



Institute for International
Law and Justice

**IILJ International Legal Theory Colloquium Spring 2009:
Virtues, Vices, Human Behavior and Democracy in International Law**

Benedict Kingsbury and Joseph Weiler
NYU Law School

Pollack Colloquium Room, Furman Hall 9th Floor, 245 Sullivan Street
Thursdays 4pm-5.50pm

[student seminar also meets separately, Tuesdays 4pm-5.50pm]

Note: speakers' topics listed are indicative of areas, not final titles, and may change

- January 15 - Derek Jinks, University of Texas Law School**
Topic: *Humanization and Individualization in the Enforcement of International Humanitarian Law*
- January 22 - Anne van Aaken, University of St Gallen Law School, Switzerland**
Topic: *International Investment Law and Rationalist Contract Theory*
- January 29 - Craig Calhoun, NYU Institute for Public Knowledge & President, SSRC**
Topic: *Humanitarian Action in Cosmopolitan Perspective*
- February 5 - Paolo Carozza, Notre Dame Law School and Chair, IACmHR**
Topic: *Local Freedom, Human Rights, and International Law: A Tocquevillian Approach*
- February 12 - Leigh Payne, Oxford University Sociology (Latin American Societies)**
Topic: *Neither Truth Nor Reconciliation in Confessions of State Violence: Unsettling Accounts and Colombia's Justice and Peace Law*
- February 26 - William Miller, University of Michigan Law School**
Topic: *Messengers and Intermediaries: Insights from Ancient Law*
- March 5 - Moshe Halbertal, NYU Law School and Hebrew University**
Topic: *Pre-Conditions for Forgiveness*
- March 12 - Joseph Weiler, NYU Law School**
Topic: *Europe Against Itself: On the Distinction between Values and Virtues (and Vices) in the Construction and Development of European Integration*
- March 26 - Armin von Bogdandy, NYU Law School, Director MPI Heidelberg**
Topic: *Problems of International Public Authority*
- April 2 - Pierre Rosanvallon, Collège de France**
Topic: *The Metamorphoses of Democratic Legitimacy*
- Tuesday, April 7- (SPECIAL SESSION, 4:00 pm to 5:50 pm)**
Faculty Club, D'Agostino Hall, 110 West 3rd Street
Alexander Somek, University of Iowa
Topic: *Democracy-Enhancing International Law: The Argument for Transnational Effect*
- April 16 - Conference in Honor of Professor Andreas Lowenfeld**
(For more information, go to www.iilj.org – all welcome!)
- April 23 - Martha Nussbaum, University of Chicago Law School**
Topic: *Patriotism*

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Humanization and Individualization in the Enforcement of International Humanitarian Law

Derek Jinks[†]

Compliance is a deep problem in international humanitarian law (IHL). As an empirical matter, non-compliance is common—and the systematic commission of serious violations of IHL is not unusual. More fundamentally, though, the social and organizational context in which IHL applies presents a range of seemingly insurmountable structural impediments to effective enforcement. These fundamental considerations are straight forward and, frankly, vexing. Because IHL applies only in time of armed conflict and in the context of military occupation, compliance problems arise only where the opposing parties are already engaged in the ultimate enforcement measure: organized, sustained military hostilities directed against the other party. The capacity of warring parties, therefore, to compel each other is necessarily approaching its point of exhaustion whenever IHL is potentially applicable. Moreover, the capacity of warring parties to exert other forms of social influence on law-disregarding enemies is also severely compromised by the very armed conflict that triggers IHL. The conflict—and often the grievance motivating the conflict—typically degrade trust and social identification between the parties to the point that intra-conflict socialization becomes improbable in the extreme.

Note, though, that these problems complicate only the capacity of warring parties to influence each other to embrace law-regarding tactics. Two obvious kinds of solutions to these problems bear mentioning—even if only to clarify the problem under investigation here and its importance.

First, IHL is, to some degree and under certain conditions, self-enforcing.¹ Warring parties do, indeed, have good reasons to observe IHL irrespective of the tactics employed by the opposing party. As discussed more fully below, mistreatment of the enemy often decreases morale in one's own forces, discourages surrender and motivates more ferocious fighting by the enemy forces, encourages mistreatment of one's own forces when captured, and complicates efforts to restore the peace post-conflict. More

[†] Marris McLean Professor in Law, University of Texas School of Law; Visiting Professor of Law, Harvard Law School. This short paper sketches the contours of a more extended argument I am developing on the enforcement of IHL. This is, therefore, an early draft so your thoughts are most welcomed. Please send comments and criticisms to djinks@law.utexas.edu.

