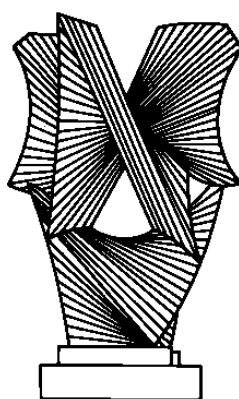


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Human Rights, the Laws of War, and Reciprocity

Eric A. Posner

**THE LAW SCHOOL
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Human Rights, the Laws of War, and Reciprocity

Eric A. Posner¹

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Abstract. Human rights law does not appear to enjoy as high a level of compliance as the laws of war, yet is institutionalized to a greater degree. This paper argues that the reason for this difference is related to the strategic structure of international law. The laws of war are governed by a regime of reciprocity, which can produce self-enforcing patterns of behavior, whereas the human rights regime attempts to produce public goods and is thus subject to collective action problems. The more elaborate human rights institutions are designed to overcome these problems but fall prey to second-order collective action problems. The simple laws of war institutions have been successful because they can exploit the logic of reciprocity. The paper also suggests that limits on military reprisals are in tension with self-enforcement of the laws of war. The U.S. conflict with Al Qaeda is discussed.

The Bush administration's counterterrorism tactics provoked a great deal of criticism from the standpoint of international law. However, the criticism in the United States and in other countries differed in important respects. In foreign countries, particularly in Europe, critics focused on violations of human rights norms, particularly those contained in the Convention Against Torture and the International Covenant on Civil and Political Rights.² In the United States, the debate centered on the Geneva Conventions. In statements issuing from the president,³ debates in Congress,⁴ legal memoranda produced by lawyers in the executive branch,⁵ and judicial opinions,⁶ the laws of war received a great deal more attention than human rights law,

¹ University of Chicago Law School. Prepared for Conference on Rights and Reciprocity, Tel Aviv, January 2011. Thanks to Eyal Benvenisti, Gabby Blum, Ryan Goodman, Bob Keohane, Ola Mestad, Ariel Porat, and Peter Rosendorff, and participants at an international law workshop at NYU Law School. James Kraehenbuehl provided helpful research assistance.

² See, e.g., Conor Foley, *In The Dock*, *Guardian*, Oct. 18, 2007.

³ See, e.g., President George W. Bush, *Missile Defense and the War on Terror: Address at the National Defense University* (Oct. 23, 2007) (describing the interrogation techniques as "lawful"); see also President George W. Bush, *Historical Analogies for the War on Terror: Address at the Heritage Foundation* (Nov. 1, 2007) (defending his nominee to Attorney General for not answering question on water boarding by describing the technique as "lawful" and "necessary").

⁴ E.g., the McCain Amendment, S. Amdt. 1977 to H.R. 2863 (Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006).

⁵ E.g., Memorandum from John Yoo, Deputy Ass't Att'y Gen., to William J. Haynes, Gen. Counsel of the Dep't. of Def., *Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan. 9, 2002).

⁶ See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

which received hardly any attention at all. Commentators debated whether the methods of coercive interrogation violated a domestic statute banning torture but paid little attention to the Convention Against Torture.⁷

What accounts for these differences? One factor is that most foreign critics rejected the premise that the United States was at war with Al Qaeda. If the United States and Al Qaeda were not at war, then the Geneva Conventions did not come into play. Restrictions on U.S. treatment of Al Qaeda could come only from international human rights law. But if that factor explains why foreigners focused on human rights law, it does not explain why criticism based on the laws of war received more attention in the United States than criticism based on human rights law.

In this paper, I argue that this difference is connected with the structure of international law. At the heart of international law lies the phenomenon of reciprocity. States take international law norms most seriously when the penalty for violating them is direct and immediate retaliation from other states in the form of reciprocal violation of the same norms. When international law has this structure, it is relatively robust. When it lacks this structure, it is weak. I argue that the United States takes the law of war more seriously than human rights law because the laws of war are reciprocally enforced, while human rights laws are not. There is a further twist to this story in the context of the conflict with Al Qaeda. Because the United States had no reason to believe that Al Qaeda (or any other organization or country) would retaliate if the United States violated the laws of war in the conflict with Al Qaeda, it did not permit itself to be constrained by those laws. This is why even the heightened concern about the Geneva Conventions resulted in only partial compliance with them—and why the United States disregarded the laws of war in the conflict with Al Qaeda while largely complying with them (albeit with notable exceptions) in the simultaneous conflict with Iraq.

In Part I of this paper, I argue that the laws of war are enforced through reciprocity; where reciprocity fails, violations occur. In part II, I argue that human rights treaties are not enforced through reciprocity. Those treaties are best understood as efforts to overcome a collective action problem on the part of a subset of liberal states, efforts that have largely failed, albeit with some important exceptions. In part III, I further draw out the differences between the two approaches by comparing their embodiment in international organizations. In part IV, I return to U.S. policy in its conflict with Al Qaeda.

⁷ See Douglas Jehl, Questions Left by C.I.A. Chief on Torture Use, N.Y. Times, Mar. 18, 2005 at A1.

I. The Laws of War

International humanitarian law, also known variously as the laws of war and *jus in bello*, limits the methods, tactics, and activities of each side in a war. Rules require, among many others things, that prisoners of war and civilians in occupied territory be treated humanely; that the lives and property of citizens of neutral states be respected; and that reasonable force be used against targets. Hospitals and cultural sites cannot be attacked. Enemy soldiers accused of war crimes must be given fair trials. Military forces must keep order and supply public services in occupied areas. Truces must be respected.⁸ Another set of rules governs the types of weapons that can be used, forbidding dum-dum bullets, certain types of fragmentary explosives, blinding lasers, poison gas, and other weapons believed to be inhumane.⁹

Laws of war have always existed. In earlier times, they governed siege and the exchange of hostages, as well as the treatment of civilians and captured soldiers. Up until the twentieth century, states understood that violation of the laws of war would be met with retaliation. If one belligerent slaughters POWs, then the other belligerent would respond by slaughtering its own prisoners. If one belligerent ignored the rules of siege, the other belligerent would as well.¹⁰ In the twentieth century, however, states agreed that reprisals would be limited.¹¹ With a few exceptions, states were no longer permitted to inflict collective punishment on the enemy.¹² Retaliation was limited and legalized. States could capture enemy soldiers responsible for war crimes, give them a fair trial, and punish them if they were convicted.

