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RECIPROCITY AND THE LAWS OF WAR: AN HISTORICAL ANALYSIS OF U.S. STATE PRACTICE

by

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Abstract

Reciprocity and the Laws of War: An Historical Analysis of U.S. State Practice

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This dissertation argues that reciprocity has been an instrumental component of the state practice of the United States in post-World War II 20th century armed conflict. This contrasts with conventional narratives that argue that the humanitarian emphasis of post-World War II treaties have rendered reciprocity invalid. Despite recent interest in the laws of war, there remain two substantial gaps in the literature that this dissertation has sought to address. Fist, research has yet to thoroughly examine, from the perspective of state practice, the historical role that reciprocity has played in this branch of international law. Second, reciprocity and the laws of war have not been framed within a theoretical model that allows for multiple perspectives of international relations. This dissertation addresses these gaps in two primary ways.

First, this dissertation frames reciprocity and the laws of war within an inclusive theoretical understanding of international relations in the form of The English School tripartite model. This contrasts with much of the literature that has considered this subject from the dichotomous realist/idealist arguments. The English School, by including the international society perspective, provides a powerful explanatory tool with which to conceptually analyze the laws of war and reciprocity.

Second, an historical methodology has been incorporated that emphasizes a comprehensive investigation of primary source material found in key government archives. A methodological model has been developed that examines state practice as a four-stage decision-making process that involves the diplomatic and legislative creation of international treaties, military application of treaty obligations in the form of training doctrine, and executive branch decisions to apply and adhere to the laws of war before and during belligerent conflict. This research seeks to contribute to the historical record of United States practice and to provide the basis for unique contemporary understandings of the laws of war.

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Part I

Introduction

The September 11, 2011 attacks and the United States government's legal policy during the subsequent 'war on terror', created one of the most contentious debates in modern American history and one that has resounded throughout much of the world. Arguably, not since the years immediately following World War II had the laws of war been the focus of so much commentary and debate. On one hand was the fervent outpouring from human rights groups advocating for the humane treatment of detainees and demanding that the U.S. strictly adhere to the laws of war. More surprising, however, were the legal memoranda, court briefs, and public position statements sent to the various branches of government from current and former military leaders and prisoners of war (POW) (see Brief of Certain Former Prisoners of War, 2004; McCain, 2005; Retired Military Leaders, 2006; and Shane, 2008). This reached a climax during the Congressional debate over the Military Commissions Act of 2006 when active members of the Judge Advocate General (JAG) publicly disagreed with Defense Department superiors and joined retired military officers in protesting the government's decision to not apply, in full, the 1949 Geneva Conventions. The arguments forwarded by these different groups shared a common theme: Refusal to follow the laws of war, especially as they relate to aggressive or illegal interrogation techniques and detention practices, will likewise endanger captured US servicemen and women in this and in future conflicts.

At the same time that human rights groups, military leaders and former POWs were advocating for the strict adherence to the laws of war, legal counsel representing the executive

branch were articulating arguments to justify the non-application of the laws of war to terrorist detainees in what became known collectively as 'the torture memos' (see Bybee, Jan. 22, 2002, p. 103 and Gonzales, Jan. 25, 2002, p. 121, reprinted in Greenberg & Dratel, 2005). One of the arguments implied by the government in these memos was that the laws of war do not apply to groups that fail to adhere to them in the first place. What may initially appear to be two separate arguments following disparate intellectual threads are, in fact, closely connected by a larger concept that has operated, at times openly and other times in an underlying manner, throughout the history of the laws of war. This concept is reciprocity, which has both positive and negative effects. At its most basic level, reciprocity is defined as "the practice of making an appropriate return for a benefit or harm received from another." (Oxford Dictionary, 1992) Reciprocity entails mutual action, or as Lenhoff writes: "the interrelation of action and counteraction." (1955, p. 627) In its negative form reciprocity implies returning harm for harm and is premised largely on the concept of retaliation. In its positive form reciprocity involves forbearance, cooperation and returned gain.

Histories of the laws of war (Best, 1994 and Roberts & Guelff, 2000) indicate that reciprocity has played an official and an unofficial role in both restraint and justification of violations. However, despite post 9/11 interest in the laws of war, research has yet to comprehensively examine the historical role of reciprocity from the perspective of state practice. This dissertation has two primary goals. The first is to systematically examine the role of reciprocity in the state practice of the United States. To accomplish this I have developed a model that considers the laws of war as occurring within a dynamic, four-stage decision-making

process. This model, I argue, allows for a systematic analysis of historical source material that can capture multiple perspectives and levels of state practice.

The second goal is to disseminate this research into a theoretical model that can aid scholars across disciplines. While examining the theoretical relationship between reciprocity and the laws of war, I have adopted an interdisciplinary approach that combines aspects from the academic fields of International Relations and International Law. A significant flaw in existing literature is that disciplinary-specific analysis has created narrow and, at times, misleading conclusions. I argue that an interdisciplinary approach leads to a deeper understanding of this dissertation's subject matter (reciprocity and the laws of war), scope (state practice of the United States) and methodology (historical archival research).

Organization of Dissertation

This dissertation is organized in three parts. In Part I, I provide an overview outlining the salient problems that have informed this dissertation. This is followed by a clarification of terms with specific attention paid to the conceptualization of reciprocity which will be incorporated in later analysis. The literature review section emphasizes empirical research on reciprocity and the laws of war and includes a summary of findings made by international lawyers on the subject. The methodology section consists of three parts: decision-making process model, primary source material and historical perspective/objectivity. I conclude with the theoretical orientation and assumptions employed in this dissertation.

Part II, *Theoretical Model and Research Findings*, discusses the themes found in the research findings and further defines negative and positive reciprocity. The research findings are applied to an inclusive theoretical model that facilitates further discussion. The English School of international relations provides the primary theoretical lenses through which to view the interaction between the laws of war and reciprocity. This provides the context for the research findings subsequently discussed in the case studies. Part II concludes by advancing a theoretical model of reciprocity that is subsequently applied to the primary source material comprising the four individual case studies.

Part III presents the four case studies organized by stage in the decision-making process. The first two case studies, *creation* and *implementation*, exist primarily, though not exclusively, in a condition of pre-conflict while the latter case studies, *application* and *adherence*, exist primarily in a condition of interstate belligerence. The separate cases reflect different types and levels of government involvement. For example, the first two case studies largely depict the work of diplomats, legal advisers and military administrators while the latter cases depict greater executive and departmental involvement in policy decision-making. As the case studies in this dissertation demonstrate, reciprocity is a varied, dynamic and ubiquitous feature of the laws of war. These findings support the argument that reciprocity considerations play an integral part, across multiple levels of government and military decision-making, to United States practice of the laws of war.

Problem

This dissertation has been informed by three salient and, at times, related problems. First, there exists an overreliance on strict legal analysis of the laws of war. Second, there is a tension in the literature between a cynical rejection of the laws of war on the one hand and unrealistic optimism at their codified success on the other. Finally, and related to the second, there exists a dichotomy in theoretical paradigms that either views the laws of war from the perspective of realist self-interest or inflates the laws of war to universal norms of cosmopolitanism.

Legal Analysis Emphasis

Writers who argue that reciprocity is an invalidated concept in relation to the laws of war often rely on a 'rules based' legal analysis of the completed and codified provisions found in multilateral treaties and conventions. This is also referred to as the 'conventional law' or 'positive law' perspective. When analysis is confined to a strict rule-based interpretation of the treaties that comprise the laws of war, there is a trend towards the elimination of reciprocity as a relevant concept. However, a problem inherent in legal-based analysis is that it often fails to systematically consider examples of state practice. Furthermore, strict legal analysis is often atemporal and fails to consider change over time. As a result, insufficient consideration is given to the historical context and the unique circumstances that are inherent in each conflict. The outcome is often a mechanical, sterile and potentially one-sided view of the laws of war. This dissertation, while including a legal analysis of reciprocity, advances a methodological model that situates the laws of war in a historical, decision-making context that permits multiple perspectives and sources of state practice.

Cynicism versus Optimism

There is a tension that exists in the literature between the cynical rejection of the laws of war as a failed project versus unrealistic optimism based on the codified success of the laws of war. Concerning the former, there exists a potential draw towards cynicism in writing about legal rules that are often blatantly violated in actual conflict settings. This position is reminiscent of Reinhold Niebuhr's warning that "realism runs the risk of spilling over into cynicism." (in Thompson, 1996, p. 154) Walzer clearly expressed this when he wrote: "War is so awful that it makes us cynical about the possibility of restraint, and then it is so much worse that it makes us indignant at the absence of restraint." (1977, p. 46)

On the other side there exists a substantial body of writing on the laws of war that presents an overly optimistic view. The second half of the 20th century witnessed the proliferation of multilateral treaties limiting the destructiveness of war and advancing human rights. The continued codification of the laws of war and the development of international human rights instruments is correctly viewed as a successful post-World War II attempt to alleviate human suffering. If conclusions are based solely or largely on the codified laws of war treaties, there is cause for optimism. Not surprising, overly optimistic writing on the subject of the laws of war often fails to consider state practice and focuses instead on strict legal analysis of the codified rules. As a result, writings on the laws of war are often more concerned with establishing a vision of how the laws of war are supposed to work (what ought to be) rather than describing how they actually work in practice (what is). Related is an underlying trend in laws of war writing towards advocacy. When state practice is considered it is often under this pretext.

This point is discussed in greater detail below when the empirical research of the International Committee of the Red Cross (ICRC) is examined in detail. In short, much of the literature suffers from cynicism or subjective optimism and advocacy.

Dichotomous Paradigms

Prominent in the literature is a dichotomous view that has been applied to international relations in general and, more specifically, to the laws of war and reciprocity. On one side is the 'power politics' realist view that places primacy on sovereignty, national security and traditional interpretations of the laws of war. From this perspective reciprocity is viewed as the "fundamental basis" of international law (Lenhoff, 1953, p. 465) and argues that without reciprocity, the laws of war lose relevance and risk becoming meaningless (Bialke, 2001, p. 43). This is compatible with the political philosophy that views international relations as occurring in a Hobbesian or Machiavellian state of self-interest and conflict.

On the other side is the idealistic/universalistic view which argues that reciprocity is no longer a valid concept applicable to the laws of war. Advocates of this view contend that legal and normative changes have occurred to the laws of war since World War II which have rendered reciprocity obsolete. This process, aptly called 'humanization' by Theodore Meron (2000), refers to a change in the international framework from state-centered law, which in the past relied on reciprocity, to individual- based rights that rely on universal notions of human rights. This view is most often associated with the cosmopolitan political philosophy that has been influenced by the writings of Emmanuel Kant.

This dissertation is informed by a third paradigm in the English School of international relations. Discussed in greater detail below and in Part II, The English School provides a middle ground, or via media, between realism and idealism in what is referred to as the international society approach. Influenced by the writings of Hugo Grotius, the international society approach argues that international relations (including belligerent conflict) occur within a larger framework consisting of a society of states that are bound by rules and customs. An important distinction is that the international society approach does not exist exclusive of realism and universalism. On the contrary, the international society approach, and the English School's understandings of international relations in general, takes into consideration the interaction of realism and universalism. The result is a theoretical tripartite model comprised of *international system* (realist/Hobbesian/Machiavellian), *international society* (Grotian) and *world society* (universalist/Kantian). As the findings of this dissertation show, both reciprocity and the laws of war exist and interact within all three perspectives.

Clarification of Terms

Throughout this dissertation a number of terms have been incorporated. In order to avoid confusion, the terms *reciprocity*, *laws of war* and *state practice* are clarified here. The primary purpose of the following section is to provide a more refined conceptualization of key terms that will help to identify the research findings and theoretical models subsequently discussed.

Reciprocity

In the literature on the laws of war there is disagreement regarding whether reciprocity is a strictly legal concept or a more expansive political and social concept. I assume the latter position and argue that reciprocity is at once a legal, political and social concept with varying degrees of relevance and meaning when applied to the laws of war. I argue that a strictly legal interpretation of reciprocity and the laws of war has led to narrow and misleading interpretations of this important subject. Thus, reciprocity is viewed as a broad and, at times, ambiguous concept that has several meanings not limited to strict legal interpretation and classification.

Reciprocity has been characterized as a "meta-rule" of international law (Parisi & Ghei, 2003, p. 118) and an autonomous concept attached to every legal norm of international law. (Zoller, 1984) According to Schwarzenberger, it is on the historical basis of reciprocity that the laws of both war and neutrality have developed. (1962, p. 42) Parker (1994) dates the modern influence of reciprocity to early modern Europe (1550 - 1700). Similarly, Rosas (1976) cites the stabilization and centralization of States at the conclusion of the 30 Year War as a catalyst for its growth. From this perspective, reciprocity is seen as a stabilizing feature of the Westphalian system which emphasizes state sovereignty.

As a moral concept, reciprocity dates back much further and can be seen in the retributive nature of *lex talionis* on one side and the deontological value of 'The Golden Rule' on the other. In his seminal work on cross-cultural anthropology, Malinowski (1922) argues that reciprocity is an instrumental element in both gift exchange and unsociable behavior in the development of all societies, primitive through modern. Anthropologist Douglas Fry contends that reciprocity

constitutes “a central feature” and a “foundation stone” of morality. (2008, p. 399) Fry concludes that across cultures and religions, “reciprocity is a key element of human moral thinking. Humans repay good deeds and revenge bad ones.” (*ibid*, p. 416) The full range of reciprocity’s negative and positive effects can be seen in its Latin root, *reciprocus*, which means ‘moving backward and forward’. Narotzky & Paz (2002) refer to this as the “beneficent and maleficent” tension that exists within reciprocity (p. 282), or what Simma (1984) identifies as the ‘Janus-faced nature’ of reciprocity. Provost (2002), addressing the Janus-faced positive/negative dynamic of reciprocity upon the laws of war states: “Its positive side inspires moderation and compliance while its negative side limits application and allows for the reverberation of violations.” (p. 236-237)

Robert Keohane (1986) provides a useful model for understanding the different types and dynamics of reciprocity. Though created with international trade policy in mind, Keohane’s model of reciprocity has been effectively applied to the laws of war and human rights (Provost, 2002) and to post 9/11 United States counterterrorism policy (Osiel, 2009). Keohane distinguishes between two types of reciprocity: specific and diffuse. (Provost, 2002, refers to these categories, respectively, as ‘immediate’ and ‘systemic’ reciprocity). *Specific reciprocity* focuses on the equivalent and conditional exchange between partners in response to previous actions. In specific reciprocity, well-established boundaries of rights and duties are delineated in a bilateral ‘quid pro quo’ relationship. The strategy often incorporated in specific reciprocity is tit-for-tat (game theory), where retaliation or cooperation is dependent upon the immediate prior behavior of the parties involved.

In *diffuse reciprocity*, less emphasis is placed upon equivalent exchange between parties and greater emphasis is placed upon long-term goals of cooperative group gains. In diffuse reciprocity, an accepted standard of behavior develops through previous, repeated behavior. For diffuse reciprocity to be maintained there must be a strong normative sense of obligation. (Keohane, 1986, pg. 20) If norms of obligation are absent then the party is exposed to exploitation. At this point, diffuse reciprocity can collapse into specific reciprocity and a tit-for-tat relationship may ensue. Diffuse reciprocity rests on more fragile footing than does specific reciprocity.

Laws of War

Three terms are often used to describe the constraints and acceptable practices exhibited during times of war: law (s) of war, law (s) of armed conflict, and international humanitarian law. Though a number of well-respected and influential authors in the field, including Geoffrey Best and Frits Kalshoven, use the terms interchangeably, I use the term 'laws of war' throughout this dissertation to refer to the body of rules and customs that regulate behavior during periods of armed conflict. My primary reason for preferring the term 'laws of war' is that it is more consistent with this dissertation's theoretical framework that emphasizes multiple perspectives of international relations. In turn, the term 'international humanitarian law' is viewed, in this instance, as being linked to a normative advancement in line with the 'humanization' view previously discussed. The laws of war, on the other hand, are viewed throughout this dissertation as a neutral classification comprised of three categories: rules concerning weapons, rules concerning warfare, which includes rules pertaining to permissible tactics and targeting, and

humanitarian rules relating to the victims of conflict. (Delupis, 2000, p. 159) Historically, the laws of war have been divided into two categories, *jus in bello* which is concerned with defining the acceptable conduct in war and *jus ad bellum* which is concerned with the acceptable justifications that lead to war. The foremost concern of this dissertation lies in the *jus in bello* category.

The two primary sources of the laws of war are conventional law, also referred to as positive law, and customary law. Conventional laws of war consist of codified rules found in multinational treaties. Historically, these treaties have been further divided into two categories which have been defined by city of treaty conference: Hague law, which is concerned primarily with the behavior of belligerents in war including methods and means of warfare, and Geneva law which is concerned primarily with treatment of individuals in times of war. Conceptually, this separation is regarded as somewhat artificial because there has always been a certain level of overlap between the two, specifically as it relates to prisoners of war. Furthermore, the 1977 Additional Protocols to the 1949 Geneva Conventions witnessed the legal merger of the "previously bifurcated Hague and Geneva tradition." (Watts, 2009, p. 426) As opposed to Hague and Geneva law, customary law is non-codified and is defined by the United States government as the "general and consistent practice of states which is followed by them from a sense of legal obligation". (Restatement (Third) of Foreign Relations Law of the United States (1987) § 102 (2)) As I discuss in further detail below, I argue that both conventional and customary law are anchored to a larger decision-making processes that include diplomacy, military implementation, legislative decisions and executive decisions.

State Practice

In order to realize a comprehensive analysis of reciprocity, an expansive view, or what Byers (1999) refers to as the 'inclusive approach', of state practice has been adopted to this dissertations understanding of the laws of war. Hoof (1983) views state practice in the 'wider sense' (*lato sensu*) as the designation of a state's attitude, position or opinion regarding what constitutes international law. Akehurst argues that state practice "covers any act or statement by a State from which views can be inferred about international law". (1974-5, p. 135) Borrowing from the work of the International Committee of the Red Cross (ICRC), which will be discussed in further detail in the Literature Review section, and Ian Brownlie's *Principles of Public International Law* (1990), sources of state practice of the laws of war have been operationalized for research purposes (see Appendix A) and include: policy statements, diplomatic correspondence, press releases, the opinions of official legal advisers, military manuals, executive decisions, comments of treaty drafts (*travaux préparatoires*), Congressional testimony, and use, or threatened use, of certain weapons. These sources of state practice provide the substance for the decision-making process model of the laws of war that will be discussed in the Methodology section.

Literature Review

One challenge encountered while conducting research on reciprocity is that authors often fail to define reciprocity when writing on the subject. As discussed, reciprocity has both positive and negative connotations and meanings and these different views often conflict with and contradict one another. The following is a review of the legal findings and empirical research that have

been conducted on reciprocity and the laws of war which also includes the research of academics and jurists who have contextualized reciprocity in their research.

As this literature review shows, despite the political, public and academic interest on the subject, little systematic research has been conducted regarding reciprocity and the laws of war. As a result, four noticeable gaps in the literature emerge. First, much of the literature is geared toward humanitarian advocacy. This, in turn, has led to subjective and, at times, biased analyses. Second, the literature fails to comprehensively view reciprocity through historical cases of state practice. Instead, much of the research is atemporal and has been based on strict legal positivist analysis that emphasizes codified treaty rules. This can lead to misleading views of the laws of war in practice. Third, the few empirical studies that have been conducted on the state practice of reciprocity and the laws of war suffer from methodological problems including over-breadth in study scope and problems related to selection and verifiability of primary source material. The result is an absence of focused and systematic country-specific studies. Finally, to date reciprocity has not been adequately framed within a larger theoretical framework that takes into account varying perspectives of international relations.

The laws of war are unique in comparison to other fields of international law because they are created to potentially exist in a state of physical and material violence (belligerence), whereas other specializations of international law (e.g. environmental law and international economic law) overwhelmingly fall within the realm of peaceful (i.e. non-belligerent) state interaction. This situation is reminiscent of Sir Hersch Lauterpacht's often-cited adage that "if

international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law." (1952, p. 382)

With this in mind, a portion of the literature on the laws of war is either implicitly or explicitly geared towards humanitarian advocacy. This is not surprising when one considers the subject matter and the populations that have been, and continue to be, directly impacted by compliance or noncompliance with the laws of war. Arguably, no other branch of international law has a greater potential impact on humanity. In contrast to this, there is also a trend in the literature towards defeatism in response to the persistent failure of the laws of war to curtail violations. Geoffrey Best summarizes this situation when he refers to the 'contemporary scene' of the laws of war as being either unreasonably optimistic or unnecessarily pessimistic. (1994, p. 18) Taken together, there exists tension in the literature between advocacy and pessimism that often inhibits objective analysis. For this reason, position and ideological statements, of which there are many, are not included for analysis, rather, the following will focus on empirical research literature concerning the subject of reciprocity and the laws of war.

The literature review has two main sections that have been further divided into more specific subsections. In the first section I discuss the work of international lawyers on reciprocity and the laws of war and present a legal summary of reciprocity. I argue that a discipline-specific analysis produces a one-sided interpretation. In the second section I review the more empirical literature on reciprocity and the laws of war paying particular attention to methodological limitations and lessons that have been incorporated into the present study.

International Law Literature

A significant portion of the literature on reciprocity and the laws of war fall into the category of conventional law treaty rule analysis. A number of writers on the subject (see for example Kalshoven, 2007, Provost, 2002, and Watts, 2009) are international lawyers whose training and expertise naturally lead them to focus on rule-based analysis. Understandably, legal textual analysis of the laws of war documents is an important step towards obtaining a comprehensive understanding of reciprocity. However, problems arise when the study of reciprocity is limited to legal texts and fails to consider examples of state practice. In these cases generalizations can be premature and potentially misleading. Conversely, theoretical models based on this type of analysis are limited.

One benefit of the conventional law view is that it is relatively parsimonious and clear. From this perspective, international law does not become confused with other 'non-legal' disciplines or phenomena because the focus of analysis lies primarily with the rules found in treaties (Müllerson, 2000, p. 24). However, this disciplinary-specific examination, which rarely includes an analysis of state practice, runs the risk of presenting an overly optimistic outlook of the laws of war. This view is well articulated by Roberts & Guelff (2000): "any work concerning the laws of war which is limited to international agreements risks distorting not only the form but also the substance of the law." (p. 7) The result is a sterile view of the laws of war that fails to consider the dynamic interaction of state practice including the political and military decision-making processes which are involved.

Rene Provost (2002) goes a step further than most international lawyers by including military training manuals (see e.g. p. 159, 187, 192) and a theoretical model of reciprocity. Though his work relies primarily on legal analyses of reciprocity, Provost acknowledges that reciprocity "is at once a social, political and legal phenomenon, the presence of which is so common that it is rarely the object of specific commentary in legal literature." (2002, p. 125-26) Provost's work focuses on the theoretical and normative dynamics between international human rights and humanitarian law and argues that immediate (Keohane's *specific*) reciprocity plays an important role in the laws of war, while systemic (Keohane's *diffuse*) reciprocity corresponds more closely with international human rights law. Provost's work does not attempt to systematically analyze reciprocity historically or to frame reciprocity within the larger framework of international relations. However, Provost's work is particularly important within the context of this dissertation because it demonstrates the successful application of a theoretical model of reciprocity to the laws of war.

Legal Analysis of Reciprocity

When state practice is excluded from analysis, there is a noticeable trend towards the elimination of reciprocity from the laws of war. From the conventional legal analysis of the laws of war it appears that reciprocity has, to a large extent, lost relevance. The following analysis is a legal overview of reciprocity from the perspective of codified laws of war treaties. Included is the legal maxim, *si omnes*, and the legal defense to charges of laws of war violations, *tu quoque*. Both have a direct bearing on how reciprocity corresponds with the laws of war and both point towards the legal removal of reciprocity from the laws of war.

The *si omnes* clause (also called the 'general participation clause') was common in early laws of war treaties, including the Hague Conventions of 1899 and 1907 and the Geneva Conventions of 1864 and 1906. According to the *si omnes* clause, laws of war treaties are "only binding between signatories, or in conflicts where all combatant States were signatories." (Costi, 2004, p. 220) The clause fell out of use in post World War I treaties and was unequivocally reversed in Common Article 2 of the Geneva Conventions of 1949 that states: "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." Additional Protocol I to the 1949 Geneva Convention affirms this rejection in Article 96 (2): "When one of the Parties to the conflict is not bound by this Protocol, the parties of the Protocol shall remain bound by it in their mutual relations." According to Meron (2008), the rejection of the *si omnes* clause shows that "reciprocity has lost much of its force as a driver of the law." (p. 13)

The concept of negative reciprocity is directly linked to the legal maxim *inadimplenti non est adimplendum* (*inadimplenti* rule) which Gomma defines as "if a party substantially violates a treaty, the other party may invoke the violation to put to an end its application." (1996, p. 117, note 122) The Geneva Conventions of 1949 explicitly rejects the *inadimplenti* rule in Common Article 1: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances." According to Best (1994), the closing three words mark the "legal death" of reciprocity. (p. 146) However, as it relates to this dissertation's understanding of reciprocity, the *inadimplenti* rule comports with the 'condition of reciprocity'

that is still found in government reservations to weapons-related treaties such as the 1925 Geneva Protocol.

The 1969 Vienna Convention on the Law of Treaties is important because it depicts both the codification of the *inadimplenti* rule to multilateral treaties and its rejection in the case of humanitarian treaties. Under the heading, "Termination or suspension of the operation of a treaty as a consequence of its breach" Article 60 (2) provides that "a material breach of a multilateral treaty by one of the parties may enable other parties to suspend the treaty in whole or in part, or to terminate it." However, paragraph 5 of Article 60 sets an important limitation by declaring that this provision does not apply 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." This restriction on reciprocity in general, and particularly on negative reciprocity in the form of reprisals, is an important legal qualification that impacts the extent for which countermeasures can be legally initiated for violations of the 1949 Geneva Conventions. Though the U.S. has not ratified the Vienna Convention (signed April 24, 1970) the Department of State has declared that many of its provisions constitute customary international law, and are thus binding (see http://www.state.gov/s/l/treaty/faqs/70139.htm for official State Department policy statement). In subsequent laws of war conferences and policy statements, which will be discussed in Case Study I, the U.S. position appears to confirm that it considers the Geneva Conventions of 1949 as falling within the purview of customary international law and Article 60 (5) of the Vienna Convention.

The rejection, in large part, of reprisals as a legally sanctioned means of enforcement is an important example of the legal removal of negative reciprocity from the laws of war. The legal prohibition of reprisals began with the1929 Geneva Convention relative to the Treatment of Prisoners of War that banned reprisals on prisoners (Art. 2). The 1949 Geneva Conventions contains provisions banning reprisals against the sick, wounded and shipwrecked (Convention II, Art. 47), against prisoners of war (Convention III, Art. 13) and "protected persons and their property" (Convention IV, Art. 33). The 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict prohibits reprisals against cultural property (Art. 4). The first Additional Protocol (1977) extensively added to the ban on reprisals against: civilians or the civilian population (Art. 51), civilian objects (Art. 52), cultural property, including works of art or places of worship (Art. 53), objects indispensible for the survival of the civilian population (Art 54), natural environment (Art. 55) and against dams, dikes or nuclear power stations (Art. 56). The issue of reprisals is of particular significance in this dissertation and is discussed in greater length because the United States has largely resisted efforts to prohibit reprisals in post 1949 Geneva Convention laws of war treaties.

Tu quoque is considered a specific example of the incorporation of the concept of negative reciprocity. Latin for 'you, too' *tu quoque* is considered both an individual defense against charges and a general exoneration for a state violating the laws of war. The 1971 Conference of Government Experts (Vol. 2) equates reciprocity specifically with *tu quoque*, which it defines as "the right for a belligerent to adopt, in a particular case, an attitude identical to that of the other belligerent". (p. 53) Kalshoven (1971a, p. 364) treats *tu quoque* as a synonym

for reciprocity. The Nuremberg Military Tribunal defined *tu quoque* as meaning: "A state cannot blame another state for having violated the law by an action which it commits itself." (Vol. XI, p. 411)

The *tu quoque* argument is most commonly associated with a defense against international crimes, prosecution and punishment. According to Yee (2004), "the argument [*tu quoque*] is that if one side in a conflict has committed certain crimes, it has no authority to prosecute or punish nations of the other side for the same or closely similar crimes." (p. 87) Yee further argues that *tu quoque* as a legal defense rests less on reciprocity than it does on a "clean hands" argument of "whether the prosecuting authority is lawfully or morally entitled to pursue the prosecution and to punish the defendant." (p. 100) As seen in the Dönitz case at Nuremberg, *tu quoque* was successfully used as a rationale to mitigate punishment and responsibility but not to establish a finding of guilt. Kalshoven (2009) suggests that the silence on the part of the Prosecutors at Nuremberg to submit charges of bombardment of civilian populations against Nazi Germany rested on the rationale that "since the Allied air forces had behaved no better, non-prosecution of these crimes was to be preferred over the defendants raising the argument of *tu quoque* at trial." (p. 440) The International Criminal Tribunal for the former Yugoslavia (ICTY), in the 14 January 2000 judgment in the case of Kupreskic et al. (IT-95-16-T) concluded that *tu quouque* is a principle that is "fallacious and inapplicable" to the "absolute character of obligations imposed by fundamental rules of international humanitarian law."

As the preceding shows, reciprocity in its negative context has largely been eliminated legally from the laws of war. A significant exception is the laws of war that pertain to weapons,

such as the Geneva Protocol of 1925 that retains legal reciprocity in the form of reservations that allow for retaliatory countermeasures in the case of a belligerent's first use, effectively releasing treaty obligation. The impact of the legal limitation of reciprocity to the laws of war in *practice* is well summarized by Theodor Meron who acknowledges, after a lengthy analysis on the legal rejection of reciprocity, that, "In reality, of course, reciprocity and reprisals…remain more significant than acknowledged by the text treaties." (2000, p. 251) The 'reality' mentioned in passing by Meron is part of a significant gap in the literature that this dissertation seeks to address.

Empirical Research on State Practice

Along with *opinio juris* (a sense of legal obligation), state practice is considered one of two components of customary international law. According to Kwakwa (1992), an analysis of customary law is important because the laws of war have an extensive unwritten (or *lex non scripta*) character. Though state practice is considered to be the 'raw material' of customary law (Villiger, 1985, p. 4), the scope of this dissertation includes the concentrated and systematic study of a single state, the United States, and does not advance customary arguments per se. However, as an arguably specially affected State, the United States has a greater influence on customary international law than many countries do thus there is reason to believe that by focusing on the state practices of the U.S., this dissertation will contribute to academic debates concerning customary international law.

Anyone attempting to study customary international law is immediately faced with the challenge of calculating consensus among all, or a majority, of the world's nations. Not

surprisingly, the two studies that have attempted to address reciprocity and state practice have problems related to applied methodology and scope. The purpose of the following analysis is to focus on the methodology employed and related critiques. It will highlight the current state of knowledge on the subject and point the way towards a more systematic path of analysis that has been incorporated in the present work.

The ICRC Study

In 2005 The ICRC published the report, *Customary International Humanitarian Law* (Henckaerts & Doswalk-Beck, 2005, henceforth The ICRC Study). At over 5,000 pages, The ICRC Study is unprecedented in both size and scope and is the largest study to date on customary international law and the laws of war. The backbone of this work, Volume 1, contains 161 proposed rules that cover the full range of the laws of war (Geneva and Hague). Volume II provides the background material for each rule.

The ICRC Study's Introduction describes the variables employed in assessing state practice. It is generally accepted that this methodology is sound (see Bellinger & Haynes, 2006; Dinstein, 2006; Scobbie, 2007) and it provides much of the operationalization of state practice that has been incorporated in this dissertation (see Appendix A). Of further significance are the multiple critiques of The ICRC Study, in particular, the claims that it ultimately failed to follow and apply the recommended assessment of state practice in a rigorous, systematic and transparent manner. Overall critique of The ICRC is summarized as follows:

- Negative practice is given inadequate or no weight (Parks, 2005; Bellinger & Haynes, 2006)

- Lack of a historical context and frame of reference (Parks, 2005)

- Non-transparency in the selection of state practice examples (Scoobie, 2007)

- 'Specially affected States' that have greater experience in conflict are given equal weight with States that have "little history of participation in armed conflict" (Bellinger & Haynes, 2006)

- Failure to address the United States as a persistent objector to Additional Protocol I and as a 'specially affected' State in regard to weapons treaties (respectively, Scoobie, 2007, p. 35, Dinstein, 2006, p. 13)

- Overall lack of focus in the selection of State practice (Dinstein, 2006, p. 4)

Arguably, the sharpest criticism of The ICRC Study concerns the lack of impartiality employed in selecting relevant state practices. According to Parks (2005) the ICRC selectively chose examples of state practice that advocated their position while ignoring contradictory examples. As summarized by Parks (2005): "One can only wonder if the Customary Law Study is a dispassionate legal analysis or a brief for past and future ICRC agenda items." (p. 211) Related critiques include Aldrich (2005) who accuses the ICRC of "deliberate deception" in order to "avoid conditions they find troubling" (p. 512) and Osiel (2009) who considers the ICRC's role in interpreting the laws of war as bordering on 'self-aggrandizement.'(p. 469, note 151)

Regarding reciprocity, The ICRC Study concludes in Rule 140: "The obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity." (p. 498) To substantiate this conclusion in relation to the United States, The ICRC cites two military manuals; a 1976 U.S. Air Force pamphlet and a 1995 U.S. Naval handbook (ICRC

Study, p. 3190). In particular, both manuals refer to the1949 Geneva Convention on The Protection of War Victims as being non-reciprocal in that obligations remain in effect regardless of belligerent behavior and violations. No other examples of U.S. state practice are provided. As the research in this dissertation shows, ICRC Rule 140 is not supported when held to more rigorous analysis of United States that considers more numerous and varied examples of state practice.

From a methodological perspective, the unrealistically large scope of the ICRC Study might contribute to the incomplete selection of available primary source material. By limiting the scope of analysis to the state practice of the United States, this project, unlike The ICRC Study, has remained a manageable endeavor. The influence of The ICRC Study upon this dissertation is fittingly summarized by George H. Aldrich who writes: "I believe it is a very important study, but I think its importance rests on its being used as a basis for further work and as a spur to such works, rather than on its conclusions." (2005, p. 504) In summary, The ICRC Study has influenced this work in two ways. First, I have utilized much of the ICRC operationalization of state practice, including a delineation of the source material that constitutes state practice. Second, while planning and implementing this dissertation I have taken into consideration the various critiques of The ICRC Study.

Morrow and Battlefield Reciprocity

The research of James Morrow (2001, 2002 & 2004) addresses the patterns of compliance and retaliation of the laws of war with particular attention paid to the role of 'individual level' or battlefield level reciprocity among soldiers, as opposed to a state level policy approach. At this

level, battlefield acts by individual units can potentially lead to the breakdown of specific laws of war obligations. This view is comparable with the tit-for-tat view of negative reciprocity discussed previously. To analyze battlefield level reciprocity, Morrow constructed a database consisting of every 20th century interstate conflict from the Boxer Rebellion (1898 – 1901) to the Gulf War of 1991 (dataset and codebook can be found at: http://sitemaker.umich.edu/lawsofwar/home).

Raw data consisted of recorded violations across a range of laws of war topic areas that were compiled using secondary sources including biographies and historical newspaper accounts (2004).

According to Morrow, joint ratification of a law of war treaty signals an expectation to comply; this is compatible with the findings of Chayes & Chayes (1993) on the subject of treaty compliance. However, along with this strengthening of expectations comes the increasing likelihood of retaliatory, negative, tit-for-tat reciprocity in the case of treaty violation. Osiel (2009), summarizing the work of Morrow, states: "Joint ratification of a humanitarian treaty…strengthens not only adherence to its norms but also reciprocal response to their violation." (p. 277-278)

Morrow's study is important because it illustrates methodological problems encountered when analyzing reciprocity and the laws of war. By relying on secondary data, Morrow operates under the tenuous assumption that the authors have sought independent verification when, in practice, individual level violations of the laws of war are often difficult to verify. In general, there are inherent problems in conducting empirical studies on the subject of battlefield behavior. Missing or biased data can result when a government conceals violations, promotes embellished

or exaggerated rumors of violations or, conversely, downplays or denies violations. These problems are often magnified in newspaper accounts if a government has strategic reasons to embellish or deny reports of violations. All of these serve to potentially corrupt data, thus raising questions surrounding the reliability and verifiability of source material.

A related critique of Morrow's work is its scope. On one hand, focusing on battlefield level behavior is overly narrow because it fails to consider government decision-making relating to policy. Furthermore, for some conflicts, such as World War II, there exist voluminous bodies of research pertaining to battlefield behavior whereas with other conflicts, such as the Boxer Rebellion or the 1920 Lithuanian-Polish war there is sparse and often unreliable evidence. On the other hand, its focus upon battlefield behavior level of reciprocity and its failure to consider larger policy questions leads to an overly narrow scope. Finally, Morrow's analysis of battlefield reciprocity fails to place reciprocity into a larger theoretical model of understanding.

In summary, much of the literature on reciprocity and the laws of war suffer from one or more of the following shortcomings:

- Overemphasizing strict legal analysis without consideration of state practice
- Lack of historical cases upon which to base conclusions
- Advocacy bias
- Unrealistically broad research scope that sacrifices concentrated, country-specific studies or favors declarations concerning customary international law by focusing on every country (ICRC Study) or every conflict (Morrow).

