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# The Institutional Features of the Prisoners of War Treaties

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During the twentieth century, a system for the treatment of prisoners of war (POWs) was legalized. This system improved the treatment of POWs in some cases, but in others it failed to induce states to abandon the abuse and murder of soldiers who had surrendered to them. My primary aim is to explain the form of the legal rules and the system they have induced to handle POWs. My secondary aim is to explain why the system succeeds in some cases but not in others.

International institutions vary widely in their forms. Among international institutions, international law has relatively less institutional structure. Compared with other international institutions surveyed in this volume, the laws of war do not require recurrent decisions to be made on proper policies as the International Air Transport Association did, nor do they judge the facts in individual cases as dispute-resolution panels do. Instead, POW treaties and other laws of war set standards and prescribe mechanisms for ratifying states to use when they are at war with one another. Enforcing the standards is left to the parties themselves. In the context of the Rational Design project my analysis provides an example of how normative values legalized into a treaty shape state behavior. It also addresses the central question of the project: why do these treaties take the form they do?

Informal understandings on the treatment of POWs are as old as war. In the twentieth century states formalized these understandings into negotiated institutional arrangements that prescribe appropriate treatment of POWs and provide ways for states to verify that their soldiers taken prisoner are being treated well. I argue that states created these arrangements as a rational response to four strategic problems POWs pose: monitoring under noise, individual as opposed to state violations, variation in preferred treatment of POWs, and raising a mass army. I

I thank the editors of this special issue of *IO*, the other participants in the Rational Design project, and the editors of *IO* for their comments on earlier drafts of this article. Comments by seminar participants at the Hoover Institution and University of California at Davis also improved the article.

address not just the legal principles underlying the treatment of POWs but also the system of monitoring and enforcement built on those principles.

The first three strategic problems correspond to the following independent variables of the Rational Design framework: UNCERTAINTY ABOUT BEHAVIOR, DISTRIBUTION and UNCERTAINTY ABOUT PREFERENCES, and ENFORCEMENT and UNCERTAINTY ABOUT BEHAVIOR, respectively. The fourth strategic problem concerns the relations between a state and its citizens and lies outside the scope of the Rational Design framework. I test several of the Rational Design conjectures to determine how they fit with membership, centralization, and flexibility in the POW system.

Briefly, I find that the POW system corresponds to a rational design that responds to the four strategic problems. The system incorporates a general standard of treatment applicable in every war. States then avoid the need to negotiate a specific standard when they go to war. The process of states ratifying the standard screens out some states that have no interest in following it. The standards produce general reciprocal responses that are irregular and may be disproportionate to apparent violations of the standard. When the system breaks down, it fails at both the individual and the state level. The power to monitor the agreement is devolved away from the warring parties.

The POW case broadly supports the Rational Design conjectures on membership, centralization, and enforcement. Specifically, the POW system corroborates the following conjectures:

M2: restrictive MEMBERSHIP increases with UNCERTAINTY ABOUT PREFERENCES

M3: MEMBERSHIP increases with DISTRIBUTION problems

C1: CENTRALIZATION increases with UNCERTAINTY ABOUT BEHAVIOR

C3: CENTRALIZATION increases with NUMBER

F1: FLEXIBILITY increases with UNCERTAINTY ABOUT THE STATE OF THE WORLD

F3: FLEXIBILITY decreases with NUMBER.

Because the POW system shows a greater level of complexity than the Rational Design framework predicts, it does not support conjectures M1, restrictive MEMBERSHIP increases with ENFORCEMENT problems; C4, CENTRALIZATION increases with ENFORCEMENT problems; and F2, FLEXIBILITY increases with DISTRIBUTION problems. For example, the POW system centralizes the determination of standards but decentralizes enforcement. The POW case suggests that the rational design of institutions depends on the strategic problems posed by an issue; consequently, the Rational Design conjectures should hold only when the case being examined contains the strategic problems the framework addresses.

In the next section I discuss some general issues about the laws of war as an international institution. I then present the four strategic problems and rational institutional responses to each. A description of the POW system in practice allows a comparison of the predicted forms of the institutions with their reality. I evaluate the Rational Design conjectures in the context of the POW system. I then examine some alternative arrangements for handling POWs and compare these to existing institutions.

## How Can the Laws of War Work?

Political institutions must be self-enforcing to be sustained. In the language of game theory, institutions must form an equilibrium of a game, both in the sense that a particular institution induces equilibrium behavior and in the sense that the particular institution must be in equilibrium within the set of all possible institutions, including none.<sup>1</sup> Kenneth Shepsle calls these the questions of institutional equilibrium and equilibrium institutions.<sup>2</sup>

The POW treaties are one aspect of the laws of war, that is, prewar agreements about acceptable conduct during wartime. Such agreements operate as institutions by shaping the decisions of actors during wartime. They codify standards of treatment for POWs and rules for verifying that those standards are being upheld. The institutional equilibrium for the laws of war is the wartime behavior of states given the existing treaties. Such behavior includes not just treatment of POWs by states and individuals but also how actors develop and use the POW system. An agreed standard can shape what strategies states use to prevail in a war (I use strategy in its broadest sense, that is, all actions undertaken during war). A prewar agreement to abjure certain strategies can be upheld during war when reciprocity and audience costs make both sides unwilling to be the first to use a banned strategy.<sup>3</sup> The treaties of the laws of war are a public means for states to accept and understand their obligations during wartime. The agreement does not prevent the parties from acting in their own best interests; instead, it sways actors' decisions about which strategies they will use in their pursuit of victory.

If there are enforceable prewar agreements to restrict violence during wartime, there are likely to be many different ones. Having a precise standard matters to ensure that all know what treatment is unacceptable. Which standards to incorporate is the question in designing equilibrium institutions. A rational approach requires that existing institutions be Pareto optimal in the set of enforceable institutions; some party would be worse off if an institution were changed to another enforceable institution. Otherwise, no actor would object to a change of the institution, and the institution would not persist. Later, I will consider some alternative arrangements for handling POWs and compare them to existing institutions as a way to evaluate why the POW system persists.

