

Reciprocity in the War against Terrorism?

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Reciprocity is an accepted aspect of the laws of treaties and a recognized element of state responsibility. “No state is obliged by customary international law to remain passive when another state takes action inimical to its legally protected interests.”¹ Countermeasures are likewise a recognized act of enforcement in international law, and the International Law Commission draft on the subject reads:

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State.²

A material breach of a treaty by one party even enables the other party to “invoke it as a ground for suspending the operation of the treaty in whole or in part.”³

One of the much admired aspects of the law of armed conflict, or modern international humanitarian law applicable in armed conflict (IHL), however, is that it lacks any such aspect of reciprocity.⁴ Soldiers are taught that the legal obligations of IHL are binding even if the other party to the conflict grossly violates them. The principle behind this rule is that even if the enemy were, for instance, to commit genocide or conduct bestial acts against innocent civilians, such behavior would not justify similar reciprocal behavior by the opposing state. The rationale behind the rule of denying reciprocity is to increase civilian protection in armed conflict, and the rule receives further support from the increasing tendency to blur the distinction between IHL

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and the human rights law. It is universally accepted that human rights norms are absolute and reciprocity is irrelevant. People are entitled to such rights by virtue of their humanity and not by virtue of reciprocity, state behavior, the existence of an international element, or even state recognition of such rights. However, it is worth questioning whether this lofty principle of the absence of reciprocity has in fact contributed to the protection of civilians in armed conflict.

Traditionally, one of the factors motivating armed forces to comply with IHL has been the element of reciprocity, both in its positive and negative sense. Positive, for example, because decent and correct treatment of enemy civilians, the wounded, and POWs is likely to encourage the enemy to behave in a similar fashion. Negative in the sense that if, for example, one side to the conflict executes POWs, the likelihood increases that its own soldiers will not receive a high standard of treatment should they be captured.

The question of reciprocity becomes particularly salient in an armed conflict where a regular army, complying with the laws of war, confronts irregular fighters who deliberately attack civilians, a scenario that often prompts a blending of IHL and human rights law. However, a disturbing result of this merger is that international human rights organizations tend at times to presume automatically that any civilian death caused by a regular army in an armed conflict is a violation of IHL, while simultaneously attributing (and thus implicitly excusing) civilian deaths caused by irregular forces to inferior weapons or the exigencies of power asymmetry vis-à-vis their better-equipped and more organized state adversary. Similarly, it is often claimed that it is legitimate for irregular forces to attack the “soft underbelly” of their enemy, namely civilians. The effect that merging of human rights law with IHL has in this phenomena is the presumption against the state’s right to use force (which is very limited under human rights law), and an intuitive (but false) sense that states are subject to more stringent rules.

At the same time, there is little utility in analyzing what rules of international law are applicable to terrorist groups, although this issue is debated much in academic journals. The very *raison d’être* of armed groups using terror tactics is to achieve their political aims by means that flout norms of law and humanitarian behavior. It is highly unlikely that the late Osama Bin Laden or his colleagues consulted legal textbooks on international law prior to engaging in their nefarious activities.

Thus the question remains as to what legal measures states can use to deter acts of terrorism.⁵ The UN General Assembly has declared that acts of terrorism “are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or other nature that may be invoked to justify them.”⁶ Over the years, the international legal community has created an impressive network of treaties that require states to prosecute or extradite persons who have committed acts of terrorism. The reality, however, is that there has been a dearth of actual prosecutions. By its nature, the International Criminal Court can deal with very few cases and thus exerts only limited effect and influence. The increasing reliance on the principle of universal jurisdiction seems to have been used mainly as a political tool to demonize Israel and the US, rather than to prosecute individuals from groups that deliberately target civilians.

Democratic states are faced with the question of what measures of enforcement can be legally applied against irregular forces that deliberately target civilians. Such forces exploit the fact that the regular army of a democratic state will comply with the law of armed conflict. The UN Security Council has recognized that in addition to criminal prosecutions, states have a right of self-defense against terrorism – a right that includes the use of armed force.⁷ The International Court of Justice gave its opinion that a right of self-defense exists only if the attack comes from the territory of another state. There has, however, been strident academic criticism of this legal opinion, and it is reasonable to assume that a right of self-defense exists against terrorist attacks even if the attack does not emanate from a foreign state. At what point the right of self-defense kicks in would seem to be dependent on the scale and intensity of the hostilities.

