

**DOES ONE ILLEGALITY MERIT ANOTHER?
THE LAW OF BELLIGERENT REPRISALS IN
INTERNATIONAL LAW**

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I. Introduction

A special feature of international law is its lack of an effective enforcement mechanism. The law of reprisals results from that weakness, providing States a limited power of self-help to force other States to obey international law. It permits a State to take extraordinary measures, indeed measures that would otherwise be unlawful, against another State in response to a prior illegal act of the State to which the reprisal is directed. Although reprisals may have a useful deterrent effect, they can cycle out of control into an orgy of violence, and even when they do not, they typically inflict great suffering on innocents. For these reasons, successive international treaties have limited their use. Some argue that restrictions on reprisals have now gone too far, however, and are wholly out of step with political and military realities.

This article begins by defining belligerent reprisals. It then examines the conditions on the use of reprisals, including persons and objects protected from reprisals by various treaties. Once the law on reprisals is outlined, arguments for and against reprisals are critiqued to determine whether the limitations on reprisals in international law are appropriate. Finally, the article considers possible future developments and makes recommendations for clarification of certain areas of international law.

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II. Belligerent Reprisals

One must distinguish reprisals from related notions and what may appear to be related situations. *The Naulilaa Case (Portugal v. Germany)*² contains the classic definition of reprisal and its elements. This was an arbitration established in accordance with the Versailles Treaty.³ The *Naulilaa* tribunal stated:

Reprisals are an act of self-help on the part of the injured states, responding after an unsatisfied demand to an act contrary to international law on the part of the offending State They would be illegal if a previous act contrary to international law had not furnished the reason for them. They aim to impose on the offending State reparation for the offense or the return to legality in avoidance of new offenses.⁴

Reprisals are related but distinct from the concept of retorsion—acts that “are generally not unlawful and which are taken in response to behavior which itself is not necessarily illegal.”⁵ In contrast, reprisals involve acts that would normally be illegal. Reprisals are also distinct from

2. Responsabilité de L'Allemagne a Raison des Dommages Causés dans les Colonies Portugaises du Sud de L'Afrique, 8 Trib. Arb. Mixtes 409 (1928) (Portugal v. Germany) (*The Naulilaa Case*), reprinted in 2 R. Int'l Arb. Awards 1011 (1949).

3. C.H.M. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 RECUEIL DES COURS 455, 460 (1952).

4. *The Naulilaa Case*, 8 Trib. Arb. Mixtes at 422-25, reprinted in 2 R. Int'l Arb. Awards at 1026. This is similar to the definition by the Institut de droit international:

Les représailles sont des mesures de contrainte, dérogoires aux règles ordinaires du droit des gens, décidées et prises par un Etat, à la suite des actes illicites commis à son préjudice par un autre Etat, et ayant pour but d'imposer à celui-ci, par pression exercée au moyen d'un dommage, le retour à la légalité.

[Reprisals are measures of coercion, derogating from the ordinary rules of the law of the people, determined and taken by a State, following the commission of illicit acts against it by another State, and having as their aim to impose on the second State, through pressure exerted by means of harm, a return to legality.]

38 ANNUAIRE 708-11 (1934).

5. Christopher Greenwood, *The Twilight of the Law of Belligerent Reprisals*, 20 NETH. Y.B. INT'L L. 35, 38 (1989).

another form of self-help, acts of self-defense.⁶ Both involve the application of armed force by a State, and share certain preconditions to their use.⁷ The difference is the purpose of the two actions.⁸ In self-defense, force is applied to counter “an immediate and physical danger” to the State, whereas reprisals coerce another State to abide by international law.⁹ Of course, reprisals are also a form of future self-defense in the sense that they may protect the State from violations of international law in the future.¹⁰

Certain rules of war are structured in such a way that their violation by one party releases other parties to the conflict from the rule. A standard reservation to the Geneva Gas Protocol of 1925¹¹ provides that the Protocol will cease to bind the State if an enemy State breaches its obligations. In effect, this agreement becomes a “prohibition on the first use of gas,”¹² so that States that are attacked with a weapon prohibited by the Protocol may respond in kind without needing to rely upon the doctrine of reprisals. Indeed, Article 60(5) of the 1969 Vienna Convention on the Law of Trea-

6. See generally Report of the International Law Commission (32d sess.), 2 Y.B. INT'L L. COMM'N 1, 53–54 (1980).

7. Derek W. Bowett, *Reprisals Involving Recourse To Armed Force*, 66 AM. J. INT'L L. 1, 3 (1972). These include a prior violation of international law by a State, an attempt to obtain relief by other non-forceful measures, and a proportionate response. *Id.*

8. William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterrorism Operations*, 30 VA. J. INT'L L. 421, 423 (1990).

9. FRITS KALSHOVEN, *BELLIGERENT REPRISALS* 26 (1971). See also Byard Q. Clemmons & Gary D. Brown, *Rethinking International Self-Defense: The United Nations' Emerging Role*, 45 NAVAL L. REV. 217, 243 (1998). The author discusses *The Caroline* case of 1837, where U.S. Secretary of State Daniel Webster asserted that self-defense may be exercised only when the “necessity of that self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation.” *Id.*

10. Edward Kwakwa, *Belligerent Reprisals in the Law of Armed Conflict*, 27 STAN. J. INT'L L. 49, 50 (1990); Bowett, *supra* note 7, at 3.

