Reciprocity and the Law of War

Sean Watts*

This Article examines how the principle of reciprocity operates within the international law of war. Tracing the historical development and application of the law, the Article demonstrates that the existing law of war derives from a set of rules that are contingent on reciprocity. Contrary to common understanding, reciprocity strongly influences states’ interpretation and application of the law of war. The Article first identifies an obligational component of reciprocity that restricts operation of the law to contests between parties with parallel legal commitments. Second, the Article identifies an observational component of the principle of reciprocity that permits parties to suspend or terminate observance when confronted with breach. Although the principle of reciprocity was softened by late twentieth century legal instruments, it continues to form a critical component of the law of war and guides both pragmatic and theoretical discourse. Regardless of normative conclusions about reciprocity as a precondition to application of the law, the Article’s reciprocity-cognizant framework for understanding the law of war provides a useful platform for reform efforts.

Observe what Justice is and what Reciprocity. In my opinion, Justice rules between individuals, Reciprocity between States. Justice regulates rights and duties, and is a single entity—majestic, powerful, impartial. She wears a bandage over her eyes, and regards neither personalities nor Reciprocity. On the other hand, Reciprocity proclaims to the whole world: “I am not Justice, and I pay no regard to her. I am the Goddess of the Market and have my eyes open, and in the market of the nations I myself am the price of Justice.”

Wyndham A. Bewes

I. INTRODUCTION

The principle of reciprocity has long been foundational to international law and the law of war specifically. Reciprocity has a particularly strong
intuitive appeal as a condition on war rules. Few would consider practicable a legal regime that required one side to “fight with one hand tied behind its back” while its enemy exercised free reign. Until recently, reciprocity has been an important tool in marketing the law of war to its end users: combatants and commanders. The U.S. Military’s law of war training routinely includes inducement of reciprocity by adversaries as one of many reasons for integrating international law into military doctrine and operations. The Army’s law of war instructional materials caution soldiers to this effect.

Conditions of reciprocity pervade modern law of war treaties and their forebears. The pre- and post-Westphalian customs that formed the groundwork of the law of war reflected exclusive codes rather than universal moral norms. As such, they were highly susceptible to suspension in cases of permutation.

3. Sir Lauterpacht has observed similarly, “[I]t is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them.” Hersch Lauterpacht, The Limits of the Operation of the Law of War, 30 BRIT. Y.B. INT’L L. 206, 212 (1953); see also Alan Dershowitz, Should We Fight Terror with Torture?, THE INDEPENDENT, July 3, 2006 (quoting Aharon Barak, President of the Supreme Court of Israel), available at http://www.independent.co.uk/news/world/americas/alan-dershowitz-should-we-fight-terror-with-torture-406412.html.

4. The U.S. Navy publishes a legal guide for its commanders. DEP’T OF THE NAVY, ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, NWP1-14M/MCWP5-2.1/COMDT PUB P5800.1 (1997). The guide observes, “Some obligations under the law of armed conflict are reciprocal in that they are binding on the parties only so long as both sides continue to comply with them.” Id. at 6–21. The Handbook excludes rules of a humanitarian nature from the condition of reciprocity and reserves non-reciprocity-based suspension of law to the National Command Authority. Id.


6. U.S. ARMY LAW OF WAR INSTRUCTOR’S GUIDE, supra note 5, at 25. The Guide poses the following question in a section of sample questions and answers:

Question: Why should we obey the Hague and Geneva conventions when the enemy does not obey them?

Answer: As soldiers, you obey these rules because the commander-in-chief requires you to obey them . . . . Our standards are set; we will not lower them by accepting the reprehensible standard of our enemies . . . . Moreover, strict adherence to these rules may pressure the enemy into complying with the requirements of the Conventions.

Id.
ceived military necessity or in conflicts with enemies from foreign cultural and religious traditions. For their part, early law of war treaties included reciprocal commitment to and reciprocalobservance of the law of war as preconditions to their operation. Even after explicit and often draconian conditions on reciprocity fell out of favor, reciprocity persist ed beneath the surface of the law of war. Limits on application, requirements of state affiliation, and conditions on armed groups’ conduct and characteristics continued to limit operation of the law of war. Such conditions operated similarly to conditions of reciprocity by effectively denying application of the law of war to all but peer competitors committed to reciprocal observance of the law of war.

Against this strong historical and textual tradition, some have argued that reciprocity is no longer a condition of the modern law of war. Grounded primarily in the theory that the nature of the law of war has changed—that restraint in war is based no longer on promissory compromises between sovereigns—this view has gained significant traction and influenced the interpretive approaches of a number of legal authorities. Adherents of this modern view support their claims with compelling textual and normative arguments. Thus jurists and policymakers who give primacy to sovereignty, national security, and adherence to limits on the operation and scope of the law of war have clashed with those who seek to humanize war further through evolution or even reconceptualization of the law.

Reciprocity is underappreciated as an element of disagreement in this clash of views. Shared misunderstandings about the nature of the existing law and failure to appreciate persistent strains of reciprocity in the law of war explain some disagreement over and disappointment with the law. The tension between these views presents an opportunity to assess how reciprocity has shaped the existing law of war and what role, if any, it should continue to play.

Reciprocity continues to form a critical component of the law of war and structures both theoretical and pragmatic discourse. As recently as 2002, the United States explicitly cited concerns of non-reciprocity in its decision to deny application of the law of war to Taliban fighters in Afghanistan. This
Article suggests that a productive reform dialogue must include a reciprocity-cognizant understanding of the law of war.

This Article offers three conclusions about reciprocity that will facilitate debate over the current and future law of war. First, the law of war has long been conditioned on notions of reciprocal obligation and observation. Even as formal mechanisms have faded from use, similarly-minded limits on the operation of the law have persisted below the surface, vindicating the same concerns that informed traditional insistence on reciprocity. Second, states have recently shown a willingness to adapt the principle to changing conceptions of humanity in warfare. In particular, rules on treaty interpretation that minimize the role of reciprocity have fostered widespread agreement that many law of war provisions operate as obligations owed \textit{erga omnes} rather than as bilateral concessions of a contractual nature. In both the law of war and human rights law, states have consented to peremptory norms that are not subject to traditional reservations of reciprocity. Finally, this Article observes that the law of war has failed to keep pace with the evolution of how and why states fight. Insistence on reciprocity, grounded in early and mid-twentieth century law of war treaties, increasingly clashes with states’ own strategic and tactical responses to conflict and may distract from military and political effectiveness. An analysis of the law of war that considers the impact of reciprocity could resolve the current theoretical and doctrinal debate over conflict regulation.

II. THE PRINCIPLE OF RECIPROCITY

French legal scholar Louis Le Fur observed that reciprocity lies at the root of all international law.\textsuperscript{9} Le Fur’s observation was characteristic of early twentieth century scholarship and political views about international law.\textsuperscript{10}

\textsuperscript{9} FRITS KALSHOVEN, BELIGERENT REPRISALS 24 (1971) (referencing LOUIS LE FUR, DES REPRÉSENTATIONS EN TEMPS DE GUERRE (1919)). Later writers confirm the pervasiveness of reciprocity in the international system. Elisabeth Zoller notes that reciprocity was a central principle of primitive life. ELISABETH ZOLLER, PEACETIME UNILATERAL REMEDIES 14 (1984). Lacking hierarchies, primitive tribes relied on reciprocity to order relations between equal members. Id. (citing BRONISLAW MALINOWSKY, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926)). Zoller concludes that the international legal system is in some senses a similarly primitive legal system, lacking de jure hierarchies and authorities and thus reliant on reciprocity to govern relations. Id.

\textsuperscript{10} See, e.g., PASQUALE FIORE, INTERNATIONAL LAW CODIFIED AND ITS LEGAL SANCTIONS 325 (Edwin M. Borchard trans., Baker, Voorhis & Co. 1918) (1890) (observing that states alone can establish particular rules for their relations by reciprocal agreement); WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 408 (A. Pearce Higgins ed., 8th ed. 1924) (“It is obviously an implied condition of the obligatory force of every international contract that it shall be observed by both of the parties to it.”); OPPENHEIM’S INTERNATIONAL LAW 579 (2d ed. 1912) (“Violation of a treaty by one of the con-
Reciprocity was an essential component of the system of sovereign, de jure equals. The prominence of reciprocity was especially apparent in diplomacy, the primary medium of state interaction. For instance, states frequently included conditions of reciprocity in the immunities and privileges they afforded diplomatic personnel and public property. In 1938, the British House of Lords observed that the customary immunity recognized between states could “be taken to flow from reciprocity, each foreign state within the community of nations accepting some subtraction from its full sovereignty in return for a similar concession on the side of the others.”

International relations theorists have developed complex models to explain how reciprocity shapes states’ interactions. Seeking to resolve ambiguity inherent in the principle, Robert Keohane identifies two
manifestations of reciprocity in international relations, distinguished by the
nature and level of interaction involved. They are “specific reciprocity” and
“diffuse reciprocity.”

Specific reciprocity describes situations in which actors in a bilateral relation-
ship trade items or acts of roughly equivalent value in a sequential ex-
change or interaction. Specific reciprocity describes situations in which
actors in a bilateral relationship trade items or acts of roughly equivalent
value in a sequential exchange or interaction. Contracts are clear examples of
specific reciprocity, as they operate through promissory exchanges of similarly valued goods or
services. Keohane notes that while specific reciprocity is a temperamental
form of cooperation that can frustrate those who seek stable, beneficial
agreements, it can ensure cooperation in the anarchic world of international
relations.17 Arrangements based on specific reciprocity are typically tempo-
rary and often isolated. Consistent with realist skepticism, specific reciproc-
ity discounts promissory arrangements as merely epiphenomenal evidence of
momentary state interest, rather than reflective of lasting or meaningfully
binding norms on state behavior.

Diffuse reciprocity describes interactions between a state and a group,
rather than an individual actor or peer.18 Keohane notes that diffuse reci-
proc: ty’s broader scope of commitment to accepted standards of behavior
reduces unnecessary and inefficient conflict. Yet he cautions that diffuse reciproc-
ity can only be achieved where the actors share compatible interests and
norms of obligation. Absent these prerequisites, diffuse reciprocity exposes
parties to exploitation.20

Thus while the principle of reciprocity is recognized as a general tenet of
international law, it does not operate uniformly across the spectrum of inter-
national relations. Legal scholars disagree on its precise contours. The opera-
tion and applicability of reciprocity frequently depend on the legal source of
the obligation, the political standing of the actor to whom the obligation is
owed, and subjective evaluations of the nature of the obligation itself. This
section identifies two main types of reciprocity, obligational and observa-
tional reciprocity, and discusses their operation and limitations in both
treaty and customary international law. It concludes by distinguishing reciproc-
ity from reprisal.

A. Reciprocity and Treaty Law

Generally speaking, the international law of treaties governs law of war
treaties. The law of treaties is a set of secondary rules—in other words,
"rules about rules." Secondary rules guide the application and interpretation of primary rules that prescribe or describe lawful conduct. For instance, the Vienna Convention on Diplomatic Relations describes duties and obligations owed to states’ representatives by their foreign hosts. Primary rules of the Convention include the inviolability of embassy premises, exemption from taxes, and immunity from arrest for diplomatic agents. The Convention also includes secondary rules which condition the operation of primary rules. For example, the Convention prohibits parties from discriminating between states in their application of the Convention’s protections. Thus, like nearly all other primary international rules, the Convention’s primary rules operate subject to the secondary rules of international law.

The principle of reciprocity has long been recognized as an important secondary rule under the law of treaties. Reciprocity places conditions on the binding force, interpretation, and operation of treaties. As a general matter, rules of treaty interpretation have evolved from custom into a formal "treaty on treaties." Detailed, codified rules, often tailored to specific types of treaties and obligations, now guide states’ interpretation and implementation of their treaty obligations. Prior to examining this evolution, however, it will be useful to outline some generally applicable doctrines associated with reciprocity.

Understood broadly, reciprocity operates in both an obligational sense and an observational sense. Reciprocity operates on an obligational level in that states are generally bound by treaties only in their relations with states that have consented to be bound by the same treaty. The binding effect of a treaty is thus contingent on other states’ reciprocating with indicia of in-
tent to be bound.\textsuperscript{30} In this sense, the operation of treaties is contingent on obligational reciprocity.\textsuperscript{31}

It is not surprising that legal scholars often analogize treaties to contracts.\textsuperscript{32} Indeed, many treaties refer to parties as "High Contracting Parties."\textsuperscript{33} Lawyers and scholars trained in civil law systems occasionally cite the legal maxim \textit{inadimplenti non est adimplendum}\textsuperscript{34} to describe the contract-like, reciprocity-based nature of treaty obligations.\textsuperscript{35} Similar to the law of

\begin{thebibliography}{10}
\bibitem{30}

\bibitem{31}
Derek Jinks has referred to required mutuality of obligations as "first-order reciprocity." Derek Jinks, \textit{The Applicability of the Geneva Conventions to the "Global War on Terrorism,"} 46 \textit{Va. J. INT'L L.} 165, 192 (2004). Realist international relations scholars addressing bilateral or "specific" reciprocity minimize the concept of obligation. Thus, Robert Keohane and Robert Axelrod argue that reciprocity may be satisfied through real time reactions to actual behavior rather than prescriptive obligations. Keohane, \textit{supra} note 14, at 19–20 (remarking that Axelrod declines to address obligation in his theory of reciprocity). In place of formal commitment and putatively binding agreements, Keohane and Axelrod envision a game of tit-for-tat on the basis of self-interest. \textit{Id.} at 19. However, Keohane concedes a place for obligation in multilateral settings. As mentioned, he offers the term "diffuse reciprocity" to describe situations where one’s counterpart is a group rather than an individual actor. See \textit{supra} text accompanying notes 18–20. Especially in sociological and anthropological literature, "the language of reciprocity is the language of obligation." \textit{Id.} at 20–21 (citing BARRINGTON MOORE, JR., \textit{INJUSTICE: THE SOCIAL BASES OF OBEDIENCE AND REVOLT} 506 (1978); ALVIN W. GODDARD, \textit{The Norm of Reciprocity: A Preliminary Statement}, 25 \textit{Am. Soc. Rev.} 161, 169–71 (1960)).

\bibitem{32}
MALCOLM N. SHAW, \textit{INTERNATIONAL LAW} 88–89 (5th ed. 2003); SHABTAI ROSENNE, \textit{THE LAW OF TREATIES 46} (1970) (equating the law of treaties, the law of contract, and the civil law notion of "the law of obligations"); 1 HERSCH LAUTERPACHT, \textit{INTERNATIONAL LAW} 351 (1970) (observing that "the contractual nature of all treaties is now no longer seriously challenged").

\bibitem{33}

\bibitem{34}
If one party violates a treaty obligation, the other party can refuse to perform the corresponding obligation. Specifically, “[a] state’s compliance with the rules hinges on another state’s observance; \textit{inadimplenti non est adimplendum}.” ZOLLER, \textit{supra} note 9, at 15; see also John Norton Moore, \textit{Enhancing Compliance with International Law: A Neglected Remedy}, 39 \textit{Va. J. INT’L L.} 881, 957–62 (1999) (explaining the right to refuse reciprocal performance if a treaty obligation is violated by the other party); OSCAR SCHACHER, \textit{In Defense of International Rules on the Use of Force}, 53 \textit{U. Chi. L. REV.} 113 (1986) (discussing the use of armed force as a reaction to the violation of international law).

\bibitem{35}
See, e.g., Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶ 520 (Jan. 14, 2000). The \textit{International Criminal Tribunal for Yugoslavia} observed:

\begin{quote}
[A] material breach of that treaty obligation by one of the parties would not entitle the other to invoke that breach in order to terminate or suspend the operation of the treaty. Article 60(5) provides that such reciprocity or in other words the principle \textit{inadimplenti non est adimplendum}.
\end{quote}
contracts, treaty law requires evidence of parties’ intent to be bound. Like contracts, treaties traditionally do not create obligations or rights for third parties.

The decision of the International Court of Justice (“ICJ”) in the seminal North Sea Continental Shelf cases illustrates how the requirement of mutual consent limits treaty obligation. These cases arose from a dispute over a territorial boundary in the shallow waters between West Germany, on the one hand, and Denmark and the Netherlands on the other. Denmark and the Netherlands promoted a provision of the 1958 Geneva Convention on the Continental Shelf as the proper basis for the Court’s decision. They argued that West German public statements in support of the Convention were sufficient indicia of West Germany’s consent to be bound. The ICJ rejected application of the provision in question, and the treaty generally, because West Germany had not ratified the Convention. The Court insisted that treaty obligations do not arise casually, particularly when legal instruments specify formal means of manifesting intent to be bound. The Court found the dangers of applying conventional provisions absent clear manifestations of consent so obvious as to be “hardly worth stressing.”

does not apply to the provision relating to the protection of the human person contained in treaties of humanitarian character, in particular the provisions prohibiting any form of reprisal against persons protected by such treaties.

Id.

36. Vienna Convention, supra note 27, art. 11. Article 11 includes signature, exchange of instruments, ratification, acceptance, approval, or accession as means for expressing a state’s intent to be bound by a treaty. Id.

Additionally, Article 11 requires evidence of intent to be bound by a treaty, but it can sometimes be difficult to interpret expressions of intent. States will need to look at many factors in the treaty negotiation process. See Jerry Z. Li, The Legal Status of Three Sino-U.S. Joint Communiqués, 5 Chinese J. Int’l L. 617, 624–25 (Nov. 2006).

37. Vienna Convention, supra note 27, art. 34. The Convention outlines exceptions to the general rule, primarily where third parties express consent. Id. arts. 35–36. The similarities between contracts and treaties offer an opportunity to compare third-party rights and obligations. In both contracts and treaties, a third party does not have rights unless the parties intended to create rights for the third party. Just as courts interpreting contracts look outside the document itself to ascertain the parties’ intent, the interpretation of treaties can expand to include sources other than the treaty itself; for instance, previous drafts and preparatory works can indicate an intent to create third-party rights and obligations. See, e.g., Sital Kalantry, The Intent-to-Benefit: Individually Enforceable Rights Under International Treaties, 44 Stan. J. Int’l L. 63, 74–83 (2008).


39. Id. ¶ 25. The parties did not call upon the Court to demarcate the border, but merely asked to identify the relevant international legal rule. Id.

40. Id.

41. Id. ¶ 27.

42. Id. ¶ 28.

43. Id. ¶ 33.
The practice of submitting reservations to treaties also illustrates the operation of obligational reciprocity. As a general matter, states need not accept treaties wholesale. The law of treaties permits states to condition ratification on exclusion of particular treaty provisions. Once submitted, a state’s treaty reservation stands for acceptance or rejection by the treaty’s remaining states parties on an individual basis. If accepted by another state party, the reservation modifies the agreement between the reserving and accepting state to the extent of the reservation. If the reservation is rejected, the entire provision in question does not operate between the two states. Thus, the practice of reservations closely observes the principle of obligational reciprocity. It also illustrates the existence of bilateral interactions within multilateral treaty systems.