Assuming that a state is involved in armed conflict with an armed group that deliberately attacks civilians, the question then arises as to whether that state can take countermeasures that would otherwise be illegal in order to prevent further attacks against its civilians. It can be argued that the laws of war are inadequate when they attempt to address a situation where one party, which is a regular army, implements the laws of war while the other party, which is not a regular army, deliberately acts against the laws of war and bases its military tactics on the exploitation of the fact that the state adversary facing it abides by this legal framework. International law, and in particular IHL, has very limited means of enforcement, and the desire

for mutuality is one of the elements that motivates hostile parties to respect the law of armed conflict.

Countermeasures in armed conflict, which are commonly referred to as “reprisals” or “belligerent reprisals,” have been defined as:

Acts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the laws of war, for the purpose of enforcing future compliance with the recognized rules of civilized warfare.⁸

It has been argued that it was the fear of reprisals in kind that led the Axis States to refrain from using poison gas during the Second World War. By way of another example, the Third Geneva Convention requires the release of all prisoners at the end of “active hostilities.”⁹ The language of the Convention does not authorize states to demand reciprocity with regard to the release of prisoners, yet common sense dictates reciprocity, and indeed that is what happens in practice. The International Committee of the Red Cross (ICRC) has never demanded from one state that it release prisoners except against a reciprocal release by the other party involved.

However, in most circumstances the modern law of armed conflict appears to reject the legality of reprisals. The modern rule, included in the 1977 Protocol to the Geneva Conventions (Protocol I), is that “attacks against the civilian population or civilians by way of reprisals are prohibited.”¹⁰ According to the International Criminal Tribunal for the former Yugoslavia, “the bulk of this body of law lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity.”¹¹

At the same time, the outlawing of reprisals against civilians may not be as clear cut as would appear. The right to carry out acts of reprisal – apart from a number of absolute prohibitions such as the murder of prisoners of war¹² – has been recognized in the past, and was the legal basis to the justification of the air bombardment of German cities by Allied forces during the Second World War.

The 1949 Geneva Conventions did not reject reprisal actions against civilians in enemy territory, and the modern rule quoted above is an innovation.¹³ During the debate at the diplomatic conference that drafted Protocol I, some states expressed reservations as to the prohibition on acts of reprisal

against civilian targets. The US representative remarked that “by denying the possibility of a response and not offering any workable substitute, the Protocol is unrealistic and, in that respect, cannot be expected to withstand the test of future armed conflict.”¹⁴ One leading academic commentary states that customary and “existing conventional law does not prohibit reprisals against enemy combatants and enemy civilians in territory controlled by the enemy.”¹⁵ When the British government ratified Protocol I, it added a reservation stating that the UK retains the right to attack the enemy’s civilians or civilian targets in reprisal against such attacks against it, solely in order to force the enemy to cease from such attacks. The reservation adds that such attacks can only be undertaken after the enemy has been warned, and that the decision to carry out an act of reprisal must be made at the highest levels.¹⁶ This reservation is reflected in the order found in the British Army Manual whereby reprisals “may not be undertaken by UK armed forces without prior authorization at the highest level of government,” thus clearly not rejecting the actual legality of acts of reprisal.¹⁷ Germany and Italy also added a statement that was similar to the British reservation, though couched in vaguer terms and not in the form of a reservation. The German and Italian statements assert that they retain the right to respond to an attack on civilians with all the means allowed to them by international law.¹⁸ No state sent an objection to the British reservation.