- Selective or incomplete use of primary source material (ICRC Study) or over-reliance on secondary sources (Morrow) which raises validity and confirmability concerns

Methodology

The critiques outlined in the Literature Review section have influenced this dissertation's methodology in three ways. First, by creating an inclusive model that views the laws of war as a decision-making process I have been able to capture a more dynamic picture of state practice than has been previously found in much of the literature. Second, by having a clear delineation of state practice, I have been able to collect extensive original source material in multiple archives and through government declassification programs. Finally, since the scope of this dissertation is historical, I have addressed the related issues of objectivity and historical perspective. As discussed previously, this is particularly important within a body of literature that often contains elements of subjective advocacy. The following describes these methodological considerations in greater detail.

Laws of War as Decision-Making Process

The International Law as Process (ILP) approach to international law has influenced the decision-making process model incorporated in this dissertation. This model has, in turn, been applied to the primary source material that has been collected and is analyzed in the four case studies that comprise Part III. Derived primarily from the work of Rosalyn Higgins (1968, 1976, 1991, and 1994), who had been influenced by the policy-oriented approach developed by Myers McDougal & Harold Lasswell at Yale University (also referred to as the New Haven School of

International Law), ILP rejects the view that international law consists solely of neutral 'rules' that exist to be "impartially applied". (1994, p. 2) According to the 'rule' based view of international law, the law exists and is applied regardless of "context or circumstances" and is thus distanced from policy and political considerations (Higgins, 1991, p. 4-5). Higgins refers to this technique as being mechanistic in that the role of the international lawyer (or scholar) is simply to identify the relevant rule and to apply it. Higgins' position is consistent with my critique that much of the literature on the laws of war has relied too heavily on a strict legal analysis of codified treaty rules.

In contrast to rule application, Higgins views international law as occurring within a more expansive decision-making process. According to this view traditional 'extralegal' considerations, including policy considerations, play an important part in the decision-making process. (Higgins, 1976, p. 85) From a methodological perspective, the researcher who is analyzing international law from the ILP perspective is exposed to a broader scope of phenomena including state practice and the pronouncements of authorized decision-makers. (Higgins, 1994, p. 10) A researcher subscribing to the 'rule based' view of international law will be primarily interested in the completed treaty as source material and will have little, if any, interest in state practice considerations. In contrast, research influenced by the ILP approach will include a greater scope of potential primary research sources.

Applying the ILP approach to this dissertation, I view the laws of war as existing within a larger framework and context than can be found in the codified treaties. This expansive framework has led to the creation of a decision-making model of the laws of war that is

comprised of four stages: creation, implementation, application and adherence. Throughout the four stages there exists an authoritative decision-making function which is exercised by diplomats and practitioners who have been authorized by the executive branch to create the laws of war, to legislators who have been tasked with debating and ratifying treaties, to the different military branches who are required to implement the completed treaties (often in the form of manuals, codes of conduct and training films). The decision-making process also involves deciding when to apply the laws of war to a particular conflict and whether to remain in adherence in the face of threatened, perceived, or actual violations. At every stage there are decision-making considerations. The completed treaties, viewed here as the 'product' of the laws of war, are only one component of a much larger process in which the laws of war operate.

The *creation* of the laws of war includes the diplomatic conference and 'conferences of experts' in addition to the subsequent ratification process that is required to create and formalize the codified laws of war. The second stage, *implementation*, involves the law of war treaty being applied as military doctrine through the incorporation of training material. In the *application* stage, a conflict is occurring, or is about to occur, and a political or military decision is made regarding whether or not to apply the laws of war to the conflict. The final stage, *adherence*, is concerned with the reaction to violations (threatened, actual or perceived) or with other instances where an executive or military decision is made regarding whether or not to adhere to the laws of war during conflict (see Table 1 for summary). The primary source material that constitutes each stage consists of the examples of state practice found in Appendix A, Operationalization of State Practice. By dividing the laws of war into a four stage decision-making process I have been able

to facilitate a detailed and systematic examination of reciprocity from the perspective of state practice. In conducting this analysis the relevant question to be answered is: In what capacity and in what context does reciprocity enter into the four stages of the decision-making process?

The four stages of the decision-making process do not exist completely independent of one another. For example, there is overlap conceptually between implementation and application. Dissemination of the laws of war as military doctrine is often a legal requirement found in the completed treaties. Therefore, the implementation of the laws of war through the process of military training is evidence of the successful application of the laws of war. However, in order to retain a clear research design and organization of primary source material, implementation is considered separate from the application of the laws of war during conflict. The scope of source material in the implementation case study primarily consists of official military publications (including training manuals, films and regulations). This material specifically relates to the promulgation of the laws of war as military doctrine. The application stage, on the other hand, utilizes source material from government agencies including the State Department, Department of Defense, Joint Chiefs of Staff and the National Security Council.

Critique of ILP

Richard Falk (1995), while acknowledging the strength of the ILP approach as a "guide of thought" for international law, warns that it is often incorporated in a nonobjective manner for policy advocacy and the pursuing of normative goals. This is an important critique to consider in light of the humanitarian nature of this dissertation's subject matter. According to Falk, the problem with ILP is that it is largely premised on a teleological assumption based on the

"Enlightenment confidence that science produces over time a stream of advances in knowledge, and the further conviction that if knowledge is properly put to the task of the realization of values, the results will lead inevitably to human betterment." (ibid, p. 2002) This view is reminiscent of Herbert Butterfield's critique of "Whig history" which presents the historical interpretation of the past as the inevitable progression towards greater enlightenment. Falk's primary point of contention is that under ILP, decision-making elites operate under the assumption that they are promoting "human dignity" while "ignoring the distorting effects" of exploitation and privilege. (ibid, p. 2006-2007) The result is advocacy of an Enlightenment type of universal reason and an absence of critical perspective.

The influence of the ILP approach on this dissertation rests primarily on its strength of providing a general orientation towards the law that diverges from a strict positive 'rules based' treatment. Thus, the ILP impact has affected overall research design, without sharing the teleological assumptions that are discussed in Falk's critique. To summarize, a part of the literature on reciprocity and the laws of war is geared specifically towards policy advocacy. On the other hand, the few empirical studies that have addressed the subject suffer from methodological shortcomings. By focusing on historical examples of state practice, this dissertation seeks to provide an analysis of reciprocity and the laws of war that does not advocate an agenda or cause, and is informed by Falk's valid critique.

Source Material

The United States is a particularly good subject for the decision-making process model because of the availability of primary source material in the form of open archives and government

declassification policy. The original source material utilized in this dissertation has been collected through the combined incorporation of archives (both government and academic) and document declassification of government documents through the use of the Freedom of Information Act (FOIA).

Since there is an abundance of source material, document location and classification has been critical in keeping research manageable. The challenge has been to locate and then 'filter' through the voluminous material available. The National Archives and Records Administration (NARA) is the primary archive for the United States and has provided the greatest quantity of primary source material, including a majority of the State Department and Department of Defense documents utilized in this dissertation. At the most general level, the finding aid for NARA (and the presidential libraries that NARA manages) is the Archival Research Catalog (ARC). However, NARA estimates that only approximately 50% of its holdings are searchable under ARC, thus, there is substantial lacuna in the finding aid. This has necessitated working closely with archivists who manage first-hand the individual archival holdings.

Individual document location has been made possible through the use of FOIA. The FOIA process involves referencing a specific report or memorandum that is cited in another document or news report and submitting a legal request that adheres to Title 5 of U.S. Code 552 (FOIA). This has the effect of compulsory document location and necessitates a security classification decision by an archivist. If security classification is removed then the completed document is released to the researcher. If part of the document is deemed classified then a redacted version is released. On the rare occasion that the entire document is deemed classified,

or is so heavily redacted that content analysis is impossible, a declassification request can be filled through FOIA or a separate interagency process called Mandatory Declassification Review (MDR). Throughout the three-year process of primary source collection I have submitted approximately one hundred FOIA requests to NARA College Park, The Department of State, The Department of Defense and the Ronald Reagan Presidential Library. These efforts resulted in the location and declassification of a number of important documents pertaining to U.S. government policy concerning the laws of war.

For executive level policy reviews, a combination of presidential archives and the National Security Archive (NSA) at George Washington University were utilized. The NSA is the largest non-government research institute in the United States dedicated to releasing classified material relating to national security. As of 2008 the NSA had applied for approximately 35,000 FOIA requests and compiled over 5 million pages of documents. (Carlson, 2008) The NSA publishes many of these documents in text-searchable form through the subscription service (ProQuest) Digital National Security Archive (DNSA). The DNSA and NSA archives in Washington, D.C. have been valuable sources for cabinet meeting minutes, National Security Council policy statements and Joint Chiefs of Staff papers. I have utilized Presidential libraries (Johnson, Ford, Carter and Reagan) to obtain national security information that was unavailable from DNSA. Other archives that have proven invaluable in collecting primary source material include the US Army Military History Institute (USMHI), in Carlisle, PA, the Library of Congress (Washington, D.C.) and the United States Naval Academy (Annapolis, MD). A list of the specific archives that have been utilized and their content can be found in Table 2.

Historical Method and Objectivity

Throughout this dissertation I utilize the historical method, understood here as "the discovery of evidence and a critical examination of past records" to examine reciprocity and the laws of war. (McDowell, 2002, p. 77) The scope of this study's analysis is the state practice of the United States in post-World War II 20th century conflict. The historical method lends itself well to the United States because the U.S. has had much relevant experience with the laws of war throughout the 20th century. This can be seen in the number of conflicts that the United States has been in and its extensive participation in the creation of the laws of war. As summarized by McDowell, the quality of historical research often depends upon the availability and careful use of source material. (ibid, p. 54) The primary source material utilized in this dissertation consists largely of government documents and materials that were compiled as a matter of policy and created at the time of the specific events under consideration. Furthermore, as previously discussed, the extensive holdings and availability of U.S. government documents in archives has helped to facilitate a study of this scope.

Subjectivity and Bias

Throughout evidence collection and writing, I have remained cognizant of the dual issues of bias and subjectivity. On the subject of bias, Shafer (1974) comments: "The historian must remember that he is looking at the evidence from the prism of his own culture and time." (p. 147) Furthermore, when conducting historical research efforts, one should be made to recognize and identify one's own bias and to place that bias into perspective. (McDowell, 2002, p. 79) A related issue is confirmation bias: when the researcher notices only the information that confirms

his or her preconceptions while ignoring evidence that fails to match these preconceptions (Gant & Wagstaff, 2009, p. 7). This form of bias often involves predetermining research results and drawing conclusions based on a limited and selective collection of primary source material. To address bias, I have maintained high professional standards in order to conduct accurate and balanced research and have made all attempts to avoid prejudice in selecting and reporting research results. Alternatives to reciprocity that have been found in the source material are discussed at length. Furthermore, I have made attempts to not overstate or understate the validity of evidence. Documents have been critically examined and authenticated. A 'chain of custody' has been kept for source material that considers both the type and the origin of the document along with the intended recipient (s), including government agencies, for which the document was originally intended. When critically examining primary source material I have considered the author/creator of the document, when it was created, for whom it was intended, the context of document creation (why it was created and its intended purpose), and other sources referred to in the document.

As discussed previously, a flaw in the current body of literature on the laws of war is that much of it is advocacy-driven and fails to view research from the perspective of historical context. To address this I have consciously maintained my position as a detached researcher. In Peter Novick's seminal work on objectivity in historical writing and research, *That Noble Dream* (1988), the objective and detached position of the historian is described as follows: "The objective historian's role is that of a neutral, or disinterested, judge; it must never degenerate into that of advocate or, even worse, propagandist." (p. 2) Though historical writings can never be

completely free of feelings and beliefs, and thus realize true objectivity, it is nonetheless important to maintain a sense of neutrality in historical research and to place primary source material and related case studies into broader historical and political contexts. To address this, my research openly considers the domestic and international political milieu in which the respective events took place and includes the historical and political decision-making contexts of the cases selected. By setting the contents of each case within a broader historical-political context, nuances and temporal considerations can be addressed.

Theoretical Framework

This dissertation incorporates a theoretical framework as a way to organize and assign meaning to empirical observations. The primary theoretical framework that is being utilized is the English School of International Relations. Central to the English School is the tripartite understanding of international relations. As the following demonstrates, one benefit of the tripartite understanding is that it allows for multiple perspectives, or lenses, through which to view international relations. As the research findings of this dissertation show, this theoretical framework provides a useful model and basis from which to analyze both the laws of war and reciprocity.

The English School was founded on the work of scholars from England who were active between the 1950's and the 1980's, specifically Herbert Bufferfield, Martin Wight, Adam Watson and Hedley Bull, who created and sustained the *British Committee on the Theory of International Politics*. A majority of the foundational works of the English School can be attributed to these authors. At the heart of the English School is the tripartite classification of three conceptual categories, or 'pillars', of international thought that together form the complex

patterns of international relations: international system, international society and world society. These three concepts correspond, respectively, to the political paradigms classified (by Bull, 1995 and Wight, 1991) as Hobbesian/Machiavellian (international system), Grotian (international society) and Kantian (world society). In the following, each tradition is considered in detail with particular attention paid to international society and the convergence of this tradition with the other two.

International System

Also referred to as the Hobbesian (Bull, 1995) and Machiavellian (Wight, 1991) view of international relations, the international *system* is characterized by its emphasis on power politics and the self-interest of the state. According to this view, international relations exist in a perpetual condition of competition and conflict. For an international system to emerge and survive, there must be minimal interaction and contact between individual states. According to Delven et al. (2005), the international system rests upon the repeated interaction between and among states "so that each must calculate the others' behavior in operating within the system." (p. 183) Although a certain minimal degree of contact and interaction among states is expected within the international system, there are no "shared rules or institutions" between them. (Dunne, 2008, p. 276) Viewed from this perspective, any cooperation or restraint that occurs finds its basis in the calculating self-interest of the state and not from legal or normative considerations.

World Society

On the other end of the tripartite spectrum is the *world society* view, referred to by Bull (1995) as the 'universalist tradition' or Kantian view, and by Dunne (2008) as the 'Idealist' view of

international relations. This view rejects the state-centered discourse found in the realist tradition in favor of one that views the individual as the primary "normative unit". (Tesón, 1998, p. 1) The world society view believes in the existence of a "latent *community* of humankind" and advocates the replacement of the state-system with a "world political organization", or society. (Linklater & Suganami, 2006, p. 117, emphasis in original) According to the universalist view, international relations only superficially, or temporarily, belongs to the realm of states while, in fact, the true subject is the collective relationship among "all men in the community of mankind." (Bull, 1995, p. 24) In this case the goal is the eventual "overthrow of the system of states and its replacement by a cosmopolitan society." (ibid, p. 25)

The Kantian revolutionist approach places a strong emphasis on normative or 'moral imperatives' to limit the power of the state over the individual citizen. At the center of this tradition of international relations is the concept of human rights (see Dunne, 2008, p. 278). The concept of the universal rights of the individual furthers the cosmopolitan ideal of a 'community of mankind' that will eventually transcend the state-centric system viewed by realists. Whereas the international system, or realists, view international politics as existing within conditions of perpetual conflict and competition among states, the world society tradition views international relations as occurring within the realm of "trans-national social bonds" that will eventually "sweep the system of states into limbo." (Bull, 1995, p. 25)

International Society

The *international society* view, also referred to as the Grotian tradition, is the central and primary pillar in the tripartite conceptualization of international relations and stands between the

dichotomy of the realist *system* and the revolutionist *world society*. Martin Wight (1966) argues that international society is a *via media*, or intermediate position, between the two dichotomies. (p. 91) Bull (1995), provides the following definition of international society:

> A society of states (or international society) exists when a group of states, conscious of certain common interests and common values form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions. (p. 13)

The "common set of rules" required for an international society to exist often takes the form of multilateral treaties and the "regular exchange of diplomatic representatives" (Delven, et al. 2005, p. 183). As a result, international society devotes greater attention to international law than do to the other two traditions. International law, for Bull, is important because "it is itself indicative of the very existence of international society." (Anderson & Hurrell, 2000, p. 30)

Overlap

Though the international *society* tradition presents a unique view of international relations, there is overlap with both the international *system* and the *world society* view. The international system and the international society tradition both view the primacy of the state in world politics. The centrality of the state is the core assumption for examining the existence of international society. Furthermore, a precondition for the existence of an international society is the existence of the international system (see Dunne, 2008, p. 276). Thus, the international system can be viewed as a necessary step towards the creation of the international society which adds another layer of overlap between international system and society.

From the perspective of international society, realists give insufficient attention to the role of norms and institutions in international relations (see Alderson & Hurrell, 2000, p. 22). To address this, international society acknowledges the role that moral and normative ideas play in international relations. Specifically, international society shares with world society the view that moral imperatives can *limit* the behavior of the state. Though overlap in the form of moral considerations exists, international society rejects the revolutionist aspect of world society which anticipates and advocates for the eventual overthrow of the state system for a cosmopolitan 'community of mankind'. To summarize, there exists overlap between international system and society in the form of state primacy as a necessary precondition for the creation of a society. Overlap also exists between international society and world society in the form of moral and normative considerations.

Pluralist/Solidarist Tension

Within the international society approach there is debate concerning two normative trends: pluralism and solidarism. The pluralist perspective asserts that the state should have moral priority over the individual whereas the solidarist perspective asserts that moral priority should be given to the individual. (Linklater & Suganami, 2006, p. 64-65) According to traditional pluralism, the institutional framework that maintains order and stability, and which creates and dominates norms in international society, are states. (Dunne, 2008, p. 274, and Alderson & Hurrell, 2000, p. 10) According to the pluralist, international order exists within a highly diverse, anarchical and fragile society where the best we can expect is for States to "simply respect one another." (Caney, 2001, p. 267)

In contrast, the solidarist perspective considers the influence of non-state actors and sees room for "states to work together to promote common goals." (Caney, 2001, p. 267) This opens the process of norm creation to a "wider range of actors" including non-states (Alderson & Hurrell, 2000, p. 9-10) and is closely connected to the promotion of human rights. Conceptually, the solidarist perspective is more aligned with the cosmopolitan view while the pluralist is associated with a more centrist international society approach.

The pluralist view of international society is concerned primarily with preserving international order whereas the solidarist places justice "at the centre of foreign policy." (Wheeler & Dunne, 1996, p. 92) With its emphasis on justice, the solidarist perspective often contains an element of collective enforcement of international rules and norms, including the laws of war. According to Bull, potential solidarity witnesses the joining of states for the purpose of "upholding the collective will of the society or states against challenges to it." (1995, p. 230) Modern examples of the solidarist view of collective enforcement can be seen in the creation of the ad-hoc Tribunals for the former Yugoslavia and Rwanda and in the creation of the International Criminal Court (ICC). Bull warns, however, against placing too much pressure on the "thin fabric of international society" and warns of "premature global solidarism". (Alderson & Hurrell, 2000, p. 15) Another modern example of the pluralist/solidarist tension can be seen in the creation of regional state organizations. According to Buzane (2001), the pluralist position is concerned primarily with the "preservation of cultural differences and political independence" while the solidarist view leans "towards more cultural homogeneity and a degree of political integration (as best illustrated by the EU)." (p. 486)

Though solidarism advocates an element of collective enforcement within international society, it differs from the world society perspective in that it retains the role of rules and political institutions whereas the world society perspective abandons political institutions altogether for a world government. According to Dunne (2008), solidarism is an *extension* of an international society, "not its transformation", whereas cosmopolitan/world society views the transformation of the international society into a world free of institutions based on sovereign states (or collection of states). (p. 275, emphasis in original) The pluralist/solidarist debate should not be viewed as a dichotomous split within international society but, rather, as a 'tension' occurring within the 'normative wing' of the English School. (Dunne, 2008, p. 276) Though this dissertation is conceptually more aligned with the pluralist view, examples of solidarism do exist and are discussed in greater detail in the dissertation's Conclusion.

Assumptions

Conceptually, the work of this dissertation comports more closely with the pluralist view of international society. This can be seen in four assumptions that explain the "research enterprise" of the English School. (see Delven et al., 2005) This dissertation shares these assumptions and argues that they underlie the present study. The following lists each assumption and then addresses how the assumption relates to both the laws of war and to the United States.

Assumption 1 – States are the primary actors

That the state is the most influential actor in relation to the laws of war appears nearly self-evident. States (in the case of this dissertation's scope a single state, The United States)

determine the foundational decision-making requirements as they relate to the laws of war. It is the *sole* responsibility of the state to decide whether to appear and participate in international conferences that create the laws of war, whether to sign and ratify a convention, and whether to implement the treaty in the training of its military. At the end of the day (or conference) it is the state that decides whether to sign, ratify, implement, apply and adhere to the laws of war.

Though the state is the primary actor, non-government organizations or, as this dissertation's research clearly shows, a quasi non-government organization in the form of the ICRC, substantially influence the laws of war. As this dissertation discusses at length, the ICRC was particularly active in arranging conferences, drafting treaty provisions and applying pressure on governments (including the United States) to apply and adhere to the laws of war. At times, the United States felt at liberty to oppose the ICRC on a number of important laws of war initiatives and to ignore its assertions while at other times the U.S. acquiesced to ICRC recommendations.

Assumption 2 – A system of states exists

As previously discussed, in order for a system of states to exist there must be a minimal level of contact with other states. Assuming that the lack of inter-state belligerent conflict is the ultimate test of the stability of the international system, it is evident that in post-World War II 20th century conflict involving the United States, the international system succeeded in maintaining stability. This can be seen in the face-to-face negotiations and armistice/cease-fires that were entered into and adhered to between the United States and North Korean (1953), North Vietnam (1973) and Iraq (2001).

Assumption 3 - The international system is anarchic

The anarchical quality of the international system (or society, for that matter) can be seen in the fact that international relations exist in the absence of a common government or centralized enforcement entity. As discussed in Part II, this lack of centralized enforcement of the laws of war necessitates the continued relevance of reciprocity, often in the form of countermeasures such as reprisals.

Assumption 4 – States exist in an international society

Some characteristics of international society include frequent diplomatic exchanges and attention to international law, among them multilateral treaties. The laws of war, viewed in this instance as the codified product of multilateral treaty creation, is proof of the very existence of international society.

English School and the Historical Method

In addition to its tripartite classification, one of the defining aspects of the English School is its emphasis on the inductive approach to theorizing on the subject of international relations. Bull (1966), refers to this as the classical approach which is based upon the study of philosophy, history and law. The link between historical research and the English School is closely related to the importance placed (by Hedley Bull and others) on the connection between theory and practice. (see Alderson & Hurrell, 2000, p.27) According to Bull, sustained and detailed historical research is the "essential companion to theoretical study". (*ibid*, p. 38) According to this view, theory and practice are not separate spheres of academic study, but, rather, the two are

intertwined and operate jointly. In other words, theory develops through, and is subsequently confirmed by, practice.

This inductive study of international relations, or what Bull (1966) refers to as the classical approach, stands in contrast to the scientific approach which includes the use of quantitative methods and strict empirical procedures of verification (p. 362). Bull critiques the scientific approach on the grounds that it fails to provide a fundamental basis for international relations theorizing. Furthermore, the subject of international relations has inherent characteristics that lead to complications when applying the scientific approach including an "unmanageable number of variables of which any generalization about state behavior must take account" and a "resistance of the material to controlled experiment". (ibid, p. 369) As it relates to the methodological influence of the English School on this dissertation, I am analyzing the historical state practice of the United States to construct a theory of reciprocity and the laws of war based on the English School's tripartite classification of international relations. The strength of both the classical approach and the English School tripartite model is that they permit multiple perspectives to be viewed. This, in turn, allows for the generation of conceptual explanations that are rich in detail.

Conclusion

This dissertation has set out to describe, in a systematic and neutral manner, the interaction between reciprocity and the laws of war. To realize this I have incorporated a model that views the laws of war as occurring within a dynamic decision-making process. The inclusive worldview of the English School's tripartite model allows multiple levels of theoretical analysis

to occur. In Part II the theoretical model that developed through my research will be analyzed. As my research shows, both the laws of war and reciprocity coexist and are influenced by the three international perspectives that comprise the English School.

Part II

Theoretical Model and Research Findings

Organization

As stated previously, one of the goals of this dissertation is to frame the laws of war and reciprocity within a larger theoretical framework. One of the strengths of the English School's tripartite model is that it is not weighed down by the dogmatic assumptions that are frequently found in the realist/universalist debate. Furthermore, a review of the literature shows that the tripartite model is an untapped source for generating theoretical scholarship on both the laws of war and reciprocity.

The development of the theoretical model of the laws of war is discussed in four parts. First, the tripartite model, viewed through the metaphor of theoretical lenses, is applied to the laws of war. Second, positive and negative reciprocity are described in detail with particular attention paid to the concept of reprisals and alternatives to reciprocity. Third, the tripartite theoretical lenses are further 'focused' and applied to reciprocity. Finally, I propose a model that views the English School and reciprocity as a continuum. I argue that international society, as the via media between international system and world society, acts as a conduit between which the laws of war and reciprocity, in its negative and positive currents, flow. I conclude with an overview of key research findings that are found in the subsequent four case studies.

Tripartite Lenses

The dynamic between the English School, the laws of war, and reciprocity is viewed through the metaphor of a camera lens. At the widest, or macro lens level, are the three philosophical

foundations of international thought (Hobbesian, Grotian and Kantian). This lens is further 'focused' upon the tripartite classification of the English School (international system, international society and world society). The next stage involves applying the dynamics of the laws of war and reciprocity to the tripartite model. Taken together, a dynamic model of international relations emerges where the laws of war and reciprocity interact within and between the three 'lenses' of the English School's tripartite model.

English School and International Law

International law is important to the English School because "it is itself indicative of the very existence of international society." (Anderson & Hurrell, 2000, p. 30) However, thinking in terms of an international society does not insure that relations among states are peaceful, stable and harmonious. (Alderson & Hurrell, 2000, p. 4) The historical and contemporary records attest to the fact that belligerent conflict remains an international institution and a reality, and that power and conflict continue to play a role in international relations. The relevant question to ask is "whether, and to what extent, these conflicts occur against the backdrop of shared institutions." (ibid, p. 4)

According to the realist view, international law is not 'actual' or 'authentic' because it lacks a centralized coercive force to impose and enforce sanctions, a prerequisite found in domestic legal institutions (Morgenthau, 1948). Bull attributes the origins of this view to the realism of Hobbes who wrote 'where there is no common power, there is no law' and the legal positivism of John Austin who wrote that law is 'the command of the sovereign'. According to Bull, the need for enforcement resulted from the transposition of domestic perspectives of law to

the international realm. Domestic, or municipal, legal systems possess a centralized executive enforcement authority whereas international law in its current form does not.

Bull rejects the 'domestic analogy' applied by legal positivists and realists on the grounds that in *actual practice*, stakeholders and 'actors' in international law (i.e. statesmen, legal advisors, lawyers, academics, national and international courts and other practitioners) operate under the assumption that the rules they are dealing with are, in fact, law. As it relates to the subject matter of this dissertation, the realist argument that the laws of war are not 'actual' law because they lack an officially sanctioned and centralized enforcement mechanism is easily countered by an argument based on the official acknowledgment and practice of states, in this case the United States. The United States government has acknowledged the existence and legitimacy of the laws of war since the 1863 Lieber Code (discussed in Case Study II). This is clearly demonstrated in numerous policy statements, court cases and in the indoctrination of soldiers. The recent debates on the applicability of the laws of war to counter-terrorism policy (see Introduction) confirm that the laws of war are in fact considered to be 'law' by the United States. Finally, as the case studies in this dissertation confirm, substantial government resources and energy have been expended to create, implement, apply and adhere to the laws of war.

The Tripartite Model and the Laws of War

In the following section, I begin with a discussion of the relationship between the laws of war and the three philosophical models (Hobbesian, Grotian, and Kantian). While important from a theoretical foundational perspective, the more promising model from a research perspective is the English School tripartite classification of international system, international society and

world society. Through this tripartite classification I view the dynamic interaction of the laws of war.

From the perspective of the Realist/Hobbesian tradition, the numerous treaties comprising the laws of war are collectively viewed as an ineffective means of curtailing violence in conflict and can be summarized by Cicero's maxim, "in times of war, law is silent" (*inter arma enim silent leges*). According to this view, international relations occur within an atmosphere of perpetual conflict, "an arena of struggle in which each state is pitted against each other" and "free to pursue its goals in relation to other states without moral or legal restriction of any kind." (Bull, 1995, p. 23-24) If there is state compliance to the laws of war it is due to the rational calculation of self-interest. Once the self-interest incentive is removed from the equation, state compliance with the laws of war will cease. The Grotian tradition, on the other hand, views conflict and war as existing "within a highly institutionalized set of normative structures – legal, moral and political." (Alderson & Hurrell, 2000, p. 23) According to Bull, the "conventions of war" are indicative of international society and are proof of its existence. This view rejects the realist contention that denies the restraining effect of the laws of war.

The Kantian or Universalist tradition acknowledges the limiting effect of the laws of war on the action of nations; however, restraint exists not to promote the society of cooperative states, but to further the cosmopolitan ideal of a 'community of mankind' guided by the universal rights of the individual. According to this interpretation, the laws of war have been transformed, or have 'evolved', from being state-centric to establishing the rights of individuals (universal human rights) regardless of state citizenship. The Grotian tradition, which shares with the

Universalist the legitimacy and importance of moral considerations in international relations, rejects the revolutionist end view of a cosmopolitan world society free of individual states. According to the Grotian view, states remain the primary unit in international relations. The interaction between the laws of war and the English School is depicted in Table 3.

The tripartite classification of international system, international society and world society holds substantial theoretical potential by which to view and analyze the laws of war. For example, the creation and ratification of laws of war treaties arguably confirm the existence of, and state admission into, international society. Armed conflict tests the integrity of the international society structure. If the laws of war are generally adhered to then the integrity of the international society remains. However, non-adherence, or a conflict that escalates to the point of 'general war' or worse, can result in the international society's collapse into a system. On the other hand, acknowledging that the laws of war have 'evolved' to become global human rights that are non-derogable reflects adherence to the world society view.

According to a number of authors a particularly strong tension exists between the system and society categories. For example, according to Colombo, armed conflict is a "paramount feature of the tension between international system and international society." (2007, p. 1) In his discussion of the system/society distinction, Dunne (2008) poses a number of intriguing questions that have specific relevance to the laws of war, including: "under what circumstances might a society lapse back into a systemic order in which their actions impact upon one another but there is no mutual recognition or acceptance of a common framework of rules and institutions?" (p. 276) From this perspective, armed conflict can be viewed as potentially existing

in either (or both) international system and/or international society depending upon the level of violence (i.e. general or limited war).

The creation and wide acceptance of the laws of war confirm the emergence of international society (in the form of shared rules and institutions) as the primary perspective in the tripartite model. However, since war is the breakdown of order, the structural integrity of the international society is tested. According to Dunne, if the "dominant actors in international society cease to comply with the rules and act in ways that undermine international security…the society collapses back into the system." (2008, p. 277) Armed conflict remains within the realm of international society, as long as the rules are not systematically violated and as long as there is not an escalation to a state of general war. A nation's restraint in war arguably signals its desire to remain a member of international society.

Though tension exists between the international system and society, at no point in the three conflicts analyzed in this dissertation (Korea, Vietnam and Second Gulf War) does belligerence reach a point where international society 'collapses.' In all three conflicts the United States maintains, through allies and international organizations such as the UN, its position in international society. As the case studies in this dissertation demonstrate, tension exists between the international system and international society. This often takes the form of interdepartmental debates regarding whether to violate a treaty in response to an enemy's violation. As is discussed in greater detail, the most consistent example of international society veering towards international system occurs in relation to the issue of reprisals.

At the other end of the tripartite spectrum, there is inherent tension between the international society emphasis upon the state as the normative guardian of the laws of war and the development of world society, in the form of universal human rights. (see Buzan & Little, 2001, p. 478) For example, government's acknowledging that it will adhere to the laws of war out of treaty obligation strengthens the international society view. On the other hand, if a government insists that it is adhering to the laws of war out of respect for basic humanitarian or human rights principles the world society view is strengthened. As my research shows, both of these views are supported and can, in fact, contribute to the same policy decision. Furthermore, although there is tension between the international and world society perspectives, U.S. support for the latter can be seen throughout the four case studies. This includes statements acknowledging the inviolable, universal and humanitarian nature of a number of laws of war-related provisions and treaties.

Reciprocity

Reciprocity is often cited as a force which influences observance and non-observance of the laws of war. This view is well summarized by Sir Hersch Lauterpacht who notes: "it is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them." (1953, p. 212) Hedley Bull takes this a step further by claiming that reciprocity is the driving force behind observance. According to Bull, if war is to be conducted 'according to the rules' then "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." (1966, p. 57-58)

G.I.A.D. Draper, who participated in the drafting of both the 1949 Geneva Conventions and their 1977 Additional Protocols, refers to reciprocity as a meta-legal force active in the laws of war (1979, p. 9 & 50)

Negative Reciprocity

Negative reciprocity entails retaliation and countermeasures which can include reprisals, non-application of the laws of war and treaty suspension. For an act to be considered retaliatory it must be linked as a response to an earlier act. (Fotion & Elfstrom, 1986, p. 152) From the perspective of the tripartite model, negative reciprocity encompasses the international system and falls within the realm of international society. The system/society dynamic is useful in understanding the grey area between restraint and retaliation (threatened and actual). For example, threatened reprisals may show an initial willingness to remain within the international society 'family'. However, actual reprisals can have a 'slippery slope' affect which may lead to a regression into general war. Negative reciprocity is also seen in legal provisions that permit treaty termination. For example, a reservation permitting retaliation in kind to a weapons treaty is viewed as negative reciprocity. Kalshoven (1971a) refers to this as the 'condition of reciprocity'. (p. 353)

The research in this dissertation confirms that negative reciprocity comes into consideration throughout much of the decision-making process. This can be seen in the persistent U.S. rejection of prohibitions on reprisals and the view that "retaliation in kind" is a right in reference to weapons violations. Military training often demonstrates examples of negative reciprocity by incorporating a rationale that violation begets violation. This often involves a

warning that non-adherence to the laws of war will impact present or future violations on the part of the enemy. Furthermore, as the final case study shows, law of war adherence during conflict often involves a negative reciprocity consideration on the part of government and military decision-makers.

Military Necessity

An alternative to negative reciprocity can be seen in the important concept of military necessity. As defined by the Department of Defense *Dictionary of Military and Associated Terms*, military necessity refers to: "The principle whereby a belligerent has the right to apply any measures which are required to bring about the successful conclusion of a military operation and which are not forbidden by the laws of war. " (2001, p. 343) It is often argued that along with proportionality and distinction, military necessity is a basic principle governing the use of force in the laws of war.

Though negative reciprocity and military necessity are considered to be different alternatives, they share two important features. First, both can be used to justify belligerent escalation. The motivation behind this escalation varies, however. In the case of negative reciprocity, the justification for escalation or countermeasures is a response to an enemy's previous act. Military necessity, on the other hand, is justified by the overriding concern of defeating the enemy and ensuring the survival of one's own forces. Second, under legal requirements, both military necessity and negative reciprocity (in the form of reprisals) are required to comport to minimal humanitarian standards. However, in actual practice both often lead to conflict escalation and the increase in laws of war violations.

Within the scope of this dissertation, there is a key difference between the two concepts. There has arguably been no instance in post-World War II 20th century conflict involving the United States where a situation of military necessity became so dire, from an executive decision-making policy perspective as to warrant substantial consideration of its justification. Thus, from the perspective of U.S. state practice, military necessity appears on the periphery. On the other hand, negative reciprocity, and reprisals in particular, are addressed extensively in all three of the conflicts analyzed.

Reprisals

The question of reprisals brings to mind the philosophical riddle, "If a tree falls in a forest and no one is around to hear it, does it make a sound?" The question applied to reprisals is "If an act is referred to as a reprisal and it doesn't fit the legal definition, is it still a reprisal?" According to the strict application of the law, the answer will often be negative. As a result, reprisals fall outside of analysis that considers state practice of the laws of war and are often deemed a crude form of extra-legal enforcement. On the other hand, if reprisals are taken at face value based upon their stated use by government officials, any serious analysis of state practice would have to include a detailed consideration of reprisals.

In keeping with the view that the laws of war and reciprocity are expansive concepts that include state practice and are influenced by an extensive decision-making process, it follows that the analysis of reprisals will also be considered an expansive concept. Greater tensions exist, however, when considering reprisals in the 'wider sense' (*lato sensu*). In large part this can be attributed to the fact that reprisals have, since World War II, been more precisely legally defined

and have been qualified in the form of prohibitions. In short, for a reprisal to be legal it must comport to the following criteria: The reprisal must be in response to a violation of the laws of war. It must be carried out with the intention of achieving compliance and subsidiarity is required (i.e. all other means of making the other side comply have failed). There must be proportionality between the offense and the reprisal and warning must be issued beforehand. Finally, the reprisal must be terminated once the other party has ceased violation.

The precise legal definition of reprisals comes into serious question, however, when considering actual practice, where reprisals often more aligned with a broad application of retaliation than they do with any precise legal concept. According to Best (1994), it is only reprisals' legal basis as "one of the few recognized means of enforcement" that separates it from retaliation. (p. 203-204) As the examples in Case Study IV clearly demonstrate, decision-makers rarely follow the legal definition of reprisals. Instead, reprisals are used to justify conflict escalation or are viewed as a general means of retaliation. Furthermore, as is discussed in Case Study I, the United States has consistently opposed extending prohibitions on reprisals beyond those found in the 1949 Geneva Conventions. Much of the reasoning behind this is based on the purported strength of reprisals as a deterrent for violations.

