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Terrorism and the Laws of War

Eric A. Posner*

Do the laws of war apply to the US-led “war on terror”? There are several positions. (1) The laws of war do apply and to the same extent that they apply in regular wars. (2) The laws of war do not apply; the US military has a free hand. (3) The laws of war apply but in modified form.¹

This disagreement matters because the laws of war, if they do apply, could interfere with current US policy. If position (1) is correct, and a captured al Qaeda suspect is considered a prisoner of war (“POW”), he has the right to receive humane treatment, to have contact with humanitarian organizations, and to have various procedural protections in case he is tried for war crimes.² At the end of the “war,” he must be repatriated. All or many of these consequences conflict with current US policy.³

Some people take position (2). They argue that because the “war on terror” is a special kind of war, the ordinary laws of war—which were designed for regular interstate wars, not wars against terrorist organizations—have no or

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¹ There is a fourth position: The laws of war do not apply because the “war on terror” is an ordinary criminal enforcement action; instead, the relevant constitutional and criminal laws apply (both foreign and domestic). For a discussion, see generally Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 *Yale J Intl L* 559 (1999) (written before Sept 11, 2001); Noah Feldman, *Choices of Law, Choices of War*, 25 *Harv J L & Pub Poly* 457 (2001–02); Ronald J. Sievert, *War on Terrorism or Global Law Enforcement Operation?*, 78 *Notre Dame L Rev* 307 (2002–03); Peter Spiro, *Not War, Crimes* (FindLaw Sept 19, 2001), available online at <http://writ.news.findlaw.com/commentary/20010919_spiro.html> (visited Oct 17, 2004).

² For skepticism about whether denying POW status makes much of a difference, see Derek Jinks, *The Declining Significance of POW Status*, 45 *Harv Intl L J* 367 (2004).

³ The US government has tried to evade these consequences by classifying members of al Qaeda as “unlawful combatants.” For a general discussion of the international lawfulness of such a classification, see Symposium, *Agora: Military Commissions*, 96 *Am J Intl L* 320 (2002).

limited relevance.⁴ On this view, US authorities can treat al Qaeda suspects however they want, subject only to the minimal constraints in general human rights treaties.

I will argue for a position somewhere between (2) and (3). The laws of war might sensibly be applied to conflicts between states and international terrorist organizations, though most likely in a highly modified form. Currently, there is no reason to think they should be applied to the conflict with al Qaeda, but this may change with time.

My argument has three steps. First, I discuss the purposes of the laws of war, and argue that humanitarian considerations provide only an ambiguous rationale for limiting the weapons and tactics of warfare. Second, I discuss why some weapons and tactics are outlawed while others are not, and argue that humanitarian ideals cannot, by themselves, explain the pattern. The best explanation focuses on the enforceability of laws. I identify two conditions under which belligerents would agree on a law of war, and would be willing to comply with their agreement. The symmetry condition requires that the laws of war generate military advantages for neither belligerent. The reciprocity condition requires that each belligerent have the ability to retaliate when the other belligerent violates the laws of war. Third, I discuss the extent to which these conditions apply to the war on terror. I argue that at present they do not apply at all, but they have applied in other conflicts between governments and international terrorist organizations and could apply to the conflict between the US and al Qaeda in the future.

At the outset, I should make clear that my focus is on the law, and not other considerations that might influence tactics used against enemy states or terrorist organizations. My question is whether the laws of war provide nations with a reason for curtailing strategies and tactics. I do not address the question whether independent moral or pragmatic reasons exist for behaving in ways that are not controlled by international law. For example, one might think that the US has good moral or pragmatic reasons for treating captured al Qaeda members humanely even if one concludes that it is not constrained to do so by the laws of war.

I. THE PURPOSE OF THE LAWS OF WAR

Laws of war have existed since ancient times. The Greeks recognized a rule prohibiting armies from pursuing defeated enemy armies. Soldiers in the Middle

⁴ Compare Kenneth Anderson, *Who Owns the Rules of War?*, NY Times Mag 38 (Apr 13, 2003) (arguing that the laws of war need to be rethought in light of the increasing “asymmetry” of armed conflict).

