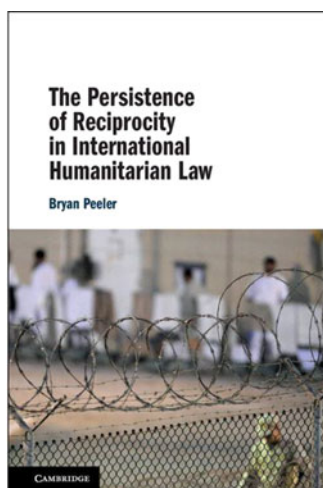


## BOOK REVIEW



# The Persistence of Reciprocity in International Humanitarian Law

**Bryan Peeler\***

**Book review by Matthias Vanhullebusch**, Chenxing Associate Professor at the KoGuan School of Law, Shanghai Jiao Tong University.<sup>1</sup>

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Compliance has been one of the most perennial questions of international humanitarian law (IHL), and theoretical and empirical studies have sought to comprehend how IHL functions respectively in the legal and policy debates and on the battlefield. Falling into the former category, Bryan Peeler's recent book on *The Persistence of Reciprocity in International Humanitarian Law* develops a new theory on compliance from the perspective of the State in general and, accordingly, illustrates this exclusively with reference to US State practice. Peeler contends that both the development and the interpretation of IHL are inherently informed by a logic of consequences: that is to say, respect for IHL is driven by reciprocal commitments on behalf of States in times of war as well as in peacetime.<sup>2</sup> His thesis draws from realist<sup>3</sup> and neoliberal institutionalist<sup>4</sup> readings of international relations. As Peeler applies these to the study of compliance with IHL obligations, he juxtaposes them with the "humanization of IHL" thesis. This latter perspective instead proclaims a logic of appropriateness when explaining normative conduct on the international plane, whereby the decision-making

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process privileges a perception “of normatively correct behaviour” above a mere cost-benefit analysis on such conduct.<sup>5</sup> Such logic is advanced by various other strands of international relations, including liberalism<sup>6</sup> and constructivism,<sup>7</sup> as well as international law schools of thought, including international legal process. Following the theory of the realist Keohane, who distinguishes between specific<sup>8</sup> and diffuse reciprocity<sup>9</sup>—embodying the logic of consequences—Peeler’s new theory on compliance is less concerned with diffuse reciprocity; instead, it further refines specific reciprocity and, accordingly, differentiates between legal and strategic reciprocity in his study on compliance with IHL obligations (Chapter 2).<sup>10</sup>

In this respect, regarding legal reciprocity, Peeler argues that, from its inception onwards, IHL has incorporated reciprocity into its language. He finds support for this in the negotiating history of the Geneva Conventions and their Additional Protocols (Chapter 3),<sup>11</sup> which stipulate conditions under which belligerent reprisals are possible under the rules governing the conduct of hostilities and afford standards of protection to those who comply with IHL obligations.<sup>12</sup> Strategic reciprocity, on the other hand, has—as a matter of policy—informed decision-making processes regardless of the (il)legality of a country’s conduct on the battlefield. Here, Peeler tests his model with reference to the United States’ usage of positive and negative strategic reciprocity in respect of its treatment of enemy fighters respectively during the Vietnam War (Chapter 4)<sup>13</sup> and the Global War on Terror, including aspects of the use of

1 Dr Matthias Vanhullebusch (PhD, SOAS) is a Visiting Professor on various training programmes organized by the International Committee of the Red Cross (ICRC) across Asia. He has been a Visiting Scholar at the Geneva Academy of International Humanitarian Law and Human Rights, the Oxford Institute for Ethics, Law and Armed Conflict, and the Asia-Pacific Centre for Military Law.

2 *The Persistence of Reciprocity in International Humanitarian Law*, pp. 39, 42.

3 According to Peeler, realist theories “deny that IHL can have ... an independent constraining effect on the behaviour of states”. *Ibid.*, p. 23.

4 In order to ensure compliance with IHL obligations, Peeler argues, “neoliberal institutionalism suggests that states include measures implementing the strategy of TFT [tit-for-tat] into the law”. *Ibid.*, p. 23.

5 *Ibid.*, p. 40.

6 Peeler considers that liberal international relations theories responsabilize the agent to promote “a culture of IHL compliance”. *Ibid.*, p. 46.

7 Constructivists, from the perspective of Peeler, believe that compliance with international norms is possible given States’ capacity towards socialization – or internalization – of international law. *Ibid.*, p. 48.