The laws of war rely on reciprocity for enforcement. The threat of reciprocal response may deter violators. However, reciprocity can be implemented in many ways: which actions trigger a response, who should respond to an unacceptable action, and which responses are properly reciprocal rather than violations themselves? Reciprocity, therefore, requires shared understandings about appropriate treatment and responses that are institutional in nature. The shared understanding of how reciprocity will be employed on an issue shapes behavior on that issue

1. See Schotter 1981; and Calvert 1995.

2. Shepsle 1983.

3. Morrow 1997.

(institutional equilibrium), and that understanding can be changed if none oppose a change (equilibrium institutions). The laws of war can be thought of as the codification of the shared understanding at the heart of reciprocal enforcement of standards.

I now turn to the specifics of the POW issue. Actors create institutions to address problems they face, and an institution's character reflects those problems and how they are being addressed. I examine four strategic problems the POW issue presents to states and discuss states' rational responses to them.

## Four Strategic Problems

The issue of how to handle POWs raises four strategic problems that shape the institutions addressing their treatment. In this section I describe each problem and discuss how the rational institutions literature addresses the institutional response to each. I detail the institutional forms we should expect on the POW issue and explain their underlying logic. In practice the four strategic problems are closely related; I discuss them individually so that I can apply results from analyses that consider these problems separately.

### Monitoring Under Noise

Institutions built on reciprocity require actors to monitor one another's actions so that they can respond to violations of an agreement. Noise—uncertainty about behavior in the Rational Design framework—makes monitoring a significant issue for institutions because actors cannot observe what others have done. Actors must instead draw inferences about others' actions from outcomes. Because outcomes result in part from factors outside actors' control, drawing such inferences is not straightforward. A classic example from economics of uncertainty about behavior is cartel enforcement if the members of the cartel can only observe the market price.<sup>4</sup> They would like to know if any member of the cartel is cheating on the agreement by producing more than its agreed share. However, others' production cannot be observed directly. If one member overproduces, the market price should drop. Production alone, however, does not determine price; a drop in demand could also cause a drop in price. Should cartel members respond to a drop in price by raising their own production, the appropriate reciprocal response if a member has cheated on the agreement?

Alternatively, problems of uncertainty about behavior can sometimes be addressed by designating a neutral actor to collect and disseminate information.<sup>5</sup> The information provided by the neutral actor can alleviate some of the monitoring

4. Green and Porter 1984.

5. Milgrom, North, and Weingast 1990.

problems, provided that such a neutral actor can be found and the parties have incentives to comply with its requests for information. Rational Design conjecture C1, CENTRALIZATION increases with UNCERTAINTY ABOUT BEHAVIOR, is based on this argument.

Noise arises in the POW issue for two reasons. First and most important, a state cannot observe in detail whether another is complying with the standards of POW treatment because POWs are in the hands of the other side. Japan denied the Red Cross access to American and Commonwealth soldiers taken prisoner in the first few months of the war in the Pacific during World War II. Consequently, it took months, and in some cases years, before the Commonwealth nations and the United States knew how the Japanese were treating POWs.<sup>6</sup> Here a neutral actor to collect and disseminate information could have helped.

Second, much that occurs on a battlefield lies outside the view of commanders, so they rely on reports from lower-level personnel about their own soldiers' conduct on the battlefield. When soldiers commit atrocities, few are willing to report their personal involvement in such acts. Reports of summary killings of POWs commonly identify unspecified others as having carried out the act, and often such reports are indirect rather than eyewitness accounts. Within POW camps, camp commanders and guards have some autonomy in how they operate. Factors outside the control of a detaining power may prohibit them from providing full support for POWs. Because of the vagaries of war, a state may, in the course of military operations, inadvertently kill its own soldiers taken prisoner by the other side. During World War II, for example, U.S. submarines sank Japanese ships transporting Americans held prisoner to Japan.<sup>7</sup> A neutral actor is not likely to be helpful in addressing this source of noise because of the large amount of action to observe and the risks of combat to observers. Both of these problems create noise; POWs may not receive treatment up to the standards of the treaties even though the detaining power has tried to live up to its treaty obligations.

Uncertainty about behavior affects the problem of uncertainty about preferences. A government at war attempts to judge its opponent's preferences—that is, whether the opponent intends to honor its treaty obligations—by observing the opponent's behavior. Uncertainty about another's behavior can make it difficult to do this. Overreacting and underreacting to reports of violations are possible under noise, and any system must address this inferential problem and the appropriate response in the face of it.

The rational response to uncertainty about behavior requires moving from direct and immediate reciprocity to more general reciprocity involving "bright lines" of acceptable outcomes.<sup>8</sup> Tit-for-tat responses to noise can lead to feuds of reciprocal punishments triggered by outside influences rather than to a defection from the agreement. Instead, actors should ignore small violations of the agreement and only

6. Vance 1994, 185–88.

7. Bailey 1981, 53.

8. See Downs and Rocke 1990 and 1995.

respond to large violations of the accepted standard. A common standard for determining minor and acceptable levels of violations allows the actors both to predict one another's likely responses and to avoid reciprocal feuds triggered by small amounts of noise. Because reciprocal punishments are not always carried out in response to violations that appear minor, such punishments must be disproportionate in order to have the same deterrent effect as direct and immediate reciprocal actions. Therefore, uncertainty about behavior has two primary effects on reciprocal enforcement of an agreed standard: First, the sides adopt a common standard of acceptable behavior against which to judge significant defections, and second, punishments become irregular and disproportionate to violations.

### Individual as Opposed to State Violations

An effective agreement on the treatment of POWs must operate not only at the state level but also at the individual level. The greatest risk of being killed as a POW occurs from the time the soldier attempts to surrender to the time the soldier enters a holding area behind enemy lines.<sup>9</sup> Soldiers of even the most-disciplined armies kill those attempting to surrender for a variety of reasons, including personal revenge, combat stress, and an immediate concern not to be bothered with the presence and care of prisoners.<sup>10</sup> The use of surrender as a ruse for surprise attack occurs at times. Factors that could be described as cultural can also make the act of surrender difficult.<sup>11</sup> For instance, German military law forbade soldiers to surrender until they had expended all their ammunition; American soldiers were often enraged by Germans who surrendered only after the Americans had closed in on their position under fire. Furthermore, German soldiers often killed any American prisoner who possessed German items under the assumption that the items had once belonged to a German soldier who that American had killed. Because of these practical difficulties and the risks of surrendering, an effective agreement on POWs must operate at the individual level as well as at the state level. The POW treaties do specify some important elements of conduct on the battlefield, such as the use of uniforms to identify soldiers and armies; nevertheless, much of the agreement in practice is *ad hoc*.

