, *supra* note 10, at 533 (asserting that “[j]udge advocates then conducted a legal assessment of the target to ensure that . . . [it] made an effective contribution to the military action and that its damage or destruction offered a definite military advantage”).

147. See Schmitt, *supra* note 141, at 457–58.

148. *Id.* at 450.

*F. An Ethic of Engagement with International Entities*

States should also engage with international tribunals and other entities. These tribunals are flawed, yet the failure to engage is often a self-fulfilling prophecy. Only engagement improves the tribunals and allows them to gather other perspectives. A policy of engagement also recognizes that such tribunals are a pervasive aspect of modern international law and helps adjudicate the boundaries between IHL and human rights. As a pragmatic matter, like most structural rules characterized by self-constraint,<sup>149</sup> such rules encouraging engagement result in a state's benefit in the intermediate and long term.

This ethical commitment to engagement makes sense as a matter of temporal judgment and holistic signaling. A state faces short-term pressure *not* to cooperate with transnational tribunals or entities: Those entities may cramp the style of a country with far-flung diplomatic, political, and military responsibilities, such as the United States. These concerns helped persuade the U.S. to limit its cooperation with the International Court of Justice (ICJ) in the Nicaragua case.<sup>150</sup> Alternatively, a nation like Israel, long a favorite target of other countries for political and ideological reasons, may feel that it will not receive a fair hearing. This concern led to Israel's failure to cooperate in the ICJ's "Wall" case.<sup>151</sup>

While these short-term moves were expedient, in the longer term they were unwise. Lack of cooperation has helped reinforce a strand in international discourse that sees the United States and Israel as outliers in the international legal system.<sup>152</sup> This is a caricatured and unfair view. However, a lack of cooperation invites this result.

Current models of U.S. engagement with international entities provide a contrasting vision. Initially, the U.S. flatly opposed the International Criminal Court (ICC), viewing it as an entity with only a limited up-side,

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149. See Goldsmith & Levinson, *supra* note 40, at 1835 (discussing states' willingness to sacrifice short-term interests for long-term benefits).

150. See *Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 64–65 (June 27) (holding that the United States, while it had improperly sponsored the Contras' violent activities, lacked "effective control" over their actions).

151. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (Int'l Ct. Justice July 9, 2004), 43 ILM 1009, P 139 (2004).

152. See generally Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003) (analyzing different meanings, causes, and consequences of American exceptionalism). In arguing that best practices require cooperation with international investigations, I disagree with Peter Berkowitz. See BERKOWITZ, *supra* note 59, at 5–6 (arguing that Israeli government acted prudently in declining to cooperate with Goldstone investigation of Gaza incursion, given ample indications that Goldstone inquiry was flawed from the start). Berkowitz is correct, however, that a state should accord highest priority to its own comprehensive investigation. *Id.*

and a significant potential for second-guessing American forces deployed around the world.<sup>153</sup> While the U.S. has not ratified the Statute of Rome, which created the ICC, it has participated in a recent round of talks addressing whether and how to include the crime of aggression within the ICC's jurisdiction.<sup>154</sup> Another model from the human rights realm is the United States' engagement with the Inter-American Commission on Human Rights (IACHR), where the United States responds to complaints even though it does not recognize the commission's decisions as binding.<sup>155</sup>

An ethic of engagement promotes sound signaling and temporal judgment, despite its occasional amenability to short-term bumps in the road. First, consider the relatively low opportunity costs. A state that participates does not give up the right to criticize a result as unfair. The appropriate analogy is to a litigant before a court—the litigant does not waive the right to appeal because she has appeared in a case before a trial court. An ethic of engagement also reinforces that a state has nothing to fear from a transparent investigation; this message promotes holistic signaling, proving a state's bona fides in the international legal system. Willingness to participate can also have a useful *ex ante* effect; it will oblige the state to use methods that may minimize casualties and other damage, including the use of the most sophisticated technology available and the use of the least possible force to disable dual-use facilities such as communications hubs. States that rightly point to the distorted incentives wrought by the duty to risk should not ignore their own responsibility to set norms and live by them. That is the heart of self-governance, domestically and internationally, and an essential element of effective counterterrorism.

#### CONCLUSION

A structural approach that considers the likelihood of reciprocity and pushes states to calibrate force when possible, use precautions, and

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153. LOUIS HENKIN, SARAH H. CLEVELAND, LAURENCE R. HELFER, GERALD L. NEUMAN & DIANE F. ORENTLICHER, *HUMAN RIGHTS* 733–35 (2d ed. 2009).

154. See Howard LaFranchi, *US Opposes ICC Bid to Make 'Aggression' a Crime Under International Law* CHRISTIAN SCI. MONITOR (June 15, 2010), <http://www.csmonitor.com/USA/Foreign-Policy/2010/0615/US-opposes-ICC-bid-to-make-aggression-a-crime-under-international-law> (reporting view of State Department Legal Adviser Harold Koh that participation in Kampala talks, which produced significant concessions favoring U.S. interests, “reset US relations with the court from hostility to positive engagement”). For an account of the overall importance of accountability through the ICC or other viable tribunals, see Diane F. Orentlicher, *Settling Accounts Revisited: Reconciling Global Norms with Local Agency*, 1 INT'L J. TRANSITIONAL JUST. 10 (2007).

155. See HENKIN, et al., *supra* note 153, at 617–20 (discussing United States's ambiguous yet ongoing engagement with IACHR).

deliberate with a greater range of actors about lethal tactics will lack the sentimental appeal to valor of the duty to risk. However, this approach will also be free of the hindsight bias that plagues the duty to risk's strict liability. Moreover, it will send cleaner signals to both states and non-state actors, pushing territorial non-state actors to consider blowback from their own constituencies instead of—as in the duty to risk—permitting them to strike, but withholding from states an adequate right of self-defense.

This approach also avoids the more obvious errors of the duty to risk's extrapolation from Walzer's cellar scenario. Building a theory from a vivid example can obscure the facts in the wide run of cases, including the actual facts—which champions of the duty to risk get wrong—on civilian casualties in campaigns like Kosovo and Gaza. Indeed, to the extent that the cellar scenario turned on the soldier's warning, a structural approach that incentivizes warnings is actually closer to the spirit of the story itself. The approach recommended here may not produce more heroes, but it may save the lives of more civilians.