Ages granted quarter to enemy soldiers who threw down their weapons. Laws of war were, until recently, not formally codified in treaties or conventions, but had evolved as custom. By the end of the nineteenth century, the major states agreed that the laws of war that were then recognized ought to be more clearly specified in treaty instruments. Conventions were called in The Hague, and then in Geneva; these conventions yielded, at intervals, instruments that together record the modern laws of war.⁵

The laws of war, as they are currently understood, can be divided into general principles and specific rules. The principles hold that soldiers may target only enemy soldiers and other military objectives, and not civilians or civilian property; that incidental damage to civilians and their property should not be disproportionate to the value of the military target; and that weapons and tactics used even against military targets should not cause unnecessary suffering.

These principles are reflected in various specific rules. An early rule against the use of dum dum bullets seems to have been based on the premise that their military justification—stopping a soldier—could be accomplished with an ordinary bullet, and the dum dum bullet caused unnecessary bodily damage.⁶ A similar idea underlies rules against the use of poison gas, blinding laser weapons, and explosives that produce microscopic projectiles that cannot be detected by doctors. Recent efforts to outlaw land mines rest on the argument that these weapons' harm to civilians outweighs their military value. Rules against the destruction of military hospitals and execution and mistreatment of POWs reflect the principle that suffering should be limited to what is necessary for achieving legitimate military objectives.⁷

The traditional statement in favor of laws of war is that they serve humanitarian principles.⁸ Wars are brutal and awful; it would be better to minimize the suffering by requiring soldiers to follow a minimal set of rules. It is better for soldiers to take prisoners than to execute enemies who surrender; it is better to treat POWs well than to starve and torture them; it is better to spare civilians than to kill them.⁹

⁵ On the history, see generally Geoffrey Best, *War and Law Since 1945* (Clarendon 1994); Geoffrey Best, *Humanity in Warfare* (Columbia 1980); Michael Howard, George J. Andreopoulos, and Mark R. Shulman, eds, *The Laws of War: Constraints on Warfare in the Western World* (Yale 1994).

⁶ See Eric A. Posner, *A Theory of the Laws of War*, 70 U Chi L Rev 297, 298 (2003).

⁷ See Christopher Greenwood, *The Law of Weaponry at the Start of the New Millennium*, in Michael N. Schmitt and Leslie C. Green, eds, *The Law of Armed Conflict: Into the Next Millennium* 185, 189–90 (Naval War College 1998).

⁸ See id at 189.

⁹ See generally Best, *Humanity in Warfare* (cited in note 5).

As attractive as these ideas are, they are vulnerable to diverse criticisms. One problem is that war itself is brutal and horrible, and if laws of war are enforceable, why limit them to the scope of the principles described above? Why not outlaw war altogether, or limit it to a duel between chosen representatives of each side, as was tried (unsuccessfully) by the Greeks and the Trojans in *The Iliad*? And if this is unrealistic, then why think that the existing laws of war can exert any force in the first place? The implicit assumption of the laws of war is that the evils of war can be lessened but cannot be eliminated. However, the idea of humanitarianism is too vague to provide an explanation for the lines that are drawn.

A second problem with the humanitarian theory is that the laws of war apply equally to both (or all) sides of the dispute, and thus indifferently to the aggressor and its victim. In theory, the French should have complied with the laws of war to the same extent as the Nazi invaders, but if aggression was initiated by the Nazis, why shouldn't the prospect of foreign occupation and Nazi tyranny justify the use of all means necessary to resist the invasion, including the mass killing of German civilians? Indeed, by the end of the war, the British and the Americans had concluded that mass killing of enemy civilians was justified for ending the Nazi menace, even if it was formally a violation of the laws of war.¹⁰ This problem was recognized as early as Grotius, who appeared to believe that the belligerent with the just cause was not constrained by the principle of proportionality.¹¹

Third, a more humane war may be one that is more likely to occur and more likely to persist once it begins. One argument in favor of area bombing during World War II was that it would demoralize German citizens and end the war earlier. Thus, the short-term costs would be high, but in the long term fewer soldiers and citizens would die than if targeted bombing was used. This was also the justification for dropping atom bombs on Hiroshima and Nagasaki. And during the cold war, reliance on nuclear weapons was justified for their deterrent value: no war would occur just because the weapons were so inhumane.

