
Conforming Instrumentalists: Why the USA and the United Kingdom Joined the 1949 Geneva Conventions

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Abstract

Why have major Western powers committed to international laws of war? Given recent American conduct amid the War on Terror, lively debate rages over this important question in scholarly and policy circles, featuring arguments that range from sheer hypocrisy and self-interest to domestic politics and international social pressures. Through a careful study of the British and American process of deciding whether to sign and ratify the core modern law-of-war treaties – the Geneva Conventions of 1949 – and to do so with or without reservations, this article demonstrates that international social conformity pressures and instrumental motives jointly influenced these countries' signature and ratification decisions. American and British reasoning was neither as self-serving as some realists presume nor as aloof to international social dynamics as rational institutionalist and liberal scholars commonly allow. The article calls for the further refinement of the theoretical debate on state commitment to international law of humane conduct, including humanitarian and human rights law, and encourages the pursuit of alternative methods, namely archival sources, to answer these and other enduring puzzles.

1 Introduction

Intense academic and policy debate rages in the USA and beyond regarding the country's commitment to the laws of war.¹ The principal trigger of the controversy, as is well known, was the Bush administration's attitude and subsequent action towards the applicability of the 1949 Geneva Conventions in the conflicts against the Taliban

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¹ Here I use the expressions 'laws of war' and 'international humanitarian law' interchangeably, though I understand the charged history and politics of both terms.

government and Al Qaida in Afghanistan after 9/11.² By initially arguing that the Geneva Conventions were not applicable in those cases (or in the broader ‘War on Terror’), the Bush administration seems to have facilitated or encouraged the commission of gruesome acts prohibited under international law, including the torture of enemy detainees.³

Scholars of international relations and international law have for some time grappled with this sort of behaviour, raising crucial questions about why states make and commit to the laws of war in the first place.⁴ According to realist legal theorists, states are said to join laws of war treaties out of self-interested convenience and disregard them in adverse circumstances when the costs of compliance outweigh the benefits.⁵ In this mindset, international law has no independent effect on states; immediate, instrumental self-interest dominates. In contrast, and while agreeing with the claim that states create, join and comply with international law largely out of self-interest, rational-institutionalist scholars maintain that treaty adherence can be a meaningful long-term signal of states’ preference for restraint, such that when non-compliance occurs factors such as failed reciprocity or battlefield ‘noise’ may explain it.⁶ Finally, liberal and constructivist international relations theorists assert that at least some types of states, especially democracies, may join the laws of war sincerely, either because they comport with their domestic interests and values⁷ or with their social identity and sense of belonging in the international community.⁸

² See, e.g., D.P. Forsythe, *The Politics of Prisoner Abuse: The United States and Enemy Prisoners after 9/11* (2011); J.L. Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* (2008); J. Mayer, *The Dark Side: The Inside Story of How The War on Terror Turned into a War on American Ideals* (2009).

³ See the sources in note 2 above. The Bush administration is of course not the sole instance of this type; one might mention others and not only involving the USA. But it is a prominent case that has shaped domestic and international debate regarding the laws of war over the last decade. Note also that although the Obama administration arguably demonstrated a changed (more favourable) disposition towards international law, and the laws of war, in particular, critical observers have nonetheless struggled to characterize some of its decisions as altogether different from those of its predecessor. I cannot address this controversy here, but offer some reflections in the concluding section. See generally Goldsmith, ‘The Contributions of the Obama Administration to the Practice and Theory of International Law’, 57 *Harvard International Law Journal* (2016) 1; C. Savage, *Power Wars: Inside Obama’s Post-9/11 Presidency* (2015).

⁴ A sizable literature deals with treaty commitment and compliance with international human rights law. Comparatively less work exists on the laws of war, but see J.D. Morrow, *Order within Anarchy: The Laws of War as an International Institution* (2014); J.D. Ohlin, *The Assault on International Law* (2015); Valentino, Huth and Croco, ‘Covenants without the Sword: International Law and the Protection of Civilians in Times of War’, 58 *World Politics* (2006) 339, at 374. A literature straddling international relations and international law has analysed the conduct of the Bush administration with regard to the laws of war. See, e.g., Forsythe, *supra* note 2; S. Perrigo and J. Whitman, *The Geneva Conventions under Assault* (2010); K. Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (2011); D. Wippman and M. Evangelista, *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts* (2005).

⁵ J.L. Goldsmith and E.A. Posner, *The Limits of International Law* (2005).

⁶ Morrow, *supra* note 4.

⁷ B.A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (2009).

⁸ Finnemore and Sikkink, ‘International Norm Dynamics and Political Change’, 52 *International Organization* (1998) 887. For a recent legal, social-constructivist argument, see R. Goodman and D. Jinks, *Socializing States: Promoting Human Rights through International Law* (2013).

Resolving the debate about treaty commitment is especially difficult for at least two reasons.⁹ On the one hand, the reasons for, and the process through, which states decide to sign and ratify international treaties are usually confidential. Therefore, although conjectures abound, adjudicating among them is elusive due to data issues. Some scholars try to elucidate motives behind ratification by developing and testing empirical expectations about compliance (what conduct one should expect to observe if *x* were the reason for treaty commitment), yet, though useful, this approach collapses two processes that are (analytically and temporally) separable: the decision to join and the decision to comply.

On the other hand, international relations scholars of various persuasions have for some time questioned the wisdom of attempting to conceptually declare any single motivation or factor (however described – usually ‘rational’ or ‘material’ versus ‘social’) as the explanation for state behaviour towards international law. Increasingly, international relations scholarship seems to share the view that world politics is almost always characterized by the complex interaction of strategic conduct alongside (or within) social dynamics of various types, making efforts to disentangle them unnecessary, perhaps futile.¹⁰ Yet, despite this healthy move, it appears that at least in the area of the laws of war and human rights, the theoretical search for a predominant factor driving international legal commitment has continued, with realist theories seemingly gaining special attention in academia and in policy circles.¹¹

This article contributes to this knotty debate empirically and theoretically. It presents extensive archival evidence about the historical process of the signature and ratification of the main treaty source of the modern laws of war – the 1949 Geneva Conventions – by two of the powers at the centre of current debates, the USA and the United Kingdom (UK).¹² Doing so advances the theoretical discussion – first, by correcting sweeping realist claims, not discarding them but, rather, granting them a far more limited space than they seemed to enjoy in recent years, and, second, by buttressing the view of those who argue for a refined combination of arguments/reasons (rational institutionalist and social constructivist) to understand state commitment to international law. Put otherwise, a careful study of the historical record demonstrates that these two major states committed to the 1949 Geneva Conventions due both to

⁹ This discussion compliance maps onto a broader interdisciplinary conversation between international relations and international law scholars. See Abbott, ‘International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts’, 93 *American Journal of International Law* (1999) 361; J. Dunoff and M. A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013); C. Reus-Smit (ed.), *The Politics of International Law* (2004).

¹⁰ Checkel, ‘Theoretical Pluralism in IR: Possibilities and Limits’, in W. Carlsnaes, T. Risse and B.A. Simmons (eds), *Handbook of International Relations* (2nd edn, 2012) 220; Fearon and Wendt, ‘Rationalism vs. Constructivism: A Skeptical View’, in W. Carlsnaes, T. Risse and B.A. Simmons (eds), *Handbook of International Relations* (2002) 52; R. Sil and P.J. Katzenstein, *Beyond Paradigms: Analytic Eclecticism in the Study of World Politics* (2010).

¹¹ Ohlin, *supra* note 4.

¹² Geneva Conventions 1949, 1125 UNTS 3.

instrumental reasons and social conformity, even if they expressed scepticism towards some aspects of the Conventions. I name this behaviour conforming instrumentalism.

The finding of instrumental acceptance comports well with rational-institutionalist studies of compliance with the laws of war, yet the pervasive reference to social influences in the confidential reasoning of US and UK policy makers recasts institutionalist explanations to bring social dynamics into sharper relief, alongside considerations of coordination and joint benefits.¹³ This is an important empirically grounded contribution in line with a flood of ‘pluralist’ work in international relations.¹⁴ Realist arguments find some empirical support, but smaller than usually thought; the historical record discredits the pervasive role of insincere or ‘immediatist’ instrumental self-interest among the officials deciding whether to sign and ratify the laws of war in these two countries. At the same time, however, the evidence suggests that realist-style reasoning, specifically a self-serving willingness to use post hoc interpretations (rather than *ex ante* formal reservations) to justify or exculpate future non-compliance with some provisions of the Geneva Conventions, was not entirely absent from the officials’ considerations. Yet, while the decision makers considered the possibility of self-serving interpretive moves, they did so specifically in reference to provisions that were either perceived as extremely onerous or as unlikely to elicit reciprocal good war-time conduct.

Finally, the documentary record on signature and ratification process reveals two interesting arguments advising against future non-compliance even in adversity or amid doubts regarding reciprocity. First, the American officials insisted that other states’ violations of the Geneva Conventions should not lead to the USA’s disregard of its own commitments because violators would be judged in ‘the court of public opinion’. Second, the British officials ventured that, as a civilized state, the UK should want to respect even those provisions of the Conventions that were deemed inconvenient or fragile. That government officials in the 1940s and 1950s made these arguments and took them seriously bears contemporary importance, as discussed in the concluding section.

To my knowledge, this article is the first to present direct evidence about the historical process of these states’ commitment to the Geneva Conventions, thereby shedding important light on a contentious contemporary global debate.¹⁵ And, although I ultimately endorse those who dismiss simplistic theory testing and favour a more complex and integrated understanding of the reasons for state commitment to international

¹³ Morrow, *supra* note 4.

¹⁴ Checkel, *supra* note 10; T. Risse, S.C. Ropp and K. Sikkink, *The Persistent Power of Human Rights: From Commitment to Compliance* (2013); Sil and Katzenstein, *supra* note 10.

