1

Introduction

When states met at the Diplomatic Conference to update the Geneva Conventions in the aftermath of the Second World War, they removed overt forms of reciprocity, such as the *si omnes* clause and the resort to belligerent reprisals, from the international laws governing armed conflict. The removal of these overt forms of reciprocity has led to the emergence of a view that, following Theodor Meron, I will call the "humanization of humanitarian law" thesis.[1] This is the view that the standards of conduct embodied in the international law governing armed conflict found in treaties such as the Geneva Conventions (1949)[2] and the Protocols Additional to the Geneva Conventions (1977)[3] represent appropriate standards of conduct in armed conflict; appropriate standards that states have agreed to comply with regardless of the actions of their opponents. According to the humanization of humanitarian law thesis, reciprocity is no longer a condition of international humanitarian law (IHL).

[1] Theodor Meron, "The Humanization of Humanitarian Law," *American Journal of International Law* 94, no. 2 (2000); *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006).

[2] International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (GC I), 12 August 1949, 75 UNTS 31; International Committee of the Red Cross (ICRC), *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (GC II), 12 August 1949, 75 UNTS 85; International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Treatment of Prisoners of War* (GC III), 12 August 1949, 75 UNTS 135; International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (GC IV), 12 August 1949, 75 UNTS 287.

[3] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I), 8 June 1977, 1125 UNTS 3; International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), 8 June 1977, 1125 UNTS 609.

This logic of appropriateness-based understanding of IHL obligations would face a stern test in the aftermath of the 11 September 2001 ('9/11') attacks on the USA. In the months following the attacks, the Bush administration was under intense pressure to find those responsible and to prevent further attacks on American soil. In order to obtain the intelligence necessary to accomplish these goals, the USA relied on the interrogation of detainees in what it was calling the "Global war on terror" (GWOT). Many in the government believed that traditional interrogation techniques developed by the US armed forces and limited by Geneva Convention (III) relative to the Treatment of Prisoners of War (GC III) were insufficient to the task. Thus began an intense debate, not only within the US government itself, but also among the government, the US military, human rights groups, and international lawyers about the prisoner of war (POW) status of detainees.

In this debate, an important argument made by certain Bush administration officials against applying POW status to detainees was their alleged IHL violations. Since neither the Taliban nor al-Qaeda attempted to comply with IHL obligations, so the argument went, they were not entitled to its protections. This reciprocity-based argument caught many in the international community off guard, as even in the Vietnam War US policy makers decided to treat Viet Cong detainees as POWs. Moreover, more and more human rights groups, international lawyers, and even the US military had accepted the humanization of humanitarian law view that IHL obligations are mandatory regardless of the actions of one's opponents. To critics of the US decision denying POW status and the attendant rights under GC III to detainees taken in the GWOT, it appeared the USA was not willing to live up to its IHL obligations.

However, as I argue here, such a policy should not have been surprising. Both the text of IHL treaties and state practice indicate that considerations of reciprocity still play an important role in how states respond to non-compliance with the law by their opponents. Such considerations have persisted despite the fact that there has been a concerted effort to remove reciprocity from the law.

The remainder of this chapter serves three main purposes. First, it outlines the book's central argument for why the expectation of reciprocity continues to be an important consideration for states when they decide how to respond to violations of IHL. Second, it describes the methodology used to analyze the role played by such expectations in the decision making of states regarding their IHL obligations. Finally, it provides an overview of the remainder of the book.

1.1 Reciprocity and IHL

In the years following the attacks of 9/11, questions about the relationship between power and norms, between states pursuing their self-interest and the constraining effects of international law, and between the realities of modern warfare and the existing laws of war have been at the forefront of both academic research and public policy debates. In particular, many have depicted the US response as reversing the trend which was towards the humanization of humanitarian law. My argument, however, is that such a process has always been overstated and that what differentiates the US response in the GWOT from earlier decisions is not the application of reciprocity arguments per se but the circumstances in which policy makers have applied such arguments.

