Introduction

What treatment is fitting for high-ranking Al Qaeda suspects who can be detained or located, who repudiate humanitarian law,[1] and who qualify as neither prisoners of war nor protected civilians under the Geneva Conventions?[2] Such persons undoubtedly have information about terrorist organizations and plans[3] that could be useful in preventing mass atrocity. If militant jihadists continue to threaten the United States with attacks on the scale of 9/11, is it defensible to detain hundreds of such individuals indefinitely? And may such groups' leaders be killed at any time, even when far from any combat?[4] More generally, when may a country at war expect the enemy to reciprocate its own restraint in following the law of armed conflict?[5] And if the enemy will not exercise a similar forbearance, at what point (and in what ways) is the law-abiding state released from its normal legal duties, to restore a tactical and moral symmetry in confrontation?

The law of war rests on certain assumptions not immediately applicable to America's conflict with Al Qaeda and kindred groups.[6] Within such law, for instance, the justice of a country's cause is irrelevant to how enemies should treat that country's soldiers.[7] Conscripts are often the innocent means by which unjust rulers pursue their ignoble ends. Even enlistees in a wrongful cause are generally misguided dupes of well-intentioned nationalist ardor, aroused by powerful leaders employing state censorship and propaganda. Such leaders remain the true culprits, behind the scenes. The lowly "grunt" or "doughboy" acts from duty, not from passion, except perhaps the understandable passion to protect immediate combat "buddies." Belligerent forces consist of modern armies that, as formal bureaucracies, are committed to a means-end rationality. The Geneva Conventions, in their protections for prisoners of war (POWs) and other detainees, are predicated on all these assumptions.

But what happens to the law of war when these assumptions cannot be made? Has traditional humanitarian law become today's conceptual "iron cage," preventing fresh thinking about the novelties of the West's strategic predicament and the legal challenges it poses?

Some will reply that the answers to most such questions are now clear from the U.S. Supreme Court's 2006 opinion in *Hamdan v. Rumsfeld*.[8] All captives enjoy the considerable protections afforded by Common Article 3 of the Conventions. That provision prohibits treatment of detainees amounting to "outrages upon human dignity, in particular, humiliating and degrading treatment."[9] It permits a detainee's prosecution only by "a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[10] Assassination has long been banned by executive order,[11] thereby eliminating it from the American arsenal of lawful fighting methods. Positive law is thus clear, to this extent.

Yet this is not the proper endpoint of legal, much less of moral or sociological analysis. The principle of reciprocity continues to infuse much of international law, including humanitarian law, both customary and treaties, particularly those governing the conduct of hostilities and prohibiting certain weapons. The United States has also "persistently objected" to the development of a customary rule prohibiting "reprisals" against civilians, and so America is not bound by such an emergent rule.[12] As a moral principle with deep roots throughout international law and in the U.S. law of foreign relations, reciprocity has a strong gravitational force. It could be understood to justify forcible countermeasures through targeted killing of Al Qaeda leaders, for instance, and perhaps also their sustained, preventive detention and coercive interrogation.[13]

Insofar as they may be justified by the reciprocity principle, the three practices here in question would entail a qualified relaxation of normal rules of humanitarian law in response to its complete repudiation by the belligerent whose fighters would be so treated. Retaliation directed only against those in positions of responsibility within Al Qaeda would withstand the perennial criticism that reprisals punish the innocent.[14] Such reprisals would be, in fact, highly discriminating and hence respect humanitarian law's most central principle. On this understanding of reprisal, leaders – whether combatant or civilian – of a fighting force dedicated to mass attacks on civilians may be subjected to degrading measures insofar as these practices are directed toward protecting civilian populations, through incapacitation and intelligence gathering.[15]

Answering the legal questions does not entirely resolve, in any event, the more basic moral question: In this type of conflict, what should the law

permit, prohibit, and require concerning Al Qaeda leaders whose whereabouts can be identified or who have been detained? In offering an answer, this book aims to move existing discussion beyond the tired opposition between a crude "utilitarianism" (the ends justify the means) and "Kantian" absolutism (torture and extrajudicial killing are always impermissible, though the heavens may fall).