Within the whole context of a continuing state of antagonism between states, with recurring acts of violence, an act of reprisal may be regarded as being at the same time both a form of punishment and the best form of protection for the future, since it may act as a deterrent against future acts of violence by the other party.

Id.

11. Protocol for the Prohibition of the Use of Asphyxiation, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 94 L.N.T.S. 65 (1929).

12. Greenwood, *supra* note 5, at 38.

ties states, inter alia, that treaty provisions prohibiting reprisals are not, without more, terminated or suspended because of material breach.¹³

This article is limited to the notion of belligerent reprisals that occur during a pre-existing armed conflict. A debate is currently ongoing concerning non-belligerent reprisals and the United Nations Charter.¹⁴ Briefly, the United Nations Charter is a clear expression of the collective will of nations to find alternatives to the use of force.¹⁵ Article 2 of the Charter states, “All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any manner inconsistent with the Purposes of the United Nations.” Article 2 quite clearly suggests that reprisals using force are not permitted under the Charter.¹⁶ Article 2 is modified by Article 51 of the Charter, however, which states that “nothing in the present Charter shall impair the inherent right of individual . . . self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” It might be argued that although reprisals using force are illegal under the Charter, perhaps their functional equivalent could be permitted if characterized as an act of self-defense.¹⁷ This question, which involves non-belligerent reprisals, is beyond the scope of this article.

III. Conditions on the Recourse to Reprisals

The *Naulilaa Incident*, referred to at the beginning of Section II, specified now well-accepted limits on the use of reprisals. Specifically, reprisals (1) can only be executed by agencies or instrumentalities of a State; (2) must be proportionate; and (3) must follow a failed attempt to resolve the

13. Vienna Convention on the Law of Treaties, 1969, 1155 U.N.T. S. 331, 346; YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 196 (3rd ed. 2001).

14. See generally NICHOLAS GREENWOOD ONUF, *REPRISALS: RITUALS, RULES, RATIONALES* 35-62 (Center of International Studies, Woodrow Wilson School of Public and International Affairs, Research Monograph No. 42, 1974).

15. Leah M. Campbell, *Defending Against Terrorism: A Legal Analysis of the Decision to Strike Sudan and Afghanistan*, 74 TUL. L. REV. 1067, 1078 (2000).

16. Onuf, *supra* note 14, at 35.

17. See DINSTEIN, *supra* note 13, at 172-73 (discussing “interceptive self-defence”); Robert W. Tucker, *Reprisals and Self-Defense: The Customary Law*, 66 AM. J. INT’L L. 589 (1972).

violation by peaceful negotiation.¹⁸ Applying these rules to the facts in *Naulilaa*, the tribunal found Germany's reprisal illegal, since the acts were not a proportionate response and had not been preceded by any attempts at negotiation.¹⁹ This formulation is important because it sets out the conditions for recourse to reprisals. While treaties have significantly changed the scope of the persons and objects that may be the subject of reprisals, they have not altered these principles relating to recourse to reprisals in general, which remain governed by customary international law.²⁰ This article considers these elements in some detail below.

A. Prior Violation of International Law

The State that is the subject of a reprisal must be the State that perpetrated the prior violation of international law or its ally.²¹ The prior violation must be of the law regulating the conduct of war²²—not simply a violation of the laws regulating resort to force.²³ Therefore, a State cannot use the doctrine of reprisals to justify otherwise unlawful means or methods of warfare against a State whose only illegal act was initiating a war of aggression. This is because the law regulating the conduct of war applies to all parties regardless of any breach of the laws regulating resort to

18. Kwakwa, *supra* note 10, at 52. A similar formulation is found in section 905 of the Restatement (Revised) of the Foreign Relations Law of the United States:

(1) Subject to subsection (2), a state victim of a violation of an international obligation by another state may resort to countermeasures that might otherwise be unlawful, if such measures: (a) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and (b) are not out of proportion to the violation and the injury suffered. (2) The threat or use of force in response to a violation in international law is subject to prohibitions on the threat or use of force in the United Nations Charter as well as to Subsection (1).

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 905 (1987) (Unilateral Remedies).

19. H. BRIGGS, *THE LAW OF NATIONS* 953 (1952).

20. Greenwood, *supra* note 5, at 39.

21. *See id.* at 40; M. GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 410-11 (1959).

22. *Ius in bello*.

23. *Ius ad bellum*.

force.²⁴ Indeed, as Sir Hersch Lauterpacht recognized, this is necessary to avoid the ridiculous situation “in which one side would be bound by the rules of warfare without benefiting from them and the other side would benefit from them without being bound by them.”²⁵ It also prevents each side from accusing the other of aggression and invoking the doctrine of reprisals to avoid the law regulating the conduct of war.²⁶

B. Proportionality

Although it is clear that reprisals must be proportionate, there is some disagreement as to what act or object the reprisal needs to be measured against.²⁷ The traditional view is that reprisals should be proportionate to the initial violation of international law.²⁸ McDougal and Feliciano argue, however, that the reprisal must be sufficient but not excessive in forcing compliance with international law, not necessarily proportionate to the initial violation.²⁹

While it is appropriate to bear the purpose of the reprisal in mind, it does not seem correct to suggest, as McDougal and Feliciano do,³⁰ that reprisals may exceed the initial violation in terms of violence. This would clearly increase the risk of escalating the conflict. Instead, the purpose should impose an additional limitation on the use of the reprisal so that the

24. United States v. List, 15 Ann. Dig. & Rep. Pub. Int'l Cases 632, 637 (1948).

Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, pmbl., 1125 U.N.T.S. 3 [hereinafter Protocol I].

25. Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT'L L. 206, 212 (1953). See also Christopher Greenwood, *The Relationship Between ius ad bellum and ius in bello*, 9 REV. INT. STUD. 221 (1983).

26. Greenwood, *supra* note 5, at 41.

27. *Id.* at 43.

28. OXFORD MANUAL, THE LAWS OF WAR ON LAND art. 86 (1880).

29. M. McDUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 682 (1961).

30. *Id.*

reprisal must not exceed either the initial violation or the minimum level of force required to induce compliance with international law.³¹ Even so, determining whether a reprisal is proportionate can still be a crude exercise,³² particularly when reprisals are not in kind, for example where a State attacks enemy soldiers with prohibited weapons in retaliation for enemy attacks on civilian targets.

C. Last Resort

Reprisals must only be used after the State attempts other reasonable methods of seeking redress short of force that have failed. In circumstances where there is a need to act quickly to protect civilians or troops from further injuries arising from violations of international law, or where it is clear that the enemy will not respond to other approaches, no other attempts may be required before resort to reprisal is permissible.³³ The requirement of last resort remains appropriate as a general rule, however, because it recognizes the drastic nature of reprisals and the likelihood of horrific consequences.

IV. Persons and Objects Protected Against Reprisals

A. Geneva Conventions of 1929

The 1899 and 1907 Hague Regulations on the Law of Land Warfare³⁴ contained no direct reference to reprisals, possibly out of concern that doing so would be seen as condoning their use. Article 27 of the Hague Regulations of 1907, however, implicitly prohibited reprisals against cultural property.³⁵ The frequent use of reprisals during the First World War,³⁶ particularly against prisoners of war, led to the first explicit prohibition on

31. Greenwood, *supra* note 5, at 43.

32. The *Ardeatine Caves* case involved a German reprisal, the slaughter of 355 Italian prisoners in response to a bomb attack by the Italian Resistance that killed thirty-three German military policemen. 15 Ann. Dig. & Rep. Pub. Int'l Cases 471 (1948). The court found the reprisal disproportionate not only because of the relative difference in numbers, but also because of the difference in the ranks of those killed. *Id.*

33. KALSHOVEN, *supra* note 9, at 340.

34. Hague Convention No. II with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247; Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct 18, 1907, 36 Stat. 2277, 1 Bevans 631.

35. KALSHOVEN, *supra* note 9, at 66-67.

36. For example, the burning of the University of Louvain as a reprisal against the

their use against particular targets in Article 2 of the 1929 Convention Relative to the Treatment of Prisoners of War.³⁷ This Convention prohibited reprisals against prisoners of war,³⁸ an arguably legal practice under international law until that time. Although the prohibition was unanimously accepted by the Convention, arguments were made against it, including the assertion that no army “could reasonably be expected to renounce in war so effective and powerful a weapon for the redress or cessation of a reported intolerable wrong upon its own nationals at the hand of the enemy as immediate or threatened reprisal on enemy units in its own hands.”³⁹ Curiously, it was not included in the Geneva Conventions of 1864 and 1906 dealing with the wounded and sick, perhaps due to an oversight.⁴⁰

B. Geneva Conventions of 1949

In response to the horrors of the reprisals that had occurred during the Second World War, new treaties were prepared prohibiting reprisals against new classes of targets. The adoption of the 1949 Geneva Conventions⁴¹ represented a significant development in the law of reprisals. They prohibited:

36. (continued)

alleged firing on German troops by Belgian non-combatants. *See infra* note 91 and accompanying text.

37. Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 2 Bevans 932.

38. “[M]easures of reprisal against [prisoners of war] are forbidden.” *Id.* art. 2(3).

39. KALSHOVEN, *supra* note 9, at 74 (quoting the Tenth International Conference of the Red Cross).

40. COMMENTARY, GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 244 (J. Pictet ed., 1952).

41. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilians in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

- (1) reprisals against soldiers who are wounded or sick, medical personnel, or medical buildings or equipment;⁴²
- (2) reprisals against naval personnel who are wounded, sick, or shipwrecked, naval medical personnel, hospital ships or equipment;⁴³
- (3) reprisals against prisoners of war;⁴⁴ and
- (4) reprisals against civilians and their property in occupied territory and internment.⁴⁵

These Conventions significantly clarified the law of reprisals and outlawed the practice in relation to an expanded class of legally protected persons.⁴⁶ Most of the expansion resulted from the Fourth Geneva Convention, which prohibited reprisals against civilian internees and inhabitants of occupied territories. These were previously some of the most common targets for reprisals.⁴⁷ The prohibition of reprisals against the sick and wounded was also an important development, as earlier Geneva Conventions did not cover these reprisals. Today, almost all nations accept the four Geneva Conventions,⁴⁸ and their provisions may constitute *ius cogens* obligations.⁴⁹

42. "Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited." Geneva Convention I, *supra* note 41, art. 46.