Obligational reciprocity operates in emerging forms of international legal obligations as well as treaties. International law increasingly recognizes a role for quasi-contractual instruments that do not rise to the level of treaties. States and international law scholars have distinguished this so-called “soft law” from binding treaties and customs. It often takes the form of nonbind-

44. Vienna Convention, supra note 27, art. 19.
45. Id. Reservations that operate contrary to the “object and purpose” of treaties are generally forbidden. Id. art. 19(b). Furthermore, some treaties expressly forbid reservations or limit the subject of permissible reservations. For instance, the 1993 Chemical Weapons Convention prohibits any reservations to the provisions of the Convention, permitting reservations only to the Convention’s Annex. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction art. 12, opened for signature Jan. 13, 1993, 1974 U.N.T.S. 45, S. Treaty Doc. No. 103–21 (1993). Other treaties appear to limit reservations through more subtle textual schemes. The Convention against Torture addresses reservations in three substantive articles, suggesting that states may not submit reservations to articles that do not include an explicit reservation provision. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment arts. 28–30, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 8. The U.N. Human Rights Committee has gone further with respect to human rights instruments. In its General Comment 24, the Committee observed, “Although treaties that are mere exchanges of obligations between States allow them to reserve inter se application of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction.” Off. of High Comm’r for Hum. Rts. [OHCHR], General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, CCPR/C/21/Rev.1/Add.6 (Apr. 11, 1994), available at http://www.unhchr.ch/tbs/doc.nsd/0/69c525b086f72957ec12563ed004ec7a/Open document.
47. Vienna Convention, supra note 27, art. 21.
48. The International Court of Justice confirmed the contractual nature of the treaty reservation system in the 1951 Advisory Opinion on Reservations to the Genocide Convention, supra note 46. The Court observed that “no reservation was valid unless it was accepted by all the contracting parties.” Id. at 6. Commentators have minimized the legal effect of the Court’s conclusion, noting that the Court merely addressed reservations to the Convention as positive law, leaving unaddressed the mitigating effect of treaty provisions that have attained customary status. See Mark Villiger, Customary International Law and Treaties 260 (1985).
Reciprocity doctrine traditionally operates at an observational level as well as an obligational level. Once the parties bind themselves, the continued force of a treaty is contingent on reciprocal observation by states parties. That is, states are bound by a treaty only to the extent that other states observe the treaty’s substantive provisions in practice. Material breach of a treaty is widely accepted as a sufficient cause for an affected party to terminate or suspend operation of the provision at issue or, in extreme cases, the entire treaty. In an effort to refine the doctrine of reciprocity, interna-


51. Soft law regulations are occurring with more frequency. Williamson observes:

Diplomats and their governments sometimes prefer concluding soft law instruments because doing so can be easier than adopting treaties. Soft law instruments are advantageous because they avoid constitutional and other domestic legal requirements in most democracies for entry into force that apply to treaties. Another commonly cited advantage is the very fact that soft law is nonbinding, making it easier to induce a reluctant state to become a party, and overcoming a state’s fears that it might be committing itself to a course of conduct when future circumstances are hard to foresee.


52. "As soft law, Antarctic Treaty recommendations carry a certain measure of legal authority. Consultative Parties hold strong expectations that norms contained in adopted recommendations will command respect by all ATCP governments, as well as by other Antarctic Treaty Parties, and that these norms will be adhered to over the long term." Joyner, *supra* note 51, at 414.

53. Lord McNair, *The Law of Treaties* 575 (1961). Lord McNair observes, "[I]t is not uncommon for the injured state, by way of sanction, to suspend the operation of a provision corresponding to, or analogous with, the provision broken." Id. However, he further notes the uncertain and then-largely uncodified status of his rule. Id. The U.S. Supreme Court has confirmed the general rule of suspension in response to breach. Justice Iredell observed, "It is part of the law of nations, that if a treaty be violated by one party, it is at the option of the other party, if innocent, to declare, in consequence of the breach, that the treaty is void." *Ware v. Hylton*, 3 U.S. 199, 261 (1796). In 1986, in response to New Zealand’s refusal to grant reciprocal access to ports and air strips, the United States suspended observance of its security obligations toward New Zealand under the 1951 ANZUS Pact. *Office of the Legal Adviser, Dept. of State*, 1 Cumulative Digest of United States Practice in International Law 1981–88 (Marian Nash (Leich) ed., 1993) (citing Australia, New Zealand, United States Security Treaty (ANZUS Pact), Sep. 1, 1951, 3 U.S.T. 3420, T.I.A.S. 2493).

54. Vienna Convention, *supra* note 27, art. 60. The Convention describes a material breach as either repudiation of the treaty or "violation of a provision essential to the accomplishment of the object or purpose of the treaty." Id. art. 60, ¶ 3(a) & (b). But see Herbert W. Briggs, *Unilateral Denunciation of Treaties: The Vienna Convention and the International Court of Justice*, 68 Am. J. Int’l L. 51 (1974). Commenting on the ICJ’s 1971 Namibia advisory opinion, Briggs lamented what he considers Court dictum,
tional lawyers have identified two strains of observational reciprocity in state practice and treaty law: “positive” and “negative” reciprocity.

Negative reciprocity, perhaps the more intuitive strain, refers to state suspensions of legal obligations in response to breaches.\(^{55}\) The 1969 Vienna Convention on the Law of Treaties codified much of the traditional law of treaties.\(^{56}\) It outlines a range of options for the exercise of negative reciprocity, drawing a clear distinction between bilateral and multilateral treaties. The Convention subjects bilateral treaties to less stringent limitations on the exercise of negative reciprocity by permitting suspension or termination at the discretion of the non-breaching party.\(^{57}\)

In the case of material breach of a multilateral treaty, non-breaching parties have four options. First, with the unanimous agreement of the treaty parties, they may terminate the treaty in whole or in relevant part in their mutual relations with the breaching state.\(^{58}\) Second, subject again to unanimous agreement, the parties may terminate the treaty as between all the parties, essentially dissolving the agreement altogether.\(^{59}\) Third, states that have been specially affected by the breach may unilaterally suspend the treaty in their relations with the breaching state.\(^{60}\) Finally, any party other than the breach state may suspend the treaty when the breach “radically changes” the parties’ positions with respect to future performance.\(^{61}\)
The Vienna Convention enjoys wide ratification. In addition to binding states parties, the Convention’s reciprocity regime likely binds non-parties as a matter of customary international law. The Commentary to an earlier draft convention indicates that the majority of contemporary jurists regarded the statements on reciprocity contained in paragraphs one through three of Article 60 as reflective of customary rules. Preparatory works on negative reciprocity had attempted to divest states of unilateral authority to suspend treaty provisions in case of breach. A draft convention on treaty law devised a procedure whereby suspensions in response to breach would be provisional only, requiring confirmation by an international tribunal to have permanent effect. However, states—rejecting such limits—ultimately retained unilateral authority to exercise negative reciprocity under the Vienna Convention.

Positive reciprocity is the second strain of obligational reciprocity. It refers to states’ efforts to induce reciprocal compliance from other actors through continued respect for an international norm or treaty provision, notwithstanding their legal right not to comply by virtue of breach or non-

63. Although the United States is not a party to the Vienna Convention, U.S. courts have recognized the Vienna Convention as codification of customary international law. See Chubb & Son, Inc. v. Asiana Airlines, Inc., 214 F.3d 301, 308 (2d Cir. 2000). Additionally, the international legal community has recognized the customary status of the Vienna Convention:

[A]ccording to a widespread opinio juris, legal conviction of the international community, the Vienna Convention represents a treaty which to a large degree is a restatement of customary rules, binding states regardless of whether they are parties to the Convention. Even before the Convention entered into force, its provisions had been invoked by states and by the International Court of Justice.

66. The Vienna Convention’s rules on reciprocity replicate to some extent preparatory work of the Harvard Research in International Law project. Conducted between 1932 and 1935, the project produced a Draft Convention on the Law of Treaties as part of its comprehensive, multi-volume survey of International Law. Draft Convention on the Law of Treaties, in 29 Am. J. Int’l L. Supp. (1935), reprinted in 2 The HARVARD RESEARCH IN INTERNATIONAL LAW: ORIGINAL MATERIALS 1077 (John P. Grant & J. Craig Barkler eds., 2008) [hereinafter HARVARD RESEARCH COMMENTARY]. Article 27 of the Draft Convention recognizes suspension of a treaty obligation as a legitimate response to breach. Id. The Draft Convention, however, requires consultation or authority from “a competent international tribunal” prior to declaring that the treaty itself is no longer binding. Id. The researchers were concerned that states ought not “be the final judges in their own causes by permitting them unilaterally to terminate the treaty as between themselves and the party or parties alleged to have violated the treaty.” Id. Article 60 of the Vienna Convention reveals that states chose not to adopt the consultation requirement. Vienna Convention, supra note 27, art. 60.
67. HARVARD RESEARCH COMMENTARY, supra note 66, at 1077.
accesion by other states. For example, a number of treaties include offers to non-state parties to comply on an ad hoc basis or to express their intent to observe the instrument’s primary rules. In exchange, state parties agree to reciprocate. Although positive reciprocity represents a more hopeful strain of the doctrine, it is not an obligation under general international law. Its operation is usually restricted to treaties bearing such express provisions or offers made as a matter of state policy rather than law.

The previous discussion demonstrates that states have developed and even codified highly refined secondary rules for treaty interpretation and application. These rules account for both obligational and observational components of reciprocity in treaty practice. The following section discusses the extent to which these rules operate in the separate realm of customary international law.

B. Reciprocity and Customary International Law

While treaty law is often cited as the chief source of modern international legal obligations, it by no means represents the full extent of international constraints on states’ conduct. In fact, in a hierarchy of international law, some commentators would give primacy to custom. According to a widely accepted formula, customary international law is general and consistent state practice exercised out of a sense of legal obligation. As conflicting case law and scholarship attests, however, the formula is much more easily stated than applied. The ambiguous nature and content of customary international law complicates its relationship with the principle of reciprocity. This section demonstrates that reciprocity operates slightly differently in the


70. The Vienna Convention reflects no agreement between states on positive reciprocity evidently reserving the issue for resolution on a treaty-by-treaty basis. See Vienna Convention, supra note 27.


realm of customary international law than in treaty law because custom does not require the consent of the parties to be binding. As a result, observational reciprocity is much more salient in this area than obligational reciprocity.

Customary law supplements and interacts with treaty law in a complex manner.\textsuperscript{75} International norms and rules often migrate between custom and treaty.\textsuperscript{76} Treaty conferences not only create new law but also codify existing customary rules into the less ambiguous form of treaties. Similarly, provisions of widely-ratified and effective treaties often mature into customary rules that bind all states regardless of their individual ratification status.

For instance, custom played a decisive role in the \textit{North Sea Continental Shelf} cases addressed above. While the ICJ summarily dismissed the contention that the Continental Shelf Convention bound West Germany as a non-party, the Court entertained far more seriously the Danish and Dutch position that the Convention’s provisions reflected preexisting customary international law.\textsuperscript{77} Ultimately, the Court found the evidence inadequate to support the argument that the Convention had merely codified preexisting customary rules concerning the demarcation of international nautical boundaries.\textsuperscript{78} Instead, the Court determined that the rule supporting the Danish and Dutch stance was “a purely conventional rule.”\textsuperscript{79} The Court also rejected the assertion that the Convention had matured into customary law after its entry into force. However, it conceded the principle behind the Danish and Dutch argument by noting that treaties can create binding norms if their provisions mature into custom. But the Court established a high burden of proof on parties seeking to give treaty provisions the exceptional effect of binding states that had not ratified them.\textsuperscript{80} In a similar vein,

\begin{quote}
[Claim[s] must be gauged against the current state of international law, looking to those sources we have long, albeit cautiously, recognized. “Where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”
\end{quote}

\textit{Id.} (quoting The Paquete Habana, 175 U.S. 677, 700 (1900)).
Theodor Meron has identified examples of custom operating as a legal backstop where failures of reciprocity prevented treaties from operating. 81

Early twentieth century scholarship suggested that the doctrine of reciprocity applied with equal force to both customary and treaty law. 82 Lack of reciprocal obligation or observance gave rise to rights of suspension of customary law. 83 However, current scholarship suggests that reciprocity might operate differently in the realm of custom. 84 At a minimum, this is likely true for obligational reciprocity. By definition, established customary norms bind states regardless of formal or express indicia of consent such as ratification. 85 Customary law reaches all states by virtue of their claims to sovereign status. Thus observance of customary norms is not subject to the condition of express reciprocal commitment from other states. Yet in the long term, repeated and especially widespread disregard or suspension of a rule of customary law would certainly undermine the element of state practice required for the rule to sustain its binding force.

Custom may not be an effective check on the operation of reciprocity in international law. Customary international law recognizes the status of persistent objector, 86 which refers to states that consistently and expressly pur-


82. KALSHOVEN, supra note 9, at 24 (citing Le Fur, supra note 9). Le Fur contended that the doctrine of reciprocity applied equally to conventional and customary law. He observed that “[r]eciprocity is fundamental to a system of conventions between equals.” Without reciprocity, concluded Le Fur, “international law would work toward its own destruction.” Id. at 24 (translated by Kalshoven).

83. ZOLLER, supra note 9, at 15.

84. MARK E. VILLEGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 274–75 (1985). Villeger contends that Article 60(5) operates with respect to both conventional and customary norms. Id. The International Law Commission has observed that the maxim inadimplenti non est adimplendum “was not a principle that applied to international law in general and was apparently not applicable in the context of customary law.” Summary Records of the 2590th Meeting, [1999] 1 Y.B. Int’l L. Comm’n 165, U.N. Doc. A/CN.4/SER.A./1999.

85. Although the formation of custom requires “general” practice, unanimous or universal practice or accession is not required to establish general obligation. See 1 HERSCH LAUTERPACHT, INTERNATIONAL LAW: COLLECTED PAPERS 68 (Elihu Lauterpacht ed., 1970). Lawyers in the U.S. Department of Justice Office of Legal Counsel expressed a skeptical view of the legal status of customary law, in part because it was not based on the express consent of states. Memorandum for William J. Haynes II, Gen. Counsel, Dep’t of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002) reprinted in THE TORTURE PAPERS, supra note 8, at 38, 72.

86. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §102, cmt. d (1987) (hereinafter RESTATEMENT (THIRD) OF FOREIGN RELATIONS). Some writers express less enthusiastic support for the doctrine of persistent objection. See SHAW, supra note 32, at 86. Shaw limits the doctrine to states that have objected since the origin of the custom in question.
port to opt out of particular customary norms. While some customary norms may not be subject to persistent objection, many can be avoided by rigorous exercise of objections. It is foreseeable that states bound by a customary norm would decline to apply that norm to persistent objectors on the basis of lack of reciprocal obligation. Thus persistent objection may be an exception to custom’s non-requirement of express obligational reciprocity.

For instance, suppose that in the North Sea Continental Shelf cases Germany had conceded the customary status of the Continental Shelf Convention provision in question. Imagine that Denmark had persistently objected to the rule. Germany might then have argued effectively for an exercise of negative reciprocity with respect to this customary norm, at least vis-à-vis Denmark. Germany could have claimed that though it was bound to respect non-objecting states’ boundaries with regard to the norm, Germany did not owe such respect to Denmark for its claim to exceptional excusal from the rule. No authoritative source resolves the scenario, yet the logic of obligational reciprocity appears apposite.

Although the United States is not a party to the 1977 Additional Protocols to the Geneva Conventions, it has supported portions of the Protocols as reflective of customary international law. For instance, the United States has indicated that the Protocol I provisions on medical transportation of wounded, including the requirement that aircraft land for inspection when summoned in contested territory, reflect custom. Yet the United States makes clear that a summons to land need only be respected as a customary rule where “there is a reasonable basis to believe the party ordering the landing will respect the Geneva Conventions” or where the opposing force concludes an agreement to honor the rule in question itself. Thus reciprocal commitment to the law of war conditions the United States’ obligation to respect this customary norm.

In the context of customary international law, states insist less on obligational reciprocity than observational reciprocity—that is, reciprocal practice. As demonstrated previously with respect to treaty-based norms, some cus-

---

90. Id.
91. See supra text accompanying notes 66–68.
tomary norms enjoy a degree of insulation from negative reciprocity. Peremptory norms, or so-called *jus cogens*, describe a body of law widely accepted as binding all states in all situations.\(^92\) Like custom, *jus cogens* does not require express consent. *Jus cogens* is not susceptible to derogation or preemption by treaty.\(^93\) Even adherents to the doctrine of persistent objection usually concede that states may not opt out of *jus cogens* norms.\(^94\) In fact, exemption from persistent objection may be a hallmark of *jus cogens*, distinguishing it from ordinary customary international law. That distinction itself, however, lends a degree of credibility to claims that negative reciprocity remains available to states with respect to ordinary customary norms.

C. Reprisal Distinguished

The practice of reprisal has also evolved from a fundamental and nearly universally recognized aspect of international law into a complex and contentious sanction. While reprisal’s application in the evolving international legal system is disputed, there is consensus on some limiting principles.

First, reprisals are reactive sanctions. Defined simply, reprisals are violations of international law undertaken in response to unauthorized violations by another subject of international law.\(^95\) Breach of a binding rule is an absolute prerequisite to legitimate reprisal under nearly all conceptions of the practice.\(^96\) Reprisal also requires a degree of privity between parties. Generally, legitimate reprisals must be in response to breaches which have adversely affected the state in question.\(^97\) Accordingly, no authority recognizes a right to anticipatory reprisal.

A second prerequisite for the exercise of reprisals is international legal personality.\(^98\) Only entities authorized to act within the international legal

---

\(^92\) *See Re statement (Third) of Foreign Relations*, supra note 86, cmt. k; United States v. Matta-Ballesteros, 71 F.3d 754, 764 (9th Cir. 1995).


\(^95\) Naulilaa Case, 2 R.I.A.A., 1011 (1928), reprinted in *Whiteman, Digest of International Law* 148–49 (1963). The case, heard by an international arbitration tribunal established by the Versailles Treaty, addressed a German raid on Portuguese South-West Africa in retaliation for the death of three German citizens. “The *sine qua non* of a legitimate resort to reprisals is that there should have been a previous violation of international law by the other party . . . .” *Id.* The tribunal rejected Germany’s claim to a legitimate right of reprisal, finding that Portugal had not engaged in any prior breach of international law but had rather killed the German citizens by accident. *Id.*


\(^98\) Kalshoven, supra note 9, at 36–37. Kalshoven notes that reprisals, though aimed at the offending state, “almost certainly will have their direct impact on individuals who, as likely as not, are innocent of the wrong provoking the reprisal.” *Id.* at 42.
system may carry out reprisals.\footnote{OPPENHEIM'S INTERNATIONAL LAW 138 (Hersch Lauterpacht ed., 6th ed. 1948) (hereinafter OPPENHEIM 2).} Classic international legal theory conceives of the state as the primary, if not sole, legal actor.\footnote{See Henry Wheaton, Elements of International Law 32 (Coleman Phillipson ed., 3rd ed. 1916); Charles H. Stockton, Outlines of International Law 61–63 (1914). Though generally adhering to the traditional model of international legal personality, Ian Brownlie observes that international organizations as well as states may satisfy conditions precedent to international personhood. BROWNLIE supra note 88, at 58–59. International organizations such as the United Nations and regional human rights bodies are increasingly recognized as powerful actors in international relations and law. The exercise of reprisal rights by international organizations is not, however, well developed in practice or theory. Kalshoven concludes that international organizations should be included as possible participants in the practice of reprisal. KALSHOVEN supra note 9, at 28–29. International humanitarian organizations, including the International Committee of the Red Cross, are not parties to the Geneva Conventions. However, in the event that a Protecting Power is unable to fulfill its duties, "the following "substitutes" are available to fulfill their duties: 'an organization which offers all guarantees of impartiality and efficacy,' a neutral State or such an organization, or 'a humanitarian organization, such as the International Committee of the Red Cross." Christiane Bourloyannis, The Security Council of the United Nations and the Implementation of International Humanitarian Law, 20 DENV. J. INT'L L. & POL'T 335, 337 (1992) (quoting Common Article 8, ¶ 1 of the First, Second and Third Geneva Conventions and Article 9 of the Fourth Geneva Convention). This common article does not explicitly state that the right to reprisal is included in this delegation of responsibilities. See also Brian D. Tittmmore, Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations, 53 STAN. J. INT'L L. 61 (1997) (discussing whether U.N. Peacekeeping troops should be subject to the rights and duties associated with International Humanitarian Law). Notwithstanding instances where non-governmental or supra-national organizations take on the duties of states, it is difficult to imagine them engaging in reprisal. R\footnote{Thus, international human rights law envisions individuals as both beneficiaries and agents of enforcement. Twentieth century conceptions of human rights posit that individuals benefit from rights directly and merely by virtue of the inherent qualities of being a person. By comparison, traditional concepts of international law recognized individual protections only in a derivative sense. Benefits enjoyed by individuals under international law flow indirectly from the person's status as an agent or as chattel of the state. Modern human rights law also provides for an individual role in enforcement. A number of human rights bodies have adopted complaint systems, permitting vindication of rights by individuals directly against member states. In this regard, individual enforcement in human rights law departs from the classic, sovereign-centric system of state self-help. R\footnote{See U.S. DEPT. OF THE ARMY, FIELD MANUAL 27–10: THE LAW OF LAND WARFARE, ¶ 497 (1956): [Reprisals] should never be employed by individual soldiers except by direct orders of a commander, and the latter should give such orders only after careful inquiry into the alleged offense. The highest accessible military authority should be consulted unless immediate action is demanded, in which event a subordinate commander may order appropriate reprisals upon his own initiative. Id. The Canadian Armed Forces manual provides, "The decision to take reprisal action must therefore be authorized at the highest political level. Operational commanders on their own initiative are not authorized to carry out reprisals." OFFICE OF THE JUDGE ADVOCATE GENERAL OF CANADA, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS, 15–3 (2004). The British Manual of Military Law includes a similar reservation of authority. MINISTRY OF DEFENCE, BRITISH MANUAL OF MILITARY LAW, pt. III ¶ 645 (1958). Even the earliest codifications of reprisal doctrine reserved their authorization to the highest level of command. Accordingly, the Oxford Manual for Military Law of 1880 reserved reprisals to authorization by "the commander in chief." Institute of International Law, Oxford Manual}
Most importantly, reprisals can only be undertaken to induce or compel renewed compliance with the rule breached. The overarching purpose of reprisal “is to coerce the addressee to change its policy and bring it into line with the requirements of international law.”103 Two important restraints on reprisal flow directly from its purpose. First, reprisals are subsidiary.104 Subsidiarity requires that states exhaust less drastic means of enforcement, such as diplomatic protest, prior to resorting to reprisal. It performs the important function of reducing miscommunication of motives through breaches of international law. Threats or warnings of reprisals are considered prerequisites to actual reprisals.105 Second, reprisals must be proportionate to the violations that provoke them.106 Though it is an ambiguous standard, proportionality ensures that the scale of reprisals does not become unmoored from its purpose of preventing repeat violations.107 Reprisals include retaliatory, punitive, and rehabilitative elements, all directed at inducing renewed compliance. Rather than resurrecting compliance, disproportionate reprisals have the effect of provoking further retaliation. Proportionality purports to restrain such cycles of escalating breaches.