¹⁰ The issue arose again during the Kosovo intervention when human rights groups complained that NATO's use of high altitude bombing protected pilots at unreasonable expense to civilians who were killed or injured by errant bombs. See, for example, Amnesty International, "*Collateral Damage*" or *Unlawful Killings?: Violations of the Laws of War by NATO during Operation Allied Force 18–20 (June 2000)*, available online at <[http://web.amnesty.org/library/pdf/EUR700182000ENGLISH/\\$File/EUR7001800.pdf](http://web.amnesty.org/library/pdf/EUR700182000ENGLISH/$File/EUR7001800.pdf)> (visited Oct 17, 2004). The relevant question is, if you think that the Kosovo intervention was justified on humanitarian or security grounds, but think that American public opinion would not have tolerated an air campaign that resulted in nontrivial casualties to American pilots, should the American government have chosen not to intervene in order to avoid violating international humanitarian law?

¹¹ See Judith Gail Gardam, *Proportionality and Force in International Law*, 87 Am J Int'l L 391, 396 n 30 (1993).

These considerations suggest that the humanitarian contribution of the laws of war is ambiguous. The laws may make war more humane by depriving soldiers of destructive weapons and tactics; but they may make war less humane by prolonging it, and they may make the world less secure by making war more attractive. How these tradeoffs should be evaluated is a difficult question that I have addressed elsewhere and will not repeat here.¹² For the purpose of this paper, I will assume that a proper evaluation of the tradeoff would not indicate that laws of war are undesirable, and that some laws of war—moderate or expansive—are optimal.

My focus from now on is enforceability. Many proposed laws of war, though desirable in the abstract, are not created because states will not agree to them or because they are not enforceable. Part II addresses this problem.

II. SYMMETRY AND RECIPROCITY

As noted earlier, the ideal of humanitarianism does not explain why some weapons and tactics are outlawed and others are not. The ideal has no natural stopping point: it suggests that all weapons and tactics should be outlawed, which in turn implies that war itself should be outlawed. But the premise of the laws in war—*jus in bello*—is that wars themselves are going to occur, whether or not they are outlawed. So we have an empirical and normative puzzle. The empirical puzzle is why some weapons and tactics are outlawed but not others, even though they are all inconsistent with humanitarianism. The normative puzzle is, why should humanitarianism stop short of abolition of war?

The answer to both puzzles is the same: states will agree to limits on warfare and will comply with those limits only under certain conditions. This Part discusses two of these conditions: symmetry and reciprocity.

Initially, we need to understand what exactly the laws of war accomplish from the perspective of the states. Suppose that two states are at war, expect the war to end some day, and prefer to minimize their own losses. Everything else being equal, the ultimate winner would rather win at less expense of blood and treasure than at greater expense; the ultimate loser would also rather lose at less expense rather than at greater expense. Thus, even though the states are at war, they share an interest in minimizing their losses. The problem for each state is that it can minimize its own losses only by persuading the other state to use less, rather than more, destructive weapons and tactics. But, given that the states are at war, how can one state persuade the other to use less force?

The answer is that, in theory, the states can implicitly agree on joint limits on the use of force as long as the limits make both states better off, each state

¹² See generally Posner, 70 U Chi L Rev at 297 (cited in note 6).

can credibly threaten to retaliate against the other state for violating the limits, and each state cares enough about the future. The strategic problem is similar to the prisoner's dilemma, and the solution is the same: mutual threats of retaliation.¹³ But there must be limits to cooperation; why, otherwise, have the war in the first place, or not end it early rather than merely limit the use of weapons?