43. "Reprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention are prohibited." Geneva Convention II, *supra* note 41, art. 47.

44. "Measures of reprisal against prisoners of war are prohibited." Geneva Convention III, *supra* note 41, art. 13(3).

45. "Reprisals against protected persons and their property are prohibited." Geneva Convention IV, *supra* note 41, art. 4(1). "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." *Id.* art. 33(3).

46. Kwakwa, *supra* note 10, at 57.

47. *Id.*

48. At the time of writing, 189 States were parties to the Geneva Conventions of 1949.

49. Also *ius cogens* [compelling law]. See L. Alexidze, *Legal Nature of Jus Cogens in Contemporary International Law*, 172 RECUEIL DES COURS 223, 262-63 (1981); A. ROBERTS & R. GUELF, DOCUMENTS ON THE LAWS OF WAR 1970 (2d ed. 1989).

C. Additional Protocols of 1977

While the 1949 Geneva Conventions significantly expanded the class of persons and property protected from reprisals, unmentioned was whether civilians and civilian objects in enemy, non-protected territory should also be protected from reprisals. The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts, Geneva, 1974-1977, resolved this issue. The Conference resulted in two additional protocols to the Geneva Conventions of 12 August 1949, of which Protocol I was particularly important in relation to reprisals.⁵⁰ Protocol I applies between parties to the Protocol in cases of international armed conflicts, and by virtue of Articles 1(4) and 96(3), applies between a party to the Protocol and a national liberation movement as defined by those two provisions.⁵¹ It should be noted, however, that the United States is not a party to Protocol I and that other countries have made reservations with respect to the articles addressing reprisals.⁵² This article next describes briefly those Protocol I provisions relevant to reprisals.

Article 20 of Protocol I prohibits reprisals against persons and objects protected by Part II of Protocol I. This includes the wounded, the sick and shipwrecked, and those medical and religious personnel, buildings, vehicles and aircraft protected by Articles 8 through 34 of Protocol I. This prohibition is uncontroversial and simply extends the proscriptions on reprisal in the First and Second Geneva Conventions to a broader range of persons and objects involved in the care of the wounded, sick and shipwrecked.⁵³

Article 51(6) of Protocol I contains what appears to be an extremely broad prohibition on reprisals: "Attacks against the civilian population or

50. Protocol I, *supra* note 24; Protocol Additional to the 1949 Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 609 (Protocol II).

51. Protocol I, *supra* note 24, arts. 1(4), 96(3).

52. "The U.S. does not support [those provisions] of Article 51 and subsequent Protocol I . . . prohibiting the use of reprisals and [does] not regard such prohibitions to reflect customary international law." Michael J. Matheson, Department of State Legal Adviser, *Comments to the Humanitarian Law Conference*, in 2 AM. U.J. INT'L L. & POL'Y 419, 426. See also YORAM DINSTEIN, *supra* note 17, at 197. "Countries making reservations in respect to the articles addressing reprisals include Germany and the United Kingdom. Although worded differently, both countries have reserved the right to take reprisals against countries making serious and deliberate attacks against their: civilians, civilian population, or civilian objects." *Id.*

53. Greenwood, *supra* note 5, at 53.

civilians by way of reprisals are prohibited.”⁵⁴ It has been argued, however, that this article should be read in conjunction with Article 51(5)(b)⁵⁵ to make legitimate those attacks justified by military necessity.⁵⁶ This argument is somewhat disingenuous, given that Article 51(5) clearly gives examples rather than an exhaustive list of illegal indiscriminate attacks. Further, Article 51(5) is clearly concerned with so-called “collateral damage” rather than acts of reprisal directed primarily towards civilians. Finally, normal principles of construction would suggest that the specific wording of Article 51(6) on reprisals would prevail over any implications on reprisals that one might attempt to draw from the discussion of indiscriminate attacks in Article 51(5)(b).

Article 52(1) of Protocol I states, “Civilian objects shall not be the object of attack or reprisals.”⁵⁷ Civilian objects are defined as all objects that are not military objectives.⁵⁸ This provision recognizes that reprisals against civilian objects often result in incidental loss of lives and often affect the important interests of civilians. Interestingly, the International Committee of the Red Cross did not propose the prohibition of reprisals on

54. Protocol I, *supra* note 24, art. 51(6).

55. *Id.* art. 51(5)(b).

Among others, the following types of attacks are to be considered as indiscriminate . . . (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Id.

56. Kwakwa, *supra* note 10, at 60.

57. Protocol I, *supra* note 24, art. 52(1).

58. *Id.* art. 52(2).

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Id. “In the case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.”
Id. art. 52(3).

civilian objects.⁵⁹ Arguably, such a prohibition encourages States to take reprisals against civilian persons, rather than civilian objects, in cases where the States' civilians suffer as victims of illegal attacks.⁶⁰ Permitting the right of reprisal against civilian objects, therefore, could ultimately result in a mitigation of the loss suffered by the civilian population. This argument essentially maintains that States are likely to agree to reprisals that are not as hideous as the original act complained of, so long as they are permitted to do something close or related to the original act. This view may or may not be correct, but it gives little guidance as to how many classes of legally protected persons or objects there should be. At its extreme, the argument suggests there should be only one class of legally protected persons because any extension could result in States choosing to ignore all the prohibitions.

