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# INFOFLASH



**ASSESSING REPRISALS AS AN  
ALTERNATIVE TO JUDICIAL PROCEEDINGS  
FOR ENFORCING COMPLIANCE WITH  
INTERNATIONAL HUMANITARIAN LAW**

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## Introduction

The second Chapter of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA) (ILC, 2001) deals specifically with countermeasures. The concept was developed as a response to another State's intentionally wrongful conduct and it encompasses actions that would commonly be considered illegal under IHL. Therefore, countermeasures become permissible as a lawful response to a breach of an international obligation by another State, while they are also understood as a circumstance that precludes wrongfulness, such as the concepts of necessity and self-defence (ILC, 2001). Notably, they must not be punitive in character. Instead, the injured State can undertake them against the violating State for the sole purpose of inducing it to cease the breach and comply with its international obligations (ILC, 2001). Therefore, the undertaken measures must be reversible and feasibly suspendable.

Moreover, according to Article 51, the countermeasure taken must be proportionate vis-à-vis the gravity of the wrongful act and the overall objective of inducing compliance (ILC, 2001). To act in good faith, it must be preceded with a request to the breaching State to fulfil its obligations and, should that not suffice, an additional notification about implementing the countermeasure with an offer to negotiate (ILC, 2001). As soon as the violating State ceases its breach, the injured State is obligated to end the countermeasures (ILC, 2001). This obligation to withhold countermeasures also applies if the dispute between the two States is pending before a judicial body empowered to make a binding decision (ILC, 2001). For the purpose of this article, it is important to note that countermeasures cannot affect the obligations of IHL that prohibit reprisals (ILC, 2001).

International Humanitarian Law (IHL) has a similar system in place. The concept of belligerent reprisals emerged as one of the enforcement measures. Following a similar logic to countermeasures, it applies to circumstances of IHL violations. It allows the injured State to take measures that would normally violate IHL yet are permitted in this case to compel the violating State to comply with the law of armed conflict. However, a key distinction is the prohibition of the use of force, which in line with Article 2(4) of the United Nations Charter, is forbidden in the case of countermeasures. Nonetheless, belligerent reprisals are only applicable to cases of armed conflict. Subsequently, it becomes evident that they are largely manifesting as a military operation or an attack.

Before delving into belligerent reprisals in detail, it is important to briefly examine the more controversial mechanism of armed reprisals. This concept encompasses the use of similar measures yet operates outside of the context of armed conflicts. Over the years, some authors have tried to promote armed reprisals (Jessup, 1954). The idea was based on the

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belief that the complex realities of conflicts and disputes on the international scale often cannot be categorised as strictly times of peace or war. Drawing from this idea, some cases which, in theory, took place outside of an armed conflict allowed for the application of armed reprisal (Salpeter & Waller, 1971). It is worth to highlight, however, that the International Court of Justice (ICJ) has directly pronounced any armed reprisals during peacetime as unlawful (Legality of the Threat or Use of Nuclear Weapons, 1996).

## **1. The development of belligerent reprisals in IHL throughout history**

The concept of revenge and the “eye for an eye” principle (*lex talionis*) was part of the legal order at the earliest stages of its development and can be traced back to the Code of Hammurabi (Barsalou, 2010). Although the concept of belligerent reprisals is not punitive in nature, one might observe certain similarities between this mechanism and the ancient *lex talionis*. As understood nowadays, belligerent reprisals were developed in the Middle Ages and studied by legal scholars, such as Grotius (Barsalou, 2010). The history of the codification of belligerent reprisals begins with the Lieber Code of 1863, which marked the initial attempt to codify IHL (Wallace et al., 2018). The Lieber Code describes reprisals as the sternest feature of war yet acknowledges the necessity of limiting them to prevent conflicts from regressing into a “war of savages” (Lieber Code, 1863). Despite some scholars arguing in favour of de-legalising belligerent reprisals, the subsequent IHL Treaties and Conventions have accepted the practice while adding certain limitations.

