EXPECTATIONS OF RECIPROCITY IN THE LAW OF ARMED CONFLICT

by

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Abstract

The expectation of reciprocity has a long history in international law generally and the law of armed conflict in particular. When negotiating international agreements states often include provisions allowing for negative in-kind responses as remedies for violations of treaty obligations. Historically, this kind of reciprocity has been central to the law of armed conflict. According to some, though, the purpose of the law of armed conflict has changed. Instead of a tool protecting the interests of states involved in armed conflict, the purpose of the law is now to limit the suffering of those caught in war-zones; both combatants and non-combatants alike. Under this conception, the expectation of reciprocity has no role to play when states consider their legal obligations towards their opponents in an armed conflict.

Contrary to this view, I argue that an expectation of reciprocity continues to be an important factor when states consider their law of armed conflict obligations. First, by taking a more nuanced view of reciprocity than just negative in-kind responses, I show how expectations of reciprocity still exist within the law of armed conflict. Second, using Hart’s understanding of law as the union of primary and secondary rules, I demonstrate how states have preserved the expectation of reciprocity – both within the law as a secondary rule and beyond the law as a policy option – to respond in the face of continued non-compliance with law of armed conflict obligations by an opponent. Lastly, by taking the multi-actor setting of state decision-making seriously, I show how these more nuanced forms of reciprocity make themselves felt in debates about law of armed conflict obligations.

The case studies of this dissertation concentrate on the Geneva Conventions and the Protocols Additional to the Geneva Conventions. The first case study illustrates the many
places where the law maintains expectations of reciprocity. The final two cases examine US policy regarding Prisoner of War obligations in the Vietnam War and the Global War on Terror to show how states make use of the more nuanced forms of reciprocity in these secondary rules in response to continued non-compliance by an enemy.
Preface

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<tr>
<td>AP I</td>
<td>Protocol (I) Additional to the Geneva Conventions</td>
</tr>
<tr>
<td>AP II</td>
<td>Protocol (II) Additional to the Geneva Conventions</td>
</tr>
<tr>
<td>ARVN</td>
<td>Army of the Republic of Vietnam</td>
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<tr>
<td>CIA</td>
<td>Central Intelligence Agency</td>
</tr>
<tr>
<td>DRV</td>
<td>Democratic Republic of Vietnam</td>
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<tr>
<td>EITs</td>
<td>Enhanced interrogation techniques</td>
</tr>
<tr>
<td>FLN</td>
<td>National Liberation Front of Algeria</td>
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<tr>
<td>GC I</td>
<td>Geneva Convention (I) For the Amelioration of the Condition of the Wounded and Sick in Armed Force in the Field</td>
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<tr>
<td>GC II</td>
<td>Geneva Convention (II) For the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea</td>
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<td>GC III</td>
<td>Geneva Convention (III) Relative to the Treatment of Prisoners of War</td>
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<tr>
<td>GC IV</td>
<td>Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War</td>
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<tr>
<td>GWOT</td>
<td>Global War on Terror</td>
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<tr>
<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<tr>
<td>ILM</td>
<td><em>International Legal Materials</em></td>
</tr>
<tr>
<td>ILR</td>
<td>International Law Reports</td>
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<tr>
<td>JAG</td>
<td>Judge Advocate General</td>
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<tr>
<td>LOAC</td>
<td>Law of armed conflict</td>
</tr>
<tr>
<td>MACV</td>
<td>Military Assistance Command Vietnam</td>
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<tr>
<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
</tr>
<tr>
<td>OLC</td>
<td>Office of Legal Council</td>
</tr>
<tr>
<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
</tr>
<tr>
<td>POW</td>
<td>Prisoner of war</td>
</tr>
<tr>
<td>RIAA</td>
<td>Reports of International Arbitral Awards</td>
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<td>RVN</td>
<td>Republic of Vietnam</td>
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<tr>
<td>TFT</td>
<td>TIT-FOR-TAT</td>
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<tr>
<td>UCMJ</td>
<td>Uniform Code of Military Justice</td>
</tr>
<tr>
<td>UNTS</td>
<td>United Nations Treaty Series</td>
</tr>
<tr>
<td>US</td>
<td>United States</td>
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Dedication

For Leigh – For all her love and support.
Chapter 1: Introduction

When states met at the Diplomatic Conference to update the Geneva Conventions in the aftermath of the Second World War, they removed from the law overt forms of reciprocity such as the *si omnes* clause and the resort to belligerent reprisals. The removal of these overt forms of reciprocity has led to the emergence of a view that, following Theodor Meron, I will call the “humanization of humanitarian law” thesis.¹ This is the view that the standards of conduct embodied in law of armed conflict (LOAC) treaties such as the Geneva Conventions (1949) and the Protocols Additional to the Geneva Conventions (1977) represent appropriate standards of conduct in armed conflict that states have agreed to comply with regardless of the actions of their opponents. According to the humanization of humanitarian law thesis, reciprocity is no longer a condition of the LOAC.

This logic of appropriateness-based understanding of LOAC obligation would face a stern test in the aftermath of the 11 September 2001 attacks on the USA. In the months following the attacks, the Bush administration was under intense pressure to find those responsible and to prevent further attacks on American soil. In order to obtain the intelligence necessary to accomplish these goals, the USA relied on the interrogation of detainees in what it was calling the “Global War on Terror” (GWOT). Many in the government believed that traditional interrogation techniques developed by the US armed forces and limited by Geneva Convention (III) Relative to the Treatment of Prisoners of War (GC III) were insufficient to the task. Thus began an intense debate, not only within the US

government itself, but also among the government, the US military, human rights groups, and international lawyers about the Prisoner of War (POW) status of detainees.

In this debate, an important argument made by certain Bush administration officials against applying POW status to detainees was their alleged violations of the LOAC. Since neither the Taliban nor al Qaeda attempted to abide by the LOAC, so the argument went, they were not entitled to its protections. This reciprocity-based argument caught many in the international community off guard as even in the Vietnam War US policy makers decided to treat Viet Cong detainees as POWs. Moreover, more and more human rights groups, international lawyers, and even the US military had accepted the humanization of humanitarian law view that LOAC obligations are mandatory regardless of the actions of one’s opponents. To critics of the US decision denying POW status and the attendant rights under GC III to detainees taken in the GWOT, it appeared the US was not willing to live up to its LOAC obligations.

However, as this dissertation argues, such a policy should not have been surprising. Both LOAC treaties and state practice indicate that considerations of reciprocity still play an important role in how states respond to non-compliance with the LOAC by their opponents. Such considerations have persisted despite the fact that there has been a concerted effort to remove reciprocity from the law.

The remainder of this chapter serves three main purposes. First, it outlines this dissertation’s central argument for why the expectation of reciprocity continues to be an important consideration for states when they decide how to respond to LOAC violations. Second, it describes the methodology used to analyse the role played by such expectations in
the decision making of states regarding LOAC obligations. Finally, it provides an overview of the remainder of the dissertation.

1.1 Reciprocity and the LOAC

In the years following the attacks of 9/11, questions about the relationship between power and norms, between states pursuing their self-interest and the constraining effects of international law, and between the realities of modern warfare and the existing laws of war have been at the forefront of both academic research and public policy debates. In particular, many have depicted the US response as reversing the trend towards the humanization of humanitarian law. This dissertation contends, however, that such a process has always been overstated and that what differentiates the US response in the GWOT from earlier decisions is not the application of reciprocity arguments per se but the circumstances in which policy makers have applied such arguments.

1.1.1 A More Nuanced View of Reciprocity

First, building on Robert Keohane’s distinction between specific and diffuse reciprocity, this dissertation distinguishes between two further types of specific reciprocity.2 The first, which I term “legal reciprocity,” involves particular reciprocal commitments that states build into the wording of international agreements such as LOAC treaties. Yet specific reciprocity can also make itself felt beyond the written law. This second type of specific reciprocity, which I term “strategic reciprocity,” states can use as a policy device regardless of the law. States

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may resort to this type of reciprocity in an attempt to induce behavior consistent with international legal requirements even in situations where no specific legal obligation exists between the two parties. In concentrating on overt forms of legal reciprocity, supporters of the humanization of humanitarian law thesis have overlooked these subtler forms of strategic reciprocity.

Next, using H. L. A. Hart’s theory of the nature of law, this dissertation shows how states have maintained these subtler forms of specific reciprocity within the LOAC. Hart described law as the union of primary rules of obligation and secondary rules conditioning the application of primary rules. When conceived of as a secondary rule conditioning the application of the LOAC’s primary rules, instances of specific reciprocity overlooked by the humanization of humanitarian law thesis become apparent. I demonstrate how states have used secondary rules as a way to accomplish the same goals, such as limiting the application of the LOAC to armed conflicts between sovereign states and their armed forces, for which they previously used overt forms of specific reciprocity.

As the first case study demonstrates in more detail, the LOAC has always included a system of secondary rules conditioning the application of its primary rules to certain conflicts and to certain participants taking part in those conflicts. The earliest rules governing the conduct of warfare relied on professional custom for their enforcement and ensured compliance by restricting participation in hostilities to an elite class of combatants, be they chivalrous knights or members of the professional armies of European absolute monarchs. States began to codify these customs in the form of international treaties beginning in the

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mid-19th century. However, while states explicitly included the condition of reciprocal observation in many of these treaties, a concurrent trend of humanitarianism was beginning to take hold in thinking about the conduct of warfare. States, however, have never agreed to remove reciprocal considerations completely from the law. Rather, they shaped this concern for reciprocal application of restraint in warfare into the LOAC in the form of secondary rules.

Finally, by looking inside the “black box” of state decision-making, this dissertation builds on standard neoliberal institutional explanations for state compliance with the LOAC based on reciprocity. Beginning from the assumption that the state is a unitary actor, standard neoliberal institutionalist accounts explaining the persistence of reciprocity in the LOAC emphasize negative reciprocity – the matching of one violation with another violation – as a response to non-compliance with the law. However, by emphasizing the domestic multi-actor setting in which policy decisions about LOAC obligations take place, I show that the role played by reciprocity is more complicated. Reciprocity may also exist in a positive form, such as the extension of LOAC protections to actors to whom a state does not technically have a legal obligation in the hope of inducing a similar policy. I show that in many cases what appear to be debates about whether or not an LOAC obligation exists are really debates about which type of specific reciprocity – negative or positive – to apply.

1.1.2 Beyond Codified Law: Reciprocity in Practice

This is a dissertation in the field of international relations and not international law. While the topic of the LOAC inevitably entails an investigation into the content and nature of the law, this dissertation is primarily intended as a contribution to the fields of Political Science
and International Relations. The central question is, therefore, less about what constitutes compliance with the LOAC but under what political conditions states are in fact willing to extend the protections envisioned by the law to their opponents.

Those who argue that conditions of reciprocity no longer exist within the LOAC tend to focus on a strict analysis of the codified provisions of LOAC treaties. Philippe Sands, a leading critic of US policy in the GWOT, has stated “The ‘war on terrorism’ has led many lawyers astray.” Yet, as Stephanie Carvin correctly points out, such claims are made “…without ever explaining exactly what lawyers have been laid astray from.” In criticisms such as Sands’, one is reminded of E.H. Carr’s statement that there is “…a strong inclination to treat law as something independent of, and ethically superior to, politics.” Such a focus on what the law says fails to consider examples of state practice and changes in that practice over time. This leads to an insufficient consideration of historical context and the unique circumstances of particular armed conflicts.

Even Jean Pictet, the editor of the four-volume *Commentary to the Geneva Conventions*, emphasized the importance of state practice in the proper interpretation of the LOAC. Pictet had served as one of the International Committee of the Red Cross (ICRC)’s delegates to the 1949 Diplomatic Conference that drafted the updated Geneva Conventions. Although the ICRC published the *Commentaries*, the Foreword refers to them as “…the

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personal work of its authors.” In addition, with respect to interpreting the requirements of the Conventions, the Commentaries state “...only the participant States are qualified, through consultation through themselves, to give an official, and, as it were, authentic interpretation of an intergovernmental treaty.” The fact that Pictet’s Commentaries have gained an authoritative force in the interpretation of the Conventions demonstrates the importance of state practice to the interpretation of the LOAC obligations.

Proponents of the humanization of humanitarian law point to certain examples, including the War in Vietnam, as evidence that humanization has taken root in not only law but also state practice. In this case, Viet Cong detainees received POW status despite their continued non-compliance with the LOAC. The humanization of humanitarian law thesis cannot account for the variation between this case and the GWOT. It therefore falls back on the charge that the Bush Administration broke with established practice regarding the POW status of insurgent groups who do not comply with the LOAC. In contrast, this dissertation’s focus on strategic reciprocity allows it to account for both the Vietnam War and GWOT cases as a continuation of a long-held state practice.

Applied to the important case of USA policy making with respect to its treatment of detainees in particular armed conflicts, the argument defended here makes three predictions.

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First, we should expect to see that expectations of reciprocity remain an important consideration in debates about the POW status of detainees. Second, we should expect the USA to give POW status to an insurgent group when that group’s non-compliance with the LOAC can impose high costs on the USA. This is likely to occur when the insurgent group does – or could potentially – hold a significant number of USA troops as detainees and the USA expects that group to treat its detainees badly. Third, we should expect the USA not to treat members of an insurgent group as POWs when that group cannot impose significant costs on the USA. Even if the USA expects the insurgent group to treat USA detainees badly in return, if such a group does not hold a significant number of USA detainees, there is a low cost to the USA in denying these detainees status as POWs.

Such an understanding of state incentives accounts for the variation in USA policy towards the POW status of detainees in the Vietnam War and GWOT case studies that the humanization of humanitarian law thesis cannot. In the case of the War in Vietnam, while the USA decided to treat Viet Cong detainees as POWs, this was due to their concern with the treatment of USA detainees held in North by the North Vietnamese Army and in the South by Viet Cong troops. In the case of the GWOT, the Bush Administration made and then defended their decision not to give POW status to Taliban and al Qaeda detainees with specific reference to the values enshrined in the LOAC. In addition, those who made the decision had not just recently come around to such views about POW status. Rather, they had been arguing for denying POW status to those who did not comply with the LOAC for most of their public lives. In such a case, to say that these people had not internalized the values of the LOAC would seem odd. Instead, what distinguished them was their appeal to the expectation of reciprocity within the law.
1.2 Methodology

The methodology chosen for investigating why and how reciprocity has persisted in LOAC treaties and state practice respecting LOAC treaty obligations consists of comparing structured qualitative case studies of different instances of GC III compliance behaviour. Comparison, writes Gourevitch, “…allows us to stage a confrontation between competing explanations in the social sciences.”⁹ I use a series of focused case studies to develop and provide empirical support for the argument of this dissertation. George and Bennett define a “case” as “…an instance of a class of events” and a “case study as “…a well-defined aspect of a historical episode that the investigator selects for analysis, rather than a historical event itself.”¹⁰ Specifically, this dissertation focuses on:

- The negotiations that took place at the Diplomatic Conferences of 1949 and 1974-1977 which lead to the Geneva Conventions (1949) and the Protocols Additional to the Geneva Convention (1977);
- The US debate surrounding the legal status of detainees taken by US military forces in the Vietnam War; and
- The US debate surrounding the legal status of detainees taken by US military forces in the GWOT.

The case study method has the advantage of allowing for process tracing within each case. Process tracing involves a researcher examining “…histories, archival documents, interview transcripts, and other sources to see whether the causal process a theory hypothesizes or implies in a case is in fact evident in the sequence and values of the intervening variables in

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that case.”11 This methodology is a useful approach for testing a theory where a small number of cases are addressed in a comprehensive manner.

The dissertation focuses on the treatment of POWs because it represents a “hard case” for the role of reciprocity in the LOAC. Defenders of the humanization of humanitarian law thesis cite the Geneva Convention Relative to the Treatment of Prisoners of War (1929) as the first of the Geneva Conventions to outlaw reciprocity. Article 82 of the Conventions states: “The provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances” (L 290).12 In addition, the requirements of GC III represent norms embedded in both US domestic law and military culture. If the case studies demonstrate that reciprocity continues to play an important role in the application of GC III and USA policy makers’ decisions regarding the treatment of detainees, then there is support for the argument about the continued importance played by the expectation of reciprocity defended here.

I have selected these particular case studies for several reasons. First, the diplomatic conferences that updated the Geneva Conventions of 1949 and the Additional Protocols of 1977 represent the most significant advance in international law for the humanitarian protections of victims of war. All the states of the international community have ratified the Geneva Conventions and the Conventions themselves are synonymous in the mind of the public with the LOAC. The text of the Geneva Conventions and the apparent practice of many states that are High Contracting Parties to the agreements suggest that reciprocity is not a factor when states decide whether to apply the Conventions in international armed conflict.

11 Ibid., p. 6.
However, I argue that upon closer inspection states have maintained within the Conventions particular rules that they can activate in the face of an opponent that perennially defects from LOAC obligations.

Second, the Vietnam War and the GWOT provide an interesting contrast to each other with respect to US application of GC III. In both cases, the US faced an opponent that did not intend to comply with the LOAC. Humanization of humanization law proponents suggest that, when faced with such a situation, signatories to the Conventions still have a legal obligation to apply POW status to detainees. Traditional neoliberal based theories of compliance suggest that the US should have defected from implementing GC III protections for detainees in both cases. However, in the case of the Vietnam War, the US applied POW status to Viet Cong prisoners, while in the case of the GWOT, it denied POW status to al Qaeda prisoners. This has been taken to suggest a change in policy about how the US understood its obligation to comply with international law with respect to perennial defectors. However, as I argue in this dissertation, a more nuanced understanding of reciprocity and the nature of the state decision-making process demonstrate that the neoliberal theory of compliance with international law is the best explanation of US policy in this area.

Finally, the US is a hard case for the continued role of reciprocity in how states frame debates about compliance with the LOAC. Humane treatment of POWs has informed US military practice since the Revolutionary War. US military doctrine first codified humane treatment for prisoners during the Civil War. In the late 19th century, European governments looked towards US military doctrine on POW treatment as models for their own military manuals. In addition, US politicians have routinely linked the idea of humane treatment of
individuals in time of war with US identity. Lastly, the US has had much relevant experience with the LOAC throughout the 20th century as can be seen in the number of armed conflicts in which it has been involved and its extensive participation in the creation of LOAC treaties.

To investigate the continued role played by the expectation of reciprocity in the LOAC, the case studies rely on four main sources of information. The first are primary documents including international treaties outlining states’ commitments to certain rules governing the conduct of warfare and the letters, memos, and discussions of those government officials who took part in the negotiations that concluded these treaties. The second source of information consists of the writings of policy makers inside the US government during both the Vietnam War and the GWOT as they reflect important perceptions of the problems faced by and the options open to the US government in applying GC III to each of the armed conflicts examined here. The third important source of commentary on how states frame debates about LOAC compliance is academic books and journal articles on the subject. Since the beginning of the GWOT, there had been a renewed academic interest in the LOAC and – in particular – with the topic of Geneva Convention compliance. In this dissertation, I incorporate this recent work into my theory of why the expectation of reciprocity has persisted within the LOAC.

Finally, I conducted a series of telephone and in-person interviews in the USA. Interviewees included former US military personnel, Bush administration officials from both the US State Department and the US Defense Department, and members of international non-governmental organizations such as the ICRC and Human Rights Watch that have participated in debates surrounding the application of GC III in the cases studied. Appendix 1 gives an overview of where and when these interviews took place. As I have intended the
interviews for qualitative analysis, the interviews did not follow a standardized questionnaire. Rather, I asked each interviewee about their specific area of expertise and relevant experience with respect to decisions regarding US policy towards LOAC treaty obligations in the particular case study under investigation.

1.3 Structure of Dissertation

In addition to this introduction, the dissertation has six chapters. Chapter 2 develops the theoretical argument that reciprocity has persisted in both the text of LOAC agreements and state practice with respect to LOAC obligations. This chapter begins by outlining the rules governing the conduct of hostilities in warfare and presents two important arguments, one from international relations theory and the other from international legal theory, as to why specific reciprocity is important to states when they consider complying with these rules. It then describes what I will call the “humanization of humanitarian law” argument. This argument analogizes the LOAC to international human rights law, claiming that states have agreed to comply with the LOAC regardless of the actions of their opponents. Based on a logic of appropriateness, it suggests alternatives such as legal process, legitimacy, and honour to explain states’ decisions regarding LOAC obligations. The final section of this chapter suggests that these alternatives are insufficient to explain such decisions. Rather, the expectation of reciprocal compliance continues to influence policy making regarding the LOAC, though militated by the multi-actor setting of domestic politics.

The subsequent three chapters provide empirical support for this theoretical position that specific reciprocity continues to play an important role in state decision making about applying the LOAC. The first case study examines the negotiations at the Diplomatic
Conference of 1949, which updated the Geneva Conventions in the aftermath of the Second World War, and the Diplomatic Conference of 1974-1977, which created the Protocols Additional to the Geneva Conventions of 1949 in response to decolonization. The remaining two case studies examine USA application of GC III to prisoners during the Vietnam War (1964-1975) and the GWOT (2001-present) respectively. Each describes the international law applicable to armed conflict at the time and pre-existing USA government policy towards opponents who do not comply with the LOAC before analyzing USA policy choices in each case. Both of these case studies provide considerable support for the contention that the expectation of reciprocity considerations played a key role in USA decisions to extend GC III protections to detainees. Finally, the conclusion summarises the evidence from the case studies and then steps back from this dissertation’s focus on GC III to consider the implications of the continued role of reciprocity based discourse in state decision-making about the LOAC in general.
Chapter 2: Reciprocity and Compliance with the LOAC

Classic texts in both the legal and political science literature often cite the expectation of reciprocity as an important force influencing when states comply with their LOAC obligations. Hersch Lauterpacht wrote that it was “…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.”¹ Hedley Bull went even further, claiming that reciprocity was the driving force behind compliance: “…the duty to abide by the laws of war must be made reciprocal, for it is only on the understanding of reciprocity that any prospect exists for their being observed.”² It is this attitude towards LOAC obligations that the humanization of humanitarian law thesis rejects. However, as this chapter argues, the humanization view of LOAC obligations overlooks the nuanced ways states have left themselves to implement reciprocity in the law and the ways they apply reciprocity in practice. As such, the apparent move towards humanization since the end of the Second World War has been overstated.

This chapter lays the theoretical groundwork for this argument. In the first section, I outline the legal regime governing armed conflict. The second section provides an initial definition of reciprocity and reviews two literatures explaining its importance to compliance with international legal regimes such as the LOAC. In section three, I outline what I am terming the “humanization of humanitarian law” thesis. This is the view that states are and

can be expected to implement LOAC obligations even if their adversaries do not. In section four, I present a more nuanced view of reciprocity. I demonstrate, via H. L. A. Hart’s theory of law as the union of primary and secondary rules, how states have maintained reciprocal strategies for dealing with LOAC non-compliance through secondary rules. I then explain how the domestic, multi-actor setting of state decision-making allows policy makers to use these secondary rules to respond to LOAC non-compliance just as they had done in the past with more overt forms of reciprocity. In the last section, I examine logic of appropriateness theories found in the international relations and international law literatures that could serve as a basis for the humanization of humanitarian law thesis and constitute the key alternative theories of contemporary implementation of LOAC obligations.

2.1 The LOAC: Rules Governing the Conduct of Hostilities

Though parties to a given armed conflict may intentionally ignore them, rules purporting to regulate the conduct of hostilities do in fact exist in contemporary international politics. Since the end of the Second World War, these rules have been supplemented by the creation of international human rights law. International human rights law, which is intended to apply in both times peace and armed conflict, is meant to provide non-derogable rights to individuals such as the right to life and freedom from torture. The laws of war go beyond the protections of international human rights law in conferring special status and protections on those taking part in hostilities. Yet the relationship between these two types of law is problematic. For its part, the US view is that the LOAC is *lex specialis* during an armed
conflict and that international human rights law does not apply. Even Meron himself, one of the main proponents of the humanization of humanitarian law thesis, notes the important difference between the LOAC and international human rights law:

…it has become common in some quarters to conflate human rights and the law of war/international humanitarian law. Nevertheless, despite the growing convergence of various protective trends, significant differences remain. Unlike human rights law, the law of war allows, or at least tolerates, the killing and wounding of innocent human beings not directly participating in an armed conflict, such as civilian victims of lawful collateral damage… As long as the rules of the game are observed, it is permissible to cause suffering, deprivation of freedom, and death.  

Central to the purposes of this dissertation is that although human rights law applies to these individuals regardless of reciprocity, the additional protections of the LOAC – such as status as a prisoner of war – still are based on consideration of reciprocity.

Historically, the laws of war have been divided into two categories: (i) the *jus in bello*, which concerns acceptable conduct in war; and (ii) the *jus ad bellum*, which concerns acceptable justifications for going to war. The concern of this dissertation is with the *jus in bello*, or what I will term the law of armed conflict (LOAC). Table 2.1 lists the major international treaties codifying the LOAC that are in force today:

**Table 2.1 LOAC Treaties in Force**

<table>
<thead>
<tr>
<th>Treaty</th>
<th>Date of Adoption</th>
<th>Date of Entry into Force</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hague Convention (IV) on War on Land and Annex</td>
<td>18 October 1907</td>
<td>26 July 1910</td>
</tr>
<tr>
<td>Geneva Convention (I) on Wounded and Sick in Armed Forces in the Field</td>
<td>12 August 1949</td>
<td>21 October 1950</td>
</tr>
<tr>
<td>Geneva Convention (II) on Wounded and Sick and Shipwrecked in Armed Forces at Sea</td>
<td>12 August 1949</td>
<td>21 October 1950</td>
</tr>
<tr>
<td>Geneva Convention (III) on Prisoners of War</td>
<td>12 August 1949</td>
<td>21 October 1950</td>
</tr>
<tr>
<td>Geneva Convention (IV) on Civilians</td>
<td>12 August 1949</td>
<td>21 October 1950</td>
</tr>
<tr>
<td>Protocol (I) Additional to the Geneva Conventions</td>
<td>8 June 1977</td>
<td>7 December 1978</td>
</tr>
<tr>
<td>Protocol (II) Additional to the Geneva Conventions</td>
<td>8 June 1977</td>
<td>7 December 1978</td>
</tr>
</tbody>
</table>

The primary sources for the LOAC are treaty law and customary international law. The treaty law regulating the conduct of armed conflict consists of those rules codified in multilateral agreements among states. This law is usually further divided into Hague law and Geneva law. The term “Hague law” refers to those agreements regulating the methods and means of warfare and include such treaties as the Hague Conventions (1907). The term “Geneva law” refers to those agreements regulating the treatment of individuals in time of war such as the four Geneva Conventions (1949). The customary international law of armed conflict, on the other hand, consists of non-codified rules governing the conduct of hostilities.\(^5\) This law consists of both *opinio juris* and state practice. *Opinio juris* refers to the subjective element of custom surrounding what states believe to be a legal obligation while state practice is the more objective element of custom.

The contemporary *jus in bello* is based on three important principles. First is the principle of distinction. Because killing is morally problematic, the LOAC must provide an account of why certain individuals are legitimate targets of attack and establish how they are to be distinguished from those who are not. Rousseau was one of the first to formulate the principle of distinction: “Since the purpose of war is the destruction of the enemy state, one has the right to kill the defenders of that state as long as they bear arms. However, as soon as they lay down their arms and surrender, they cease to be enemies or instruments of the

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enemy. They return to being simply men; and one no longer has a right to their lives.'" On this account, an individual is a legitimate target or “combatant” when that person is engaged in defending the state through force of arms. Those individuals who are not legitimate targets or “non-combatants” include civilians and those members of the state’s armed forces who are hors de combat through either surrendering or becoming wounded, sick, or shipwrecked.

Like most LOAC norms, the principle of distinction grew from jus in bello practice, eventually being codified in multilateral treaties among a limited number of parties and eventually becoming more widely applicable as customary international law. Although it was not an international treaty, the Lieber Instructions (1863) issued to the Union Army during the US Civil War invoke the principle of distinction in documenting the historical shift away from attacking an enemy’s civilian population:

…as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit (L 7).

Articles 1 and 6 of the Geneva Convention (1864) use the principle of distinction to ascribe neutrality to those who care for the wounded (L 214). The St. Petersburg Declaration (1868), which was the first formal international agreement banning a particular type of weapon – exploding bullets under 400 grams - also makes use of distinction. In its preamble, the signatories agree that: “…the only legitimate object which states should endeavor to accomplish during war is to weaken the military force of the enemy” (L 96). Prior to such

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agreements, a codified principle of distinction was unnecessary by states because civilians were rarely part of the field of battle. However, with the advent of industrialized warfare and technologies like long-range artillery and aerial bombardment – all of which expanded the scope of the battlefield – additional codification became necessary.

Article 48 of Protocol (I) Additional to the Geneva Conventions (AP I) explicitly codifies the principle of distinction for international armed conflicts. It states that: “In order to ensure respect for and the protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives” (L 580). In its Commentary to AP I, the ICRC writes of the principle of distinction that:

It is the foundation on which the codification of the laws and customs of war rest: the civilian population and civilian objects must be respected and protected in armed conflict, and for this purpose they must be distinguished from combatants and military objectives. The entire system established in The Hague in 1899 and 1907 and in Geneva in 1864 to 1977 is founded on this rule of customary law.  

For non-international armed conflicts, Article 13 of Protocol (II) Additional to the Geneva Conventions (AP II) codifies the principle of distinction. It states, “The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations” (L 626).

As such, the principle of distinction consists of two related parts. The first refers to individuals and requires that combatants distinguish themselves from non-combatants. The wearing of uniforms or distinctive emblems that are visible from a distance so that they are
recognizable as members of a party to an armed conflict is the usual method of satisfying this condition. The second part requires that combatants target only military objectives. The principle of distinction forms the core of the LOAC regime.

Military necessity is the second *jus in bello* principle. This principle is used as a guide to determine what counts as legitimate military objectives and is an attempt to balance a belligerent’s need to gain a military advantage with satisfying the humanitarian impulse to minimize suffering and destruction. Grotius invokes military necessity when he states, “…all engagements, which are of no use for obtaining a right or putting an end to war, but have their purpose a mere display of strength…are incompatible both with the duty of a Christian and with humanity itself.” The Lieber Instructions represent a first attempt to codify this *jus in bello* norm. Article 14 states: “Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war” (L 6). Article 22 of Hague Convention IV gives expression to the principle of military necessity in its recognition that the “…right of belligerents to adopt means of injuring the enemy is not unlimited” (L 76). Therefore, to suggest “anything goes” in armed conflict is not correct.

While mentioned in several places, neither the Geneva Conventions nor the Additional Protocols explicitly codify the concept of “military necessity.”

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11 See, for example, Articles 8, 30, 33, 34, and 50 of GC I; Article, 8,28, 51 of GC II; Articles 8, 76, 126, and 130 of GC III; Articles 9, 49, 53, 55, 108, 112, 143, and 147 of GC IV; Articles 54, 62, and 67 of AP I; and Article 17 of AP II.
Military Tribunal’s *Hostage Case* (1948) summarizes military necessity as follows: “Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of military force to compel the complete submission of the enemy with the least possible expenditure of time, life and money.”\(^{12}\) The US Army Field Manual states that military necessity “…has been defined as that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.”\(^{13}\) However, the Manual does caution that military necessity “…has been generally rejected as a defence for acts forbidden by the customary and conventional laws of war.”\(^ {14}\) Nevertheless, the International Law Commission does mention “certain humanitarian conventions applicable to armed conflicts” as subject to the principle of necessity.\(^ {15}\) This highlights the principle of military necessity as customary international law.

In practice, military necessity is linked to the third *jus in bello* principle: proportionality. In time of war, some amount of risk to non-combatants is generally permissible for the sake of securing important military objectives. The principle of proportionality is an attempt to provide guidance to military commanders about how to balance the value of a particular military objective with humanitarian concerns. Grotius gave voice to this principle when he cautioned military commanders to “…beware of what

\(^{12}\) *In re List* (Hostages Case), US Military Tribunal at Nuremberg February 14, 1948, 15 ILR 632, p. 646


\(^{14}\) Ibid.

happens, and what we foresee may happen, beyond our purpose, unless the good which our
action has in view is much greater than the evil which is feared, or, unless the good and the
evil balance, the hope of good is much better than the fear of the evil.”

Central to this LOAC principle is the notion that parties to an armed conflict should oppose force with
similar force and “…thwart the assailant’s purpose using the minimum force necessary to do
so.”

Both Hague Convention IV and AP I explicitly codify the concept of proportionality. Article 22 of Hague Convention IV states: “The right of belligerents to adopt means of injuring the enemy is not unlimited” (L 76). Articles 51 and 57 of AP I also codify the principle of proportionality. Article 51 states, in part, that an attack is disproportionate if it “…may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated” (L 581). Article 57 requires that: “…an attack shall be cancelled or suspended if it because apparent that the objective is not a military one or…that the attack may be expected to cause incidental loss of human life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated” (L 585). Whereas Article 51 relates to the protection of civilians generally, Article 57 relates to the precautions a belligerent must take in an attack on a military objective.

Of these three LOAC principles, this dissertation is primarily concerned with the principle of distinction. In particular, it focuses on how reciprocal expectations of LOAC

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compliance have conditioned states’ willingness to accord POW status to insurgent groups. As the first case study will explore in more detail, GC III lays out certain criteria that any individual taking direct part in hostilities must fulfill in order to qualify for POW status. Only combatants are entitled to status as POWs. Moreover, the term “combatant” applies only to a certain sub-set of those taking direct part in hostilities. The second and third case studies demonstrate how state policy-makers have relied on these criteria and consideration of negative and positive strategic reciprocity in their decisions as to what non-state actors they will consider POWs.

2.2 Reciprocity and the LOAC

The previous section demonstrated that a set of rules regarding the proper conduct of armed conflict does exist. Historically, the expectation of reciprocal compliance with these rules has played an important role in restraining the conduct of armed conflict. This section examines why this would be the case. For the purposes of examining the role of the expectation of reciprocity in compliance with the LOAC, I will define compliance as the conformity of behavior to legal rules. It begins with an examination of Robert Keohane’s definition of reciprocity. Next, it outlines two important arguments, one from international relations theory and the other from political theory, as to why an expectation of reciprocity would be important to states involved in armed conflict.

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2.2.1 Reciprocity: An Initial Definition

Keohane defines reciprocity as “…exchanges of roughly equivalent values in which the actions of each party are contingent on the prior action of the others in such a way that good is returned for good and bad for bad.”\(^{19}\) He then distinguishes between two key features of reciprocity. The first is equivalence, which requires that Actor B’s response to Actor A be roughly similar to the action by Actor A. The second key feature is contingency, which implies that Actor B’s behaviour toward Actor A is conditional on what A last did to B.

These two features of reciprocity are important because Keohane goes on to use them to distinguish between two types of reciprocity. The first type, which he terms “specific reciprocity,” describes situations in which “…specified partners exchange items of equivalent value in a strictly delimited sequence. If any obligations exist, they are clearly specified in terms of rights and duties of particular actors.”\(^{20}\) Both equivalence and contingency feature prominently in specific reciprocity. For example, consider a sequential quid pro quo where B gives something of value to A precisely because A has given something of equal value to B. Examples of specific reciprocity exist in many areas of the international system. In international trade, a relation of specific reciprocity exists when one country reduces its tariffs on a certain item precisely because another country did the same. The same phenomenon occurs in the field of arms control when one side reduces its levels of a particular weapon in response to the other side’s reduction in its numbers of that weapon.

