

HUMAN RIGHTS, THE LAW OF ARMED CONFLICT, AND REPRISALS

by F. Kalshoven

The Henry Dunant Institute is inaugurating its collection of scientific works with an important book by F. Kalshoven which is reviewed in this issue. We are pleased to publish below a paper which this writer delivered at the International Congress on Humanitarian Law in San Remo last September.¹ (Ed.)

Ever since the International Conference on Human Rights, held at Teheran in April/May 1968, unanimously adopted Resolution XXIII on human rights in armed conflicts, the realization of respect for those rights in situations of armed conflict has remained and, indeed, increasingly become a topical question. But it requires no profound knowledge of the matter to realize that the problem is of course much older. It may be safely stated that the idea of human rights, though perhaps not under that name, lies at the root of all the conscious attempts at codifying the law of war, undertaken since the Conference of Brussels of 1874.

In that Conference, as well as in the Peace Conference of The Hague of 1899, one of the main subjects of discussion was the position of the civil population in occupied territory. The history of armed conflicts showed many instances of resistance against an occupant. Should the population be accorded a right to resist, or should resistance, on the contrary, be expressly prohibited? Should the occupant have an unlimited right to suppress resistance, even by the sharpest measures of retaliation against the population in

¹ See *International Review*, November 1970.

its entirety, or should limits be set to his powers in that respect? The outcome of the debate on these and similar questions, as it was ultimately laid down in the Hague Regulations on Land Warfare of 1899, was negative in so far as the right to resist was concerned: the opening Articles, dealing with combatant status, did not mention the resistance fighters in occupied territory among the categories of legitimate combatants. On the other hand, Article 50, in the section specially devoted to the occupation régime, restricted the powers of the occupant to retaliate against persons other than the actual perpetrators of acts of resistance, by laying down that collective punishment would only be permissible against a population that could be held collectively responsible for the act retaliated against.

While this seemed quite an important step towards improving the position of the population in occupied territory, the situation was confused by a seemingly incidental remark in the report of Rolin, the rapporteur of the Sub-Committee that had elaborated the text of the Regulations. For, when he explained how the Committee had arrived at the decision to extend the scope of Article 50 from collective fines (as originally proposed) to all forms of collective punishment, he added that this decision had been without prejudice to the question of reprisals.² This suggested, without explaining the point, that reprisals were something different from collective punishment and that an occupant could resort to reprisals in situations where collective punishment would be out of the question.

The records of the Peace Conference of 1899 throw hardly any further light on this question. Actually, that Conference did not deal with the issue of reprisals in any general way. Nor had the Conference of Brussels set any better example. True, the Russian proposals for a draft Convention which were before that Conference contained provisions dealing with belligerent reprisals. When, however, the discussion turned to the question of violations of the laws and usages of war and, in that context, to the proposed text on reprisals, the Belgian delegate argued that there was something odious to the very principle of reprisals; and, he said, as any draft-

² *Conférence internationale de la Paix*, Proceedings, Vol. III, p. 46.

ing of rules bearing on reprisals must necessarily imply that odious principle, it seemed wise not to embody the proposed Article in the draft Convention which the Conference was elaborating. He therefore proposed to sacrifice the Article as it was on the altar of humanity; a proposal that was accepted unanimously.³

What was this principle of reprisals, merely alluded to in 1899 and even expressly sacrificed to humanity in 1874? Was it so odious as to be better not referred to at all? Here, it may be interesting to quote an author who wrote in the same period and whose opinion was certainly not so entirely negative. This author, Henri Brocher, after mentioning the traditional function of so-called peacetime reprisals as measures short of war, went on to explain that reprisals had also become an intermediate way between war waged according to the rules and war not so waged. Belligerent reprisals, in other words, were a means to prevent war becoming completely barbarous. As such, they were the symptom of progress, although, he added, further progress would be necessary to lead to their reduction or even complete disappearance.⁴

This more positive view of belligerent reprisals was expressed, it should be added, in 1873, one year before the Conference of Brussels decided to refrain from discussing the concept in the name of humanity. Which side was right?

The opinion that belligerent reprisals have a place in the international legal order, where they operate as sanctions of the laws of war, can certainly be defended on sound theoretical grounds. International society is still characterized by a high degree of decentralization, leaving the enforcement of international law very much to the interested States. This is true in normal times, and it applies *a fortiori* in the abnormal situation of armed conflict. States—and also belligerent States—may exercise this function of law enforcement by various means, such as protest, complaint in an appropriate organ such as the Security Council, or bringing the matter before a competent Court (if there is one). They may also take recourse to unilateral enforcement action directly against the opposite party, and this may take the form of reprisals. Without any

³ Conference of Brussels, De Martens, N.R.G. 2nd Series, Vol. IV, p. 139.

