Introduction

Reciprocity is a deceptively simple concept that in reality has a complex and elusive nature. Emmanuel Decaux wrote in describing reciprocity, "*Intuitivement, chacun croit la connaître, avec cette force de l'évidence qui exclut toute definition. Mais, s'agit-il de l'analyser, la réciprocité devient floue, incertaine, évanescente.*"[1] [Intuitively, everyone believes they know it, with the force of the obvious that excludes any definition. But when it comes to analyzing reciprocity, it becomes blurry, uncertain, evanescent] "Reciprocity" is often used to describe some kind of return, of dependence of conduct. In the context of international law, its use also often takes on negative connotations: reaction, reprisals, retortion. It implies lawlessness, private justice, symmetrical reactions: the famous maxim of "an eye for an eye, a tooth for a tooth." But reciprocity may also have positive connotations when used to mean returning kindness with kindness, comity, and positive returns. All these, however, still fall short of the label of law. It is this elusive nature of reciprocity that constitutes the main challenge when analyzing its role in international law.

It is particularly the negative connotations of reciprocity and its link to conduct-based responses in a lawless context that have led to a juxtaposition of reciprocity with community interests, institutionalization, and the existence of objective legality. This opposition between reciprocity and community is, like the concept of reciprocity itself, deceptively simple. Intuitively, it makes sense: to have stable legal relations in a wider interest than the bilateral, even selfish, reactions of one State to the conduct of another, then international relations simply cannot be based on reciprocity.

[1] E. Decaux, *La réciprocité en droit international*, Paris, Librairie générale de droit et jurisprudence, 1980, p. 2.

The aim of this book is to go beyond reciprocity merely as a description of conduct, to look at the *legal* concept of reciprocity as exists in international law. As the reader will see, reciprocity is found in many areas of public international law; it underlies numerous mechanisms of the law, and turns up even where we might not expect to find it, including in areas of public international law that concern rules of interest to the international community as a whole, and in obligations *erga omnes* that are owed by States to the international community.

The question addressed here is thus: What explains the role of reciprocity in contemporary, communitarian public international law, and is it antithetical to community interests and obligations – indeed, to the existence of an international community itself? The answer advanced here is that reciprocity in public international law is not antithetical to community interests and obligations but that its importance is explained by a structural factor: the sovereign equality of States. This explains and predicts where reciprocity will be relevant and where it will find its limits. Reciprocity will predictably be important as a default means of regulation in areas closely connected to the exercise of sovereign power by the State, where an imbalance in obligations can most easily impair equality. But it is its relevance in the horizontal legal obligations between States, regardless of content, which explains why we find reciprocity even in areas relating to human rights and community interests. Its application is instead limited in obligations owed by States to individuals, where the legal relationship has a vertical element, and legal inequality between the subjects of the rule makes reciprocity inapplicable. Reciprocity is not something limited to bilateral obligations, but it also works in multilateral obligations and those whose focus is an interest of the international community as a whole. Reciprocity is therefore a structural factor in international law, fundamental to the operation of a horizontal system of law based on the *legal*, if not always factual, equality of States.

Many scholars across the social sciences view the notions of reciprocity and community as antithetical. There is widespread recognition among authors that reciprocity has a fundamental importance in international law; yet reciprocity is almost invariably contrasted with the idea of an international community and of community obligations; reciprocity is therefore generally viewed as a characteristic of a "classical" international law that is primarily bilateral in operation.

On the other hand, views that consider reciprocity as the basis on which the international legal system rests often see international law

as the sum of mutual renunciations made by States[2] – what may be termed a voluntarist viewpoint that sees international law as no more than a series of contractual undertakings.[3] This view is difficult to reconcile with concepts such as community interests, *erga omnes* obligations, and the existence of peremptory norms of international law.[4] Reciprocity is also considered fundamental by those who consider international law a result of coexistence between antagonists, particularly theorists from the time of the Cold War. Georg Schwarzenberger, for example, underlined the "reality" of international law as reciprocal, expressed through the principle of State sovereignty.[5] In these approaches, reciprocity is understood as tit for tat, or conduct dependent on the actions of another subject.