In this dissertation, I offer two key refinements to the concept of specific reciprocity which are explored in section 2.4.1 below.

\(^{19}\) Keohane, "Reciprocity in International Relations," p. 8. Emphasis in the original.
\(^{20}\) Ibid., p. 4.
Keohane, though, recognized that reciprocity could also involve a more complex relation than a simple *quid pro quo*. The features of equivalence and contingency can be relaxed such that exchanges can involve more than two parties and items of different value. Keohane termed this second type of reciprocity “diffuse reciprocity.” In this type of reciprocity, “…the definition of equivalence is less precise, one’s partners may be viewed as a group rather than as particular actors, and the sequence of events is less narrowly bounded. Obligations are important.”\(^{21}\) In these exchanges, a different party, in a different situation, and at a different time may receive the particular benefit or share the particular burden involved. Unconditional Most Favored Nation status within the World Trade Organization regime is an example of diffuse reciprocity. This type of reciprocity emphasizes conformity with a certain standard of behaviour among members of a group rather than the maintenance of a bilateral relation. As Byers notes, the concept of diffuse reciprocity was an important advance in the discussion of reciprocity as previously the international relations literature had assumed that the degree of trust to support such non-specific exchanges did not exist.\(^{22}\) In this dissertation I am mainly concerned with specific reciprocity, though I do explore diffuse reciprocity arguments where they are relevant.

### 2.2.2 Neoliberal Institutionalism and Reciprocity

In the international relations literature, neoliberal institutionalism provides an argument for why states would want to maintain the reciprocal expectation of compliance within the LOAC and why reciprocal consideration might feature prominently in state decisions about

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\(^{21}\) Ibid.

whether to implement LOAC provisions in certain circumstances. This argument has its basis in the logic of collective action. On this account, the decision about whether to comply with the LOAC takes the form of a Prisoner’s Dilemma. The Prisoner’s Dilemma models interactions between states in the international system as one-off games in which each state has two different choices: comply or defect. This leads to four possible outcomes that states can place in a preference ranking. The matrix in Figure 2.1 represents such a ranking:

**Figure 2.1 Prisoner’s Dilemma Pay-off Matrix**

<table>
<thead>
<tr>
<th>State Decision</th>
<th>State A: Comply</th>
<th>State A: Defect</th>
</tr>
</thead>
<tbody>
<tr>
<td>State B: Comply</td>
<td>(3,3)(^1)</td>
<td>(1,4)(^2)</td>
</tr>
<tr>
<td>State B: Defect</td>
<td>(4,1)(^3)</td>
<td>(2,2)(^4)</td>
</tr>
</tbody>
</table>

In such a situation, both states A and B pursue a strategy that will optimize their position with reference to the strategy available to the other. In the case of the Prisoner’s Dilemma, the dominant strategy is to defect.\(^{23}\) This is because, whether the other side defects or not, one’s own pay-off is higher if one defects. Therefore, both states defect from their LOAC obligations and fail to achieve the Pareto-improving outcome represented by Box 1 in relation to Box 4.\(^{24}\)

While the Prisoner’s Dilemma explains why compliance with the LOAC is difficult, neoliberal institutionalism interprets the result as showing that states do recognize the advantage of mutual compliance. While defection may be the dominant strategy, compliance by both parties is a Pareto-improvement over mutual defection. If played only once, the Prisoner’s Dilemma exaggerates the difficulty of implementing LOAC provisions. A more realistic picture of relations among sides in an armed conflict is to view them as interacting

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\(^{23}\) A “dominant strategy” is the strategy preferable to any alternative no matter the strategy adopted by the other player.

\(^{24}\) A Pareto-improving outcome occurs when one party is better off and the other party is no worse off.
repeatedly over time. In these repeated interactions, A needs to factor in the different possible reactions of B when deciding whether to implement LOAC provisions or to defect. As a result, what Axelrod terms the “shadow of the future” has an important effect on the strategic calculations of the opposing sides. The iterated nature of interaction creates the prospect for future gains from mutual restraint by rewarding compliance with the LOAC and punishing defection.

In an iterated Prisoner’s Dilemma, a strategy of specific reciprocity after an initial cooperative move – nicknamed TIT-FOR-TAT (TFT) – can bring about cooperation. According to Axelrod:

What accounts for TIT-FOR-TAT’s robust success is its combination of being nice, retaliatory, forgiving and clear. Its niceness prevents it from getting into unnecessary trouble. Its retaliation discourages the other side from persisting whenever defection is tried. Its forgiveness helps restore mutual co-operation. And its clarity makes it intelligible to the other player, thereby eliciting long term cooperation.

Applied to the issue of compliance with the LOAC, neoliberal institutionalism suggests that states include measures implementing the strategy of TFT into the law. While many have built on Axelrod’s insight by examining additional mechanisms such as reputation, information sharing, and marginal costs, the particular focus of this dissertation is on the role played by reciprocity.

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27 Axelrod, The Evolution of Cooperation, p. 54.
Other rationalist theories in both the international law and international relations literature, most prominently realism, deny that the LOAC can have such an independent constraining effect on the behavior of states. Some claim that international law merely reflects a pre-existing “harmony of interests” among states in certain issue areas of the international system.\textsuperscript{28} Others argue that states comply with international law because it demands only modest departures from how they would have otherwise acted.\textsuperscript{29} If this is truly the case, then why is there so much talk about law in the international system? Goldsmith and Posner reply that appeals to international law are just cheap talk: “…international legal rhetoric is used to mask or rationalize behavior driven purely by self-interested factors having nothing to do with international law.”\textsuperscript{30} On the “cheap talk” model, governments merely use the rhetoric of liberal ideology as \textit{ex post facto} justifications for actions they would have taken anyway in pursuit of their own self-interest.

Yet the first case study in this dissertation suggests just the opposite of the “cheap talk” model. The negotiations that occurred at both the diplomatic conferences in 1949 to update the Geneva Conventions and in 1974-1997 to create the Protocols Additional to the Geneva Conventions consumed important resources that states could have used in other ways. In addition, when accused of violating their Geneva Convention obligations, state use important resources in an attempt to justify their actions by appealing to the law. If, as suggested by the “cheap talk” argument, the LOAC had no impact on the behavior of states


\textsuperscript{29} George W. Downs, David M. Rocke, and Peter N. Barsoom, "Is the Good News about Compliance Good News about Cooperation?," \textit{International Organization} 50, no. 3 (Summer 1996).

involved in armed conflict, there is little reason for them to use important resources on such things as negotiations at international conferences and justifying their actions in relation to the law.

Still other realists claim that what is actually constraining state behavior is not the law itself but rather a hegemonic actor who is willing to sustain the cost of maintaining and enforcing international legal requirements that match its own interests. For example, during the 19th century, the United Kingdom used its power to help establish and police the regime outlawing the international traffic in slavery. In addition, the economic regimes established after the Second World War exist mostly because of the hegemonic power of the United States. On such an account, states comply with international law because compliance reduces the likelihood of the hegemon using its power against them. On the other hand, the hegemon complies and forgoes the possible benefits of occasional violations of the law, in return for the long-term benefit of order and stability in the international system.

However, this realist approach also suffers considerable difficulties. The hegemonic actor theory suggests that hegemonic states should face few costs from operating within the framework of international law. For one reason, the hegemon has supposedly created the law to reflect its own interests. Second, the hegemon should prefer to work outside the framework of international law where it would encounter few restrictions on its own conduct.

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Yet, as the case studies demonstrate, the LOAC does not necessarily reflect the interests of hegemonic states. As both the Vietnam and GWOT cases demonstrate, this is especially true in the awarding of POW status to insurgent groups. As such, the expectation of reciprocity is the most credible rationalist mechanism for ensuring implementation of LOAC provisions.

2.2.3 The Original Position and Reciprocity

The political theory literature also provides an argument for why reciprocity can be expected to play a central role both in the LOAC and in states’ decisions about whether to implement LOAC provisions in particular conflict situations. Rawls writes of reciprocity that it is an important shared idea “…implicit in the notion of a well-ordered society.” He argues that any theory of justice and the rules derived from it must acknowledge reciprocity as a “…deep psychological fact.” Rawls goes on to say of reciprocity that, “Without it our nature would be very different and fruitful social cooperation fragile if not impossible...If we answered love with hate, or came to dislike those who acted fairly toward us, or were adverse to activities that furthered our good, a community would soon dissolve.” For Rawls, reciprocity requires that “…when terms are proposed as the most reasonable terms of fair cooperation, those proposing them must think it at least reasonable for others to accept them, as free and equal citizens, and not as dominated or manipulated or under pressure caused by an inferior political or social position.” Rawls even defines “reasonableness” itself in terms

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36 Ibid., pp. 494-95.
of reciprocity, in the sense that those choosing rules should “…abide by them willingly, given the assurance that others will likewise do so.”

Rawls intended the concept of the Original Position to specify a fair agreement, one that would reflect principles that treat persons as equals. The Original Position is the position under which people are free, equal, and rational and are concerned to make a choice of principles they will live under. A key characteristic of the Original Position is that people are behind what is termed a “veil of ignorance.” According to Rawls, behind the veil of ignorance:

…no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conception of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles or the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain.

This is an intuitive test of fairness and ensures that those who might be able to influence the selection of principles that favour their own interests are unable to do so. The original position it intended “…to represent equality between human beings as moral persons,” and the resulting principles are those which people “…would consent to as equals when none are known to be advantaged by social and natural contingencies.”

In the case of choosing rules to govern the conduct of armed conflict, we can use the veil of ignorance to tease out the implications of the moral equality of soldiers. In terms of

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40 Ibid., p. 12.
41 Ibid., p. 19.
Rawls’s theory, evaluating the role of reciprocity in terms of the LOAC raises the following question: From behind a veil of ignorance – not knowing what side in an armed conflict they will occupy – will reasonable belligerents maintain an expectation of reciprocal compliance? According to Rawls, people are risk averse and apply the principle of maximin – minimizing the possible loss in a worst-case scenario – when choosing rules to govern their relations.\(^{42}\) Given the “deep psychological fact” of reciprocity, it is at least plausible that when choosing such rules states would not allow for any defection in order to not to be subject to defection themselves. Putting these two concepts together, those involved in armed conflict will view the LOAC as reasonable restrictions on their behaviour when – and only when – they believe all are subject to the same rules. It is the expectation of reciprocity, on this account, that generates perceptions of LOAC demands being reasonable and hence deserving of implementation.

This is a social contract argument because it is based on the idea that we are only obligated by principles we would agree to under normal conditions. Political theorists often consider social contract arguments weak because of their apparently implausible assumptions, such as asking us to imagine a state of nature prior to the existence of any political authority.\(^ {43}\) However, the claim defended here is not that when deciding upon what rules should be part of the LOAC that states actually go behind a “veil of ignorance” and are unaware of their future strengths and weaknesses. Instead, it is that we should think of a social contract as a device for teasing out the implications of certain premises – like the moral equality of soldiers – in the law. Conceiving of the LOAC as a social contract allows

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for a process of reflecting upon and revising our beliefs about the role of reciprocity, the endpoint of which is a reflective equilibrium.

We can modify the Original Position such that one does know that one of the belligerents in an armed conflict will defect from its LOAC treaty obligations but does not know which one. In such a case, any belligerent in the Original Position using the maximin principle to choose LOAC rules would chose rules allowing it to retaliate in some way against defection whenever it puts them at a disadvantage. So, from behind a veil of ignorance, states in the original position would maintain the expectation of reciprocal compliance within the LOAC should no other effective means of treaty enforcement be in place.

It is worth noting that the point of departure for this argument is the moral equality of belligerents, and that questions have been raised about whether such an assumption is still operative within the LOAC. Indeed, Osiel claims that the law has abandoned this concept. 44 For example, Article 1(4) of AP I stipulates that “…armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination” are international armed conflicts. This gives combatant status – and the resulting POW privilege – to individuals based on the cause for which they fight and not because of their membership in a state military or insurgent group that can ensure reciprocal compliance with LOAC requirements. Yet as the first case study will demonstrate, though states were willing to concede this status to such groups, they still maintained the requirement of a reciprocal commitment to LOAC compliance through

secondary rules defining “combatant” and “POW.” Thus the notion of reciprocity as central to the perceived reasonableness of LAOC demands remains plausible. Like neoliberal institutionalism, this political theory approach also predicts that the expectation of reciprocity should persist in state policy making about LOAC obligations.

2.3 The Humanization of Humanitarian Law

Despite these reasons to expect reciprocity to be central to compliance with international law, since the end of the Cold War, an important literature has emerged arguing that reciprocity no longer conditions the LOAC obligations of states. Following Meron, I refer to this as the “humanization of humanitarian law” thesis.\textsuperscript{45} Such a view has both a normative and a descriptive element. The normative element cites the growing emphasis on human rights in the post-Second World War international system. Supporters of the humanization of humanitarian law thesis claim that states should comply with their LOAC obligations because of an overriding moral duty to respect the human rights norms enshrined in these laws. The descriptive element cites changes in the wording of LOAC texts negotiated and agreed to by states. The humanization of humanitarian law thesis claims that states have deliberatively removed reciprocity from the LOAC.

The humanization of humanitarian law thesis rests on three critical pieces of evidence. The first is the special character of the LOAC as enshrining \textit{jus cogens} norms and constituting \textit{erga omnes} obligations. \textit{Jus cogens} norms do not allow for derogation: states must comply with these norms regardless of the actions of other states.\textsuperscript{46} The legal literature

\textsuperscript{45} Meron, "The Humanization of Humanitarian Law."; Meron, \textit{The Humanization of International Law}. Leiden: Martinus Nijoff, 2006).

\textsuperscript{46} See the Vienna Convention on the Law of Treaties, 23 May 1969, 1115 UNTS 331, Article 53.
on LOAC obligations cites several reasons for their status as *jus cogens*. In its *Legality of the Threat or Use of Nuclear Weapons* (1996) Advisory Opinion, the International Court of Justice (ICJ) cited the extensive codification of LOAC rules, the nearly universal accession to LOAC treaties by states, and the fact that the denunciation clauses of LOAC treaties have never been used as evidence that LOAC rules have attained *jus cogens* status.47 Pictet’s *Commentary* to AP I also states that, “The prohibition against invoking reciprocity in order to shirk the obligations of humanitarian law is absolute.”48

The *erga omnes* character of an obligation implies that states owe that obligation towards the international community of states as a whole. The ICJ first codified this concept into international law in its *Barcelona Traction Case* (1970) ruling.49 The international community deems some norms so important that all states have an interest in prosecuting their violation.50 The interest of third party states in compliance with these obligations is evidence that the norms are not merely bilateral obligations. The wording of both Common Article 1 to the Geneva Conventions and Article 1(1) of AP I are usually cited as evidence of the *erga omnes* status of LOAC obligations. Each says that the particular obligations are to be complied with “…in all circumstances.”51 Thus, Pictet’s Commentary to Common Article 1 refers to the Geneva Conventions as “…a series of unilateral engagements solemnly

47 The Legality of the Treat or Use of Nuclear Weapons, 1996 ICJ Rep. 225, para. 82.
49 *Barcelona Traction Case (Second Phase)*, 1970 ICJ Rep. 3, paras 33-34
contracted before the world as represented by the other Contracting Parties.”

Meron as well refers to Common Article 1 as “…the humanitarian law analogue to the human rights erga omnes principle.”

The second piece of evidence for the humanization of humanitarian law thesis is the increasing number of restrictions states have agreed to place on their use of belligerent reprisals. In international law, the term “reprisal” refers to an act that what would otherwise be an illegal act but that is permissible as retaliation for the commission of an earlier illegal act by another actor. The classic definition of a reprisal comes from the Special Arbitral Tribunal’s decision in the *Naulilaa Case* (1928):

Reprisals are an act of self-help on the part of the injured states, responding after an unsatisfied demand to an act contrary to international law on the part of the offending State…They would be illegal if a previous act contrary to international law had not furnished the reason for them. They aim to impose on the offending State reparation for the office or the return to legality in avoidance of new offences.

In addition to defining reprisals, the *Naulilaa Case* laid out several requirements for their legality. These requirements include: (i) that only a state, its agent, or instrumentality may carry out the reprisal; (ii) that the reprisal be proportionate to the illegal act it responds to, and (iii) an attempt be made first to resolve the illegal act by means other than force. In terms of the LOAC, a “belligerent reprisal” is a reprisal that takes place during an armed conflict.

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54 *Naulilaa Incident Arbitration (Portugal v. Germany)* July 31, 1928, 2 RIAA, 1011, p. 1026
55 Ibid.
Historically, belligerent reprisals have been an important way for states to respond to LOAC violations. Nevertheless, states have agreed to an increasing number of restrictions on their ability to resort to such reprisals. The banning of belligerent reprisals against certain types of protected persons first appeared in Article 2 of the *Geneva Convention Relative to the Treatment of Prisoners of War* (1929): “Measures of reprisal against them [POWs] are forbidden” (L 274). Following the Second World War, the updated Geneva Conventions banned belligerent reprisals against all classes of protected persons defined in each of the four Conventions (L 323, 349, 367, 443). The *Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict* (1954) protected cultural property from belligerent reprisals (L 664). When states negotiated AP I, they agreed to further restrict their resort to belligerent reprisals. The reasoning behind these restrictions is easy to understand: such reprisals run counter to the idea of justice because the targets of belligerent reprisal, more often than not, are non-combatants who have committed no crime.

Finally, supporters of the humanization of humanitarian law thesis cite the principle of universal jurisdiction over crimes against peace, war crimes, and crimes against humanity as evidence for their claim. Both the International Military Tribunal and the International Military Tribunal for the Far East established the principle that certain LOAC violations give rise to individual criminal responsibility in addition to state responsibility. Following the

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Second World War, the High Contracting Parties to the Geneva Conventions agreed that they were obligated to “…search for persons alleged to have committed, or have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.”\(^{58}\) In addition, Article 90 of AP I provides for the creation of international fact-finding commissions to aid in the enforcement of the LOAC. The rationale for universal jurisdiction over LOAC violations is that such violations pose such a threat to the international community’s sense of justice that states have a moral duty to prosecute them no matter where they occur.

Taken together, the special character of the rules comprising the LOAC, the increased restrictions that states have agreed to place on their resort to belligerent reprisals, and the principle of universal jurisdiction over many LOAC violations have convinced many of the humanization of humanitarian law thesis.\(^{59}\) On this view, states have agreed to transform the LOAC from a reciprocity-based set of rules intended to protect their interests in times of armed conflict to a law protecting the interests of individuals and their human rights. As such, compliance with LOAC obligations is no longer a bilateral concern between the parties to an armed conflict that they enforce through self-help. Rather, the international community as a whole has an interest in the continued compliance with LOAC obligations by the parties involved because such obligations protect the universal human rights of individuals who find themselves caught in war zones.

\(^{58}\) Article 51 of GC I, Article 52 of GC III, Article 129 of GC III, and Article 148 of GC IV. Each Convention defines “grave breaches” for its class of protected person. See Article 50 of GC I, Article 51 of GC II, Article 130 of GC III, and Article 147 of GC IV.

2.4 Preserving Expectations of Reciprocity within the LOAC

While agreeing with the normative claim of the humanization of humanitarian law thesis, this dissertation takes issue with its descriptive claim that states have agreed to comply with the LOAC no matter the actions of their opponents in an armed conflict. To establish this, I first distinguish between the different forms specific reciprocity can take and argue that because of its concentration on belligerent reprisals, the humanization of humanitarian law thesis misses these more nuanced forms of specific reciprocity within the law. Next, I use H. L. A. Hart’s theory of law as the union of primary and secondary rules to argue that states have in fact maintained these more nuanced forms of specific reciprocity within the LOAC as secondary rules. Specific reciprocity’s status as a secondary rule has led proponents of the humanization of humanitarian law thesis to overlook its continued existence within the text of LOAC agreements. Lastly, by disaggregating state decision-making and emphasizing the multi-actor setting of domestic politics, I show how different actors can use these more nuanced forms of reciprocity to respond to non-compliance with the LOAC.

2.4.1 A More Nuanced Version of Specific Reciprocity

In developing a more nuanced view of specific reciprocity, this dissertation shows how the expectation of reciprocity operates in subtler ways within the LOAC than those typically associated with such logic of consequence arguments. In general, neoliberal institutionalism

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60 March and Olson draw a distinction between two types of motivational logic driving state behaviour. One is a “logic of expected consequences” where actors decide on a certain course of action based on their expectations of the costs and benefits that action will entail. The other is a “logic of appropriateness” where such decisions are based on “...evoking an identity or role and matching the obligations of that identity or role to a specific
conceives of reciprocity in terms of the specific reciprocity strategy of TFT. As a response to LOAC violations, TFT usually manifests itself in the form of belligerent reprisals.

Proponents of the humanization of humanitarian law thesis take the banning of reprisals as evidence of the abandonment of logic of consequence calculations by states with respect to the LOAC obligations. This has led them to stress the role that the logic of appropriateness – i.e. decision-making based on perceptions of normatively correct behavior rather than on calculations of beneficial and detrimental consequences – has come to play within the LOAC. However, belligerent reprisals are not the only way states can implement specific reciprocity within the LOAC. As such, the case for the decline of reciprocity and attendant rise in logic of appropriateness dynamics within the LOAC has been overstated.

First, specific reciprocity within the LOAC can take the shape of what I will refer to as “legal reciprocity.” With legal reciprocity, the “exchanges of value” spoken of in Keohane’s general definition extend only as far as the specified members of the legal agreement. For example, signatories to international treaties such as the Geneva Conventions only owe the obligations spelled out in those agreements to other signatories. Legal reciprocity is reflected in the use of the term “High Contracting Parties” to refer to the signatories. The concept of “contracting” is important because states are explicitly recognizing their obligations in their interactions with each other. In its ruling in the North Sea Continental Shelf Cases (1969), the ICJ stated that West Germany’s public statements in

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favour of the Geneva Convention on the Continental Shelf (1958) alone were insufficient to indicate its consent to the provisions of the Convention.\textsuperscript{62} Indeed, the ruling went on to state that the “…dangers of the doctrine here advanced (unilateral assumption of an international obligation through conduct and public statements alone)…if it had to be given general application in the international law field, hardly need stressing.”\textsuperscript{63} In this sense, legal reciprocity reflects a foundational principle of international law – voluntarism.

The second way states make use of specific reciprocity within the LOAC I will refer to as “strategic reciprocity.”\textsuperscript{64} Once parties bind themselves to the provisions of an international agreement through signing treaties and creating relations of legal reciprocity, they often consider the continued application of these agreements as contingent on the \textit{de facto} compliance by the High Contracting Parties. The most familiar implementation of strategic reciprocity is TFT. Responding to the violation of an international legal obligation with a violation can be termed “negative reciprocity.” The aim is to make the regime member that is in violation of its legal obligation change its behaviour by imposing a price for non-compliance. For example, in response to country A imposing a tariff on the entry of certain goods from country B in violation of a trade agreement between the two countries, country B may also impose a tariff on similar goods from country A in order to get it to comply. When

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\textsuperscript{63} Ibid., para. 33.
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discussing how states implement TFT in armed conflict, the literature on LOAC compliance focuses mainly on belligerent reprisals.\(^{65}\)

However, reciprocity can also exist in a positive form. In general, positive reciprocity refers to a state’s effort “…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-accession by other states.”\(^{66}\) A state may want to continue to comply with its treaty obligations despite a breach by one of its treaty partners for several reasons. It may want to verify that the partner was in fact in violation of or intended to violate its obligations before also defecting. In the case of non-accession, High Contracting Parties may also want to extend the possibility of enjoying the benefits of a treaty as an incentive in order to regularize interactions between them and other non-party states. Nevertheless, the decision to make such a positive inducement is not a legal requirement under international law. The Vienna Convention on the Law of Treaties does not require that treaties contain articles offering non-parties the ability to comply on an \textit{ad hoc} basis in return for reciprocal treatment by signatories.\(^{67}\)

\section*{2.4.2 Hart, Secondary Rules, and Specific Reciprocity}

Using H. L. A. Hart’s theory of law as the union of primary and secondary rules, this section notes how states have implemented the different types of specific reciprocity noted above in

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\textsuperscript{66} Watts, "Reciprocity and the Law of War," pp. 377-78.
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the LOAC via secondary rules. The humanization of humanitarian law thesis overlooks the continued role played by specific reciprocity because of its status as a secondary rather than primary rule.

Hobbes famously claimed that, “Covenants, without the Sword, are but Words, and of no strength to secure a man at all.”68 Many conclude from Hobbes’ observation that the key to something being law is its status as a command. Notably, John Austin concluded that the laws of a society are the general commands of the sovereign intended to govern the conduct of the society’s members.69 However, at the international level no such sovereign with the power to issue such commands exists. Therefore, if this is the correct understanding of the nature of law, it is hard to see how there could be such a thing as “international law” to affect state behavior. Indeed, Austin’s own response was that: “The so called law of nations consists of opinions or sentiments current among nations generally. It therefore is not law properly so called.”70

Hart developed his theory of law as the union of primary and secondary rules in direct response to Austin’s “command theory.”71 According to Hart, the primary rules of a legal system are those rules that either forbid or require certain actions and generate duties or obligations. The secondary rules, on the other hand, are rules that describe the manner in which we recognize, change, and adjudicate violations of primary rules. This provides an answer to Austin’s allegation that international law is not really law while at the same time

70 Ibid., p. 124.
71 Hart, The Concept of Law.
explaining why states comply. Following the lead of Bentham, Hart claimed that international law was “law” since it “…was ‘significantly analogous’ to municipal law.”  

This is to assume that international law has some method of sanctioning non-compliance. Indeed, Hart himself stated “…secondary rules provide the central official ‘sanctions’ of the system.”  

At the domestic level, law affects behavior because the state imposes penalties on individuals for non-compliance. At the international level, where no such sovereign exists, secondary rules implementing reciprocity provide states with the means to punish non-compliance with the primary rules of an agreement.

We can conceive of the LOAC in terms of a combination of primary rules outlining the legal obligations that signatories have towards one another in armed conflict and secondary rules conditioning the application of those primary rules. If this is the case, it becomes less obvious how humanitarian considerations alone condition LOAC obligations as is claimed by the humanization of humanitarian law thesis. As Chapter 3 will show in greater detail, rules such as the application clauses of the Geneva Conventions, the definitions of “belligerent” in Hague Convention IV and “POW” in GC III, and the reservations submitted by states to the Geneva Conventions all act as secondary rules qualifying the application of law’s primary rules. These secondary rules provide an equivalent to more overt forms of specific reciprocity such as belligerent reprisals because they, too, influence a state’s calculation of whether or not to implement LOAC provisions in a particular conflict situation.

73 Hart, The Concept of Law, p. 87.
Application clauses of international agreements are a type of secondary rule because they determine who will be beneficiaries of those agreements’ primary rules. These secondary rules preserve legal reciprocity based on the principle of voluntarism. According to this principle, states are only bound to those agreements to which they have freely consented. The principle of voluntarism finds its expression in the judgment of the Permanent Court of International Justice in the *Lotus Case* (1927):

> International law governs relations between independent states. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States therefore cannot be presumed.\(^{74}\)

Only through ratifying an international legal agreement does a state create specific reciprocal obligations between itself and other members of the agreement. Article 34 of the Vienna Convention codified the principle of voluntarism in international law: “A Treaty does not create either obligations or rights for a third state without its consent.” In terms of the LOAC, Common Article 2 of the Geneva Conventions functions as a secondary rule stating that the regime’s primary rules are only operative among the State Parties.

States can also use application clauses in international agreements as secondary rules implementing positive reciprocity. Often, states will include provisions that allow non-party states to accede to the obligation set out in international agreements. Under the Vienna Convention, such provisions allowing for positive reciprocity are not a legal obligation. Instead, the insertion of such clauses reflects a strategic choice among state parties to extend the benefits and obligations of particular international agreements to others in an attempt to

further regulate behavior in the international system. As the first case study demonstrates, the LOAC preserves positive reciprocity in two places. First, Common Article 2 of the Geneva Conventions extends the benefits of the regime to any non-party state willing to accept and apply the agreement. Second, the article defining POW status in GC III holds out the possibility of applying the protections of the agreement’s primary rules to non-state parties and even non-state actors but only if they comply with the LOAC’s primary rules.

Reservations to treaty provisions are also a type of secondary rules affecting the operation of an international agreement’s primary rules. The ability to submit reservations is important to states because it allows them to become a party to an international agreement while at the same time excluding the effects of certain provisions to which they object. Article 2(1)(d) of the Vienna Convention defines a reservation as “…a unilateral statement, however phrased or named, made by a State, when signing, ratifying, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.” Article 21 of the Vienna Convention codifies the legal effects of reservations. When submitted, other state parties either accept or reject the reservation on an individual basis. If accepted, the reservation modifies the agreement between the reserving and accepting states. If rejected, the particular treaty provision does not operate between the reserving state and the rejecting states.

As the first case study will demonstrate, states have used reservations to particular LOAC treaty provisions to preserve specific reciprocity in two important ways. First, states have used reservations to ensure that they are only obliged to apply LOAC treaty provisions to other states that have ratified those particular LOAC instruments. The insertion of reservations into international agreements stipulating that the reserving state only owes
specified obligations to other treaty members preserves legal reciprocity within the scope of particular treaties. Second, states have used reservations to allow for the exercise of negative reciprocity in response to material breaches of certain LOAC obligations. For example, within Hague Law, many states have submitted reservations to treaties such as the Geneva Protocol for the Prohibition of Gases (1925) allowing them to use an otherwise prohibited weapon in response to first-use by an opponent (L 115-119). Within the Geneva Conventions themselves, states such as the United Kingdom have made reservations to prohibitions on the use of belligerent reprisals against certain classes of protected persons in order to allow them to respond to a LOAC violation by an opponent (L 635).

Another important example of where states have resorted to secondary rules within the LOAC to implement specific reciprocity is the qualification for POW status. These secondary rules define who is entitled to participate directly in hostilities and which of these individuals qualify for POW status. The secondary rules determining POW status preserve legal reciprocity in two ways. First, they ensure that only the members of national militaries of state parties to LOAC treaties qualify for POW status. Second, they require that insurgent groups taking direct part in hostilities be able to trace their authority to participate in hostilities back to a state that is a party to LOAC treaties. The secondary rules determining POW status also preserve strategic reciprocity through requiring insurgent groups to de facto comply with the LOAC in order to receive POW protections.

2.4.3 The Domestic Multi-Actor Setting

Standard accounts of LOAC compliance emphasizing the role of reciprocity in its TFT form rely on the assumption that the state is a unitary actor, attempting to maximize its interests in
an international system characterized by anarchy. The unitary actor assumption makes particular sense when studying states engaged in armed conflict given that a shared enemy threatening the state with attack would usually tend to unite citizens.\textsuperscript{75} The humanization of humanitarian law thesis typically accepts the assumption of unitary actors and common understandings of how reciprocity would operate among them. In doing so, however, it misses the extent to which policy debates within states about extending LOAC protections to opponents involve disputes about which form of reciprocity to apply.

Liberal international relations theory rejects the unitary actor assumption on the basis that it does not adequately take into account the role of domestic politics in determining state interests.\textsuperscript{76} States are not just “black boxes” attempting to survive in an anarchic system; they are a configuration of individual and group interests projected through a particular government. Therefore, state policy reflects the interests of some dominant subset of domestic society. In the international law literature, liberals emphasize the primacy of the individual in transnational society. This reverses the traditional emphasis of international law on inter-state relations.\textsuperscript{77} This emphasis on the effect of law on the individual militates against the role reciprocity can play as a mechanism for ensuring compliance with the LOAC. In its place, other mechanisms such as regime type, audience costs, and national courts enforce international law.\textsuperscript{78}


\textsuperscript{78} Laurence R. Helfer and Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication," \textit{Yale Law Journal} 107, no. 2 (November 1997); James D. Fearon, "Domestic Political Audiences and the
Liberalism’s focus on mechanisms other than reciprocity would seem to lend support to the humanization of humanitarian law thesis. For example, Dickinson argues that the US military has created an organizational structure that uses multiple and nested principal-agent relationships to promote a culture of LOAC compliance. The US Judge Advocate Generals (JAGs) administer training programs meant to educate US armed forces in the LOAC. When it is involved in an armed conflict, the US military assigns JAG lawyers to individual units as advisors in the field. In addition, as part of their training, US armed forces learn to ask for JAG authorization before making key targeting decisions. In turn, the US military structures chains of command in such a way as to allow JAG lawyers some independence in making these assessments. Yet this tends to obscure the fact that debates among policy makers about extending LOAC protections to opponents can just as easily reflect disagreement about what type of reciprocity to apply in a certain case. Given their influence on military operations, the way in which the JAGs – and other policy-makers – understand reciprocity will play an important role in shaping LOAC compliance decisions.

As the GWOT case study in Chapter 5 demonstrates, both the US State Department lawyers’ and the JAG’s attitude towards compliance with LOAC obligations took a more diffuse interpretation of reciprocity than did those at the Departments of Justice and Defence. Understanding reciprocity in a more diffuse way suggests responding to LOAC violations with continued compliance so as not to be subject to non-compliance in a future armed

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80 Ibid., p. 10.
conflict with a different adversary. For example, denying POW status to detainees a state is holding in a current armed conflict – even in reaction to LOAC non-compliance on the part of one’s opponent – lowers the bar for compliance in armed conflict more generally.

However, diffuse reciprocity can become so diffuse that it is no longer recognizable as reciprocity. As Keohane cautioned: “Diffuse reciprocity, in the absence of strong norms of obligations, exposes its practitioners to the threat of exploitation. In the absence of strong norms of obligation, specific reciprocity may provide an antidote to the abuse of diffuse reciprocity.”81 For diffuse reciprocity to fully explain compliance with the LOAC, international society must provide appropriate remedies to states suffering LOAC violations in return for giving up the right to self-help. Yet, as both the Vietnam War and GWOT case studies demonstrate, the international system would seem to provide states – especially the US – with little support in this area. This may motivate other actors to propose other forms of reciprocity – including positive and negative strategic reciprocity – as a method for responding to LOAC violations. The multi-actor setting in which state decision-making takes place allows these arguments to get a hearing and, when such policies are strategically advantageous, be implemented by the state.

2.5 Alternative Mechanisms for Gaining Compliance with the LOAC

The idea that humanizing the LOAC requires the removal of expectations of reciprocity implicitly rests on the further claim that there are other mechanisms sufficient for inducing compliance. The mechanisms examined in this section base compliance with the LOAC on a

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81 Keohane, "Reciprocity in International Relations," p. 24.
logic of appropriateness rather than a logic of consequences.\textsuperscript{82} Both constructivists in international relations theory and legal theorists who believe that states naturally respect legal commitments, or have a capacity to be socialized into following international law, endorse this logic of state motivation. Rather than asking what the expected costs and benefits of a certain decision are, these theorists propose that policy makers ask themselves what course of action is appropriate in the particular situation they are facing. March and Olsen describe the process as follows:

To describe behavior as driven by rules is to see action as a matching of a situation to the demands of the position. Rules define relationships among roles in terms of what an incumbent of one role owes to incumbents of other roles…The terminology is one of duties and obligations rather than anticipatory, consequential decision making. Political actors associate specific actions with specific situations by rules of appropriateness.\textsuperscript{83}

Such an explanation is plausible because even rationalists in international relations theory and international law concede that states must take into account the social opprobrium associated with certain actions when deciding on how to react to LOAC violations.

