PRISONERS AND PROPERTY RIGHTS*

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Throughout history, defeated enemies have been treated in strikingly distinct ways. Many instances are known in which they were treated with utmost brutality and massacred in large numbers. In his history of the crusades, Runciman tells us that when the Persians conquered Jerusalem in the year 614, 60,000 Christians were murdered regardless of sex or age. The crusaders conquering Jerusalem 500 years later (1099) butchered men, women, and children in the city (among them many Christians) for an entire afternoon and throughout the following night. During the French Revolution, which was based, after all, on the ideal of fraternity among men, all prisoners taken by the revolutionaries in the Vendée (1793–95)—more than 150,000 in all—were massacred. Snow reports that the Japanese killed more than 42,000 men after having conquered Nanking in December 1937. Chinese sources quote much higher figures: 300,000 people are said to have been murdered by the Japanese, among them 30,000 disarmed soldiers in the northern part of the city.

On the other hand, history provides many examples of humane treatment of defeated enemies. In the European Middle Ages, they were nearly always spared and ransomed. The battles between the mercenaries in Italy at the time of the condottieri were relatively humane.

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"Battles, when they did occur, were often very bloodless affairs." In many battles, only two or three combatants lost their lives, but hundreds of defeated adversaries were taken prisoner. At the end of the sixteenth century, a particularly harmless form of war emerged. When two opposing armies met, the respective numbers of soldiers were counted, and the side with the lower number simply surrendered to the other. Ransoming prisoners was a widespread practice up to the seventeenth century, and it continued, to some extent, thereafter. In the relationship between Christians and Saracens, it went on until the nineteenth century.

In this article, we propose to give a comprehensive explanation for the striking differences in the treatment of conquered enemies. This explanation is based on economic theory, in particular on the economic model of behavior in which it is assumed that expected benefits and costs determine individual behavior. It is shown that the institution of property rights is a major determinant in the decision whether a defeated adversary is treated brutally or humanely. We intend to demonstrate (1) the conditions for the emergence, existence, and change of particular property rights and (2) the effects of particular property rights on behavior in war. The influence of expected benefits and costs on the individual is essential in explaining the treatment of defeated enemies and prisoners. These individual benefits and costs depend on the allotment of the property right over prisoners.

Three assignments of property rights will be distinguished: (a) that of the individual soldier who takes a prisoner and thereby owns the property right over him (Section I), (b) the property right belonging to the state (Section II), and (c) the property right that is transferred to a supranational entity (Section III). These types of property rights are associated with typical periods in history. For reasons of space, only circumstantial evidence can be provided.

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8 See, for example, Encyclopaedia Britannica 15th ed. (1978), 19:544h, s.v. "war."
I. Property Rights Belong to the Captor

A. Emergence of Property Rights

The assignment to the soldier of the property right over prisoners must be consonant with the technological conditions of warfare and the existing social organization. Assigning the right to individuals is an appropriate form when battles are fought man against man and when it is possible to make out who is taken prisoner by whom. When a ruler has limited or no means of extracting taxes from the population in order to pay his or her soldiers, and if he or she has limited power to force them to serve, other incentives must be used. An effective incentive is granting each individual soldier the right to the spoils of war that he secures for himself, be it goods or prisoners. Individual property rights thus serve to motivate men to participate in war and to fight effectively.

B. Consequences of Individual Property Rights

A soldier who voluntarily participates in a war may be assumed to act rationally. He also acts rationally when he decides either to kill or to spare a defeated enemy. If he kills him he eliminates any risk of the defeated soldier striking back. The advantage of sparing a defeated enemy, on the other hand, is the monetary benefit of selling him at a price determined by the prisoner himself, his family, or whoever else is interested in his release. A greater benefit, of course, can be expected from a rich prisoner than from a poor one, from a healthy prisoner than from a wounded or sick one.

There are various costs involved in keeping an adversary prisoner. There is always the risk of his attacking the captor; he must therefore be appropriately guarded, which is costly. Moreover, there are the costs of feeding and housing the prisoner and of giving him medical treatment if necessary. Finally, transaction costs arise in the process of ransoming, including the risk that no monetary compensation will be secured for freeing the prisoner.

The (net) value of a defeated enemy thus depends on a number of empirically observable factors influencing benefits and costs, given the particular form of property rights. The general proposition advanced here is that an individual soldier is more inclined to spare, treat well, and exchange a defeated enemy when the costs of doing so are low and/or the expected benefits are high, and that more defeated enemies are killed when the expected benefits of sparing them are low and/or the costs high.
C. Ransoming in History

In antiquity, death was generally the fate of the vanquished. 11 Greek law gave the conqueror absolute power, which frequently resulted in the slaughter of the defeated nation. However, cases of ransom being paid are known from the Homeric Age and the Punic Wars. 12 The Romans were the first to perceive the economic value of captives taken in war, and consequently some of these prisoners were sold as slaves by the state, the proceeds being distributed as booty to the soldiers or put into the general treasury. The "practice of enslavement ... probably produced an improvement in the position of prisoners of war." 13 Nevertheless, in most cases they were put to death as criminals for having offended against the majesty of Rome. 14 Conditions were similar in Northern Europe. 15 Between the fall of Rome and the Middle Ages, war practices remained brutal and savage.

In the European Middle Ages, conditions obtained that made it efficient to assign property rights over a defeated enemy to the individual soldier. The rulers had but limited means of extracting taxes from the population. Under these circumstances, no wars could have been undertaken since the combatants (in most cases, knights and their subordinates) could neither be forced to participate (over a period extending beyond the feudal obligations), nor could they be paid. The promise of material compensation in the form of goods and ransom was therefore the only way of inducing combatants to participate in a war. In the Middle Ages the predominant incentive for the individual "soldier" to participate in a war was the expectation of spoils. 16 Therefore, "[a]ny mercenary would insist on a clear statement of the bounty (including ransoms) being written in his


12 Priam prevails on Achilles to deliver up the dead body of Hector, on payment of a ransom, to allow his due burial. During the First and Second Punic Wars, Roman and Carthaginian generals exchanged prisoners, a sum of gold being paid by the recipient of the greater number. See Thomas A. Walker, A History of the Law of Nations 55 (1899).

13 Flory, supra note 11, at 12.


15 Scheidl, supra note 11, at 15.

16 Erler, supra note 5; Hochheimer, supra note 7. It is interesting to note that the same applies to tournaments. Non-wealthy knights participated for the prospect of material gain, which consisted partly in the ransom from the defeated participants and partly in the value of the armament, clothing, and horses of the losers. See Joachim Banke, Höfische Kultur: Literatur und Gesellschaft im hohen Mittelalter 350–73 (1986).
contract." The custom of ransoming prisoners both during and after wars was considered by such eminent lawyers as Grotius to be a step toward a more humane society. The property right over a defeated adversary was well established in law and could even be bequeathed. The individual’s right to his booty was so generally accepted that "it was usual to go to court for the settlement of economic disputes between the prisoner (and his family) and the captor..."