¹⁵ Excellent work does exist on the overall negotiation process of the 1949 Geneva Conventions, *supra* note 12, and broadly on a state’s subsequent implementation. See G. Best, *War and Law since 1945* (1994); S. Conway-Lanz, *Collateral Damage: Americans Noncombatant Immunity and Atrocity after World War II* (2006); Hitchcock, ‘Human Rights and the Laws of War: The Geneva Conventions of 1949’, in A. Iriye, P. Goedde and W.I. Hitchcock (eds), *The Human Rights Revolution: An International History* (2012); G. Mantilla, ‘Under Social Pressure: The Historical Regulation of Internal Armed Conflicts through International Law’ (unpublished typescript, on file with author).

law, it seems important, given the nature of the conversation about the laws of war, to engage it directly and to make the ‘complexity’ point strongly in empirical terms via previously untapped archival evidence. I proceed in four steps. First, I develop the logic and mechanisms behind many standard international relations/international law approaches to the topic of state commitment to the laws of war. Second, I detail the observable implications of the research design and various theories. I then provide some background to the making of the Geneva Conventions. Fourth, I present and assess the American and British decision-making process of signature and ratification in light of the theories under consideration. The conclusion considers the implications of the findings for empirical and theoretical debates about the laws of war and other areas, especially human rights law.

2 Explanations for State Ratification of the Laws of War

Signature and ratification (or accession) are the formal mechanisms through which states commit to international treaty law.¹⁶ When signing or ratifying, states can usually qualify their commitments by lodging reservations (or understandings and declarations) regarding specific articles or the entire treaty, introducing a degree of ‘flexibility’.¹⁷ Here I consider states’ choices to commit and to qualify international law because, as Beth Simmons asserts, the latter can provide further information about the former and, thus, about future compliance.¹⁸ Three different outcomes are therefore possible: (i) ratification without reservations; (ii) ratification with reservations and (iii) no ratification.

Rational choice-based scholarship offers varying conjectures about why states commit to international treaties, including the laws of war. Realist international relations and international law scholars assert that states join international treaties out of self-interest, reaping the ‘expressive’ rewards of public acceptance while calculating the cost of compliance with the benefits on a recurrent case-by-case basis.¹⁹ Though often unstated, realist theorists seem to imply a relatively high ease/readiness by states to set international law aside in adverse circumstances (whenever the cost-benefit calculus so advises), resulting in a generally ‘pessimistic’ outlook towards the law’s potential.²⁰ This reasoning suggests that states should have no need to make reservations

¹⁶ Some treaties include an explicit window for ratification, after which states can ‘accede’ to them. Both have the same binding legal effect.

¹⁷ Helfer, ‘Flexibility in International Agreements’, in J. Dunoff and M.A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2012) 175; Neumayer, ‘Qualified Ratification: Explaining Reservations to International Human Rights Treaties’, 36 *Journal of Legal Studies* (2005). For simplicity, I refer only to reservations unless otherwise necessary.

¹⁸ Simmons, *supra* note 7, at 98. As I suggest later, the connection between ratification (with or without reservations) and future compliance should be taken as a hypothesis for empirical research, not as a necessary assumption.

¹⁹ Goldsmith and Posner, *supra* note 5, at 127–128.

²⁰ The claim about implicit premeditation is mine, but the charge of ‘pessimism’ is broadly shared. Guzman, ‘The Promise of International Law’, 92 *Virginia Law Review* (2006) 533; Ohlin, *supra* note 4.

to ‘empty’ commitments since to do so would only lower the possibility of receiving public rewards.²¹

More optimistically, rational institutionalists hold that states self-interestedly build international laws to establish shared expectations of behaviour (‘common conjectures’) of, in this case, wartime conduct. Ratification of the laws of war functions as a signal of states’ interest in living up to its standards – that is, their preference for a restrained battlefield.²² In this view, states soberly study the negotiated law and make reservations against the provisions with which they feel unable (or unwilling) to comply in the future. In the case of established liberal democracies studied here, this line of theorizing suggests that they will be especially ‘careful about the precise nature of the legal obligations in which they enter’, resorting to reservations only towards the provisions deemed impracticable but without imperilling overall good-faith compliance.²³

International legal scholars have recently set forth other rational-institutionalist arguments to explain state laws-of-war commitments. Jens Ohlin advances a normative theory of ‘constrained maximization’, whereby states should build and join laws-of-war treaties since doing so is in their long-term rational interest. Key to this view is the idea that treaty making and treaty keeping must be seen as a collective instrumental enterprise, making individual defection self-defeating over the long run. Although this approach emphasizes rational interest, it does so by purporting to include moral obligation within it.²⁴ Despite a slight divergence on the nature of the reasons for ratification, constrained maximization theory also endorses a sincere, rational decision for ratification, with reservations depending on an equally honest assessment about states’ actual ability to comply.

Although not excluding the importance of instrumental behaviour, international relations constructivists typically go beyond it, approaching international politics as an inter-subjective realm of meaning making, legitimation and social practice through factors such as moral argument, reasoned deliberation or identity and socialization dynamics.²⁵ Two broad constructivist perspectives can be discerned to explain formal state adoption of international law: states may ratify international treaties either because they are (or have been) convinced of their moral and legal worth or because they have been socialized to regard participation in them as a marker of good standing among peers or within the larger international community. The first perspective relies on moral persuasion and reasoned deliberation as causal mechanisms, showing how principled ‘norm entrepreneurs’ (states, non-governmental organizations [NGOs] and/or individuals) proselytize and engage in discursive practices in order to win sceptical states over and get them to accept the value of international law, including

²¹ Hathaway, ‘Do Human Rights Treaties Make a Difference?’, 11 *Yale Law Journal* (2002) 1935, at 2013, 2019; ‘Why Do Countries Commit to Human Rights Treaties?’, 51 *Journal of Conflict Resolution* (2007) 588.

²² Morrow, *supra* note 4, at 78–80.

²³ Simmons, *supra* note 7, at 102.

²⁴ Ohlin, *supra* note 4, at 111.

²⁵ Finnemore and Sikkink, ‘Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics’, 4 *Annual Review of Political Science* (2001) 391.

the laws of war.²⁶ The second view relies on group pressures and self-perceptions of status, legitimacy and identity as the engines of 'socialization'. In this article, I focus particularly on this latter line of argument, since it is the one that most constructivists have relied on in practice to understand international treaty ratification specifically.²⁷

For constructivists, states co-exist and interact in an international society imbued with principles, norms, rules and institutions that are, to varying degrees, shared. Since international law is one of modern international society's 'fundamental institutions', it harbours a crucial legitimating force that compels states to want to adhere to it, thereby becoming members of the group of law-conscientious states.²⁸ At the same time, given that international society is never completely homogenous but, rather, suffused by difference and hierarchy, the adoption of international norms and law could also result from contests over legitimacy and social status between the collectivities of states, especially of political struggles to claim the moral 'high ground' over the definition of international society's norms and institutions.²⁹

There are thus at least three specific constructivist mechanisms leading states to commit to international law, including the laws of war. The most ambitious one posits that states may ratify treaties because they have internalized an adherence to international law as the appropriate, 'good-in-itself' course of action, especially to agreements that embody pro-social principles of humane conduct.³⁰ This partly coincides with liberal rationalism, which also expects established liberal democracies to accept humanitarian law as a reflection of deeply held values.³¹ Yet, in point of contrast, constructivists might suggest that taking exception to the laws of war via numerous reservations could be seen not as a 'principled' rational move but, rather, as a compromise of their moral fabric. Constructivists might thus suggest that a state that has internalized the acceptance of international law in its very identity will instinctively refrain from taking exceptions to specific provisions, even when doubts remain about their instrumental wisdom.

A second constructivist mechanism for ratification might propose that states that identify with similar others and see themselves as 'belonging' to like-minded collectivities (or 'communities' even) will want to act in consonance with those groups' values and expectations so as either to preserve or to increase their 'in-group' status.³²

²⁶ Finnemore, 'Norms and War :The International Red Cross and the Geneva Conventions', in M. Finnemore, *National Interests in International Society* (1996) 154; Finnemore and Sikkink, *supra* note 8; Goodman and Jinks, *supra* note 8; A.I. Johnston, *Social States: China in International Institutions, 1980–2000* (2008).

²⁷ T. Risse, S.C. Ropp and K. Sikkink, *The Power of Human Rights: International Norms and Domestic Change* (1999).

²⁸ C. Reus-Smit, *The Moral Purpose of the State: Culture, Social Identity, and Institutional Rationality in International Relations* (1999).

²⁹ Mantilla, 'Forum Isolation: Social Opprobrium and the Origins of the International Law of Internal Conflict', *International Organization* (forthcoming 2018).

³⁰ Koh, 'Internalization through Socialization', 54 *Duke Law Journal* (2005) 975.

³¹ Simmons, *supra* note 7.

³² A version of this argument, dubbing social influence a 'cultural' mechanism, is proposed by Goodman and Jinks, *supra* note 8. I do not subscribe to this view, but it bears mentioning.

I elaborate on the difference between status preservation and ‘status maximization’ below,³³ but, in general, this social psychological view claims that states are sensitive to the perceptions of others (and to the effects of those perceptions), whether to opportunities to increase in ‘social ranking’ or to risks of potential isolation or stigmatization.³⁴ Regarding ratification of the laws of war, the expectation here is that although states may evaluate how well their particular domestic interests match the contents of a new treaty, they will be attentive to the attitude of their ‘significant others’ and will either seek to ratify accordingly in order to be ‘back-patted’ by them or will be cautious not to act contrary to those peers through non-ratification or ratification with reservations, especially if doing so will single them out conspicuously.³⁵

Third, beyond relations among peers, a group of states may also care about how its attitudes towards international law will look *vis-à-vis* those of other groups.³⁶ Once more, this is because global politics consists not only of struggles over the distribution of material power among ‘like units’, but also over the disputed construction, maintenance or transformation of order with legitimate social purpose among collectivities of states with diverse ideas, identities and preferences. Given a socially heterogeneous international system, it is reasonable to imagine that states not only want to feel good or avoid embarrassment before their peers but also to minimize opportunities for their foes to claim moral superiority, among others, in their adoption of international treaties. There might be historical moments in which this dynamic of competing worldviews can be especially heightened, most obviously during the Cold War period of struggle between East and West but also perhaps more recently in the context of alleged ‘civilizational’ struggles between the liberal West and others.³⁷

It is crucial to clarify the two sides of the argument laid out. One claim is that states act in the international arena to augment their social approval by peers or within the international community at large. Another is that they may act in order to avoid social opprobrium, understood as real or perceived discomfort over (potential or actual) embarrassment and isolation, resulting in status loss. Despite their similarities, these two claims are analytically distinct. In terms of commitment to international law, a state may wish to join a treaty to accrue ‘expressive benefits’ and increase its social ranking (for example, to move from uncivilized to ‘civilized’ status) or it may do so to avert shunning from in-group peers as well as general loss of stature and shaming by out-group foes. Of these two alternatives, only the former meaningfully merits the

³³ Johnston, ‘Conclusions and Extensions: Toward Mid-Range Theorizing and Beyond Europe’, 59 *International Organization* (2005) 1013, at 1031; Johnston, *supra* note 26, at 84.

