Chapter 34
Belligerent Reprisals Revisited*

1 Introduction

The international law of armed conflict aims to regulate the conduct of hostilities by belligerent parties and their armed forces and to protect certain especially vulnerable categories of persons, such as prisoners of war and the inhabitants of occupied territories. How effective can it be in this pretension, and what mechanisms are available to promote compliance?

In common with most other branches of public international law, the law of armed conflict lacks community institutions of the type normally found in systems of municipal law to ensure respect of the law. Yet it has never been totally devoid of means for the promotion of compliance either: e.g., State responsibility and individual liability for war crimes; supervision by outside powers; and obviously, dissemination of knowledge of the law.

This paper examines one classic device, available to the parties to the conflict and recognized since time immemorial as an institution of customary international law. It is the belligerent reprisal, i.e., an act in breach of a specific rule of the law of armed conflict, directed by one belligerent party against another party with a view to inducing the latter to stop violating this particular or some other rule of this body of law (reprisal in kind or not in kind, respectively).¹

While belligerent reprisals were never entirely free of controversy, in the course of time the very idea of recourse to such draconian measures became exposed to ever louder criticism. The main grounds for such criticism were that they were rarely effective, were apt to affect persons who could not be held accountable for the other party’s violation of the law, and tended to set in motion a spiral of reciprocal reactions resulting in an escalation of violence in complete disregard of the law.

The criticism was not shared in all quarters. Yet it was sufficiently strong to lead to the introduction into an ever growing number of treaties on the law of

---

* Published earlier in 21 NYIL (1990) pp. 43-80. In an introductory footnote, the author thanked Professor George H. Aldrich for reading and commenting on an earlier version of the paper.

1 This is a mere working definition. For a fuller discussion of the concept and definition of reprisal, see F. Kalshoven, Belligerent Reprisals (1971) Chapter I.
armed conflict, of provisions outlawing reprisals against specified categories of persons or objects protected by those treaties. The parties to an armed conflict governed by these treaties thus saw themselves deprived of the means of enforcement that the reprisal in breach of specific rules embodied in these treaties (and more often than not in response to a violation of the same rules) purported to be. At the same time, other mechanisms were introduced, such as outside supervision, and it was hoped that these could take over the role of the banned reprisal.

Not all belligerent reprisals were so prohibited. Apart from this, the debate continued unabated: were belligerent reprisals really as bad as they were depicted, and were they not perhaps indispensable after all? In the 1970s, when along with other major parts of the law of armed conflict, the rules for the protection of the civilian population against the effects of hostilities were brought up for revision, this debate gained fresh impetus.

In 1971, with the process of “reaffirmation and development” of the law of armed conflict in its initial stages, this author happened to publish his book on “Belligerent reprisals”, which may have exerted some influence on subsequent events. In view of its continuing topicality he now ventures to return to the topic, in an attempt to clarify the present state of affairs and the prospects of reprisals as a means of enforcement in the international law of armed conflict.

Chapter 2 provides a short history of the existing conventional prohibitions on recourse to reprisals in international armed conflicts. Chapter 3 enters into the debate around those prohibitions specifically designed to protect the civilian population in non-occupied territory. Chapter 4 explores some areas where reprisals at first sight have remained permissible. Chapter 5 discusses some specific problems attending the notion of reprisals in internal armed conflicts. Finally, and by way of conclusion, the author sets forth his views on possible trends in development. One thing he hopes to show is that the question of belligerent reprisals has always been, and still is, less simple than it may seem.

2 Short History of Prohibitions in Force

The first treaty prohibition on a specific case of recourse to reprisals dates back to 1929. In that year, a Diplomatic Conference convened in Geneva to draft two