Still others consider reciprocity as being proper to legal systems that are less developed or institutionalized, of which, so the argument goes international law is a clear example. For example, in his separate opinion in the *Former Yugoslav Republic of Macedonia* v. *Greece* case before the International Court of Justice (ICJ), Judge Simma stated:

> Reciprocity constitutes a basic phenomenon of social interaction and consequently a decisive factor also behind the growth and application of law ... The lower the degree of institutionalization of a legal order, however, the more mechanisms of direct reciprocity will still prevail as such.[6]

[2] Combacau, for example, at one point describes *ius cogens* as a "useless notion"; J. Combacau and S. Sur, *Droit international public*, 10e ed., Paris, Montchrestien, 2010, p. 162.

[3] See G. Scelle, "La doctrine de Léon Duguit et les fondements du droit des gens," *Archives de philosophie du droit et de sociologie politique*, nos. 1–2, 1932, pp. 84–85; D. Anzilotti, *Corso di Diritto Internazionale*, Padova, Cedam, 1955, p. 46.

[4] Combacau and Sur, *Droit international public*, p. 162.

[5] G. Schwarzenberger, "The Fundamental Principles of International Law," *Collected Courses of the Hague Academy of International Law*, vol. 87, 1955, p. 225. The basis of coexistence between States from the beginning of the Cold War was to be based on the five principles of Panch Shila, later also echoed among the principles in the Declaration on Friendly Relations and Co-operation among States of 1970; these include mutual respect for territorial integrity and sovereignty, mutual noninterference in internal affairs, equality and mutual benefit, and peaceful coexistence: See Agreement (with exchange of notes) between the Republic of India and the People's Republic of China on Trade and Intercourse between Tibet region of China and India, 29 April 1954, 299 U.N.T.S. 57, preamble; General Assembly Resolution 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, 24 October 1970; M. Virally, "Le principe de réciprocité dans le droit international contemporain," *RCADI*, vol. 122, 1967, p. 8.

[6] Application of the Interim Accord of 13 September 1995 (the *Former Yugoslav Republic of Macedonia* v. *Greece*), Judgment of 5 December 2011, ICJ Reports 2011, Separate Opinion of Judge Simma, p. 699.

International law is sometimes considered to be an example of a primitive system of law that, lacking a centralized enforcement mechanism, allows self-help and retaliation in response to wrongdoing. The idea that a reciprocal form of retaliation must be available in a legal system lacking a centralized enforcement mechanism is present in many of the explanations according to which a "state of nature" exists at the international level.[7] "Primitive" in this case refers to the lack of centralized organization in the international legal order and more precisely to the absence of a centralized mechanism to make rules and impose sanctions.

But it seems limiting to write off as "primitive" the international legal system, even as it changes and develops, merely because it is a system in which States are legally equal, rather than subject to a higher, centralized lawmaking body. If we accept that international law is, by virtue of its lack of centralized enforcement, a "primitive" system of law, then we are essentially saying that internal law is the only possible, developed legal system – or "the only finalised form law can take, and its only finality."[8] There may be those who agree, and look forward to the day a world State exists. However, it is perhaps more useful in the international legal – and political – system as we know it to see international and domestic law as *different*, rather than as different stages of evolution of the only form a legal system can take.

Those views that consider international relations and indeed international law as something similar to a "state of nature" at the international level also only describe a situation in which there are no legal rules – which is not an accurate depiction of the international legal system, in which certain very well-defined consequences exist when rules are broken, as will be seen in the examination of State responsibility in Chapter 5.[9] Furthermore, the absence of any punitive element to the consequences of breaching rules of international law, firmly rejected during the codification of the rules on States responsibility, limits the

[7] For example, international economic law analyses; see, for example, F. Parisi and N. Ghei, "The Role of Reciprocity in International Law," *Cornell International Law Journal*, vol. 36, no. 1, Spring 2003, p. 1. In game theory, reciprocity is indicated as an ideal strategy to ensure cooperation over repeat interactions between States – but only where there is an advantage to be drawn from such cooperation; see ibid., p. 11.