1.1.1 A More Nuanced View of Reciprocity

First, building on Robert Keohane's distinction between specific and diffuse reciprocity, I distinguish between two further types of specific reciprocity.[4] The first, which I term "legal reciprocity," involves particular reciprocal commitments that states build into the wording of international agreements such as IHL treaties. Yet specific reciprocity can also make itself felt beyond the written law. This second type of specific reciprocity, which I term "strategic reciprocity," can be used by states as a policy device regardless of the written law. States may resort to this type of reciprocity in an attempt to induce behaviour consistent with international legal requirements even in situations where no specific legal obligation exists between two parties. In concentrating on overt forms of legal reciprocity, supporters of the humanization of humanitarian law thesis have overlooked these subtler forms of strategic reciprocity.

Next, using H. L. A. Hart's theory of the nature of law, I show how states have maintained these subtler forms of specific reciprocity within IHL treaties. Hart described law as the union of primary rules of obligation and secondary rules conditioning the application of primary rules.[5] When conceived of as a secondary rule conditioning the application of the primary rules of IHL, instances of specific reciprocity overlooked by the humanization of humanitarian law thesis become apparent. I demonstrate how states have used secondary rules as a way to

[4] See Robert O. Keohane, "Reciprocity in International Relations," *International Organization* 40, no. 1 (1989).
[5] H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

accomplish the same goals, such as limiting the application of IHL to armed conflicts between sovereign states and their armed forces, for which they previously used overt forms of specific reciprocity.

As the first case study demonstrates in more detail, the law governing armed conflict has always included a system of secondary rules conditioning the application of its primary rules to certain conflicts and to certain participants taking part in those conflicts. The earliest rules governing the conduct of warfare relied on professional custom for their enforcement and ensured compliance by restricting participation in hostilities to an elite class of combatants, be they chivalrous knights or members of the professional armies of European absolute monarchs. States began to codify these customs in the form of international treaties beginning in the mid-nineteenth century. However, while states explicitly included the condition of reciprocal observation in many of these treaties, a concurrent trend of humanitarianism was beginning to take hold in thinking about the conduct of warfare. States, however, have never agreed to remove reciprocal considerations completely from the law. Rather, they shaped this concern for reciprocal application of restraint in warfare into IHL in the form of secondary rules.

Finally, by looking inside the "black box" of state decision making, my research builds on standard neoliberal institutional explanations for state compliance with IHL based on reciprocity. Beginning from the assumption that the state is a unitary actor, standard neoliberal institutionalist accounts explaining the persistence of reciprocity in IHL emphasize negative reciprocity – the matching of one violation with another violation – as a response to non-compliance with the law. However, by emphasizing the domestic multi-actor setting in which policy decisions about IHL obligations take place, I show that the role played by reciprocity is more complicated. Reciprocity may also exist in a positive form, such as the extension of IHL protections to actors to whom a state does not technically have a legal obligation in the hope of inducing a similar policy. I show that in many cases what appear to be debates about whether or not an particular IHL obligation exists – such as the entitlement to POW status – are really debates about which type of specific reciprocity – negative or positive – to apply.

1.1.2 Beyond Codified Law: Reciprocity in Practice

This is a work in the field of international relations and not international law. While the topic of IHL inevitably entails an investigation into the

content and nature of the law, this book is primarily intended as a contribution to the fields of political science and international relations. Therefore, the central question is less about what constitutes compliance with IHL, but under what political conditions states are in fact willing to extend the protections envisioned by the law to their opponents.