The laws of war have a simple economic explanation. When two states go to war, they foresee an endpoint, which will typically involve certain concessions by one state—the transfer of territory, monetary reparations, etc. Given that both states will end up at some new equilibrium in terms of territory or wealth or power, it is best for both states if they can reach that

⁸ See generally Geoffrey Best, *War and Law Since 1945* (1994); Geoffrey Best, *Humanity in Warfare* (1980).

⁹ For an overview, see Christopher Greenwood, *The Law of Weaponry at the Start of the New Millennium*, in Michael N. Schmitt and Leslie C. Green, eds., *The Law of Armed Conflict: Into the Next Millennium* 185, 189-90 (1998).

¹⁰ For examples, see Posner, *supra*; Mark Osiel, *The End of Reciprocity: Terror, Torture, and the Law of War* 21-23 (2009); Bruno Frey and Heinz Buhofer, *Prisoners and Property Rights*, 31 *J. Law & Econ.* 19 (1988); James D. Morrow, *The Institutional Features of the Prisoners of War Treaties*, 55 *Int'l Org.* 971 (2001); François Bugnion, *The International Committee of the Red Cross and the Protection of War Victims* 182-89 (2003).

¹¹ See First Convention art. 46 (prohibiting reprisals against military personnel on land), Second Convention art. 47 (prohibiting reprisals against military personnel at sea), Third Convention art. 13 (prohibiting reprisals against POWs); Fourth Convention art. 33 (prohibiting reprisals against protected civilians). For a valuable discussion, see Michael A. Newton, *Reconsidering Reprisals*, 20 *Duke J. Comp. & Inter'l L.* 361 (2010).

¹² Some controversy exists over whether these rules have entered customary international law. See Newton, *supra*.

equilibrium cheaply rather than expensively. The problem is that each state does individually best if it uses harsh tactics, regardless how the other state acts. If the other state refrains from using harsh tactics, then the first state obtains an advantage by using them. If the other state uses harsh tactics, then the first state is put at a disadvantage if it does not use them. Yet both states are better off if they both refrain from using harsh tactics than if they both use harsh tactics. For example, each state does better by (for example) killing enemy prisoners than incurring the cost of sheltering and feeding them, but both states are better off if POWs are protected than if they are killed.¹³

The problem of harsh tactics has the structure of the familiar prisoner's dilemma, and can be solved through repeated play. The particular norms of *jus in bello* can be understood as descriptions of the equilibrium outcomes; they provide focal points that minimize the risk that cooperation breaks down because states misinterpret each other's actions.¹⁴ Note that the law does not constrain states in the same way that domestic law constrains citizens—through third-party enforcement. The law simply provides a script or protocol that states can choose to follow or ignore. The cooperative outcome can be sustained only if each state credibly threatens to retaliate in response to violations. Thus, the threat of noncompliance with the law must be ever-present. If one state knows that the other state will not retaliate, then the first state has every incentive to violate the law itself. It follows that if one state does violate the rules, the other state should violate the rules as well.

Putting aside cases where the laws of war require behavior that a state will engage in for nonlegal reasons, a state will obey the laws of war only if the other state has the right incentives to retaliate in response to a violation—which roughly means that it has a sufficiently low discount rate (it values future payoffs). In addition, both states must receive high enough payoffs from cooperating. Neither condition is necessarily satisfied. When wars are fought against states or other entities that lack command structures that can control their soldiers, it may be impossible

¹³ It is possible that states do better by treating prisoners humanely because that encourages enemy soldiers to surrender. But if that is the case, laws are not necessary to ensure humane treatment.

¹⁴ See Eric A. Posner, *Terrorism and Laws of War*, 5 *Chi. J. Int'l L.* 423 (2005). Similar themes can be found in James D. Morrow, *When Do States Follow the Laws of War?*, 101 *Amer. Pol. Sci. Rev.* 559 (2007); James D. Morrow, *The Institutional Features of the Prisoners of War Treaties*, 55 *Inter. Org.* 971; James D. Morrow, *The Laws of War, Common Conjectures, and Legal Systems in International Politics*, 31 *J. Legal Stud.* S41 (2002). There is, however, a possible perverse effects of the law of war—that by reducing the cost of waging a war, they make war more likely in the first place. See Eric A. Posner, *A Theory of the Laws of War*, 70 *U. Chi. L. Rev.* 297 (2003).

to sustain cooperation. And sometimes one side in a war may believe that the laws of war give the other side an advantage. In that case, the disadvantaged party may refuse to comply with that rule.

Anecdotal evidence provides some support for these hypotheses.¹⁵ States have always selectively obeyed the laws of war. Before the twentieth century, European states and other major powers would presumptively respect the laws of war in wars among themselves but not wars with tribal groups (like American Indians or African tribes), pirates, “uncivilized” states, and domestic insurgents. The latter groups themselves did not comply with the laws of war—either because of lack of institutional capacity or because those laws, which were invented by Europeans, favored organized armies. Even in conflicts among European states, the laws of war eroded in circumstances where reciprocity became difficult or the laws ended up favoring one side. The rules of siege warfare, for example, required the victorious belligerent in certain conditions to release prisoners and allow them to return to home. This made less sense in the wilderness, where soldiers could quickly melt into the forest and then rejoin their army, and was abandoned on the American continent during the Seven Years War.

In the twentieth century, advances in the mechanization of warfare and the professionalization of armies rendered irrelevant old rules governing siege, prize, neutrality, and related matters.¹⁶ World War I saw extensive violation of these out-dated rules. Yet certain basic norms, such as the humane treatment of POWs, were respected. In World War II, these rules were respected on the western front but not on the eastern front. Their collapse on the eastern front can be attributed to long supply lines and the massive number of prisoners who were taken—both of these factors made it extremely costly to hold POWs in humane conditions. The Nazis also regarded Russians as subhuman, and where one side launches a total war, the other side has no reason to respect the laws of war. Similar factors may explain violations of the laws of war by all sides in the Pacific theater.¹⁷ In the numerous post-World War II wars, the laws of war were respected on an ad hoc basis. POWs were often but not always mistreated; poison gas was used in the Egypt-Yemen and Iran-Iraq Wars, but not in the others. A prominent casualty was the entire law of occupation, which no state ever acknowledged as a binding legal obligation

¹⁵ As does statistical evidence; see Morrow, *When Do States*, supra. Morrow also finds that democracies are more likely to comply with the laws of war than are authoritarian states, which is orthogonal to my argument.

