

Reciprocity in Public International Law

There is a common perception of reciprocity as a concept that is opposed to the communitarian interests that characterise contemporary international law, or merely a way of denoting reactions to unfriendly or wrongful conduct. This book disputes this approach and highlights how reciprocity is instead linked to the structural characteristic of sovereign equality of States in international law. This book carries out an in-depth analysis of the concept of reciprocity and the elements that characterise it, before examining the various roles and articulations of reciprocity in a number of fields of public international law: the law of treaties, the treatment of individuals, the execution of international law, and the jurisdiction of international courts and tribunals. In all these areas, it analyses both more traditional and more contemporary examples to demonstrate how reciprocity is closely linked to the very structure of public international law.

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Reciprocity in Public International Law

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Foreword

Reciprocity has a bad reputation in current times. It can be seen as a matter of selfishness, a way of taking into account one's own interests first, which in turn become the yardstick by which to measure what one is ready to accept from the other in exchange. On the contrary, progressive ideas are focused on communitarian interests, be they matters of human rights, protection of the commons, peoples' rights, or peace. At first sight, a reader may think that this work swims against the tide. Indeed, it does something different and more important than that. The book you have in your hands or on your screen challenges received ideas and proceeds with a concrete analysis, beyond superficial *a priori* takings of stance, unfortunately so in vogue today.

The subject of reciprocity has been addressed by the doctrine and to a certain extent, it can even be said, quite extensively. Nevertheless, it needed a contemporary, global, and specific study, and this is what Dr. Whelan has undertaken. This is a revised and updated version of her PhD thesis, brilliantly defended at the Graduate Institute of International and Development Studies of Geneva with the highest possible grades. She gives us a text of rather small dimensions, if we judge it in light of a current tendency to produce long pieces of work. Conciseness is therefore another merit of this text. Nothing in this book is superfluous or merely descriptive.

The working hypotheses are clearly presented and discussed. First, the author demonstrates that reciprocity is not in opposition to the increasing consideration by international law of community interests or subjects other than the State. Second, the still important role of reciprocity in international law nowadays is explained by the existence of sovereign

equality as a fundamental principle of international law, one of its very structural factors.

The structure of the book is clear, and the text is readable in an agreeable manner. The first two chapters expound and analyze the role of reciprocity in society and in law in general, which then allows the author to frame the concept more correctly within international law. The following chapters relate to the main areas in which reciprocity plays its major role in international law: treaties, international organizations, the protection of the individual in its various forms, the implementation of the consequences arising from nonrespect of the law (which includes but goes beyond international responsibility), and finally the settlement of international disputes and more broadly the activity of international courts and tribunals.

The reflection was carried out and transpires in the text in a rigorous way. Only someone with an excellent knowledge of the subject matter, and also of law in general, is able to produce such an important contribution to the theory of international law. The case law considered is from many different areas and a variety of different courts and tribunals. Doctrinal works are critically appraised and, something remarkable in these times of exclusive use of English, were consulted and studied in several languages. Reciprocity allowed the author to make a cross-sectional study of the international legal system, which requires deep knowledge of the different “branches” of the discipline.

I am sure you will not only enjoy and benefit from reading this book but also, at the end, certainly come away with an enriched perspective on international law.

Marcelo Kohen, Professor of International Law
Graduate Institute, Geneva
Geneva, March 2022

Preface and Acknowledgments

This book is the revised version of a PhD thesis completed in 2017 at the Graduate Institute of International and Development Studies in Geneva, under the supervision of Professor Marcelo Kohen. It began its life a few years before then, from a curiosity about the idea of reciprocity in international law; during my time as a student in International Law at the Graduate Institute, I had the good fortune of being taught by Professor Pierre-Marie Dupuy shortly before his retirement. He first convinced me that not only was reciprocity an interesting topic but that it deserved to be the subject of a PhD thesis.

That initial idea of analyzing the role of reciprocity in international law gained in scope and complexity the more familiar the concept became. Reciprocity is something extremely concrete, and yet, up close, it proves almost frustratingly elusive, which at the very least makes it an excellent candidate for in-depth research. Perhaps because it feels so concrete, reciprocity is often considered a vestige of a classical system of international law that we have left behind with the advent of ideas such as community interests and peremptory norms. Nonetheless, it still crops up across public international law. The idea underlying that doctoral thesis – and this book – is that reciprocity is important in international law because it reflects a structural characteristic of the system, namely sovereign equality, and it is not just found in areas closely linked to the “old”, classical international law.

I would most certainly not have found a path through the many questions, or the fuzzy contours of the concept, were it not for the careful supervision of Professor Marcelo Kohen. I was privileged to be the teaching assistant for his General Course of Public International Law for over three years at the Graduate Institute, which pushed me to reflect on the *tout organique* of international law and on reciprocity’s role within

it. Not only am I extremely grateful for his guidance over the years but also greatly honored that he has written the foreword for this book. The text also greatly benefited from the thoughtful comments of those who, alongside Professors Kohen and Dupuy, were members of the jury at my thesis defense, namely Judge Georg Nolte and Professor Eric Wyler.

Since 2017 the road has been long, and that initial thesis has undergone further work in preparation for its publication. I am deeply grateful to Cambridge University Press, and particularly Tom Randall, for agreeing to publish it and also for the guidance and patience during the process of revision. The text has also benefited greatly from the comments of its five (anonymous) reviewers, who pushed me to reflect and, I hope, improve it. Since completing the PhD in 2017, I have been working at the Department of Foreign Affairs of Ireland. It goes without saying that the views expressed in the present book are my own and do not represent those of the department.

If the ideas in this book have matured over time, it is also thanks to those who I worked with during my time as a teaching assistant at the Graduate Institute, the position that funded the original PhD – particularly Edward Kwakwa, Professor Jorge Viñuales, and Fuad Zarbiyev. Thanks also go to my friends and former colleagues Bérénice, Chiara, Dan, Elena, Elizabeth, Ginevra, Jason, Kendra, Kerim, Leon, Lorenzo, Sarah, and Vince, for (variously) their comments, insights, and assistance in accessing resources. Thanks also to Marcin Kaldunski for inviting me to discuss my work with his research group. I am also particularly grateful to the staff of the Graduate Institute Library and the Peace Palace Library in The Hague. Completing work on this book without access to a university library, and with the restrictions of the Covid-19 pandemic, would have been impossible if not for the many resources available remotely through their networks.

Finally, thanks to my family – particularly my parents, Gerard and Silvia, and my sister, Antonia. This book is dedicated to them, and to the memory of my grandfathers, Eugenio and Anthony.