

# SUBOPTIMAL HUMAN RIGHTS DECISION-MAKING

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## ABSTRACT

*The literature on human rights generally assumes that when a state fails to comply with human rights norms, it is because the state's leaders rationally determined that a violation would maximize the state's expected utility. Strategies for improving compliance accordingly focus on altering a state's expected utility calculation either through coercion, which seeks to introduce external incentives that make compliance more attractive, or persuasion, which seeks to recalibrate a state's underlying preferences. A wide array of social science research, however, has demonstrated that human beings regularly make suboptimal decisions that fail to maximize their expected utility. This so-called behavioral research has had a significant impact on domestic law scholarship, but its implications for human rights, as well as for international law more broadly, have not yet been adequately explored.*

*This Article begins that long-overdue conversation by showing that states may in some instances have an interest in complying with human rights norms but fail to do so as the result of suboptimal decision-making by their leaders. In particular, this Article explores how three strands of social science research—on prospect theory, overconfidence, and emotion-based decision-making—have been applied to state leaders in international relations scholarship and can be extended to help explain suboptimal decisions in the human rights context. In doing so, this Article also addresses (without attempting to conclusively resolve) some of the major methodological objections to such a project by collecting the most recent available research on the extent to which experimental findings about individuals in laboratories can be translated into predictions about state behavior. Two more detailed examples are then provided to illustrate how suboptimal decision-making may have contributed to human rights violations in real-world scenarios. Finally, this Article identifies several steps the human rights community can take, beyond coercion and persuasion, to capitalize on existing incentive structures and find ways to ensure that states that already have an interest in complying actually do so.*

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INTRODUCTION

Country *A* has a long tradition of respecting and promoting human rights. A recent spate of terrorist attacks, however, has created unease among the citizenry about national security concerns. In response to these concerns, the government enacts a series of measures that enhance its power to prosecute suspected terrorists and their allies at the expense of civil liberties. Human rights nongovernmental organizations (NGOs) and other members of the international community criticize these measures as an unacceptable infringement upon individual rights of speech and association.

Country *B* has no tradition of valuing human rights. Its current leaders, however, have signed and ratified a number of international conventions because doing so enhances the country's reputation among potential trading partners and providers of aid. The ruling party in country *B* has a longstanding conflict with an ethnic minority group, which has recently escalated into violent skirmishes between rebels and state security forces. As a result, the government begins arresting and detaining members of the minority group without evidence and authorizes its security troops to use forceful methods to quell protests.

With only the limited information provided above, both of these scenarios can be readily explained in terms of a rational actor model, meaning that the leaders of both *A* and *B* could have made decisions that maximized the expected utilities of their respective countries. Although the leaders of country *A* may have a general preference for respecting human rights, they could have made a rational calculation that security interests outweighed that preference at a particular moment in time. Likewise, although the leaders of country *B* may see human rights compliance as desirable from an instrumental perspective, they could have made a rational determination that the course of action they adopted would have more benefits in their domestic conflict than any accompanying costs to the country's international reputation.

Importantly, however, both of these scenarios could also have involved suboptimal decision-making, meaning that the leaders of *A* and *B* actually failed to maximize the expected utilities of their respective countries. In the case of country *A*, it could be that a differ-

ent balancing of liberty and security would have adequately protected civil and political rights without substantially sacrificing national security objectives. Likewise, in the case of country *B*, it could be that the reputational benefits to be gained from a more conciliatory approach to the domestic conflict would have outweighed the strategic benefits gained from a retaliatory approach. In short, for both countries compliance with human rights could have been the optimal course from the standpoint of maximizing utility.

The goal of this Article is to bring attention to the possibility of suboptimal decision-making in the human rights context and to begin a conversation about what can and should be done about it. Much of human rights scholarship and practice is still premised on the assumption that violations result from utility-maximizing behavior. This limited perspective is apparent in the assumptions behind the two leading strategies for influencing human rights compliance: coercion and persuasion.<sup>1</sup> Both types of strategies seek to improve compliance by altering a state's expected utility calculation. Coercion strategies attempt to introduce additional material incentives into that calculation designed either to make compliance more beneficial or violation more costly.<sup>2</sup> Country *A* could thus be coerced into complying with international norms on speech and association rights if the new incentives meant that compliance would now yield the most net benefits. Persuasion strategies, on the other hand, attempt to recalibrate the existing components in a state's expected utility calculation by reshaping the state's underlying preferences to give greater weight to human rights concerns.<sup>3</sup> Country *B* could thus be persuaded to comply with international norms on arrest and detention if the international community could convince *B*'s leaders of the importance and validity of these norms.

What is overlooked by coercion and persuasion strategies is the possibility of improving compliance within a state's existing incentive structure. It is undoubtedly true that many human rights violations result from utility-maximizing behavior, and for those violations the only options for improving compliance would be to alter the state's incentives and change its underlying preferences. As I hope to demonstrate, however, it is likely that at least a subset of human

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1. See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 633-38 (2004) (describing these two mechanisms of social influence). Goodman and Jinks describe a third mechanism of social influence, acculturation, by which behavioral changes are induced "through pressures to assimilate." *Id.* at 638. For purposes of this Article, I set acculturation aside because it overlaps sufficiently with the other two mechanisms at least in the aspects with which the present discussion is concerned.

2. *Id.* at 633-34.

3. *Id.* at 635-38.

rights violations result from what would properly be deemed suboptimal decision-making. That is, at least some human rights violations are committed because a state's leaders fail to recognize that compliance would actually be optimal in light of the state's existing incentives and preferences. And if that is correct, then other measures, beyond coercion and persuasion, may be needed to address such abuses. In short, there may be opportunities for the human rights community to improve compliance by ensuring that states that already have an interest in complying actually do so.

Social science research in disciplines like behavioral economics and cognitive psychology has shown that real, live human beings regularly fail to make decisions consistent with what a rational actor model would predict.<sup>4</sup> A rational actor model assumes that individuals make decisions by consciously calculating the expected utility of competing choices and opting for the course that maximizes their utility. Empirical studies of people observed in both laboratory and real-world settings, however, suggest that individuals depart from this model in a number of ways. To take just one example that will be explored further below, people have a tendency to treat prospective losses and gains asymmetrically in their decision-making process. Although a rational actor model predicts that individuals would invest equally to avoid a ten-dollar loss and to acquire a ten-dollar gain, in fact they tend to be more motivated by the prospect of the former than that of the latter.<sup>5</sup>

The existence of such obstacles to complete rationality is uncontroversial, and outside of international law this so-called behavioral research has had a significant influence on legal scholars already. Some critics may dispute the extent or prevalence of particular biases,<sup>6</sup> or contend that they are of limited value to policymaking,<sup>7</sup> but the basic point that humans sometimes make suboptimal decisions is

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4. See generally Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000) (describing the social science research and various potential applications to legal theory).

5. See *infra* Part II.B.1.

6. See, e.g., Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1570 (1998) (questioning the "empirical robustness of behavioral economics").

7. These objections take a variety of forms. One is that the evidence is incomplete or otherwise inconclusive. See Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 73-74 (2002). Another is that the research does not provide a sufficiently systematic understanding of human behavior to guide policymaking. See *id.* at 71-72. A third is that, even assuming suboptimality could be systematically understood, there may be unintended consequences of paternalistic governmental intervention. See Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 MINN. L. REV. 1620, 1622-23 (2006).

now widely accepted.<sup>8</sup> The question, then, is whether and how this research can inform efforts to promote human rights compliance. This Article aims to spark that conversation.<sup>9</sup>

There are reasons for caution. Apart from the objections that scholars have made to the broader behavioralist project, a further reason that this research has not yet been adapted to the human rights context specifically is the uncertainty regarding how individual-level biases mostly observed in laboratories can be applied to analyze the real-world behavior of leaders acting on behalf of states. Recent work by international relations scholars, however, has seen at least some progress in attempting to make that translation. Thus, apart from the particular insights this discussion may have for human rights policy and practice, a further contribution I hope to make here is to collect recent research from the international relations literature on suboptimal decision-making by state leaders and begin a broader conversation about its implications for international law in general.<sup>10</sup>

Part I begins by describing the existing human rights regime, including the major strategies for improving compliance and the extent to which they have succeeded. Part II then explains the concept of suboptimal state decision-making and identifies three lines of social science research that I believe are most likely to have useful implica-

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8. See Joshua D. Wright, *Behavioral Law and Economics, Paternalism, and Consumer Contracts: An Empirical Perspective*, 2 N.Y.U. J.L. & LIBERTY 470, 471-72 (2007) ("Although some scholars have challenged this empirical literature, they have not generally denied the existence of cognitive biases, or the possibility that behavioral models might have greater predictive power than neoclassical models under some conditions." (citation omitted)).

9. Legal scholars have applied other aspects of the behavioral literature to human rights concerns. Andrew Woods, for example, has explored how human rights regimes might be adapted to go beyond their present focus on influencing unitary actors and take account of new research on how broader contextual factors shape social change. See Andrew K. Woods, *A Behavioral Approach to Human Rights*, 51 HARV. INT'L L.J. 51, 53 (2010). A recent volume edited by Woods, Ryan Goodman, and Derek Jinks collects interdisciplinary essays by researchers in psychology, economics, and political science to consider issues such as how human rights change interacts with the development of social norms and how the phenomenon of psychic numbing may pose an obstacle to effective intervention against genocide. See Deborah A. Prentice, *The Psychology of Social Norms and the Promotion of Human Rights*, in UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS 23, 23-46 (Ryan Goodman, Derek Jinks & Andrew K. Woods eds., 2012); Paul Slovic & David Zions, *Can International Law Stop Genocide When Our Moral Intuitions Fail Us?*, in UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS, *supra*, at 100-34.

10. Two recent works have undertaken a similar project, though they survey international law generally rather than focusing on human rights. See generally Anne van Aaken, *Behavioral International Law and Economics*, 55 HARV. INT'L L.J. 421 (2014) (applying the behavioral law and economics approach to questions of treaty design and international law compliance); Tomer Broude, *Behavioral International Law*, 163 U. PA. L. REV. (forthcoming 2015), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2320375](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2320375) (applying behavioral insights to problems in international treaty-making, the structure of international tribunals, and target selection in armed conflict).

tions for human rights. The first is prospect theory, and in particular its prediction that human beings are more motivated to avoid losses than to obtain gains. The second is overconfidence, namely the phenomenon that human beings make overly optimistic assessments of their abilities and prospects for success. And the third is the role of emotions in decision-making, and in particular the idea that human beings view situations through the lens of particular patterns that were formed during emotionally resonant past experiences. For each cause of suboptimal decision-making, I focus on how the concept has been applied to state leaders in international relations scholarship before discussing how similar patterns may illuminate decision-making in the human rights context specifically.

In Part III, I discuss two examples in further depth to illustrate how the various forms of suboptimal decision-making discussed in Part II may have contributed to human rights violations by the United States in the events at Abu Ghraib and by Turkey in its treatment of its Kurdish population. Finally, Part IV proposes some ways in which the human rights community could make immediate gains in improving compliance, without having to alter a state's incentives or preferences, by adopting strategies specifically designed to address the causes of suboptimal decision-making.

In highlighting the problem of suboptimal decision-making for human rights, this Article ultimately seeks to supplement rather than displace existing reform agendas. As noted above, I would not dispute that many human rights violations are the result of rational decision-making, and to prevent such violations it is essential to find ways to strengthen material incentives for compliance as well as to change the hearts and minds of state leaders who place little value on human rights concerns. But I believe developing strategies to counter suboptimal decision-making is an equally important and complementary task.<sup>11</sup> It is equally important because at least some conceivable measures to address the causes of suboptimal decision-making are more realistically achievable and immediately attainable. Coercion strategies often fail because they require substantial resources and political will to succeed,<sup>12</sup> while persuasion strategies are necessarily gradual and will take a significant period of time.<sup>13</sup> While the efforts on those two fronts are ongoing, the human rights community could achieve some more immediate progress by targeting suboptimality barriers specifically. Addressing suboptimality is also

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11. I made two similar points in an earlier project that applied behavioral research to analyze corporate human rights violations. See Note, *Organizational Irrationality and Corporate Human Rights Violations*, 122 HARV. L. REV. 1931, 1934 (2009).

12. See Eric A. Posner, *Human Rights, the Laws of War, and Reciprocity*, 6 L. & ETHICS HUM. RTS. 148, 157-60 (2012).

13. See EMILIE M. HAFNER-BURTON, MAKING HUMAN RIGHTS A REALITY 64 (2013).

generally a complementary strategy because even when coercion and persuasion strategies have succeeded in making compliance the utility-maximizing option, the state's leaders could still go awry and opt for noncompliance as the result of suboptimal decision-making.

In sum, suboptimal decision-making is likely to be an important issue for the human rights project in the short and long term, so while empirical work on the nature and scope of the problem remains to be done, the conversation about its implications should not be delayed.

### I. THE EXISTING HUMAN RIGHTS REGIME

This Part provides a brief overview of the existing human rights regime. I begin by describing coercion and persuasion, the two major categories of strategies for improving compliance, and show how both are focused on altering a state's expected utility calculation. I then discuss the extent to which these strategies have succeeded. The discussion in this Article applies only to the extent that states have an interest in complying with at least some human rights norms. Of course, that condition will be satisfied more often for some states than others, and suboptimality concerns may be of limited relevance to changing the practices of the most repressive regimes. As we will see, however, even repressive regimes may have instrumental reasons to comply in some instances, and thus even their failures to comply could be suboptimal rather than utility-maximizing behavior.

Both coercion and persuasion are attempts to alter a state's expected utility calculation and in that sense work within the rational actor model. The core premise of the rational actor model is that actors seek to maximize their expected utility. This means that they evaluate the costs and benefits of competing options and choose the course that will yield them the most benefit for the least cost.<sup>14</sup> In the context of international relations, a rational actor model would typically apply a simplifying assumption that treats the state (or the state's leaders) as a unitary actor.<sup>15</sup> A state's utility is a function of its interests and preferences, which are typically material in nature, such as wealth and security, but could also be moral in nature, such

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14. Korobkin & Ulen, *supra* note 4, at 1063. As Korobkin and Ulen explain, there are other variants of rationalist theory that make more or fewer foundational assumptions. *See id.* at 1060-66. I focus on what they call the expected utility variant for the sake of simplicity but would note that none of the other versions of the theory would account for the suboptimality concerns raised here. *See id.* at 1066-70 (explaining why the various versions of rationalist theory are either inadequate or implausible or both).

15. *See* JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 6 (2005). Rationalist theorists do not deny that states are composed of diverse individuals with varying interests but conclude that the simplifying assumption does not sacrifice explanatory power. *Id.*

as human rights. A decision is understood to be utility maximizing and therefore rational if it yields more expected net benefits (that is, expected benefits minus expected costs) in relation to the state's interests and preferences than any other option.<sup>16</sup>

Coercion strategies attempt to alter a state's expected utility calculation by introducing additional costs or benefits. For example, if country *X* would like to influence country *Y* to improve compliance with a particular norm, country *X* could threaten sanctions for continued violations or offer additional aid for demonstrated improvements. NGOs may similarly try to change country *Y*'s behavior by shaming its leaders and thereby adding reputation costs to the equation.<sup>17</sup> In this scenario, it is irrelevant whether country *Y* places any independent weight on human rights. Coercion strategies may succeed by incentivizing compliance from a purely instrumental perspective.<sup>18</sup>

Persuasion strategies, by contrast, seek to alter the underlying preferences of a state's leaders. The objective is for "[p]ersuaded actors [to] 'internalize' new norms and rules of appropriate behavior and redefine their interests and identities accordingly."<sup>19</sup> Leaders of other states, as well as members of the broader human rights community, may attempt to persuade a country's leaders that a particular norm is worthy of respect. This can involve linking that norm to other values the country's leaders already hold or using information to attempt to debunk previously held beliefs.<sup>20</sup>

Coercion and persuasion can potentially work together in a complementary fashion, each reinforcing the other (though this will not necessarily be so).<sup>21</sup> Each also has sufficiently serious limitations that

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16. The focus is on *expected* utility, which means that outcomes have to be discounted based on the probability they will occur, because we are asking whether decisions were rational at the time they were made. Thus, a decision could be rational even if it turned out, after the fact, that a different one would have been utility maximizing.

17. Some commentators classify shaming as a persuasion strategy. *See, e.g.*, Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 1, 14 (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999) ("In the area of human rights, persuasion and socialization often involve processes such as shaming and denunciations . . ."). I classify it as a coercion strategy here because, although it may also contribute to persuasion, shaming can have the effect of improving compliance without changing underlying preferences.

18. *See* Goodman & Jinks, *supra* note 1, at 633-34.

19. *Id.* at 635.

20. *See id.* at 636-37 (distilling the persuasion literature into the two subcategories of "framing" and "cuing").

21. *See* RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* 172 (2013) (noting that the different mechanisms of social influence may have negative interactions if one motivation to comply "crowds out" another).



cause many observers to view the overall human rights regime with skepticism. With coercion, the primary challenge is that states may not value the rights of people in other states enough to invest substantial resources in their improvement.<sup>22</sup> Moreover, even when a group of states is willing to invest resources to improve human rights, they face a collective action problem that may prevent them from successfully cooperating to do so.<sup>23</sup>

Persuasion strategies face a different hurdle. While there is no shortage of actors with an interest in and willingness to persuade, such advocacy rarely has an immediate impact. Even proponents of persuasion strategies recognize that they are designed to work over a long period of time through “an iterative process of discourse”<sup>24</sup> and a “repeated cycle of interaction, interpretation, and internalization.”<sup>25</sup> Thus, even under the most favorable assumptions coercion and persuasion are likely to foster only limited and gradual improvements.