In this section, I consider three such alternative mechanisms. The first emphasizes the role of legal interactions in gaining and maintaining compliance with international law. The second emphasizes the role of legitimacy in generating “compliance pull” for the law. The final alternative mechanism emphasizes the role of norms and identity. If policy makers understand their country’s role in the international system as one of promoting compliance with international law, then they will advocate for compliance. I will examine each alternative mechanism in turn.

\textsuperscript{82} March and Olsen, "The Institutional Dynamics of International Political Orders." Autumn 1998).
2.5.1 Legal Process and Compliance with the LOAC

Two important logic of appropriateness approaches to compliance with the LOAC fall under the broad heading of legal process theories. The “managerial school,” which emphasizes the role of intergovernmental coordination at the state level in compliance represents a horizontal legal process. Transnational legal process theory, on the other hand, also includes the process of norm diffusion from the international level down to the domestic law of individual states. Transnational legal process represents a wider interpretation of legal process theory than does managerialism because it includes both horizontal and vertical legal processes. This section looks at each theory of compliance in turn.

For the managerial school of legal process theory, the mechanism driving compliance with international law is an already pre-existing propensity to comply. For one thing, compliance is a more efficient use of states resources than is the constant re-calculation of a state’s interests regarding treaty obligations. Second, since states need only join those treaties that reflect their interests, compliance is already in the state’s interest. Finally, states would waste the care and resources used in negotiating international agreements if they did not comply. For managerialism, the existence of international forums where states meet to discuss legal issues enhances the pre-existing propensity to comply. Such forums provide venues for repeated interaction among treaty members where non-compliant members must justify their actions to others. According to Chayes and Chayes, since “…good legal arguments can generally be distinguished from bad,” the very nature of the legal discourse

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used by states in these forums puts a premium on compliance.\textsuperscript{85} This process of “jawboning” tends to increases the commitment of states to international agreements like the LOAC and maintain compliance at an acceptable level.\textsuperscript{86}

If states have an existing predisposition to comply with the LOAC then the failure to comply is not rooted in state preferences. Instead, LOAC violations are due to other factors.\textsuperscript{87}

For one thing, treaty language is often vague and reflects a lack of international consensus on more specific legal obligations. Therefore, a state may be exploiting an ambiguity in the text of an agreement to test the acceptable limits of its obligations. Alternatively, a state may not be in compliance because it lacks the resources to establish necessary treaty implementation mechanisms. Lastly, since states intend international agreements to govern their behavior for long periods, non-compliance may actually reflect a time lag in the implementation of treaty requirements. According to supporters of managerialism, we should think of these alternative explanations for non-compliance as “defenses” used to justify the behavior of a non-compliant state. Thus, LOAC violations are not something to punish through reciprocal sanction. Instead, treaty members should manage such non-compliance.

The legal processes in which LOAC regime members interact need not be restricted to state interaction at diplomatic conferences, though, as emphasized by managerialism. Koh has expanded the notion of legal process to include non-state and domestic actors and the influence they can bring to bear on state compliance with international law in what he terms

\textsuperscript{85} Chayes and Chayes, \textit{The New Sovereignty: Compliance with International Regulatory Agreements}, p. 119.
\textsuperscript{86} Ibid., p. 25.
“transnational legal process.” 88 This is a vertical process where “…domestic decision making becomes ‘enmeshed’ with international legal norms as institutional arrangements for the making and maintenance of an international commitment become entrenched in domestic legal and political processes.” 89 In this way, international treaties can influence state incentives. As Koh writes, it is through this “…repeated cycle of interaction, interpretation, and internalization, that international law acquires its ‘stickiness’…and that nations come to ‘obey’ international law out of perceived self-interest.” 90

The important mechanism in transnational legal process that leads to compliance with international agreements is the degree to which the state’s domestic law has incorporated the treaty’s provisions. As such, it is the differing degrees to which domestic law has incorporated the relevant international agreement that explains variations in compliance. Applying transnational legal process to the LOAC, compliance should be highest among those states that have ratified the greatest number of LOAC treaties and expressed the most support for customary LOAC obligations. Compliance should also be high among those states that have passed the most comprehensive legislation incorporating LOAC treaty and customary obligations into their domestic legal systems. Lastly, compliance should be high among those states that have participated in international institutions created to monitor LOAC compliance and adjudicate LOAC disputes and violations.

90 Ibid., p. 2655.
The different mechanisms identified by legal process theories can help explain why states comply with or violate their LOAC obligations in certain cases. However, such theories fail to explain the continued existence of secondary rules within the law preserving the expectation of reciprocal compliance and the managerial model’s assumption of a predisposition to comply seems out of place in armed conflict. For one thing, since the stakes involved in an armed conflict are so high, there is always the incentive to cheat. Thus the decision to comply with the law more closely resembles a Prisoner’s Dilemma than a coordination game.91 Second, the assumption of a predisposition to comply does not apply to many groups who reject out of hand the application of rules to warfare. Transnational legal process, on the other hand, is correct to emphasize the role of domestic legal institutions in leading to compliance with the LOAC. Many countries have incorporated such things as the “Grave Breaches” provisions of the Geneva Conventions into their domestic law. However, the theory leaves unexplained the particular mechanisms by which these norms change the preferences of states in favor of compliance.92 In particular, transnational legal process cannot explain why lawmakers would incorporate humanitarian norms into domestic legislation more easily than a norm of reciprocity. As this dissertation in fact suggests, sub-state actors continue to reference the expectation of reciprocity in arguments about their LOAC obligations.

Empirically, moreover, the mechanisms identified by legal process theories fail to account for the variance between the two cases this dissertation explores: USA POW policy

during the Vietnam War and the GWOT. The criteria for POW status laid out in the LOAC are already precise and in both cases, the USA had the capacity to treat detainees as POWs. As such, the factors cited by managerialism cannot account for the different policy decisions in the two cases. Moreover, the USA has incorporated nearly all the primary instruments of the LOAC into its domestic law. In such a case, transnational legal process suggests that the US would award POW status to both sets of detainees. Yet US policy in these cases contradicts this prediction. Chapters 4 and 5 suggest that while legal process theory predicts a continuity in policy between the cases, a focus on specific strategic reciprocity can explain the difference in US policy towards POW status in each case.

2.5.2 The Compliance Pull of the LOAC

A second logic of appropriateness-based explanation for compliance with the LOAC refers to the discourse of law. What differentiates this explanation from the legal process theories discussed above is the belief that international law is more than just a set of rules to regulate state behavior. Rather, the prescriptions of international law exert a specific “compliance pull.”93 The compliance pull of particular laws will be stronger or weaker depending on their perceived legitimacy. Franck defines legitimacy as “…a property of a rules or rule-making institution which itself experts a pull towards compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process.”94 The assumption that

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international law has a particular internal mode of operation sufficient to ensure compliance is in opposition to the theory presented in this dissertation which defends a continued place for exogenous reasons such as reciprocity to influence decisions about compliance with the LOAC.

According to proponents of this alternative perspective, the determinacy of international law makes legal discourse distinct from strategic calculations of costs and benefits. As Kratochwil writes, legal rules “…provide relatively firm guidance not only with respect to ends but also to the means to be adopted.”95 Franck, in a slightly different way, agrees that determinacy provides greater legitimacy to international law and, therefore, leads to compliance. However, determinacy is only one of four intrinsic elements of legal norms that give them legitimacy. For Franck, the “compliance pull” of international law is generated by the key mechanisms of legitimacy and fairness. He identified four non-coercive factors falling under the general heading of “legitimacy” that prompt states to comply with international law. These four elements include:

1. Determinacy: The law clearly communicates permitted and prohibited behaviors;
2. Symbolic validation: The law has attributes that identify it as a significant part of a system of social order;
3. Coherence: The law relates in a principled manner to other rules in the same system and in its application like cases are treated alike; and
4. Adherence: The law is “made within the procedural and institutional framework of an organized community” rather than in an ad hoc fashion.96

Franck expanded on the idea of legitimacy in an effort to respond to the criticism that his earlier work concentrated too much on procedural legitimacy.97 Franck modified this

conception of legitimacy to say that not only must a rule be procedurally fair, in the sense that it embodies the four elements mentioned above, but that it also be substantially fair. In this case, “substantial fairness” means that the rule leads to distributive justice.\textsuperscript{98} When those to whom the rules apply view them as both procedurally and substantively fair, international law will exert a compliance pull that is independent of a state’s material considerations.\textsuperscript{99} In this case, since states have themselves negotiated LOAC agreements, the compliance pull of the rules codified in the law is substantial. According to this view, one solution to improve LOAC compliance among insurgent groups would be to have them involved in the development of the law.

As the three case studies in this dissertation demonstrate, while legitimacy may help promote LOAC compliance, it is not sufficient to guarantee it. Only a pre-existing shared normative belief in the values of determinacy, symbolic validation, coherence, and adherence allows for such elements of international law to generate a compliance pull.\textsuperscript{100} It is precisely for cases where no such shared belief exists that states maintained their right to reciprocal defection from certain LOAC obligations. Moreover, the legitimacy of LOAC rules does not account for the variance of US POW policy in the Vietnam and GWOT case studies. It is also worth noting that even though many insurgent groups participated in the creation of AP I, the law did not create a compliance pull among those groups that came to power in particular states. As the historical case study shows, not one insurgent group that eventually came to power in a state was willing to recognize the belligerent status of groups they had to fight.

2.5.3 **Identity and Compliance with the LOAC**

The last logic of appropriateness approach to compliance with the LOAC considered here draws on constructivist research in political science. Constructivism focuses on how ideas construct social environments that help constitute state identities and interests. Actors attribute meaning to reality through ideas. As such, actors construct their beliefs – including beliefs about appropriateness – out of their understanding of the world as they take it to be.\(^{101}\) For constructivists, the constitutive power of norms create actors’ identities and hence their interests. This suggests that norms also have causal power.\(^{102}\) States do not comply with norms of international law merely because they have a pre-existing interest in compliance shaped by the fear of material consequences. States may also comply because they have internalized these norms or because they understand themselves as good citizens of an international society where they understand “good” in terms of compliance with international law. This section looks at these two mechanisms in turn.

The process of internalization can occur at different levels. At the state level, policy makers may choose to comply with certain norms of international law for their own sake, most notably because they believe in the moral rightness of the norm. Such arguments appear in different areas of the LOAC such as Tannenwald’s work on nuclear weapons and Price’s work on both the “chemical weapons taboo” and Ottawa Treaty banning the use of anti-

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\(^{102}\) Ibid., p. 397.
personnel land mines. Some states may also define their national identity in terms of certain norms, such as the humane treatment of individuals in times of armed conflict. In such cases, certain policy options about how to respond to LOAC violations by an enemy may be “off the table.” As John McCain argued regarding Geneva Convention compliance by the US: “Were we to abandon the principles of wartime conduct to which we have freely committed ourselves, we would lose the moral standing that has made America unique in the world.” On this reading of national identity, complying with LOAC norms is part of a certain state’s own particular traditions.

Finnemore and Sikkink provide a useful model of the life cycle of a norm, which strengthens Price’s argument and has important implications for the study of LOAC compliance. The life cycle of a norm consists of three stages: (i) norm emergence, (ii) norm cascade, and (iii) norm internalization. Stage I, “norm emergence,” is characterised by norm entrepreneurs attempting to convince a critical mass of states to adopt a given norm. At stage II, the “norm cascade” stage, states adopt norms in response to international pressure in order to conform to international standards. If norms reach stage III, they become “internalized” in the sense that they “…achieve a ‘taken-for granted’ quality that makes conformance with the norm almost automatic.” Thus, we can assume that during stage I

107 Ibid., p. 904.
and stage II of the life cycle, substantial external persuasion is necessary to bring about compliance and that acts of non-compliance should be relatively common. With stage III norms, on the other hand, compliance should be standard and the need for external enforcement should be rare. With states like the US, which see themselves as law-abiding members of the international system, the norm of awarding POW status to detainees in an international armed conflict would seem to be part of its identity.

Norm internalization may also occur at the sub-state level. In this case, a particular group may internalize an international norm as part of its professional standards. Part of what it means to be a member of a profession is having a deep commitment to a set of values defining that profession. In the case of the LOAC, the concept of martial honor as including humane treatment of detainees represents the internalization of a norm that may lead to compliance with the law, though not all concepts of martial honour need involve the internalization of LOAC principles. Conceptually, one could think of martial honour as a type of internal morality that has the same meaning for members of the armed forces as the Hippocratic Oath does for doctors. In this sense, the LOAC is intended to serve “...as a conceptual boundary between the language of war and other activities, some of which it uncomfortably resembles, particularly murder.”

While the constructivist theories examined above assume that the norms influencing the construction of state preferences will tend towards compliance, however it is equally plausible that state preferences favouring reciprocal reaction to LOAC violations will

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determine state behaviour. In addition, as will be argued in the subsequent chapters, mechanisms such as national and martial honour do not explain the different decisions regarding the POW status of Viet Cong and GWOT detainees. Empirically, such an argument referencing nation honor is also problematic. After the attacks of 11 September 2001, surveys found that US citizens were quite willing to endorse the use of torture against GWOT detainees, belying McCain’s belief that torture is un-American.\textsuperscript{110} If Huntington is correct in describing the US as “…a universal nation based on values common to all humanity and in principle embracing all peoples,” it is hard to see why someone like McCain thinks the attitude of the US military towards the LOAC is different to any other – especially Western – military.\textsuperscript{111}

\textbf{2.6 Conclusion}

The theory presented in this chapter regarding why reciprocity continues to play a central role in the LOAC and in state decisions about whether to extend LOAC protections to their opponents in particular armed conflicts is rooted in the traditional neoliberal explanation for compliance with international agreements: In iterated Prisoner Dilemma situations, reciprocity allows for the enforcement of agreements lacking a centralized enforcement mechanism. This will come as no surprise to anyone who studies international relations. Vast arrays of international agreements use reciprocity to enforce their provisions.

Nevertheless, in the aftermath of the Second World War, international human rights groups have lead a concerted effort to remove reciprocity from the LOAC. This view, which I have called the “humanization of humanitarian law” concentrates too much on the strategy of TFT as implemented in the form of belligerent reprisals and therefore misses the subtler ways that states have maintained the expectation of reciprocity within the law. Using Hart’s theory of law as the union of primary and secondary rules, I have argued that states inserted rules preserving the reciprocal expectation of compliance as secondary rules within the LOAC to condition the application of the law’s primary rules of obligation. I have also shown how the multi-actor setting of state decision-making allows for these subtler aspects of reciprocity to influence state policy towards their LOAC obligations depending on the particular strategic circumstances of an armed conflict. In particular, we should understand specific reciprocity to include strategic considerations of reciprocity, such as positive reciprocity, that go beyond what is enshrined in international law.

Meanwhile, the humanization argument builds on arguments based in a logic of appropriateness. This chapter has examined three versions of these foundations and raised concerns about each as an explanation of state attitudes towards GC III obligations. It is true that states have been willing to expand the protections of POW status to more individuals who take part in hostilities. Yet it does not follow that they are willing to remove completely the expectation of reciprocal compliance from the law. The following case studies will demonstrate how secondary rules of application transformed TFT from its more overt forms to more covert forms. The first case study examines the negotiations that lead to the Geneva Conventions (1949) and the Protocols Additional to the Geneva Conventions (1977) to demonstrate how states preserved reciprocity within the LOAC as secondary rules. The
Vietnam War and GWOT case studies analyze the specific issue of the POW status of detainees held by the US and examines how policy makers made use of these secondary rules in formulating their decisions. According to the logic of appropriateness accounts examined above, we should expect a similar policy of awarding POW status to both insurgent groups. Yet this is not the case. Contrary to the humanization of humanitarian law thesis, expectations of reciprocal compliance with the LOAC were never far from the surface.
Chapter 3: Reciprocity and the Updating of the Geneva Conventions

Greenwood succinctly describes the dilemma that the expectation of reciprocity poses for the application of LOAC obligations. In discussing AP I he writes:

On the one hand, Protocol I, like any treaty, will be applicable between any two States only if both have become party to it or have otherwise consented to apply it. If either of these States has become party subject to reservations, those reservations will apply on a reciprocal basis. In that sense, the reciprocal acceptance of obligations is the basis for the application of all the treaties on the law of armed conflict. On the other hand, the ICRC (International Committee of the Red Cross) has always stressed that the continued application of those treaties is not dependent upon reciprocity, in the sense that a breach by one party does not relieve the other parties of their obligations towards it.¹

The strongest arguments against basing LOAC obligations in an expectation of reciprocity are non-consequentialist ones. For those who reject reciprocity, “…it is immaterial, when one’s own violations are judged, that one’s military opponent committed the same breaches.”² Since the end of the Second World War it is this understanding of the nature of LOAC obligations that has been in the ascendency.

However, as I will argue in this chapter, the negotiations surrounding both the Geneva Conventions and the Protocols Additional to the Geneva Conventions demonstrate that the expectation of reciprocity still exists with the LOAC despite significant concessions towards humanitarianism. This chapter proceeds in four parts. In the first section, I give a brief history of the LOAC and highlight the role historically played by expectations of reciprocity within the regime. In sections two, three and four I examine the negotiations that took place at the Diplomatic Conferences of 1949 and 1974-1977 that updated Geneva law.

² Osiel, The End of Reciprocity: Terror, Torture, and the Law of War, p. 73.
Each section demonstrates how, despite the willingness of states to extend the protections of LOAC regulations to more armed conflicts and individuals, they were only willing to do so given the expectation of a reciprocal commitment – both *de jure* and *de facto* – to comply with the law. I conclude with some remarks about what the history of these negotiations demonstrates about the continued role played by expectations of reciprocity in the POW regime, given that this is the central focus of the subsequent two chapters.

### 3.1 The Expectation of Reciprocity and the LOAC Prior the Second World War

The expectation of reciprocal compliance played a limited role in constraining behavior in armed conflict prior to the Peace of Westphalia in 1648. Until this time, just war theory had been the predominant mode of strategic thinking in the West. Just war theory deals mostly with the conditions justifying the resort to war. Its understanding of armed conflict as a method for enforcing natural law had the important implication that wars were not fought between moral equals. Though one’s enemies did not lose their natural law right to self-defense, those fighting for an unjust cause had no legal immunity for killing in war. Therefore, in its treatment of the conduct of hostilities just war theory mainly followed the principle of necessity and not reciprocity. If you had justice on your side, then any type of conduct was allowable to ensure victory. The obvious problem for just war theory is that because all think they are on the side of justice, there is little room for restraint.

With the end of the Wars of Religion and the signing of the Peace of Westphalia in 1648, came also an end to the assumption that the conduct of war could be grounded in universally agreed upon moral rules. The Thirty Years War itself was fought over just whose moral rules – Catholicism’s or Protestantism’s – would triumph. The Peace of Westphalia
further entrenched the principle first laid out in the Religious Peace of Augsburg (1555) of *cuius regio eius religio* (whose region, his religion). As such, the Thirty Years War had the unintended consequence of establishing that there were no universally agreed upon moral rules that leaders could appeal to in judging the conduct of war. Nevertheless, as the common morality which underpinned just war theory broke down, a belief in a common European civilization was beginning to emerge and take its place.³ As noted by Michael Howard, this sense of a common civilization created a sense of fraternity among belligerents that acted as an important source of restraint in the conduct of warfare during the 18th century.⁴ Though there was no explicit recognition in terms of international agreements, common rules for the conduct of war were beginning to be established.

Due to both the experience of the Wars of Religion and the primitive nature of state finances, the 18th century was an age of limited warfare. Wars were “limited” in several senses of the term. First, the issues fought over were those which war could actually decide, such as territorial boundaries or who would control a certain trade route. These were not ideological wars. Second, the armies that fought these wars were relatively small. Since many national armies were made up of foreign mercenaries, they were expensive to maintain. For example, in 1752, Prussia spent nearly 90 per cent of its state revenue on the military. In 1784 France spent nearly two-thirds of its national budget on the army.⁵ Therefore, it was in

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the self-interest of all European sovereigns to limit the violence of war in order to preserve these forces as much as possible. Finally, these wars were limited because, to a remarkable degree, states agreed to abide by the outcome of major battles.⁶ In the words of Emperor Joseph II of Austria: “I have lost a battle. I pay with a province.”⁷ This unspoken, but nevertheless mutually agreed upon, set of rules for the conduct of war rested upon the reciprocal expectation that one’s opponent would do the same.

The French Revolution and the wars of Napoleon would end this age of limited war. These conflicts witnessed the shift of several European militaries from small, professional armies made up of mercenaries to mass armed forces drawn from the population at large. While the training that the officers of these new armies received steeped them in the existing cosmopolitan traditions of restraint, no such training existed for the rank-and-file soldiers. After Napoleon was defeated, the major European powers attempted to restore both the international and domestic status quo. Most importantly, they did not want to maintain large, citizen armies motivated by nationalism out of fear of the type of war to which they could lead. Such worries led to the signing of a series of international agreements among states in the mid-19th century codifying existing custom regulating the conduct of hostilities into positive law.

Perhaps the most influential codification of rules for the conduct of war during this period was US General Order No. 100, commonly known as the “Lieber Code.” Though intended for use by the Union Army in the US Civil War, the Lieber Code is widely credited


with starting the trend towards multilateral treaties codifying existing customs regulating conduct in warfare. The regulations represented the first time since ancient Rome that a state had adopted a formal code of law to regulate the conduct of its army towards enemy soldiers, non-combatants and POWs.

While not expressly mentioning reciprocity, the Lieber Code clearly understands the strategy of TFT as integral to enforcing the LOAC. Article 27 states: “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. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage” (L 7). The article immediately following reads:

**Art. 28.** 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. Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine war of savages (L 7).

Both Articles 61 and 62 reinforce this belief in retaliation, permitting the suspension of certain of the Code’s humanitarian protections in the event of an enemy breach (L 12).

The scope of the LOAC is dealt with in the final section of the Lieber Code. Article 152 regards the application of the law to intra-state conflict as a matter of state discretion. As with other codifications of the LOAC that would follow, the Lieber Code denies that a state’s decision to apply the law to an internal conflict in any way lends legitimacy – legal or

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otherwise – to an insurgency. It is also silent on the issue of whether the decision by an insurgent force to comply with the LOAC should lead to reciprocal application by the state. Humanitarianism is the only justification the Lieber Code cites for applying the LOAC to intra-state conflicts. Although not legally binding on the Confederacy, the provisions of the Code anticipated reciprocal observation by its army and did grant POW status to a broad range of Confederate soldiers. However, the exclusion of spies, traitors, and brigands from POW status demonstrates a preference for protecting conventional forces similar to those of a state in organization and conduct.

In 1874, several European powers met in Brussels in an attempt to codify exiting customary LOAC rules. The Project for an International Declaration Concerning the Laws and Customs of War (Brussels Declaration), dealt with such issues as authority over occupied territory, combatant qualification, the proper means of injuring the enemy, and the treatment of POWs. Article 23 defines POWs as “…lawful and disarmed enemies” (L 30). Articles 9, 10, and 11 define such “lawful and disarmed enemies” as follows:

**Art. 9.** The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
1. That they be commanded by a person responsible for his subordinates;
2. That they have a fixed distinctive emblem recognizable at a distance;
3. That they carry arms openly; and
4. *That they conduct their operations in accordance with the laws and customs of war.*

In countries where militia constitute the army, or form part of it, they are included under the denomination army

**Art. 10.** The population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having time to organize themselves in accordance with Article 9, shall be regarded as belligerents if they respect the laws and customs of war.

**Art. 11.** The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both shall enjoy the rights of prisoners of war (L 28-29. Emphasis added).
Though the Brussels Declaration never entered into force, it demonstrates an expectation among states that those individuals taking direct part in hostilities who are not members of national armies will comply with the LOAC. In particular, Article 9(4) requires that these individuals conduct hostilities in compliance with the LOAC in order to receive the protections of POW status.

In 1880, European states attempted once again to codify existing customary LOAC rules with the publication of the *Oxford Manual on The Laws of War on Land*. The *Oxford Manual* defined the combatant qualification similarly to the Brussels Declaration, requiring that “…national guards, landsturm, free corps, and other bodies…” taking direct part in hostilities “conform to the laws of war” in order to be entitled to POW status (L 37). With respect to dealing with LOAC violations, the Oxford Manual suggests that: “…the offending parties should be punished, after a judicial hearing, by the belligerent in whose hands they are” (L 47). However, it considers belligerent reprisals an important mechanism for enforcing the law:

This mode of repression (judicial hearing), however, is only applicable when the person of the offender can be secured. In the contrary case, the criminal law is powerless, and, if the injured party deem the misdeed so serious in character as to make it necessary to recall the enemy to a respect for law, no other recourse than a resort to reprisals remains.

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 (L 48).

While the Lieber Code, Brussels Declaration, and the *Oxford Manual* were not legally binding international law, their importance to the current argument lies in the attitude they demonstrate towards reciprocity. As states began to codify the customary rules of the LOAC,
though they were willing to expand the protections of the law to more individuals, this was based on the expectation that these persons would comply with the LOAC.

When states met again in The Hague in 1899 and 1907 to update existing LOAC rules, the expectation of reciprocity continued to manifest itself in the law. One telling instance was the inclusion of a clausula si omnes. Also known as a “general participation clause,” the clausula si omnes had the effect of ensuring the law would operate only among those states that were High Contracting Parties to the agreement. Article 2 of Convention IV (1907), states: “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 Conventions” (L 65; emphasis in the original). The negotiators assumed this to be a codification of existing customary rules with respect to armed conflict. Fyodor de Martens defended including Article 2 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.”

All of the Hague Conventions negotiated in 1907 contained such a clause. Even an essentially humanitarian treaty like Hague Convention X, which extended Geneva Convention protections to maritime warfare, contained such a clause (L 249).

The expectation of reciprocity can also be seen in the rule requiring militia and volunteer corps to comply with the LOAC in order to be considered lawful belligerents. Article 1 of the Annex to Hague Convention IV states:

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**Article 1.** The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:
1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war (L 69. Emphasis added).

Article 2 of the Annex, which applies to *levees en masse*, also confers belligerent status only on those members who “respect the laws and customs of war” (L 69-70). These requirements are a near word-for-word replication of those found in both the Brussels Conference document and the *Oxford Manual*. In the terminology of the previous chapter, this is an example of positive reciprocity. With Article 1, signatory states created a legal obligation to extend the LOAC’s protections to members of non-regular armed forces. Nevertheless, these protections were conditional on such groups complying with the same rules as state armed forces. There is an expectation that those who want belligerent status – and the benefit of receiving POW status that goes along with it – must obey the same rules that professional armies do.

Finally, the expectation of reciprocity can be seen in the insistence of the High Contracting parties to maintain the right of reprisal. According to Kalshoven, states studiously avoided this issue when negotiating the Hague Conventions for “fear that express regulation might be interpreted as a legitimation of their use.”

However, there is Article 50 of Hague Convention IV, which reads: “No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible” (L 83-84). Kwakwa understands this as a

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“clear, albeit feeble, attempt to grapple with the problem of belligerent reprisals.\textsuperscript{11}

Nonetheless, Article 50 occurs in a section of the Conventions dealing mostly with financial penalties such as collection of taxes and levies for military needs. Therefore, it is not clear that Article 50 outlaws the legitimate use of belligerent reprisals as a way of responding to LOAC violations.

As states were beginning to codify existing rules for the conduct of warfare, such as the expectation of reciprocity, into international treaties, a contrary trend towards humanitarianism was beginning to emerge. From the mid-19th century onward, increasing wealth and education in the West was creating a society of middle class liberals uneasy with the brutalities of war. Such brutalities were brought to their very doorsteps through new developments in communications technology such as the war reporting of William Howard Russell of \textit{The Times of London} and photographs of Roger Fenton from the Crimean War (1853-1856). Perhaps more importantly, warfare disrupted the growing wealth of this emerging middle class. Peace movements began to spring up in Britain, France, and the United States, receiving much of their support from this emerging class. This led to an attempt to humanize armed conflict as much as was possible. Having witnessed the horrifying conditions of the Battle of Solferino (1859), Henri Dunant initiated an international conference held in Geneva that adopted the \textit{Convention for the Amelioration of the Condition of the Wounded in Armies in the Field} (1864) and formed the International Committee of the Red Cross. The Convention was an exclusively humanitarian instrument intended to ease the suffering of those members of national armed forces injured in combat.

\textsuperscript{11} Kwakwa, “Belligerent Reprisals in the Law of Armed Conflict,” p. 54; n. 23.
This trend towards humanitarianism in the LOAC is also evident in other international agreements negotiated at the time. In 1868, representatives from various states met in St. Petersburg to adopt a declaration against the use of exploding bullets. The

*Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight* (St. Petersburg Declaration) codified the existing custom against the use of weapons that caused unnecessary suffering:

…the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose, it is sufficient to disable the greatest number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the suffering of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity (L 96).

The St. Petersburg Declaration also expressed the growing belief that the deliberate targeting of civilians was an illegitimate way to wage war in noting that the “only legitimate objective” of armed conflict was to “weaken the military force of the enemy” (L 96).

This trend towards humanitarianism can also be seen in the Hague Conventions. This set of treaties was primarily intended to regulate the methods and means of armed conflict and not the treatment of individuals caught in war-zones. However, they do contain the famous “Martens Clause,” which appears to emphasize a logic of appropriateness when considering a state’s obligations towards opponents in an armed conflict:

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 the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience (L 64).\(^\text{12}\)

\(^{12}\) This wording of the Martens Clause, found in Hague Convention IV (1907), is slightly different to the original wording found in Hague Convention II (1899).
Provost claims, “...the inclusion of the Martens Clause in all major humanitarian law
conventions perhaps provides the strongest support for a principle of humanity that would
limit belligerent reprisals.”

Nevertheless, despite this emerging trend towards humanitarianism in the LOAC, as
states began to codify norms of conduct for armed conflict the expectation of reciprocal
compliance would still feature prominently. The St. Petersburg Declaration contained its own
*si omnes* clause:

> This engagement is obligatory upon the Contracting Parties 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 (L 96).

Nor did states introduce such wording as found in the Martens Clause into LOAC agreements
solely for humanitarian purposes. The Martens Clause was the result of a compromise
between the Great Powers and smaller European states regarding the legal status of so-called
“francs-tireurs” who fought as irregular troops. Even an essentially humanitarian agreement
like the Geneva Convention, which was updated in 1906 in response to the Russo-Japanese
War (1904-1905), contained a *si omnes* clause (L 239).

The First World War was the first significant test of the Hague and Geneva
Conventions and their limited success indicated their inadequacy. Each side cited the other’s
failure to apply the LOAC consistently as a reason for their own violations. France claimed
that German breaches of the Hague Convention had terminated its application in their mutual

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13 Provost, *International Human Rights and Humanitarian Law*, p. 196; See also Justin Morris, "Law, Politics,
and the Use of Force," in *Strategy in the Contemporary World*, ed. John Baylis, James J. Wirtz, and Colin S.
relations.\textsuperscript{14} According to Best, states used the Hague Conventions more as a tool to vilify their enemies than as a means for enforcing the LOAC.\textsuperscript{15} In order to deal with this situation, the 10th International Red Cross Conference in 1921 appointed a committee to draft a new Geneva Convention. Here we see the first proposal for an absolute prohibition on the use of reprisals against a particular class of persons – POWs. Article 2 of the Geneva Convention (1929) states: “Measures of reprisal against them [POWs] are forbidden” (L 274). In the same year, the International Law Association proposed another draft code for the treatment of POWs. According to Kalshoven, the prohibition on reprisals against POWs brought about a situation where “the illegality of such actions would be incontestable; and, more important, the frequency of such reprisals would certainly diminish considerably through the sheer force of the rule.”\textsuperscript{16}

Despite their legal prohibition, reprisals against POWs continued to occur. Those opposed to the ban based their opposition on arguments about its practicality. As Lord Younger, the British delegate to the International Law Association Conference in 1921 argued, no state “…could reasonably be expected to renounce in war so effective and powerful a weapon for the redress or cessation of supposed intolerable wrong upon its own nationals at the hand of the enemy as immediate or threatened reprisal on enemy units in its own hands.”\textsuperscript{17} Cases such as the execution of eighty Germany POWs by the French Forces of the Interior in 1944 and the famous “Shackling” incident of 1942 involving the shackling of British and Canadian POWs in response to the same of German POWs are examples of

\textsuperscript{14} Provost, \textit{International Human Rights and Humanitarian Law}, p. 172; n. 73.
\textsuperscript{16} Kalshoven, \textit{Belligerent Reprisals}, pp. 80-81.
\textsuperscript{17} Statement by Lord Younger, 30th Conference of the International Law Association. Reprinted in ibid., p. 74.
continuing reprisals against POWs. Such reprisals continued because of their success. The fear of retaliation even worked on the Western front for those not covered by the POW Convention. When Germany captured Free French troops at Bir-Hakeim in 1942, though technically “outlaws” according to the terms of the armistice between German and Vichy France, these detainees received POW status out of concern for what Allied forces might do to German POWs by way of retaliation.

The treatment of POWs when one side had a monopoly on them also demonstrates that the expectation of reciprocity mattered to both sides. As noted by MacKenzie, after the success of the German campaigns in the spring and early summer of 1940, the Wehrmacht had taken into captivity nearly the entire remaining forces of Norway, the Netherlands, Belgium, and France. Though the Germans released all the Dutch, Flemish Belgians, nearly all the Poles and almost a third of the French forces, this did not lead to the freeing of the remainder of the POWs. Though Germany eventually released around 300 000 French POWs, these troops were mostly ill or in return for some concession from the Vichy government. By the summer of 1942, the only way France could get its POWs back was in exchanges of one unskilled POW for sending three civilian skilled workers to Germany.

Best has characterized most inter-war legal developments regarding the LOAC as “window dressing.” Such an evaluation seems harsh. As witnessed by the creation of the International Committee of the Red Cross, the signing of the Geneva and Hague

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18 Ibid., pp. 193-200, 179-88.
20 Ibid., p. 497.
21 Ibid., p. 498.
23 Best, Law and War Since 1945, p. 46.
Conventions, and the Martens Clause, since the mid-19th century a significant trend towards increased humanitarian concerns in the LOAC emerged. Yet it would not be until after the horrors of the Second World War came to light that such concerns would come to the fore.

3.2 The Application of the Geneva Conventions and Additional Protocols

Since the end of the Second World War, states have expanded the scope of the Geneva law to include more armed conflicts. At the Diplomatic Conference of 1949, states eliminated the *si omnes* clause, requiring High Contracting Parties to apply the Conventions in an armed conflict even if a non-signatory state was a Party to a particular conflict. States also agreed to rules regulating non-international armed conflicts. At the Diplomatic Conference of 1974-1977, states agreed to expand the definition of “international armed conflict” to include wars of national liberation. This decision had the effect of applying the entirety of the LOAC to what had previously been considered non-international armed conflict. Nevertheless, the expanded application of the LOAC to more armed conflicts does not represent the rejection of the expectation of reciprocity within the LOAC. The rules of application included in these treaties work in the same way as more obvious methods of reciprocity that were used to incentivize compliance and punish defection. In particular, these secondary rules require *de facto* compliance with the LOAC on the part of non-state actors participating in armed conflict for their state opponents to have a *de jure* obligation to apply the law.
With respect to international armed conflict, Common Article 2 of the Geneva Conventions is the secondary rule which determines if the full complement of the Conventions’ primary rules apply.\textsuperscript{24} Common Article 2 states:

\textbf{Art. 2.} In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to cases of declared war or any other armed conflict which may arise between two or more of the \textit{High Contracting Parties}, even if the state of war is not recognized between them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

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, \textit{if the latter accepts and applies the provisions thereof} (L 308; 336; 361-362; 433. Emphasis added).