The consequences of failing to secure agreement at the individual level are stark. Atrocity breeds retaliation. Furthermore, state-level agreements play a large role on the battlefield. Rumors about how POWs are treated spread rapidly within armies and affect soldiers' willingness to surrender. When POWs are reportedly treated poorly by a state, the opposing side's soldiers are less likely to surrender, preferring to fight on even in unfavorable situations.<sup>12</sup> Such resistance makes the soldiers of the first state less likely to grant quarter to those who do attempt to surrender. This

9. Barker 1975, 27–35.

10. Holmes 1985, 381–87.

11. Linderman 1997, 107–14.

12. See Bartov 1985, 118; and Holmes 1985, 324.

was the case during World War II on both the eastern front, where Nazi Germany fought the Soviet Union, and in the Pacific, where Japan and the United States fought. On the eastern front state policy reinforced the tendency on the battlefield toward no quarter. In the Pacific, U.S. policy did not encourage acts of brutality, but the dynamics of the battlefield resulted in widespread brutality by U.S. GIs and Marines.<sup>13</sup>

The possibility of individual violations of a treaty standard creates an enforcement problem under uncertainty about behavior. The Rational Design framework focuses only on enforcement problems for actors directly involved in the institution; however, violations at the individual level pose an important enforcement problem in the POW system. If individual violations are not restrained, they can lead to widespread violations and a collapse of the system of enforcement at the individual level, as discussed earlier.

The institutional logic of controlling individual behavior parallels social institutions for controlling ethnic rivalry and conflict.<sup>14</sup> One way to control behavior between groups is to entrust each group's members to respond appropriately to violations by members of the other group. The fear of an overall breakdown, and the cost to all involved, deters bad behavior. Another approach is to give each group responsibility for punishing its own violators. When each group polices its own members, deterrence is stronger because a violator's own group may have better information about who did what as well as the ability to punish the violator personally. A system in which members from one group respond to violations by members of another is likely to break down when there is substantial noise because violations breed cross-group retaliation. Under some circumstances the threat of a complete breakdown may effectively restrain violence across armies. An example is the live-and-let-live principle found along some sections of the western front in World War I despite efforts by both sides' leaders to break down such agreements.<sup>15</sup> However, a system that decentralizes enforcement of individual violations controls more effectively the noise such violations produce and is less likely to break down into general cross-group violence.<sup>16</sup>

An institutional response to the two-level problem devolves responsibility for punishing individual violations on the militaries of the violators. A devolved system of enforcement will not prevent all individual violations, but it can prevent the spread of such violations. The punishment of individual violations by the violator's own national military is a sign of the institution's efficacy. When soldiers are not held accountable for their actions or when state policy encourages atrocities, general violations are more likely to occur on the battlefield. This centralization of monitoring and disciplining of individual violations follows the same logic as

13. See Dower 1986, 52–53, 61–71; and Linderman 1997, 143–84.

14. Fearon and Laitin 1996.

15. Ashworth 1980.

16. Fearon and Laitin 1996.

Rational Design conjecture C4, CENTRALIZATION increases with ENFORCEMENT problems, with centralization being the ability to punish violators.

### Variations in Preferred Treatment of POWs

Devising a common standard for the treatment of POWs requires that states agree on many aspects of the handling of prisoners. However, states disagree about how prisoners should be treated. Each would like to see its own preferred standard enforced and may choose to violate an agreed standard. Other states are willing to live within an agreed standard even though they prefer some other standard. A state may choose not to sign an agreement because it disagrees with specific provisions in the draft agreement. The Soviet Union, for example, did not sign the 1929 Geneva agreement on POWs because it allowed captor nations to treat officers and soldiers differently. In short, the adoption of any standard creates a distributional problem;<sup>17</sup> furthermore, differences in preferences about treatment create uncertainty about other states' motivations and thus uncertainty about their future actions.

For insight into the variety of ways states view the issue of POWs, consider the strategic advantages warring states gain through their treatment of POWs. Bad treatment of POWs by one side encourages soldiers of the opposing side not to take prisoners themselves, making it harder for the first side's soldiers to surrender. Mistreatment does have consequences on the battlefield as rumors of the other side's treatment of POWs spread. Soldiers generally believe that reciprocity will hold; for example, after watching the German SS massacre nearly three hundred Russian POWs, one German soldier reacted, "It was already clear to us that it would have repercussions. That our prisoners [in Russian hands] would be treated in the same way."<sup>18</sup> States may decide to treat prisoners poorly to fortify their own soldiers' willingness to fight hard on the battlefield. In some cases POWs have been recruited into the army of the detaining power, though coercion is often present in such recruiting appeals, particularly when joining the enemy army is a way out of terrible treatment in POW camps.<sup>19</sup> POWs are commonly used as a labor force, though treaties ban their being forced to work in a state's war effort. Prisoners often welcome work, particularly agricultural, as a reprieve from a dreary existence in camps. The question is, what work and under what conditions? During World War II, Germany and Japan used some POWs as slave labor in mines and railroad construction. The death rate for prisoners forced to work in those efforts was extremely high. Soviet POWs used as mine labor in Germany were treated so badly that the Nazis had to improve their diet and accommodations and limit their work hours to get any valuable work out of them.<sup>20</sup> Captors can also extract useful military information from POWs, both on the battlefield (where the practice is more

17. See Krasner 1991; Morrow 1994c; and Fearon 1998.

18. Fritz 1995, 57.

19. Overy 1997, 128.

20. Barker 1975, 97–112.



common) and behind the lines. Upholding treatment standards is costly to the detaining power, so it is tempting for states to cheat.