Despite the limits just described, it is important to emphasize that the international human rights movement has achieved meaningful progress. Since the modern movement began in 1948 with the adoption of the Universal Declaration of Human Rights, nine major multilateral conventions developed under the auspices of the United Nations have entered into force,<sup>26</sup> and every state in the world is a party to at least one.<sup>27</sup> Of course, a state’s membership in a treaty regime does not necessarily mean its leaders are genuinely committed to the treaty’s principles. Some states may join in the hopes of improving their standing in the international community without any intention of altering their conduct.<sup>28</sup> But the fact that those states join for more opportunistic reasons is at least evidence that other states do genuinely believe in the principles at stake and are willing to reward that participation.

Evidence also supports the conclusion that some states are in fact changing their practices to comply with treaty norms. In an exhaustive empirical study, political scientist Beth Simmons finds correla-

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22. See Posner, *supra* note 12, at 160.

23. See *id.* at 157-59.

24. ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* 25 (1995).

25. Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1411 (1999).

26. See *The Core International Human Rights Instruments and Their Monitoring Bodies*, U.N. HUM. RTS. OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS., <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx> (last visited Feb. 28, 2015).

27. Rachael Lorna Johnstone, *Cynical Savings or Reasonable Reform? Reflections on a Single Unified UN Human Rights Treaty Body*, 7 HUM. RTS. L. REV. 173, 179 (2007).

28. Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71, 119 (noting that some states may “ratify to obtain various material and nonmaterial benefits (such as foreign aid or lower trade barriers) that follow from the act of ratification”).

tions between ratification of particular human rights conventions and improved practices.<sup>29</sup> For purposes of the present discussion, it is irrelevant whether the treaties played a causal role. Even if Simmons' findings reflect only a correlation,<sup>30</sup> meaning that the states that improved their practices were already predisposed to do so, the significant point is that at least some states are endeavoring to improve their human rights practices without apparent material incentives to do so. These are the states that have been successfully "persuaded" at least as to a particular set of human rights norms.

For those states that lack such intrinsic motivation, the remaining question is the extent to which material incentives exist to influence their conduct. At a general level, the answer is discouraging. States can join human rights treaties for the limited signaling value that entails without expecting much in the way of enforcement against them for failures to comply.<sup>31</sup> Human rights violations take place routinely and in the open without triggering any meaningful response by other states. Despite the International Criminal Court's call for an end to impunity,<sup>32</sup> leaders of authoritarian regimes commit atrocities without apparent fear of retribution.

Notwithstanding this bleak overall picture, there is reason to think that material incentives exist for individual states to improve in particular areas. The United States, for example, has several statutes that authorize sanctions against or the withholding of aid from countries that have engaged in a pattern of serious human rights violations.<sup>33</sup> Both the United States and European Union have preferential trade agreements with numerous countries requiring human rights reforms by their trading partners, with the threat of withdrawing economic cooperation as the penalty for noncompliance.<sup>34</sup>

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29. See BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 20 (2009). Simmons finds, for example, that "countries that have ratified the [International Covenant on Civil and Political Rights] are in fact likely to reduce their interference with some civil liberties, such as free religious practice," and that "a government that has committed itself to [the Convention on the Elimination of Discrimination Against Women] is much more likely to improve educational opportunities for girls, employment opportunities for women, and reproductive health care and autonomy for women." *Id.*

30. Simmons herself concludes that the treaties she studied did in fact "contribute to a political and social milieu in which these rights are more likely, on the whole, to be respected," but she emphasizes that her theory is "probabilistic, not deterministic." *Id.* at 21.

31. See Helfer, *supra* note 28.

32. See Rome Statute of the International Criminal Court pmbl., July 17, 1998, 2187 U.N.T.S. 91.

33. See Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 31-48 (2001) (summarizing the statutes and describing instances in which they have been invoked).

34. See EMILIE M. HAFNER-BURTON, *FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS* 16-17, 33 (2009).

Commentators have shown that these tools are not necessarily wielded in a consistent, principled manner against all violators, but instead are deployed when other geopolitical factors support their use.<sup>35</sup> But regardless of the motives of the actors applying the coercion, the significant point for present purposes is that there exist states in the world that place little independent weight on human rights but have instrumental reasons to comply with some norms.

The preceding discussion attempts to establish the modest conclusion that at least some states have an interest in complying with at least some human rights norms. Some may have moral preferences for doing so, while others have only instrumental reasons. In either case, it should be a priority for human rights advocates to ensure that states that have an interest in complying actually do so. Given the likelihood, discussed in the next Part, that state leaders make suboptimal decisions in the human rights sphere as they do in other contexts, it follows that violations are likely occurring that are not utility-maximizing and could thus be prevented with tools other than coercion and persuasion.

## II. SUBOPTIMAL DECISION-MAKING

This Part begins with a Section on some basic issues of scope. I then discuss three particular causes of suboptimal decision-making before separately addressing research on group dynamics in decision-making processes.

### A. *Issues of Scope*

I begin this Section by elaborating the general concept of suboptimality in state decision-making, before more narrowly defining the category of suboptimal decisions with which this Article is concerned. I then address how suboptimality concerns arise in the context of human rights decision-making in particular.

As far as individual actors are concerned, the basic concept of suboptimality is simple: a decision is suboptimal if it fails to maximize the individual's expected utility.<sup>36</sup> The matter becomes more complicated, however, when applied to state action. A broad range of individuals, from high-level policymakers to low-level officers, have the capacity to act on behalf of the state. These individuals have their own interests that may or may not be aligned with the interests of the state. Thus, the most obvious form of suboptimality, which has no parallel in the context of individual actors, is when a single official acts to serve her own interests in a way that fails to maximize the

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35. See *id.* at 14-16.

36. See Korobkin & Ulen, *supra* note 4, at 1069.

state's expected utility. Similarly, because states have complex organizational structures in which authority and information are dispersed among a variety of actors, the combined result of a group of decisions could be suboptimal even when all the individual actors involved made decisions that were rational within their respective spheres.<sup>37</sup>

While those concerns are undoubtedly important, and I return to them briefly in Part IV.A, my focus here is more limited. For purposes of this Article, I define suboptimal decisions as those made by high-level officials that seek and fail to maximize the state's expected utility. A couple of observations will help clarify this definition. First, the definition excludes decisions made by individual officials seeking to advance their own interests at the expense of the state's. Such actions are undoubtedly commonplace, but accounting for them would create a degree of complexity that I could not address within the span of these pages. Second, the focus is on high-level officials because that is consistent with the international community's typical approach, which targets state leaders with reform efforts rather than attempting to reach ground-level officers directly. The category of human rights violations committed by rogue agents is therefore set aside except to the extent that decisions made by state leaders actually contributed to the abuse.

As is evident from those two points, my definition retains some of the rational actor model's foundational assumptions, namely that there is such a thing as state interests and that state leaders do seek to maximize utility in relation to them. Regarding the former premise, I do not offer here a particular model for aggregating the interests and preferences of a domestic population into a discrete and identifiable utility for the state as a whole. For present purposes all that matters is that there is some meaningful concept of state utility that exists apart from the narrower, self-serving interests of a specific leader or group of leaders and against which particular decisions can be evaluated and determined to be rational or suboptimal. Regarding the latter premise, this is, as noted above, a necessary simplifying assumption, but it nonetheless likely describes how many state decisions are made. In other words, it is plausible to assume that a state's leaders are at least sometimes attempting to maximize the expected utility of their state, and the present analysis would be relevant to at least that extent.

Turning to how suboptimality appears in the context of human rights decision-making, two further clarifications are in order. First, suboptimality concerns can arise at different stages in a course of action. For example, state leaders in a planning stage could miscalcu-

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37. See Note, *supra* note 11, at 1937-39.

late which of their available options would maximize their state's utility. In the country *B* scenario laid out in the Introduction, that would mean failing to see that a conciliatory approach to the domestic conflict would have higher net benefits than a retaliatory approach. Alternatively, state leaders may as an initial matter have determined that compliance is desirable, whether for instrumental or moral reasons, yet fail at the stage of execution to fulfill that objective. To illustrate using the country *A* scenario, *A*'s leaders could have made an optimal decision to protect speech and association rights, but then go on to make suboptimal decisions that lead to human rights violations by providing inadequate training or allocating insufficient resources to officers on the ground. As I will explain later, the stage at which errors arise may affect the response that human rights advocates opt to take, but the point for now is that decisions at all stages may properly be deemed suboptimal.

Second, the universe of relevant decisions includes those that implicate human rights both directly and indirectly. A direct human rights decision is one for which human rights concerns are the primary focus. For example, a state may confront the question whether to relax speech restrictions to provide greater rights to its citizens, or vice versa. An indirect human rights decision is one that primarily addresses some other strategic objective but also has human rights consequences. For example, a state may decide to crack down on public unrest primarily to serve the goal of improving social stability, with unintended human rights violations occurring as a result. As with the prior point, this distinction may have implications for how the human rights community should respond, but for basic definitional purposes it is sufficient to note that suboptimality concerns are potentially relevant to both types of decisions.

### *B. Three Causes of Suboptimality*

Decisions could be suboptimal as the result of a wide range of causes, and all of them are at least potentially relevant to human rights. I focus here on three lines of research on suboptimal decision-making, chosen in part because they have been extensively explored in the international relations literature and therefore can more readily be applied to human rights, and in part because they involve forces that seem likely to push actors toward violations rather than compliance.<sup>38</sup> In each of the Subsections below, I will introduce one line of research on a particular cause of suboptimality, with an emphasis on

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38. In principle, suboptimal decision-making could be just as, or more likely, to drive actors toward compliance. As elaborated below, the three causes on which I have chosen to focus seem likely to exacerbate the types of risk-taking and power-seeking behavior that often lead to human rights violations.

how it has been used to analyze the decision-making of state leaders in international relations scholarship.<sup>39</sup> I will then discuss how that research can be applied to understanding the causes of human rights violations.<sup>40</sup>

As noted at the outset of this Article, one of the challenges to this project is that much of the research on departures from rationality has focused on individuals and in particular how they behave in laboratory experiments. The difficulty of translating that research into predictions about how state leaders in the real world will act likely explains why its impact on international law scholarship has been limited. While I cannot attempt to conclusively resolve this difficulty, I will explore the most recent efforts in the international relations literature to bridge this gap and thereby craft an argument for why the research on suboptimal decision-making at least warrants closer attention by international law scholars. I address one aspect of the objection—whether experimental findings on individuals in laboratories can meaningfully predict how state leaders, who are typically experienced elites, will behave in the real world—within each of the Subsections below. I address the second aspect of the objection—whether the fact that state leaders often make decisions in groups rather than as isolated individuals—in a separate Section at the end of this Part.

### 1. Prospect Theory

Prospect theory was first introduced in 1979 by economists Daniel Kahneman and Amos Tversky. Its central tenet is that the value individuals place on an outcome varies depending on the reference point.<sup>41</sup> This tendency reflects a departure from rationality because classical expected utility theory assumes that individuals have fixed preferences that would not vary based on how choices are framed.<sup>42</sup>

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39. I will be briefer in my summary of the basic concepts because they have been discussed at length in numerous other law review articles. For detailed overviews of the major findings of behavioral economics and cognitive psychology and their applications to law, see generally Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998), and Korobkin & Ulen, *supra* note 4.

40. To preview the discussion below, after sketching in the main text how a particular cause of suboptimality could contribute to human rights violations involving certain paradigmatic scenarios, I provide in the footnotes some examples of such violations. My purpose in providing these rough examples is only to show that the paradigmatic scenarios are grounded in real cases, and not to contend that these specific instances necessarily involved suboptimal decisions.

41. See Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q. J. ECON. 1039, 1039 (1991).

42. See ROSE McDERMOTT, *POLITICAL PSYCHOLOGY IN INTERNATIONAL RELATIONS* 69-71 (2004).

One concrete application of prospect theory is the phenomenon known as loss aversion. Experimental research demonstrates that individuals dislike losses relative to a preexisting status quo more than they value identical gains.<sup>43</sup> Because of this aversion, individuals may, for example, be willing to invest more to protect against a prospective loss than to produce the corresponding potential gain.<sup>44</sup>

A corollary of this finding addresses how loss aversion affects people's preferences for risk. Specifically, when people are operating in the realm or domain of gains, meaning that all outcomes are likely to involve some form of gain, they will proceed with particular caution to avoid losses. Conversely, when people are operating in the realm or domain of losses, meaning that all outcomes are likely to include some form of loss, they will engage in riskier behavior in the hopes of obtaining an unlikely gain.<sup>45</sup> Put more simply, individuals are more likely to act cautiously if they are operating from a secure position, while they are more likely to take risks if they are operating from a desperate position.<sup>46</sup>

Related to loss aversion is a phenomenon known as the status quo bias, which describes the tendency of individuals to prefer the existing state of affairs more than expected utility theory would predict.<sup>47</sup> Loss aversion provides at least a partial explanation for this bias in suggesting that individuals will overvalue the expected losses from the change and undervalue the expected gains.<sup>48</sup> As a result, they may fail to make changes that would maximize their utility. An additional reason posited to explain the status quo bias is regret avoidance, namely that people expect to feel greater regret when they suffer negative consequences from action than when they suffer equivalent consequences from inaction.<sup>49</sup> To the extent regret avoidance is at work, it would suggest that the status quo bias would be particularly strong when the consequences of decisions are uncertain.<sup>50</sup>

Loss aversion is one cognitive bias to which state leaders, or at least experienced ones, may be less prone than the individuals who

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43. See Tversky & Kahneman, *supra* note 41, at 1047.

44. See McDERMOTT, *supra* note 42, at 72.

45. See *id.* at 71-72.

46. Rose McDermott & Jacek Kugler, *Comparing Rational Choice and Prospect Theory Analyses: The US Decision to Launch Operation 'Desert Storm', January 1991*, J. STRATEGIC STUD., Sept. 2001, 49, 51.

47. See generally William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7 (1988) (noting that experiments show individuals disproportionately choose the status quo).

48. See Daniel Kahneman et al., *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, J. ECON. PERSP., Winter 1991, at 193, 200.

49. See Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 657 (1998).

50. See *id.*; see also *id.* at 647-60 (discussing other explanations for the status quo bias).

serve as the typical subjects of experimental research. As one group of political scientists concludes from the experimental data, “[e]xperience leads to more symmetrical decisionmaking.”<sup>51</sup> Such research suggests that applications of prospect theory to international relations should proceed with caution, but not that they should be aborted entirely. Indeed, the finding that experienced elites are less prone to loss aversion has a useful takeaway—that the principles of prospect theory should be taken particularly seriously when predicting the behavior of young regimes and inexperienced leaders. Since a significant subset of human rights violations may well be carried out by such actors, these principles should not be overlooked.

Prospect theory has been one of the most influential behavioral insights among those that have been applied to international relations. One basic proposition in the literature is that state leaders “may be more concerned to prevent a decline in their [state’s] reputation or credibility than to increase it by a comparable amount.”<sup>52</sup> Since imposing reputation costs and conferring reputational benefits are among the few effective tools that human rights advocates possess in persuading state leaders to alter their behavior, it is important to be aware that leaders are likely to have a stronger motivation to prevent losses than to achieve gains. Thus, to maximize their influence, human rights advocates seeking to pressure a state’s leaders to take some action should attempt to identify concrete losses that will follow from their failure to do so.

Another set of propositions in the international relations literature draws on the corollary noted above regarding the effect of loss aversion on risk behavior. Jack Levy notes that “[a]fter suffering losses (in territory, reputation, domestic political support, etc.), political leaders have a tendency not to accommodate to those losses but instead to take excessive risks to recover them.”<sup>53</sup> Moreover, excessive risk taking does not depend on losses having actually taken place. It may also follow when people perceive themselves as operating with-

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51. Emilie M. Hafner-Burton, D. Alex Hughes & David G. Victor, *The Cognitive Revolution and the Political Psychology of Elite Decision Making*, 11 *PERSP. ON POL.* 368, 370 (2013).

52. Jack S. Levy, *Loss Aversion, Framing, and Bargaining: The Implications of Prospect Theory for International Conflict*, 17 *INT’L POL. SCI. REV.* 179, 187 (1996).

53. Jack S. Levy, *Prospect Theory, Rational Choice, and International Relations*, 41 *INT’L STUD. Q.* 87, 93 (1997). Janice Gross Stein provides one real-world illustration of this phenomenon. She argues that “President Sadat of Egypt . . . never ‘normalized’ for the loss of the Sinai to Israel in 1967,” and therefore launched a war in 1973 in an effort to recapture the Sinai despite Israel’s obvious military advantages. Janice Gross Stein, *Psychological Explanations of International Decision Making and Collective Behavior*, in *HANDBOOK OF INTERNATIONAL RELATIONS* 195, 199 (Walter Carlsnaes, Thomas Risse & Beth A. Simmons eds., 2d ed. 2012).



in the realm of losses, such that they assume some form of loss is forthcoming.<sup>54</sup>

To illustrate this latter point, as well as to test their hypothesis that novice leaders are more prone to loss aversion than experienced elites, a group of political scientists examined how the George W. Bush Administration dealt with two distinct crises involving North Korea to determine whether its approach changed with the benefit of more experience. In 2002, evidence emerged showing that North Korea had secretly explored a uranium enrichment program in violation of prior treaty commitments.<sup>55</sup> At that time, a significant proportion of the President's key foreign policy advisers lacked crisis bargaining experience and in particular experience with North Korea.<sup>56</sup> And because of the recent 9/11 terrorist attacks and concerns about other states at the time possessing weapons of mass destruction, it is likely that interactions with North Korea were perceived as within the realm of losses.<sup>57</sup> In these circumstances, prospect theory would predict that the Bush Administration would take an overly aggressive, risk-embracing stance.<sup>58</sup> In fact, the Administration did adopt a confrontational stance, cutting off oil shipments that were due under an earlier agreement.<sup>59</sup> By contrast, four years later when the Administration had acquired more experience, its response to a similar crisis in which North Korea tested its first nuclear weapon was more measured.<sup>60</sup> The Bush Administration may well have still been operating in the realm of losses, but its increased level of experience enabled the team "to manage risks more symmetrically."<sup>61</sup>

It is important for the human rights community to understand what leads to excessive risk taking because many human rights violations stem from desperate conduct by state leaders. Government officials of a state that has suffered losses in territory to a regional rival may undertake a risky strategy of escalating the conflict, creating opportunities for human rights abuses by both sides.<sup>62</sup> Leaders of

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54. See Hafner-Burton et al., *supra* note 51, at 374; cf. Levy, *supra* note 53, at 93 ("State leaders take more risks to maintain their international positions, reputations, and domestic political support than they do to enhance those positions.").

