

RECIPROCITY AND WAR: A NEW UNDERSTANDING OF
RECIPROCITY'S ROLE IN GENEVA CONVENTION OBLIGATIONS

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INTRODUCTION

“If you were president, how would you deal with the challenge of ‘stateless’ detainees?”¹ The United States government has faced this vexing question throughout the war on terrorism. In 2006, Fox News posed the

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¹ *Bush Signs Law for Tough Interrogation of Terror Suspects*, FOXNEWS.COM, Oct. 17, 2006, <http://www.foxnews.com/story/0,2933,221480,00.html>.

question to its viewers. Erik from Atlanta weighed in: “I would give them no recognition at all. Terrorists are terrorists, nothing more. We have no incentive to treat them better; they won’t treat us better . . . Does anyone actually believe that we would be respected, or treated better, by terrorists for taking the high ground?”²

Erik’s answer has two distinct features worth noting. First, he emphasizes strategic considerations over legal interpretation. That is, his central concern is not whether the detainees fit into legal categories contemplated by the text of the Geneva Convention; rather he worries primarily about what type of reaction a decision to treat detainees “better” would invite. The second distinct feature about his answer is how narrowly he defines the field of potential forces reacting to this decision: he looks only at how the immediate enemy would react.

This answer is notable because it captures essential elements of the United States’ actual answer to the detainee question throughout the war on terrorism.³ U.S. officials have engaged in the same calculus Erik used. Reciprocity calculations have not been all that have driven U.S. policy, but there is evidence that officials have considered the reaction their decisions on detainee policy would invite, and they have defined the scope of potential reactors narrowly. In so doing, they have seen little benefit in extending Geneva protections to detainees in the war on terrorism. As a result, they have offered protections that fall short of the prescriptions in Common Article 3 of the Geneva Conventions.⁴

Public discussion about compliance with the Geneva Conventions has focused on the issue of reciprocal behavior, but nobody has examined empirically how reciprocal behavior has actually impacted prisoner of war (“POW”) or detainee treatment. This article fills that hole in the literature. Using data from conflicts over the past century, this article analyzes countries’ prisoner of war treaty compliance. This analysis uncovers strong evidence that countries essentially engage in tit-for-tat behavior. That is, when one side in a conflict violates prisoner of war treaties, the other side usually does too. Thus, data suggest that states have long thought about Geneva obligations in the same way Erik did. On the whole, they have emphasized considerations of reciprocal behavior and narrowly defined the potential actors whose reactions to decisions about compliance matter.

This article does not take issue with the mere presence of reciprocity calculations in the creation of detainee policy. Instead, this article focuses on the second-order question: If states do consider reciprocal effects of their treatment of POWs and detainees, then how should states calculate those

² *Id.*

³ *See infra* Part III.B.

⁴ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

reciprocal effects? To answer this question, this article seeks first to understand the various ways in which reciprocity is defined. By borrowing from political science literature and by generating a new definition, this article considers a range of definitions of reciprocity ranging from the narrow to the broad.

After analyzing various notions of reciprocity, this article ultimately disagrees with the United States' (and Erik's) narrow reciprocity calculation. The article instead argues that states would best serve their self-interest by employing a broad conception of reciprocity. Looking only at the way the immediate enemy reacts to a decision about detainee treatment ignores reactions that are less direct, but no less important. Reciprocity calculations should take into account other types of reactions, including those that might play out beyond the present conflict and, especially, reactions that might come from actors other than the current enemy.

Focusing only on the direct enemy's reaction to a decision about detainee treatment is especially inapt in the age of the modern media. It has never been easier for other countries to watch, listen and read about how the United States handles its conflicts. When asked whether they had heard about the abuses at Abu Ghraib and Guantanamo, 98% of Germans, 90% of British and Spaniards, 88% of French and Japanese, 80% of Egyptians, and 79% of Jordanians answered "yes."⁵ Given this level of visibility, countries waging war should expect reactions and judgments from more than just their immediate enemy. Other countries are watching. Those countries might respond directly by withdrawing support for the U.S. war effort. Or they might respond indirectly by lowering their own standards of detainee treatment, which could affect the many U.S. troops posted around the globe.

If states engaging in a reciprocity calculation ignore these spectator countries and simply ask whether giving an enemy better treatment will get them better treatment, then states will often choose to violate their Geneva obligations. This is true especially in modern conflicts, where enemies tend to be non-state actors with little regard for the laws of war. But if states take less direct reactions into account, they will occasionally realize a net benefit from applying Geneva protections even when the enemy will not reply in kind. To be clear, this argument for a broader application of Geneva obligations does not argue that states should respect norms simply for the sake of doing so. Rather, this article argues that the United States should care about how it treats detainees because of how reciprocal reactions will affect its self-interest.

⁵ The Pew Global Attitudes Project, *No Global Warming Alarm in the U.S., China: America's Image Slips, But Allies Share U.S. Concern Over Iran, Hamas* 4, June 13, 2006, <http://pewglobal.org/reports/pdf/252.pdf> [hereafter *No Global Warming*]. By comparison, only 76% of Americans had heard about these abuses. *Id.*

This article proceeds in four parts to explain why the United States should employ a broader definition of reciprocity. Part I establishes a theoretical foundation by examining the concept of reciprocity, both in general and in the context of international law. This discussion shows that a number of international law and international relations scholars have discussed the concept, but have often done so with an excessively narrow definition in mind. This article then lays out three definitions of reciprocity, borrowing two from political science literature and generating a new third definition.

With these various conceptions of reciprocity in hand, Part II examines the current debate about whether and how reciprocity ought to affect Geneva obligations. Various sources offer competing answers to this question. The Convention itself suggests that signatories' legal obligations do not depend at all on reciprocal compliance. The United States claims reciprocity does play a role, and that a narrow definition of reciprocity is most appropriate. Critics of the official U.S. position do not take issue with the fact that reciprocity plays a role, but they advocate a broader conception of reciprocity in this context.

Part III sheds light on this clash of views by examining what role reciprocity has actually played in prisoner of war treaty compliance over the past century. It does so by conducting original analysis of empirical data. This analysis reveals that states have acted reciprocally in the context of POW treaty compliance over the past century and have done so with a narrow definition of reciprocity in mind.

In light of this empirical historical analysis, Part IV informs the normative issue of how states *should* conceive of reciprocity in the future. It does so by outlining how recent U.S. treatment of detainees has triggered significant reactions from actors other than al Qaeda and the Taliban. These reactions harm U.S. self-interests, yet are not currently factored into the United States' narrow reciprocity calculation. The Conclusion advocates for a broader conception of reciprocity.

I. THE CONCEPT OF RECIPROCITY

At first blush, reciprocity appears to be a straightforward concept: any favors, benefits, or penalties one party grants to another party should be returned in kind.⁶ Scholars have found this concept to underpin voluntary

⁶ The concept has a long history, particularly in the writings of a number of major religions and cultures. *E.g.*, *Matthew 7:12* ("So in everything, do to others what you would have them do to you . . ."); *The Last Sermon of Muhammad* ("Hurt no one so that no one may hurt you."); *The Mahabharata 5:15:17* ("This is the sum of duty; do naught unto others what you would not have them do unto you."); *Analects 15:23* ("What you do not wish upon yourself, do not to others.").

social exchange in a number of contexts.⁷ And it has permeated numerous fields of study,⁸ especially international law and international relations. The literature in these latter disciplines has discussed reciprocity in the context of a number of central problems. But this literature has not captured the full complexity of the concept. Rather, it has focused primarily on a narrow definition of reciprocity. This Part fleshes out the concept of reciprocity and establishes three definitions, ranging from the narrow to the broad. By importing two definitions from political science literature and generating a third, this Part then establishes a new framework for analysis of the recent discussions about reciprocity and Geneva obligations.

A. Types of Reciprocity

Reciprocity has assumed an important role in international law. A distinguishing feature of international law, perhaps *the* distinguishing feature, is that there exists no central authority to oversee enforcement. An important related point is that international law is voluntary. Given these characteristics, states are, for the most part, not bound by international law unless they choose to be bound.⁹ As Professors Francisco Parisi and Nita Ghei put it, “[i]nternational law, in this sense, exists in a state of nature.”¹⁰ But there are a number of reasons states still comply with international law. A central reason is that states are concerned about how others will react to them. If one state violates an obligation to another state, it can expect that state to return the behavior, or to attempt retaliation in some similar fashion. Such reciprocal behavior can make non-cooperative behavior unprofitable and cooperative behavior profitable. As such, reciprocal behavior patterns can foster cooperation and stability.¹¹ Such a decentralized way of attaining

⁷ Evolutionary psychologists have even hypothesized that humans have evolved a sort of mental predisposition to engaging in reciprocal behavior. See Joyce Berg, J. Dickhaut & Kevin McCabe, *Trust, Reciprocity and Social History*, 10 *GAMES & ECON. BEHAV.* 122 (1995); Elisabeth Hoffman, Kevin McCabe & Vernon Smith, *Behavioral Foundations of Reciprocity: Experimental Economics and Evolutionary Psychology*, 36 *ECON. INQUIRY* 335 (1998).

⁸ For example, reciprocity has been a fruitful concept for those trying to understand basic social interaction of primates. E.g., FRANS DE WAAL, *GOOD NATURED: THE ORIGINS OF RIGHT AND WRONG IN HUMANS AND OTHER ANIMALS* (1996); Joan B. Silk, *The Patterning of Intervention among Male Bonnet Macaques: Reciprocity, Revenge and Loyalty*, 33 *CURRENT ANTHROPOLOGY* 318 (1992).

⁹ For a discussion of these key characteristics, see generally Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 *U. CHI. L. REV.* 469 (2005).

¹⁰ Francisco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36 *CORNELL INT’L L.J.* 93, 94 (2003).

¹¹ ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 39 (1984).

these goals has long been regarded as valuable in the anarchical international system in which states operate.¹²

Defined basically as returning good behavior for good behavior and bad behavior for bad behavior,¹³ reciprocity has a few central components. Professor Robert Keohane has identified two of them.¹⁴ This article adds to Keohane's parsing of the concept by identifying a third. The two features Keohane identified are contingency and equivalence. Contingency simply means that actor B's behavior toward A is conditional on what A last did to B. Equivalence means that B's responding action is roughly similar to A's initial action. The third feature, which Keohane did not identify, is whether or not state interaction is mediated – whether A and B interact directly with one another or, instead, through other actors. To illustrate, imagine that A, B, and C are in a group, and A does something to B. If B reacts and does something to A, that is unmediated. But if C, who was not the object of the first action, sees what A has done and reacts by doing something to A, that is mediated. Varying the admixture of these three components – contingency, equivalency, and directness – produces three distinct types of reciprocity.