Article 53 of Protocol I prohibits making "historical monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples . . . the object of reprisals."⁶¹ This prohibition is made "[w]ithout prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and other relevant international instruments."⁶² Article 4 of the Convention on the Protection of Cultural Property prohibits "any act directed by way of reprisals against cultural property."⁶³

In relation to Article 53 of Protocol I, the lesser of two evils argument again arose. Specifically, the delegates debated whether all places of worship should be protected, or whether protection should be limited to those

59. See COMMENTARY ON THE ADDITIONAL PROTOCOLS 982-86 (Y. Sandoz, C. Swinarski & B. Zimmerman eds., 1987); see also Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 250 n.58 (2000) ("The steering committee of ICRC experts on customary rules of international humanitarian law took the position that the prohibition on reprisals against civilian objects . . . is contentious and has not yet matured into customary law.").

60. Kwakwa, *supra* note 10, at 63.

61. Protocol I, *supra* note 24, art. 53.

62. *Id.*

63. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, art. 24, 249 U.N.T.S. 240. Cultural property is defined as:

- (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art;

places of worship that made up the cultural heritage of a people. The rapporteur stated that those who wished

to include all places of worship adduced both religious reasons and traditions of immunity and asylum to support their proposal. Those who wished to limit the objects protected . . . to [those with] considerable historical, cultural, and artistic importance argued that the immunity of these latter objects would inevitably be undermined if all local churches and other places of worship were included.⁶⁴

Protocol I does not directly withdraw protection for cultural objects and places of worship when they are used for military purpose, for example a church spire being used by snipers. It does so indirectly, however, since Article 53 of Protocol I is expressly subject to the Hague Convention, Article 11 of which provides for the loss of immunity where such objects are used for military purposes.⁶⁵

As an additional restriction upon reprisals, Article 54(4) of Protocol I provides that objects indispensable to the survival of the civilian popula-

63. (continued)

manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above; (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a); (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments."

Id. As with Protocol I, the United States is not a party to the Convention on the Protection of Cultural Property. President Clinton sent the Hague Cultural Property Convention to the Senate for its advice and consent to ratification in 1999. According to the President's letter of transmittal, U.S. military policy and conduct of operations are entirely consistent with the Convention's provisions. *See* President's Letter of Transmittal, Hague Cultural Property Convention (Jan. 6, 1999).

64. VI OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 224, CDDH/SR.42, Annex (1974-77) [hereinafter OFFICIAL RECORD OF THE DIPLOMATIC CONFERENCE].

65. Kwakwa, *supra* note 10, at 66.

tion "shall not be made the object of reprisals."⁶⁶ Such objects include "foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works."⁶⁷ It is clearly the corollary of the desire to protect civilians recognized in Article 51, since reprisals against objects indispensable to the civilian population lead to the same outcomes as attacks on civilians.

Article 55(2) of Protocol I states, "Attacks against the natural environment by way of reprisals are prohibited."⁶⁸ The elusive Article 55(1) offers the only guide to the meaning of "natural environment."

Care must be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.⁶⁹

Perhaps some of the uncertainty about this prohibition arises because the term "natural environment" was not particularly well understood even at the Diplomatic Conference. Kalshoven observed that "the Conference started from the premise that 'the natural environment' was a value worth being protected against intolerable damage, and left it at that."⁷⁰

Finally, Article 56(4) of Protocol I prohibits making works and installations containing dangerous forces the object of reprisals.⁷¹ Article 56(1) defines "dangerous forces" to include such things as "dams, dykes and nuclear electrical generating stations . . . [where] attack may cause the release of dangerous forces and consequent severe losses among the civilian population."⁷²

66. Protocol I, *supra* note 24, art. 54(4).

67. *Id.*

68. *Id.* art. 55(2).

69. *Id.* art. 55(1).

70. Frits Kalshoven, *Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977*, 9 NETH. Y.B. INT'L L. 107, 103 n.55 (1978); Kwakwa, *supra* note 10, at 49 n.92.

71. Protocol I, *supra* note 24, art. 56(4).

72. *Id.* art. 56(1).

V. Evaluating the Law on Reprisals

A. The Current Position

As discussed in Part IV, Protocol I dramatically reduced the scope of persons and objects that can legitimately be made the subject of reprisals. At the time of writing, 157 states were parties to Protocol I, although a number of countries are conspicuously absent.⁷³

For those countries bound by Protocol I, in cases of land warfare, reprisals may only be taken against: (1) members of an enemy's armed forces actively engaged in hostilities or other persons who are participating directly in hostilities even if they are not members of an enemy's armed forces; and (2) military objectives, meaning "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."⁷⁴

In cases of air and naval warfare, the scope for reprisals is broader. Article 49(3) states:

The provisions of [Part IV, Section I (containing all of the reprisal provisions except Article 20)] apply to any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land. They further apply to all attacks from the sea or from the air against objectives on land but do not otherwise affect the rules of international law applicable in armed conflict at sea or in the air.⁷⁵

This means that the reprisal provisions in Protocol I, other than Article 20, do not apply to ship-to-ship, ship-to-air, or air-to-air combat unless the combat has an attendant effect on civilians or civilian objects on land.⁷⁶ Therefore, a State's navy or air force is permitted to subject civilian aircraft and merchant ships to reprisals.⁷⁷ Why different rules should apply to air

73. These countries include Afghanistan, France, India, Iran, Iraq, Israel, Pakistan, and the United States.

74. Protocol I, *supra* note 24, art. 52(2).

75. *Id.* art. 49(3).