There are tempting connections to be drawn between the principal of reciprocity and the practice of reprisal. At the most basic level, each constitutes a state response to a counterpart’s breach. Reciprocity and reprisal are thus closely related as means of state self-help in the international legal system. Each is also a product of states’ peculiar status as both subjects and authorities in the international legal system.108 Early attempts to codify authority and limits concerning reprisal and reciprocity often conflated the two or grounded the former in the latter.109 Yet important distinctions differentiate reciprocity from reprisal and illustrate the theoretical foundations of each form of sanction.


103. Kalshoven, supra note 9, at 33.

104. Id. The International Arbitrators in the Naulilaa Case noted that German reprisals should have been preceded by a demand for reparations. Naulilaa Case, supra note 95.

105. Darcy, supra note 96, at 193.

106. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 246, ¶ 46 (July 8); Naulilaa Case, supra note 95; Kalshoven, supra note 9, at 33.


108. Kalshoven, supra note 9, at 21–22 (“International society is characterized by the ambiguous position of States as member-subjects and authorities at the same time.”).

109. See Oxford Manual, supra note 102, art. 84. “Reprisals are an exception to the general rule of equity, that an innocent person ought not to suffer for the guilty. They are also at variance with the rule that each belligerent should conform to the rules of war, without reciprocity on the part of the enemy.” Id. While the Manual formed the basis for negotiations that produced the Hague Regulations of 1899, its observations on reprisals and reciprocity were not reproduced.

Uncharacteristically, Lauterpacht adds some confusion in his description of reciprocity as an element of reprisal. Lauterpacht describes “negative reprisal” as “refusal to perform such acts as are under ordinary circumstances obligatory, such as the fulfilment of a treaty obligation or the payment of a debt.” Oppenheim 2, supra note 99, at 140.
Negative reciprocity and reprisal differ most significantly in their respective effects on the underlying legal rule.\textsuperscript{110} Reprisal assumes, and seeks to compel, continued operation of the law in question. In this sense, reprisal affirms international law, reflecting the importance and value that states place on compliance.\textsuperscript{111} The temporal component of reprisal is illustrative: international law authorizes reprisals only while the offending state persists in breach.\textsuperscript{112} The offending state extinguishes the legal basis for reprisal when it realigns itself with the norm in question. Negative reciprocity, by contrast, suspends or terminates the legal obligation altogether. Actions justified by failure of reciprocal observance regard the law in question as extinguishable or entirely inapplicable in the event of breach.

Unlike reprisal, reciprocity is not formally subject to the requirements of subsidiarity and proportionality.\textsuperscript{113} To exercise negative reciprocity, states need not necessarily exhaust other means of sanction. Material breach is sufficient. Furthermore, negative reciprocity can be exercised in an anticipatory sense. Faced with persistent evidence that a counterpart intends not to honor a legal rule, a state might reasonably regard the norm as inapplicable in its relations with that counterpart. Obligational reciprocity permits states to suspend or withhold operation of a legal rule without waiting for a material breach. Recurring objections to a norm in question, formal treaty reservations, and consistent patterns of state practice would indicate future intent to disregard an international norm. In this sense, obligational reciprocity operates less like a sanction than a mere determination of applicability—in other words, as a secondary rule of international law.

The principle of negative reciprocity operates under other restraints that do not limit the practice of reprisal. Negative reciprocity operates with respect to particular provisions of international law. As a general matter, the reach of reciprocity is limited to the rule breached or repudiated. Legal doctrine limits suspension of entire legal covenants or regimes in favor of suspension of the particular provision breached by a counterpart. Negative reciprocity does not authorize suspension or termination of unrelated or even collateral legal norms. Reprisal is not similarly restricted. Reprisal may take the form of breach of an entirely separate or unrelated legal provision.\textsuperscript{115} For instance, in response to a breach of diplomatic immunity, a state may violate the protected economic interests of the state concerned, so long as it observes the principles of subsidiarity and proportionality. In this regard, the

\textsuperscript{110} Maurice Greenspan notes, "Reprisals are illegitimate acts of warfare, not for the purpose of indicating abandonment of the laws of war, but, on the contrary, to force compliance to those laws." \textit{Maurice Greenspan, The Modern Law of Land Warfare} 467–68 (1939).

\textsuperscript{111} Kalshoven, supra note 9, at 43.


\textsuperscript{113} Kalshoven, supra note 9, at 363.

\textsuperscript{114} Vienna Convention, supra note 27, art. 60, ¶¶ 1–3.

\textsuperscript{115} Kalshoven observes that "reprisals need not affect the same norm as has been violated by the original offender." \textit{Kalshoven, supra note 9}, at 25.
means selected for reprisal are a function of anticipated effect on compliance rather than an effort to match or reciprocate the addressee’s breach. By contrast, reciprocity is an effort to reestablish a position of equality—a leveling of comparative legal obligations and conduct.

III. Reciprocity and the Development of the Law of War

The law of war has always included its own system of secondary rules that supplement the rules that apply to all international law. This section argues that the history of the law of war and its relationship with reciprocity reveals a trajectory of development, refinement, and obscuration of reciprocity doctrine. The law of war has long included strong evidence of conditions of reciprocity in both its specific and diffuse forms. The earliest laws of war relied on professional custom and ensured reciprocal observance by restricting application to elite classes of combatants. Later positive provisions included express conditions on application that vindicated similar concerns over combatants’ capacity and willingness to observe constraints. While some of these provisions were enforced only sporadically and ultimately vanished, they were often replaced by veiled conditions on the application of the law of war that had much the same effect as explicit conditions of reciprocity. At times, state reservations reinforced restrictive provisions on application. Even after the most important and humanitarian-focused revision of the law of war in 1949, reciprocity was never entirely eliminated in a positivist sense. Rather, conditions of reciprocity merely changed form.

A. Early History

Just as warfare has always included restraints on conduct, the law of war has nearly always limited the application of its rules to specified circumstances and persons. Although prohibitions on inhuman or unnecessary killing and destruction are nearly universal, they are also nearly universally qualified. Numerous exceptions have succeeded the seemingly categorical injunction, “Thou shalt not kill.” Jean-Jacques Frésard observes that “[r]eligious themselves are the first to specify, more or less explicitly, that the injunction concerns above all our people. The others, the ‘unbelievers,’ infidels and apostates, may be run through by the swords of men when they are not simply delivered up to the sword of God.” For example, ancient

---

116. According to Kalshoven, “[I]n selecting a reprisal action the decision-makers in the State will be guided by considerations of estimated effect rather than reciprocity . . . .” Id.
117. See supra discussion accompanying notes 21–26, discussing secondary rules in international law.
118. See supra discussion accompanying notes 16–20.
121. Id.
Hebrews distinguished protections for civilians belonging to immediate enemies from civilians belonging to remote enemies. Drawn from the Bible, such customs permitted a free hand in dealing with the former, even permitting genocide, while protecting the latter and their property from arbitrary violence.\textsuperscript{122}

Although strong evidence supports the law of war’s religious foundations,\textsuperscript{123} a second wellspring for many early restraints on conduct in war was the sense of fraternity between belligerents.\textsuperscript{124} The military class developed a sense of respect and honor that called for restraint among its members. Combatants began to appreciate the long-term benefits of such restraints as honoring surrenders and respecting the wounded comrades and enemies alike.\textsuperscript{125} Only the warrior class observed these rules.\textsuperscript{126}

The preterit law of war always operated most reliably between the professional military classes of homogeneous cultures.\textsuperscript{127} Some have argued that its restrictive application resulted from the conclusion that only members of the professional military class could guarantee compliance with battlefield proclamations.\textsuperscript{128} A common thought was that only those schooled in the customs and traditions of organized combat would observe its elaborate constraints—undoubtedly, an early manifestation of reciprocity. Furthermore, the relatively limited and conjunct class of combatants ensured accountability for atrocities. Acts of treachery ignited costly and prolonged blood feuds.\textsuperscript{129} Restraint tended to diminish in conflicts between elites and lower social orders where such vengeance-based sanctions were unlikely.\textsuperscript{130}

\begin{thebibliography}{99}
\bibitem{124} Michael Howard observes, “Restraint on war grew out of the cultures of the war-making societies, rather than being imposed on them by some transcendent moral order.” Michael Howard, Constraints on Warfare, in The Laws of War 2 (Michael Howard et al. eds., 1994).
\bibitem{125} Id. at 3.
\bibitem{126} The terms bellum romanum and guerre mortelle often refer to early European conflicts fought against barbarians or infidels without restraint or discrimination. Id. Bellum romanum was waged against three categories of enemy: “rebels, infidels, and savages.” Id. at 3.
\bibitem{127} Id. at 3 (explaining that earliest norms of combat applied as matters of professional respect between elite classes of warriors and were generally not extended to “barbarians” or “infidels”). Geoffrey Best observes, “[E]veryone with strong experience of the active conduct of war understood two things very well: first, that its laws and customs could only be observed in relation to circumstances and, second, that in any ordinary tussle between law and military necessity, law would have to be accommodating.” Geoffrey Best, Law and War Since 1945, at 22 (1997).
\bibitem{128} For example, Robert Stacey observes, “The laws of war governing pitched battles were quite detailed, but they applied only to knights and squires, in the later Middle Ages the only two groups capable of bearing hereditary insignia.” Robert C. Stacy, The Age of Chivalry, in The Laws of War, supra note 124, at 36.
\bibitem{129} See Geoffrey Parker, Early Modern Europe, in The Laws of War, supra note 124, at 54.
\bibitem{130} See id.; Harold Selesky, Colonial America, in The Laws of War, supra note 124, at 59 (observing that controls over the use of force “slip . . . away on the margins”). Selesky notes a high level of barbarity in engagements between English and French forces where the latter extensively employed Native American forces. Id. at 57–58. Confronted with an unfamiliar enemy, English soldiers did not observe the restraints associated with conflicts between professional armies. Id. at 85.
\end{thebibliography}
Geoffrey Parker suggests that durability of relations was the essential condition for restraint in war in pre-Enlightenment Europe, because it provided "some certainty that the two sides will meet again."\[131]\n
In the late eighteenth and early nineteenth centuries, professional fraternity and shared cultural identity receded as the foundations for restraint in war. Law of war historians note the development of relatively less exclusive behavioral customs in later periods of Western warfare. Their works suggest a convergence of natural law, military law, ecclesiastical precept and self interest.\[132]\n
However, restraints of the period had more to do with improving discipline and preventing distractions associated with looting and pillaging than with vindicating humanitarian concerns or universal rules of combat.\[133]\n
Thus while combatants began to recognize practical advantages to mutual restraint, the code that emerged remained in most respects "a contractual etiquette of belligerence" conditioned on opponents having both the capacity and resolve to respect its terms.\[134]\n
B. The Early Positive Law of War

Until the late eighteenth century, custom was nearly the sole source of international regulation of warfare. But by the mid-nineteenth century, custom had become sufficiently refined to be regarded as a "common law of war."\[135]\n
Custom had the advantage of widespread applicability but lacked

---

131. Parker, supra note 129, at 57. Surveying the Napoleonic Wars of the early nineteenth century, Gunther Rothenberg observes that self interest of combatants played an important role in the operation of restraints on warfare. Gunther Rothenberg, The Age of Napoleon, in THE LAWS OF WAR, supra note 124, at 97. Rothenberg argues that the traditional accounts of hostilities devolving from highly regulated encounters into total chaos are greatly exaggerated. Id. Accounting for exceptions, Rothenberg notes that combatants largely observed the laws and customs of warfare out of self interest with significant collateral humanitarian impact. Id.

132. Parker, supra note 129, at 42; see also Howard, supra note 124, at 4 ("[T]he were beginning to creep into the conduct of war not only prudential but ethical constraints on their treatment.").

133. Best, supra note 127, at 34.

134. Parker, supra note 129, at 41. Geoffrey Best observes, "Humanitarian commentators in our own time too easily fall into the good-natured error of transferring their universalist principles on to ages and peoples whose views of their own species were strictly discriminatory." Best, supra note 127, at 24–25.

135. Emer de Vattel mentions the customary status of the law of war in his early nineteenth century work on the law of nations:

The war being reputed equal between two enemies, whatever is permitted to one, in virtue of the state of war, is also permitted to the other. Accordingly no nation under pretence of justice being on its side, ever complains of the hostilities of the enemy, while they observe the terms prescribed by the common laws of war.

2009 / Reciprocity and the Law of War

389

clearly. Although states could not mandate universal consent, they eventually clarified the law of war through international legal instruments.


Reciprocity figured prominently in the earliest treaty-based law of war provisions. The first international legal instruments to regulate warfare were bilateral treaties. These instruments were not aimed at regulating warfare per se but were rather broad efforts to maintain peaceful and productive relations between states.136 The articles that addressed the law of war were brief and subsidiary to the purpose of the treaties. Scholars credit the U.S.-Prussia Treaty of Amity and Commerce as one of the earliest positive international formulations of restraint on the conduct of land warfare.137 The treaty established rules of neutrality in case either state engaged in war with a third state,138 guaranteed safe return to civilians in the event of war between the parties139, and provided for the safe and open detention of prisoners of war.140

Upon first inspection, the Treaty of Amity appears to be conditioned on obligatory and observational reciprocity. Indeed, the Treaty preamble recites reciprocity as a basis for the agreement.141 However, the Treaty’s provisions on the law of war were insulated from at least one general justification for suspension, termination in the event of war. The Treaty explicitly stated

136. See Documents on the Laws of War 4–5 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) (noting bilateral treaties also used to fix obligations of neutrality since the early seventeenth century) (citing W.E. Hall, The Rights and Duties of Neutrals 27–46 (1874)).


139. Id. art. 25. Article 25 took its form from a nearly identical clause proposed for the peace treaty concluding the American Revolutionary War. Bordwell, supra note 119, at 69–70. Benjamin Franklin drafted the original proposal to the U.S.-Great Britain Treaty of Peace and saw that it was included in the U.S.-Prussian Treaty. Id. at 70. R

140. U.S.-Prussia Treaty of Amity and Commerce, supra note 137, art. 24. Protections for prisoners of war included freedom from confinement in dungeons, prisons or ships; a prohibition on shackling; rations comparable to those provided to forces of the detaining power; and receipt of comfort items and supplies. Id. R

141. Id. pmbl. The Treaty’s preamble states:

His majesty the King of Prussia, & the United States of America, desiring to fix, in a permanent and equitable manner, the rules to be observed in the intercourse and commerce they desire to establish between their respective countries, his majesty & the United States have judged that the said end cannot be better obtained than by taking the most perfect equality and reciprocity for the basis of their agreement. Id. (emphasis added).
that it would persist in case of war between the parties, eliminating the
option to exercise negative reciprocity.\footnote{142. \textit{Id.} The preamble goes on to state:

\& it is declared, that neither the pretence that war dissolves all treaties, nor any other

whatever, shall be declared as annulling or suspending this \& the next preceding article, but

on the contrary, that the state of war is precisely that for which they are provided, \& during

which they are to be as sacredly observed as the most acknowledged articles in the law of

nature or nations.\textit{Id.} The last clause suggests a persistence or immunity from conditions of reciprocity, recognizing a nearly

peremptory status for the norms of Articles 23 and 24. It is uncertain how the parties envisioned this

provision would interact with the preamble’s stated commitment to the principle of reciprocity.

143. \textit{See, e.g., Treaty of Peace and Amity, concluded between the United States of America and the

Dey and Regency of Algiers, Feb. 11, 1822, reprinted in 2 TREATIES AND OTHER INTERNATIONAL ACTS OF

THE UNITED STATES OF AMERICA (Hunter Miller ed., 1931). The Treaty guaranteed safe passage to
diplomats and civilians in case of war between the parties. The parties disclaimed resort to war as a
response to breach prior to a three-month period of notice and redress. \textit{Id.} art. 16. The Treaty did not
address retaliation or reciprocity more explicitly. \textit{See also} Chilean-American Diplomacy Convention of

edu/19th_century/chile01.asp. The Treaty guaranteed the safe return of civilians from occupied territory
in the event of war. \textit{Id.} art. 23. Article 31 relegated retaliation for breach, including either negative
reciprocity or reprisal, to a subsidiary status. \textit{Id.} art. 31. In the event of breach, both states agreed to serve
notice and provide an opportunity for redress prior to exercising traditional forms of state self-help. \textit{Id.}
Reciprocity assumes a central place in the Treaty by virtue of the following opening passage from the
preamble:

[D]esiring to make firm and lasting the friendship and good understanding which happily
preval between both nations, have resolved to fix, in a manner clear, distinct and positive, the
rules which shall in future be religiously observed between the one and the other, by means of a treaty

\textit{Id.} pmbl. (emphasis added). In 1872, the United States and the Netherlands agreed, in the event of
hostilities, to allow a nine-month evacuation period for the citizens of each state, “in all freedom and
without hindrance.” \textit{The Law of War: A Documentary History, supra} note 122, at xiv.\textit{R}}

States continued to enact bilateral treaties to regulate conduct in war con-
tinued through the mid-nineteenth century.\footnote{144. \textit{See, e.g., Treaty of Peace and Amity, concluded between the United States of America and the

Dey and Regency of Algiers, Feb. 11, 1822, reprinted in 2 TREATIES AND OTHER INTERNATIONAL ACTS OF

THE UNITED STATES OF AMERICA (Hunter Miller ed., 1931). The Treaty guaranteed safe passage to
diplomats and civilians in case of war between the parties. The parties disclaimed resort to war as a
response to breach prior to a three-month period of notice and redress. \textit{Id.} art. 16. The Treaty did not
address retaliation or reciprocity more explicitly. \textit{See also} Chilean-American Diplomacy Convention of

edu/19th_century/chile01.asp. The Treaty guaranteed the safe return of civilians from occupied territory
in the event of war. \textit{Id.} art. 23. Article 31 relegated retaliation for breach, including either negative
reciprocity or reprisal, to a subsidiary status. \textit{Id.} art. 31. In the event of breach, both states agreed to serve
notice and provide an opportunity for redress prior to exercising traditional forms of state self-help. \textit{Id.}
Reciprocity assumes a central place in the Treaty by virtue of the following opening passage from the
preamble:

[D]esiring to make firm and lasting the friendship and good understanding which happily
preval between both nations, have resolved to fix, in a manner clear, distinct and positive, the
rules which shall in future be religiously observed between the one and the other, by means of a treaty

\textit{Id.} pmbl. (emphasis added). In 1872, the United States and the Netherlands agreed, in the event of
hostilities, to allow a nine-month evacuation period for the citizens of each state, “in all freedom and
without hindrance.” \textit{The Law of War: A Documentary History, supra} note 122, at xiv.\textit{R}}

2. \textit{The U.S. Lieber Code}

Despite the formative role of bilateral treaties in the effort to codify cus-
tomary restraints on warfare, the most influential nineteenth century codifi-
cation of the law of war was not itself an international instrument. Just as

\textit{Id.} The last clause suggests a persistence or immunity from conditions of reciprocity, recognizing a nearly

peremptory status for the norms of Articles 23 and 24. It is uncertain how the parties envisioned this

provision would interact with the preamble’s stated commitment to the principle of reciprocity.
surprising, the instrument in question arose in the context of a domestic conflict. U.S. General Order No. 100 of 1863—commonly called the Lieber Code after its author and promoter, Dr. Francis Lieber—is widely credited with kicking off the late nineteenth century trend of codifying the customs and usages of war into multilateral treaties. In addition to codifying pre-existing norms of respect for wounded combatants and prisoners, the Lieber Code added significantly to prevailing military custom. The Code dealt


To be sure, the Lieber Code was not the first articles of war issued to an army. Barbara Donagan notes that several early articles of war and even permanent legislation governed sixteenth and seventeenth century armies. Barbara Donagan, Codes of Conduct in the English Civil War, in 118 PAST AND PRESENT 65, 74–76 (1988). Such codes typically prescribed conduct of loyalty, but also included restraints on conduct toward civilians. Id. at 82. Examining legal limitations on seventeenth century European armies, Donagan identifies three primary sources of restraint: the law of nature and nations, the law of war, and military law. Id. at 74–75.