¹⁶ For an excellent account focusing on neutrality, see Stephen C. Neff, *The Rights and Duties of Neutrals* (2000). The book emphasizes the fluidity of the laws of neutrality over all of naval history, not just the twentieth century.

¹⁷ For additional evidence, see sources cited in supra note ____.

until the second Iraq War.¹⁸ One possible explanation is that occupation is the end game; the occupier no longer fears retaliation by the defeated or nearly defeated enemy.

It should be clear that reprisal never really went away, at least in the broad sense that nations did not regard themselves as bound to laws of war that their enemies violated. Why not? One hypothesis is that the restrictions on reprisals, if obeyed, prevent belligerents from effectively retaliating when the other side violates the laws of war. The threat of prosecution of war criminals is insufficient to deter violations because the probability that soldiers are captured and tried is low. The law tries to address this problem by giving military superiors a legal obligation to try and punish subordinates who violate the law of war. But enemy states have no legal way to retaliate if the superiors fail to take this action—aside from taking diplomatic and economic countermeasures not prohibited by international law. The superior faces a sanction only in the unlikely event that he or she is captured by the enemy. But, unlike an ordinary soldier, the superior will usually be far behind enemy lines.¹⁹ In order to deter law-of-war violations, or to avoid being put at a disadvantage if they are not deterrable, belligerents acted in reciprocal fashion rather than comply with the law.

In sum, reciprocity both explains why the laws of war are self-enforcing, and their limits. Rules that make states jointly better off in one war but not in another war may be respected in the first war but will not be respected in the second. Rules that make states jointly better off in one theater but not another will also be respected in only the first theater. When the conditions for reciprocity fail—as the war nears its end, when one belligerent does not have sufficient institutional structure—the laws of war will not be respected. Finally, the laws regulating reprisals failed because they interfered with the only effective mechanism for ensuring that the laws were self-enforcing.

II. Human Rights

The modern international human rights regime began with the Universal Declaration of Human Rights of 1948. Although the UDHR did not create binding international law, subsequent treaties fleshed out its general terms and incorporated them into international law binding on the states that would ratify those treaties. These treaties include the International Covenant on Civil

¹⁸ Eyal Benvenisti, *The International Law of Occupation* 182 (1993).

¹⁹ *Yamashita v. Styer*, 327 U.S. 1 (1946), is a rare illustration of success, but the conviction has been criticized because of the difficulty of proving that Yamashita failed to take adequate steps to prevent soldiers from massacring civilians.

and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, the Genocide Convention, and the Convention Against Torture. The ICCPR recognized a standard list of political and civil rights akin to those in the United States Bill of Rights, while the ICESCR created rights to work, social security, health care, and the like. Other treaties protected children, prohibited discrimination against women, minorities, and disabled people, and established other rights.

Two schools of thought have arisen about the human rights treaties. The first holds that human rights are moral universals, and the treaties, by incorporating human rights into law, require states to abide by universal ideals. This school of thought draws on a long philosophical and political tradition in the west, and continues to have considerable rhetorical and political power, but it has foundered on philosophical disagreements about the nature of morality. Modern moral philosophy has repudiated natural law thinking, the enterprise of deriving universal moral ideals from human nature or the human condition.²⁰

The second school of thought sees human rights treaties as serving political purposes. These “agreement theories,” as Charles Beitz calls them, emphasize that human rights treaties are *law*.²¹ States make law only when it serves their interests; therefore, human rights treaties must serve their interest. According to agreement theories, human rights norms are simply those on which all (or nearly all) governments can agree, reflecting the lowest common denominator among their moral and political systems. If one state respects norms A, B, and C, while another state respects norms C, D, and E, then only C can be regarded as a norm of human rights.

Neither approach quite captures the way that the idea of human rights plays out in political and legal discussion. The first approach draws on international morality, but international law rests on the consent of states and rejects appeals to morality. Because international morality is highly contested, states prefer to rely on agreement as a basis for international cooperation. The second approach, however, cannot account for the actual content of international human rights treaties, which include many norms that are not universal. It also assumes a puzzling scenario in which states commit only to comply norms that they already observe; what is the point of that? When states criticize each other for violating human rights

²⁰ See Jack Donnelly, *The Relative Universality of Human Rights*, 29 *Hum. Rts. Q.* 281, 292-93 (2007); Joseph Raz, *Human Rights Without Foundations* 2-8 (working paper, 2007).

²¹ See, e.g., Charles Beitz, *The Idea of Human Rights* 74 (2009).

treaties, their debates often touch on profound disagreements about the content of human rights norms.

The starting point for understanding international human rights law is the recognition that the norms contained in human rights treaties do not in fact reflect an overlapping consensus—at least if the human rights treaties are interpreted, as they normally are by western commentators, as requiring norms of liberal democracy plus possibly a number of positive rights to medical care, work, and the like.²² Developing states give priority, in varying degrees, to economic growth, traditional values, and political order. We need a different approach to understanding how human rights law might work.

Assume that states have preferences over a range of outcomes, which can include altruistic as well as conventionally self-interested outcomes.²³ The preferences of states reflect the preferences of the general population, interest groups, or elites, as they emerge through political institutions. If these groups care about the well-being of people in other countries, then their preferences will be reflected in part in the state's. States might also have instrumental reasons for pursuing what otherwise seem like other-regarding goals. For example, states may support human rights in other states because foreign states that respect human rights might be less belligerent and more stable places for trade and investment.

States' other-regarding interests, as I will call them, can differ considerably. One state might care about the health of people living in foreign countries, while another state might care about salvation of their souls. One state might believe that people living in other countries should enjoy the benefits of a market economy, while another state might believe that those people should benefit from education, health care, and social security. A state might be indifferent to the well-being of people in other states as a general matter but draw the line at massacres or genocide. Finally, the intensity of states' other-regarding interests will vary. Many states have highly intense preferences, and are willing to back them with substantial resources; other states have weaker preferences.

²² However, I will argue below that other countries do not interpret human rights treaties in this way.

²³ This basic rational choice approach, which allows states to seek to further their values as well as their interests, underlies much of the recent writing on human rights treaties. See, e.g., Andrew Moravcik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 *Int'l Org.* 217, 243–46 (2000); Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *Yale L.J.* 1935, 2004–10 (2002); Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* (2005); Beth Simmons, *Mobilizing for Human Rights* 64–80 (2009).