This brings us to what I will call *symmetry* and *reciprocity* conditions. These conditions are probably necessary for self-enforcing laws of war; I doubt they are sufficient, however.

The *symmetry* condition says that a law of war can be self-enforcing, and indeed possible in the first place, only if it gives an advantage to neither state in the conflict. It must be neutral as between them.

Let me provide two examples. Prior to World War II, the great powers discussed banning submarine warfare and certain kinds of sea mines. Britain favored such a rule, but other states—such as France—opposed it.¹⁴ The Great Powers also discussed banning poison gas, did so, and (for the most part) did not violate the rule.¹⁵ What accounts for this difference?

The best answer is that a ban on submarine warfare and sea mines would have provided an advantage to one state; the ban on poison gas did not. Because every major state had the capacity to manufacture and deploy poison gas, the ban benefited all while not clearly providing an advantage to any state. Thus, a ban was possible and turned out to be self-enforcing during World War II as between the major belligerents. By contrast, although France and Britain both would have benefited from a ban on submarine warfare because such a ban would have protected their commercial shipping, Britain would have benefited much more than France would have, and this would have given Britain an advantage over France in a war (or, more likely, normal colonial competition). Britain relied more on commercial shipping than France did, and Britain's naval superiority would have been vulnerable to the new threats posed by submarines. In the poison gas case, the gains were equal, giving no one a *relative* gain; in the

¹³ The actual strategic setting is more complicated. There most likely will be asymmetric information, for why would the states go to war unless there were some kind of bargaining failure? The asymmetric information problem that results in war may explain why states are unable, during the war, to make deals limiting the kinds of weapons and tactics they can use. Agreeing to laws of war prior to the war makes such bargaining unnecessary, but then asymmetric information may interfere with the threat of retaliation in case of violation of the laws, which then makes cooperation difficult. I am assuming that the decision to go to war is a rational choice. See generally James D. Fearon, *Rationalist Explanations for War*, 49 *Intl Org* 379 (1995).

¹⁴ See Jeffrey W. Legro, *Cooperation under Fire: Anglo-German Restraint during World War II* at 37 (Cornell 1995).

¹⁵ See Best, *War and Law Since 1945* at 306–07 (cited in note 5).

submarine warfare case, the gains, while positive for both sides, would have been unequal, giving Britain a relative gain vis-à-vis France, Germany, and other countries.

These examples are relatively clear, but symmetry is always a matter of context, and often the relative gains of a rule are hard to identify and vary between different pairs of belligerents. Requiring humane treatment of POWs, for example, may seem symmetrical, but in practice it may not be for various reasons. For example:

1. Some states have, for internal reasons, a long history of treating POWs well, so a new rule does not require any changes to practice or culture; other states do not. The rule benefits the first group more than the second.

2. Some states turn out to have logistical advantages. If one state captures POWs in its territory, for example, it may be easier to treat them humanely than a state that captures them on hostile territory at the end of long supply lines. The rule benefits the first state more than the second.

3. Some states might believe that treating POWs well is a good way to get them to surrender, while other states might believe that treating POWs poorly is a good way to demoralize the belligerent and persuade it to sue for peace. The rule benefits the first state by not requiring it to act differently from the way it thinks is militarily appropriate; the rule hurts the second state.¹⁶

As a result, one finds a complex pattern in the treatment of POWs reflecting all of these factors. I will say more about this in a moment.

Let's turn to the second condition for self-enforcing laws of war, which is *reciprocity*. By this I mean that if a belligerent violates the laws of war, the opponent both has the capacity and an interest in retaliating by violating the same rule or some other rule. Reciprocity exists only when a war is ongoing, the outcome is unclear, all belligerents share an interest in keeping the war limited, and all belligerents have the ability to constrain those who fight under their flag.