[8] R. Kolb, *La bonne foi en droit international public*, Paris, PUF, 2000, p. 167; see also M. Virally, "Sur la prétendue 'primitivité' du droit international," in *Le droit international en devenir: Essais écrits au fil des ans*, Paris, PUF, 1990, pp. 91–101.

[9] These are set out in the law of State responsibility; see Section 5.2.

possible comparisons with another commonly considered view of reciprocity, that of "an eye for an eye," the *lex talionis*.

This separation between classical, reciprocal and contemporary, non-reciprocal international law, which either considers international law itself as primitive, or considers reciprocity to be extraneous to community interests and obligations, seems to give an inordinate amount of importance to the execution of the law and particularly to the absence of a centralized public power that can enforce the observation of rules. This book instead aims to show how it is the horizontal structure of international law that provides the ideal conditions for reciprocity to operate: equality and independence of the subjects of the law, and the absence of any superior power. Reciprocity in this sense is both a result of the sovereign equality of States,[10] which implies the need for a given State not to obtain a greater advantage or bear more obligations than another, and a means of ensuring that sovereign equality is maintained effectively.[11] But these structural characteristics do not change because a rule concerns a given subject matter that is of particular importance to the international community. It is not sufficient to look at reciprocity in international law through the prism of classical versus modern or bilateral versus communitarian. Therefore, the analysis here will juxtapose "classical" and "contemporary" domains of international law, looking at how reciprocity operates to see where it might encounter limitations, and why. The analysis focuses in particular on whom obligations are owed to, and what the consequences of their violation are – that is, the *structure* of international legal obligations, rather than their content or object. The aim throughout is to look closely at areas that might generally be considered to escape the operation of reciprocity, to see whether this is really the case, and if not, then why.

While the analysis here focuses on reciprocity in international law, the starting point in Chapter 1 is a socio-philosophical approach, looking at the relationship between reciprocity, psychology, and morality, to see how reciprocity is a concept that is closely linked to the existence of a

[10] P.-M. Dupuy, "L'unité de l'ordre juridique international: Cours général de droit international public," *Collected Courses of the Hague Academy of International Law*, vol. 297, 2000, p. 54.

[11] Parisi and Ghei, "Role of Reciprocity in International Law," p. 41. This same idea is put forward by Michel Virally, when he underlines that, by virtue of reciprocity, sovereignty limits sovereignty, so that to each obligation for one State, there corresponds an obligation for another State; but also, for each obligation of one State, that same State can claim a corresponding right from others. M. Virally, "Panorama du droit international contemporain," *RCADI*, vol. 183, 1983, p. 84.

community, but also, in its deepest sense, to fairness and equality. Chapter 1 also goes on to analyse the origins of reciprocity in the Roman law of contracts, as well as more modern applications in contract law, and other examples of the operation of reciprocity in domestic law. This look at domestic legal systems shows not only that reciprocity in fact can, and does, exist within "institutionalized" domestic law but also shows the close link between reciprocity and sovereignty, giving an important initial indication of the use made by national legal systems of reciprocity as a basis on which to limit the State's sovereignty.

The issue of defining reciprocity is the focus in Chapter 2, alongside establishing the legal nature of the concept and the functions it can have within the law – in norm-creation, as a condition of application of the law, and in ensuring execution of the law. "Reciprocity" can have many possible meanings, and many are used in different fields of the sciences and social sciences, as examined in Chapter 1. However, as the topic being dealt with here is public international law, for present purposes, the meaning given to reciprocity is that of the legal interdependence of the corresponding rights and obligations States mutually owe each other. Therefore, it does not cover mere factual conduct but relates to the structure of international rights and obligations. The functions of reciprocity identified in Chapter 2 are the frame of reference for the analysis of positive law that follows in Chapters 3–6. In discussing public international law, it is also important to situate reciprocity with respect to the doctrine of sources of international law, and in particular general principles and customary international law. Reciprocity is particularly relevant as a dynamic basis of cooperation in the creation of rules of customary international law.

Having examined the background of reciprocity as a concept, establishing its nature as relevant to community relations, intrinsically linked to fairness and equality, and its uses in domestic law as well as a conceptual background in international law, the remaining chapters carry out an analysis of reciprocity in public international law and practice.