If, as seems likely, other-regarding preferences overlap, states' efforts to help foreign nationals face a collective action problem. As an example, imagine two states, say, the United States and the European Union,²⁴ which have an interest in improving the well-being of people who live in third state, say, Zimbabwe. When the well-being of people in Zimbabwe improves, the United States and the European Union are both made better off, in the sense that a "good" for which they have preferences (for which they are willing to pay) has been supplied.

From the perspective of maximizing the joint welfare of the three countries, the United States and the European Union should each contribute to Zimbabwe's well-being. A simple example will show why. Suppose that the United States and the European Union each have wealth of 200, that Zimbabwe has wealth of 100, and that marginal utility of money is declining. The jointly optimal distribution of wealth is one in which the three countries share equally: each receives approximately 167. When the United States contributes one dollar to Zimbabwe, global welfare increases, because Zimbabwe values its 101st dollar more than United States values its 200th dollar. The next dollar, however, should come from the European Union because the European Union values its 200th dollar less than the United States values its 199th dollar. This should continue until all countries have equal wealth.

Interdependent utility functions of this type lead to strategic dilemmas. If the United States contributes to Zimbabwe's well-being, the United States also thereby increases the European Union's utility. If the European Union contributes to Zimbabwe's well-being, the European Union increases the United States' utility. But the United States and the European Union have no desire to contribute to each other's well-being. Thus, if they act unilaterally, they will underfund Zimbabwe. They will do better if they can cooperate where each country agrees to benefit the other country by donating to Zimbabwe.

I have so far spoken in terms of monetary contributions, and the analysis applies straightforwardly to the contribution of financial aid to a poor country. But the analysis can also be applied to more conventional types of human rights enforcement. Suppose that the government of Zimbabwe practices torture. The United States and the European Union incur disutility when Zimbabwe's people are tortured, and so they are willing to contribute to reduce the amount of torture. The United States' and the European Union's contributions now take the form of costly actions—the cutting off of trade, diplomatic pressure, aid for retraining police,

²⁴ Obviously, the European Union is not a state; but it sometimes acts like a state.

and so forth—that will reduce the amount of torture in Zimbabwe. The United States and the European Union face the same strategic dilemma and jointly do best by cooperating.

We now need to examine Zimbabwe’s incentives. Zimbabwe’s government does not respect human rights, for three possible reasons: (1) doing so interferes with the government’s objectives (for example, to stay in power); (2) the government lacks capacity (for example, poorly trained police); and (3) the public does not support the human rights in questions (for example, equality for women in a traditional society). Accordingly, Zimbabwe will not respect human rights unless other countries bribe it to, or other countries threaten to cause harm to it if it does not.

Thus, there are two parallel games—one between the United States and the European Union, the other between Zimbabwe and the joint venture of the United States and the European Union, so to speak. We can apply the original repeated prisoner’s dilemma model to each of these games.²⁵

First, the United States contributes to the disciplining of Zimbabwe, conditional on the European Union contributing to the disciplining of Zimbabwe. Thus, reciprocity underlies the United States’ and the European Union’s cooperative effort to enforce human rights treaties against Zimbabwe. If the United States and the European Union cooperate, then they will hold out bribes and threats in order to influence Zimbabwe’s behavior. They might, for example, offer to pay to retrain Zimbabwe’s police force, so that it stops using torture. Or they might threaten to reduce trade or financial assistance if Zimbabwe fails to stop engaging in torture. Note in this connection why it is crucial that the United States and the European Union cooperate with each other. If the United States unilaterally reduces trade, then the European Union will take up the slack, and Zimbabwe will be affected marginally or not at all.

Second, the United States and the European Union must jointly threaten Zimbabwe with sanctions if Zimbabwe fails to cooperate by improving its treatment of its citizens. In each round Zimbabwe must act by reducing or stopping torture; then the United States and the European Union must react by refraining from issuing sanctions or otherwise maintaining benefits. If

²⁵ More formally, consider a timeline in which (1) Zimbabwe chooses to respect human rights norms (which is costly) or not, (2) the United States chooses to punish Zimbabwe at some cost to itself or not to, and (3) the European Union chooses to punish Zimbabwe at some cost to itself or not to. In a one-shot version of this game with discrete actions, the European Union would refuse to punish, the United States would refuse to punish, and Zimbabwe would violate the norms. As discussed in the text, in a repeated version of the game, an equilibrium in which the United States and the European Union cooperate, and Zimbabwe respects human rights norms, is possible.

Zimbabwe continues to torture, then the United States and the European Union must cut off benefits. Otherwise, Zimbabwe has no incentive to stop torturing its citizens.

As is always the case, there are multiple equilibria. In one equilibrium, Zimbabwe does not respect human rights because the United States and the European Union are not able to cooperate in sanctioning it. In another equilibrium, Zimbabwe respects human right because the United States and the European Union cooperate in sanctioning it. One can also imagine alternatives: for example, the United States and the European Union cannot cooperate but each does discipline Zimbabwe unilaterally if Zimbabwe fails to respect human rights. Their independent efforts will be less than their coordinated efforts, so Zimbabwe's improvement will be less as well.

There are three reasons for being skeptical about the equilibrium in which Zimbabwe's human rights behavior improves. First, the United States and the European Union may not be able to cooperate. In the real world outside our example, the rich states number in the dozens, and as the number of parties increases, cooperation becomes more difficult. In addition, states frequently disagree about when a human rights violator should be sanctioned, in part because the states have different interests that they balance against the gains from improvement in human rights. During the cold war, the United States refused to sanction human rights violators, such as Guatemala, that were also western allies. After the cold war, the United States has refused to sanction human rights violators, such as Saudi Arabia and Egypt, that cooperate in the conflict with Al Qaeda and peace efforts with Israel. Other countries, such as Sudan, receive support from China, which has a strong interest in obtaining reliable suppliers of natural resources.

The basic problem of collective action is aggravated by philosophical and strategic rifts between states otherwise committed to human rights. Europeans condemn the death penalty; Americans do not. American insist on stronger protections on freedom of expression. The two sides differ on how much importance should be given to economic and social rights. They have different strategic interests which they sometimes permit to override their human rights commitments. And then there are other powerful countries like China, Brazil, and Russia, which have different values and interests. The targets of enforcement, countries like Zimbabwe, can exploit these differences and undermine cooperation.²⁶

²⁶ See Eric A. Posner, Kathy Spier, & Adrian Vermeule, *Divide and Conquer*, *J. Legal Analysis* (forthcoming).