Those who argue that conditions of reciprocity no longer exist within IHL tend to focus on a strict analysis of the codified provisions of international treaties. Philippe Sands, a leading critic of US policy in the GWOT, has stated that: "The 'war on terrorism' has led many lawyers astray."[6] Yet, as Stephanie Carvin correctly points out, such claims are made "without ever explaining exactly what lawyers have been laid astray from."[7] In criticisms such as Sands', one is reminded of E. H. Carr's statement that there is "a strong inclination to treat law as something independent of, and ethically superior to, politics."[8] Such a focus on what the law says fails to consider examples of state practice and changes in that practice over time. This leads to an insufficient consideration of historical context and the unique circumstances of particular armed conflicts.

Even Jean Pictet, the editor of the four-volume *Commentary to the Geneva Conventions*, emphasized the importance of state practice in the proper interpretation of IHL. Pictet had served as one of the International Committee of the Red Cross (ICRC)'s delegates to the 1949 Diplomatic Conference that drafted the updated Geneva Conventions. Although the ICRC published the *Commentaries*, the Foreword refers to them as "the personal work of its authors."[9] In addition, with respect to interpreting the requirements of the Conventions, the *Commentaries* state "only the participant States are qualified, through consultation through themselves, to give an official, and, as it were, authentic interpretation of an

[6] Philippe Sands, *Lawless World: The Whistle-Blowing Account of How Bush and Blair Are Taking the Law into Their Own Hands* (London: Penguin UK, 2006), p. 206.

[7] Stephanie Carvin, *Prisoners of America's Wars: From the Early Republic to Guantanamo* (New York: Columbia University Press, 2011), p. 10.

[8] E. H. Carr, *The Twenty Year's Crisis 1919–1939: An Introduction to the Study of International Relations* (New York: Palgrave, 2001), p. 159.

[9] Jean S. Pictet (ed.), *Commentary: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 4 vols., vol. 1 (Geneva: ICRC, 1952), p. 1; *Commentary: Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 4 vols., vol. 2 (Geneva: ICRC, 1960), p. 1; *Commentary: Geneva Convention (III) relative to the Treatment of Prisoners of War,* 4 vols., vol. 3 (Geneva: ICRC, 1960), p. 1; *Commentary: Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 4 vols., vol. 4 (Geneva: ICRC, 1958), p. 1.

intergovernmental treaty."[10] The fact that Pictet's *Commentaries* have gained an authoritative force in the interpretation of the Conventions demonstrates the importance of state practice to the interpretation of IHL obligations.

Proponents of the humanization of humanitarian law point to certain examples, including the US armed conflict in Vietnam, as evidence that humanization has taken root in not only law but also state practice. In this case, Viet Cong detainees received POW status despite their continued non-compliance with their IHL obligations. The humanization of humanitarian law thesis cannot account for the variation between this case and the GWOT. It therefore falls back on the charge that the Bush administration broke with established practice regarding the POW status of insurgent groups who do not comply with IHL. In contrast, this book's focus on strategic reciprocity allows it to account for both the Vietnam War and GWOT cases as a continuation of a long-held state practice.

Applied to the important case of US policy making with respect to its treatment of detainees in particular armed conflicts, the argument defended here makes three predictions. First, we should expect to see that expectations of reciprocity remain an important consideration in debates about the POW status of detainees. Second, we should expect the USA to give POW status to an insurgent group when that group's non-compliance with IHL can impose high costs on the USA. This is likely to occur when the insurgent group does – or could potentially – hold a significant number of US troops as detainees and the USA expects that group to treat its detainees badly. Third, we should expect the USA not to treat members of an insurgent group as POWs when that group cannot impose significant costs on the USA. Even if the USA expects the insurgent group to treat American detainees badly in return, if such a group does not hold a significant number of US detainees, there is a low cost to the USA in denying these detainees status as POWs.

Such an understanding of state incentives accounts for the variation in US policy towards the POW status of detainees in the Vietnam War and GWOT case studies that the humanization of humanitarian law thesis cannot. In the case of the war in Vietnam, while the USA decided to treat

[10] *Commentary: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field*, p. 1; *Commentary: Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, p. 1; *Commentary: Geneva Convention (III) relative to the Treatment of Prisoners of War*, p. 1; *Commentary: Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War*, p. 1.