Reciprocity requires that each state maintain an effective military authority that can both ensure that its own soldiers obey the laws of war and that an appropriate response—generally, retaliation—can be made when the other state violates the laws of war. When a war is about to end, and the enemy is in disarray, the other state has less reason to obey the laws of war because the losing state is powerless to retaliate: thus, pillage and looting are more likely to result than otherwise. And when one state violates all the laws of war—if it adopts a scorched earth policy—then it loses the ability to retaliate against the other state when that state violates the laws of war, as it cannot adopt more

¹⁶ For a discussion of these and related factors, see generally James D. Morrow, *The Institutional Features of the Prisoners of War Treaties*, 55 *Int'l Org* 971 (2001).

extreme tactics than those that it already uses. In a limited war, both states exercise self-restraint so that they have a way of retaliating if the other state fails to exercise restraint.

Reciprocity helps to explain the single most ineffective area of the laws of war: the laws of occupation. In no case since World War II has a state declared that the laws of occupation are applicable to a particular occupation—the only exception being America’s current occupation of Iraq.¹⁷ The reason is that a conquered state has no power to retaliate against the conqueror for violating the laws of war. There is no reciprocity.

Reciprocity is intuitive but frequently misunderstood. One often hears the following complaint about a particular violation of the laws of war—say, the American abuse of detained Iraqis during the recent war in Iraq: “Because the US has violated the laws of war by torturing POWs and civilians, we can expect that in its next war the US’s enemy will torture American POWs.” The logic here is dubious. Suppose that the US’s next war is with North Korea. There is no reason to believe that North Korea will torture American POWs *because* US forces tortured Iraqis. After all, if North Korea tortures American POWs, it can expect the US to retaliate in some way. North Korea has no interest in vindicating the rights of Iraqis; its interest is in limiting (or not) its war with the US.

What is true is that if the US and North Korea are at war, the US may want to treat North Korean POWs humanely in the hope that North Korea will reciprocate and treat American POWs humanely. This is the true sense in which reciprocity may function to the benefit of both sides.¹⁸

The symmetry condition and the reciprocity conditions overlap somewhat, but they are intended to capture distinct phenomena. The symmetry condition says that the law must give an advantage to no party. The reciprocity condition says that one party must be able to retaliate if the other party violates the law. If it cannot, this is usually because it has already been defeated (as in the case of occupation) or it is not a well organized army (as in the case of civil wars involving guerillas and irregulars, in some cases).

¹⁷ See Eyal Benvenisti, *The International Law of Occupation* 182 (Princeton 1993).

¹⁸ Note that there will often be divergence between the formal laws of war agreed to in advance of war and the “law in action” as the war progresses. This happens because during wars weapons and tactics evolve quickly and unpredictably, rendering earlier judgments irrelevant. For example, during World War I, when the British imprisoned German U-boat crews for war crimes, the Germans responded by imprisoning a group of British officers. Eventually, the British gave in: they could not deter the Germans from their U-boat tactics because they valued humane treatment of their captured soldiers more than any gains from imprisoning U-boat crews. See Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* 61–62 (Princeton 2000).

III. THE WAR ON TERROR

There are two polar responses to the problem of applying the laws of war to international terrorism. One response is that the laws of war apply with full force against terrorists. This view is reflected in the 1977 protocols to the Geneva Convention, which many states, but not the United States, have ratified. Under the 1977 protocols, nearly everyone picked up in a theater of combat is entitled to protection of the laws of war.¹⁹ People guilty of war crimes—including terrorists who blow up civilians—would, under these laws, be entitled to various procedural protections. They could be punished for their crimes, but not otherwise treated any differently from regular soldiers.