The pre-Lieber Code 1856 Paris Declaration Respecting Maritime Law is widely acknowledged to be the first multilateral law of war instrument. Paris Declaration Respecting Maritime Law, Apr. 16, 1856, 46 BFSP 26, reprinted in DOCUMENTS ON THE LAWS OF WAR, supra note 136, at 47–49. The Declaration did not address humanitarian concerns beyond respect for property and duties of neutral powers. Parties to the Declaration agreed to limit the use of privateers and the seizure of neutral property at sea. Id. at 49. As evidence that its rules were based on obligational reciprocity, the Declaration’s penultimate clause limits the parties’ obligations to states that have acceded to the Declaration. Id.

145. During the American Civil War, Lieber wrote:

How far rules which have formed themselves in the course of time between belligerents might be relaxed with safety toward the evildoers in our civil war, or how far such relaxation or mitigation would be likely to produce a beneficial effect upon an enemy who, in committing a great and bewildering wrong, seems to have withdrawn himself from the common influences of fairness, sympathy, truth and logic—how far this ought to be done at the present moment must be decided by the executive power, civil and military, or possibly by the legislative power. It is not for me in this place to make the inquiry. So much is certain, that no army, no society engaged in war, any more than a society at peace, can allow unpunished assassination, robbery, and devastation without the deepest injury to itself and disastrous consequences which might change the very issue of the war.

explicitly with regulation of occupied territory, guerrilla tactics, and even protections for civilians and their property.

Despite its encouraging humanitarian provisions, the Lieber Code took a harsh view of reciprocity. The Code provided, “The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war.” Subsequent articles reinforce the Lieber Code’s tolerance for retaliation by permitting the suspension of the Code’s protections in the event of enemy abuses.

It is unclear whether the Code’s references to retaliation meant to reserve a right to exercise negative reciprocity, belligerent reprisals, or both. Explaining the conditions for resort to retaliation, the Code notes only retributive goals. Reciprocity and retaliation share “the idea of doing the same thing in response to something.” Like negative reciprocity, retributive retaliation suggests an intent to balance accounts between forces rather than to inspire future compliance, the hallmark of belligerent reprisal.

In its final section, the Code addresses the law of war’s scope of application. The Code regarded the application of the laws and customs of war to internal conflicts as a matter of state discretion. Presaging later qualifications on rules applicable to internal conflicts, the Code denied that a state’s decision to apply the law of war had any legal effect on the legitimacy of

---

146. Lieber Code, supra note 144, arts. 1–7.
147. Id. arts. 81–85.
148. Id. art. 23.
149. Id. art. 27.
150. Id. arts. 61–62. Stone offers support for associating retaliation with reciprocity. JULIUS STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 354 (2d ed. 1959) (“The premise on which retaliation in war proceeds is, indeed, that a belligerent’s duty to observe the laws of war is not absolute, but conditional on the enemy’s reciprocation.”).
151. The first edition of Colonel William Winthrop’s highly influential treatise on Military Law does not address reciprocity. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (1886). His omission may not be surprising given that the positive law of war was still primarily restricted to national codes and instructions to armed forces. The major efforts to develop multilateral treaties on the law of war were still in nascent stages when Winthrop wrote. The omission of conditions of reciprocity from the second edition of Winthrop’s work in 1920 is less easily explained. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1920). The preface to the second edition advertises a material supplement to the previous edition’s law of war section. Id. at 7. Yet the section draws exclusively on pre-twentieth century sources for support, despite major multilateral codifications of the law of war at the 1899 and 1907 Hague Conferences. See infra Part III.C. It may be best to understand Winthrop’s work on the law of war, including the 1920 update, as a limited survey of nineteenth century custom.
152. Lieber Code, supra note 144, art. 28. Article 28 reads:

Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution.

Id.

153. ZOLLER, supra note 9, at 14. Zoller notes that the Latin root of retaliation, “talis,” developed from “talis” meaning “of the same quality.” Id.
154. Lieber Code, supra note 144, art. 152.
insurrection or rebellion. The Code does not indicate whether a rebel force’s compliance could compel reciprocal state observance. Humanitarian concerns are the only cited justification for applying the regular law of war to rebels. Although technically not binding on Confederate forces, the Code’s retaliation provisions clearly anticipated reciprocal observance by the armed forces of the South. With the exception of its use of guerilla warfare, the Confederate Army was in most respects a peer of the Union Army. In fact, a significant portion of the United States’ pre-Civil War professional military class had defected to the South. The Code granted belligerent—and consequently prisoner of war—status to a broad range of Confederate participants, including partisans, sutlers, reporters, and scouts. Only spies, traitors, and brigands not formally incorporated into the Confederacy’s forces were categorically excluded from protection. The Code thus expressed a strong preference for protecting conventional forces similar to those of the state in organization and conduct.


156. Lieber Code, supra note 144, art. 152.

157. Although the Confederate Army only mobilized one million troops to the Union Army’s 2.6 million, the composition of the two armies was similar. Both consisted of relatively small classes of officers and enlisted men with overwhelming numbers of new recruits. Since the Confederate Army was led by West Point graduates, its organization scheme was almost identical to the regular U.S. Army, and by extension the Union Army. The methods employed by the Confederate Army mirrored French École Polytechnique and the Napoleonic model. See Robert M. Epstein, The Creation and Evolution of the Army Corps in the American Civil War, 55 J. MILITARY HIST. 21, 22 (1991); see also HERMAN HATTAWAY & ARCHER JONES, HOW THE NORTH WON: A MILITARY HISTORY OF THE CIVIL WAR 10 (1983).

158. See HATTAWAY & JONES, supra note 157. Many officers from Southern states were either dismissed or allowed to resign from the Army at the beginning of the Civil War. Prior to resignations or dismissals, 1,105 officers were in the regular army. Id. Of this group, 809 officers remained with the Union army and 270 officers joined the confederacy. Id. The officers were almost all professionally trained at West Point. Id. “West Point graduates on the active list numbered 824; of these, 184 became Confederate officers. Of the approximately 900 military academy graduates then in civilian life, 114 returned to the Union army and ninety-nine others acquired southern commissions.” Id. Incidentally, Henry Heth, the West Point graduate who translated the French tactical guide used by both armies in the Civil War, later defected to serve in the Confederate Army. Epstein, supra note 157 at 23.

Geoffrey Best posits that the Lieber Code may have been a response to the character of the United States’ new enemy. Led by gentlemen and former members of its own armed forces, the Union Army could not have employed practices used against “Red Indians and Mexicans.” Best, supra note 127, at 41.

159. Lieber Code, supra note 144, art. 81.

160. Id. art. 90.

161. Id.

162. Id. arts. 82–84, 90–91, 103.
The Lieber Code was a great textual advance for positive humanitarian concerns in war. The Code is well-understood as a codification of the general common law of war applied as a matter of policy to a civil war. Despite its humanitarian attentions, the Code was conditioned on observational reciprocity. A series of efforts inspired by the Code demonstrated the continued role of reciprocity in international codifications of the common law of war.

3. Early Multilateral Law of War Treaties

Enthusiasm for codifying the law of war spread through Europe at the end of the nineteenth century. Pursuing diverse objectives, multiple efforts continued Lieber’s work. A Swiss businessman who observed the intense suffering of wounded and sick combatants at the Battle of Solferino led the movement that produced the 1864 Geneva Convention and its iterative incarnations. A scant ten articles, the Convention focused exclusively on humanitarian concerns for the wounded and contained no explicit limits on application or conditions of reciprocity.

However, other contemporaneous treaties placed far more emphasis on reciprocity. In 1868, Czar Alexander II of Russia invited the world’s major powers to St. Petersburg, a gathering which resulted in a declaration that renounced the use of exploding or inflammable substances in light projectiles. But the binding force of the Declaration was conditioned on the strictest obligational reciprocity. By its terms, the Declaration applied only to conflicts comprised exclusively of states parties to the treaty. The Declaration did not address consequences of breach between parties, presumably leaving questions of negative reciprocity to international law.


164. The United States reissued General Order 100 to its armed forces during the Spanish-American War. Wells, supra note 155, at 4–5.


166. Id. at n.5.

167. The Declaration provided in relevant part:

This engagement is obligatory only upon the Contracting or Acceding Parties thereto, in case of war between two or more of themselves: it is not applicable with regard to non-Contracting Parties, or Parties who shall not have acceded to it.

It will also cease to be obligatory from the moment when, in a war between Contracting or Acceding Parties, a non-Contracting Party or a non-Acceding Party shall join one of the belligerents.

Id.
In 1874, again on the initiative of the Russian Czar, European states convened in Brussels to draft an agreement on the laws and customs of war.\footnote{See Project of an International Declaration concerning the Laws and Customs of War (Aug. 27, 1874), available at http://www.icrc.org/ihl.nsf/INTRO/135/0OpenDocument.} The Brussels Conference undertook a much broader codification than its predecessor, addressing authority over occupied territory, means and methods of warfare, combatant status, and prisoners of war.\footnote{Id. Actually called a “project,” the Brussels Conference was not formally authorized to conclude a treaty but had hoped to produce a agreement on principles that states might endorse. See The Law of War: A Documentary History, supra note 122, at 152.} It also incorporated the 1864 Geneva Convention by reference.\footnote{Project of an International Declaration concerning the Laws and Customs of War, supra note 168.} However, the Brussels Declaration lacked support and suffered from substantive disagreements between less powerful states and Europe’s perennial military powers. Attempting a similarly broad codification of the law of war, the International Law Institute produced the 1880 Laws of War on Land.\footnote{Oxford Manual, supra note 102.} Perhaps mindful of state reluctance encountered at Brussels, its authors issued the Oxford Manual, intended for distribution by states to their armed forces. Like the Brussels Declaration, the Oxford Manual appears to have been merely a draft proposal rather than an authoritative or binding progression in the law of war.

Unlike their immediate predecessors and successors, neither the Brussels Declaration nor the Oxford Manual addressed reciprocity in either the obligational or observational sense. The limited effect of each instrument was doubtless the product of politics, diplomacy, and timing. Yet with the exception of the omission of reciprocity, their similarity in substance to contemporaneous instruments is striking.

C. Reciprocity and the Hague Tradition\footnote{Law of war scholars have noted a bifurcation of the modern jus in bello between rules derived from the Hague Regulations of 1899 and 1907 and rules usually appearing in the various iterations of the Geneva Conventions. The former rules are typically said to be of the Hague Tradition and concern primarily regulation of the means and methods used in warfare. Rules derived from the so-called Geneva Tradition typically focus on protections for the victims of warfare, including the wounded, sick, shipwrecked, and civilians. The bifurcation has always been slightly artificial as each tradition has consistently overlapped with the other. For instance, both the Hague and Geneva Traditions address protections for prisoners of war.}

Although they were innovative in many respects, the conventions produced at the Hague Peace Conferences of 1899 and 1907 resembled their predecessors in their insistence on reciprocity as a condition of application.

1. The Origins of the Hague Conventions

Still hopeful of achieving peace and limiting the effects of war through international law, as well as perhaps vindicating political and security concerns, Czar Nicholas II initiated the First Hague Peace Conference in
The Conference produced highly contentious discussions on arms limitations, the use of international arbitration and mediation to avoid war, and naval operations. By comparison, the Conference’s effort at codifying regulations of land warfare proved easy. The U.S. delegation reported strong similarities between the proposed regulations for land warfare and the still-operative Lieber Code. The influence of the 1874 Brussels Declaration was clear in the Conference’s organization and agenda. Ultimately, the Conference produced the 1899 Convention with Respect to Laws and Customs of War on Land. The Conference placed the bulk of the Convention’s substantive provisions in an annex of regulations containing 60 articles.

Shortly after the 1899 Conference concluded, there were calls for a second Conference. In 1907, the Second Peace Conference met at the Hague and produced thirteen conventions. Again, agreement on laws of land warfare proved relatively easy to conclude. Conference delegates seemed content to
reproduce in large part the work of the drafting efforts at Brussels and Oxford. The Fourth Hague Convention of 1907\textsuperscript{180} reproduced, with only slight variations, the work of the 1899 Conference’s Second Convention, including the regulations contained in the appendix.\textsuperscript{181}

Like its successful predecessors the Lieber Code and the St. Petersburg Declaration, the Fourth Hague Convention included an explicit reference to reciprocity. Article 2 of the Convention provided the clearest possible condition of obligational reciprocity, stating, “The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting powers, and then only if all the belligerents are parties to the Convention.”\textsuperscript{182} The clausula \textit{si omnes}, or general participation clause, thus ensured that the Convention would operate exclusively between Treaty parties. In the plenary session that reviewed the provision, Louis Renault, a law professor attached to the French delegation to the 1899 Conference, remarked that article 2 “merely sanctions the common law in the matter of the binding effect of the Regulations.”\textsuperscript{183} He also noted the appearance of the clause in the earlier St. Petersburg Declaration.\textsuperscript{184} At a later review, Russian delegate Fyodor de Martens, who would lend his name to the Convention’s famous preamble,\textsuperscript{185} strongly defended the \textit{si omnes} clause as evidence of “a ‘mutual insurance association against the abuse done of force in time of war,’ an association which states should be free to enter or not, but which must have its own by-laws obligatory upon the members among themselves.”\textsuperscript{186}

The nature of the other twelve conventions produced at the 1907 Hague Conference is consistent with the parties’ inclusion of the \textit{si omnes} clause. Even the effort to extend the 1864 Geneva Convention to maritime settings, a treaty of an essentially humanitarian nature, was made subject to a \textit{si omnes} clause.\textsuperscript{187} Most of the thirteen 1907 Hague Conventions reflected innovations in international law.\textsuperscript{188} Without customary status, states subjected many of the Hague Conventions to harsh conditions of obligational reciproc-
ity. In fact, First World War belligerents rejected operation of a number of these instruments because their enemies had failed to ratify them. 189

2. The Status of the Conventions: Custom or Innovation?

Uncertainty about whether the Conventions reflected custom when they were signed led parties to object to their application on the grounds of both obligational and observational reciprocity. The Convention’s preamble indicates an effort at innovation, stating an intention “to revise the general laws and customs of war, either with a view to defining them with greater precision or to confining them within such limits as would mitigate their severity as far as possible . . . .”190 Yet, because so many of the Regulations drew their provisions from existing sources, some authorities have concluded that they reflected preexisting custom.191 Further, the relatively widespread ratification of the Fourth Conventions and its regulations may suggest customary status.192

If the Regulations merely reflected custom, the parties’ insistence on the si omnes clause would be curious. The clause would be largely superfluous if states intended to condition duties arising under the Convention on obligational reciprocity when those same provisions were already universally applicable as a matter of custom. It is of course possible that the Convention and its Regulations matured into custom in the few years between 1907 and the First World War.193 However, there is insufficient state practice to support such a claim.194 It is more plausible that some portions of the Regulations

189. Coleman Phillipson, International Law and the Great War 175 (1915) (noting German rejection of binding force of Hague Convention IX because not all belligerents ratified the Convention). Similarly, Dr. Phillipson dismissed the legal effect of British and Belgian agreement to prohibit launching explosives and projectiles from aircraft, because other major powers, including Germany, had not ratified the declaration. Id. at 176.
190. 1907 Hague Convention IV, supra note 179, pmbl. (emphasis added).
192. A contemporary source noted that “44 of the 47 states now commonly recognized as belonging to the family of civilized nations” met at the Second Conference. Tryon, supra note 173, at 478. Forty-one states signed the Hague Convention IV. See Documents on the Laws of War, supra note 136, at 84–85. By 1914, twenty-seven states had ratified the Convention. Id.
193. Ian Brownlie notes that no formal duration of practice is required for the formation of custom. Brownlie, supra note 88, at 5. It seems that a notable intensity of practice might compensate for a short duration.
194. Although Article 1 of the Convention required parties to issue instructions to their armed forces in conformity with the Regulations, few states complied. Hersch Lauterpacht offers a survey of the Regulations’ status under the municipal law of a number of states between the world wars. Hersch Lauterpacht, The Law of Nations and Punishment of War Crimes, 21 Brit. Y.B. Int’l L. 58, 64 (1944) [hereinafter Lauterpacht, War Crimes]. Lauterpacht relates the interesting story of a German Major charged with preparing a 1901 Army Manual entitled “Customs of War on Land.” Id. at 64 n.1. The Manual contained no reference to the Hague Regulations. Id. When questioned on the omission by a Reichstag Commission on War Crimes, the Major replied that he “had no detailed knowledge of the Hague Regulations at the time.” Id. (citing 1 Volkerrecht im Weltkrieg 27).
reflected custom, whereas others had not garnered sufficient state practice and acceptance to attain customary status prior to or during the War.

The Hague Regulations had a mixed record in the First World War. States applied the Regulations inconsistently, often claiming that other parties failed to respect both obligational and observational reciprocity. For instance, German newspapers cited the *si omnes* clause to justify Germany’s non-application of the Hague Regulations. German authorities invoked negative reciprocity in response to allegations of atrocities in Belgium and France. French authorities claimed that Germany’s breach had terminated application of the Hague Regulations to their mutual relations. Assessing the Regulations’ bombardment provisions, Geoffrey Best argues that the Hague Regulations may have been far more effective as opportunities for states to vilify their enemies rather than as limits on states’ conduct in war. Best maintains that citations to the Hague Regulations often merely showcased how the enemy had treacherously reneged on its very recent legal commitments. W. Hays Parks, a U.S. Department of Defense expert on the law of war, notes that the reciprocal nature of Hague protections for civilians marginalizes targeting restraints.