There is also the question of why states do or do not comply with their duties. We lack, and urgently need, what might be called a sociology of restraint: an account of the forces within and between societies that lead them to honor or to stray beyond the law's bounds when engaged in war. The demands of positive law in this area have not always been sufficient to motivate full adherence, even for constitutional democracies committed to the "rule of law."[16] In international relations, knowing the formalities of positive law "on the books" is rarely enough to know what will actually happen "in action."

American practice regarding detained Al Qaeda suspects is widely and rightly regarded as troubling. Yet it is notable how broad the range of American support has been for only the most minimal restraint. More than half of Americans report to survey researchers that they find it "convincing" that "given what we learned from the 9/11 attacks, we cannot afford to tie our hands by declaring off limits any method for getting information that could be useful in the war on terrorism."[17]

Six of seven 2008 Republican presidential hopefuls, in their second public debate, expressly condoned the use of "aggressive interrogation techniques" on terrorist suspects.[18] In June 2007, only two of the party's enlarged group of ten announced candidates favored closing the Guantánamo detention facility.[19] Its closure would, in any event, have entailed sending many of its denizens home to countries more likely to mistreat them seriously than has the United States. And in a public lecture, Supreme Court Justice Antonin Scalia even praised the television program *24*, announcing that there should be no "absolute" prohibitions on torture.[20] Memoranda by Steven Bradbury, acting head of the Justice Department's Office of Legal Counsel, continued to authorize harsh interrogation methods well after the Bush administration publicly claimed to have abandoned them.[21] In February 2008, Republican presidential nominee John McCain voted against a bill that would have barred the CIA from waterboarding detainees and encouraged President Bush to veto the legislation.[22] In her electoral campaign, Senator Hillary Clinton expressly countenanced the presidential authorization of torture in a "ticking time-bomb" situation.[23]

The illegality of such methods hence cannot be the end of the conversation. The more pressing question is: What forces might restrain a state

tempted to employ such methods? More specifically, what is to stop the United States from indefinitely detaining Al Qaeda leaders and other militant jihadists who appear to pose a significant threat? In fact, why should the U.S. *not* coercively interrogate such people whenever it has good reason to believe they possess valuable information about terrorist groups' internal operations, personnel, and plans? Some influential voices would indeed like to see current law changed, by domestic statute or international agreement, thereby permitting more aggressive tactics for fighting terrorist networks whose members do not honor humanitarian norms.[24]

That international law itself often tells us so little about what actually will be done in war paradoxically renders the purely moral questions even more salient. The normative question this book examines is whether humanitarian law should operate reciprocally, so that Al Qaeda's disregard for noncombatant rights would authorize the United States to do targeted killings of jihadist leaders – a policy accepted by all major presidential hopefuls in the 2008 primaries[25] – and relax presumptive standards for detention and treatment of Al Qaeda suspects.[26] Or should humanitarian law be understood as largely nonreciprocal, in which case its consistent violation by Al Qaeda would in no way diminish American legal duties toward detained Al Qaeda members or its leaders still at large?

Our intuitive, unschooled reaction to this question is likely to be mixed. On the one hand, most agree that basic principles of humanity (and perhaps also considerations of national self-interest) limit what may be done to even the most egregious violators of fundamental humanitarian norms.[27] No one seriously argues, for instance, that "these terrorists do not deserve any better treatment than the treatment they have displayed toward their victims."[28]

On the other hand, fairness has often been thought to require that each side to an armed conflict be subject to the same restrictions and that neither should be permitted to seek unfair advantage by violating them. Reciprocity in the sense of tit-for-tat also makes possible self-policing,[29] which is often necessary in the absence of effective international enforcement.[30] Self-help is always the ultimate remedy when the "social contract" and its normal method of execution completely break down. "Gated communities" arose in response to rapidly rising crime rates, after all. In war, self-enforcement offers a practical form of corrective justice and a means of deterring future violations.[31] For these reasons, as Sir Hersch Lauterpacht wrote, "It is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from rules of warfare without being bound by them."[32] Hans Kelsen, an equally distinguished jurist, said much the same.[33]

What legal rules, then, should mark the meeting point between our contending intuitions here? Today, both reciprocal and nonreciprocal impulses find expression in different parts of the Geneva and Hague Conventions. This creates some vexing ambiguities.