Positive Reciprocity

From the perspective of the tripartite model, positive reciprocity is found within the world society and international society categories and is characterized by restraint and cooperation. Positive reciprocity emphasizes adherence to the laws of war. According to the ICRC, positive reciprocity means that parties to a conflict exceed the minimal legal obligations found in the

completed laws of war treaties. (ICRC, 1969, Pilloud et al., 1987, p. 37) Kalshoven & Zegveld (2001) understand positive reciprocity as meaning, "I am bound to respect the law because you undertake to do so too" (p.143). A common example of positive reciprocity is a precarious condition of restraint or forbearance in the face of threatened or actual violation. (Osiel, 2009) Continued respect communicates to the other parties the desire to induce compliance. (Watts, 2009, p. 377) For example, a state's decision to respect the rights of POWs out of concern for future treatment of one's own soldiers falls into this category. (see D'Amato, 1998, p. 52) The research in this dissertation confirms that positive reciprocity plays an important role in the decision-making process.

Humanitarian Restraint

An alternative to positive reciprocity is humanitarianism. Calls for restraint and compliance (often in the face of an enemy's violations) based on humanitarianism differ from positive reciprocity calls for restraint and compliance. Humanitarianism is based upon the universal normative notion of human rights. Conceptually, the individual, not the state, is the primary entity which is consistent with the world society view. Positive reciprocity, on the other hand, calls for restraint and adherence in the hope of receiving the enemy's restraint and adherence in return. Though the end result of positive reciprocity is humanitarian, its motive often fails to comport with the universalist nature of humanitarianism and world society.

In the case studies that follow, the differences between motives of positive reciprocity and humanitarianism become apparent, especially when one considers the Geneva Conventions of 1949. An example that illustrates the humanitarian motive can be seen in a 14 September 1966

memorandum sent from U.S. Ambassador Henry Cabot Lodge, Saigon, to his South Vietnamese counterpart. During this period, the South Vietnamese government had refused, as policy, to adhere to the Geneva Conventions on the grounds that the North Vietnamese government was not according similar treatment to its prisoners (an example of negative reciprocity that is discussed in greater detail in Case Study IV). Ambassador Lodge's rebuttal to the Saigon government conceptually supports the humanitarian and world society view in relation to Convention III of the 1949 Geneva Conventions:

> The prisoner of war convention was designed to protect individuals and not to serve the political interest of states. As a body of humanitarian law it is the individual who is the object of the Geneva Conventions, not nations or groups. (14 Sept 1966, RG 59, Lot E5307, Box 52)

The humanitarian alternative to positive reciprocity can also be seen in the ratification of the 1949 Geneva Convention (Case Study I), in training material calling for U.S. soldiers to adhere to the laws of war (Case Study II), and in the decision to voluntarily repatriate prisoners during the Korean War (Case Study III).

Reciprocity and the Tripartite Model

My research demonstrates that reciprocity interacts in a varied, nuanced and dynamic manner within the tripartite model. Furthermore, the Case Study results support the argument that international society is the primary paradigm in which international relations (including conflict) occurs. Within the English School's tripartite ordering, both positive and negative reciprocity fall primarily, though not exclusively, within the realm of international society. However, reciprocity considerations still play a critical role from the international system perspective where the

subject of reprisals and treaty termination are addressed. Negative reciprocity, viewed here broadly as retaliatory countermeasures, is inherently escalatory because in practice it runs the risk of destabilizing international society.

Since international society rests conceptually upon the foundation of the international system, there exists the potential (albeit rare) of interstate belligerence escalating to the point where society collapses back into system. In the 20th century this can be seen in the example of total war on the Eastern Front during World War II, what Omer Bartov (1984) aptly refers to as "the Barbarisation of Warfare". The level of belligerence demonstrated exceeded the minimal standard required to establish reciprocity or to meet the basic requirements for international society. For example, Best (1994) argues that the condition of belligerence that existed on the Eastern Front was such that "neither side saw any advantage of reciprocity." (p. 60) However, Snyder (2010) does present an extreme interpretation of negative reciprocity to the Soviet/Nazi conflict. After explaining that in the customary laws of war prisoners were usually accorded basic standards of treatment (food, shelter and medical treatment) in order to ensure that the enemy does the same (an example of positive reciprocity), Snyder argues that:

> Hitler wished to reverse the traditional logic. By treating Soviet soldiers horribly, he wished to ensure that German soldiers would fear the same from the Soviets, and so fight desperately to prevent themselves from falling into the hands of the enemy. (2010, p. 175)

This is an example of the negative reciprocity rationale *in extremis*. The limitation of treaties in the face of total conflict is well articulated by Reisman & Leitzau (1991): "When loss could mean national extinction, it is reasonable to assume that elites will reconsider past agreements or

decisions which are strategically limiting. In an absolute conflict, a specific norm will rarely be attributed as much importance as winning." (p. 11)

On the other side exists positive reciprocity which can be seen in the continued adherence to the laws of war in the face of violation. Positive reciprocity signals a desire to, at a minimum, remain within the international society structure. Though it is difficult to imagine belligerent conflict existing conceptually within the realm of world society (as opposed to international system), my research supports the view that application of and adherence to the laws of war at times includes a universal humanitarian rationale found in the world society perspective.

English School and Reciprocity Continuum

Conceptually, the role of reciprocity within the English School's tripartite model is seen as a continuum that runs from both 'left to right' and 'right to left.' At the outermost theoretical perimeter of international system is negative reciprocity *in extremis* which results in the collapse of the laws of war as a legal and normative framework into a subsequent condition of anarchical total war. On the far right, at the outermost perimeter of world society, is the transformation of the laws of war into internalized universal norms. The result is the realization of the world society devoid of inter-state conflict. Overlapping with the negative and positive reciprocity continuum is the tripartite model that depicts *international system* on the far left and *world society* on the far right with *international society* in the center. As discussed previously, international society acts a via media, or buffer, between the dichotomy of international system and world society. For conceptual clarity I depict both negative and positive reciprocity as existing in the center of international society. However, as discussed in Part I there exists

penumbra, or 'grey area' around the borders between international system and international society and between world society and international system. The English School and Reciprocity Continuum, depicted in Figure 1, provides the framework through which the specific research findings on reciprocity and the laws of war are discussed.

Summary of Results

The English School and Reciprocity Continuum (Fig. 1) provides a framework for viewing the research findings depicted in the following four case studies. Research findings show that both reciprocity and the laws of war interact within the tripartite model in a dynamic and varied manner. Significant case study results are depicted in Figure 2. Research Findings.

In Case Study I, negative reciprocity is seen in the persistent objection by the United States in relation to the legal prohibition of reprisals. The source material reveals that the U.S. considered reprisals to be one of the few deterrents available in a legal regime otherwise void of enforcement mechanisms. The U.S. reservation to the 1925 Geneva Protocol and the decision-making process relating to the treaty's ratification further supports, conceptually, negative reciprocity. A theme that emerges in Case Study I is that policy makers often made a clear distinction between weapons and means-related laws of war issues and humanitarian-related laws of war issues, as found in the 1949 Geneva Conventions.

Case Study II, *Implementation*, depicts the application of the laws of war as military doctrine. My analysis of official training material and regulations shows positive reciprocity in the form of training messages that convey that observation of the laws of war will lead to

likewise observation by the enemy. Furthermore, positive reciprocity is also viewed in the Golden Rule message which conveys that U.S. soldiers should treat the enemy as they would like to be treated. The negative reciprocity message that failure to observe the laws of war will lead to an enemy's violation also supports the overall concept of positive reciprocity.

Case Study III, *Application*, shows that there is little decision-making controversy in the initial application of the laws of war to a conflict, however, the application of the laws of war *in practice* is often a highly complex and controversial matter. The Vietnam War witnessed an official "reciprocity repatriation" policy coordinated by the Department of State. Though the policy ultimately failed in its intended goal and, as a result, did not facilitate the early release of U.S. POW's, it conceptually depicts that decision-makers could base policy on a positive reciprocity rationale. The Gulf War of 1990-1991 showed the U.S.-led coalition of states and the United Nations operating under the assumption that the laws of war would be applied as policy. However, United States insistence on retaining reprisal, as a right, in the case of Iraqi use of non-conventional weapons strengthened conceptually negative reciprocity.

Since the final case study, *Adherence*, is concerned primarily with decision-makers' reactions to violations of the laws of war, negative reciprocity is the primary focus. The Korean War conceptually strengthens the prohibition against reprisals. However, the Vietnam War witnesses the use of reprisals as a justification for U.S. military escalation and strengthens negative reciprocity. Reactions to laws of war violations committed against U.S. prisoners of war by Viet Cong and North Vietnamese forces demonstrate decision-makers debating whether to conduct countermeasures in the form of reprisals. Furthermore, negative reciprocity is depicted

in U.S. consideration for the safety of its soldiers in light of South Vietnamese ally violations of the laws of war. Finally, negative reciprocity is discussed in reference to U.S.-threatened retaliatory policy in the 1990-1991 Gulf War.

Conclusion

The four Case Studies which follow depict the separate stages of the decision-making process. A methodological strength of this model is that it facilitates the organization of primary source material, allowing for a clear delineation of state practice. In relation to the English School, my research findings confirm that reciprocity interacts within each of the three tripartite perspectives. Furthermore, there is an emphasis upon both positive and negative reciprocity occurring within international society. Conceptually, this strengthens the argument that international society acts as a via media between international system and world society. However, the Case Studies also include examples of the laws of war and reciprocity occurring within the international system and world society perspective. Taken together, these results confirm that the English School tripartite model of international relations is an important tool for understanding the laws of war and reciprocity.

Part III
Case Study I

Creation

Scope

The initial stage in the decision-making process involves the accumulated efforts of government officials including diplomats, State and Defense Department legal aides, legislatures and White House officials. It also involves the efforts of organizations, such as the ICRC, to facilitate conferences and provide much of the initial content for proposed changes to the laws of war. This case study centers around two salient developments to the laws of war. First were the efforts by the ICRC that culminated in the 1977 Additional Protocols to the 1949 Geneva Conventions. This included the official ICRC Conferences (1952 - 1969) and ICRC-sponsored conferences of experts (1971,1972, 1974 and 1976) that, taken together, provided the foundation for the work of the Diplomatic Conferences (1974 – 1977), which, in turn, led to the codification of the 1977 Additional Protocols (I & II). Overlapping with this was the executive and legislative level decision-making which led to the U.S. ratification of the Geneva Protocol of 1925 (1969 – 1975). A majority of the archival source material that is available involves these events.

Source Material

Primary source material for this Case Study can be divided into four categories. First, State Department and Department of Defense memoranda, reports, position papers and diplomatic cables have been utilized. Second, official reports containing the negotiations of diplomatic conferences, also referred to as the *travaux préparatoires*, have been referenced. Third, National Security Council reports which reflect executive-level decision making are analyzed. Finally, the

legislative activity which led to treaty ratification has been utilized including Congressional hearings and reports.

Secondary source materials in the form of academic publications have also been referenced and are included. This is necessary, in large part, because of the ICRC's strict confidentiality policy by which only the ICRC general archives prior to 1965 are open to researchers. For example, Frits Kalshoven (who acted as Rapporteur for a number of committees that addressed the issue of reprisals) published a series of articles for the *Netherlands Yearbook of International Law* (Kalshoven 1971b and 1972) that provide a rare picture of the behind-the-scenes workings of the ICRC conferences. Furthermore, U.S. Delegates George Aldrich and Richard R. Baxter subsequently published articles relating their experiences at the diplomatic conference which also provide valuable insight into the position of the U.S. Delegation.

Analysis

The following analysis focuses largely on the diplomatic maneuvering and legal decision-making involved in creating the laws of war. The role of the ICRC was integral in organizing and arranging diplomatic conferences related to the laws of war. The early post-World War II conferences, however failed to substantially address the laws of war. Beginning in the mid 1960's, the ICRC begins to assume a more active role in the creation of the laws of war. This effort coincides with United States involvement in the Vietnam War where laws of war interests were of particular significance, especially as they relate to Geneva Convention III relative to the Treatment of Prisoners of War.

18th International Red Cross Conference – Toronto – 1952 (July 23 – August 6)

The U.S. Government sent a 10-person observer (non-voting) delegation chaired by Charles Burton Marshall, a member of the State Department's Policy Planning Staff, to the 18th ICRC Conference. Three factors influenced the decision to send a non-voting observer delegation. First, the conference was being attended by 'unrecognized Communist regimes.' Voting would risk the U.S. ascribing a level of legitimacy to these regimes. Second, the United States' closest allies (Canada and UK) were also sending observer-only delegations. Finally, according to the State Department, "The agenda of the Conference contains no major items on which a vote by this government would be imperative." (23 July 1952, State Department, Foreign Service Dispatch, RG 59, Lot 60D514, Box 2)

The Foreign Service dispatch report from American Consulate General in Geneva to Department of State, DC (Subject: 18th International Red Cross Conference, July – August 1952) discussed problems which were anticipated at the Toronto Conference including participation by communist regimes and issues with the ICRC itself. The report described the ICRC as an undemocratic "private club" with "unbusiness-like administration" fraught with internal dissension. The failure of the ICRC to alleviate the suffering of POWs in recent conflicts weighed heavily on the U.S.: "The most telling count against the Committee…is the bare fact of its virtual inability to act behind Soviet lines during World War II, and its complete inability, in spite of repeated efforts for two years, to act behind the North Korean lines in Asia." The U.S. report concluded with the pessimistic prediction that the Toronto conference was "unlikely to accomplish its appointed tasks".

The conference itself ended up being a highly politicized event with ideological controversies playing a primary role. A majority of the State Department cables from U.S. delegates during the conference concerned North Korean accusations of alleged U.S. use of bacteriological warfare in the Korean conflict. The available records show that updating or creating the laws of war played a tertiary role behind politicized Cold War debates and criticism of the ICRC itself. A cynical post-conference assessment was made by U.S. Ambassador (to Australia), William J. Sebald, who reported that the Toronto Conference "combined the main characteristics of a revival meeting, clam bake, Democratic or Republic convention and Navajo powwow." (28 September 1956, Sebald to Murphy, RG 59, Lot 60D514, Box 1)

My analysis of the source material for the 18th ICRC Conference shows no reciprocity consideration (on behalf of the U.S. or other delegations) although this soon changed as U.S. national security policy became directly linked to nuclear weapons. This policy, called New Look (formalized in October, 1953, NSC 162/2) rested upon the nuclear threat of 'massive retaliation' in order to deter Communist aggression. Future attempts by the ICRC to limit nuclear and other weapons were often met with outright opposition by the U.S.

Ratification of the 1949 Geneva Convention - 1955

The 1949 Geneva Convention was originally forwarded to the U.S. Senate in 1951 (26 April). However, hearings were not held due to the Korean War. After a four-year delay, on 7 June 1955, the U.S. Senate gave its advice and consent and the convention came into force on 2 February 1956. The analysis that follows is derived from Congressional hearings before the Committee on Foreign Relations (3, 9 and 27 June 1955) and from background papers prepared

between 1954 and 1955 by an interdepartmental working group (State Department and Department of Defense) for use "in conjunction with the Senate's consideration" of the Geneva Convention of 1949 (henceforth, Background Papers, RG 389**,** Lot A1 439, Box 12). Analysis of the 550 plus pages of the Background Papers reveals little concern for reciprocity, positive or negative. However, humanitarian principles came into prominence while considering possible U.S. reaction to violations of the Geneva Convention.

An interesting section in the Background Papers, "Anticipated Questions and Suggested Answers", was created to prepare State and Defense officials for Congressional questioning during ratification hearings. The questions anticipated scenarios where negative reciprocity in the form of retaliatory countermeasures or treaty termination might be an expected policy option in light of enemy violations:

Q. If the Communists did not live up to the Geneva Convention in Korea what expectation is there that they would do so in any future war? Are we not simply limiting our own freedom of action but getting no real protection for our own prisoners of war?

A. We are not sanguine, of course, that in any future war the Communists would faithfully carry out the Geneva Convention. Even in Korea, however, there is reason to believe that but for the international acceptance of the principles contained in the Geneva Convention and the Communist undertaking to abide by them, the Communist record would have been considerably worse even than it was. Moreover, the Geneva Conventions provided principles of conduct which the Communists agreed to embody in the Korean Armistice Agreement.

Indeed we would not wish even to reserve the right to act in any way other than in conformity with the humanitarian principles of these Conventions. In the event of widespread and flagrant violation of this Convention by another party, in the course of a conflict, the United States would be legally justified in reconsidering the extent of its obligations under the Convention.

Q. What recourse do we have if an enemy violations a provision of the Conventions?

A. Our recourse would be to diplomatic protest through neutral channels, to appeals addressed to world opinion, to reconsideration of our own legal position toward a violating state, and to ultimate criminal prosecution for offenses against accepted international rules governing the conduct of hostilities.

Though negative reciprocity was arguably alluded to by the use of the word "reconsideration", the substantial content of the government response implied non-belligerent responses such as diplomatic protests, appeals to world opinion and criminal prosecution. The leading response was predicated on the expectation of conformity with humanitarian principles and was thus, non-reciprocal.

The statement made by Wilber M. Brucker, General Counsel of the Department of Defense (and future Secretary of the Army), before the Senate Foreign Relations Committee in support of ratification (June 3, 1955) touched upon a number of themes of theoretical importance:

> If the enemy fails to comply with the Conventions, there can be little real quarrel about the law, and to the extent that we have removed this source of controversy, we have made the humane treatment of the wounded and sick, prisoners of war, and civilians that much more probable of attainment. The universal character of the Conventions also means that world public opinion will be mobilized against the violator of the treaties, who will have broken not just a bilateral treaty but the universal law of the civilized community itself.
>
> 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 restraints altogether, it would then rest with us to reconsider what our position might be.

A number of points are worth highlighting here. First, the inviolable legal and universal nature of the Geneva Convention was emphasized along with The Convention's normative characteristic that superseded the contractual treaty obligation. Taken together, this clearly supports the world society perspective of the laws of war and is a denial of negative reciprocity. However, the conclusion indicates that the negative reciprocity 'door' may remain open in the case of an enemy's flagrant or sustained violations.

19th ICRC Conference – New Delhi - 1957 (Oct 28 – Nov 7)

The central issue pertaining to the laws of war addressed at the 19th ICRC Conference was the 1956 Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War (henceforth Draft Rules). According to the ICRC, the primary concern of the Draft Rules was the protection of civilians against aerial bombardment, something that had been left largely unaddressed in the 1949 Geneva Conventions. The Draft Rules are significant for two reasons. First, they showed, for the first time, the ICRC becoming actively involved in methods/means issues pertaining to the laws of war. Secondly, the Draft Rules provided a template for future ICRC laws of war initiatives.

Initial debate occurred between the State Department and the Department of Defense regarding whether to send an observer or a voting delegation to the New Delhi conference. The State's initial position, made without interdepartmental consultation and without having studied the Draft Rules in detail, advocated sending an observing non-voting delegation. The State Department argued that this was in line with the "standing policy of the Department not to accredit official delegations to international conferences attended by unrecognized Communist

regimes". (16 July 1957, Memo: Wilcox (Assistant Secretary of State) to Under Secretary of Defense, RG 43, Lot 5536 (A1), Box 227-228) The Department of Defense, however, had circulated and studied the Draft Rules before The State Department and argued for a fully committed voting delegation. Defense argued, "If the U.S. were to adhere to the rules [Draft Rules] in their present form, our military commanders would find themselves severely restricted in their operations in time of war." (Interim Report by the Nuclear Energy Working Group on U.S. Government Participation in XIXth International Red Cross Conference, 18 June 1957, RG 43, ibid) Though the interdepartmental debate between State and Defense was short-lived, it did highlight a theme which was revisited in subsequent U.S. decision-making relating to the laws of war and which reflected the oftentimes contrasting views between these two government organizations.

With a coordinated policy between State and Defense, the departments determined to counter the Draft Rules. A June 26, 1957 telegram, signed by Secretary of State Dulles and sent to all U.S. embassies, confirmed U.S. policy to oppose the Draft Rules. According to the telegram, the Draft Rules "poses a major problem" for the U.S. and called upon embassies to help provide "information necessary to planning effective tactics for blocking the proposed draft regulations in their present form or vitiating their propaganda possibilities." (Telegram, Dulles to U.S. Embassies, 26 June 1957, RG 43, ibid)

According to a member of the U.S. delegation, R. R. Baxter, the Draft Rules were viewed as unrealistic because they would make "the use of nuclear weapons impossible and conventional bombing questionable". (Baxter, 1974, p. 3, see Bugnion (2005) for a detailed

discussion on ICRC attempts to restrict the use of nuclear weapons.) The position taken by the U.S. delegation was expressed in an undated confidential report that was attached to the 'official report' of the conference (discussed below):

> The instructions to the Delegation were to prevent a Conference endorsement of the "Draft Rules" or a recommendation that they be made the subject of an international conference. The reasons for this position were that the "Draft Rules" are not only generally unrealistic but that they – and particularly Article 14 – would place unacceptable limitations on the use of nuclear weapons and be directly in line with Soviet proposals for a ban on the use of such weapons. (Undated Confidential Report for 19th ICRC Conference, RG 43, ibid, pg. 2)

Article 14 (Chapter IV) of the Draft Rules pertained specifically to the subject of methods of warfare, in particular the prohibition of weapons that endanger the civilian population through the "dissemination of incendiary, chemical, bacteriological, radioactive or other agents". The U.S. delegation was directed to develop a resolution disposing the Draft Rules "by merely referring them to governments for study" (*ibid*, pg. 2), a fate which "can be understood to be a form of burial." (Baxter, 1974, p. 3)

Though the Draft Rules were relegated to 'future study' they provided a blueprint for future, and more successful, changes to the laws of war. According to Geoffrey Best, the Draft Rules "acquired the character of holy writ within the Red Cross movement" and paved the way for the two Additional Protocols of 1977 and the Conventional Weapons treaty in 1980. (1994, p. 255 & 325) The ICRC came under sharp criticism by the U.S. on the grounds that it was getting involved in an area of the laws of war that was beyond its traditional function, namely, to protect victims of conflict. As will be seen, this criticism is revisited in future ICRC laws of war initiatives and sponsored conferences.

The final report of the U.S. Delegation noted that the conference was highly politicized and that the issue involving the seating of the Government of the Republic of China and Communist China "hung over the meeting like a cloud from its inception." (Final Report, RG 49, ibid, pg. 3) In his final report to the State Department, Robert McClintock, head U.S. delegate, criticized the politicized nature of the conference and the structure of the Red Cross itself. McClintock referred to the Red Cross Conference as "an additional battle-ground of the cold war" (Final Report, pg. 6) and the Red Cross organization as a schizophrenic "Jekyll and Hyde" where each country is entitled to have two delegations, "one representing the National Red Cross Society and the other the National Government." (Final Report, pg. 2) As a result, government delegations represented official government policy while Red Cross Society delegations "were concerned more with humanitarian ideals and emotional concepts." (ibid. pg. 2) The failure to harmonize policy between the government-sponsored delegations and the respective National Red Cross Societies resulted in conflicting votes and disparate positions between two delegations representing the same country.

The head U.S. delegate made the following observation of the 19th ICRC Conference in his final report:

> To paragraph Voltaire's analysis of the Holy Roman Empire ("neither Empire, nor Roman, nor Holy"); the 19th International Conference of the Red Cross was neither Universal, Non-Political nor Humanitarian. Basically, however, it is a worthy institution which merits being left out of the cold war if it is to achieve the great purpose of its founders: to care for the victims of all war, cold or hot.

The 19th Conference was the final conference before substantial United States combat involvement in Vietnam. Subsequent ICRC Conferences witnessed U.S. delegations that were

focused on POW issues and methods/means weapons controversies. Furthermore, there was a notable change in the tenor and attitude of future U.S. delegations. Whereas the 18th and 19th ICRC Conferences saw a U.S. delegation essentially 'going through the diplomatic motions' and focused on ideological controversies, the 20th and 21st Conferences had a more serious tone due to the concern for the physical safety of U.S. POW's. However, a consistent theme continued to be U.S. objections to ICRC involvement in weapons-related issues.

20th ICRC Conference – Vienna – 1965 (October 2 – October 9)

Less than a week before the opening of the 20th ICRC Conference (26 September), the Viet Cong announced the executions of Capt. Humbert R. Versace and Sgt. Kenneth M. Roraback in 'reprisal' for the execution of convicted terrorists by the Saigon government. The executions of Versace and Roraback coincided with Hanoi's repeated threat to put on trial captured U.S pilots (both incidents are discussed in detail in Case Study IV). These events also corresponded with the general escalation of the Vietnam conflict and led to greater U.S. involvement than in previous conferences. In particular, substantial effort was made on the part of the U.S. delegation to pass a POW Resolution condemning acts of reprisals against POW's.

The importance placed upon the POW Resolution by the U.S. delegation, is clearly stated in the Final Report of the United States Delegation submitted to Secretary of State Dean Rusk by Head Delegate Robert F. Woodward (henceforth, Final Report, 20th Conference):

> From a purely political viewpoint, the most important item to the US in the International Humanitarian Law Commission was the adoption of a US (government and ARC) draft resolution declaring that prisoners of war should be accorded the treatment prescribed by the Geneva Prisoners of War Convention of 1949. In presenting this resolution, the US

> delegate made a brief statement expressing concern at the treatment that had in certain instances recently been accorded to prisoners of war. (Final Report, pg. 10)

The text of the resolution (adopted on October 9, 1965 with the approval of 117 votes to none, with 6 abstentions) alluded to the recent incidents in Vietnam and supported the U.S. position that negative reciprocity in the form of reprisals does not extend to POWs:

> Recalling the historic role of the Red Cross as a protector of victims of war, Considering that only too often prisoners of war as objects of retaliation is inhuman, Recognizing that the international community has consistently demanded humane treatment for prisoners of war and facilitation of communication between prisoners of war and the exterior, and condemned reprisals directed against them, Calls upon all authorities involved in an armed conflict to ensure that every prisoner of war is given the treatment and full measure of protection prescribed by the Geneva Convention of 1949 on the Protection of Prisoners of War, including the judicial safeguards afforded to every prisoner of war charged with any offense, and that the International Committee of the Red Cross is enabled to carry out its traditional humanitarian functions to ameliorate the conditions of prisoners of war. (Department of State Bulletin, 1965, pg. 726)

It is clear that the primary intention of the U.S. resolution was to publicly condemn the treatment of U.S. POW's as is seen in a note from Head Delegate Woodward to Raymund Yingling (Legal Adviser, Department of State) upon the completion of the final report: "We got across the idea that prisoners *are* being used for the purposes of reprisals (with recognition by 117 delegations that this has been so)…We intended nothing more." (RG 59, Lot 5307 (A1), Box 35, emphasis in original) The absence of the North Vietnamese and Communist Chinese governments at the conference most likely helped the U.S resolution's adoption by an overwhelming majority with little debate.

U.S. opposition to ICRC resolutions relating to weapons/means of warfare continued at the New Delhi conference. Specifically, the U.S. abstained from ICRC resolutions that called for

a "prohibition on nuclear and similar weapons" and a statement that included "tear gas" among the prohibited weapons found in the 1925 Geneva Protocol. According to a statement by Head Delegate Woodward at the conference, resolutions relating to specific weapons go "beyond the purview of the Red Cross Conference." The issue of tear gas proved to be a highly contentious issue throughout the ratification process of the 1925 Geneva Protocol. However, the U.S. did support a weapons-related resolution (Resolution 28) which extended "general principles of the Law of War" to "nuclear and similar weapons."

21st ICRC Conference – Istanbul – 1969 - (September 6 – 13)

In May 1969, the ICRC published the report "Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflict" (The ICRC Reaffirmation Report) which was, in large part, the work of a 'meeting of experts' held in Geneva in February 1969 and at which the United States was not represented. The ICRC Reaffirmation Report provided the template for the forthcoming 21st ICRC Conference in Istanbul. One effect of circulating the provisional agenda four months before the conference was that the U.S. Department of Defense and State Department were able to perform a more extensive pre-conference legal analysis than they had prior to previous ICRC Conferences. The result was a series of 'position papers' created by legal advisers in the State Department and Department of Defense that highlighted legal questions pertaining to the laws of war which directly related to reciprocity.

George Aldrich, a State Department legal advisor who would later play an integral role as the head U.S. delegate involved in negotiating the Additional Protocols to the 1949 Geneva Convention, wrote in a 15 August 1969 memorandum that the primary goal of the U.S.

delegation at the Conference was to put pressure on the Democratic Republic of Vietnam (DRV) by supporting a conference resolution declaring the universal application of the Geneva Conventions to the war in Vietnam. Aldrich assumes a more forward-looking perspective to the laws of war than was previously recorded in the source material:

> [T]he Red Cross Conference is one of the few forums in which legal arguments are likely to produce separate and independent pressures on the DRV. Moreover, we face a longer-term question of precedent. The Vietnam War was the first to which the Geneva Conventions were clearly applicable as a matter of law. I suggest we have an interest that extends beyond Vietnam in preventing those conventions from becoming moribund through non-application in practice. It would be a helpful precedent for the Istanbul Conference to declare their applicability to the war in Vietnam. It would be a harmful precedent if the conference appeared to ignore or condone their non-application. (RG 59, Lot 5307 (A1), Box 50-74)

The Aldrich memo touches upon a theme that became more salient for U.S. policy in laws of war conferences throughout the 1970's, namely, that legal development of the laws of war should focus upon the application of *existing law* rather than on the creation of new law that would ultimately fail to be applied in practice. According to this argument, failure to apply the existing laws of war would weaken the entire foundation upon which future rules would be based. This would have a far-reaching impact upon the role of reciprocity because it would perpetuate the need to rely upon reciprocity in its negative forms as one of the few tools available for enforcement and deterrence.

The Department of Defense Office of General Counsel to the Secretary of Defense distributed a series of memoranda outlining legal opinions to the draft position papers for the U.S. Delegation (DOD Legal Opinion, 3 October 1969). The Defense Legal Opinions were

supplemented by a series of Department of State Position Papers prepared for the U.S. Delegation (DOS Position Paper, 28 August 1969) that outlined legal opinions of specific proposed items supplied by the ICRC. Taken together, both the State and Defense legal opinions addressed general laws of war issues that impact reciprocity, including limitations on methods and means of warfare. Furthermore, the U.S. positions specifically addressed by name, for the first time, the issues of reciprocity and reprisals.

State and Defense legal analysis shared two related themes: That the ICRC should focus on existing humanitarian rules and that the primary mandate of the ICRC should remain within the realm of the Geneva Conventions and not focus on weapons, means and methods of war. On the latter point, the Department of Defense legal analysis concluded that the ICRC should not "attempt to put too much of its future efforts and concern in areas which may conflict with other more authoritative and effective efforts which seek to restrict, delimit, or reduce the means of waging war, or which coincide too closely upon what are the law-making and law-applying functions of sovereign States." (DOD Legal Opinion, p. 2)

The ICRC Reaffirmation Report section titled "Treatment of Enemies, No Quarter Declaration, and Treachery in Combat" touched upon a conduct of warfare issue that is usually viewed as non-controversial in that no quarter declaration and treachery tend to be universally condemned. However, the legal opinion by Defense lawyers reflected the dual critique of ICRC expansion into Hague law and the problem of enforcing the laws of war:

> The ICRC in dealing with the above questions [Treatment of enemies, no quarter declaration, and treachery in combat] is moving into areas which in effect would expand the reach of the Geneva Conventions, particularly as far as "no quarter" and "treachery in

> combat" is concerned. Although the United States might support the ICRC on all these issues, we should call attention to the fact that this support should be accompanied by a United States caveat that such declarations are meaningless unless subjected to effective implementation and supervision, that the ICRC is in reality unable at the present time to supervise the conduct of warfare itself…the United States Delegation should emphasize the importance of implementation. (DOD Legal Opinion to 21st ICRC, p. 10)

The issue of no quarter and treachery is addressed in the 1907 Hague Convention IV, Respecting the Laws and Customs of War on Land (specifically Article 22 and 23). The Defense legal opinion is critical of the ICRC for involving itself in a subject outside its historical role as 'guardian' of the Geneva Conventions. Expanding to cover issues involved in the conduct of warfare is seen as not only beyond the ICRC mandate, but also a misapplication of resources.

Reciprocity and Reprisals at the 21st ICRC Conference

The 21st ICRC conference was the first ICRC conference to specifically include, by name, the related issues of reciprocity and reprisals as conference agenda items in the section "Rules Securing the Application of the Laws and Customs Under Consideration". The legal analysis to the Draft Positions supplied by the ICRC warrants close examination because it highlights many of the theoretical and conceptual qualities of reciprocity. The ICRC Reaffirmation Report defined reciprocity as such: "if one of the Parties fails to apply the essential rules, the adversary is no longer bound to observe them." (p. 83) Thus, the ICRC definition of reciprocity is one that is consistent with this dissertation's understanding of negative reciprocity.

According to the ICRC recommendation, fundamental rights (also referred to as "basic human rights") of individuals should be independent of reciprocity. The ICRC commentary concluded with the following statement on reciprocity:

> Reciprocity is a *de facto* element which should not be neglected. It can play an important role in the effective application of the rules concerned. To admit this element, which is more of a sociological order, as a principle of international law in the field considered [basic human rights] would however be very dangerous. (*ibid*, p. 83)

The footnote to the first sentence above stated: "The ICRC often invokes reciprocity when it is a matter of granting advantages to victims over and above the minimum guarantees from which they ought to benefit under international humanitarian law." (ibid, p. 83, footnote 1) This four-sentence (including footnote) statement by the ICRC encapsulates many of the themes (and ambiguities) that are present when considering the role of reciprocity in the laws of war. The ICRC acknowledged that, in practice, reciprocity is an influential force that should not be ignored. However, unless it is applied in its positive sense (i.e. "above the minimum guarantees") reciprocity should be regarded as a dangerous concept. Furthermore, whether legally sanctioned in the positive law, reciprocity is a *de facto* force that can assist in *both* the successful application of the laws of war (positive reciprocity) and the justification for their violation (negative reciprocity), the latter of which led to the warning by the ICRC.

The Department of State position paper on the item of reciprocity and reprisals (Item 4e in the Provisional Agenda of the Commission on International Humanitarian Law) discussed the ICRC recommendation and its limitations. What follows is the direct wording from the Department of State Position Paper (under the heading of "Problem") on the agenda items of reciprocity and reprisals:

> **(1)** Reciprocity: The ICRC suggests that reciprocity should not be applicable in areas of basic human rights and should only be continued in areas where violation of a definite rule would give one side immediate advantage.

(2) Reprisals: The ICRC would like to see reprisals totally prohibited, but believes this position is unrealistic as long as some nations consider it necessary to resort to them. In these cases however, the ICRC proposes humanitarian limits in their scope, especially that the principle of proportionality be applied. (DOS Position Paper, 28 August 1969)

It is interesting to note that an earlier undated State Department draft of the position paper included an explicit reference to reciprocity in connection with reprisals (under the heading Implementation) and replaced the wording 'principle of proportionality' for 'principle of reciprocity': "Although the ICRC would like to see reprisals totally prohibited, it recognizes that this position is unrealistic. However, when they are used, the ICRC proposes humanitarian limitations in their scope: *that the principle of reciprocity be applied here* and that an attempt be made to limit harmful effects." (my emphasis)

The first instance of ICRC conference discussion of reciprocity was limited to its non-application to individual human rights. This is understandable in light of what is historically considered the primary mission of the ICRC – the protection of individual victims of war. This was, in retrospect, a tempered approach to limit negative reciprocity because it acknowledged, and justified to a certain extent, the continuation of reciprocity in instances of an immediate military advantage. This, in effect, opened the door to considerations of military necessity when making decisions to limit reciprocity. This utilitarian approach by the ICRC to limit the application of reciprocity in armed conflict is understood here as setting an attempt to set a minimal standard of protection for individuals from negative reciprocity.

A similar utilitarian approach was taken by the ICRC to prohibit reprisals. The ICRC tempered its goal of total prohibition with the reality that nations would retain, as necessity, the

need for retaliation. The best the ICRC hoped for was humanitarian limitations, specifically that reprisals would remain proportional to their original violations. The Reaffirmation Report showed the ICRC attempting to limit reciprocity and reprisals as an armed conflict option while at the same time acknowledging their existence in practice. This utilitarian approach to addressing negative reciprocity is, however, short lived; future conferences and ICRC-sponsored treaties became more aspirational and forward-looking in their goals. This led to greater criticism by the U.S. concerning the practicality of ICRC proposals, specifically those that concerned the issue of reprisals.

The Department of State legal analysis recommended that the U.S. support both ICRC proposals to limit reciprocity and reprisals while acknowledging certain exceptions. The 'discussion' section of the Department of State Position Paper gives a more detailed description of the U.S. position:

> The ICRC recognizes that the principle of reciprocity is found in general treaty law: if one of the party fails to apply the essential rules, the adversary is no longer bound to observe them. Where humanitarian standards aimed at safeguarding the fundamental rights of individuals are involved, however, the ICRC believes their observance should be independent of reciprocity. This position is consistent with the high regard of the United States for fundamental human rights and specifically with Article 60 (5) of the Convention on the Law of Treaties adopted last May in Vienna. It should be noted, the ICRC allows the following exception: if one party, in violation of definite rules, employs weapons or other methods of warfare which give an immediate, great military advantage, the adversary may, in its own defense, be induced to retort at once with similar measures. (DOS Position Paper, August 28, 1969)

The significance of the Vienna Treaty in limiting reciprocity (discussed in Part I) was further confirmed in the Department of State legal analysis and lends support to the argument that the

U.S. viewed certain sections of the treaty as customary in nature and, thus binding even though the United States has not ratified the Vienna Convention. However, while it acknowledged the minimal standard of protection of individual human rights, a clear distinction was drawn when it came to method/means and the issue of military advantage. Although military necessity was not mentioned by name, it can arguably be implied as falling conceptually within a scope that includes the concept of 'military advantage'. This lends support to the argument that negative reciprocity is a relevant variable in Hague-type method/means laws of war while loosing relevance (though not eliminated entirely from) Geneva-type humanitarian law.