55. Hafner-Burton et al., *supra* note 51, at 375.

56. *Id.*

57. *Id.* at 376.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Border conflicts are unfortunately all too commonplace. One that is particularly noteworthy for the human rights concerns involved is the Bosnian War that followed the breakup of Yugoslavia. See Damjan Panovski, Comment, *Some War Crimes Are Not Better Than Others: The Failure of the International Criminal Tribunal for the Former Yugoslavia to Prosecute War Crimes in Macedonia*, 98 NW. U. L. REV. 623, 633-35 (2004).

an authoritarian regime facing domestic uprisings and mounting international pressure may take bold steps to reassert their power or else to establish a position of bargaining strength, resulting in high civilian death tolls.<sup>63</sup> And state leaders who have recently seen lives lost in attacks by terrorists or rebel forces may take drastic measures to restore security, leading to widespread infringement upon individual liberties.<sup>64</sup>

In all of those scenarios, the fact that a risk was taken does not necessarily mean it was the result of suboptimal decision-making. Each of the hypothetical actions described could have served important strategic objectives of the state. The state leaders at issue could thus have chosen their course without having been influenced by loss aversion, based on a rational calculation of expected utility. In any event, the important takeaway for the human rights community is simply to recognize the possibility that loss aversion is at work because, as discussed in Part IV below, its presence or absence may affect how the community chooses to respond.

## 2. Overconfidence

A broad range of social science research points to the conclusion that human beings tend to be overconfident. Psychologists Shelley Taylor and Jonathon Brown have identified three primary ways in which people demonstrate overconfidence: “(a) They view themselves in unrealistically positive terms; (b) they believe they have greater control over environmental events than is actually the case; and (c) they hold views of the future that are more rosy than base-rate

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63. Examples of such behavior are not hard to find. Shortly before the Libyan dictatorship fell, commentators observed that Muammar Gaddafi was making desperation moves from an increasingly vulnerable position. See David Williams, *Gaddafi Fires Scud Missile at Rebel Forces in Desperate New Tactic to Hang on to Power*, DAILYMAIL.COM, <http://www.dailymail.co.uk/news/article-2026634/Gaddafi-fires-Scud-missile-rebel-forces-desperate-new-tactic-hang-power.html> (last updated Aug. 17, 2011, 2:08 AM). Likewise, the recent use of chemical weapons by Bashar al-Assad in Syria has been described as a desperate attack launched because the regime was feeling cornered. See Nic Robertson, *Chemical Weapons: The Desperate Commander's Escape from Stalemate*, CNN.COM, <http://www.cnn.com/2013/09/07/world/syria-chemical-weapons/> (last updated Sept. 8, 2013, 12:11 PM). Of course, some have described the deal reached in the aftermath of that attack as a victory for Assad, so the risk he took may well have been a rational one. See Shadi Hamid, *The U.S.-Russian Deal on Syria: A Victory for Assad*, THE ATLANTIC (Sept. 14, 2013, 3:15 PM), <http://www.theatlantic.com/international/archive/2013/09/the-us-russian-deal-on-syria-a-victory-for-assad/279680/>.

64. The United States' response to the 9/11 attacks has been criticized on these grounds. See, e.g., David Schultz, *Democracy on Trial: Terrorism, Crime, and National Security Policy in a Post 9-11 World*, 38 GOLDEN GATE U. L. REV. 195, 206-07 (2008) (citing criticisms of the United States for national security policies that infringed on individual liberties).

data can justify.”<sup>65</sup> The evidence for the overconfidence bias starts with extensive survey data showing that a majority of respondents believe themselves to be better than average in some attribute or more likely than average to succeed in some respect.<sup>66</sup> And experiments confirm that test subjects will in fact act consistently with their overconfidence, as when they fail in mock negotiations to properly assess the strengths and weaknesses of their respective positions.<sup>67</sup>

Overconfidence may have an evolutionary basis. Dominic Johnson, who is trained in both political science and evolutionary biology, argues that exaggerated confidence was an adaptive advantage in our evolutionary past.<sup>68</sup> Among other advantages, overconfidence may have long-term benefits because “the costs of failure . . . often matter less than the missed opportunities arising from accuracy or overcautiousness,” and because “it can increase performance in conflict” by “boost[ing] resolve and/or bluff[ing] the enemy into submission.”<sup>69</sup> Johnson explains that overconfidence in modern life is unlikely to be adaptive in the evolutionary sense (i.e., in promoting reproductive success) but probably remains an advantage in the sense that overconfident people may in general be more likely to succeed.<sup>70</sup>

The flipside, of course, is that overconfidence leads to failed undertakings that a rational actor might have chosen not to pursue.<sup>71</sup> Moreover, the costs of such failures may be more extreme precisely because the overconfident actor does not recognize pitfalls or is willing to march resolutely into impending disaster.<sup>72</sup> The negative effects of overconfidence are exacerbated by the related self-serving bias, which refers to “the observation that actors often interpret information in ways that serve their interests or preconceived notions.”<sup>73</sup> Thus, rather than being dissuaded from a course of action by new data that would give rational actors pause, overconfident actors may find a way to interpret that same information as confirming their initial belief or choice.

In contrast to similar studies of prospect theory, experimental research provides evidence that experienced elites overestimate their

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65. Shelley E. Taylor & Jonathon D. Brown, *Positive Illusions and Well-Being Revisited: Separating Fact from Fiction*, 116 PSYCHOL. BULL. 21, 21 (1994).

66. See Korobkin & Ulen, *supra* note 4, at 1091.

67. See *id.* at 1093-94.

68. DOMINIC D. P. JOHNSON, OVERCONFIDENCE AND WAR 6 (2004).

69. *Id.*

70. See *id.* at 16-17.

71. Roy F. Baumeister, *The Optimal Margin of Illusion*, 8 J. SOC. & CLINICAL PSYCHOL. 176, 177 (1989) (“[O]verestimating one’s abilities and likelihood of success can lead one into various undertakings that consume time and energy and produce failure.”).

72. See JOHNSON, *supra* note 68, at 16.

73. Korobkin & Ulen, *supra* note 4, at 1093.

abilities even more so than inexperienced test subjects.<sup>74</sup> Further, Johnson makes a persuasive case that state leaders, as a particular species of experienced elites, are especially likely to be prone to overconfidence. In describing the characteristics of leading politicians, he notes that "[t]he people who make it to the top of political hierarchies tend to be those who have especially pronounced self-esteem, confidence in their ability to change things, and optimism that they can make a difference."<sup>75</sup> Moreover, to obtain their high position they must have "a character that can shoulder major burdens, accept numerous setbacks, and withstand constant criticism, and yet still get up every day believing they are right."<sup>76</sup> Finally, having obtained these positions, political leaders may be further buoyed by their newfound power and a sense that they can achieve something great.<sup>77</sup>

The consequences of overconfidence in international affairs are likely widespread and have been recognized as such. Johnson applies the research on overconfidence to the issue of wartime decision-making and examines several case studies to support the general hypothesis that overconfidence increases the likelihood of war. He demonstrates, for example, how both sides in World War I were not only confident in their prospects for victory, but believed that victory would come swiftly.<sup>78</sup> Furthermore, he cites instances during the course of that war in which attacks were launched with great optimism only to end in disastrous defeats.<sup>79</sup> While the mistaken judgments on both the macro and micro levels are easiest to see in hindsight, commentators suggest that there was adequate information available to make more appropriate evaluations of the risks—and that some actors in the war did make such assessments contemporaneously.<sup>80</sup> Evidence shows that overconfident beliefs were prevalent among political and military leaders as well as the citizens of the states involved.<sup>81</sup>

It is a small step to extrapolate from Johnson's analysis of war decision-making by states and recognize how similar dynamics are involved in human rights decision-making. At the planning stage, state leaders must make the strategic calculation of whether the benefits of a war will outweigh its costs. If overconfidence plagues

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74. See Hafner-Burton et al., *supra* note 51, at 372.

75. JOHNSON, *supra* note 68, at 24.

76. *Id.*

77. See *id.* at 25-26.

78. *Id.* at 59.

79. *Id.* at 77-79.

80. *Id.* at 78-79 (citing Jack Snyder, *Civil-Military Relations and the Cult of the Offensive, 1914 and 1984*, in *MILITARY STRATEGY AND THE ORIGINS OF THE FIRST WORLD WAR* 20, 20-21 (Steven E. Miller, Sean M. Lynn-Jones & Stephen Van Evera eds., rev. ed. 1991)).

81. *Id.* at 65-66.

that decision-making process, the state may enter a strategically unfavorable war. Similar errors in calculation may result in human rights conduct that fails to maximize the state's expected utility. The range of strategic planning decisions that could implicate human rights issues is quite broad. For example, a state's leaders could specifically choose not to comply with an established human rights norm because they are unduly optimistic that the righteousness of their course of conduct will be recognized by the international community.<sup>82</sup> In a different vein involving human rights concerns that are presented more indirectly, state leaders may hold overconfident attitudes that blind them to the fact that a given course of action is likely to have human rights implications at all, thus preventing them from making the optimal calculation based on all the relevant inputs.<sup>83</sup>

Parallels can also be drawn at the operational level or implementation stage. For example, military leaders at war need to make complex decisions about the allocation of resources. Avoidable failures can occur if the leaders are overconfident in their calculation of the resources needed to pursue a given strategy. Likewise, the improvement of human rights practices will often require the investment of resources, and state officials could be overconfident about their ability to make those improvements without that investment or with a less complete investment.<sup>84</sup> Therefore, human rights violations may result even when a state's leaders believe compliance is in the state's interest because they fail to provide adequate training to, or resources needed by, ground-level officials to meet international standards.<sup>85</sup>

Another operational-level parallel can be drawn in the crisis decision-making that is required both during war and in the human rights context. Johnson observes that overconfidence is likely to in-

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82. China's leaders, for example, regularly justify their slow progress in implementing human rights by arguing that developing countries require more leeway to deal with problems of social instability, but these justifications are widely criticized. See Randall Peerenboom, *Assessing Human Rights in China: Why the Double Standard?*, 38 CORNELL INT'L L.J. 71, 113-14 (2005).

83. Environmental regulations, such as efforts to combat climate change, have been scrutinized for potential unanticipated human rights consequences. See Naomi Roht-Arriaza, "First, Do No Harm": *Human Rights and Efforts to Combat Climate Change*, 38 GA. J. INT'L & COMP. L. 593, 594-95 (2010).

84. To be clear, even when leaders have determined compliance to be in the state's overall interest, each implementation decision requires its own expected utility calculation. Although I highlight the failure to provide adequate resources as a potentially suboptimal decision due to overconfidence, the decision could also be rational in a given instance if, for example, those resources were needed to serve some other important state interest, or simply because the benefits they would yield in terms of improved compliance do not outweigh the costs.

85. See, e.g., David Aronofsky & Matthew Cooper, *The War on Terror and International Human Rights: Does Europe Get it Right?*, 37 DENV. J. INT'L L. & POL'Y 567, 594-96 (2009) (describing concern that U.S. immigration detention facilities do not meet international human rights standards as a result of inadequate resources and training for staff).

crease during times of danger.<sup>86</sup> In war, overconfidence during such moments of urgency may result not only in avoidable defeats, but crippling or catastrophic losses. The stakes are similar in the human rights context. During a crisis situation, such as widespread public unrest, overconfident state leaders may improperly calculate the possibility of escalation and send unprepared officers into the fray who then commit abuses even though compliance would have better served the state's interests.<sup>87</sup>

As in the prospect theory Section, it is important to emphasize that for any given real-world scenario that follows one of the paradigms described above, the actual state leaders involved could have been making entirely rational calculations. The point to see, however, is how overconfidence may operate in these general types of scenarios, because in the marginal case overconfidence could make the difference between violation and compliance.

### 3. *Emotion-Based Decision-Making*

That emotions play some role in human decision-making is well understood. The difficulty lies in assessing whether that role should be given any attention in models of human behavior, given its unwieldiness. One skeptical viewpoint would suggest that emotion is irrational and therefore not subject to systematic explanation.<sup>88</sup> Without attempting to resolve those objections to the larger project of incorporating emotions into models of human behavior, I will draw on one particular strand of research that has previously been applied to international relations, termed "emotion-based pattern recognition" by political scientist Stephen Peter Rosen.<sup>89</sup>

In Rosen's account, human beings "can and do make decisions that are the result of the comparison of alternative expected outcomes."<sup>90</sup> This much is consistent with rational models of behavior. But when operating under time pressure and addressing an issue in which they have prior experience, people will view the situation through the lens of those past experiences, drawing particularly on "remembered patterns [that] were formed at a time of emotional arousal through which the decision maker[s] lived."<sup>91</sup> When time permits, a more conscious cognitive process can use subsequently obtained data to alter

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86. JOHNSON, *supra* note 68, at 46.

87. The recent crisis in Ukraine, for example, has been attributed to a public backlash following overly severe government crackdowns on peaceful protesters. See *Why Is Ukraine in Turmoil?*, BBC NEWS (Feb. 22, 2014), <http://www.bbc.com/news/world-europe-25182823>.

88. McDERMOTT, *supra* note 42, at 169.

89. STEPHEN PETER ROSEN, WAR AND HUMAN NATURE 29 (2005).

90. *Id.*

91. *Id.*

the emotion-based decision, but rational analysis may also play a more secondary role by simply helping to select the course of action that will best implement the earlier decision.<sup>92</sup> In short, while not rejecting the possibility and importance of rational analysis entirely, this account supplements the rational model by explaining how human beings find the data points they deem relevant and reach an ultimate conclusion when it would simply be impossible to do a full processing of all the available information that would potentially bear on the decision.

Compared to the previously discussed causes of suboptimality, the phenomenon of emotion-based decision-making has a stronger scientific basis and does not depend primarily on observations of how random individual subjects have behaved in laboratory settings. Neuroscience research studying activity in the human brain during decision-making confirms that the cognitive processing of information includes an emotional component.<sup>93</sup> Given this firmer grounding, there is less reason for concern that the research would not translate to elite state leaders operating in real-world conditions, and the international relations literature has not shown reluctance in taking such a step.<sup>94</sup>

As Johnson did with overconfidence, Rosen applies the concept of emotion-based pattern recognition to decision-making in war. One case study used by Rosen examines the decision-making process of John F. Kennedy and his administration during the Cuban Missile Crisis. While a traditional account of that episode portrays the actors as engaged in a “careful evaluation of alternative options, and a conscious search for information to illuminate those options,” one historian’s review of transcripts of meetings about the crisis emphasizes the striking absence of any substantive debate about the military importance of Soviet missiles being present in Cuba.<sup>95</sup> In light of that observation, Rosen advances the alternative explanation that Kennedy’s tough-minded response was formulated on the basis of negative emotions, stemming from the negative reaction Kennedy had following a Vienna summit meeting with Soviet premier Nikita Khrushchev, and from subsequent comments by the latter that likely left Kennedy feeling the need to avoid the appearance of weakness.<sup>96</sup> Even assuming that a rational weighing of costs and benefits would

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92. *Id.*

93. See *id.* at 32-35; see also Rose McDermott, *The Feeling of Rationality: The Meaning of Neuroscientific Advances for Political Science*, 2. PERSP. ON POL. 691, 692-93 (2004).

94. Of course, future advances could show that experienced elites are less prone to be influenced by emotions in their decision-making, but to my knowledge no research has been done to test this question.

95. ROSEN, *supra* note 89, at 59, 61.

96. See *id.* at 63.

have produced the same decision, the important point for present purposes is that Kennedy's decision was, in fact, made quite early on, before there would have been time to assess the relevant data.<sup>97</sup> Thus, Rosen concludes that an account of the crisis that factors in Kennedy's emotion-based decision-making is more persuasive.<sup>98</sup>

How, then, might emotion-based pattern recognition apply to human rights decision-making? Perhaps the clearest example would come from human rights violations that take place in the course of longstanding conflicts between religious or ethnic groups. In scenarios in which one group holds power over a religious or ethnic minority, for instance, the regime in power will inevitably view dealings with the minority group through the lens of past interactions. In particular, to the extent the minority group has created threats to the majority through protests, acts of terror, or legitimate warfare, those traumatic moments form the emotionally resonant paradigms on which state leaders will later draw.<sup>99</sup> More generally, even when a state does not have a troubling history with a single minority group in particular, its leaders may draw on conflicts with other opposition forces that have previously plagued the state.

As Rosen recognizes, emotion-based decision-making does not always produce suboptimal choices, but given the distorting effect it has on the available data points, it is certain to produce some.<sup>100</sup> And the likelihood of suboptimal decision-making seems particularly high in the context of human rights. When a minority group engages in protests or other forms of organized activity, state leaders will generally not have a reservoir of memories involving peaceful resolutions on which to draw. Thus, if the patterns they do recall typically involve violent uprisings that ended only with harsh crackdowns, they are likely to respond with excessive force or pass unduly restrictive policies.