While not operating with the severity of the \textit{si omnes} clause, Common Article 2 still maintains legal reciprocity within the LOAC: the first clause limits the application of the Conventions’ primary rules to only those armed conflicts involving states that have made a reciprocal legal agreement to comply with the regime through becoming High Contracting Parties.

The third clause of Common Article 2 functions as a secondary rule implementing both legal and strategic reciprocity. It represents an offer of positive reciprocity on the part of regime members to non-party states involved in armed conflicts with High Contracting Parties. If the non-party state commits to, and does in fact comply with the primary rules of the Geneva Conventions, state parties are required to apply the law as well. This requires not only \textit{de jure} acceptance of the Conventions by a non-Party state but also \textit{de facto} adherence to its primary rules for reciprocal application to occur. As the Special Committee that

\textsuperscript{24} Common Article 2 is “common” in the sense that all four Geneva Conventions have the same Article 2.
adopted the text made clear, the provisional application of the Geneva Conventions to non-Party states would end “…when it is admitted that a non-signatory State is not applying the Conventions.”25 This is important because, though today all countries are signatories to the Conventions, at the time the Conventions first came into force it was possible for an international armed conflict to occur between a High Contracting Party and another state that was a non-signatory.

However, as defenders of the humanization of humanitarian law thesis argue, the wording of Common Article 1 would seem to militate against the expectation of reciprocity in the Geneva Conventions. After all, Common Article 1 states: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances” (L 307; 336; 361; 433. Emphasis added). According to Meron, this particular wording of Common Article 1 epitomizes “…the rejection of reciprocity and insistence on the automatic application of the Conventions.”26 Kalshoven and Zegveld concur, writing: “For the 1949 Geneva Conventions the operation of this crude principle [reciprocity] is excluded by the provision in Common Article 1 that the contracting states are bound to respect the Conventions ‘in all circumstances.’”27 For these authors, Common Article 1 requires signatory states not only to comply with the Geneva Conventions when involved in an armed conflict with a non-High Contracting Party but also when faced with an opponent who persistently defects from LOAC requirements. Signatories have, after all, agreed to apply the primary rules of the Geneva Conventions “in all circumstances.”

27 Kalshoven and Zegveld, Constraints on the Waging of War: An Introduction to International Humanitarian Law, p. 73.
Pictet’s *Commentaries* on the Geneva Conventions, which international lawyers use to interpret the Conventions, lend some support to this understanding of the legal obligation contained in Common Article 1. For example, the *Commentary to the First Geneva Convention* states that the legal obligation to comply with its rules:

…is not an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations *vis-a-vis* itself and at the same time *vis-à-vis* the others.  

Pictet’s description of Common Article 1 in the *Commentary to the Third Geneva Convention* essentially states the same view:

By undertaking this obligation at the very outset, the Contracting Parties drew attention to that fact that it is not merely an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations *vis-a-vis* itself and at the same time *vis-a-vis* the others.  

On Pictet’s understanding of the legal obligation created by Common Article 1, states are bound to comply regardless of the actions of their opponents because they have freely agreed to the standards set out in the Conventions.

Defenders of the humanization of humanitarian law thesis also cite Article 1(1) of AP I, which – just like Common Article 1 of the Geneva Conventions – requires the High Contracting Parties “…to respect and ensure respect for this Protocol *in all circumstances*” (L 558. Emphasis added). Just like the *Commentaries* to the Geneva Conventions, the Commentary to AP I interprets the legal obligation of the signatories as “…unilateral

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28 Pictet, *Commentary: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field*, p. 25.
engagements solemnly contracted in front of the world.”\textsuperscript{30} It, too, advocates an understanding of a state’s legal obligation that would seem to ban expectations of reciprocity. For instance, paragraph 51 of the Commentary states:

The prohibition against invoking reciprocity on 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 whole or in part, even if this is aimed at obtaining reparations from the adversary or a return to a respect for the law from him. 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.\textsuperscript{31}

The reference in the Commentary to AP I to Article 60 of the Vienna Convention is important to a discussion of the expectation of reciprocity within the LOAC. Article 60(5) of the Vienna Convention removes considerations of reciprocity from “…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.”\textsuperscript{32} Prior to the Vienna Convention, with respect to suspension or withdrawal from treaty obligations in response to material breach, no such exemption for “treaties of a humanitarian character” existed. A Swiss delegate to the UN Conference noted how “…conventions relating to protection of the human person should be sacrosanct.”\textsuperscript{33} In particular, he mentioned how the motivation for the Swiss delegation’s proposal was the

\textsuperscript{31} Ibid., p. 38.
prohibition against reprisals in the Geneva Conventions of 1949.\textsuperscript{34} Many others have cited Article 60(5) when claiming that LOAC obligations are not subject to the expectation of reciprocal observation by one’s opponent in an armed conflict.\textsuperscript{35}

The argument against the reciprocal nature of LOAC obligations based on the wording of Article 60(5) of the Vienna Convention is problematic, though, for two reasons. First, treaties that came into effect prior to February 1980 are exempt from the Vienna Convention’s restriction of reciprocity in “treaties of a humanitarian character.” Article 4 of the Vienna Convention states: “The Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States.”\textsuperscript{36} This exemption includes both the Geneva Conventions and the Protocols Additional to the Geneva Conventions. Second, as one of the expert consultants to the UN Conference pointed out, given the denunciation clause allowing for the termination of treaty obligations in the Vienna Convention, it would “…seem strange to exclude the possibility of suspension or termination as a reaction to a material breach.”\textsuperscript{37} Had the negotiators wanted to apply Article 60(5) to treaties negotiated prior to 1980, such as the Geneva Conventions and the Additional Protocols, they certainly could have done so.

Moreover, the extent to which the phrase “in all circumstances” reflects the abandonment of an expectation of reciprocity within the Geneva Conventions should not be

\textsuperscript{34} Ibid.
\textsuperscript{36} United Nations, Documents of the Conference, p. 290.
\textsuperscript{37} United Nations, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole: First Session, p. 359.
overstated. The phrase was first introduced into the LOAC at the 1929 Diplomatic Conference that updated the existing Geneva Convention and drafted the new POW Convention. At no time did any delegate to the Conference claim that one side in an armed conflict should apply the law in the face of persistent defection from the Conventions’ requirements. Rather, the intention was to maintain legal reciprocity among High Contracting Parties in the event a non-signatory entered a conflict.³⁸ In addition, compared to the amount of attention given discussions of reciprocal application of Geneva Convention obligations involving other articles at the Diplomatic Conference in 1949 – like Common Article 3 – Common Article 1 did not merit much discussion from the drafting committees.³⁹ Finally, the Record of the Diplomatic Conference does not reflect Pictet’s wider understanding of the application of Common Article 1. The debate that did occur centered on the meaning of the phrase “ensure respect” and not on the meaning of “in all circumstances.”⁴⁰ Therefore, given the participants’ narrow understanding of the phrase “in all circumstances” as excluding non-signatory states and the thin record of state commentary on Common Article 1 it is hard to see how its wording signals the end the expectation of reciprocal compliance within the Geneva Conventions.

Perhaps the most difficult provision in the Geneva Conventions for a theory of reciprocity to account for is Common Article 3. Indeed, the Commentary to GC I states that the legal obligation to comply with Common Article 3 “…is absolute for each of the Parties, and independent of the obligation on the other Party. The reciprocity clause has been omitted

³⁹ See ICRC, Final Record of the Diplomatic Conference of Geneva of 1949, p. 27.
⁴⁰ Ibid., p. 53.
intentionally.” Prior to this, any restrictions applying to conduct in non-international armed conflicts were solely of a humanitarian nature. The significance of Common Article 3 lies in the fact that it is an international legal commitment by states to abstain from certain acts during war, like murder and torture, “…at any time and in any place whatsoever…” (L 308, 336, 362, 434). While an insurgent group can agree to abide by Common Article 3 requirements, as a non-state actor it is unable to sign the Geneva Conventions and create a relation of legal reciprocity with the High Contracting Party it is fighting. In this sense, legal reciprocity between a state and an insurgent group is not required for the application of Common Article 3 obligations.

Important international and domestic US court cases also support the view that Common Article 3 obligations are not conditioned on an expectation of reciprocity. In 1986, the ICJ ruled in the Nicaragua Case that, “Common Article 3 serves as a ‘minimum yardstick of protection’ in all conflicts, not just internal armed conflicts.” In 1995, the International Criminal Tribunal for the Former Yugoslavia endorsed the extension of Common Article 3 obligations to international armed conflicts. In its Appeals Chamber decision in the Tadić Case the court stated: “The International Court of Justice has confirmed that these rules [Common Article 3] reflect ‘elementary considerations of humanity’ applicable under customary international law to any armed conflict, whether it is of an internal or international character.” According to the US Law of War Handbook, “This

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41 Pictet, Commentary: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, p. 51. Emphasis added.
expanded view of Common Article 3 is consistent…with US policy.” Similarly, the US Supreme Court recently affirmed in *Hamdan v. Rumsfeld* that Common Article 3 is a minimum threshold for all armed conflicts and persons not qualifying for the full protections of the Conventions.  

Nevertheless, states still maintained implicit criteria that operated in much the same way as strategic reciprocity because they did not want Common Article 3 to regulate just any type of violence that occurred within their borders. While it is true that states removed a clause requiring *de facto* reciprocity from what would become the final version of Common Article 3, this was done in order to reach a text upon which all the signatories could agree.  

Neither does the humanitarian understanding of the obligation created by Common Article 3 match the intention of those present at the Diplomatic Conference of 1949. They wanted its application to be restricted to acts of insurgency. Among the criteria that the *Commentary* to Geneva Convention IV cites for distinguishing between insurgency and other forms of internal violence, two relate to specific reciprocity. First, the Commentary states that “…the armed force [of the insurgents] act under the direction of an organized authority and are prepared to observe the ordinary laws of war.” Second, it includes the requirement that “…the insurgent civil authority agrees to be bound by the provisions of the Convention.” Therefore, it is not obvious that states intended to apply Geneva Convention obligations,

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49 Ibid.
even the basic humanitarian requirements of Common Article 3, regardless of the actions of their opponents.

By the mid-1970s, driven by developments like decolonization and wars of national liberation, states convened a second Diplomatic Conference to revise the Geneva Conventions. To extend the protections of the Conventions to individuals fighting in wars of national liberation, AP I broadened the concept of an “international armed conflict.” Article 1(4) of AP I states:

The situations referred to in the preceding paragraph (Common Article 2 armed conflicts) include armed conflicts which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (L 558. Parentheses added).

Prior to AP I, states had considered such wars as non-international armed conflicts and, therefore, regulated under Common Article 3.

One reason cited at the Diplomatic Conference for including wars of national liberation as a type of international armed conflict was that such armed conflicts were just wars. As stated by the head of the Chinese Delegation:

Wars were divided into two kinds, just and unjust. Imperialism was at the root of all wars of aggression. While imperialism persisted in the world, there would always be a danger of war…The first step in protecting victims of international armed conflicts was therefore to condemn imperialist policy aggression and to mobilize the people of the world in a resolute struggle against the policies pursued by the imperialist countries. Moreover, a distinction between just and unjust wars, should be made in the new Protocols. 50

Most delegates from Western states rejected this view. A Canadian delegate stated he was:

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…deeply concerned about the suggestion that the Protocol should contain provisions that could result in the standard of humanitarian protection becoming dependent upon the declared purpose of an armed conflict. A case in point was the proposed new paragraph 3 appearing in a foot-note to article 42, which would accord extraordinary protection to persons captured in conflicts relating to self-determination. Yet no single principle was more necessary to humanitarian law than that of non-discrimination, and the Conference should reflect carefully before incorporating a concept totally alien to both the spirit and letter of humanitarian law.51

The concern underlying the criticisms by delegates from Western states was that reintroducing the idea of just war would undermine the long-standing LOAC principle of the moral equality of belligerents. As one UK delegate stated: “…it was a basic principle of the Geneva Conventions, The Hague Regulations and other instruments that legal and humanitarian protection should never vary according to the motives of those engaged in a particular armed struggle.”52 In particular, states such as Israel worried that national liberation movements would deny POW status to detainees in their custody based on the detainee’s involvement in an “unjust war.”53 They also worried this would discourage states from recognizing the existence of such conflicts and, thus, the applicability of the LOAC. As the US State Department Legal Advisor said: “Rare was the man who thought his enemy right and even rarer the State which, when combating rebellion, could afford to apply international standard to captured rebels if by so doing it implicitly acknowledged the justness of the rebel’s cause of the right to self-determination.”54

Prior to AP I, some national liberation movements had been willing to declare their intention to apply and in fact did apply Geneva Convention provisions to prisoners in their custody in an effort gain reciprocal treatment from their state opponents. In both 1956 and

51 Ibid., CDDH/SR.18, p. 183.
52 Ibid., CDDH/I/SR.2, p. 13.
53 Ibid., CDDH/SR.6, pp. 57-58.
54 Ibid., vol 5, CDDH/SR.11, p. 110.
1958, the National Liberation Front of Algeria (FLN) declared its intention to apply the POW Convention to French detainees and gave orders to its soldiers to comply with the Geneva Conventions. The hope of the FLN was that their adherence to the Conventions would generate reciprocal adherence by France. For its part, in 1956 the French government had recognized the applicability of Common Article 3, the existing international law governing non-international armed conflict at the time, to the Algerian War. However, as Wilson notes, “This was at least partially because the FLN threatened reprisals if executions of captured FLN members continued.”

The application of Common Article 3 to wars of national liberation seemed logical to the Western colonial powers because such conflicts occurred within “the territory of one of the High Contracting Parties” (L 308, 336, 362, 434). Nevertheless, such attitudes were changing. The FLN had argued that, rather than being involved in a rebellion against a legally constituted colonial government, it was actually attempting to regain the independence France had stolen from the Algerian people. The FLN believed theirs was the legitimate government of Algeria and that they were therefore a lawful belligerent involved in an international armed conflict with France. This argument was then coupled with important innovations in human rights such as the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), the International Covenant on Economic, Social and Cultural Rights (1966) and the International Covenant on Civil and

Political Rights (1966), all of which made “peoples” the subject of international law.\(^{56}\) As Neff points out, the “…question naturally arose as to whether this ill-defined entity had the same right as states did to resort to armed force.”\(^ {57}\)

Those Western states opposed to the inclusion of Article 1(4) in AP I had two concerns. First, they worried that it would make the Protocol dead letter law. No state involved in such a conflict would apply the rules of AP I since its application required the implicit admission by that state to being “racist,” “alien,” or “colonial.”\(^ {58}\) Second, they worried about making the application of AP I subject to a certain \textit{casus belli} and not the national liberation movement’s reciprocal application of the law. In explaining his country’s abstention on the vote, the Italian delegate said such a decision “…seriously prejudiced the uncontroversial application of the rules of international law.”\(^ {59}\) While the US government of the day agreed to AP I, in 1987 President Reagan recommended the US Senate reject the treaty on the basis of its recognition of non-state actors taking part in hostilities who did not make a reciprocal commitment to comply with the LOAC as POWs. In his Letter of Transmittal to the USA Senate Foreign Relations Committee, President Reagan stated that AP I “…would undermine humanitarian law and endanger civilians in war.”\(^ {60}\) To this day,


\(^{59}\) Ibid., p. 45.

though accepting many provisions of AP I as customary international law, the USA still has yet to rarify AP I.

At the Diplomatic Conference, states also negotiated Protocol II Additional to the Geneva Conventions (AP II). AP II, which applies to all armed conflicts not covered by AP I, “…develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application” (L 621). AP II is important for enhancing the protections afforded the wounded and sick in non-international armed conflicts (L 625-6256) and for laying out detailed protections for civilians from the effects of hostilities (L 626-628). However, while AP II added much needed detail to the protections of Common Article 3, the scope of its application reflects the negotiators’ continued concern with specific reciprocity within the LOAC.

The draft application clause for AP II presented to the Diplomatic Conference by the ICRC simply read: “The present Protocol shall apply to all armed conflicts not covered by Article 2 common to the Geneva Conventions of August 12, 1949, taking place between armed forces or other organized armed groups under responsible command.”61 The ICRC’s goal was to widen the scope of LOAC rules applicable to non-international armed conflicts as much as possible. In remarking on the proposal, the ICRC delegate stated the need to specify objective criteria for the existence of a non-international armed conflict “…so that the Protocol could be applied when those criteria were met and not be made subject to other

considerations.” For example, the ICRC’s draft made no mention of a rebel group’s ability to implement the rules of AP II as a requirement for its application by states.

The application clause eventually agreed to by state negotiators, however, reflects their continued expectation of reciprocal compliance in return for applying the LOAC to such conflicts. Article 1(1) of AP II reads:

This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol (L 621. Emphasis added).

The insistence that the protections of AP II would only apply to insurgent groups willing to implement its provisions enshrines the expectation of reciprocity within the text. In addition, the Commentary to the Additional Protocols refers to a rebel group’s ability to implement the requirements of AP II as “…the fundamental criterion which justifies the other elements (being under responsible command and in control of territory) of the definition (of non-international armed conflict).” Therefore, while states may have been willing to expand the humanitarian protections of the LOAC to cover more individuals in more armed conflicts, they were only willing to do so based on the expectation of their opponent’s reciprocal commitment to applying the LOAC.

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62 Ibid., CDDH/I/SR.22, p. 203.
3.3 Reciprocity and the Treatment of POWs

Resistance movements in Nazi-occupied Europe provided much-needed aid to Allied forces during the Second World War. Because of this, states participating at the Diplomatic Conference of 1949 wanted to expand the humanitarian protections of the POW Convention to cover members of such groups. Nevertheless, they did so with the expectation that these resistance movements would reciprocate by complying with the LOAC. As this section demonstrates, the secondary rules for qualification as a POW and the protections of GC III that go along with that status work in the same way that the more obvious methods of reciprocity worked to incentivize compliance and punish defection from the LOAC.

Article 4 of GC III acts as a set of secondary rules for determining who qualifies for the protections of the POW Convention’s primary rules. The relevant clause with respect to resistance movements and the expectation of reciprocity is 4A(2):

Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements fulfil the following conditions:
1. that of being commanded by a person responsible for his subordinates;
2. that of having a fixed distinctive sign recognizable at a distance;
3. that of carrying arms openly;
4. that of conducting their operations in accordance with the laws and customs of war (L 362-363. Emphasis added).

First, states preserved legal reciprocity through the requirement that resistance movements belong to “…a Party to the conflict.” This means that in order to qualify for the protections of GC III, members of these groups must be able to trace their status as belligerents back to a state that is a High Contracting Party to the Geneva Conventions. As such, States Parties to the Geneva Conventions are under no legal obligation to give POW status to just any non-
state actor participating in an armed conflict, even if these non-state actors comply with all LOAC requirements. Second, states preserved strategic positive reciprocity through the requirement that members of resistance movements must undertake “…their operations in accordance with the laws and customs of war” (L 363) in order to qualify for POW status. In this way, GC III provides a positive incentive for members of these groups to comply with the LOAC.

Prior to these qualifications for members of resistance movements as POWs, Chapter I of the Annex to Hague Convention IV (1907) “The Qualification of Belligerents” set out the legal requirements for protection under the 1929 POW Convention. In the Annex to Hague Convention IV, there was no mention of “resistance movements” since civilians were not legally entitled to take part in hostilities. The belligerent qualification that states put into the Hague Convention listed only armies, militia, volunteer corps, and _levees en masse_ (L 69-70). States maintained the expectation of reciprocal compliance with the LOAC by requiring these groups to “…conduct their operations in accordance with the laws and customs of war” (L 69-70). Following the end of the Second World War, the ICRC convened a conference of government experts in 1947 to review these requirements. The government experts agreed that, if resistance movements were to conduct their operations in accordance with the laws and customs of war, then they should receive the concomitant protection of POW status.\(^4\)

At the 17th International Red Cross Conference held in Stockholm in 1948, the ICRC presented a report entitled, _Draft Revised or New Conventions for the Protection of War_

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Victims. This report contained a provision – Article 3(6) – for granting POW status to members of resistance movement. It stated in part:

Persons belonging to a military organization constituted in an occupied territory with a view to combating the occupying Power, on condition:

(a) that this organization has notified its participation in the conflict to the occupying Power, either through its responsible commander, or through the intermediary of a Party to the conflict, or that it has secured the effective, albeit temporary control of a determined area;

(b) that its members are placed under the orders of a responsible commander; that they constantly wear a fixed distinctive emblem, recognizable at a distance; that they carry arms openly; that they act in obedience to the laws and customs of warfare; and in particular that they treat nationals of the occupying Power who may have fallen into their hands, according to the provisions of the present Convention.65

On the one hand, the ICRC believed states should expand the humanitarian protections of POW status to members of resistance movements. Yet even they saw the value in maintaining a link between the expectation of reciprocal compliance with the LOAC and POW status by requiring that these groups comply with the “laws and customs of warfare” and treat those they take as prisoners according to the standards of Geneva Conventions.

The following year, when states met in Geneva at the Diplomatic Conference of 1949, the finalized version of the text dealing with resistance movements presented by the ICRC defined them as “Persons belonging to a military organization or to an organized resistance movement constituted in an occupied territory to resist the occupying Power.”66

Though the ICRC was suspicious of adding the phrase “organized resistance movement” into the text, its worry had more to do with the precise definition of such a movement and not with whether the expectation of reciprocal compliance should condition the extension of

POW status to such groups.\textsuperscript{67} Therefore, while the states participating in the Diplomatic Conference agreed to extend POW status to resistance movements, they only did so based on an expectation of reciprocal compliance with the LOAC.

When states next revised the POW Convention, it was in the political context of decolonization and debate centered on the issue of expanding humanitarian protections to guerrilla movements fighting wars of national liberation. In preparation, the ICRC convened a conference of government experts in 1971. Some in attendance thought that any law regulating guerrilla tactics should do away with such traditional requirements as the wearing of a distinctive sign and openly carrying arms since these requirements were against “...the very nature of guerrilla warfare.”\textsuperscript{68} Other experts felt that these criteria were necessary to maintain the principle of distinction, long a basic principle of the LOAC regime. As one expert stated, “...a guerrilla fighter may camouflage himself or blend into the countryside but he may not disguise himself as a civilian nor may he melt into the crowd.”\textsuperscript{69} Many in attendance at the Conference raised the issue of reciprocity in the context of wars of national liberation. According to the Conference report, some of the experts believed “...any regulatory control of the activities of guerrillas should conform to the principle of reciprocity, and it would not be proper to give preferential treatment to one of the Parties. If guerrillas were granted certain rights, they should, by that token, also assume obligations.”\textsuperscript{70}

\textsuperscript{69} Ibid., para. 381, p. 69.
\textsuperscript{70} Ibid., para. 365, p. 67.
At the conference of government experts’ second meeting the following year, those in attendance again raised the issue of reciprocal compliance with LOAC requirements on the part of guerrilla movements in exchange for POW status. The conference report states that “By emphasizing de facto reciprocity in the application of humanitarian law by regular armed forces and guerrilla fighters, an expert proposed to grant to the latter, when captured, the same treatment as accorded to those known as regular soldiers.”71 Another expert stated how the requirement that guerrillas comply with the LOAC in order to receive POW status would prevent states from having to grant this status to “terrorists.”72 The government experts were aware that compliance with the LOAC on the part of guerrilla movements would be problematic. As one expert noted, “…sometimes guerrilla fighters did not exercise control over a given territory and did not have adequate material means for respecting humanitarian law.”73 Nevertheless, this did not lead the conference to recommend that the law should hold guerrillas to a lesser standard in their treatment of POWs as compared to states. Instead, their recommendation was that guerrilla movements hand over any detainees in their custody to “…friendly States.”74

It was precisely because of states’ concerns about the willingness and ability of guerrilla movements to comply with LOAC requirements that the draft article on POW status presented to the Diplomatic Conference of 1974-1977 by the ICRC continued to emphasize

72 Ibid.
73 Ibid.
74 Ibid.
the expectation of reciprocity. The Draft Article 42 “New category of prisoner of war” reads as follows:

1. In addition to the persons mentioned in Article 4 of the Third Convention, members of organized resistance movements who have fallen into the hands of the enemy are prisoners of war provided such movements belong to a Party to the conflict, even if that Party is represented by a government or an authority not recognized by the Detaining Power, and provided that such movements fulfil the following conditions:
   (a) that they are under a command responsible to a Party to the conflict for its subordinates;
   (b) that they distinguish themselves from the civilian population in military operations;
   (c) that they conduct their military operations in accordance with the Conventions and the present Protocol.

2. Non-fulfilment of the aforementioned conditions by individual members of the resistance movement shall not deprive other members of the movement of the status of prisoners of war. Members of a resistance movement who violate the Conventions and the present Protocol shall, if prosecuted, enjoy the judicial guarantees provided by the Third Convention and, even if sentenced, retain the status of prisoners of war.\textsuperscript{75}

Clause 2 of the draft shows how the ICRC was willing to extend the humanitarian principles of the POW regime by giving POW status to individual members of resistance movements. Yet this was based on their \textit{de facto} compliance with LOAC requirements and not just group adherence to the law as found in GC III. The expectation of reciprocity was maintained in Clause 1 of the ICRC’s Draft Article through preserving the long-standing requirement that resistance movements belong “…to a Party to the conflict” in order for states to be legally required to offer them the protections of POW status. Clause 1(c) also maintained the expectation of reciprocity by requiring that resistance movements “…conduct their military

operation in accordance with the Conventions and the present Protocol” in order for states to have a legal obligation to award them POW status.

While Draft Article 42 referred to “organized resistance movements,” there was no explicit mention in the main text of members of national liberation movements. Rather, the ICRC included a footnote in its proposal to deal with these groups. It said that, subject to final approval by the Diplomatic Conference, the following statement should be included as the final clause in Article 42 dealing with POW status:

In the case of armed struggle were peoples exercise their right to self-determination as guaranteed by the United Nations Charter and the ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,’ members of organized liberation movements who comply with the aforementioned conditions shall be treated as prisoners of war for as long as they are detained.76

This wording was put forward as a compromise by the ICRC for those states that wanted wars of national liberation to fall under the regime dealing with international armed conflict. Despite this, both Eastern Bloc and Third World delegates wanted a more explicit recognition of wars of national liberation in the main text of AP I. Delegates from these states proposed an amendment to Article 1 that would include wars of national liberation in the definition of an international armed conflict.77 Such a move would entitle members of national liberation movements involved in armed conflict to the full humanitarian protections of the Geneva Conventions.

While the Diplomatic Conference eventually adopted Article 1(4) and made members of national liberation movements eligible for the protections of POW status, this concession does not represent a rejection of the expectation of reciprocity by states. The qualification for

POW status agreed to in AP I is a two-step process referencing both Articles 43 and 44.

Article 44(1) states: “Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war” (L 577. Emphasis added). To conclude from this alone that reciprocal compliance with LOAC requirements no longer plays a role in POW status fails to realize the key role played by the term “combatant.” If AP I defined “combatant” merely as “any person taking direct part in hostilities” then questions regarding the reciprocal relation between LOAC compliance and POW status would be justified since any person who took up arms against a state would qualify for POW status.

Yet, the term “combatant” has a particular meaning within the LOAC. According to AP I, only members of the armed forces are “combatants.” Article 43 defines “armed forces” as:

…organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict (L 577; emphasis added).

Therefore, Article 43 preserves the expectation of reciprocity at the group level – as it is in GC III – ensuring that only combatants who belong to “armed forces, groups, and units” that commit to and apply the LOAC will receive POW status. In the end, while AP I does change the test for who receives POW status, states insisted on maintaining the assurance that only those individuals taking part in hostilities committed to the reciprocal obligation and observance of the LOAC could benefit from POW status.

In addition to the secondary rules enshrined in the Geneva Conventions to make POW status conditional on reciprocal compliance, reservations to the Convention reinforce
restrictive provisions of application that have the same effect as negative reciprocity. Article 85 of GC III, which deals with prisoners who have not individually complied with the LOAC states: “Prisoners 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” (L 391). As such, a state Party to the Convention cannot deny POW status to an individual member of a High Contracting Party’s armed forces because of that individual’s violation of the LOAC prior to capture. Instead, under Article 102 of Geneva Convention III, the Detaining Power can prosecute a POW using the same domestic legal procedure as its own armed forces (L 396).

Allowing POW status for war criminals upset Eastern Bloc countries. In discussing the draft article, the Soviet delegate remarked, “…those who violated the common laws of humanity automatically forfeited their rights under the Conventions,” and that “…none of the provisions of the Convention should be applied to war criminals.”\textsuperscript{78} Unable to amend this provision at the Diplomatic Conference, the Eastern Bloc countries all made reservations to Article 85. These reservations allowed for the use of negative reciprocity against individuals the reserving countries had convicted of war crimes. In this way, reserving states maintained strategic reciprocity with respect to their Convention obligation by requiring individual adherence to the LOAC to receive POW status. For example, Hungary submitted a reservation stating: “prisoners of war convicted of war crimes and crimes against humanity in accordance with the principles of Nuremberg must be subject to the same treatment as criminal convicted of other crimes” (L 505-506).\textsuperscript{79} Thus, given the reservation, only


\textsuperscript{79} See ibid., p. 347.
individual adherence to the LOAC by an opponent would guarantee Hungary’s reciprocal application of POW status.

### 3.4 Reciprocity and the Treatment of Civilians

In addition to regulating treatment of combatants, the Geneva Conventions impose rules about the treatment of civilians. Here, too, the expectation of reciprocity may appear to have been excised from the LOAC. In particular, the restrictions that states agreed to place on their ability to resort to reprisals against civilian populations as found in AP I would seem to all but eliminate their use as a method of negative specific reciprocity and lend support to the humanization of humanitarian law thesis. However, as this section argues, even in this area specific reciprocity was not fully excised from the law.

In AP I, the general rule prohibiting the use of reprisals is *Article 20 – Prohibition on reprisals*. It states: “Reprisals against the persons and objects protected by this Part [of the Protocol i.e. wounded, sick, and shipwrecked] are prohibited” (L 567). In addition, Articles 51 through 56 provide for a wide range of prohibitions on reprisals against civilians and civilian objects (L 581-L 584). According to Greenwood, these prohibitions were uncontroversial and merely extended the ban on reprisals to a broader range of individuals and civilian objects involved in the care of the wounded, sick, and shipwrecked. As noted in the Official Records of the Diplomatic Conference, there was little opposition to these provisions. For example, *Article 51 – Protection of the civilian population*, passed by a vote

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of 77-1 with only France voting against the Article. The Polish representative stated that his delegation “…welcomed the clear and categorical prohibition of reprisals. The UK representative welcomed the ban as a “…valuable reaffirmation of existing customary rules of international law designed to protect civilians.” To these countries, reprisals against civilians ran counter to the humanitarian ethos embodied in the LOAC.

While the UK may have publically welcomed the restrictions placed on the use of reprisals against civilians, it still submitted reservations to all articles banning the practice. One such reservation states:

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 1949 nor will such measures be continued after the violations have ceased.

The reservation appears to contradict the wording of Articles 51-56 but no state objected to it. This fact is even more striking given the number of states at the Diplomatic Conference arguing in favor of not allowing reservations to these Articles.

82 Ibid., p. 166.
83 Ibid., p. 164.
84 Roberts and Guelff, Documents on the Laws of War, p. 511. These reservations deal with the following article: Article 51-Protection of the civilian population; Article 52-General protection of civilian objects; Article 53-Protection of cultural objects and places of worship; Article 54-Protection of objects indispensable to the survival of the civilian population; and Article 55-Protection of the natural environment.
The US took a similar view regarding the use of reprisals in response to continued LOAC violations by an opponent. During the debate on AP I, Article 56 – *Protection of works and installations containing dangerous forces*, the US delegate remarked:

The provisions on the responsibility and co-operation of Governments were important in terms of the reaffirmation of existing law. As between adversaries, however, *reciprocity and mutuality of interest remained perhaps the most powerful pressures for compliance with the Protocol*. The Protocol had gone far to remove the deterrent of reprisals, for understandable and commendable reasons and in view of past abuses. In the event of massive and continuing violations of the Conventions and the Protocol, however, the series of prohibitions on reprisals might prove unworkable. Massive and continuing attacks directed against a nation’s civilian population could not be absorbed without a response in kind. By denying the possibility of such response and not offering any workable substitute, the Protocol was unrealistic and, in that respect, could not be expected to withstand the test of future armed conflicts.\(^{85}\)

While considering several articles of AP I as customary international law, the US has yet to ratify the Protocol. Indeed, the current US Law of Land Warfare Field Manual states that US forces will comply with their LOAC requirements “…subject only to such exceptions as shall have been directed by competent authority by way of legitimate reprisals for illegal conduct of the enemy.”\(^{86}\)

It was at the time of the Diplomatic Conference that the US adopted its nuclear strategy of “Mutually Assured Destruction.” Such a policy was incompatible not only with the restrictions on reprisals found in AP I but also with its regulations of the methods and means of warfare found in *Article 35 – Basic Rules*:

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

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3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment (L 574-575).

Nevertheless, nuclear strategy represents a major part of warfare exempted from the ban on specific reciprocity in the form of reprisals as laid out in AP I.

In its Commentary to the Draft Additional Protocols presented to the Diplomatic Conference, the ICRC wrote about nuclear weapons: “Problems relating to atomic, bacteriological and chemical warfare are subjects of international agreements or negotiations by governments, and in submitting these draft Protocols the ICRC does not intend to broach these problems.” At the Diplomatic Conference, a UK delegate concurred with the ICRC’s approach, adding, “It was on the assumption that the draft Protocols would not affect those problems that the United Kingdom Government had worked and would continue to work towards final agreement on the Protocols.” The US came to the Conference with a similar understanding about the status of nuclear weapons: “…such problems, which call for urgent action in other forums, were beyond the scope of the Conference.” India stated it would support Article 35 “…with the understanding that the basic rules contained in this article will apply to all categories of weapons, namely nuclear, bacteriological, chemical, or conventional weapons or any other category of weapons.” Nevertheless, no state proposed any specific amendment to deal with the issue of nuclear weapons.

88 Ibid., CDDH/SR.13, p. 134.
89 Ibid., CDDH/III/SR.40, p. 441.
NATO made its strategy consistent with the targeting requirement of AP I through an appeal to nuclear exceptionalism. Several NATO member states, including the US, argued that the LOAC should regulate nuclear weapons differently from conventional weapons. Once the Diplomatic Conference adopted both the Additional Protocols, a US delegate said of AP I: “It is the understanding of the United States that the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons.”\textsuperscript{92} The assumption was that a nuclear attack or a non-nuclear attack sufficient to warrant the response of a nuclear attack would essentially lead to the reciprocal suspension of the LOAC. According to Watts, “Cold War nuclear exceptionalism indicates states’ extraordinary commitment to conditions of reciprocity” and describes the “explicit carve-outs for nuclear exchanges” as “equivalent to anticipatory negative reciprocity.”\textsuperscript{93}

Even the ICJ, in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1996), was equivocal as to the use of such weapons as a form of negative reciprocity. As the majority opinion stated, the use of nuclear weapons was “scarcely reconcilable” with LOAC requirements and they concluded that “…the threat or use (of nuclear weapons)…would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law.”\textsuperscript{94} However, they went on to state that: “…it does not have sufficient elements to enable it to conclude with certainty that he use of nuclear weapons would necessarily by at variance with the principles and rule of law applicable in armed conflict in any circumstance.”\textsuperscript{95} Therefore, the

\textsuperscript{93} Watts, "Reciprocity and the Law of War," p. 431.
\textsuperscript{94} The Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ Rep. 225, para. 95.
\textsuperscript{95} Ibid., para 95.
example of nuclear strategy undermines the argument that states have eliminated specific negative reciprocity as reason for compliance with the LOAC.