America's greatest military and political leaders have long felt pulled in both directions. During the Revolutionary War, General George Washington often reminded his troops that they were fighting for liberties and freedoms that, as rights of all humanity, extended even to their enemies. When the British treated captive American "rebels" so poorly that more died in captivity than on the battlefield,[34] Washington nonetheless informed the British General Lord Howe that, in retaliation, he intended to conduct reprisals.[35] Yet Washington ultimately refrained from exercising that right, instead ordering subordinates in charge of 221 British troops captured at Princeton to "treat them with humanity, and let them have no reason to complain of our copying the brutal example of the British army in their treatment of our unfortunate brethren."[36] That Washington both avowed his right of reprisal and ultimately declined to exercise it begins to capture the ambivalence that the doctrine evoked even then, an ambivalence that has only deepened over time.

History casts a long shadow over current controversies. Since the mid-nineteenth century, the Geneva Conventions – treaties today ratified by virtually all states – have chiefly regulated the treatment of noncombatants and prisoners of war. The Hague treaties, beginning in 1899, do so as well, but they and their many progeny also govern the conduct of hostilities (e.g., weapons and their permissible uses).[37] The more recent agreements seek, for instance, to ban the manufacture or international trade in particular armaments, from small arms and antipersonnel land mines to biological and chemical weapons or small arms.[38] The law of Geneva and that of weapons prohibitions share a concern with eliminating unnecessary human suffering caused by war. Yet they often diverge in their stance toward reciprocity.[39]

Several aspects of the West's conflict with Al Qaeda have longstanding precedents that may serve as guidance. Others have none. Those who drafted The Hague and Geneva Conventions did not foresee, in particular, conflicts combining elements of war, criminal law enforcement, and domestic national emergency. The drafters mainly contemplated war between states.[40] To a lesser extent, they anticipated conflicts involving entities closely resembling states, such as armed militias fighting alongside a state's army and subject to its effective control.[41] They did not anticipate, or write rules regarding, armed conflict with multinational terrorist networks.

Because international law has traditionally focused on states, the international law of war focuses on armies. When championing the cause of human rights against state oppression, we are today likely to condemn the state-centric nature of international law, the pride of place it gives to national sovereignty. Yet the key conceptual distinctions of humanitarian law, such as that between a state's combatants and its civilians, rest on this very state-centrism, on a stark dichotomy between those whom the state authorizes to kill on its behalf (and who may hence be targeted in war) versus those who may not be deliberately killed because they have not been so authorized (i.e., noncombatants).[42] Without any inkling of possible inconsistency, we decry in the first breath a state-centrism that we find inviolable, even sacred, in the next.

The Third Geneva Convention, for instance, clearly embodies these statist assumptions in its provisions regarding POWs. It refers to belligerents who employ regular armed forces, display identifying insignia, have formal chains of command, and generally adhere to the laws of war governing states.[43] The treaties also assume belligerents who seek only the traditional goal of territorial control (to enhance their national power), rather than belligerents who harbor more amorphous aspirations[44] and fight on no particular battlefield. We can no longer make any of these assumptions about belligerents and must therefore reassess the law's main categories. Little of the considerable debate, public or scholarly, has directly engaged the question of reciprocity, though that question has always hovered ominously in the background.

The questions dominating public debate have often been poorly formulated. What most laypeople regard as the key question was reportedly never even asked by those at the highest levels of law enforcement. In fact, the State Department's Legal Adviser following 9/11 maintains that "no serious analysis of the advantages and disadvantages of adhering to Geneva rules regarding interrogation methods was undertaken before it was decided that because the Conventions did not apply as a matter of law, they should not guide our conduct."[45]

The operative answer became, We should do whatever the law allows and we should interpret the law, where ambiguities so permit, to allow as much force as possible.[46] This is the almost the antithesis of the stance adopted by the Judge Advocate Generals (JAGs). Even in public statements, the president left no doubt about his central priority: "My most important job as your president is to defend the homeland; it is to protect the American people from further attacks."[47] The JAGs differed here only in that they understood

this aim to be fully compatible with other vital national objectives; this is a story told in Chapter 12.