⁴ Henri Brocher, "Les principes naturels du droit de la guerre", *Revue de droit international et de législation comparée*, Vol. V, 1873, p. 349.

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attempt at exactness, one could define belligerent reprisals as acts infringing, it is true, one or other norm of the law of war, but serving to make the adversary abandon a particular mode of conduct which equally infringes some norm of the law of war.

While there is thus a theoretical basis for the justification of belligerent reprisals, there are also grave objections, particularly from the point of view of human rights. It is of course easy to refer to reprisals as acts of one belligerent party against the other, but in reality the acts will affect the interests, or even the life or health, of human beings. Moreover, the victims will in all probability be innocent of the wrong retaliated against. Thus, if prisoners of war are killed in retaliation for the allegedly unlawful execution of members of one's own party who were prisoners in enemy hands the victims of reprisal bore no responsibility whatsoever for the executions retaliated against. Belligerent reprisals, in other words, rest on the idea of solidarity, of holding the members of a community jointly and severally liable for the deeds of some of them. It hardly needs emphasizing that this goes to the roots of the concept of human rights, as fundamental rights of the human being as an individual, as distinct from his position as a member of the collectivity.

Another, equally grave, objection to belligerent reprisals comes to light when these are considered from the other side, that is, the side of the retaliating party. The laws of war restrict belligerents in their power to conduct war by any means or methods of their choice. They are, in other words, a reluctantly accepted limitation on the sovereignty of States, intended to have their effect (in the words of Article 4 of the International Covenant on Civil and Political Rights) "in time of public emergency which threatens the life of the nation". Recourse to belligerent reprisals means the setting aside of certain such limits, or, in other words, a resumption of unrestricted sovereignty in a situation where this is least desirable and, indeed, least tolerable from the point of view of human rights.

These considerations lead to the conclusion that it is worth pursuing the abolition of belligerent reprisals. To be sure, this goal has in part been realized; while in 1929 a prohibition of reprisals was only introduced into the Prisoners of War Convention con-

cluded in that year, all four Geneva Conventions of 1949 contain an express prohibition of reprisals against persons and property protected under their terms. In the Fourth Convention this prohibition is extended to collective punishment and measures of terrorization of the civil population in occupied territory, as well as to the taking of hostages. Again, the Convention of The Hague of 1954 prohibits reprisals against protected cultural property. In all these cases, it should be added, the prohibition of reprisals was made possible by the introduction of other, less destructive, means: supervision of the observance of the rules, and individual punishment of breaches.

Even so, however, there remain a number of problems unsolved. These are connected, first of all, with the law of The Hague, or law of war. True, reprisals against cultural property are prohibited; but this accounts only for a very minor aspect of the problems encountered here.

It should be stated at the outset that some of the most basic problems which one meets here, though at first sight connected with belligerent reprisals, arise not so much from that concept as from that of reciprocity. Thus, the reservations made by a number of States in ratifying the Geneva Gas Protocol of 1925 have given the prohibition against the use of certain chemical and biological means of warfare, contained in the Protocol, the character of a no-first-use declaration. In other words, as soon as one belligerent in the course of an armed conflict starts using such prohibited weapons, the prohibition lapses and all the participants in that particular armed conflict are for the duration thereof free to use chemical or biological weapons in the same manner as they may use other non-prohibited means of warfare. And the same would hold good if a prohibition against the use of nuclear weapons were to assume the character of a prohibition of first use: any first use by one belligerent would restore the other belligerents in their right to use the weapons as if there were no prohibition; without prejudice, again, to the rules concerning the use of non-prohibited weapons, such as (to name a particularly important one) the prohibition to make the civil population the object of direct attack.