³⁴ Towns, ‘Norms and Social Hierarchies: Understanding International Policy Diffusion “From Below”’, 66 *International Organization* (2012) 179.

³⁵ Johnston, *supra* note 26, at 79–94. Some might see these dynamics as examples of ‘thin rationalism’, yet, as Johnston notes, they are still entirely social because they ‘can only be made in a social environment in which members of a community are rewarding appropriate behavior with status markers’.

³⁶ International relations scholars have not yet fully articulated this perspective, but see Adler-Nissen, ‘Stigma Management in International Relations: Transgressive Identities, Norms, and Order in International Society’, 68 *International Organization* (2014) 143A; Zarakol, *After Defeat: How the East Learned to Live with the West* (2010).

³⁷ Mantilla, *supra* note 29.

label of 'reward', the latter is better characterized as conformity.³⁸ I maintain these analytical distinctions while evaluating the empirical evidence on the laws of war.

3 Research Design

The puzzle addressed here concerns the motivations and the mechanisms that drive states to commit to international treaties; in this case, the commitment by the USA and the UK to the 1949 Geneva Conventions, with or without reservations. The appropriate method to identify and assess the operation of causal mechanisms is process tracing. Process tracing is 'the analysis of evidence on processes, sequence, and conjunctures of events within a case' with the purpose of identifying and probing causal mechanisms in action.³⁹ I conduct two types of process-tracing tests geared to demonstrate the relevance and stability of various arguments for ratification, especially instrumental reasoning and conformity pressures, during the US and UK processes of signature and ratification. Careful testing is particularly crucial with regard to social pressures (such as opprobrium), given the doubt normally cast on the plausibility and importance in signature and ratification processes. To this end, I rely on a so-called 'hoop' test, which is designed to affirm a hypothesis' relevance.⁴⁰ Second, I seek to evaluate the stability of opprobrium concerns over time, through longitudinal within-case tests.⁴¹ This is also critical, because even if one establishes that social pressures were expressed sometime during the decision-making process, it is possible for them to have been assuaged, struck out or otherwise set aside along the way.

Since signature and ratification decision making largely takes place behind closed doors, the best type of evidence for assessing the underlying mechanisms is private evidence.⁴² In particular, it seems crucial that arguments about social influence or pressure be expressed in private among decision makers, given the scepticism that their usage in public is only 'cheap talk'.⁴³ For this article, I located, organized and analysed most of the crucial memoranda, reports and cables produced by the USA and the UK prior, during and after the negotiations of the Geneva Conventions, both internally – between the USA and the UK – and, occasionally, externally with other countries. These comprise roughly 12,000 pages held at the US National Archives in College Park, Maryland and the UK National Archives in Kew Gardens outside of London.

³⁸ Rational institutionalists would prefer the term 'reputation' over conformity. Here I follow common practice in demarcating social influences (such as opprobrium and conformity) from reputational concerns over future cooperation. See Johnston, *supra* note 26; Lebovic and Voeten, 'The Politics of Shame: The Condemnation of Country Human Rights Practices in the UNCHR', *International Studies Quarterly* (2006) 861. However, a newer literature argues 'reputation' should merge social and instrumental concerns. J. Erickson, *Dangerous Trade: Arms Exports, Human Rights, and International Reputation* (2015); J.G. Kelley, *Scorecard Diplomacy: The Power of Reputation to Influence States* (2017).

³⁹ A. Bennett and J. Checkel (eds), *Process Tracing: From Metaphor to Analytic Tool* (2014), at 3–4.

⁴⁰ Collier, 'Understanding Process Tracing', 44 *PS: Political Science and Politics* (2011) 823, at 826.

⁴¹ Jacobs, 'Process Tracing the Effects of Ideas', in Bennett and Checkel, *supra* note 39, 41.

⁴² *Ibid.*, at 49–56.

⁴³ Goldsmith and Posner, 'Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective', 31 *Journal of Legal Studies* (2000) 115.

Both archival sources, especially the British files, are exceptionally rich, allowing for careful process tracing. This approach differs from common efforts to assess states' motives or reasoning behind ratification indirectly through the systematic study of public documentation⁴⁴ or through the testing of observable compliance patterns.⁴⁵

Case selection was driven by a substantive concern with the attitude of these specific countries – the USA and the UK – towards the laws of war, around which much policy and academic debate currently centres. Thus, the research design was not geared to conduct a cross-national test or to buttress the generalizability of the findings across states, historical epochs or issues. Nevertheless, it may be said that the focus on these two country cases might serve as a 'hard test' of constructivist claims about social pressure because the USA and the UK are both examples of prominent Western states whose relative power, especially at the victorious post-World War II historical juncture, should have lessened their vulnerability to social pressure. And, while this remains to be assessed in later work, a key intuition is that if social concerns are found to be relevant in these powerful countries' decision making, one might reasonably expect them to have played some role (perhaps a divergent one) in other cases.

4 Assessing the Theories

How might we know empirically which factors motivate states' treaty commitment to the laws of war, with or without reservations? Given the availability of archival evidence, the observable implications of the various theories under consideration become quite straightforward. States' private deliberation should reveal the character of the arguments *vis-à-vis* ratification and reservation making. If the realist conjectures are correct, one would expect to see a swift, uncomplicated and insincere high-benefit/low-cost calculus to have prompted positive and unqualified treaty adherence. In turn, if the first rational-institutionalist view is correct, we would expect states' decisions to ratify to represent a central motive, demonstrating an (honest) commitment to live up to the laws of war as an (instrumentally) useful international standard of conduct. Wherever unpalatable provisions are identified, one might expect reservations to follow, reflecting a well-meaning ('law-oriented') assessment of willingness and ability to comply. The second rational-institutionalist perspective would also predict the presence of law-respecting instrumental arguments – that is, reasoning based not on immediate cost-benefit calculations but, rather, on a 'long-term' willingness to abide by the new law.⁴⁶

Two forms of evidence, of varying strength, might help establish the relevance of the constructivist conjectures. First, private government documents might feature a desire to learn about the plans of peers (that is, those within a given reference group)

⁴⁴ Nielsen and Simmons, 'Rewards for Ratification: Payoffs for Participating in the International Human Rights Regime?', 59 *International Studies Quarterly* (2015) 197.

⁴⁵ Morrow, *supra* note 4.

⁴⁶ Ohlin, *supra* note 4.

regarding ratification and reservations. While a version of this expectation coincides with rationalist claims about coordination, reputation keeping and reciprocity inducement, the nature of the evidence should help glean whether there are at stake considerations about discomfort over being out of step with group behaviour or about concerns over squandering future cooperative opportunities. A stronger form of evidence for the social conformity perspective would relate to governmental worries about how their choices may be perceived by peers, the broader international community or by different, competing state groupings and the influence of those perceptions on social status. In the case of these Western liberal states, one might be able to trace a concern over international social standing and moral virtuousness *vis-à-vis* less civilized 'others'. Yet, since the conformity argument suggests that socially pressured acquiescence is to some degree also insincere (because it is begrudging), evidence of adoption, accompanied by the suspicion of inability to respect the rules (but without formal reservations), might be especially telling. This type of evidence might also provide a bridge between constructivists' social conformity mechanism and a moderate version of realism. With this theoretical and empirical guidance in mind, I now turn to the case evidence.

5 The Geneva Conventions: Background and Process

After the harrowing experience of World War II, states embarked on the project of revising the three existing Geneva Conventions for the protection of war victims (on wounded and sick soldiers on land and at sea and of prisoners of war) and of creating a new one on civilians. These Conventions are the definitive treaty source of the modern laws of war, and, to this day, they retain formal universal acceptance.⁴⁷ Several decades after their adoption, it is easily forgotten just how disputed and revolutionary some of their features were at their inception. Extensive official and unofficial deliberation over three years (1946–1948) went into the preparation of the draft texts that formed the basis for negotiation, including meetings between the International Committee of the Red Cross (ICRC), the National Red Cross and Red Crescent Societies and governments, in different combinations. Some states, including the UK and the USA, formed inter-departmental committees (IDC) devoted to the revision of the Geneva Conventions. A wide array of civilian and military personnel with legal and diplomatic backgrounds poured over the existing law, formulated new proposals and considered the changes sponsored by others.

I consider the process of the signature and ratification of the Geneva Conventions as a whole, but, in order to address scholarly debate on whether and why states lodge reservations to 'inconvenient' or 'uncertain' provisions, I focus on perhaps the most controversial innovation of the Conventions – namely, the introduction of humanitarian rules for internal conflicts through an article common to all four Conventions – Common Article 3.⁴⁸ The prevalence of internal wars after World War II also makes

⁴⁷ At the time of writing, the Geneva Conventions have 196 state parties.

⁴⁸ For my explanation of Common Article 3's origins and negotiation, see Mantilla, *supra* note 29.

this a most relevant rule. Moreover, since Common Article 3 focuses primarily on the challenging issue of states' humane treatment of their own nationals in the midst of violence, it allows for a comparison to human rights law, as I discuss below.

