Reflections on the legality of attacks against the natural environment by way of reprisals / Stavros-Evdokimos Pantazopoulos

The paper examines the concept of belligerent reprisals and assesses the legality of attacking the environment by way of reprisals. The law of belligerent reprisals, which is linked to the principle of reciprocity, allows one belligerent State unlawfully injured by another to react by means of what under normal circumstances would constitute a violation of the jus in bello, so as to induce the violating State to comply with the law. The instances of lawful recourse to reprisals have been considerably limited, since their application is either explicitly prohibited against certain protected persons and objects, including against the natural environment, or is subject to stringent conditions according to customary International Humanitarian Law (IHL). Despite its narrowing scope, the doctrine of reprisals remains a valid concept under the existing legal framework. For one, the state of affairs under customary international law with respect to reprisals directed at civilian objects (including against parts of the environment), subject to certain rigorous conditions, remains unclear. To complicate matters even further, any proposition on the status of reprisals in the context of a non-international armed conflict (NIAC) is shrouded in controversy, as there is no relevant treaty provision. In this regard, the present author endorses the approach espoused in the International Committee of the Red Cross (ICRC) Study on Customary IHL, namely to altogether prohibit resort to reprisals in the context of a NIAC. Turning to the status of reprisals against the natural environment under customary IHL, it is argued that a prohibition of attacks against the natural environment by way of reprisals is in the process of formation with respect to the use of weapons other than nuclear ones. All things considered, the International Law Commission (ILC) was confronted with an uncomfortable situation in the context of its work on the ‘Protection of the Environment in Relation to Armed Conflicts’. By sticking to the verbatim reproduction of Article 55(2) of Additional Protocol I, the ILC chose the proper course of action, since any other formulation would not only undercut a significant treaty provision, but might also result in the normative standard of conduct being lowered.