Viet Cong detainees as POWs, this was due to their concern about the treatment of American detainees held in the North by the North Vietnamese Army and in the South by Viet Cong troops. In the case of the GWOT, the Bush administration made and then defended their decision not to give POW status to Taliban and al-Qaeda detainees with specific reference to the values enshrined in IHL. In addition, those who made the decision had not just recently come around to such views about POW status. Rather, they had been arguing for denying POW status to those who did not comply with IHL for most of their public lives. In such a case, to say that these people had not internalized the values of IHL would seem odd. Instead, what distinguished them was their appeal to the expectation of reciprocity within the law.

1.2 Methodology

The methodology chosen for investigating why and how reciprocity has persisted in IHL treaties and state practice respecting IHL treaty obligations consists of comparing structured qualitative case studies of different instances of GC III compliance behaviour. Gourevitch writes that this "allows us to stage a confrontation between competing explanations in the social sciences."[11] I use a series of focused case studies to develop and provide empirical support for the argument of this book. Alexander and Bennett define a "case" as "an instance of a class of events" and a "case study" as "a well-defined aspect of a historical episode that the investigator selects for analysis, rather than a historical event itself."[12] Specifically, I focus on:

- The negotiations that took place at the Diplomatic Conferences of 1949 and 1974–7 which lead to the Geneva Conventions (1949) and the Protocols Additional to the Geneva Convention (1977);
- The US debate surrounding the legal status of detainees taken by US military forces in the Vietnam War; and
- The US debate surrounding the legal status of detainees taken by US military forces in the GWOT.

The case study method has the advantage of allowing for process tracing within each case. Process tracing involves a researcher examining

[11] Peter Gourevitch, *Politics in Hard Times: Comparative Responses to International Economic Crises* (Ithaca NY: Cornell University Press, 1986), p. 10.
[12] George L. Alexander and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge MA: MIT Press, 2005), pp. 17–18.

"histories, archival documents, interview transcripts, and other sources to see whether the causal process a theory hypothesizes or implies in a case is in fact evident in the sequence and values of the intervening variables in that case."[13] This methodology is a useful approach for testing a theory where a small number of cases are addressed in a comprehensive manner.

This work focuses on the treatment of POWs because I believe it represents a "hard case" for the role of reciprocity in IHL. Defenders of the humanization of humanitarian law thesis cite the *Geneva Convention relative to the Treatment of Prisoners of War* (1929) as the first of the Geneva Conventions to outlaw reciprocity. Article 82 of the *Convention* states: "The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances" (L 290).[14] In addition, the requirements of GC III represent norms embedded in both US domestic law and military culture. If the case studies demonstrate that reciprocity continues to play an important role in the application of GC III and US policy makers' decisions regarding the treatment of detainees, then there is support for the argument about the continued importance played by the expectation of reciprocity defended here.

I have selected these particular case studies for several reasons. First, the diplomatic conferences that updated the Geneva Conventions of 1949 and the Additional Protocols of 1977 represent the most significant advance in international law for the humanitarian protections of victims of war. All the states of the international community have ratified the Geneva Conventions and the Conventions themselves are synonymous in the mind of the public with IHL. The text of the Geneva Conventions and the apparent practice of many states that are High Contracting Parties to the agreements suggest that reciprocity is not a factor when states decide whether to apply the Conventions in international armed conflict. However, I argue that upon closer inspection, states have maintained within the Conventions particular rules that they can activate in the face of an opponent that perennially defects from their IHL obligations.