¹ See, e.g., Eric Posner, *A Theory of the Law of War*, 70 U. CHI. L. REV. 297 (2003).

generally, warring parties often have an interest in minimizing the overall level of destruction wrought in any conflict—an interest that strongly supports compliance with the general principles of targeting law. Such factors, no doubt, partially explain the patterns of compliance—and non-compliance—with IHL. And where such factors favor the adoption of law-regarding tactics, the compliance problem will often disappear. The problem, of course, is that non-compliance is all too often perceived by parties as tactically, strategically, or operationally valuable. In addition, compliance problems will often persist even when law-regarding behavior is in the interest of the parties. Stable, IHL-regarding cooperation might unravel irrespective of the intentions of the parties—understood here as groups—for many reasons including (1) the difficulty of monitoring violations under noise and; (2) the confusion of individual and party/state violations.²

Second, IHL is, at times, directly or indirectly enforced by non-belligerent third parties. International institutions, non-belligerent states, and non-governmental organizations often monitor compliance with IHL. These actors also often impose steep material and social costs on IHL-disregarding parties. The complex political economy of international legitimacy no doubts exerts meaningful influence over the actions of warring parties—directly and indirectly encouraging the observance of IHL. Moreover, the development of formal accountability mechanisms at the international level—most prominently, the remarkable development of international criminal tribunals—promises to curtail serious violations of IHL irrespective of whether warring parties have the political will or the institutional or organizational capacity to enforce the rules themselves. Nevertheless, the prospects of effective third-party enforcement should not be overblown. The third parties otherwise well-placed to respond to serious violations of IHL often lack the resources or sustained political will to influence law-disregarding parties in any meaningful way. The fact of the armed conflict suggests some defect in the will or capacity of third-parties to influence the warring parties—after all, they were unwilling or unable to influence the warring parties to resolve their dispute peacefully. And even when such actors or institutions are both capable and committed to sustained enforcement measures, these measures will often exert influence only in a gradual, diffuse and uneven way.

The upshot of this discussion, though, is not to deny, minimize, or even question the importance of self-enforcement or non-belligerent third party enforcement. Both kinds of enforcement schemes play an important role in the promotion of IHL. The point is that these schemes do not eviscerate the importance of developing effective inter-belligerent enforcement schemes. Inter-belligerent enforcement is, in fact, often the most immediate and direct mechanism for incentivizing—or otherwise inducing compliance by—warring parties. This is part of the reason why the formal enforcement schemes of IHL so clearly emphasize this variety of enforcement. The central questions are what

² See, e.g., James Morrow, *The Institutional Features of Prisoner of War Treaties*, 55 Int'l Org. 971, 974-980 (2001).

kind of scheme is employed in contemporary IHL and how best to design effective schemes—what is the law, what are its strengths and weaknesses. In this paper, I address these questions through an examination and evaluation of some constitutive features of the Geneva Conventions. The approach to enforcement in the Conventions differs importantly from the approach that characterized the classical law of war. These differences suggest that enforcement in contemporary IHL is increasingly humanized—in the sense that parties are not permitted to respond to illegalities with tactics that would be unlawful in the absence of any illegality—and individualized—in the sense that parties are required to direct punitive sanctions at individuals rather than groups. Contemporary IHL also increasingly favors inclusive, socialization strategies that seek to promote compliance through engagement of irregular groups particularly in irregular conflict types. Many have criticized the approach of the Conventions on the grounds that it ostensibly abandons all meaningful reciprocity—and hence the only mechanism for effective inter-belligerent enforcement. For these critics, this “end of reciprocity” in the name of a short-sighted humanitarianism threatens to degrade substantially the capacity of IHL to reduce suffering and death in time of war.³ This primary purpose of this paper is to provide a descriptive account of the approach of the Conventions—making clear not only the ways in which the Conventions mark an important decline in certain kinds of reciprocity constraints, but also the ways in which the Conventions encourage, even require, warring parties to retaliate against serious violations of IHL. The paper also offers some reflection on the strengths and weaknesses of this approach—emphasizing not only structural, but also sociological, cognitive, and behavioral considerations. I conclude that the approach to enforcement in the Conventions, once properly understood and evaluated in light of various psycho-social considerations, better deters serious violations of IHL and, perhaps more importantly, avoids the considerable downside risk associated with the classical approach.