A *Making International Rules for Internal War*

Until 1949, states had avoided serious discussion of treaty rules to regulate armed conflicts occurring within their borders through the laws of war. This is perhaps unsurprising. The issue after all encroaches directly upon national sovereignty and state security, and any new rules in this field promised to commit states to showing restraint towards rebels and (potentially treasonous) civilians in their midst. Second, the political risk of legitimizing – hence, encouraging – rebellion through a rule like this loomed large, while, at the same time, it offered no guarantees that rebels would abide by it. The bloodbath of the Spanish Civil War (1936–1939) provided the decisive demonstration effect for the idea of regulating internal conflicts through international law.⁴⁹ By 1946, this proposal relied on the passionate sponsorship of the ICRC and various National Red Cross Societies. At the same time, it greatly aggravated major states (especially the UK, but also France) in the context of growing pressures for decolonization and social unrest in a recently liberated Europe. The two UK IDCs set up to prepare the revision of the Geneva Conventions struggled extensively to formulate a position, with the Cabinet of Ministers ultimately urging the delegation to 'kill' the idea altogether or else 'resist it to the bitter end'.⁵⁰

The US IDC was not as incensed as its British counterparts with the 'humanization' of internal conflicts, but, in the preparatory inter-state meetings, the American delegates did insist that only a formula featuring two conditions would make a rule on internal conflicts acceptable: the consent of the conflict-ridden state and the *de jure* and *de facto* commitment and compliance of rebels. In the American view, without these two requirements, states would be committing to a unilateral – hence, threatening and counter-productive – humanitarian rule.⁵¹ Thus, while less extreme than the British, the Americans were still concerned with sovereignty costs.

Surprisingly, once the Diplomatic Conference began in April 1949, these powerful sceptics found it hard to prevail. The British, French and American delegates, supported by Greece, China, Australia and Canada, pushed back against the text presented to them by the ICRC, which featured neither of the two conditions cited

⁴⁹ F. Bugnion, *The International Committee of the Red Cross and the Protection of War Victims* (2003), at 282–283.

⁵⁰ Minutes of a Meeting of Ministers Held at No. 10, Downing Street, S.W.1. on Monday, 28th March, 1949, at 10.15 a.m., GEN. 281/1st Meeting, file PRO 130/46/281, The National Archives, United Kingdom (UK TNA). For a partial account of the United Kingdom's attitude towards Common Article 3 and its role in the negotiations, see Hitchcock, *supra* note 15. For a more complete account of the British, American, and French protagonism, see Mantilla, *supra* note 15.

⁵¹ US Draft for the Revision of the Convention for the Protection of Civilian Persons in Time of War, prepared by the Interdepartmental Committee on Prisoners of War, Washington DC, 21 March 1949, POWC D-48, in Administrative Division, Mail and Records Branch, Geneva Convention, 1946–1949, Record Group (RG) 389, entry 437, box 673, US National Archives at College Park (US NACP).

above and involved not the creation of specific rules for internal conflicts but, rather, the complete, automatic operation of the four Conventions in them. The conference eventually agreed to explore textual alternatives, pitting the 'sceptical' delegations (mentioned above) against the persistent sympathizers of the idea, including Norway, Denmark, Monaco, Switzerland, Mexico and Uruguay. Most consequential of all, however, was the attitude of the Soviet Union and its satellites. In pointed speeches, the Soviet delegates grilled Western (especially colonial) states for their conservatism, reproaching them for using sovereignty-based arguments to contain a needed legal innovation.

Repeated attempts at compromise eventually made it clear that a legal formula featuring the conditions desired by the British, French, Americans and other sceptics would simply not be acceptable. The British were especially flummoxed by the isolating embarrassment that general public rebuttals were causing them.⁵² Convinced that an absolutely undesirable outcome could be still avoided (the Soviets were preparing a new, more comprehensive proposal) and realizing their affinity of opinion, the British and French anxiously requested a change in instructions and set out to design a text that would please the pro-regulation coalition but that, from their perspective, might also be less threatening. To this end, they sought and secured the support of key allies, especially the USA and the British Commonwealth countries. The new UK–French draft proposed that the 'principles' of the Geneva Conventions (that is, not their every provision) plus a list of specific rules should be observed in 'armed conflicts not of an international character'. This vague expression gave the British and French some confidence that they could avoid the operation of the rule by arguing that whatever violence they experience did not rise to the level of 'non-international conflict'.⁵³ With some additions of protective content, the British–French compromise text went on to become Common Article 3.⁵⁴

It is important to stress just how radical Common Article 3 was at the time of its inception. Often referred to as a 'convention in miniature', it legally binds the parties in conflict to respect and care for those who have fallen wounded or sick, who have surrendered or were detained as well as others not taking direct part in hostilities (non-combatants). It also prohibits atrocities against such persons including torture, ill-treatment, hostage taking and unlawful execution and provides for judicial guarantees to captured persons and enshrines the ability of the ICRC to offer its humanitarian services to all sides.⁵⁵ The logic of Common Article 3 closely resembles that of human rights law and norms – states should observe basic measures of respect and humane treatment towards their citizens – but, by including armed rebels within

⁵² Sir R. Craigie, UKDEL, Geneva, to Mr. Caccia, Memorandum of Diplomatic Conference for the Protection of War Victims – Civil War, file PRO FO 369/4149, K4720, UK TNA.

⁵³ See F. Klose, *Human Rights in the Shadow of Colonial Violence: The Wars of Independence in Kenya and Algeria* (2013).

⁵⁴ The full text of Common Article 3 is available at www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=BAA341028EBFF1E8C12563CD00519E66 (last visited 13 March 2017).

⁵⁵ J.S. Pictet (ed.), *Commentary on the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick Armed Forces in the Field, August 12, 1949* (1952), at 48.

the sphere of protection, it goes beyond them. Given that the Universal Declaration of Human Rights, which was signed just months prior, was considered non-binding law, it seems all the more striking that states could accept something like Common Article 3 as binding.⁵⁶ A lack of legal clarity regarding just how rebels could be compelled to comply with the new rule (to match states' commitment) added to its potential danger and also heightens the questions explored in this article, namely states' eventual unqualified ratification of the Geneva Conventions.

B *Post-Negotiation Attitudes*

Although the adopted version of Common Article 3 had clearly been attenuated, the provision continued to nag a British delegation that believed it 'would make it more difficult to deal promptly and effectively with rebellion'.⁵⁷ For instance, in post-Conference reports, the UK delegates urged delegates to avoid any efforts to argue that the violence that occurred at the time in Malaya was an armed conflict (although they believed it was one) since to do so would cause them great embarrassment.⁵⁸ For its part, the USA remained unconvinced about the language of Common Article 3, albeit for more functional reasons. To American eyes, the adopted text simply seemed like a unilateral gesture of states that, in its failure to credibly commit rebels, was likely to break down in the heat of violence.

It appears then that, even if the text had been watered down, both the British and the Americans had reasons to express scepticism about humanitarian law's novel incursion into internal conflicts. Although the Diplomatic Conference itself had elicited great anxiety and acted as the institutional platform and focal point of social pressure, the subsequent process of signature and ratification presumably lacked these traits. In other words, one might have expected that, having gone back to their capitals, delegates would have felt more at ease to make 'cool' choices about signature/ratification outside of the negotiating room. Yet neither the USA nor the UK made a reservation on Common Article 3. They also failed to qualify the undesirable introduction of individual criminal accountability against violations of the Geneva Conventions through the legal figure of 'grave breaches', which not only encouraged domestic prosecution but also allowed for universal jurisdiction. In fact, of all the innovations the USA and the UK had found inconvenient throughout the revisions of the Geneva Conventions in 1949, only one resulted in a formal reservation: Article 68's prohibition of the death penalty in occupied territory. The puzzle thus becomes: why did the USA and UK embrace binding treaties that included measures they had opposed earlier, limiting themselves to, in their own words, 'minimal reservations'?

⁵⁶ Universal Declaration of Human Rights 1948, UN Doc. A/810 (1948).

⁵⁷ Minutes of a Meeting of Ministers Held at No. 10, Downing Street, S.W.1. on Friday, 2nd December, 1949, at 10.30 a.m., GEN. 281/3rd Meeting, file PRO CAB 130/46/281, UK TNA.

⁵⁸ War Office (Mr. Gardner to Mr. Alexander), 'War Office Comments on the Draft of the Common Articles Memorandum,' file 369/4163, K10223, UK TNA.

C US Decision Making

After the Diplomatic Conference ended in August 1949, states could either sign the Geneva Conventions on the spot or wait for a formal ceremony scheduled for 8 December of that year. The US delegates decided to sign three of the agreements right away (the First, Second and Third Conventions on wounded and sick on land and at sea and on prisoners of war), but wished to study the new Fourth Convention on civilians more closely. The British, more cautiously, decided to wait until December and seek approval from the Cabinet of Ministers on all four treaties. In this section, I describe the process behind the US decision-making process to sign and ratify with minimal reservations. The next section details the British process.

The US IDC began its study of the Fourth Convention on civilians in October. State Department Legal Advisor Raymond Yingling set the tone, noting how the USA had not signed the Fourth Convention 'out of super caution'. This attitude needed correction since, in his view, 'it was important *from the standpoint of prestige and as inducement to others* that the United States be among the original signatories of the Convention'.⁵⁹ The US IDC already expected to file a reservation on the use of the death penalty, but, beyond this point, decisions were not made. Yingling announced that the IDC was open to hearing about other possible 'serious objections' to the Fourth Convention and requested separate studies from various participating agencies, including the departments of the army, air force, navy, justice and state. The italicized reference to 'prestige' hints at social conformity, but it remains unclear whether the concern here was to increase American prestige (by leading the move to ratify) or merely to preserve it (that is, to avoid opprobrium). It also remains to be seen whether such concerns survived the assessment of various governmental agencies, with their own (perhaps countervailing) incentives.

Two weeks after the initial meeting, the army representative came back with a long list of considerations.⁶⁰ The army document was rather conservative, illustrating the military's strong concern with a potential commitment to onerous international rules that the USA could not uphold. On Common Article 3, for instance, it noted how its second paragraph (which reads: 'the wounded and sick shall be collected and cared for') was 'couched in mandatory terms concerning a situation which may be largely impossible of implementation'.⁶¹ Overall, the army seemed especially worried about fulfilling international standards in the provision of food, medical supplies, clothing and other means of support to likely a very large group ('hundreds of thousands') of civilians under a future American occupation.