3.5 Conclusion

In many respects, states’ exercise of specific negative reciprocity in armed conflict to punish defection from Geneva Convention obligations has subsided over time. We see this especially in the decline of the use of belligerent reprisals as a method of punish defection from the obligations of the Geneva Conventions and Additional Protocols. However, as this chapter demonstrates, states have put into place restrictive rules on the types of conflicts and qualifying criteria for protection as positive incentives for reciprocal compliance with the LOAC. These secondary rules work in the same manner as more obvious methods of reciprocity such as the *si omnes* clause and resort to belligerent reprisals. Moreover, while states have extended the application of some Geneva Convention and Additional Protocol protections to non-sovereign competitors, they have still used these rules as conditions for the actual application of the law in armed conflicts contrary to the humanization of humanitarian law thesis.

The following two chapters examine US policy in the War in Vietnam and the GWOT with respect to its GC III obligations towards detainees, respectively. The theory developed in Chapter 1 predicted that the expectation of reciprocity will play an important role in decision-making about the extension of GC III protections to detainees in armed conflict. As this chapter has demonstrated, such an expectation not only predates the codification of the LOAC but was intentionally maintained by those states negotiating the Geneva Conventions and Additional Protocols. In particular, a secondary rule has always
existed requiring those taking direct part in hostilities to comply with the LOAC in order to receive its protections. States maintained this rule as a means to induce compliance with the LOAC by both non-Party states and non-state actors. Chapters 4 and 5 of this dissertation examine how US policy makes relied on this secondary rule maintain the expectation of reciprocity in order to show how the humanization of humanitarian law is incomplete.
Chapter 4: The Expectation of Reciprocity and the War in Vietnam

The US decision to apply the protections of GC III to detainees in the Vietnam War is puzzling for a theory emphasizing the persistence of reciprocity in the LOAC such as the one defended here. At the time, US policy, military doctrine, and its interpretation of customary international law all suggested that in the face of perennial defection from Geneva Convention obligations the US would also defect. Crucially, in the Vietnam War the US faced an enemy that did not intend to comply with its LOAC obligations. Yet the Johnson administration decided to extend the protections of POW status to detainees anyway. Such an action would seem to confirm the humanization of humanitarian law thesis that states comply with the LOAC because they believe it is the appropriate thing to do in armed conflicts. For example, in his criticism of the use of military commissions to try GOWT detainees, law professor Joseph Blocher specifically cites the example of Vietnam when he claims, “American military regulations and practice have historically recognized presumptive POW status.” However, when the US decision is examined more closely, it turns out that the expectation of reciprocity was an important factor in this policy decision.

This chapter explores why the US decided to apply the Geneva Conventions during the Vietnam War. In particular, it examines the US decisions to treat North Vietnamese and Viet Cong detainees as POWs and to investigate war crimes committed by US forces. It begins by providing some historical background regarding US attitudes to perennial

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defection from LOAC obligations and argues that US policy makers and the military were united in their views that the US was not obliged to apply the Conventions in such cases. It then demonstrates that logic of appropriateness explanations nevertheless do not fully account for the US decision to apply the Conventions. Instead, concerns about positive reciprocity played a crucial role in persuading US decision makers to apply the Geneva Conventions. These concerns were central to US decisions to apply GC III to North Vietnamese and Viet Cong detainees and to investigate alleged US war crimes. In this case, the US relied on positive reciprocity because of it viewed the North Vietnamese and Viet Cong as potential partners in a relation of specific reciprocity.

4.1 US and Compliance with the LOAC Prior to the Vietnam War

At the time of its participation in the Vietnam War, the USA recognized Hague Convention IV (1907) and the Geneva Conventions (1949) as the applicable treaty law governing its conduct in international armed conflicts. In particular, GC III governed the treatment of POWs. However, many voices – particularly from the Third World – were beginning to question the ability of the existing LOAC to protect victims of war. In 1965, the International Red Cross Conferences passed a resolution urging continuing efforts to strengthen the Geneva Conventions. The 1968 UN International Conference on Human Rights held in Tehran passed a resolution regarding “…the need for additional humanitarian conventions to ensure the better protection of civilians, prisoners and combatants” (L 198). In a series of

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resolutions, the United Nations General Assembly began merging international human rights requirements with the LOAC. Yet as this section demonstrates, the attitude of the US State and Defence Departments and its military doctrine towards perennial defectors from the LOAC continued to be one of specific, negative reciprocity. US policy towards GC III compliance provides clear evidence against the view that states comply with the LOAC purely out of humanitarian concerns.

It is important to note that humanitarianism did play a factor in the USA’s ratification of the Geneva Conventions. In his letter of 29 March 1955 to the Chairman of the Senate’s Foreign Relations Committee, Secretary of State John Foster Dulles wrote that the US “…should associate itself with conventions which are designed to alleviate the sufferings of any victims in the event of future armed conflict.” In his opening statement to the Senate Foreign Relations Committee hearing looking into the Geneva Conventions, Deputy Under Secretary of State Robert Murphy said that in ratifying the Conventions the US desired to “…confirm our support of the humanitarian cause and to extend the protection of the conventions to our own citizens should it ever become necessary.” In its final report, the Senate Committee stated, “The United States has a proud tradition of support for individual rights, human freedom, and the welfare and dignity of man. Approval of these conventions

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6 Ibid., p. 2.
by the Senate would be fully in conformity with this great tradition.”7 These statements show that a concern for humanitarianism was important in the US decision to ratify the Geneva Conventions.

However, US acceptance of and compliance with Geneva Convention standards in armed conflicts was understood to be conditional on reciprocal compliance by the enemy. First, US policy makers at both the State and Defence Departments understood US compliance in terms of specific negative reciprocity. Secretary of State Dulles made special note of reciprocal compliance in his letter to the Senate’s Committee on Foreign Relations. It is true that in noting the Eastern Bloc countries’ reservations to Article 85 of GC III, he said that though the US rejected such reservations the Senate should still approve the Conventions so that their other provisions would still operate among these countries. However, in the case of a reserving state acting contrary to the humanitarian principles of the Conventions, Dulles wrote “…the United States would, of course, be in a position to consider that it was not required further to apply the conventions vis-à-vis such defaulting states.”8

In his testimony before the Senate Committee, Deputy Under Secretary of State Robert Murphy made a similar statement regarding the Communist Bloc countries’ reservations to Article 85 of GC III. Murphy testified that:

If a reserving state later, through unwarranted use of its reservations, should seek to evade its obligations under unreserved portions of the conventions, with the effect of nullifying the objectives and broad humanitarian purposes of the Geneva rules, the United States would be free to consider whether in such circumstances it should continue to assume obligations under the convention vis-à-vis a defaulting state.

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While the State Department was also willing to recommend accepting the Conventions, it too believed that US policy options were open with respect to a signatory that would not reciprocally respect the obligations of GC III.

In Defence Department General Counsel Wilber M. Brucker’s testimony about the Geneva Conventions before the Senate Committee on Foreign Relations on 3 June 1955, he too stressed how Article 4 of GC III – which defines POW status – would protect the country’s armed forces from “…hostile attacks by persons purporting to be peaceful civilians.”  

He cited the article’s requirement that members of resistance movements must comply with the LOAC in order to receive the protections of GC III. As Brucker went on to testify, “‘Unlawful belligerents’ may be visited with the penalties provided by customary international law.” With respect to a state that continually violated the LOAC, Brucker testified:

Should war come and our enemy should not comply with the conventions, once we both had ratified – what then would be our course of conduct? The answer to this is that to a considerable extent the United States would probably go on acting as it had before, for, as I pointed out earlier, the treaties are very largely a restatement of how we act in war anyway. If our enemy showed by the most flagrant and general disregard for the treaties, that it had in fact thrown off their restraint altogether, it would then rest with us to reconsider what our position might be.

Therefore, in the view of the Defence Department, in ratifying the Geneva Conventions the US was not committing itself to treat everyone who directly participated in hostilities as a POW but only those who reciprocally complied with the LOAC.

In its Report, the Senate Foreign Relations Committee concluded:

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9 Ibid., p. 8.
10 Ibid.
11 Ibid., p. 11. Emphasis added.
…these four conventions may rightly be regarded as a landmark in the struggle to obtain for military and civilian victims of war, humane treatment in accordance with the most approved international usage. The United States has a proud tradition of support for individual rights, human freedom, and the welfare and dignity of man. Approval of these conventions by the Senate would be fully in conformity with this great tradition.\(^\text{12}\)

It also recommended ratification because the standards of the Geneva Conventions were already part of the US armed forces regulations. The Committee highlighted, in particular, how the grave breaches provision of the Geneva Conventions was already part of the Uniform Code of Military Justice (UCMJ).\(^\text{13}\) However, when it came to the application of POW status to members of resistance movements, the Committee made special note of the requirement of reciprocal compliance. Specifically, it stated the “…extension of protection to ‘partisans’ does not embrace that type of partisan who performs the role of farmer by day, guerilla by night. Such individuals remain subject to trial and punishment as unlawful belligerents.”\(^\text{14}\) Thus, going into the War in Vietnam, US policy makers clearly took that view that reciprocity would condition their application of GC III in any applicable armed conflict.

Second, US military doctrine of the time also stated that the US expected reciprocal compliance with the LOAC by resistance movements for their members to receive POW status. At the beginning of the war in Vietnam, Field Manual 27-10 “The Law of Land Warfare” (1956) and Field Manual 19-40 “Handling of Prisoners of War (1952) covered LOAC compliance and POW handling issues. Paragraph 80 of Field Manual 27-10 states that members of resistance movements who do not comply with the LOAC are “…not entitled to


\(^{13}\) Ibid., p. 27.

\(^{14}\) Ibid., p. 5.
be treated as prisoners of war and may be tried and sentenced to execution or imprisonment.”

Paragraph 6 of Field Manual 19-40, though it dealt mostly with operational matters regarding POWs, repeats the text of Article 4A(2)(d) of GC III stating that members of resistance movements must comply with the LOAC in order to qualify for POW status. 

Therefore, at the time of the war in Vietnam, both US policy and military doctrine left open the possibility of denying POW status to those groups who did not reciprocally comply with the LOAC.

Finally, the customary LOAC of the time also suggests that the Viet Cong were required to comply with the LOAC in order to be eligible for POW status. In its judgment in The High Command Case (1948), the International Military Tribunal at Nuremberg stated that both Hague Convention IV (1907) and the Geneva Convention Relative to the Treatment of Prisoners of War (1929) were “…clearly an expression of the accepted views of civilized nations and binding on Germany and the defendants on trial before us in the conduct of the war against Russia civilized nations of the world.”

Recall that Article 1 of the 1929 POW Convention stated that the protections of POW status applied only to those persons mentioned in Hague Convention IV (L 273). Article 1(4) of Hague Convention IV requires all belligerents “To conduct their operations in accordance with the laws and customs of war” (L 69). Therefore, the existing customary LOAC of the time also suggests that members of resistance movements, in order to be legally entitled to the protection of GC III needed to comply with the LOAC.

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17 In re von Leeb (High Command Case), US Military Tribunal at Nuremberg, 28 October, 1948, 15 ILR 376, p. 384.
4.2 The Decision to Apply the Geneva Conventions to the War in Vietnam

Carvin has described the Vietnam War as “…a conflict with an identity crisis.”\(^{18}\) From 1959 through 1964, it consisted mostly of a low-level insurgency within the Republic of Vietnam (RVN) involving the government fighting communist rebels backed by the Democratic Republic of Vietnam (DRV). However, with the passage of the Gulf of Tonkin Resolution and the resultant increase in the number of US troops in the conflict, the nature of the war changed. On 11 June 1965, the International Committee of the Red Cross (ICRC) felt the need to send a letter to all the belligerents, including the US. It stated, in part, that “The hostilities raging at the present time in Viet Nam – both North and South of the 17th parallel – have assumed such proportions recently that there can be no doubt they constitute an armed conflict to which the regulations of humanitarian law as a whole should be applied.”\(^{19}\) All three states involved – the US, RVN, and DRV – were States Parties to the Geneva Conventions.

4.2.1 The Logic of Appropriateness and Applying the Geneva Conventions

In response to the ICRC’s letter requesting that all belligerents involved in the armed conflict comply with the Geneva Convention in their treatment of war victims, the DRV stated it would not grant US detainees POW status.\(^{20}\) For one reason, the DRV viewed the US


detainees as “pirates” responsible for carrying out “…pirate-raids, destroying the property and massacring the population of the Democratic Republic of Vietnam.” The DRV also justified its decision claiming that the US detainees were war criminals under the Nuremberg Charter. It accused them of being “…major (war) criminals caught in flagrante delicto and liable for judgement in accordance with the laws of the Democratic Republic of Vietnam.” A DRV government lawyer stated that “By betraying the 1954 Geneva agreement [on the status of Vietnam] solemnly recognized by their own government and by conducting an aggressive war in South Vietnam and expanding the air war of destruction in North Vietnam, the U.S. imperialists have been committing crime after crime against peace.”

In the same article, the DRV government also accused the US of committing “concrete war crimes” and crimes against humanity, like genocide, in South Vietnam.

Though the DRV claimed that it would treat US detainees humanely, it consistently refused to apply GC III provisions throughout the war.

For its part, the National Liberation Front of South Vietnam – the political wing of the Viet Cong – did not even offer a formal response to the ICRC’s letter asking that they comply with the Geneva Conventions. Instead, it denied that the Viet Cong were “…bound by the international treaties to which others besides itself subscribed.” Though the exact nature of the relationship between the North Vietnamese Army and the Viet Cong was never clear, the legal application of POW status to Viet Cong detainees was unambiguous. If the North Vietnamese Army was directing Viet Cong operations in South Vietnam, then the Viet

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22 Ibid.

Cong were required to comply with the LOAC to receive POW status. Article 4A(2)(d) clearly states that “…members of other militias and members of other volunteer corps, including those of organized resistance movements belonging to a Party to the conflict and operating in or outside their own territory” in order to qualify as POWs must conduct “…their operations in accordance with the laws and customs of war” (L 363). On the other hand, if the North Vietnamese Army was not directing the Viet Cong and they were instead an independent insurgent group, Viet Cong detainees were only legally entitled to the Protections of Common Article 3. Either way, the US was under no legal obligation to treat Viet Cong detainees as POWs.

In the US reply to the ICRC’s letter, Secretary of State Dean Rusk wrote that “The United States Government has always abided by the humanitarian principles enunciated in the Geneva Conventions and will continue to do so.” The government of South Vietnam responded to the ICRC the following day. In his reply to the ICRC, RVN Minister of Foreign Affairs Tran-Van-Do stated that his government was “…fully prepared to respect the provisions of the Geneva Conventions and to contribute actively to the efforts of the International Committee of the Red Cross to ensure their application…I should like to inform you that the Geneva Conventions although not yet promulgated in Viet Nam have, in fact, always been applied.”

As noted in the previous section, in cases where it faced perennial defection from LOAC obligations, US policy and military doctrine suggested that it would reconsider its

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24 See Appendix 2 for full text of GC III, Article 4.
26 Ibid., p. 478.
obligation to apply the Geneva Conventions to an armed conflict. Yet, when faced with the refusal on the part of both the DRV and Viet Cong to apply the Geneva Conventions to the War in Vietnam, the US decided to apply the law anyway. This would seem to suggest a shift in policy regarding application of the Geneva Conventions on the part of the US towards humanitarianism, in line with the predictions of the humanization of humanitarian law thesis. However, as the remainder of this chapter argues, the expectation of reciprocity featured prominently in this decision.

4.2.2 Reciprocity and the Decision to Apply the Geneva Conventions

While the US had no legal obligation to apply the Geneva Conventions to the armed conflict in Vietnam, it did so anyway. This would seem to be confirming evidence for the humanization of humanitarian law thesis. However, the US decision to apply the Conventions to the Vietnam War corresponds chronologically to the US policy of “Americanization.” This refers to the escalation of the bombing campaign against the DRV that began in late 1964. The policy of Americanization saw US troop levels in the RVN increase from approximately 25,000 to nearly 200,000 by the end of 1965. Along with this increase in troop-strength came an increase in the number of US armed service personnel held captive by both the North Vietnamese Army in the North and the Viet Cong in the South. As this section will show, a policy of positive reciprocity – continued compliance with international law in order to induce compliance from other side – drove the Johnson Administration’s decision to apply the Geneva Conventions to the Vietnam War.

When the US first became involved in Vietnam, it was in an advisory capacity to the Army of the Republic of Vietnam (ARVN). At this point in the conflict, the ARVN denied
the application of the Geneva Conventions and the attendant GC III protections to Viet Cong detainees. Neither the US nor the RVN wanted to recognize the legitimacy of the DRV government or the Viet Cong insurgents. Therefore, they initially refused to recognize the existence of either an international or a non-international armed conflict in Vietnam. Rather than refer to Viet Cong detainees as POWs, US policy followed the ARVN in referring to Viet Cong detainees as “communist rebel prisoners.” These were defined as “…all those who carry or do not carry arms and belong to the following three categories: intruders from the North, returned from regroupment to the North, or joined the VC armed forces in the South, to fight against the RVNAF (Republic of Vietnam Armed Forces), and are captured by RVNAF or friendly forces during military operations.”27 Once in custody, US forces would conduct brief tactical intelligence interviews of the prisoners before turning them over to the ARVN.

Prior to the US decision to apply the Geneva Conventions in Vietnam, the DRV held a handful of US military personnel such as Lieutenant Everett Alvarez and Captain Floyd James Thompson in custody. The decision to apply the Geneva Convention to the armed conflict in Vietnam came in response to the executions of several US detainees. On 24 June 1965, the Viet Cong executed Sargent Harold G. Bennett as a reprisal for the executions of several communist prisoners by the RVN. The Viet Cong threatened more reprisal executions if the RVN continued with its policy of executing communist rebel prisoners. Despite the execution of Bennett, the Johnson administration did not immediately bring this LOAC

27 Communist Rebel Prisoner Definition, no date. Container 8, Entry A1 316, RG 472, National Archives at College Park, MD.
violation to the attention of the ICRC.\textsuperscript{28} The Joint Chiefs of Staff, though, went to US Secretary of Defence Robert McNamara for approval of reprisal airstrikes if “…another prisoner execution occurred or a U.S. official was kidnapped or assassinated.”\textsuperscript{29} While McNamara approved a listing of potential reprisal targets, he ruled out a standing policy of reprisals in response to future Viet Cong violations of the LOAC for the moment because of their lack of strategic success.\textsuperscript{30}

It is also important to note that in the US reply to the ICRC’s letter, Secretary of State Rusk wrote not only that the US had always complied with the “…humanitarian principles enunciated in the Geneva Conventions” but that it also expected “…the other parties to the conflict to do likewise.”\textsuperscript{31} As noted in the previous section, in cases where it faced perennial defection from LOAC obligations, US policy and military doctrine suggested that it would reconsider its obligation to apply the Geneva Conventions to an armed conflict. Yet, when faced with the refusal on the part of both the DRV and Viet Cong to comply with the LOAC, the US decided to apply the Conventions anyway and urged its opponents “…to do likewise.” This suggests a policy of specific positive reciprocity rather than humanitarianism.

The executions of Captain Humbert R. Versace and Sargent Kenneth M. Roraback by the Viet Cong on 26 September 1965 did lead the US to re-evaluate its Geneva Convention

\textsuperscript{31} Letter from US Secretary of State Dean Rusk to President of the ICRC Samuel Gonard, 10 August 1965. Reprinted in ICRC, "Responses to the ICRC’s Appeal to have the Rules of Humanity Respected in Viet Nam," p. 477.
policy. On 7 October 1965, the State Department officially protested these executions at the ICRC’s 20th Conference in Vienna. The US Ambassador to Vietnam went directly to State Department officials and recommended “…more belligerent measures to improve prisoners’ lot.”32 Two days later, at a US Mission Council Meeting in Saigon held to discuss a response to the executions, negative reciprocal actions such as “…branding the NVN and Front leaders as war criminals and threatening them with a Nuremberg-like trial” and even “…putting a bounty on the heads of various NVN and VC leaders” were considered.33 These incidents demonstrate that while humanitarianism may play a role in the decision to apply the Geneva Conventions to an armed conflict, in fact, the expectation of reciprocity still dominates and the real question is about whether to apply a policy of negative or positive reciprocity.

4.3 The POW Status of Detainees

In a telegram sent to the US Embassy in Saigon the week following the executions of Captain Versace and Sergeant Roraback, Secretary of State Rusk sent the following in a memo to the US Embassy in South Vietnam:

Greatly appreciate your most thoughtful message on VC reprisal executions of American prisoners and DRV threats to treat their U.S. prisoners as war criminals. We agree that we can neither submit tacitly to these actions or threatened actions, nor can we ignore them. However, problem is to find ways and means of bringing effective pressure against DRV and VC to move them to treat prisoners in accordance with 1949 Geneva Convention. At same time, GVN must be free to go on treating VC terrorists in accordance with Vietnamese law (but ensuring that punishment is commensurate with

crime) and we must continue to do everything possible to reaffirm and emphasize to world clear distinction between such terrorists and prisoners of war.footnote{34}

This statement is indicative of the dilemma the US faced regarding applying POW status to DRV and Viet Cong detainees. On the one hand, Rusk wanted US detainees held by the DRV and Viet Cong to receive reciprocal treatment under GC III. On the other hand, he wanted to maintain the GC III requirement that in order to receive POW status those who take direct part in hostilities must comply with the LOAC. While the number of US prisoners held by the DRV and Viet Cong was relatively small, the US could maintain this distinction. When the number of prisoners began to increase, though, its policy would have to change.

4.3.1 The Logic of Appropriateness and the POW Status of Detainees

Following the US decision in August 1965 to apply the Geneva Conventions in Vietnam, instruction in the Geneva Conventions for US troops in South Vietnam was increased. General Westmoreland directed that all soldiers receive an orientation in the Geneva Conventions and four informational cards: (i) Nine Rules, (ii) Code of Conduct, (iii) Geneva Conventions, and (iv) The Enemy in Your Hands. In September 1965, Military Assistance Command, Vietnam (MACV) published a list of “Do’s and Don’ts” regarding detainee handling and POW treatment. At the Command and General Staff College for the academic year beginning in September 1965, there was one hour of instruction on the Geneva Conventions. By October, MACV had issued the informational cards to all US personnel in Vietnam and had them translated into Vietnamese for use by the ARVN. In December, Army Regulation 350-216 “Training: The Geneva Conventions of 1949 and Hague Convention No.

footnote{34} Telegram from the Department of State to the Embassy in Vietnam, 13 October 1965. Reprinted in Foreign Relations of the United States, Document 167. Parentheses in the original.
IV of 1907” stipulated that all members of the Army must be familiar with the Geneva Conventions. Soldiers would receive two hours of instruction the Geneva Conventions during basic training and the US Army integrated the principles of the Conventions into training exercises.

As recommended by Colonel Prugh, applying the POW standard more widely would “…ameliorate domestic and international criticism of the war.”35 Portrayals of Johnson criticize him for being unaffected by emerging criticism of the war from members of the Congress, public, and international observers. Yet Johnson kept himself informed about public and media opinion. According to McGeorge Bundy, Johnson “…insisted on there being additional ways for him to hear of important differences of view.”36 Not only did Johnson have several television sets installed in the Oval Office, he also had Associated Press and United Press International wire services “news tickers” installed and read them several times a day.37 Johnson was well aware of domestic and media opinion of the war and believed that one of the ways to improve the image of the US role in Vietnam was to ensure that its forces treated all detainees humanely.

When the US decided to apply the Geneva Conventions to the Vietnam War, MACV moved quickly to develop policy ensuring that US forces complied with the country’s GC III obligations. In the spring of 1966, MACV issued three important Directives establishing proper treatment and classification procedures for prisoners taken in the Vietnam War. First,

36 Transcript, McGeorge Bundy Oral History Interview III, 19 March 1969, by Paige Mulhollan, Electronic Copy, LBJ Library
on 5 March 1966, MACV issued Directive 381-11 “Military Intelligence: Intelligence Procedures for Handling, Processing, and Exploitation of Captives, Returnees, Suspects, and Documents.”38 This Directive is important because it established Common Article 3 as a base line for treatment of all prisoners regardless of final status determination. It stated, “Captives, returnees and suspects will be treated humanely. No violence will be done to their life or person nor will outrages of any kind be committed upon them.” It also required that detainee interrogations comply with Article 17 of GC III, which states in part “No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever (L 368). The Directive also established US responsibility for the treatment of all POWs transferred to the ARVN in accordance with Article 12 of GC III.

Second, on 16 May 1966, MACV issued Directive 20-5 “Inspections and Investigations: Prisoners of War – determinations of Eligibility.”39 This Directive is significant because it implemented Article 5 of GC III. Article 5 requires that if the status of a detainee as a POW is in doubt, the detaining power must convene a “competent tribunal” to determine the detainee’s proper status (L 364). The Directive defined “competent tribunal” as consisting of “…three or more officers. Where practicable, the members should be judge advocates or other military lawyers familiar with the Geneva Conventions.”40 Annex A of the Directive contained detailed guidance on how to conduct these “Article 5 tribunals.”41 Such

40 Ibid., p. 725.
41 See ibid., pp. 726-30.
guidance included information on the rights of the detainee and counsel, voting procedures, powers of the tribunal, and post-hearing procedures. The MACV staff judge advocate would review all tribunal decisions “…to insure there were no irregularities in the proceedings.”

Third, on 24 May 1966, MACV issued Directive 190-3 “Military Policy: Enemy Prisoners of War.”42 It stated, “All personnel detained by US forces will be extended the full protection of the Geneva Conventions of 12 August 1949.” It divided “detainees” into four groups: (i) Prisoners of War, (ii) Returnees, (iii) Civil Defendants, and (iv) Innocent Civilians. In particular, it defined POWs as:

Persons who qualify under Article 4 of the GPW. In addition, the following persons shall be extended the protection of the GPW in Vietnam: (1) Persons who are captured while actually engaging in combat or a belligerent act other than an act of terrorism, sabotage, or spying against the Republic of Vietnam (RVN) or US and other FWMAF. (2) Any captive member of the North Vietnamese Armed Forces or of the Viet Cong, whether captured in combat or not, except terrorist, saboteur, or spy.43

If doubt existed as to a particular detainee’s status as a POW, US forces would conduct an Article 5 hearing as per Directive 20-5. US forces turned over those classified as Civil Defendants – suspected terrorists, saboteurs, and spies – to the RVN for criminal trial. This Directive represents a state-level policy determination that members of the Viet Cong caught while directly participating in hostilities satisfied the POW criteria in Article 4 of GC III.

These three Directives represent policy action on the part of the US to comply with GC III in Vietnam. In August of 1966, MACV Commander General Westmoreland wrote letters to all his major commanders emphasizing that the proper handling and processing of POWs “…in accordance with International Law is vital.”44 Despite these policies, neither the

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43 Ibid.
DRV nor the Viet Cong changed their attitude toward treating US prisoners as POWs subject to the protections of GC III. Nevertheless, the US continued to apply and extend POW status to more detainees throughout the Vietnam War. This would suggest a policy of compliance with the Geneva Conventions based on humanitarianism, again in line with the humanization of humanitarian law thesis. In fact, however, concerns for reciprocity featured prominently in this policy decision, as the next section demonstrates.

4.3.2 Reciprocity and the POW Status of Detainees

Unlike within the Bush Administration during the GWOT, during the war in Vietnam no constituency existed to advocate denying POW status to North Vietnamese and Viet Cong detainees taken by US forces. On the contrary, within the Johnson administration different constituencies existed for taking a wider view of the application of POW status to detainees. Political actors such as Secretary of State Dean Rusk, Secretary of Defence Robert McNamara, and National Security Council member Chester Cooper favored expanding the category of POW beyond what was contained in Article 4 of GC III. Military actors, too, such as Chairman of the Joint Chiefs of Staff General Wheeler, Commander MACV General William Westmoreland, and Staff JAG officer Colonel George S. Prugh all believed that an expansive view of POW status would benefit US strategic goals in Vietnam. Understanding what underlay these preferences is critical to explaining the decision to apply POW status to Viet Cong detainees.

Shortly after the US decision to apply the Geneva Conventions to the armed conflict in Vietnam, Ambassador to South Vietnam Henry Cabot Lodge Jr. explicitly tied the treatment of US prisoners to ARVN treatment of Viet Cong detainees. In a telegram sent to
the State Department relating a conversation he had with the South Vietnamese Prime Minister, the US Ambassador wrote, “I took occasion to express the hope that whenever sentence is passed on prisoners that it be publicly made very clear that the punishment was commensurate with the offense. His treatment of prisoners concerned us very intimately because of the fate of our own prisoners. He said he understood and agreed to cooperate.”

This statement demonstrates the US belief that how the ARVN treated North Vietnamese and Viet Cong prisoners had a reciprocal effect on the treatment of its own prisoners, and in particular the US hope that good treatment would lead to POW status and its accordant treatment for its own prisoners.

Part of the problem in securing POW status and the resultant GC III treatment for US prisoners held by the DRV and Viet Cong was that the US itself did not hold any DRV or Viet Cong POWs. Instead, US troops handed over all detainees to the ARVN after conducting a brief tactical intelligence screening. The Geneva Conventions allow for such prisoner transfers under Article 12 of GC III (Responsibility for the treatment of prisoners, L 366-367). The policy of transferring detainees to the ARVN rather than holding them itself was a result of US experience administering POW camps during the Korean War. During that armed conflict, a series of riots at POW camps occurred. One such riot at the Koje-do POW camp left 31 POWs and one US soldier dead and 139 POWs and 14 US soldiers wounded. For this reason, going into the war in Vietnam, the US did not want to administer POW camps.

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The transfer of detainees from the detaining Power to another Party to the Convention, though permitted, is only allowable if the receiving Party complies with GC III. Article 12 states in part: “Prisoners of war may only be transferred by the Detaining Power to a Power which is a Party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention” (L 366).

Yet, as previously mentioned, the RVN was hesitant to apply POW status and the subsequent protections of GC III in its treatment of Viet Cong detainees because of its fear this would give the insurgents international legitimacy. However, as the number of US troops in the RVN increased and so did the number of US prisoners held by both the DRV and Viet Cong, the US put increasing pressure on the RVN to apply GC III. The motivation of the US was its hope to generate positive reciprocity from the DRV and Viet Cong for the treatment of US detainees.

For example, the US State Department was also concerned with how the ARVN’s treatment of Viet Cong prisoners affected the treatment of US prisoners held captive by the North Vietnamese and Viet Cong. In a summary of his meeting with ICRC officials in Geneva for Assistant Secretary of State Abba Schwartz, National Security Staff member Chester Cooper wrote, “This subject [compliance by the ARVN with the Geneva Conventions] is rapidly approaching a critical state.” The ARVN was failing to comply with GC III in its treatment of Viet Cong prisoners in a number of different ways. It had not established a central office for collecting names of prisoners, it was not furnishing lists of prisoners to the ICRC, and it was not allowing ICRC delegates unescorted access to POW

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camps for inspections. According to Schwartz, getting the ARVN to comply with GC III was important because: “GVN non-compliance inhibits our ability to take public or private actions to obtain better treatment for American military personnel held by the Viet Cong and DRV.” The US motivation in pushing for GC III compliance by the ARVN was positive reciprocity.

In a telegram to the US Embassy in Saigon the following month, the US Secretary of State reiterated the concern on the part of the US with the ARVN’s record of applying GC III and its effect on the treatment of US prisoners:

I am deeply concerned about limited degree of GVN compliance with Geneva Conventions on treatment of prisoners. As you know, U.S. is responsible under GC for treatment of prisoners transferred from US to GVN custody. Matter is urgent for sake of GVN and U.S. image abroad and as it affects plight of US prisoners held by DRV and VC.

We have an obligation to our soldiers and citizens to take every action not detrimental to security that increases likelihood American prisoners will receive satisfactory treatment. Leverage we can bring to bear on DRV and VC through ICRC and other international efforts depends to considerable extent on degree to which U.S. and GVN standards of prisoner treatment meet requirements of Geneva Conventions. I believe that substantial compliance by GVN and USG with Convention and publicity given such compliance constitute one of best available protections against further mistreatment American prisoners.

Throughout the war, the US government would use diplomatic, financial, and military aid to induce the ARVN to comply with GC III standards in order to gain better treatment for its own prisoners held by the DRV and Viet Cong.

The US military was also concerned about the lack of ARVN compliance with GC III and the effects it had on the treatment of US prisoners. The Office of the Staff Judge Advocate also expressed concern about non-compliance with GC III on the part of the

48 Ibid.
ARVN. In a memo dated 26 December 1966, Commander Powell stated, “The fact that North Vietnam refuses to honor its treaty obligations under the Geneva Conventions of 1949 does not in any way relieve the Government of Vietnam of its legal obligation to allow delegates of the ICRC to perform their functions in South Vietnam.”50 The memo goes on to cite both Pictet’s commentary to Common Article 2, stating “…that reciprocity is not a prerequisite to the application of the Conventions” and the joint statement from the Honolulu Conference that both the US and RVN would comply with GC III.51

If the US believed that non-compliance with GC III on the part of the DRV did not relieve the RVN of its obligation to comply, this seems to confirm the humanitarian thesis. Yet the timing of this memo belies its humanitarian sentiment. Prior to this time, there were less than 25 000 US troops in the RVN and fewer than 10 US prisoners. Now, there were more than 300 000 US troops and nearly 150 US prisoners. Before the US troop buildup in 1965, the JAGs spent little time dealing with POW treatment or LOAC violations.52 During this period, they dealt mostly with criminal activity on the part of US personnel in Vietnam, such as currency manipulation and black-market activities for US goods.53 The Staff Judge Advocate’s office had just finished developing its POW program when Commander Powell issued his memo on compliance with the Geneva Convention.54 Since under GC III the ARVN was the detaining Power, the JAGs wanted it to comply with the standards of the Convention in its treatment of North Vietnamese and Viet Cong detainees – not only out of a

51 Ibid.
belief that it was the humanitarian thing to do, but because it wanted reciprocal treatment for its own prisoners.

When the US initiatives of 1966 did not result in POW status for US prisoners, the US tried positive reciprocity again in late 1967. On 27 December 1967, MACV issued Directive 384-46 “Military Intelligence: Combined Screening of Detainees.” This Directive widened the qualification for POW status to include not only members of the Viet Cong but also “Irregulars,” defined as “Organized forces composed of guerrilla, self-defence, and secret self-defence elements subordinate to village and hamlet level VC organizations.” Irregulars were classified as POWs if captured “…while actually engaging in combat or a belligerent act under arms (or) who admits or for whom there is proof of his having participated or engaged in combat or a belligerent act under arms.” Nevertheless, consistent with previous policy, POW status was denied to those who had participated in “…an act of terrorism, sabotage, or spying.” In these cases, the US continued its policy of classifying these detainees as “civilian defendants” and turning them over to the RVN for criminal trial. As such, while the US was willing to expand the category of POW status in the hope of obtaining POW status for its prisoners held by the DRV and Viet Cong, it still refused to treat as POWs those who perennial defected from LOAC obligations.