U.S. Position at Conference

The primary issue of contention for the United States was the ICRC's proposed ban on weapons of mass destruction including chemical and bacteriological warfare. It is interesting to note that the weapons related resolution was the only occasion where the two U.S. delegations (Government Delegation and American Red Cross delegation) split their vote. The Department of Defense, in its legal review of the resolution, took a strong stance against ICRC involvement in methods/means of warfare:

> The International Red Cross should not be placed in a position to regulate the use of weapons or the methods or means of warfare…there has been a continuing trend toward confusing the "international humanitarian rules" which the Geneva Conventions set forth and making it the notion overriding the accepted principle that weapons used in warfare shall not be the cause of unnecessary suffering.
>
> In this resolution, there is an appeal for States to accede to the Geneva Protocol and to comply strictly with its provisions. This is a matter which is clearly not within the mandate of the International Red Cross and again amounts to efforts which can easily

> border on "meddling" with problems connected with the problems of war. (DOD Legal Opinion, 3 October 1969)

The State Department legal analysts recommended that the U.S. delegation oppose all references to individual weapons and also mentioned that issues involving the limitation of individual weapons should be left to other international bodies, specifically, the United Nations and the Geneva Disarmament Committee (both of which the United States exerted substantially more leverage in than it did the ICRC Conference).

The issue of ICRC involvement in laws of war relating to methods/means continued to be a point of contention and controversy for the United States in future laws of war conferences. As with previous ICRC conferences, issues relating to treatment of POW's proved to be less controversial. In the Department of Defense Legal Opinion, positive reciprocity reasoning is made in reference to humanitarian standards relating to POW's: "The USG [United States Government] should support reasonable humanitarian standards. To do otherwise places USG in untenable position in regard to treatment of U.S. and Allied personnel in unfriendly hands." (p. 6) The final State Department report of the 21st ICRC Conference concluded: "The US achieved its prime objective, adoption of a satisfactory resolution on prisoners of war, general in language but understood by all delegations to point at North Vietnam's persistent flouting of the Geneva Convention on POW's."

The Final Report criticized the conference as being "unbusinesslike" and "unstructured and disorganized". It is interesting to note that following the conference, in an internal Department of Defense memorandum (2 December 1969) that was subsequently forwarded to

the Department of State, the United States was criticized for sending an overly politicized delegation that failed to represent military interests. The memorandum described a conversation between the author of the memo, Harry Almond (Attorney-Senior Advisor, Office of General Counsel, Department of Defense), and Roy S. Lee of the United Nations Secretariat on Human Rights:

> His [Lee's] impression of the Istanbul Conference was somewhat negative: He stated that a number of the delegates that he had met had adopted the view that the United States was primarily taking a political position at the Conference. The reason for this is that the United States sent a very strong team from the Department of State – which is viewed as the political arm of the United States Government, and sent no one from the Department of Defense, and particularly failed to send delegates who wear the uniform of the United States military services. He believed that had the United States done so, it would have indicated more effectively its close concern with the implementation of the Geneva Conventions by the men most deeply involved. (2 December 1969, Memorandum from Harry Almond to Charles Havens (Assistant to Assistant Secretary of Defense and International Security Affairs) and Lt. Colonel Richard Rowland (Provost Marshall General), RG 59, Lot E5307, Box 37)

Future U.S. delegations to ICRC-sponsored conferences had a much stronger representation of Department of Defense personnel. One result of greater Defense participation was that two separate views solidified concerning the role of the ICRC to weapons and the legitimacy of reprisals. Not surprisingly, the Department of Defense took a strong position on these subjects, often countering attempts at greater restrictions by arguing that military necessity would override restrictions in practice.

Conference of Government Experts – Geneva (1971 & 1972)

According to Kalshoven (1971b), the idea behind the Conference of Experts was that "participating Governments would have an opportunity to air their views without formally committing themselves to any fixed position". (p. 37) Though the scope of the conference did not include the creation of a binding agreement, the final product of the conference, *Report on the Work of the Conference* (1971 & 1972), provided a template for the Diplomatic Conference (1974 - 1977) that resulted in the codification of the 1977 Additional Protocols. According to a participant in the U.S. delegation: "Experts sent by governments could express themselves with a certain freedom because their statements would not bind governments, but their governmental association meant that they spoke with some authority and would probably reflect the views of their governments, without committing their masters." (Baxter, 1974, p. 6) Though the experts' opinions cannot be qualified as 'official positions' of their respective countries, they nevertheless provide valuable insight into key debates that involved reciprocity. Furthermore, many of the same participants in the Conference of Experts went on to participate in the formal U.S. Delegation to the Diplomatic Conference. The importance that the U.S. government placed upon its participation in the Experts' Conferences is clearly seen in its conferring diplomatic protection upon U.S. participants in the form of embassy-secured courier message services and the use of embassy resources.

Conference of Government Experts, First Session - 1971 (May 24 – June 12)

The first ICRC-sponsored Conference of Government Experts was comprised of 39 countries. The role of the ICRC at the conferences was to draft rules while the government experts advised

and provided recommendations. The U.S. 15-person delegation was headed by George Aldrich, Deputy Legal Adviser, Department of State, and was comprised of five members from the State Department and nine members from the Department of Defense and other military branches. One private citizen, Richard R. Baxter, Professor of Law, Harvard University, supplied counsel for both State and Defense (Professor Baxter, as discussed in Case Study II, had been integral in drafting the 1956 U.S. Army field manual, *The Law of Land Warfare* and would go on to be elected judge on the International Court of Justice in 1978).

At The Experts' Conference, the United States was faced with having to balance advocating humanitarian treatment of its soldiers in the hands of the North Vietnamese and Viet Cong with fending off criticism of its own (and allies') treatment of prisoners of war. Taking place under the backdrop of the recent and well-publicized conviction (29 March 1971) of Lt. William Calley for his involvement in the My Lai massacre, the United States was in a tenuous position as related to the laws of war. Not surprisingly, the main focus of the U.S. delegation was to implement the existing Geneva Convention, specifically, the institution of the Protecting Power (as required under Article 8 of Convention III). According to a U.S. Delegate who was present: "It was somewhat paradoxical to be drafting new law when the old law was not fully implemented and the principal instrument for neutral supervision was moribund." (Baxter, 1975, p. 7)

The issue of reprisals played a prominent role in this conference and subsequent conferences which culminated in the 1977 Additional Protocols. Reprisals, along with the subject of Protecting Power, were addressed in the Conference Report (Volume II) under the heading:

"Measures intended to reinforce the implementation of the existing law." The report acknowledged the recently published work by Frits Kalshoven (1971a) and stated that the chapter on reprisals "takes greatly into account the ideas put forward by Mr. Kalshoven" (p. 49) The specific work on reprisals was conducted by Commission IV for which Kalshoven was Rapporteur. At the conference, the ICRC proposed: "The civilian population taken as a whole, like the individuals who constitute it, must never be made the object of reprisals." (ibid, p. 62)

The post-conference report, *Report on the Work of the Conference* (1971), summarized the debate that occurred in Commission IV on the subject of reprisals. According to the report, two general positions on the subject of reprisals were taken. Under the heading "The Problem of Reprisals," the two positions are summarized as follows:

> Some experts were of the opinion that the problem of reprisals…should no longer be considered as a measure of law enforcement and evoked in this respect the United Nations Charter and the declaration relative to the principles of international law concerning friendly relations and co-operation among States, adopted by the General Assembly of the United Nations at its 25th session, enjoining States to discharge their duty of refraining from acts of reprisal involving the use of force. It was further pointed out that the Security Council had condemned military reprisals on several occasions. Reprisals being among the most barbarous of the methods in the conventional law of war, they should henceforth be abolished. (ibid, pg. 111)

> There were many experts who considered, however, that reprisals inflicted by belligerents still held an important place in the law of armed conflicts. One of the experts declared that the introduction to the Charter of the United Nations was within the framework of *jus ad bellum*, while the present Commission was discussing *jus in bello*. In the conduct of hostilities, reprisals were still a legal device that was reasonably efficacious. Another expert held the view that it was impossible to outlaw at the present moment the system of reprisals, in view of the backward nature of the international community. Some experts considered that it was necessary to be realistic and that reprisals were, in certain cases, still justified. (ibid, pg. 111)

Due to ICRC confidentiality policy, the final report failed to list individual experts and their respective countries. However, the subsequent *Report of the United States Delegation* which was submitted to the Department of State confirms that the U.S. delegation took a critical position towards the banning of reprisals, a position that the United Sates would continue to take in subsequent laws of war conferences.

Conference of Government Experts, Second Session - 1972 (May 3 – June 3)

A criticism of the first conference was that developing countries had not participated. To address this, the ICRC invited all parties to the Geneva Conventions of 1949 to the 1972 Conference (77 states sent delegations). As a result, the 1972 Conference was, according to one U.S. delegate, "conducted in many respects like an international diplomatic conference." (Baxter, 1975, p. 8) Though the second conference was much larger than the first, many of the same themes emerged. For example, U.S. delegates continued to advocate that weapons-related issues should be addressed in forums other than the ICRC. Another feature, which would play a greater role in subsequent debates concerning Protocol II was the expansion of laws of war protections to guerillas without "commensurate responsibilities" (Prugh, 1972, p. 10).

An analysis of the *Report on the Conference of Government Experts* (1972) indicates that a number of unidentified government experts expressed reciprocity concerns. For example, one expert argued that the "rights and obligations" of humanitarian law should follow the "principle of reciprocity" while another delegate argued that insurgents would ignore the observance of Protocol II and that "reciprocity in the observance" was necessary. (p. 27 and p. 124) In all, I recorded seven (7) instances where government experts argued that an element of, or "principle

of", reciprocity should be introduced into the Articles or that the absence of reciprocity would weaken any Articles that emerged. Conversely, other experts argued against reciprocity; one stating that reciprocity and the "balance and equality of rights and obligations" had no place in international humanitarian law. (p. 209) Though no specific policy posture for the United States (or, for that matter, any other country) can be gleaned from this analysis, this does highlight the fact that reciprocity concerns were a point of contention at the conference.

A similar debate took place concerning the issue of reprisals. The ICRC and a number of government experts argued for adding conditions to, or the outright prohibition of, reprisals. On the other hand, some government experts argued that reprisals remained an important legal device in enforcing the laws of war and deterring violations. As can be seen in the subsequent Diplomatic Conference, this issue remained a point of contention not only between delegates representing different nations, but also within the U.S. delegation itself.

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict – Geneva (1974 – 1977)

From the 1971 and 1972 Conference of Government Experts, the ICRC developed two draft Additional Protocols. Protocol I related to international armed conflict while Protocol II was concerned with non-international armed conflict. Submitted to the 22nd ICRC Conference in November 1973 (Tehran), the Additional Protocols were subsequently addressed in a series of four Diplomatic Conferences held in Geneva (1974 – 1977). Apart from the Additional Protocols, participants of the two conferences of experts requested that the question of conventional weapons be addressed in a separate forum. This resulted in the ICRC's organizing

two meetings, held in Switzerland in 1974 and 1976 under the title: Conference of Government Experts on the Use of Conventional Weapons. These conferences are discussed in further detail below. The following section continues with the Additional Protocols, first in their draft form and then in the context of the specific committees that argued points relevant to considerations of reciprocity.

Draft Additional Protocols – 1973

A review of the Draft Additional Protocols conducted by The Joint Chiefs of Staff (JCS) and forwarded to the Secretary of Defense outlined specific objections and included a detailed Appendix with recommendations to "be provided to the US Delegations as a basis for formulating US negotiating positions" (8 January 1974, JCS Review, RG 389, Lot 511-02, Box 25) A consistent theme found throughout the JCS Review of the Draft Additional Protocols is that the ICRC initiative failed to strike a balance between military necessity and humanitarian protection. The JCS Review recommended that the U.S. delegation continue to focus on strengthening existing law, specifically the Protecting Power provision, and continue to oppose discussions on weapons while maintaining that weapons-related matters were outside the purview of the ICRC and should be discussed in other forums, such as the Conference on the Committee on Disarmament.

Regarding the balance between military necessity and humanitarian protection of civilians, the JCS Report provided a vague description of what constitutes military necessity. According to the report's recommendation: Though the U.S. should support provisions protecting civilians and civilian objects, it should oppose "provisions which would unrealistically limit military

operations, fail to recognize military necessity, or otherwise restrain a military commander from the lawful performance of his mission." The subject of military necessity was clarified further in the report's recommendation concerning the issue of proportionality found in Article 50 (Precautions to attack): "A military commander should not be expected or required to alter his plan of attack, required by military necessity, for the purpose of protection of civilians or civilian objects, especially when such change may incur increased losses to his own forces."

On the issue of reprisals, The JCS Report recommended that delegates oppose the prohibitions of reprisals in Article 46 (civilians), Article 48 (objects indispensible for the survival of the civilian population) and Article 49 (works and installations containing dangerous forces). The arguments forwarded in the JCS Report highlight many of the key issues involving reprisals that would later be revisited:

> Prohibition against reprisals in all circumstances would only bring the Protocol into disrepute as it seems inevitable, in practice, that State Parties would resort to reprisals under certain circumstances in time of war. The threat of reprisal is a longstanding keystone of the measures designed for the implementation of the international law of war. Even though the use of reprisal measures may carry the risk of counterreprisals and as escalation of the conflict, the concept of deterring violation of the law of war through the threat of reprisals appears overriding and the US Delegation should oppose the prohibition of reprisals in Article 46, 48, and 49.

The report's utilitarian view of reprisals stood in stark contrast to the views forwarded by the ICRC. The key justification for reprisals in The JCS Report included the inevitable use of reprisals *in practice* and the deterrent value that threats of reprisals played, even outweighing the escalatory nature of the countermeasure. Taken together, this supports the view that negative reciprocity (in the form of reprisals) had continued relevance, at least from the utilitarian

perspective of the JCS. Though the U.S. Delegation eventually acquiesced to reprisal prohibitions, the State Department, Department of Defense and Joint Chiefs of Staff continued, even years after the conference, to oppose reprisals, and recommended that the U.S. attach a reprisal exception as a reservation if the U.S. ever decided to seek ratification.

1974 - 1977 Diplomatic Conference

I. 1974 - February 20 – March 29
II. 1975 - February 3 - April 18
III. 1976 - April 21 - June 11
IV. 1977 - March 17 - June 10

The Diplomatic Conference got off to a highly politicized and unprofessional start as can be seen in the contents of a communiqué sent early in the conference (20 February 1974) from the U.S. Mission, Geneva, by Head Delegate Aldrich to Carlyle Maw, Legal Adviser, Department of State, D.C. According to Aldrich: "political questions have so contaminated atmosphere that serious search for improvements in international law certain to be delayed for some days." Aldrich singled out the Communist and African delegates. Regarding the latter, Aldrich wrote: "Africans have brought delegates out of all their Geneva closets that 34 African states are represented…Knowledge of international law not evident in most cases, but energy and eagerness to play political games seems boundless." (20 Feb 1974, RG 389, Lot 511-02, Box 25)

The tone of the conference continued to be highly politicized with the issue of national liberation movements playing a prominent role. For U.S. delegate Richard Baxter, considerations of reciprocity became relevant when considering whether the new Protocols should be applied to these groups. According to Baxter, national liberation movements lacked the legal power and

material means possessed by states and, as a result, would be unable to carry out and comply with the provisions of the Conventions. “This lack of practical reciprocity between the authorities in power and the national liberation movement destroys one of the important forces that exist for compliance with the law of war.” (Baxter, 1975, p. 16)

The issue of reprisals continued to be a prominent point of contention for the U.S. delegation throughout the conference. Within Committee III (The conduct of war and protection of civilian populations) the diplomatic wrangling on the limitation and/or prohibition of reprisals occurred. During committee sessions delegations argued the official positions of their respective states. It was within these meetings that an important level of decision-making occurred. However, as mentioned previously, individual committee minutes from the 1974-1977 Diplomatic Conference are not available. However, Frits Kalshoven, who was present in official capacity during Committee III, has published extensively on the inner workings of the Conference (see Kalshoven, 2007 for collective published essays). In addition to Kalshoven, head U.S. delegate George Aldrich (rapporteur for Committee III) has published accounts describing his experiences (see Aldrich, 1985, 1991 and 2005). Through these sources, a picture of the dynamics that occurred within Committee III emerges.

Committee III, in the second session of 1975, was tasked with addressing the conduct of war and the protection of the civilian population and dealt directly with the issue of reprisals. In the ICRC draft text, paragraph 4 of Article 46 stated “[a]ttacks against the civilian population or civilians by way of reprisals are prohibited.” Committee III, in the second session, also added a prohibition on reprisals of ‘civilian objects’. According to Kalshoven (1977), “these two

developments demonstrated a clear polarization of the issue [of reprisals]." (p. 741) By including a ban on reprisals of both civilians and civilian *objects*, the draft rules effectively banned reprisals in their entirety for this group. The legal arguments and diplomatic discord that ensued culminated with the U.S. delegate's attempts to remove a general ban on reprisals. The rapporteur for Committee III, U.S. delegate George Aldrich, made "explicit in his report to the Committee" that the phrase 'nor of reprisals' be removed after the statement that "Civilian objects shall not be the object of attack". (Kalshoven, 1977, p. 743-744) The Committee vote on February 25, 1975 rejected Aldrich's attempt to remove a ban on reprisals, voting 58 in favor, 3 against and 9 abstaining for the inclusion of the reprisal ban wording.

The U.S. delegation then attempted to override Committee III's decision by reverting it to Committee I. The vote by Committee III was in reference to draft Article 46, however, Articles 48 and 49 also contained clauses prohibiting reprisals. Rapporteur Aldrich noted that the work of Committee III was not complete in the matter of draft Article 48 and 49 and that Committee I was also interested in the subject of reprisals. Kalshoven (1977) explained the course of events that followed:

> He [Aldrich] suggested that it might therefore be desirable to set up a joint working group of the two Committees. This suggestion was met favourably by Committee III, but without any attempt at defining the terms of reference of such a joint working group. The importance of the latter point became apparent soon enough when Mr. Reed, delegate of the USA, noted his delegation's "reservation on the issue of reprisals as contained in Article 46 (4); Article 47 (I), and Article 47*bis* [on the protection of cultural objects and places of worship] to the effect that those provisions must be consistent with and subject to the work and determinations on the question of reprisals taken up by Committee I under Article 74 – repression of breaches – and by the proposed special study group which would consider that matter." This suggested that, at least in the view of this

> delegate, Committee I and the joint working group would both have power to reconsider the whole issue of reprisals with complete disregard of the decisions taken by Committee III. (p. 744)

Though the General Committee, in the third session, eventually decided against assigning the reprisals question to Committee I, this example shows U.S. delegates making a concerted, and coordinated, effort *against* the prohibition of reprisals. As discussed previously in the legal analysis of reciprocity in Part I, the prohibition of reprisals against civilians (and civilian objects) successfully became codified in the finalized Additional Protocol I (Articles 51 – 56).

It is interesting to note that in the over 1,100 pages of *The Summary Record of the Plenary Meetings* (Vol. 5 – 7 of the *Official Reports*) the term 'reciprocity' appears only twice in reference to the Additional Protocols. The first occurrence is by the South African delegate (H. L. T. Taswell) who argued, early in the first session (11 March 1974), that the entirety of the Geneva Conventions and Additional Protocols were based on reciprocity (Vol. V, p. 195). The use of reciprocity in this context implies that violations result in treaty termination. As discussed previously this is also referred to the "principle of reciprocity," or rule *inademplenti*. The second occurrence of the use of term 'reciprocity' appears at the closing of the fourth (and final) session when delegations were given the opportunity to give summaries of the Diplomatic Conference. It is in this setting that the head delegate of the United States, George Aldrich, made the following closing remarks (9 June 1977) in reference to Protocol I:

> 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. (p. 294, my emphasis)

This statement by Mr. Aldrich succinctly and directly linked the concept of negative reciprocity with reprisals from the perspectives of compliance and deterrence. The U.S. delegate's view on reprisals is later confirmed in the U.S. Government's positions toward the non-ratification of Additional Protocol I.

U.S. non-Ratification

In 1987 (January) President Reagan, in a notification to Congress, stated that Additional Protocol I was "fundamentally and irreconcilably flawed" and would not be submitted to the Senate for review and ratification. The reasoning behind the government's decision was outlined in a State Department 'Letter of Submittal' and included the following: Additional Protocol I protects guerilla forces, restricts unreasonably legitimate military targets, fails to improve "compliance and verification," is "too ambiguous and complicated to use as a practical guide for military operations" and, furthermore, Additional Protocol I "eliminates an important sanction against violations"(Letter of Submittal, Department of State, 13 December 1986). The final point was a reference to the prohibition of reprisals found in Articles 51 - 56.

George Aldrich (who left the State Department in 1981 and went on to serve as a judge in the Iran-United States Claims Tribunal) has published an extensive critique of the government's rationale for failing to submit Additional Protocol I and has advocated for U.S. ratification with

the addition of a reservation which would permit reprisals in situations involving "serious and systematic unlawful attacks on its civilian population." (1991a, p. 17) In an exchange in the *Virginia Journal of International Law* (1985) between Aldrich and G. B. Roberts, Aldrich acknowledged that the 1977 Additional Protocols "may have gone too far in prohibiting reprisals." (p. 710) Aldrich suggested that a reservation "will cure" any problem associated with reprisals in Additional Protocol I (1991a, p. 15).

Conference of Government Experts on the Use of Certain Conventional Weapons – Lucerne (1974) and Lugano (1976)

Apart from the Additional Protocols, participants of the two conferences of experts (1971 & 1972) requested that the question of conventional weapons be addressed in a separate forum. This resulted in the ICRC organizing two meetings where were held in Switzerland in 1974 and 1976 under the title: Conference of Government Experts on the Use of Conventional Weapons (henceforth Weapons Experts). The stated purpose of the conferences was to "study in depth, from the humanitarian standpoint, the question of the prohibition or limitation of the use of conventional weapons that may cause unnecessary suffering or have indiscriminate effects." The reports from these conferences show considerable reciprocity considerations and support the argument that negative reciprocity (including the 'condition of reciprocity') is linked directly to weapons.

In a similar situation discussed previously, Frits Kalshoven, as general rapporteur, had key insight into the conference and subsequently published his account in the *Netherlands Yearbook of International Law* (1975 & 1977). His account has been confirmed in the

conference proceedings' Final Report. The First Session of the Weapons Experts (1974) was largely concerned with technical matters such as small caliber projectiles, blast and fragmentation, and incendiary weapons. The result was a conference that was overwhelmingly concerned with scientific and technical aspects of conventional weapons, while legal and political issues remained in the background. According to Kalshoven, the first conference "generated more questions than answers." (1975, p. 170)

The rules of procedure for the second session (1976), while addressing the same types of weapons as the first, were amended to focus on weapons that "have been, or may become, the subject of proposed bans or restrictions of use." As a result, political and legal aspects were emphasized as opposed to technical aspects and, in turn, deliberations tended to be more 'heated.' It was within this context that one of the more revealing, and fascinating, debates in this case study occurred.

The debates between experts found in Kalshoven's account, and confirmed in the Final Report, concerned whether weapons treaties should carry an "absolute obligation" *versus* "no first use". Within this debate the issue of "right to reprisal" was considered. One group of experts, citing national security concerns, "held that it would be of the utmost importance for future instruments to pay due heed to the principle of reciprocity and, therefore, to be worded in terms of a "no first use" obligation only." (Kalshoven, 1977, p. 178) This argument was similar to the 'condition/principle of reciprocity' where rule violation results in treaty termination. At this point it would arguably be expected that the group of experts arguing for "absolute obligation" would do so on the grounds of restraint, perhaps including a humanitarian rationale.

What occurred, however, was very different than restraint or humanitarian-based reasoning and deserves quoting at length:

> Another group preferred to see an absolute obligation, this on the argument that a mere prohibition of first use ceases to have effect as soon as one party to the conflict starts using the weapon in question. This latter group of experts added that the principle of reciprocity could also be reflected in the form of a right to take reprisals, which, they felt, should suffice as a means of enforcing the instrument…This addition may seem somewhat surprising, as the recognition of a right to take reprisals, though less disastrous than unmitigated reciprocity, still considerably weakens an otherwise absolute obligation to refrain from using a certain weapon. (ibid, p. 178)

To summarize: On one side experts argued for a 'principle of reciprocity' with treaty termination in the event of violation. The other side argued for a 'right to reprisal', or what can be viewed in this context as the justification for repeated retaliation for a violation. What is fascinating is that Kalshoven appeared to have been operating, understandably, under the assumption that 'absolute obligation' entailed restraint or forbearance: "From another angle, the very recognition of the right of reprisal in the context of weapons prohibitions can only be considered as evidence of a welcome degree of realism on the part of this group of participants in the debate." (p. 178) In this example, as in others presented in this dissertation, what was *not* being argued (in this case restraint) was just as important as what was being argued (negative reciprocity).

What appeared next in Kalshoven's analysis confirms the non-restraint/non-humanitarian reasoning underlying the debate:

> In the ensuing discussion of the right of reprisal, views once again differed widely. At one extreme, one expert felt that the very concept was repugnant to the nature of humanitarian law; while this may appear a most idealistic point of view, it should be taken into account that the expert who expressed it had in the previous discussion taken

> the side of "reciprocity" and "no first use". Other experts of that group confined themselves to denying the relevance of a discussion of reprisals, since "reciprocity" would govern a future instrument anyway. (ibid, p. 178)

An analysis of the Final Report to the Conference of Government Experts on the Use of Certain Conventional Weapons (1976) reveals an inventory of negative reciprocity reasoning including:

- There was widespread agreement among the experts that reciprocity would be an essential condition for the effective prohibition or restriction of the use of any given conventional weapon. An expert, speaking in this vein, expressly rejected that such prohibitions or restrictions would be brought about unilaterally. (p. 6)

- Any decision should provide for a system of reciprocity involving sanctions (reprisals or other measures) against those who did not comply with the rules laid down. (p. 24)

- One delegate stated that: "his delegation would be guided by two basic principles: first, that it would be unrealistic to envisage the restriction on humanitarian grounds of a weapons system without carefully considering whether an alternative system existed which would meet satisfactorily the security requirements of the peoples concerned; and second, that it would be unrealistic to envisage unilateral restrictions, which would be applied by some but not by others. Reciprocity was indispensable if the security of the peoples was not to be endangered." (p. 28)

As with the previous government expert conferences, it is not possible to ascertain the national identity of representatives. Though the views of the experts cannot be qualified as 'official positions', they nevertheless provide valuable insight into the dynamics of reciprocity from the perspective of laws of war creation. The United States regarded its participation in the conference to be important as can be seen in its extending diplomatic protection and privileges, including official courier protection for classified documents and State Department provided resources (office equipment, car and hotel) to U.S. participants. At the close of the conference, it was decided that further conventional weapon negotiations would be conducted under the

auspice of the UN. These meetings, held in 1979 and 1980, produced The 1980 U.N. Certain Conventional Weapons Convention (CCW).

1925 Geneva Protocol Ratification (1969 – 1975)

Occurring largely outside of the ICRC conferences (Experts and Diplomatic) was a separate initiative by the United States government towards the ratification of the 1925 Geneva Protocol (Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare). In 1969, after years of inaction, President Nixon submitted the 1925 Geneva Protocols to the Senate for consent and ratification. There was a noted difference in the level and type of decision-making involved between the ICRC-sponsored conferences and the ratification of the 1925 Geneva Protocol. The former, as discussed, largely involved the interdepartmental policy-making between The Department of State and Department of Defense. In this decision-making process, legal points were argued and positions formulated; rarely was there contact with higher levels of government decision-makers, such as the National Security Council (NSC). The different levels of interdepartmental decision-making related to the laws of war is discussed by Michael Matheson, who served in the Office of Legal Adviser, State Department (beginning in 1972), was deputy head of the U.S. delegation to the 1976 Weapons Experts conference (Lugano), and head of the U.S. delegation for the CCW. In a 2002 interview given by Leon Sigal (for Sigal's book, *Negotiating Minefields*, 2006), Mr. Matheson stated:

> The law of war activity, he [Matheson] said, "was almost always done directly between the State and Defense Departments and basically between the legal adviser's office and the military lawyers. We almost never went to the NSC for decisions," a step Matheson was loathe to take. "Whenever humanly possible, don't ask the NSC to decide an issue. Then it gets into politics in a big way. (Sigal, 2006, p. 61-62)

The 1925 Geneva Protocol, on the other hand, involved greater executive-level decision-making, specifically the involvement of the NSC that coordinated and oversaw the decision-making process among multiple government departments. The period between treaty submission in 1969 (25 November) and its eventual ratification in 1975 (10 April) saw a number of NSC reports that had immediate bearing on the issue of reciprocity.

In the following I begin with a discussion of the treaty reservations affixed to the Geneva Protocol with particular attention drawn to the condition of reciprocity. In some cases multiple examples of negative reciprocity exist within the same reservation. Next I discuss the related issues of riot control agents (RCAs) and herbicides that became central issues of contention and controversy in the U.S. ratification. I show that negative reciprocity is not only included in the text of the official treaty reservation, but that it also weighed heavily in the decision of whether to include in the reservation the right to use non-lethal chemical agents such as RCAs and herbicides.

The Geneva Protocol of 1925 prohibits "the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids materials or devices". The treaty contains numerous reservations attached by ratifying countries stating that treaty obligation will be terminated the moment another party violates its legal obligations. Conceptually, this relates to the 'condition of reciprocity' or what Detter (2002) refers to as "strict reciprocity." (p. 256) According to Roberts & Guelff (2000), as a result of the reservations is that the Geneva Protocol has become a non first-use treaty that does not contain an "absolute prohibition of the use of such weapons, but only an agreement not to use such weapons first." (p. 155)

Many of the countries that initially ratified the Geneva Protocol made reservations similar to France (see ibid pg. 165 for a list). The French ratification is considered here not only because it influenced other countries, but also because it shows multiple types of negative reciprocity. The following is the French reservation as it appears in the official text:

> (1) The said Protocol is only binding on the Government of the French Republic as regards States which have signed and ratified it or which may accede to it.
>
> (2) The said Protocol shall *ipso facto* cease to be binding on the Government of the French Republic in regard to any enemy State whose armed forces or whose Allies fail to respect the prohibitions laid down in the Protocol. (Roberts and Guelff, 2000, p. 165)

The first passage of the reservation contains the clause *si omnes*, a common feature in many pre-World War II treaties (and not found in the general treaty text of the Geneva Protocol). As discussed previously (Part I, Legal Analysis) the clause *si omnes* has the effect of binding legally *only* the signatory parties of a treaty. The second passage contains the *inadimplenti* rule or what is referred to in this dissertation as the 'principle' or 'condition' of reciprocity. This limits the Geneva Protocol to a non first-use treaty that releases a state from its treaty obligation in the case of violations. That reciprocity is a relevant concept to reservations attached to the Geneva Protocol is made explicit by China, which stated upon ratification: "that it would implement the provisions of the Protocol 'provided that all the other contracting and acceding powers observe them reciprocally'" (ibid, p. 165). Incidentally, a number of governments, including the French in 1996, have since withdrawn their original reservations.

A review of the relevant source material related to The Geneva Protocol reveals that little debate occurred concerning the decision by the United States to affix a reservation containing the

condition of reciprocity. As can be seen in documents prepared by the State Department in preparation for Secretary of State Rogers' testimony before the Foreign Relations Committee, the answer to the anticipated question of "Why is it necessary for the U.S. to make any reservation?" was met with the following reply:

> …in light of the fact that reservations have been made by many of the Parties, the omission of a similar reservation by the United States might be taken as an implication that the United States had intentionally relinquished the right to retaliate with chemical weapons in the event that chemical or biological agents are first used by another State or one of its allies against the United States.
>
> The proposed reservation…constitutes a precautionary measure designed to avoid giving any other Party a mistaken impression of the rights that the United States considered that it has retained. In addition, in the absence of a reservation so providing, our right to retaliate against a State for action taken by one of its allies would be open to question.

As this illustrates, the U.S. considered, as a 'right', the retaliation for treaty violation. The reservation that the U.S. attached in 1975 (22 January) to the 1925 Geneva Protocol reflects this and subsequently strengthens, theoretically, the 'condition of reciprocity' as a relevant concept. The text of the U.S. reservation is as follows:

> The said Protocol shall cease to be binding on the Government of the United States with respect to the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, in regard to an enemy state if such state or any of its allies fails to respect the prohibitions laid down in the Protocol.

The issue of riot control agents (RCA) and chemical herbicides consumed much of the ensuing Senate and departmental debate and served to 'stall' the Geneva Protocol in Congress until late 1974.

In 1973 Henry Kissinger (Assistant to the President for National Security Affairs) established the Ad Hoc Group on U.S. Policy Toward the 1925 Geneva Protocol which consisted of representatives from the Secretary of State, the Secretary of Defense, the Director of the Central Intelligence Agency, the Director of the Arms Control and Disarmament Agency and the Joint Chiefs of Staff. In the final report of the Ad Hoc Group (subsequently referred to as Ad Hoc Report) the issues of RCAs and herbicides weighed heavily. The scope of the Ad Hoc Groups assessment clearly did not include the negative reciprocity considerations of retaliation or second use of RCAs and herbicides. According to the Statement of Issue in the Ad Hoc Report:

> [T]he basic question is whether the US wishes to retain the option to initiate use of RCAs and herbicides in war. The answer to this question will depend upon whether the overall military benefits in retaining the first use option for these two agents outweigh the political costs of our not becoming a party to the Protocol. Second use or the right to retaliate with these agents in the event they were used against US forces is not at issue here. (25 April 1974, DNSA File 000695)

The comprehensive (22 page) report goes on to weigh and argue the benefits between the military effectiveness of RCAs (in particular their use in fortified positions in Vietnam, i.e. caves, bunkers and tunnels) and herbicides (in jungle defoliation, crops destruction and establishing base perimeters) *versus* the diplomatic, political and legal costs of their continued use. In addressing other countries' reservations to the Geneva Protocol, the Ad Hoc Report considers negative reciprocity in relation to the possibility of a spiral in escalation that would begin with RCAs and end with lethal chemical warfare. From the final report:

> Under reservations taken by a number of Parties (including members of the Warsaw Pact), our use of RCAs and herbicides against them could relieve them of their

> responsibilities under the Protocol toward the US and our Allies and could, in their view and that of many other Parties, provide them a legal rationale for escalation to chemical warfare should they consider it militarily advantageous to respond in this manner. (Ad Hoc Report, 1974, pg. 7)

This 'escalatory' line of reasoning can also be found in State Department documents written in preparation for Hearings before the Committee on Foreign Relations (March, 1971) and strengthens the argument that negative reciprocity considerations, in the form of a 'slippery slope' retaliation that would eventually lead to treaty termination, were relevant in the decision-making process.

In the end, the NSC advised against including a reservation clause permitting the use of non-lethal RCAs and herbicides. A number of variables contributed to this decision but prominent among them was the prospect that including the clause would result in the failure to obtain Senate advice and consent. Though RCAs and herbicides were not included in the final reservation, the U.S. position that they fail to fall within the purview of the Geneva Protocol was affirmed in the Presidential Signing Statement (22 January 1975) attached to the treaty upon ratification.

Conclusion

Negative reciprocity considerations entered into the decision-making process involving the creation of the laws of war in the form of U.S. insistence on retaining reprisals as a general means of laws of war enforcement and specific to the subject of weapons (both conventional and nuclear). Negative reciprocity thus retained particular strength as a relevant variable in the creation of the laws of war. A recurring theme operating within this case study was the consistent

objection by the United States of ICRC involvement in weapons-related issues. The ICRC, understood here to be a hybrid between a non-government organization and an intergovernmental organization, advanced an agenda clearly in line, conceptually, with the world society view. The persistent U.S. rejection of the ICRC as a forum for weapons-related issue conceptually reflects U.S. resistance to the world society paradigm and strengthened the prominence of the state in international society.

On the other hand, U.S. support for the world society perspective can be seen in the ratification of the 1949 Geneva Conventions where the treaty provisions were based on universal humanitarian standards. It is apparent from the interdepartmental and Congressional records pertaining to U.S ratification of the 1949 Geneva Conventions that retaliatory countermeasures or possible treaty suspension were not seriously considered to be an option in the case of an enemy's non-adherence. Taken together, what emerges is a clear U.S. policy distinction between weapons-related laws of war and an understanding of laws of war based solely on the protection of individual victims of armed conflict, as is seen in the 1949 Geneva Conventions. This supports the argument that the legal joining of Geneva and Hague laws of war was premature in light of state practice of the United States. Moreover, the retaining of the Geneva and Hague distinction rests largely on a negative reciprocity rationale.

Case Study II

Implementation

The second stage of the decision-making process involves implementing the laws of war as training policy. Implementation involves the laws of war being applied as military doctrine and includes the related concepts of dissemination, promulgation and training. State practice of the laws of war is often reflected in the numerous field manuals (FM), army pamphlets (AP), army regulations (AR), training circulars (TC), and training films (TF) that are produced by governments to train their military. This material collectively comprises the source material that has been analyzed in the *implementation* case study that follows. Reisman & Leitzau, refer to the implementation, promulgation and dissemination of the laws of war as "an essential component in the international lawmaking process" and "a necessary step if law is to be transformed from an exercise in theory to a matter of practice." (1992, p. 1 and 3)

Dissemination of the laws of war is clearly required by the 1949 Geneva Conventions. According to Article 126 of Geneva Convention III (1949):

> The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to all their armed forces and to the entire population.