There are also important ideological and moral differences in the treatment of POWs. Japan inculcated its soldiers with the doctrine that those who surrender are considered dead for all purposes by one's home country.<sup>21</sup> This doctrine fostered the exceptional willingness of Japanese soldiers to die in combat during World War II. It also led to a general contempt toward soldiers of other nations who surrendered to the Japanese. In contrast, democratic states generally provide good treatment of POWs as an expression of the value they place on the individual, despite the political debate it triggers about whether POWs are being treated too well under the circumstances. Finally, racial attitudes affect state policy toward POWs, a notable example being racist Nazi policies in Eastern Europe during World War II.

This wide range of strategic consequences from the treatment of POWs leads to a wide range of plausible positions states can take on the issue. Some provide a reasonable existence for POWs, and others seize the advantages that mistreating POWs offers. State leaders make judgments about how their states will treat POWs given their states' strategic situations and values. In terms of institutional design, a state's preferences reflect the considerations underlying these judgments.

These differences in state preferences create the dilemma of inferring future actions from unknown preferences. State leaders can try to infer others' preferences by observing their actions. Often, however, actors would like information on others' preferences, and are willing to transmit such information about their own preferences, before acting. One institutional response to this dilemma is to create systems that allow states to signal their preferences to one another or force them to screen themselves in or out of a group. Often, such signals or screens are costly so that actors with differing preferences will have an incentive to separate themselves.<sup>22</sup> Such costs could arise within the process itself though the consequences of separation, turning costless actions, "cheap talk," into effective signals.<sup>23</sup> Outside parties can then better judge the preferences, and likely future actions, of a state.<sup>24</sup>

Signaling or screening costs in international politics are commonly attributed to audience costs.<sup>25</sup> The signal may set up dynamics by itself that lead to other actors' imposing costs on the state leader who sent the signal. Such audiences could be external or internal. Other states might use violations of treaty obligations to judge the reliability of future promises; interested domestic parties could choose to remove

21. Japanese training manuals contained the warning, "Those becoming prisoners of war will suffer the death penalty"; see Barker 1975, 122.

22. Morrow 1999.

23. See Farrell 1987; and Morrow 1994c.

24. None of this discussion should be read as implying that signaling or screening is perfect. My contention is not that preferences are completely revealed by signals or screens, but merely that actors can refine their knowledge of others' preferences after observing a signal. Nor am I suggesting that all actors then act as the type they have signaled.

25. Fearon 1994.

leaders who fail to uphold state obligations.<sup>26</sup> Such audience costs could be sufficient to make treaty obligations binding in some cases. A treaty would screen out some states that are unwilling to live up to the obligations of the treaty, and it would inform other states that ratifying states were more likely to carry out their obligations under the treaty.

The adoption of a single standard of conduct through a treaty creates a screen to help separate those states who are willing to live with the agreed standard from those who are not. Furthermore, a uniform standard solves the distributional problem that setting a standard poses. Once a standard is set, the question moves from which standard is appropriate to which states will comply with this standard? A uniform treaty therefore addresses problems of both distribution and uncertainty about preferences inherent in the question of variation of preferred treatment of POWs.

These arguments reflect the logic behind Rational Design conjecture C3, *CENTRALIZATION* increases with *NUMBER*; and conjecture M2, *restrictive MEMBERSHIP* increases with *UNCERTAINTY ABOUT PREFERENCES*. A single standard of conduct centralizes the judgment of who accepts a standard. Restricting membership in the system to those who ratify the treaties reduces uncertainty about states' preferences regarding POWs.

### Raising a Mass Army

Modern warfare is fought by mass armies, mobilized from a nation's citizenry. Conscription raises mass armies, and most armies since the Napoleonic Wars have relied on some form of it, particularly during wartime. Understandably, many able-bodied citizens are reluctant to face the risks of combat. Draft evasion and desertion are serious threats to raising a mass army and sustaining it in combat. The well-known logic of public goods applies here; all citizens enjoy the benefit of a victorious army, whereas those killed or maimed in combat and their families bear the cost.

Nevertheless, large numbers of citizens are willing to fight for their country when drafted, and others volunteer (though the likelihood of being drafted drives some enlistments in wartime). Margaret Levi calls this behavior "contingent consent."<sup>27</sup> Citizens are more willing to serve, and less likely to resist conscription, when they perceive that the state treats them fairly. Such fairness is judged by the treatment of potential inductees, war aims, and citizens' overall view of the legitimacy of their government. A state's enforcement actions against those who try to evade the system help to create a sense that the system treats all fairly. Quasi-voluntary compliance therefore combines citizens' cooperation with the state's enforcement actions. All types of political systems rely on a combination of citizen compliance and state coercion to fill out their mass armies, although democracies rely on coercion less than other systems do.

26. Bueno de Mesquita et al. 1999.

27. Levi 1997.

The implicit bargain between a state and its citizens extends to the treatment of citizens once inducted into the military. Standards for the handling of POWs should reflect the need of states to uphold their end of that implicit bargain. Institutionalizing those standards at the international level increases the credibility of a state's promise to protect its citizens serving under arms to the greatest extent possible in the vagaries of war.

Clearly, these four strategic problems are interrelated. Uncertainty about behavior plays a key role both in the character of reciprocal responses and in the handling of individual versus state violations. Some of the uncertainty about others' preferences stems from differences in states' commitments to their own citizens who serve in the military, and these differences make a screening system useful.

Pulling together the characteristics that would form a rational international institution on the POW issue, we find that there should be a common standard that states agree on in advance of conflict. This standard serves as a bright line to determine what constitutes a violation and also as commitment by member states to treat POWs well. Ratifying the standard before war begins serves as a screen that separates those willing to uphold the standard from those unwilling to live up to it. One standard also solves the distributional problem posed by states holding different preferences for POW treatment. Enforcement mechanisms for the standard must address the noise problem at both the state and the individual level. Retaliation for violations is likely to be irregular and disproportionate to the violations. Evidence of failing to uphold the standard should appear both between states and on the battlefield. During wartime, individual violators will be tried and punished only by their own militaries. Of course, many individual violations will go unpunished, if not unreported.