56 Ibid., p 750.
57 Ibid., p. 751.
58 Ibid.
4.4 War Crimes

The US decision to have the JAGs investigate alleged war crimes committed by US troops and to develop policy to prevent future LOAC violations in the War in Vietnam again appears to offer evidence for the humanization thesis. On closer investigation, however, these policy decisions corroborate the argument that reciprocity still plays an important role in determining state policy towards LOAC compliance.

4.4.1 The Logic of Appropriateness and War Crimes

With the decision to apply the Geneva Conventions to the Vietnam War, the US and RVN established a joint committee in order to help alleviate the problems of non-compliance with GC III by ARVN forces. For its own part to improve US forces’ compliance with GC III, as mentioned above, MACV began issuing a card to all troops called “The Enemy in Your Hands.”59 MACV also had the card translated into Vietnamese and distributed to the ARVN. It contained the following five rules for dealing with Viet Cong detainees:

1. Handle him firmly, promptly, but humanely;
2. Take the captive quickly to security;
3. Mistreatment of any captive is a criminal offence. Every soldier is personally responsible for the enemy in his hands;
4. Treat the sick and wounded as best you can;
5. All persons in your hands, whether suspects, civilians, or combatants, must be protected against violence, insults, curiosity, and reprisals of any kind.

Point 3 of the card goes on to state: “It is both dishonorable and foolish to mistreat a captive. It is also a punishable offence. Not even a beaten enemy will surrender if he knows his captives will torture or kill him. He will resist and make his capture costlier. Fair treatment of

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captives encourages the enemy to surrender.” These rules suggest that the reason for complying with GC III requirements is that it is the appropriate – as well as rational – way for a member of the armed forces to behave.

In September 1965, the JAGs decided to update Directive 20-4 to reflect US policy that the Vietnam War was an international armed conflict. In a letter dated 23 November 1965, Lieutenant R. E. Rieder wrote to Staff JAG Prugh that, “As I take it, the official view is now that the conflict here is international in character, the directive should so state.” In addition to this modification, Rieder suggested that the updated Directive also require the investigation of war crimes allegedly committed by US troops. He felt this was needed “…so as to preserve a true picture of the situation should the issue later come into the question.”

In an editorial in the *Washington Post* on 6 December 1965, responding to news of US troops executing wounded DRV soldiers, General Westmoreland was quoted as saying that a detainee “…is a human being and must be treated like one.” These statements suggest a policy of humanitarianism towards detainees as the motivation for investigating possible war crimes committed by US troops.

Many in the Johnson administration also believed they could use the issue of DRV and Viet Cong war crimes as a powerful tool of foreign policy. By expanding POW status to those who technically did not qualify under Article 4 of GC III, the US could help legitimize its role in the war. The day that Secretary of State Rusk replied to the ICRC’s request that the belligerents comply with the Geneva Conventions in Vietnam, an interagency group was

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61 Ibid.
meeting to discuss the POW issue. Legal Advisor to the State Department Leonard Meeker stated that the US should:

1. Instruct our troops in the field to conduct themselves in conformity with the Geneva convention and accepted standards of warfare (without hampering their efforts to prosecute the war); and
2. Publicly demonstrate our concern that the rules of war be observed in Viet-Nam. This should be accomplished by publicizing our willingness to cooperate with the Red Cross, and the Viet Cong-North Viet-Nam unwillingness to do likewise. We should call on the other side to mark their hospitals, permit inspection of prison camps, etc. We should also publicize directives and guidelines given to our troops in the field.63

Chester Cooper agreed with Meeker’s assessment and added, “At issue here is how the war should be fought…Our objective is not so much to destroy the enemy as to win a people. We must make sure our military operations are in fact productive.”64 Such a view reflects the “hearts and mind” approach to winning an insurgency, where acting in accordance with appropriate standards of international behavior is key.

4.4.2 Reciprocity and War Crimes

This section examines three issues. First, it looks at MACV policy on the prosecution of war crimes and some initiatives to prevent them, then the US policy of reprisal bombing against the DRV, and lastly at US attempts to improve the compliance of the RVN with the LOAC. All three of these issues demonstrate a US policy of positive reciprocity with respect to the investigation and prevention of LOAC violations in the war in Vietnam.

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63 Memorandum of Conversation, 10 August 1965. Reprinted in Foreign Relations of the United States, Document 117.
64 Ibid.
Prior to the Americanization of the Vietnam War, the US had no official policy on LOAC violations and who should investigate them. Official US policy on war crimes was first codified in MACV Directive 20-4 “Inspections and Investigations: War Crimes and Similar Prohibited Acts” of 20 April 1965. Directive 20-4 defined “war crimes” as any “…violations of the law of war.” A grave breach of the Geneva Conventions “…constitutes a war crime for these purposes, and includes wilful killing, torture or inhumane treatment of persons protected by the Conventions.” The Directive also included violations of Common Article 3 as part of its scope despite official US policy at the time being that the Vietnam War was not an international armed conflict. Given that the US had not officially committed itself to applying the Geneva Conventions, this suggests a humanitarian motivation on the part of the US.

However, the scope of the original war crimes directive included only “…alleged or apparent war crimes and prohibited acts, violations of the Geneva Conventions, inflicted by hostile forces upon US military or civilian personnel assigned in Vietnam.” According to Colonel George S. Prugh, the Staff JAG who drafted the Directive, the reason for this was:

Prior to the introduction of ground combat units in Vietnam in March 1965, U.S. troops in Vietnam served in an advisory capacity; U.S. units had not planned or executed combat operations or taken prisoners, and there were no indications that U.S. advisors were violating the Geneva Conventions. To the contrary, the only atrocities known to the U.S. command at the time were those committed against U.S. advisors by the Communists.

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66 Ibid. Emphasis added.
This suggests a self-interested motive on the part of the US for creating a policy regarding the investigation and prosecution of war crimes: To show that both its military and civilian personnel were victims of such crimes.

While the impetus for creating an official US war crimes policy was self-interest, a concern for positive reciprocity provides the best explanation for the subsequent evolution of policy on this issue. Recall that in its response to the ICRC’s call to apply the Geneva Conventions, the DRV threatened to try US prisoners as war criminals. The DRV based this threat on its reservation to Article 85 (Offences committed before capture) of GC III. This article states, in part:

Art 85. Prisoners of war prosecuted under the law of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention (L 391).

The DRV’s reservation reads: “The Democratic Republic of Vietnam declares that prisoners of war tried and convicted of war crimes or crimes against humanity, in accordance with the principles laid down by the Nuremberg Judicial Tribunal, shall not benefit from the provisions of the present Convention as is specified in Article 85” (L 521, emphasis added). While other communist-bloc countries gave assurances that their reservations would not alter the effect of Article 85 until “the sentence has become legally enforceable,” the DRV understood its reservation to apply to either those accused or convicted of war crimes and crimes against humanity (L 521). This interpretation had the effect of nullifying the effect of the Article altogether.

69 See Pictet, Commentary: Geneva Convention (III) Relative to the Treatment of Prisoners of War, p. 424.
The JAGs at MACV reacted to the DRV threat of war crimes trials against captured US soldiers by updating Directive 20-4. In November of 1965, Lieutenant R. E. Rieder wrote a memo to Colonel Prugh suggesting that MACV update the Directive to reflect the US view on the international character of the armed conflict in Vietnam.\textsuperscript{70} In addition to this modification, Rieder also suggested that an updated policy include the investigation of war crimes allegedly committed by US troops. This was necessary, he felt, “…to preserve a true picture of the situation should the issue later come into the question.”\textsuperscript{71} On 25 March 1966, MACV re-issued Directive 20-4 reflecting this change in policy.\textsuperscript{72} The timing of the decision to investigate war crimes committed by US troops suggests a policy of positive reciprocity. The US wanted to be in a position to say to the DRV, should it go ahead with war crimes trials, that it was investigating and prosecuting such charges and that the DRV and Viet Cong should treat US prisoners according to GC III standards.

In another initiative designed to prevent violations of GC III requirements in the hope of gaining better treatment for US prisoner, the US Army re-issued FM 30-15 “Intelligence Interrogations,” on 27 July 1967. This Field Manual covered the proper conduct of interrogations of North Vietnamese Army and Viet Cong.\textsuperscript{73} Paragraph 1-8 “Use of Force” rules out the use of force by US Army interrogators for reasons of inefficiency. Its states that the use of force in interrogations is “…prohibited by law and international agreements and is

\textsuperscript{70} Letter from Lieutenant R. E. Rieder to Colonel George S. Prugh, 23 November 1965. Container 8, Entry A1 316, RG 772, NACP.
\textsuperscript{71} Ibid.
not authorized by the United States Army...At best, use of force is a poor technique, since it may induce the Subject to tell what he thinks the interrogator want to hear.” However, Paragraph 3-2 “Geneva Conventions” gives a positive reciprocity reason for not using force in the conduct of interrogations. It states, “Observance of the Geneva Convention by the interrogator is not only mandatory, but advantageous, because there is a chance that U.S. personnel, when captured, will receive better treatment.”

A second reason for thinking positive reciprocity best explains US policy on war crimes is the reaction of the DRV to the US policy of reprisal bombings. Presidential Assistant for National Security McGeorge Bundy first laid out the policy of “sustained reprisals” in a memo of 7 February 1965. Prior to this, the US had conducted ad hoc reprisals in response to Viet Cong war crimes. For example, the day after a Viet Cong attack on the US airbase at Pleiku that left nine US service personnel dead and 128 wounded, President Johnson ordered Flaming Dart I, which was a reprisal air raid on the DRV. On 10 February 1965, the Viet Cong responded by attacking a hotel in the city of Qui Nhon where US soldiers were being billeted. The next day, the US launched Flaming Dart II in reprisal for the attacks at Qui Nhon. According to Drew, these two reprisal raids set the stage “…for a campaign of sustained and graduated bombing against North Vietnam.” On 13 February, President Johnson approved the sustained reprisal policy under the code name “Rolling Thunder.” Thus began an extensive bombing campaign lasting from March 1965 to November 1968.

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Initially, the US policy towards reprisals was one of negative reciprocity. The Johnson Administration dealt with DRV and Viet Cong violations of the LOAC in a straightforward quid pro quo manner. Yet Bundy’s memo states, “Once a program of reprisals is clearly underway, it should not be necessary to connect each specific act against North Vietnam to a particular outrage in the South.” The standard criticism of such reprisals is that they lead to a slippery slope of LOAC violations; what Best has characterized as a “…vicious spiral of purported reprisals and counter-reprisals.” The nature of Bundy’s “sustained reprisal policy” eventually blurred the distinction between reprisals as a method of punishing LOAC violations and a military strategy. As he wrote “We are convinced that the political value of reprisals require a continuous operation. Episodic responses geared on a one-for-one basis to ‘spectacular’ outrages would lack the persuasive force of sustained pressure. More important still, they would leave it open to the Communists to avoid reprisals entirely by giving up only a small element of their own program.”

Yet in early December 1965, the US received credible evidence that the DRV planned war crimes trials for later that month to coincide with the fifth anniversary of the founding of the National Liberation Front. In response, President Johnson began a peace initiative and the “Christmas bombing halt” of December 1965. Both the State and Defence Departments prepared a joint “draft contingency press statement” for when the DRV announced the start of trials. It stated “By its announcement that it will hold so-called ‘war crimes trials’ Hanoi

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has made clear once again its disregard for the norms of international law and civilized behavior...any such trial would be thinly disguised acts of reprisal forbidden by the Geneva Conventions of 1949."79 The letter concluded with a threat of negative reciprocity should the trial go ahead: “Should DRV make reference to death or other severe sentences, following would be added to the text: ‘There should be no doubt in Hanoi that those who inflict severe penalties against American prisoners of war must be prepared to bear the consequences of their acts.”80

In order to stop the DRV from going ahead with war crimes trials the State Department focused its efforts on two fronts. First, it tried to establish a protecting power for US prisoners held by the North Vietnamese and the Viet Cong. A “protecting power” is a third-party state, with whom two states at war have diplomatic relations, which uses its “good offices” to act on behalf of the protected state and represent its interests (L 309, 337-338, 364-365, 436). The US approached several countries including the UK, France, and Canada. All declined the request. The United Arab Republic agreed but the DRV rejected its appointment because it claimed the US prisoners were war criminals and as such were not entitled to GC III protection. Second, the US launched an extensive diplomatic campaign defending its right to assist the RVN in its fight against the Viet Cong and threatening the DRV with international condemnation if it went ahead with war crimes trials.81 DRV threats of war crimes trials began to fade. This would suggest that diplomatic pressure was partly responsible for the decision on the part of the DRV not to pursue such trials at that time.

79 “Draft Contingency Press Statement, 3 December 1965,” Box 1, Lot A 147, RG 472, NACP.
80 Ibid
Yet this time-period also coincides with the US Christmas bombing pause from 24 December 1965 to 31 January 1966.\textsuperscript{82} On 24 December 1965, President Johnson chose to suspend the strategic reprisal campaign against the DRV as part of a peace initiative and bring the country to the negotiating table.\textsuperscript{83} Given the lack of any movement by the DRV or Viet Cong towards a settlement, on 31 January 1966 President Johnson ordered the bombing campaign to resume. Less than two weeks later, the DRV ambassador to Egypt informed that country’s foreign minister of the DRV’s plans to go ahead with war crimes trials.\textsuperscript{84} According to Davis, this timing suggests that the DRV postponed war crimes trials in response to the US halting its plan of strategic reprisals.\textsuperscript{85} Only when the US resumed its program of strategic bombing did the DRV begin threatening war crimes trials again.

In the summer of 1966, the DRV once again began threatening to hold war crimes trials of captured US prisoners. On 6 July 1966, the DRV paraded US detainees through the street of Hanoi in violation of Article 13 (Humane treatment of prisoners) of GC III. The State Department interpreted this action as a prelude to possible war crimes trials of the US POWs. Then, on 11 July 1966, the DRV announced that detained US pilots would “be tried as war criminals” and would “have to pay for their crimes before the tribunal of our army and people.” The following week, on 16 July 1966, Ambassador-at-Large Averell Harriman sent a memo to Secretary of State Rusk. This memo summarised the efforts that the State Department was taking to deal with the situation: “We have mounted a major diplomatic

\textsuperscript{82} Memorandum From the President’s Special Assistant for National Security Affairs (Bundy) to President Johnson, 27 November 1965. Reprinted in Foreign Relations of the United States, Document 208.


campaign to warn the DRV of the inadvisability of holding war crimes trials, hinting at the possibility of retaliatory action and emphasizing the adverse effects such actions could have on American opinion and the prospects for peace.\textsuperscript{86} This is an example of negative reciprocity.

In light of the DRV’s announcement of war crimes trials, the State Department prepared a press conference briefing paper. It contained the following response to a hypothetical question requesting comments on the threat:

In wartime, strong pressures sometimes develop to retaliate against prisoners serving in the armed forces who have been captured while carrying out the policy of their government. It is equally clear that the best interests of both sides in hostilities are best served by assuring these prisoners, on a reciprocal and equal basis, protection from mistreatment and arbitrary punishment. Almost every state, including ourselves and the South Vietnamese, in fact has recognized this principle through adhering to the Geneva Convention. The Government of North Vietnam subscribed to this convention on June 28, 1957.\textsuperscript{87}

The reference to negative reciprocity in the form of reprisals, though veiled, is consistent with State Department policy throughout the DRV threatened war crimes trials in the summer of 1966. Davis describes Harriman’s strategy as “hinting at possible retaliation.”\textsuperscript{88} Overall, the emphasis in US policy on dealing with the threats of war crimes trials was through such threats of negative reciprocity.

Had war crimes trials actually taken place, the Joint Chiefs of Staff had recommended immediate retaliation against the DRV because “To do anything less could have adverse effects on the morale of our fighting men as well as the families back home.”\textsuperscript{89} Specific targets recommended for reprisal attacks included the Ministry of Defence building in Hanoi.

\textsuperscript{86} Memo from Averell Harriman to Secretary of State Dean Rusk, Box 50-52, Lot E 5307, RG 59, NACP.
\textsuperscript{87} Ibid.
\textsuperscript{89} Admiral Sharp, Command-in Chief Pacific to Joint Chiefs of Staff, Box 50-52, Lot E 5307, RG 59, NACP.
and the port cities of Haiphong, Cam Pha, and Hon Gay. A member of the US Congress stated that if the threatened war crimes trials were to take place, the US should “…wipe North Vietnam out, hitting civilian targets as well as military.”

The State Department, though, was somewhat sceptical of the use of negative reciprocity. In an internal memo from acting head of the State Department’s Bureau of Security and Consular Affairs Philip Heymann to William Bundy, Heymann worried that such retaliation would lead to an escalation of attacks of POWs and “…grossly distort our military and diplomatic strategy.”

Though sceptical, the State Department was not opposed to the use of reprisals in response to war crimes trials of US POWs. What Ambassador Harriman, who was in charge of the overall POW policy for the State Department, rejected was the immediate use of reprisals against the civilian population of the DRV. Harriman’s response to suggested reprisal attacks against civilians was that “…the US should not take on the face of the enemy” and that “…he was reflecting the President’s feeling in noting that we would not hit civilian targets as reprisals for trials or even executions.” Therefore, the threat of reprisals was never taken off the table as a response to the threatened war crimes trials in July of 1966.

On 24 July 1966 DRV President Ho Chi Minh announced the postponement of the war crimes trials.

The issue of RVN non-compliance with the Geneva Conventions made the problems faced by the US with respect to threatened war crimes trials far worse. Part of the State Department’s effort to gain public support against the DRV’s threatened war crimes trials was to increase its pressure on the RVN to cooperate more closely with the ICRC on POW

91 Heymann quoted in ibid., p. 82.
92 Quoted in ibid., p. 83. Emphasis in the original.
issues such as providing it with prisoner’s lists and allowing it access to POW camps in the South. MACV Commander General Westmoreland was convinced that because of “…VC acts of outrage over the years…the highest RVN military and political figures were not yet quite ready to fully accept the Geneva Conventions.” Nevertheless, the State Department argued that such efforts would assist in US demands for “…reciprocal treatment for U.S. PW’s” from the DRV. The remainder of this section highlights several instances where the US attempted positive reciprocity through pressuring the ARVN to comply with the LOAC.

In October 1965, Chairman of the Joint Chiefs of Staff General Earle Wheeler ordered a study of the RVN’s POW policy and its compliance with GC III. While the study was ongoing, the State Department learned via both the ICRC and the US diplomatic mission in Geneva that the RVN was not complying with GC III in its treatment of Viet Cong detainees. In a letter dated 22 October 1965, the ICRC told Secretary of State Rusk that since the RVN was not in compliance, it would publicly call on the US to take effective measures to improve the situation. On 20 November 1965, the American diplomatic mission in Geneva informed the State Department that the RVN was not complying with several provisions of GC III. When confronted with this evidence in early December 1965, the RVN assured the State Department that it would comply with GC III in its handling of Viet Cong insurgents. When the US Joint Chiefs of Staff POW study was complete, it concluded that

94 Ibid.
American and RVN armed forces must comply with GC III and that the Americans had to do more to pressure the ARVN to comply in order to improve the treatment of American POWs held by the DRV and the NLF.97

On 9 August 1966, the RVN Information Minister held a press conference with nine recently captured North Vietnamese Army POWs. The State Department was critical of this move, recommending it be made clear to the RVN that its actions were contrary to Article 13 of GC III and that “…placing prisoners on show may…lead some observers to draw unfortunate parallels with Hanoi’s attempts to exploit U.S. POWs.”98 While the Minister’s staff requested the US Embassy in Saigon to provide military transportation for the POWs, it refused to do so on the ground that “…overt U.S. participation would provide excuse to Hanoi to undertake similar steps with American POWs.”99 The US insisted on a policy of continued compliance with Article 13 of GC III, not merely because doing otherwise was contrary to the LOAC, but to ensure proper treatment for its prisoners held by the DRV.

On 13 December 1966, the RVN Defence Minister sent a letter to the ICRC in which it denied the organization any further access to POW camps in South Vietnam. The letter stated that the RVN would allow the ICRC to inspect POW camps only “…on the basis of reciprocity.” According to the State Department, “The letter indicated that under this policy, only after the ICRC had visited prison camps and centers in North Vietnam would they be permitted to make similar visits in SVN.”100 On 3 January 1967, in a memo to both the US

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98 Letter, 9 August 1966, Box 12, Lot 511-02, RG 389, NACP.
99 Ibid.
100 Letter, 31 December 1966, Box 38. Lot E 5307, RG 59, NACP.
embassy in Saigon and the US mission in Geneva, a State Department official referred to this policy as a “…serious and flagrant violation (of GC III) which cannot be permitted to stand.”\footnote{Memorandum to US Embassy in Saigon, 3 January 1967, Box 38, Lot E 5307, RG 59, NACP.} While such a remark may appear to be inspired by humanitarian concerns, the underlying motive was positive reciprocity. During the fall of 1966, the US had worked hard at pushing for ICRC access to POW camps in the DRV where its prisoners were being held.\footnote{Davis, The Long Road Home: US Prisoner of War Policy and Planning in Southeast Asia, pp. 123-24.} Such action on the part of the RVN put US prisoners at greater risk.

In an incident reminiscent of the much later waterboarding charges in the GWOT, the Washington Post reported on 21 January 1968 that a US Ranger assisted a South Vietnamese interpreter in holding down a suspected Viet Cong member while another interpreter poured “…water on a towel covering his face.” The description accompanying the photo read, “This induces a fleeting sense of suffocation and drowning meant to make him talk.”\footnote{"Interrogations," Washington Post, 21 January, 1968.} In a message from the Department of the Army to the Commanding General US Army and distributed to the US Commander in Chief Pacific, it was stated that this incident was “irrational” and “…contradicts moral traditions of the Army.” Importantly, the message went on to say that such actions expose US detainees to “retaliatory treatment in kind.”\footnote{Memorandum US Department of Army, 7 February 1968, Box 26, Lot P 2, RG 389, NACP.} In response to the story, Provost Marshall General Major General Carl C. Turner warned that the actions depicted in the story would not only “…refute the moral basis of our efforts in Vietnam” but also “…expose all U.S. PW in enemy hands to retaliatory treatment.”\footnote{Letter, 24 January 1968, Box 26, Lot P 2, RG 389, NACP.}
Finally, during the summer of 1972, the US and RVN encountered problems of mass disobedience in POW camps in South Vietnam. In response to prisoners refusing to do authorised labour, the suggestion was made that all prisoners have their daily food ration lowered to 1450 calories per day.\textsuperscript{106} Such a response contradicts Article 26 of GC III, which requires that “Collective disciplinary measures affecting food are prohibited” (L 372). One of the reasons MACV gave for rejecting such a plan stated that “This proposal marks a departure from the expressed purposes of the United States, specifically, a concern for humanitarian principles.”\textsuperscript{107} However, the memo went on to state compliance with Article 26 was necessary to ensure proper treatment for US POWs: “This proposal, if implemented, could have drastic consequences especially for American PW presently interned by the government of NVN. It would provide a basis for retaliation, a practice not unknown of those governments who subscribe to the politico-social theories espoused by the government of NVN.”\textsuperscript{108} There is, therefore, substantial evidence that even though the DRV and the Viet Cong were not complying with the LOAC, US officials advocated continued respect for its provisions and punishment for its violations. What is also clear is that the policy of compliance was implemented with the expectation of reciprocal treatment for US prisoners.

4.5 Conclusion

Supporters of the humanization of humanitarian law thesis point to the US decision to comply with GC III in its treatment of Viet Cong detainees as evidence that reciprocity no
longer conditions compliance with the Geneva Conventions. These same critics also point to the decision as evidence for a shift in US policy regarding the Geneva Conventions in general. As I will discuss in the next chapter, the Bush administration’s decision not to apply GC III status to Taliban and al Qaeda detainees in the GWOT is taken as evidence of a subsequent second important shift in US policy away from international law in general and the Geneva Conventions in particular. However, as this chapter has shown, reciprocity did play an important role in the US decision to comply with GC III during the Vietnam conflict. Critically, however, the impulse towards positive reciprocity outweighed arguments for negative reciprocity. Since both the Viet Cong and DRV held a significant number of US service personnel prisoner, it believed that its own compliance could have an impact on their treatment.

Such a decision should not be surprising. Despite the fact that the DRV and Viet Cong were perennial defectors from the LOAC, the US never gave up hope that a policy of positive reciprocity would yield better treatment of its own prisoners held by the enemy. For the US, since defecting from its GC III responsibilities would have been cost prohibitive with respect to the treatment of its soldiers, it had to view the Viet Cong as a potential partner in a relation of specific reciprocity.
Chapter 5: The Expectation of Reciprocity and the GWOT

On the surface, the US decision not to apply the protections of GC III to detainees captured in the GWOT appears to reflect a major policy shift in US attitudes towards its LOAC obligations. Throughout different armed conflicts in the 1980s and 1990s such as Operation Urgent Fury (Grenada 1983), Operation Just Cause (Panama 1989), and the First Gulf War (1991) the US applied POW status and the attendant GC III protections to all its opponents. Proponents of the humanization of humanitarian law thesis assumed that the US would continue with its policy of extending the protections of GC III to its opponents in the GWOT. In many ways, the nature of the opponent facing the US in the GWOT was similar to that in Vietnam – in both cases the US faced an opponent who did not intend to treat US prisoners in accordance with GC III standards. Yet in this case, unlike in Vietnam, US policy was to deny the application of GC III to its non-state opponents.

This chapter argues that what appears to be a break in the US policy towards its GC III obligations is really a change in emphasis from positive reciprocity to negative reciprocity. The multi-actor setting of US policy decision-making made such a change possible. The chapter begins by examining the period from the end of the Vietnam War through to the US-led NATO bombing campaign against Yugoslavia. It demonstrates how a split emerged, one that had not existed previously, between US policy makers and the military in attitudes towards reciprocity and the LOAC. It then analyzes three key decisions: (i) to use military commissions to try detainees for LOAC violations, (ii) to deny POW status to detainees, and (iii) to use “enhanced interrogations techniques” when questioning detainees. It argues that logic of appropriateness explanations cannot fully explain US policy
decisions towards the treatment of detainees in the GWOT. In each of the three policy
decisions examined, concerns with specific negative reciprocity are necessary to understand
fully the US decision not to apply GC III.

5.1 The US and LOAC Obligations: Vietnam to Yugoslavia

The period from the end of US involvement in the Vietnam War to its participation in
Operation Allied Force (1999) against the Federal Republic of Yugoslavia is important to
understanding the role played by reciprocity in US policy regarding the application of GC III
in the GWOT for two reasons. First, while this period marked a growing commitment on the
part of the US military to compliance with the Geneva Conventions, a mistrust of such
international legal standards in other quarters of the US government was growing. Therefore,
by the time the Bush Administration came to power, a coherent critique of the constraining
effect of international law on US power already existed. Second, the way in which the US
conducted armed conflict changed significantly since the Vietnam War. The US has fought
the GWOT with only one-tenth of the troops it used in Vietnam. This led to a situation where
even as US troop levels in Afghanistan increased, the likelihood of their being taken prisoner
did not. Both factors set up a conflict between those pushing for the US to apply GC III to
GWOT detainees and those arguing against its application. The remainder of this section
focuses on the first development while subsequent sections of this chapter explore the second
development.

In an attempt to incorporate the lessons learned from the War in Vietnam and
integrate evolving LOAC standards into state policy, the Department of Defence created a
new Law of War Program. Its purpose was to provide “…policy guidance and assignment
responsibilities within the Department of Defence for a program to ensure compliance with
the law of war.”¹ The Directive, which the Defence Department updated in 1979, 1998, and
again in 2011 sets out specific duties and responsibilities for both LOAC training and the
reporting of suspected LOAC violations. According to Carvin, this new emphasis on the
LOAC came about because of a new way of understanding law within the US military,
termed “operational law.”² This approach brought together all aspects of US law applicable
to the military, including domestic laws such as contracts for service, foreign military sales,
and status of forces agreements, and international law like the Geneva Conventions.

The operational law approach created a group of what Carvin terms “activist
lawyers.”³ These lawyers were “activists” in the sense that they pushed an agenda to
convince military commanders that JAGs could provide valuable operational advice that
would be to the benefit of the US military in complying with the LOAC. According to
Carvin, instead of presenting the LOAC as a set of restrictions on the military, “…emphasis
was placed on the use of this law [LOAC] as a planning tool that not only dictates
responsibilities but also set out the legal rights of the military.”⁴ By the early 1980s, the JAGs
were now involved in the detailed review of operational planning.⁵ By the time of the First
Gulf War, the number of legal advisors sent by the US compared to its allies was 70:1.⁶ Then
Chairman of the Joint Chiefs of Staff Colin Powell remarked that “Decisions were impacted

¹ US Department of Defence, Directive 510077 “Department of Defence Law of War Program,” (5 November
² Carvin, Prisoners of America’s Wars: From the Early Republic to Guantanamo, p. 117.
³ Ibid.
⁴ Ibid.
⁵ Frederic L. Borch III, Judge Advocates in Combat: Army Lawyers in Military Operations from Vietnam to
⁶ David Garratt, “The Role of Legal Advisors in the Armed Forces,” in The Gulf War 1990-91 in International
by legal considerations at every level…Lawyers proved invaluable in the decision making process.”⁷ By the time of Operation Allied Force, lawyers were fully ensconced in the decision making process of issues surrounding such things as targeting and detainee treatment.

As the US military implemented the Law of War Program across its different armed services, states negotiated an important update to the LOAC. As noted in Chapter 3, the states attending the Diplomatic Conference of 1974-1977 negotiated AP I with the intention of making the LOAC applicable to new forms of armed conflict that had emerged since the end of the Second World War. The US Ambassador to the Diplomatic Conference, George H. Aldrich, pushed the US government to ratify AP I because of the improved provisions regarding POW protections. Aldrich had worked on the issue of POW treatment during the Vietnam War for both the Johnson and Nixon administrations. He believed that had the more precise rules of AP I, such as those relating to the assignment of a Protecting Power, been in place during the Vietnam War it would have put more pressure on the DRV and Viet Cong to apply GC III treatment to US prisoners.⁸ Aldrich also argued that AP I represented a single, non-discriminatory set of rules applicable to all enemy combatants.⁹ US ratification of AP I would eliminate the need for the reservations to GC III put in place by Communist Bloc states and used by North Vietnam to deny the protections of POW status to US prisoners.

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In late 1977, the Defence Department began a review of AP I. Hays Parks, who participated in the review, claims there were significant worries about the effect of AP I within the US military.\textsuperscript{10} For example, about the prohibition on reprisals against civilians and civilian objects in AP I, Hayes writes “…it was concluded that the removal of this legal right placed any further respect for the rule of law by certain nations in jeopardy.”\textsuperscript{11} In particular, Parks cited the treatment of US POWs in Korea and Vietnam as reasons for preserving the right of reprisal to respond to LOAC violations.\textsuperscript{12} He also discussed concerns the military had with extending POW status to groups which did not comply with the LOAC, which Hays writes “…substantially diminished the likelihood of respect for the law of war.”\textsuperscript{13} In all, Hays describes Aldrich’s delegation to the Diplomatic Conference as suffering from the fact they were “…international lawyers, not all of whom were entirely conversant with either the law of war or their client’s [the Defense Department’s] business.”\textsuperscript{14}

Political support for ratification of AP I also ran up against the concerns of the new US government under President Ronald Reagan. Douglas Feith, who would become Under Secretary of Defence in the George W. Bush administration, spoke out against adopting the treaty. He objected to what he saw as the politicized negotiation process of the Diplomatic Conference and provisions that he believed protected “terrorists,” and even legitimated their

\textsuperscript{10} For example, see Report by the J-5 to the Joint Chiefs of Staff on JCS Review of the 1977 Protocols Additional to the 1949 Geneva Conventions (13 September 1982). The Joint Chiefs of Staff’s final recommendations regarding AP I remain classified.  
\textsuperscript{12} Ibid., pp. 95-96.  
\textsuperscript{13} Ibid., p. 101.  
tactics.\textsuperscript{15} In 1987, President Reagan announced that he would not be sending AP I to the Senate for its approval. As noted by Carvin: “…the rejection of Additional Protocol I, especially in such strict ideological terms, was controversial for the United States internationally and for those lawyers at home who wished to see the US as a model global citizen.”\textsuperscript{16} Despite the official rejection of AP I by the government, however, the US has come to accept many of the agreement’s provisions as customary international law.\textsuperscript{17}

During the 1990s, a significant political critique of international law also emerged within the US. It viewed existing international legal regimes as vague, unenforceable, and illegitimately intruding into US domestic affairs. Underlying this view was the notion of sovereignty. As such, in an article written in \textit{Foreign Affairs}, Peter Spiro referred to supporters of this view – many of whom would go on to play significant roles in the George W. Bush administration – as the “new Sovereigntists.”\textsuperscript{18} According to Rabkin, “Sovereignty is at the heart of all [political] compromises, because it supplies the idea of political authority which can accommodate difference…and yet still demand ultimate political allegiance.”\textsuperscript{19} On this account, it is the sovereign nation state that is best placed to protect the rights of citizens, and not international legal regimes. Given both the power of the US and the constitutional


\textsuperscript{16} Carvin, \textit{Prisoners of America’s Wars: From the Early Republic to Guantanamo}, p. 131.


duty of its President, the new Sovereigntists contended that the US should opt-out of any international legal regime not in its national interest.

The new Sovereigntists were particularly suspicious of integrating international human rights law with the LOAC. As Chapter 3 demonstrated, the LOAC developed separately from human rights law and reflected the interests of those states involved in armed conflict. Yet in the 1990s, human rights NGOs and many international lawyers began advocating for full implementation of international human rights law in armed conflicts – a policy reflecting the triumph of the humanization of humanitarian law thesis that provides the central focus of this dissertation. Antonio Cassese, the first president of the ICTY, has claimed the LOAC has “…become less geared to military necessity and increasingly impregnated with human rights values.”20 These kinds of claims worried those who believed combining the two regimes would needlessly complicate the LOAC and lead to less, not more, compliance. Critically, they feared that such a move would undermine the role played by reciprocity in enforcing compliance with the LOAC. Reciprocity makes little sense in the enforcement of human rights treaties, as reciprocal violation must somehow harm the party that initially violated the agreement. How Iran treats its human rights obligations may outrage the US but the US cannot induce the Iranian government into compliance by violating its own human rights obligations. The vision of LOAC obligations promoted by such groups favoring the humanization of humanitarian law thesis, therefore, did not sit well with the new Sovereigntists.

US experience during NATO’s bombing campaign against the Federal Republic of Yugoslavia reinforced this attitude among the new Sovereigntists. The establishment of a Review Committee by the ICTY Prosecutor Carla Del Ponte to investigate possible war crimes committed by NATO angered many US politicians. As the Chairman of the US Senate Foreign Relations Committee Jesse Helms remarked, “…the very fact that she [Del Ponte] entertained the idea brings to light all that is wrong with the UN’s conception of global justice, which proposes a system in which independent prosecutors and judges, answering to no state or institution, wield unfettered power to sit in judgement of the foreign policy decisions of Western democracies.”21 As Helms saw it, the US was putting its troops in harm’s way to prevent a genocide from occurring on European soil, and should not have its actions scrutinized by those unwilling to take part in this effort.