The following incident, which occurred in the battle of Poitiers in 1356, is reproduced in extenso because it illustrates well how far property rights over defeated enemies extended and how some of the transaction cost problems that arose were solved:

There on all sides you could see the French scattered, and the English running and making prisoners. Among these Frenchmen stood the Count of Dammartin, dismounted, it would appear, and probably more or less immobile in his heavy armour. First, as he stood thus, an esquire of the Black Prince’s household called John Traill came up and demanded his faith, which he gave him "in such wise that he should save me..." Traill took his buscinet and his gauntlets, and while he was doing so another man rushed up and cut the strap of his sword, which the count asked Traill to keep, as he preferred him, rather than any other, to have it. Traill then handed him over to a yeoman of his, who, however, quickly disappeared in quest of private gain. After this a Gascon came up, to whom also the count gave his faith, and who took an escutcheon of his armour. He too then moved on, and as he went the count called after him that since he was leaving him, he would give his faith to anyone else who might appear and would offer to save him. Finally, a man of Sir John Blankmoister arrived on the scene, who stayed with him and took him to his master and the Earl of Salisbury.

When Salisbury and the Black Prince both claimed the count as their prisoner before the Constable, it was thus not at all easy to decide to whom he had pledged his faith. He had been much too liberal with it for that. To avoid this sort of problem, the courts demanded better evidence than conflicting memories of verbal promises. The first man to receive the faith of a prisoner, they ruled, was in law his captor, but on two conditions. Firstly, he ought to establish his capture in the proper way; he should be the first man to seize the prisoner’s right gauntlet, and to put his right hand in his. Thereafter, the gauntlet served as a token of his right. Secondly, he must have made some attempt to fulfill his contract to his prisoner, to protect his life. If he simply abandoned him on the field, he lost his right to him. He must therefore either put the prisoner in the charge of someone who would look after him, or he must escort him to a safe place behind the lines. Otherwise the prisoner was still a free man, and to protect his life might give

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[19] See in detail Maurice H. Keen, The Laws of War in the Late Middle Ages, ch. 9 (1965).
his faith to whom he chose. No doubt it was on his last ground that the Count of Dammartin was in the end adjudged the prisoner of the Earl of Salisbury.  

The prisoners’ names had to be made public in order to provide the information necessary for potential demanders to become active. Prominent prisoners, including women, were at the disposition of the commander in chief. This does not mean, however, that the soldier taking the prisoner lost his property right; he had to be appropriately compensated by the commander.

In the Middle Ages, noteworthy institutional techniques were used to reduce the transaction cost in the market for prisoners. One such device was the rule that the prisoner had to assess his own value. He or she had an incentive to indicate a ransom without too many strategic distortions: to indicate too low a value would increase the risk of being killed because the expected benefits to the captor might well be lower than the cost; to indicate too high a value would ruin him or her financially, and if the sum was not paid the prisoner ran the risk of being killed.

Another means of reducing transaction costs in the market was the rule of releasing the prisoner by word of honor. Giving parole was advantageous for both captor and captive because the former did not have to carry the cost of guarding and feeding, while the latter enjoyed freedom of movement. This procedure had the added advantage that the ransom could be raised by the prisoner himself, reducing the cost of communication and decision making. The terms of parole were usually kept because the person (or members of his family or household) might possibly be recaptured. Moreover, in medieval society, breaking one’s word of honor was considered untrustworthy, which also had negative effects on economic dealings. When, for example, the imprisoned French King François I broke his word to the Emperor Charles V in the year 1525, he had to

21 Keen, supra note 19, at 165–66.
22 Id. at 148.
23 Glover, supra note 17, at 160; Rosas, supra note 20, at 51; Keen, supra note 19, at 145; Flory, supra note 11, at 114.
24 Keen, supra note 19, at 169. The captor may overestimate the “value” of a prisoner, in which case the ransom is not paid and the imprisonment is drawn out. This happened to Miguel de Cervantes Saavedra, who was taken prisoner by corsairs in 1575 and was sold on the slave market of Algiers. Because he carried a letter of recommendation to the King of Spain from his chief commander, Don Juan d’Austria, the Algerians thought that they could ask 1,000 gold thalers for his release. His family could not raise this sum. Only in 1580 were the monks of the Order of Trinité (see below) able to arrange for a reduction so that the ransom could be paid by his family.
25 Geoffrey Best, Restraints on War by Land before 1842, in Restraints on War: Studies in the Limitation of Armed Conflict 170 (Michael Howard ed. 1979).
bear the cost of a lower reputation. The behavior of the French King John II, who was taken prisoner by the English in the battle of Poitiers in 1356, was quite different. Having undertaken to pay 3 million écus d'or as ransom, he was allowed to return to France but had to furnish hostages. When one of them, his own son, fled, John II returned to England and died in captivity in 1364.  

A third way to reduce transaction costs was the use of specialized institutions serving to establish contact between the demanders and suppliers in the market for prisoners. Obviously, a prisoner's value drops to zero if the captor is unable to transmit his demands to those willing to pay for his release, and the same holds if those willing to pay do not know to whom they can make an offer. This problem may be of little relevance in many markets, but it is crucially important in the market for prisoners. In the Middle Ages, two types of institutions emerged for the purpose of helping to clear the market.

*Individuals acting as professional dealers in prisoners.* This function was often performed by Jews because under medieval law only non-Christians were allowed to lend money on interest. As bankers (or being closely connected to banks), Jews could act effectively because they were able to advance the ransom from their own means, thus profiting from price rebates. The dealers had a right (supported by the courts) to get the outlays and the corresponding costs refunded by the released prisoner.  

There was indeed competition between the professionals working for the benefit of each side of the market.

*Private organizations specializing in the ransom of prisoners.* Two religious orders were prominent in this field up to the French Revolution. The Mercedarian order (Ordo Beatæ Mariae Virginis de mercede redemptionis captivorum) was founded in 1218 as a knightly order, but in 1318 it was transformed into a purely religious order so as to improve its position as a neutral intermediary, especially in dealings with the Saracens. Over a period of 500 years, roughly 70,000 prisoners are said to have been ransomed by this order. The Trinitarians (Ordo SS. Trinitatis redemptionis captivorum), founded in 1198, seem to have achieved even more; they are reputed to have arranged the release of 900,000 prisoners (as with the Mercedarians, most of these prisoners were in the hands of the Saracens). In addition to these orders, cities also engaged themselves as neutral intermediaries.