¹² See e.g., MICHAEL BYERS, CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW 89 (1999) (arguing that “the concept of reciprocity . . . may be responsible for a great deal of inter-State co-operation or exchange, outside or in addition to any international legal obligations.”); RUSSELL J. LENG, INTERSTATE CRISIS BEHAVIOR, 1816-1980: REALISM VERSUS RECIPROCITY 70 (1993) (“[I]n the interstate system, where there exists no established central authority to maintain order . . . reciprocity provides the guiding norm for cooperation and the yardstick for applying sanctions against transgressions. The norm that has provided the foundation for much of international law and the practice of diplomacy can be stated very simply: respond in kind and in proportion to the actions received from the other party.”); Robert Jervis, *Security Regimes*, 36 INT’L ORG. 357, 366-67 (1982) (arguing that reciprocity is central to security regimes and that in nineteenth century Concert of Europe, “[t]he norm of reciprocity . . . allowed states to cooperate”); John Norton Moore, *Enhancing Compliance with International Law: A Neglected Remedy*, 39 VA. J. INT’L L. 881 (1999) (contending that specifically reciprocal conduct may be more effective in promoting long-term compliance than formal institutional mechanisms); Bruno Simma, *Reciprocity*, in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 29, 30 (Rudolf Bernhardt, ed., 2000) (“As long as the international legal order lacks a centralized enforcement machinery and thus has to live with autodetermination and self-help, reciprocity will remain the principle leitmotiv, a constructive, mitigating, stabilizing force, the importance of which can hardly be overestimated.”). See also KENNETH A. OYE, COOPERATION UNDER ANARCHY (1986). But see Robert E. Scott & Paul B. Stephan, *Self-Enforcing International Agreements and the Limits of Coercion*, 2004 WIS. L. REV. 551 (2004) (suggesting that in order to induce compliance a softer approach to enforcement is preferable to coercive enforcement, such as reciprocal violation of treaty terms).

¹³ Robert O. Keohane, *Reciprocity in International Relations*, 40 INT’L ORG. 1, 8 (1986) (“Reciprocity refers to exchanges of roughly equivalent values in which the actions of each party are contingent on the prior actions of the others in such a way that good is returned for good, and bad for bad.”).

¹⁴ *Id.* at 5-8.

When international law scholars think about reciprocity, they often consider only the most narrow type: specific reciprocity. Specific reciprocity is a “situation in which specified partners exchange items of equivalent value in a strictly delimited sequence.”¹⁵ In this type of reciprocity, all three components outlined above – contingency, equivalence, and unmediated relationship – feature prominently. For an example of this type of reciprocal behavior, we might think of a simultaneous or sequential quid pro quo, where A gives something to B precisely because B gives something to A of roughly similar value in return.

In recent years, international law and international relations scholarship on reciprocity, primarily in the area of security and trade, has been fixated on this narrow sort of reciprocity. Professor Robert Axelrod is perhaps most responsible for this focus. In his 1984 book *The Evolution of Cooperation*,¹⁶ Axelrod develops a theory of cooperation that centers on what is essentially specific reciprocity. Effectively, he answers the question: “When should a person cooperate, and when should a person be selfish, in an ongoing interaction with another person?”¹⁷ More formally, how should actors in iterated plays of the Prisoner’s Dilemma treat one another in order to achieve the best possible outcome? To answer this question, Axelrod tests a number of strategies with computer simulation. Tit-for-tat emerges as the winning strategy. In tit-for-tat, a player cooperates in his opening move; then, in subsequent moves, the player simply reciprocates what the other participant did on the previous move. This strategy induces cooperative behavior more often than any other strategy Axelrod considered, and it also leads to the largest overall payoff for both players. Axelrod’s analysis caught scholars’ attention, and this tit-for-tat view of reciprocity has since become a dominant paradigm for understanding how reciprocity works.

International security scholars have adopted this tit-for-tat model of reciprocity to explain how adversarial states come to cooperate. In perhaps the most convincing series of studies, Professor Joshua Goldstein and assorted collaborators examine trends of cooperation between the Cold War superpowers,¹⁸ between warring groups in the Middle East,¹⁹ and between the various parties in the 1990s Bosnia conflict.²⁰ These authors find both that the short-term interactions were marked by specifically reciprocal

¹⁵ *Id.* at 8.

¹⁶ AXELROD, *supra* note 11.

¹⁷ *Id.* at vii.

¹⁸ JOSHUA GOLDSTEIN & JOHN R. FREEDMAN, *THREE-WAY STREET* (1990).

¹⁹ Joshua Goldstein et al., *Reciprocity, Triangularity, and Cooperation in the Middle East, 1979-1997*, 45 J. CONFLICT RESOL. 594 (2001).

²⁰ Joshua Goldstein & Jon C. Pevehouse, *Reciprocity, Bullying, and International Cooperation: Time-series Analysis of the Bosnia Conflict*, 91 AM. POL. SCI. REV. 515 (1997).

behavior, and that these patterns of reciprocal behavior eventually led to improvements in diplomatic relations. These studies rely on a relatively narrow definition of reciprocity, akin to Axelrod's. More broadly, the literature on arms races and disarmament have also focused on Axelrod's tit-for-tat reciprocity as a means of managing the prisoner's dilemma that inevitably arises in these contexts.²¹ One author even calls specific reciprocity the "golden rule of international politics – do unto others what they have recently done unto you."²²

The other major literature that has focused on reciprocity is the literature on monetary policy, which includes trade conflicts,²³ monetary coordination,²⁴ and debt negotiations.²⁵ In each of these cases, authors writing on reciprocity have focused on specific reciprocity. The literature on trade liberalization, for example, observes that two parties looking to open their markets engage in a classic example of the Prisoner's Dilemma. Both sides would often be better off in a free trade regime, but if one state lowers trade barriers and the other side does not, then the liberalizing state stands to lose.²⁶ The way to achieve the optimal outcome in this scenario is through a quid pro quo arrangement. Scholars have suggested such a solution and states have employed it. Indeed, the original instrument of the effort to reduce barriers to international trade, the General Agreement on Tariffs and Trade ("GATT"), relied heavily upon the norm of reciprocity. In the GATT preamble, governments committed themselves to entering into "reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade."²⁷ As one author observes: "[T]he GATT embodies reciprocity as an *end* in the form of mutual benefit,

²¹ E.g., George W. Downs, David M. Rocke & Randolph Siverson, *Arms Races and Cooperation*, 38 *WORLD POL.* 118, 128-29 (1985); Matthew Evangelista, *Cooperation Theory and Disarmament Negotiations in the 1950s*, 42 *WORLD POL.* 502, 504-06 (1990) (reviewing various authors' discussions of Axelrod's tit-for-tat theory).

²² Michael Don Ward, *Seasonality, Reaction, Expectation, Adaptation, and Memory in Cooperative and Conflictual Foreign Policy Behavior*, 8 *INT'L INTERACTIONS* 229, 230 (1981).

²³ E.g., STEPHEN D. KRASNER, *ASYMMETRIES IN JAPANESE AMERICAN TRADE: THE CASE FOR SPECIFIC RECIPROCITY* (1987); RORDEN WILKINSON, *MULTILATERALISM AND THE WORLD TRADE ORGANIZATION: THE ARCHITECTURE AND EXTENSION OF INTERNATIONAL TRADE REGULATION* 109-111 (2000).

²⁴ E.g., Kenneth A. Oye, *The Sterling-Dollar-Franc Triangle: Monetary Diplomacy, 1929-37*, in *COOPERATION UNDER ANARCHY* (Kenneth A. Oye, ed., 1986).

²⁵ E.g., Charles Lipson, *Banker's Dilemma: Private Cooperation in Rescheduling Sovereign Debts*, in *COOPERATION UNDER ANARCHY* (Kenneth A. Oye, ed., 1986).

²⁶ Francisco Parisi & Nita Ghei, *The Role of Reciprocity in International Law*, 36 *CORNELL INT'L L. J.* 93, 111-12 (2003).

²⁷ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, preamble [hereafter GATT] (emphasis added).

where signatory nations expect equivalent treatment abroad for their producers in exchange for what they offer to other nations' producers²⁸ Thus, in this important area of international law and relations, specific reciprocity and its immediate exchange of equivalent treatment have played a central role over the last century.

In focusing on specific reciprocity, scholars have largely ignored important variations on the basic concept of reciprocity. Keohane noticed this problem and offered a second definition by distinguishing specific reciprocity from diffuse reciprocity. In diffuse reciprocity, the three characteristics of specific reciprocity are somewhat relaxed: "[T]he definition of equivalence is less precise, one's partners may be viewed as a group rather than as particular actors, and the sequence of events is less narrowly bounded."²⁹ This type of reciprocity emphasizes conformity with a certain standard of behavior and maintenance of an overall balance as a group. So assume A, B, and C are in a group. If A commits a bad act against B, A lowers the standard by which members of the group treat one another. Everyone, including C, may then start treating each other according to the new lower standard. The next time A participates in that group, he may get bad treatment simply because the group conducts itself according to a lesser norm. In this scenario, A's initial action influences the treatment A eventually receives, but in a somewhat roundabout way.³⁰ One can imagine how this might play out in the context of Geneva obligations. States perceiving the United States as treating Taliban detainees poorly, for example, may follow the United States' lead and begin treating one another poorly, further lowering the overall norm of conduct. When the United States later fights an enemy that conducts itself according to this new norm, the United States' original poor treatment of detainees would return in the form of mistreatment of *its own* troops by a new and seemingly unrelated actor.

Keohane's effort to broaden and clarify our understanding of reciprocity is helpful but incomplete. A third type of reciprocity rests somewhere between his specific and diffuse forms. This third type might be called indirect reciprocity. It too features a strong form of contingency, as in

²⁸ CAROLYN RHODES, RECIPROCITY, U.S. TRADE AND THE GATT REGIME 12 (1993).

²⁹ Keohane, *supra* note 13, at 4.

³⁰ Keohane acknowledges that his definition of diffuse reciprocity is suggested in previous works. *Id.*, at n.19. Professor Peter Blau distinguished between social and economic exchange, where social exchange involves sequential exchanges of "unspecified obligations" and economic exchange involves precisely specified and immediate exchange. PETER M. BLAU, EXCHANGE AND POWER IN SOCIAL LIFE 93-97 (1964). Marshall Sahlins distinguished between generalized and balanced reciprocity. The former generates no specific counter-obligation, but the latter refers to direct and simultaneous exchange. MARSHALL SAHLINS, STONE AGE ECONOMICS 194 (1972).

specific reciprocity. Equivalence takes a somewhat weaker form here than in specific reciprocity but a stronger form than in diffuse reciprocity. Moreover, a key characteristic is that reactions come from actors other than those upon whom the initial act was committed – that is, they are mediated. To see how this plays out, imagine again the group of A, B, and C. Assume A treats B badly. C watches this, disapproves, and likely conceives of A as an actor not worthy of good treatment. C, therefore, takes measures to treat A badly, either now or in the near future. Since C is not party to the original interaction, it is unlikely that he will react in an entirely equivalent manner. But C may still act in ways that affect A's self-interest. Again, this chain of events could play out in the context of Geneva obligations. If a state perceives the United States as treating Taliban detainees poorly, for example, that state, though not involved, may take umbrage with this conduct and respond to the United States. Since this state is not in direct conflict with the United States, it cannot respond by mistreating U.S. troops. Instead, it might react in alternative, less direct ways such as by withdrawing public support for the U.S. war effort.