Second, the human rights violator itself may not be able to cooperate with the countries that seek to change its behavior. Recall that cooperation requires a low discount rate. For countries, this means political institutions that take account of future payoffs. But many human rights violators have weak institutional capacity. Elected officials face coups; authoritarian leaders act arbitrarily; bureaucracies are corrupt and cannot constrain leaders. In many cases, the government has little power over local officials who commit human rights violations. In extreme cases, such as Somalia, the government collapses and anarchy prevails.

Third, the United States and the European Union can compel Zimbabwe to improve human rights only if they can credibly threaten to sanction Zimbabwe if it fails to do so. However, threats to sanction are not always credible. Sanctions typically harm ordinary people more than they harm leaders; indeed, sanctions work mainly by impelling ordinary people to overthrow the government. They can do so only by causing pain to ordinary people. However, the humanitarian impulse that causes rich states to pressure poor states to enter human rights treaties also makes it difficult for them to follow through and punish the population, already poor and miserable, if their country does not comply with the treaty. This problem has been dubbed the Samaritan's Dilemma.²⁷

It should also be kept in mind that liberal countries rarely have a strong interest in improving well-being in other countries. The governments of liberal countries stay in power by providing benefits to voters, not to foreigners. Thus, governments give aid to foreigners only when doing so benefits voters. This can happen for two reasons. First, voters care about the well-being of foreigners. No doubt they do, but it is equally clear that the well-being of foreigners is a low priority for most people.²⁸ Second, voters care about security and prosperity, and providing help to foreigners advance these goals. Although sometimes it does, liberal governments have discovered that they often do better along these dimensions by providing support to illiberal states when they are strategically or economically important.

Nonetheless, the analysis I have sketched out provides a plausible explanation of enforcement of international human rights law from a rational choice perspective. It is important to note, however, that the model does not track the official understanding of human rights

²⁷ See James Buchanan, *The Samaritan's Dilemma in Altruism, Morality, and Economic Theory* 71-81 (Edmund S. Phelps ed., 1975).

²⁸ See Wojciech Kopczuk, Joel Slemrod, and Shlomo Yitzhaki, *The Limitations of Decentralized World Redistribution: An Optimal Taxation Approach*, 49 *European Econ. Rev.* 1051, 1075 (2005).

treaties. As written and generally understood in official and academic discussion, human rights treaties place identical constraints on all states, which are jointly responsible for ensuring compliance. I have, by contrast, emphasized distinct horizontal and vertical dimensions. The horizontal dimension involves cooperation among a limited number of rich, liberal states; the vertical dimension identifies their relationship with the target states.

It is also important to see that human rights treaties do not reflect the logic of reciprocity, unlike the laws of war and (I have argued elsewhere) much of the rest of international law.²⁹ If one state violates a human rights treaty, other states do not have a right to violate the treaty—that would not make any sense. Sweden would not torture its own citizens in order to punish Egypt for torturing Egyptians. The type of direct reciprocity that works reasonably well in ensuring that the laws of war are (often) respected is absent in the human rights regime, where states must overcome a collective action problem and contend with the Samaritan’s dilemma.

This approach helps explain a number of empirical patterns. The first is the contrast between compliance with the laws of war and compliance with human rights law. As we have seen, compliance with the laws of war has been meaningful although far from perfect, and it reflects the reciprocal nature of international legal enforcement. Compliance with human rights law has been minimal.³⁰ States generally do not improve their human rights records after they

²⁹ See Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* (2005).

³⁰ See Beth Simmons, *Mobilizing for Human Rights* 165–345 (Cambridge 2009) (finding, generally, the effect of ratifying ICCPR, CEDAW, CAT, and CRC have the greatest impact in transitional/partly democratic countries, where ratification was generally correlated with an improvement in human rights practices); Beth Simmons, *Women and International Institutions: The Effects of the Women’s Convention on Female Education, in Power, Interdependence, and Nonstate Actors in World Politics* 108–25 (finding that ratification of CEDAW is correlated with a small and statistically significant reduction in male-female literacy gaps; ratification was also correlated with an increase in female enrollment in tertiary enrollment that is statistically significant that increases five years after ratification), Emilie M. Hafner-Burton, *Forced to be Good: Why Trade Agreements Boost Human Rights* 160–64, 175–78 (2009) (finding no statistically significant relationship between ratification of CAT or ICCPR and human rights practices), Beth Simmons, *Civil Rights in International Law: Compliance with Aspects of the “International Bill of Rights”*, 16 *Ind. J. Global Legal Stud.* 437, 449–56 (2009) (finding that ratification of ICCPR and its Optional Protocol had no statistically significant impact on human rights practices three years after ratification, but has a small positive correlation five years after ratification), Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming and the Human Rights Enforcement Problem*, 62 *Int’l Org.* 689, 703–06, 706 n. 44 (2008) (finding no statistically significant relationship between ratification of ICCPR and repressive behavior following shaming activity; a detrimental correlation was found for ratification of CAT in shamed countries), Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Justice Lost! The Failure of International Human Rights Law to Matter Where Needed Most*, 44 *J. Peace Res.* 407, 415–22 (2007) (finding no statistically significant lagged relationship, or a negative one, in countries that were repressive before ratifying the ICCPR or CAT), Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 *Am. J. Soc.* 1373, 1396–1401 (2005) (finding that the number of human rights treaties ratified and the duration of ratification of any particular treaty is correlated with an increase in human rights abuses), Eric Neumayer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 *J. Conflict Resol.* 925, 941–50 (2005) (finding that ratification of the

enter human rights treaties. The major exception is the European Union's success in encouraging the human rights behavior of potential members. The EU has a great deal of leverage because potential members benefit a great deal when they enter the union. The EU has also devised institutional mechanisms for overcoming the collective action problem that would otherwise hinder cooperation among its members.³¹

The second is the contrast between the recognized agreement on the meaning of the laws of war and the riotous conflict over the meaning of human rights. Subject to fairly technical disagreements, many arising out of the extent to which the 1970s protocols should be considered part of the customary laws of war, and others arising out of understandably different parsings of ambiguous clauses, states agree on what the laws of war require. By contrast, human rights is an essentially contested concept.³² Everyone believes in "human rights" in the same way that everyone believes in "liberty" or "democracy" or "fairness" or "justice." The consensus on the label masks disagreement about the meaning of the referent, as though moral disagreement were just a matter of semantics. The United States treats human rights as essentially the American bill of rights as interpreted by the Supreme Court. Europeans disagree in significant respects—opposing the death penalty and other harsh criminal sanctions while having more limited conceptions of freedom of expression and supporting a range of positive rights. Many Islamic