In short, the period from the end of the War in Vietnam to Operational Allied Force did see the US military incorporate several of the new norms of AP I into practice. Despite this, official US military doctrine and government policy with respect to LOAC obligations had not changed regarding the expectation of reciprocity. Moreover, the criticisms of both international law and AP I made by the New Sovereigntists had existed since the early 1980s. Thus the attitude of the Bush administration to LOAC obligations was not significantly different to previous administrations. The remainder of this chapter analyzes three key decisions taken by the US regarding the application of GC III to GWOT detainees. The decisions to try detainees by military commission, to deny them POW status, and to use

enhanced interrogation techniques (EITs) on them all show that specific negative reciprocity played a determining role in US GC III policy.

5.2 The Use of Military Commissions to Try Detainees

Shortly after Congress authorized the use of military force against those responsible for the attacks of 11 September 2001, President Bush issued his “Military Order of 13 November 2001.” The Military Order authorised the use of military commissions to prosecute detainees for LOAC violations. It stated, “International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that had created a state of armed conflict that requires the use of the United States Armed Forces.” This was a clear signal that the US considered the GWOT a war, which meant that the LOAC was applicable to the conflict. The US Supreme Court would eventually rule that the trial procedures set out in the Military Order were unconstitutional. In addition, the Military Commissions Act (2006) and the Military Commissions Act (2009) would modify the procedures used by military commissions in order to address the concerns of the court. However, military commissions were not replaced by the trial procedures laid out in either the UCMJ or GC III.

In this section, I argue that a logic of consequences based on negative reciprocity, rather than logic of appropriateness arguments, motivated the original decision to use

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23 Ibid., p. 25.
military commissions and the changes made to their procedures. Given the multi-actor setting of US domestic politics, those in the Bush administration favoring a policy of negative reciprocity were able to minimize the impact of logic of appropriateness arguments put forward by State Department officials and the JAGs. This led to the continued use of military commissions to prosecute GWOT detainees for LOAC violations in contradiction to what we should have expected if the humanization of humanitarian law had taken root in US policy.

5.2.1 The Logic of Appropriateness and Military Commissions

In the weeks following the 11 September 2001 attacks, two important logic of appropriateness arguments against the use of military commissions to try GWOT detainees for LOAC violation emerged. The first argument was that the UCMJ and GC III already contained the appropriate methods for trying LOAC violations and not to use them would be a violation of US treaty obligations. The second argument was that not to use the existing trial procedures of the UCMJ and GC III would go against both the image of the US military as an organization that complies with GC III standards and the national image of the US as a state that complies with international law. This section examines these arguments in turn and demonstrates that they are both insufficient for a proper understanding of the decisions taken by the US in this case.

In the days following the 11 September 2001 attacks, White House Counsel Alberto Gonzales set up an inter-agency group to look into the best way to try GWOT detainees.24

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The group was led by Pierre-Richard Prosper, the State Department Ambassador-at-Large for War Crimes and a former prosecutor with the International Criminal Tribunal for Rwanda. By October 2001, though, Vice President Cheney felt that Prosper’s group was moving too slowly. Without Prosper’s knowledge, the Vice President had Deputy White House Counsel Timothy Flanigan and Legal Counsel to the Vice President David Addington write a draft of what would later become the Military Order. According to several sources, the Vice President had given strict instructions that others in the White House and the Cabinet such as National Security Advisor (and future Secretary of State) Rice, Secretary of State Powell, and the lawyers in those departments not see the Military Order until the President had signed it. We should expect individuals in these positions to make arguments based on respect for international law given their role in its development, promotion, and compliance. However, given the Vice President’s instructions, it was hard for such logic of appropriateness arguments to influence the decision on the use of military commissions.

Decision makers in the Bush administration also limited the amount of input the JAGs could contribute to drafting the Military Order. The only member of the JAGs that Defence Department General Counsel Haynes informed of the pending order was Army General Tom Romig. According to several sources, Haynes told Romig he could have only one other person review the draft Military Order with him and that person could not have a

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copy or take any notes.27 Romig chose Colonel Lawrence Morris, head of the Army’s
criminal law branch, to review the draft. Romig, based on Morris’s analysis, said such an
order “…was going to be perceived as unfair because it was unnecessarily archaic.”28
Though Morris suggested changes, Haynes ignored them.29 Such actions on the part of these
Bush administration officials prevented the influence of arguments based on either
international law or military honor, which Chapter 2 identified as a logic of appropriateness
mechanisms operating at the sub-state level, against the use of military commissions.

Once the President issued his Military Order, the strongest logic of appropriateness
argument against the use of military commissions came from military and civilian lawyers.
The JAGs argued that the existing military justice system was the appropriate means for
trying detainees. Since the end of the Second World War, the US had implemented two
important steps to comply with LOAC requirements. First, in 1951, Congress enacted the
UCMJ. The particular section of the UCMJ dealing with military commissions states that if
used, they should use the same procedures and provide the same rights to defendants as
found in military courts-martial.30 Second, in 1955, the Senate had ratified the updated
Geneva Conventions. New additions to GC III (L 391-399) granted all POWs the right to a
fair trial. In particular, Article 102 states: “A prisoner of war can be validly sentenced only if
the sentence has been pronounced by the same courts according to the same procedure as in

27 See Harold H. Bruff, Bad Advice: Bush’s Lawyers in the War on Terror (Lawrence KS: University Press of
House," Presidential Studies Quarterly 39, no. 2 (June 2009): p. 370; Savage, Takeover: The Return of the
28 Romig quoted in Savage, Takeover: The Return of the Imperial Presidency and the Subversion of American
Democracy, p. 138.
29 Bruff, Bad Advice: Bush’s Lawyers in the War on Terror, p. 214; Pfiffner, "The Contemporary Presidency:
the case of members of the armed forces of the Detaining Power” (L 396). It came as a shock to the JAGs when the Military Order ignored these two developments.

Civilian lawyers also endorsed the use of the existing military legal system to try GWOT detainees for LOAC violations and saw no need for the use of military tribunals. Several hundred law professors and practicing lawyers wrote Chairman of the US Senate Judiciary Committee Patrick Leahy. They objected to what they viewed as the Military Order’s assumption that “…regularly constituted courts and military courts-martial that adhere to well-tested due process are unable to handle prosecutions of this sort.” The letter also reminded the Senate Committee that, “The third Geneva Convention of 1949, ratified by the United States in 1955, requires that every prisoner of war have a meaningful right to appeal a sentence or a conviction.” In early 2002, the American Bar Association’s Task Force on Terrorism and the Law also questioned the legality of the military commissions as called for by the Military Order. They, too, argued for the use of established courts-martial procedures and judicial review instead of military commissions to try the detainees.

In *Hamdan v. Rumsfeld* (2006), the US Supreme Court ruled that the use of military commissions provided for by the Military Order was unconstitutional; specifically referencing the UCMJ and the Geneva Conventions. In his decision, Justice Stevens wrote that Common Article 3 applied to the GWOT. He wrote, “…there is at least one provision of

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32 Ibid.
the Geneva Conventions that applies here even if the relevant conflict is not between signatories.”35 The decision stated that Common Article 3 “…affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory who are involved in a conflict ‘in the territory of’ a signatory. The latter kind of conflict does not involve a clash between nations (whether signatories or not).”36 The JAGs interpreted the Hamdan decision as a vindication of their position about the use of UCMJ standards for prosecuting LOAC violations. As Navy JAG Lieutenant Commander Charles Swift, who successfully sued Secretary of Defence Rumsfeld in Hamdan said in explaining why al Qaeda’s attitude towards LOAC obligations was irrelevant to how the US treated detainees: “It’s not about them, it is about us.”37

In late 2006, the US Congress began work on drafting what would become the Military Commissions Act (2006) and new standards for trying detainees accused of LOAC violations. In his testimony regarding the new Act, Attorney General Gonzales assured the Senate that “Our deliberations have included a detailed discussion with members of the JAG Corps…They have provided multiple rounds of comments and those comments will be reflected in the legislative package that we plan to offer for Congress’s consideration.”38 However, when the JAGs and Office of Legal Counsel (OLC) lawyers met to discuss the use of such things as secret evidence, the OLC lawyers said that there was no point in debating

35 Ibid., para 629.
36 Ibid. Parentheses in the original.
the issue “…because a determination would be made by more senior officials.” According to Washington correspondent for the New York Times Charlie Savage, with the JAG’s main concern ruled out for discussion, the meeting was limited to “…minor concerns – wording changes, typo corrections, and procedural matters.” The meeting lasted only five hours and eventually OLC lawyers completed work on the new bill by themselves.

As Osiel writes, the JAGs pride themselves on their standing as military officers and as independent professionals. Since the implementation of the UCMJ and other LOAC reforms following the Vietnam War, this sense of honor and independence had increased. For this reason, the JAGs felt compelled to argue publicly against the Bush administration’s choice to use military commissions rather than the established trial procedures of the UCMJ. Moreover, Congress agreed with the JAGs and outlawed the use of such things as secret evidence. Yet it still did not question the use of military commissions to try LOAC violations. In fact, both the Military Commissions Act (2006) and Military Commissions Act (2009) emphasize that they do not “…establish new crimes that did not exist before its enactment” and that it merely “…codifies those crimes for trial by military commission.” As such, there is no major policy change regarding how the US would prosecute LOAC violations. Therefore, while logic of appropriateness arguments may have led to some procedural changes to military commissions, such arguments did not lead to the rejection of their use.

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40 Ibid.
5.2.2 Reciprocity and Military Commissions

The debate over how to try GWOT detainees for LOAC violations demonstrates how the expectation of reciprocity continues to play an important role in decision-making about LOAC obligations. In the discussions surrounding the Military Order and the different iterations of the Military Commissions Act, concerns about reciprocity drove arguments both in favor and against the use of commissions. In this case, the OLC argued on the narrow grounds of negative reciprocity in favor of the use of military commissions while the JAGs and some in Congress used the wider concept of diffuse reciprocity to argue against their use. As this section illustrates, while the JAGs and Congress were able to make some changes to the military commissions, the US did not abandon their use. This decision demonstrates that in debates between specific and diffuse reciprocity, the former and not the latter type of reciprocity motivated the decision-makers.

The legal justification given in the Military Order for the use of military commissions is from the memo “Legality of the Use of Military Commissions to try Terrorists,” written by Deputy Assistant Attorney General Patrick Philbin.43 Here, Philbin cited the legal precedent set by the US Supreme Court in *ex parte Quirin* (1942). In Quirin, the court upheld the jurisdiction of a military commission created by President Roosevelt to try eight Nazi saboteurs captured inside the US during the Second World War.44 The Philbin memo, though, did not rely on this legal precedent alone. According to the memo, the attacks of 11 September 2001 were an act of war. Though al Qaeda – a non-state actor – carried out the

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44 See *Ex parte Quirin*, 317 US 1 (1942).
attacks, the LOAC still applied to the GWOT because Common Article 3 makes “…it plain that the laws of armed conflict may apply to hostilities conducted by a non-state actor.”

This is an argument for the use of military commissions based on legal reciprocity. Since al Qaeda had committed an act of war, the LOAC applied to the GWOT and military commissions were a legitimate tool to try detainees for LOAC violations.

Philbin argued that, rather than being lawful belligerents, the detainees were unlawful enemy combatants. While this seems to suggest that a legal version of the specific reciprocity argument was driving US policy about how to try GWOT detainees, the underlying reason given was not legal but strategic. According to Philbin, just because a non-state actor committed the attacks, they should not be exempt “…from the standards demanded by the laws of armed conflict and the punishments that would apply when the terrorists undertake violent attacks in violation of those laws.” If the US were to try the detainees in accordance with the trial procedures laid out in the UCMJ and GC III, it would be rewarding those who had violated the LOAC and providing no incentive for non-state actors such as al Qaeda to comply with the law.

The day before the Bush administration released the Military Order, the Heritage Foundation published a paper entitled “Bringing Al-Qaeda to Justice” arguing publicly for the use of military commissions. The authors claimed that such an option would offer several advantages: “…trials before military tribunals need not be open to the general public and they may be conducted on an expedited basis, permitting the quick resolution of individual

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45 Philbin, "Memorandum Opinion for the Counsel to the President: Legality of the Use of Military Commissions to Try Terrorists (6 November 2001)."
46 Ibid., p. 35.
47 Ibid., p. 27.
cases and avoiding the disclosure of highly sensitive intelligence material, which would have to be made public in an ordinary criminal trial.”48 Their argument, though, did not rest on considerations of US national interest alone. They also argued that according to the definition of “belligerent” in Hague Convention IV, the detainees were unlawful enemy combatants because they did not comply with the LOAC.49 Therefore, the US did not need to comply with the trial procedures laid out in GC III. Like the Philbin memo, this is an argument based on strategic reciprocity because it references the requirement of de facto compliance with the LOAC in order to qualify for trial procedures of GC III.

In response to the US Supreme Court’s Hamdan decision, the Bush Administration set about drafting the Military Commissions Act (2006). The wording of the proposed Act also contained aspects of specific reciprocity. It relied on the definition of “unlawful enemy combatants” in order to deny GWOT detainees the Common Article 3 protections the Supreme Court’s Hamdan decision said were required as a matter of law. According to the proposed Act, “Any alien unlawful enemy combatant is subject to trial by military commission under this chapter.”50 The Act defined “unlawful enemy combatant” as someone who does not comply with the LOAC.51 Arguing in favor of the bill, Senator Saxby Chambliss said, “We have made this distinction [between lawful and unlawful enemy combatants] for no other reason than to provide incentive for every nation across the world to observe international agreements for the proper treatment of captives.”52 In this way, the

49 Ibid., p. 4.
50 10 US Code Chapter 47A, Military Commissions, Subchapter VIII, Punitive Matters §948c.
proponents of the measure presented and defended it as incentivizing compliance with the LOAC by threatening its opponents with trial by military commission.

Opponents of the Military Commissions Act (2006) also cast their arguments in terms of reciprocity, underlining the extent to which such considerations shape debate about states’ decisions to apply the LOAC. However, unlike in the case of the Vietnam War, those who supported applying GC III trial procedures to GWOT detainees despite their perennial defection from LOAC obligations did not argue on the grounds of positive reciprocity. The conditions for such policy arguments never arose, given the small number of US prisoners held by the Taliban and al Qaeda. Instead, opponents of specific negative reciprocity concentrated their arguments on diffuse reciprocity concerns that a future US opponent would treat its prisoners similarly.

On 6 September 2006, former Chairman of the Joint Chiefs of Staff General John Shalikashvili and forty-eight other high-ranking retired former officials from the Defence Department and the State Department sent a letter to the Senate Armed Services Committee reviewing the bill. These officials argued, on both strategic and diffuse reciprocity grounds, against Congress passing the bill. With respect to diffuse reciprocity, they argued the bill would “violate…the core principles of the Geneva Conventions and pose a grave threat to American service-members, now and in the future wars.” With respect to strategic reciprocity, the letter said, “This is not just a theoretical concern. We have people deployed right now in theaters where Common Article 3 is the only source of legal protection should

they be captured. If we allow that standard to be eroded, we put their safety at greater risk.”

The letter concluded as follows:

…we believe – and the United States has always asserted – that a broad interpretation of Common Article 3 is vital to the safety of U.S. personnel. But the Administration’s bill would put us on the opposite side of that argument. We urge you to consider the impact that redefining Common Article 3 would have on Americans who put their lives at risk in defense of our Nation. We believe their interests, and their safety and protection should they become prisoners, should be your highest priority as you address this issue.

These concerns demonstrate that many who served in the upper echelons of the US Armed Forces believed that the US must comply with LOAC standards in the GWOT since not to do so would lead to reciprocal action taken against US service personnel in the current conflict and possibly in future conflicts.

Individual soldiers opposed to the bill also made diffuse reciprocity arguments for why the US should extend Common Article 3 protections to GWOT detainees. In an opinion piece for the New York Times, Paul Rieckhoff, a former Infantry Platoon Leader stationed in Baghdad, wrote that not complying with Common Article 3 would endanger US troops in future wars “…because when we lower the bar for the treatment of our prisoners, other countries feel justified in doing the same.” As Rieckhoff rhetorically asked:

It is not hard to imagine that one of our Special Forces soldiers might one day be captured by Iranian forces while investigating a potential nuclear weapons program. What is to stop that soldier from being water-boarded, locked in a cold room for days without sleep as Iranian pop music blares all around him — and finally sentenced to die without a fair trial or the right to see the evidence against him?

54 Ibid.
55 Ibid.
57 Ibid.
The following month in an editorial, the New York Times reiterated these diffuse reciprocity concerns when it criticized the Military Commissions Act, claiming that “…by repudiating key protections of the Geneva Conventions [the Bush administration] needlessly increases the danger to any American soldier captured in battle.”\textsuperscript{58}

In its 2008 \textit{Boumediene v. Bush} ruling, the US Supreme Court found the Military Commissions Act (2006) unconstitutional because of its denial of \textit{habeas corpus} to alien unlawful enemy combatants.\textsuperscript{59} However, it still allowed the use of military commissions to prosecute GWOT detainees for violations of the LOAC. In July of 2009, during the Senate hearings on the Military Commissions Act (2009), Navy JAG Admiral Bruce MacDonald stated that reciprocity was an important factor to consider in creating the military commissions system. Admiral MacDonald testified that it was imperative for the US to create a “fair and just” process that would be fitting to try US military personnel if an enemy held US troops as detainees.\textsuperscript{60} When asked whether he felt the proposed Act met this standard, Admiral MacDonald stated, “I would be very comfortable having a U.S. service member subjected to these rules.”\textsuperscript{61}

As the debate over the use of military commissions to try detainees for violations of the LOAC demonstrates, decision-makers in the Bush administration excluded those most likely to make logic of appropriateness arguments from discussions of using military commissions to try detainees. However, those making such arguments who did have access also put forward arguments based on reciprocity. In this way, considerations of reciprocity

\textsuperscript{61} Ibid.
drove arguments both for and against military commissions as predicted by the neoliberal explanation of compliance with international law. Yet both sides based their arguments for and against the use of military commissions on different conceptions of reciprocity. The absence of worry among those favouring the use of military commissions about what their use could mean for US prisoners in the GWOT or future war is also as expected. The fact that the Taliban and al Qaeda would not comply with the LOAC anyway, combined with the low probability that they would hold US forces prisoner, allowed for negative reciprocity arguments to win the debate.

5.3 The POW Status of Detainees

On 7 February 2002, President Bush issued the memo “Humane Treatment of al Qaeda and Taliban Detainees” denying GWOT detainees POW status.62 The issuing of “Humane Treatment” was the culmination of a debate between the State Department on one side and the Defence Department and OLC on the other. The State Department argued that Taliban detainees were POWs while the Defence Department the OLC disagreed. However, those at the Defence Department and the OLC disagreed on the reason why the detainees were not POWs. As this section demonstrates, while logic of appropriateness arguments did play a role in the argument in favour of POW status for the detainees, these did not ultimately determine US policy. Instead, concerns with specific negative reciprocity led to the US decision denying POW status to the detainees.

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5.3.1 The Logic of Appropriateness and POW Status

The decision not to apply POW status to GWOT detainees provides evidence that logic of appropriateness arguments are insufficient to explain state decisions regarding application of the LOAC. Of course, it may be objected that such a decision could not be explained by such arguments since it went against what was appropriate in the situation. However, as this section shows, logic of appropriateness arguments were made in favor of granting GWOT detainees POW status. Therefore, an explanation for why these arguments did not prove decisive is required.

The first logic of appropriateness argument for applying POW status to detainees despite their failure to comply with the LOAC is that such an action would demonstrate respect on the part of the US for international law. Legal Counsel for the State Department William Howards Taft IV argued that the US was legally required to grant Taliban detainees POW status because Afghanistan was a state party to GC III. Taft also argued that a legal obligation to treat Taliban detainees as POWs existed because the State Department’s publication Treaties in Force and the ICRC’s database both listed Afghanistan as a High Contracting Party to the Geneva Conventions. As such, Taft concluded that GC III did govern US classification of the detainees. He wrote that, “…the case is clear for applying the Third Geneva Convention (GPW) to the Taliban, and presumptively according the Taliban members Prisoners of War (POW) status and/or treatment consistent with the GPW.”

64 Ibid., pp. 7-8.
65 Ibid. Parentheses in the original
Taft also argued that the status of the Geneva Conventions as customary international law created a legal obligation for the US to treat detainees as POWs. The OLC argued that, because customary international law was not federal law and only federal law could bind the US, customary international law had no effect on US GC II policy. The State Department countered that the US had long accepted customary international law as binding. It cited both the Department of the Army’s Field Manual on the Law of Land Warfare and Defence Department Directive 5100.77 which each state that customary international law “…will be strictly observed by the United States forces.” Taft also cited the ICJ’s ruling in *Barcelona Traction* (1970) as evidence that “…it is well-established that customary international law creates obligations on States.” However, the ability of Taft’s logic of appropriateness arguments to influence the decision about POW status for detainees was limited. As Mayer writes, President Bush had already decided on 8 January 2002 to deny POW status to the detainees. This was three days prior to Taft sending his response to the OLC.

A second logic of appropriateness argument for applying POW status to detainees also fails to explain US POW policy regarding GWOT detainees. On this account, despite the detainees’ failure to comply with the LOAC, the US should have awarded POW status to them anyway because that is the honourable thing to do. One way to understand this argument is in terms of the identity of the US military as an organization that complies with

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67 Taft IV, "Your Draft Memorandum of January 9 (11 January 2002)."
68 Ibid.
the LOAC despite the action of its opponents. As Chairman of the Joint Chiefs of Staff General Richard Myers argued, the Geneva Conventions were “…a fundamental part of our military culture and every military member was trained on them. In addition, our military personnel were trained to treat detainees and prisoners humanely. Objectively applying the conventions was important to our self-image.”

However, for the most part, the Bush administration chose to exclude the US military from the decision-making process about POW status. General Myer’s opinion was only consulted at the 4 February 2002 National Security Council meeting. Ultimately, President Bush never mentioned the US military’s historical adherence to Geneva Convention standards or even the importance of the Geneva Conventions to the military’s self-image in “Humane Treatment.”

However, one can also understand the concept of honour in terms of national honour. According to this logic of appropriateness argument, the US should have awarded POW status to the detainees because it views its national self-image as one that extends LOAC protections to its opponents – even when those opponents refuse to comply with the law. In this particular case, though, President Bush used national honor as a reason not to award GWOT detainees POW. While Bush decided to deny the detainees the legal status of POWs – so as not to create a legal obligation to extend them treatment according to GC III provisions – he did order they be treated “…in a manner consistent with the principles of Geneva.”

As the President stated, “Our nation has been and will continue to be a strong

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supporter of Geneva and its principles.” However, he had also written that the GWOT had ushered in a “new paradigm…[requiring] new thinking in the laws of war.” Such “new thinking,” in certain times of crisis, may override appeals to both professional and national honor when policy makers have to consider how to apply the LOAC.

Therefore, complying with the standards of international law such as GC III because one’s sense of honour, either as a military professional or as a national, did not play a determining factor in the decision about the POW status of GWOT detainees. The military did not play a key role in the decision-making process regarding POW status. Moreover, when the concept of honour did play a role in the decision making process, as it did in President Bush’s final decision, it did so not to justify POW status for GWOT detainees but to give them treatment merely consistent with the Geneva Conventions.

5.3.2 Reciprocity and POW Status

President Bush’s decision in “Humane Treatment” to deny POW status to detainees demonstrates not just the importance of reciprocity but also the importance of debates about which type of reciprocity – specific or diffuse – to apply. At first, it appears President Bush endorsed arguments from specific legal reciprocity in his decision. He suggested that the US did not have to apply GC III to GWOT detainees because al Qaeda was not a High Contracting Party to the Conventions and Afghanistan was a failed state. However, he did decide to treat these detainees “…humanely and, to the extent appropriate and consistent with

72 Ibid.
73 Ibid., p. 134.
74 Ibid.
military necessity, in a manner consistent with the principles of Geneva.” He also decided to apply GC III to Taliban detainees despite accepting the OLC’s argument that he had the legal right to suspend the application of the Geneva Conventions between the US and Afghanistan. These decisions would appear to confirm the humanization of humanitarian law thesis. However, as the remainder of this section demonstrates, President Bush did not base these decisions on humanitarian concerns but on a different type of reciprocity: strategic negative reciprocity.

While it may first appear that legal reciprocity arguments drove the decision to deny POW status to GWOT detainees, considerations of strategic reciprocity fundamentally shaped the decision and, as discussed above, the absence of US POWs ensured the muting of positive reciprocity arguments. The argument from legal reciprocity says that when a state ratifies an international agreement it creates reciprocal legal obligations to apply treaty provisions between it and the other States Parties. The OLC argued that the US had no reciprocal legal obligations towards al Qaeda detainees. Since it was not a state, al Qaeda was not a party to GC III and, therefore, the US had no obligation to apply GC III protections to its detainees. The OLC also argued that the US had no reciprocal legal obligation to treat al Qaeda detainees in accordance with Common Article 3 because, as a matter of law, the GWOT was an international armed conflict to which the provisions of Common Article 3 did not apply. Finally, the OLC argued that the US had no reciprocal legal obligation apply GC

75 Ibid., p. 135.
76 Ibid., p. 134.
78 Ibid., p. 49.
III to al Qaeda detainees because they did not meet the qualifications for POW status in Article 4 of GC III. These are all legal reciprocity arguments because they are premised on the idea that the US only has a reciprocal obligation to apply GC III to others who have made a reciprocal commitment to also apply the agreement by becoming High Contracting Parties.

The OLC also made legal reciprocity arguments as to why the US did not have to apply GC III to Taliban detainees. This is the “failed state” argument, which claimed that because Afghanistan was a failed state, it was no long a party to international agreements, and therefore the US had no reciprocal legal obligation to apply GC III to Taliban detainees. The OLC based the failed state argument are three interrelated claims. One was that the President could decide that a territory no longer had the political structure to qualify as a state for the purposes of treaty implementation because of the executive branch’s power over the conduct of US foreign policy. The OLC also claimed that Afghanistan was no longer a state because it failed to meet the criteria for statehood laid out in the Montevideo Convention on the Rights and Duties of States (1933). Lastly, the OLC claimed that since only one other state – Pakistan – recognized the legitimacy of the Taliban government, Afghanistan was not a real state and the US no longer had reciprocal legal obligations towards it. On 22 January 2002, the OLC sent the finalized version of “Application of Treaties” to White House Counsel Alberto Gonzales and Defence Department General Counsel William Haynes.

79 Ibid., pp. 49-50.
80 Ibid., p. 52.
81 Ibid., p. 55.
82 Ibid., pp. 55-59.
On 25 January 2002, Gonzales endorsed the OLC’s legal version of the specific reciprocity argument in a memo he wrote to President Bush. Gonzales repeated the reasoning of the OLC that the President had the constitutional authority to suspend the application of US LOAC treaty obligations towards detainees because Afghanistan was a failed state. He went on to say that the “...OLC’s interpretation of this legal issue is definitive.” He did note, though, that since 1949 the USA had never denied the applicability of the Geneva Conventions to an armed conflict in which it was involved and that it had been the stated policy of the George H. W. Bush administration to apply the Geneva Conventions “...whenever armed hostilities occur with regular foreign armed forces.” However, Gonzales ultimately advised President Bush not to reverse his decision regarding the inapplicability of POW status to the detainees: “On balance, I believe that the arguments for reconsideration and reversal are unpersuasive.”

The OLC and Gonzales memos suggest that the legal version of the specific reciprocity argument was driving US policy about the POW status of detainees. This argument was premised on the fact that, since neither al Qaeda nor Afghanistan were High Contracting Parties to the Geneva Conventions, the US did not have a legal obligation to award detainees POW status. However, the underlying reason was not legal but strategic. As the remainder of this section will argue, considerations such as the lack of actual compliance

85 Ibid., pp. 118-19.
86 Ibid., p. 119.
87 Ibid., p. 120.
88 Ibid.
with the LOAC on the part of al Qaeda and the Taliban really drove this policy decision. It was members of the Defence Department, who focused on the role specific reciprocity plays in creating incentives to comply with the LOAC and how this served US interests that influenced the decision not to give detainees POW status.

Under Secretary of Defense Douglas Feith rejected the concept of legal reciprocity implicit in the OLC’s “failed state” argument. He cited the State Department’s list of Treaties in Force as evidence that the Conventions did have the force of law. Indeed, according to Feith, the US should comply with the Geneva Conventions in the GWOT because such a policy served “…the interests of our military.” In the briefing paper he prepared for the 4 February 2002 National Security Council meeting, Feith specifically noted that the US should comply with GC III because “…the Convention is a sensible document that requires its parties to treat prisoners of war the way we want our captured military personnel treated.” He continued, “US forces are more likely to benefit from the Convention’s protections if the Convention command is applied universally.” Then Feith specifically cited strategic reciprocity when pointing out that, just because the Geneva Conventions applied to the armed conflict with Afghanistan, it did not follow that detainees were automatically entitled to POW status; if they did not comply with the LOAC then they were not entitled to POW status.

While it may appear that the Bush administration was looking for a legal argument to justify its position on the POW status of GWOT detainees, this was not the first time these

90 Ibid.
91 Ibid., p. 163.
92 Ibid.
93 Ibid.
officials had made such arguments. For example, Feith had long argued for understanding Geneva Convention obligations in terms of an incentive system for increasing compliance. As noted above, while a member of the Reagan administration Feith had argued against the US ratifying AP I because he believed it would give POW status to guerrillas who did not comply with the LOAC. Feith’s main worry was that such a policy would have an adverse effect on the principle of distinction. He wrote that “All in all, the humanitarian benefits of Articles 43 and 44, measured as a function of the putative incentive for irregulars to comply with the law, fall far short of the costs entailed in blurring (not to say erasing for all practical purposes) the distinction between combatants and non-combatants.” Feith worried that not being able to distinguish easily between combatant and non-combatant would lead to even more civilian deaths in warfare.

Even Yoo, the author of the “failed state” argument, had argued on several occasions for a strategic rather than legal understanding of specific reciprocity about compliance with the Geneva Conventions. According to Yoo, those combatants who did not engage in the reciprocal patterns of behavior that are expected from a state actor should not receive the protections of GC III by receiving POW status:

Customary law...requires combatants to distinguish themselves from the civilian population in order to help enemy soldiers avoid doing harm to civilians. Naturally, in return for these various protections from hostilities, civilians are strictly forbidden under customary law from engaging in hostilities. The former cannot exist without the latter; combatants cannot fairly be told to refrain from using force against civilians if they regularly suffer attacks from such groups.96

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In a *Wall Street Journal* editorial, Yoo cited a lack of strategic reciprocity as one of the justifications for not awarding POW status to GWOT detainees: “The reasons to deny Geneva status to terrorists extend beyond pure legal obligation. The primary enforcer of the laws of war has been reciprocal treatment. We obey the Geneva Conventions because our opponent does the same with American POWs.”

More specifically, with respect to al Qaeda, Yoo wrote that it:

…violates every rules and norm developed over the history of war. Flagrant breach by one side of the bargain generally releases the other side from the obligation to observe its end of the bargain. Al Qaeda has made no bargain, and observes no rules resembling those contained in the Geneva Conventions. It does not limit fighting to combatants. It does not spare innocent lives. It does not take prisoners.

Secretary of Defence Rumsfeld also rejected the legal interpretation of specific reciprocity put forward in the “failed state” argument. He agreed that the Taliban was the *de facto* government of Afghanistan and that Afghanistan was still a High Contracting Party to the Geneva Conventions. In a meeting with Feith and Chairman of the Joint Chiefs of Staff General Myers, Secretary Rumsfeld said that the US “…couldn’t risk the perception that we were discarding long-established rules of international law and our treaty obligations.”

At the 4 February 2002 National Security Council meeting, Secretary Rumsfeld made clear that “…the US government should not use a legal argument to avoid applying the Geneva Conventions to the conflict in Afghanistan.”

Like Feith, Secretary Rumsfeld understood US application of POW status to detainees in strategic terms as a system of incentives that “…encourage combatants to obey

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98 Yoo, *War By Other Means: An Insider's Account of the War on Terror*, p. 23.
100 Ibid., p. 564.
the laws of war…” and that the US “…needed to reinforce the incentives embodied in the Geneva Conventions.”101 If POW status was given to detainees regardless of their lack of compliance with the LOAC there “…would no longer be any incentive whatsoever for enemies to abide by the Geneva rules.”102 Rumsfeld viewed the detainees as ‘defectors’ from the LOAC: “They were enemies who had ignored the long-established rules of warfare and, as a result, effectively waived the privileges accorded to regular soldiers.”103 He attributed this understanding of Geneva Convention compliance to those who met at the Diplomatic Conference in 1949: “The architects of the modern Geneva Conventions also envisioned and assumed a degree of reciprocity and mutuality of interest among the warring parties.”104 The conclusion Rumsfeld drew from the Bush Administration’s discussion surrounding detainee POW status was that it “…was the sort of thing that I thought would have done the drafters of the Geneva Conventions proud.”105

Supporters outside the Bush Administration also made specific reciprocity arguments based on strategic considerations defending the decision not to give POW status to the detainees. For example, former member of the Secretary of State’s Advisory Committee on International Law Ruth Wedgwood argued in a New York Times editorial that: “To claim the protection of the law, a side must generally conduct its own military operations in accordance with the laws of war. Al Qaeda has violated these laws at every turn, and currently in the Sept. 11 attacks. In protecting and harboring Osama bin Laden and his operatives, the

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101 Ibid., p. 555.
102 Ibid., p. 562.
103 Ibid., p. 555.
104 Ibid., p. 560.
105 Ibid., p. 565.
Taliban leadership has also become party to the violations. ”Wedgewood’s claim is that reciprocal compliance with the LOAC should play an important role in the decision to apply the status of POW to detainees and that the US should define reciprocity narrowly as strategic reciprocity.

These arguments give credence to Posner’s claim that the US did not just add strategic concerns about reciprocity to the legal arguments for not applying POW status to detainees. Rather, as he suggests, strategic reciprocity provided the impetus for making the legal arguments in the first place:

When the Bush administration claimed in 2002 that Common Article 3 of the Geneva Conventions did not apply to al Qaeda, it advanced a legal argument – but the decision was really based on a common-sense policy judgment. The United States obtained no advantage from obeying Article 3, because al Qaeda itself clearly had no interest in complying either. However we treat them, they will torture and behead our soldiers…Common Article 3 failed because of the absence of reciprocal interest on the part of relevant parties to comply with its provisions. This type of reciprocity is also absent in the conflict with al Qaeda. There is no reason to think that if the Bush administration improves or worsens the conditions of detention it will have any effect on al Qaeda’s behavior toward captured Americans or other westerners.

This explanation underscores how strategic considerations of specific reciprocity played a determining role in Bush Administration’s thinking about the POW status of detainees, even if much of the public discussion had focused on legal arguments.