ENFORCEMENT IN THE CLASSICAL LAW OF WAR

The approach to enforcement in the classical law of war emphasized reciprocity constraints along a number of dimensions. This approach placed rigid constraints on both the types of conflict triggering application of what we would now call IHL and the types of armed groups entitled to any protection in that law.⁴ The nature of these commitments is best understood by reference to the basic conceptual structure of IHL. IHL applies only in certain *situations*—the material field of application of IHL. In these situations, IHL

³ See, e.g., MARK OSIEL, *THE END OF RECIPROCITY* (forthcoming OUP 2009); see also JOHN YOO, *WAR BY OTHER MEANS* (2006); Eric Posner, *Terrorism and the Laws of War*, *CHI J. INT'L L.* (2005); Steven Ratner, *Rethinking the Geneva Conventions: Codifying the Unconventional*, in *Crimes of War* (2003).

⁴ This is not to say that these features of the classical law of war were designed primarily to promote compliance. Indeed, these features were often justified by unrefined appeals to military necessity or as necessary for fair play (the equality of obligation). See, e.g., Theodor Meron, *The Humanization of Humanitarian Law*, 94 *AM. J. INT'L L.* 239 (2000).

protects only certain specific categories of *persons*—the personal field of application of IHL. And when in these situations, these persons are guaranteed a certain bundle of *rights*—the substantive rules of IHL. The classical approach to enforcement manipulated each of these moving parts of IHL to induce law-regarding behavior. And contemporary IHL—beginning with the Geneva Conventions of 1949—substantially modify each moving part.

In these schemes, reciprocity functioned at times as a broad applicability constraint, at times as a constraint on the personal field of application of IHL, and at times as a substantive principle modulating the scope or content of specific rules of war. As an applicability constraint, reciprocity required both a strict mutuality of obligations between all the parties to a conflict (first-order reciprocity) and the substantial satisfaction of these obligations (second-order reciprocity). Failure to accept the obligations of IHL as a formal matter or the renunciation of IHL obligations as a formal or even informal matter would often preclude the application of IHL. Similarly, widespread or systematic disregard of IHL would often preclude the applicability of that law—pervasive non-compliance by one party would relieve the other party of all obligations. First- and second-order reciprocity requirements, in this way, provided structural incentives to warring parties to formally accept and materially observe the rules of war imposed hard constraints on the material field of application of the law of war.

The personal field of application of the classical law of war also included a fairly robust reciprocity requirement. Of those participating in the hostilities, only individuals qualifying for prisoner of war (POW) status were entitled to any rights-bearing status upon capture. Members of fighting groups failing to satisfy the specific behavioral prerequisites for POW status, including compliance with the laws and customs of war, were classified as “unprivileged belligerents” and placed outside the personal field of application of IHL.⁵ That is, whether any member of an armed group qualified for some

⁵ See, e.g., GEORG SCHWARZENBERGER, II INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS: THE LAW OF ARMED CONFLICT 115–17 (1968) (arguing that unprivileged belligerents are in the same position as “spies,” and as such, are entitled only to the “minimum requirements imposed by the standard of civilization”—which, he suggests, includes the right to “a [standardless] trial”); JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL ARMED CONFLICT 549 (1954) (maintaining that the distinction between unprivileged and privileged combatants “draws the line between those personnel who, on capture, are entitled under international law to certain minimal treatment as prisoners of war, and those not entitled to such protection. ‘Non-combatants’ who engage in hostilities are one of the classes deprived of such protection Such unprivileged belligerents, though not *condemned* by international law, are not protected by it, but are left to the discretion of the belligerent threatened by their activities.”); 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 257 (H. Lauterpacht ed., 1952) (1905) (arguing that unlawful combatants are “liable to be treated as war criminals and shot.”); J. M. SPAIGHT, WAR RIGHTS ON LAND 37 (1911) (“[W]ar law has a short shrift for the non-combatant who violates its principles by taking up arms.”); *id.* at 35–72 (outlining long history of summary treatment accorded unlawful combatants). EMMERICH DE VATTTEL, THE LAW OF NATIONS 481 (Luke White trans., 1792) (1758) (“A nation attacked by such sort of [unlawful combatants] is not under any obligation to observe towards them the rules of wars in form.”).

rights-bearing status in the classical law of war turned on not only the conduct of the individual fighter, but also the character of the group in question.⁶

More narrowly, the violation of specific rules by one party might relieve the opposing party of any obligation to observe that or some related rule. That is, the violation of a rule warranted reprisals by the aggrieved party. Although subject to a fairly robust set of constraints, the right of reprisal in IHL empowered warring parties to enforce IHL through otherwise unlawful tactics.⁷ Once again, these retaliatory violations were collective sanctions—directed not against the wrong-doers, but instead against some group thought to be in a better position to influence the wrong-doer than the retaliating party.