## The POW System

The Geneva Conventions are the centerpiece of the institutions that deal with POW issues.<sup>28</sup> The rules codified in the treaties are applicable to all wars between members of the treaty. The treaties create a common standard that is subject only to limited and specified revision by individual pairs of warring states. For example, warring states may agree to exchange prisoners during wartime, but they are not obliged to work out an exchange agreement. The treaties cover nearly every facet of treatment of prisoners from the time of capture to repatriation at the end of the war. Diet, discipline, the right to escape, the type of work prisoners can perform, and who qualifies as a POW are among the topics covered in the 1949 Geneva Convention. Each successive convention has included more detail.

28. For text of the 1907 Hague Convention and the 1949 Geneva Conventions on the treatment of POWs, see Reisman and Antoniou 1994.

After each world war, the relevant treaties were renegotiated to account for experiences with them during the war. Negotiations occurred at multilateral international conferences open to representatives of all states, though not surprisingly the major powers dominated the negotiations. The Red Cross served as an important nonstate actor during the negotiations. National ratification signals acceptance of the renegotiated standards, and records of ratification are now centralized in the UN.

Treaty enforcement is decentralized. The warring parties alone may counter behavior that violates the treaties. Although member states at war are entitled to prosecute and punish those from the other side who violate the treaties, they rarely do so, owing in part to concern with retaliation against their own soldiers held captive. Even trials for prisoners' committing criminal acts during captivity are treated cautiously; for instance, there were several cases where Nazi POWs in the United States killed other German POWs for committing acts considered disloyal to the Nazi regime. The United States prosecuted the killers but did not carry out their death sentences until after the war was over.<sup>29</sup>

Reciprocity is the unstated but recognized tool of enforcement. When treaty rules are generally observed in a conflict, protests often suffice to remedy individual cases of mistreatment. Sometimes parties use very direct reciprocal sanctions. After the Dieppe Raid in 1942, a number of Germans taken prisoner by Canadian soldiers during the raid and then freed were found to have had their hands tied, a violation of the rules. In response German soldiers bound the hands of Commonwealth soldiers they held prisoner, leading to countersanctions by the British against Germans they held prisoner.<sup>30</sup>

In conflicts where major violations of the rules occur at the state level, reciprocity generally is the norm. Both sides typically mistreat prisoners in these wars, with the notable exception being treatment of Japanese POWs by U.S. and Commonwealth forces during World War II. Breakdowns of the agreement of treatment of POWs often also leads to direct retaliation by soldiers on both sides on the battlefield; surrendering becomes a much riskier proposition than in other types of wars (not that the act of surrendering is ever free of the risk of being killed by one's captors).

Because POWs are held behind enemy lines, the treaties provide for independent monitoring of camp conditions. The "protecting powers," neutral states that function as diplomatic liaisons for one warring state within the territory of the other, are the primary monitors of the agreement. Representatives from each protecting power are responsible for compiling lists of soldiers taken prisoner, conveying mail to and from POWs, and monitoring conditions in camps, including discipline of POWs, and must be given free rein by states holding POWs to do these tasks. Once war begins, each protecting power establishes a POW bureau, which serves as a clearinghouse for information on prisoners. The Red Cross also does many of these tasks, particularly when one side or the other finds it difficult to appoint a protecting

29. Krammer 1979, 169–73.

30. Garrett 1981, 159–60.

power. Its unique role as a humane agency that ministers to POWs, particularly those wounded in combat, places the Red Cross in the appropriate position to serve as a monitor. In either case, the collection of information is taken away from the national agents of either warring party.

Member states are also charged with educating their own soldiers about their rights as POWs and their responsibilities toward those from the other side who surrender. Member states must enforce the rules among their own soldiers and punish those who violate the treaties' provisions. Punishment occurs on the rare occasions when it can be established that a soldier violated clearly communicated military policy on the treatment of POWs. Member states are entitled to prosecute violators from other states as war criminals; the trials must be open to monitors from the protecting power, and the accused must be treated as a POW until convicted, but such trials are rare.

Membership in the treaties is open to all states that sign and ratify them. As is typical in international laws, ratifying states can object to parts of the treaty by filing a reservation at the time they ratify. States can make clarifying statements about how they interpret aspects of the treaty, and member states may also object to ratification by nonmember states seeking membership.

Joint membership by warring parties has been a strong signal that both parties will generally honor their obligations under the treaties. The notable exception to this generalization is the Iraq-Iran War, where both sides broadly violated the agreements despite their being members.<sup>31</sup> In cases where treaty standards have been broadly ignored, at least one warring side was not a party to the treaty, such as the Soviet Union and Japan in World War II and North Korea and China during the Korean War.<sup>32</sup> One measure of adherence to treaty standards is POW death rates because substandard treatment usually results in prisoner deaths. Table 1 shows death rates for the major combatants by front in World War II. The death rates on the eastern front and in the Pacific theater were substantially higher than in Western Europe. The difference in death rates between Soviet prisoners held by Germany and American and Commonwealth prisoners held by Germany is quite stunning and corroborates accounts of differences in treatment.<sup>33</sup> In some wars between a ratifying state and a nonratifying state, the ratifying state generally upheld its obligations under the treaty in the face of violations by the nonratifying state. During World War II, for example, Japan did not abide by the standards, whereas the United States upheld its treaty obligations for the small number of Japanese taken prisoner.

Escalation of retaliatory actions on the battlefield, such as summary killings of soldiers attempting to surrender, indicates the breakdown of an agreement. Reports of such killings are relatively common in wars where agreements have been violated, as occurred on the eastern front and in the Pacific theater during World

31. Best 1994, 361–62.

32. See Garrett 1981, 204–18; and Best 1994, 352–55. For lists of ratifying states and the date and status of their ratification as of their date of publication, see Reisman and Antoniou 1994.