8 According to Keohane, specific reciprocity occurs when “specified partners exchange items of equivalent value in a strictly delimited sequence. If any obligations exist, they are clearly specified in terms of rights and duties of particular actors.” See Robert Keohane, “Reciprocity in International Relations”, *International Organization*, Vol. 40, No. 1, 1989, p. 4.

9 What distinguishes specific from diffuse reciprocity is, according to Keohane, the involvement of multiple actors concerned with the behaviour of other actors with whom they do not entertain a specific relationship, which affects in turn how they will perform certain obligations under international law vis-à-vis each other in different situations and across different timeframes. Here, according to Keohane, “the definition of equivalence is less precise, one’s partners may be viewed as a group rather than as particular actors, and the sequence of events is less narrowly bounded. Obligations are important.” *Ibid.*, p. 4.

10 *The Persistence of Reciprocity in International Humanitarian Law*, pp. 12–58.

11 *Ibid.*, pp. 59–94.

12 *Ibid.*, p. 93.

13 *Ibid.*, pp. 95–127.

enhanced interrogation techniques against such persons (Chapter 5).<sup>14</sup> Like Hart, he argues that the application of primary obligations of the fighting parties under IHL is inherently conditioned by the secondary rules on reciprocity.<sup>15</sup> Peeler richly explores this understanding through US case studies in which a multiplicity of contested arguments across the spectrum of authorities was present throughout the planning and execution of the Vietnam War and the Global War on Terror.

By drawing from archival resources, memos and Supreme Court judgments, Peeler offers a unique insight into those US legal and policy debates pertaining to the treatment and detention of opponents in the Vietnam War and the Global War on Terror. Interviews which he conducted in February and March 2014 with key (legal) advisers to the US State Department, such as John Bellinger and William Taft, and officials at the US Defense Department add another layer to the rich exposé of conflicting interpretations of the rules governing the treatment, detention and interrogation of enemy persons by the United States. Indeed, for (legal) historians and political scientists, this is definitely one of the most engaging and informative accounts of the different voices within the relevant US administrations—White House officials, Judges Advocate General, members of the Houses, etc.—in crucial decision-making processes on these matters. The logic of consequences, according to Peeler, was ultimately followed by those in power and the White House officials who were capable throughout these decision-making processes of silencing their domestic (political) opponents. The latter favoured a logic of appropriateness for the sake of the interests of the United States’ national image and the security of its soldiers in those conflicts and beyond.<sup>16</sup> Peeler’s new theory sheds a different light on these case studies compared to the previous work by Mark Osiel in *The End of Reciprocity*. Contrary to Osiel, who argues that “[i]t is immaterial, when one’s own violations are judged, that one’s military opponent committed the same breaches”,<sup>17</sup> Peeler finds that the United States’ decision-making processes explicitly engage with different discourses on reciprocity in order to justify certain strategic options regarding the treatment of enemy fighters in detention and their respective interrogation.

Peeler argues that during the Vietnam War, despite the ambiguities on the application of Geneva Convention III relative to the Treatment of Prisoners of War (GC III), the Johnson administration advanced a positive strategic reciprocity strategy. In this respect, by providing humane treatment to captured enemy fighters, the United States expected that American prisoners of war would equally deserve decent treatment when falling into the hands of the Democratic Republic

14 *Ibid.*, pp. 128–168.

15 Peeler refers to Hart’s distinction of primary and secondary rules, explaining that “the primary rules of a legal system are those rules that either forbid or require certain actions and generate duties or obligations. The secondary rules, on the other hand, are rules that describe the manner in which we recognize, change and adjudicate violations of primary rules.” *Ibid.*, p. 42. See also Herbert L. A. Hart, *The Concept of Law*, Oxford University Press, Oxford, 1961, p. 87.

16 *The Persistence of Reciprocity in International Humanitarian Law*, pp. 145–146.

17 Mark Osiel, *The End of Reciprocity*, Cambridge University Press, Cambridge, 2009, p. 73.

of Vietnam and the Viet Cong – despite the latter’s defection from IHL obligations. Perennial defectors, however, would not enjoy equal decent treatment.<sup>18</sup> Positive reciprocity was also advanced through the United States’ investigation into its own commission of war crimes in order to bring the communists to the negotiating table.<sup>19</sup> Conversely, the Bush administration introduced a departure from the specific positive reciprocity and general focus on IHL compliance on behalf of the US military that had existed since the Vietnam War and the conflict in Yugoslavia.<sup>20</sup> The perspectives of the Judges Advocate General were ignored throughout the decision-making processes on the drafting of the Military Commissions Act (2006/09)<sup>21</sup> and the standards of conduct regarding enhanced interrogation techniques that reflected the White House’s prevailing negative strategic reciprocity argument.<sup>22</sup>