### C. Group Dynamics

Having summarized the research on three causes of suboptimal decision-making and provided an initial sketch of how they might affect human rights compliance, I turn to the second methodological concern I flagged above, namely that the behavioral research has focused on individual decision-makers and cannot readily be translated

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97. See *id.* at 62. Rosen notes that Kennedy's first reaction to reports of missiles in Cuba was to say angrily, "He [Khrushchev] can't do that to *me*." *Id.* at 63 (alteration in original) (internal quotation marks omitted).

98. See *id.* at 63-64.

99. Like conflicts over territory, such ethnic conflicts are all too commonplace. The conflict between Turkey and its Kurdish population, discussed in Part III.B, is one of many examples.

100. See ROSEN, *supra* note 89, at 69.



to state conduct. The first step in addressing this methodological concern is to recognize that decisions for a state must be made by individual officials who are at least potentially susceptible to the causes of suboptimality described above. As explained in Part II.A, I do consider whether decisions are rational or suboptimal from the perspective of the state as a unitary entity, because a model that attempted to incorporate the wide range of interests held by diverse individual officials would be too unwieldy to produce any generalizable theory. But I do not mean to suggest that states are directly subject to the causes of suboptimality in any anthropomorphized sense. State decisions are potentially suboptimal, if at all, because of errors made by *state leaders* acting on behalf of the state.

Even accepting this initial caveat, one could further question whether it makes sense to be concerned with individual biases when decisions on behalf of a state are often made by groups rather than individuals. If the group is sufficiently small, as will often be the case in authoritarian regimes, this concern seems less important, as there is less reason to think that the cognitive biases that affect individual decision-making will be corrected in that setting.<sup>101</sup> Likewise, even if decisions by state leaders are driven by a more diffuse group, such as the broader domestic public, those decisions may nonetheless be suboptimal if they represent the aggregation of cognitive errors committed by that larger group of individuals. Other legal scholars have made similar points.<sup>102</sup>

Research on group dynamics lends further support to the likelihood that individual cognitive biases will persist, and perhaps even be magnified, in a collective decision-making process. International relations theorists have drawn on the work of Irving Janis, the psychologist who coined the term “groupthink,” to describe how in-group pressures drive individuals to coalesce around a group consensus view.<sup>103</sup> Groups with certain levels of cohesiveness tend to produce suboptimal decisions because their members seek unanimity and as a result are unable to evaluate information and consider alternative

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101. See Patrick J. Keenan, *Curse or Cure? China, Africa, and the Effects of Unconditioned Wealth*, 27 BERKELEY J. INT’L L. 84, 124 (2009) (“When power is concentrated in the hands of a small number of individuals, individual psychology is important.”).

102. See *id.* (“If we assume that state behavior represents the distillation of the preferences of many constituencies, and that behavioral or decisional biases are common, then the actions of states may well reflect those biases. Thus, even if state behavior is guided by institutions, not individuals, state behavior may still be influenced by individual biases.”); see also Jean Galbraith, *Treaty Options: Towards a Behavioral Understanding of Treaty Design*, 53 VA. J. INT’L L. 309, 355 (2013) (noting that “even if state decision-makers have no cognitive biases, their decision-making may nonetheless be affected by the real or perceived cognitive biases of other actors,” such as their “domestic audience”).

103. See *generally* IRVING L. JANIS, *GROUPTHINK* (2d ed. 1982) (describing the dynamics that lead groups to suppress individual dissent and apply pressures to conform in their decision-making processes).

options as effectively as they would have on individual bases.<sup>104</sup> These conformist pressures also mean that dissenting views are likely to be suppressed, further interfering with an effective group deliberation process.<sup>105</sup> Groupthink theory thus finds that, even in the absence of cognitive biases, each individual's decision-making process would be skewed. To the extent that individuals arrive with preexisting biases, Janis's research would suggest that interactions within a group setting likely reinforce the effect of those biases.

A related line of research on group polarization finds that, under certain conditions, a group may make more extreme decisions than any individual within it otherwise would have. This theory suggests that "members of a deliberating group predictably move toward a more extreme point in the direction indicated by the members' pre-deliberation tendencies."<sup>106</sup> Like groupthink, group polarization is partially explained by the absence of any effective counterarguments in a deliberative process.<sup>107</sup> But whereas groupthink further relies on conformist tendencies as an explanation, group polarization draws on social comparison theory, which suggests that individuals desiring to preserve their self-image and reputation will shift their positions relative to that of the group.<sup>108</sup> To illustrate the point with an example that would be particularly relevant to prospect theory, one key experimental finding known as the "risky shift" shows that groups of individuals already predisposed to prefer a risky course will settle on a collective preference for even greater risk-taking.<sup>109</sup>

The research on both groupthink and group polarization contains many qualifications and does not purport to explain all collective decision-making processes.<sup>110</sup> Moreover, other theories on group decision-making provide reasons to think that groups can—again, at least under certain conditions—reduce the impact of individual cognitive biases.<sup>111</sup> The important point for present purposes is that these qualifications and opposing lines of research do not cast doubt

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104. *Id.* at 9.

105. *See id.* at 9-10.

106. Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74 (2000).

107. *Id.* at 89-90.

108. *Id.* at 88-89.

109. *Id.* at 86-87.

110. For summaries of the caveats recognized in each literature, see MCDERMOTT, *supra* note 42, at 252-55, and Sunstein, *supra* note 106, at 90-96.

111. *See, e.g.*, ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* 27-41 (2009) (explaining how groups are likely to make better decisions than individuals based on the former's superior ability to aggregate information, evolve over time, and deliberate with the benefit of diverse perspectives); Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 12-32 (2002) (citing experimental evidence suggesting that groups sometimes make better decisions than individuals).

on the basic proposition that some degree of suboptimal decision-making afflicts groups. Thus, the goal for this project and others like it is to be aware of limitations and make more modest claims using the best available evidence on group decision-making in a narrowly specified context. With that objective in mind, I turn now to address the available evidence on the extent to which groups are affected by the particular causes of suboptimality described above.

First, with respect to prospect theory, empirical research on the behavior of firms provides reason to think that groups operating in the real world may be subject to loss aversion.<sup>112</sup> In a survey of the empirical literature, economist Christoph Engel notes evidence that firms engage in more risky behavior when they are performing below their aspirational levels, or when their industries are performing poorly relative to other industries.<sup>113</sup> In other words, they take greater risks when they are operating in the realm of losses. There may be differences between firms and states that caution against drawing any definitive conclusions, but it is nonetheless useful to know as a first step that there is evidence that groups, like individuals, may be prone to loss aversion.

Second, with regard to overconfidence, there are reasons in principle to think that overconfidence will often be exacerbated in a group setting. The tendencies that drive groupthink, which can result in the reinforcement of a variety of biases, are especially likely to exacerbate overconfidence. Groupthink draws on such dynamics as “a shared illusion of invulnerability,” “an unquestioned belief in the group’s inherent morality,” and the “stereotyping [of] out-groups as too evil for negotiation or too weak to be a threat.”<sup>114</sup> These dynamics relate closely to, and are thus likely to reinforce, the forces that contribute to the overconfidence of individuals. All of that said, the empirical evidence on how groups and individuals compare in their susceptibility to overconfidence is more mixed and has been shown to depend on a variety of group characteristics.<sup>115</sup>

Finally, with regard to emotion-based decision-making, there is less research to draw on in assessing whether suboptimality at the individual level persists in groups. From a theoretical perspective, although Rosen does not tackle this question directly, the implica-

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112. Van Aaken, *supra* note 10, at 444 (citing Christoph Engel, *The Behaviour of Corporate Actors: How Much Can We Learn from the Experimental Literature?*, 6 J. INSTITUTIONAL ECON. 445, 445 (2010)).

113. Engel, *supra* note 112, at 450.

114. JOHNSON, *supra* note 68, at 21.

115. See generally Norbert L. Kerr et al., *Bias in Judgment: Comparing Individuals and Groups*, 103 PSYCHOL. REV. 687 (1996) (finding that the relative degree of individual and group bias depends on factors such as group size, the type of bias, the magnitude of bias, initial individual judgment, and the decision-making process).

tions of his argument would suggest that suboptimality is, at least in many cases, and with respect to state decision-making specifically, likely to persist. That is because the relevant patterns on which state leaders draw in making policy decisions may often come from experiences shared by an entire generation of the state's citizens.<sup>116</sup> Rosen refers to statistical studies "confirm[ing] that negative experiences of the kind that could easily lead to severe negative emotional arousal have reliably led nations to turn against the policies that led to the negative emotions."<sup>117</sup> One example from international relations specifically is that, in deciding whether to align or stay neutral in a big war, small countries tended to draw more from their own experiences than from the general experiences of small countries making alignment decisions in the past.<sup>118</sup> This finding suggests that emotions played some role because, while a systematic study of all similarly situated states would have more empirical validity, a state's own experience would have more emotional resonance for its leaders.<sup>119</sup>

### III. ILLUSTRATIONS

In this Part, I attempt to show how the various forms of suboptimal decision-making described above may have contributed to human rights violations in two real-world scenarios. It is difficult to prove definitively that a given course of conduct was suboptimal. Any such analysis requires making a number of assumptions about how a state's leaders value particular costs and benefits, determining what information was available at the time of decision, and calculating probabilities of the range of possible outcomes. It is harder still to prove that any particular cause of suboptimality contributed to a given decision, absent access to the internal thoughts of the relevant decision-makers.

My more modest goal is simply to show that it is intuitively plausible that the various causes of suboptimality were at work in the scenarios below, and if not in those, then others like them. In doing so, I acknowledge the possibility that the decisions involved were actually fully rational, and I do not attempt to prove that my alternative account is more persuasive. It will suffice for present purposes to show that suboptimal decision-making in human rights compliance is a realistic possibility and thus warrants greater attention.

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116. See ROSEN, *supra* note 89, at 52.

117. *Id.* at 53; see also *id.* at 54 ("Quantitative studies of national behavior do seem to support the hypothesis that massive social violence or trauma can generate shared emotional experiences and memories, which can then determine state behavior.").

118. *Id.* at 53-54.

119. See *id.* at 54.

### A. Abu Ghraib

In April 2004, CBS aired the first photographs depicting the abuse of Iraqi detainees by U.S. soldiers in Abu Ghraib prison on its magazine show, *60 Minutes II*.<sup>120</sup> The photos were published two days later on the *New Yorker* website along with a story by Seymour Hersh.<sup>121</sup> News of the abuse provoked outrage among American politicians as well as members of the public. It likewise triggered protests and threats of retaliation in Iraq and other parts of the Middle East. This Section argues that the Abu Ghraib scandal could plausibly have been the result of suboptimal decision-making by the United States and illustrates how some of the causes of suboptimality discussed in the prior Part may have contributed to the events.

#### 1. Background

In March 2003, the United States invaded Iraq, and by August 2003 the war effort was going badly, with particular concerns about the absence of useful intelligence causing frustration.<sup>122</sup> Around that time, President George W. Bush decided to send General Geoffrey Miller, the commander in charge of Guantánamo Bay, to review the situation in the prisons of Iraq and provide recommendations.<sup>123</sup> The thrust of General Miller's recommendation was that Iraqi prisons should be transformed into interrogation centers in the mold of Guantánamo.<sup>124</sup>

Within a few months, in January 2004, a major investigation into widespread human rights violations was launched after a military police officer turned over a disk containing photographs of abuse to Army commanders.<sup>125</sup> The resulting report was authored by Major General Antonio Taguba and documented what he called "sadistic, blatant, and wanton criminal abuses" in the Abu Ghraib prison between October and December of 2003.<sup>126</sup> General Taguba cited the following particular instances of abuse:

Breaking chemical lights and pouring the phosphoric liquid on detainees;

Threatening detainees with a charged 9mm pistol;

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120. See David Remnick, *Introduction* to SEYMOUR M. HERSH, CHAIN OF COMMAND: THE ROAD FROM 9/11 TO ABU GHRAIB ix, xviii (2004).

121. *Id.*

122. HERSH, *supra* note 120, at 20.

123. *Id.* at 20.

124. *Id.* at 31.

125. *Id.* at 25.

126. ANTONIO M. TAGUBA, DEP'T OF THE ARMY, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE 16 (2004), available at <https://www.aclu.org/sites/default/files/torturefoia/released/TR3.pdf>.

Pouring cold water on naked detainees;

Beating detainees with a broom handle and a chair;

Threatening male detainees with rape;

Allowing a military police guard to stitch the wound of a detainee who was injured after being slammed against the wall in his cell;

Sodomizing a detainee with a chemical light and perhaps a broom stick[.];

Using military working dogs to frighten and intimidate detainees with threats of attack, and in one instance actually biting a detainee.<sup>127</sup>

General Taguba also noted the extensive use of sexual humiliation, which was captured in some of the most offensive photos that were later published. These included “[f]orcibly arranging detainees in various sexually explicit positions for photographing,” “[f]orcing naked male detainees to wear women’s underwear,” and “[f]orcing groups of male detainees to masturbate themselves while being photographed and videotaped.”<sup>128</sup>

The abuse of detainees was primarily carried out by members of the military police, who the report found had not received adequate training in the treatment of prisoners of war, including in the requirements established by the Geneva Conventions.<sup>129</sup> Most of the abuse described did not take place during actual interrogations; the officers involved instead believed they were fulfilling the request of military intelligence officers to “loosen” the detainees up for interrogations to be conducted later.<sup>130</sup> General Taguba’s report concluded with a series of recommendations designed to improve the training and oversight of military police officers and increase the involvement of experts in international and operational law.<sup>131</sup>

A few months after the report was released internally within the government, the *New Yorker* magazine obtained a copy, and the photos were published both on the magazine’s website and in a televised CBS news broadcast. Condemnations from the media came swiftly.<sup>132</sup> Public outrage was intense and widespread.<sup>133</sup> Military leaders past

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127. *Id.* at 17-18.

128. *Id.* at 16.

129. *Id.* at 16, 19-20.

130. *Id.* at 19.

131. *See id.* at 20-21.

132. *See* Laura Barandes, Note, *A Helping Hand: Addressing New Implications of the Espionage Act on Freedom of the Press*, 29 CARDOZO L. REV. 371, 376 & n.40 (2007) (collecting editorials).

133. *See, e.g.*, M. Angela Buenaventura, *Torture in the Living Room*, 6 SEATTLE J. FOR SOC. JUST. 103, 114 (2007) (describing public reaction in the United States to the Abu Ghraib scandal); *see also* David Paul Kuhn, *Bush Ratings Fall Amid Iraq Woes*, CBS NEWS

and present were among the most vocal critics of the behavior.<sup>134</sup> Elected officials demanded reforms and accountability.<sup>135</sup> The concern expressed among these various groups was that abusive treatment of detainees was inconsistent with American values as well as damaging to the United States' material interests in the foreign policy realm.

The evidence that the United States suffered such material harm is compelling. The Abu Ghraib scandal likely undermined the legitimacy of the war in Iraq while helping to attract recruits to the insurgency.<sup>136</sup> The events also damaged the United States' broader interests in the Middle East by feeding into the propaganda of terrorist leaders and otherwise exacerbating anti-American sentiment in the

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(May 12, 2004, 6:40 PM), <http://www.cbsnews.com/news/bush-ratings-fall-amid-iraq-woes> (citing a poll that found sixty percent of Americans believed that the abuse depicted in the Abu Ghraib photos was very serious and seventy-seven percent believed it was not justified); *New Poll: Majority of American Voters Want Next President to Restore and Protect Civil Liberties; Seek a More Assertive Congress*, AM. CIV. LIBERTIES UNION (Oct. 4, 2007), <http://www.aclu.org/safefree/general/32084res20071004.html> (finding that eighty percent of Democrats, eighty-seven percent of Independents, and seventy-four percent of Republicans who responded wanted to "make it clear that the policy of the United States is to oppose torture and follow the Geneva Conventions").

134. See, e.g., Rebecca Leung, *Abuse of Iraqi POWs by GIs Probed*, CBS NEWS (Apr. 27, 2004), <http://www.cbsnews.com/news/abuse-of-iraqi-pows-by-gis-probed/> (quoting reactions from former Marine Lt. Col. Bill Cowan and Brig. Gen. Mark Kimmitt, then-deputy director of coalition operations in Iraq); cf. HERSH, *supra* note 120, at 3-4 (describing the concerns of General John A. Gordon, then-deputy national security adviser for combatting terrorism, following the CIA analyst's report in 2002). A view commonly expressed among military commanders is that abusive treatment of detainees may endanger American soldiers who are captured in the course of a war. See Leung, *supra*; see also HERSH, *supra* note 120, at 71-72 (describing the concerns of Judge Advocate General officers).

135. See, e.g., HERSH, *supra* note 120, at 66-67. Hersh quotes Senator John Warner, chairman of the Armed Services Committee as well as a former Marine and Secretary of the Navy, as saying in his opening statement at the committee hearing, "There must be a full accounting for the cruel and disgraceful abuse of Iraqi detainees . . . I think it is important to confront these problems swiftly, assuring that justice is done and take the corrective action so that such abuses never happen again." *Id.* at 67. The outrage among the public and elected officials probably had some concrete impact in the sense of voluntary changes implemented by the executive branch, see Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 IND. L.J. 1255, 1282-83 (2006) (describing steps taken by the Army and Pentagon to address detention conditions), but it did not result in accountability on the part of high-level officials or in lasting legislative reforms to address future concerns, see HERSH, *supra* note 120, at 66-70 (describing the investigation conducted by the Senate Armed Forces Committee, which began aggressively but was quickly scaled back); Stuart Streichler, *The War Crimes Trial That Never Was: An Inquiry into the War on Terrorism, the Laws of War, and Presidential Accountability*, 45 U.S.F. L. REV. 959, 974 (2011) (noting that congressional hearings were "toned down" after Republican colleagues threatened to strip Senator Warner of his chairmanship of the Armed Services Committee); see also *id.* at 974-75 (noting that legislative oversight of the prosecution of the war on terror did not increase significantly even after Democrats took control of Congress after the 2006 election).