33. For further detail on treatment of POWs during World War II, see Mackenzie 1994.

TABLE 1. Death rates of POWs in captivity

	Death rate <sup>a</sup>
Dyads involving Japan or the Soviet Union	
Soviet soldiers held by Germany	around 60%
German soldiers held by Soviet Union	15–33%
Japanese soldiers held by Soviet Union	10%
U.S. and Commonwealth soldiers held by Japan	27%
Japanese soldiers held by United States	relatively low, mainly suicides
Dyads not involving Japan or the Soviet Union	
German soldiers held by the United States and Commonwealth countries	<1%
U.S. and Commonwealth soldiers held by Germany	4%

Sources: Bailey 1981, 12–13; Barker 1975, 154; Bartov 1985, 153–54; Nimmo 1988, 116–17; Overy 1997, 297; Streit 1993, 271–72; and Vance 1994, 194

<sup>a</sup> Percentage of prisoners who died in custody.

War II.<sup>34</sup> All warring states engage in some violations of POW treaties; it is not unusual for soldiers, even in the most disciplined armies, to shoot soldiers from the other side attempting to surrender.<sup>35</sup> The critical factor is whether the violations are driven by a state's policy or its failure to control its own soldiers. Nazi Germany, the Soviet Union, and Japan all had army policies that encouraged their soldiers to kill soldiers from the opposition who attempted to surrender and to punish their own soldiers who had surrendered. Germany ordered its troops to execute any Soviet commissar captured during Operation Barbarossa.<sup>36</sup> In August 1941 Stalin issued Order 270, which declared that Soviet soldiers who surrendered were "traitors to the motherland" and that they were subject to execution when they returned and their wives to imprisonment.<sup>37</sup> Japanese military training emphasized that soldiers who surrendered would be considered never to have existed in the eyes of their families and the nation.<sup>38</sup>

## Testing the Hypotheses

Does the POW system match the expectations derived from models of institutional responses to the four strategic problems? As expected, the system creates a common standard with little room for ad hoc adjustment for individual cases. Punishment of

34. For the eastern front, see Bartov 1991, 84–89. For the war in the Pacific, see Dower 1986, 62–71.

35. Holmes 1985, 381–87.

36. Barker 1975, 21.

37. Overy 1997, 80–81, 300–304.

38. Linderman 1997, 150–51.

apparent violations at both the state and individual level is irregular, and many violations go unpunished. The responsibility for punishing individual violators predominantly falls on the state of those violators. The ratification process screens out some states who do not intend to abide by the agreed standards during wartime. When state policy violates the standard or when individual violations either go unpunished or are encouraged, the agreement breaks down on the battlefield. Surrendering in such settings is unusually hazardous. Finally, the power to monitor compliance with the agreements is devolved from the warring parties to independent agents.

There are two areas where the POW system may not match the expectations of the models. First, determining what constitutes a “disproportionate” response is difficult, especially when soldiers committing atrocities are from states unwilling to uphold the standards. Were atrocities committed by U.S. Marines in the Pacific theater a “disproportionate” response to the Bataan Death March? Second, states may prosecute individual violators of the standard through war crimes tribunals, as occurred after World War II. Such tribunals are legally permissible under the Geneva Conventions, but they rarely occur during wartime, and the system does not rely on postwar trials. The tribunals held after World War II were *ad hoc*, and they were not recognized as part of the system before or after they occurred. The International Criminal Court seeks to codify such postwar trials and integrate them into the laws of war generally, but whether such a system will work or even be adopted is not yet clear.

Does the POW system match the conjectures of the Rational Design project? Clearly, a single case can neither prove nor disprove these conjectures, and conjectures, by nature, are open to modification as further evidence and argument emerge. I use this case to shed some light on three of the Rational Design dependent variables—MEMBERSHIP, CENTRALIZATION, and FLEXIBILITY.

### Membership

An institution’s membership, according to the Rational Design framework, should be determined by the severity of the enforcement and distributional problems and by the level and type of uncertainty. The membership rules of the POW system are not restrictive; states seeking membership need only ratify the treaties. Treaty ratification appears to screen out some states that do not intend to follow the standards, so the actual membership is not universal. One can imagine more restrictive membership rules tied to stronger enforcement of the system, as is the case in the recent Chemical Weapons Convention, where member states are prohibited from trading in restricted chemicals, both toxic and precursors, with nonmembers. This restriction provides a positive incentive to sign the treaty, which allows much stricter international inspections than earlier treaties.

The POW case shows mixed support for the Rational Design conjectures on membership, primarily because the logic underlying the POW system differs from the logic underlying the Rational Design framework. There is an enforcement

problem regarding POWs when the warring states have ratified the treaties. In this situation the framework expects that membership should be restrictive to exclude possible defectors and free riders (conjecture M1, restrictive MEMBERSHIP increases with ENFORCEMENT problems). But because membership restrictions in the POW system are weak, free riding is not an issue; more crucial is identifying both a common standard and which states will agree to uphold it. Membership in the POW treaties does reduce uncertainty by screening out some states that are not willing to abide by the treaties' standards, supporting conjecture M2, restrictive MEMBERSHIP increases with UNCERTAINTY ABOUT PREFERENCES. The POW system weakly supports conjecture M3, MEMBERSHIP increases with DISTRIBUTION problems. Opting in is a signal that a state will abide by the system's rules, and this solves the distributional problem of agreeing on a particular standard. However, the logic of membership in the POW system is different from the logic behind conjecture M3, where inclusive membership allows for tradeoffs to solve distributional problems. In the POW system the distributional problem is solved by admitting only states who signal their willingness to abide by the standards of the treaty.

### Centralization

The mix of centralization and decentralization in the POW system both supports and contradicts the Rational Design conjectures on centralization. Treaty negotiation and ratification are centralized, and enforcement is decentralized. Information collection is both, but making neutral parties responsible for collecting information is more important to the system than whether the task is centralized. In the absence of any evidence but words, states setting general standards face the problem of uncertainty about how other nations intend to treat POWs; enforcement involves just the problem of inferring intentions from actions amidst noise. In other words, the uncertainty involved in centralized treaty negotiation and ratification is more profound than the uncertainty involved in centralized enforcement.