⁵⁹ Prisoners of War Committee Minutes, 10:00 a.m. to 11:10 a.m., Thursday, 13 October 1949, file POWC M-126, Administrative Division, Mail and Records Branch, Geneva Convention, 1946–1949, RG 389, entry 437, box 673, US NACP (emphasis added).

⁶⁰ Convention for the Protection of Civilian Persons in Time of War, Pertinent Comments Received from the Division of the Department of the Army, attachment to Prisoners of War Committee Minutes, 10:00 a.m. to 12:00 p.m., Thursday, 27 October 1949, POWC M-127, Administrative Division, Mail and Records Branch, Geneva Convention, 1946–1949, RG 389, entry 437, box 673, US NACP.

⁶¹ *Ibid.*

Rational institutionalism might lead one to expect that the army's objections should have mattered heavily in the IDC's assessment of the Geneva Conventions, especially if objections involved a potential inability to comply, if they compromised reciprocity or if they entailed 'adjustment costs'. What occurred? Although the US IDC considered each of the 34 observations made by the army; strikingly, all were rebuffed. The IDC instead scolded the army representative for his exaggerated, undue apprehension and reminded him that the standards as set out were in many ways 'not absolute', presumably meaning that they were conditional on the parties' best efforts to live up to them.⁶² The IDC further explained that the agreement could not be renegotiated and that, upon judicious study, the army's concerns could all be addressed via accommodating interpretations of the texts. Regarding Article 55, for instance, which enshrined the 'duty of ensuring the food and medical supplies of the population', the IDC declared that the 'impossibility of achievement is always an excuse, under any law. The Convention draft is consistent with present practice, and what is provided for therein is a legal and moral obligation in any event ... no country would be expected to do more than it is possible for it to do.'⁶³

Lest we take the IDC's apparent embrace of the entire Geneva Conventions without quibbles as evidence of internalization, it seems instead that its members were determined not to reopen a conversation about them for instrumental and social reasons. For example, when the army suggested that the USA should press to include the denial of the practice of religion within the list of grave breaches, the IDC responded that 'the United States would not want additional sanctions introduced into the Convention. "Grave breaches" were accepted unwillingly at the Conference at Geneva, and the Committee was opposed to extending the scope'.⁶⁴ This confirms that although doubts remained (even among the proponent State Department lawyers), an unwillingness to give the impression that the USA wanted to unilaterally rewrite the Conventions proved stronger.

The US IDC closed the debate on the army views by announcing its wish to arrive at a firm decision regarding signature and reservations 'as soon as possible' in order to let other governments know about the USA's plans.⁶⁵ Various countries (including Belgium, Switzerland, the UK and Canada) had already consulted it on the matter.⁶⁶ Consulting and informing allies seemed an important concern, suggestive of 'peer pressure', yet it was unclear whether the worry was over social status or instrumental cooperation. The strong negative response to the army seemed to cause an impression, and no other government agencies voiced concerns. The IDC thus cleared the Fourth Convention on civilians for signature on 8 December 1949, with only one reservation,

⁶² Prisoners of War Committee Minutes, 10:00 a.m. to 12:00 p.m., Thursday, 27 October 1949, POWC M-127, Administrative Division, Mail and Records Branch, Geneva Convention, 1946–1949, RG 389, entry 437, box 673, US NACP.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

which was on the death penalty. That same reservation was made by Canada, New Zealand, the Netherlands and, as seen in the next section, the UK.

It bears re-emphasizing how puzzling it is that the IDC declined all of the objections made by the army. Read theoretically, this suggests that although instrumental concerns with effective applicability were put forth by well-placed, presumably powerful policy advocates, they were addressed, minimized and accommodated on the basis of social motives (the prestige of the USA, which did not wish to be seen as renegotiating the Geneva Conventions), coupled with pragmatic, potentially realist antidotes (accommodating interpretations and the expectation of exculpatory justification). Taken together, the USA's actions constitute plausible evidence for the relevance of social arguments/mechanism in the process, passing a hoop test that affirms their initial relevance.

Although the Secretary of State had wanted to move quickly from signature to ratification (President Harry Truman submitted the treaties to Congress in 1951), the outbreak of the Korean War prompted him to wait until after the hostilities had ended and issues regarding prisoner of war exchanges were concluded.⁶⁷ Debate about ratifying the Geneva Conventions resumed in 1954. A private letter written by the General Counsel of the Department of Defense to the Secretary of State (John Foster Dulles) urged him to reignite the path to ratification by arguing that a further delay could interfere with proper US military preparations and training in respect of international law, make the North Atlantic Treaty Organization's (NATO) policy coordination difficult and, given an imminent Russian ratification, produce a (negative) 'political effect', presumably meaning that the Soviet Union could score (and exploit) propaganda points against the USA.⁶⁸ American officials seemed especially stressed about the last point. Another confidential memo sent by the deputy undersecretary of the State Department to Dulles reaffirmed this view and, after noting that the British and French had already ratified or were moving towards it, added the following:

The Geneva Conventions of 1949 are a great improvement ... our failure to ratify them, after the leading part we took in their negotiation, can only give rise to the most unfortunate inferences and be the basis for effective Soviet propaganda. Our ratification will assist greatly in establishing the improved standards on a world-wide basis ... our uncertain position on ratification was a matter of genuine informal concern among friendly delegations.⁶⁹

This statement combines again instrumental and social arguments for ratification: coordination concerns, a desire to avoid 'unfortunate inferences' (that is, how US non-ratification would look alongside Soviet acceptance of the Geneva Conventions)

⁶⁷ As stated in a letter from Wilber M. Brucker, General Counsel of the Department of Defense, to the Secretary of State John Foster Dulles, 5 May 1954, 'Controversial File on Civilian Convention,' Auxiliary Military Policy Program – Class wires and papers from the Geneva Convention File, Historical File 1941–1958, RG 389, entry 439A, box 3, US NACP.

⁶⁸ *Ibid.*

⁶⁹ Letter from Robert Murphy, Deputy Undersecretary of State, to the Secretary of State, 4 January 1955, Records Relating to the Red Cross and Geneva Conventions, 1941–1967, Office of the Legal Adviser, RG 59, entry 5210, box 1, US NACP.

as well as concern about what ‘friendly delegations’ thought and support for the improved standards introduced by the updated treaties.

Dulles was receptive to this advice since in a matter of months a voluminous set of studies on all of the Geneva Conventions, in addition to several specific issues, would be prepared for submission to the Senate.⁷⁰ Dulles’ cover letter on this report noted that the Conventions, with 47 contracting states, had already gone into force, and he reassured Senator Walter George, chair of the Foreign Relations Committee that ‘the Conventions as formulated generally reflect United States practice and prescribe methods of conduct which the United States would attempt to pursue in the absence of such treaties’. He added: ‘[T]his Nation has always taken pride in its leading role of helping to establish and apply humane standards for the protection of the wounded, sick and defenseless in time of war’ and had greatly contributed to the making of the Conventions themselves. For this reason, Dulles believed the USA ‘should no longer delay action; that it should clearly manifest its interest in these humanitarian conventions by ratification of them’.⁷¹ These words echo the social conformity argument made earlier (continuing with a proud tradition of support for humanitarian law, a desire to conform to ‘world standards’ and the avoidance of being seen to lag behind the USA’s peers and, especially, behind the Soviet Union) and featured an instrumental argument about the absence of ‘adjustment costs’. Indeed, previous worries about the Conventions’ inclusion of onerous or unattainable international standards seem to have been placated in the years since their signing, and, in the end, the only reservation the State Department endorsed upon ratification related to the article on the death penalty.

Senate Committee hearings were held in June 1955, and, here again, the combination of arguments earlier offered in private by the various reviewing agencies remained stable. In his supporting statement, the Deputy Undersecretary of State exalted the value of the Geneva Conventions, supporting the social conformity argument by noting that ‘the large number of states which have already ratified represents a major portion of world opinion approving the work of the Geneva Conference’.⁷² Crucially, he reminded his audience that ‘the Soviet Union deposited its ratification last May. *It has thereby gained a propaganda advantage which it has been quick to use in recent international meetings*’.⁷³ And he closed thus:

⁷⁰ Background Papers, Geneva Conventions for the Protection of War Victims (prepared during 1954–1955 by members of the State-Defense-Justice working group), Historical File 1941–1958, Geneva Conventions, 1941–1967, RG 389, entry 439A, box 10, US NACP.

⁷¹ Letter from John Foster Dulles to Senator Walter F. George, 29 March 1955, Background Papers, Geneva Conventions for the Protection of War Victims, Historical File 1941–1958, Geneva Conventions, 1941–1967, RG 389, entry 439A, box 10, US NACP.

⁷² Statement by the Honorable Robert Murphy, Deputy Undersecretary of State before the Senate Foreign Relations Committee with Respect to the Geneva Conventions for the Protection of War Victims, 3 June 1955, 1949 Geneva Convention Special Papers and Related Material, German P/W, Historical File 1941–1958, Geneva Conventions, 1941–1967, RG 389, entry 439A, box 12, US NACP.

⁷³ *Ibid.* (emphasis added).