With the aim of examining whether reciprocity is still relevant in community-focused obligations of international law, and seeing where limitations to reciprocity arise, the first focus of the analysis in Chapter 3 is on treaties. The law of treaties is a fertile ground in which to easily compare the functioning of reciprocity in a variety of legal obligations. The drafting history of the Vienna Convention on the Law of Treaties (VCLT), particularly in relation to reservations to treaties, sets out the

reciprocity underlying how treaty obligations work. The outline that begins to emerge from examining different kinds of treaty, particularly where human rights are concerned, is that limitations to mechanisms of reciprocity appear when obligations are owed to individuals. The study of treaties of the integral type shows that it is not the subject matter or the existence of a collective or community interest on which the obligation focuses that limits the applicability of reciprocity but rather this existence of a vertical legal relationship within the obligation.

This is however not a sufficient point at which to stop in examining reciprocity in the functioning of treaties; after all, the argument that reciprocity is linked to sovereign equality and therefore characterizes horizontal legal relations would be invalidated if reciprocity were absent from treaties that created objective regimes, or put in place differentiated obligations. The remainder of Chapter 3 therefore looks at how reciprocity works in treaties that have differentiated obligations, those founding international organizations, or where treaties have effects beyond the parties. For all these kinds of treaty, reciprocity again follows the pattern described above, being more limited where rights are conferred upon entities that are not in a relationship of sovereign equality to States. Distinctions as to bilateral or multilateral obligations, or the content of the obligation itself, do not have an effect on the relevance of reciprocity.

A closer analysis of how reciprocity functions in rules concerning the treatment of individuals in public international law is the subject matter of the analysis in Chapter 4. Here again, the point is to examine whether it is the *content* of the norm – that is, the fact that it concerns an individual, or the international protection of an individual – or its *structure* that dictates whether reciprocity will be limited within a given rule. Therefore, the analysis looks both at "classical" standards of treatment of individuals, such as the international minimum standard, national treatment, or most-favored nation (MFN) treatment, and compares these with contemporary international humanitarian law, human rights law, and investment law. Here again, the same pattern emerges, of reciprocity finding its limitations when rules have a vertical element in that they give rights directly to individuals, and reciprocity instead playing a more important role when there is an inter-State dimension to a rule, even when such a rule concerns a collective interest.

Reciprocity in the execution of rules is another crucial function and one in which the tension between the view of reciprocity as a negative reaction to some form of wrongdoing and that advanced here, of a

structural feature of a legal system based on sovereign equality, can most easily be seen. It is after all in this area that we might expect to find the greatest relevance of reciprocity because of the lack of a central enforcement mechanism in international law. Chapter 5 therefore looks at how reciprocity functions in the execution of international law, in the law of treaties, and the law of State responsibility. Rather than finding any "pure" reciprocity, or principle of reciprocity, in this area of international law reciprocity has the greatest variety of meanings and is expressed in a number of specific mechanisms. Chapter 5 compares the classical mechanisms of responsibility and nonperformance in response to a breach of the law to the regime around peremptory and *erga omnes* rules, to see whether rules that are designed to protect a matter of collective interest to the international community escape the functioning of reciprocity in execution. It finds that the different types of obligation that exist in international law (bilateral, interdependent, integral) all still function on the basis of reciprocity, as does the law of State responsibility in its entirety. In the inter-State domain of the rules of international responsibility, reciprocity remains a structural factor.

In contemporary international law, it is not only the rules of State responsibility that dictate the consequences of a breach, but there exist a number of dispute settlement mechanisms and courts to which States, and individuals, can have recourse. Chapter 6 therefore finally looks at the jurisdiction of a variety of international courts and tribunals, including human rights mechanisms. Reciprocity plays an important role in the context of dispute settlement, and is particularly important in the jurisdictional requirements of the ICJ and the dispute settlement system under Part XV of the UN Convention on the Law of the Sea (UNCLOS). It is also still required in inter-State complaints mechanisms under human rights treaties. However, in individual–State complaint mechanisms, reciprocity is simply inapplicable. Once again, the existence of a relationship of legal equality between the two subjects concerned in a dispute is the key. The chapter ends with some considerations on the extension of the jurisdiction of investment arbitral tribunals on the basis of the MFN clause.