With this introduction of indirect reciprocity, we now have a more complete range of reciprocity definitions. The following table summarizes the key characteristics of each type of reciprocity:

	Equivalency	Contingency	Unmediated Relationship
Specific Reciprocity	Yes	Yes	Yes
Indirect Reciprocity	Yes	Yes	No
Diffuse Reciprocity	Uncertain	Yes	Not necessarily

B. Relative Advantages and Disadvantages of Various Types of Reciprocity

Each of the three types of reciprocity serves a somewhat different purpose than the others, and each presents relative advantages. Understanding the relative strengths of each type and the roles each can play informs an actor's choice of which type to emphasize in a given interaction.

Specific reciprocity serves two main purposes. First, it allows one actor to exact retribution on another. By responding immediately and equivalently, an actor can use reciprocal behavior to inflict proportionate

punishment for bad behavior. Second, specific reciprocity also serves an educative function. If B behaves badly toward A and A immediately replies in kind, B will, in some cases, learn through conditioning not to engage in that bad behavior again. Specific reciprocity benefits A, then, by shaping B's current and future behavior.³¹

Despite its educative function, specific reciprocity has a major drawback. Specific reciprocity can serve its educative function only in limited circumstances. The necessary precondition is that B must be willing to change his behavior according to A's actions. Where this precondition is present, specific reciprocity can serve an educative purpose effectively. There are a number of reasons B might be willing to change its behavior: For example, B may be willing to change if it fears A, or if it wants something from A. But there are a number of cases where this precondition is absent. B might not be willing to change its behavior in response to A's actions, for instance, because B has an absolutist agenda. Or perhaps B does not fear A or perceive that it would ever be possible to get what it wants from A. In scenarios involving this "unwavering B," A's reciprocal actions will perform no educative function. In this case, then, specific reciprocity does not serve A's self-interest by averting threats to its well-being from B. Instead, it is reduced to playing the small role of exacting retribution for retribution's sake and satisfying A's notion of just desserts.

In contrast to specific reciprocity, the other two types of reciprocity – diffuse and indirect – do not benefit an actor by directly shaping another actor's behavior. Rather, employing these types of reciprocity primarily benefit an actor by allowing that actor to predict the full range of costs or benefits of a certain action, including those that do not come directly from the enemy. By taking or avoiding certain actions, actor A may be able to avert certain harmful reactions from actor B. In this way, A might be said to affect B's future behavior toward A, but it does so indirectly.³²

These broader types of reciprocity present two potential drawbacks. First, an actor employing a broad conception of reciprocity may not be able to send the moral messages it wants to send to other actors. For example, assume B treats A badly. A might want to return the behavior toward B in order to make a point. But assume that it has also calculated that C would react badly toward A in response. The cost of C's potential reaction may ultimately dissuade A from returning B's violations. In this scenario, critics might say that A's broad view of reciprocity prevents it from sending the

³¹ See, e.g., RHODES, *supra* note 28, at xi (concluding that, in some cases of trade relations, specific reciprocity "does serve a useful enforcement role.").

³² Alvin W. Gouldner. *The Norm of Reciprocity: A Preliminary Statement*, 25 AM. SOC. REV. 161, 171 (1960) ("[T]he basic character of the reciprocity norm . . . imposes obligations only contingently, that is, in response to the benefits conferred by others.").

message of condemnation it wanted to send to B. In this way, perhaps a broad definition of reciprocity actually prevents an actor from upholding and enforcing certain norms.

This criticism is not fatal, though, for actor A can almost certainly still signal his opprobrium even if he cannot engage in tit-for-tat behavior with B. Assume that these actors are states, and that the aforementioned bad treatment is violation of a treaty. State A would have a number of ways to show its condemnation. A could violate the treaty in response, exercising specific reciprocity. Or it could choose other ways to make the same point, perhaps by downgrading trading status or issuing a diplomatic statement. Thus, the criticism that a broad definition of reciprocity erodes an actor's ability to take moral stances withstands scrutiny.

A related drawback of these broader types of reciprocity is the potential for exploitation.³³ Imagine again the situation outlined in the previous paragraph where actor A does not return B's bad treatment because it fears C's potential reaction. If B acts maliciously toward A and gets away with it, then B might think that it can continue to mistreat A. Indeed, this belief may even lead B to act maliciously toward A more often than it would in a regime of specific reciprocity. This line of criticism would suggest that employing a broader conception of reciprocity could actually lead to worse outcomes from the direct enemy.

Yet criticism based on potential exploitation of broader types of reciprocity stands only in rare cases. First, as discussed above, just because an actor cannot respond in a tit-for-tat way does not mean that it cannot still signal its condemnation and discourage another actor from engaging in bad behavior in the future. Second, there are a number of actors who will act maliciously regardless of how others respond to them (the "unwavering B" discussed above). If this is the case – as it appears to be with al Qaeda, for instance – then A will, indeed, receive malicious treatment. This article assumes that bad treatment would continue anyway. It is not the result of B exploiting A's failure to reply in kind; rather, it is the result of B being unwavering in its course of action. Thus, not all malicious treatment toward an actor employing broad definitions of reciprocity should be counted as exploitation.

Given these varied purposes, advantages and disadvantages, an actor should consider her circumstances on a case-by-case basis before selecting a conception of reciprocity from the above options. These types of reciprocity are not mutually exclusive. An actor can use all three at the same time. But different types might be more or less useful in different situations. Specific reciprocity, for example, might best be employed on actors who appear primed to learn social norms through sanctioning and who will likely change

³³ Keohane, *supra* note 13, at 24.

their behavior to comport with those norms in the next interaction. Broader conceptions of reciprocity, though, become more important where the recipient of an action shows no promise of changing his behavior, and yet the initiator of the action is still concerned with how others will react to the initial action.

Understanding these reciprocity typologies sheds light on the normative question of how we *should* conceive of reciprocity. It also brings a measure of clarity to the subject of the next Part: the descriptive issue of what role reciprocity has played in the recent debate about Geneva obligations.

II. RECIPROCITY IN THE CURRENT DEBATE OVER GENEVA OBLIGATIONS

There has been much public discussion recently about why states do or do not comply with their Geneva obligations. Much of this discussion has focused on the role of reciprocity. Different sources offer competing answers to that question. This Part summarizes that discussion by outlining the three main answers heretofore offered. First, it looks at what the text of the Convention itself says, as well as at what scholars and judges have interpreted it to say. This Section concludes that reciprocity plays no role in the text of the Convention. But, in practice, that answer is not the final word on the topic. Second, this Part examines the rhetoric U.S. officials have used in discussing Geneva obligations. This analysis reveals that U.S. policy makers believe reciprocity does play a role and that they should focus, in particular, on specific reciprocity. This approach has met with some criticism. Third, this Part examines how critics respond to such U.S. rhetoric and finds that these critics do not take issue with the fact that reciprocity plays a role, but they do take issue with its definition. Ultimately, they advocate for a broader conception of reciprocity than that which the United States' officials espouse.

A. *What Role the Law Intends Reciprocity To Play*

As a legal matter, the Geneva Conventions do not condition legal obligations on reciprocity of any type. Specifically, the Conventions do not authorize one side to violate simply because the other side has violated. Common Article 3 establishes minimum protections that signatories must extend to *all* individuals within its territory, regardless of citizenship. Those taking no active part in the conflict – including military personnel who once fought but now are *hors de combat* (out of the fight) – “shall in all circumstances be treated humanely.”³⁴ To this end, the Convention prohibits “cruel treatment and torture” and “outrages upon personal dignity, in

³⁴ Geneva Convention Relative to the Treatment of Prisoners of War, art. 3(1), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereafter Geneva].

particular, humiliating and degrading treatment.”³⁵ The Convention also protects certain process rights. Sentences, for example, must be “pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people.”³⁶ These protections extend even to those not classified as prisoners of war.

Persons qualifying for the more formal POW status receive greater protections under Article 4. To be considered a POW, one must be a member of an armed force or militia that is party to the conflict. Alternatively, one can be a member of another militia or resistance group, so long as the person meets the following requirements: (1) operating in a chain of command; (2) having a fixed, distinctive, and recognizable sign; (3) carrying arms openly; and (4) conducting operations in accordance with the laws and customs of war.³⁷ Prisoners satisfying these criteria must be treated humanely,³⁸ and must be protected against violence, intimidation, and torture.³⁹ Furthermore, they shall be quartered under conditions “as favorable as those for the forces of the Detaining Power” in the same area,⁴⁰ and must be supplied with clothing,⁴¹ medical attention,⁴² and a monthly advance of pay.⁴³ Capturing forces may compel prisoners to give nothing more than identifying information (name, date of birth, and rank).⁴⁴

The Geneva Conventions do not permit agreements about these protections to operate as bilateral contracts. If they did, then when one country committed a violation, the other country would have legal grounds to do likewise. Instead, the Conventions impose unconditional obligations upon each signatory country. Article 1 of the Convention states that the signatories “undertake to respect and to ensure respect for the present Convention *in all circumstances*.”⁴⁵ The International Committee of the Red Cross Commentary explains that the prominent position of this language at the very beginning of the 1949 Convention gives it increased importance⁴⁶: “Contracting parties drew attention to the fact that it is not merely an engagement concluded on a basis of reciprocity, binding each party to the

³⁵ *Id.* art. 3(1)(a) & (c).

³⁶ *Id.* art. 3(1)(d).

³⁷ *Id.* art. 4A(2)(a)-(d).

³⁸ *Id.* art. 13.

³⁹ *Id.* art. 17.

⁴⁰ Geneva, *supra* note 34, art. 25.

⁴¹ *Id.* art. 27.

⁴² *Id.* art. 31.

⁴³ *Id.* art. 60.

⁴⁴ *Id.* art. 17.

⁴⁵ *Id.* art. 1.