This silence is especially meaningful since during the diplomatic conference, a significant number of states expressed their opinion that the Article promulgating the rule itself regarding the defense of citizens is so important that reservations to it should not be permitted. The International Criminal Tribunal for the former Yugoslavia examined the legality of reprisal acts against civilians and eventually rejected the legality, but commented that, *inter alia*, “the protection of civilians and civilian objects provided by modern international law may cease entirely or be reduced or suspended ... at least according to some authorities, when civilians may legitimately be the object of reprisals.”¹⁹ The Tribunal added “that at any rate, even when considered lawful, reprisals are restricted.”²⁰ The Tribunal proceeded to give details of the conditions for permitting acts of reprisal.²¹

It is thus clear that the innovative prohibition against acts of reprisal is not considered a rule of *jus cogens* (a customary rule that is immutable and inalienable and thus not subject to exceptions), and is not considered by some as representing customary law.²² The ICRC study on the customary

law of war does not contend that the rule prohibiting reprisals has solidified into custom, but rather refers to “the *trend* towards outlawing reprisals.”²³ The Tallinn Manual on the International Law Applicable to Cyber Warfare also reaches the conclusion that although certain objects (e.g., medical units) enjoy immunity from being the object of reprisals, no blanket prohibition on reprisals exists.²⁴ International legal scholar Yoram Dinstein argues that:

If Contracting State A commits atrocities against the civilian population of Contracting State B, the latter is not allowed to retaliate in kind against the civilian population of State A. But what do the framers of the Protocol expect State B to do? Turn the other cheek? That is a religious tenet rather than a serious military or political proposition. Since the Protocol does not provide State B with any practical alternative response, what is likely to happen is that Article 51, Para. 6 will remain a dead letter and – notwithstanding the paragraph’s lucid language – State B will resort to belligerent reprisals against the civilians of State A.²⁵

However, cogent arguments can be made against allowing reprisals. A reprisal means deliberately killing civilians not participating in hostilities in order to pressure terrorists and other violators; in other words, reprisals are a form of collective punishment. Frits Kalshoven points out the “dubious efficacy” of such tactics, as terrorist organizations may well be callously indifferent to their own civilian losses, and indeed welcome such losses as part of their “lawfare” against democratic societies.²⁶ Furthermore, the ICRC recalls that “on the pretext that their own population had been hit by attacks carried out by the adversary, [the Second World War belligerents] went so far, by way of reprisals, as to wage war almost indiscriminately, and this resulted in countless civilian victims.”²⁷ Allowing reprisals against civilians can clearly become a slippery slope, reducing the arguments about legality to “who started it.”

Israel has never had a policy of deliberately attacking civilian targets as an act of reprisal, and it is not suggested that this policy should be changed. In one of his rulings former president of the Israel Supreme Court Aharon Barak wrote that “democracies fight wars with one hand tied behind their backs.” Israel can be proud of belonging to that small group of states that fights wars with one hand tied behind their backs. Nevertheless, it is worth

examining how far IHL allows vigorous action where terrorists deliberately use civilians as human shields. One avenue that may be explored is to interpret the terms “civilians” and “civilian targets” in a narrower sense than is currently adopted by the ICRC. The destruction of governing executive or financial institutions is likely to yield a distinct military advantage to the attacking party. Clearly, obviously civilian institutions such as health, welfare, or justice institutions are not included here. Ingrid Detter writes that “it is questionable whether government buildings are excluded under any clear rule of law from enemy attack.”²⁸ The ICRC also recognizes that a factory that produces for the civilian market can provide support for a military effort, and therefore, there is a military advantage to be gained by its destruction.²⁹

In a draft version presented to the diplomatic conference that drew up the 1977 Protocols to the 1949 Geneva Convention, the ICRC suggested defining civilian targets to include facilities and means of transport that were planned for the civilian population, “except if they are used mainly in support of the military effort.”³⁰ The ICRC definition did not relate to government institutions.³¹ The ICRC draft was not accepted and the version that was accepted stated, in the negative, that a civilian object target is not a military target.³² Protocol I states, “In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.”³³ The list of civilian objects that possess civilian status does not include broadcasting stations, means of transport, or government institutions.³⁴ An indirect definition of permitted targets appears in the 1954 Hague Convention, concerning the protection of cultural places, that notes that cultural treasures may not be stored near “industrial centers, an aerodrome, broadcasting station, establishment engaged upon work of national defense, a port or railway station of relative importance or a main line of communication.”³⁵ It could be well argued that such objects are legitimate targets, and even if not, they would be legitimate objects for reprisals, thus making a distinction between reprisals against semi-civilian governing bodies and reprisals against civilians and indisputably civilian objects.