Additional examples of wording that indicate the mandatory nature of dissemination can be found in Convention I (Art. 47), Convention II (Art. 48) and Convention IV (Art. 144).

Historical Basis – Lieber Code

The historical codification of the laws of war began with United States Army General Orders No. 100, *Instructions for the Government of Armies of the United States in the Field* (1863). Commonly referred to as the Lieber Code after its author, Francis Lieber, a professor at Columbia College Law School (now Columbia University), the code provided the first historical example of a manual for the conduct of war and proved to be highly influential in subsequent development of the laws of war. (Best, 1979, p. 20) Five thousand copies of the Lieber Code were printed and disseminated to Union troops and "transmitted to the Confederate forces under a flag of truce." (Elliot, 1983, p. 7) As Roberts & Guelff (2000) note, the Lieber Code served as the model for military manuals issued by other countries (Netherlands in 1871, France in 1877, Serbia in 1879, Spain in 1882, and Portugal in 1890) and formed the basis of the Brussels Declaration (1874) which, in turn, influenced the 1899 Hague Declaration and 1907 Hague Regulations. (ibid, p. 12 – 13, 22)

The Lieber Code contained a number of humanitarian provisions that went on to become central components in subsequent laws of war codifications, including the prohibition on inflicting suffering for the sake of revenge and forbidding the use of torture, poisons, perfidy and "wanton devastation". The Code also contained aspects of negative reciprocity. For example, on the subject of retaliation the Lieber Code 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 opponents no other means of securing himself against the repetitions of barbarous outrage. (Art. 27)

The most extreme form of negative reciprocity found in the Lieber Code concerned the subject of denying quarter to the enemy. Theodor Meron (1998) aptly summarizes this in the following:

> Article 62 of the Lieber Code even authorized a savage form of reciprocity, declaring that troops that gave no quarter, would receive none in return. Article 66 extended reciprocity and retribution to the period after the battle, when there could no longer be any semblance of necessity. It allowed killing of enemy prisoners if within three days after the battle it was discovered that they belonged to a corps that gave no quarter. (p. 193)

Though subsequent manuals, and the laws of war in general, would discredit this extreme form of negative reciprocity, reciprocity considerations in general, both positive and negative, continued to be a part of the implementation of the laws of war.

Content and Context

The material being analyzed in this case study was either created by or approved by the U.S. military for use in its training regimes and is considered to reflect official policy. The formal purpose of the material is the promulgation of the laws of war and the training of soldiers on U.S. legal requirements in order that they may adhere to treaty obligations. Training material content can be broadly divided into two categories: legal and non-legal. The strictly legal content often consists of the dissemination of specific treaty rules, often verbatim, while non-legal content can include calls for laws of war adherence based on moral and humanitarian obligations, military honor and reciprocity. The legal/non-legal categories are not, however, mutually exclusive. In fact, the content of the training material often blends the legal with the non-legal, sometimes within the same section or statement.

As mentioned previously, a common problem with literature concerning the laws of war is that there is an overwhelming emphasis placed on strict legal analysis. As it relates to the implementation of the laws of war, this type of analysis involves confirming that the legal content of training material conforms to the legal rules contained in laws of war treaties. This type of analysis though is highly limited and presents a one-sided perspective. A similar view is taken by Reisman & Leitzau (1991) who state: "It is not enough to develop a mechanical checklist to verify that certain items are in the manual. How they are translated to the pertinent vernacular and with what nuance and shading are also important." (p. 5-6) A strict rule-based analysis is avoided in the following analysis, which, instead, emphasizes non-legal aspects and context when analyzing training material. Though the legal content often contains rules relating to reciprocity, in particular the banning of reprisals, it is within the non-legal content that reciprocity considerations often exist and, as a result, lead towards richer avenues of analysis.

Since reciprocity is viewed as an expansive concept that is relevant to both the legal and the non-legal content of the laws of war, it is important to consider context when analyzing the source material. To understand, as fully as possible, the role or non-role of reciprocity in the implementation of the laws of war, what is excluded from military training is often as important as what is included. The relevant questions for this case study include: What variables do the military present in training to motivate soldiers to follow and adhere to the laws of war? What is the role of reciprocity in this training? What other variables, besides reciprocity, are provided? Are reciprocity considerations addressed in the context of laws of war violations?

Theme

A theme that emerged during my analysis is that there was a noted shift in military training as a result of the public outrage and government inquiries following the My Lai massacre. My analysis of the training material utilized before and after the My Lai investigations reveal three sub-themes. First, there was a marked change in training content. Previous to the My Lai inquiries greater emphasis had been placed on rule-based instruction of the laws of war that often focused on the rote study of the specific provisions of the Geneva and Hague Conventions. In contrast, following the My Lai investigation military training became more creative with an instructional model that emphasized greater use of problem-solving and scenario-based examples. Second, and closely related to the first, the training target audience became more clearly defined after My Lai. Previously, the target audience had often been unstated and critics had noted that training material was not written in 'layman terms' and was difficult for many combat soldiers to comprehend. After My Lai, training materials (films and field manuals) were developed specifically for use in training combat soldiers. R. R. Baxter, who was influential in the drafting of early post World War II manuals, suggests in a 1977 *Military Law Review* article that there should be three levels of manuals, "one for the basic education of soldiers, a middle level manual for officers, and a large legal treatise for lawyers." (p. 182) Finally, and not at all surprising in light of the atrocities that occurred at My Lai, training emphasis became more focused towards enforcement and punishment under the Uniform Code of Military Justice for violations of the laws of war.

Positive reciprocity is conveyed in the training message that 'good treatment begets good treatment.' This includes the argument that following the laws of war influences the enemy to do so. Related is the "Golden Rule" rationale of "treat the enemy as you would like to be treated." Negative reciprocity is conveyed in the message that 'violations beget violations.' This can involve the reminder that "the enemy holds U.S. prisoners" coupled with the threat that "your violation will result in enemy violations." Both positive and negative reciprocity messages conveyed in the training material analyzed supports, conceptually, positive reciprocity because the underlying purpose of the messages is the observance of the laws of war.

Alternatives to reciprocity include calls for military honor, individual moral virtue and universal humanitarian standards. Furthermore, utilitarian reasoning for adherence, including gathering reliable intelligence and the threat of punishment in the case of violations, are included as a training rationale. The analysis that follows is organized sequentially according to the date that the training material was released. At the end of the primary reference section is a separate section for official military training material.

Analysis

Korean War

The Korean War (25 June 1950 – 27 July 1953), took place during the intervening period of post-signing and pre-ratification of the Geneva Convention of 1949. Technically, the Geneva Conventions of 1949 were not legally applicable to this conflict. However, on July 4, 1950, the Supreme Commander for the Allied Powers, General MacArthur, stated that the "humanitarian principles" of the Geneva Conventions would be applied. Furthermore, and as will be discussed

in greater detail in Case Study III, the United States, in particular the State Department, operated throughout the conflict under the assumption that all four of the Geneva Conventions of 1949 applied. That the U.S. military considered Convention III (prisoners) as binding policy before ratification is apparent in the two primary laws of war field manuals produced during this period: FM 30-15, *Examination of Personnel and Documents* (1951) and FM 19-40, *Handling Prisoners of War* (1952). For example, FM 30-15 (1951) states that though the "United States is not legally bound [to the 1949 Geneva Conventions]…the policy of the Department of Defense is to adhere to the standards…in our treatment of enemy prisoners of war." (p. 68) After acknowledging the legally non-binding status of the1949 Geneva Convention, the Foreword to FM 19-40 (1952), states that the United States "acting unilaterally and by special directives" applies the provisions of the Geneva Conventions of 1949. (p. iii)

Though reciprocity is more common in later manuals, it did appear in both general and specific contexts in the two Korean War era manuals. For example, FM 30-15 (1951) included the following rationale for upholding the laws of war: "Recognizing and obeying the law in our treatment of prisoners helps to insure proper treatment of personnel who become prisoners of an enemy signatory to the convention." (p. 68) This passage, not included in the 1945 edition of FM 30-15, implies forward-looking positive reciprocity. The hope was that adherence to the laws of war would influence likewise positive treatment of U.S. prisoners of war.

A more specific and somewhat confusing reference to reciprocity is made in FM 19-40 (1952) which describes the requirement that the detaining party establish an Information Bureau to facilitate the exchange of prisoner information (as required in Articles 122 – 125 of Convention III). The manual outlined the role of the U.S. Enemy Prisoner of War Information

Bureau in coordinating the collection of identifying data of each prisoner (e.g. serial number, names of the prisoner's parents, addresses of those to be informed of capture, etc). There is an interesting reference to negative reciprocity as a possible consequence if prisoner information is not transmitted: "Failure to transmit this information speedily to the enemy power through the channels provided may encourage *retaliation in kind*." (FM 19-40, 1952, p. 10, my emphasis) This passage stood out in the 115-page field manual for two reasons. First, it is the only reference to negative reciprocity. This is interesting because throughout the manual there are many opportunities where the consequences of possible violations (i.e. capture, interrogation and discipline of prisoners of war) would arguably warrant a negative reciprocity warning. Second, the phrase "retaliation in kind" is awkward when referring to the exchange of prisoner information. Usually associated with an act of belligerence, such as enemy use of a forbidden weapon or tactic, 'retaliation in kind' as used in FM 19-40 appears to imply that failure to transmit prisoner information can delay or impede the reciprocal sharing of prisoners' information.

Post Korea

Three main themes pertaining to the laws of war emerged in the years immediately following the Korean War. First, the ratification of the Geneva Conventions of 1949 (in 1955) meant that manuals and training material had to be revised to reflect the legal obligation of the United States. Second, the controversy surrounding the issue of forced versus voluntary repatriation of prisoners came into prominence. The issue of repatriation, discussed in greater detail in Case Study III, was a salient point of contention in cease-fire negotiations and UN commitment to

voluntary repatriation created a lengthy impasse in negotiations that lasted almost two years. (Sandler, 1995 p. 97) The third theme involved the controversy surrounding accusations that a large number of U.S. POWs collaborated with their North Korean and Chinese captors. The Korean War was the first major conflict where U.S. prisoners were utilized for widespread propaganda efforts. As a result, post-Korean War laws of war training focused primarily on the work completed by The Defense Advisory Committee on Prisoners of War that established the Code of Conduct (*Code of the U.S. Fighting Force*, 1955).

The first significant military manual to emerge following the Korean War was Department of Defense Pamphlet 8-1 (DOD PAM 8-1), *The U.S. Fighting Man's Code* (1955). The manual deals primarily with the problems that U.S. soldiers faced in Korea while fighting a Communist enemy bent on indoctrinating prisoners and using them for propaganda purposes. An obvious emphasis, as seen in the title, is the Code of Conduct. The pamphlet goes to great length to demonstrate that the misconduct (bordering treason) of U.S. POWs in Korea was largely a misconception.

The most important and extensive collection of the laws of war during this time was the issuance of FM 27-10, *The Law of Land Warfare* (1956). Revised in 1976 to reflect the ratification of the 1925 Geneva Protocol, FM 27-10 is still in effect and is included in the most recent Army Judge Advocate General training supplement (2010). The stated purpose of FM 27-10 is to provide the "authoritative guidance to military personnel on the customary and treaty law applicable to the conduct of warfare". (p. 3) The primary author of FM 27-10 was Richard R. Baxter (discussed in Case I for his work as a U.S. delegate at conferences related to the 1977 Additional Protocol). FM 27-10 is more of a collected dissemination of the laws of war (Hague

and Geneva) than a training regime. For example, over 100 pages of the manual are dedicated to disseminating the requirements, almost verbatim, regarding the treatment of prisoners of war as found in Geneva Convention III.

FM 27-10 is the first instance where the term "human rights" is used in a U.S. military training manual. Under the heading of Basic Principles, the importance of "safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians" is stressed (p. 3). The focus on the individual is also extended to the applicability of the laws of war in general: "The law of war is binding not only upon States as such but also upon individuals and, in particular, the members of their armed forces." (p. 4) The shift from State to individual responsibility followed the precedent set by the Nuremberg Principles which emphasized the responsibility of individual soldier to the laws of war.

Concerning reciprocity, by affirming the applicability of Common Article 2 (p. 8) FM 27-10 further supports the rejection of the *si omnes* clause to the Geneva Conventions.

Chapter 8 of FM 27-10, *Remedies for Violation of International Law*, addressed the issue of reprisals. After defining reprisals, Paragraph 497 (a), gives the following, somewhat vague, example to justify their use: "the employment by a belligerent of a weapon the use of which is normally precluded by the law of war would constitute a lawful reprisal for intentional mistreatment of prisoners of war held by the enemy." (p. 177) However, no specific weapon is mentioned. Provost (2002, p. 194) states in his analysis of Paragraph 497 (a) that this would include the use of dumdum bullets, a weapon prohibited in the Hague Convention of 1899 (Declaration III). The manual then states that, "Other means of securing compliance with the law

of war should normally be exhausted" before resorting to reprisals. (ibid, p. 177) After listing the forbidden categories of reprisals found in the Geneva Conventions (wounded and sick, prisoners and protected civilians), the manual states "reprisals may still be visited on enemy troops who have not yet fallen into the hands of the forces making the reprisals." (ibid, p. 177) Furthermore, "Reprisals are never adopted merely for revenge…[and] should never be employed by individual soldiers except by direct orders of a commander". A certain amount of leeway is given to the type of reprisal employed in that the reprisal does not have to conform to the initial violations, however, it "should not be excessive or exceed the degree of violence committed by the enemy." As these examples demonstrate, negative reciprocity in the form of reprisals, while curtailed, is still permitted in some cases. Furthermore, there exists a certain amount of ambiguity regarding the type of weapon allowed and the proportionality permitted in the reprisal.

As mentioned, FM 27-10 (1956) failed to include a specific training regime for the laws of war, presenting instead a legal dissemination of the treaties. Furthermore, its intended target audience is unclear. Written in a style that emphasizes technical legal terminology, it does not appear that this manual was produced with the combat soldier in mind. An extensive review conducted by the Department of Defense in 1972, *Doctrine for Captured/Detained US Military Personnel Study* (US POW Study), was highly critical of FM 27-10, referring to the text of the training manual as "stilted legal jargon…[that] provides a handicap for most individuals." (Volume II, Part I, p. 4-127) The US POW Study also criticizes FM 27-10 as being overly legal and unrealistic as a tool for training combat soldiers: "The text is primarily legal in its approach and not written in layman's terms. It deals with the obligations and privileges of the PW in a manner which is difficult for the combat soldier to comprehend." (ibid p. 4-77)

In April 1958 the Department of the Army published Pamphlet 20-151, *Lectures of the Geneva Convention of 1949*, to assist officers in teaching the laws of war. The material is presented in a less complex manner than found in FM 27-10 with specific legal jargon largely omitted. A prominent theme in the condensed (24 page) description of the four Geneva Conventions of 1949 is the individual responsibility of each soldier to follow the Geneva Conventions. It is interesting to note that reciprocity (positive or negative) is not found in statements relating to the rationale for adhering to the Geneva Conventions as is found in subsequent training material. For example, in the introduction to Geneva Convention III (prisoners of war) the following rationale is given to support adherence:

> During hostilities, *any* soldier may become a prisoner of war and *every* soldier should have prior knowledge of his rights under the Convention; he should also know exactly what rules and regulations he is required to follow during his imprisonment by the enemy. Similarly, when our armed forces capture enemy personnel, we, as soldiers, must know the standards of treatment to which they are entitled if we are to abide by the terms of the Convention and thus uphold the dignity and honor of our country. (p. 2-3, emphasis in original)

Here the concepts of 'dignity' and 'honor' of nation are offered as the rationale for adherence, rather than calls for positive reciprocity restraint (treat the enemy as you would like to be treated) or warnings against negative reciprocity (mistreatment may lead to abuse of captured U.S. POW's).

An acknowledgement of the possibility of enemy refusal to honor the Geneva Conventions of 1949 is clearly stated in the concluding paragraph of the lecture on Geneva Convention III:

> The United States is bound by these treaties, and the Convention provisions are therefore law. Accordingly, all military personnel are legally required to conduct themselves in conformity with the rules laid down in the Conventions with respect to the treatment of prisoners of war, visitors, etc. There is, of course, no assurance that in any war in which the United States may become involved in the future, the enemy will similarly implement the treaty provisions. (p. 16)

The absence of reciprocal consideration is consistent with other training material from this period including the Department of Defense sponsored film: *The Code: The U.S. Fighting Man's Code of Conduct* (AFIF 90).

Vietnam 1964 - 1969

In 1964, an update of the 1952 FM 19-40, *Enemy Prisoners of War and Civilian Internees* (discussed above) was published. The 1964 revision contained a more detailed dissemination of the relevant Geneva Conventions and included a more specific listing of objectives. The intended audience of FM 19-40 is noted to be military police, officers and enlisted men who come into contact with prisoners of war and civilian internees. In the manual's introductory objectives a call for positive reciprocity is established. Found verbatim in the 1967 revision, the manual's objectives are as follows: "a) Acquisition of maximum intelligence information within restrictions imposed by the law of land warfare. b) Prevention of escape and liberation, c) *By example, promotion of proper treatment of own personnel captured by the enemy.* d) Weakening the will of the enemy to resist capture. e) Maximum use of PW's and civilian internees as a source of labor." (p. 2, my emphasis) As is seen in future manuals, the call for positive reciprocity or a caveat warning against negative reciprocity was standard and in some instances became the primary training message.

In July 1964 the U.S. government announced that the U.S. military contingency in South Vietnam would increase from 5,000 to more than 21,000. As U.S. combat involvement in Vietnam expanded, a large number of training initiatives, including films, were produced to prepare soldiers for, among other things, counterinsurgency warfare. Like many of the training manuals analyzed here, early training films often consisted of a legal reading of the laws of war, with the addition of visual aids. Furthermore, the films often contained a political component. In the training films produced during the latter part of the Vietnam War it is questionable whether the motive for the films' production was to provide military training or to confirm and convince others of the United States' strict observance of the laws of war (e.g. VTR 29, 1969 discussed below).

In 1965, the U.S. Army released the training film (TF), *Geneva Conventions and Counterinsurgency* (TF 27, 1965). Though the film addressed internal conflict occurring globally (Laos, South American, Cyprus and Congo) and often relied on stock footage of these conflicts, the film's primary reference was Vietnam. The film sets out to answer the question: "What is the legal status of prisoners who have been fighting their fellow citizens within the borders of their own country?" (TM 27, 1965, Part I, 1:15) The response is Common Article 3 of the Geneva Conventions (conflicts not of an international character). The content that followed was a reading, verbatim, of Article 3 in its entirety with stock footage from numerous conflicts being shown to highlight specific provisions. (ibid, 3:40 – 6:40)

Reciprocity was implied in a number of scenes. For example, in a scene depicting U.S. military advisers training South Vietnamese Army personnel in first aid the following commentary is included:

> 7:59 - Encourage others to provide adequate first aid and medical care for their prisoners. Not just because you are obligated to do so, but also because it is possible that the insurgents may be influenced to follow the same example.

Negative reciprocity along the lines of "mistreatment of the enemy may result in the mistreatment of our captive POW's" is not included as it is in future training material, arguably because few U.S. soldiers were held captive at the time the film was produced. A form of negative reciprocity is implied, however, during discussion of violations to the laws of war:

> 0:55 - Any type of mistreatment, real or imagined, gives the insurgent a strong propaganda weapon… Affording the insurgents another excuse for more and worse atrocities. Brutality brings on more brutality. (Part II)

In addition to the suggestion of reciprocity, there is emphasis placed on the humane treatment of insurgents who may surrender and could possibly convert to the legitimate government. Furthermore, the film stressed that insurgents are responsible for following the Geneva Conventions and that insurgent atrocities can lead to prosecution and punishment. Finally, and not surprisingly, there are strong political overtones in this, and other, training films. For example, in one instance the enemy is described as one who "respects no rights and obeys no rules" and advances a "technique of terror and enslavement." (ibid, Part II)

In September 1967, the U.S. Military Assistance Command Vietnam (MACV) issued, "The Enemy in Your Hands". This three inch by five inch card contained basic Geneva

Convention requirements and was issued to all U.S. troops arriving in Vietnam (Prugh, 1975, pg. 75) The card, containing five rules, was also produced in Vietnamese and distributed to the Army of the Republic of Vietnam (ARVN). The card instructed troops to handle those captured: "firmly, promptly, but humanely…he must not be tortured killed, mutilated, or degraded, even if he refuses to talk (Rule 1)…Mistreatment of any captive is a criminal offense. Every soldier is personally responsible for the enemy in his hands. It is both dishonorable and foolish to mistreat a captive…Not even a beaten enemy will surrender if he knows his captors will torture or kill him. He will resist and make his capture more costly. Fair treatment of captives encourages the enemy to surrender (Rule 3)…Treat the sick and wounded captive as best you can. The captive saved may be an intelligence source. In any case he is a human being and must be treated like one. The soldier who ignores the sick and wounded degrades his uniform (Rule 4)…All persons in your hands, whether suspects, civilians, or combat captives, must be protected against violence, insults, curiosity, and reprisals of any kind (Rule 5)." The requirement for U.S. treatment of enemy captives in accordance with the Geneva Convention, as depicted in "The Enemy in Your Hands" was based on a rationale of humanity, utility, honor and the threat of punishment and was not tied to reciprocity (positive or negative), implicitly or otherwise.

In 1969, the U.S. Army released the two-part film "Vietnam training report" (VTR), *Detainee Operations Vietnam* (VTR 29, 1969). Part I focused upon the initial capture and transfer of detainees while Part II addressed Republic of Vietnam administration of POW's. Filmed in 1968, VTR has a higher production quality than previous training films and contains little stock footage. Though the stated purpose of the VTR 29 is the training of the Military

Police Corp., the film leaves the impression that it was also created to confirm U.S. adherence to the Geneva Convention of 1949.

The propaganda value of the film can be seen in an interdepartmental memorandum from the State Department to the Department of Defense requesting training material in preparation for U.S. participation in the 21st ICRC Conference (1969) in Istanbul (discussed previously in Case Study I). The memorandum, the subject title of which is "State Department Request for Information Concerning Implementation and Dissemination of the Geneva Conventions of 1949" specifically requested a copy of *Detainee Operations Vietnam* for showing at the 21st ICRC Conference to "assure that a valid case of USG compliance is presented at Istanbul." (18 July 1969, RG 389, P2, Lot 511-02, Box 28)

Part I of the film, "Capture point to point of transfer" deals primarily with the role of the U.S. soldier in the initial capture and classification of detainees. Throughout, strict adherence to the Geneva Conventions is emphasized, which includes maintaining detailed records concerning detainee classification and processing, keeping receipts for personal possessions confiscated, providing adequate medical care and feeding (in accordance with Geneva Convention requirement to honor the native eating habits of detainees), and facilitating the prompt evacuation of detainees from the combat area. Particular emphasis was placed on allowing regular ICRC visits to prisoners and the film invests significant time and footage to this particular subject. According to the commentator, the ICRC "makes regular visits…without restriction" with the added caveat that it does so "in spite of the fact that the enemy does not permit such activity".

Reciprocity analysis is focused upon Part I of the film which outlines laws of war practice of U.S. soldiers. Reciprocity was emphasized early in the film in a section that focused on the critical period of initial capture:

> 5:55 - The best reason for treating detainees with humanity is that it is the right thing to do. But there are other, more down to earth reasons for being fair as well as firm: First, decent treatment of detainees imposes a demand on the enemy that U.S. and allied prisoners be treated the same way. Second, good treatment produces better intelligence. Third…mistreatment is a criminal act against both military law and international law.

Thus, in this example a call for positive reciprocity is presented as the initial consideration followed by more utilitarian reminders concerning intelligence gathering and threats of punishment. The following caveat was included shortly thereafter:

> 7:15 - It is said in Vietnam that the clouds have eyes and the wind has ears. The enemy knows how detainees are treated. Any mistreatment is an invitation to the mistreatment of U.S. or allied soldiers in enemy hands.

This is a clear example of a warning against negative reciprocity and serves as a reminder that ill treatment of a detainee might result in the mistreatment of a fellow comrade in enemy hands.

As mentioned earlier, much of the tone and content of *Detainee Operations Vietnam* emphasized that the U.S. was complying with its international obligation under the Geneva Conventions. The second part of the film, "ARVN Operations of PW Camps" was a continuation of this theme with emphasis placed on the Republic of Vietnam's compliance with the "terms and spirit" of the Geneva Conventions and on the regular ICRC visits to prisoners of war camps. This latter point was arguably emphasized due to the contentious relationship that existed between the ICRC and the Republic of Vietnam throughout the conflict. This

relationship, and its implications for the United States, is one of the themes discussed in Case Study IV. Concerning reciprocity, my analysis of Part II of *Detainee Operations Vietnam* found no reference to reciprocity reasoning.

The Impact of My Lai on Training

In November 1969 the My Lai massacre became public knowledge and appeared on the covers of both *Time* and *Newsweek*. The same month, the Peers Inquiry was established to investigate the events that occurred at My Lai on 16 March 1968 and the subsequent 'cover up'. The results of the Peers Inquiry are worth examining because they directly led to changes in U.S. implementation of the laws of war. Published on March 17, 1970, the Peers Inquiry concluded that the 11th Infantry Brigade (of which Charlie Company, the perpetrators of My Lai) had undergone an "accelerated training program" prior to deployment where "little emphasis was placed on the treatment of civilians and refugees or the responsibility for reporting war crimes or atrocities." (Peers Report, 1970, p. 4-8) The result was a "deficiency" and "lack of instruction on the Geneva Conventions." (ibid, p. 4-3) According to the Peers Report, the instructors themselves often degraded what little training Charlie Company received. From the *Peers Report* (vol. 2, bk. 24, p. 3):

> Herbert Carter was a "tunnel rat" with Charlie Company. Along with many other soldiers, Carter could barely remember any training in the rules of warfare, but he did remember that the instructor treated the lesson in a joking manner, as if the entire idea of rules in war was absurd:
>
> Q: Do you recall getting any instructions on how to handle prisoners of war during this time?
>
> A: We had a little instruction on that.

Q: Do you recall what they told you?

A: They told us that if we get a prisoner to hold them until someone, intelligence, was actually supposed to interrogate them. The instructor sort of laughed about this.

Q: Why did they, or he, laugh about this? Do you know?

A: It was just the way they said it, like you do what you want to do with them actually.

Conducted independent of the Peers Inquiry, the Congressional Report on the My Lai massacre reached a similar conclusion: "The units involved in the My Lai operation had minimal training with respect to the handling of civilians under the Rules of Engagement and the Geneva Conventions." (Report of the House Armed Services Investigation Subcommittee Investigation of the My Lai Incident, 91st Cong., 2d Sess. 6, 1970, p. 6)

The My Lai massacre, according to Elliot (1983), provided the "catalyst for a complete review of Army training in the law of war". (p. 9) A direct result of the military investigation into the My Lai massacre was the issuance (May 1970) of Army Regulation (AR) 350-216, "Training update on The Geneva Conventions of 1949 and Hague Convention No. IV of 1907". The Regulation made it mandatory for soldiers to receive two hours of instruction during basic training in the laws of war and it required field commanders to "insure that all members of his command receive at least 2 hours' formal instruction…each calendar year." (1970, AR 350-216, p. 2) Furthermore, AR 350-216 centralized the preparation of training material to The Judge Advocate General (TJAG).

According to the new regulations, the scope of training should stress the following: Acts of violence against and inhumane treatment of personnel:

(1) Discredit the United States and the U.S. Army and are punishable under the Uniform Code of Military Justice.

(2) Reduce chances of enemy surrender and alienate possible intelligence sources.

(3) *Increase the likelihood of reciprocal enemy actions in kind against captured and detained U.S. personnel.* (ibid, p. 2, my emphasis)

As this demonstrates, the recurring themes of threatened punishment, utilitarian considerations, and reciprocity were emphasized. It is interesting to note that reciprocity is often included as the final rationale offered when considering adherence to the laws of war. In some instances it appears that reciprocity is included as an afterthought while in other instances reciprocity is advanced as the primary rationale for observance.

For example, reciprocity appears as an afterthought in a two-part September 1970 MACV "Command Information" directive. Under the heading "The importance of complying with the Geneva Conventions" a systematic rationale is presented arguing for compliance. The following is cited in its entirety because it displays the secondary role of reciprocity as a rationale for compliance:

> First and foremost we must show the world that we observe the humanitarian principles for which our nation stands. Second by observing international law and showing due respect for our treaty obligation we discredit our enemies who have thus far disregarded their international obligations. Third, by affording prisoners of war the best possible treatment we induce more enemy soldiers to defect and surrender. Fourth, we discredit communist propaganda which tells their soldiers they will be shot if they allow

> themselves to be captured by the Americans. Fifth, prisoners of war are extremely valuable sources of intelligence. A well-treated prisoner is much more likely to cooperate with his captors than one who has been mistreated. *We must realize that the manner in which we treat prisoners of war will have, hopefully, a direct influence on the treatment received by our personnel who are in the hands of the enemy*. (MACV, Command Information 14-16, p. 3, my emphasis)

As this example illustrates, reciprocity rests on a less solid foundation than the other rationales provided. This shows one of the salient qualities and limitations of relying on positive reciprocity as a reason for advocating the humane treatment of prisoners: *uncertainty*. It is highly improbable that calls for positive reciprocity will be confirmable during a conflict. Furthermore, accounts of mistreatment, real or otherwise, will work to largely discredit any call for positive reciprocity.

Another variation of positive reciprocity that became common in training material of this time is the 'Golden Rule' type of positive reciprocity. Simply stated: Treat the enemy as you would like to be treated. One of the more innovative training tools developed following My Lai is the 1971 training film *When the Enemy is my Prisoner* (TF 21-4229) The Pentagon summarized the film as follows: "Dramatizes a patrol operation, showing the right and wrong ways to handle prisoners of war; gives examples of how to handle illegal or unclear orders, and how to report criminal orders and actions." *When the Enemy is my Prisoner* is different from the training material analyzed thus far because of its attempt to realistically depict scenarios that involve complex decision-making. The main action in the film involves the reaction of a platoon to an enemy ambush and focuses on the treatment of detainees.

The primary interaction in the training film occurs between two characters, PFC La Manna and Platoon Sergeant Crowley. PFC La Manna, the protagonist, objects to the execution of a disarmed, wounded surrendering enemy, refuses to carry out an order given by the Platoon Sergeant to execute civilians and is faced with the decision of whether or not to report violations of the laws of war to the Company Commander. Platoon Sergeant Crowley is the battle-fatigued, retribution-seeking antagonist who recently lost a comrade to the enemy.

This film is different from previous training material in several ways. First, the challenge of identifying the enemy was highlighted, in particular the different categories of regular and irregular forces, active supporters and innocent civilians. Second, the film depicted U.S. soldiers violating the laws of war by executing wounded prisoners and civilians, including women and children. Though the film places legal emphasis on the proper handling of detainees, the quandary that a soldier faces in reporting violations of the laws of war was also highlighted. Finally, the issue of revenge and retaliation was addressed. In the principal scene depicting the execution of a group of civilians, the commentary states the following while the camera slowly pans out on the bodies of the dead civilians:

> 19:51 - Taking revenge upon unarmed enemy or civilian personnel is a crime under international law. Equally important is the fact that we as Americans must set high standards of humane treatment for our detainees and not lower our values by duplicating an enemy's criminal behavior.

The rationale advanced in the film's conclusion argues for adherence to the laws of war and advocates humanity and positive reciprocity. On the former, the penultimate scene in the film summarized the procedures to follow while caring for detainees and states:

> 27:30 - Bear in mind that even as captives they are still human beings who retain the basic right to live, to be treated decently, to be safe from torture, mutilation, humiliation and all other degrading or violent acts.

It is evident that positive reciprocity, in the 'Golden Rule' context, is the film's primary message particularly in the final scene. While showing a U.S. soldier caring for a civilian the following closing message is emphasized:

> 29:15 - The rules and laws you are required to observe demand that you leave the killing on the battlefield against enemy hostile forces. And once the enemy has fallen into your hands that you follow the basic standards of humanity. You can't go wrong if you make this your personal motto: Treat others as humanely as you would have them treat you.

As this example illustrates, positive reciprocity was the primary message of the film.

Reciprocity (positive and negative) is found throughout training material that developed in the 1970's. The 1972 training pamphlet (PAM), *The Law of Land Warfare: A Self-Instruction Text* (PAM 27-200) is an example where several perspectives on reciprocity were emphasized within the same text. Prepared by TJAG, the pamphlet was an instructional booklet where information on the laws of war was presented in short statements followed by questions with blank spaces for answers provided. The following are examples of statements that are reciprocity related:

> The customary law of war and the Geneva Conventions of 1949 establish rules governing treatment of noncombatants, prisoners of war, sick and wounded and other detained civilians. The general principle to keep in mind is to treat all prisoners of war, other detained persons, and civilians humanely. You naturally hope that if you are ever captured that you will be properly treated. *If we mistreat prisoners, the enemy may well retaliate against captured US soldiers. Inducement to proper treatment for captured American soldiers is a primary objective to consider when handling enemy prisoners of war and civilians*. (PAM 27-200, p. 6, my emphasis)

The above is an example of how negative reciprocity (retaliatory threat) and positive reciprocity (proper treatment begets proper treatment) can be combined in a single statement. In the following example, positive reciprocity in the form of the 'Golden Rule' was included as an example of humane treatment:

> You ask, what does it mean to treat someone humanely? A good rule of thumb is that if you treat such persons as you would like to be treated if you were captured or detained, you will be treating them humanely. (ibid, p. 7)

The penultimate statement in the self-instructional text specifically refers to reciprocity:

> Another reason [for following the laws of war] is that by adhering to the rules of war we encourage our enemies to provide reciprocal treatment. This is clearly to the advantage of the individual soldier or citizen who may fall into enemy hands. (ibid, p. 47)

The following is the question that corresponded with statement above: "Observance of the law encourages _____ _____ from the enemy." The correct answer, as found in the answer key, is "reciprocal treatment". (ibid, p. 48 – 49)

In 1974, the illustrated pamphlet *Your Conduct in Combat Under the Law of War* (PM 27-1) was published by the U.S. Army Training and Doctrine Command (TRADOC). Prepared by TJAG, PM 27-1 became a cornerstone for training and was revised and reissued in 1984. Written and illustrated in a simple, concise manner, the target audience of PM 27-1 is clearly the combat soldier. Throughout, there are many examples of reciprocity. For example, Part II "Enemy Captives & Detainees", draws a connection between reciprocity and humane treatment in a manner similar to PAM 27-200 (1972):

> The most important guide to lawful treatment of such persons is: Treat all captured or detained personnel HUMANELY**. "*Humanely*" means: *Treat such people as you would***

> ***like to be treated if captured.*** (PM 27-1, 1974, p. 13, capitalization, italics and bold in original)

In PM 27-1 an interesting emphasis is placed on the agency and responsibility of the soldier towards a captured prisoner:

> Once he surrenders to you, he is under *your* control and his safety is *your* responsibility until you are relieved of this job. Enemy soldiers who surrender are a source of valuable information. Moreover, other enemy soldiers may surrender if they see how well you treat captives. (ibid, p. 14, emphasis in original)

The concepts of revenge and reciprocity are described in detail under the heading "Treat all captives and detainees humanely":

> We all recognize that full compliance with the Geneva Conventions is not always easy for the combat soldier, especially in the heat and passion of battle. For instance, you might be extremely angry and upset because your unit has taken a lot of casualties from enemy booby traps or hit-and-run tactics. But, you must **never engage in reprisals, or acts of revenge against any person**, enemy or civilian, whom you capture or detain in combat. (ibid, p. 15, bold in original)
>
> If you **treat such people as you would like to be treated** were you captured or detained, then you will be treating them *humanely*. (ibid, p. 15, bold and italics in original)

At the bottom of the page, in larger, bold font, was the basic lesson: "Treat Captives as YOU'D Like to be Treated" (p. 15, capitalization in original). Other 'lessons' found on the bottom of the pamphlet's pages include: "Humane treatment gets results", "Help the wounded and help your conscience" and "Your family and community expect you to be a civilized soldier"

The 1984 revision to PM 27-1 (PM 27-2) contains much of the same wording and illustrations of the 1974 edition. While minor changes were made, primarily in formatting, they did not impact the pamphlet's emphasis on reciprocity. In some cases, positive reciprocity was

further emphasized, as in the case of civilian treatment. For example, the 1974 edition stated the following under the heading "Civilians must be moved humanely and for proper cause": "Treat civilian refugees as you would want to be treated under the circumstances." (PM 27-1, p. 22) The 1984 revision magnified this message by asking the soldier to consider his or her own family back home: "Treat civilian refugees as you would want your family to be treated under similar circumstances." (PM 27-2, 1984, p. 22)

A majority of training material analyzed thus far has focused on the Geneva Conventions of 1949 while Hague-related (methods/means) laws of war were often not included. An exception is the 1978 Air Force training film, *Air Operations and the Law of Armed Conflict* (TS 119). Col. Kenneth W. North, a pilot who spent over six years as a POW in North Vietnam, provided the training film's introduction and addressed the deficiency of training in Hague-related laws of war and how it impacted him during confinement:

> One of the things that really threw me, once the interrogation started, was the fact that I had little training in the law of war, formally or informally. When I was faced with accusations that I had used napalm to cause unnecessary suffering and that I had bombed undefended cities and villages in direct violation of the Hague treaties I had no good answer. All I knew about the law of war was how to treat POWs. I wasn't sure what my obligations were or those of my country.

Much of the film's content focused on "5 Cardinal Rules" relating to Hague-type laws of war: (1) The methods/means of war are not unlimited (i.e. there are legal and illegal weapons), (2) Only military objectives can be attacked, (3) Civilians and civilian property enjoy general protection, (4) Collateral damage to civilians should be minimized, and (5) Special protection will be given to medical facilities, POW's, the wounded and cultural objects.