⁴⁶ Commentary, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 17 (Jean S. Pictet ed., 1960) [hereafter Commentary].

contract only in so far as the other party observes its obligations. It is rather a series of unilateral engagements”⁴⁷ Furthermore, the Commentary explicitly reiterates this point with respect to Common Article 3: “It at least ensures the application of the rules of humanity which are recognized as essential by civilized nations . . . This text has the additional advantage of being applicable automatically, *without any condition in regard to reciprocity*.”⁴⁸

Furthermore, the Vienna Convention on the Law of Treaties, which is generally considered customary international law,⁴⁹ underscores the non-reciprocal nature of Geneva obligations. Article 60 of the Vienna Convention allows termination of treaty obligations in return for their violation.⁵⁰ But Section 5 of Article 60 limits this rule. Section 5 says that states may not invoke Article 60 to terminate treaty obligations in cases of “provisions relating to the protection of the human person contained in treaties of a humanitarian character.”⁵¹ Common Article 3 of the Geneva Conventions clearly falls into this exception for humanitarian obligations.

This exclusion of reciprocity is consistent with the contemporary approach to the related concept of reprisals. A reprisal occurs when the victim of a violation of the laws of war engages in a limited and deliberate violation of the same laws of war with the purpose of punishing the enemy or inducing the enemy to cease its unlawful conduct. Justification for reprisals has traditionally been found in their law enforcement function.⁵² Indeed, states used reprisals through the Second World War.⁵³ But the legality of this mechanism has steadily eroded over the last century. Professor, and later President of the International Criminal Tribunal for the Former Yugoslavia, Antonio Cassese has called reprisals “primitive

⁴⁷ *Id.* at 17-18.

⁴⁸ *Id.* at 35.

⁴⁹ *See, e.g.,* Ehrlich v. Am. Airlines, Inc., 360 F.3d 366, 373 n.5 (2d Cir. 2004); Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 433 (2d Cir. 2001).

⁵⁰ Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 332, art. 60; *see also* I RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 145 (1987) [hereafter Vienna Convention] (“This Restatement accepts the Vienna Convention as, in general, constituting a codification of the customary international law governing international agreements, and therefore as foreign relations law of the United States even though the United States has not adhered to the Convention.”).

⁵¹ Vienna Convention, *supra* note 50, art. 60(5).

⁵² Prosecutor v. Kuprekic, IT-95-16-T, Judgment, ¶ 530 (Jan. 14, 2000) (“[R]eprisals could have had a modicum of justification in the past, when they constituted practically the only effective means of compelling the enemy to abandon unlawful acts of warfare and to comply in future with international law . . .”).

⁵³ For a historical look at the use of reprisals, see generally FRITS KALSHOVEN, BELLIGERENT REPRISALS (2005).

instrument[s] through which violence escalates into barbarity.”⁵⁴ Most international conferences on the laws of war since 1874 have “revealed a [similar] hostility towards reprisals and each treaty on the law of armed conflict since 1929 has seen the scope for taking lawful reprisals further reduced.”⁵⁵ Most notable amongst these treaties is the First Additional Protocol to the Geneva Convention, which explicitly outlaws attacks against civilian populations⁵⁶ or civilian objects⁵⁷ by way of reprisals. The United States has not ratified the First Protocol, but this treaty is evidence of a broader trend in international law. The 1996 United Nations Draft Articles on State Responsibility continued in this vein by prohibiting as countermeasures “conduct derogating from basic human rights.”⁵⁸ In January 2000, a trial chamber of the International Criminal Tribunal for the former Yugoslavia rejected reprisal as a justification for alleged violations of the laws of war.⁵⁹ Thus, as one commentator has observed, “in the whole of the international legal order, [reprisals] have become a complete anachronism.”⁶⁰

The broad consensus of legal scholars is that Geneva obligations do not depend, as a legal matter, on reciprocity.⁶¹ This position was adopted by the

⁵⁴ ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 274 (1986).

⁵⁵ C.J. Greenwood, *Reprisals and Reciprocity in the New Law of Armed Conflict*, in *ARMED CONFLICT AND THE NEW LAW* 227, 227 (Michael A. Meyer, ed., 1989).

⁵⁶ Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 51(6), June 8, 1977, 1125 U.N.T.S. 3.

⁵⁷ *Id.* art. 52(1).

⁵⁸ Draft Articles on State Responsibility, in *Report of the International Law Commission on the Work of its Forty-Eighth Session*, art. 50(d), U.N. GAOR, 51st Sess., Supp. No. 10, A/51/10 (1996).

⁵⁹ Prosecutor v. Kuprekić, IT-95-16-T, Judgment, ¶¶ 521-36.

⁶⁰ KALSHOVEN, *supra* note 53, at 377.

⁶¹ See, e.g., G.I.A.D. DRAPER, *THE RED CROSS CONVENTIONS* 8-9 (1958); Maj. Julie Long, *What Remedy for Abused Iraqi Detainees?*, 187 *MIL L. REV.* 43, 50-52 (2006); Charles Lysaght, *Conference: The American Red Cross – Washington College of Law Conference: International Humanitarian and Human Rights Law in Non-International Armed Conflicts, April 12-13, 1983: The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments*, 33 *AM. U.L. REV.* 9, 22 (1983); W. Hays Parks, *Air War and the Law of War*, 32 *A.F.L. REV.* 1, 4 (1990) (noting that Geneva Conventions of 1949 “renounce any dependency on reciprocity.”); Jordan Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 *COLUM. J. TRANSNAT’L L.* 811, 815 & nn.13-16 (2005) (“Article 1 also provides that the duty to respect and to ensure respect for Geneva law is not based on reciprocal compliance by an enemy”); Kal Raustiala, *Form and Substance in International Agreements*, 99 *AM. J. INT’L L.* 581, 604 n.157 (2005) (calling Geneva Conventions reciprocity-based in structural and political sense, but not in legal sense); Gabor Rona, *War, International Law, and Sovereignty: Reevaluating the Rules of the Game in a New Century: Legal Frameworks to Combat Terrorism: An Abundant Inventory of Existing Tools*,

United States Supreme Court in a recent case, *Hamdan v. Rumsfeld*, in which the Court held that signatories owe enemies in conflicts certain minimal protections, regardless of whether the enemy bears any reciprocal legal obligation.⁶² Specifically, the Court held that Common Article 3 “affords some minimal protection . . . to individuals associated with neither a signatory nor even a nonsignatory ‘Power’ who are involved in a conflict ‘in the territory of’ a signatory.”⁶³ Thus, Common Article 3 required that Hamdan, an alleged member of al Qaeda, be tried by a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.”⁶⁴ With this ruling, the Supreme Court clarified that Common Article 3 obligations do not legally depend on reciprocal compliance.

B. How the Administration and Its Supporters Claim Geneva Obligations Work

Despite the fact that the Geneva Convention imposes unconditional obligations, the United States has viewed these obligations as reciprocal. A number of voices have recently concluded that detainees in the war on terrorism do not deserve Geneva protections. In arriving at this *legal* conclusion, some have drawn quite heavily on *strategic* considerations of reciprocity. In short, these policy-makers have felt that since al Qaeda does not treat U.S. troops humanely, the United States need not treat al Qaeda in accordance with Common Article 3 of the Geneva Conventions.

President Bush announced the official U.S. policy on detainees in a February 7, 2002 memo. In sum, this memo denied detainees the full suite of humanitarian protections. It concluded that “none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.”⁶⁵ President Bush also said “Common Article

5 CHI. J. INT’L L. 499, 505 (2005); Melysa H. Sperber, Note, *John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting with Enemy Forces*, 40 AM. CRIM. L. REV. 159, 174 n.69 (2003); Michael Veuthey, *Conference: The American Red Cross – Washington College of Law Conference: International Humanitarian and Human Rights Law in Non-International Armed Conflicts, April 12-13, 1983: Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts: The Role of the International Committee of the Red Cross*, 33 AM. U.L. REV. 83 (1983) (“Article 60(5) of the 1969 Vienna Convention on the Law of Treaties excludes reciprocity as a condition for application of humanitarian law.”).

⁶² *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795 (2006).

⁶³ *Id.* at 2796.

⁶⁴ *Id.* (citations omitted).

⁶⁵ Memorandum from George W. Bush, President of the United States, to the Vice

3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and Common Article 3 applies only to ‘armed conflict not of an international character.’”⁶⁶ Finally, President Bush asserted that since Taliban detainees are “unlawful combatants” they do not qualify as prisoners of war under Article 4, and “because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.”⁶⁷ Thus, the administration did not explicitly make reciprocity arguments in announcing this legal position – that is, it did not argue that detainees were entitled to Geneva protections *but for* specific violations by their respective organizations. Instead, the administration argued that Geneva provisions simply did not apply to those organizations at all.

Although this announcement of U.S. policy did not explicitly rely on reciprocity logic, supporters and commentators have helped draw out the role reciprocity considerations played in creation of this policy. Sympathetic to the United States’ approach to this issue, Professor Ruth Wedgwood made an early public justification for curtailing Geneva obligations in the war on terrorism. In a *New York Times* op-ed, she wrote:

To claim the protection of the law, a side must generally conduct its own military operations in accordance with the laws of war. Al Qaeda has violated these laws at every turn, and certainly in the Sept. 11 attacks. In protecting and harboring Osama bin Laden and his operatives, the Taliban leadership has also become party to the violations.⁶⁸

Wedgwood essentially argued that reciprocity plays a role in Geneva obligations, and that the United States should define reciprocity narrowly.

Starting in 2002, various government lawyers produced a series of memoranda echoing Wedgwood’s argument. In January 2002, Deputy Assistant Attorney General in the Office of Legal Counsel John Yoo and Special Counsel Robert J. Delahunty argued that the Geneva Conventions do not protect al Qaeda detainees because al Qaeda is a non-state actor, and non-state actors cannot be party to international agreements governing war.⁶⁹

President, et al., *Humane Treatment of al Qaeda and Taliban Detainees* (Feb. 7, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/020702bush.pdf>.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Ruth Wedgwood, *The Rules of War Can’t Protect al Qaeda*, N.Y. TIMES, Dec. 31, 2001, at A11.

⁶⁹ Draft Memorandum from John Yoo, Deputy Assistant Attorney Gen., & Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel of the Dept. of Def., *Application of Treaties and Laws to al Qaeda and Taliban Detainees* (Jan. 9, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf>.

They claimed that the Geneva Conventions did not apply to Taliban detainees for similar reasons: the Taliban was not a government and Afghanistan was a failed state.⁷⁰ Furthermore, the memo argued that the Taliban militia were so intertwined with al Qaeda as to be “functionally indistinguishable” from it.⁷¹ Finally, Yoo and Delahunty argued that the president could suspend Geneva obligations and that international common law did not bind the United States.