THE ARGUMENT

This book argues that the reciprocity principle is well embedded in the law and, as generally understood, cannot support a policy of restraint in fighting Al Qaeda or similar militant jihadists. The Geneva Conventions and other relevant treaties, as well as the recent U.S. Detainee Treatment Act and Military Commissions Act, do not provide satisfactory answers to the central questions. These legal materials lack a coherent, principled view of when compliance by one party to a conflict should be contingent on compliance by its opponents.

This book first argues against a common version of Kantian ethical theory, which posits that fairness generally requires the shared commitment by all parties to common rules, ensuring like treatment of like conduct. From behind a Rawlsian veil of ignorance, no prospective belligerent would accept a law of war that put it at unfair disadvantage by affording its adversary less onerous constraints. Other theories also based on Kant's ethics similarly conclude that fairness demands a symmetry in the risks that each party may impose on its counterpart; it involves a balance of benefits and burdens reflected in rules equally binding on all. The law thereby establishes a moral parity that demands restoration when one party's wrongs effectively disrupt it. Al Qaeda violates humanitarian law in ways that disrupt this symmetry: Jihadist terror takes unfair advantage of the liberal state's continued adherence to humanitarian law. As an U.S. Air Force officer writes, "The basic strategy is that one party fights by the rules, whereas another does not. Moreover, a state's . . . compliance with the law of armed conflict is essential to the effective execution of an adversary's strategy to exploit it."[48]

Though this statement is more straightforward than what one finds in scholarly writing on these issues, it is only by turning to Internet chitchat that we may come to appreciate the full depth and intensity of such thinking, concealed behind the veil – now not of Rawlsian ignorance – but rather authorial anonymity. One such blogger, for instance, unburdens himself of this intentional *reductio ad absurdem*:

> Let's say you could fight a war very humanely. We're talking supersurgically, with a Human Rights Watch liaison and a lawyer attached to every squad. Any enemy caught alive would have to be proven to be an enemy (i.e., chain of evidence, etc.) . . . by a neutral party. Your army

> would be willing to lose man after man attacking a fortified house that might have civilians in it rather than risk an airstrike. Whatever, you get the drift. Now, say I'm on the other side. I know that if I decide to make war on you, my losses among my women and children will be very low. I risk only my men and even then it won't be so bad. I have a sort of advantage in that I can kick sand and bite, but you won't. That's a bit of a moral hazard in some ways.[49]

Quickly retreating from his own suggestion, however, even the anonymous blogger feels curiously compelled to add, in conclusion, "The above is a thought experiment only." Still, the blogger's point about moral hazard, in particular, is compelling and goes entirely unremarked in the scholarly literature on terrorism. A situation of moral hazard is one in which someone engages in harmful conduct because he or she is insured against its costly consequences.[50] International law, for instance, prohibits the United States from targeting terrorists in a country that, though itself "unable" to prosecute, denies permission to attack them on its territory.[51] The *ex ante* effect of such a rule is to ensure that terrorists seek refuge in precisely such a country. For that is where they can escape the costs of their criminal activity. It insures them against the risks of such conduct. The result is both inefficient and unfair, insofar as "people should bear the consequences of the risky choices they make," theorists of many persuasions agree.[52]

The upshot of such thinking, whether or not restrained by scholarly decorum, is that restoring symmetry and the fairness ideal on which it rests may sometimes require rules that release the victim of material breach from the very duties the victimizer has violated. The basic idea is familiar from domestic contract law,[53] in that "flagrant breach by one side of a bargain generally releases the other side from the obligation to observe its end of the bargain."[54] The question, then, is whether Al Qaeda's consistent breach of the most basic rules of humanitarian law authorizes the United States to respond with methods also at odds with such standards to reestablish symmetry in the risks that belligerents may lawfully impose on one another. In a word, this view concludes that fairness requires reciprocity.