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26 For the role of parole see Flory, *supra* note 11, at 116–31; Scheidl, *supra* note 11, at 495–503.


28 *Id.* at 29–36.
The general proposition that a defeated enemy’s fate depends on the (net) value of the prisoner to the captor allows us to derive specific theoretical propositions for the case of well-defined property rights of the individual captors over the prisoners. They can, in principle, be empirically tested. As appropriate data are lacking, no econometric tests are possible. The propositions are therefore illustrated by examples. The following seven ceteris paribus hypotheses are advanced, with the first four referring to factors on the demand side and the last three referring to the supply side.

Hypothesis 1. The higher the disposable material wealth of a prisoner and/or of other demanders, the more likely it is that he will be spared and ransomed. Poor, vanquished soldiers have a higher risk of being killed on the battlefield.

This hypothesis is not trivial. It could also be plausibly argued that the military leaders of the enemy (who tended to be the more prosperous men) were made responsible for the war and were accordingly punished by long imprisonment or death. The common soldiers (who were generally less wealthy), on the other hand, could not be made responsible for the war and were soon released. This view would predict a type of behavior in contrast with Hypothesis 1.

In legal literature, it is often argued that the prices asked were too high, so that only the wealthiest prisoners could ransom themselves. This is a misunderstanding of the price system. Prices asked for poorer prisoners were indeed much lower than for rich ones, but while the cost of sparing, guarding, and keeping them was similar for all kinds of prisoners, the expected profit to be gained from ransoming a wealthy captive was higher, so that a larger number of them were exchanged.

Historical literature is rich in evidence speaking for Hypothesis 1. Sultan Bajazet is reported to have selected twenty of the richest prisoners for ransoming after a victorious battle and to have had the remaining 3,000 prisoners put to death. It is often said that the Swiss soldiers habitually killed all defeated enemies. In fact, the vanquished enemies were spared, provided it was materially rewarding to hold them for ransom. The asymmetric kind of behavior observed in the Peasants’ War

29 For example, Delesserts, supra note 14, at 22.
30 See, for example, Ploly, supra note 11, at 111; Philippe Contamine, La France au XVe et XVe siècles: Hommes, mentalités, guerre et paix 266–61 (1981).
31 Glover, supra note 17, at 158.
32 For example, Contamine, supra note 30, at 244.
33 Walter Schaufelberger, Der Alte Schweizer und sein Krieg (1952); August Bernoul, Basels Kriegführung im Mittelalter, 19 Basler Zeitschrift für Geschichte und Altertumskunde 106–29 (1921).
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(Bauernkrieg) in Germany (1524–25) is also consistent with Hypothesis 1: the (winning) nobility brutally tortured and killed more than 30,000 (poor) peasants, but when the peasants, on the other hand, got hold of a (rich) nobleman, they tended to hold him for ransom, despite the heavy grievances they had against their oppressors.

HYPOTHESIS 2. The higher a prisoner’s human capital value (that is, the better his abilities and education are, and the younger and healthier he is), the better are his chances of being spared in battle and held for ransom.

This hypothesis is, of course, closely related to the preceding hypothesis, but the emphasis here is not only on market income but also on the (expected) nonmarket output that one such as a political or religious leader might have. An example is King Richard I (Lionheart) of England. He was seized by the Austrian Duke Leopold on his return from the First Crusade and sold to the German Emperor Henry VI for 50,000 marks, a sum which enabled the latter to build the wall around Vienna. Henry VI then sold Richard for three times the sum (150,000 marks) to England, thereby financing his costly campaigns in Sicily.34 The English were prepared to pay this enormous sum because of Richard’s performance as an able ruler.35

According to this hypothesis, defeated enemies were also spared if they were able to perform valued labor services for the individual victors. Coerced labor services, closely akin to slavery, were a perfectly legal treatment of prisoners in the Middle Ages, and for centuries one of the purposes of warfare was to secure such services.

HYPOTHESIS 3. The more effectively the demanders can act in financial respects, the better a prisoner’s chance of being ransomed.

Most of the prisoners of war in the Middle Ages were men. The wives therefore had to be given the right of disposing of the family property. The law, for example, permitted the wives to use the property they had brought into the marriage, which they otherwise were not allowed to dispose of,36 thus contributing to a (ceteris paribus) upward shift of the demand curve.

HYPOTHESIS 4. The higher the demand for ransoming, the less the family members can appropriate the assets and other sources of income of the captured relative.

This hypothesis suggests that it is not solely family ties that determine how much effort is made to have a family member released. There are also material aspects involved that influence this effort. The law knew of

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34 Erler, supra note 5, at 37–44.
35 A fact vividly illustrated in Sir Walter Scott’s Ivanhoe.
36 See Erler, supra note 5, at 46.
this trait of human nature. There was no legal duty to ransom any relative; however, care was taken that there were no positive incentives for opportunistic behavior. One of the rules was that children could not inherit from their parents unless they had made a definite effort to ransom them from captivity.\textsuperscript{37} Under certain conditions, the relatives automatically lost their share in the testator’s wealth if they failed to have him released. This was, for instance, the case when the prisoner owned titles and privileges (for example, monopoly rents) \textit{ad personam}, which also conferred benefits on the relatives.

\textbf{Hypothesis 5.} The more costly it is to spare a defeated enemy, the more enemies will be killed and the worse they will be treated in captivity.

In the Middle Ages the victors often found it difficult to nourish prisoners. Accordingly, they often resorted to the right of killing them. The massacres of Christian crusaders among the Saracens (and also Christians) in Palestine may be attributed to the high cost of providing food and water. There is evidence that, when the prisoners were able to carry the cost of imprisonment themselves (which was rarely the case), they were treated more mildly.\textsuperscript{38}

\textbf{Hypothesis 6.} No unconditional right (or insurance) to be ransomed from captivity is granted.

In the Middle Ages, some guilds, knightly orders, cities, and even (small) states had in their statutes the provision that they would ransom their members. This provision was, however, not unconditional because one was aware that this would drive up the price of a prisoner and would reduce the incentive for the members to avoid capture. Accordingly, ransoming was promised on only three conditions:\textsuperscript{39} (i) the member must have been captured on an official mission, (ii) he must have made a clear effort to minimize the risk of being captured, and (iii) he must have proven his courage in the battle (or under similar circumstances).

\textbf{Hypothesis 7.} Captured civilians are not treated worse than captured soldiers, provided the captor expects the same ransom.