Later that month, White House Counsel Alberto Gonzales supported the reasoning and conclusions in the Yoo-Delahunty memo, suggesting that President Bush declare the Taliban and al Qaeda to be outside of the Geneva Convention protections.⁷² Further, in August 2002, Assistant Attorney General Jay Bybee in the Office of Legal Counsel sent the president’s counsel a memo making legal arguments to justify the use of “cruel, inhuman, or degrading” acts to extract information from al Qaeda detainees.⁷³ Finally, in 2004, the Independent Panel to Review Department of Defense Detention Operations validated these arguments and claimed that al Qaeda and Taliban fighters should be ineligible for the protections of the Geneva Conventions precisely because they do not obey the rules themselves.⁷⁴

Although this series of memoranda might suggest that legal arguments were driving the Bush administration’s thinking, there is evidence to suggest that these arguments are based, in part, on strategic decisions about detainee treatment. Commentators have asserted that al Qaeda does not engage in the reciprocal behavior patterns we have come to expect of a state actor. This perceived lack of reciprocity has been advanced as one of the justifications for obviating Common Article 3 obligations. John Yoo wrote: “The reasons to deny Geneva status to terrorists extend beyond pure legal obligation. The primary enforcer of the laws of war has been reciprocal treatment. We obey the Geneva Conventions because our opponent does the same with American POWs. That is impossible with al Qaeda.”⁷⁵

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Memorandum from Alberto Gonzales, White House Counsel, to President George W. Bush (Jan. 25, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf>.

⁷³ Memorandum from Jay S. Bybee, Assistant Att’y Gen., to Alberto Gonzales, Counsel to the President. *Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban* (Aug. 1, 2002), available at <http://www.washingtonpost.com/wpsrv/nation/documents/dojinterrogationmemo20020801.pdf>.

⁷⁴ James R. Schlessinger, et al., *Final Report of the Independent Panel to Review DoD Detention Operations*, 82 (Aug. 2004), available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>.

⁷⁵ John Yoo, *Terrorists Have No Geneva Rights*, WALL ST. J., May 26, 2004, at A16.

David Rivkin, former White House Associate Counsel to Presidents Ronald Reagan and George H.W. Bush, has argued more sharply that the United States should condition its treatment of detainees on who those detainees are and how they treat the United States and the rest of the world. After calling al Qaeda “a bunch of barbarians – bad people” who are besieging civilization, he said:

Qualitatively, we are dealing with a grave threat to everything: to civilized law and order, to democracy . . . For us to say, “We’re going to treat everyone the same. Everybody is going to get the gold standard. Everybody is going to get POW treatment. Everybody is going to get courts martial.” . . . It would be unimaginably bad.⁷⁶

Rivkin went on to argue that there has always been a connection between how people behave prior to capture and the treatment they receive after capture.⁷⁷ And to decouple these two things in the war on terrorism would be “condemning to death hundreds of thousands and millions of civilians.”⁷⁸ Thus, he premises Geneva obligations to detainees on the nature and intentions of those on the other side of the conflict.

Professor Eric Posner makes a similar argument, but goes one step further in assessing the role these types of arguments have played in official decision-making. He claims that these pragmatic concerns about reciprocity were not simply appended to the legal arguments for downgrading Common Article 3 standards. Instead, Posner suggests that reciprocity concerns provided the Bush administration with the impetus for making these legal arguments in the first place. He writes:

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

⁷⁶ Videotape: David B. Rivkin, ACS Panel Explores “Hamden v. Rumsfeld: What’s Next?” (July 26, 2006), available at <http://www.acslaw.org/node/3090>.

⁷⁷ *Id.*

⁷⁸ *Id.*

it will have any effect on al Qaeda's behavior toward captured Americans or other westerners.⁷⁹

This explanation underscores how central reciprocity considerations have been to the administration's thinking about Geneva compliance, even if much of the public discussion has focused on legal arguments.

To be sure, reciprocity concerns do not tell the *whole* story behind U.S. detainee policy. Other considerations have influenced U.S. policy on this topic. First, decreasing Geneva protections would allow greater interrogation flexibility. Explaining the advantages of this flexibility in a memo to the president, Alberto Gonzales noted that "the war against terrorism is a new kind of war" and the "nature of the new war places a high premium on . . . the ability to quickly obtain information from captured terrorists . . . in order to avoid further atrocities against American civilians."⁸⁰ Whether coercive techniques actually have provided useful information is still being debated,⁸¹ but it is important to note that this consideration has influenced official policy.

Another concern driving U.S. detainee policy has been a fear of future prosecution for war crimes. The War Crimes Act⁸² prohibits commission of a war crime by U.S. officials. Gonzales advised the President that "'war crimes' for these purposes is defined to include . . . any violation of Common Article 3."⁸³ An official determination that Geneva did not apply to the Taliban, Gonzales argued, "would mean that [the War Crimes Act] would not apply to actions taken with respect to the Taliban."⁸⁴

The presence of other policy considerations does not undermine the assertion that reciprocity concerns have played a key role in the creation of U.S. detainee policy. This Section does not aim to prove that reciprocity considerations were the *only* drivers of U.S. detainee policy. Rather, it highlights the fact that reciprocity considerations have played some role in

⁷⁹ Eric Posner, *Apply the Golden Rule to al Qaeda?*, WALL ST. J., July 15, 2006, at A9.

⁸⁰ Memorandum from Alberto Gonzales, White House Counsel, to President George W. Bush, *supra* note 72.

⁸¹ For an example of an interrogator vouching for the effectiveness of coercive techniques, see generally CHRISTOPHER MACKAY, *THE INTERROGATORS* (2004). The Department of Defense also published a list of helpful information gathered in Guantanamo interrogations. U.S. Department of Defense, *Fact Sheet: Guantanamo Detainees* (Feb. 13, 2004), available at <http://www.defenselink.mil/news/Apr2004/d20040406gua.pdf>. For an example of an FBI agent expressing skepticism about whether U.S. practices have yielded better information than non-coercive practices would have, see e-mail from [redacted] to Gary Bald, et al. (Dec. 5, 2003), available at <http://www.aclu.org/torturefoia/released/FBI.121504.3977.pdf>.

⁸² 18 U.S.C. § 2441 (2000).

⁸³ Memorandum from Alberto Gonzales, White House Counsel, to President George W. Bush, *supra* note 72.

⁸⁴ *Id.*

the creation of U.S. policy, and it seeks to understand how policy-makers discuss and conceive of reciprocity in this context. Examining the rhetoric reveals that the United States has perceived Geneva obligations, in large part, as *quid pro quo*: if you do not observe the laws of war and refuse to extend us Geneva protections, then we will do likewise.

C. *What Critics Say about Reciprocity and Geneva Compliance*

A number of critics inside and outside the government have taken issue with the administration's approach to detainees in the war on terrorism. Although some have responded primarily to the legal arguments government lawyers have made, others have more squarely addressed the administration's underlying conception of how reciprocity works with regard to detainee treatment. These latter critics argue that the United States has failed to consider the full range of effects that might result from its actions.

Legal Adviser to the Department of State, William Howard Taft, IV, almost immediately rebutted each of the legal arguments Yoo and Delahunty advanced in their original memoranda. He pointed out a number of difficulties with the argument that the president could suspend Geneva obligations. First, a party may not suspend obligations retroactively; it must give advance warning of such suspension, and the United States did not give any warning.⁸⁵ Second, the United States did not clearly have grounds for suspension with regard to Taliban detainees because it did not identify Afghanistan's alleged breach and how it affected the United States.⁸⁶ Third, Taft pointed to the aforementioned Article 60(5) of the Vienna Convention to argue that humanitarian treaties may not be suspended.⁸⁷ He also argued that the failed state claim was without support, as "the concept of 'failed state' has been developed as a historical and political analytic tool, not as a legal concept."⁸⁸ In rebutting this failed state argument, Taft questioned the administration's conception of reciprocity. He noted "the application of the Geneva Conventions does not depend upon the mutual recognition of the parties – either recognition of governments or statehood."⁸⁹

Meanwhile, others addressed the administration's conception of reciprocity in the context of Geneva obligations more directly. Almost immediately after Yoo and Delahunty penned their first memo in 2002,

⁸⁵ Memorandum from William H. Taft, IV, Dept. of State Legal Adviser, to John Yoo, Office of Legal Counsel Deputy Assistant Att'y General, 26 (Jan. 11, 2002), *available at* http://www.pegc.us/archive/State_Department/taft_memo_20020111.pdf.

⁸⁶ *Id.* at 26.

⁸⁷ *Id.* at 27.

⁸⁸ *Id.* at 4.

⁸⁹ *Id.* at 14.

Secretary of State Colin Powell expressed concern about how various actors beyond the Taliban and al Qaeda would react to the repudiation of Geneva obligations in the war on terrorism. In a memo to Gonzales, Powell outlined the potential drawbacks of such a decision. He worried that not applying the Geneva Convention in the conflict at hand would “undermine the protections of the law of war for our troops, both in this specific context and in general.”⁹⁰ In addition, he feared that “negative international reaction” might “undermine public support among critical allies, making military cooperation more difficult to sustain.”⁹¹ Thus, Powell did not argue that reciprocity should be off the table. Instead, he essentially argued that the United States had taken too narrow a view of reciprocal effects, and he urged something akin to indirect reciprocity.

In 2003, Judge Advocate Generals (“JAGs”) from the Air Force, Army, Navy, and Marines wrote memoranda reacting to the Office of Legal Counsel’s (“OLC”) arguments and the administration’s actions. These JAGs took a similarly broad view of reciprocity. Like Powell, they also expressed some concern about the administration ignoring indirect reciprocity. They felt that implementation of questionable techniques might harm soldiers by undercutting popular support for their efforts:

Should any information regarding the use of the more extreme interrogation techniques become public, it is likely to be exaggerated/ distorted in both the United States and in international media. This could have a negative impact on international, and perhaps even domestic, support for the war on terrorism.⁹²

As Senator Lindsay Graham put it when he quoted this portion of Rives’ memo on the Senate floor: “These are not ACLU lawyers.”⁹³

These military lawyers also warned that abdication of Geneva obligations could endanger U.S. soldiers in the future. One warned that “[t]reating OEF [Operation Enduring Freedom] detainees inconsistently with the Conventions arguably ‘lowers the bar’ for the treatment of U.S. POWs in future conflicts.”⁹⁴ Another expressed concern that the United States’

⁹⁰ Memorandum from Colin Powell, Secretary of State, to Counsel to the President and Assistant to the President for National Nat’l Sec. Affs. (Jan. 26, 2002), *available at* <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.26.pdf>.

⁹¹ *Id.*

⁹² Memorandum from Jack Rives, Major Gen., U.S. Air Force, to SAF/GC (Feb. 5, 2003), *available at* <http://balkin.blogspot.com/jag.memos.pdf>.