Rational Design conjecture C1, CENTRALIZATION increases with UNCERTAINTY ABOUT BEHAVIOR, would explain why the mechanisms for negotiating and ratifying treaties in the POW systems are more centralized than those for enforcing them. Uncertainty about preferences, and hence future behavior, leads to a centralized system of setting and ratifying standards to address that uncertainty. Enforcement is decentralized in the POW system because, unlike the logic of conjecture C1, individual parties, rather than all states, enforce the agreement. The large number of actors involved in treaty negotiations leads to a centralized system for setting the standards of conduct, whereas the dyadic nature of war leads to a decentralized system of enforcement and monitoring, in accord with conjecture C3, CENTRALIZATION increases with NUMBER. This case does not support conjecture C4, CENTRALIZATION increases with ENFORCEMENT problems. In the POW system the responsibility for enforcing treaties lies with individual member states rather than being centralized. The problems of uncertainty, instead of problems of distribution and enforcement, drive centralization in the POW issue.



## Flexibility

Although the standards are generally inflexible, flexibility in the POW system arises in two ways. First, states can renegotiate the treaties to refine the standards, as occurred after both world wars. Second, noise on the battlefield and behind the lines creates some flexibility in the system by allowing sides to ignore small violations of the treaties. The standards are inflexible during wartime, but how and when the parties enforce those standards is up to individual states.

This case supports conjecture F1, FLEXIBILITY increases with UNCERTAINTY ABOUT THE STATE OF THE WORLD. In the POW system uncertainty about the state of the world is low, and the treaties' standards are inflexible. Indeed, lack of specificity in the earlier treaties can be thought of as undesirable flexibility in the sense that vague legal provisions provide excuses for some states' actions that others see as violations. The POW case does not support conjecture F2, FLEXIBILITY increases with DISTRIBUTION problems. The adoption of a standard creates a distributional problem among member states. Conjecture F2 suggests that the standards should be flexible between individual member states at war to accommodate different ideas of appropriate treatment, but the standards in the POW system are inflexible in order to sort out which states are willing to abide by them. Finally, unlike the large number of states involved in negotiating the standards, in a given situation typically only two states are involved in enforcing them. Flexibility therefore does decrease with the number of actors involved, in accord with conjecture F3, FLEXIBILITY decreases with NUMBER.

Where the Rational Design framework fails to fit the POW system, the strategic logic of the conjectures differs from that underlying the POW system. For example, conjecture M1, restrictive MEMBERSHIP increases with ENFORCEMENT problems, follows from a public goods logic where membership is used to prevent free riding. However, the logic of membership in the POW system centers on screening out those states unwilling to accept the standard. The strategic problem the POW system addresses, screening, differs from the strategic problem assumed in conjecture M1, free riding. In other words, the institutions an issue gives rise to depend on the strategic problems the issue poses. The Rational Design conjectures follow from certain strategic problems, so we should not be surprised that those conjectures do not hold when the assumed strategic problems are not present in the issue-area.

## Alternative Institutional Arrangements for POWs

To draw out the institutional logic of the POW system, I consider some alternative institutional arrangements for handling POWs. I examine how other systems might shape state and individual responses to the strategic problems POWs present. I seek to clarify how the POW system deals with its strategic problems and to explain why the alternatives have not replaced the current system.

The first alternative is no framework whatsoever. Although there would be ideas about the proper treatment of POWs, states would not formalize them in a legal treaty or system. Instead, warring parties would devise ad hoc agreements on the treatment of POWs geared to a specific war. Because states differ in their views of appropriate treatment, the lack of an institution has the advantage that it would let warring states tailor agreements to their specific preferences rather than having to uphold a multilateral agreement negotiated to incorporate the views of all signatories. This added flexibility carries serious drawbacks, however. First, negotiating an ad hoc agreement during wartime is likely to be difficult because the specific agreement can affect the outcome of the war. For instance, a state that wishes to exploit POWs as slave labor can gain an advantage over an opponent who refuses to use POWs for this purpose. Indeed, such differences in intentions underlie the notable failures of the POW system. Second, an ad hoc agreement is likely to be a “lowest common denominator” between the warring parties. To reach an agreement the party with the higher standard will have to accept a standard lower than it wishes. In a general treaty all signatories operate in ignorance of the wars they will fight in the future, so the distributive conflict among states is reduced. If many different standards could be enforced in wartime, states may be willing to agree to the most rigorous standards beforehand. Third, ad hoc agreements forfeit the screening effects of ratification. Finally, it will be difficult to train troops in their rights and responsibilities under an ad hoc system. The two-level problem should be worse under ad hoc agreements for the lack of such training.

Some parts of the POW system, such as prisoner exchanges, are open to ad hoc agreements between warring parties. The Hague Conventions in effect during World War I were vague, and consequently, the standards for treating POWs were subject to wartime negotiations between warring parties. Those standards varied as the warring nations negotiated different ad hoc agreements. Furthermore, the general standards of treatment were lower in World War I than they were in World War II; POWs were fed less and worse food during World War I, even under agreements between Great Britain and Germany, and they were often forced to work in their captors’ war effort, such as railroad construction.

The second alternative institution for POWs is a strongly centralized agency that would adjudicate and punish violators, similar to the proposed International Criminal Court. One could even imagine a system where all POWs would be detained in a neutral country and supervised by an international agency. A centralized system faces the problem of collecting information on violations and arresting violators, at both the state and individual levels. A state’s defeat and occupation would enable the agency to collect evidence about violations, where it exists, and to detain violators, provided that the victors provide the agency with free rein.<sup>39</sup> However, few wars end in the occupation of the defeated state. At the individual level,

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39. Would Stalin have allowed an agency over which he had little control to prosecute and punish Nazi war criminals after World War II?

evidence of violations is hard to collect even by the violator's army; it is hard to imagine that an international agency could do better than a military interested in controlling individual violations. A supernational agency charged with enforcing agreements on POWs may also remove the obligation of militaries to police their own soldiers, particularly those states seeking to bend the agreed standard. In both cases, conditions on the battlefield could worsen because of the shift in monitoring and responsibility. The signaling property of ratification would be lost in a centralized system where the international agency had authority over all violations, even those by a nonratifying state. Alternatively, if the centralized agency only addressed violations by signatory states and their soldiers, reciprocity against nonmembers would be undermined.