This hypothesis stands in stark contrast to the notion that civilians were generally treated badly in medieval wars. This is certainly true for the poor part of the population, in particular the peasants, who often were unable to raise ransom.\textsuperscript{40} On the other hand, there are many accounts

\textsuperscript{37} Id. at 21.

\textsuperscript{38} Schaafberger, supra note 33, at 180.

\textsuperscript{39} Eder, supra note 5, at 22–25.

\textsuperscript{40} For a mass of evidence see, for example, Alfred Vagts. A History of Militarism (1938); Flory, supra note 11; Keen, supra note 19, at 243.
of rich civilians (citizens) being ransomed, but these people were only a small part of the total population. Traditional historians seem to be surprised by this similar treatment of soldiers and civilians. Thus Contamine writes: "Certes il est frappant de voir que les ransoms des non-combatants supposés ne sont pas trop inférieures à celles des soudoyers."  

D. Weakening of the Market for Prisoners

At the end of the Middle Ages, independent and centralized nation-states began to arise, the extreme case being the absolute monarchy in France in the eighteenth century. This process was accompanied by a basic change in philosophical thinking about war, most clearly expressed by Rousseau in his Contrat social of 1762: "La guerre n’est donc point une relation d’homme à homme mais une relation d’Etat à Etat." Following this view, a soldier is not a criminal but is someone who follows the demands of his country.

The gradual development of independent nation-states was accompanied by the emergence of standing armies in which the soldiers became public servants paid in principle by the state. In the same period, military technology began to change. Rifles, the new firearms, could be used effectively only if the firing power was concentrated. Therefore, the soldiers had to fight in line under strict discipline. The military commanders could no longer allow individual soldiers to fight in an uncoordinated manner or, in particular, to take prisoners on their own account.

Changes in weapons technology led to prisoners being taken at an increasingly higher level of military organization. As a consequence, ransoming negotiations began to shift from the individual to a higher level of social (military) organization. The prisoners’ individual property rights were gradually attenuated. This corresponded to a process of an increasing of taxation on individual ransoms by collective units. The war party engaging in centralized bargaining over prisoners could obtain more favorable terms of exchange over an atomistic counterpart. The opponent had an incentive to follow suit.

Toward the end of the seventeenth century and during the eighteenth

41 For example, Erler, supra note 5; Schaulfelberger, supra note 33.
42 Contamine, supra note 30, at 258.
43 Jean-Jacques Rousseau, Du contrat social 24 (1876).
44 For example, Delessert, supra note 14, at 16, 28–30.
45 Geoffrey Brennan & Gordon Tullock, supra note 10.
century, ransoming cartels became common. These treaties were based on bilateral exchange and were concluded before a battle or a war took place. They stipulated exactly the exchange rates to be used. Usually, exchange proceeded on the basis of rank for rank, and the remaining prisoners were then ransomed according to the prices agreed on by paying a sum of money in a stipulated currency. The cartels also determined whether the exchanges were to take place during or after the battle and whether parole was granted, and they usually contained provisions relating to the sick and wounded.

The first ransoming agreements of this kind were concluded between the military commanders in the field. An example is the Cartel of Sluys (Écluse), agreed on between the French Major-General Marquis de Barail and the English Major-General Conway during the Seven Years War (1759). Prisoners had to be returned fifteen days after capture, and in order to settle the likely balances after the exchange of rank for rank, a table of ransoms for the various ranks was included. A field marshal was worth 2,500 pounds while a private of the line cost forty pounds; guardsmen were seventy pounds. Regimental officers were to be ransomed for the equivalent of one month’s pay. Later, ransoming cartels were concluded between states. An example is the treaty made by England with France in 1780. In this cartel, the ransom for each rank was stated and ranged from sixty pounds for a commander in chief, twelve pounds for a colonel, to one pound for a common sailor. The ransoming prices fixed in the cartels varied considerably depending on the relative scarcities and the expected outcome of the battle or war. While the price of an officer of top rank relative to a common soldier was 60:1 in the above-mentioned treaty between England and France of 1780, it was 5,000:1 in cartels of 1673 and 1675 concluded between France and the Netherlands. The larger price of military commanders relative to soldiers in the seventeenth century compared to the eighteenth century also reflects the fact that military commanders had more decision-making power in the earlier period and that in this period the outcome of a battle or war depended more

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46. E. Gürll, Zur Geschichte der internationalen und freiwilligen Krankenpflege 25 (1873), discusses the exact content of 291 treaties and provides excerpts of the most important parts in the original language. Similar efforts are due to Georges Frédéric Martinet, Recueil de traités d’alliance, de paix, de trève, de neutralité et de commerce etcetera depuis 1776 jusqu’à présent (1826); and Armand Du Peyrat, Le prisonnier de guerre dans la guerre continentale (1910).

47. Glover, supra note 17, at 168–70; Gürll, supra note 46, at 25.

48. Flory, supra note 11, at 112.

49. Rosas, supra note 20, at 54–55. Further information on the ransoming prices fixed in cartels is provided, for example, in Erler, supra note 5.
on them than it did in the following century. Ransoming cartels were also concluded with what were then called "Barbary States"—for instance, between Britain and Algiers in 1664, or between the United States and Morocco in 1786.

In the earlier cartels, the ransom receipts were distributed to the soldiers engaged in the particular military encounter. In the eighteenth century, the ransom was increasingly put into the public treasury, and the soldiers were paid by the state. War booty gradually lost its importance as a means of inducing men to go to war. From there it was only a small step to explicitly transferring the property right over prisoners to the state.

II. Property Rights Belong to the State

A. The Transfer of the Right

The final transfer of the property right over prisoners from the individual soldier to the state was brought about by two changes, one in technology, the other in society.

i) More effective, long-range firing weapons became available for mobile and large-scale use on the battlefield. Cannons,\textsuperscript{30} for example, could kill or wound the enemy in large numbers. If the property right had remained with the individual soldiers, they would have had no incentive to use these new war technologies effectively. Indeed, throughout the eighteenth century, the artillery was stationed on the left of the battlefront to indicate that it must yield "precedence and honor to the rest of the army."\textsuperscript{31} This change in military technology led the state to ratify the definite transfer of property rights over prisoners from the individual to the state—a transfer which was initiated by the gradual shift toward ransoming cartels mentioned above.

ii) The French Revolution led to the "levée en masse" of the (male) population as a result of the rise of nationalism and the advent of democracy. Conscription was introduced; the material incentive to go to war was substituted by (democratically sanctioned) force. In consequence,

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\textsuperscript{30} Cannons were used in an effective way much earlier to attack (and later also to defend) cities and castles. The Turks employed, for instance, a huge cannon when they conquered Constantinople in 1453. These cannons were difficult to transport and not suitable for field battles. See, for example, Fernand Braudel, Civilisation matérielle, économie et capitalisme, XVe-XVIIIe siècle. Les Structures du quotidien: Le possible et l'impossible, ch. 6 (1979); John M. Bridgman, Gunpowder and Governmental Power: War in Early Modern Europe (1494–1825), in War: A Historical, Political and Social Study (L. L. Farrar, Jr. ed. 1978).