Negative reciprocity can be found in the discussion on "economy of force". Simply stated, "economy of force" involves the proportional and judicious application of power, in this case weapons. One of the rationales given for following the laws of war is that if the "economy of force" equation is violated then reprisals may result:

> 20:55 - Disproportionate or excessive collateral injury or damage will cost us a lot politically both at home and abroad. It might also jeopardize the protection of our own civilian population or the protection of our allies by reprisals."

This reprisal/retaliatory nature of negative reciprocity was elaborated upon in the training film's concluding remarks:

> 23:40 - Adherence to the law prevents unwanted escalation of the conflict. And war crimes can interfere with the early end of hostilities. Reciprocity is also an underlying basis. Acts of reprisal are avoided if the law is followed.

The literal use of the term reciprocity in connection with reprisals is consistent with this dissertation's understanding of negative reciprocity as a retaliatory countermeasure and further highlights the escalatory nature of negative reciprocity.

At the close of The Second Gulf War (1990-1991), President George H.W. Bush declared, "By God, we've kicked the Vietnam syndrome once and for all". Though such a clear historical delineation of the Vietnam War (on social and political levels and in the specific context of My Lai) is artificial, for the sake of chronological brevity I am using the conclusion of the Second Gulf War (1990-1991) as the point of departure for the conclusion of this case study.

The latter part of the 20th century witnessed the continued use of the reciprocity rationale in laws of war training. For example, the 1992 field manual, *Intelligence Interrogation* (FM 34-

52) includes the following negative reciprocity reasoning prohibiting the use of torture against detainees:

> Revelation of use of torture by US personnel will bring discredit upon the US and its armed forces while undermining domestic and international support for the war effort. It also may place US and allied personnel in enemy hands at a greater risk of abuse by their captors. Conversely, knowing the enemy has abused US and allied PWs does not justify using methods of interrogations specifically prohibited. (p. 1-9)

The above is an update to the 1987 edition of FM 34-52 that did not contain the reciprocity-based argument.

Training materials produced by the U.S. Marines during this period also contained reciprocity rationales. For example, the 1993 U.S. Marine training film *Law of War* (TF 11-3635) contains references to both positive and negative reciprocity in relation to treatment of POW's and the wounded:

> 4:10 - By treating prisoners, the sick and the wounded humanely, we increase the chances that our fellow marines who have fallen into enemy hands will be treated in the same manner."
>
> 7:18 - "Wounded enemy soldiers in your control are to receive the same degree of care as friendly sick and wounded…keep in mind that some of our own sick and wounded might be under enemies care"

The 1998 Marine Corp Reference Publication (MCRP) *Enemy Prisoners of War and Civilian Internees* (MCRP 4-11.8C), which was prepared specifically for the training of military police, contains the following positive reciprocity "Golden Rule" rationale:

> As a general rule, all individuals in your custody should receive humane treatment. In other words, treat them as well as you would want to be treated if you were captured by an enemy force." (MCRP 4-11.8C, 1998, p. 5)

Positive reciprocity in the form of the "Golden Rule" has an inherent appeal because it echoes a commonly held moral precept often reinforced in early childhood rearing and found in the three monotheistic faiths (see Wattles, 1996).

Conclusion

The research findings in Case Study II demonstrate a willingness on the part of the United States to apply the legal requirements of the laws of war to the military in the form of promulgation and training. Conceptually, this strengthens the international society perspective. The results of this case study suggest that a reciprocity rationale plays a key part in the implementation of the laws of war. Furthermore, a salient theme demonstrated in this case study is that public knowledge of the My Lai massacre directly impacted laws of war training and led to an increase in the use of reciprocity, both positive and negative, as a training rationale.

There are several variations of the positive reciprocity message: good treatment begets good treatment. For example, the "Golden Rule" rationale of "treat enemies as you would like to be treated" came into prominence in the 1970's. The argument that "following the laws of war/Geneva Conventions influences the enemy to do so" is found throughout training material of this period. Variations of the negative reciprocity message: violations beget violations, are also found and often involve the implicit threat and reminder that "the enemy holds U.S. prisoners" and that "your violation will result in enemy retaliation". Non-reciprocity considerations in Case Study II include training that emphasized laws of war adherence for humanitarian/human rights reasons and adherence out of military honor. The former strengthens the world society perspective.

Case Study III

Application

The application of the laws of war to a conflict can be viewed from two perspectives: The *initial* application as official policy and the application in *practice* of the laws of war. The initial application of the laws of war to a conflict involves an executive level decision and the formal announcement that a specific treaty or treaty provision is legally applicable to a conflict. Application can be triggered by a decision that the conflict has become international in scope or through the official recognition of a belligerent. (Bill, 2000, pg. 30) The second perspective involves the application of the laws of war in practice. This process entails multiple government agencies and levels of bureaucracy enacting policies towards the successful administration and carrying out of treaty obligations. As is readily apparent, the application of the laws of war in practice is a more complex process than official and initial conflict application. In practice, multiple variables, both internal and external, can obstruct and hinder the application of the laws of war.

As the conflicts analyzed in this case study show, the official decision to apply the laws of war is often straightforward and noncontroversial. However, the application *in practice* of the laws of war is more complex with a myriad of influencing factors that are often beyond the control of decision-makers. For example, an ally or coalition can strengthen the application of the laws of war (as was the case with the Second Gulf War) or it can weaken and make the application more difficult (as was the case with the Vietnam War). Furthermore, the lack of a

harmonized policy between government departments can lead to further complications in the application of the laws of war.

A majority of the source material incorporated in this and the final case study consists of State Department and Department of Defense memoranda and reports that were created at the time of the conflict. Official histories that were commissioned, endorsed or authorized by the U.S. Government (Department of Defense and State Department) have been used to confirm specific sequences and basic facts surrounding an event. However, because of potential issues involving post-conflict perspective bias, official histories have not been used in the analysis.

Organization

This case study is organized chronologically by conflict. Three post World War II 20th Century conflicts are considered: The Korean War (1950-1953), Vietnam War (1954-1975) and the Second Gulf War (1990-1991). I begin each case with a discussion of the initial and official application of the laws of war to the conflict followed by its application in practice during hostilities. There are varying degrees of reciprocity relevance depending on the conflict. For example, the Korean War saw reciprocity considerations on the periphery of decision-making related to the laws of war. The Vietnam War, on the other hand, witnessed an explicit policy of reciprocal repatriation of prisoners of war. Finally, during the Second Gulf War (1990-1991) the U.S. and coalition allies (in addition to the United Nations) operated under the assumption that the laws of war were applicable.

Analysis of the archival material related to the three conflicts shows an emphasis on the Vietnam War. There are two explanations for this. First, the length and nature of the Vietnam

War facilitated the need for the U.S. government to develop laws of war policy. A result was substantial documentation in the form of memorandum, reports, and diplomatic and military communiqués. The relatively short length of active hostilities in Korea, in addition to the protracted armistice negotiations, meant that government decision-making policy focused on negotiated conflict settlement and not specific laws of war policy (e.g. POW policy and retaliatory countermeasures). The protracted length of active hostilities in the Vietnam War stands in stark contrast to the brevity of the Second Gulf War, where the ground campaign (Operation Desert Storm) lasted 42 days (17 January 1991 to 28 February 1991). Furthermore, controversy relating to prisoners of war did not enter prominently into public and media discourse, as it had during the Vietnam War, and to a lesser extent, Korea. Second, many of the interdepartmental documents relating to the Second Gulf War remain within the custody of individual government departments (e.g. Department of State and Department of Defense) or are retained by the George H.W. Bush Presidential Library (College Station, TX). As a result, security classification remains an obstacle and many documents have not been cataloged into searchable indexes.

Korean War

At the start of the Korean War (25 June 1950) none of the main parties involved had ratified the Geneva Conventions of 1949. Thus, from a strict legal perspective, the argument could be made that the Geneva Conventions were not applicable to the conflict. However, the primary belligerents involved stated that they would follow, at a minimal, the "humanitarian principles" found in the Conventions. Furthermore, specific provisions of Geneva Convention III

came into prominence during armistice negotiations. Two primary themes are addressed in the application of the laws of war to the Korean War. First is the interdepartmental debate that occurred between the Department of State and Department of Defense concerning which of the four Geneva Conventions was applicable to the conflict. The second theme addressed the debate of forced versus voluntary repatriation and the application of Article 118 of Geneva Convention III which came to the forefront during armistice negotiations. Reciprocity plays a peripheral role in both examples.

In response to requests by the ICRC on 28 June 1950 (three days after the opening of hostilities), the United States announced that it would be guided by the "humanitarian principles" of the 1949 Geneva Conventions, specifically Article 3. On 4 July 1950, General Douglas MacArthur, Commander of UN forces, announced that the United Nations Command (UNC) would adhere to the Geneva Conventions of 1949. In his announcement, MacArthur stated:

> My present instructions are to abide by the humanitarian principles of the 1949 Geneva Conventions, particularly the common Article 3. In addition, I have directed the forces under my command to abide by the detailed provisions of the prisoner-of-war convention…and have fully accredited the ICRC delegates accordingly. (text reproduced in Seyersted, 1966, pp. 184-185)

On 14 July the Department of State announced in a similar message to the United Nations Commission on Korea that the United States would be guided by the "humanitarian principles" of the Geneva Conventions of 1949.

Interdepartmental Controversy

An interdepartmental controversy between the Department of State and Department of Defense occurred throughout most of the conflict regarding whether all four of the Geneva Conventions of 1949 were applicable (as State argued) or if only Convention III pertaining to prisoners of war was (view of Defense). In the months following the signing of the armistice (27 July 1953) the State Department created the Committee on Prisoners of War to assess policy problems raised in the application of the Geneva Conventions to the Korean War. In late June 1954 the Committee published a series of reports that addressed, among other things, the debate between State and Defense on the application of the Geneva Conventions. (28 June 1954, RG 59, Lot 61D53, Box 75) Cataloged in these reports is the original memorandum from which much of the following analysis developed.

In February 1951 the ICRC notified the State Department that the UNC had refused to allow ICRC delegates to perform services under Convention I, II and IV of the 1949 Geneva Conventions. Specifically, the issue of Convention IV, The Protection of Civilian Persons in Time of War, was of concern for the ICRC due to the substantial refugee problems created by the conflict (see Conway-Lanz, 2006, Chapter 6 for a detailed discussion of Korean War refugee problem). A series of informal meetings and communiqués between State Department and Department of Defense reveals that in 1951 the UNC "would not extend recognition to the ICRC with respect to all four Conventions because of what its delegates might discover and report." (28 June 1954, memorandum from Charles Runyon, Assistant to the Legal Adviser to Louis Halle, Policy Planning Staff) As the result of further objections, on 21 November 1951 the

State Department sent a letter to Secretary of Defense Robert A. Lovett from Assistant Secretary of State John D. Hickerson formally requesting that Defense take steps to apply all four Geneva Conventions of 1949. The State Department's argument for the application of Convention IV rested upon a two-prong rationale based on positive reciprocity through compliance and the potential international embarrassment of the U.S. if non-application were to be made public.

The positive reciprocity through compliance rationale is as follows: The United States and UNC had publicly stated that the ICRC had been given full cooperation as it related to all four Conventions. Since the U.S. government and senior UNC generals publicly challenged the North Korean and Chinese Communist governments to allow ICRC access to prisoners, the State Department regarded it "as essential to our efforts…to point to compliance with the Geneva Conventions on the part of the United States." The argument followed that the only way reciprocal pressure for enemy compliance could be justified is if the U.S. had received a "clean bill of health with respect to the treatment of civilians as well as prisoners of war."

In October 1951 the U.S. and its allies requested that the Secretary General of the United Nations approach Chinese Communist and North Korean leaders and suggest that in light of UNC application of the Geneva Conventions they permit the ICRC to perform its traditional humanitarian functions. Included in this request was a specific indication that the UNC was applying the provisions of Convention IV. According to the State Department, since the issue of compliance could be raised at any time in the United Nations, the United States and UNC could face great embarrassment if their non-application of the Geneva Conventions were to be exposed.

The Department of Defense reply dated 15 February 1952 and sent by Deputy Secretary of Defense William C. Foster emphasized four counterpoints to the Department of State argument. First, the United States and most of its allies had not ratified The Conventions and were thus not legally bound to follow their provisions. Furthermore, instructions from the Commander in Chief, United Nations Command (CINCUNC) failed to specifically instruct the Department of Defense to "implement fully the detailed provisions" or to "accredit the representatives of the ICRC." Second, since the UNC lacked the means and resources to insure compliance of Convention IV it was unable logistically to apply the convention without substantially weakening combat troop strength. Third, in a frank acknowledgement of the likelihood of laws of war violations, the Department of Defense admitted that ICRC reports concerning activities relating to UNC handling of refugees "would probably result in condemnation…more detrimental to all concerned than the potential embarrassment to which you refer." Finally, Defense argued that enforcing compliance would infringe upon the sovereignty of its South Korean ally. Positive reciprocity, whereby compliance is necessary when demanding reciprocal behavior, entered into Korean War application in a subsidiary manner as compared to other considerations. The most prevalent consideration that appeared in the State Department documents was the potential for international embarrassment that the United States would fact by its non-application of all four of the Geneva Conventions of 1949.

Forced versus non-forced repatriation

One of the more controversial policies of the United States and UNC relating to the laws of war during the Korean War was the decision to repatriate prisoners on a voluntary basis. From

one perspective this shows the United States' non-application of the Geneva Conventions (specifically Convention III, Article 118). From another perspective, discussed in further detail below, insisting on voluntary repatriations reflected a humanitarian advancement in the concept of the individual in the laws of war. Prior to the Korean War, common military practice had been to exchange all prisoners of war at the end of the conflict. At the closing of World War II it became apparent that many soldiers in Europe resisted repatriation to their own country out of fear of prosecution or execution. (Roberts, 1994, p. 131) Complicating the matter were the thousands of prisoners who were retained as laborers after hostilities ceased in the Soviet Union, France and the United Kingdom. The Geneva Conventions of 1949 (Convention III, Article 118) failed to directly address the issue of forced versus voluntary repatriation, stating: "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities." It was not until armistice negotiations began in Panmunjom (July 1951) that the issue of noncompulsory, or voluntary, repatriation came into the forefront of the laws of war.

The emotionally charged issue of prisoners of war consumed armistice negotiations for over fourteen months. (see Hermes, 1966, for detailed official Army history on negotiations). Due to the substantially disproportionate number of prisoners held (UNC held over 132,000 to the Communists approximately 13,000), the initial objective of U.S. negotiators was to prevent a manpower advantage to the Communists in an all-for-all exchange of prisoners. In order to prevent this, UNC negotiators initially advanced a proposal for a strictly reciprocal one-for-one exchange. After the Communist rejection of the one-for-one proposal the United States took up the cause of voluntary exchange and repatriation. The forced repatriation issue was of capital

importance to the United States. This is clearly seen in a speech that President Truman gave at West Point in May 1952:

> To agree to forced repatriation would be unthinkable. It would be repugnant to the fundamental moral and humanitarian principles which underlie our actions in Korea. To return these prisoners of war in our hands by force would result in misery and bloodshed to the eternal dishonor of the United States and the United Nations…We will not buy an armistice by turning over human beings for slaughter or slavery. (Papers of Harry S. Truman, 7 May 1952, No. 121)

An extensive (22 pages) memorandum issued 24 October 1952 (RG 59, Lot A1 5210, Box 9) by the State Department titled *Considerations Underlying the Position of the United Nations Command Regarding the Issue of Forced Repatriation of Prisoners of War* succinctly summarizes the legal position taken by the UNC and Communist negotiators at Panmunjom. According to the Communist negotiators:

> Under international law, and more specifically under Article 118 of the Geneva Convention of 1949 on Prisoners of War, the United Nations Command is *required* to send back to North Korea and to the Chinese Communist regime *all* prisoners of war, even though the prisoners would strongly resist, fearing that once they returned they would be persecuted for political reasons. (emphasis in original)

The U.S. argument echoes the humanitarianism found in Truman's speech three months before: "The Geneva Conventions for the Protection of Prisoners of War is a humanitarian document, and it cannot be believed that the framers intended to make illegal the granting of asylum to prisoners of war." (ibid)

The theoretical importance of the voluntary repatriation precedent set by the United States in the Korean War can be viewed from the perspective of the English School

understanding of the laws of war. Conceptually, the humanitarian emphasis on the individual prisoner's right to decide his fate supports the World Society perspective because it supplants the state as the primary decision-maker. Theodore Meron (2008), discussing the importance of voluntary repatriation from the perspective of human rights, states: "If the right to repatriation belongs to the state, then the POWs must be repatriated when the state of origin demands their return. If the right belongs to the individuals, they should be able to refuse repatriation if they so desire." (p. 11) The United States based its decision on an understanding of humanitarianism that emphasized the individual, which, according to Meron, marked a "profound shift from the old state-centric days." (ibid, p. 12, 2008)

The U.S. insistence on voluntary repatriation provided a precedent for future conflicts including Vietnam and The Second Gulf War. Though a type of specific and immediate reciprocity can be seen in the U.S. government's initial emphasis on one-for-one prisoner exchange, this was eventually superseded by the humanitarian emphasis placed on voluntary repatriation. It is interesting to note that archival research revealed no specific reciprocity concerns for U.S. POW's in Communist hands. This changed during the Vietnam War when POW issues would become highly polarized. Reciprocity entered prominently into government decision-making relating to POW's in the form of an explicit reciprocity prisoner exchange policy.

Vietnam War

Major General George S. Prugh, the author of the official U.S. Army study on the laws of war during the Vietnam War (*Law at War: Vietnam 1964-1973*), noted the difficulty faced by the

U.S. government as it attempted to apply traditional principles of the laws of war to a conflict which was mired in legal confusion. At the root of the problem was the reluctance of the respective belligerents to accord a degree of legitimacy to one another by acknowledging the application of international treaty law, an act that would arguably elevate the status of the enemy to State recognition. The initial application of the Geneva Conventions to the Vietnam War can be seen in a series of official announcements made by the United States. All the parties to the Vietnam War (with the exception of the Viet Cong) had acceded to the 1949 Geneva Conventions: United States (2 February 1956), Republic of Vietnam (South Vietnam, 14 November 1953), and the Democratic Republic of Vietnam (North Vietnam, 28 June 1957).

On 10 August 1965, at the request of the ICRC, the United States announced that U.S. armed forces "were abiding and would continue to abide by the Geneva Conventions of 1949." (MACV Command History, 1965, p. 429) The following month (13 September) the State Department announced that the U.S. "is applying the provisions of the Geneva Conventions and we expect the other parties to the conflict to do likewise." (U.S. State Department Bulletin, No. 1368, p. 447) Another statement affirming application of the Geneva Conventions of 1949 is the U.S. sponsored resolution at the 1965 ICRC Conference (9 October 1965) which called for the full protection of prisoners of war under the Geneva Conventions (discussed in Case Study I). On 8 February 1966 President Johnson and the Prime Minister of Vietnam issued a joint statement following discussions in Honolulu, the penultimate point being that the Geneva Conventions of 1949 on prisoners of war (Convention III) would be adhered to by the combined forces of the U.S. and Republic of Vietnam. (Papers of Lyndon B. Johnson, No. 54) Ten months latter, at the

close of the Manila Conference, a joint communiqué was issued between the United States and the Government of Vietnam (GVN) reaffirming the allies' "determination to comply fully with the Geneva Conventions of 1949." (Papers of Lyndon B. Johnson, 25 October 1966, No. 549) The Manila Communiqué also announced that the U.S. and GVN would begin to repatriate seriously sick and wounded prisoners of war, indicating their "willingness to meet under the auspices of the ICRC or in any appropriate forum to discuss the immediate exchange of prisoners." (ibid)

Shortly after the communiqué was issued, Embassy Saigon began pressing GVN to compile rosters of POWs who met criteria under Article 109 and 110 of the Third Geneva Convention. Subsequent reports compiled by the Provost Marshal General indicated that a majority of the sick and wounded prisoners interviewed by the ICRC stated that they would refuse repatriation (of 261 sick and wounded prisoners interviewed only 39 wished repatriation). (Provost Marshal General Report, 12 May 1967, RG 389, P2, Box 23) According to the ICRC, prisoners who refused repatriation stated: "We were sent South to remain until the war is over, and the North Vietnamese Government and our families will not welcome us back until the war is over." (Memorandum from Saigon Embassy to State, D.C., Subject: Screening of Seriously Sick and Wounded PW's for Repatriation to North Vietnam, ibid)

Reciprocity Repatriation Policy

On 4 April 1966 Senator Robert F. Kennedy met with Philip B. Heyman, acting head of the State Department's Bureau of Security and Consular Affairs, on the subject of U.S. POW's. Kennedy came away from the meeting "convinced that the government was not doing enough for the

prisoners or their families." (Davis, 2000, p. 41) As a result of a subsequent letter from Senator Kennedy to Secretary of State Dean Rusk (19 April 1966) the Interdepartmental Prisoner of War Committee was created "to devise and obtain action on additional measures looking toward establishment of contact with, and hopefully release of, American prisoners of the Viet Cong and the DRV." (ibid, p. 42) On 18 May 1966, W. Averell Harriman was appointed to "assume general supervision of the department's actions relating to both U.S. and enemy prisoners of war in Vietnam." (ibid, p. 42)

From a prisoner of war policy perspective, The Johnson Administration "had made the early release of U.S. prisoners its prime objective" (Davis, p. 113) As part of this policy, an early prisoner release program based on reciprocity was created with Ambassador Harriman serving as chief architect and advocate. After Harriman left in spring 1968 for preliminary peace talks in Paris, his assistant, Frank Sieverts, took over much of the State Department's POW responsibilities. Several attempts were made at establishing reciprocity through prisoner exchange. This included unilateral releases in hopes of initiating positive reciprocal releases in direct response for NVN and VC release of U.S. prisoners. The reciprocity release policy was primarily the initiative of the State Department, D.C., Substantial resistance to the policy came from South Vietnamese ally (GVN), the U.S. Embassy, Saigon, and the Department of Defense. The reciprocity release policy was most active from January 1966 to August 1968 and consisted of eight specific cases.

Before discussing individual reciprocity release initiatives, two related variables need to be explored: U.S. policy of prisoner transfer to GVN and the possession of prisoners in U.S.

custody. Complicating attempts to establish a reciprocity policy in the exchange of prisoners was the Westmoreland-Co Agreement of 27 September 1965 (negotiated between U.S. Commander, General Westmoreland and GVN Minister of Defense, General Nguyen Huu Co). According to the Westmoreland-Co Agreement, U.S. captured prisoners would be transferred to South Vietnam for custody and control. This had three important results. First, U.S. policy initiatives would have to comport with the GVN. As will be seen, this proved to be a hindrance in U.S. initiated attempts to create a reciprocity policy of prisoner exchange. Second, because the capturing power retains residual responsibility for the treatment of prisoners, any criticism of the GVN for its non-application of the laws of war would be linked directly to the United States (discussed further in Case Study IV). Third, a direct result of the Westmoreland-Co Agreement was that the United States initially lacked any trading 'material' for reciprocal exchanges with the enemy. As a result, the U.S. reciprocity release policy involved having to convince the GVN, as the detaining power, to release VC and NVN prisoners. This proved to be a continuous problem during attempts to implement a reciprocal exchange policy.

Prior to Ambassador Harriman's appointment, much of the supervision of POW affairs was conducted by the State Department's Bureau of Security and Consular Affairs (SCA) headed by Abba Schwartz. (Davis, 2000, p. 57) The first recorded reference to acquiring prisoners for exchange can be found in a 24 October 1965 memorandum from Abba Schwartz to Chester Cooper and William Bundy. In the memo, Schwartz recommends that "holding at least some prisoners would not only keep us in compliance with the Conventions…[but] would also provide us with a small amount of additional leverage for use in connection with a possible exchange of

prisoners". (RG 59, Lot E 5307, Box 34) The United States did eventually acquire bartering material for reciprocal trade with the North Vietnamese. On 1 July 1966, the U.S. Navy sank three PT Boats attempting to attack a U.S. destroyer in the Gulf of Tonkin and the U.S. was able to rescue 19 NVN sailors (two of whom were wounded). Because they had been captured in international waters, the sailors remained in U.S. custody and were not transferred to the GVN. In retaining custody of the NVN sailors, the U.S. now had bargaining material for a reciprocity prisoner exchange.

Shortly after the Manila Communiqué, the State Department recommended the repatriation of sick and wounded with the "encouragement of reciprocal action" by the North Vietnamese and Viet Cong (5 Dec 1966, message to U.S. Embassy Saigon, RG 59, Lot E5307, Box 50-54). According to the State Department message, repatriation "would have advantage of encouraging reciprocity where it is apparently most urgently needed – i.e., repatriation of US and GVN sick and wounded" (ibid) A message sent four days latter from the Commander in Chief, U.S. Pacific Command (CINCPAC) to the Joint Chiefs of Staff (JCS) recommended that "only the PW's who were seriously wounded be considered in this proposed unilateral action. The remainder should remain in custody as possible bargaining for future prisoner exchanges." (15 Dec 1966, RG 472, Lot A146, Box 1-2) South Vietnam's Foreign Minister warned the U.S. Embassy, Saigon, that the U.S. was "falling into a trap" by repatriating sick and wounded prisoners and that Hanoi "would not reciprocate". The U.S. Embassy responded that repatriation was a "unilateral action without condition, but with hope North Vietnamese might reciprocate"

(15 Dec 1966, RG 389, Lot 511-02, Box 7, U.S. Ambassador, Saigon to Secretary State, DC). The repatriation of the two wounded prisoners did not take place until March 1967.

The same day that the South Vietnamese Foreign Minister issued his warning, the State Department, D.C., communicated to the U.S. Mission, Geneva, the wording to be given to the ICRC, the intermediary that would pass the message to the North Vietnamese government:

> This offer is unconditional and requires only that the Government of North Vietnam indicate the place to which the prisoners can be delivered and the earliest date on which repatriation can take place.
>
> On the matter of repatriating prisoners who are not seriously sick or wounded, the Governments of the Republic of Vietnam and of the United States of America are prepared to release the naval personnel captured on July 1, 1966, and other prisoners of war who desire to go to North Vietnam on a reciprocal basis. This could be accomplished with or without negotiations. The ICRC is assured that any steps by North Vietnam to accomplish such repatriation will be promptly reciprocated. (15 Dec 1966, RG 389, P2, Box 9, From: Secretary of State, D.C. to U.S. Mission, Geneva)

The U.S. was able to offer the prompt reciprocation of prisoners to NVN because it had in custody the captured NVN sailors.

On 4 January 1967, the Viet Cong released two U.S. citizens (Robert Monahan and Thomas Scales) and a Philippine national (Ofelia Gaza). Soon afterwards, the State Department, D.C., recommended the reciprocal release of VC prisoners in GVN control. A joint U.S. Embassy/MACV message (signed by Deputy Ambassador to South Vietnam, William Porter) opposed the reciprocal release of the VC because it would be "unpalatable to the GVN". (8 Jan 1967 – Joint Embassy/MACV Message, RG 472, Lot A146, Box 1-2) The State Department prevailed and on 22 January 1967 the U.S. Embassy announced the release of three Vietcong

combat captives. The official press statement by the U.S. Embassy linked this with the earlier releases:

> The release was brought about at the suggestion of the United States, with the full agreement and cooperation of the Vietnamese Government. It was a direct response to the release by the Vietcong on January 4 of American citizens Scales and Monahan, of Mrs. Gaza, a Philippine national.

The actual release, however, was filled with controversy and resulted in a series of messages directed to U.S. Ambassador to South Vietnam, Henry Cabot Lodge, Jr. from Averell Harriman stating that the release was "far from the reciprocal gesture we had in mind" (1/26/67 Telegram, RG 59, Lot E5307, Box 50-52). In this example, the problem lied in the fact that the prisoners, under the close observance of the GVN, made statements at the time of release that they had "no intention of rejoining the VC". The GVN also announced that it intended to keep the released prisoners "under surveillance". According to Harriman, these measures "destroyed in advance any hope" that the release operation "could encourage release by VC of other U.S. prisoners." (ibid) A follow-up telegram sent five days later from Harriman concluded: "I recognize that reciprocal release of the kind we envisaged is extremely hard to arrange in practice. Nevertheless, if another opportunity presents itself I hope we can try again." (31 Jan 1967, RG 59, ibid) Harriman went on to recommend that clearly "unrepentant VC" be released in future reciprocal release operations.

The following month, on 23 February 1967, the Vietcong released two U.S. prisoners, PFC Charles Crafts and Sgt. Sammie Womack. This release illustrated many of the problems that accompanied the State Department's attempt to establish a reciprocity repatriation policy. On

the same day of the announced release, Harriman sent a joint memorandum to the American Embassy, Saigon, and U.S. Mission, Geneva that stated: "Widespread public attention focused on this release [of Crafts and Womack] makes it especially desirable to reciprocate promptly, and to do so in a way that enables released prisoners to return swiftly to VC control." (23 Feb 1967, Harriman to Saigon and Geneva, RG 59, Lot E5307, Box 46)

The U.S. Embassy objected to the reciprocal release on the grounds that the GVN would oppose the release of unrepentant VC's. As a result of the embassy objection, an extensive memorandum (including background report) was written by George Aldrich (legal counsel, State Department) and sent to Averell Harriman on 2 March 1967. The Aldrich memo outlines the arguments supporting, and objections experienced, to date, in attempts to bring about a policy of "*de facto* exchanges" of prisoners. The memorandum and background report are worth citing at length because they highlight the difficulty in arranging the reciprocity release and the friction between State Department, D.C. and the U.S. Embassy, Saigon:

> In the most recent message in the long series dealing with our efforts to respond to VC releases of US prisoners by reciprocal releases of VC prisoners, the Embassy in Saigon has told us in no uncertain terms that its view, not ours, will prevail. The essence of this disagreement is that we propose to give the VC something they want in return for their giving us something (two US soldiers) that we want, but the Embassy refuses to ask the GVN to give *anything* to the VC. We want to bring about *de facto* exchanges. The Embassy remains adamant that we not ask the GVN to change its plans, which are to return to their families two VC who do not wish to return to the VC ranks.
>
> We cannot, of course, know that release to the VC forces of two POWs who remain loyal to the VC would induce them to release further U.S. soldiers. We can be sure, however, that to do what the Embassy and the GVN propose is to give the VC *nothing* of value. How we could defend that as a serious effort to bring about the release of U.S. personnel is a mystery to me. (2 Feb 1967, Aldrich to Harriman, RG 59, ibid, emphasis in original)

The background memorandum continued by pointing out, "It is declared US policy to attempt to achieve a comprehensive exchange of prisoners of war before the termination of hostilities." Furthermore, the reciprocity policy involved "releasing VC prisoners in a manner directly responsive to the VC action." The memo also pointed out that Ambassador Lodge's recommended solution to the problem, that the U.S. release prisoners in its custody before they were transferred to the GVN, was rejected by the Joint Chiefs of Staff on the grounds that it violated the Westmoreland-Co Agreement.

On 8 March 1967, a telegram from Harriman to the U.S. Embassy, Saigon, (complete with stamped approval by Secretary of State Dean Rusk) clearly instructed the U.S Embassy to facilitate a reciprocal release in exchange for the VC release of Crafts and Womack. Much of the wording and rationale of Harriman's telegram comes directly from the Aldrich memorandum:

> We believe that we must do everything possible to induce [the] VC [to] release further PWs. Realistic effort this end requires that we release two VC PWs who unequivocally desire to return to VC forces.
>
> To release to their families VC who do not wish to return to VC ranks is to give VC nothing of value. Essence of *de facto* exchange we are trying to create is that we return their men to them in return for their having returned two US soldiers to us…You may tell GVN that this action is one we feel compelled to take in interest of our personnel held prisoner by VC forces and that return of two low-level VC to VC forces obviously of minimal military significance. (8 March, 1967, RG 59, Lot E 5307, Box 46-49)

Three days later, on 11 March 1967, the Government of Vietnam "in reciprocation for 23 February release" by VC of two U.S. prisoners, released two VC prisoners.

In April 1967 Ellsworth Bunker replaced Henry Cabot Lodge, Jr., as United States Ambassador to South Vietnam. In preparation for the transfer, Harriman's office prepared a

memorandum summarizing POW issues in Vietnam (4 April 1967, RG 59, ibid). The memorandum clearly states that the U.S. had been following a policy of "reciprocal release in response to releases of American prisoners" and that the "GVN attitude sharply undercuts the effect of this policy." Embassy protests to the reciprocal release policy became more vocal and persistent with the change in leadership.

After the mid-March reciprocity release there were two unilateral efforts orchestrated by the Department of State, D.C. to initiate, or 'trigger', further VC and NVN releases of U.S. prisoners. On 20 March 1967, the U.S. repatriated the two sick and wounded NVN sailors that had been captured the previous year in accordance with Geneva Conventions III (Art. 109 & 110). The repatriation was conducted through the Australian Embassy in Phnom Penh, Cambodia, and was done in secret without information being leaked to the press (by either side). The repatriation was "used as precedent to bring pressure on Hanoi to reciprocate with sick or injured U.S. prisoners." The successful repatriation led to an initiative by the State Department to inquire with the Australian and Cambodian governments regarding the prospect of future assistance in prisoner of war exchanges. In a secret 'Memorandum of Conversation' (12 April 67, RG 59, Lot E 5307, Box 46-49) between Robert H. Robertson, Counselor, Embassy of Australia and George Aldrich (State Department) the Australian Ambassador recommended that the U.S. unilaterally release the remaining seventeen NVN sailors in the hopes that NVN "might reciprocate." Aldrich responded that these were "healthy prisoners" and that the U.S. was "interested in an exchange, not a unilateral release."

A second unilateral release was conducted on 12 June 1967 in the "hope of triggering further releases". For this release, the GVN freed four U.S. captured Vietcong POW's. The release was requested by the State Department on the grounds that previous releases had been reactions to VC initiatives. According to the embassy announcement, "This is in continuation of attempt to establish a procedure for the reciprocal release or exchange of US PWS." An ICRC delegate attended the release ceremony. Again, the U.S. Embassy objected to the release, this time on the grounds that the proposed date (23 May) coincided with a GVN planned release of Buddhist struggle movement prisoners. The State Department replied (12 May 1967) that a separate press release would be issued in advance "with expression of hope that VC will reciprocate" which "could avoid confusion with release of Buddhist struggle movement prisoners." (RG 59, ibid)

On 11 November 1967, the Vietcong released three U.S. Army Sergeants through Cambodia (Daniel Pitzer, Sam Johnson and James Jackson). The reciprocal release for the November 1967 freeing of the three sergeants took nearly 6 months to realize (26 April 1968) and involved substantial protests and 'stalling' by both the U.S. Embassy and the GVN. The circumstances of the release are unique compared to the other examples discussed thus far as this example shows, for the first time, the active participation of U.S. peace activists, in this case Tom Hayden, in the release of U.S. prisoners. While traveling in Hanoi, Hayden had been informed by VC representatives that they were preparing the release of the U.S. prisoners as a "gesture of goodwill" and that they would be allowed to depart to the United Sates on commercial (i.e. non-military) aircraft. When one considers the VC statements made at the time

of the release, it becomes clear that the underlying motive behind the release was propaganda, not the previous reciprocal releases. “Two of the men were black, and the Viet Cong broadcast said their release was intended to underscore Vietnamese Communist sympathy for the American Negro’s struggle against oppression.” (Davis, 2000, p. 106)

The U.S. Embassy’s protest to the reciprocal release of three VC prisoners rests largely upon the argument that this release, and the previous ones, were not the result of the reciprocal response policy but stemmed from other motives. This is clearly outlined in an extensive memorandum from U.S. Embassy Saigon to Secretary of State, D.C., dated 12 January 1968 (RG 389, Lot 511-02, Box 7). The memorandum relates a conversation between Ambassador Ellsworth Bunker and an unidentified GVN Foreign Minister in which the latter gave his view on “reciprocity releases”:

> He expressed the opinion that releases by our side have nothing to do with releases by the enemy. The NLF has released our personnel for its own purposes. In each case, the release can be explained in those terms, rather than in terms of response to our actions.

The memorandum continues with a more specific breakdown of the specific motives for VC release of U.S. prisoners:

> We agree that the views expressed by the Foreign Ministry official represent the past pattern of such releases…The January 4, 1967 release of Scales and Monahan was a New Year’s release, and the February 23 release of Crafts and Womack was presented as a Tet release. None of these appear to have been made in response to releases by our side, and the NLF did not respond to the GVN release of four US captured PW’s on June 12. The November 11 release of the three Sergeants seems designed either to offset reaction to the announcement of Hertz’ death in captivity or to build up anti-Vietnam war groups in the U.S.

The November 11 release references Gustav Hertz, a Foreign Service adviser who was captured by the VC on 2 February 1965 and who died of malaria on 24 September 1967 while in VC captivity (Rochester & Kiley, 1998, p. 252-253) In spite of the Embassy's opposition to the reciprocity release policy, there was continued pressure by the State Department, D.C., for the reciprocal release of the three sergeants. In light of the Tet Offensive (31 January 1968), the South Vietnamese government became further entrenched in its opposition to reciprocal release.