"Realist" views of international relations, focused on power politics, differ greatly from such moral thinking. Yet they reach a similar conclusion: Effective restraint in war demands reciprocity. Such views are this book's other primary antagonist. Realists anticipate that successful enforcement of humanitarian law will prove impossible without granting a right of retaliation for war crimes. If humanitarian law is to work at all, each belligerent's duties must remain contingent on continued adherence to like duties by

adversaries. In this way, reprisal becomes indispensable for punishing and preventing violations.[55]

This second rationale for reciprocity, unlike the previous one, is concerned with the practical consequences of response in kind. How well has reciprocity actually worked to restrain warfare's illicit methods? Modern military history offers extensive materials for answering this question. Recent social science employs this historical record to incisive effect, finding that forbearance in treatment of an enemy is almost never unidirectional, nonreciprocal. And reciprocal restraint occurs only when fighting takes place between certain kinds of states and military organizations, adversaries of a sort not faced in the conflicts with Al Qaeda or even with Iran and North Korea.

These studies suggest that a belligerent should be "nice," as game theorists use the term, only with adversaries prepared to play tit-for-tat. That game requires the players to accept modest punishment for their prior defection from cooperative rules, rather than interpreting such sanction as a new and independent wrong against them, providing legitimate grounds for retaliation – specifically, for increased use of the forbidden practice. There are few exceptions to the statistical regularity: no restraint without reciprocal forbearance.

These anomalies nonetheless suggest an entirely different way to view the matter. They indicate that the argument for forbearance in U.S. treatment of Al Qaeda detainees should be sought neither in liberal theories of morality nor in realist/rationalist tit-for-tat, but in a professional ethic of honor derived from military culture and an attendant account of individual and collective self-respect. These anomalies begin on the vocational plane, but extend potentially to the national.

The point of departure for this approach lies in the JAGs' argument for unqualified adherence to Geneva norms. That argument, reflected in their 2006 congressional testimony and internal memoranda preceding it, appealed to "who we are" and "what we stand for." These sources and related interviews also suggest a novel pathway for enhancing future U.S. adherence to international humanitarian law and perhaps to international law more generally.

To what extent can identity – national and professional – provide a major basis of foreign policy? That question preoccupies the last part of this book. The "realist" preoccupation with American power nevertheless receives sympathetic attention. The question of whether to employ coercive interrogation is submitted to cost-benefit analysis.[56] Realists' use of such

methods has been unduly selective, leading them to miss considerations essential to the effective projection of positive U.S. influence abroad.

Even most realists today are concerned with enhancing "soft power," which may be described as the "summation of economic leverage, cultural pull, and intellectual clout that has made the U.S. the preeminent force in the world."[57] Rightly understood, realist (and related rationalist) approaches to international relations support a policy of self-restraint in fighting Al Qaeda, despite the apparent impossibility of reciprocity from this antagonist. Those concerned chiefly with enhancing American global influence should therefore favor forbearance in U.S. detention and interrogation policies.

This conclusion begins to suggest a third type of reciprocity – as neither fairness in fighting nor as an enforcement device – based rather on U.S. gains from preserving world confidence in an international legal system to which the Geneva Conventions are now integral. That system provides a public good in which the United States is heavily invested and from which it greatly profits. This argument highlights the advantages of contributing to an effective international legal system in exchange for its current and future benefits. Only this last conception of reciprocity can convincingly support American restraint in fighting Al Qaeda and its affiliates. This view appreciates that a state at war is at once involved both with its immediate antagonists and also with a much larger group of states with whom reciprocal relations must be maintained throughout the conflict and thereafter. In the notion of *erga omnes*, these states – though not party to the war – today find a legal basis for concern about how each side treats the other's civilians and detained fighters.

This variety of reciprocity is diffuse rather than specific.[58] In specific reciprocity, two parties sequentially exchange actions of equivalent value. A breach of humanitarian law by one belligerent might immediately permit its antagonist an act of reprisal, according to this logic. With diffuse reciprocity, by contrast, the value equivalence is less precise, and the exchange of value is not immediate. The crucial difference between these types of reciprocity is that the diffuse variety can become the basis for a general system of rules, such as that of free trade. Specific reciprocity cannot, except for the rule, if it may even be so called, that every concession must elicit a concession of equal value by the other side. In international trade, specific reciprocity would mean that, as under early GATT rules, that each state must make comparable accommodation to every other state from which it sought a given trade arrangement. We may contrast this to today's World Trade Organization rules, under which a multilateral organization decides whether and to what extent international law permits the victim of a trade