Whether or not the Hague Regulations reflected custom at the time they were signed, the Fourth Hague Convention acknowledged the role of custom as a fixture in law of war treaties. The Martens Clause appears in the Convention’s preamble, stating:

> Until a more complete code of the laws of war has been issued, the high contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from

---

195. Phillipson, supra note 189, at 138 (citing reports in the *Cologne Gazette*). Phillipson rejects the assertion that entry of non-Parties Serbia, Montenegro, and Turkey negated application of the Hague Regulations. *Id.* Phillipson concedes that had the Regulations been novel or concerned minor details, the “technical defence” offered by the general participation clause might have been acceptable. *Id.* at 138, 176. However, he maintains that the Hague Regulations codified the preexisting custom, denying effect to the general participation clause. *Id.* Later, Phillipson renews his argument concerning the customary status of the Hague Conventions with respect to the prohibition on bombardment of undefended places in the Article 25. *Id.* at 175–76. As observed earlier, Phillipson’s observation on the customary status of the Hague Conventions appears restricted to the Hague Convention IV. See supra text accompanying note 189.

196. Phillipson, supra note 189, at 177.


199. *Id.* at 47.

200. Parks, *Air War*, supra note 191, at 15. Parks notes that Article 27 of the Annexed Regulations to the Hague Conventions requires protection of hospitals, museums, and schools so long as they are not used for military purposes. *Id.*
the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience. 201

The Martens Clause emerged from unresolved debate over the rights of inhabitants of occupied territory to resist their occupiers. 202 Small states, who would be forced to rely on “unconventional” means of resistance in case of invasion, objected to limits on rights of popular resistance proposed by more powerful states. The Martens Clause resolved the impasse over treatment of resistance fighters by referring to the common law of war and to more general norms of humane treatment.

Several conclusions flow from the Clause. First, the Martens Clause concedes the incomplete nature of the Hague Regulations. The drafters were aware of the limitations their political interests placed on any agreement codifying war rules. The Clause denies that the new, positive law of war would operate in an exclusive fashion, clearly anticipating that customary norms would supplement the Hague Regulations during war. Second, the Martens Clause evidences the broad applicability of some customary norms. The Clause explicitly acknowledges the Regulations’ limits on applicability, specifically mentioning the si omnes clause. 203 However, the Clause also reminds parties that failure to achieve conditions for treaty application does not give rise to lawlessness.

While certainly advancing humanitarian considerations, the Martens Clause reiterates the shortcomings of custom. That the Clause arose as a compromise to intractable debate over substantive provisions of the law of war reveals the unsettled nature of the customary constraints on war. 204 The Clause suggests that many constraints could only be expressed in the broadest and most general terms—as principles rather than detailed provisions. Furthermore, although identification of universally applicable customs would go a long way toward overcoming the requirement of obligational reciprocity, one wonders whether states at the time would in practice have adhered to such norms in the face of persistent objection or violation by an enemy. 205

203. The passage immediately following the Clause reads, “They declare that it is in this sense especially that Articles 1 and 2 of the Regulations adopted must be understood.” 1907 Hague Convention IV, supra note 179, pmbl.; 1899 Hague Convention II, supra note 176, pmbl.
204. See supra text accompanying note 202.
205. See supra discussion accompanying note 210 (discussing retaliatory attacks on civilian population centers in the Second World War).
State practice from the First World War through the Second World War reveals the practical limitations of the Hague Conventions. Indeed, the atrocities committed during this era cast doubt on whether the Conventions had any impact on state behavior. Failure to convene meaningful post-conflict war crimes tribunals likely retarded authoritative, neutral, or independent interpretation of the Martens Clause and the Hague Regulations generally. Although the otherwise draconian Versailles Treaty provided for the transfer and international trial of war criminals, these provisions were never enforced. Only a handful of German domestic trials were ever conducted. The Leipzig Trials, conducted by the German government against its own soldiers, did not include significant analysis of the Hague Regulations’ applicability, the state of customary laws of war, or of the legitimacy of exercising negative reciprocity.

The inter-war period also shed little light on the status of the Hague Convention. Only two states acceded to the Convention between 1919 and 1939—Poland, in 1925, and Ethiopia in 1935, the latter on the eve of being invaded by Italy for the second time in less than fifty years. Italy had signed but had not ratified the Fourth Hague Convention. The Second Italo-Ethiopian (or Abyssinian) War involved infamous atrocities, including maltreatment of prisoners, attacks on Red Cross facilities and hospitals, and the use of poisonous gas. The states were entreated to observe the 1864

---


Lauterpacht also considers the interesting reciprocity-based question of whether absence of mutuality concerning prosecution of war crimes between victors and defeated powers undermines the legitimacy of the former. Lauterpacht, War Crimes, supra note 194, at 68. He concedes the apparent inequity and offers aspirations, yet little more, for a more equitable post-war system of prosecutions, including the possibility of an International Criminal Court. Id. at 68, 82.

207. See generally Claud Mullins, The Leipzig Trials (1921).

208. Id.

209. Some regard the inter-war period as a dark age of sorts for development of the law of war. See J.W. Garner, The Outlook for the Law of War and of Neutrality, in Transactions of the Grotius Society 1 (1937). Professor Garner observes of the period, “Many persons spoke of [the law of war] more or less contemptuously as the ‘so-called’ law of war. . . . University professors dropped the subject from their course, and even text writers omitted it from their books . . . .” Id.

210. Italy was not party to the Hague Conventions, and the tactics it employed in the 1935 to 1936 conflict repulsed countries around the world. “The employment of gas in Ethiopia was roundly condemned and the world recoiled with horror when reports of systematic attacks on Red Cross units by Italian aircraft began to reach Europe.” A.J. Barker, The Civilizing Mission: A History of the Italo-Ethiopian War of 1935–1936, at 243 (1968). Italy had ratified the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, and 750 Italians were charged with war crimes as a result of the atrocities committed in the war. M. Cherif Bassiouni, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 Harv. Hum. Rts. J. 11, 30 (1997).
Geneva Convention, to which they were both parties,\textsuperscript{211} but research reveals little discussion of the Hague Regulations as having binding force as custom or as the foundation for establishing war crimes. Indeed, the law of war appears to have existed within an especially "chaotic state" during this period, prompting commentators to speculate that future war would be conducted under very uncertain rules.\textsuperscript{212}

The Second World War resurrected questions about the effect of the Hague Conventions’ \textit{si omnes} clause and obligational reciprocity generally. A number of parties to the conflict, including Bulgaria, Greece, Italy, and Yugoslavia, had not acceded to the Hague Conventions. However, war crimes tribunals in the post-war era, including the Nuremberg International Military Tribunal ("IMT"), rejected the clause as a defense to crimes based on violations of the Regulations.\textsuperscript{213} The IMT’s conclusions regarding the Convention and Regulations’ status as customary law essentially rendered the \textit{si omnes} clause a dead letter. The IMT’s recognition of the Hague Regulations’ provisions as customary obligations ran contrary to states’ insistence that various conditions restricted their application. Accepting the IMT’s conclusions requires a fragmentation of the Convention. That is, the IMT’s assignment of customary status divorced the substantive Regulations from their clear textual conditions on application. Until the Second World War, states had not evinced any willingness to accept the Regulations’ constraints independent of formal obligational reciprocity. As late as 1994, governments resorted to the \textit{si omnes} clause in their analyses of the applicability of the Hague Regulations. For instance, the German Federal Government replied to inquiries submitted by a member of its Lower House of Parliament concerning application of the Hague Regulations to the armed conflict between

\textsuperscript{211} See Bernard Bridel, \textit{Les ambulances à croix rouge du CICR sous les gaz en Ethiopie}, Le TEMPS (Aug. 13, 2003), translated and reproduced at [http://www.icrc.org/English/siteeng0.nsf/wwPlsEng/0FEB07F09BE30F488C1256DB0004793988?0FEB07F09BE30F488C1256DB0004793988](http://www.icrc.org/English/siteeng0.nsf/wwPlsEng/0FEB07F09BE30F488C1256DB0004793988?0FEB07F09BE30F488C1256DB0004793988) (describing ICRC reports of atrocities committed by both parties to the conflict).

\textsuperscript{212} Garner, supra note 209, at 5.

\textsuperscript{213} George H. Aldrich & Christine M. Chinkin, \textit{The Hague Peace Conferences: A Century Of Achievement And Unfinished Work}, 94 Am. J. Int’l L. 90, 93 (2000) (“For example, the relevant provisions of the 1899 and 1907 Hague Conventions on the Laws and Customs of War on Land became accepted in practice so that, by 1945, the international tribunal trying Germans accused of war crimes was able to hold that Hague Convention No. IV and its annexed Regulations had become part of customary international law binding on Germany, even though the Convention as such was not applicable to the Second World War.”) (citing United States v. Von Leeb [High Command Case], in \textit{11 Trials Of War Criminals Before The Nuremberg Military Tribunal Under Control Council Law No. 10}, at 462 (1950)); \textit{see also} OPPENHEIM’S INTERNATIONAL LAW 234–36 (Hersch Lauterpacht ed., 7th ed. 1952).

The Nuremberg Military Tribunal declared the Hague Regulations to be customary law: “The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt ‘to revise the general laws and customs of war,’ which it thus recognized to be then existing, but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6(b) of the Charter.” Id. at 51 (quoting \textit{Trial of German Major War Criminals}, 22:467).
2009 / Reciprocity and the Law of War

the Government of Turkey and the PKK by noting that Turkey had not ratified the Fourth Hague Convention.\(^{214}\)

The vitality of observational reciprocity under the Convention and Regulations during the Second World War is similarly uncertain. The scope and scale of violations of purportedly settled restraints on war were truly shocking. Widespread, indiscriminate bombing and deplorable treatment of prisoners of war on both sides of the conflict flouted the spirit of prohibitions contained in the Hague Regulations. In the first edition of his update to Oppenheim’s international law treatise after the Second World War, Hersch Lauterpacht observed that the law of war “never before in history was so widely and so ruthlessly disregarded as in the Second World War.”\(^{215}\) The historian Michael Howard concluded that the War marked the “beginning of the end of what we have called the Grotian era,” wherein it had been thought that “an assumption of common values . . . would govern the conduct of . . . wars, whether or not these values were codified.”\(^{216}\) In fact, during the war, neutral governmental pleas for restraint in the conduct of hostilities provoked reiteration of the condition of observational reciprocity from both sides of the conflict.\(^{217}\)

State claims and reservations notwithstanding, the IMT weighed in strongly against rights of negative reciprocity, as illustrated by its rejection of the *tu quoque* defense.\(^{218}\) Charged with, *inter alia*, violating rules for the use of submarines against merchant shipping,\(^{219}\) the former German Chief of Naval Operations, Admiral Karl Dönitz argued that mutual breach had sus-

---

\(^{214}\) BTDrucks 12/8458, translated in Sassoli & Bouvier, *supra* note 188, at 1384–85. Ultimately, the response determined that Common Article 3 of the 1949 Geneva Conventions set the minimum legal standards applicable to the conflict. *Id.* at 1385. The response noted that the parties might augment Article 3 by agreeing to undertake further legal obligations through Article 96(3) of Additional Protocol I. *Id.*

\(^{215}\) OPPENHEIM 2, *supra* note 99, at iii.


\(^{217}\) See Tami Davis Biddle, *Air Power*, in *The Laws of War*, *supra* note 124, at 151. Biddle notes that “[r]esponding in 1939 to a plea by President Roosevelt, Germany, England, and France agreed to limit bombing to strictly military objectives at the outset of the war. But all three powers reserved the right to take appropriate action in the event that their enemies reneged.” *Id.*


pended the rules. Dönitz’s defense offered responses to an interrogatory
from U.S. Fleet Admiral Chester Nimitz, who confirmed that U.S. subma-
rine forces had also disregarded the submarine rules in the Pacific theater. The IMT rejected Dönitz’s defense, concluding that, despite mutual breach,
the rules remained in effect. Although the IMT convicted Dönitz, it denied
taking account of the submarine violations during sentencing. As with
obligational reciprocity, the IMT proved willing to read conditions of obser-
vational reciprocity out of the law of war in the face of compelling evidence
of state practice to the contrary. The IMT Prosecutor, however, declined
to prepare indictments based on the targeting provisions of the 1907 Hague
Regulations. Telford Taylor, the Chief Counsel for the IMT, related after the
trial:

Many of the provisions of the Hague Conventions regarding un-
lawful means of combat . . . were antiquarian. Others had been
observed only partially during the First World War and almost
completely disregarded during the Second World War . . . . The
indictment of the first Nuremberg trial, accordingly, contained

220. See 17 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY
TRIBUNAL 378–81 (1949); see also 40 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY
TRIBUNAL 108–11.

221. 13 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY
TRIBUNAL 347.

222. 22 Nuremberg IMT, supra note 219, at 559. The Tribunal sentenced Admiral Dönitz to ten
years’ imprisonment. Id. at 588. For his part, Dönitz expressed no regret over his conduct of the subma-
rine campaign. In his final statement to the Tribunal, Dönitz stated, “I consider this form of warfare
justified and have acted according to my conscience. I would have to do exactly the same all over again.”
Id. at 390.

223. War crimes trials conducted by national military tribunals mirrored some conclusions of the
Nuremberg International Military Tribunal. See United States v. Von Leeb, in 12 TRIALS OF WAR
CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW 532–33
(1951) [hereinafter The High Command Trial]; United States v. Ernst von Weizsäcker, in 14 TRIALS
OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW 323
(1951) [hereinafter The Ministries Case]. In the High Command Trial, Field Marshal von Leeb’s final state-
ment recounted a failure of reciprocal observance of the law of war on the Eastern Front. Von Leeb stated:

In the East the grim aspect of the war was determined by Russia. Stalin’s appeal for the
slaughter of all Germans induced the partisans to pervert the conduct of the war. We, as
German soldiers, had up to that moment refrained from such conduct, and we had not desired
and sought such extremes; neither in Russia nor in other theaters. We were forced to seek
effective protection against this degeneration in warfare. We acted in self-defense.

The High Command Trial, supra at 459–60. In The Ministries Case, the Nuremberg International Military
Tribunal addressed charges stemming from the murder upon recapture of fifty escaped British Prisoners
of War from Stalag Luft III, an event dramatized in the Steve McQueen film The Great Escape and a
number of memoirs. See generally WILLIAM ASH, UNDER THE WIRE (2005); PAUL BRICKHILL, THE GREAT
ESCAPE (1950); ALAN BURGESS, THE LONGEST TUNNEL (1991); ALBERT P. CLARK, 33 MONTHS AS A
POW IN STALAG LUFT III (2005). The Nuremberg International Military Tribunal noted a German
Foreign Office response to Swiss inquiries on behalf of the British prisoners wherein the German Foreign
Office asserted that because of its bombing of the German civilian population the British “must be
denied the moral right to take a stand in the matter of the escapees or to raise complaints against others.”
The Ministries Case, supra at 456–57. The Nuremberg International Military Tribunal dismissed the de-
fendants’ assertion of suspension of the Geneva Conventions or the Hague Regulations. Id. at 461.
2009 / Reciprocity and the Law of War

no charges against the defendants arising out of their conduct of the war in the air. 224

States continued the work of the Hague tradition at a number of treaty conferences throughout the interwar years. 225 The 1925 Geneva Gas Protocol illustrates prevailing state views on reciprocity and issues associated with the Hague Tradition. 226 The Protocol opens with an aspirational preamble urging universal acceptance and practice of its ban on the use of asphyxiating gases. 227 The goal of universal observance seemed reasonable given that the Protocol built on the work of the First Hague Conference’s Declaration II, which prohibited the use of projectiles to deploy “deleterious gases.” 228 The fact that Declaration II was thought to have merely codified preexisting custom against the use of poison and treacherous weapons may also have bolstered optimism about widespread observance. 229 Putative customary status notwithstanding, states’ delegates to the drafting convention attempted to condition treaty obligations on reciprocity by inserting a si omnes clause. 230 While other delegates fended off the inclusion of reciprocity in the treaty text, major powers ratified the Protocol only with reservations to that effect. For instance, the Government of France submitted the following reservations:

The said Protocol is only binding on the Government of the French Republic as regards States which have signed or ratified it or which may accede to it.

The said Protocol shall ipso facto cease to be binding on the Government of the French Republic in regard to any enemy State

---

224. See Parks, supra note 191, at 37–38 (quoting Telford Taylor, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10, at 65 (1949)).


229. See Documents on the Laws of War, supra note 136, at 59, 155.

whose armed forces or whose Allies fail to respect the prohibitions laid down in the Protocol.\(^{231}\)

The Soviet Union, Czechoslovakia, Great Britain, and the Netherlands replicated France’s reservations.\(^{232}\) Germany similarly declared that it would observe the 1925 Protocol subject to reciprocity.\(^{233}\) The reservations managed to address both obligational and observational reciprocity. In the first clause of the reservation, states parties to the Gas Protocol resurrected the reciprocity-based conditions that appeared in the Hague Regulations’ *si omnes* clause.\(^{234}\) In the second, they reserved the right to exercise negative reciprocity in response to the use of chemical weapons. Again, the states’ reservations are curious considering that the prohibition on the use of asphyxiating gases was thought to be a customary norm. The most likely explanation is that the form and content of whatever customary rule existed did not, in the opinion of states, match the Protocol in scope or content. Additionally, the 1925 Geneva Gas Protocol reservations may indicate that such customary norms were also subject to conditions of at least observational reciprocity.\(^{235}\)

More generally, however, the Protocol’s reservations evince that states regarded customary norms as fully subject to both obligational and observational reciprocity.

Law of war historian Geoffrey Best has characterized most inter-war legal developments as window dressing.\(^{236}\) In these fledgling efforts to forge international agreements on the law of war, obligational reciprocity cabined the limits on the conduct of hostilities. Although judicial bodies rejected defendants’ arguments that legal norms were suspended under negative reciprocity, states were unwilling to codify limits on negative reciprocity, pre-

\(^{231}\) See *Documents on the Laws of War*, supra note 136, at 165 (emphasis added).


\(^{233}\) *Documents on the Laws of War*, supra note 136, at 156.

\(^{234}\) By the mid 1990s, many states, including France, withdrew their reciprocity-based reservations to the 1925 Gas Protocol. For a complete catalog of reservations and withdrawals to the 1925 Gas Protocol, see *Documents on the Laws of War*, supra note 136, at 164–67. The CWC supplements the 1925 Protocol’s regulation of the use of gas. The CWC includes no readily apparent conditions on application; for instance, the treaty makes no distinction between international and non-international armed conflict. Parties to the CWC pledge in Article 1 “never under any circumstances” to develop, use, prepare to use or encourage others to use chemical weapons.” *Id.* art. 1. Furthermore, Article 22 of the CWC prohibits reservations to the treaty’s main body. *Id.* art. 22. Yet, the treaty’s withdrawal provisions include what might be characterized as a nod to conditions of reciprocal observance under extreme conditions. Article 16 permits a state to withdraw with ninety days notice in the case of “extraordinary events it regards as having jeopardized its supreme interests.” *Id.* art. 16.

\(^{235}\) See supra discussion accompanying note 231. Japan, though it never ratified the treaty, was prosecuted for using gas against China.

\(^{236}\) *Best, supra note 127*, at 46, 59. Best questions even his own earlier work’s conclusions regarding the practical influence of the Hague Regulations. *Id.* at 46.
ferring to leave the doctrine to treaty reservations and the general customs of treaty law. Indeed, there are few state commitments to un reciprocated observance of the law of war from that period.

D. The 1949 Geneva Conventions

The 1949 Geneva Conventions represented one of the most significant legal advances for humanitarian protections during war. Universally ratified and almost universally recognized, they have become synonymous with the law of war in the popular understanding. Although they continued the pre-existing Geneva Tradition of regulating the law of war, the 1949 Conventions were nothing less than revolutionary. First, although they built on previous Geneva guarantees of protection for recognized classes of war victims (the wounded and sick, the shipwrecked, and prisoners of war), the 1949 Conventions originated a system of enforcement that none of their predecessors, including treaties of the Hague Tradition, had managed. Second, the 1949 Conventions explicitly addressed the treatment of victims of armed conflict beyond the limited context of war between sovereigns. Finally, in recognition of their horrendous suffering in the Second World War, the 1949 Conventions added civilians to the Geneva Tradition’s classes of protected persons.