ASSESSING THE CLASSICAL APPROACH: SOCIOLOGICAL, COGNITIVE, AND BEHAVIORAL CONSIDERATIONS

The extensive reciprocity requirements of classical law of war all exhibit a certain vision of inter-belligerent enforcement. Two important aspects of this vision structure the specific institutional features of classical law of war treaties. First, violations of IHL are deterred, on this view, by the pervasive structural threat of retaliatory, otherwise-unlawful tactics by the opposing forces. Second, retaliation takes the form of a collective sanction. This view of enforcement is, of course, predicated on a theory of battlefield social behavior. At a high level of generality, reciprocity-based approaches have much to recommend them in the IHL context. Stable cooperation in the observance of IHL almost certainly requires some viable reciprocity-based enforcement scheme—given the absence of a centralized enforcement mechanism, the acute group-level motivation to defect from IHL when law-regarding behavior risks compromising the war effort, and the sharply limited capacity of the international community and the warring parties to enforce IHL

⁶ Hague Convention (IV) on the Laws and Customs of War on Land art. 1, Oct. 18, 1907, 1 Bevans 631, U.S.T.S. 539. To be clear, I do not mean to imply that either the fact of such prerequisites or their collective character is unique to the classical law of war. Similar—indeed, virtually identical requirements are included in the Geneva Conventions. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 4, 75 U.N.T.S. 135, 137. In other words, the same kind of considerations might deprive the members of a fighting group ineligible for POW status under the Geneva Conventions. Nevertheless, as I describe more fully below, the Geneva Conventions as a whole do not deprive any such persons of humanitarian protection altogether. Indeed, any such persons would be entitled to a robust level of humanitarian protection irrespective of whether they qualify for POW status. See *infra*. Moreover, Additional Protocol I to the Geneva Conventions recasts the organizational and behavioral prerequisites as individual obligations rather than collective criteria. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 44 (3)-(4), June 8, 1977, 1125 U.N.T.S. 3; see also *infra*.

⁷ See, e.g., Christopher Greenwood, *The Twilight of the Law of Belligerent Reprisals*, in Greenwood, *ESSAYS ON THE LAW OF WAR* 295, 321 (2006).

collateral to the conflict itself.⁸ Important recent empirical work strongly supports this view by demonstrating that substantial compliance with IHL is most likely when opposing parties send meaningful, reliable signals of their intentions to comply and to enforce compliance.⁹

Reciprocity, on this view, requires only that the parties have a clear, shared understanding of what constitutes non-compliance and the parties have some means of retaliating against defectors within the four corners of the regime. In other words, reciprocity, even if necessary, might assume many institutional forms. Any such scheme is, however, most effective when there is certainty about which actions rightly trigger a reciprocal response and which responses are properly reciprocal rather than violations themselves. The great virtue, then, of the enforcement scheme embraced in the classical law of war was its commitment to reciprocity. The great weakness: the precise way in which it institutionalized reciprocity.

Because the classical law of war broadly authorized retaliation in the form of abject disregard of humanitarian principles—recognizing drastic reciprocity constraints on the material field of application, the personal field of application, and the scope and content of specific substantive provisions—this scheme blurred the line between proper reciprocal response and violation. If violations are met with law-disregarding retaliation which is in most relevant respects identical to the initial violations, there is a high risk that the retaliation will be interpreted as a violation by the relevant audiences—which, in turn, risks a spiral into unmitigated barbarity. Of course, reciprocity is an effective enforcement strategy only if the enemy understands when a particular action is a reward and when it is a punishment. A decision to apply the Conventions to a conflict, or the decision to accord humane treatment, is unlikely to be understood by the enemy as a “reward.” The protections required by the treaties are much more likely to be understood as entitlements. Moreover, a decision not to apply the Conventions, or (worse still) not to accord humane treatment, may not be understood as a punishment. The difficulty is that this type of retaliation can itself be understood as a *violation* of the treaty—which, in turn, risks prompting retaliation from the enemy as a response to this “violation,” *ad infinitum*, thereby risking a retaliatory spiral.