76. Greenwood, *supra* note 5, at 53-54.

77. N. Ronzitti, *The Crisis in the Law of Naval Warfare*, in *THE LAW OF NAVAL WARFARE* 48-50 (N. Ronzitti ed., 1988).

and naval warfare remains unclear.⁷⁸ Future international agreements should remove this anomaly because the civilian persons and objects Protocol I seeks to protect against reprisals require protection in the air and at sea just as they do on land.

B. Deterrence or Escalation?

Some commentators have suggested that after Protocol I, “the future of belligerent reprisals as an institution of international law must be in doubt.”⁷⁹ Protocol I changed dramatically the law of belligerent reprisals and has been heavily criticized on a number of grounds. Protocol I is commonly criticized because it removes an important sanction of States to deter unlawful behavior. Indeed, the Diplomatic Conference recognized that there was a need to create an alternative means of redress for States given the dramatic restrictions on their right to reprisals. The result was the insertion of Article 90 in Protocol I.⁸⁰

Article 90 provided for the establishment of an International Fact-Finding Commission to inquire into facts alleged to be grave or serious breaches of the Geneva Conventions or Protocol I and to “facilitate, through its good offices, the restoration of an attitude of respect for the Conventions and this Protocol.”⁸¹ The Commission has jurisdiction when both parties to a conflict recognize its competence.⁸² Such recognition is separate from signing or ratifying Protocol I, and it may be ongoing or limited (for example, for the purposes of a particular conflict or investigation).⁸³ Where both parties to a conflict have not accepted the competence of the Commission in advance, the Commission may only institute an inquiry with the consent of both parties.⁸⁴ The Commission was officially constituted in 1991 after twenty States parties recognized its compe-

78. See SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (L. Doswald-Beck ed., 1995). It is unclear why reprisals were not dealt with in this work, which represents the only major attempt to restate the law of armed conflicts at sea.

79. Greenwood, *supra* note 5, at 56.

80. Protocol I, *supra* note 24, art. 90.

81. *Id.* art. 90(2)(c).

82. *Id.* art. 90(2)(a).

83. At the time of writing, fifty-seven countries have recognized the competence of the International Humanitarian Fact-Finding Commission. International Humanitarian Fact-Finding Commission, *States Parties*, at <http://www.ihffc.org/en/index.htm> (last modified Mar. 8, 2000).

84. Protocol I, *supra* note 24, art. 90(2)(d).

tence.⁸⁵ The Commission has never once been called upon, and one commentator derided it as “an almost toothless tiger.”⁸⁶

While the International Fact-Finding Commission may not be the strongest mechanism for enforcing the law of armed conflict, the arguments against this Protocol I creation presuppose that reprisals would be more effective. Some commentators suggest that the execution or threat of reprisal encourages an adversary to refrain from or discontinue violations of the laws of war. In other words, reprisals provide an important deterrent or compliance effect. For example, during the Second World War, President Roosevelt threatened reprisals against the Axis Powers if they used poison gas:

[T]here have been reports that one or more of the Axis powers were seriously contemplating use of poisonous or noxious gases or other inhumane devices of warfare. . . . We promise to any perpetrators of such crimes full and swift retaliation in kind. . . . Any use of gas by any Axis power, therefore, will immediately be followed by the fullest possible retaliation upon munition centers, seaports, and other military objectives throughout the whole extent of the territory of such Axis country.⁸⁷

Some argue that this threat compelled the Axis Powers to refrain from using poison gas during the Second World War.⁸⁸ Moreover, even if war crimes are committed, it could be argued that reprisals deter the bolder and more ruthless violations of the law. These arguments in favor of reprisals can never be proven, however, and numerous examples suggest they are wrong.

During the Iran-Iraq conflict,⁸⁹ the belligerents frequently bombarded each other's civilian populations in reprisal, with no discernible impact on their enemy's behavior.⁹⁰ Similarly, in the First World War, the German High Command burned the University of Louvain on 26 August 1914 in reprisal for the alleged firing on German troops by Belgian civilians, but

85. *See id.* art. 90(1)(b).

86. Greenwood, *supra* note 5, at 57.

87. 8 STATE DEP'T. BULL. 507 (1943).

88. H. Almond, *Remarks*, 74 PROC. AM. SOC'Y INT'L L. 211 (1980).

89. Iran and Iraq are not parties to Protocol I.

90. Frits Kalshoven, *Belligerent Reprisals Revisited*, 21 NETH. Y.B. OF INT'L L. 43, 54 (1990).

this only increased Belgian resistance.⁹¹ In the Second World War, German forces fighting on the Eastern front scaled back their reprisals after the Winter of 1941-42, realizing that they were hardening Russian resistance.⁹² Kalshoven, in his classic text on belligerent reprisals, refers to the “incontestably dubious efficacy of reprisals against the civilian population and civilian objects.”⁹³ Given that the deterrent effect of reprisals is at most equivocal, these examples support the current restrictions on reprisals in international law.