How difficult it is to obtain the exclusion of reciprocity from a prohibition as that against chemical weapons, came to light in

the 1930s when the Disarmament Conference met in Geneva, from 1932 to 1934. That Conference saw itself confronted with all the problems of inspection, in time of war as of peace, with which the present Conference of the Committee on Disarmament again has to wrestle. The endeavours of the Disarmament Conference remained without success. But it is of interest to note that the Conference in the course of its deliberations dealt very extensively with the problem of sanctions to be attached to a prohibition not on the condition of reciprocity. These sanctions, the Conference felt, should be special ones, and reprisals, even in kind, should preferably be excluded. It was only towards the end of the Conference, when all hope of success had in fact gone, that a British proposal fell back on the traditional position and stated that, in case of use of chemical weapons in violation of the relevant prohibition, reprisals in the form of retaliation in kind would be the principal sanction. Even then, however, it was not for a moment suggested that gas might be used in retaliation for any other infringement of the laws of war, that is, as retaliation not in kind.⁵

Similar difficulties will attend any attempt at achieving a prohibition against the use of nuclear weapons not restricted by a condition of reciprocity. Principal questions will be the prevention of violations of such a prohibition, and sanctions in case of violation. I need not enter into the various conceivable solutions for these problems. It may suffice to note that the difficulties here are as overwhelming as the interests at stake are tremendous. Indeed, one must fear that these problems will prove unsolvable for quite some time to come. It seems, therefore, that a prohibition against first use of nuclear weapons is for the time being the only end within reach.

This brings us back to the question of reprisals. For, as I remarked a moment ago, the effect of a reciprocity clause attached to a prohibition of nuclear weapons would merely be to deprive them, once used in an armed conflict, of their character of prohibited weapons for the duration of the conflict. Belligerents using them would, in other words, still have to respect the rules governing the use of non-prohibited weapons. But can they set aside these

⁵ Draft Convention on Disarmament, Conf.D. 157 (1); Geneva, 16 March 1933.

rules by way of reprisals? Can they, in particular—and this is the crucial question here—set aside the fundamental principle that the civil population should not be made the object of armed attack?

It is submitted that they cannot justifiably do so. In order to arrive at this conclusion, however, one cannot (as some authors have attempted to do)⁶ simply rely on the fact that a retaliatory nuclear attack on enemy territory would necessarily also affect property protected by the Geneva Conventions of 1949 or the Hague Convention of 1954: it has never been the intention, either of those Conventions, or of the prohibition of reprisals which they contain in particular, to decide *en passant* the issue of the protection of the civil populations against attacks with weapons of mass destruction.

Nor is it permissible simply to state that nuclear retaliation against the civil population would infringe the laws of humanity and, hence, be unjustifiable as a reprisal. There is no such thing as “the laws of humanity” which would all by themselves lead to the outright prohibition of certain forms of belligerent reprisals. Inhumanity, it should be realized, is more or less by definition a characteristic of belligerent reprisals.

There does exist, however, a principle of humanity, as one of the fundamental principles governing justifiable recourse to belligerent reprisals. Another such fundamental principle, complementary to humanity, is effectiveness. In a situation such as the one we are discussing, where there are no positive indications in customary or treaty law deciding the issue, the solution must in the last resort be found by weighing these two principles against each other in the light of all the relevant facts. Some authors who have done this have arrived at the conclusion that in case of nuclear retaliation against the civil population the inhumanity and, indeed, barbarity of the act is counter-balanced by its effectiveness

⁶ Baron von der Heydte, “Le problème que pose l’existence des armes de destruction massive et la distinction entre les objectifs militaires et non militaires en général”, reports drawn up for the 5th Commission of the *Institut de droit international, Exposé préliminaire*, 1961, in *Annuaire de l’Institut de droit international*, 1967, Vol. II, p. 89; N. Singh, *Nuclear Weapons and International Law*, 1959, p. 222 (unless “the first user of nuclear weapons destroys protected persons and property”: in that supposition “there would appear to be justification to retaliate in kind, . . . even though the provisions of the Geneva Conventions were being violated”).

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as a reprisal⁷. I venture to call in question the correctness of their evaluation. While there is no practice with nuclear retaliation, the experience of recent armed conflicts, including the Second World War, shows clearly that the short-term effect of retaliatory attacks against the civil population is uncertain, and that in the long run they are even likely to produce the opposite effect of the one intended. The so-called reprisal bombardment of London, in 1940, is a case in point.

True, the available facts do not permit the unqualified conclusion that the effect of a policy of retaliation against the civil population will be negligible, or even negative, in all circumstances. Even so, however, I do not hesitate to rate the effectiveness of such a policy as extremely dubious.