A growing body of sociological and psychological evidence documents multiple mechanisms that might trigger or sustain such a spiral of atrocities. The problem is that both the offender and offending parties are more likely to perpetrate further violations when proper retaliation mirrors violations. The moral disengagement that facilitates

⁸ James Morrow, *The Institutional Features of Prisoner of War Treaties*, 55 Int’l Org. 971, 973 (2001) (“The laws of war rely on reciprocity for enforcement. The threat of reciprocal response may deter violators.”).

⁹ James D. Morrow, *When do States Follow the Law of War?*, 101 AM. POL. SCI. REV. 559 (2007).

radical inhumanities is often triggered by perceived victimization in time of war.¹⁰ Moral disengagement is also encouraged by systematic group-level recourse to (1) justifications for violations and (2) dehumanizing characterizations of the enemy as morally or psychologically defective.¹¹

These problems are further accentuated by the other important aspect of classical IHL enforcement: the reliance on collective sanctions. This is not to say that collective sanctions are necessarily ineffective or improper. To the contrary, collective sanctions are often a rational response to regulatory problems of a certain character—indeed, regulatory problems similar to inter-belligerent enforcement of IHL in some non-trivial respects. Collective sanctions target some group better-positioned to monitor and control the individual wrong-doer than the sanctioning agent.¹² The deterrence function is, in effect, delegated to the targeted group.

Given the nature of the sanctions imposed by the classical law of war and the context in which these sanctions are to be imposed, collective approaches risk unraveling inter-belligerent cooperation on IHL. The central difficulty is that collective sanctions further blur the distinction between lawful retaliation and violation because the retaliation is not directly targeted at the wrongdoers. Moreover, collective sanctions produce a host of collateral cognitive and behavioral consequences that would likely decrease overall respect for IHL—even if delegated deterrence is seemingly more efficient along some axes. And some of these consequences in the context of armed conflict would circumvent the delegated deterrence strategy as well.

These consequences stem from one psycho-social by-product of collective sanctions: Collective sanctions increase the salience of group-based identity.¹³ Recent groundbreaking research in social psychology documents two related social processes triggered in such contexts. First, increased entitativity of a group—triggered by the instantiation of group-level responsibility—sharply increases individual social identification with the group.¹⁴ Second, increased entitativity, particularly in contexts with high mortality salience such as an armed conflict,¹⁵ increases the glorification of the in-group by sharply increasing the proclivity of group members to appraise the acts of in-

¹⁰ See, e.g., Daniel Munoz-Rojas & Jean-Jacques Fresard, *The Roots of Behavior in War: Understanding and Preventing IHL Violations*, 86 INT'L REV. RED CROSS 189 (2004).

¹¹ See, e.g., id.; Albert Bandura, *Moral disengagement in the perpetration of inhumanities*, 3 (3) PERSONALITY AND SOCIAL PSYCHOLOGY REV. (1999).

¹² See Daryl J. Levinson, *Collective Sanctions*, 56 STANFORD L. REV. 345 (2003).

¹³ Id.

¹⁴ See, e.g., Simona Sacchi, et al., *Perceiving One's Nation: Entitativity, Agency and Security in the International Area*, INT'L J. PSYCHOLOGY (2008). "Entitativity"—an increasingly well-studied psychological phenomenon—refers to the extent to which a group is considered an actual entity with purpose and agency.

¹⁵ See, e.g., Emanuele Castano, et al., *I Belong, Therefore I Exist: Ingroup Identification, Ingroup Entitativity, and Ingroup Bias*, 28 PERSONALITY & SOCIAL PSYCH. BULL. (2002).

group members favorably (often even when such acts involve the commission of atrocities directed against members of an out-group).¹⁶ Some evidence suggests that this process is also strongly associated with dehumanization of the victims of in-group acts.¹⁷

ENFORCEMENT IN THE GENEVA CONVENTIONS

The Geneva Conventions take a fundamentally different approach along each axis. More specifically, the Conventions impose only modest constraints on either the circumstances in which IHL is applicable or the categories of individuals entitled to some rights-bearing status. The material field of application of the Conventions includes only a modest reciprocity constraint—requiring simply a formal mutuality of obligations. The Conventions recognize few reciprocity constraints on the categories of persons protected—indeed, all persons made subject to the authority or lethality of the enemy are entitled to some rights-bearing status in the Conventions and the two 1977 Protocols thereto. And the Conventions, particularly as supplemented by the two Protocols, sharply limit the use of reprisals in time of armed conflict. This scheme represents a fundamental humanization and individualization of inter-belligerent enforcement. When compared with the approach of the classical law of war, this scheme, properly understood, provides a superior framework for the effective enforcement of IHL—providing a sound basis for inter-belligerent sanctions while minimizing the grave risks that collective, law-disregarding sanctions pose to humanitarian values.