Throughout the pages that follow, and attempt will be made to highlight both the structural consequences of reciprocity in international law and the specific meanings that it may have in given contexts or in given roles. The end result will hopefully be to paint a picture of reciprocity in public international law that shows both a general landscape and – like trees, rivers, and villages on a canvas – the different manifestations of reciprocity and the roles it may fulfill within that landscape.

1 Reciprocity at the Basis of Law and Society

The study of reciprocity has not been restricted to the field of international law – far from it. Reciprocity is a concept of some importance in philosophy, psychology, and sociology, in explaining human behavior, and indeed in the formation of law. Reciprocity is relevant not only in international law but also in certain branches of domestic law – a point that goes some way toward disproving the view of reciprocity as a characteristic of "primitive" or prestate legal systems. Notably, reciprocity is of fundamental importance in the law of contracts and in the relationships between entities of federal states, as well as being a basis for respecting international law in domestic constitutions.

A study of reciprocity in public international law would miss out on some important insights into the nature of reciprocity if it were to limit the analysis exclusively to the field of international law. The analysis in this book will therefore begin with a wider background to the concept of reciprocity, which will give a deeper comprehension of its significance. This will highlight the importance of reciprocity as a concept that is fundamental to human behavior, intrinsic to the existence of law, and foundational to notions of fairness.

1.1 The Formation of Law and Society

Reciprocity has been the object of significant attention in philosophy, ethics, and sociology. There are many interesting questions that could be addressed here, but the analysis will focus on the characteristics of reciprocity that are most useful to the study of its role in international law: the relationship between reciprocity and community, reciprocity's relationship with justice, and its importance in the formation of legal rules.

1.1.1 *Philosophical Approaches to Reciprocity*

Some of the basic questions regarding the nature of reciprocity in philosophical thought mirror the issues we encounter in international law: Is reciprocity limited to bilateral and self-interested relationships, such as those that may arise from a contract? Or does it have a greater role to play in human community?[1]

It can be hard to imagine how the concept of reciprocity could be compatible with the idea of community if understood as "tit for tat," or returning cooperation or defection for like behavior. If we presuppose that in a community there exist absolute obligations owed by each member regardless of the conduct of the others, it seems completely incongruous to accept that each subject may modulate its conduct in response to the behavior of others. Intuitively, if "tit for tat" is the rule in social relations, other principles have presumably already fallen by the wayside; any idea of community would appear to have already broken down.

But this depends on our understanding of reciprocity. Hiskes, for example, is one author who argues that "tit for tat" is not the same as reciprocity but rather a pattern of behavior that diminishes reciprocity.[2] According to this point of view, reciprocity is a wider ethical principle that cannot be reduced to reactive responses to conduct. In any case, reciprocity operates in a distinctly intersubjective manner, regardless of its ethical significance or of whether it is operating between two individuals or in a community. I cannot reciprocate toward myself; I need another person, or a collective, with whom to enter into a relationship of reciprocity. Reciprocity by necessity implies social relations.

But in order to enter into such a relationship with another, a second requirement exists: I need to recognize that other subject as capable of being bestowed with rights and obligations, and of offering some kind of exchange. Even considering a simple exchange of goods between two persons, the effect of reciprocity is to create correlative rights and obligations for the two persons involved. A prerequisite for reciprocity is therefore mutual recognition between two or more subjects.[3]

[1] See, e.g., R. P. Hiskes, *The Human Right to a Green Future*, Cambridge, Cambridge University Press, 2009, pp. 50–51.
[2] Ibid., p. 52.
[3] On the function of justice as providing relationships of mutual recognition, see J. Robbins, "Recognition, Reciprocity and Justice," in M. Clarke and M. Goodale, eds., *Mirrors of Justice: Law and Power in the Post–Cold War Era*, Cambridge, Cambridge University Press, 2010, pp. 187–188.