The Geneva revolution was not entirely successful. Although states proved willing to expand protections and strengthen enforcement regimes, the Conventions were almost as conditional as previous instruments of the Geneva Tradition. Evidence of these conditions was subtle and often veiled. To be sure, the 1949 Conventions did not include a si omnes clause. The Conventions explicitly rejected non-parties’ entry into conflicts between states parties as a basis for withholding application of the Conventions among parties. However, restrictions on the types of conflict to which


238. See sources cited supra note 172 (describing the Geneva and Hague Traditions as well as the limits of these characterizations).

239. The Conventions are to be enforced primarily through a system identifying grave breaches: each of the four Geneva Conventions includes two articles describing offenses punishable as grave breaches and delineating a system of universal and compulsory jurisdiction for states parties. See, e.g., 1949 Geneva Convention IV, supra note 155, arts. 146, 147.

240. See 1949 Geneva Convention I, supra note 155, art. 3; 1949 Geneva Convention II, supra note 155, art. 3; 1949 Geneva Convention III, supra note 155, art. 3; 1949 Geneva Convention IV, supra note 155, art. 3.


242. See, e.g., 1949 Geneva Convention I, supra note 155, art. 2(3); 1949 Geneva Convention II, supra note 155, art. 2(3); 1949 Geneva Convention III, supra note 155, art. 2(3); 1949 Geneva Convention IV, supra note 155, art. 2(3).
most of the Conventions applied and restrictions on the persons to whom
the Conventions gave their most elaborate protection qualified their cover-
age in a manner similar to traditional reciprocity provisions.

A number of common misconceptions and exaggerations have grown
around the Conventions.243 The gravest of these misconceptions may be that
the Geneva Conventions apply in their entirety to all cases of hostilities.
States’ rejection of this notion at the diplomatic convention could not have
been clearer. Since promulgating the 1864 Geneva Convention, the Interna-
tional Committee of the Red Cross (“ICRC”) has been the de facto conven-
ing authority for diplomatic conferences to revise instruments of the Geneva
Tradition. As at earlier conferences, the ICRC submitted a draft convention
to the states assembled in 1949.244 The most ambitious passage of the draft
would have applied the Conventions to all conflicts. Article 2 of the Stock-
holm Draft would have made the Conventions applicable in their entirety
not only to armed conflict and belligerent occupation between states parties,
but also to “armed conflict not of an international character which may
occur in the territory of one or more of the High Contracting Parties.”245
Perhaps as an enticement to adopt this radical alteration of the scope of the
law of war, the draft included an explicit and remarkable guarantee of nega-
tive reciprocity. Draft Article 2, Section 4 read: “[E]ach of the Parties to the
conflict shall be bound to implement the provisions of the present Conven-
tion, subject to the adverse party likewise acting in obedience thereto.”246
The clause would have done for observational reciprocity what the si omnes

243. One of the most common misconceptions is that the Geneva Conventions still constitute a single
convention. Strictly speaking, the term “the Geneva Convention” accurately describes only the 1864
Geneva Convention. Each incarnation from the Geneva Tradition since 1864 has either supplemented
that Convention or taken the form of multiple Conventions emanating from the same Diplomatic
Conference.

244. The draft convention submitted to states’ representatives in Geneva in 1949 was known to the
Conference as the Stockholm Draft. The Stockholm Draft emerged from work on an earlier draft submit-
ted to states at the 1948 17th International Red Cross Conference in Stockholm, Sweden. COMMENTARY,
IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 6–7
(Jean S. Pictet ed., 1958) [hereinafter COMMENTARY, GENEVA CONVENTION IV].


The 1949 Diplomatic Record’s use of the term “in the territory of one or more of the High Contracting
Parties” is in contrast to the phrase adopted to describe the geographic reach of Common Article 3.
Ultimately, states used the term “in the territory of one of the High Contracting Parties.” In 2002, that
adopted formulation led the U.S. Department of Justice Office of Legal Counsel (“OLC”) to conclude
that Common Article 3 did not apply to international conflicts with non-state actors, such as the Global
War on Terror. See infra note 252 (describing in greater detail OLC’s analysis of Common Article 3).

246. 1949 DIPLOMATIC RECORD, supra note 245. Norway objected early to the condition of reciproc-
ity in general and as running counter to the Conventions’ ban on reprisals against prisoners of war. 2B
2004) (1950) [hereinafter 2B 1949 DIPLOMATIC RECORD]. Likewise, the United States objected to the
condition of observational reciprocity in civil wars. See id. at 48. Italy preferred that reciprocity not be
“dealt with specifically in the case of conflicts which were not dealt with of an international character.”
clause did for obligational reciprocity. Concessions to reciprocity notwithstanding, states rejected the proposal.\footnote{Citing practical and legal concerns, states significantly narrowed the Draft Article's scope of coverage in the final Convention.} In their final version, only one of the Conventions' nearly four hundred separate articles applies to all cases of armed conflict—Common Article 3.\footnote{Common Article 3 is “common” only in the sense that it appears in each of the four Conventions. Called a “Convention in miniature” by one of the delegates to the 1949 Geneva Conventions Diplomatic Conference, Common Article 3 outlines a minimum level of humanitarian protections in situations of armed conflict to which other conventional protections do not apply. Though textually committed to regulating “armed conflict not of an international character,” Common Article 3 is best understood in contraposition to armed conflicts covered by the rest of the Conventions. As the U.S. Supreme Court recently affirmed, Common Article 3 is a minimum threshold for armed conflicts and persons not qualifying for protection under the full Conventions.}\footnote{The revolutionary nature of Common Article 3 lay neither in its self-contained format nor in the character of the protections it afforded. The Article eschews elaborate schemes of regulation, confining itself to the broadest humanitarian principles. Common Article 3 was truly novel in its focus on states' internal affairs and its application of international law to the conduct of civil wars. Common Article 3 constrains states' treatment of their own citizens who rebel or conduct organized hostilities within their own territory. Id. at 49. The Soviet Union remained committed to the original draft, including its condition of de facto reciprocal compliance with the Conventions as a precondition to application. Id. at 50.}

\footnote{A record of states' discussions and ultimate rejection of the draft universal application provision is available in 2B 1949 DIPLOMATIC RECORD, supra note 246, at 41–43. Among other conceptual concerns, the delegates noted that applying the Civilians Convention to insurgents would be problematic, because the Convention relied on the enemy's nationality to define the protected person class. Id. at 41. The Delegation of the Soviet Union was the exception, championing the draft article's expansion to cover non-international armed conflicts. See id. at 43. The Soviet Delegation's apparently magnanimous and confusingly liberal approach to revising the Conventions confounded and frustrated the delegations of Western powers during the Conference. See id. at 318–20, 380, 448–53.}

The revolutionary nature of Common Article 3 lay neither in its self-contained format nor in the character of the protections it afforded. The Article eschews elaborate schemes of regulation, confining itself to the broadest humanitarian principles. Common Article 3 was truly novel in its focus on states' internal affairs and its application of international law to the conduct of civil wars. Common Article 3 constrains states' treatment of their own citizens who rebel or conduct organized hostilities within their own territory. Id. at 49. The Soviet Union remained committed to the original draft, including its condition of de facto reciprocal compliance with the Conventions as a precondition to application. Id. at 50.

\footnote{A record of states' discussions and ultimate rejection of the draft universal application provision is available in 2B 1949 DIPLOMATIC RECORD, supra note 246, at 41–43. Among other conceptual concerns, the delegates noted that applying the Civilians Convention to insurgents would be problematic, because the Convention relied on the enemy's nationality to define the protected person class. Id. at 41. The Delegation of the Soviet Union was the exception, championing the draft article's expansion to cover non-international armed conflicts. See id. at 43. The Soviet Delegation's apparently magnanimous and confusingly liberal approach to revising the Conventions confounded and frustrated the delegations of Western powers during the Conference. See id. at 318–20, 380, 448–53.}

\footnote{A Soviet delegate remarked on debate concerning the scope of application of the Conventions, “No other issue has given rise to such a long discussion and to such a detailed and exhaustive study as the question of the extension of the Convention to war victims of conflicts not of an international character.” Id. at 325.}

\footnote{See, e.g., 1949 Geneva Convention I, supra note 155, art. 3; 1949 Geneva Convention II, supra note 155, art. 3; 1949 Geneva Convention III, supra note 155, art. 3; 1949 Geneva Convention IV, supra note 155, art. 3.}


\footnote{Jean Pictet's Commentary to the 1949 Conventions discusses the requirement that rebel movements be organized to qualify for protection under Common Article 3. COMMENTARY, GENEVA CONVEN-
territories. As in the case of the Lieber Code’s application to the American Civil War, states had previously applied humanitarian legal restraints to civil war, yet Common Article 3 is remarkable as an international legal commitment to such restraint.

The implications of Common Article 3 for the traditional principle of reciprocity are potentially profound. As non-international armed conflicts do not entail interactions between states, the operation of Article 3 might be entirely free from conditions of mutual obligation. For example, a state party could not avoid Article 3 restrictions regarding its conduct in a civil war merely by failing to ratify the Conventions. In this sense, Common Article 3 could be a truly unilateral international norm, rather than a bilateral or multilateral obligation subject to traditional privity of commitment. Common Article 3 may further limit traditional obligational reciprocity because parties to the conflict may lack international legal character. Though a rebel force may express commitment to Article 3 and its principles, it cannot ratify the Conventions. Common Article 3 does not grant international legal personality to individuals or rebel groups. Rather, it binds rebel forces when ratified by their sovereign opponents. Thus, formal, obligational reciprocity between belligerents in a non-international armed conflict is not a precondition to the operation of Article 3.

Obligational reciprocity may persist in at least one regard with respect to Common Article 3. As an international legal commitment rather than a domestically guaranteed right, Common Article 3 relies on the international legal system for enforcement. Although Article 3 encapsulates a number
2009 / Reciprocity and the Law of War

of principles and norms expressed in both international human rights law and domestic law, it lacks the individual complaint and enforcement provisions emblematic of the domestic legal regimes. Common Article 3 thus remains subject to inter-state means of enforcement: politics, diplomacy, international courts, and the use of force. A state engaged in a non-international armed conflict could, in theory, refuse to entertain complaints from states not reciprocally committed to the Conventions as states parties. Under such an understanding, only states that had ratified the 1949 Conventions would have standing to enforce Common Article 3 through the international legal system.

Common Article 3 maintains an element of observational reciprocity as well. The question of what constitutes an “armed conflict” for purposes of Article 3 arose repeatedly at the Diplomatic Conference. States were adamant that Article 3 could not cover every conceivable act of violence committed within their territories, but rather would be restricted to cases of insurgency. Although they did not incorporate such provisions into the text of the Article, states enumerated criteria to identify conditions under which the Article would apply and to distinguish rebels and insurrectionists from mere bandits and rioters. Among the distinguishing characteristics of an insurgency triggering application of Common Article 3 is that the movement is “prepared to observe the ordinary laws of war” or “agrees to be bound by the provisions of the Convention.” Although the condition of de facto reciprocity that had appeared in earlier iterations was dropped from the final version of Common Article 3, states created implicit criteria for qualifying insurgencies to retain reciprocity in practice. Thus even while states consented to a revolutionary expansion of the reach of international law into their internal affairs, they included a veiled requirement of observational reciprocity.
Article 1 directly addressed states parties’ exercise of negative reciprocity. It states simply, “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.” 264 Jean Pictet’s Commentaries to the Conventions point to Common Article 1 as evidence that the Conventions are not engagements “concluded on the basis of reciprocity.” 265 Pictet’s Commentaries conceive the Conventions as a binding testimonial, “a series of unilateral engagements solemnly contracted before the world . . . .” 266 Compared to other provisions common to the four Conventions, Article 1 received scant attention from the drafting committees. 267 A member of the joint discussion committee suggested a narrower meaning than that given by Pictet’s Commentary. 268 The Norwegian delegation believed “that the object of this Article was to ensure respect of the Conventions by the population as a whole.” 269 That is, states should ensure not only that their armed forces were trained under the Conventions, but that their populations were as well. Claude Pilloud, a delegate of the ICRC, who later assisted in the preparation of Pictet’s Commentaries, responded that Article 1 was included in the Stockholm Draft to remind states not only to apply the Conventions themselves but also to see that the “humanitarian principles of the Conventions were universally applied.” 270

Neither comment suggests that the Conventions apply either universally or unconditionally. When notions of reciprocity were so thoroughly debated in the context of other Articles, 271 states would not have simply waved through Article 1 with the understanding that it would spell the end of reciprocity. Along with the thin record of state commentary on Article 1 generally, these comments suggest a more modest meaning for Article 1 than that offered by Pictet.

264. 1949 Geneva Convention I, supra note 155, art. 1 (emphasis added); see also 1949 Geneva Convention II, supra note 155, art. 1; 1949 Geneva Convention III, supra note 155, art. 1; 1949 Geneva Convention IV, supra note 155, art. 1. Article 1 carried over in the preparation of the Stockholm Draft from the 1929 Prisoner of War Convention’s Article 83 and the 1929 Wounded and Sick Convention’s Article 23. Only the phrase “in the name of their peoples” was removed. See 2B 1949 DIPLOMATIC RECORD, supra note 246, at 26.

265. COMMENTARY GENEVA CONVENTION IV, supra note 244, at 15. Kalshoven and Zegveld also assert that Article 1 precludes the operation of negative reciprocity under the 1949 Geneva Conventions. KALSHOVEN & ZEGVELD, supra note 55, at 75. They state, “For the 1949 Geneva Conventions the operation of this crude principle is excluded by the provision in common Article 1 [sic] that the contracting states are bound to respect the Conventions ‘in all circumstances.’” Id. Kalshoven and Zegveld concede that negative reciprocity may persist as a legitimate state sanction in the Hague Tradition, including bans on the use of certain weapons. Id. However, they limit this observation on reciprocity and means and methods rules to pre-1977 Protocol provisions. Id.

266. COMMENTARY, GENEVA CONVENTION IV, supra note 244, at 25.

267. See 2B 1949 DIPLOMATIC RECORD, supra note 246, at 27.

268. Id. at 53.

269. Id.

270. Id. (emphasis added).

271. See supra notes 253–61 (noting discussion of reciprocity as a condition to applying what would become Common Article 3 to non-international armed conflicts).
A full appreciation of Article 1 and reciprocity under the 1949 Conventions requires examination of the Conventions’ inner workings. Scholars and writers have begun to appreciate that the Conventions’ conditions on applicability with respect to situations and persons operate in much the same way as the traditional principle of reciprocity.272 Common Article 2 is the provision most responsible for guaranteeing obligational reciprocity within the Conventions. Article 2 interacts with the principle of obligational reciprocity in two ways. The opening clause of Article 2 limits states’ obligations to co-parties to the Conventions, stating in relevant part, “[T]he present Convention shall apply to cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties . . . .”273 It is hard to imagine a clearer statement of intent to limit the operation of the Conventions to conflicts between sovereign, peer competitors. For a significant portion of the Conventions’ history, war between a state party and non-party state remained possible and in at least one case occurred.274 In such a situation, the Conventions would not have operated in a formal, de jure sense. Article 2 insulated states parties from de jure operation of the Conventions in armed conflicts with non-state actors. The final clause of Common Article 2 also addresses obligational reciprocity, stating:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provision thereof.275

Although it does not operate with the severity of the 1907 Hague Conventions’ “si omnes” clause or the reservations submitted to the 1925 Gas Protocol,
the final clause of Common Article 2 confirms that obligational reciprocity is a precondition to application of the vast majority of the 1949 Geneva Conventions. Only non-parties that commit to the Conventions in a de jure sense and abide by them in a de facto sense may resort to them for protection vis-à-vis a state party. The condition of de facto application also reflects a condition of observational reciprocity in Common Article 2. The Special Committee that adopted the text made clear that provisional application of the Conventions to non-parties would cease “when it is admitted that a non-signatory State is not applying the Convention.”

Once a conflict activates the full body of the Conventions through Common Article 2, reciprocity operates in the criteria required for victims of war to benefit from their protections. As their titles suggest, each of the four Conventions identifies a class of so-called “protected persons” that is the primary focus of its safeguards. The criteria for groups to benefit from the protections of the first three Conventions are nearly identical.

Article 4 of the Third Convention includes at least two conditions that guarantee reciprocal acceptance and application of the law of war. The first condition requires militias, volunteer corps and resistance movements to satisfy four criteria to qualify for prisoner of war (“POW”) status. Only groups that conduct "their operations in accordance with the laws and customs of war" are accorded POW status. Commitment to and compliance with the law of war first appeared as a condition for irregular fighters to claim POW status in the Brussels Declaration of 1874. The Conventions’ law of war condition simultaneously satisfies states’ desire for observational reciprocity and provides a positive incentive for states to comply with the law of war generally.

In addition to state observation of the law of war, the Geneva Conventions address individual compliance. Article 85 of the Third Convention covers POWs who had not individually complied with the law of war. The article states that “[p]risoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.” Thus, POWs who violate the law of war prior to their capture do not lose their POW status. Instead,

---

276. 2B 1949 DIPLOMATIC RECORD, supra note 246, at 128.
279. 1949 Geneva Convention III, supra note 155, art. 4.
280. Project of an International Declaration concerning the Laws and Customs of War, Brussels, supra note 169, art. 9. The criterion was also present in POW qualification criteria of the Hague Regulations and the 1929 Geneva Conventions. See 1899 Hague Convention IV, supra note 179, Annexed Regulations, art. 1; 1907 Hague Convention IV, supra note 179, Annexed Regulations, art. 1.
the Detaining Power may prosecute POWs under the same domestic legal regime as its own armed forces. Article 85 denies the operation of negative reciprocity at the individual level.

Denying states the opportunity to regard POW protections as inapplicable to war criminals drew strong objections from the Soviet Bloc delegations. General Slavin of the Soviet delegation remarked: "[T]hose who violated the common laws of humanity automatically forfeited their rights under the Convention," and that "none of the provisions of the Convention should be applied to war criminals." After failing to amend or remove the provision from the Convention, these states filed reservations insisting on a loose version of negative reciprocity at the individual POW level. The Warsaw Pact objections and reservations reflect clear insistence on observational reciprocity not only as a matter of general state practice but on an individual level as well. Under the Soviet reservations only militants’ personal observation of the Conventions guarantees their reciprocal application.

The second condition of reciprocity required for groups to receive POW status is less obvious. Where the requirement to accept and apply the law of war is clearly enumerated in itemized format, the requirement that such groups claiming POW status belong to a state party is easy to miss. Under Article 4, only militias, volunteer corps, and resistance movements “belonging to a Party to the conflict” qualify for POW status. In other words, state imprimatur is a precondition to any group qualifying for POW status. Armed groups taking part in international armed conflicts must trace their authority to do so back to a state party to the Conventions. This requirement ensures that an actor with international legal personality assumes responsibility for the group’s conduct. Furthermore, the requirement limits obligational reciprocity because only states can ratify the Conventions. Even non-state actors that fastidiously satisfy each of the four itemized criteria in Article 4 do not merit Geneva POW status without state imprimatur.

Like the first three Conventions, the Fourth Geneva Convention, which protects civilians, includes a provision outlining preconditions to the majority of its protections. Article 4 of the Fourth Convention is the gateway to the most extensive and elaborate protections for civilians. Essentially, any

---

282. See id. art. 102.
284. Their reservations operated to deny the law of war to persons who had not observed it. Thus, Hungary submitted a reservation to Article 85 stating, "prisoners of war convicted of war crimes . . . must be subject to the same treatment as criminals convicted of other crimes." 1949 DIPLOMATIC RECORD, supra note 245, at 347. Albania, Bulgaria, Poland, Romania, Czechoslovakia, and the Soviet Union. Id. at 342–55.
285. 1949 Geneva Convention IV, supra note 155, art. 4. Article 4 reads in relevant part:
person finding herself in the hands of her nation’s enemy qualifies as a “protected person” under the Fourth Convention. 286 During international armed conflict, nationals of states parties that are either in enemy territory or find their own territory occupied by an enemy state party must be accorded protected status. The Convention leaves nationals of non-party states largely unprotected. 287 Thus Article 4 sustains the condition of obligational reciprocity by denying protected person status to nationals of states not party to the Conventions. It provides further evidence that, while states were eager to rectify the humanitarian shortcomings of the preexisting law of war, they would only do so on the basis of reciprocal commitment. 288

Like most international agreements and treaties, the Geneva Conventions include withdrawal provisions. Article 158 of the Fourth Convention is representative of the Conventions’ approach to withdrawal. 289 Article 158 permits states to withdraw from the legal effect of ratification upon one year’s notice. 290 However, denunciation does not take effect in ongoing conflicts involving the denouncing state party. Furthermore, Article 158 makes clear that withdrawal from the Conventions does not create a legal void. States exercising withdrawal under Article 158 remain subject to “the principles of the law of nations” and specifically to norms traditionally preserved by the Martens Clause. 291 Not surprisingly, the Article limits the effect of denunciation to the denouncing party, preserving operation of the Conventions between remaining states parties.