The opposite response is that no laws of war should apply to a state's military operations against terrorists. This view is based on two misunderstandings about terrorism. The first is that it is purely destructive and has no political aim. Most terrorist groups have a specific political aim—in the case of al Qaeda, the elimination of American military forces from Arab lands and possibly the elimination of Western influence in the Middle East.²⁰ This is a coherent political aim, and it could be satisfied if the US adjusted its strategic priorities. The second misunderstanding is that terrorists are not amenable to reason and are unable to exercise self-discipline. Terrorist groups frequently respect certain rules or enter *modi vivendi* with particular governments.²¹ They grant immunity to message-bearers, for example, and restrict their activities to certain targets. Often terrorists seek to force governments into negotiations, and they respect certain ground rules the violation of which would make negotiation impossible.²² In many cases—including in Spain, Italy, Northern Ireland, and South Africa—terrorist organizations have evolved (albeit in some cases, only

¹⁹ Protocol Additional to the Geneva Conventions of Aug 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art 48, 1125 UNTS 3, 25 (1977).

²⁰ See National Commission on Terrorist Attacks Upon the United States, *The 9/11 Commission Report* 47 (2004), available online at <<http://www.9-11commission.gov/report/index.htm>> (visited Nov 15, 2004).

²¹ Religious terrorists may be undeterrable because they are motivated by religious duties. See Bruce Hoffman, *Inside Terrorism* 168 (Victor Gollancz 1998). They are also more violent. *Id.* at 93. But they have aims that they are pursuing using rational means, and this is true for terrorists generally. *Id.* at 183.

²² Hoffman provides some examples. Israel and the PLO exchange prisoners; other states and terrorist organizations have done so as well. *Id.* at 67, 133–35. Terrorist organizations sometimes try to avoid harming civilians, focusing on soldiers and officials instead. *Id.* at 164.

partially) into political organizations that reached a settlement with the government.²³

It is true that terrorist groups do not act like most states, but states themselves are highly diverse, and sometimes the governments of states and terrorist organizations are hard to distinguish. Many such states do comply with many rules of international law, even as they sponsor or engage in terrorism. If ordinary states can be expected to comply with the laws of war while fighting each other, then quasi-states, terrorist states, rogue states, and state-like terrorist organizations may be expected to do so as well.

Laws of war are possible between states and terrorist organizations for the same reason that they are possible in interstate disputes. Although each side has an interest in defeating the other side, each side also has an interest in minimizing its own losses prior to victory or defeat, as the case may be. When each side can curtail its use of destructive tactics against the other side, can benefit from the other side doing the same, and does not, in doing so, confer a military advantage to the other side, then self-enforcing limitations on conduct are possible.

But there is a difference between saying that the laws of war could apply to states fighting terrorists and saying that the existing laws of war—those that have evolved to deal with limited wars between roughly equal states—will apply. The premise of acknowledging a body of laws of war is that the belligerents have a reason to comply with them. However, one expects that the body of laws that two ordinary states would respect would be different from the body of laws that a state and a terrorist organization would respect in their violent dealings with one another.

Indeed, one might argue that the dealings between governments and different terrorist organizations are too heterogeneous to be covered by a single code of law. We might prefer to isolate the bilateral relationships between particular governments and particular terrorist organizations, identify the conventions that evolved to regulate conflict between them, and leave it at that, rather than refer to a broad code that governs the relationships between all governments and all terrorist organizations but is frequently violated. This is reasonable, but one could say the same thing about the relationships between states that engage in limited war; these are surely just as heterogeneous. What matters is not the label one uses but the substance of the laws, conventions, or *modi vivendi* that arise—or that ought to arise—as states and terrorist organizations struggle with each other.

²³ See Michael von Tangen Page, *Prisons, Peace and Terrorism: Penal Policy in the Reduction of Political Violence in Northern Ireland, Italy and the Spanish Basque Country, 1968–97* at 164–68 (St Martin's 1998).

The question is, given that terrorism exists, what rules should govern the military conflict between terrorists and governments?

The first point to recall is the constraint of symmetry. Any rule that provides an advantage to government or terrorist will not be respected. The outlawing of terrorist methods is the extreme example: governments can outlaw terrorism but cannot expect terrorists to pay attention.