136. See Marcy Strauss, *The Lessons of Abu Ghraib*, 66 OHIO ST. L.J. 1269, 1303-04 (2005).

region.<sup>137</sup> At the same time, the Abu Ghraib episode damaged the United States' reputation among its allies, whose support the country needs in prosecuting the war on terror.<sup>138</sup> As a Senate Armed Services Committee study of detainee treatment concluded, "The fact that America is seen in a negative light by so many complicates our ability to attract allies to our side, strengthens the hand of our enemies, and reduces our ability to collect intelligence that can save lives."<sup>139</sup>

## 2. *Alternative Explanations*

Despite the readily apparent harm caused by the Abu Ghraib episode to U.S. interests, it is possible to provide an account of the events that relies solely on rational decision-making. Although human rights compliance is undoubtedly one component of U.S. interests, it is not an absolute one that trumps all other objectives. Thus, the first point to emphasize is that even for a country that genuinely values human rights compliance, decisions are not necessarily suboptimal merely because they lead to human rights violations. In any given decision, government leaders must balance the value of human rights against other interests, such as national security, and could make a rational determination to pursue such interests in a way that will result in human rights costs. Accordingly, the weighing of human rights consequences discussed below should be understood to include a moral as well as a material component, but the moral element is subject to the same balancing as any other factor in the expected utility calculation.

Nor does the fact that the Abu Ghraib revelations provoked moral outrage and triggered material harms necessarily mean that the decision-making of government officials was suboptimal. We must consider the question from the perspective of government officials at the time they made the particular decisions that led to Abu Ghraib. One account that would not require resorting to suboptimality explana-

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137. See *id.* at 1304-05. Strauss quotes Bush advisor Karl Rove as stating "that it will take a generation to repair the damage to America's image in the Middle East." *Id.* at 1304 (quoting Mark Bowden, *Lessons of Abu Ghraib*, THE ATLANTIC (July 1, 2004, 12:00 PM), <http://www.theatlantic.com/magazine/archive/2004/07/lessons-of-abu-ghraib/302980/>).

138. See Sandeep Gopalan, *Alternative Sanctions and Social Norms in International Law: The Case of Abu Ghraib*, 2007 MICH. ST. L. REV. 785, 818 (2007) (noting the "harsh reaction of European states to the Abu Ghraib episode"); see also Richard B. Bilder & Detlev F. Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT'L L. 689, 695 (2004) ("A nation's reputation for decency and respect for law is a vital national asset that can strongly affect its influence and leadership. Unless U.S. foreign policy and actions in the 'war on terror' are seen by its own citizens and other nations as legitimate and in compliance with broadly accepted legal and moral standards, they may fail to gain domestic and international support. There is little doubt that disclosure of abuses at Abu Ghraib and elsewhere seriously damaged the United States' international standing.").

139. S. COMM. ON ARMED SERVS., 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY xxv (Comm. Print 2008).



tions is that the officers involved were simply rogue agents who acted independently, meaning that no responsibility should be attributed to state leaders in the first place. While that explanation is consistent with the Bush Administration's view that the abuse was primarily the result of individual misconduct,<sup>140</sup> most outside observers have attributed at least some responsibility to policies determined by executive branch officials.<sup>141</sup> On this view, even if no direct orders were ever issued from the highest levels, senior officials established the conditions that made the abuse possible—first, by authorizing the expansion of coercive interrogations to Abu Ghraib prison, and second, by failing to provide adequate training and resources to officers on the ground.<sup>142</sup>

Starting from that premise, we can roughly sketch an expected utility calculation for each of those decisions. Consider first the decision to expand coercive interrogations to Abu Ghraib. While other considerations could have entered the equation, the key tradeoff would likely have been in maximizing the national security benefits of obtaining useful intelligence while minimizing the human rights costs (again, in material and moral terms) from potential abuses. The determination that this balance was best achieved by expanding coercive interrogations to Abu Ghraib could have been fully rational if some combination of the following beliefs was reasonable in light of the information available to the decision-makers: that authorizing more coercive interrogations had a high likelihood of producing actionable intelligence; that most officers in charge of interrogations could be trusted to stay within bounds; that even if some officers crossed the line into clear violations of human rights, these violations were unlikely to be revealed; and that if the violations were publicly revealed, the international response would be relatively muted.

There are compelling reasons, however, to question whether each of those beliefs was in fact reasonable. First, given the composition of

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140. Testifying before Congress, Secretary Rumsfeld and Joint Chiefs Chairman General Richard Myers said that it was “‘the actions of a few’ rogue MPs and the military-intelligence personnel who egged them on.” Mark Hosenball, *Abu Ghraib and Beyond*, NEWSWEEK (May 16, 2004, 8:00 PM), <http://www.newsweek.com/abu-ghraib-and-beyond-128393>. Similarly, Lieutenant General Paul T. Mikolashek, the Army Inspector General, testified that instances of detainee abuse in Iraq and Afghanistan were “not representative of policy, doctrine or soldier training. These abuses were unauthorized actions taken by a few individuals, coupled with the failure of a few leaders to provide adequate monitoring, supervision, and leadership.” HERSH, *supra* note 120, at 69.

141. As Republican senator and Armed Services Committee member Lindsay Graham said, “This is not a few bad apples. This is a system failure, a massive failure.” Hosenball, *supra* note 140.

142. See HERSH, *supra* note 120, at 46-49, 60-63; see also Keith Rohman, *Diagnosing and Analyzing Flawed Investigations: Abu Ghraib as a Case Study*, 28 PENN ST. INT’L L. REV. 1, 10-11 (2009) (describing the systemic failures that led to the abuses at Abu Ghraib).

the prisoner population at Abu Ghraib, it is extremely unlikely that even effective interrogations could have produced anything of value.<sup>143</sup> Second, based on the United States' experience running the prisons at Guantánamo Bay, there were reasons to think that military police officers could not be trusted to handle these sensitive responsibilities without running into human rights problems.<sup>144</sup> Third, although there had been no prior revelations of comparably serious, specific abuses, the Bush Administration's interrogation program had recently come under scrutiny by NGOs and the media, and at least the possibility of leaks should have been foreseen.<sup>145</sup> Fourth, given the criticisms made by the human rights community of the Administration's interrogation program, the international outrage should not have been surprising.<sup>146</sup> If one or more of these four points is correct, then the expected net benefits of expanding the coercive interrogation program to Abu Ghraib may well have been low and thus likely not the optimal course of action.

Consider next the decisions that led to the allocation of resources and amount of training received by officers at Abu Ghraib. The expected utility calculation here would simply require weighing the expected benefits to be gained from additional training and resources against the expected costs of those changes. The expected benefits would include improvements in human rights compliance as well as in the effectiveness of intelligence gathering. The expected costs would primarily include financial expenditures.<sup>147</sup> The best indication that the Bush Administration's decision-making on resources and training was suboptimal is that the recommended improvements identified in subsequent investigations of the Abu Ghraib episode were fairly basic ones that would not have required any great investment of resources.<sup>148</sup> While there is no guarantee that these measures would have prevented the events at Abu Ghraib, it is nonetheless informative that the recommended solutions for a problem that turned out to be so costly were relatively modest in scope. Thus, it seems plausible to say the expected net benefits of the Administra-

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143. See TAGUBA, *supra* note 126, at 8 (noting that "the intelligence value of detainees held at . . . Guantanamo . . . is different than that of the detainees/internees held at Abu Ghraib" because Iraqi criminals not suspected of terrorist ties constituted a significant proportion of the latter population).

144. See HERSH, *supra* note 120, at 32.

145. See *id.* at 13-14.

146. See *id.*

147. The costs should also arguably include the lost value in intelligence gathering if some amount of strategic ambiguity in the guidelines enabled officers to cross lines they would not have crossed with additional training. I bracket that factor, however, because it is difficult to quantify in even a rough sense.

148. See *supra* note 131 and accompanying text.

tion's decisions in this area were low and, like the decision to expand coercive interrogations to Abu Ghraib, not the optimal choice.

### 3. *Causes of Suboptimality*

Having attempted to show that Abu Ghraib was plausibly the product of suboptimal decision-making by the United States, I now turn to consider which of the various causes discussed in the prior Part may have contributed to those decision-making defects.

The first likely contributing factor is loss aversion, and specifically the fact that the United States was probably acting in the realm of losses—and thus prone to take excessive risks—when it made certain decisions to encourage increased reliance on coercive interrogations. As has been commonly observed, it is difficult to imagine a true victory in the war on terror; the best possible outcome is to avoid one attack, with the knowledge that others are being plotted. The roots of the specific policies that permitted harsher techniques were, of course, the 9/11 terrorist attacks. Having failed to prevent the tragic losses of that day, the Bush Administration was likely in desperation mode for a significant period afterward.<sup>149</sup> It is during such periods of desperation that prospect theory predicts actors will take unwise risks to avoid the apparent certainty of further losses. One such risk may have been the Administration's decision to establish a special-access program (SAP) that authorized the creation of secret interrogation centers and the use of harsher techniques in the aftermath of 9/11.<sup>150</sup> Indeed, during this time, secret memoranda were circulated that encouraged military leaders "to take greater risks" to change the course of the war on terror.<sup>151</sup>

It is likely that the same dynamic led to the extension of the SAP to Iraqi prisons. As noted above, the war effort was going poorly in August 2003; and, more specifically, the Bush Administration was concerned about failures to generate useful intelligence about the growing insurgency.<sup>152</sup> In addition to extending the SAP to Abu Ghraib, the Administration invited General Miller, the Guantánamo commander, to assist in effecting a transition to a more Guantánamo-like prison model. Given all the concerns that were already circulating about Guantánamo itself, it can probably be said, even without the benefit of hindsight, that this was an excessively risky ploy.<sup>153</sup> In

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149. See Hafner-Burton et al., *supra* note 51, at 376.

150. See HERSH, *supra* note 120, at 16.

151. *Id.*

152. See *id.* at 20, 58-59.

153. One White House official who had supported reforming Guantánamo at the time commented after the fact, "Why do I take a failed approach at Guantánamo and move it to Iraq?" *Id.* at 20; see also *id.* at 3-6 (describing efforts by General Gordon to reform prison policies at Guantánamo).

short, to the extent the Abu Ghraib scandal resulted from the dubious extension of policies encouraging coercive interrogations to the prisons in Iraq, that decision can plausibly be explained as an excessive risk taken during a time when the Bush Administration was operating in the realm of losses.

The second likely contributing cause of suboptimal decision-making is emotion-based pattern recognition. One piece of evidence that this phenomenon was at work is the fact that U.S. officials were so quick to assume that the solution to the problems posed by the growing insurgency was to employ tactics used at Guantánamo. Putting aside whether the Guantánamo model was flawed on its own merits, the problem is that the issues raised in each setting were distinct. As General Taguba's report appropriately recognized, the use of procedures developed for Guantánamo was questionable because "the intelligence value of detainees held at . . . Guantanamo . . . is different than that of the detainees/internees held at Abu Ghraib."<sup>154</sup> The latter population included a significant number of common criminals who were not suspected of terrorist ties.<sup>155</sup> That General Taguba spotted this disconnect before the scandal broke suggests that a more objective analysis of the relevant information could have produced that same conclusion before General Miller's recommendations were adopted in late 2003. And during this same timeframe, the prison was failing to address an issue that actually needed attention, namely the creation of a system for processing detainees.<sup>156</sup> Such reforms were important not only to respect the rights of detainees, many of whom had been arrested on dubious grounds,<sup>157</sup> but also because they would likely have made the collection of intelligence more efficient by focusing interrogators on the correct targets.

Despite these facially apparent differences, General Miller, upon his arrival at Abu Ghraib, made clear that he intended to "Gitmo-ize" the prison.<sup>158</sup> In this vein, he is reported to have told the commanding general at the time that prisoners should be treated "like dogs . . . . If they ever get the idea that they're anything more than dogs, you've lost control of your interrogation."<sup>159</sup> Such statements reveal that General Miller was likely unable to see the situation he had been brought in to review through anything other than the past lens he had developed as commander in charge of Guantánamo.

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154. TAGUBA, *supra* note 126, at 8.

155. *Id.*; *see also id.* at 10 (noting that the highest-value detainees were held at a different complex).

156. *See* HERSH, *supra* note 120, at 13 (citing concerns raised by the International Committee of the Red Cross).

157. *See id.* at 21.

158. *See* JANIS KARPINSKI WITH STEVEN STRASSER, ONE WOMAN'S ARMY 197 (2005).

159. *Id.* at 197-98.

The third likely contributing cause of suboptimal decision-making is overconfidence.<sup>160</sup> While the prior two factors help explain how the Administration came to expand coercive interrogation policies into Abu Ghraib, the factor of overconfidence helps explain how failures in the implementation of that strategic decision contributed to the abuses that took place. Simply put, once the decision was made to expand the interrogation mission of Abu Ghraib prison, the Administration probably underestimated the resources that were required to gather intelligence in a manner consistent with human rights norms.

The first mistake was to place General Janis Karpinski, a commander who “had never run a prison system . . . [and] had no training in handling prisoners,” in charge of Abu Ghraib.<sup>161</sup> She was named commander in June 2003, was tasked with implementing the changes recommended by General Miller beginning in August 2003, and was relieved of her post in January 2004 after the concerns of abuse had been discovered internally.<sup>162</sup> All the investigations of the Abu Ghraib episode recognized that leadership failure was one major cause of the misconduct.<sup>163</sup> Given her transparent lack of qualifications for this position, it seems likely that Administration officials acted with overconfidence in placing and then leaving her in charge of this sensitive mission.<sup>164</sup>

Administration officials may have similarly failed to appreciate the training, supervision, and guidelines that were required to implement the policies they had adopted. After the SAP was expanded into Iraq, the Administration believed it was beginning to obtain valuable intelligence. But it then likely erred in attempting to speed up its work by employing military police officers who were not trained in intelligence gathering to assist in the process.<sup>165</sup> One former intelligence official observed that hubris likely led Pentagon officials to cir-

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160. At first blush, there might appear to be some tension between suggesting that the Administration was operating in the realm of losses and arguing that the Administration was simultaneously overconfident. In other words, if the Administration felt certain that every possible outcome would be some form of loss, in what sense could it nonetheless have been overconfident? To avoid this tension, I have to distinguish between the decision to authorize coercive interrogations at Abu Ghraib, which was arguably an excessively risky one made while the United States was operating in the realm of losses, and operational decisions about how to implement that policy, which were arguably tainted with overconfidence.

161. HERSH, *supra* note 120, at 21.

162. *Id.* at 21-22.

163. See Rohman, *supra* note 142, at 21, 25 n.127.

164. One alternative explanation for this error may be simple carelessness. But carelessness and overconfidence are not mutually exclusive. Indeed, it is easy to see how they could go together when overconfidence about one's prospects for success in a given area leads one to pay it less attention.

165. See HERSH, *supra* note 120, at 60-61.

cumvent the military planners who would have properly identified the risks involved and recommended better controls.<sup>166</sup> Ultimately, it is telling that insiders at the time believed the Administration was making poor implementation decisions, such as when the CIA decided to end its participation in Abu Ghraib interrogations.<sup>167</sup>

In sum, once the decision to employ enhanced interrogation at Abu Ghraib was made, the conditions were such that the likelihood of abuses might have been high already. But however suboptimal that first decision was, the failure to implement it with adequate resources as a result of overconfidence likely compounded the problem.

### *B. Turkey's Kurdish Problem*

Since 2004, Turkey has been a formal candidate for accession to the European Union (EU). The official opening of this process was seen as a landmark moment for Turkey, which had long sought EU membership as a marker of acceptance among Western states. The primary obstacle to Turkey's accession is Turkey's human rights record, and foremost among the concerns of the EU members has been Turkey's treatment of its Kurdish population. This Section contends that at least some of the human rights violations Turkey has committed against its Kurdish population could plausibly have resulted from suboptimal decision-making and, as in the previous Section, attempts to illustrate how the causes of suboptimality discussed in the prior Part may have contributed to those violations.

#### *1. Background*

The Kurds are an ethnic group consisting largely of Sunni Muslims who live predominantly in Turkey, Iraq, Iran, and Syria.<sup>168</sup> In Turkey, their population has been estimated at around fifteen million and is concentrated in the southeast region where they constitute a majority of the population in several provinces.<sup>169</sup> Prior to World War I, the Kurds lived with relative autonomy under the Ottoman Empire, but the end of the war and the division of the Empire split the area occupied by the Kurds among the four states just noted.<sup>170</sup> The Treaty of Sèvres, signed in 1920 to end the war between the Allied powers and Ottoman Empire, had contemplated independence for the Kurds as well as various other minority groups that lived under Ot-

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166. *See id.* at 62.

167. *See id.*

168. KERIM YILDIZ & MARK MULLER, THE EUROPEAN UNION AND TURKISH ACCESSION: HUMAN RIGHTS AND THE KURDS 4-5 (2008).

169. *Id.* at 6.