Contrary to arguments in favor of reprisals as a means of deterrence, many reprisals may lead to a chain of violent conduct and counter-reprisals.⁹⁴ This dangerous potential becomes evident when reprisals are used as a form of revenge. Coster posits that “[s]ocially approved, controlled and limited acts of revenge” are examples of “safety-valve institutions” within society and can play a positive role.⁹⁵

An illustration of safety-valve mores which provide a sanctioned outlet for hostilities against the original object is supplied by the institution of the duel both in Europe and in nonliterate societies. Dueling brings potentially disruptive aggressive self-help under social control and constitutes a direct outlet for hostilities between members of the society. Socially controlled conflict “clears the air” between the participants and allows a resumption of their relationship. If one of the participants is killed, his kin and friends are assumed not to continue the hostility against his adversary: the affair is then “socially closed” and relations can resume.⁹⁶

91. BERNARD BRUNGS, HOSTAGES, PRISONER REPRISALS, AND COLLECTIVE PENALTIES 316-41 (1969).

92. *Id.* at 462. A similar reaction was found in the Netherlands. *Id.* at 465.

93. KALSHOVEN, *supra* note 9, at 26.

94. The greatest weakness of reprisals “is the fact that those to whom it is applied may have so little sense of measure that they will reply with still other violations and start down the incline that leads to a war of savagery.” E. Stowell, *Military Reprisals and the Sanctions of the Laws of War*, 36 AM. J. INT’L L. 643, 649 (1942).

95. LEWIS COSTER, THE FUNCTIONS OF SOCIAL CONFLICT 42 (1964).

96. *Id.*

Regardless of any “safety-valve” role that duels might play within a society, they offer a poor analogy for acts of revenge.

Revenge involves unilateral determinations of right and wrong—in the case of reprisal, determining when the laws of war have been broken and what response is appropriate. No neutral and independent authority determines whether a prior violation of the law has occurred,⁹⁷ and no understanding exists between the parties regarding the significance of any reprisal. For example, the poison gas claims made during the Iran-Iraq conflict were unequivocally denied. The enemy, therefore, denied the legitimacy of reprisals based on these claims.⁹⁸ This illustrates how the subjective decision regarding permissible reprisals can be contested by the State subject to the reprisal, which may view it as “arbitrary or self-serving violence.”⁹⁹ In this case, not only does the reprisal fail to contribute to future compliance with international law, but also the State subject to the reprisal views itself as having been wronged, contributing to the likelihood of another round of revenge.¹⁰⁰ Indeed, the Lieber Code of 1863 warned that “[u]njust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages.”¹⁰¹ This continued exchange of violence is particularly likely when large groups such as States are involved. Thus, far from “clearing the air,” reprisals may perpetuate violence through an open-ended series of aggressive exchanges.

C. The Law/Realpolitik Tension

Some commentators suggest that politically unrealistic limitations on reprisals will increase the likelihood of serious breaches of international humanitarian law:

If there are serious and long term attacks upon the civilian population of a country at war, in breach of the provisions of the Protocol, it is likely that public opinion would demand that similar action be taken against the enemy and there is an argument for suggesting that this latter action should be controlled by legal

97. Greenwood, *supra* note 5, at 42.

98. *Id.* at 41.

99. Kwakwa, *supra* note 10, at 74.

100. Onuf, *supra* note 14, at 7.

101. U.S. Dep’t of Army, Gen. Orders No. 100, art. 28(2) (1863), *reprinted in* THE LAWS OF ARMED CONFLICT (D. Schindler & J. Toman eds., 3rd ed. 1988).

norms rather than becoming uncontrolled and unlawful retaliation.¹⁰²

Breaches of Protocol I by an enemy could create significant pressure for retaliations in kind. However, there will always be pressure on States to abandon the rules of armed conflict in war whether as revenge for countrymen killed according to the laws of war by the enemy or when compliance with the laws of war requires greater military casualties in order to minimize the loss of civilian life. In either case, speculation as to public opinion or “the likelihood of popular demands for revenge”¹⁰³ should not guide the development of the laws of war.

Some argue also that reprisals avoid giving a significant military advantage to the aggressor in a conflict.¹⁰⁴ From this perspective, reprisals “equalize the position of the belligerents by releasing the one from obedience to the law which the other has flouted.”¹⁰⁵ This appears to be the view of the U.S. Joint Chiefs of Staff, who regard the limitations on reprisals resulting from Protocol I to be “unacceptable from the point of view of military operations.”¹⁰⁶

The military disadvantage flowing from compliance with Protocol I is difficult to establish. For example, special protection ceases when civilians take a direct part in hostilities, or works and installations containing dangerous forces are being used “in regular, significant and direct support of military operations and if such attack is the only feasible way to termi-

102. Kalshoven, *supra* note 70, at 58 (quoting David Hughes-Morgan). These comments are similar to comments of the United States delegation to the Diplomatic Conference:

In the event of massive and continuing violations of the Conventions and the Protocol, this series of prohibitions of reprisals may prove unworkable. Massive and continuing attacks directed against a nation's civilian population could not be absorbed without a response in kind. By denying the possibility of a response and not offering any workable substitute, the Protocol is unrealistic and, in that respect, cannot be expected to withstand the test of future armed conflict.