Material Field of Application

The Conventions impose one modest reciprocity constraint on the material field of application of IHL—the Conventions require a mutuality of formal obligations. That is, the Conventions do not impose unilateral obligations on the parties—belligerents are obligated under the rules only insofar as their adversary is. Common Article 2 expressly incorporates this kind of reciprocity constraint. This provision, by its terms, requires belligerent states party to the treaties to observe the Conventions “in their mutual relations.”¹⁸ In other words, the Conventions do not require that states party to them apply the treaties when fighting against states that have not accepted the Conventions. Because the Conventions could not impose obligations on states not party to them, the treaties do not govern the mutual relations of parties and nonparties. This is a thin

¹⁶ See, e.g., Emanuele Castano, *On the Perils of Glorifying the Ingroup: Intergroup Violence, Ingroup Glorification, and Moral Disengagement*, 2/1 *Social & Personality Psychology Compass* 154 (2008).

¹⁷ *Id.*; see also Emanuele Castano & Roger Giner-Sorolla, *Not Quite Human: Infrahumanization in Response to Collective Responsibility for Intergroup Killing*, 90 *J. PERSONALITY & SOCIAL PSYCHOLOGY* 804 (2006).

¹⁸ For example, GPW, art. 2, 6 U.S.T at 3320, 75 U.N.T.S. at 138.

commitment to reciprocity¹⁹ designed to ensure only that the belligerents are subject to a common set of rules.²⁰ The mutuality of obligations required by Common Article 2, then, is a *formal* reciprocity designed to ensure only that the law applies to both parties, not to ensure that both parties are equally accountable as a sociological matter, equally capable of observing the rules as an organizational matter, or equally observant of the rules as an empirical matter. And, remarkably, Common Article 3 regulating non-international armed conflicts includes no reciprocity constraint whatsoever.

Neither Common Article 2 nor Common Article 3 conditions the application of the Conventions on the enemy's substantial compliance with the rules. Indeed, the Conventions do not even authorize states to withhold humane and fair treatment as an inducement to comply with the rules or as a response to violations of the rules. Indeed, the only discernable legal consequence of noncompliance is that enemy fighters might be denied POW status—and even this is a reciprocity constraint bearing on who is protected, and how much, rather than a threshold question of applicability.²¹ The point is not that the Conventions fail to punish noncompliance by denying humane and fair treatment. Rather, the claim is only that the applicability of the Conventions is not subject to such a constraint.

Personal Field of Application

Unlike the classical law of war, the Geneva Conventions do not impose any broad-based reciprocity constraint on the personal field of application of IHL. Although the POW Convention includes an analogue to the classical reciprocity constraint on lawful combatant status, this commonality is of little significance for the enforcement scheme in the Conventions.²² First, it is unclear whether the reciprocity constraint applies broadly to all categories of POWs or whether it applies only to the category of militias and volunteer corps not formally incorporated into the armed forces of a state.²³ Second, this

¹⁹ This is not to suggest that “first order reciprocity” is unimportant. To the contrary, it is an essential feature of stable, cooperative outcomes in this context. See James Morrow, *Common Conjectures and the Laws of War*, 31 J. LEGAL STUD. 41 (2002).

²⁰ The practical relevance of the constraint in Common Article 2 conflicts is negligible now that the Conventions have been ratified by nearly all states.

²¹ And as I have argued elsewhere, the denial of POW status carries only a few, mostly modest, protective consequences. See Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367 (2004). Several other provisions of the Conventions illustrate that even law breakers enjoy substantial humanitarian protection. For example, the POW Convention expressly provides that persons convicted of war crimes retain their POW status. GPW, art. 85, 6 U.S.T. at 3384, 75 U.N.T.S. at 202. See *infra* for further elaboration of the other potentially applicable protective schemes.

²² Recall that the POW Convention, like the Hague Convention of 1907, requires some groups to conduct their operations in accordance with the laws and customs of war in order for members of the group to qualify for POW status. GPW, art. 4(a)(2).

²³ One important question here is whether the four criteria expressly applied to “militia and other volunteer corps” in paragraph (A)(2) also limit the scope of paragraph (A)(1) concerning members of the armed forces. That is, there is some question whether members of the regular armed forces must have a

reciprocity constraint has been recast and substantially eroded by Additional Protocol I. Under the Protocol, no law-disregarding fighter would be denied *any* of the protections of the POW Convention.²⁴ And third, even persons wholly deprived of POW status enjoy some rights-bearing status in the Conventions—under either the Civilian Convention, the Additional Protocol, the penal repression scheme of the Conventions, and Common Article 3. A brief summary of each of these status categories makes clear that the Conventions effectively eliminated reciprocity constraints on the applicability of IHL to various categories of persons.