As another example, consider the prohibition on coercive interrogation of POWs. This rule has not always been respected during regular wars, but it has been respected at times. When each belligerent benefits more from the humane treatment of its soldiers by the enemy than it loses from being deprived of the fruits of interrogation, and—crucially—each party can monitor the other's performance either through intermediaries like the Red Cross or through reports from escaped or rescued POWs, then the rule is, in principle, self-enforcing. And even if each state may cheat a little on the margins, it does seem that the laws of war have improved the treatment of POWs during some wars.²⁴

But now we must ask ourselves whether the US could benefit from a similar implicit deal with al Qaeda. The answer is probably not. Al Qaeda does not currently hold American soldiers as prisoners, and if it ever does, it seems highly unlikely that it would refrain from torturing and killing them, regardless of how the US treats captured al Qaeda members. The problem is that, at the present time, al Qaeda would gain less by sparing Americans, if it had any, than the US would gain by sparing al Qaeda prisoners. The al Qaeda–US conflict is not symmetrical in the way that an ordinary war is: the US cannot expect to gain any benefits from al Qaeda by treating al Qaeda prisoners in a humane manner given al Qaeda's demonstrated ferocity in its treatment of enemy civilians.

Thus, the symmetry condition is violated; it may be that the reciprocity condition is violated as well. Suppose that both the US and al Qaeda believed that both would be jointly, and equally, better off if they agreed (implicitly) to treat prisoners humanely. The question now is whether each party can credibly promise to comply with the deal as long as the other party does. We know that the US could; but we do not know if al Qaeda could. It depends on whether the al Qaeda leadership can exercise discipline over all those who see themselves as carrying its banner. On one hand, some view al Qaeda as a relatively coherent organization, and it may be that Osama bin Laden and other leaders can control the activities of its members. If so, reciprocity is met; al Qaeda could engage in self-restraint in return for American self-restraint. On the other hand, many people think of Islamic terrorism as a more diffuse phenomenon, and it is doubtful that any one person or organization controls the activities of members.

²⁴ See Morrow, 55 *Intl Org* at 971 (cited in note 16).

If so, reciprocity is not met. The practical problem is just that al Qaeda's leaders would not be able to prevent members from treating prisoners inhumanely. If so, then the US has no incentive to enter a deal with al Qaeda.

This discussion is only illustrative, but one clear implication is that the "laws of war" between states and terrorist organizations are likely to be highly context-specific.

IV. CONCLUSION

Most writing on the application of the laws of war to conflicts with terrorist organizations is formalistic: the laws are taken for granted, and then doctrinal analysis is used to determine whether various tactics against al Qaeda are covered or not. My approach, by contrast, is to identify the underlying purpose of the laws of war, and then see the extent to which they apply to terrorist organizations, including al Qaeda. I conclude that some terrorist organizations are similar enough to states—they have enough power and organization, and they have political goals that the target state may be willing to accommodate—that it makes sense for a government and the terrorist organization to try to limit the violence through the application of the laws of war, even as they try to work out a political solution in the context of an ongoing military conflict. It does not appear that the conflict between al Qaeda and the US has reached this stage, though it may in the future.

In the meantime, I conclude that the US should not consider itself governed by the laws of war in its conflict with al Qaeda, as they are normally understood, but it should be alert for opportunities for creating implicit norms of conduct that serve the American interest.²⁵ If such opportunities arise, the traditional laws of war may serve as a useful source for creating these norms.

²⁵ It might be politically sensible to evade the laws of war through aggressive "interpretation" of its provisions, rather than declaring as a matter of policy that the US will not regard them as conferring protections on members of terrorist organizations even if, under a proper interpretation of the law, they do. Alternatively, the US might declare that such laws do not apply to terrorist organizations unless those organizations commit to respect its substantive provisions regarding the treatment of prisoners, civilians, etc.