The international community recognised the need to limit the scope of reprisals only after the end of the First World War (Barsalou, 2010). Unfortunately, the steps that were undertaken were relatively limited and mainly focused on the cases of prisoners of war (Barsalou, 2010). Subsequently, it was only after the horrors of the Second World War that the issue of belligerent reprisals was approached more thoroughly, as reflected in the Geneva Conventions.

However, even these efforts were limited, as they mostly omitted rules that would govern the actual application of the mechanism. In turn, what can be found in the Conventions are prohibitions for certain types of reprisals like the ones that are aimed at the sick and wounded (First Geneva Convention, 1949), the shipwrecked (Second Geneva Convention, 1949), prisoners of war (Third Geneva Convention, 1949) and other protected peoples and their property (Fourth Geneva Convention, 1949). Furthermore, the First Additional Protocol to the Geneva Conventions (API) forbids reprisals against civilian population, cultural objects, the environment, the infrastructure indispensable for the population’s survival, and installations containing dangerous forces (Protocol I, 1977). Additional regulations can also be found in the Customary International Humanitarian Law (CIHL), which is organised into a

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set of rules by the International Committee of the Red Cross (ICRC).

## **2. Belligerent reprisals in IHL**

### *General rules of belligerent reprisals*

On top of the reiteration of the prohibitions outlined in the Geneva Conventions, the ICRC rules recognise the legality of belligerent reprisals under stringent conditions. The requirements, contained in Rule 145, focus on the purpose, proportionality, and the circumstances surrounding the reprisal (Henckaerts & Doswald-Beck, 2005) and were further expanded in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) (Prosecutor v. Kupreškić et al., 2000).

Firstly, belligerent reprisals can only be undertaken as a response to a preceding serious violation of IHL. Thus, as per Rule 145, the sole purpose of the measure is to induce the violating side to cease the breach and comply with the norms (Henckaerts & Doswald-Beck, 2005). The provision clearly dismisses any possibility of anticipatory reprisal, meaning that any reprisal that predates the original violation is illegal under IHL, even if the violation seems immediate and inevitable. Furthermore, belligerent reprisals are only applicable to violations of IHL provisions and not general International Law. Some military manuals require that all reprisals must be publicly announced and communicated to the adversary (Henckaerts & Doswald-Beck, 2005), which appears to be a logical consequence of the necessary purpose of belligerent reprisals and an effort to further legitimise the undertaken measures.

Secondly, belligerent reprisals must be treated as a measure of last resort (Prosecutor v. Kupreškić et al., 2000). This means that no other non-forcible measure is available in such cases, and a prior warning has been issued to the adversary regarding the violation, which failed to achieve the desired outcome (Prosecutor v. Kupreškić et al., 2000).

Thirdly, reprisals must be proportional to the original violation (Henckaerts & Doswald-Beck, 2005). If a measure undertaken is excessive in force, it may lose the status of a legal belligerent reprisal. Excessiveness in such cases must be assessed from the perspective of the military combined with the moral and ethical one (Schmitt, 2023).

At the same time, it is important to highlight that proportionality does not mean that the reprisal must relate to the same violation as the original breach (Schmitt, 2023). As the reprisal can violate very different rules than the original breach, the proportionality test must be carried out on a case-to-case basis. The principle was further confirmed in the

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jurisprudence of the ICJ (*Legality of the Threat or Use of Nuclear Weapons*, 1996) and International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Kupreškić* case, where the judges also incorporated in the proportionality condition the requirement to cease the reprisal as soon as the adversary stops the original violation and complies with IHL obligations (*Prosecutor v. Kupreškić et al.*, 2000).