\textsuperscript{31} Vagts, supra note 40, at 44.
the property right over prisoners could be taken away from the individual soldiers without impairing the pursuit of war.\textsuperscript{52}

Both the change in military technology and the introduction of the compulsory draft enabled the state and made it efficient for it to hold the property right over prisoners and to appropriate the ransom. As war became a relation between states, "soldiers [were not] held responsible for the war, nor its consequences."\textsuperscript{53} Under this changed property rights structure, the individual soldier no longer has an incentive to take an interest in the enemy for material reasons. Killing an enemy in battle entails no monetary costs for the individual soldier concerned (and may even bring rewards in the form of decorations). The restraint placed on killing an enemy when it would be possible to do so must therefore be based on ethical motives only. As it may be assumed that morality does not change with a transfer of property rights, the same ethical motives for not killing a defeated enemy may be taken to have existed earlier and to a similar (or even the same) extent. A decrease in material incentives for not killing an enemy, together with a similar level of morality toward the enemy, must be expected to lead to a greater number of the defeated enemy being killed. On the same grounds, the treatment of enemy soldiers who fall into captivity must be expected to worsen because—with unchanged morality—there is no material incentive for a soldier to concern himself with the prisoners. The change in property rights is thus ceteris paribus expected to result in a lower standard of living for prisoners of war with respect to nourishment and medical care, at least as far as it hinges on the discretion of the individual soldiers.

\textbf{B. Historical Observations}

The theoretical hypothesis derived about the worsening fate of defeated enemies is well borne out by the revolutionary and Napoleonic wars at the end of the eighteenth and in the first half of the nineteenth century. In these periods, the changes in military technology and in army organization (conscription) took place and had the consequences expected in theory.

The revolutionary and Napoleonic wars are generally observed to have been of great brutality, in many ways far exceeding what happened on the battlefields in former times. "In the revolutionary wars there seems to

\textsuperscript{52} In addition, war decorations were introduced from the beginning of the nineteenth century, which were also given to the common soldiers so as to increase individual incentives for fighting. Thus, the French Légion d'Honneur was introduced in 1802; the German Eisernes Kreuz in 1813; and the British Victoria Cross in 1856.

\textsuperscript{53} Delessert, \textit{supra} note 14, at 29.
have been a tendency on both sides . . . not to regard the adversary as a lawful combatant . . . but rather as a rebel or criminal fighting for an illegal cause.” In this spirit, the leaders of the French Revolution decided that enemy soldiers were not to be given quarter and refused to exchange prisoners or to ransom them from captivity. Trade with the enemy was considered treason and was therefore strictly forbidden to the individual soldier by two laws promulgated by the French National Assembly (September 12, 1792, and March 25, 1793). These rules were the result not only of ideology but also of a rational calculation by war leaders: the release of prisoners “might restore fighters to the enemy more in need of them than the French.” As these rules were disadvantageous for the troops in the field, they were repeatedly disregarded on the scene of battle, and the decree forbidding a soldier to spare a defeated enemy was repealed.

Despite the repeal, bilateral exchanges of prisoners depending on state action were often difficult, or even impossible, when the prisoners on the two sides of the conflict were of unequal value. Thus, in 1793 France did not agree to exchange man for man and rank for rank, “her not illogical argument being that every fighting man, officer or private, was of more value to Britain [who was notoriously short of soldiers] than were three times their number of Frenchmen to France.” Ransom on the basis of an exchange of man for man is unlikely to come about when the unequal military value of prisoners is not balanced by money.

Conscription (introduced in France by law on August 23, 1793) not only led to a change in the property rights over prisoners but also drastically changed the cost of war for the leaders of the army. Until then, soldiers had been a valuable good for which one had to expend large sums and that one spared as far as possible. The “democratization” of war made the whole (male) population (except the very young and very old) available to the army. The monetary cost of war was therewith lowered because it was difficult and inefficient to raise taxes on the income that would have been generated in civilian occupation. According to Fuller, “conscription

54 Rosas, supra note 20, at 62.
55 Vagts, supra note 40, at 119.
56 Id. at 120; Rosas, supra note 20, at 65.
57 Francis Abell, Prisoners of War in Britain 1756–1815 (1914), at 30. For a similar reason, an exchange proposal by Napoleon to the British did not materialize because the French wanted to exchange Spanish and Portuguese soldiers who were of little fighting value man for man for British soldiers. Id. at 34–36; Glover, supra note 17, at 174–89.
changed the basis of warfare. Hitherto soldiers had been costly, now they were cheap... [Napoleon] boasted to Metternich that he could afford to expend 30,000 men a month—men were now as cheap as dirt.

The increased brutality of war observable in the revolutionary and Napoleonic wars between 1792 and 1815 is thus due to a decrease in the value of all soldiers: the soldiers become of less worth to their own commanders, and the enemy soldiers become of less worth to the soldiers of the adversary. Accordingly, battles led to enormous loss of life and to terrible suffering of the wounded and prisoners. In one single battle (Borodino of 1812), for instance, the French suffered 30,000 dead and wounded and the Russians more than 44,000. Obviously, moral principles were not able to stem the tide of ever-increasing loss of life in war and of the mistreatment of prisoners of war. Exchanges of prisoners during wars took place, but irregularly and unpredictably. Most prisoners had to suffer long detention under extremely poor conditions until the end of the war, provided they lived to see it. The treatment of the wounded was "lamentably falling off from the generous humanitarian conventions observed by the military of the ancient régime."

From the middle of the nineteenth century, it became clear to the political leaders of the nations that a solution must be found to improve at least the situation of the wounded and the prisoners of war. Otherwise, the system of negative incentives (conscription) and positive incentives (decorations) to join up was feared to be insufficient, in the long run, to motivate men to go to war.

