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978-0-521-51351-7 - The End of Reciprocity: Terror, Torture, and the Law of War

Mark Osiel

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THE END OF RECIPROCITY

Why should America restrain itself in detaining, interrogating, and targeting terrorists when they show it no similar forbearance? Is it fair to expect one side to fight by more stringent rules than the other, placing itself at disadvantage? Is the disadvantaged side then permitted to use the tactics and strategies of its opponent? If so, then America's most controversial counterterrorism practices are justified as commensurate responses to indiscriminate terror. Yet different ethical standards prove entirely fitting, the author contends, in a conflict between a network of suicidal terrorists seeking mass atrocity at any cost and a constitutional democracy committed to respecting human dignity and the rule of law. The most important reciprocity involves neither uniform application of fair rules nor their enforcement by a simple-minded approach. Real reciprocity instead entails contributing to an emergent global contract that encompasses the law of war and from which all peoples may mutually benefit.

Mark Osiel has written five books on the law of war, most recently *Making Sense of Mass Atrocity* (Cambridge University Press, 2009) and *Mass Atrocity, Ordinary Evil, and Hannah Arendt: Criminal Consciousness in Argentina's Dirty War* (2001). He has lectured at the International Criminal Tribunal for the former Yugoslavia and advised on the prosecution of General Augusto Pinochet and the perpetrators of the Rwandan genocide. He regularly consults to international organizations and governments in postconflict societies on issues of transitional justice. Osiel has been a Visiting Fellow at Cambridge University, Harvard's Kennedy School of Government, the London School of Economics, and universities in Argentina, Brazil, France, and India. He teaches law at the University of Iowa and is director of International Criminal and Humanitarian Law at the T. M. C. Asser Institute, a think-tank in The Hague devoted to international law and part of the University of Amsterdam.

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TERROR, TORTURE, AND THE LAW OF WAR

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For my recent international students:

Khaliq, Mohit, Rohit, Sergei,

Elvana, Jon, and David

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We acquire attachments to persons and institutions according to how we perceive our good to be affected by them. The basic idea is one of reciprocity, a tendency to answer in kind. Now this tendency is a deep psychological fact. Without it our nature would be very different.

John Rawls, *A Theory of Justice*, 1971

International humanitarian law texts rarely admit it, yet without reciprocity in practice those texts may be of little avail, for not all belligerents will be so saintly as to observe restraint and to honour humanitarian obligations in the face of an enemy's persistent refusal to do so. The most effective actual working engine of international humanitarian law observance, far from being established or even mentioned in the Geneva Conventions . . . works in fact in apparent defiance of them. Reciprocity is its name. Reciprocity may roughly back humanitarian principle, whether humanitarians or principle ask it to or not.

Geoffrey Best, *War and Law since 1945*, 1994

Since we have reacted in kind, your description of us as terrorists . . . necessarily means that you and your actions must be defined likewise. . . . If killing those that kill our sons is terrorism, then let history witness that we are terrorists. . . . We treat others like they treat us. . . . The Americans started it, and retaliation . . . should be carried out following the principle of reciprocity, especially when women and children are involved. . . . If we don't have security, neither will the Americans. . . . We swore that America could never dream of safety, until safety becomes a reality for us living in Palestine. . . . Terror for Terror . . . Blood for blood, destruction for destruction . . . Stop spilling our blood in order to save your own.

Osama bin Laden, *Messages to the World: The Statements of Osama bin Laden* (2005), and 2007 fatwa

Whoever fights monsters should see to it that in the process he does not become a monster. And when you look long into an abyss, the abyss also looks into you.

Friedrich Nietzsche, *Beyond Good and Evil*, 1886

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Frontmatter

[More information](#)

Contents

| | |
|--|---------------|
| Introduction | <i>Page</i> 1 |
| PART ONE RECIPROCITY IN HUMANITARIAN LAW | |
| 1 Reciprocity in the Law of War: Ambient Sightings, Ambivalent Soundings | 31 |
| 2 Reciprocity in Humanitarian Law: Acceptance and Repudiation | 49 |
| 3 Humanitarian vs. Human Rights Law: The Coming Clash | 111 |
| PART TWO THE ETHICS OF TORTURE AS RECIPROCITY | |
| 4 Is Torture Uniquely Degrading? The Unpersuasive Answer of Liberal Jurisprudence | 151 |
| 5 Fairness in Terrorist War (1): Rawlsian Reciprocity | 166 |
| 6 Fairness in Terrorist War (2): Kantian Reciprocity | 178 |
| 7 Humanitarian Law as Corrective Justice: Do Targeted Killing and Torture “Correct” for Terror? | 195 |
| PART THREE RECIPROCITY IN THE SOCIAL SCIENCE OF WAR | |
| 8 Reciprocity as Civilization: The Terrorist as Savage | 221 |
| 9 The Inflationary Rhetoric of Terrorist Threat: Humanitarian Law as Deflationary Check | 244 |
| 10 Reciprocity as Tit-for-Tat: Rational Retaliation in Modern War | 264 |

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978-0-521-51351-7 - The End of Reciprocity: Terror, Torture, and the Law of War

Mark Osiel

Frontmatter

[More information](#)

viii

Contents

| | | |
|----------------------------------|--|-----|
| 11 | The “Gift” of Humanitarianism: Soft Power and Benevolent Signaling | 296 |
| PART FOUR THE END OF RECIPROCITY | | |
| 12 | Martial Honor in Modern Democracy: The JAGs as a Source of National Restraint | 329 |
| 13 | Roots of Antireciprocity: Transnational Identity and National Self-Respect | 362 |
| | Conclusion | 390 |
| | <i>Acknowledgments</i> | 399 |
| | <i>Notes</i> | 405 |
| | <i>Index</i> | 653 |