⁹³ 151 CONG. REC. S11066 (daily ed. Oct. 5, 2005) (statement of Sen. Graham).

⁹⁴ Memorandum from Jack Rives, Major Gen., U.S. Air Force, to SAF/GC, *supra* note 92. Rives also noted in his February 6 letter the importance of considering “whether implementation of such techniques is likely to result in adverse impacts for DoD [Department

employment of aggressive interrogation techniques might “adversely impact . . . [t]reatment of U.S. Service members by captors.”⁹⁵ A third worried that “implementation of questionable techniques will very likely establish a new baseline for acceptable practice in this area, putting our service personnel at far greater risk”⁹⁶ These concerns are essentially those of diffuse reciprocity.

General John Shalikashvili and forty-eight other high-ranking retired officials from the Departments of Defense and State agreed with these expressions of concern for U.S. troops. Just after the five-year anniversary of the September 11 attacks, a distinguished group of former military brass wrote a letter to the Senate Armed Services Committee arguing that the way the United States treats its enemies in the war on terrorism affects how enemies treat Americans. The military leaders said that passing such legislation would “violate[] the core principles of the Geneva Conventions and pose[] a grave threat to American service-members, now and in future wars.”⁹⁷ With this letter, people who had spent their lives in the field witnessing how the enemy reacts to U.S. moves were claiming unequivocally that treating enemies poorly invites indirect reciprocal actions that will harm U.S. troops in future conflicts.

Finally, these types of concerns are not limited to the upper ranks of the military. Soldiers who have recently fought on the front lines report concern for the safety of U.S. soldiers if Geneva protections are not extended to the enemy. Maintenance of the Geneva Conventions are important to troops because the more an enemy expects he will be treated well upon capture, the more willing he might be to surrender. Paul Rieckhoff, who served as an Infantry Platoon Leader in Baghdad in 2003-04, explained that it was precisely for this reason that “America’s moral integrity was the single most important weapon my platoon had on the streets of Iraq. It saved innumerable lives, encouraged cooperation with our allies and deterred Iraqis from joining the growing insurgency.”⁹⁸ An erosion of this moral

of Defense] personnel who become POWs, including possible perceptions by other nations that the United States is lowering standards related to the treatment of prisoners, generally.” *Id.*

⁹⁵ Memorandum from Kevin M. Sandhulker, Brigadier Gen., U.S. Marine Corps, to Gen. Counsel of the Air Force (Feb. 27, 2003), *available at* <http://balkin.blogspot.com/jag.memos.pdf>.

⁹⁶ Memorandum from Thomas Romig, Major Gen., U.S. Army, to the Gen. Counsel of the Dep’t of the Air Force (Mar. 3, 2003), *available at* <http://balkin.blogspot.com/jag.memos.pdf>.

⁹⁷ Letter from John Shalikashvili, Gen. (Ret.), et al. to Sen. John Warner, Chairman, and Carl Levin, Ranking Member, Senate Armed Servs. Comm., *Letter to Sen. John Warner, Chairman, and Carl Levin, Ranking Member, Senate Armed Services Committee on Common Article 3 of the Geneva Conventions*, Sept. 12, 2006, *available at* <http://www.humanrightsfirst.info/pdf/06913-etn-military-let-ca3.pdf> (emphasis added).

⁹⁸ Paul Rieckhoff, *Do Unto Your Enemy*, N.Y. TIMES, Sept. 25, 2006, at A25.

authority could endanger U.S. troops in future wars “because when we lower the bar for the treatment of our prisoners, other countries feel justified in doing the same.”⁹⁹ What would stop Iran from water-boarding a U.S. soldier in a future conflict, he asks.¹⁰⁰ “We will . . . become unable to protect our troops if they are perceived as being no more bound by the rule of law than dictators and warlords themselves.”¹⁰¹ The following month, the *New York Times* echoed these concerns in an editorial criticizing President Bush’s new law on military tribunals, claiming that “by repudiating key protections of the Geneva Conventions, [the administration] needlessly increases the danger to any American soldier captured in battle.”¹⁰² Such concerns about Americans being hurt because the norm for detainee treatment is diluted stem from a conception of reciprocity akin to diffuse reciprocity.

Each of the individuals making these admittedly speculative arguments draws on a slightly different body of knowledge and experience. Yet their disparate experiences have resulted in a unanimous warning: the administration might be defining its field of vision too narrowly when it tries to gauge what sort of reaction its treatment of detainees will engender.

This Part has examined the contours of the debate over Geneva compliance and what role reciprocity plays in that debate. It used the current discussion about detainee policy in the war on terrorism as a case study to examine these themes. The next Part casts its gaze backward and asks how states have treated their Geneva obligations in the past.

III. WHAT ROLE RECIPROCITY ACTUALLY HAS PLAYED IN GENEVA CONVENTION COMPLIANCE

The recent debate about what role reciprocity plays in states’ maintenance of Geneva obligations has taken place without a rigorous understanding of what has actually happened on the ground. How have states responded to their Geneva obligations? Have they actually treated Geneva compliance as a reciprocal obligation? This Part adds to the discussion by examining historical data on POW treaty compliance over the past century. Analysis of these data reveal that the United States is by no means alone in seeing Geneva obligations through the lens of specific reciprocity. That is, when one side in a conflict has violated prisoner of war treaties, the other side has, too. Such a finding helps place the United States’ current actions in historical context.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Editorial, *A Dangerous New Order*, N.Y. TIMES, Oct. 19, 2006, at A26.

Professor James Morrow has compiled data on state compliance with laws of war for twentieth century conflicts.¹⁰³ Specifically, these data capture all interstate wars from the Boxer Rebellion to the Gulf War of 1991.¹⁰⁴ The data break every conflict into dyads (country pairs) and examine one country's behavior toward the other. For a conflict between A, B, and C, the data yield information on:

- How A treats B
- How B treats A
- How A treats C
- How C treats A
- How B treats C
- How C treats B

For each of these interactions, Morrow scored violations of prisoner of war treaties¹⁰⁵ on two key dimensions: magnitude and frequency of violations.¹⁰⁶ Magnitude reflects the severity of the violations. Frequency gauges how often the violations occurred in the course of a conflict. Every interaction was given a score on a scale of one to four on each of these dimensions.¹⁰⁷

Using cross-tabulation analysis, this article examines the dataset for patterns of reciprocal behavior.¹⁰⁸ The table below breaks each dyad into Side A and Side B. It charts each side's score on a given dimension of compliance. Boxes that fall along the main diagonal – boxes with the same heading on the X-axis as on the Y-axis – are most important, since these boxes indicate cases in which each side treated the other side the same way

¹⁰³ James D. Morrow & Hyeran Jo, *Compliance with the Laws of War: Dataset and Coding Rules*, 23 CONFLICT MGMT. & PEACE SCI. 100, 91-113 (2006). To code this data, Morrow relied upon secondary historical sources whenever possible “because the authors of such sources have often done the difficult work of separating truth from unfounded accusation.” *Id.*

¹⁰⁴ *Id.* at 92.

¹⁰⁵ Relevant treaties include the Hague Convention of 1907 and, most importantly, the 1929 Geneva Convention Relative to the Treatment of Prisoners of War, and its 1949 revision. See Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, available at <http://www.yale.edu/lawweb/avalon/lawofwar/hague04.htm>; Geneva, *supra* note 34.

¹⁰⁶ Morrow & Jo, *supra* note 103. Data are gathered from research in secondary historical work and contemporary journalistic sources.

¹⁰⁷ Morrow and Jo rely on information and inference to assign each interaction a score. *Id.* at 104 (“Commonly reported violations of POWs include maltreatment or summary executions. In the absence of detailed information on treatment of POWs, we make some inferences. The death rate of POWs captured often provides a general view of the treatment.”). See the appendix for chart of dimensions and possible scores. *Id.* at 110.

¹⁰⁸ Morrow examined his data for patterns of reciprocity in violation of laws of war, more generally, but he did not examine reciprocal behavior specifically in the data on POW violations. See Morrow & Jo, *supra* note 103.

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it was being treated (for example, where Side A commits “Some Major Violations” and Side B also commits “Some Major Violations”). Boxes within one space of this diagonal are also of interest, since these boxes indicate that the two sides treated one another similarly. The following figure illustrates the table used, with the key boxes labeled:

		VIOLATOR VIOLATIONS			
		None	Minor Violations	Some Major Violations	Many Major Violations
VICTIM VIOLATIONS	None	Diagonal	Touching Diagonal		
	Minor Violations	Touching Diagonal	Diagonal	Touching Diagonal	
	Some Major Violations		Touching Diagonal	Diagonal	Touching Diagonal
	Many Major Violations			Touching Diagonal	Diagonal

If actors exhibited no reciprocal behavior, then we would expect to see interactions scattered roughly equally across all sixteen boxes. In the absence of reciprocity, the boxes along the upper-left-to-lower-right diagonal – i.e., instances where each side has given the same treatment it has received – should capture only about 25% of all interactions. Adding the boxes touching these boxes – i.e., instances where each side has given either exactly or roughly the same treatment as it has received – should capture 63% of all interactions. If actors exhibit reciprocal behavior, then we would expect to see a greater proportion of interactions clumped in these labeled boxes.

The results of the empirical analysis are striking. They show that when one side has violated, the other side has often violated with exactly the same magnitude of violations, and has almost always violated with at least roughly the same magnitude of violations:

MAGNITUDE OF VIOLATIONS¹⁰⁹

		VIOLATOR VIOLATIONS			
		None	Minor Violations	Some Major Violations	Many Major Violations
VICTIM VIOLATIONS	None	6	3	4	0
	Minor Violations	2	1	1	0
	Some Major Violations	7	4	27	14
	Many Major Violations	1	0	9	6

A large proportion of cases (47%) fall along the main diagonal, indicating exactly the same magnitude of violation on both sides. This is significantly higher than the 25% of interactions we would expect to see in the absence of reciprocal behavior patterns. The bulk of these interactions fall in the “Some Major Violations/ Some Major Violations” box. Furthermore, the vast majority of all interactions (86%) come within one cell of the diagonal, indicating roughly similar violations on both sides. Again, this proportion is significantly higher than the 63% that we would expect to see in the absence of reciprocal behavior. Only one case falls in the “off” diagonal corners (e.g., where Side A commits no violations and Side B commits many major violations). In sum, these findings indicate that states have usually given enemies either exactly or roughly the same treatment they have received in a conflict. That is, states have treated violations of and compliance with POW treaties as a matter of specific reciprocity.