OFFICIAL RECORD OF THE DIPLOMATIC CONFERENCE, *supra* note 64, para. 81, *cited in* Greenwood, *supra* note 5, at 58.

103. Greenwood, *supra* note 5, at 58.

104. Kwakwa, *supra* note 10, at 76.

105. EVELYN SPEYER COLBERT, *RETALIATION IN INTERNATIONAL LAW* 2 (1948).

106. A.D. Sofaer, *The Rationale for the United States Decision Not to Ratify*, 82 AM. J. INT'L L. 784, 785 (1988).

nate such support.”¹⁰⁷ In all but the most extraordinary circumstances, therefore, no significant military advantage arises from violating the Protocol I prohibitions on reprisals.¹⁰⁸

D. The Old and New Schools

The doctrine of reprisals developed in a time when duties under international law were owed to another State and based almost exclusively on notions of reciprocity. Under this classical school of international law, the relationship between States was considered in contractual terms, so that violation by one State of its obligations to the other justified a corresponding violation by the second State towards the first.¹⁰⁹ In contrast, the modern school of international law, particularly international human rights law, considers that a State has obligations not only to other States with whom it trades or interacts, but also to individuals and the international community as a whole.

While it is possible to view civilians as targets based on a principle of collective responsibility,¹¹⁰ this view runs directly counter to the United Nations Charter, which declares the resolve of the peoples of the United Nations to “reaffirm faith in fundamental human rights, [and] in the dignity and worth of the human person.”¹¹¹ A principle of collective responsibility also generally overestimates the ability of civilians to control the way in which their State conducts war. While one may wish all individuals to have a government responsive to their wishes, it is naïve to believe that this exists everywhere. Kalshoven notes that “in many (perhaps most)

107. Protocol I, *supra* note 24, art. 56(2)(c).

108. Kalshoven, *supra* note 70, at 57.

109. Remigiusz Bierzanek, *Reprisals as a Means of Enforcing the Laws of Warfare: The Old and the New*, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 235 (Antonio Cassese ed., 1979).

110. Major General Halleck stated that “all the members of a town or corporation are held responsible in damages for the neglect or carelessness of their agent; so, in a war, a city, an army, or an entire community, is sometimes punished for the illegal acts of its rulers or individual members.” H. Halleck, *Retaliation in War*, 6 *AM. J. INT’L L.* 107, 110-11 (1912).

111. U.N. CHARTER, pmb. See Bierzanek, *supra* note 109, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT*, *supra* note 109, at 244.

Under customary international law, members of the enemy civilian population are legitimate objects of reprisal. The United States nonetheless considers reprisal actions against civilians not otherwise legitimate

countries the population is an instrument in the hands of those in power, rather than the other way round.¹¹²

A belief in human rights suggests that, at least in the context of military operations, a distinction needs to be drawn between humans as individuals and humans as part of a wider collective.¹¹³ For this reason, international humanitarian law classifies individuals as combatants or non-combatants. These humanitarian obligations owed by States to the international community as a whole support the prohibition against civilian reprisals in Protocol I and, because of the impracticability of distinguishing between civilians and civilian objects, the prohibition on reprisals against civilian objects.

VI. Conclusion

While the international community must continue to search for more effective means to enforce international law, the successive reduction in the class of individuals and objectives that may be the subject of reprisals is both workable and appropriate. The uncertain potential of the doctrine of reprisals to make a positive contribution to the maintenance of international law cannot outweigh its certain potential for abuse.¹¹⁴ Advances in

111. (continued)

objects of attack to be inappropriate in most circumstances. For nations party to [Geneva Protocol] I, enemy civilians and the enemy population are prohibited objects of reprisal. The United States has found this new prohibition to be militarily unacceptable because renunciation of the option of such attacks “removes a significant deterrent that presently protects civilians and other war victims of all sides of a conflict.”

U.S. DEP'T OF NAVY, NAVAL WARFARE PUBLICATION 1-14M, COMMANDERS HANDBOOK ON THE LAW OF NAVAL OPERATIONS para. 6.2.3.3 (n.d.) (citing Sofaer, former Legal Adviser to the State Department). See also A.R. Thomas & J.C. Duncan, *Annotated Supplement to the Commander's Handbook on the Law of Naval Operations*, 73 J. INT'L L. STUD. (1999).

112. Kalshoven, *supra* note 70, at 60.

113. Kwakwa, *supra* note 10, at 74.

114. EVELYN SPEYER COLBERT, RETALIATION IN INTERNATIONAL LAW 200 (1948).

the destructive firepower of military technology only heighten this abusive potential.

More appropriate enforcement mechanisms are found at an international level. These include admittedly imperfect bodies such as the International Fact-Finding Commission and the International Criminal Court. Rather than lament their imperfections, we should recognize how they reinforce modern conceptions of international law where States owe duties to the international community. They can be no less effective than the practice of reprisals they replace, and they will result in much less bloodshed.