Moreover, there is an obligation to take special precautions before undertaking reprisals, meaning that the decision to implement belligerent reprisal can only be taken at the highest level of military command (*Prosecutor v. Kupreškić et al.*, 2000). This means that the authority to make such decisions lies solely on the national level with the top military and political officials. The ICTY directly prohibits local military commanders from deciding on (*Prosecutor v. Kupreškić et al.*, 2000). This condition aims to limit the number of reprisals undertaken and ensure that the previous requirements are fully met. Only the top officers who have a broad understanding of the conflict and are well informed about the circumstances can decide on the usefulness of a belligerent reprisal in inducing the adversary to comply with IHL. Should regional commanders be allowed to conduct belligerent reprisal independently, their objective would shift towards revenge and retribution, which the IHL forbids.

Finally, the last element recognised by the ICTY in the *Kupreškić* case was described with the notion of the “elementary considerations of humanity”, which has been examined by the ICJ over several cases (*United Kingdom of Great Britain and Northern Ireland v. Albania*, 1949; *Nicaragua v. United States of America*, 1986). While the concept has been legally present for a considerable time, its scope and normative status are still not entirely unambiguous in contemporary International Law (Jørgensen, 2000). In the context of belligerent reprisals, it is understood to imply that the acts of reprisal should not target persons who do not directly participate in the hostilities (Darcy, 2003).

#### *Belligerent reprisals in Non-International Armed Conflicts (NIACs)*

The requirements presented in the previous section constitute the primary rules that govern the commission of belligerent reprisals in International Armed Conflicts (IACs). However, the rules applicable to reprisals in Non-International Armed Conflicts (NIACs) remain unclear, including whether they are even permitted.

There are three main schools of thought regarding the belligerent reprisals in NIACs. The first one precludes the existence of belligerent reprisals in NIACs due to the conflicting nature of the two. Reprisals are meant to be a tool used by States to enforce compliance with the rules of war by other States. In the case of NIACs, there is never more than one

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State involved; thus, belligerent reprisals are non-applicable (Blikova, 2014).

On the contrary, the other two approaches accept the use of belligerent reprisals in NIACs. While one of them accepts them unconditionally, the other subjects them to legal restraints (Bílková, 2014). The jurisprudence of the ICTY clearly supports the latter approach, as the judges have deemed the question of the international nature of the conflict irrelevant (Prosecutor v. Kupreškić et al., 2000) and have instead focused on whether the legal requirements were met in the case at hand (Prosecutor v. Kupreškić et al., 2000).

Subsequently, the ICTY had to deal with the question of reprisals in the Martić case, where one can find indications that the Court recognises the existence of belligerent reprisals in NIACs. Firstly, while examining the existing prohibitions on the reprisals aimed against the civilian population, the judges specified that these rules must be respected in all armed conflicts (Prosecutor v. Milan Martić, 1996). Secondly, while assessing the legality of reprisals in the examined case, the judges did not consider the character of the conflict. Instead, they invoked the five criteria stipulated above (Prosecutor v. Milan Martić, 2007).

Thus, it becomes apparent that the ICTY recognised the existence of legal belligerent reprisals in NIACs as long as they fulfilled all of the requirements. At the same time, under CIHL, belligerent reprisals are forbidden in NIACs (Henckaerts & Doswald-Beck, 2005). In support of this conclusion, the ICRC invoked the limited evidence of the concept materialising in International Law vis-à-vis NIACs, as well as the lack of recognition by the States, with only four voicing support for the practice (Henckaerts & Doswald-Beck, 2005).

### **3. Challenges and opportunities of the belligerent reprisals**

There are many concerns regarding the practice of belligerent reprisals. Firstly, the concept can be used to legitimise illegal attacks that serve as retaliation. Such tactics can be seen in the Russian justifications for the attacks on Ukrainian civilian infrastructure (Schmitt, 2023). Furthermore, the availability of reprisals can lead to an increase in violence and the number of victims, including the protected persons. According to some people, the experiences of the World Wars showcased that belligerent reprisals, on top of being barbarous, often fail to achieve the intended goal, rendering them pointless (Wallace et al., 2018).

These considerations led some authors to conclude that the decision to omit an outright prohibition of belligerent reprisals into the API was a failure, which can only result in intentional bad-faith interpretations of the existing rules (Darcy, 2003). One need not look far for an example of such actions, as Russia has employed comparable strategies to justify its unlawful strikes on Ukraine, as aforementioned.