The Geneva Conventions ... reflect enlightened practices as carried out by the United States and other civilized countries and they represent largely what the United States would do whether or not a party to the Conventions ... We know that many nations have looked to us for an indication as to what they should do and have acted favorably on the Geneva Conventions in the expectation that we would do the same. We feel that ratification of the Conventions now before you would be fully in the interest of the United States.⁷⁴

The words of the General Counsel of the Department of Defense echoed these views. Contrary to the army's scepticism years earlier, the Department of Defense now agreed that they had 'encountered nothing which would prejudice the success of our arms in battle'. Importantly, with regard to lingering concerns over the Communist states' unwillingness to reciprocate and abide by key portions of the law, Wilber M. Brucker declared that:

[t]o the question whether the Conventions will be complied with by our enemies in a possible future war, no certain answer can be given ... *Actually, the great virtue of the four treaties is that they create a standard of conduct recognized by the overwhelming majority of civilized states ... if the enemy fails to comply with the Conventions, there can be little real quarrel about the law, and to the extent that we have removed this source of controversy, we have made the humane treatment of the wounded and sick, prisoners of war, and civilians much more probable of attainment. The universal character of the Conventions also means that world public opinion will be mobilized against the violator of the treaties, who will have broken not just a bilateral treaty but the universal law of the civilized community as well.*⁷⁵

Cumulatively, the evidence presented so far strongly and consistently demonstrates the importance of instrumentalist and social conformity reasons in the USA's decision to ratify the Geneva Conventions. Curiously, however, US officials took the Conventions to be 'absolute' standards, such that worries about the unlikelihood of effective reciprocity from enemy (communist) states were not strong enough to 'block' ratification. The final report of the Senate Committee on Foreign Relations, recommending ratification of the Conventions in June 1955, indicates this further:

We should not be dissuaded by the possibility that at some later date a contracting party may invoke specious reasons to evade compliance with the obligations of decent treatment which it has freely assumed in these instruments. Its conduct can now be measured against their approved standards and the weight of world opinion ... If the end result is only to obtain for Americans caught in the maelstrom of war a treatment which is 10 percent less vicious than they would receive without these conventions if only a few score of lives are preserved because of the efforts at Geneva, then the patience and laborious work of all who contributed to that goal will not have been in vain ... By adding our name to the long list of nations which have already ratified, we shall contribute still further to the world-wide endorsement of those high standards which the draftsmen at Geneva sought to achieve.⁷⁶

⁷⁴ *Ibid.*

⁷⁵ Statement by the Honorable Wilber M. Brucker, General Counsel of the Department of Defense before the Senate Foreign Relations Committee in Support of Approval of the Geneva Conventions for the Protection of War Victims, 3 June 1955, 1949 Geneva Convention Special Papers and Related Material, German P/W, Historical File 1941–1958, Geneva Conventions, 1941–1967, RG 389, entry 439A, box 12, US NACP (emphasis added).

⁷⁶ Committee on Foreign Relations, Geneva Conventions for the Protection of War Victims, Report to the United States Senate on Executives D, E, F, and G, 84th Congress, 1st Session, 1955, Executive Report no. 9, 32.

In the end, although doubts lingered regarding the functionality of Common Article 3 on internal conflicts, the USA made no reservation to it. The confidential US commentary on that article noted that although ‘some fear was expressed lest the lawful government be subject to the restrictions of the Conventions while the insurgents would not be’, it had proved impossible to achieve a compromise featuring reciprocity. ‘How’, the document later asked, ‘can this article bind the rebels, who are not parties to the Conventions?’ The response given was: ‘Probably on the basis that the insurgents are nationals of a Contracting Party ... however, the juridical basis of the obligation imposed on rebels is not altogether free from doubt.’⁷⁷

This statement again casts some doubt on the institutionalist expectation that states will generally seek to qualify international commitments *ex ante* when they deem their future application dubious. Nevertheless, in the case of Common Article 3, it is difficult to discern whether American policy makers were unconcerned with the unlikely prospect of actually having to bear the legal consequences of not applying it in US territory or whether it felt it was imprudent to express public quibbles about a provision it nevertheless considered eminently humanitarian. I now turn to the British process, which resembled the US experience rather strikingly.

D *British Decision Making*

Of all the states attending the Diplomatic Conference in 1949, the UK arguably expressed the most objections to the draft Geneva Conventions being considered. Prior to the start of the conference, the delegation privately recorded that ‘if a provision was likely to prove impracticable ... it should not find its way into the Conventions’.⁷⁸ Special dread was directed at the inclusion of a rule on internal conflicts, which would impinge on British colonies, but several other provisions such as the introduction of grave breaches were also intensely disliked. Many of these inconvenient ideas survived negotiation, yet the British made only one reservation (on the death penalty article) upon signature and ratification. Why?

A few days before the close of the negotiations, Head British Delegate Robert Craigie confessed in a private note to London:

It is difficult as yet to make any final assessment of the effects of these Conventions on British interests. On most of the important points referred to the Cabinet before the Delegation left England, reasonably satisfactory solutions have been secured. *But a large number of provisions have been introduced with a mistakenly humanitarian purpose, which may prove inapplicable in practice or otherwise undesirable.* The cumulative effect of these provisions will have to be carefully weighed by the Departments concerned before any recommendation can be made to Ministers in the matter of signature. The political advantages of refraining alone, or almost alone, from the signing of this or that Convention will also need to be taken into careful account.⁷⁹

⁷⁷ Analysis of the Convention Relative to the Treatment of Prisoners of War of 12 August 1949, section on Common Article 3, Historical File 1941–1958, Geneva Conventions, 1941–1967, RG 389, entry 439A, box 10, US NACP.

⁷⁸ Minutes of a Meeting Held at the War Office on Tuesday, 15 March, 1949, Concerning the UK Delegation to the Diplomatic Conference on Conventions for the Protection of War Victims, file PRO FO 369/4146/3289, UK TNA.

⁷⁹ Letter from Sir Robert Craigie to Mr. Caccia, 28 July 1949, file PRO FO 369/4158/7325, UK TNA (emphasis added).

Note the strong contrast between the instrumental and social concerns in Craigie's words.

Despite such hesitation, British decision making much resembled that of the USA. By October 1949, the agencies involved in the negotiation of the Geneva Conventions reconvened to consider steps towards signature. Craigie set the tone from the start, declaring that the UK 'wished to make as few reservations as possible'.⁸⁰ But not all agreed. The British War Office, like the US army across the pond, had complaints about several of the approved provisions, including Common Article 3. The War Office felt that whenever an article threatened to elicit conflicting interpretations, a British declaration or a statement of understanding should accompany it. This sceptical attitude raised alarms among others in attendance. The Foreign Office noted how such an attitude would '1) throw doubt on our bona fides, 2) be resented by others who have signed, and 3) be regarded as a "trick" to obtain our ends defeated in open conf'ce [sic]'.⁸¹ In fact, Foreign Office representatives feared that a show of exaggerated apprehension (through multiple reservations) might legally invalidate British adhesion to the Geneva Conventions. Instrumental and social concerns were present and clashed during the initial British assessment.

Given the diversity of opinion, the UK IDC decided to lay out both views and let the Cabinet of Ministers decide: 'It was agreed that an explanation should be made in the article [for the Cabinet] that the U.K. delegation was not entirely satisfied with all the articles of the Conventions and considered that some of them might break down in time of war.'⁸² And, although there was relative clarity about making a reservation on the death penalty article, the IDC still felt an expressed need to consult the USA, NATO states and the British Commonwealth to make sure they were not acting in isolation.⁸³ Just a few days before the IDC's report went out to the Cabinet, Sir Hartley Shawcross, the British Attorney General, responded to the Foreign Office regarding the Conventions. His candid letter opened thus: 'I do not think that there is any reason why we should be astute to find conflict between the letter of our existing law and the requirements of the Conventions.'⁸⁴ The rest is worth considering at length:

⁸⁰ Notes of a Meeting Held at the Foreign Office on 19th October, 1949, to Discuss the Four Conventions, file PRO FO 369/4163, UK TNA.

⁸¹ War Office Examination of the Conventions for the Protection of War Victims Adopted by the Diplomatic Conference at Geneva, handwritten notes (by John Alexander) on sleeve, file PRO FO 369/4164/10482, UK TNA.

⁸² Notes of a Meeting Held in the Foreign Office at 11.30 a.m. on the 15th of November, 1949, file PRO FO 369/4165/10988, UK TNA.

⁸³ As is evident in Minutes of a Meeting of Ministers held at No. 10, Downing Street, S.W.1. on Friday, 2nd December, 1949, at 10.30 a.m., GEN 281/3rd Meeting, file PRO CAB 130/46/281, UK TNA. See also various notes exchanged between the United Kingdom (UK) and other countries in file PRO FO 369/4165, UK TNA. The North Atlantic Treaty Organization states specifically cited were the Netherlands, Belgium, Switzerland, France, Luxembourg, Norway, Denmark, Italy and Portugal. Switzerland also pressured the USA to clarify its position on signature.

⁸⁴ Extract from a Letter of the 12th November, 1949, from the Attorney-General to Sir Eric Beckett, Annex III to GEN 281/2, file PRO CAB 130/46/281, UK TNA.

The United Kingdom has been almost too strict and rigid in the practice which it has hitherto followed about adherence to international Conventions ... we have taken up the position that we would not adhere to Conventions unless our own law corresponded with them not only in the spirit but in the letter. This ... did not lead us into any political or international difficulties in the old days when international bodies were not interesting themselves so keenly ... in social problems and where foreign countries were not so much on the lookout for any kind of stick with which to beat us. *Nowadays, however, the United Kingdom is becoming conspicuous amongst all the other countries of the world for the rigidity of our attitude ...* The result of all this is that ill-disposed countries which wish to make propaganda against us as 'white slavers' or 'fascist beasts' and so on, are provided with a certain amount of material which is quite plausible to those to whom our propaganda is addressed and that we are liable to be pilloried at international Conventions.⁸⁵

Shawcross' striking words point clearly to the importance of opprobrium avoidance as a strong reason to adopt the Geneva Conventions and to do so without many (if any) reservations. Importantly, Shawcross added that he was 'by no means suggesting that we should adhere to Conventions without a proper sense of responsibility but I think that it would be right and to our advantage if we took up a somewhat less rigid attitude and looked to the spirit of these Conventions rather than to their letter'. In this regard, Shawcross even doubted the wisdom of making a reservation on the death penalty article. To avoid potential embarrassment by acting alone, he suggested close coordination with the USA and, should the USA fail to make that reservation, perhaps the UK should not either.

The Secretary of State's report to the minister reconfirmed Shawcross' missive. It clarified the UK's combination of instrumental and social concerns, although seemingly pressing the latter much more strongly. After listing the countries that had already signed the Geneva Conventions, the report asserted that:

[d]espite setbacks, some of them important ... Any decision that His Majesty's Government should abstain from signing these well-known humanitarian Conventions would need to be based on the strongest grounds. The same applies to signature accompanied by reservations either so numerous or of such a character as to be unlikely to be accepted by other Parties to the Conventions, thus producing a situation tantamount to non-signature. *The political and psychological results of such an abstention would certainly be unfortunate as the new Conventions, while containing certain provisions which may prove unworkable in practice, represent the general trend of world opinion in this field. They must also be regarded as a considerable advance ... in that the scope of protection afforded to war victims is greatly extended. It is likely that they will be signed by the great majority of the States represented at Geneva.*⁸⁶

Regarding the only proposed reservation (on the death penalty), the report conveyed the probability that the USA, Australia, New Zealand, Canada, Netherlands and Belgium would do the same, and it recommended making a positive decision, noting that other 'countries likely to follow our lead' should be notified 'in order to enlist as

⁸⁵ *Ibid.* (emphasis added).