Second, the Vietnam War and the GWOT provide an interesting contrast to each other with respect to US application of GC III. In both cases, the USA faced an opponent that did not intend to comply with its

[13] Ibid., p. 6.
[14] L = Dietrich Schindler and Jiri Toman (eds.), *The Laws of Armed Conflict: A Collection of Conventions, Resolutions, and Other Documents*, 2nd ed. (Geneva: Henry Dunant Institute, 1981).

obligations under IHL. When faced with such a situation, humanization of humanization law proponents suggest that signatories to the Geneva Conventions still have a legal obligation to apply POW status to detainees. Traditional neoliberal-based theories of compliance suggest that the USA should have defected from implementing GC III protections for detainees in both cases. However, in the case of the Vietnam War, the USA applied POW status to Viet Cong prisoners, while in the case of the GWOT, it denied POW status to al-Qaeda prisoners. This has been taken to suggest a change in policy regarding how the USA understood its obligation to comply with international law with respect to perennial defectors. I argue, however, that a more nuanced understanding of reciprocity and the nature of the state decision-making process demonstrates that the neoliberal theory of compliance with international law is the best explanation of US policy in this area.

Finally, the USA is a hard case for the continued role of reciprocity in how states frame debates about compliance with IHL obligations. Humane treatment of POWs has informed US military practice since the Revolutionary War. US military doctrine first codified humane treatment for prisoners during the Civil War. In the late nineteenth century, European governments looked towards US military doctrine on POW treatment as a model for their own military manuals. In addition, US politicians have routinely linked the idea of humane treatment of individuals in time of war with US identity. Lastly, the USA has had much relevant experience with IHL throughout the twentieth century, as can be seen in the number of armed conflicts in which it has been involved and its extensive participation in the creation of IHL treaties.

To investigate the continued role played by the expectation of reciprocity in IHL, the case studies rely on four main sources of information. The first are primary documents including international treaties outlining states' commitments to certain rules governing the conduct of warfare and the letters, memos and discussions of those government officials who took part in the negotiations that concluded these treaties. The second source of information consists of the writings of policy makers inside the US government during both the Vietnam War and the GWOT, as they reflect important perceptions of the problems faced by and the options open to the US government in applying GC III to each of the armed conflicts examined here. The third important source of commentary on how states frame debates about IHL compliance is academic books and journal articles on the subject. Since the beginning of the GWOT, there had been a renewed academic interest in IHL and – in particular – the

topic of Geneva Convention compliance. I incorporate this recent work into my theory of why the expectation of reciprocity has persisted within IHL.

Finally, I conducted a series of telephone and in-person interviews in the USA. Interviewees included former US military personnel, Bush administration officials from both the US State Department and the US Defense Department, and members of international non-governmental organizations such as the ICRC and Human Rights Watch which have participated in debates surrounding the application of GC III in the cases studied. Appendix 1 gives an overview of where and when these interviews took place. As I have intended the interviews for qualitative analysis, the interviews did not follow a standardized questionnaire. Rather, I asked each interviewee about their specific area of expertise and relevant experience with respect to decisions regarding US policy towards its IHL treaty obligations in the particular case study under investigation.

1.3 Structure of Book

In addition to this Introduction, the book has six chapters. Chapter 2 develops the theoretical argument that reciprocity has persisted in both the text of IHL agreements and state practice with respect to IHL obligations. This chapter begins by outlining the rules governing the conduct of hostilities in warfare and presents two important arguments: one from international relations theory and the other from international legal theory, as to why specific reciprocity is important to states when they consider complying with these rules. It then describes what I will call the "humanization of humanitarian law" argument. This argument analogizes IHL to international human rights law, claiming that states have agreed to comply with IHL regardless of the actions of their opponents. Based on a logic of appropriateness, it suggests alternatives such as legal process, legitimacy and honour to explain states' decisions regarding their IHL obligations. The final section of this chapter suggests that these alternatives are insufficient to explain such decisions. Rather, the expectation of reciprocal compliance continues to influence policy making regarding IHL obligations, though militated by the multi-actor setting of domestic politics.

The subsequent three chapters provide empirical support for this theoretical position that specific reciprocity continues to play an important role in state decision making about applying IHL. The first case study