Commentators have cited Article 158 as evidence of a renunciation of negative reciprocity. 292 While in a sense accurate, such claims overstate the effect of Article 158 and fail to appreciate how the Conventions’ conditions on application, outlined previously, operate as conditions of reciprocity. First, where Article 158 would deny legal effect to a state’s denunciation of the Conventions that was precipitated by failure of observational reciprocity during an ongoing armed conflict with the breaching state, the effect would

Id.; see Commentary, IV Geneva Convention, supra note 244, at 4–5 (noting the unprecedented scope and scale of protections provided by the Fourth Convention); see also Knut Dörmann, The Legal Situation of Unlawful/Unprivileged Combatant, 85 INT’L REV. RED CROSS 45, 60–61 (2003) (summarizing and classifying the Fourth convention’s extensive and detailed protective regime for civilians).

286. Civilians who do not meet the nationality criteria of the Article 4 are limited to protections of Part II of the Fourth Convention. See 1949 Geneva Convention IV, supra note 155, art. 4.


288. The universal ratification of the Conventions overcame this category. See supra note 274.

289. Article 158 is common to the four of the 1949 Geneva Conventions. It appears as articles 63, 62, and 142, respectively, in the first three Conventions. See Geneva Convention I, supra note 155, art. 63; Geneva Convention II, supra note 155, art. 62; Geneva Convention III, supra note 155, art. 142.

290. Geneva Convention IV, supra note 155, art. 158.

291. Article 158 reads in relevant part: “[D]enunciations shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.” Geneva Convention IV, supra note 155, art. 158.

292. Bouchez-Saulnier, supra note 7, at 137.
be merely to delay termination of the Conventions rather than to deny withdrawal entirely. Following denunciation, the Conventions would not operate in a subsequent armed conflict between the breaching and victim states. Further, the option of declining to apply the Conventions to groups of persons not meeting the Conventions’ protected person criteria would remain available to the victim state and vindicate most of the concerns that have traditionally informed the principle of reciprocity. It remains unclear whether Article 158 would entirely foreclose suspension of an individual provision of the Conventions under the traditional law of treaties.

The arc of late-nineteenth and early to mid-twentieth century efforts to codify the law of war reflected a growing trend away from blunt expressions of reciprocity. States gradually abandoned formal conditions on obligational reciprocity, including the *si omnes* clause and reservations to its effect, and limited their resort to negative reciprocity as a means of self-help in response to failures of observational reciprocity. Yet states simultaneously preserved the function of former conditions on reciprocity through restrictive secondary rules. This preservation limits the application of the law of war to conflicts with peer competitors and groups similarly committed to honoring the customs and usages of the traditional law of war. Subsequent developments in both the law of war and the law of treaties would introduce new considerations into the debate concerning the continued vitality and propriety of the principle of reciprocity.

IV. MODERN DEVELOPMENTS OF THE PRINCIPLE OF RECIPROCITY

The traditional principle of reciprocity both reflects and reinforces an international legal system dominated by sovereigns. Negative reciprocity, a measure of state self-help, follows easily from a system that sees the state as the true and perhaps exclusive beneficiary of international legal norms. As illustrated above, the law of war has historically adhered to such traditional notions of reciprocity. Even while states shed coarse conditions of reciprocal obligation and observance like the *si omnes* clause, they preserved the contingency of their international legal obligations by reserving application of the vast majority of the law to peer competitors. Thus, like the traditional principle of reciprocity, the established law of war has reinforced the sovereign focus of the international legal system.

In the late twentieth century, academic and judicial circles questioned the vitality of that system, warranting an examination of how such developments impact reciprocity.293 The evolution in the law of treaties mentioned

293. See generally MERON, THE HUMANIZATION OF INTERNATIONAL LAW, supra note 71 (compiling a series of the authors’ earlier articles emphasizing individuals’ growing roles in international law); George Abu-Saab, The Specificities of Humanitarian Law, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET (Christophe Swinarski ed., 1984).
previously\textsuperscript{294} includes a reconceptualization of the contractual nature of treaties. While conceding the synallagmatic nature of most treaties, international scholars have characterized some treaties as non-contractual. Sometimes called “law-making treaties,” these instruments are argued to evince obligations of a general or even ubiquitous nature.\textsuperscript{295} These are usually multilateral treaties, stating broad, normative rules of conduct applicable across the spectrum of states parties’ international conduct. Some commentators cite such treaties as evidence of a relative decline in the importance of sovereignty to evaluating and applying international legal rules.\textsuperscript{296} More importantly, “law-making treaties” are frequently said to regard individuals rather than states as their primary beneficiaries.

As modern conflicts have proved that existing law of war instruments inadequately protect the full range of humanitarian interests in the welfare of civilians and victims of war, a less sovereign-focused outlook on protections has emerged. It is not uncommon to hear states’ obligations under the law of war referred to as “rights” that vest in individuals.\textsuperscript{297} Such reconceptions coincide with a broader recognition of transnational relationships and individuals as proper subjects of international law.\textsuperscript{298} This evolution is not only apparent from human rights instruments and scholarship but has found its way into the secondary rules governing international law, including the treatment of reciprocity by the law of treaties. A number of sources have leveraged the emerging non-sovereignist conception of international law to reduce reciprocity’s role in the law of war. Recognizing the interaction between such emerging secondary rules and the law of war is critical to a complete understanding of the modern doctrine of reciprocity.

A. The 1969 Vienna Convention on the Law of Treaties

The Vienna Convention on the Law of Treaties\textsuperscript{299} is integral to the argument that reciprocity no longer conditions law of war obligations. The Con-
vention purports to regulate the most important aspects of the international treaty system.300 A number of sources, including U.S. government administrations301 and U.S. federal courts,302 regard the Vienna Convention as generally reflective of customary international law.303 However, it may be more accurate to regard the Convention as it was viewed when drafted, as a mixture of codified pre-existing practice and “progressive development” on subjects not fully realized in international law.304

The Convention codified a significant portion of the pre-existing customary law of treaties.305 Article 60 of the Convention addresses states’ exercise of negative reciprocity in response to breaches of treaty obligations.306 The Article’s provisions on suspension of treaty obligations reflected accepted customary limits and conditions on state practice with respect to negative reciprocity.307 Article 60 sustains states’ freedom to suspend performance of a broad range of positive legal obligations when confronted with breach.

Despite this codifying effect, Article 60 also challenged traditional state prerogatives. In particular, paragraph 5 supports the emerging non-sovereignist view of international legal obligations, stating, “Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.”308 As borne out by its drafting history, paragraph 5 reads almost as an afterthought to Article 60. Whereas the first three paragraphs of Article 60 were the product of extensive debate and decades of scholarly and committee

---

302. Fujitsu Ltd. v. Fed. Exp. Corp., 247 F.3d 423, 433 (2d Cir. 2001). Applying the Convention, the court observed, “we rely upon the Vienna Convention here ‘as an authoritative guide to the customary international law of treaties.’” Id. (quoting Chubb & Son, Inc. v. Asiana Airlines, 214 F.3d 301, 309 (2d Cir. 2000)).
303. See supra note 300, at 11–12. The Convention’s preamble acknowledges a developmental aspect noting a “progressive development of the law of treaties achieved in the present Convention . . . .” Vienna Convention, supra note 27, preamble.
304. See supra note 300, at 11–12. The Convention’s preamble acknowledges a developmental aspect noting a “progressive development of the law of treaties achieved in the present Convention . . . .” Vienna Convention, supra note 27, preamble.
305. See supra note 300, at 11–12. The Convention’s preamble acknowledges a developmental aspect noting a “progressive development of the law of treaties achieved in the present Convention . . . .” Vienna Convention, supra note 27, preamble.
306. See supra discussion accompanying notes 36–61.
307. Frankowska notes that although the United States has not ratified the Convention, it has resorted to Article 60 in its treaty relations with other states. Frankowska, supra note 63, at 298 (addressing U.S. courts’ treatment of the Convention as reflective of customary law).
308. Vienna Convention, supra note 27, art. 60, ¶ 5.
work. Paragraph 5 appeared in a plenary committee session as an oral
amendment offered by the Swiss delegation. Mohammed Gomaa charac-
terized paragraph 5 as “an innovation of the Conference.” When intro-
ducing the written amendment, a Swiss delegate described the 1949 Geneva
Conventions, as well as conventions on refugees, genocide, and “human
diffs in general,” as instruments that should not be subject to traditional
notions of reciprocal suspension or termination. Records of discussion
of the Swiss amendment are sparse. While several states commented on
the desirability of the rule, none referred to any pre-existing custom to the
same effect. Nor did the proposal replicate any provision in existing law of
war treaties. Ultimately, the plenary Committee adopted the Swiss amend-
ment by a vote of 87 votes to none, with nine abstentions.

Despite its humble origins, the doctrinal consequences of paragraph 5 for
conflict regulation are potentially enormous. Paragraph 5 might represent a
major shift in both the theoretical and doctrinal underpinnings of the prin-
ciple of reciprocity. On the theoretical level, paragraph 5 signifies a major
coup for jurists and interests dissatisfied with the persistence of reciprocity
in the law of war. It clearly characterizes humanitarian obligations as duties
owed erga omnes rather than inter partes. From this transformation, accord-
ing international legal personality to individuals under humanitarian trea-
ties is an attractive and understandable next step. Paragraph 5 thus signifies
a major shift away from the sovereigntist view of the law of war and other
humanitarian legal disciplines.

309. See Rosenne, supra note 32, at 33–34. Shabtai Rosenne attended the Vienna Convention Diplo-
matic Conference as a delegate for the State of Israel. Rosenne contributed to committee’s discussions on
310. Mohammed M. Gomaa reports that Sir Gerald Fitzmaurice, a Special Rapporteur of the ILC,
proposed to exempt human rights treaties, labor conventions, and maritime safety conventions from
termination or suspension upon breach. MOHAMMED M. GOMAA, SUSPENSION OR TERMINATION OF TREA-
tIES ON GROUNDS OF BREACH 106–07 (1996). Later, Special Rapporteurs declined to include the exemp-
tion in drafts of the ILC’s work. Id. Review of the diplomatic record of the Convention indicates that
Switzerland first proposed the concept captured in paragraph 5 in a plenary meeting at the 1968 Session
A/CONF.39/11 (May 9, 1968). The Swiss renewed their proposal the next year at another plenary ses-
311. GOMAA, supra note 310, at 107.
313. Sir Humphrey Waldock, an unaligned expert consultant to the Conference, noted concern that
paragraph 5 would conflict with many existing termination provisions contained in existing treaties.
Waldock observed that the persistence of rules that had matured into custom and jus cogens would serve
the same interests addressed by the Swiss delegation’s amendment. U.N. Conference on the Law of
314. Rosenne, supra note 32, at 319.
315. For an exhaustive analysis of erga omnes in the international obligations, see generally MAURIZIO
The potential doctrinal byproducts of paragraph 5 are no less significant. In its broadest interpretation, paragraph 5 would insulate the law of war entirely from the reciprocity-based remedies of the first three paragraphs of Article 60. A maximalist reading of paragraph 5 accords with a movement toward conflating human rights and international humanitarian law into a general and truly universal international law of humanitarian concerns. The extent to which human rights law and the law of war merge, coexist, overlap, or even conflict is the subject of extensive academic debate and literature. A complete survey of the field, much less an effective defense of a viewpoint in this debate, is well beyond the scope of this Article. For purposes of this Article, however, it is sufficient to note that paragraph 5 of the Vienna Convention arguably supports a viewpoint that regards human rights law and the law of war as at least equivalent in terms of their purported rejection of negative reciprocity as a means of state self-help. Paragraph 5 might be read to acknowledge no distinction between human rights law and the law of war in terms of suspension or termination of legal norms as responses to failures of obligational or observational reciprocity.

316. GOMAA, supra note 310, at 109.

317. Paragraph 5 might express a human rights-like theory of the obligation to protect victims of war—a monumental development when one considers the history of the law of war illustrated earlier. As demonstrated above, early thought on war conflated the person and state. Combatants and even civilians were conceived as extensions of the state. One of the theoretical developments in armed conflict critical to the modern law of war was Rousseau’s contention that war should not be conceived as a conflict between persons. “War then, is not a relation between man and man, but a relation between State and State, in which individuals are enemies only by accident, not as men, nor even as citizens, but as soldiers; not as members of their fatherland, but as its defenders. In short, each State can have as enemies only other States and not individual men; inasmuch as it is impossible to fix any true relation between things of different natures.” JEAN JACQUES ROUSSEAU, 1 SOCIAL CONTRACT OR PRINCIPLES OF POLITICAL RIGHT, ch. 4 (Charles M. Stover trans., The New American Library 2d ed. 1974) (1762). The rights-based conception of the law of war carries this evolution further, characterizing rights that persist in the context of armed conflict and restrain states’ efforts.


319. René Provost provides the most thorough exploration of the interaction between human rights law and the law of war. See generally supra note 197. Provost offers a nuanced exploration of how the two legal systems differ, overlap, and may in some cases be reconciled, including an excellent comparison on how reciprocity may operate differently within the two disciplines. Id.

320. The Swiss delegation, in its discussion proposing paragraph 5, mentioned the Geneva Conventions and major human rights instruments all at once. See supra discussion accompanying note 510, ¶ 21.
In fact, the nature of the treaty-based norm in question may limit negative reciprocity. If classic international law conceived of treaties as contracts, it regarded states as the parties in privity. To continue the contractual analogy, causes of action for breach accrued to states, not to individual persons whom they may incidentally have affected. However, modern human rights treaties present an exception and illustrate the growing "humanization" of international law in some circles. Rather than recognize states as their primary beneficiaries, human rights treaties are frequently thought to benefit individuals. While treaties predating the mid-twentieth century international human rights movement often benefitted individuals, such benefits were incidental and usually owing to the person's status as de facto chattel, or at least interests, of the sovereign. Most modern human rights treaties operate differently. They elevate interactions between the state and individuals to concerns of international law. Persons may thus be said to gain a limited degree of international personality from human rights treaties. In this sense that human rights treaties are said to be obligations owed erga omnes as opposed to inter partes.

Negative reciprocity loses much of its logical and legal relevance under this conception of human rights treaties. When an obligation is owed primarily to individuals, a breach occurring between State A and such individuals would not occasion suspension between State B and other, or even the same, individuals. The effects of any reciprocal suspension or termination of the norm in question by State B would miss their mark almost entirely. For this reason, international human right treaties are said to operate largely free from conditions of observational reciprocity and the sanction of negative reciprocity.

Extrapolating human rights treaties' conception of the legal status of individuals to the law of war is an attractive step. If the law of war protects individuals from states rather than states' interests in individuals and military goals, the logic of negative reciprocity quickly evaporates. State A's failure to observe the law of war with respect to nationals of State B would not warrant suspension of the relevant norms by B. The nationals of State A, having had no part in the earlier breach by their state, would continue to enjoy protection throughout the armed conflict.

321. See supra discussion accompanying notes 32–37.

322. See generally Merson, The Humanization of International Law, supra note 71.


325. Proctor, supra note 197, at 167.

Yet textual limits within paragraph 5 of the Vienna Convention and temporal limits on application of the Convention generally caution against such a drastic reconceptualization of the law of war. First, paragraph 5’s restriction on negative reciprocity addresses only “provisions relating to the protection of the human person.” While the law of war includes important affirmative authority to use armed force against persons; to destroy, confiscate or requisition property; and to detain persons. Indeed, an ICRC instructor reputedly regarded the right to kill as “the first principle of the law of war.” A number of treaties from the Hague Tradition, including the 1925 Geneva Protocol and the 1980 Convention on Conventional Weapons and its Protocols, defy the categorical label “humanitarian treaty.” Such provisions or treaties might be outside the scope of the paragraph 5 “provisions relating to the protection of the human person” and thus still subject to traditional conditions of reciprocal obligation and observance.

The Vienna Convention’s general rule of non-retroactivity may be a second limit on the effect of paragraph 5. Article 4 states, “[T]he Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.” At a minimum, treaties concluded prior to January 27, 1980 would not be subject as a matter of conventional law to the reciprocity regime outlined in Article 60. Even today, most law of war treaties predate the Vienna Convention’s entry into force. The same temporal restriction holds true for a number of the human rights instruments specifically mentioned in the discussions that led to the adoption of paragraph 5.

Thus Article 60, Paragraph 5 could only operate on earlier treaties such as the 1899/1907 Hague Regulations, the 1949 Geneva Conventions, and the 1977 Additional Protocols to the Geneva Conventions under a theory that its rejection of negative reciprocity reflected custom. To be more precise, at least one of two possibilities must be true for paragraph 5 to operate on the majority of major law of war treaties. First, paragraph 5 could have reflected or codified a pre-existing customary rule at the time it was drafted.
natively, paragraph 5 may have matured since its development in 1969 into a customary rule with retroactive effect on treaties of a humanitarian nature.

At least one commentator has attributed customary status to paragraph 5 at the time of its drafting. Gomaa asserts that paragraph 5 reflected, at the time of its drafting, an existing rule of customary international law. Gomaa, supra note 310, at 113.

The ICJ has also stated in dictum that paragraph 5 reflected custom. I.C.J. Namibia Advisory Opinion, supra note 56, ¶ 94.

The International Criminal Tribunal for Yugoslavia applied paragraph 5 to the 1949 Geneva Conventions, strongly suggesting that the Tribunal attributes customary status to paragraph as well. The Tribunal stated: Article 60(5) [of the Vienna Convention] provides that such reciprocity or in other words the principle inadimplenti non est adimplendum does not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular the provisions protecting against persons protected by such treaties.


Yet the customary status of paragraph 5 is dubious. Elisabeth Zoller has expressed skepticism at the general applicability and reach of Article 60. She posits that attributing customary status to Article 60 “has so many distorting effects on international relations that it cannot purport to be an exact image of the international law in force.” Zoller, supra note 9, at 17–18.

Legal historians have identified three major drafting efforts leading to the Convention explored a humanitarian exception to the reciprocity regime ultimately codified in Article 60.

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

(a) the legal force of such agreements;
(b) the application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;
(c) the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.

Vienna Convention, supra note 27, art. 3. Article 3(b) contemplates the operation of preexisting secondary rules on treaty interpretation and application drawn from custom.

Gomaa asserts that paragraph 5 reflected, at the time of its drafting, an existing rule of customary international law. Gomaa, supra note 310, at 113.

The ICJ has also stated in dictum that paragraph 5 reflected custom. I.C.J. Namibia Advisory Opinion, supra note 56, ¶ 94.

The International Criminal Tribunal for Yugoslavia applied paragraph 5 to the 1949 Geneva Conventions, strongly suggesting that the Tribunal attributes customary status to paragraph as well. The Tribunal stated: Article 60(5) [of the Vienna Convention] provides that such reciprocity or in other words the principle inadimplenti non est adimplendum does not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular the provisions protecting against persons protected by such treaties.


Yet the customary status of paragraph 5 is dubious. Elisabeth Zoller has expressed skepticism at the general applicability and reach of Article 60. She posits that attributing customary status to Article 60 “has so many distorting effects on international relations that it cannot purport to be an exact image of the international law in force.” Zoller, supra note 9, at 17–18.