III. Property Rights Belong (Partly) to International Institutions

A. Reasons for the (Partial) Transfer

The shift of the property right over prisoners from the individual soldier to the state induced the combatants to employ the newest military technology (long-distance firing weapons), but this had a negative consequence that in the long run made this property right allocation inefficient. The ever-increasing brutality occurring with the use of increasingly effective weapon technology resulted in military confrontations with enormous

59 Fuller, supra note 6, at 35.
60 See in general, for example, Best, supra note 25.
62 For example, Abell, supra note 57.
casualties. This in turn brought the problem of motivating individual soldiers to the fore. A soldier is more likely to shirk military service and active fighting the larger the perceived cost is (keeping the benefits constant). If there is a widespread feeling among the soldiers that military service is intolerably cruel because of the high risk of being killed and because of the dismal fate of the wounded and captured, the willingness to serve declines.\(^{64}\) The war leader of each nation thus has an incentive to improve the situation for his own soldiers: he would like to be able to assure them that they will receive adequate medical attention if wounded, and that they will be treated well if taken prisoner.

The leaders of a particular nation cannot provide such a guarantee by unilateral action because the treatment of the wounded and the prisoners depends to a large extent on the behavior of the adversary. In this situation, two possibilities arise.

i) An ethical norm is set up stating that, on moral grounds, a defeated enemy has to be treated well. The question is, of course, how to set up such a norm. The prospects do not look too good in view of the fact that the Christian religion has always stressed that one's fellow man has to be treated well and may not be killed. This ethical norm has not proved to be strong enough to prevent the growing brutality of war.

ii) International rules have to be established by consensus, stipulating that each nation is obliged to treat defeated enemy soldiers well. Such a consensus is possible behind the "veil of ignorance,"\(^{65}\) that is, in a state in which the participating nations do not know whether the rules arrived at are to their advantage or disadvantage in a particular war, in a particular battle, or with respect to a particular type of weapon used. What matters is that the rules must be considered beneficial to the leaders of each participating nation over a whole sequence of possible future military conflicts. To the extent that such international rules are arrived at, the participating nations voluntarily transfer part of their property rights over defeated enemies to an international institution. The main problem with this approach is that each nation has an incentive to break the contract when it is found to be advantageous to do so in a particular situation.

Four theoretical propositions may be advanced on the basis of the foregoing: (1) it is difficult and time-consuming to find a consensus about suitable international rules of war; (2) the enforcement is difficult, and

\(^{64}\) This also holds for voluntary acts of bravery. A wholly different situation obtains when a soldier is "trapped," that is, when he has no chance to evade (or the cost of doing so is too high). In that case he fights as hard as possible so as not to fall into the hands of the enemy—but he still tries not to get wounded if he knows that medical attention is bad.

acts of killing defeated prisoners and bad treatment of prisoners, that is, of free riding, will often be observed; (3) interactions and agreements between the conflicting parties concerning prisoners of war tend to be of reciprocal nature (which violate the basic idea of the humanitarian conventions); and (4) the actual treatment of prisoners is largely explicable by benefit-cost considerations of the relevant decision makers.

B. The Rise of International Humanitarian Institutions

The dreadful experience of the battle at Solferino (1859) motivated Henry Dunant to fight actively for the establishment of international institutions to improve the lot of wounded and captured soldiers. The basis for that effort was laid by such philosophers and lawyers of the Enlightenment as Montesquieu (1689–1755), Vattel (1714–67), and Rousseau (1712–78). These ideas may have contributed to the establishment of a new morality concerning the treatment of defeated enemies, but there can be little doubt that the international humanitarian institutions were of considerably larger practical importance.

As expected in theory, the international humanitarian institutions were slow to emerge. The basic principles of the rules became clear in the mid-nineteenth century, but it was very difficult to find a consensus among the nations concerned. The search for mutually acceptable rules for the treatment of defeated enemies took more than a century.\(^6\) In 1864, the first Geneva Convention on the treatment of wounded and sick prisoners was arrived at. The first multinational convention about the prisoners of war came about in 1899. A major breakthrough was achieved in the Geneva Convention of 1929, which before World War II was ratified by the main powers—France, Germany, Great Britain, and the United States—but not by the Soviet Union and Japan. The most important international rule relating to prisoners of war is the Third Geneva Convention of 1949, which has attained almost universal acceptance.

In the various conventions, the following four main international rules of warfare with respect to individual participants were fixed: (i) wounded

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\(^6\) For details, see J. D. Armstrong. The International Committee of the Red Cross and Political Prisoners, 39 International Organization 615 (1985); Rosas, supra note 20, at 69–84. There was a lack of concern among decision makers for the fate of imprisoned civilians (internees): "a large part of the explanation lies in the difficulty of persuading armies, navies, and air forces to be collectively enthusiastic about proposals for improving any parts of the law of war other than those directly saving their own professional interests." Best, supra note 63, at 142. A Geneva Convention dealing with civilians as well was arrived at only in 1949, when it became clear that in modern warfare, there is no longer a clear distinction between soldiers and civilians.
and captured soldiers are to be spared and taken care of; (ii) wounded and sick soldiers are to be exchanged without compensation during the war; (iii) prisoners of war are the property of the state in whose hands they are (accordingly, this state also carries the burden of responsibility, and at the end of the war the prisoners must immediately be released without compensation); (iv) prisoners of war, except officers, may be employed for "nonmilitary" work. Most of these rules had already been part of bilateral treaties and conventions with respect to particular wars;\textsuperscript{67} the unconditional release of prisoners after the war had, for example, already been included in the Treaty of Westphalia ending the Thirty Years War (1618–48). The Red Cross Conventions, on the other hand, are multilateral and applicable in general for all wars. These rules in effect state that the individual nations have transferred part of their property rights to international institutions. They have agreed to restrict their right over the prisoners, and in particular they have relinquished the right to treat them as they think fit—for instance, to put them to death if it is to their advantage.

Parallel with the conventions, international humanitarian organizations were founded, most notably the Red Cross. Founded in 1863 by Dunant for the care of wounded soldiers, it concerned itself only later with the situation of the prisoners of war.\textsuperscript{68} According to its statutes, the Red Cross is neutral and stands apart from the parties in order to act efficiently in situations of military conflict. This holds in particular for the International Committee of the Red Cross\textsuperscript{69} but not necessarily for the national Red Cross societies\textsuperscript{70} with an "efficient and in many cases total integration with their respective countries' war machines."\textsuperscript{71}

The second proposition on the widespread inhumane treatment of prisoners of war in violation of the international humanitarian conventions is also supported by historical evidence. The general picture is summarized in the International Encyclopaedia of the Social Sciences, which states bluntly: "The history of actual prisoner treatment during the century that

\textsuperscript{67} Best, supra note 63, at 149; and very extensively in Gurtt, supra note 46.