As with the decision about the use of military commissions, officials who objected to the policy of deny POW status to GWOT detainees did not object to the focus on reciprocity by its proponents. Instead, they advocated taking an alternative view of reciprocity in terms of diffuse reciprocity. When Secretary of State Colin Powel first learned of the decision

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denying POW status to the detainees, he sent a memo to White House Counsel Gonzales asking the President to reconsider the decision.\textsuperscript{108} He recommended that the US treat all GWOT detainees consistently with GC III standards because not to do so would “…undermine the protections of the law of war for our troops, both in this specific conflict and in general.”\textsuperscript{109} Powell took issue with the OLC’s narrow view of reciprocity as specific reciprocity, directly expressing concerns about how various actors beyond al Qaeda and the Taliban would react to the detainees not receiving POW status. Yet Gonzalez had already sent his memo to the President. Moreover, Counsel to the Vice President David Addington had leaked the memo to the \textit{Washington Times}. The \textit{Times} story said Bush administration officials “…expressed anger at Powell, whom they accused of bowing to pressure from the political left” and that “…if Mr. Bush heeds his secretary of state’s advice, the U.S. will have to provide detained terrorists with all sorts of amenities, including exercise rooms and canteens.”\textsuperscript{110} This effectively scuttled Secretary Powell’s argument and limited his influence with the President.\textsuperscript{111}

When the State Department’s Legal Advisor read the Gonzales memo, he too expressed diffuse reciprocity concerns regarding its conclusions. Taft argued that the decision not to apply POW status to GWOT detainees did not take into account the effects such a decision would have both now and in the future for US service members taken as


\textsuperscript{109} Ibid., p. 123.


detainees. According to Taft, the decision “…deprives our troops of any claim to the protection of the Convention in the event that they are captured and weakens the protections accorded by the Convention to our troops in future conflicts.”112 Such comments further demonstrate that both sides agreed about the reciprocal nature of GC III obligations while disagreeing about the particular form of reciprocity. However, in the aftermath of the leaked Gonzales memo, Taft’s influence on policy was also limited. According to Gellman, David Addington – who had leaked the memo in the first place – blamed the State Department, saying it showed Taft could not be trusted.113 According to Taft, “I was off the team.”114

Neither were the JAGs consulted regarding the POW status of the detainees. Sands reports David Addington as saying not to bring the JAGs into the process because “…they aren’t reliable.”115 The only member of the US military involved in this decision was Chairman of the Joint Chiefs of Staff General Richard B. Myers. At the 4 February 2002 National Security Council meeting, General Myers made an argument based on diffuse reciprocity for applying POW status to GWOT detainees. His worry, like that of the State Department, was about what a decision to deny POW status would mean to the treatment of US troops in future armed conflicts:

I wanted any American who might fall into enemy hands anywhere in the world to be protected under the Geneva Conventions. I didn’t naively believe that al-Qaida or the Taliban would treat Coalition prisoners humanely out of the goodness of their hearts…but I did think that our respect for the Geneva Conventions could give us support around the world that might translate into pressure on our enemies – in this or

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113 Gellman, Angler: The Cheney Vice Presidency, p. 171.
114 Taft, quoted in ibid.
any future war – to give proper treatment to any of our forces unfortunate enough to be captured.\footnote{116 Myers, \textit{Eyes on the Horizon: Serving on the Front Lines of National Security}, p. 203.}

Though General Myers did not think that the Taliban or al Qaeda would respect the Geneva Conventions in the present conflict, he did believe that the US gained in other areas – specifically in GC III treatment for US troops in any future wars.

Ultimately, participants in the discussions about POW status for GWOT detainees viewed them as a policy rather than a legal debate. As one US State Department Official who opposed the decision denying POW status to the detainees said, “…we didn’t argue that al Qaeda was legally entitled under the Conventions to be treated as POWs…the argument that we made had mostly to do with the Taliban. But as a policy matter we did propose to treat the al Qaeda people in the same way.”\footnote{117 Author’s interview, remark not for attribution.} Since the essential debate was over policy, reciprocity played the deciding factor about the POW status of GWOT detainees. This is as predicted by the neoliberal theory of compliance with international law. Yet those in favour of and those opposed to the POW status of detainees based their arguments on different types of reciprocity. Just as in the case of the debate over military commissions, the US denied POW status to GWOT detainees based on negative reciprocity, since it did not expect the Taliban or al Qaeda to comply with the LOAC. Since neither the Taliban nor al Qaeda held or was expected to hold a significant number of US prisoners, moreover, there was no perceived need to implement a policy of positive reciprocity.
5.4 The Use of EITs on Detainees

The debate surrounding the use of EITs on GWOT detainees pitted the Bush administration civilian General Counsels against the JAGs on the definition of torture. As in the previous two cases, the most significant debate over the use of EITs was over what type of reciprocity was relevant in applying GC III standards rather than over whether reciprocity was applicable at all. In this case, the civilian lawyers advocated for a negative interpretation of specific reciprocity while the JAGs defended a more diffuse version of reciprocity. While the JAGs – and notably the civilian General Council for the US Navy – did make logic of appropriateness arguments against the use of EITs, these arguments ultimately had little impact on the program because they were excluded from the decision-making process. As in the two previous cases, concerns about strategic reciprocity ultimately determined US policy.

Assistant Attorney General Jay Bybee provided the legal reasoning for the President’s denial of POW status to detainees found in the President’s “Humane Treatment” memo.118 In “Applications of Treaties,” Bybee argued the criminal penalties for US officials charged with violations of Common Article 3 and the grave breaches provisions of the Geneva Conventions did not apply because the detainees were not POWs.119 However, Bush administration civilian lawyers believed US Code Title 18 §2340 – the domestic legislation implementing the UN Convention Against Torture – still provided a barrier to the use of

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119 Ibid., p. 9.
EITs. Article 134 of the UCMJ provides the basis for prosecutions of US Code Title 18 §2340 violations committed by the armed forces. Article 134 states:

…all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

On 1 August 2002, Bybee sent another memo to White House Counsel Gonzales listing approved interrogation techniques. The focus of “Standards of Conduct” was on clarifying the particular meaning of the phrases “specifically intended to inflict” and “severe pain and suffering” found in the section on torture in US Code Title 18 §2340 in an attempt to side step the Convention Against Torture. Bybee interpreted the particular phrases to be saying that, as long as a person’s specific purpose was not to cause severe pain, merely knowing a particular act will cause severe pain is not enough to be torture. In terms of physical pain and suffering, the memo defined “severe” as a “…level that would ordinarily be associated with a sufficiently serious physical condition or injury such as death, organ failure, or serious impairment of body functions…” In terms of mental pain and suffering, the memo defined “severe” as resulting from:

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120 Article 1 of the Convention defines “torture” as: “…any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.” See United Nations Convention Against Torture, 1465 UNTS 85/(1989) ATS 21
123 Ibid., p. 175.
124 Ibid., p. 176.
(A) the intentional infliction or threatened infliction of severe physical pain or suffering;
(B) the administration or application, or threatened administration or application, of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
(C) the threat of imminent death; or
(D) the threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or personality.¹²⁵

The memo concluded that acts constituting torture “…as a whole, (encompass) only extreme acts.”¹²⁶

Bybee addressed another memo that same day to US Central Intelligence Agency (CIA) acting General Counsel John Rizzo.¹²⁷ The CIA had requested a legal opinion on US Code Title 18 as applied to the interrogation of Abu Zubaydah; a citizen of Saudi Arabia whom the US believed to be a top-ranking al Qaeda member. According to the CIA, “The interrogation team is certain that he [Zubaydah] has additional information that he refuses to divulge.”¹²⁸ The CIA wanted to know if, under Title 18 or the Convention against Torture, certain techniques such as waterboarding amounted to torture. According to Bybee’s memo if such practices were applied in such a way as “…to ensure that no prolonged mental harm would result from the use of these proposed procedures” then CIA interrogators would not be in violation of the law.¹²⁹

¹²⁵ Ibid., p. 177.
¹²⁶ Ibid., p. 183.
¹²⁸ Ibid., p. 1.
¹²⁹ Ibid., p. 4.
In October 2002, Commander of Joint Task Force 170 at Guantanamo Bay Major General Michael Dunlavey asked the Department of Defence to sign off on the use of EITs.\textsuperscript{130} General Diane Beaver, a lawyer with the US Army JAG office, wrote that because such techniques “would constitute a \textit{per se} violation [of the UCMJ]…It would be advisable to have permission or immunity in advance” before carrying out such interrogations.\textsuperscript{131} On 27 November 2002, Defence Department General Counsel Haynes sent a memo to Secretary of Defence Rumsfeld. It recommended “…as a matter of policy, you authorize the Commander of USSOUTHCOM to employ, in his discretion, only Categories I and II and the fourth technique listed in Category III (“Use of mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing”).\textsuperscript{132} Secretary Rumsfeld approved the request on 2 December 2002. That same day Secretary Rumsfeld established a working group to study the use of EITs on the detainees.\textsuperscript{133}

5.4.1 The Logic of Appropriateness and EITs

Once the working group began its study, the strongest logic of appropriateness arguments against the use of EITs on detainees accused of LOAC violations take two forms. First, Navy


General Counsel Alberto J. Mora and the JAGs objected to the use of EITs claiming that such methods did not conform to standards for the conduct of interrogations as found in the LOAC. Second, the JAGs and some members of Congress argued that the use of such techniques was antithetical to the sense of identity of both the military and the nation.

Mora objected to the use of EITs based on their illegality. When he first saw the memos justifying the use of EITs, he referred to Beaver’s legal justification as “…a wholly inadequate analysis of the law” and Secretary Rumsfeld’s approval as “…fatally grounded on these [Beaver’s] serious failures of legal analysis.” In response to discussions between Mora and Defence Department General Counsel William J. Haynes, Secretary Rumsfeld rescinded his initial approval of the EITs. On 15 January 2003, Secretary Rumsfeld requested the creation of an inter-departmental working group to assess issues surrounding interrogations. Haynes appointed Air Force General Counsel Mary Walker to chair the group. One week later, Mora – a member of the working group – reviewed a hard copy of the memo “Standards of Conduct” in Walker’s office. While Walker did not question Bybee’s memo, Mora believed that it displayed “catastrophically poor legal reasoning.” He believed the memo to be “fundamentally in error” and that it was “virtually useless as

134 Mora quoted in Mayer, The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals, p. 221.
135 See Rumsfeld, "Memorandum for Commander USSOUTHCOM, SUBJECT: Counter-Resistance Techniques (15 January 2003)," in The Torture Papers: The Road to Abu Ghraib, p. 239.
138 Mora quoted in Mayer, The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals, p. 229.
guidance as now drafted and dangerous in that it might give some a false sense of comfort.”

The JAGs who took part in the working group also argued against the use of EITs by citing their illegality. US Air Force JAG Major General Jack Rives, in a memo to Walker stated, “Several of the more extreme interrogation techniques, on their face, amount to violations of domestic criminal law and the UCMJ (e.g., assault).” He was also concerned about how other states would react to this interpretation of the law: “Additionally, other nations are unlikely to agree with DoJ/OLC’s interpretation of the law in some instances” putting US service personnel at risk of criminal prosecution abroad. Due to their different interpretations of the law, other countries may feel the appropriate course of action on their part is to prosecute US personnel for LOAC violations. US Marine Corps JAG Brigadier General Kevin Sandkuhler displayed similar worries about possible domestic and international criminal prosecutions of US service personnel in his memo to Walker, stating that “…the OLC does not represent the services; thus, understandably, concern for service members is not reflected in their opinion. Notably, their opinion is silent on the UCMJ and foreign views of international law.”

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141 Ibid., p. 386.

In a memo to Walker, US Army JAG Major General Thomas Romig also argued against the use of EITs because they did not comply with international law. Major General Romig described the OLC’s conception of military necessity as based on the claim that “…any existing federal statutory provision or international obligation is unconstitutional per se, where it otherwise prohibits conduct viewed by the President, acting in his capacity as Commander-in-Chief, as essential to his capacity to wage war.” He did not believe such a conception of military necessity would stand up in any US court or international forum. Major General Romig also feared the use of such techniques would put US service personnel at risk of criminal and civil prosecution.

However, when Walker presented the Working Group Report to Secretary Rumsfeld, she determined that the legal reasoning behind “Standards of Conduct” was sound. The Report stated that the “…choice of interrogation techniques involves a risk benefit analysis in each case, bound by the limits of DOD [Department of Defence] policy and U.S. law.” Once again, as in the previous debates, decision-makers ignored arguments based on a failure to conform to standards of law. As Mora would later remark, contributions from the working group “…began to be rejected if they did not conform to the OLC guidance.”

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144 Ibid., p. 386.
145 Ibid.
147 Mora quoted in Mayer, The Dark Side: The Inside Story of How the War on Terror Turned into a War on American Ideals, p. 231.
Mayer pointed out Mora and the JAGs were not even aware that the Working Group’s Report was being drafted.\(^{148}\)

In the debate over the use of EITs on detainees, logic of appropriateness explanations for compliance with the LOAC based on honour played more of a role than in the previous debates over the use of military commissions and POW status. Nevertheless, appeals to either military or national honour ultimately failed to significantly shape the policy decision regarding EITs. Though it is the case that many took the concept of honor very seriously as a reason not to employ the use of EITs, those were not the key policy decision makers.

In his memo to Walker’s working group investigating the use of EITs, Rives wrote:

> The use of more extreme interrogation techniques simply is not how the U.S. armed forces have operated in recent history. We have taken the legal and moral “high road” in the conduct of our military operations regardless of how others may operate…We need to consider the overall impact of…giving official approval and legal sanction to the application of interrogation techniques that U.S. forces have consistently been trained are unlawful.\(^{149}\)

In a follow-up, Rives made several more comments on the working group’s draft report emphasising the role of martial honour as a reason for complying with standards set out GC III. He wanted greater emphasis placed on how the culture and self-image of the US Armed Forces “…suffered during the Vietnam conflict and at other times due to perceived law of armed conflict violations” and how the Department of Defense “…Law of War Program in 1979 and subsequent service regulations greatly restored the culture and self-image of U.S.

\(^{148}\) Ibid., p. 233.

Armed Forces."\textsuperscript{150} Rives also argued explicitly against a reciprocal interpretation of GC III obligations citing how US forces were trained “…to take the legal and moral ‘high-road’ in the conduct of military operation regardless of how others may operate.”\textsuperscript{151}

Several US politicians argued against the use of EITs claiming such techniques went against the values the US stood for as a country. In the midst of the Hamdan case, Senators John McCain, John Warner, and Lindsey Graham sponsored the Detainee Treatment Act (2005) that incorporated Common Article 3 standards into GWOT detainee interrogations. The Act prohibited “cruel, inhuman, or degrading treatment or punishment” of any prisoner of the US Government, including those at Guantanamo Bay.\textsuperscript{152} While their position may have appeared motivated by humanitarianism, the Act only provided for an abridged appeals process that fell well short of the requirements of GC III.\textsuperscript{153} Moreover, the Graham-Levin amendment to the Act further denied the habeas corpus right of detainees to appear before a court and sue the US government for violations of the “cruel, inhuman and degrading treatment” provisions of the Convention Against Torture.\textsuperscript{154} When the US Supreme Court ruled in Boumediene v. Bush (2008) that detainees held at Guantanamo Bay had a constitutional right to file habeas petitions in US federal courts, McCain called it “one of the worst decisions in the history of the country.”\textsuperscript{155}

\textsuperscript{150} Rives, "Memorandum for SAP/GC, SUBJECT: Comment on Draft Report and Recommendations of the Working Group to Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees held By the U.S. Armed Forces in the War on Terrorism, (6 February 2003)," in The Torture Debate in America, p. 379.
\textsuperscript{151} Ibid.
\textsuperscript{153} Ibid., pp. 2740-2741.
\textsuperscript{154} Amendment No. 2524, pp. 3-4
What motivated these politicians to fight against the use of EITs was, therefore, not a commitment to humanitarian principles enshrined GC III. Rather, it was a specific concern with national values. According to Senator McCain, “when the principle of reciprocity does not apply, we must instead remember the principles by which our nation conducts its affairs…Were we to abandon the principles of wartime conduct to which we have freely committed ourselves, we would lose the moral standing that has made America unique in the world.”

For McCain, the illegality of EITs was neither conditional on the detainees’ LOAC compliance nor based on standards endorsed by the international community. McCain intended his opposition to the use of EITs, regardless of how the other side treated US prisoners, to reaffirm US exceptionalism among states.

Former Chief Prosecutor for the Guantanamo Bay military commissions Colonel Morris Davis gave a similar reason for his decision to rule that evidence obtained from waterboarding was inadmissible against detainees:

Twenty-seven years ago, in the days of the Iran hostage crisis, the CIA’s station chief, Tom Ahern, faced his principal interrogator for the last time. The interrogator said the abuse Mr. Ahern had suffered was inconsistent with his own personal values and with the values of Islam and, so as if to wipe the slate clean, he offered Mr. Ahern a chance to abuse him just as he had abused the hostages. Mr. Ahern looked the interrogator in the eyes and said “We don’t do stuff like that.” Today Tom Ahern might have to say: “We don’t do stuff like that very often.” Or, “We generally don’t do stuff like that.” That is a shame. Virtues requiring caveats are not virtues.

The “we” that both McCain and Davis refer to in their statements are US citizens.

In both McCain’s and Davis’ remarks, there is no mention of individual rights or international human rights norms. To require humane treatment of detainees as a matter of

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individual or international human right standards would undercut the claim that US compliance with GC III in its interrogation of detainees was an exercise in national honour. This helps to explain the seeming contradiction between McCain advocating for applying Common Article 3 standards to interrogations while at the same time limiting detainees’ access to such things as *habeas corpus*. As McCain, himself a victim of torture at the hands of the Viet Cong said, “I hold no brief for the prisoners, but I do hold a brief for the reputation of the U.S. as to adhering to certain standards of treatment of people, no matter how evil or terrible they might be.”\textsuperscript{158} The mere fact of applying GC III standards to the interrogation of detainees does not allow for the exhibition of the type of national honour McCain has in mind when he speaks of the “reputation of the U.S.”

In the end, while the concept of honour, in both its military and national forms, played a somewhat more important role in the debate over the use of EITs on GWOT detainees, it did not determine policy. Former US military personnel who now were in Congress and could therefore have more influence on policy than the JAGs were able to roll back some of the more egregious provisions of the EIT program, such as waterboarding and confinement in small coffin like boxes. However, the Bush administration did not eliminate the programme.

\subsection*{5.4.2 Reciprocity and EITs}

It is unsurprising that neither a concern for standards of behavior embodied in international law nor martial or national honor motivated the Bush administration to reject the use of EITs.

Significantly, such logic of appropriateness arguments do not fully account for the JAGs position against the use of EITs. OLC lawyers argued in favor of these techniques based on the legal reciprocity argument that GC III did not apply to GWOT detainees. The JAGs argued against the use of such techniques for diffuse reciprocity worries such as the treatment of US service personnel in future conflicts. The memos written by those JAGs who took part in the inter-departmental working group demonstrate that they took a broader view of the reciprocal nature of the US’s GC III obligations than did the OLC.

In his account of his time at the OLC, Yoo defended his position regarding the memo “Standards of Conduct.” Yoo argues on grounds of legal reciprocity that EITs were justified because the detainees were not POWs and, therefore not protected by GC III standards. He claims that President Bush’s order in “Humane Treatment” that the detainees be treated “humanely” was sufficient to protect them from any abuses that may occur during interrogations.159 Yoo also cites the Senate’s definition of torture as applying only to the US criminal justice system and not to those, such as GWOT detainees, who live outside the US.160 This reasoning incorporates the narrow view of reciprocity as legal reciprocity. Since GC III did not cover the treatment of the detainees, the US had no reciprocal legal obligation to apply its standards to them.

In his memo to the chair of the Working Group investigating EITs, Navy JAG Rear Admiral Michael Lohr accepted the legal reciprocity argument of the OLC that the detainees were not legally subject to the protections of GC III or the US Torture Statute. Yet he also

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159 Yoo, *War By Other Means: An Insider's Account of the War on Terror*, pp. 171-72.
160 Ibid., p. 172.
recommended that “…we consider asking decision-makers directly: is this the ‘right thing’ for U.S. military personnel.” While this may appear to be a logic of appropriateness argument, Lohr based his reasoning on diffuse reciprocity. He was concerned that, when another enemy captured US forces in the future, US personnel could face similar punishments to GWOT detainees. As Lohr rhetorically asked, “Should service personnel be conducting interrogations? How would this affect their treatment when incarcerated abroad and our ability to call others to account for their treatment?“

Though Rives cited concerns with international law and military honor in his memos to the EIT working group, he also appealed to worries based on diffuse reciprocity. He claimed that not adhering to GC III standards in the present conflict could put US soldiers in danger in future wars: “…treating OEF [Operation Enduring Freedom] detainees inconsistently with the Conventions arguably ‘lowers the bar’ for the treatment of U.S. POWs in future conflicts.” In his follow-up memo to Walker, Rives argued that the use of EITs was “…likely to result in adverse impacts for DOD personnel who become POWs.”

Other JAGs, too, worried that US non-compliance with GC III obligations respecting the interrogation of detainees could lead to future LOAC violations against US personnel. In United States Marine Corps JAG Sandkuhler’s memo to Walker’s working group, he argued

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162 Ibid.
“…the authorization of aggressive counter-resistance techniques by servicemembers will adversely impact…Treatment of U.S. Servicemembers by Captors and Compliance with International law.”165 In his memo to Walker’s working group, Romig put forward similar diffuse reciprocity worries. He wrote that failing to conduct interrogation in compliance with GC III requirements “…could adversely impact DOD interests worldwide” and that the “…implementation of questionable techniques would very likely establish a new baseline for acceptable practice in this area, putting our service personnel at far greater risk and vitiating many of the POW/detainee safeguards the U.S. has worked hard to establish over the past decades.”166

Thus, in the debate over the use of EITs on GWOT detainees accused of violating the LOAC, a necessary part of the explanation for the positions taken by both the OLC (in favour of the use of EITs) and the JAGs (against the use of EITs) has to do with reciprocity. While arguments about the appropriate standards of treatment for detainees enshrined in GC III and about honour did play a role in the discussions, concerns about reciprocity played a determining factor in the consideration of policy. This is just as the neoliberal theory of compliance with international law would predict. Yet, as demonstrated in this section, the substantive debate over EITs was between groups with different conceptions of reciprocity. Opposition to the policy on the part of the JAGs had to do with diffuse reciprocity concerns while those in support of the EIT policy relied on arguments based on specific reciprocity.

5.5 Conclusion

Despite the humanization of humanitarian law thesis, US policy towards its GC III obligations in the GWOT provides support for the claim that states still take reciprocity seriously when considering their application of LOAC treaty principles and the extension of protections offered in the LOAC. Logic of appropriateness explanations do not adequately explain US policy on the use of military commissions, POW status, or the use of EITs. Those who created the policies were part of a group suspicious of the cosmopolitan standards of international law and did not believe that these standards should take precedent over US sovereignty. Moreover, these officials had a long history of being critical about international law in general and the extension GC III treaty protections to those who did not reciprocally comply with the LOAC in particular. Equally as important, those arguing against the policies championed by this group also espoused reciprocity arguments; though a different type of reciprocity.

Just like in any other area of international law, expectations about reciprocal compliance – both specific and diffuse – form a necessary piece of the picture in order to have an accurate understanding of US policy towards the application of GC III treaty provisions in the GWOT. This case study demonstrates how much of the debate was not about a policy of reciprocal compliance versus non-reciprocal compliance but, rather, about different forms of reciprocity. This is just as the neoliberal theory of compliance predicts. The GWOT is similar to the case of the Vietnam War in that the US was fighting an enemy who perennially defected from its LOAC obligations. However, in this case, the nature of the conflict provided a setting for those making negative reciprocity arguments to win these
debates. The fact that the US did not expect the Taliban or al Qaeda to take a significant number of US forces prisoner, combined with the understanding that neither the Taliban nor al Qaeda could be expected to comply with the LOAC, allowed for the implementation of policy based on negative reciprocity.
Chapter 6: Conclusion

This dissertation has argued that states have maintained the expectation of reciprocal compliance within the LOAC primarily because of concerns about specific strategic reciprocity. This concluding chapter summarizes and compares the findings of the three case studies. Overall, the empirical findings of this dissertation support the continued importance of considerations of reciprocity within the LOAC.

This dissertation has analysed the negotiations surrounding the Diplomatic Conferences that updated the Geneva Conventions and created the Protocols Additional to the Geneva Conventions. It has also compared US policy towards the application of GC III in the Vietnam War and the GWOT. In the case of Viet Cong detainees, the US applied the protections of GC III and in the GWOT, the US denied these same protections to Taliban and al Qaeda detainees in the GWOT. The empirical variation in these two cases suggests to supporters of the humanization of humanitarian law thesis an important shift in US policy regarding its LOAC obligations. Despite this difference, important similarities exist that support the claim of this dissertation that the variation is due to a feature thought to have disappeared from the LOAC: specific reciprocity.

Chapter 2 of this dissertation laid out the conceptual background for investigating the continued role played by expectations of reciprocity in policy decision regarding LOAC obligations. It first described the existing international regime governing the conduct of hostilities in international armed conflict. Next, it reviewed two existing literatures explaining the importance of reciprocal expectations of to compliance with regimes. The first argument, based in the neoliberal institutional theory of international relations, uses the
reasoning of the prisoner’s dilemma to demonstrate that in a situation of international anarchy, international agreements such as the LOAC can be enforced through the expectation of reciprocity. The second argument, based in political theory, uses Rawls’s concept of fairness to argue why states would maintain the expectation of reciprocal compliance within regime. The chapter then contrasted these arguments with what I term the “humanization of humanitarian law” thesis. This is the idea that the use of reciprocity, in either its specific or diffuse forms, is morally and legally wrong as a method for punishing non-compliance with the LOAC because of the existence of an overriding duty to respect the human rights of those caught in war zones.

Next, chapter 2 developed a more nuanced view of reciprocity. First, it distinguished between several different ways states can implement specific reciprocity in international law. Next, using Hart’s distinction between primary and secondary rules, it shows how specific reciprocity is maintained in legal regimes as a secondary rule affecting the application of a regime’s primary rules. When a non-member of the regime is able to impose costs on a state party, that state will rely on the secondary rules of the LOAC to induce compliance on the part of its opponent. Finally, the chapter described the multi-actor domestic setting of the state in order to explain how debates about LOAC obligations are often shaped by these different understandings of reciprocity. Finally, the chapter contrasted this logic of consequences explanation for the persistence of expectations of reciprocity within the LOAC with three other perspectives found in the current international relations and international law literature: (i) legal process theory, (ii) legitimacy theory, and (iii) constructivism.

The subsequent chapters examined empirical evidence for these alternative theories of LOAC compliance. First, as the history of the two diplomatic conferences discussed in
chapter 3 demonstrates, specific reciprocity still exists both within the text of LOAC agreements such as the Geneva Conventions and with regard to state practice towards those agreements. It is true, as the humanization of humanitarian law thesis points out, that states have agreed to the removal of the more conspicuous examples of specific reciprocity from the LOAC during the 20th century. However, states replaced overt examples of specific reciprocity with restrictive secondary rules of application in order to accomplish the same goals. Common Article 2’s restriction of the full panoply of Geneva Convention protections to international armed conflicts between states, the definition of “prisoner of war” found in Article 4 of GC III, and the use of reservations all act to condition the application of the primary rules of the LOAC. These rules condition the application of the LOAC’s protection to sovereign states and resistance groups fighting on their behalf who make both a *de jure* and *de facto* commitment to comply with the law.

Second, Chapter 3 traces the unacknowledged role specific reciprocity has played in debates over how states should apply the LOAC to non-state actors. The history of the diplomatic conferences demonstrates that once these groups are able to inflict significant costs on state militaries, states will recognize the applicability of such requirements as those found in GC III to these groups. During the Second World War, resistance movements in occupied Europe played a significant role in helping the Allies defeat Nazi Germany. Therefore, the updated POW regime accorded these resistance movements protected status in recognition of their important role in the conflict. In the aftermath of decolonization, states once again expanded the rules regarding POW status. As the example of the FLN shows, once nationalist rebellions grew in strength and could impose costs on their state opponents by taking more prisoners, states began to apply the LOAC to the conflicts in order to induce
reciprocal compliance. It has only been in the last several decades that non-state actors have been able to impose heavy costs on the militaries of their state opponents. Contrary to the humanization of humanitarian law thesis, which predicts that all such groups be accorded POW status, the reciprocity argument defended here explains the variation in the application of the LOAC in the historical case.

The comparative case studies of US GC III policy in the Vietnam War and the GWOT demonstrate that the key variable in explaining the application of POW status is an opponent’s combat strength and ability to take prisoners. When a military opponent can impose significant costs, reciprocity becomes relevant. States will seek to induce compliance through applying the LOAC, even if the enemy does not always comply. This qualifies Posner’s reasoning that the willingness of non-state actors to abide by the LOAC alone explains why a state would deny POW status to such groups.1 With respect to the GWOT, Posner and others have argued that the US should not apply POW status to Taliban and al Qaeda detainees because these groups do not comply with the LOAC. However, as demonstrated by the Vietnam War case, if a non-state actor does not comply with the LOAC, reciprocal defection is not the only outcome. Rather, if the non-state actor has significant strength that allows it to impose costs through the taking of its state opponents as prisoners, that state may choose to induce reciprocal compliance through the application of the LOAC to the conflict.

The evidence from the comparative case studies is also odds with alternative theories of compliance based on the logic of appropriateness. For example, the comparative case

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1 Posner, "Apply the Golden Rule to Al Qaeda."
studies are at odds with the legal process theory of compliance found in the international law literature as a sufficient explanation of state compliance behavior. The coordination game scenario envisioned by managerial theory mischaracterises the problem of compliance with GC III and fails to explain the variation in in GC III policy found in the comparative cases. The vertical norm-internalization form of legal process theory, too, fails in explaining adequately the comparative cases. The multi-actor nature of the domestic setting hinders the internalization of the norm of compliance with the LOAC. Those most likely to make logic of appropriateness arguments, such as non-governmental organizations promoting human rights in armed conflicts, may not have access to or have their arguments fail to influence policy decisions about LOAC compliance. If those who take a logic of appropriateness view of compliance with the law are not the ones making the final decision regarding compliance, then concerns for reciprocity will make themselves felt.

The evidence from the comparative case studies also tells against the sufficiency of the legitimacy theory of compliance found in the international law literature to explain LOAC compliance. The Vietnam War and GWOT case studies show that, though a concern for the legitimacy of LOAC rules played a part in US policy decisions about POW status, it was not the deciding factor. The US was one of the leading nations helping to revise the Geneva Conventions in 1949 and going in to the Vietnam War, the Conventions had been ratified by the Senate, incorporate into the UCMJ and US military field manuals. However, if the legitimacy of these rules had been enough to ensure US application of GC III to the Viet Cong, it would have done so from the outset of the conflict. Instead, the US waited until 1965 – the year of the “Americanization” of the war – to apply the Convention. In the case of the
GWOT, a concern with the legitimacy of the LOAC militated against applying POW status for fear of rewarding illegal behavior on the part of detainees.

Finally, the evidence from the comparative case studies does not support the identity-based theories of compliance from the constructivist theory of international relations as a sufficient explanation for compliance with the LOAC. The multi-actor setting of decision-making in the state may hinder those who view compliance with the standards enshrined in the LOAC as appropriate, either because of martial or national honour. In the case of the Vietnam War, martial honour most certainly played a role in preventing LOAC violations at the individual level. However, as a matter of state policy, there is little evidence to suggest that such concerns influenced decision-making. In the case of the GWOT, though a concern with both martial and national honor may have played a part in curbing the excesses of the EIT program, for the most the Bush administration did not consult the military on policy issues regarding the application of GC III.

The theory defended in this dissertation about why an expectation of reciprocal compliance with the LOAC continues to persist – despite significant attempts to expand its protections – is rooted in traditional neoliberal institutionalist theory: In iterated Prisoner Dilemma situations, reciprocity allows for the enforcement of agreements lacking a centralized enforcement mechanism. This will come as no surprise to anyone who studies international relations. Vast arrays of international agreements rely on the expectation of reciprocity to enforce their provisions. The LOAC is no different. Concentrating too much on the strategy of TFT, though, misses that reciprocity can work in subtler ways. By failing to notice the subtler way states use reciprocity, the humanization of humanitarian law thesis
overlooks the prominent role this method of responding to non-compliance still plays as part of the toolbox of those states who engage in armed conflict.
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Gomma, Mohammed M. *Suspension or Termination of Treaties on Grounds of Breach*. The Hague: Martinus Nijhoff, 1996.


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Appendices

Appendix A  List of Interviews

Bellinger III, John B., Former Chief Legal Advisor to the US Department of State and the National Security Council, Washington DC, 26 February 2014.


Prasow, Andrea, Senior Council Human Rights Watch, via Skype, 3 March 2014.

Taft IV, William H., Former Chief Legal Advisor to the US State Department, via Skype, 22 January 2014.
Appendix B  Geneva Convention (III) Relative to the Treatment of Prisoners of War

Article 4 Prisoners of War

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy

1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.

2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
   (a) that of being commanded by a person responsible for his subordinates;
   (b) that of having a fixed distinctive sign recognizable at a distance;
   (c) that of carrying arms openly;
   (d) that of conducting their operations in accordance with the laws and customs of war.

3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any
more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.
## Appendix C  Summary of Key GWOT Detainees Memoranda

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<td>Legality of the Use of Military Commissions to Try Terrorists</td>
<td>Patrick F. Philbin</td>
<td>Alberto R. Gonzalez</td>
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<td>13 November 2001</td>
<td>Military Order of November 13, 2001</td>
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<td>Application of Treaties and Laws to al Qaeda and Taliban Detainees (Draft)</td>
<td>John Yoo, Robert Delahunty</td>
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<td>Application of Treaties and Laws to al Qaeda and Taliban Detainees</td>
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<td>26 January 2002</td>
<td>Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan</td>
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<td>5 February 2003</td>
<td>Re: Final Report and Recommendations of the Working Group to Assess the Legal, Policy, and Operational Issues Relating to Interrogation of Detainees Held by the US Armed Forces in the War on Terrorism</td>
<td>Jack Rives</td>
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<td>Jack Rives</td>
<td>Mary Walker</td>
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<td>7 February 2003</td>
<td>Re: Working Group Recommendations Relating to Interrogation of Detainees</td>
<td>Kevin M. Sandkuhler</td>
<td>Mary Walker</td>
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<td>3 March 2003</td>
<td>Draft Report and Recommendations of the Working Group to Assess the Legal, Policy, and Operational Issues Relating to Interrogation of Detainees Held by the US Armed Forces in the War on Terrorism</td>
<td>Thomas J. Romig</td>
<td>Mary Walker</td>
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### Appendix D Table of Cases


The Legality of the Threat or Use of Nuclear Weapons, 1996 ICJ Rep. 225 35

*In re* List et. al (Hostages Case), US Military Tribunal at Nuremberg, February 19, 1948, 15 ILR 632

The SS Lotus (France v. Turkey), PCIJ, ser. A, no. 9 (1927)

Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US), 1986 ICJ Rep 14

Naulilaa Incident (Portugal v. Germany), July 31, 1928, 2 RIAA 1011

North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark), 1969 ICJ Rep. 3

*Ex parte* Quirin, 317 US 1 (1942)

Prosecutor v. Tadić (Jurisdiction), International Criminal Court for the Former Yugoslavia, October 2, 1995, 32 ILM 35

*In re* von Leeb (High Command Case), US Military Tribunal at Nuremberg, October 28, 1948, 15 ILR 376