Chapter 36
Reprisals and the Protection of Civilians:
Two Recent Decisions of the Yugoslavia Tribunal*

1 Introduction

The term “reprisal” is in common use to indicate an act that is done in retaliation or revenge. Drug barons may be murdered “in reprisal” for earlier killings on their side, and witnesses to criminal activity may not wish to testify out of “fear of reprisal”.

On the loftier plane of international affairs, the term is often used to mark inter-state conduct, again in common parlance as a synonym for retaliation or revenge. However, on this plane it has acquired a legal connotation as well, indicating a claimed justification of unlawful acts in response to equally unlawful acts of another party. What sets this employment of the term apart from its day-to-day use is that, to be justified as a “reprisal”, an act must meet a series of stringent conditions. Apart from the obvious requirement of previous unlawful conduct by the other party, these conditions may be summed up as: a distinct purpose (to induce the other party to discontinue the unlawful conduct); timely warning; subsidiarity (the measure must be a last resort); proportionality (the measure brings no more serious injury than the injury inflicted by the other party); and termination as soon as the conduct occasioning the measure has come to a stop. Needless to say, the mere claim that a certain measure constitutes a legitimate reprisal provides no guarantee that it actually deserves that qualification. As with any other legal argument, this one too is apt to be misused, in an attempt to justify conduct that, on scrutiny, meets none of the essential conditions for a legitimate reprisal.

In the law of armed conflict in particular, the notion of “belligerent reprisal” has developed over the course of time into an often used, and even more often misused, device to check the conduct of an adverse party that violates given rules of that body of law. Occasionally it has been applied with great precision and efficacy. In other cases, reprisals, once resorted to, ran out of hand, disregarding the condition of proportionality and thus giving rise to counter-reprisals. The effect in such cases was a spiral of violence in contravention of the law and causing great

harm to victims on either side, who may have no connection with the original wrong. This is the reason why, in 1949, prohibitions on recourse to reprisals were included in the four Geneva Conventions for the protection of war victims.¹

In 1977, provisions banning reprisals against civilians and civilian objects were included in Protocol I additional to the Geneva Conventions of 1949 and applicable in international armed conflicts,² in the framework of the general protection of civilian populations against the effects of hostilities.³ Protocol II, concluded at the same time and applicable in non-international (or internal) armed conflicts,⁴ contains no such provision.

Subsequent bans on reprisals, once again largely designed for the better protection of civilian populations against the effects of hostilities, are found in the 1980 Mines Protocol and the 1996 Amended Mines Protocol, attached to the Conventional Weapons Convention of 1980.⁵ The last-mentioned Protocol, in contrast with the original Mines Protocol, is applicable both in international and internal armed conflicts (Art. 1(2)).⁶

The prohibitions in Protocol I on reprisals against the civilian population and civilian objects are of interest because of the strong differences of opinion and intense debate that preceded their adoption, the uncertainty how, once adopted, they would fare in actual practice, and the silence on the subject of reprisals in Protocol II on internal armed conflicts.⁷ In this light, it should be welcomed that

---

¹ For a fuller discussion of reprisals in the context of armed conflict, including concrete instances of claimed reprisals and the prohibitions introduced in treaties concluded in the Interbellum and after the Second World War, see F. Kalshoven, *Belligerent Reprisals* (1971).


³ The relevant provisions are Articles 51(6), 52(1), 53 (c), 54(4), 55(2) and 56(4).

⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II); *Documents*, p. 483.


⁶ Article 2(3) provides that in the latter situation, “each party to the conflict shall be bound to apply the prohibitions and restrictions of this Protocol.”