Less dramatic variations on the institutions are possible. Responsibility to provide for POWs could be placed on prisoners' home states rather than on the captor state. After all, a state has a greater interest in the welfare of its soldiers than its wartime opponent does. There is some precedence for such a system. The Hague Convention in effect during World War I asserted that POWs had to be fed as well as civilians would be fed. When the British blockade reduced Germany's food supply near the end of the war, the rations the Germans provided to POWs dropped to as low as a half-pound of bread a day. Many British, French, and American POWs survived because their home countries provided regular packages of food and clothing through the Red Cross.<sup>40</sup> Under such a system, the captor state could confiscate the packages, especially if the state were also blocking monitoring agencies from camps, as Japan did during World War II. Monitoring could be carried out by agents of the belligerents. That possibility raises the problem for the captor nation of providing free movement within its country to such agents during wartime. Understandably, neutral agents are preferable.

This discussion of alternate institutions should not be taken as a statement that the existing institutions in the POW system are the "best" possible. The system exists, continues, and succeeds because it provides a workable solution to the strategic problems posed by POWs. If one of these alternatives were clearly better for all, we would expect the system to move toward it. Some advocates of an International Criminal Court contend that it would be superior to the current system. The controversy of such a court indicates that not all relevant actors agree with its advocates.

## Alternative Explanations for State Treatment of POWs

Culture is another common explanation for the treatment of POWs. Undoubtedly, cultural attitudes about the role and duty of soldiers affect which standards are judged appropriate. Japanese abuse of POWs during World War II stemmed in part

40. Dennett 1919.

from cultural traditions that emphasize individual loyalty and sacrifice to the group. Racist attitudes toward Slavic peoples in Nazi ideology played a large role in German abuse of Soviet POWs during World War II. As noted earlier, American attitudes about fairness in combat and German attitudes about surrender complicated the act of surrender on the battlefield between the two armies, even when both sides generally met the standards of the 1929 Geneva Convention. Culture does play some role in the treatment of POWs.

On closer examination, however, culture does not completely explain treatment of POWs. Japanese policy changed dramatically from World War I to World War II. During the Russo-Japanese War and World War I, Japan scrupulously fulfilled its obligations to Russian and German POWs under the treaties of the time. In both cases the Japanese government used good treatment of POWs to gain sympathy among the Western powers. Furthermore, Japanese soldiers who had been captured were not generally court-martialed on their return to Japan, though some were subject to scorn when they returned to their villages. By World War II, Japanese policy had switched to neglect of prisoners at best and outright abuse of them at worst, and through training and social pressure it discouraged its own troops from surrendering. Japanese cultural attitudes about the shame of surrender appear to have persisted throughout the war.<sup>41</sup>

There were also limits to how far Nazi ideology could shape Germany's treatment of POWs. Nazi Germany treated poorly POWs captured from the Polish Army in 1939. Polish soldiers and pilots who made their way to the West (including POWs captured by the Soviet Union who were later released to fight with the Western Allies) were formed into Polish units that fought with the French armies in 1940 and the Western Allies from 1943 on. The Nazis treated Polish soldiers captured from these units the same as they treated French and British POWs. They were placed in the same camps, received the same Red Cross aid packages, and could be elected to positions of leadership inside the camps. The British government explicitly warned the Nazis to consider Free Polish soldiers in the British army as Commonwealth soldiers. The Nazi government did so and kept Free Polish POWs separate from other Poles taken prisoner in 1939 even though the Red Cross pressured Germany to amalgamate its Polish POWs. In short, the possibility of reciprocal punishment overrode Nazi racist ideology in determining the treatment of Free Polish POWs.<sup>42</sup>

Culture does affect ideas about how POWs should be treated; nevertheless, the institutional standards of the treaties shape actual treatment. Explanations for actions taken in pursuit of state interests must also account for how institutions direct the consequences of those actions. In the case of POWs, the treaties define standards of treatment that lessen the problem of judging when a reciprocal response is appropriate. States can then anticipate likely responses to their treatment of POWs and adjust their policies. Some states choose to violate such standards even at the

41. Hata 1996.

42. ICRC 1948, 2:116–57, and 3:9–48, 251–55.

risk of retaliation, and cultural values play a role in that choice. Realists make a similar mistake when they argue that institutions are epiphenomenal in international politics, that outcomes are purely driven by interests and power.<sup>43</sup> Institutions influence a state's judgment of how it should use its power to pursue its interests; different institutions could produce different patterns of behavior.

## Conclusion

The POW system addresses four strategic problems in the issue-area: monitoring under noise, variation in preferred treatment of POWs, individual as opposed to state violations, and raising a mass army. The system relies on a universal standard that applies to all wars between ratifying states. The Red Cross and Protecting Power serve as neutral monitors of the standards. Treaty ratification helps states to identify which states may not live up to the standards. Enforcement is generally reciprocal, although the consequences of violations are often seen on the battlefield rather than at the state level. When agreements break down at the state level, they also fail on the battlefield. The existence of a standard helps ratifying states to recruit soldiers.

The case of the POW system suggests that international law and norms more generally can operate as institutions in international politics. The standards persist and shape state actions, but they do not determine them. Because states can enforce many standards during wartime, the agreements help states to fix state behavior by prescribing which behaviors are unacceptable and what the consequences of unacceptable behavior may be. I am not suggesting that other factors such as state preferences are irrelevant to the treatment of POWs. Rather, the institution interacts with state preferences to produce behavior.

The Rational Design framework needs to attend more carefully to variations in the strategic dynamics of different issues. The framers contend that observed institutions fit the demands of the issues they address; otherwise, the relevant actors would replace the institutions with alternatives that better address those issues. Strategic problems like provision of public goods are well known, but not all problems are appropriately thought of as public goods. Carefully considering the problems an issue poses is necessary to determine what institutions we should expect in that area.

43. For example, Mearshemer 1994/1995.