170. *Id.*

toman rule.<sup>171</sup> The terms of that treaty were quickly abandoned, however, as Turkish revolutionaries led by Mustapha Kemal Atatürk waged a war of independence that ended in a superseding Treaty of Lausanne, signed in 1923.<sup>172</sup> That treaty established most of the modern-day borders for the Republic of Turkey and provided neither for Kurdish independence nor for any protections for the Kurds as a minority group.<sup>173</sup>

Atatürk went on to become Turkey's first president and helped pass the new Turkish Constitution in 1924.<sup>174</sup> Atatürk's vision, embodied in that document, was for Turkey to become "a unified, centralized and ethnically homogeneous state with a single Turkish identity."<sup>175</sup> To achieve this objective, Turkey would have to force the assimilation of minority groups like the Kurds, and it proceeded to do just that. From the very beginning of Turkey's existence, the government sought to eliminate non-Turkish identities, which in the southeast region dominated by Kurds meant deploying a combination of "restrictive legislation and state-sponsored violence."<sup>176</sup> The Kurds attempted several uprisings in the 1920s and 1930s, which were met with brutal retaliations.<sup>177</sup>

Such repressive measures continued in the decades following, leading to the creation of the Kurdistan Workers Party (PKK) in 1978.<sup>178</sup> The PKK launched a full-scale insurgency in 1984, lasting until 1999, when the PKK's leader Abdullah Öcalan was captured and the PKK declared a ceasefire.<sup>179</sup> Between 1984 and 1999, more than 37,000 people died, around 3500 villages were evacuated, and nearly three million people were internally displaced.<sup>180</sup> One author describes the atmosphere during this period as follows:

State security forces targeted both the PKK and Kurdish rural communities, and security operations in Kurdish villages were accompanied by arbitrary arrests, looting of moveable property, beatings, torture and 'disappearances'. Few Kurds escaped the trauma of the actions of state security forces. In detention, Kurds were fre-

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171. *Id.* at 7.

172. *Id.*

173. *Id.*

174. *Id.* at 13.

175. *Id.*

176. *Id.* at 14.

177. *Id.* at 15-16.

178. See MICHAEL M. GUNTER, *THE KURDS ASCENDING: THE EVOLVING SOLUTION TO THE KURDISH PROBLEM IN IRAQ AND TURKEY* 6 (2d ed. 2011) (detailing the creation of the PKK in Turkey).

179. YILDIZ & MULLER, *supra* note 168, at 14-15.

180. *Id.* at 17; Hamit Bozarslan, *Human Rights and the Kurdish Issue in Turkey: 1984-1999*, 3 HUM. RTS. REV. 45, 45 (2001).

quently subject to ill-treatment, torture and extra-judicial execution, including *falaka* (beating the soles of the feet), electric shock treatment and rape. This was facilitated by the relative ease with which public authorities could subject Kurds to prolonged, incommunicado detention and a climate of impunity among the police and gendarmerie in which convictions for such acts were rare and sentences light.<sup>181</sup>

During this time period, freedom of expression was significantly restricted as the government continued its efforts to eradicate Kurdish culture by, for example, banning Kurdish folk songs, Kurdish names, and even use of the term "Kurdish."<sup>182</sup> Likewise, political parties that put the rights of Kurds on their agendas were declared illegal, and political leaders who supported such rights were imprisoned and in some instances violently attacked.<sup>183</sup>

Following the 1999 ceasefire, several encouraging developments took place. First, Öcalan used the stage of his trial for treason to appeal for a democratic solution that would secure equal rights for Kurds within the existing political structure, which marked a shift from the PKK's original objective of establishing an independent Kurdish state.<sup>184</sup> Several prominent Turkish state officials, in turn, began to express support for removing impediments to free speech and cultural expression, emphasizing those that limited the rights of Kurds.<sup>185</sup> On the international level, the EU invited Turkey to apply for membership, having rejected Turkey's application two years earlier because of human rights concerns.<sup>186</sup> The ceasefire lasted for several years, but incidents of government persecution persisted during that time, and no lasting solution was reached.<sup>187</sup>

Although the insurgency began anew in 2004, the EU nonetheless decided in 2004 to begin the process of formal accession negotiations with Turkey.<sup>188</sup> That decision came after the EU's executive body, the European Commission, issued its finding that Turkey had made adequate progress in fulfilling the so-called Copenhagen Criteria to be eligible to begin accession negotiations.<sup>189</sup> The Copenhagen Criteria

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181. YILDIZ & MULLER, *supra* note 168, at 16.

182. *Id.* at 17.

183. *Id.* at 18.

184. GUNTER, *supra* note 178, at 67; *see also id.* at 65 (describing Öcalan's shift as beginning in the early 1990s).

185. *Id.* at 63-64 (describing comments by Ahmet Necdet Sezer, chief justice of the Turkish Constitutional Court, and Sami Selcuk, chief justice of the Turkish Supreme Court of Appeals).

186. YILDIZ & MULLER, *supra* note 168, at 15.

187. *See id.* at 18.

188. *Id.* at 18, 20.

189. *Id.* at 24.



set forth the conditions for EU membership, including the following political elements: “stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.”<sup>190</sup> Commentators have expressed concerns as to whether the EU’s decision to begin accession negotiations was reached prematurely, noting that the European Commission’s assessment might have glossed over human rights concerns particularly regarding Kurdish issues.<sup>191</sup> But even skeptics agree that the opening of accession negotiations meant a potential opportunity for the EU to place more effective pressure on Turkey’s continuing process of reforms in this area.<sup>192</sup>

The hoped-for progress has been slow in forthcoming. The skeptical commentators recognize that Turkey’s initial response to the opening of accession negotiations was to pass a broad series of legislative reforms, but they question whether these enactments meaningfully changed the facts on the ground.<sup>193</sup> Moreover, the process of reform has slowed down or seen setbacks in various respects. As noted above, the PKK insurgency began again in 2004, which has meant renewed acts of violent persecution by state officers.<sup>194</sup> A new anti-terrorism law adopted in 2006 has been criticized as overly broad and vague, creating the possibility of extreme prosecutions for expressing views that contradict official state ideology.<sup>195</sup> Requests by EU officials that Turkey take the initial step of at least recognizing that the Kurds are a distinct group with a distinct identity have been rebuffed.<sup>196</sup> A 2006 Progress Report by the European Commission cited a continuing lack of progress in Turkey’s willingness to “start[] a dialogue on the situation of national minorities.”<sup>197</sup>

In 2009, the government announced a “Democratic Opening” that entailed a series of reforms designed to help improve the situation of Kurds as well as other proposals to bring about peace.<sup>198</sup> The resulting initiatives included a relaxation of restrictions on Kurdish-

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190. *Conditions for Membership*, EUR. COMMISSION, [http://ec.europa.eu/enlargement/policy/conditions-membership/index\\_en.htm](http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm) (last updated Nov. 19, 2014).

191. See YILDIZ & MULLER, *supra* note 168, at 39.

192. See *id.*

193. See *id.* at 39-40.

194. See Comm’n of the European Communities, *Turkey 2006 Progress Report*, COM (2006) 649 final, at 22 (Nov. 8, 2006) [hereinafter *2006 Progress Report*], available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2006/nov/tr\\_sec\\_1390\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2006/nov/tr_sec_1390_en.pdf).

195. GUNTER, *supra* note 178, at 98-99.

196. See *id.* at 101 (noting that the military’s highest ranking officer “refused to countenance the concept of the Kurds as a legally protected minority,” and quoting him as saying, “[a]pproaches based on race are a shame in this century”).

197. *2006 Progress Report*, *supra* note 194, at 20.

198. Int’l Crisis Grp. (ICG), *Turkey: Ending the PKK Insurgency*, Eur. Rep. No. 213, at 1, 6-7 (Sept. 2011), available at <http://www.crisisgroup.org/~media/Files/europe/turkey-cyprus/turkey/213%20Turkey%20-%20Ending%20the%20PKK%20Insurgency.pdf>.

language media and the granting of permission for the study of Kurdish in public universities.<sup>199</sup> Even as these reforms were being implemented, however, the government continued to arrest Kurdish politicians and activists.<sup>200</sup> In 2009 and 2010, the government convicted 350 children, some as young as age twelve, and sentenced them to serve in adult prisons for violating anti-terror laws because they had attended a PKK demonstration.<sup>201</sup> The most recently published Progress Report in 2012 noted the lack of follow-up on the Democratic Opening and continuing concerns about the prosecution of Kurdish writers on terrorism charges without “a clear distinction between the incitement to violence and the expression of nonviolent ideas.”<sup>202</sup>

In April 2013, a new ceasefire between the PKK and Turkish government was announced, with both sides declaring an end to the thirty-year conflict.<sup>203</sup> The parties are now negotiating legal reforms. As of this writing, the talks are ongoing.<sup>204</sup>

## 2. *Alternative Explanations*

The starting point for assessing whether Turkey's handling of the Kurdish problem is rational is to identify Turkey's actual interests in the situation. In contrast to the United States, there is little evidence to suggest that Turkey's leaders place independent value on human rights compliance. Nonetheless, there are indications that these leaders genuinely want to improve the human rights of Kurds in particular for instrumental reasons, namely to assist in Turkey's goal of achieving EU accession and to reduce the costs of the conflict in lives and resources.

Not too long ago, Turkish leaders denied that there was a “Kurdish problem” at all that would require any special concern for the Kurds as a minority group; instead, the issue was one of economic

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199. *Id.* at 14-15.

200. *Id.* at i.

201. Yelena E. Archiyan, *Turkey and the European Union: An Association in the Making*, 20 MICH. ST. INT'L L. REV. 117, 141-42 (2011).

202. European Commission, *Turkey 2012 Progress Report*, COM (2012) 600 final, at 22 (Oct. 10, 2012), available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2012/package/tr\\_rapport\\_2012\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2012/package/tr_rapport_2012_en.pdf).

203. See Constanze Letsch, *Kurds Dare to Hope as PKK Fighters' Ceasefire with Turkey Takes Hold*, THE GUARDIAN (May 7, 2013), <http://www.theguardian.com/world/2013/may/07/kurds-pkk-turkey-peace-talks>.

204. See Ceylan Yeginsu, *Renewing Call to End Turkey Conflict, Kurdish Rebel Leader Hails 'New Era'*, N.Y. TIMES (March 21, 2015), [http://www.nytimes.com/2015/03/22/world/europe/renewing-call-to-end-turkey-conflict-kurdish-rebel-leader-hails-new-era.html?\\_r=0](http://www.nytimes.com/2015/03/22/world/europe/renewing-call-to-end-turkey-conflict-kurdish-rebel-leader-hails-new-era.html?_r=0) (describing the status of peace talks, including the parties' recent agreement on a “10-point peace framework”).

development in the southeast region.<sup>205</sup> However, by 2005 the Turkish prime minister was finally willing to acknowledge that a Kurdish problem existed, that the government had made “grave mistakes” in the past, and that the solution required “more democracy.”<sup>206</sup> Shortly afterward, the Justice and Development Party (AKP), the current ruling party that first entered power in 2002, began outreach efforts to Kurdish communities in the lead-up to the Democratic Opening.<sup>207</sup> In 2009, the Turkish president recognized that the Kurdish issue was not just a problem, but the primary challenge facing his government.<sup>208</sup> Apart from what the country stands to gain from EU accession, the material benefits of resolving the Kurdish issue are apparent to the government, as its own pamphlet on the Democratic Opening estimated that the internal conflict had cost Turkey \$300 billion.<sup>209</sup>

That Turkey seems genuinely committed to achieving EU accession appears equally clear. This objective may be based on reasons of both economic gain and nationalistic pride. On the economic side, although trade may not increase dramatically as the result of EU accession because Turkey already has free trade agreements in place, commentators suggest there is potential gain to be had in the form of attracting more foreign direct investment.<sup>210</sup> The more abstract benefit of nationalistic pride stems from the vision of Turkey’s founder, Atatürk, of achieving full integration into the West.<sup>211</sup> Since that time, Turkey has continued to pursue the goal of Westernization and has sought membership in key organizations to validate and further advance its progress. In the years leading up to the opening of EU accession negotiations, Turkey joined such other European organizations as the Organization for Economic Cooperation and Development, Council of Europe, Western European Union, and North Atlantic Treaty Organization.<sup>212</sup> Membership in the EU would be the capstone of this process.<sup>213</sup>

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205. GUNTER, *supra* note 178, at 88.

206. *Id.* at 91 (quoting statements by Recep Tayyip Erdogan) (internal quotation marks omitted).

207. *See* ICG, *supra* note 198.

208. *Id.* at 1 n.1 (quoting President Abdullah Gül as saying, “Whether you call it a terror problem, a south-eastern Anatolia problem or a Kurdish problem, this is the first question for Turkey. It has to be solved.”).

209. *Id.* at 6.

210. *See* Harry Flam, *Economic Effects of Turkey’s Membership on the European Union*, in *TURKEY: ECONOMIC REFORM & ACCESSION TO THE EUROPEAN UNION* 341, 351 (Bernard M. Hoekman & Sübidey Togan eds., 2005).

211. *See* YILDIZ & MULLER, *supra* note 168, at 13, 20.

212. Archiyan, *supra* note 201, at 117-18.

213. *See* YILDIZ & MULLER, *supra* note 168, at 20 (describing EU membership “as an important ‘crossroads’ for Turkey, marking a seminal point in her history and tying her future firmly to Europe”).

The picture just painted is not without complication. There are undoubtedly factions in Turkey that believe EU accession would be contrary to their own interests or that have a different vision for Turkey's future. Public opinion polls have varied but generally show a majority of the population favoring EU accession.<sup>214</sup> Moreover, it is possible that some of Turkey's leaders oppose Kurdish reforms out of fear that their own economic or political standing will suffer as a result, or that some are simply prejudiced against the group and do not wish to see them succeed. While there is undoubtedly evidence that such countervailing forces exist, any evidence that they actually outweigh pro-reform forces is more difficult to find. Instead, most commentators agree that Turkey's leaders genuinely believe that solving the Kurdish problem is in the state's interest but have simply been unsuccessful in doing so.<sup>215</sup> If that is correct, then the existence of internal forces opposed to reform does not alter the conclusion that the *state's* interests are best understood to include a genuine commitment to resolving the Kurdish issue.

The calculation might have come out differently a couple of decades ago when the PKK pursued a more explicitly separatist agenda. Perhaps EU membership and a peaceful resolution would not have been worth the price of altering Turkey's borders or sacrificing fundamental goals of national unity. But it is more difficult to see how merely granting Kurds more legitimate status in Turkish society and recognizing their need for certain protections as a minority group would outweigh the value of domestic peace and the economic and prestige gains that would flow from EU membership.

Although there is compelling evidence that solving the Kurdish issue is, as a general matter, in Turkey's interest, the relevant question for present purposes is whether particular decisions are rational or suboptimal. Just as human rights compliance was only one component of the United States' interests, so is solving the Kurdish problem only one component of Turkey's. Any given decision could fail to maximize Turkey's chances in that single regard but nonetheless be rational because it maximizes the state's overall utility, which takes into account all of its interests.

Turkey's leaders are probably making a broad range of such decisions every day. I will focus on policies restricting the basic cultural and language rights of Kurds, as these are particularly difficult to explain in solely rational terms. As described above, Turkey has in place various policies forbidding Kurdish language instruction in public schools and bans on cultural expression, such as Kurdish mu-

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214. Gizem Arikan, *Attitudes Towards the European Union in Turkey: The Role of Perceived Threats and Benefits*, PERCEPTIONS, Autumn 2012, at 81, 86-87.

215. See YILDIZ & MULLER, *supra* note 168, at 20.

sic. The expected utility calculation for these policies would primarily involve balancing Turkey's interests in ensuring the security and long-term viability of the state against its interests in successful peace negotiations and potential EU accession. At least as compared with other policies that more directly address security concerns arising from the Kurdish conflict, it is difficult to see how restrictions on cultural and language rights would yield enough benefit to be worth their substantial costs.

Even here, however, a rationalist account is possible. Turkey's leaders could have rationally decided not to enact reforms in the area of cultural and language rights if they reasonably determined, for example, that concessions in this regard would likely encourage further demands and incite greater unrest that would threaten state security far more than the initial measures on their own would have. On the other side of the equation, Turkey's leaders could have reasonably determined that reforms in this area would have only limited value because the Kurds are seeking a more radical change in their situation or status, and that EU accession at this point is unrealistic because of other political realities. If one or more of these premises is correct, then Turkey's continued adherence to restrictions on Kurdish language and culture could in fact be fully rational and not the result of any suboptimal decision-making.

The assessment of neutral evaluators, however, casts significant doubt on at least two of these premises. A 2011 report by the International Crisis Group (ICG) cites a belief among Kurds that "official recognition of their right to their own language is the best way to end deeply ingrained discrimination."<sup>216</sup> A former Interior Minister responsible for internal security affairs agreed with this view in an interview provided for the report.<sup>217</sup> Thus, there is reason to think that reforms in language and cultural rights would in fact result in meaningful progress toward a peaceful resolution. The ICG report goes on to note that steps taken thus far to provide for greater linguistic freedoms have not created any apparent problems for the state, and it points to the fact that other states have managed to recognize language rights without triggering problems among their minority populations.<sup>218</sup> Thus, there is likewise reason to think that reforms would not substantially undermine Turkey's security interests.

The one premise that is more difficult to evaluate is whether reforms in language and cultural rights would move the needle signifi-

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216. ICG, *supra* note 198, at 11.

217. *Id.* The Interior Minister said that a famous Kurdish writer in Turkey, Yaşar Kemal, told him, "It's 90 per cent language. If you solve this it's mostly done." *Id.* (internal quotation marks omitted).