Conclusion

Democratic societies must find a way to deter terrorist forces from attacking civilians without adopting the very tactics they are trying to deter. In accordance with customary law, in the past reprisals against civilians were accepted as legal in times of armed conflict, subject to the conditions of being proportional and being used only to force the enemy to desist from attacking one's own civilians. Modern IHL tends to prohibit all reprisals. By their very nature reprisals entail applying collective punishment to innocent civilians, and a policy of reprisals is vulnerable to abuse and is often ineffective.

How else can democratic societies deter attacks against their civilians? The rarely applied possibility of post factum criminal prosecution has not proved itself a sufficient deterrent. Another avenue could be to exclude executive bodies from the definition of civilians, thus allowing their categorization as legitimate targets, and certainly legitimate objects for reprisals aimed at deterring terrorist attacks against civilians.

Notes

- 1 OPPENHEIM'S INTERNATIONAL LAW 417 (Sir Robert Jennings & Sir Arthur Watts, eds., 9th ed., Volume I, 1996).
- 2 International Law Commission, 53rd Session, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Article 22, U.N. Doc. A/56/10 (August 2001).
- 3 Vienna Convention on the Law of Treaties, Article 60 (2) (b) 1969.
- 4 Vienna Convention on the Law of Treaties, Article 60 (5) 1969.
- 5 There is no universally accepted definition of terrorism; however, the U.N. General Assembly has defined terrorism as "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes." G.A. Res. 51/210, para. 2, U.N. Doc. A/RES/51/210 (December 17, 1996).
- 6 *Ibid.*
- 7 See Security Council Resolution 1368, U.N. Doc. S/RES/1368 (September 12, 2001) (recognizing the right to self-defense while condemning the terrorist attacks of 9/11/01); Security Council Resolution 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (reaffirming the right to self-defense while deciding states should take steps necessary to prevent the financing of terrorism).
- 8 U.S. DEPARTMENT OF THE ARMY, FM 27-10, DEPARTMENT OF THE ARMY FIELD MANUAL: THE LAW OF LAND WARFARE, para. 497 (1956); See also *Naulilaa Case* (Portugal v. Germany), (Portuguese-German Mixed Arbitral Tribunal, 1928) 8 Trib. Arb. Mixtes 409, 422–25, reprinted in 2 R.I.A.A. 1011, 1026.
- 9 Geneva Convention Relative to the Treatment of Prisoners of War, Article 118, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

- 10 Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Article 51(6), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter First Protocol].
- 11 Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, para. 517 (International Criminal Tribunal for the Former Yugoslavia, January 14, 2001) (criminal tribunal commenting on humanitarian law).
- 12 Geneva Convention Relative to the Treatment of Prisoners of War, Article 2, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343 (“[Prisoners of war] shall at all times be humanely treated and protected, particularly against acts of violence . . . [and m]easures of reprisal against them are forbidden.”).
- 13 See MARK OSIEL, *THE END OF RECIPROCITY, TERROR, TORTURE AND THE LAW OF WAR* 36 (2009). Further on in the same page, Osiel writes that, “There may be a difference between ordinary armed conflicts, in which reciprocity enforces legal norms, and extraordinary wars, in which it cannot.” He adds that, “The 1949 treaties do not bar reprisal, for instance, against enemy civilians and civilian property unprotected by the Fourth convention.”
- 14 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, 58th plen. mtg, (Vol. VII) U.N. Doc. CDDH/SR58, para. 81 at 294 (Geneva, 1974-1977).
- 15 MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICT* 312 (1982).
- 16 See Letter from Christopher Hulse, HM Ambassador of the United Kingdom, to the Swiss Government, *available at* <http://www.icrc.org/ihl.nsf/NORM/0A9E03F0F2EE757CC1256402003FB6D2?OpenDocument> (providing a correct copy of the letter dated 28 Jan. 1998) [hereinafter UK Declaration to Geneva Protocol I].
- 17 U.K. MINISTRY OF DEFENCE, *MANUAL OF THE LAW OF ARMED CONFLICT* 65 (2004).
- 18 Declaration of the Federal Republic of Germany upon ratification of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Reg. No. A-17512, August 14, 1991, *available at* <http://www.icrc.org/ihl.nsf/NORM/3F4D8706B6B7EA40C1256402003FB3C7?OpenDocument> (“The Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation.”); Declaration of Italy upon ratification of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Reg. No. A-17512, November 20, 1990, *available at* <http://www.icrc.org/ihl.nsf/NORM/E2F248CE54CF09B5C1256402003FB443?OpenDocument> (“Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation.”).
- 19 Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, para. 522 (International Criminal Tribunal for the Former Yugoslavia, January 14, 2000), <http://www.haguejusticeportal.net/eCache/DEF/6/117.html>
- 20 *Ibid.*, para. 535.
- 21 *Ibid.*