ICCPR and CAT was correlated with an increase in personal integrity violations; this increase was also found for civil rights violations in autocratic countries, though the effect diminished and became a reduction for more democratic countries), Todd Landman, *Protecting Human Rights: A Comparative Study* 123–57 (2005) (finding limited improvement of human rights in countries that ratify human rights treaties), Hathaway, *supra* note __, at 1989–2002 (finding that ratification of the ICCPR, CAT, the Genocide Convention, or CEDAW had either no impact or detrimental impact on the human rights practices the respective treaties are meant to protect), Linda Camp Keith, *The United Nations International Covenant on Civil and Political Rights: Does it Make a Difference in Human Rights Behavior?*, 36 *J. Peace Res.* 95, 110–12 (1999) (finding that ratification of the ICCPR has a statistically insignificant relationship with measures of personal integrity and civil rights). Simmons' book is the most recent and celebrated of this work, and some people have taken from it the message that the earlier literature was unduly pessimistic. But Simmons' results are similar to that of earlier work: the overall effect of human rights treaties is either nil or very small; even if transitional states are isolated, the effect is small (the coefficients in her regressions), and it is not clear why human rights treaties should be evaluated on the basis of their effect on a subset of states.

³¹ One other empirical finding is that the transitional states do improve some of their human rights behavior when they enter treaties, unlike democratic and authoritarian states. The simplest explanation for this pattern is that states undergoing transition both independently improve their treatment of citizens and ratify human rights treaties to signal commitment to the new regime. Thus, the independent effect of the treaty ratification on human rights is open to question. Many transitional states are western, suggesting that people in those states have human rights preferences that are independent of treaty obligations. Many transitional states also have stable institutions, which contribute to compliance.

³² W.B. Gallie, *Essentially Contested Concepts*, 56 *Proc. Aristotelian Soc.* 167 (1956).

countries interpret human rights so that they are consistent with Islamic law, which means that they reject human rights norms that require equal rights for women, that prohibit certain harsh criminal punishments, and insist on robust religious toleration. China and other developing countries advance the “right to development,” which excuses them from respecting political rights that interfere with economic growth.³³ There is no way to resolve these disagreements; it is better to recognize that there are shifting human rights coalitions that advance largely (but not entirely) different core values.

III. Institutions: A Comparison

One of the striking differences between human rights law and the laws of war is the degree of institutionalization. Human rights law is thickly institutionalized. The laws of war are supported by very few institutions. This difference might seem puzzling. One might normally expect that more successful areas of law would have more robust institutions.

A sketch of the human rights institutions would mention the following organizations and offices. The Human Rights Council, which replaced the Commission on Human rights in 2006, monitors human rights in UN member states and issues resolutions condemning human rights violations (which, however, have no legal force). In addition, the main human rights treaties established bodies charged with the task of monitoring compliance with the treaties, interpreting them, and developing them. These bodies include the Human Rights Committee (created by the ICCPR), the Committee on Economic, Social and Cultural Rights (created by the ICESCR), the Committee Against Torture (created by the CAT), the Committee on the Elimination of Racial Discrimination (created by CERD), the Committee on the Elimination of Discrimination Against Women (created by CEDAW), and the Committee on the Rights of the Child (created by the CRC). A number of other UN institutions have human rights-related responsibilities—for example, the UN High Commissioner for Refugees. And a High Commissioner for Human Rights has the task of coordinating these different agencies and publicizing human rights abuses.

A further group of institutions have responsibility at the regional level. The three most important are the European, Inter-American, and African systems. The Inter-American and African systems have a Commission and a Court. The Commission monitors compliance with

³³ See Anu Bradford & Eric A. Posner, *Universal Exemptionalism in International Law*, Harv. J. Int'l L. (forthcoming).

regional human rights treaties and typically plays an intermediary role between petitioners and the Court—screening and providing assistance. The Court has jurisdiction over the regional treaty, and can issue legally binding judgments against member states. The most developed of the regional systems is the European system, which has 47 member states. Its busy court (an earlier Commission was dropped) has issued thousands of judgments.

The laws of war, by contrast, are not created, monitored, or enforced by any international legal institution. The sole institution with any authority over the laws of war is the International Committee of the Red Cross.³⁴ The ICRC is not an international organization in the ordinary sense. It was not established by states; nor are its members or officials supplied by governments. It is a private institution organized under Swiss law. (It does receive funding from governments, mainly western.) The ICRC derives legal authority from the Geneva Conventions and their protocols, which oblige states to permit the ICRC to monitor prisoners of war. But states have no authority over it; they do not set its mandate, for example, and they cannot exert indirect control over it through appointees. In this way, the ICRC is different from all of the human rights institutions. Yet it is far more successful than any of the human rights institutions with the possible exception of the ECtHR.

One might expect international institutions that are established and operated by states to have more power than private institutions, or that a highly institutionalized area of international law would be more successful than a thinly institutionalized area of international law. But the opposite is true. What accounts for this puzzling fact? The answer is that states established the human rights institutions to overcome a collective action problem, while the ICRC fits into the simple logic of reciprocity that undergirds the laws of war. The ICRC inserts itself between the two belligerents at war, giving each a method to monitor the behavior of the other. The states now have a commitment to permit the ICRC to meet POWs (among other things), and each state will retaliate against the other state if it violates this commitment. The system can work as long as the ICRC is committed to neutrality. Why exactly the members of the ICRC maintain those commitments is not obvious, but a likely explanation is that the ICRC will cease to have any function as soon as states stop trusting it. Its members will have to look for employment elsewhere.

³⁴ For a description of its history, structure, and functions, see Bugnion, *supra*.

Human rights institutions face a more difficult environment. The basic problem is that the collective action problem that afflicts enforcement of human rights treaties also interferes, in a second-order way, with attempts to create institutions to enforce or advance human rights.

Consider a group of states that enter a human rights treaty and also seek to establish an institution that will monitor compliance with the treaty. The institution or agency must be staffed by people chosen by the states, people who, by necessity, are given a certain degree of discretion—to set an agenda, to allocate resources to fact-finding, to evaluate the facts. The agency could be established as a court or as a committee or other institution; for current purposes, its particular form does not matter. The states grant authority to the agency to evaluate compliance.