\textsuperscript{68} For the history, see, for example, David P. Forsythe, Humanitarian Politics: The International Committee of the Red Cross (1977); Georges Willemin & Roger Heacock, The International Committee of the Red Cross (1984).

\textsuperscript{69} See, for example, Forsythe, supra note 68.

\textsuperscript{70} According to Best, supra note 63, at 141–42.

\textsuperscript{71} The same is true for earlier rules that were based not on humanitarian but on (purely) Christian ethics. For example, in the fourteenth and fifteenth centuries, the Church established rules to save churchmen, farmers, pilgrims, and travelers, and later also women and children, but "the regulations [were] nullified by contrary practice." The only exceptions were religious persons, because killing or brutal treatment meant the (then) heavy penalty of anathema. Delessert, supra note 14, at 28.
saw the development and acceptance of these legal doctrines showed largely a record of deviation from these theories.\textsuperscript{72}

In the German-French war of 1870–71, the humanitarian conventions then existing were to a large degree disregarded by the French, partly because the soldiers in the field knew little or nothing about these rules. In several instances, the Red Cross emblems were used in order to deceive the enemy, a tactic to which the Germans in turn tended to react by violating the conventions. This is a clear instance of the breakdown of mutually advantageous rules because of free riding. A leading Swiss scholar of international law of the period, Bluntschi,\textsuperscript{73} complained bitterly about the deviation between war practices and the existing rules.\textsuperscript{74} The results of The Hague Conventions, arrived at after this war (in 1899 and 1907), were “hailed as a great achievement . . . but in World War I this progress turned out to be purely on paper.”\textsuperscript{75} The many violations of the humanitarian rules occurring in 1914–18 may be exemplified in two areas.

Submarine warfare. The reasons for breaking the rules were essentially cost factors. A submarine operating on the surface, as it would have to in order to carry out the practice of visit and search, was extremely vulnerable to counterattack, and it was therefore less risky to attack a ship believed to be acting against one’s country’s interests. The same was true in World War II: “the fundamental reason for rejection of restraints lay in the technical change [which] had made the surfaced submarine increasingly vulnerable.”\textsuperscript{76}

Repatriation of prisoners of war after the end of hostilities. Instead of being released immediately by the Central Powers (Germany and Austria) in November 1918 as stipulated in the conventions, at least 250,000 prisoners from Russia, who were “short of clothing, half-starved, and received no [medical] attention of any kind,” were repatriated only in 1922.\textsuperscript{77}

In World War II “the law relating to prisoners of war was frequently violated, in some cases on a massive scale.”\textsuperscript{78} The survival chances of prisoners in Germany and the Soviet Union were low because of brutal

\textsuperscript{72} International Encyclopaedia of the Social Sciences 12 (1968), s.v. “prisoners of war.”

\textsuperscript{73} Johann C. Bluntschi, Das moderne Völkerrecht der civilisierten Staaten als Rechtsbuch dargestellt 328–31 (2d ed. 1872).

\textsuperscript{74} See also Gurlt, supra note 46, at 119–24.

\textsuperscript{75} Scheidt, supra note 11, at 94.

\textsuperscript{76} Bryan Ranft, Restraints on War at Sea before 1949, in Howard, supra note 25, at 52–53.

\textsuperscript{77} Delessert, supra note 14, at 53–54.

\textsuperscript{78} Rosas, supra note 20, at 78.
treatment and insufficient nourishment; 45 percent of the Germans captured in Russia, and 60 percent of the Russians captured by the Germans did not return to their respective countries. Repatriation was again exceedingly slow mainly because the prisoners were used for slave labor. In December 1947, thousands of German prisoners of war were still in French and British hands. According to United Nations figures, by 1950, 1,952,609 German prisoners in Soviet custody had still to be repatriated.

In the case of Vietnam, "there is an abundance of information pointing to the widespread use of torture and summary executions [of prisoners]." The International Committee of the Red Cross was not allowed to visit the prison camps in North Vietnam and stopped visiting those in South Vietnam because of interference from the government. There was generally no exchange of wounded and sick prisoners during the conflict.

The third proposition suggests that the treatment of prisoners of war is ruled to a large extent by intense bargaining and reciprocal agreements between the states at war. It thus essentially follows the historical pattern observed, although reciprocity is completely antagonistic to the humanitarian approach: "The obligations of states resulting from the provisions of the Geneva Conventions are essentially unilateral, not reciprocal, in character." In an agreement between American and German delegates signed in November 1918, for example, the exchange was based on a strict equality of the numbers of valid prisoners according to rank (only wounded and sick prisoners are to be released unilaterally). Prisoners of war are part of a package deal; they are a bargaining tool to obtain political and military concessions. The application of humanitarian principles is often made conditional on terms of reciprocity. This is evidenced in particular by the agreements in the Indo-Pakistan, Vietnam, and Middle East wars. The strong condemnation of bargaining and reciprocity by the Red Cross has achieved little, if anything. What has been said in the interwar period by a leading authority on humanitarian law still holds:

79 Keegan & Holmes, supra note 61, at 157.
81 See also Delessert, supra note 14, at 61–64.
82 Rosas, supra note 20, at 171.
83 Forsythe, supra note 68, at 25, 157–58; Delessert, supra note 14, at 113.
85 Flory, supra note 11, at 134.
86 As discussed extensively by Delessert, supra note 14, ch. 11.
“La réciprocité semble être, au moins au temps de guerre, le seul principe devant lequel se plient les gouvernements.”

The actual treatment of prisoners of war is governed by benefit and cost considerations of the relevant decision makers, as suggested in the fourth proposition. In the twentieth century, as in the centuries before, defeated enemies tend to be spared and treated well when it benefits the captor, and they tend to be killed or treated harshly when the cost of doing otherwise is high. In modern warfare, a humane treatment of defeated enemies may yield the following benefits.

i) The prisoners may be integrated in the captor’s army. This very old procedure is also practiced quite often in modern times. Glover tells the story of a Tyrolean regiment that was captured entirely in Napoleon’s Italian campaign of 1796. The French sold it to their Spanish allies for two dollars a head. Captured in turn by the British in 1798, it then volunteered for the British army and became the Ninety-Seventh (Queen’s German) Regiment. In the Second World War, many Russian prisoners chose, or were forced, to join the German ranks. The German 134th Infantry Division offered all its prisoners regular status as soldiers. At the end of 1942, about half of the division was composed of former Soviet soldiers. A well-known case is the so-called Vlasov Army, which was mainly composed of prisoners of war. In the Korean War, 50,000 South Korean prisoners of war joined the North Korean army, and in the Vietnam War a considerable number of prisoners entered the armed forces of the former enemy. The same is reported for the war in Yemen.