Analysis of the frequency data reveals similar conclusions. Not only do states violate POW treaties with the same magnitude as one another, but they

¹⁰⁹ Excel file from James Morrow (on file with author) [hereafter Morrow Data]. There are different quality levels of data ranging from 0 (when the coders had no indication of a state’s behavior) to 4 (when the coders had high confidence in their knowledge of a state’s behavior). When the quality level is 0, coders assigned default values to each category of interaction. In some interactions, the data on both sides have a quality level of 0. This analysis omits those interactions. In other cases, data on only one side of an interaction has a quality level of 0. Based on Morrow’s advice, these data include such interactions. Including these latter interactions allows the dataset to be relatively larger than it would be with these interactions omitted. And including these interactions does not skew the results of this cross-tabulation analysis. In fact, the results become even more striking when these data are excluded: 51% of interactions fall along the diagonal and 88% fall within one of the diagonal.

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also commit these violations roughly as often in the course of a conflict as do their enemies. The following table uses the same type of analysis as above:

FREQUENCY OF VIOLATIONS¹¹⁰

		VIOLATOR VIOLATIONS			
		None	Single/ Occasional Violations	Recurrent violations (but standards still occasionally observed)	Massive Violations (standard basically ignored)
VICTIM VIOLATIONS	None	6	7	0	0
	Single/ Occasional Violations	10	19	4	3
	Recurrent violations (but standards still occasionally observed)	0	8	10	6
	Massive Violations (standard basically ignored)	0	5	5	2

Here, 44% of cases fall along the main diagonal, while over 90% are touching the diagonal. Thus, in a significant proportion of conflicts, the frequency of violations on one side equals the frequency of violations on the other side. Furthermore, in nine out of ten cases, the two sides comply with roughly the same frequency as one another. Notably, the off-corners both equal zero.

These data are consistent with the idea that some states have used broader conceptions of reciprocity in some cases. The United States, for example, granted Geneva protections to POWs throughout the Korean War even though North Korea and China mistreated U.S. soldiers.¹¹¹ Moreover, the first states to employ the Geneva Conventions did so even when their

¹¹⁰ Morrow Data. Removing all data with a quality level of 0 again yields more stark results here: 46% fall directly on the diagonal and 98% fall within one of the diagonal.

¹¹¹ Ralph Michael Stein, "Artillery Lends Dignity to What Would Otherwise Be a Common Brawl": *An Essay on Post-Modern Warfare and the Classification of Captured Adversaries*, 14 PACE INT'L L. REV. 133, 148 (2002).

enemies were not signatories.¹¹² I make a modest claim about the above data, and I do not assert that they are dispositive. Rather, I argue that they strongly suggest that reciprocity matters. More precisely, I contend that specific reciprocity and its tit-for-tat trading of violations has characterized *much* of states' POW treaty behavior.¹¹³

IV. DANGERS OF DEFINING RECIPROCITY TOO NARROWLY

Data suggest that states have treated their POW treaty obligations as specifically reciprocal throughout the past century. Consistent with this historical trend, the United States has recently appealed to specific reciprocity in setting its policy on detainees in the war on terrorism. These two observations shed light on how states have conceived of reciprocity in the past. They inform the forward-looking question about what conception of reciprocity states *should* employ in this context; but, standing alone, they leave that question open.

This Part draws on these two observations and on the earlier conceptual framework of reciprocity to suggest an answer. I contend that if states focus only on specific reciprocity they fail to predict less direct reactions that may harm their national interests. The Bush administration is likely correct, for example, that giving better treatment to detainees in the war on terrorism will not beget better treatment for U.S. soldiers captured in that conflict. However, the reciprocity analysis should not end there. This Part shows that a number of actors other than the direct enemy have taken actions that have been both contingent on U.S. action and harmful to U.S. interests. By failing to assign weight to these types of potential reactions, a state fails to calculate the full costs of its actions. To illustrate the costs a state fails to account for under the specific reciprocity model, this Part outlines indirectly reciprocal and diffusely reciprocal responses to U.S. detainee treatment that have harmed U.S. national interests.

A. *Indirectly Reciprocal Responses that Harm U.S. Interests*

Although curtailing Geneva protections for the current enemy may not

¹¹² The Geneva Convention was first used when Prussia and Austria began fighting over control of the German Confederation in 1866. Austria had not acceded, but Prussian officials still applied the Convention unilaterally. Italy did likewise when it joined Prussian forces. Again, in the 1894 Sino-Japanese War, the one signatory – Japan – applied the Convention despite the fact that its enemy was not a signatory. MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 82 (1996).

¹¹³ Morrow & Jo, *supra* note 103. Morrow and Jo analyzed data on state interactions and found that states generally engage in reciprocal behavior patterns with regards to laws of war. They did not, however, examine whether states engage in reciprocal behavior specifically with regard to POW treaties. *Id.*

result in measurably worse treatment for U.S. troops *from that enemy*, U.S. detainee policy could invite adverse responses through indirect reciprocity. Perhaps the most straightforward way this would happen is as follows: Countries in future conflicts may see the United States as a bad actor because it stretched its conception of Geneva obligations in this conflict, and those countries will return the expected bad behavior. The scenario Rieckhoff imagined – where a U.S. soldier gets captured in a future conflict with Iran, and Iran uses on that soldier the very interrogation techniques the United States has allegedly used in the Iraqi conflict – illustrates this sort of reciprocity. Given that the United States is still engaged in the war on terrorism, data are not available to test whether this scenario actually plays out. But this is an interesting question for further research: do countries that violate first in one conflict, for example, receive worse treatment from another enemy in the next conflict?

The Bush administration's decisions on whether to extend Geneva protections could also affect U.S. troops through a different type of indirect reciprocal action. For actors who are not fighting in the conflict (and who therefore do not have a way of reciprocating with complete equivalency), a primary way to react to the administration's decisions is through public opinion. Although somewhat abstract, declines in public opinion can adversely affect U.S. troops in two ways: (1) waning support amongst allies and potential allies might lead them to offer less material, intelligence, and fewer troops; and (2) increased animosity specifically in the Arab and Islamic worlds might create a more hostile global environment in which to operate.

First, allegations of detainee mistreatment have almost certainly damaged international support for the United States' war effort. As noted above, a number of countries have paid close attention to news stories about the abuses at Abu Ghraib and Guantanamo.¹¹⁴ Most of the people polled have disapproved of the United States' actions: 85% of Germans and 65% of British, for instance, have said they feel the United States has violated international law at Guantanamo.¹¹⁵ This feeling appears to be widespread. In a poll of 26,000 people across twenty-five countries, 67% of world citizens disapproved of the U.S. handling of Guantanamo detainees.¹¹⁶

¹¹⁴ See *No Global Warming*, *supra* note 5.

¹¹⁵ WorldPublicOpinion.Org/ Knowledge Networks, *American and International Opinion on the Rights of Terrorism Suspects*, July 17, 2006, at 14-15, http://www.worldpublicopinion.org/pipa/pdf/jul06/TerrSuspect_Jul06_rpt.pdf. Polls also document a dramatic decline in the United States' reputation as a defender of human rights. In 1998, 24% of Germans and 22% of Britons said the United States did a "bad job" of promoting human rights; in 2006, these percentages increased to 78% and 56%, respectively. *Id.* at 16.

¹¹⁶ BBC World Service, *Poll: World View of US Role Goes from Bad to Worse*, Jan. 23, 2007, at 3, http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/23_01_07_us_poll.pdf. For a listing of

America's closest ally, British Prime Minister Tony Blair, even called for the closure of the Guantanamo prison.¹¹⁷

U.S. officials' experiences have confirmed this trend of international disapproval. In 2005, twelve retired high-ranking military officials including General Shalikhshvili wrote an open letter opposing Alberto Gonzales' nomination to Attorney General because he had played "a significant role in shaping U.S. detention and interrogation operations in . . . Iraq [and] Guantanamo . . ." ¹¹⁸ They felt it was "clear that these operations have fostered greater animosity toward the United States, undermined our intelligence gathering efforts and added to the risks facing our troops serving around the world."¹¹⁹ Other high-ranking officials – namely, Secretary of Defense Robert Gates, Secretary of State Condoleezza Rice, and Senate Committee on Foreign Relations member Joseph Biden – have called for the United States to close the Guantanamo detention facility.¹²⁰ In doing so, these officials have implicitly or explicitly acknowledged how damaging allegations of detainee abuse, and symbols of that abuse, have been to international support for the U.S. war effort.

Second, and perhaps most worrisome, is the effect allegations of detainee abuse have had on opinion throughout the Arab and Islamic worlds. One news magazine reported that "In the Islamic world, the photos [from Abu Ghraib] are seen as proof that the US military campaigns in Afghanistan and Iraq are little more than thinly veiled colonial expeditions conducted in the name of democracy."¹²¹ A leading Egyptian newspaper captured this sentiment in 2006 when it published a set of prisoner abuse

how each country responded, see Program on International Policy Attitudes, *Global Views of the US: Questionnaire and Methodology*, at tbl.M2.d, http://www.worldpublicopinion.org/pipa/pdf/jan07/BBC_USRole_Jan07_quaire.pdf. In a related poll, 59% of world citizens supported a clear rule against torture. BBC World Service, *Poll: World Citizens Reject Torture, Global Poll Reveals*, Oct. 19, 2006, at 2, available at http://www.globescan.com/news_archives/bbtorture06/BBCTorture06.pdf.

¹¹⁷ Colin Brown, *PM Finally Calls for Guantanamo to Close*, THE INDEPENDENT (UK), Mar. 17, 2006, at 19. A member of the Commons Select Committee on Foreign Affairs publicly welcomed the Prime Minister's comment. *Id.*

¹¹⁸ Letter from David M. Brahm, Brigadier General, U.S. Marine Corps, et al., to The Senate Judiciary Comm. (undated), available at http://www.humanrightsfirst.org/us_law/etn/gonzales/statements/gonz_military_010405.pdf (last visited Apr. 13, 2008).

¹¹⁹ *Id.*

¹²⁰ Thom Shanker & David E. Sanger, *New to Pentagon, Gates Argued for Closing Guantanamo Prison*, N.Y. TIMES, Mar. 22, 2007, at A1 ("As Mr. Gates was making his case, Secretary of State Condoleezza Rice joined him in urging that the detention facility be shut down . . ."); News Services, *Biden Says Prison at Guantanamo Bay Should Be Closed*, WASH. POST, June 6, 2005, at A2.