One has to weigh this dubious effectiveness against the unquestionable inhumanity of a policy of nuclear retaliation, say, against enemy cities. In my submission, this weighing up process must lead to the conclusion that such retaliation cannot be justified as a reprisal. On the other hand, the element of uncertainty implied in the above reasoning forces one to recognize that a prohibition of such forms of retaliation, in order to be effective, stands in urgent need of authoritative confirmation by the international community.

While nuclear retaliation, and the implied idea of holding the civil populations hostages for the policies their leaders choose to pursue, may be said to constitute the "maxi" problem of belligerent reprisals, there is also a "mini" problem; or, rather, there are two.

One is the issue of reprisals in non-international armed conflicts, in the sense of Article 3 of the Geneva Conventions of 1949 and Article 19 of the Hague Convention of 1954. Neither the common Article 3 of the Geneva Conventions, nor Article 19 of the Hague Convention, contains an express prohibition of reprisals. True, Article 3 (to confine ourselves to the more important Geneva Conventions) prohibits categorically the taking of hostages, along with other acts particularly violative of essential human rights. To that extent, these prohibitions can be regarded as elaborations

⁷ Singh, *op. et loc. cit.* n. 7; J.-C. Venezia, "La notion de représailles en droit international public", *Revue générale de droit international public*, Vol. 64, 1960, pp. 465 and 489.

of the requirement of humane treatment contained in the first clause of Article 3, sub-paragraph 1. But is it so unmistakably certain that the norm prescribing humane treatment of persons and thus protecting them as human beings, that is, in their individual capacity, excludes recourse to reprisals⁸ against these same persons as members of a community, that is, on the basis of the idea of solidarity?

The drafting history of the Geneva Conventions does not provide any definite answer to this question. Nor can the issue easily be decided by a recourse to fundamental principles. For, while it is beyond doubt that reprisals in the course of a non-international armed conflict will generally result in inhumane treatment of the victims of such acts, it is equally certain that the States in elaborating the text of Article 3 have displayed the utmost caution in signing away any of the powers at their disposal for the situation of internal armed conflict.

Once again, one is therefore confronted with a situation where the written law is not clear and where the resultant uncertainty can endanger human beings, even in their very lives. Amendment of Article 3 with an express prohibition of reprisals in all forms is therefore an urgent requirement.

There remains the second of the two mini-scale problems, and one that brings us outside the sphere of the law of armed conflict proper: viz., the issue of reprisals, or reprisal-like actions, in situations of non-armed political conflict. We are regularly confronted with news items about the kidnapping of diplomats and similar persons, who are then held as hostages to obtain the release of political prisoners held by the authorities. Such practices will perhaps be defended with the argument that the detention of the political prisoners was itself in contravention of fundamental human rights. Whether that contention is correct is of course a matter of appreciation of all the facts relevant to the case. The point of interest is, however, that such a practice of taking hostages in order to make the political opponent abandon a specific, allegedly unlawful, mode of conduct is in all respects identical to the practices belligerents have long pursued with a view to enforcing the law

⁸ As is suggested in the *Commentary to the Geneva Conventions of 1949*, published under the general editorship of Jean S. Pictet, I, p. 55; II, p. 36; III, p. 40; IV, p. 39.

of war. Participants in armed conflicts, whether international or not of an international character, have been deprived of the power so to react to the enemy's illegalities. Should this prohibition extend, as a matter of international law, to the non-armed political conflict?

This question, once again, cannot be simply answered by referring to certain written rules of law. True, unwarranted deprivation of liberty is contrary to a fundamental human right, and the taking of hostages is an unmistakable deprivation of liberty. But is it also unwarranted? The police, and, generally, those in power have certain powers to arrest persons even under the most democratic human rights régime. Should not the opponents of a perverted political structure likewise have certain powers to enforce human rights?

I shall not venture to suggest any definite answer to this question. But I do suggest that, if ever a code for the use of force in non-armed political conflict were to be brought about, the question of taking hostages and, in general, of reprisal-like actions on both sides in the conflict, will have to be solved one way or another. For that eventuality, I merely want to observe that here, as in the law of armed conflict, an element of particular importance should be the consideration that innocents ought not to be made to suffer for the deeds of others.

However this may be, one thing emerges with particular clarity from the foregoing summary examination of certain basic problems of the law of reprisals: on each of the three levels of coercion which we discussed, and both in the context of armed conflict and in that of non-armed political conflict, there are some crucial issues where the state of the law is uncertain, and where an authoritative solution of the problems posed by the possibility of reprisals is an urgent matter, not least in the interests of the realization of human rights.

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