⁸⁶ Memorandum by the Secretary of State for Foreign Affairs, Ministerial Committee for the Revision of the Geneva Conventions on War Victims, 25 November 1949, GEN 281/2, file PRO CAB 130/46/281, UK TNA (emphasis added).

much support as possible for the UK attitude'.⁸⁷ Interestingly, the report mentioned that the Home Secretary had suggested an additional reservation (also related to the death penalty in a different part of the Convention) but that he had recommended against it on the grounds that it was unlike to be made by any other country, leaving the UK isolated and creating 'an unfortunate impression'.

The report went into great detail about the many potentially dangerous innovations included in the Geneva Conventions, showing (like the USA) a pragmatic accommodation to the compromise attained during the 1949 Conference on certain thorny points. Despite its long-standing aversion towards the idea of regulating internal conflicts via international law, the report noted how:

the text adopted, with Ministerial authority, makes it obligatory to apply certain humanitarian provisions of a general character in the case of wounded, prisoners and non-combatants. *No doubt any civilized State would wish to conform* to these humanitarian provisions in any event and there is therefore little fear that the provisions might jeopardize State security by encouraging subversive elements.⁸⁸

Regarding grave breaches, it explained how from an early stage the UK delegation had realized that:

it would be pointless to resist the strong desire of the majority of the Conference to introduce provisions for the punishment of breaches of the Conventions and, in accordance with their instructions, the Delegation concentrated on getting an acceptable definition for such breaches. ... The acts defined as 'grave breaches' are such as the British military and civil authorities would wish to, and should be able to, avoid.⁸⁹

Head Delegate Craigie's own report confirmed this view, by noting that in the face of pressure at the conference:

[w]hile His Majesty's Government would obviously have preferred not to be bound by these new provisions in the field of international penal law, it must nevertheless be recognized that British protected persons in the hands of an enemy will almost certainly benefit from their inclusion. It is reasonable to assume that States which ratify these conventions will endeavor, to the best of their ability, to give effect to them ... So far as His Majesty's Government and British Authorities and Commanders are concerned, it may be taken for granted that they would in any case wish to avoid the practices mentioned in these Articles.⁹⁰

Besides wishing to avoid opprobrium, then, the British representatives came to appreciate (or at least rationalize to their superiors) the potential utility even of the rules they had grudgingly accepted at the Diplomatic Conference. The report to the Cabinet ended by recommending the signature of the Geneva Conventions with only one reservation, a motion it heeded in a meeting on 2 December 1949. Britain thus signed the Conventions a few days later.⁹¹

⁸⁷ *Ibid.*

⁸⁸ *Ibid.* (emphasis added).

⁸⁹ *Ibid.*

⁹⁰ Extracts from Sir Robert Craigie's Report Relating to the Questions Previously Considered by the Cabinet, 25 November 1949, GEN 281/2, file PRO CAB 130/46/281, UK TNA.

⁹¹ *Ibid.*

Ratification was the next step. The British IDC continued its analyses, and, by July 1951, the Secretary of State for Foreign Affairs and the Home Secretary had jointly submitted a memorandum updating the Cabinet on the developments since December 1949, including accounts of which states had signed and ratified or had plans to do so.⁹² Attention was given especially to Western European countries (which, according to the memo, were likely ‘waiting for a lead from the United Kingdom’), the USA (noting the apparent American readiness to ratify without waiting for implementing legislation) and the Soviet bloc states (which were also presumed to be moving quickly towards ratification). Substantively, the foreign and home secretaries justified the need for ‘prompt’ ratification of the Geneva Conventions on three grounds: (i) they were a great improvement relative to the previous standards; (ii) anticipating war against the Soviet Union, Britain should not delay the entry into force of the new law, should deny the Soviets any pretext to mistreat British prisoners of war and should ensure British civilians everywhere were legally protected and (iii) it was ‘politically undesirable’ that the majority of the world should ratify but not the UK. The memo supported the reservation on the death penalty article but discouraged others that might elicit objections from other states, thus hindering British membership in the Conventions. It closed by recommending the speedy adoption of implementing legislation to pave the way for ratification.⁹³ Again, the evidence suggests a combination of instrumental concerns and social conformity.

The Cabinet considered this analysis and agreed with a swift move towards ratification, without further reservations.⁹⁴ Reflecting an anxiety about others’ perceptions of delays in adopting domestic legislation, it requested inquiries with ‘some of the other principal signatories, including the United States and France’ as well as other Commonwealth governments on whether they planned to wait to ratify until after domestic legislation was in place. The UK government, it determined, ‘should follow the same course’.⁹⁵ British ratification came six years later, in September 1957, a month after the Parliament passed the implementing Geneva Conventions Act.⁹⁶ This delay, it can be surmised, was linked to the US decision to wait until after the Korean War to reopen congressional debate about ratification. Regardless, the UK ratified with the one and only reservation supported by its allies (the mentioned article on the death penalty). Other ‘inconvenient’ provisions were variously rationalized as aspirational, were legally accommodated domestically or, less benignly, were set aside through self-serving practices of justification, as infamously illustrated by the insistence that Common Article 3 was inapplicable to colonial conflicts in Kenya and Cyprus.

⁹² Ratification of the Geneva Conventions, 1949, Memorandum by the Secretary for Foreign Affairs and the Home Secretary, 23 July 1951, file PRO CAB/129/46, UK TNA.

⁹³ *Ibid.*

⁹⁴ Conclusions of a Meeting of the Cabinet Held at 10 Downing Street, S.W.1., on Monday, 30th July, 1951, at 10.00 a.m., file PRO CAB/128/20, UK TNA.

⁹⁵ *Ibid.*

⁹⁶ United Kingdom of Great Britain and Northern Ireland, Geneva Conventions Act, 31 July 1957: An Act to Enable Effect to Be Given to Certain International Conventions Done at Geneva on the twelfth day of August, nineteen hundred and forty-nine, and for purposes connected therewith, available at www.legislation.gov.uk/ukpga/Eliz2/5-6/52/contents (last visited 13 March 2017).

6 Discussion and Concluding Remarks

Extensive evidence presented here from the US and UK archives confirms that in both countries the commitment process to the 1949 Geneva Conventions featured a mutually reinforcing mix of instrumentalism and social conformity. This compels a reassessment of current theoretical and policy debates. Theoretically, it first of all behooves international relations and international law scholars to recognize that positing instrumental and social concerns as alternative, competing explanatory factors may be unproductive and hinder a fuller understanding of what is undoubtedly a complex process. ‘Conforming instrumentalism’ is the name I propose to better capture the amalgamation of reasons for the legal commitment shown here. Crude realist impulses were absent, yet limited self-serving attitudes featured in officials’ suggestion that they could justify non-compliance *ex post* with certain provisions of the Geneva Conventions, rather than publicly clarify their uncertainty or discontentment via formal reservations. The decision to postpone ratification until after the ongoing conflicts were ‘resolved’ (Korea for the USA and Kenya for the UK) may also be reasonably interpreted as a realist gesture, albeit one that nevertheless demonstrates an awareness of the consequences that might ensue from joining the Conventions (that is, acknowledging the power of the laws of war), not simple and wanton disregard for them.

This article joins a number of other major works in international relations (and comparative politics) that seek to transcend ‘gladiatorial’ theory testing.⁹⁷ While pluralist theorizing has gained ground recently, important scholarship exploring international legal commitments has followed suit somewhat confusingly or has decided to reopen the gladiatorial fight and then declare one side victorious. With regard to the laws of war, consider the excellent recent works of James Morrow and Jens Ohlin. Although Morrow’s work is recognizably rational institutionalist, in his book *Order Within Anarchy* he contends that the game theory-derived notion of law as codifying ‘common conjectures’ comfortably fuses utilitarianism (useful expectations) with social norms (expectations of appropriate conduct): ‘Norms and common conjectures aid actors in forming strategic expectations ... Law helps establish this common knowledge by codifying norms.’⁹⁸

Yet despite this stated congeniality, Morrow’s understanding of norms seems to downplay much of what constructivism usually highlights, namely norms’ moral and social sanctioning traits. Indeed, norms can and do encapsulate ‘common knowledge’ as game theoretical common conjectures do, yet such social knowledge is made up not only of functionalist, strategic expectations about ‘mutual best replies’ but also of ethical and moral standards that are sometimes at odds with strict functional dictates. The rules for internal conflict enshrined in Common Article 3 are one case in point, embodying a binding and challenging humanitarian legal commitment with slim chances of ‘strategic’ enforcement via battlefield reciprocity, for example. Equally important is the sociality that buttresses international law – that is, the expectation

⁹⁷ Checkel, *supra* note 10.

⁹⁸ Morrow, *supra* note 4, at 35.

that rules are to be subscribed to and followed not only out of strategic (if shared) knowledge but also because of the ‘collective pull’ they exert, which organizes international society into social groups of ‘law-abiding’ (or civilized, in officials’ own words) and ‘pariah’ states, with the strong connotations that each category brings. The richness of the US and UK archival evidence presented in this article can only be captured by a more expansive understanding of international law, one attentive not only to instrumental, coordination-focused dynamics but also to social and moral factors properly understood.