¹²¹ *America's Shame: Torture in the Name of Freedom*, SPIEGEL ONLINE, Feb. 20, 2006, <http://www.spiegel.de/international/spiegel/0,1518,401899,00.html> [hereafter *America's Shame*].

photos under the headline “Freedom! Democracy! Torture!”¹²² In the wake of a second set of photos of the Abu Ghraib abuse released in 2006, even Iraqi President Jalal Talabani “distanced himself from Washington, saying that the new Abu Ghraib photos are evidence of events ‘unworthy of a civilized society.’”¹²³

Resentment in the Arab and Islamic worlds has given extremist groups a new rallying cry against the United States. One Islamic terrorist group has allegedly incorporated these images into its recruiting materials.¹²⁴ Almost immediately after the initial publicity of Abu Ghraib, a videotape was released showing a group of men beheading Nicholas Berg, a U.S. contractor who had been taken hostage. The killers said they were avenging abuses of Iraqi detainees.¹²⁵ These killers may simply have been using Abu Ghraib as an excuse for actions they would have taken regardless of treatment of Abu Ghraib prisoners. But other events confirm that publicity of prisoner abuses by the United States has actually had a grasp on minds in much of the Islamic world.

Perhaps the best example of this came in May 2005. *Newsweek* published a report that U.S. interrogators at Guantanamo prison had flushed a Qu’ran down the toilet.¹²⁶ Imran Khan, a Pakistani cricket legend, used his celebrity status to draw attention to this report. He held a press conference where he read the *Newsweek* report, then said “This is what the U.S. is doing, . . . desecrating the Qu’ran.”¹²⁷ A local radio station picked up Khan’s press conference and, along with comments by outraged Muslim clerics and Pakistani government officials, these were broadcast throughout neighboring Afghanistan.¹²⁸ Radical Afghani Islamists took the opportunity to exploit local discontent with the poor economy and the presence of U.S. troops. Riots broke out and by the end of the week rioting had spread from Gaza to Indonesia, killing at least fifteen people.¹²⁹ The Pentagon denied

¹²² *Id.* The editor of *Al Quds al Arabi*, a London-based paper, said “Whatever Bush says will not diminish hatred toward the U.S. and its double standards of advocating democracy but shying away from democratic standards in Iraq.” Brian Knowlton, *Bush, on Arab TV, Assails Abuse*, INT’L HERALD TRIBUNE, May 6, 2004, at 1.

¹²³ *America’s Shame*, *supra* note 121.

¹²⁴ Phillip Carter, *The Road to Abu Ghraib*, WASH. MONTHLY, Nov. 2004, at 29.

¹²⁵ Sewell Chan & Ariana Eunjung Cha, *American Beheaded on Web Video; Militants Say Killing Was Revenge for U.S. Abuses at Iraqi Prison*, WASH. POST, May 12, 2004, at A1.

¹²⁶ Michael Isikoff & John Barry, *Gitmo: SouthCom Showdown*, NEWSWEEK, May 9, 2005, at 10.

¹²⁷ Evan Thomas, *How a Fire Broke Out: The Story of a Newsweek Report about Alleged Abuses at Guantanamo Bay and a Surge of Deadly Unrest in the Islamic World*, NEWSWEEK, May 23, 2005, at 32.

¹²⁸ *Id.*

¹²⁹ *Id.*

these reports of abuse, and *Newsweek* eventually retracted its story. But this episode shows how publicity of detainee abuses (real or not) can invite reactions far beyond those of the direct enemy.

This Part does not aim to present an exhaustive account of indirect reactions to U.S. detainee treatment¹³⁰ that could harm U.S. interests. It entirely omits, for example, the potential that U.S. officials will be tried for war crimes or will at least be forced to oppose pushes for such trials.¹³¹ The limited discussion above merely outlines a few of the ways in which U.S. treatment of detainees has been reciprocated from a number of actors in various ways. This discussion begins to illustrate the political and strategic costs a state can fail to account for if it focuses solely on how the direct enemy will respond to a given policy decision.

B. Diffusely Reciprocal Responses that Harm U.S. Interests

Another way U.S. repudiation of Geneva obligations could harm U.S. interests is by diluting the international norms for behavior in conflicts through diffuse reciprocity. In this scenario, initial actions shape adverse reactions toward United States, but those adverse reactions may not directly target the United States. If a U.S. action lowers the standard for behavior amongst a certain group, for example, and the United States often participates in that group (as it does with its troop deployments around the world), then United States actors are likely to meet an enemy that treats it according to the new, lower norm.

It is difficult to measure diffuse reciprocity. One way to shed light on it is to examine how American actions have affected discourse on this issue. If those actions really do influence the international norm, then we might expect to see ripple effects, where other countries point to U.S. non-compliance as validation of their own non-compliance.

Indeed, the past few years have provided plenty of examples of just that type of behavior. In 2002, for instance, Liberian President Charles Taylor adopted the Bush administration's phrase "unlawful combatants" to describe prisoners he wished to try outside civilian courts. President Bush had used

¹³⁰ I use "treatment" rather than "policy" here because not all of the above cases of mistreatment at Abu Ghraib and Guantanamo necessarily resulted from official policy. Some might have been the actions of rogue U.S. troops. When the United States adopts a policy of not granting full Common Article 3 protections, though, it becomes easier for foreign audiences to perceive these transgressions as resulting from policy. And that perception is what matters in calculations about how those observers will react.

¹³¹ In 2004, the Center for Constitutional Rights filed a criminal complaint with a German federal prosecutor's office. The prosecutor refused to take the case. *Abu Ghraib Torture Complaint Names Rumsfeld*, ABCNEWS ONLINE, Dec. 1, 2004, <http://www.abc.net.au/news/newsitems/200412/s1255125.htm>.

this label for suspected terrorists starting a year earlier, and he made clear that lesser procedural protections attached to this label: "They [suspected terrorists] are unlawful combatants who seek to destroy our country and our way of life," President Bush said. "And if I determine that it is in the national security interest of our great land to try by military commission those who make war on America, then we will do so."¹³² Then, in July 2002, Liberian journalist Hassan Bility was arrested for allegedly operating a rebel cell that was plotting Taylor's assassination. Taylor's government detained Bility and denied him a public trial. When asked by an American reporter why Bility would not receive a public trial, Liberian Minister of Information Reginald Goodridge said: "This man is being held as an unlawful combatant and it was you guys [the United States government] who coined the phrase. We are using the phrase you coined."¹³³

Malaysia acted similarly in 2003. The Malaysian government was detaining alleged militants indefinitely. When asked to explain their detention without trial, Rais Yatim, the Malaysian law minister, pointed to Guantanamo as justification for his government's actions. He said his country's practice was "just like the process in Guantanamo. What happened to the cases that are still there and there was no due process? Similarly we have got the same treatment."¹³⁴

A number of African leaders have employed similar reasoning. When the State Department criticized Namibia for violations committed by its security forces, for example, Namibia's Permanent Information Secretary dismissed the accusations and cited the indefinite detentions at Guantanamo Bay as proof that "the U.S. government was the worst human rights violator in the world."¹³⁵ A number of other African leaders in Egypt, Côte d'Ivoire, Burkina Faso, and Cameroon also quickly learned to label their opposition forces as terrorists and then take the liberty to abridge certain procedural rights.¹³⁶

The argument here is not that these countries would play by all the rules

¹³² Mike Allen & Susan Schmidt, *Bush Defends Secret Tribunals for Terrorism Suspects*, WASH. POST, Nov. 30, 2001, at A28. White House Counsel Alberto Gonzales confirmed that this term implied fewer protections: he called leaders of al Qaeda "unlawful combatants" and said that as such they are not subject to the rules of the Geneva Convention. Verman Loeb & Susan Schmidt, *U.S. Wants Custody of Enemy Leaders*, WASH. POST, Dec. 1, 2001, at A1.

¹³³ Charles Cobb, Jr., *Liberia: Detained Journalist in Military Hands Says Minister*, ALLAFRICA.COM, July 3, 2002, <http://allafrica.com/stories/200207030780.html>.

¹³⁴ JOSEPH MARGULIES, *GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER* 143 (2006).

¹³⁵ *Id.*

¹³⁶ Shehu Sani, *Inspiring Intolerance: U.S. Actions Send a Bad Signal to Africa*, INT'L HERALD TRIB., Sept. 15, 2003, available at http://www.ihf.com/articles/2003/09/15/edsani_ed3_.php.

in the absence of U.S. transgressions. And these examples do not even show clearly that countries will necessarily treat Americans worse. Rather, these examples simply show that the United States' behavior has filtered through the international community and affected the discourse in which other states engage to legitimize their actions. The United State's behavior has perhaps influenced the actions of states, as well. Indeed, the experience of the United Nations Special Investigator on Torture, Manfred Nowak, testifies to the importance of discourse. Nowak told a news conference in 2006 that when he criticizes governments for their questionable treatment of detainees those governments "all too frequently" respond that the United States is doing something similar so it must be alright.¹³⁷ Thus, although countries may not be behaving any worse than they otherwise would have, Nowak's comments suggest that some of the mechanisms for checking this bad behavior have been eroded. It is in this way that reactions from states that are not America's direct enemy can affect international norms of behavior, and ultimately harm U.S. interests.

CONCLUSION: TOWARD A NEW CONCEPTION OF RECIPROCITY AND THE GENEVA CONVENTIONS

There has been much discussion recently about why states do or do not abide by their Geneva Convention obligations. Much of this discussion has centered on considerations of reciprocity. U.S. officials and commentators have clashed with one another over how to conceive of reciprocity and whether reciprocity should enter the calculation at all. But no one has examined how states actually treat their Geneva Convention obligations, and whether states exhibit reciprocal behavior in this context.

Original analysis of historical data reveals a striking pattern. Although the laws on the books clearly do not permit reciprocation of POW violations, in the bulk of conflicts over the past century, states have reciprocated violations of POW treaties. Moreover, they have done so in a manner akin to specific reciprocity. States have likely engaged in specific reciprocity for reasons of self-interest. Reciprocating a violation makes a point by punishing the enemy and it may induce the enemy to stop violating. Although specific reciprocity has its benefits, it also has drawbacks. Most notably, it focuses only on immediate and direct exchange with the enemy at hand. It entirely excludes from consideration less direct reactions that may come in future conflicts, from other actors, and/or along other dimensions. As such, using a narrow conception of reciprocity to make policy decisions about compliance with Geneva obligations might harm a state's ability to

¹³⁷ Reuters, *Countries Cite U.S. To Deflect Criticism on Jails, Official Says*, L.A. TIMES, Oct. 24, 2006, at 5.

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anticipate the full costs of this policy. The various indirect reactions to U.S. treatment of detainees in the war on terrorism illustrate this point.

Conversely, a broadening of the administration's conception of reciprocity would focus more attention on the full range of potential reactions to a given policy decision. These reactions might not come immediately. They might not come from the direct enemy. And they may not even come in the form of equivalent mistreatment. Nonetheless, reactions that play out in public opinion polls or on future battlefields, for example, can still harm U.S. interests. States would do well to employ a broader conception of reciprocity that places weight on these reactions. It is in the state's self-interest to understand and avert the costs of POW treaty violations to the greatest extent possible, regardless of whether those costs are imposed immediately by the direct enemy.