218. *See id.* at 11-12.

cantly when it comes to EU accession. There is evidence to believe that some EU members would oppose Turkey's accession regardless of its progress on the Kurdish issue and on human rights more generally.<sup>219</sup> Thus, Turkey's leaders may see little reason to move ahead on this one issue while other obstacles remain insurmountable. But the Kurdish issue is undoubtedly one obstacle to accession, even if not the only one, and the continued use of repressive policies sends a very visible signal to EU negotiators and member states that Turkey is not acting with any urgency.<sup>220</sup> Turkey's lack of progress gives countries that oppose its accession a powerful talking point, even if it is a pretextual one.

The bottom line, in any event, is that even if reforms in Kurdish language and cultural rights would have only a small impact on Turkey's accession efforts, the other two factors do provide compelling reasons to think that Turkey's current course is suboptimal.

### 3. *Causes of Suboptimality*

As before, having attempted to make the case that Turkey has made some suboptimal decisions in its policies regarding the Kurdish situation, I now turn to consider which of the various causes discussed in the prior Part may have contributed to those decision-making defects.

The first that stands out is a likely bias in favor of the status quo. As explained above, individuals are reluctant to pursue a change from the status quo particularly when the consequences of that change are uncertain. With regard to the Kurdish situation in Turkey, state leaders can undoubtedly be certain that the overall situation needs improvement, but they may fear any particular, concrete change because they cannot be certain that it will not undermine the government, much less that it will actually result in an improvement over the status quo. Thus, they drag their feet on reforms even while a violent conflict continues at great cost to Kurdish lives and Turkish prosperity.

A second likely contributing factor is the phenomenon of emotion-based pattern recognition. One recurring theme among commentators is that Turkish leaders fear that recognizing the Kurds as a distinct group will ultimately lead to the disintegration of the Turkish state, a fear that is rooted in the history of the Ottoman Empire.<sup>221</sup> This means that the current leaders may be unable to avoid viewing the conflict as one that requires suppression, even as they may be-

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219. See Archiyan, *supra* note 201, at 144 n.211.

220. See ICG, *supra* note 198, at 12 & n.109 (describing "[l]anguage freedom" as a key EU concern).

221. See YILDIZ & MULLER, *supra* note 168, at 78.

lieve on a rational level that negotiating for more equal rights will lead to a more stable regime. In my discussion of emotion-based pattern recognition above, I noted that the relevant patterns are most often formed during emotionally resonant experiences through which individuals actually lived. In this example, Turkey's current leaders would not have lived through the destruction of the Ottoman Empire themselves. Nonetheless, the overriding concern about preserving Turkey's territorial integrity and national unity seems strong enough to have been passed through generations of leaders, such that modern-day officials may feel it almost as strongly as did the founders.

Moreover, each generation of leaders has had its own struggle with the Kurds to reinforce both the general lesson that national unity is of preeminent concern and that the Kurds pose the greatest threat to that objective. Turkey's present leaders lived through the emotionally traumatic experiences of the 1984-1999 PKK conflict. The response that has worked to preserve Turkish unity time and again has been one of repression. That may explain why, even as the government has taken steps to promote particular reforms, it has undermined its own efforts by responding reflexively to certain developments with violence or heightened restrictions.

The third possible contributing factor to suboptimal decision-making by Turkey's leaders is overconfidence. The concern here would be that state leaders are overly optimistic in their ability to manage the Kurdish problem with minimal effort as well as in their chances of attaining EU accession without more fundamental changes in this area. Public statements by state officials have sometimes betrayed this type of overconfidence.<sup>222</sup>

It is likely that actions taken by the international or European community have encouraged the overconfidence of Turkey's leaders. For example, given concerns expressed by commentators about the move being premature, the opening of the EU accession process itself might have sent an unduly encouraging signal to Turkey that its progress in human rights and on the Kurdish issue specifically was adequate.<sup>223</sup> The problem has continued with the inconsistent way in which Turkish violations have been evaluated in the European Commission's annual progress reports.<sup>224</sup> Mixed messages from the

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222. See, e.g., Abdullah Gul, *Talking Turkey: A Conversation with Abdullah Gul*, FOREIGN AFF. (Sept. 24, 2013), <http://www.foreignaffairs.com/discussions/interviews/talking-turkey> (minimizing concerns about public protests); Jonathan Tepperman, *Turkey's Moment: A Conversation with Abdullah Gul*, FOREIGN AFF. (Jan./Feb. 2013), <http://www.foreignaffairs.com/discussions/interviews/turkeys-moment> ("We are forcing our way through each door en route to full membership."). Of course, attempts to rely on public statements should always be subject to the caveat that they are a form of posturing and not necessarily reflective of sincerely held beliefs.

223. See YILDIZ & MULLER, *supra* note 168, at 18-19.

224. See *id.* at 173-74.

international community exacerbate the problems associated with overconfidence because they prevent state leaders from effectively measuring their actual progress and instead encourage them to continue overestimating their ability to meet Turkey's objectives.

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As I have emphasized, the two illustrations just provided are not meant to conclusively prove that U.S. and Turkish leaders made suboptimal decisions with respect to their handling of the Abu Ghraib and Kurdish situations respectively. My goal instead was to show that suboptimal decision-making could plausibly have been a factor. Even if both of those scenarios can be explained fully by a rational account, each presented a close question, and suboptimal decision-making could make the difference on the margins in another, similar scenario. Thus, the possibility of human rights violations resulting from suboptimal decisions is substantial enough to warrant asking how human rights advocates might adapt their strategies accordingly. I turn to that question next.

#### IV. BROADENING STRATEGIES FOR IMPROVING COMPLIANCE

As described in Part I, the promotion of human rights is often divided into the two categories of coercion strategies, which seek to pressure state leaders into compliance, and persuasion strategies, which seek to convince state leaders of the intrinsic value of human rights. If all or nearly all human rights violations resulted from utility-maximizing decisions, then this two-pronged approach could be seen as comprehensive. Under that assumption, the only options for influencing state behavior would be to alter a state's expected utility calculation either by introducing external material incentives, as coercion seeks to do, or by changing a state's underlying preferences, as persuasion seeks to do. But if a not insubstantial subset of violations follow from decisions by state leaders that fail to maximize expected utility, then there may be opportunities, currently being overlooked, for improving human rights compliance within the state's existing incentive structure. A broader strategy would look for ways to help state leaders avoid these suboptimal decisions and thereby ensure they are complying when compliance is already in the state's interest.

As I noted at the outset of this Article, developing a broadened strategy is important because measures aimed at correcting suboptimal decision-making could yield immediate gains while efforts in coercion and persuasion are gradually proceeding. Moreover, the proposals made here are generally consistent with, and potentially complementary to, existing compliance strategies. That is because as the human rights community succeeds in creating greater material incentives to comply and convincing state leaders of the validity of



norms, it must also work to remove suboptimality barriers to ensure that state leaders actually follow what would then be the utility-maximizing course.

In the following Sections, I explore three measures that could be used together to promote compliance that is already in a state's interest. The first of these, diagnosis, is more of a preliminary step that should be added to the process of human rights promotion before the work of influencing behavior begins. The second measure of engagement is already in the toolkit of human rights advocates, but I propose ways in which it should be reshaped to account for the general problem of suboptimal decision-making. The third measure of debiasing moves from the general to the specific level to address the particular forms of suboptimality described in this Article.

In addition to human rights scholars, the primary audience for these recommendations is the practitioners who work in NGOs and experts who serve on monitoring bodies because they are the actors who already have an ongoing influence on state behavior. The current relationship between NGOs and monitoring bodies on the one hand and state leaders on the other, however, may not be conducive to the type of cooperation needed to effectively implement the proposed measures. Accordingly, in Part IV.D, I describe what these actors may be able to learn from the successful relationships built by the International Labor Organization (ILO), which has a monitoring body that oversees compliance with international labor standards, and the International Committee of the Red Cross (ICRC), an NGO-like organization that monitors compliance with international humanitarian law.

### A. *Diagnosis*

The first step that should be added to the process of promoting human rights compliance is diagnosing the cause of a state's violations. The importance of this step follows directly from the discussion above, but it is not otherwise one on which the human rights community has focused. It is understandable why this step has been overlooked, because the assumption has generally been that violations follow from utility-maximizing behavior, and the same two tools of coercion and persuasion would be equally applicable (if not always equally effective) in all instances. But this two-size-fits-all approach makes less sense if the types of problems described in the preceding Parts are also contributing to human rights violations.

A diagnostic process would therefore involve asking a series of questions along the following lines. First, is the violation at issue better explained as utility-maximizing or suboptimal conduct? Answering this question requires examining evidence of the state's interests

and preferences regarding the issues at stake in the particular violation. For example, does the state involved appear to place independent value on human rights or the particular norm at issue, such that a nonmaterial interest in compliance would likely enter its expected utility calculation? What were the apparent material benefits to be gained from violating and complying, respectively? If the analysis points clearly to the conclusion that state leaders were rationally pursuing state interests, then coercion and persuasion may be the proper tools on which to focus because effecting change will require altering the state's expected utility calculation.

But if the analysis suggests even the possibility of suboptimal decision-making, the second question should be at what stage the decision-making went wrong.<sup>225</sup> As noted earlier, suboptimality can plague decisions beginning at a high-level planning stage and all the way through various stages of implementation. Determining when the overall decision-making process went awry would inform the type of response that would be appropriate. For one thing, the posture of state leaders is likely to be less cooperative if they made a conscious decision to ignore a particular norm than if the leaders had themselves determined that compliance would maximize the state's utility and had made miscalculations in attempting to implement that decision. The leaders in the former scenario would naturally feel self-righteous or defensive about their decisions, whereas the leaders in the latter scenario would be more likely to recognize a problem in need of solving. I discuss further implications of this distinction for possible intervention strategies in the following two Sections.

The final step in the diagnostic process is to determine what the likely causes of suboptimality were. As alluded to in Part I, one possible cause would be unsanctioned conduct by a rogue agent that is not fairly attributable to state leaders, and another would be self-serving conduct by officials at any level. A further possibility also alluded to earlier is one of organizational failure, in which some structural defect prevents individuals who are otherwise acting rationally within their respective spheres from reaching the optimal decision as a group. These concerns are not the focus of the present discussion, but a comprehensive diagnostic process would certainly take them into account because they point to different possible interventions. For present purposes, the potentially relevant concern would be whether any decision-making defects, such as the ones outlined in Part II, affected the state leaders involved in the violation. If so, then one or more of the various strategies discussed below may be appropriate.

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225. Even a possibility of suboptimality should suffice because it will be difficult to determine with certainty whether the causes of suboptimality are at work in any given situation.

An obvious barrier to the success of a diagnostic process is the information to which the human rights community would have access. To some extent, publicly available evidence in the form of statements by state leaders and findings from state-appointed or independent investigators would assist in the formation of plausible hypotheses, along the lines of my analysis of the illustrations in Part III. But for more definitive conclusions, human rights advocates would likely need greater access to actual decision-makers, a point I address in Part IV.D.

### *B. Engagement*

A general strategy for reducing suboptimal decision-making would involve greater engagement between state leaders and the human rights community. Engagement has been recognized as an important part of the traditional tool of persuasion but with a different emphasis. The literature on persuasion suggests that regular interactions between state leaders and members of the human rights community will gradually foster increasing acceptance among those leaders of the importance and legitimacy of human rights norms.<sup>226</sup> By contrast, the focus of the present discussion is on improving compliance not through the alteration of normative views, but through the clearing away of obstacles in the decision-making process.

There are several ways in which engagement could help address the causes of suboptimality. The most obvious is in facilitating the exchange of information and best practices. Take the example of state leaders who miscalculated in making a high-level decision to violate a particular norm. One possible response would be simply to provide additional information that could convince them that compliance would actually maximize the state's utility. As noted above, state leaders in this scenario might be prone to adopting an adversarial approach in any dialogue with members of the human rights community. Nonetheless, if concrete facts exist, or can be developed, to show that a state stands to gain more by complying than by violating a norm, then convincing the state's leaders of what is already in their interest should be more achievable than persuading them to recalibrate their underlying preferences.

The primary value of this sort of information sharing is to help state leaders solve existing problems. But a further value of engagement is that it can potentially improve future decision-making so

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226. See, e.g., HAFNER-BURTON, *supra* note 13, at 64 (describing persuasion as a "process that spreads information about the global norms that protect human rights, stirs up debate and interpretation of those norms, shames violators, and eventually teaches people to value those ideas as part of the legitimate social order in which they live while embedding those values in society's institutions").

that state leaders can more effectively address problems that have not yet arisen. The literature on cognitive biases finds that requiring a decision-maker to justify decisions to a third party tends to produce more rational thinking.<sup>227</sup> If state leaders regularly engage with human rights advocates and experts about their compliance decisions, over time their reasoning process about such decisions should improve, particularly as they anticipate having to justify such decisions to third-party evaluators. Thus, engagement can have value not only in actually changing the preferences of state leaders, and not only in helping leaders make utility-maximizing decisions on existing human rights problems, but also in counteracting the causes of suboptimality on a broader and more forward-looking basis.

While the benefits of such engagement are compelling, it is clear that the human rights community at present is not maximizing them. Consider the current reporting system in which state representatives provide a written submission detailing their compliance record in regard to a particular human rights convention and appear before a body of human rights experts to respond to questions and concerns.<sup>228</sup> Even setting aside the concerns raised by suboptimality specifically, the reporting process has been extensively criticized. As Professor Makau wa Mutua explains, “the [reporting] process is so routine that in recent years both sides just seem to go through the motions, even when the particular state in question is a serious violator.”<sup>229</sup> Rosalyn Higgins, a former member of the Human Rights Committee, which monitors compliance with the International Covenant on Civil and Political Rights,<sup>230</sup> suggests that states “seem mainly concerned now with ‘treading water’ during the dialogue, simply with ‘getting through’ the two or three days of examination, so that these matters can be shelved again for another few years.”<sup>231</sup>

These assessments suggest that the unique opportunities that human rights monitoring bodies have to engage with state leaders are not being used to their full potential. Two possibilities for improving the quality of this interaction come to mind. The first is prioritization. While undertaking a comprehensive evaluation has some natural appeal, given constraints on time and resources, the forum

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227. See Oren Bar-Gill & Barry Friedman, *Taking Warrants Seriously*, 106 NW. U. L. REV. 1609, 1643-44 (2012).

228. See Rachael Lorna Johnstone, *Cynical Savings or Reasonable Reform? Reflections on a Single Unified UN Human Rights Treaty Body*, 7 HUM. RTS. L. REV. 173, 175-77 (2007) (describing the reporting system).

229. Makau wa Mutua, *Looking Past the Human Rights Committee: An Argument for De-Marginalizing Enforcement*, 4 BUFF. HUM. RTS. L. REV. 211, 228 (1998).

230. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

231. Rosalyn Higgins, Commentary, *Ten Years on the UN Human Rights Committee: Some Thoughts upon Parting*, 6 EUR. HUM. RTS. L. REV. 570, 588 (1996).

could be used more productively if the participants focused on areas in which compliance may already be in the state's interest. Prioritization would enable the participants to set aside issues on which the two sides clearly disagree, which in addition to saving time would also foster a more constructive exchange by avoiding a rehashing of positions that could trigger unnecessarily adversarial attitudes.<sup>232</sup> A second step would be to place a greater emphasis on the importance of follow-up, even if the response is just to express disagreement with the monitoring body's viewpoint.<sup>233</sup> Even the simple act of formulating a substantive response to a raised concern may increase the debiasing potential of the interaction by requiring state officials to engage in some degree of rational reasoning.<sup>234</sup> By contrast, canned or general responses, including those that indicate a desire to comply with recommendations, suggest that the officials responsible did not give the matter serious thought.

A third, broader concern about the quality of engagement is the level of trust that exists between state leaders and the advocates and experts that make up the human rights community. I return to this issue below in describing what members of NGOs and monitoring bodies could learn from the examples of the ILO and ICRC.

### C. *Debiasing*

Having considered how engagement can improve the general quality of decision-making, I turn now to more specific debiasing strategies tailored to the three causes of suboptimality discussed above. Where possible, I will incorporate examples that draw on the illustrations developed in the preceding Part.

First, with regard to prospect theory concerns, human rights advocates and experts could place a greater emphasis on the costs of human rights violations. State leaders may naturally view changes that promote human rights as a form of loss. From a ruling class's perspective, such reforms may be perceived as making concessions to an opposition party or minority group or otherwise undermining the stability of the state. And even if these costs are outweighed by the benefits to be gained by prospective improvements, prospect theory

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232. This suggestion should not be interpreted to imply that confrontation is never appropriate. But in the absence of any power to sanction violations, monitoring bodies should reserve the confrontational approach for issues that have not already been flagged with adequate visibility so that they can set an agenda for future debate, or perhaps for issues where there is already mounting pressure on the state to change, so that there is a legitimate chance of influencing behavior.

233. See PHILIP ALSTON & RYAN GOODMAN, *INTERNATIONAL HUMAN RIGHTS* 738-40 (2013) (contrasting a response in which Thailand defended speech restrictions to the Human Rights Council with one in which Syria simply "affirmed its commitment to human rights" and the review process).

234. See Bar-Gill & Friedman, *supra* note 227, at 1644.

suggests that knowledge of such benefits may be insufficient to incentivize change, particularly when there is some degree of uncertainty about that calculation. Turkey's experience with the Kurdish problem illustrates the point: notwithstanding the evidence that Turkey stands to gain more than it would lose from reform, state leaders seem unable to overcome their bias in favor of the status quo.