- 22 OSIEL, *supra* note 13, 55–56; Theodor Meron, *The Humanization of Humanitarian Law*, 94 AMERICAN JOURNAL OF INTERNATIONAL LAW 239, 250 (2000); THE COMMANDER’S HANDBOOK OF NAVAL OPERATIONS, NWP-1-14M, para. 6.2.3.3 (1995), *available at* http://www.lawofwar.org/naval_warfare_publication_N-114M.htm (last visited September 30, 2010) (“The President alone may authorize the taking of a reprisal action by U.S. Forces.”).
- 23 See INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Vol. I, Rule 145 (Reprisals) (Jean-Marie Henckaerts and Louise Doswald-Beck eds., 2005) (emphasis added), <http://www.icrc.org/customary-ihl/eng/docs/v1-rul-rule145> (last visited September 30, 2010) (the online version of the ICRC’s Study on Customary International Humanitarian Law, conducted by the ICRC and published by Cambridge University Press in 2005).
- 24 TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE Rule 46, paras.4-5 (Michael N. Schmitt, gen. ed. 2013), <http://www.ccdcoe.org/249.html>.
- 25 Yoram Dinstein, *Comments on Protocol I*, 320 INTERNATIONAL REVIEW OF THE RED CROSS 515 (1997), <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JNV5> (last visited Sept. 30, 2010).
- 26 FRITS KALSHOVEN, BELLIGERENT REPRISALS 26 (1971).
- 27 INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, commentary to Article 51(6), 626 para. 1982 (Yves Sandoz, Christophe Swinarki & Bruno Zimmerman eds., 1987).
- 28 INGRID DETTER, THE LAW OF WAR 294 (2nd ed. 2000).
- 29 See commentary to Article 52(2), 636 para. 2023, *supra* note 27 (“Other establishments or buildings which are dedicated to the production of civilian goods may also be used for the benefit of the army. In this case the object has a dual function and is of value for the civilian population, but also for the military. In such situations the time and place of the attack should be taken into consideration, together with, on the one hand, the military advantage anticipated, and on the other hand, the loss of human life which must be expected among the civilian population and the damage which would be caused to civilian objects”).
- 30 See commentary to Article 52, 633 para. 2004, *ibid.*
- 31 *Ibid.* (“Consequently, objects designed for civilian use, such as houses, dwellings, installations and means of transport, and all objects which are not military objectives, shall not be made the object of attack, except if they are used mainly in support of the military effort.”).
- 32 See First Protocol, *supra* note 10, Article 52.
- 33 *Ibid.*, Article 52(3).
- 34 See Articles 53–56 (limiting protection of civilian objects to cultural objects and places of worship; objects related to survival, such as foodstuffs and granaries; the natural environment; and dangerous power supply installations, such as dams and nuclear power plants), *ibid.*
- 35 See Convention for the Protection of Cultural Property in the Event of Armed Conflict Article 8(1), May 14, 1954, 249 U.N.T.S. 240 (“There may be placed under special protection a limited number of refuges intended to shelter movable

cultural property in the event of armed conflict, of centres containing monuments and other immovable cultural property of very great importance, provided that they (a) are situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, *an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication*; (b) are not used for military purposes.” (emphasis added)).