On 22 January 1968, the Vietcong released two U.S. Army personnel (PFC Ortiz-Rivera and Lance Corporal Agosto-Santos). Three weeks later, on 16 February, the North Vietnamese released three U.S. pilots (Ensign David Matheny, Maj. Norris Overly and Capt. Jon Black). Under circumstances similar to those that had surrounded the release of the three sergeants the previous year, the Hanoi government coordinated the release of the three pilots in conjunction with American peace activists, Rev. Daniel Berrigan (Jesuit priest) and Prof. Howard Zinn (Boston University). With this release, The State Department was now involved in simultaneously coordinating three reciprocal releases: the Vietcong November 1967 release of the three U.S. Sergeants, the January 1968 release of two Army personnel and now the NVN release of three U.S. pilots. The latter was expedited because the U.S. retained custody of the 17 remaining NVN sailors who had been captured in July 1966. The State Department's efforts at reciprocal release, and the opposition it had faced, can be seen in a series of cables between U.S. Embassy, Saigon, and the State Department, D.C., beginning in early March under the subject headings: "Reciprocal Release of NVN Prisoners for Three US Pilots", "Reciprocal Release –

VC Prisoners", "Reciprocal Release of VC Prisoners and NVN Naval Personnel" and "Reciprocal Releases".

On the sensitive issue relating to the release of the U.S. held NVN sailors (which was in potential violation of the spirit if not the letter of the Westmoreland-Co Agreement) the State Department directed the Embassy to use the following guideline:

> Since prisoners held by USG, you should simply inform GVN of proposed release assuming rather than seeking concurrence. You should also make clear that this release does not replace or conflict with release for Jackson, Johnson and Pitzer, which should be arranged separately, also as promptly as possible. (02 Mar 1968, RG 59, Lot E5307, Box 29-33)

It becomes apparent that the GVN's objection to the reciprocal release of VC prisoners became more firmly entrenched after the Tet Offensive (31 January 1968). According to a communiqué from U.S. Embassy, Saigon to State, D.C.:

> [The Embassy was] informed March 11 by Foreign Minister official that GVN prefers not to make an early reciprocal release of VC prisoners in response to those of Jackson, Johnson and Pitzer. The official indicated that the ministry of defense opposes VC release at present moment because the public would not understand them coming so soon after the Tet offensive last month…In view of GVN sensitivities, we consider we should not press the GVN on this release for the present, but we will make follow-up in course of next two weeks. (13 Mar 1968, RG 59, ibid)

Though the State Department accepted the delay, it served to remind the Embassy (16 Mar 1968) that it still needed to arrange for the release of two more VC's in response to the January release of two U.S. military personnel. The pressure that was being exerted is apparent in the closing line: "we would not want effort to increase number three to five to become excuse for further delay." The March 1968 Monthly Report of PW Custody Activities referred to the GVN delay as

being due to “internal political considerations”. (RG 59, ibid) In the meantime, the U.S. Navy successfully orchestrated the release of the three GVN Naval prisoners on 29 March 1968 for the release on 16 February by the NVN of three U.S. pilots.

In a message dated 12 April from the U.S. Embassy, Saigon notified State Department, D.C., that the issue of the release of the three VC prisoners in reciprocation for the three U.S. sergeants had reached the Prime Minister’s office. In addition, the message mentioned that the GVN Defense and Interior Ministries were concerned that the release of the three NVN Naval personnel in reciprocation for the released U.S. pilots “may have infringed” upon the sovereignty of the GVN. The release did eventually take place on 27 April 1968, over five months after the initial VC release. The official Embassy statement signed by Ambassador Ellsworth Bunker read:

> On behalf of the United States government we are gratified at the release of these three people, which was done in reciprocity for the release last November in Cambodia of three US servicemen, Sergeants James Jackson, Daniel Pitzer and Edward Johnson. We hope this action on the part of the government of Vietnam will lead to further releases of American and allied personnel by the other side.

The release, however, came under criticism by the Department of State, D.C., because one of the three VC selected by the GVN for release included an 18-year-old female. This lack of equivalence in the ‘content’ of the reciprocal exchange was criticized two days after the release in a telegram from Harriman (State Department, D.C.) to the U.S. Embassy, Saigon:

> Appreciate your perseverance in seeing this through. Release received modest publicity in national press, including references to reciprocity for three sergeants. However, press noted one of prisoners released was an 18 year old girl, which hardly seems adequate reciprocity for US sergeant. (RG 59, Lot E 5307, Box 31**)**

The reciprocal release the following month (15 May 1968) for the two Army personnel also did not pass without controversy. After a "rather elaborate ceremony" that included band and honor guard the GVN representatives released two men, age 57 and 64. (16 May 1968, RG 389, Lot 511-02, Box 7). A 28 May 1968 follow-up from the U.S. Embassy to State, D.C. mentioned that the Embassy informed the Foreign Ministry, GVN, that future "reciprocal releases" should consist of "prisoners who are broadly comparable in the terms of age and sex to the Americans released." Finally, the U.S. Embassy official "pointed out that this is the kind of thing which newspaper reporters here are likely to pick up and use to question whether these releases are truly reciprocal."

Though no formal policy decision appears to have been made, the reciprocal release policy began to wind down after the mid-May exchange. In large part this can be explained by the start of the Paris Peace Talks (May 10, 1968) which were led by Averill Harriman, the chief proponent of the reciprocity release policy. Policy reports published at the time also began to suggest that the reciprocal exchange policy would fail. A Rand Corporation Report published on 25 April 1968, *Prisoners of War in Indochina* concluded "it is unlikely that the DRV or VC will release US prisoners as a *quid pro quo* for the release of their own men. They have surely placed a higher price tag than this on US prisoners." (RG 59, Lot 5307, Box 56) Another factor that contributed to the likely failure of the reciprocity release program was that any successful *de facto* policy of reciprocity exchange required the close cooperation of the detaining power, the GVN. As can be clearly seen, the GVN only grudgingly cooperated with the reciprocal exchange program and often only after substantial time had elapsed following the initial release. Both

internal political considerations and the civil war nature of the conflict appear as the salient explanations for GVN's uncooperative position. Finally, it is questionable that the reciprocity policy would have succeeded even with GVN cooperation in the timely and equivalent exchange of prisoners. As discussed, VC and NVN releases followed a pattern that allowed for alternative, non-reciprocal, explanations including political and propaganda-related motivations.

As can be seen in a 13 June 1968 telegram from U.S. Ambassador Bunker, Saigon, to the Secretary of State, D.C., the reciprocity exchange policy was waning in importance. While discussing the prospect for a general repatriation to North Vietnam of all sick and wounded, Ambassador Bunker stated: "We would also support the inclusion of the 14 remaining members of the North Vietnamese PT boat crew in any repatriation offer. These men have been held since July 1966 and we doubt that they can be considered to be trading bait to effect an exchange for any of our military flyers in the NVN." This clearly shows a downgrading in the once valuable trading "material" that the POW's in U.S. control once possessed.

The 14 remaining NVN sailors would not, however, be part of a general repatriation. On 2 August 1968, the North Vietnamese released three Air Force officers (Maj. James Low, Maj. Fred Thompson & Capt. Joe Carpenter) to the escort of a delegation of American peace advocates. The shift in U.S. policy from previous exchanges can clearly be seen in the August Monthly Report of Detainee Custody Activities (14 Aug 68, RG 389, Lot 511-02, Box 7):

> In response to this action by NVN and as a gesture of good will, it is planned to repatriate all of the 14 remaining VNV PT boat PW to NVN on 16 August through Vientiane. The State Department requests that all concerned *refrain from referring to the US response as*

> *"reciprocity."* Instead, the action should be mentioned as "in response to" or "a gesture of good will." The Hanoi government reacts unfavorably to the term reciprocity. (my emphasis)

The 14 POW's in U.S. custody were not repatriated until 21 October 1968 and available documents show that the term 'reciprocity' was not used. *The New York Times* reported at the time of the announced release that U.S. negotiators in Paris had stated that they hoped "the release would lead to expanded prisoner exchange." (Smith, 1968, p. A1)

Upon taking office in 1969, President Nixon appointed Melvin Laird as Secretary of Defense. Prior to this it had been U.S. policy to avoid public admonishment of treatment of U.S. POW's by the North Vietnamese and Viet Cong and to rely instead on "quiet diplomacy". However, on 19 May 1969, the U.S. formally began a publicity program, officially referred to as "the Go Public campaign", which sought to expose enemy violations against U.S. prisoners. (see Davis, 2000, Chpt. 11 for detailed background) At the introductory news briefing Secretary Laird began the campaign with the following declaration: "The North Vietnamese have claimed that they are treating our men humanely. I am distressed by the fact that there is clear evidence that this is not the case." (ibid, p. 201) Negotiators in Paris noted that the NVN responded by suspending future releases of U.S. POW's. In late 1970 (13 November), Henry Kissinger requested from the Executive Secretary, Department of State (Theodore Eliot) a report detailing the record of POW releases since 1965 "with an analysis as to what may have motivated specific Communist releases of our men." The subsequent report concluded:

> Communist releases of our men appear to have no direct relation to US/GVN releases. Our side has several times publicly expressed the hope that the other side would reciprocate our releases. This has not happened…In the Paris meetings and in contacts

> with intermediaries North Vietnam has repeatedly rejected efforts to deal with prisoner problem on a basis of reciprocity. (undated report, RG 59, Lot 5307(A1), Box 13)

The last recorded reciprocity-based exchange took place on 8 October 1971 when the Viet Cong released SSG John Sexton. Two days latter, "in response to the enemy initiative, one NVA lieutenant (PW) was released in the general area of Sexton's release." (1 Nov 1971, RG 389, Lot P2, Box 24)

The attempt to initiate through cooperative means the exchange and release of prisoners conceptually reflects positive reciprocity and fits with the international society perspective. The failure of the policy can be attributed in large part to the one-sided nature of the exchange. The value of U.S. POW's in enemy hands was greater from political and propaganda standpoints than were prisoners under U.S. and GVN control which created a disproportionate value in the "worth" of prisoners.

The failure of the reciprocity exchange policy in Vietnam does not necessarily mark the end of its use in an ad hoc manner in future conflicts involving the United States. For example, during the Kosovo War (1998-1999) President Slobodan Milosevic ordered the release of three U.S. soldiers after meeting with U.S. civilian representative Rev. Jesse L. Jackson. Shortly after the release, the *New York Times* (5 May 1999) reported: "The United States is considering freeing two Yugoslav prisoners of war as a reciprocal gesture after the release of three American prisoners over the weekend, NATO and American officials said today." (Myers, 1999)

The Second Gulf War

The Second Gulf War (2 August 1990 – 28 February 1991) is unique when compared with the previous examples because it shows a cohesive coalition action with overwhelming international approval (including United Nations authorization). An arguable outgrowth of this, and another unique feature of this conflict, was the general noncontroversial application of the laws of war. This lack of controversy and the corresponding ease in which the laws of war were applied in practice to the Second Gulf War stands in contrast to the contentious, controversial and difficult nature of the application of the laws of war in the previous examples. Furthermore, though many internal government documents remain classified, there appears to have been little interdepartmental controversy between the State Department and Department of Defense on laws of war issues.

As discussed by Roberts (1993) the United Nations, in its series of Security Council resolutions leading up to the conflict, failed to formulate a comprehensive statement of the applicable laws of war. (p. 144) According to Roberts, "the need to observe the laws of war was apparently assumed". (ibid. p. 142) As it relates to the United States, the application of the laws of war was communicated by the United States executive branch in the form of official policy statements and military instructions to armed forces. According to Roberts (2008), "Statements from the US leadership of the coalition reflected the explicit assumption that the laws of war applied to coalition operations." (p. 953) From the perspective of the United States, the assumptions concerning the laws of war application came with two important caveats. First, statements concerning the applicability of the 1977 Additional Protocol to the 1949 Geneva

Conventions were qualified. Second, the right to reprisal in the case of Iraqi use of nonconventional weapons was affirmed.

In January 1991, the ICRC distributed to the coalition forces a "Memorandum on the Applicability of International Humanitarian Law in the Gulf Region" (ICRC Memorandum). In addition, the ICRC met in private with the U.S. Department of State and Department of the Army, Judge Advocate on 10 December 1990 to discuss the application of the laws of war. The primary point of contention for the U.S. relating to the application of the laws of war (as recommended in the ICRC Memorandum) was the ICRC emphasis that the 1977 Additional Protocols were applicable, though the U.S. and most of the other military contributing coalition nations had not ratified them (including Egypt, France and the United Kingdom).

On 11 January 1991, the Department of Defense issued a directive to all U.S. commands that included the complete ICRC memorandum followed by commentary clarifying the U.S. position on the application of the laws of war. The DOD directive is the most comprehensive statement on the application of the laws of war made by the U.S. during the conflict and covers both Geneva and Hague-related topics. While affirming the application of the Geneva Conventions of 1949, the directive specifically points out that the provisions specified by the ICRC Memorandum relating to the 1977 Additional Protocols do not apply to the United States and are in need of "substantial qualification or clarification." On the subject of protection of civilian and civilian objects the following clarifications are made:

- "The obligation of distinguishing combatants and military objectives from civilians and civilian objects is a shared responsibility of the attacker, defender, and the civilian population as such."

- "Civilians working within or in the immediate vicinity of a legitimate military objective assume a certain risk of injury."
- "Measures to minimize collateral damage to civilian objects should not include steps that will place U.S. and allied lives at greater or unnecessary risk."

The right to retaliate in the case of chemical weapon use is also emphasized: "The U.S. accepts the prohibition on chemical weapons contained in the 1925 Gas Protocol as binding upon first use only."

While the U.S. was critical of certain provisions of the ICRC Memorandum it was, apparently, the only coalition nation to transmit the ICRC message to its troops. (Adam Roberts, personal communication with author, 13 December 2010) Concerning reciprocity, the United States emphasis on the right to countermeasure in the case of weapons violations strengthens, conceptually, negative reciprocity. This is discussed in greater detail in the final case study where the deterrent "threat of retaliation" played a central role as a countermeasure to Saddam Hussein's threatened use of unconventional weapons. With this exception, reciprocity (positive or negative) does not play a central role in the application of the laws of war during The Second Gulf War.

Conclusion

This case study demonstrates that the initial and official application of the laws of war to a conflict poses little controversy. Variables that complicate the successful application in practice include the lack of a harmonized interdepartmental policy by decision-makers and lack of cooperation between allies. Conversely, a cohesive coalition with international support

strengthens the laws of war to a point where their applicability is assumed. Reciprocity considerations varied depending on the level of conflict and the level of policy decision-making. The initial application of the laws of war to a conflict saw little concern for reciprocity. In practice, reciprocity played a subsidiary role during the Korean War. The Vietnam War, on the other hand, saw substantial reciprocity consideration in the form of a stated policy of reciprocal prisoner exchange. Finally, the Second Gulf War saw negative reciprocity in the form of the United States asserting the right to retaliate in the case of Iraqi violation of the 1925 Geneva Protocol.

Case Study IV

Adherence

In each of the three conflicts analyzed in this case study, non-adherence to the laws of war was anticipated, occurred, or was suspected to have occurred during the conflict. At this stage in the laws of war decision-making process a number of policy responses are possible. Reaction can take the form of countermeasures, often in the form of reprisals (actual or threatened), treaty suspension, or non-belligerent diplomatic initiatives (public or private). The adherence stage also includes decisions surrounding whether to use (or to threaten use of) banned or restricted weapons. While the primary realm of reciprocity being examined here is negative reciprocity, positive reciprocity concerns are also relevant. The examples that follow are largely incident-driven and therefore show decision makers reacting to often unforeseen events.

Korean War

What separates the Korean War from the other conflicts analyzed is that reciprocity played almost no role in the decisions surrounding adherence to the laws of war. Accusations of Communist atrocities were not widely publicized until after armistice negotiations had begun. Since negotiations were often tenuous to the point of near collapse, the United States did not pursue an active policy of countermeasures for fear that negotiations would break down entirely. As the following shows, the only recorded policy of reprisals concerns contingency plans in the event of occupation of North Korea by UNC forces. This example, though minor and occurring early in the conflict, strengthens U.S. objection to individual level reprisals.

Early in the conflict, reprisals were addressed as they related to the planned invasion and occupation of North Korea by UNC forces in late 1950. National Security Council (NSC) directive NSC 81/1 established the approved policy by which UNC Commander General MacArthur crossed the 38th Parallel and invaded North Korea. (See Walzer, 1977, p. 117 for a critique of U.S. policy to cross the 38th parallel and Nerheim (2000) for the argument that NSC 81/1 constituted 'mission creep' that led directly to China entering the war.) Approved by the Joint Chiefs of Staff and Secretary of State Dean Acheson almost a week before General MacArthur's landing in Inchon (15 September 1950), NSC 81/1 included contingency plans for MacArthur's occupation of North Korea in the event that North Korea collapsed. (Hastings, 1987, p. 117) According to NSC 81/1, the Commander of UNC forces was required to forbid "reprisals against the forces, officials, and population of North Korea, except in accordance with international law" (NSC 81/1, 1950, p. 11-12). The ban on reprisals extended protection for individuals who served in "middle or low-level positions" in the North Korean government or military. (Cummings, 2010, p. 191) NSC 81/1 included the following summary describing appropriate behavior of UNC forces: "In performing their mission beyond the 38th parallel, the general posture of the United Nations forces should be one of liberation rather than retaliation." (p. 12)

Throughout the Korean War there were charges of violations of the laws of war, particularly against civilians and prisoners of war. However, as Kalshoven points out, there are no indications that reprisals were ever carried out or even threatened. (1971a, p. 295) While the U.S. may have been tempted to conduct reprisals in light of enemy violations, its decision to refrain

from doing so is evident in a speech made by President Eisenhower on 14 January 1955 in response to China's continued custody of U.S. prisoners:

> It will not be easy for us to refrain from giving expression to thoughts of reprisal or retaliation. Yet this is what we must not now do. We must not fall into a Communist trap and through impetuous words or deeds endanger the lives of those imprisoned airmen who wear the uniform of our country. They are fighting men, trained to discipline. We now owe them discipline from ourselves. (14 Jan 1955, Statement No. 16 by the President on United Nations Negotiations With Communist China for Release of American Airmen and Other Personnel)

With the exception of these examples I did not discover any other archival records that conceptually fit with reciprocity issues involving laws of war adherence during the Korean War. It appears that a majority of the laws of war-related decision making that occurred during the Korean War focused on the repatriation issues that were discussed in Case Study III.

The span of active U.S. involvement in the Korean War lasted from 25 June 1950 – 27 July 1953. A majority of this time was spent in negotiations that began on 10 July 1951 and coincided with a stabilizing of the military front lines. One result is that the majority of combat operations occurred early in the conflict. The lack of negative reciprocity concerns can be partially explained by the decrease in belligerence after negotiations began. Adherence issues are most likely to occur during active hostilities when violations are more likely to occur. Since the front lines stabilized early in the conflict, and remained stable throughout the lengthy negotiations, there were fewer opportunities for violations.

Vietnam

The Vietnam War is a particularly interesting example which demonstrates multiple perspectives of non-adherence to the laws of war. First, it showed U.S. reaction to non-adherence to the laws of war committed by the VC and by the NVN. Second, the U.S. faced well-publicized accusations claiming that it had committed violations during the conflict; thus, one can see the reactionary position that the U.S. assumed in response to claims of non-adherence. Third, the primary U.S. ally and host, South Vietnam, faced sustained accusations throughout the conflict of non-adherence to the laws of war. The Vietnam War is also an interesting example because the archival holdings pertaining to the conflict are significantly more extensive than those of the other conflict examples that fall within this dissertation's scope. In short, having access to records from several government agencies and military branches allows for a more thorough and dynamic analysis than is possible with other conflicts.

The following examines four situations where reciprocity considerations were relevant to the adherence of the laws of war. The first example discusses the "sustained reprisal" policy that was used by the White House to justify the escalation of the conflict in February 1965. The second example addresses the Viet Cong reprisal executions of U.S. POW's. Closely linked to the second example, the third examines the threatened trials of U.S. POW's as "war criminals" by the North Vietnam Government. Fourth, the Government of Vietnam's non-adherence to the laws of war is addressed. Following these, a series of brief examples culled from the research will be discussed. While many of these brief examples do not reveal substantial or upper-level

policy decision-making, they do support the argument that reciprocity was a deep-seated component in considerations pertaining to laws of war adherence.

Sustained Reprisal Policy

In secret, the White House pursued a course of action that included reprisals in relation to U.S. military involvement. In particular, a policy of sustained reprisals was used as a pretext to justify U.S. escalation. The first stated 'reprisal raids' against North Vietnam were conducted in response to the Gulf of Tonkin incident (2/4 August 1964) when the U.S. attacked NVN naval bases on 5 August 1964. The groundwork for an explicit policy of U.S. reprisals was established early the following year in a memorandum written by McGeorge Bundy, presidential assistant for national security, and was issued 7 February 1965 under the title "A Policy of Sustained Reprisal." Subsequently made public in *The Pentagon Papers* (1971. pp. 687-691), Bundy's memorandum is an example of executive-level decision-makers utilizing reprisals in order to justify a policy of conflict escalation. The important influence that this memorandum exerted upon White House policy in Vietnam is emphasized in McGeorge Bundy's *New York Times* obituary, which refers to the reprisal policy memorandum as "one of the pivotal documents of the American escalation recorded in the Government's secret history of the war". (Kifner, Sept. 17, 1996)

Though the U.S. had previously conducted a quid-pro-quo 'reprisal raid' following the Gulf of Tonkin incident, the event that precipitated a change in overall policy was the 7 February 1965 Viet Cong attack on the American air base at Pleiku which killed 9 Americans and wounded 128. The day after the attack, President Johnson ordered Flaming Dart I, a reprisal raid

on North Vietnam. Two days later (10 February), the Viet Cong responded by attacking a hotel in Qui Nhon where U.S. soldiers were billeted. The following day President Johnson responded with Flaming Dart II. These two reprisal raids set the stage "for a campaign of sustained and graduated bombing against North Vietnam." (Drew, 1986, p. 33) On 13 February, President Johnson approved McGeorge Bundy's proposed "policy of sustained reprisal" under the code name Rolling Thunder. The extensive bombing campaign that began with the "reprisal policy" lasted from March 1965 to November 1968.

Bundy's memorandum outlines the incremental policy that would eventually result in full U.S. military commitment to Vietnam and highlights some of the problems that can arise when incorporating the concept of reprisals into policy. According to the memorandum's introduction:

> We believe that the best available way of increasing our chances of success in Vietnam is the development and execution of a policy of sustained reprisal against North Vietnam – a policy in which air and naval action against the North is justified by and related to the whole Vietcong campaign against violence and terror in the South.'

Though initial reprisals were linked directly to the previous act in a strict quid-pro-quo manner, reprisals would eventually become self-perpetuating: "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."

A consistent critique of reprisals' effectiveness as a countermeasure, applied in this example to national military policy, is that reprisals tend to result in a slippery slope of belligerent countermeasures or, according to one author, a "vicious spiral of purported reprisals and counter-reprisals". (Best, 1994, p. 392) The sustained and ongoing nature of the "policy of

sustained reprisals" which is found in Bundy's memorandum eventually blurred the distinction between individual reprisals:

> We are convinced that the political values of reprisal 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.

According to Fritz Kalshoven (1971a), the February 1965 U.S. policy of declared reprisals (Dart I & II) fell outside the scope of legal analysis because it failed to constitute a "*prima facie* violation of the law of war." (p. 289) Conceptually, incorporating a policy of belligerent reprisals as a means of justifying conflict escalation shows negative reciprocity in practice and theoretically leans towards the international system perspective.

Kalshoven argued that there are two perspectives upon which to base an analysis of the Dart I & II reprisal attacks: "that there was no armed conflict going on between the United States of America and North Vietnam, or that those parties had by that time already become involved in an armed conflict." (p. 290) The former, according to Kalshoven, is close to the "classical concept of reprisals as measures short of war, that is, actions whereby the actor brings pressure to bear on his opponent while at the same time indicating that it is not his intention to start a war". (ibid) If, on the other hand, a condition of armed conflict had already existed, then the 7 February bombing would not have "infringed the law of war" and the term "reprisals" would "in that supposition have been wholly figurative". (ibid) Kalshoven concluded that regardless of the perspective, the U.S. action could not be considered a "belligerent reprisal" because neither action was "designed to operate as sanctions of the law of war." (ibid, p. 290)

Kalshoven concluded his analysis by making the excellent point that the February 1965 reprisals were referred to in different terms depending on which U.S. department was making the reference and to whom. The White House statement, and the statement made by Secretary of Defense McNamara, referred to the 7 February incident as, respectively, "reprisals" and "retaliatory action". On the other hand, in a letter to the President of the Security Council the incident is described as a "prompt defensive action." (ibid p. 291) The variation in terminology can be understood by considering the intended target audiences: The White House and Defense statements were intended for the VC and North Vietnamese and were meant to convey the coercive nature of the action while the Security Council statement "was a clear attempt to depict the actions as being in accordance with the terms of the United Nations Charter." (p. 291)

The concept of reprisal used by the Johnson Administration to justify escalation conformed to a non-legal definition that views reprisals as a "measured response to a specified injury." (1969, p. 764) The three examples that follow (reprisal executions of U.S. POW's by the VC, threatened war-crimes trials of U.S. POW's in NVN and the failure of the GVN to cooperate with the ICRC and adhere to the Geneva Conventions of 1949) depict specific, *prima facie*, incidents of laws of war violations. Though the three examples are analyzed separately, at several points all three converge both temporally and in terms of U.S. policy decision-making.

Reprisal Execution

On two separate occasions, U.S. POW's were executed by the Viet Cong in stated "reprisal" for the South Vietnamese execution of VC terrorists. Throughout the conflict the threatened execution of U.S. POW's persisted. The reprisal execution of prisoners of war is prohibited

under Article 13 of Convention III of the Geneva Conventions of 1949, but as a non-state insurgency, the Viet Cong were not technically bound by the legal requirements of the Geneva Conventions. Kalshoven (1971a), however, argued that the prohibition on reprisals against prisoners had become part of customary international law, and was thus "binding on the parties to the conflict regardless of their acceptance or non-acceptance of the Conventions of 1949". Kalshoven concluded that the "norm embodied in Article 13" applied, and "the executions of American prisoners of war carried out by the Vietcong were clear violations of that provision." (1971a, p. 303)

On 24 June 1965, the VC executed Sgt. Harold Bennett in reprisal for the South Vietnamese government's execution of a Viet Cong terrorist. At the time, the VC also threatened future executions if the South Vietnamese continued a policy of capital punishment against convicted VC. The event did not result in substantial State Department efforts; however, the Joint Chiefs of Staff sought the approval of Secretary of Defense McNamara for retaliatory air strikes against fuel storage centers and a power plant in North Vietnam if "another prisoner execution occurred or a U.S. official was kidnapped or assassinated." (Davis, 2000, p. 37) McNamara approved the listing of potential reprisal targets, however he ruled out an automatic policy of reprisals in response to future violations.

Three months later, on 26 September 1965 and under similar circumstances, the VC announced the execution of two American prisoners (Capt. Humbert Versace & Sgt. Kenneth Roraback) in reprisal for the GVN execution of three accused "communist agitators" the week before. In this instance, Ambassador Lodge, U.S. Embassy, Saigon, communicated directly with

Department of State, D.C. officials and recommended "more belligerent measures to improve prisoners' lot." (20 Oct 1965, RG 472, Lot A146, Box 2) *The Command History for MACV* (1965) shows that retaliatory actions were of considerable interest to the U.S. Mission Council. Located in Saigon, the U.S. Mission Council was an influential in-theatre interdepartmental policy-coordinating group that consisted of the U.S. Ambassador, the Deputy Ambassador and mission heads of MACV, The Joint United States Public Affairs Office (JUSPAO), and the Central Intelligence Agency (CIA). At a 28 September 1965 meeting concerning actions in response to the executions, retaliatory actions were considered including "branding the NVN and Front leaders as war criminals and threatening them with a Nuremberg-like trial," "putting a bounty on the heads of various NVN and VC leaders" and bombing new targets such as the bridges in Hanoi and the dikes up-country (ibid, p. 429-30). The MACV Command History notes that in the meeting, Ambassador Lodge "stated that probably the single most effective deterrent would be to kidnap a number of top VC leaders…[and] suggested that some military operations should be conducted as specific reprisals for the execution of US PW's". (ibid, p. 430)

Adding even greater significance to the September executions was that they coincided with the North Vietnamese announcement to try U.S. pilots as "war criminals" (discussed below). At this point in the decision-making process, the U.S. Mission Council was advocating for retaliation in the form of belligerent reprisals while the State Department, D.C., was advocating for a policy of diplomacy. According to Davis (2000), the State Department, D.C. "reacted more vigorously" in response to the September executions than it had to the previous execution in June. While both State and Defense decision-makers in South Vietnam advocated

for belligerent reprisals in response to the VC reprisals, the State Department in D.C. promoted its traditional role and emphasized diplomatic initiatives. The latter succeeded and persuaded the South Vietnamese government to postpone the executions while still holding the convicted VC under the sentence of death. From the official Department of Defense historical summary of the event: "Apparently satisfied that they had achieved their objective, the NLF authorities refrained thereafter from deliberately killing U.S. prisoners as an act of reprisal, though serving notice that they reserved the right to do so if the Saigon government gave them cause." (ibid, p. 61)

Two years later (17 June 1967) the VC again threatened the execution of U.S. POW's if GVN executed three convicted terrorists. In similar circumstances, State Department officials were able to stay the GVN executions and South Vietnamese Premier, Nguyen Can Loc, gave the prisoners a last minute reprieve. The State Department's position on the subject of the VC-threatened reprisals for the GVN execution of VC terrorists was addressed in a State Department, DC, telegram to Embassy, Saigon, that summarized the June 1967 threatened execution of U.S. POW's:

> Appreciate your prompt action in getting GVN to agree to stay of execution of terrorists and to announce it was postponing action. We of course recognize sensitivity this issue for GVN, touching as it does on Vietnamese sovereignty and involving VC threats and blackmail.
>
> At the same time it is most important that GVN leadership understand that no repeat no executions of VC can take place for foreseeable future. As Embassy knows Hanoi promptly reacted by threatening to put three American prisoners on trial if VC are executed. VC radio also renewed reprisal threats. However such threats are characterized, we in fact cannot allow lives of our POW's to be jeopardized for sake of exacting capital punishment of VC no matter what their crimes may be. (18 Nov 1967, RG 59, Lot E5307, Box 72)

The message clearly conveyed the tension that existed within the State Department as they strove to respect the South Vietnamese domestic criminal justice system while at the same time protecting the fate of U.S. POW's who were in the hands of the enemy. The difficult question of how to balance respect for the sovereignty of its ally and host while protecting U.S. interests would continue to be revisited in other laws of war matters throughout the conflict.

Threatened Trials

As the previous example demonstrated, there was a link between VC threatened executions and NVN threatened trials of U.S. POW's as "war criminals." As with the previous example, the State Department succeeded in forestalling the trials through its diplomatic campaign while other government agencies prepared for reprisals. The extensive diplomatic efforts that were exerted are evidence that the United States regarded NVN threats to try prisoners very seriously.

When the first NVN threats of war crimes trials were announced in late September 1965, the United States immediately viewed them as reprisals for the execution of communist guerillas in the South. On 29 September 1965, the ICRC announced that Hanoi had officially labeled captured U.S. pilots as "war criminals" who would be subject to trial. Later wording stated that the prisoners would be tried as "criminals against humanity" under North Vietnamese criminal law. It is clear that the U.S. equated the threatened trials with the concept of reprisals. According to a joint State/Defense "draft contingency press statement" that was written in preparation for Hanoi's announcement commencing the start of trials:

> By its announcement that it will hold so-called "war crimes trials" Hanoi has made clear once again its disregard for the norms of international law civilized behavior…any such

> trials would be thinly disguised acts of reprisal forbidden by the Geneva Conventions of 1949 (03 December 1965, RG 472, Lot A146, Box 1)

The end of the message included a veiled threat of retaliation to be issued in the case of threatened capital punishment of U.S. POW's:

> Should DRV make reference to death or other severe sentence, following would be added to text: "There should be no RPT 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. (ibid)

State Department efforts in late 1965 focused primarily on two fronts. First, efforts were made to establish a protecting power for U.S. held prisoners as required by Article 8 of Geneva Convention III. The countries that were approached, including France, England, Canada and the United Arab Republic in Cairo, all declined. The second emphasis was focused upon an extensive diplomatic campaign intended to make Hanoi realize that trials would result in international condemnation. Threats of war crime trials subsided in late 1965; however, Davis (2000) questions whether this was due to the diplomatic efforts by the State Department or to the 37-day Christmas halt in the bombing of North Vietnam by the United States. (p. 76-77) NVN threats subsided until the summer of 1966 when the threat of POW "war crimes" trials reached a high point.

On 6 July 1966, captured U.S. pilots were paraded through the streets of Hanoi in arguable violation of Article 3 of Convention III. This was viewed by the State Department as a possible prelude to the trials of POW's. Five days later (11 July), Hanoi announced that U.S. airmen "will be tried as war criminals" and will "have to pay for their crimes before the tribunal of our army and people." The following week (16 July), UN Secretary General Thant publicly

warned Hanoi that war crimes trials would result in conflict escalation and even, possibly, World War III. (Brewer, 1966, p. 1) The same day that the Secretary General issued this warning, a memorandum was sent to Secretary of State Rusk from Averell Harriman which summarized the efforts, to date, by the State Department: "We have mounted a major diplomatic 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 action could have on American opinion and the prospects for peace." (16 July 1966, RG 59, Lot E5307, Box 50-52)

In a State Department "press conference briefing paper" prepared in light of the July 1966 POW trials announcement, the following response was prepared in answer to the question requesting comments on Hanoi's 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. (1966, RG 59, ibid, emphasis)

Though vague, the reference to reciprocity in the passage above arguably hints at a negative, or retaliatory, countermeasure which is consistent with the policy espoused by the State Department throughout the July 1966 threatened POW trials incident. Davis refers to this as "hinting at possible retaliation." (Davis, 2000, p.81) Overall, the main emphasis of U.S. policy efforts in preventing the NVN POW trials was diplomatic with veiled threats of retaliation.

In the case of actual trials, the Joint Chiefs recommended immediate retaliation on the grounds that "To do anything less could have adverse effects on the morale of our fighting men as well as the families back home." (15 July 1966, RG 59, Lot E5307, Box 50-52) Specific targets that were recommended included the Ministry of Defense building in Hanoi and the ports of Haiphong, Cam Pha and Hon Gay. A State Department internal memorandum from Philip Heyman to William Bundy was critical of the Joint Chiefs' position on the grounds that retaliation could lead to escalated attacks on U.S. POWs and "grossly distort our military and diplomatic strategy" in Vietnam. (18 July 1966, RG 59, ibid) Averell Harriman, who was in charge of overall POW policy for the Department of State, objected to an immediate military response in the case of trials and warned against pursuing a policy of reprisals. (Davis, 2000, 82-84)

On 23 July 1966, North Vietnam backed down from holding trials. In an announcement to CBS news, Ho Chi Minh stated that there would be "no trial in view" for the POWs. Three days latter, the *New York Times* reported that North Vietnam had taken the "unusual step" of rebroadcasting "three telegrams to Americans saying that no trial of American war prisoners was in view and that prisoners would be treated humanely." (26 July 1967) Ambassador Lodge, U.S. Embassy Saigon attributed the announcement as reflective of "strong U.S. official demarche" and opposition from the international community. (27 July 1966, RG 59, Lot E5307, Box 50-52) It is apparent that it was official U.S. polity to not threaten reprisals and to instead focus on more discrete diplomacy. Conceptually, this shows a policy preference to remain within the international society framework.

GVN Non-Adherence to LOW

In August 1965 the South Vietnamese government (GVN) notified the ICRC and the U.S. that the Geneva Conventions would be applied to its conflict with NVN and the VC. This view was strengthened in the February 1966 Manila Communiqué where the GVN reaffirmed that it was applying, and adhering to, the Geneva Conventions. In practice, problems continued throughout the conflict concerning the GVN's adherence to the laws of war. The United States expended substantial efforts throughout the war in the attempt to realize GVN observance, often under the reciprocity-based assumption that GVN adherence would lead to better treatment of U.S. POWs.

As the previous examples have touched upon, the issue of GVN noncooperation with U. S. policy compounded the problems that the U.S. faced in VC reprisal executions and NVN threatened "war crimes" trials. For example, part of the State Department's 1965 effort to gain public support against the trials threatened by NVN was to pressure the GVN to cooperate more closely with the ICRC by providing them with lists of prisoners and permitting them to visit POW camps. The State Department argued that these efforts would assist in demanding "reciprocity treatment for U.S. PW's" from NVN. (Command History MACV, 1965, p. 430) However, General Westmoreland, U.S. Commander, MACV, believed that due to "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." (p. 433)

As this example shows, the U.S. was not only concerned with enemy violations, but also with non-adherence on the part of its South Vietnamese ally and host. Much of this concern hinged upon an understanding of reciprocity that implied that the U.S. ally's non-adherence

would directly result in further deprivations and violations to U.S. POW's in enemy hands. The State Department acknowledged this in a 24 October 1965 memorandum that stated: "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 the DRV." (RG 59, Memorandum from Abba Schwartz to Chester Cooper & William Bundy, Subject: Vietnam and the ICRC, Lot E 5307, Box 34).

As far as the United States was concerned, there were two salient problems associated with its ally's non-adherence. First, as capturing power, the United States retained residual legal responsibility under Article 12 of Geneva Convention III. According to Article 12, it is the responsibility of the capturing power to ensure that transferred prisoners are treated in accordance with the Geneva Conventions. Thus, GVN mistreatment would result in criticism and charges by the ICRC and the world community that the transferring power (the United States) was in violation of the conventions. Second, and related to the concept of reciprocity, was the concern that its ally's lack of adherence and violations of the laws of war would lead to violations or ill treatment, in kind, against captured U.S. POW's.