Legal historians have identified three major drafting efforts leading to the Convention explored a humanitarian exception to the reciprocity regime ultimately codified in Article 60.
Neither the exhaustive survey of treaty law conducted by the Harvard Project nor the decades of preparatory work conducted by the International Law Commission noted an exception to general rules of negative reciprocity for humanitarian instruments or norms. Rather, the preparatory work for the Convention conveys the impression that the Swiss amendment was an innovation intended to remedy a normative oversight in existing law.

The contemporaneous works of prominent commentators also fail to support the existence of a customary humanitarian law exception to the general reciprocity regime. Less than a decade prior to the Vienna Conference, Stone stated, “The premise on which retaliation in war proceeds is, indeed, that a belligerent’s duty to observe the laws of war is not absolute, but conditional on the enemy’s reciprocation.”\footnote{Stone, supra note 150, at 354.} Also, Schwarzenberger noted, “The laws of war constitute a typical illustration of the international law of reciprocity.”\footnote{Schwarzenberger, supra note 55, at 452.} Just three years after the Vienna Convention was signed, he observed:

[A] belligerent when confronted with large-scale breaches of the laws of war on the part of the adversary “may . . . prefer to take . . . immediate action and, by his reprisals, reverse the operation of the chief working principle behind the laws of war from positive, to negative, reciprocity.”\footnote{Id. at 453.}

Other contemporaneous developments in the law of war further clarify the extent to which paragraph 5 either reflected or had matured into custom.

\subsection*{B. The 1977 Additional Protocols to the Geneva Conventions}

Commentary on and development of the law of war following the Vienna Convention was not limited to experts. After the Vienna Conference con-
cluded its effort to codify the law of treaties, states set out to update and further codify the law of war. Between 1974 and 1977, states met at Geneva to conclude what became the 1977 Additional Protocols to the 1949 Geneva Conventions.\(^{345}\) Even today, the 1977 Additional Protocols stand out as the most significant revision and update of the law of war since the 1949 Conventions. The Protocols not only purported to reform the application of the law of war to emerging forms of conflict such as wars of national liberation\(^{346}\) but also worked a revolutionary merger of the *jus in bello*'s previously bifurcated Hague and Geneva traditions.\(^{347}\)

One might have expected the ambitious Protocols to address explicitly or even reform the relationship between the law of war and the principle of reciprocity. Like their predecessors, the Protocols entered force prior to the Vienna Convention, insulating them from the effect of Article 60, paragraph 5 as a matter of conventional law. The drafters could have made a deliberate effort to clarify the effect of paragraph 5 before that treaty took effect. If they believed that paragraph 5 merely reflected custom, they could have excluded reciprocity from the Protocols. Alternatively, they could have included paragraph 5 by reference. Yet the Protocols neither unequivocally rejected the doctrine of negative reciprocity nor extinguished the veiled and subtle vestiges of reciprocity found in earlier twentieth century law of war instruments.

To be sure, Protocol I includes some indicia of intent to limit the operation of negative reciprocity. Article 1 restates the commitment to “ensure respect for the Conventions in all circumstances” found in Article 1 of the 1949 Conventions. Echoing the Commentary to the 1949 version, the Commentary to Protocol I, Article 1 advocates a universalist understanding of the Geneva Conventions and an aversion to conditions of formal reciprocity.\(^{348}\) In fact, the Commentary specifically cites Article 60, paragraph 5.\(^{349}\) Protocol I, Article 96(3) also provides non-parties the opportunity to effec-

---

\(^{345}\) See generally Protocol I, supra note 33.

\(^{346}\) Article 1, paragraph 4 is one of the most controversial provisions of Additional Protocol I. Article 1, paragraph 4 expands coverage to conflicts between states parties and national liberation movements or organizations fighting racist regimes. Id. art. 1, ¶ 4.


\(^{348}\) COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 32, ¶ 49 (Yves Sandoz et al., eds., 1988) [hereinafter Commentary]. The Commentary notes with respect to Article 1 that treaties of humanitarian law do not operate on the basis of reciprocity—rather they are “unilateral engagements solemnly contracted in front of the world.” Id.
2009 / *Reciprocity and the Law of War* 427

tively accede to the Protocol and induce reciprocal observance from de jure parties, thereby reducing the exclusionary effects of states’ insistence on formal obligational reciprocity.

Yet no Article explicitly requires non-reciprocal application of obligations. Furthermore, states parties’ and signatories’ statements do not mirror the unofficial Commentaries’ enthusiasm for paragraph 5. Some states parties have interpreted Article 96 as preserving the principle of obligational reciprocity. And the United Kingdom submitted with its 1998 ratification a reservation to two important provisions on protections of civilians in targeting. The UK reservation provides:

The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise there to and will not involve any action prohibited by the Geneva Conventions of

349. *Id.* ¶ 51. Paragraph 51 includes the Commentary’s strongest rejection of conditions of reciprocity, stating:

The prohibition against invoking reciprocity in order to shirk the obligations of humanitarian law is absolute. This applies irrespective of the violation allegedly committed by the adversary. It does not allow the suspension of the application of the law either in part or as a whole, even if this is aimed at obtaining reparations from the adversary or a return to a respect for the law from him. (19) This was confirmed quite unambiguously in Article 60 of the Vienna Convention on the Law of Treaties, which lays down under what conditions a material breach of a treaty can permit its suspension or termination; that article specifically exempts treaties of a humanitarian character.

350. *Id.* Report of the Swedish International Humanitarian Law Committee Stockholm, supra note 188, at 601 (observing “Sweden shall not be required to abide by more comprehensive obligation than those applying to our adversary”). The report expresses a preference for offering non-party enemies the opportunity to assent to practical observation of the Protocol by agreement. The Committee, however, reserved the right to waive full application of the Protocol where an adversary fails to reciprocate. *Id.* at 602. Finally, the Committee observed that provisions of the Protocol that had achieved customary status would be respected even in the absence of reciprocal observance. *Id.*
1949 nor will such measures be continued after the violations have ceased.351

The Vienna Convention’s nonretroactivity provision would prevent paragraph 5 from operating on the UK and states expressing similar reservations as a matter of conventional law with respect to Protocol I. The only remaining source for a prohibition on negative reciprocity and reprisal would be custom. Though framed as a question of reprisal rather than as one of negative reciprocity, the reservation casts significant doubt on the customary status of paragraph 5 from the perspective of the United Kingdom.

Nevertheless, the Protocols’ expansion of the traditional scope of application of the Geneva Conventions demonstrates an intent to diminish the operation of negative reciprocity. Two provisions in particular mitigate the Geneva Conventions’ limits on application that preserved the effects of negative reciprocity. First, the revolutionary and highly controversial Article 1, paragraph 4 extends the protections of Protocol I to armed conflict between states parties and “peoples fighting against colonial domination and alien occupation and against racist regimes . . . .”352 It thus applies a major portion of the law of war to armed conflicts with non-state actors in addition to conflicts between sovereign peer competitors. It also eschews obligatory reciprocity as the test for law of war applicability in favor of determining applicability on the basis of adversaries’ *causa belli*.

Second, in qualifying conflicts, Protocol I amends the traditional criteria for Prisoner of War protection. Through a textually complex regime, Article 44 awards POW status to all “combatants” who fall under the power of an adverse Party.353 With only one exception, individual combatants qualify for POW status notwithstanding their failure to observe the law of war.354 Under Article 44, only failure to carry arms openly in the attack, or perfidy,355 disqualifies combatants from POW status.356

The extent to which Article 44 reflects a sea change in POW status and a repeal of the vestiges of reciprocity is a matter of debate. The 1949 Conven-


353. Protocol I, supra note 33, art. 44.

354. Article 44 states in relevant part, “While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant, or if he falls into the power of an adverse Party, of his right to be a prisoner of war.” Id.

355. Protocol I defines perfidy as “[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.” Protocol I, supra note 33, art. 37.

356. Protocol I, supra note 33, art. 44, ¶ 4. While captured fighters who failed to carry arms openly forfeit POW status, Article 44 provides that they remain protected by “protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol.” Id. Thus, combatant immunity appears to be the only forfeited protection.
tions had required group adherence to the law of war as a criterion for POW status, at least for militias and volunteer corps. A cursory read of Article 44 suggests that it eliminates the requirement of observational reciprocity, except with respect to perfidy. Yet Article 44 cannot be read in isolation. Many fail to appreciate that the operative term for POW status under Article 44 is "combatant," a term defined in the preceding Article.\textsuperscript{357}

Article 43 offers a two-stage definition of combatant, curiously presented in reverse order. Article 43(2) defines combatants as "armed forces of a Party to a conflict (other than medical personnel and chaplains . . .)."\textsuperscript{358} Article 43(1), defines "armed forces" to include "all organized armed forces, groups and units which are under a command responsible to [a] Party . . . [and] subject to an internal disciplinary system which inter alia, shall enforce compliance with the rules of international law applicable in armed conflict."\textsuperscript{359}

Were the term "combatant" loosely understood to mean "persons taking part in hostilities," the consternation over Article 44 might be justified. Allowing anyone who took up arms openly to benefit from POW status would upend the law of war's detention regime and would call into question whether states could still demand obligational and observational reciprocity given such permissive criteria. But as Article 43 reflects, "combatant" is a term of art in Protocol I. As feared by detractors of Protocol I, individual combatants retain POW status despite their personal law of war violations.\textsuperscript{360} Article 43 preserves both obligational and observational reciprocity where it counts: at the group level. It ensures that only combatants who belong to "armed forces, groups, and units" that actually commit to, apply, and enforce the laws of war are eligible for POW status.

Thus while Protocol I amended the test for POW status, states retained the critical guarantee that only groups of adversaries committed to reciprocal obligation to and observance of the law of war would benefit from the status. Protocol I's limitations and states' reservations to provisions even suggesting unconditional application undermine the claim that Vienna Convention Article 60, Paragraph 5 reflected or matured into customary law. The Convention’s prohibition on retroactivity thus bars applying Paragraph 5 to earlier law of war treaties.

Finally, the Protocols’ efforts to reform the law applicable to non-international armed conflicts demonstrate states’ commitment to preserving reciprocity in the late twentieth century. 1977 Additional Protocol II updates and supplements the protections prescribed in Common Article 3 of the 1949 Conventions. Protocol II adds to Common Article 3, inter alia, ex-
panded process in criminal prosecutions, enhanced responsibilities with respect to the wounded and sick, and added details to protections from the effects of hostilities. Yet while it expanded substantive protections, Protocol II restricted the scope of application of those protections to be consistent with the rules of international armed conflict. Article 1(1) limits application of Protocol II to conflicts between states parties and armed forces or groups "under responsible command . . . as to enable them to . . . implement this Protocol." Thus only conflicts between states and groups committed and able to reciprocate observance of Protocol II trigger its protections. In this respect, some states regarded Article 1 as a step backward for the law of non-international armed conflicts. However, armed with an appreciation of the persistence of negative reciprocity in the law of war, one is less surprised to find states willing to reverse a trend of expanded application to preserve reciprocity.

C. Political and Military Context

The shared political-military context of the Vienna Convention and the Additional Protocols casts doubt on the extent to which states envisioned the actual operation of Article 60, paragraph 5, as well as its customary status. States negotiated, concluded, and widely ratified both the Vienna Convention and the Additional Protocols in an era when nuclear weapons dominated military strategy. Indeed, just as representatives to the Diplomatic Conference set out to draft the Protocols to the Geneva Conventions in 1974, U.S. nuclear strategy abandoned its emphasis on limited strikes in favor of “Assured Destruction.” In response to advances in Soviet nuclear delivery capacity, Secretary of Defense Robert McNamara committed the United States to developing the capacity to launch a second strike capable of destroying twenty to twenty-five percent of the population of the Soviet Union’s largest cities.

Such plans were almost entirely incompatible with the Protocols’ nascent limits on targeting. The ICJ acknowledged as much in its equivocal 1996 advisory opinion on the legality of nuclear weapons under the law of war and

362. Id. Part III.
363. Id. Part IV.
364. Protocol II, supra note 361, art. 1(1).
366. See David Alan Rosenberg, Nuclear War Planning, in THE LAWS OF WAR, supra note 124, at 180 (noting U.S. shift in nuclear target planning from Soviet nuclear force or military targets to urban-industrial centers).
human rights law. The NATO powers reconciled their plans with the
Protocols by an appeal to exceptionalism. Many NATO states insisted that
nuclear weapons be regulated separately from conventional weapons. The
assumption was that use of nuclear weapons, or a non-nuclear attack of suffi-
cient scale to provoke self-defense using nuclear weapons, would occasion a
large-scale and reciprocal suspension of much of the law of war.

Cold War nuclear exceptionalism indicates states’ extraordinary commit-
ment to conditions of reciprocity. The explicit carve-outs for nuclear ex-
changes are in some respects equivalent to anticipatory negative reciprocity.
Although nuclear exchanges are commonly understood to constitute repri-
sals, they more closely resemble suspension or even termination of the entire
norm in question—distinguishing characteristics of negative reciprocity.
The nuclear example thus further undermines the claim that reciprocity has
been eliminated as a condition of observance of the law of war.

A dispositive determination of the customary status of paragraph 5 re-
mains elusive. Indicia of state practice with respect to security efforts and
particularly the conduct of hostilities are closely guarded. But claims that
paragraph 5 reflected customary law at the time of its drafting or that it
matured into custom at some later point suffer from an oversimplified un-
derstanding of reciprocity under the law of war.

The developers of the law of war did not clearly address the role of reci-
procity in the instruments that followed the Vienna Convention. Proponents
of paragraph 5 likely overstate its conventional effects and customary status.
In short, reciprocity remains an underdeveloped consideration within the
discussion of how to apply and revise the law of war. With a more complete
understanding of reciprocity’s persistence in the law of war, some prescrip-
tions that may guide efforts to apply and reform the law become apparent.

V. CONCLUSION: RECIPROCITY, THE LAW OF WAR, AND
PRESCRIPTIVE CONSIDERATIONS

To some extent, state practice vindicates the claim that states’ insistence
on reciprocity has subsided over time. Practice has mirrored the positive
law’s shift toward a more subtle doctrine of reciprocity. Despite enduring
textual authority to do so, states have not frequently exercised negative reci-
procity under the law of war. Invocations of the Hague Regulations’ si omnes
clause are effectively extinct. The Geneva Conventions have rarely, if ever,
been deemed inapplicable on the basis of an adversary’s failure of observational reciprocity.

Yet states have regularly resorted to secondary rules within the law of war to vindicate the same concerns that informed traditional reservations or exercises of negative reciprocity. As the preceding analysis has shown, twentieth century law of war instruments lacking express conditions of reciprocal observance or obligation have included restrictive conditions on application and scope that vindicate the same concerns. States have held fast to these secondary rules as conditions on the de jure application of the law of war.372 While they have admitted that some law of war provisions apply to situations and persons who do not meet the sovereign-focused criteria of the traditional law, states have also been careful to characterize such applications as policy-based or gratuitous extensions and not de jure operations of the law. The categorical claim that reciprocity no longer conditions the operation of the law of war is greatly overstated and fails to appreciate how other secondary rules act as proxy or ersatz conditions of reciprocity.

Military historian Martin van Creveld has argued that “what is and is not considered acceptable behavior in war is historically determined, neither self-evident nor unalterable.”373 The reactive nature of the law of war confirms in many respects Crevald’s analysis. It is now axiomatic that, to be effective, the law of war must account for both the operational demands of armed conflict as well as contemporary notions of humanity. Historically, allegations that the law of war is out of touch or irrelevant have indicted provisions that overly burden military operations or do not adequately accommodate states’ security needs. Such provisions have withered from disuse and even disdain.374 However, if the laws of war have been unresponsive to military necessity, they have also failed to keep pace with our evolving sense of humanity and decency.375 War rules that are out of touch with modern conceptions of humanity, justice, and human rights present as great a threat to effectiveness and the rule of law as rules that fail to adequately account for military necessity.

The law of war has proved a relatively dynamic body of law, periodically evolving to balance conceptions of military necessity against maturing ex-


375. For example, the ambiguous and permissive principle of proportionality may be ripe for reconsideration because some may consider it out-of-touch with modern sensibilities.
2009 / Reciprocity and the Law of War

pectations of humanity in war. Yet the role of reciprocity remains underap-
preciated as a factor for consideration. As a critical element of both early and
extant war conventions, reciprocity warrants deliberate scrutiny to deter-
mine whether it fulfills current military needs. As Crevald’s observation
suggests, the future role for reciprocity should depend not on its pedigree
but rather on whether it remains consistent with notions of modern military
necessity and humanity.

While law of war reformers have cited evolving standards of decency and
humanity as well as the changing nature of states’ adversaries, few have
gazed inward to inquire whether changes in states’ own military doctrine
and operations call for humanitarian revisions of the law. Most discussions
focus on how changing external threats challenge or should provoke change
in the law. Thus efforts to humanize humanitarian law have leveraged in-
creased awareness of the human costs of conflict and the tactical and strate-
gic challenges presented by asymmetrical foes. Yet there has been little
analysis of whether states’ own military concerns might provide impetus for
further evaluation or humanization of the law. If vestiges of negative reci-
procity persist in the law of war, they should be scrutinized to determine
their relevance and compatibility with military doctrine and strategy. In a
follow-on piece that leverages the framework identified by this Article, I
hope to highlight such normative issues concerning the persistence of reci-
procity.

Recent developments in states’ military strategies and doctrine necessitate
a critical examination of the propriety of reciprocity’s persistence in the law
of war. Greater appreciation of the importance of public support for military
operations and a revival of counter-insurgency doctrine may cast doubt on
the propriety of negative reciprocity as a measure of state self-help. Counter-
insurgency strategy’s emphasis on political over military considerations cre-
ates the possibility of new coincidences of interest between military doctrine
and humanity.376

More importantly, counter-insurgency strategy counsels states and their
armed forces to know themselves. Sir James Graham declared in 1849 that
the principle of reciprocity made “the interest of others the measure of our

376. DEP’T OF THE ARMY, FIELD MANUAL 3–24, COUNTERINSURGENCY OPERATIONS 1–19 (Dec. 15,
2006). Field Manual 3–24 observes, “The primary objective of any [counterinsurgency] operation is to
foster development of effective governance by a legitimate government. Counterinsurgents achieve this
objective by the balanced application of both military and nonmilitary means.” Id. Of course, current
counter-insurgency strategy is not the first or only observation of the alignment of interest between
military necessity and humanity. For example:

On May 18, 1859, at Marengo, Marshal Regnaud de Saint-Jean d’Angely addressed these
words to the Imperial Guard: Soldiers of the Guard, . . . you will give the army an example of
fearlessness in danger, of order and discipline on the march, of dignity and restraint in the
country in which you are engaged. The memory of your own families will make you consider-
ate of the people of the country and will keep alive your respect for property, and you may be
sure that victory awaits you.

DUNANT, supra note 165, at 42, n.1.
interest . . . it makes the folly of others the limit of our wisdom.” 377 In fact, long before Graham, Sun Tzu counseled leaders to “[k]now your enemy and know yourself.” 378 It may be no small irony that categorical insistence on reciprocity distracts us from accomplishing the latter. Military and political planners appear to better appreciate the relationship between why they wage military operations and how they wage them. The prominence of Rule of Law or Stability Operations in modern doctrine emphasizes a new consciousness about integrating the day-to-day conduct of operations with their desired end state. 379 Such operations call on states not only to foster respect for the rule of law in developing states but also to examine their own relationship to the law. 380 Thus, whether insistence on reciprocity complements or retards the execution of emerging military strategy deserves critical examination.

Outing reciprocity in both the preterit and extant law of war does not address the entire spectrum of challenges facing the law. However, an understanding of the law of war that explicitly considers reciprocity may focus debate over law of war reform into a more fundamental conversation about the appropriate role of reciprocity in regulating the conduct of hostilities. The appreciation of negative reciprocity in the law of war offered by this Article provides a much-needed platform for such reform discussions.

379. DEP’T OF THE ARMY, FM 3–07 STABILITY OPERATIONS 3–1 to 3–2 (OCT. 6, 2008). The FM (“Field Manual”) observes, “Essential stability tasks lay the foundation for success of the other instruments of national power. This foundation must sustain the burdens of governance, rule of law, and economic development that represent the future viability of a state.” Id.