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Nonetheless, the IHL system lacks a judicial body that would specifically deal with its enforcement. While this role is often fulfilled by judicial bodies like the ICJ, the International Criminal Court (ICC), or human rights tribunals, this process can be costly and timely. Furthermore, these judicial bodies take a specific approach to IHL within the context of their original function. As a result, IHL enforcement can be somewhat lacking. In this context, the role of belligerent reprisals seems very fitting, allowing injured States to address the violations they suffered in a timely and effective manner.

In some cases, reprisals might be the only enforcement mechanism available to the State commanders to deal with the violations they suffered. Nevertheless, this role is undermined if the main objective of reprisals, the injured side's inducement to cease its violations, proves unsuccessful. Clearly, due to their very nature, reprisals can be used in bad faith and, despite the heavy regulation around them, they can create an environment of hostilities, which will be prone to the death of persons protected by the Geneva Conventions.

## **Conclusion**

Overall, countermeasures are a tool that States may use when they fall victim to a breach of an international obligation of another State. In such circumstances, the injured State is allowed to perform an act that would otherwise be illegal under IHL in order to persuade the violating State to halt the breach (ILC, 2001). Nowadays, countermeasures are nowadays an integral part of contemporary international law. They provide the States with a mechanism that, unlike judicial proceedings, can be enacted hastily and at a low cost.

Belligerent reprisals are a similar concept that has always been present in IHL (Lieber Code, 1863). This mechanism recognises that a State that has fallen victim to a breach of IHL has the right to take measures that would typically breach IHL as well to compel the violating State to respect the law of war. Since belligerent reprisals are undertaken in the context of an armed conflict, the concept allows for the use of force, unlike the related system of countermeasures.

As over the years belligerent reprisals have become much more limited in scope, it is important to note an ongoing trend that has become apparent. The most relevant rules regulating the concept in contemporary IHL can be found in the Geneva Conventions and the jurisprudence of the ICTY. The utilisation of the practice is contingent on strict conditions. Accordingly, the sole purpose of a legal belligerent reprisal must be to compel the breaching State to cease the violation (Prosecutor v. Kupreškić et al., 2000). Additionally, the reprisal must be proportional to the original violation, while the decision regarding the reprisal can only be taken at the very top of the command chain (Prosecutor v. Kupreškić et

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al., 2000). Lastly, elementary considerations of humanity have to be applied (Prosecutor v. Kupreškić et al., 2000).

The rules outlined above apply to an IAC, as the status of belligerent reprisals in the context of NIACs is not entirely unambiguous. On one hand, the ICRC rules preclude the legality of reprisals in NIACs (Henckaerts & Doswald-Beck, 2005). On the other hand, the jurisprudence of the ICTY seems to suggest that the judges accept such a possibility (Prosecutor v. Milan Martić, 2007; Prosecutor v. Kupreškić et al., 2000).

Finally, it is important to review the current standing of belligerent reprisals in contemporary International Law. In addition to the obvious ethical concerns, there are some legitimate questions regarding the possible application of the concept in bad faith and its effectiveness. Yet, reprisals provide States with a tool for enforcing IHL in an otherwise lacking system.

Therefore, it becomes evident that while belligerent reprisals can play a legitimate role in the enforcement of IHL, they constitute a treacherous tool which can be used in bad faith. While CIHL and Geneva Conventions set out explicit limitations, States still use the examined concept to legitimise attacks of a retributive nature, such as the case of Russia and Ukraine. Considering such circumstances and the historical trend of limiting the scope of belligerent reprisals over the years, it might be time to reconsider the overall utility of the mechanism. Yet, before any such developments, the problem of legal enforceability of IHL needs to be tackled. This would not only allow us to move on from the morally ambiguous practice of belligerent reprisals but also strengthen the rule of law in the context of an armed conflict.

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