Any grant of authority gives rise to agency costs. In our case, we might suppose that the “principal”—the group of states—have some particular goal, namely, the enforcement of the provisions of the human rights treaties. There may be more or less consensus about this goal; often vague language is used to paper over differences. The agent obtains power from its ability to set the agenda, and its private information—the facts that it learns about as it evaluates member states.

The agent is a collectivity as well; it will typically consist of delegates from the member states. States must appoint delegates, and it will not always be possible to find people whose preferences perfectly align with those of the appointing states. There is also the problem that states’ human rights preferences may change over time as governments are replaced. Finally, aggregating preferences always involves some arbitrariness, with a great deal depending on institutional design (for example, majority rule versus a consensus rule). For all these reasons, the preferences of the agent are likely to diverge considerably from the preferences of the principal.

The usual solution to agency problems is not available for international human rights institutions. In business settings, principals can provide appropriate incentives to agents by paying them more when agents succeed and less when they fail. Stock options, bonus pay, and similar mechanisms can be used. But these mechanisms require an objective method for evaluating the agents’ performance when the agents’ actual activities are invisible to the principal. If the principal cannot observe whether the agent works hard or not, at least the principal can observe the revenues that flow in. This is not the case for international human

rights institutions. When a human rights committee issues reports, it is difficult to evaluate them without duplicating the effort, which would create new agency problems. Nor is there some independent and objective measure that can be used to evaluate their performance.

Even when human rights organizations serve as perfect agents, they have no ability to compel their principals to obey their judgments. Here, we see the collective action problem again. If a human rights organization directs Zimbabwe to change its treatment of political prisoners, and Zimbabwe refuses to do so, only other nation states can punish it. Yet other states prefer to free ride, and so the sanction is likely to be weak or nonexistent.

For all these reasons, states have been reluctant to give human rights agencies authority to issue binding legal judgments. Even where states agree on a particular human rights goal, they cannot trust the agency to pursue it. Even when they can trust the agency, the states themselves have trouble living up to their obligations to sanction other nations that are criticized by the agency. The result is that human rights institutions are talking shops where little is accomplished.

Some of these problems are illustrated by the travails of the UN Human Rights Council, which succeeded the UN Commission on Human Rights in 2006. The Commission on Human Rights had some significant accomplishments; it drafted the Universal Declaration of Human Rights, for example. But by the first decade of the 21st century, it had lost a great deal of support. Chief among the complaints was that a large fraction of its 53 member states were routine human rights abusers such as Libya and Sudan, and that the Commission rarely criticized human rights abusers, focusing most of its attention on Israel. Thanks to some modest changes in election procedures, the Human Rights Council has fewer rights-abusing members than the Commission did (though still a substantial minority), but its record is no better. It continues to focus its attention on Israel and a handful of other countries (Sudan and Myanmar), and to ignore most other human-rights abusing countries. Consistent with the interest of developing states, the Council avoids singling out states for criticism as much as possible, and instead has instituted a toothless universal periodic review procedure. This procedure results in a document that makes recommendations for reform but does not condemn states for human rights violations. Finally,

the Council had advanced the controversial idea that “defamation of religion” violates human rights.³⁵

Both the Commission and the Council are essentially political bodies that do the bidding of the member states. Because the member states need the support of other countries to be elected, the only states that the Commission can directly criticize are those that are internationally isolated—Israel, Sudan, Myanmar, and a handful of other states. Developing countries with weak human rights records constitute a majority of countries in the world, and therefore they have majority representation on the Council. It is in their interest to protect themselves from official criticism by a UN body. The defamation of religion resolutions emerge from a coalition of Arab, Muslim, developing, and authoritarian states that routinely outvote western states.³⁶ Other states have little incentive to employ sanctions to ensure that the Council’s judgments are obeyed; even when they agree with the Council, they prefer to free ride.

The various regional human rights courts, unlike the Council and other UN human rights bodies, have the power to issue legally binding judgments. Of these, only the European Court of Human Rights has enjoyed a substantial degree of success. In 1950, the Council of Europe drafted the European Convention on Human Rights, which today has 47 parties, including the 27 members of the European Union. The Convention creates a European Court of Human Rights, which reviews petitions submitted by nationals of the member states. In thousands of cases, the ECtHR has awarded judgments—typically fines accompanied by orders to national governments requiring them to modify laws that violate the Convention. However, the extent to which the ECtHR has affected the behavior of states is unknown. There is no doubt that some advanced European states have changed their laws when required to by the ECtHR. However, Russia has slid back into authoritarianism since it joined the ECtHR in 1998, and a general view is that while states like Russia will pay penalties (which are typically small), they do not reliably

³⁵ For a useful discussion on which this paragraph relies, see Eric Cox, *The U.N. Human Rights Council: Old Wine in New Skins?*, Paper Prepared for the American Political Science Association Annual Meeting, Toronto, 2009.

³⁶ In the 2010 resolution, the following countries supported the resolution: Bahrain,, Bangladesh, Bolivia, Burkina Faso, China, Cuba, Djibouti, Egypt, Indonesia, Jordan, Kyrgyzstan, Nicaragua, Nigeria, Pakistan, Philippines, Qatar, Russian Federation, Saudi Arabia, Senegal, and South Africa. The following countries opposed it: Argentina, Belgium, Chile, France, Hungary, Italy, Mexico, Netherlands, Norway, Republic of Korea, Slovakia, Slovenia, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, Zambia. The following countries abstained: Bosnia and Herzegovina, Brazil, Cameroon, Ghana, India, Japan, Madagascar, Mauritius. See Human Rights Council, UN General Assembly, *Combating Defamation of Religions*, A/HRC/RES/13/16 (April 15, 2010).

change their laws (or enforce changes in the law) in response to adverse judgments. The sheer size of its jurisdiction—many hundreds of millions of people across Europe and parts of Asia—limits the impact of this 47-judge court, which today has an enormous backlog of cases, resulting in long delays.

The ECtHR is a regional institution, not an international institution, and it no doubt derives much of its power from the fact that most of its members belong to the EU and most of the remaining members want to belong to the EU. This sets it apart from the other international human rights institutions, which have had little impact on the behavior of states. The reason, as I have emphasized, is that they cannot overcome the collective action problem and states' weak interests in the well-being of people in other states.