If prospect theory is correct that actors are more motivated to act by the fear of losses than the desire for gains, then the appropriate strategy is to help state leaders better appreciate the costs of failing to comply—in other words, to fight losses with losses. Depending on the nature of the violations at issue, poor human rights performance may lead to costs ranging from deterring foreign investment to exacerbating public unrest. Because the status quo bias leads states to resolve uncertainty in favor of maintaining the current equilibrium, outside assistance is needed to highlight the very real costs of inaction. Scholars, NGOs, and other members of the human rights community can conduct such studies and indeed have done so before.<sup>235</sup> Developing these facts and presenting them to state leaders could incentivize change in a way that appealing to the ideals of justice or pointing to the prospect of material gains would not.

The human rights community can also help states overcome the obstacles posed by the status quo bias by encouraging incremental reforms. The idea here would be that state leaders may be more willing to enact small-scale reforms that provide for an opportunity to regularly reassess their effect and grow acclimated to a new status quo, against which subsequent further reforms can be evaluated.<sup>236</sup> For Turkey, this emphasis on gradual measures would stand somewhat in tension with the recommendations of other commentators who believe that only radical change will resolve the situation.<sup>237</sup> These writers are correct, to an extent: the arguably token measures

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235. See, e.g., James H. Lebovic & Erik Voeten, *The Cost of Shame: International Organizations and Foreign Aid in the Punishing of Human Rights Violators*, 46 J. PEACE RES. 79 (2009) (finding statistical evidence that the World Bank reduced aid to states that had been criticized in resolutions by the United Nations Commission on Human Rights). To take one particularly straightforward example, the Ukrainian Ombudsman for human rights calculated that the country paid more than \$200 million in fines based on European Court of Human Rights judgments between 2001 and 2013. See Nikolai Holmov, *Putting a Cost on Human Rights Violations—Ukraine*, ODESSA TALK (Oct. 31, 2013), <http://www.odessatalk.com/2013/10/putting-cost-human-rights-violations-ukraine/>. One judgment awarded seventeen prisoners on a hunger strike over detention conditions 435,000 Euro each; this amount was calculated to be “a combined cost probably greater than improving the conditions they were held in sufficiently to prevent their hunger strike in the first place.” *Id.*

236. Cf. Steven L. Bray, Comment, *Sealing the Conceptual Cracks in the SEC's Environmental Disclosure Rules: A Risk Communication Approach*, 18 U. PA. J. INT'L ECON. L. 655, 674 (1997) (making a similar argument regarding environmental reforms).

237. See YILDIZ & MULLER, *supra* note 168, at 178-83.

that have been enacted thus far have hardly made a dent in the problem. But wholesale change is likely not politically feasible, even setting aside the status quo bias. And the status quo bias helps us understand why seeking such wholesale change may well be counterproductive. Instead, to address the concern that small-scale measures will serve as mere token gestures, the focus of negotiations should be on a comprehensive package accomplished through a series of manageable steps, with conditions that must be fulfilled along the way and plenty of time for reassessment.

Second, with regard to overconfidence, it is important for human rights advocates and experts to translate strategic objectives into concrete action plans and ultimately into operational steps with benchmarks that allow for progress to be effectively measured. This recommendation follows from the antecedent conditions Dominic Johnson identifies for when overconfidence concerns are most likely to be present. As relevant here, he explains that overconfidence is likely to be more problematic (1) when the outcomes of policy choices are difficult to verify;<sup>238</sup> (2) in the context of broad, strategic decision-making rather than in the context of narrow, ground-level issues;<sup>239</sup> and (3) during the implementation stage rather than during the deliberation stage, meaning that once a general course of action has been decided upon, people think less realistically in figuring out how they will pursue that course.<sup>240</sup>

As discussed above, the high-level guidance and mixed messages provided by the European Commission to Turkey illustrate the challenge. If they are to overcome the apparent effects of overconfidence, Turkey's leaders need to be provided with much more concrete recommendations about how to improve the human rights situation of Kurds and, importantly, what benchmarks would constitute adequate progress for the state to remain on track for EU accession. Meanwhile, the experts who oversee compliance with human rights conventions are already taking this approach to some extent; the recommendations provided in the "concluding observations" that wrap up a reporting cycle are in some instances fairly targeted, including suggestions for specific legislation. For example, in the concluding observations of the Committee Against Torture in 2006, the first reporting date after the revelations of abuse at Abu Ghraib, the recommendations included the enactment of "a federal crime of torture, consistent with article 1 of the Convention," the proper registration of all persons detained in any territory under the country's jurisdiction,

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238. See JOHNSON, *supra* note 68, at 40.

239. See *id.* at 41.

240. See *id.* at 44-45.

and the end to the practice of detaining prisoners in “any secret detention facility under [the country’s] de facto effective control.”<sup>241</sup>

But given that, for many areas of human rights, there is a well-documented gap between laws on the books and facts on the ground, it is questionable whether recommendations for specific legislation will be effective in most instances. The discussion of proposals for reform may need to get still more granular. NGOs and monitoring bodies could collect and provide best practices that have been developed by other states facing similar issues. States in turn could be asked to share plans for solving particular challenges complete with breakdowns of required resources and intermediate deliverables to measure progress.<sup>242</sup> The opportunity to receive third-party evaluations of such plans, combined with the feedback provided by concrete progress measures, may reduce the distorting effects of overconfidence.

Third, with regard to suboptimal emotion-based decisions, this same shift toward greater emphasis on advance planning over reviewing past performance may also be beneficial. Here, again, it is useful to recognize the circumstances in which emotion-based decision-making is most likely to short-circuit more rational analysis. Rosen identifies three such circumstances. First, the time available in which to make the decision will be short; second, the decision will be one that triggers an emotional response; and third, there will be a straightforward connection between the earlier event and the present decision.<sup>243</sup> In short, emotion-based decisions take place fast and instinctively. Given that the impact of emotions on decision-making is greatest when time is short, and there will be little if any time to intervene just before a particular compliance decision is made, consulting NGOs and monitoring bodies should devote time to identifying potential crises and assisting state leaders with the preparation of an action plan to minimize human rights consequences while there is opportunity for more rational deliberation. Although the details of a future crisis will not yet be discernible, its general contours can usually be predicted based on past events, and the human rights community can help devise plans of action using objective data points that might go overlooked during the heat of a conflict. Preparing such plans while there is time for rational analysis should at least temper

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241. U.N. Comm. Against Torture, Conclusions and Recommendations of the Committee Against Torture: United States of America, 36th Session, May 1–May 19, 2006, ¶¶ 13, 16, 17, U.N. Doc. 2006CAT/C/USA/CO/2 (May 18, 2006), *available at* <http://www.state.gov/documents/organization/133838.pdf>.

242. Of course, no state is likely to share such information when it comes to issues relating to national security, but for other human rights concerns that do not touch on matters quite as sensitive—for example, prison overcrowding or speedy trial concerns—it is conceivable that states will be sufficiently forthcoming.

243. ROSEN, *supra* note 89, at 55.



the role that emotions play in decisions made during a subsequent crisis.

A further step that NGOs and monitoring bodies could take would be to do more to identify and address the emotion-based patterns that may underlie human rights misconduct. Recognizing that human rights decisions will never be entirely free of emotions, advocates and experts can attempt to counter the problematic effect produced by the default patterns by offering alternative scripts. Leaders should be reminded of crackdowns that escalated rather than ended a conflict and of force deployments that resulted in tragic losses beyond what anyone would have deemed acceptable. Because these alternative patterns would be presented in an artificial setting, they would not have the same resonance as emotionally fraught moments through which a state's leaders actually lived. Nonetheless, there is reason to believe they can provide at least a partially countervailing force against the patterns on which the leaders would otherwise instinctively draw, if only because they should raise doubts in the leaders' minds about the validity of their instinctive impressions.

In short, this approach would go beyond identifying steps that should be taken to helping state leaders understand why their current approach is flawed. With the example of language and cultural rights for Turkish Kurds, for instance, it is not enough to tell Turkey where and how it needs to improve, as the Human Rights Committee has done already.<sup>244</sup> There must be a dialogue about how the state's past conflicts with the Kurds have colored the issue, as well as efforts to increase awareness of other possible patterns so that Turkey's leaders may see the problem more clearly and not through the lens of those past conflicts.

#### *D. Examples of Cooperation*

Some of the proposals detailed above may be difficult to imagine as realistic in the context of NGOs and monitoring bodies as they are presently constituted. In particular, as alluded to above, the type of dialogue and interaction described in the preceding Sections would likely require a degree of trust between state leaders and members of the human rights community that does not currently exist. One reason that state leaders are instinctively adversarial rather than cooperative when dealing with the human rights community is that

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244. See U.N. Human Rights Comm., Concluding Observations on the Initial Report of Turkey Adopted by the Committee at Its 106th Session, Oct. 15–Nov. 2, 2012, ¶ 9, U.N. Doc. CCPR/C/TUR/CO/1 (2012), available at <http://www.ccprcentre.org/doc/2012/10/G1247598.pdf> (“The State party should ensure that all persons belonging to ethnic, religious or linguistic minorities are effectively protected against any form of discrimination, and can fully enjoy their rights. To this regard, the State party should consider withdrawing its reservation with respect to article 27 of the Covenant.”).

members of the latter group rely heavily on the practice of naming and shaming.<sup>245</sup> Given how rare it is for more concrete sanctions to be imposed on human rights violators, it is understandable that NGOs and monitoring bodies resort to publicizing and criticizing violations so that at least a reputational sanction can be imposed on noncompliant states. While this can be an effective means of coercion, the result is that few NGOs and no monitoring bodies likely have the sort of cooperative relationship needed to implement the recommendations made above.<sup>246</sup>

But by looking just beyond the core domain of human rights to areas like international labor rights and international humanitarian law, we can find two examples of organizations that have the types of relationships with state officials that would permit robust engagement and debiasing. I consider each of these organizations in turn, highlighting the features that could be useful in informing how monitoring bodies and NGOs could build the types of trusting relationships that would strengthen their ability to influence state leaders.

### 1. *International Labor Organization*

The ILO is a United Nations agency “devoted to promoting social justice and internationally recognized human and labour rights.”<sup>247</sup> Like the monitoring bodies established by various human rights conventions, the ILO has a Committee of Experts that meets to review state compliance with various international labor standards. This review process has been described as “the most sophisticated supervisory system in international law.”<sup>248</sup>

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245. See Gopalan, *supra* note 138, at 793-94 (describing the practice of naming and shaming).

246. As a caveat, I should note that my generalization about NGOs pertains to the major organizations that have broad international influence, like Human Rights Watch and Amnesty International. There likely are smaller organizations, typically operating within a single country, that rely less on naming and shaming and are able to achieve a greater degree of cooperation with state leaders.

247. *Mission and Objectives*, INT'L LABOUR ORG., <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang-en/index.htm> (last visited March 12, 2015).

248. Lee Swepston, *The International Labour Organization's System of Human Rights Protection*, in HUMAN RIGHTS: INTERNATIONAL PROTECTION, MONITORING, ENFORCEMENT 91, 95 (Janusz Symonides ed., 2003); see also Elizabeth P. Barratt-Brown, *Building a Monitoring and Compliance Regime Under the Montreal Protocol*, 16 YALE J. INT'L L. 519, 556 (1991) (“ILO mechanisms for collecting information, issuing reports and using publicity as a means of encouraging state compliance, are the strongest in the United Nations system.”). To be sure, the ILO is not considered to be an unqualified success, and some commentators believe it needs sanctioning powers to achieve results with “recalcitrant states.” Daniel S. Ehrenberg, *The Labor Link: Applying the International Trading System to Enforce Violations of Forced and Child Labor*, 20 YALE J. INT'L L. 361, 382 (1995). Nonetheless, relative to other similar organizations, it is difficult to deny that the ILO is a model of cooperation.

One unique feature of the ILO review process that likely contributes to this success is its use of a phased approach. After a state submits its report to the Committee of Experts, the Committee follows up on concerns by sending “direct requests” to governments, “requesting further information, or pointing out discrepancies between a State’s law and practice and the relevant convention.”<sup>249</sup> Such direct requests go straight to governments and are not published except for a notation in the report.<sup>250</sup> Furthermore, there is a common practice to grant a “two-year grace period before the committee publicizes a failure to implement treaty obligations, to afford time for the International Labor Office and the committee itself to work with the country to bring it back into compliance.”<sup>251</sup>

After review by the Committee of Experts, the ILO’s Conference Committee on Standards selects a set of serious cases for discussion at the annual meeting.<sup>252</sup> The Conference Committee includes about two hundred members divided equally among government, employer, and worker representatives.<sup>253</sup> Government representatives appear before the Conference Committee to explain their reasons for non-compliance.<sup>254</sup> The Conference Committee’s eventual report includes a “special list” of states that have failed to meet their obligations; these states receive prior warning in the form of “special paragraph[s]” notifying them that corrective action is warranted.<sup>255</sup>

The ILO system’s two-tiered approach could potentially pay dividends for human rights monitoring bodies by providing them with the access they need to diagnose the causes of noncompliance and effectively pursue engagement and debiasing strategies. The idea of a private initial review stage, combined with a grace period to allow for time to address noncompliance, could dramatically alter the relationship between human rights experts and state representatives. The present dynamic has been criticized for “often [being] conducive to political stands by government representatives.”<sup>256</sup> But if the dialogue began as a private one, and without the immediate threat of public confrontation, the prospects for a constructive, open exchange would seem significantly higher.

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249. Virginia A. Leary, *Lessons from the Experience of the International Labour Organisation*, in *THE UNITED NATIONS AND HUMAN RIGHTS* 580, 597 (Philip Alston ed., 1992).

250. *Id.* at 598.

251. CHAYES & CHAYES, *supra* note 24, at 232.

252. Leary, *supra* note 249, at 598.

253. *Id.* at 599.

254. Barratt-Brown, *supra* note 248, at 558.

255. *Id.*

256. Leary, *supra* note 249, at 597. Although Leary expresses concern about the lack of publicity for the Committee of Experts’ work, this tradeoff is less concerning than it might otherwise be because the next stage of review is public. *See id.* at 597-98.

Interestingly, the ILO also retains the option to pursue a coercion strategy in the form of reputation sanctions imposed by the Conference Committee. Given how I have emphasized that only a subset of human rights violations result from suboptimal decision-making, human rights monitoring bodies should likewise preserve this possibility of altering a state's expected utility calculation. By clearly separating the cooperative from the coercive stage, this approach could potentially yield the best of both worlds or, at a minimum, reduce the distrust that would creep in if coercion were used in a less constrained way.

## 2. *International Committee of the Red Cross*

The ICRC is an independent organization registered as a private association under Swiss law.<sup>257</sup> Its mission is "to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance."<sup>258</sup> While not technically an NGO, it serves many of the same functions by promoting the development of international humanitarian law, assisting individual victims, and working with governments to improve compliance.<sup>259</sup> Commentators recognize the ICRC as having a uniquely strong reputation for impartiality that enables it to obtain the cooperation of both sides of an armed conflict.<sup>260</sup>

An important factor in the ICRC's ability to work cooperatively with state officials is its promise of confidentiality for detected violations of international humanitarian law. The process begins when ICRC representatives are invited to meet with detainees held by a state (or non-state armed group), typically because both sides have agreed to such visits.<sup>261</sup> After gathering information, the ICRC, rather than broadcasting violations, communicates directly and confidentially with state and armed-group leaders to identify concerns and provide recommended solutions.<sup>262</sup> Like the ILO, the ICRC also uses a phased approach. If the ICRC determines that its concerns

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257. Steven R. Ratner, *Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War*, 22 EUR. J. INT'L L. 459, 463 (2011).

258. *The ICRC's Mandate and Mission*, INT'L COMMITTEE OF THE RED CROSS, <https://www.icrc.org/en/mandate-and-mission> (last visited March 12, 2015).

259. See *The ICRC's Mandate and Mission: 29-10-2010 Overview*, INT'L COMMITTEE OF THE RED CROSS, <http://www.icrc.org/eng/who-we-are/mandate/overview-icrc-mandate-mission.htm> (last visited March 12, 2015).

260. See Ratner, *supra* note 257, at 463; see also Leah M. Nicholls, Note, *The Humanitarian Monarchy Legislates: The International Committee of the Red Cross and Its 161 Rules of Customary International Humanitarian Law*, 17 DUKE J. COMP. & INT'L L. 223, 227-30 (2006) (describing the ICRC's reputation and ability to obtain cooperation but noting criticisms of its work).

261. See Posner, *supra* note 12, at 165.

262. See Ratner, *supra* note 257, at 468-70.

have not been adequately addressed, it turns next to seeking assistance from other actors that may have influence on the target state or armed group and ultimately to public condemnation.<sup>263</sup>

The lessons of the ICRC example for human rights NGOs essentially parallel those of the ILO example for human rights monitoring bodies. In short, the goal would be for human rights NGOs to develop the type of trusting relationship with state leaders that would provide the former with the access they need to diagnose the causes of noncompliance and work constructively to overcome suboptimality concerns. This could take the form of a phased approach in which any coercion strategies are reserved only as a fallback if cooperation fails. Alternatively, because there is no reason why any given NGO needs to undertake both roles, it may be valuable for some NGOs to specialize exclusively in cooperative strategies, which should foster an even greater degree of trust than any single NGO adopting a phased approach could.

#### CONCLUSION

This Article has attempted to show how at least some human rights violations likely result from suboptimal decision-making, and it contends that the human rights community should therefore give greater attention to the causes of suboptimality in designing strategies to improve compliance. Although efforts to alter a state's expected utility calculation through coercion and persuasion remain important pieces of the puzzle, this Article highlights the opportunities available to make more immediate gains. In short, by addressing suboptimality concerns directly, the human rights community can help clear the way for states to comply with norms when doing so would already be the rational choice.

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263. See *id.* at 470.