Like Morrow’s, Ohlin’s ‘constrained maximization’ theory wishes to modify a certain view of rationality by bringing morality back in.⁹⁹ Although this seems a healthy move, Ohlin is unclear about exactly how ‘acting in a *constrained way* might be both morally and rationally justified’.¹⁰⁰ The clearest explanation he offers is that ‘morality and rationality ... dovetail so long as the community is composed of enough individuals who are willing to cooperate with each other’.¹⁰¹ Thus stated, this seems a rather limited understanding of morality and society, leaning much too heavily in the direction of collective (strategic) self-interest and not on other factors that are also commonly understood to define morality and society: ethical values, principled beliefs, identities, ideology or legitimacy, to name a few. Ohlin’s vision of the social source of obligation brings out this point more clearly. He claims that ‘refusing to follow moral constraints could have disastrous consequences for an agent: isolation, inability to form cooperative partnerships, reaping only individual gains rather than the bounty harvested from collective action’.¹⁰² This may be so, but, of these consequences, only the first (isolation) may be rightly understood as social in an expansive sense – that is, one not primarily or exclusively concerned with the maximization of strategic pay-offs.

The study of state commitment to human rights law has produced rich conversation akin to the one this article has engaged with respect to the laws of war. Yet, there again, disagreement about the relative influence of strategic material or social dynamics has not abated. In a recent article, Richard Nielsen and Beth Simmons scrutinize the hypothesis that states might ratify international human rights treaties to gain ‘tangible’ (material) or ‘intangible’ (social) rewards, conducting exhaustive quantitative content analyses of thousands of public government and NGO documents.¹⁰³ In short, Nielsen and Simmons’ study yields negligible support for either material or social ‘benefits’ as possible factors driving human rights treaty ratification.

Notwithstanding the debatable wisdom in using quantitative methods and public evidence to adjudicate between causal mechanisms and private motives, more dissatisfying is Nielsen and Simmons’ conclusion that international social factors as reasons for treaty commitment are a ‘widespread myth’. As seen, this article’s findings

⁹⁹ Ohlin’s theory is admittedly normative, not descriptive, yet, in this article, provisionally, I formulate a descriptive version of it to facilitate empirical assessment. I thank Jens Ohlin for this clarification.

¹⁰⁰ Ohlin, *supra* note 4, at 147 (emphasis in original).

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ Nielsen and Simmons, ‘Rewards for Ratification: Payoffs for Participating in the International Human Rights Regime?’, 59 *International Studies Quarterly* (2015) 197.

regarding the laws of war confirm that social conformity pressures can weigh heavily upon states (materially powerful states included), even if social 'reward seeking' *per se* is not pervasive. In other words, it seems premature to argue that, given a lack of systematically observable 'expressive benefits' (for example, public praise after ratification), international social factors, writ large, are absent from, or unimportant in, states' commitment process. This article's focus on the regulation of internal conflicts permits an indirect parallel with human rights law, at the very least suggesting that international social influence (especially conformity pressures) may also exert an influence there, provided that analysts turn to considering primary, archival evidence.

International relations and international law scholars should thus not declare closure on the debate about treaty commitment before further refining their conceptual tools and expanding their empirical sources. And, in the particular case of the laws of war, scholars now insisting on the confluence of rationality, norms and morality should avoid simultaneously declaring the complex interaction of factors while privileging one among them in their analysis. Now I should be precise here about what not to extrapolate from this study. Let me be emphatic: I do not claim that the interaction of factors or mechanisms identified here should be empirically present across issue areas, states or historical epochs.¹⁰⁴ Instead, while I believe some combination of instrumental and social motivation will explain treaty commitment generally (rather than either factor in isolation), the specific content of those social or instrumental motivations and whether they are mutually reinforcing or not will probably vary.¹⁰⁵ One reasonable expectation (to be confirmed empirically) is that, due to their identity, values and interests, other Western liberal democracies will be more likely to exhibit the combination of ratification motives identified in this article, compared to authoritarian or post-colonial states, for example.¹⁰⁶ The Cold War context was also likely especially

¹⁰⁴ Nor am I putting forth a law-like statement here about US and UK commitment to the entire laws of war. And although the history of American and British attitudes towards the 1977 Additional Protocols I and II to the Geneva Conventions is much more complicated, my argument can still apply to them with caveats. Even if the USA has not ratified the Additional Protocols, and recognizing that the UK took a long time to do so, archival evidence suggests that both countries saw large instrumental value in them and were anxious to ratify the Protocols in the late 1970s, despite some important concerns. The central obstacle came with the politicization of Additional Protocol I during the Reagan administration. Yet, even then, despite non-ratification, the US government declared to adhere to much of the rules in the Protocols as a matter of policy and customary law. In general, I believe that domestic politicization can 'short-circuit' the impetus to sign and ratify. On the battle underlying the US non-ratification of the Protocols, and the US support for Protocol I as customary law, see Aldrich, 'Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I', 26 *Virginia Journal of International Law* (1986) 693; Matheson, 'The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions', 2 *American University International Law Review* (1987) 419. Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3; Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts 1977, 1125 UNTS 609.

¹⁰⁵ Simmons, *supra* note 7, at 2.

¹⁰⁶ Other studies support this hunch. See Simpson, 'Britain and the Genocide Convention', 73 *British Yearbook of International Law* (2002) 5.

auspicious for the operation of social pressures, sharpening ideological competition in between the liberal, allegedly civilized world and ‘the rest’, communist or otherwise.

I also do not claim that the mix of motivations for ratification identified here translated easily into American and British compliance with the Geneva Conventions immediately after 1949. Excellent recent historiography in fact demonstrates that American conduct in Korea (and in Southeast Asia), and British and French attitudes and behaviour in their African and Asian decolonization conflicts, were at best imperfect and problematic and at worst cruel and gruesome.¹⁰⁷ That both countries deliberately ‘waited’ to formally ratify the Conventions until after these wars had concluded also prevent claims of swift normative internalization, as does the historical fact that they (alongside their NATO allies) actively sought to prevent and delay the creation of additional treaty-based legal protections for civilians until the 1970s, firmly clinging to the ‘total war’ belief that their combat practices and weapons use should remain unburdened.¹⁰⁸

Yet, to reiterate an earlier assertion, the moments of ratification and implementation (or compliance) are analytically distinct, and, thus, their connection should be studied empirically, not assumed. Connections between the two are plausible, even expected; values, identities and institutions are ‘sticky’, and legal commitment and precedent do matter to many governments. But reasons for disconnect also abound: different specific agents are in charge at different moments, and divergent social and strategic considerations may factor into both.¹⁰⁹ Therefore, my argument regarding ratification can exist alongside evidence of disappointing posterior performance and breach. Historians, lawyers and political scientists should continue to carefully examine both aspects, drawing the appropriate connections.

In addition to advancing theoretical and empirical evidence for conforming instrumentalism, this article’s findings might be most powerful for their policy implications. To the Trump administration, they should serve as a ringing historical reminder of the reasons why two leading Western powers joined the treaties that embody the ‘hard core’ of the laws of war – the 1949 Geneva Conventions. These reasons, I have demonstrated, were the Conventions’ practical utility and their social value (humanitarianism included). Both American and British officials at the time regarded their membership in the Conventions, and compliance with them, not only as ‘useful’ but

¹⁰⁷ Conway-Lanz, *supra* note 15.

¹⁰⁸ Lagrou forwards a reasonably critical assessment of Western major powers’ attitude towards legal revisions and wartime practices after World War II. See Lagrou, ‘1945–1955: The Age of Total War’, in E. Biess and R.G. Moeller (eds), *Histories of the Aftermath: The Legacies of the Second World War in Europe* (2010) 287. However, note that legal protections for civilians from combat are different from the rules enshrined in the 1949 Geneva Conventions covering civilians living in occupied territory and for interned enemy civilians. The ‘Hague’ law of combat remained unchanged until the 1970s, when Western resistance waned amid growing pressure from a majority of Third World countries and US public opinion demands to address American atrocities in Vietnam. See Mantilla, *supra* note 15.

¹⁰⁹ While it is true that the enforcement of the Geneva Conventions in practice remained domestic until the 1990s, this was not necessarily a foregone conclusion in 1949, given the insertion of extraterritorial jurisdiction in the four treaties.

also as socially and politically meaningful; they thought that to embrace and uphold them separated the law-abiding and ‘civilized’ from the ‘rogue’ or ‘pariah’ states and believed in the power of the ‘court of public opinion’. Thus, the sceptical realism that shaped decision making during the Bush administration in fact has limited historical connection with American and British commitment to the laws of war.¹¹⁰ On the other hand, one should not forget that even inside a broadly ‘realist’ Bush administration, there were courageous officials who opposed, denounced and exposed others’ irresponsible interpretations of the laws of war¹¹¹ and that, in the face of executive branch hostility, other sections of government can serve as useful law-respecting checks on dubious interpretations.¹¹²

This being said, given the controversy about the conduct of the Obama administration in regard to both *jus ad bellum* (war in Syria or against the Islamic State of Iraq and the Levant and Al Qaida’s ‘associated forces’) and *jus in bello* (drone use and targeted killing), further clarification is necessary.¹¹³ Indeed, critical analysis of such actions suggests that government officials need not be realists or allergic towards international law to forward interpretations and license controversial practices that appear to bend the spirit (if not the letter) of the law. In other words, self-serving interpretation and exculpatory justification are not within the unique purview of unabashed realists – liberal, pro-international law administrations can seemingly practice them too.

On balance, it seems that respect for international law – the laws of war included – entails a combination of at least three factors: a congenial attitude towards the law, a choice to follow its letter without interpreting its spirit away and keen awareness of the robust instrumental and social reasons to adhere to it and uphold it. Present-day policy makers and scholars of all persuasions should continue to embrace and defend this complex combination of arguments as operating in the service of the national interest – just as officials in the 1940s and 1950s did – all the while avoiding the temptation to ‘creatively’ interpret the country’s way out of the laws of war’s less palatable rules when the going gets rough. As the Bush administration experience has shown, the consequences of giving into that temptation can be damning.

¹¹⁰ I thank one anonymous reviewer for suggesting that the realist view is in fact a minority within the legal academy. This may be so, and I do not claim that it is predominant. My point is that, at least at an important moment and in an important country, it gained enough policy relevance to shape government decisions and undermine that country’s commitment to the laws of war.

¹¹¹ Forsythe, *supra* note 2; Mayer, *supra* note 2.

¹¹² Here I have in mind US Supreme Court decisions during the Bush years, especially *Hamdan v. Rumsfeld*, 548 US 557 (2006).

¹¹³ Goldsmith, *supra* note 2; Savage, *supra* note 3.