It is apparent that a negative reciprocity rationale provided the South Vietnamese Government with justification for its non-adherence to the Geneva Conventions of 1949. This is clearly seen in the relationship between the GVN and the ICRC. In mid-October 1966, cables and memoranda appeared between U.S. Embassy, Saigon, and State Department, D.C., containing multiple references to difficulties between the GVN and the ICRC or what one communiqué referred to as "bad blood" between the two. A complete breakdown in the

relationship is evident in a 13 December 1966 letter from the GVN Defense Minister to the ICRC denying the ICRC further visits to POW camps in South Vietnam "except on the basis of reciprocity." According to the State Department, "The letter indicated that under this policy, only after ICRC had visited prison camps and centers in North Vietnam would they be permitted to make similar visits in SVN." (31 Dec 1966, RG 59, Lot E5307, Box 38)

A 3 January 1967, State Department, D.C., memoranda to Embassy, Saigon, and U.S. Mission, Geneva, outlined the U.S. position on the matter, referring to the GVN reciprocity policy as a "serious and flagrant violation" of Geneva Convention III "which cannot be permitted to stand." (03 Jan 1967, RG 59, ibid) The memoranda went on to state that the Saigon Government be reminded that "public opinion remains troubled by allegations of prisoner mistreatment in SVN, and can be expected to conclude that GVN action…has ulterior motive of concealing such mistreatment from outside scrutiny." The memo warned that "unless this policy is promptly reversed" the U.S. would be required by the Geneva Conventions to stop transferring prisoners to the GVN. The position of the GVN did not officially change until the 31 March 1967 decree "promulgating" the Geneva Conventions of 1949. In practice, however, the GVN continued to be at odds with the ICRC throughout the conflict. Conceptually, United States concern for its own soldiers as a result of non-adherence by its ally shows a type of vicarious third party negative reciprocity.

Other Vietnam Examples

The following is a collection of brief examples of United States decision-making relating to laws of war adherence during the Vietnam War that has been pieced together from archival source

material. Though many do not reflect extensive, high-level decision-making, they nonetheless demonstrate that reciprocity considerations influenced laws of war decision-making. Together, these examples, along with the previous ones, support the argument that reciprocity played a prominent role in the decision-making process throughout the Vietnam War.

GVN Press Conference

The following event, which was described in a series of three communiqués between U.S. Embassy, Saigon, and State, D.C., highlights both the reciprocal concern that the U.S. felt as a result of GVN behavior and the difficulty that the U.S. faced as it worked to ensure its ally's compliance with the laws of war.

On 9 August 1966, the recently appointed South Vietnamese Information Minister (General Tri) staged a press conference with nine recently captured North Vietnamese Army (NVA) prisoners. Members of General Tri's staff requested that the U.S. Embassy assist by providing military transport. The U.S. rejected the request on the grounds that "overt U.S. participation would provide excuse to Hanoi to undertake similar steps with American POW's." (09 Aug 1966, RG 389, Lot 511-02, Box 12) The State Department, D.C., supported the Embassy's decision and further recommended that the U.S. make it clear to the GVN that its behavior was highly questionable under the Geneva Conventions (Article 13, GC III) and that "placing prisoners on show may…lead some observers to draw unfortunate parallels with Hanoi's attempts to exploit U.S. POW's." (11 Aug 1966, ibid) The U.S. Embassy follow-up described a meeting between U.S. Embassy political counsel and General Tri in which the U.S. expressed concerns that the press conference exhibition of prisoners was contrary to international

law and "pointed out relevant standards set in Geneva Conventions". According to the report: "[General] Tri had obviously never thought of relevancy of Geneva Conventions and was too pleased over the results [of the press conference] to focus on the legal requirements." (12 Aug 1966, ibid).

Ordeal by Water

The following example depicts the U.S. Provost Marshal General reaction to a well- reported U.S. violation of Article 13 of Convention III, specifically "Prisoners of war must at all times be humanely treated." This example highlights negative reciprocity concerns and alludes to the sensitive issue surrounding the manner in which the U.S. dealt with its ally on the subject of adherence to the laws of war.

On Sunday, 21 January 1968 the *Washington Post* published a cover story, with accompanying pictures, titled "Incident on a Patrol: A Vietcong's Ordeal by Water." (p. A1, A23) The front-page photo depicted a U.S. Ranger assisting a South Vietnamese interpreter in holding down a Vietcong suspect while another interpreter "pours water on a towel covering his face." According to the photo description, "This induces a fleeting sense of suffocation and drowning meant to make him talk."(ibid, A1). As a result of the article, a series of memoranda were sent between the office of the Secretary of Defense to the Commander, the U.S. Military Assistance Command, Vietnam (COMUSMACV) and the Commander in Chief, Pacific Command (CINCPAC). As a result, a personal letter was sent from General Westmoreland to his South Vietnamese counterpart, General Cao Van Vien, Chief, Joint General Staff.

A message from the Department of Army to the Commanding General U.S. Army and distributed to CINCPAC noted that the incident depicted in the *Washington Post* article was "irrational", "contradicts moral traditions of the Army", "provides a basis for genuinely conscientious objection to participation in Vietnam," and exposes U.S. prisoners to "*retaliatory treatment in kind*." (7 Feb 1968, RG 389, Lot P2, Box 26, my emphasis) A message from the Provost Marshall General (Maj. General Carl C. Turner) referencing the article, warned that the treatment depicted would "refute the moral basis of our efforts in Vietnam" and "expose all U.S. PW in enemy hands to retaliatory treatment." (24 Jan 1968, ibid) It is interesting to note that when compared to the internal memoranda, the 14 February 1968 letter from General Westmoreland to General Vien assumes a more sympathetic tone when referring to the mistreatment of detainees:

> We of course recognize and are all too familiar with the barbaric callousness and savagery of our enemy. We are also familiar with the emotional reaction of our troops who see these things first hand, and can understand the revulsion and anger which leads to retaliation in kind. While their actions are understandable, they cannot and must not be condoned.

The letter continues to state that every level of command, "must do everything possible to ensure that…we adhere to the letter and spirit of the Geneva Conventions". The statement concluded with an emphasis on personal morals: "We cannot permit our ethical standards and humane principles to be reduced to those of the enemy, for it is his very brutality and lack of respect for the dignity of the individual that we most abhor." (14 Feb 1968, ibid)

Polygraph for Detainees

In 1967, the Deputy Chief of Staff for Plans and Research (DCSPR) of the U.S. Army conducted a study titled: "Use of the Polygraph for Classifying Prisoners." The study addressed the proposed use of the polygraph in screening detainees and included an analysis of the logistical and legal issues involved in polygraph deployment in Vietnam (RG 389, Lot 511-02, Box 26). Some of the logistical objections included the following: concerns for mechanical malfunctions in jungle environments, linguistic problems resulting from the presence of several local dialects, and cross-cultural differences, including the caveat that "Western concepts of morality, bound by rigid notions of truth and falsehood, must not be assumed universal." According to the report's legal analysis: "Legal objection to polygraph screening of PWs can probably be derived from GPW Article 102, which provides that a prisoner may be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedures as in the case of members of the armed forces of the Detaining Power." (ibid) The final closing paragraph of the six-page study suggested a reciprocity rationale in its recommendation against the deployment of the polygraph in Vietnam:

> It is problematic whether US interests would be served by implicitly inviting hostile detaining powers to screen US military personnel by using analogous devices…hostile polygraph use might become more a propaganda weapon for producing American "war criminals" than a disinterested administrative tool. The introduction of newly-developed classification devices raises similar objections, leaving hostile detaining powers free to employ techniques even more questionable than the polygraph. (ibid)

Flag Saluting

During an ICRC inspection of Con Son prisoner of war camp in February 1970, prisoners requested that the ICRC exert its influence and cancel the requirement that prisoners salute the

South Vietnamese flag. A State Department legal analysis concerning this question was transmitted in August 1970 and concluded that requiring NVN and VC prisoners of war to salute the flag of the Republic of Vietnam was inconsistent with Geneva Convention III (RG 389, Lot 511-02, Box 17). The legal analysis rested largely on Article 14, which states that, "Prisoners of War are entitled in all circumstances to respect for their person and honor." In the closing analysis a reciprocity rationale is included: "In addition to legal reasons given above, as matter of practice we would not want US PWs to be subject to "disciplinary penalties" for failure to salute Hanoi's flag."

Chieu Hoi Program

The Chieu Hoi ("Open Arms") Program was a South Vietnamese initiative that offered repentant members of the Viet Cong the opportunity to defect with a political pardon, vocational training, and an extensive period of "political rehabilitation". It is estimated that over 194,000 Viet Cong ralliers participated in the program between 1963 and 1971. (Koch, 1973) In 1967, the South Vietnamese government announced that it was planning to extend the program to all prisoners of war including North Vietnamese POW's. The U.S. National Security Council's (NSC) decision to address this matter is evidence that the U.S. government thought that this change was an important development with significant implications. The NSC's objection to the program's expansion is described in its report addressing POW issues dated 6 October 1967:

> The GVN has publicly announced a plan to make all or most PW's eligible for the Chieu Hoi "open arms" program. While we sympathize with the desire to proceed with rehabilitation of captured enemy personnel…such a program raises difficult questions under the Geneva Convention, Article 16 which prohibits preferential treatment based on political opinions…We expect to work out a compromise which will permit some South

> Vietnamese prisoners to return to civilian status. However, we are insisting that no North Vietnamese PW's be included in the program, since this would be most difficult to reconcile with the Convention, *and could have adverse consequences for our men held in the North*. (NSC Paper, Prisoners of War in Vietnam, RG 59, Lot 5307 (A1), my emphasis)

The final comment clearly expresses concern for negative reciprocal treatment towards U.S. POW's. According to a Provost Marshall memorandum the following year, the GVN "administratively suspended the program when US objections became known." Included in the memo's summary was the following rationale for program opposition: "[State Department] worried about possible NVN reciprocity with captured US personnel in NVN". (22 Aug 1968, Memorandum from LTC Harold Elliot, Military Police Corps to LTC Rowland, TJAG, RG 389, Lot 511-02, Box 24) This example alludes to the possibility that the NVN could have justified a policy of "political indoctrination" against U.S. POW's in its possession on the grounds of the GVN's expanded Chieu Hoi program.

The Second Gulf War

There are two general arguments regarding why Saddam Hussein was deterred from using non-conventional weapons during the 1990-91 Gulf War. The first argues that the deployment of chemical weapons was impractical from a logistical perspective (i.e. shifts in wind on the first day of the ground campaign and severed battlefield communications making delivery system deployment difficult if not impossible) (Schwartz, 1998). The second argues that the threat of U.S. reprisal retaliation impacted Saddam Hussein's decision to not use chemical or biological weapons. Price (1997) supports the latter point, arguing that political constraints, including the

threat of retaliation, deterred the use of non-conventional weapons in the 1990-91 Gulf War. (Price, 1997, pp. 145-152)

The primary purpose of the following example is to show that U.S. decision-makers considered the threat of U.S. retaliation to be an integral part of U.S. laws of war policy during the Second Gulf War. As discussed in Case Study III, insisting on the right to retaliation, as described in the U.S. reservation to the 1925 Geneva Protocol, was an essential feature of the U.S. application of the laws of war during this conflict and the United States communicated its retaliatory message through several channels. This was often done through veiled threats that the United States would use its nuclear arsenal in retaliation. For example, according to General Schwarzkopf, on 10 December 1990, the Chairman of the Joint Chiefs of Staff, Colin Powell pressed the White House to inform Iraq that the U.S. would use its unconventional weapons in the case of Iraqi use of chemical weapons. (1992, p. 451) The threat of non-conventional retaliation is also seen in a letter that Secretary of State Baker transmitted to Iraqi Foreign Minister Tariq Aziz on 9 January 1991. The letter, which Aziz refused to accept, stated: "The United States will not tolerate the use of chemical or biological weapons…You and your country will pay a terrible price if you order unconscionable acts of this sort." (05 January 1991, Letter from President Bush to President Hussein, *U.S. Department of State Dispatch*, Vol. 2, No. 2) According to Byers (2005) Secretary Baker had privately warned Saddam Hussein that "any recourse to chemical or biological weapons would result in a tactical nuclear response." (p. 125)

Former Secretary of State Baker referred to U.S. nuclear policy in the Second Gulf War as "calculated ambiguity" because it gave the "impression that the use of chemical or biological

agents by Iraq could invite tactical nuclear retaliation," and "calculated" because at least Baker, President George H.W. Bush, and National Security Advisor Brent Scowcroft agreed that nuclear weapons would not be used under any circumstances." (Arkin, 1996, p. 16) According to Baker's memoir, "I purposely left the impression that the use of chemical or biological agents by Iraq could invite tactical nuclear retaliation." (Baker, p. 359) Conley (2003) criticizes the "calculated ambiguity" policy on the grounds that strategic military preparedness suffered as a result and concludes that the U.S. needs a clearer "reprisal policy." The retaliatory threat that the U.S. proposed extended to non-coalition nations as well. In a 2 February 1991 CNN interview, Secretary of Defense Dick Cheney hinted that Israel would retaliate against Iraq with unconventional weapons. (Sagan, 2000, p. 24) According to Roberts (1993): "The U.S. administration repeatedly emphasized that any Iraqi use of chemical or biological weapons would lead to an "absolutely overwhelming" American response; and it may have been deliberately equivocal about possible U.S. use of nuclear weapons as part of such a response." (p. 149)

As this example demonstrates, United States deterrence policy rested largely on an understanding of negative reciprocity that regarded reprisals, especially in connection with weapons violations, to be accepted policy. As discussed in Case Study III, the existence of a coalition supports the international society perspective. Furthermore, the argument that the U.S never intended to actually enforce its retaliatory threats strengthens, conceptually, the view that the U.S. wished to remain within international society. However, by insisting, as policy, the

threat of retaliatory reprisals the United States still retained an important element of the negative reciprocity rationale.

An analysis of the source material failed to reveal other examples of U.S. decision-making related to Iraqi threatened or actual non-adherence. The focus of the extensive post-conflict report to Congress emphasized strict U.S. adherence to the laws of war and failed to address possible U.S. countermeasures (see *Conduct of the Persian Gulf War: Final Report to Congress*, 1991). The relative brevity of the conflict (seven months) did not permit extensive non-adherence issues and subsequent policy to develop, with the important exception of non-conventional weapons policy. Furthermore, when compared with the other two conflict examples, prisoner of war issues did not enter prominently into pubic discourse. Finally, the continued classification of source material does not permit, at this time, an extensive interdepartmental analysis.

Conclusion

As the examples in this case study show, reciprocity interacts in a varied and dynamic manner in relation to laws of war adherence. As with the previous case study, Vietnam War examples are prominent. This can be attributed to the conflict's protracted length and the nature of belligerence that resulted in multiple examples of actual and threatened violations. As a result, greater decision-making and policy considerations on the part of the U.S. government were required. This can be seen particularly in prisoner of war related issues. Furthermore, considerable archival holdings permit a more extensive analysis of the Vietnam War when compared to the other examples.

Analysis of documents related to the Korean War revealed few reciprocity concerns, with the exception of a general prohibition of reprisals in case of occupation of North Korea. This example, though minor when viewed in the larger context of the conflict, shows a strengthening of the prohibition against reprisals. The general lack of adherence-related considerations during the Korean War could be arguably attributed to the nature of peace negotiations, which focused on prisoner release and repatriation issues. Furthermore, during the prolonged negotiations, active hostilities had largely ceased and the front lines had stabilized, thus providing less opportunity for laws of war violations.

The Vietnam War provides many examples of negative reciprocity including the use of reprisals to justify a policy of military escalation. Individual acts of reprisals entered into the decision-making process in response to enemy violations, actual and threatened. In these examples a policy of diplomacy prevailed over calls for reprisal countermeasures, thus, conceptually strengthening the international society perspective. Furthermore, negative reciprocity entered into U.S. policy in the form of concern that South Vietnamese non-adherence to the laws of war would vicariously lead to violations against the United States.

Finally, the 1990-1991 Gulf War shows decision-makers incorporating a policy that emphasized retaining threatened reprisals in the event of enemy use of non-conventional weapons. This conceptually strengthens the negative reciprocity tension that exists between the international society and international system perspectives. As discussed previously, the lack of other adherence-related issues could arguably be attributed to the relatively short duration of the

conflict. As a result the conflict did not necessitate the need for a comprehensive policy regarding non-adherence to the laws of war, particularly in relation to prisoners of war.

Part IV

Conclusion

This dissertation set out to systematically explore the historical role of reciprocity and the laws of war from the perspective of state practice of the United States. In realizing this goal I proposed and applied a research model that considers state practice to be a multi-staged decision-making process. This model has facilitated the collection, organization and assessment of extensive original source material gathered through multiple archives. The research results show that reciprocity, in its positive and negative forms, was a consistent variable entering into the laws of war decision-making process for the United States throughout post-World War II 20th century. This dissertation shows that original research designs can be developed and applied to a subject that otherwise receives an overwhelmingly strict legal treatment in the literature.

A second goal of this dissertation has been to apply the research results into an inclusive theoretical understanding of international relations. In accomplishing this I have shown that the laws of war and reciprocity can be framed within a theoretical model that is largely free of the subjective and dichotomous political assumptions that are often found in the literature. The English School tripartite model of international relations has provided a powerful explanatory tool for which to analyze the laws of war and reciprocity. As discussed in the following, the theoretical work of this dissertation can provide a foundation for other laws of war-related research.

In the following, I summarize the decision-making process model results and frame them within the context of the English School's tripartite model paying particular attention to the

interaction between international society and the other two perspectives. Furthermore, research results are discussed within the context of the pluralist and solidarist tensions that occur within international society. Next I discuss this dissertation's contribution to the literature and its limitations. Finally, I propose potentially beneficial paths for future areas of research.

As previously discussed, a conceptual strength of the international society approach is that it bridges the gap between two competing paradigms (realism and idealism) which have traditionally dominated international relations thought. The research findings support the view that international society is the primary conceptual domain in which reciprocity and laws of war decision-making occur. However, as discussed previously, the three perspectives comprising the tripartite understanding do not exist in a condition of exclusive independence. There exists overlap, exchange and tension between international system and international society on one side, and international society and world society on the other.

The fact that the laws of war are created in the setting of an international diplomatic conference, with the participation of a majority of the world's nations, confirms the existence of international society and supports the view that it is the dominant paradigm in the English School tripartite model. The following section frames the research findings from the perspective of conceptual tensions that occur within the tripartite model. First, the conceptual tension that exists between negative reciprocity and the international society/international system perspectives is discussed with particular attention paid to reprisals. Second, I discuss the tension between the international society/world society perspectives. Included is a discussion concerning the relationship between the U.S. and the ICRC. I conclude with a discussion of the

pluralist/solidarist tension that occurs within international society and argue that future research would benefit from a more extensive analysis of this theoretical tension.

International Society/International System Tension

Reprisals play a prominent role in understanding the tension between international system and international society. As the findings of this dissertation show, reprisals, though susceptible to abuse and ambiguity, have nonetheless remained an important means of enforcement for U.S. laws of war policy. Closely related to this is the fact that affirming retaliation, as a right, in the case of weapon violations strengthens the negative reciprocity view of international society. This is clearly depicted in the U.S. reservation to the 1925 Geneva Protocol and the background material relating to its ratification.

The use of reprisals (threatened and actual) as a policy option in response to specific violations varies. For example, U.S. policy towards Viet Cong and North Vietnamese violations often emphasized diplomatic demarche over reprisals which were advocated by some government and military decision-makers. This conceptually shows a preference to remain squarely within international society. In contrast, the covert U.S. reprisal escalation policy in 1965 reflects negative reciprocity that conceptually depicts a veering towards international system. The secretive and unilateral U.S. policy that justified conflict escalation fails to fit with international society's emphasis on the use of common international institutions. On the other hand, the escalation reprisal policy never degenerated to the point of total war and thus conceptually remained within the general realm of international society. Conceptually falling between these examples is the U.S. policy of threatened nuclear retaliation in response to Iraqi

use of non-conventional weapons during the 1990-1991 Gulf War. Taken together, these examples depict the relevance of negative reciprocity within the international society perspective.

International Society/World Society Tension

Examples of positive reciprocity that strengthen, conceptually, U.S. support for the world society perspective often contain a humanitarian element that emphasizes the individual over the state. For example, during the Korean War, U.S. insistence on voluntary repatriation of POWs (Case Study III) supports conceptually the preeminence of the individual over state interest. My research shows that there is tension between international society and world society perspectives as can be seen in the United States reaction to the expanded role that the ICRC assumed in the post-World War II creation of the laws of war. Previously, the ICRC had been viewed as the 'guardian' of the Geneva Conventions; the sole focus of the organization was the protection of individual victims of conflict. The expanded role of the ICRC is clearly seen in the ICRC's declaration in 1967 that it had become a "factor in world peace". (see Pictet, 1965) The ICRC, from the perspective of the tripartite model, is viewed here as a quasi-government organization with an agenda that supports the world society view. As Case Study I demonstrated, there was persistent objection to ICRC involvement by the U.S. particularly in the case of issues pertaining to weapons and reprisals. U.S. resistance to the ICRC's involvement in matters outside of its traditional role conceptually shows a resistance to world society as a forum for laws of war decision-making, a subject historically confined to sovereign states. This view strengthens the international society perspective.

Pluralist and Solidarist Views

As discussed in Part I, within the international society perspective there are two competing paradigms: *pluralism*, which places moral priority on the state and has the stability of international order as its dominant goal, and *solidarism*, which emphasizes the role of human rights and moral priority of the individual, acknowledges the influence of non-states and seeks the goal of justice, often through enforcement. Though many of the theoretical assumptions of this dissertation are aligned with the pluralist perspective of international relations, my research also demonstrates a conceptual relevance with the solidarist outlook.

The solidarist perspective is an alternative to the state-centrism of pluralism and specifically takes into consideration the influence of non-state actors. The salient example of solidarism in the research findings is the role that the ICRC played in creating the laws of war and influencing states to apply and adhere to them. Though the state is the primary actor in agreeing to ratify and apply the laws of war, as my research clearly shows, the ICRC played a pivotal role in the creation of the laws of war. This can be traced to the Draft Rules of 1956 and the subsequent ICRC-sponsored conferences that culminated in the 1977 Additional Protocols. Though the relationship between the U.S. and the ICRC has been tenuous at times (specifically in regards to ICRC weapons-related initiatives), the fact that the U.S. has, at times, acquiesced to the ICRC stands as evidence to the ICRC's influence. Furthermore, the example of the ICRC disseminating to governments what it considered to be the applicable laws of war during the 1990-1991 Gulf War lends additional support to the solidarist perspective. That representatives of the U.S. State Department and Department of Defense met personally with the ICRC on the

issue, and subsequently issued theatre level commands promulgating the ICRC interpretation with U.S. clarification, is further evidence of the ICRC's influence on United States laws of war decision-making.

As these examples show, the ICRC's influence on the laws of war cannot be fully explained by the state-centric pluralist perspective. Furthermore, recent efforts made by organizations, such as Geneva Call, to influence non-state, politically motivated, armed groups to follow the laws of war fails to fit, conceptually, within a strict pluralist understanding of the laws of war. There are compelling reasons to believe that future theoretical analysis of the laws of war would benefit from a more thorough consideration of the pluralist/solidarist tension. Taken together, both pluralism and solidarism retain unique explanatory strengths that could potentially expand a theoretical understanding of the laws of war. Specifically, the solidarist focus on the influence of non-state actors shows conceptual promise.

Findings & Contribution to Literature

This dissertation provides a methodological basis upon which future studies on the laws of war may be built. This might take the form of adding case studies relating to the United States and other countries or a comparative analysis involving two or more countries. As discussed previously, the ICRC Study, though methodologically sound, failed to apply the proposed methodology in a consistent and transparent manner. This dissertation has addressed the shortcomings of the ICRC Study and shows that a dynamic understanding of state practice can be obtained through organizing and delineating primary source material into a decision-making

process model. Moreover, the explanatory strength of the English School tripartite model shows a promising theoretical avenue through which one can analyze the laws of war.

An important finding in this dissertation is that there exists, in practice, an ongoing separation between Hague and Geneva-type laws of war. This has both theoretical and practical implications. Furthermore, this distinction hinges upon a negative reciprocity-based rationale which emphasizes the retention of belligerent countermeasures as a necessary policy option. This supports the argument that, theoretically, there remains variance between Hague and Geneva laws of war. This stands in contrast to contemporary laws of war treaties, in particular Additional Protocol I to the 1949 Geneva Conventions, that have legally converged Geneva and Hague-related law into a single legal regime.

Because belligerent conflict is inherently destabilizing to international order, the laws of war, as a collective body of law, rest upon a fragile foundation. The failure of the law to comport with state practice runs the risk of destabilizing the entire legal regime. In other words, conflating both Hague and Geneva laws of war into a single non-derogable legal concept runs the risk of making the entire laws of war project irrelevant. Moreover, the trend towards greater codification places potentially destabilizing pressure on an already fragile edifice. For the laws of war to remain relevant, what is required is better implementation of existing law, not further codification.

Contemporary Reciprocity Relevance and Limitations

There are reasons to believe that reciprocity will have varying degrees of relevance in the foreseeable future. Though the issue of national liberation movements antedates the post 9/11 focus on non-state actors (e.g. Al Qaeda), the current emphasis on non-state conflict makes questionable the generalizability of this dissertation's research findings in relation to reciprocity in interstate conflict settings (Case Study III & IV). This is particularly relevant in issues pertaining to prisoners of war since the United States is not currently engaged in interstate belligerence where U.S. prisoners have been captured. In fact, current belligerence involving non-state terrorist organizations that fail to accord U.S. prisoners the most fundamental of rights, the right to life, have led a number of authors to argue that positive reciprocity is no longer a valid concept relevant to the laws of war (see specifically Osiel, 2009). With the significant exceptions of the 2004 Brief of Certain Former Prisoners of War (for *Hamdi v. Rumfsfeld*, 2004) and the 2006 (12 September) Letter to Senate Armed Services Committee from Retired Military Leaders, consideration of future interstate belligerence and the role of reciprocity in relations to POWs has failed to enter into laws of war debates.

The generalizability of this dissertation's findings concerning the position of the United States on weapons-related laws of war issues is also questionable. The United States, throughout the second half of the 20th century, was in a dominant position, politically and militarily, which permitted a level of unilateral action in relation to the laws of war that would be difficult to apply comparatively to other nations. There are strong reasons to believe, however, that reciprocity will have ongoing relevance for the continued codification of methods and means-related laws of

war. For example, In February 2011, the EastWest Institute formally called for the convening of a Geneva or Hague-type conference addressing cyber warfare. (Watts, 2011) A question then arises regarding whether future laws of war treaties will contain an element of negative reciprocity. If U.S. historical position is any guide, there are compelling reasons to believe that any treaty relating to cyber warfare will contain a reservation permitting retaliation in kind.

Though the United States is arguably considered a "specially affected" state in connection to the laws of war (due in large part to its experience in post-World War II conflict and its active participation in the creation of the laws of war) it would be a conceptual stretch to extrapolate the specific conclusions of this dissertation concerning reciprocity to customary international law arguments. However, there are strong reasons to believe that the methodological and theoretical models incorporated in this dissertation could be applied to future academic analysis on the state practice of other nations. The successful application of the decision-making process model to the U.S. was largely made possible by a transparent government policy requiring document retention and dissemination in archives. Thus, a limitation to applying the decision-making process model to other nations or influential organizations (e.g. ICRC) is that document collection, archiving, and access to primary source material is required.

Future Research

This dissertation has proposed and applied a methodological and theoretical framework to the historical study of reciprocity and the laws of war. One of the challenges that lies ahead is to apply this framework to contemporary and comparative laws of war issues and cases. For

example, future research may want to consider post-conflict enforcement, in particular, the international ad hoc tribunals for the former Yugoslavia (ICTY) (1993) and Rwanda (ICTR) (1994) in addition to the UN established Special Court in Sierra Leone (2000), the Serious Crimes Investigation Unit (SCIU) in East Timor (2000) and the Extraordinary Chambers in the Courts of Cambodia (2003). Furthermore, the establishment of the International Criminal Court (ICC) in 2002 and the position of the United States towards the ICC and the founding treaty, the Rome Statute, is a case study that would benefit from the decision-making process model and the theoretical lenses of the English School tripartite paradigms, including the pluralist/solidarist tension within international society.

The impact of positive and negative reciprocity messages on military training provides a promising opportunity for future study. As the results of Case Study II demonstrate, both positive and negative reciprocity messages are important components of military training. Research has yet to consider the role of reciprocity on individual military personnel. Specifically, future research should consider applying a mixed method approach that includes the work of experimental psychologists on reciprocity personality characteristics (Kenny & Nasby, 1980) and social interaction (Hemelrijk, 1990). Applying these measures to military personnel would potentially provide an interesting avenue for studying reciprocity at the individual and group level within the military milieu.

Appendices

Appendix A - Operationalization of State Practice

Policy statements

Executive decisions

Treaty reservations

Statements of treaty interpretation

travaux préparatoires

Congressional testimony

Military manuals

Instructions to armed forces

Diplomatic correspondence

Opinions of official legal advisers

Official protests

Threatened use of weapons

Military communiqués during conflict

Note: compiled by Brownlie (1990), *Principles of Public International Law* (1990) and Henckaerts et al. (2005), *Customary International Humanitarian Law*.

Table 1. – Laws of War as a Decision-Making Process

I Creation	II Implementation	III Conflict Application	IV Adherence
Diplomatic conference and ratification process	Laws of war applied as military doctrine	Executive/military decision to apply laws of war to conflict	Reaction to violations

Table 2: Archives Utilized

Textual Archives:

- **National Archive and Records Administration (NARA) (College Park, MD)**
  - Central repository for textual records of the State Department and Department of Defense
- **Library of Congress (Washington, D.C.)**
  - U.S. legislative branch records, including unpublished records of the Senate Foreign Relations Committee
- **Presidential Libraries:**
  - **Johnson (Austin, TX)**
  - **Ford (Ann Arbor, MI)**
  - **Carter (Atlanta, GA)**
  - **Reagan (Simi Valley, CA)**
  - Documents related to the National Security Council (NSC) and Joint Chiefs of Staff (JCS)
- **National Security Archive, George Washington University (Washington, D.C.)**
  - Declassified national security documents
- **United States Army Military History Institute (USMHI) (Carlisle, PA)**
  - Textual records pertaining to military training

Audio-Visual Archive:

- **United States Naval Academy, Nimitz Library (Annapolis, MD)**
  - Military training films

Electronic Databases:

- **The American Presidency Project**: http://www.presidency.ucsb.edu/
  - Executive orders, messages and news conferences
- **Avalon Project** – (Yale University): http://avalon.law.yale.edu/
  - Searchable database of international treaties relating to the laws of war
- **DNSA** – Digital National Security Archive (ProQuest): http://www.gwu.edu/~nsarchiv/
  - High level national security documents
- **Library of Congress** – Military Legal Resources: http://www.loc.gov/rr/frd/
  - Final Reports of Diplomatic Conferences
  - Conferences of Government Experts

Table 3 – English School of International Relations

Foundational Author	Hobbes	Grotius	Kant
Political Paradigm/Worldview	Realist • Sovereign power	Rationalist • Cooperation matters	Universalist/Revolutionist • Ideas and principles are vital
IR - English School	International System • States exist in perpetual conflict • Self-interest of state is primary concern	International Society • Society of states that share common interest in stability	World Society • Universal human rights • Cosmopolitan view of the world
Emphasis	Self-interest of state and conflict	Multilateral treaties/International Law	Power of the individual citizen over state sovereignty
Laws of War	"laws are silent in times of war" Laws of war are ineffective when compared to self-interest of state	Emphasis placed on the restraining impact of the laws of war on nations behavior Adherence	Laws of war have evolved into human right standards End Goal: International society dissolves into world society

Figure 1. English School and Reciprocity Continuum

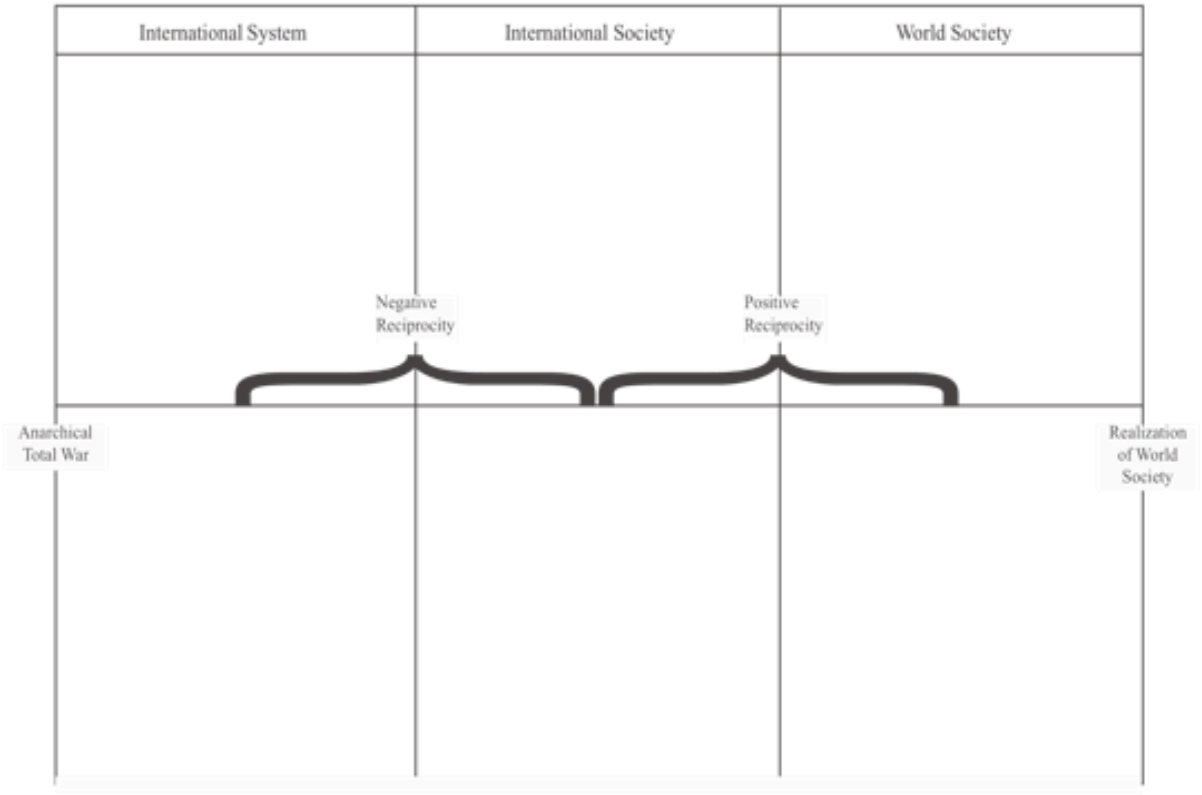
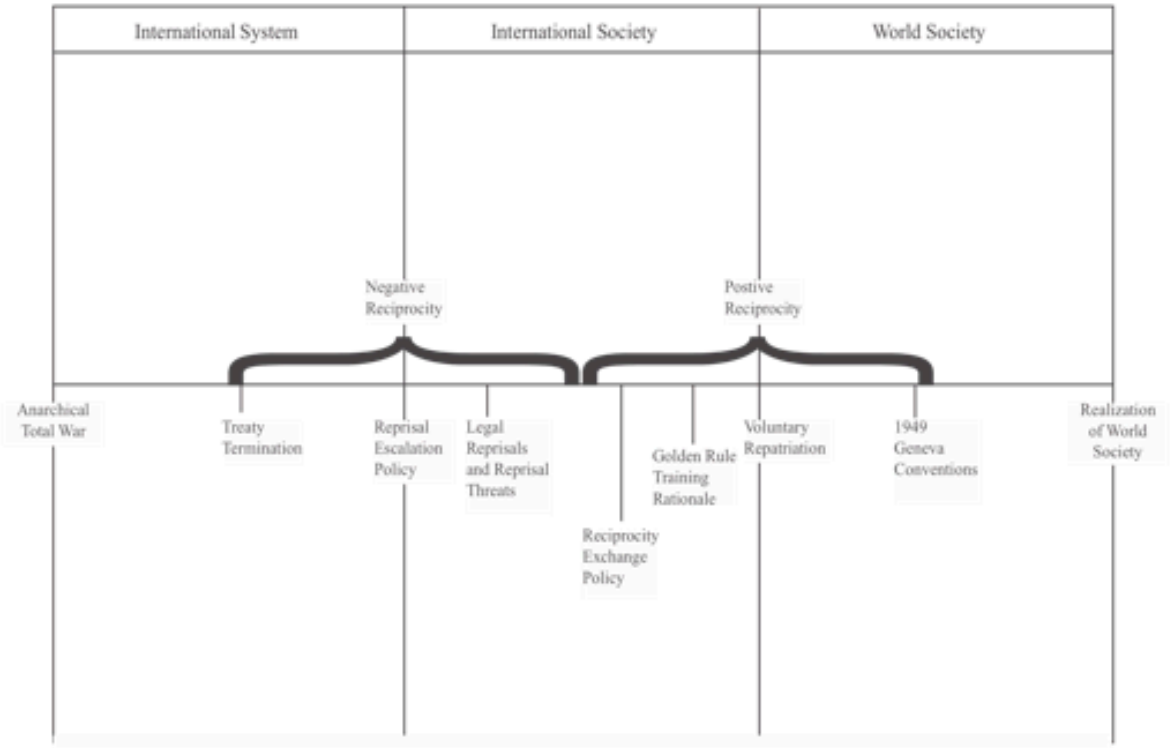


Figure 2. Research Findings



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