According to Peeler, this sovereigntist move in the Global War on Terror predates the early 1980s, when it was justified for the US to opt out of international law in general and GC III in particular if done in the national interest.<sup>23</sup> Therefore, the White House pursued the use of military commissions to try unlawful combatants, deny the procedural rights of detainees under the Uniform Code of Military Justice, and inhumanely treat suspected terrorists, despite rulings of the US Supreme Court (*Hamdan v. Rumsfeld* in 2006,<sup>24</sup> *Boumediene v. Bush* in 2008<sup>25</sup>), potential adverse security threats against US interests, and the country’s deteriorating international image beyond the specific conflicts at hand.<sup>26</sup> Moreover, the deliberate rhetoric antagonizing Islam in general and Islamic fighters in particular was put at the service of the negative strategic reciprocity argument, justifying the waiver of combatant privileges to terrorists because they did not respect the laws of war.<sup>27</sup> As a result, inducing compliance – pursuant to a logic of positive strategic reciprocity – was less an issue during the Global War on Terror given the rare cases of US soldiers being detained by terrorists. The CIA rendition programmes, however, have been left untouched in this study. Parallels could have been drawn to the earlier discussion on the Vietnam War, where the United States transferred Viet Cong detainees to the Army of the Republic of Vietnam, which failed to treat them humanely despite US training.<sup>28</sup>

While Peeler’s alternative theory on compliance has offered these new insights, the reader is left wondering whether it can have a wider personal scope

18 *The Persistence of Reciprocity in International Humanitarian Law*, pp. 95, 103, 113.

19 *Ibid.*, pp. 115, 117.

20 *Ibid.*, pp. 124, 134.

21 Military Commission Act, Pub. L. 109-366, 120 Stat. 2600, 17 October 2006; Military Commission Act, Pub. L. 111-84, 123 Stat. 2574, 28 October 2009.

22 *The Persistence of Reciprocity in International Humanitarian Law*, pp. 130, 141.

23 *Ibid.*, p. 132.

24 Supreme Court of the United States, *Hamdan v. Rumsfeld*, 548 US 557 (2006), 2006.

25 Supreme Court of the United States, *Boumediene v. Bush*, 128 US 2229 (2008), 2008.

26 *The Persistence of Reciprocity in International Humanitarian Law*, p. 153.

27 *Ibid.*, p. 152. Needless to say, once the conditions for its applicability have been satisfied, IHL governs the conduct of all fighting parties irrespective of their causes of warfare.

28 *Ibid.*, pp. 110–112.

of application. That is to say, can his study on the intersection of international relations and international law, naturally focusing on the conduct of States waging war, also be applied to the normative conduct of non-State armed groups? After all, most contemporary armed conflicts—the majority of which are of a non-international character—involve non-State armed groups. Applying Peeler’s theory to such conflicts would require further empirical research to gain access to the policy debates amongst those non-State armed groups, similar to the interviews that Peeler carried out to understand how the legal arguments of the White House in the respective conflicts have been construed.

Fortunately, such privileged insights into the conduct of non-State armed groups have already been well documented in psycho-sociological studies carried out by international humanitarian organizations such as the International Committee of the Red Cross (ICRC).<sup>29</sup> Peeler’s book could have borrowed from such earlier studies in order to offer a more holistic analysis on the role of reciprocity in the normative conduct of all fighting parties in today’s non-international armed conflicts. The seeds of such analysis are already present in Peeler’s approach across the entire book as he verifies the impact of dehumanization discourses on the enunciation of positive and negative strategic reciprocity arguments—at least from the perspective of the US government. Humanitarian legal professionals and front-line humanitarian negotiators could have benefited even more from this valuable political science study if it had engaged with their particular legal methodologies and sources.

Irrespective of the reservations of humanitarian lawyers on the limited personal and material scope of application of Peeler’s alternative theory on compliance, political scientists and historians alike will find this book very informative and innovative in its approach and presentation as it revisits the role of reciprocity in policy debates before US administrations both past and present.<sup>30</sup>

- 29 Daniel Muñoz-Rojas and Jean-Jacques Frésard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, ICRC, Geneva, 2004. This study identifies the principal cause of violations of IHL as the moral disengagement of the fighters in the course of armed conflicts. In other words, parties to the conflict justify their violations of IHL by having recourse to their superior moral and/or religious cause of warfare and by dehumanizing their opponents—both fighters and civilian populations.
- 30 In his concluding chapter, Peeler briefly touches on the challenges presented by the Trump administration regarding its (lack of) respect for international norms, including IHL. See *The Persistence of Reciprocity in International Humanitarian Law*, pp. 176–184.