The Geneva Civilian Convention provides detailed rules governing the treatment of “civilians” in armed conflicts; and the substance of these rules mirrors in most important respects the rights of POWs. Persons protected by the Convention are “those who, at any given moment and in any manner whatsoever, find themselves . . . in the hands of a Party . . . of which they are not nationals.”²⁵ The provision defining “protected persons” also makes clear that some categories of persons otherwise covered by this definition are not protected by the Convention. For example, nationals of a state “not bound by the Convention are not protected by it.”²⁶ In addition, nationals of “neutral” or “co-belligerent” states are not protected by the Convention “while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”²⁷ Once again, a thin conception of reciprocity conditions the applicability of the Conventions

command structure, wear uniforms, carry arms openly, and generally comply with laws of war to qualify for POW status. As the current POW controversy illustrates, states and commentators take divergent views on this question. *See, e.g.*, George H. Aldrich, *New Life for the Laws of War*, 75 AM. J. INT’L L. 764, 768–69 (1981) (arguing that Article 4(A)(2) criteria apply only to certain “irregular” armed forces and that “[m]embers of regular, uniformed armed forces do not lose their [POW] entitlement no matter what violations of the law their units may commit, but the guerrilla unit is held to a tougher standard . . .”). Moreover, the text and drafting history lend some support to both views. *See, e.g.*, G.I.A.D. DRAPER, *THE RED CROSS CONVENTIONS* 52 (1958); 1 HOWARD S. LEVIE, *THE CODE OF INTERNATIONAL ARMED CONFLICT* 13–14 (1986); RICHARD I. MILLER, *THE LAW OF WAR* 29 (1975). Indeed, there is good reason to doubt that standard interpretive methods can resolve this disagreement decisively. On the one hand, paragraph (A)(1) covers members of the “armed forces” of a state, and the drafting history of the provision suggests that this language covers only members of the *regular* armed forces. Hence, some have concluded that the four criteria of (A)(2) are implicitly embedded in (A)(1) because *regularization* of forces requires, at a minimum, these four characteristics. *See generally* HOWARD S. LEVIE, *PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT* 34–59 (U.S. Naval War College, International Law Studies, Vol. 59, 1977). On the other hand, the text of (A)(1) does not make reference to “regular” armed forces. Indeed, it extends coverage to “members of militia and other volunteer corps forming part of” the armed forces. Inexplicably, this reference to “militia and other volunteer corps,” unlike the reference in (A)(2), is not qualified by the four criteria. This textual anomaly suggests that the four criteria apply only to “militia and other volunteer corps” not part of the “armed forces” of the state, and that captured fighters covered by (A)(1) are POWs irrespective of whether they satisfy the four criteria.

²⁴ Additional Protocol I, art. 44(3)-(4).

²⁵ GC IV, art. 4.

²⁶ *Id.*

²⁷ *Id.*

The Geneva Conventions also specify fundamental humanitarian protections applicable to all persons subject to the authority of a party to the conflict. That is, the Conventions detail minimum protections to be accorded all persons no longer taking part in hostilities irrespective of: (1) the territory in which the affected person is located; (2) the nationality of the affected person; or (3) the character of the armed conflict. These principles, first codified in Common Article 3 of the Conventions, govern the treatment of persons no longer taking active part in the hostilities.²⁸ All such persons are entitled to humane treatment and, in the case of criminal charges, fair trial by “a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”²⁹

Building on these protective schemes, Article 75 of AP I and Article 6 of AP II clearly establish minimum humanitarian protections applicable to all persons “in the power of” a belligerent state—irrespective of whether any such person participated in the hostilities. Widely understood as the “gap filler” in Geneva law,³⁰ the “fundamental guarantees” provisions of the 1977 Protocols make clear that all persons subject to the authority of a belligerent are entitled to humanitarian protection. As discussed previously, the drafting history of Article 75 suggests that the provision was designed: (1) to clarify the scope and application of several fundamental guarantees recognized in the 1949 Conventions; (2) to extend greater protections to persons not covered by those Conventions—most notably, nationals of the detaining power, nationals of co-belligerents and neutrals, and stateless persons and refugees; and, by implication, (3) to condition the derogation powers conferred on states by Article 5 of the Civilian Convention by rendering a broader range of rights expressly non-derogable.³¹