ii) In the two world wars, the detaining states employed on a massive scale prisoners of war for work either benefiting them directly by its military character or indirectly by releasing nationals for the armed forces. This conflicts with humanitarian principles but raises the value of prisoners to the detaining power. A change in the relative benefit-cost ratio changes the way in which prisoners are treated. This is well exemplified by the way the Germans dealt with Russian and Polish prisoners of

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87 Georges Werner, Les prisonniers de guerre, 21 Recueil des cours de l’académie de droit international 3 (1928).
89 Glover, supra note 17, at 163.
90 The alternative was often starvation.
92 See, for example, Peter Huskey-Blythe, The East Came West (1964).
93 Delessert, supra note 14, at 289–90.
94 Rosas, supra note 20, at 158.
95 Id. at chs. 8, 6.
war: as long as there was no manpower shortage, they were treated most brutally, so that many of them died. But when the Germans began to depend on them for manning the factories and farms, the "Untermensch" became a "guest worker" and achieved a degree of equality with the German workers.96

iii) A further benefit from taking prisoners is a higher likelihood of surrender and defection by enemy soldiers (a strategy used by Mao and Castro) and the possibility of getting information from them.97 While such behavior is not prohibited by the humanitarian conventions, it is not in their spirit but is, rather, the result of the self-interest of the parties at war.

The actual treatment of prisoners of war in modern times is also strongly influenced by cost factors. When the cost of detaining prisoners is high, states may release prisoners unilaterally if they can be reasonably certain that they are not immediately put into the army again. This happened both before and after the establishment of the humanitarian conventions. In the Mexican War (1846–48), for example, about 10,000 prisoners were unilaterally released by U.S. troops because they placed such a heavy burden on the supplies.98 Similarly, the Republic of Vietnam released prisoners from its jails because of the lack of physical space and the cost involved in feeding them.99 When, on the other hand, prisoners could not be released without peril to one’s own side, the high cost of imprisonment had the opposite effect. Much of the ill-treatment of prisoners during the American War of Independence was due to the unpreparedness of the Americans to receive such a large number of prisoners.100 The killings, atrocities, and inhumanity of the Japanese in World War II were mainly due to their being wholly unprepared to look after a large number of prisoners.101 As has been the case in earlier periods (see our Hypothesis 5), costs are thus an important determinant of the treatment of prisoners, irrespective of humanitarian rules.

Two areas of modern war are practically outside the scope of humanitarian rules, namely guerrilla and terrorist activities. The accommodation of this kind of warfare within the law of modern wars has been the biggest problem since World War II.102 Many states consider guerrilla fighters and

97 See Rosas, supra note 20, at 134–40.
98 Charles Murphy, Prisoners of War: Repatriation or Internment in Wartime, in US POWs in South East Asia 479 (US Congress, Committee on Foreign Affairs 1971).
100 Glover, supra note 17, at 73.
101 Best, supra note 63, at 219.
terrorists to be no better than criminals to which the humanitarian principles accorded to prisoners of war do not apply, and they have in many cases been killed on the spot, or treated badly when taken prisoner.\textsuperscript{103} The Red Cross (International Committee) is quite helpless in this area\textsuperscript{104} because the element of reciprocity, which is basically rejected by the humanitarian approach, is so strong. Terrorists often resort to taking prisoners (kidnapping) in order to improve their political bargaining position or simply to raise money. In these areas the market reemerges to a considerable extent: ransoming kidnapped persons is often practiced, and the payers are both individuals (family members) and the state. There exists even a more or less secret market for ransoming prisoners of the "cold war" between states: over the period 1964–77, the government of the Federal Republic of Germany ransomed approximately 13,500 people imprisoned in the German Democratic Republic, the prices ranging from DM 180,000 for a doctor of medicine to DM 30,000 for a worker. Better known is the practice of exchanging spies.\textsuperscript{105}

IV. Concluding Remarks

Changes in the allocation of the property rights over prisoners explain many of the variations in the treatment of defeated enemies in the course of history. Benefits and costs of either killing or sparing and looking after the vanquished adversary determine the behavior of the individual soldier, but these benefits and costs differ greatly depending on the assignment of the property right. The emergence and erosion of the rules governing the allotment of these property rights is explicable in terms of technological and political developments. These are the main theses of this article. The propositions derived on the basis of economic theory are compatible with historical accounts. The hypotheses are not commonplace; a leading expert in the field states, for example: "Prior to the middle of the seventeenth century, the economic interest of the captor may have had a direct relation to the treatment accorded prisoners, but there seems to be little correlation between alterations in the law and economic advantage since that time . . . the leading principle seems to have been humanitarianism."\textsuperscript{106} However, it has been suggested here that

\textsuperscript{103} See Rosas, supra note 20, ch. 2; Best, supra note 25, at 31–36; Best, supra note 63, at 117.

\textsuperscript{104} For example, Jacques Freymond, Guerres, révolutions, Croix-Rouge 105 (1976).

\textsuperscript{105} Michel Meyer, Des hommes contre des marks (1977).

\textsuperscript{106} Flory, supra note 11, at 159.
the economic approach is able to throw light on the development of the rules established and that the actual treatment of prisoners is strongly influenced by benefits and costs of the war participants. The economic approach also makes clear that there may be a humane treatment of (some) prisoners even without humanitarian conventions—as was the case with ransomings—and that the existence of humanitarian conventions does not necessarily lead to a better treatment of prisoners—as shown by the history of war over the last hundred years.

In the Middle Ages, the individual combatant had a well-defined property right over the enemy he took prisoner. A market for the exchange of prisoners for monetary ransom emerged which was surprisingly efficient, benefiting both captor and captive. It need not be stressed that the outcome was not "just" in any sense; defeated adversaries who were of value (as determined by demand for and supply of prisoners) tended to be spared, while prisoners of little or no value risked death.

A drastic worsening of the conditions of all soldiers (and civilians) resulted when the state took control of property rights over prisoners in the wake of the French Revolution. This transfer of rights was possible and efficient because of new weapon developments (long-range firearms) and conscription. While the goal of forcing the soldiers effectively to apply the new military technologies was reached, it proved to be self-defeating. Wars became so brutal that in the long run problems arose in inducing men to participate actively in wars. The war leaders of the various nations found it in their own interest to give up part of the property rights over prisoners by agreeing to the establishment of international humanitarian rules (Geneva Conventions) and organizations (the Red Cross). Because of free riding incentives, these arrangements have proved to be only partially successful. These developments indicate that it is very difficult to substitute moral (humanitarian) principles and rules for material incentives.

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