In sum, the ICRC is an effective institution because its role is consistent with the logic of reciprocity that underlies the laws of war. The human rights organizations exist in a much less favorable strategic environment. Constructed to overcome a collective action problem, but themselves subject to the same collective action problem, they have no room for maneuver.³⁷

IV. The U.S. Conflict with Al Qaeda and International Law

Many critics argued that the Bush administration wholly disregarded international law, but this claim was always an exaggeration. The Bush administration took the laws of war seriously even while it neglected human rights law. For a salient example, compare the treatment of soldiers responsible for torture in Abu Ghraib and CIA agents responsible for torture of members of Al Qaeda in various places around the world. The U.S. government prosecuted and disciplined those involved in Abu Ghraib, while immunizing the CIA agents. The Obama administration has endorsed this policy and has paid little attention to continuing human rights concerns—now focused on targeted killings by drones as well as the constraints on judicial process for Al Qaeda defendants.

From a legal perspective, these different attitudes toward human rights law and the laws of war are hard to explain. Both types of torture—of Iraqis and of members of Al Qaeda—violate the Convention Against Torture and the ICCPR. Under principles of international criminal law, the United States had an obligation to prosecute both groups of torturers. But the strategic settings were different. The U.S. military feared that torture of Iraqis would lead to erosion of the

³⁷ For further discussion, see Eric A. Posner, *The Perils of Global Legalism* 185-91 (2009).

Geneva Conventions and possible retaliatory mistreatment of American soldiers, in this war or in future wars.³⁸ The U.S. government did not fear that Al Qaeda would retaliate against Americans as a consequence of torture because Al Qaeda already disregarded every type of humanitarian norm, and groups like it in future will as well.

The distinction makes some sense from a rational choice perspective.³⁹ It also recalls the history of the laws of war, and the many exceptions made when states battle non-state organizations. A state gains nothing by complying with international law when there is no reciprocity—and this is what undermined compliance with both human rights law and the laws of war in the conflict with Al Qaeda. The case for complying with the laws of war, I have argued, is stronger than the case for complying with human rights law.

There is, however, a further twist, which is that it is unclear whether the United States gained much by trying to comply with the laws of war in Iraq after the rapid surrender of the Iraqi army. The militias that continued to cause trouble did not themselves comply with the laws of war, so the element of reciprocity was absent. It also seems doubtful that future belligerents will violate the laws of war in conflicts with the United States because the United States violated the laws of war in the earlier conflict with Iraq. Future belligerents will care about how the United States treat *their* soldiers, not how the United States treated people from other countries in earlier wars. On the other hand, it may well be reasonable to show restraint in one war in the hope of obtaining reciprocal benefits in future wars with different countries so that norms of conduct are clear and cooperation in future wars is therefore facilitated.

There is a possible argument that disregarding human rights law has harmed U.S. reputation in a more general sense.⁴⁰ The question is whether a country's violation of some law X will cause other countries to believe that the first country will violate some other law Y that supports cooperation that the first country values.⁴¹ Some people argue that European countries were reluctant to cooperate with the United States as a result of U.S. violations of human rights

³⁸ See 152 Cong. Rec. 10,409-14 (2006) (reporting Senator John McCain, Chairmen of the Senate Armed Services Committee, stating that “modifying the Geneva Convention . . . would put our personnel at greater risk in this war and the next,” and entering into the record four letters from former generals, including General Colin Powell, who also argue that altering American interpretation of the Geneva Convention would “put our troops at risk”).

³⁹ See Eric A. Posner, *Terrorism and the Laws of War*, 5 *Chi. J. Int'l L.* 423 (2005).

⁴⁰ See Mark Osiel, *The End of Reciprocity* (2009). The role of reputation in international law enforcement has recently been emphasized by Andrew T. Guzman, *How International Law Works: A Rational Choice Theory* 71–118 (2008).

⁴¹ Compare Keohane's discussion of “diffuse” reciprocity; see Robert O. Keohane, *Reciprocity in International Relations*, 40 *Inter'l Org.* 1 (1986).

law, but the usual instances cited involve counterterror and military operations that the Europeans understandably wanted no part of, not other dimensions of international cooperation such as trade.

Economic models of reputation depend on private information. A relevant state is either a “good type” or “bad type” in economic argot—meaning that it has hidden characteristics that render it a more or less attractive cooperative partner to other states. Consider a closed state with an institutional structure that enables government officials to make and keep commitments or not. Other states may not know which is the case, and thus be reluctant to enter treaties with this state until somehow the state signals its type. If the state manages to comply with norms of international law against its own immediate interest, this visible pattern of behavior may gradually reveal that the state belongs to the good type—that its institutions work well rather than poorly. States that in this way develop a good reputation will be able to find partners in international cooperative ventures; states with a bad reputation will have trouble finding partners and will therefore be deprived of the gains of international cooperation.

This model may explain some aspects of compliance with international law, but it seems to be a poor one for explaining the behavior of open societies like the United States. Officials in a foreign state can learn more about the United States by reading American newspapers than by waiting for it to comply with or violate international law.

Conclusion

Reciprocity has always been at the heart of international law. States create international law for the sake of reciprocal gains, and they comply with international law so that those gains are not lost. The logic of reciprocity can be understood using simple game theoretical models, which show that it is the key to self-enforcement in the repeated bilateral prisoner’s dilemma. But if reciprocity can support certain forms of international cooperation, it also puts a limit on how much international cooperation can accomplish. The logic of reciprocity suggests that international law will be most robust when states cooperate in pairs or in small numbers and those states have advanced political institutions.⁴²

However, in the twentieth century nations sought more ambitious forms of international law that could generate greater international cooperation. The impulse was humanitarian. People

⁴² Goldsmith & Posner, *supra*.

were morally uneasy with reprisals and other forms of collective punishment, and sought to control them. The restrictions in the Geneva Conventions replaced collective punishment with a criminal justice approach. The human rights treaties went farther, forbidding states to engage in any abuse of their own citizens as well as of foreigners. Both developments, however, were in tension with the reciprocal logic of self-enforcement. The restrictions in the Geneva Convention, if respected by one state, would weaken the incentive of the other state to comply with the substantive provisions in the Geneva Convention because the punishment for violations would be limited. The human rights treaties rejected reciprocity altogether, and implicitly relied on a handful of liberal states for enforcement. The limited success of these efforts suggests that states have not yet overcome the historical limits on international cooperation.

Readers with comments should address them to:

Professor Eric A. Posner
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
eric_posner@law.uchicago.edu

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