Reprisals

The Conventions and the Protocols thereto sharply limit resort to belligerent reprisals. The first absolute prohibition on the taking of reprisals against a particular class of persons was set down in Article 2 of the 1929 Geneva Convention Relative to the Treatment of Prisoners of War: “Measures of reprisal against [prisoners of war] are forbidden.” Building on this innovative measure, the Geneva Conventions of 1949 extended the categories of persons against whom it is forbidden to take reprisals. The Third Geneva Convention reaffirmed the 1929 prohibition of reprisals against prisoners of war,³² while the other Conventions introduced new provisions offering protection from

²⁸ It is important to note that the provision expressly covers persons who take up arms against the state and applies even to persons who do not lay down their arms voluntarily.

²⁹ GPW, art. 3, 6 U.S.T at 3320, 75 U.N.T.S. at 138.

³⁰ See U.S. Army, Judge Advocate General, *Protection of Civilians During Armed Conflict*, in OPERATIONAL LAW HANDBOOK 9 (2003).

³¹ BOTHE, NEW RULES FOR VICTIMS OF ARMED CONFLICTS 460-61 (1982).

³² GPW, art. 13 .

reprisals to the wounded and sick under the First Geneva Convention;³³ for the wounded, sick, or shipwrecked protected by the Second Geneva Convention;³⁴ and for those civilian persons coming under the protection of the Fourth Geneva Convention.³⁵ The Conventions also expressly forbid the taking of reprisal measures against vessels, equipment, or property protected by the Conventions. And although the Civilian Convention prohibited only reprisals directed against civilian internees and civilians in occupied territory, Additional Protocol I now prohibits all reprisals directed against the civilian population or civilian objects.³⁶

War Crimes Trials: Humanization and Individualization of “Retaliation”

None of this is to say that the Conventions contemplate no adverse consequences for bad actors. In fact, there is an important commitment to a form of reciprocity embodied in the treaties. The Conventions emphasize procedurally-adequate war crimes trials—typically, though by no means exclusively, brought by national authorities.

The penal repression enforcement scheme includes two kinds of obligations. First, Conventions obligate the parties to enforce through the criminal law the fundamental requirements of the Conventions—this is the so-called grave breach system. Second, the Conventions prescribe a detailed inventory of procedural rights guarantees for prosecutions brought to enforce the treaties. That is, the Conventions provide for minimum procedural rights for any person charged with serious violations of its substantive rules *irrespective of the person’s status under the Conventions*.³⁷ Any person prosecuted for violations of the Geneva Conventions, irrespective of their status as “protected persons,” must be provided with “safeguards of proper trial and defence, which shall not be less favorable than” those outlined in Articles 105 and following of the Third Geneva Convention (concerning POWs).³⁸ Article 105 specifically provides for basic fair trial rights including: the right to counsel of the defendant’s choice, the right to confer privately with counsel, the right to call witnesses, and the right to an interpreter.³⁹ These provisions also require, for example, that accused persons be granted the same right of appeal as that open to members of the armed forces of the Detaining Power.⁴⁰ The Conventions also expressly prohibit collective punishments.⁴¹

³³ GSW, art. 46.

³⁴ GSWS, art. 47.

³⁵ GC, art. 33.

³⁶ Additional Protocol I, arts. 51-56.

³⁷ *See, e.g.*, GC, art. 146.

³⁸ GSW, art. 49; GSWS, art. 50; GPW, art. 129; GC, art. 146.

³⁹ GPW, art. 105.

⁴⁰ *Id.* art. 106.

⁴¹ *See, e.g.*, GC, art. 33.

The upshot is that wrongdoers are punished under the Conventions—but their capture, detention, trial, and subsequent punishment are all regulated within the framework of IHL. The enforcement mechanism is, then, the individualized assignment of blame for the violation of shared rules through a process that is itself consistent with shared standards. The full framework of IHL, in this sense, provides a sound basis for stable cooperation in the observance of fundamental humanitarian principles. The risk that retaliation is misunderstood as violation is minimized, the risk of perceived victimization is minimized, the augmentation of ingroup entitativity, ingroup bias, and ingroup glorification is minimized, and the risk of moral disengagement of one's own forces is minimized. Even if inter-belligerent enforcement is the most important axis along which to enforce IHL and even if any such enforcement scheme requires some form of reciprocity, the humanization and individualization exhibited in the Geneva Conventions better capture the advantages of this approach while minimizing the disadvantages.