THE EVOLUTION OF THE LAW OF BELLIGERENT REPRISALS

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Revenge is a kind of wild justice; which the more mans nature runs to, the more ought law to weed it out. For as for the first wrong, it doth but offend the law; but the revenge of that wrong putteth the law out of office.

—Francis Bacon, *Essays: Of Revenge* (1597).

I. Introduction

One of the major shortcomings of the laws of armed conflict is the failure of that regime to provide for adequate means of enforcing those laws. Belligerent reprisals have been employed on the battlefield for centuries and are one of the few available sanctions of the laws of war. They are defined as "intentional violations of a given rule of the law of armed conflict, committed by a Party to the conflict with the aim of inducing the authorities of the adverse party to discontinue a policy of violation of the same or another rule of that body of law."[2] Effectively, belligerent reprisals allow for derogation from the laws of armed conflict to ensure compliance with those same laws. It is unsurprising, therefore, that modern international humanitarian law has increasingly sought to restrict the extent to which those laws may be breached by way of belligerent reprisal. This article examines the evolution of the law of belligerent reprisals and

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2. FRITS KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR 65 (Geneva 1987).

assesses the desirability of those laws governing recourse to belligerent reprisals.

Section II begins by establishing the various customary requirements that must be met before any reprisal actions may be undertaken. This section also discusses the important established principles that must be observed in the exercising of belligerent reprisals. Having set out these basic rules, Section III examines the numerous restrictions that international humanitarian law treaties have placed on a belligerent's right to take reprisals. Section IV then enumerates those remaining permissible belligerent reprisals that may lawfully be taken. The discussion here differentiates between reprisals permitted in international armed conflicts and those allowed in non-international conflicts. Section V seeks to establish the customary law of belligerent reprisals. This section examines some of the more recent developments in the law of belligerent reprisals, in particular, some recent jurisprudence of the International Criminal Tribunal for the former Yugoslavia. The final section discusses some of the main arguments for and against the use of belligerent reprisals and also alludes to other means of enforcing compliance with the laws of armed conflict. First, however, it is necessary to discuss briefly the concept of reprisals under international law generally and to distinguish belligerent reprisals from some similar concepts.

A. Reprisals Under International Law

Belligerent reprisals under the laws of armed conflict are closely related to reprisals under international law generally; as Kalshoven puts it, "belligerent reprisals . . . are a species of the genus reprisals."[3] Belligerent reprisals, therefore, bear many of the characteristics of reprisals in general and are bound by similar principles that govern use of the latter. Reprisals under international law are prima facie unlawful measures taken by one State against another in response to a prior violation by the latter and for the purpose of coercing that State to observe the laws in force.[4] It is this law enforcement function that places reprisals in the category of sanctions of international law and that grants them legitimacy, despite their inherently unlawful character. To maintain this legitimacy, the act of reprisal must respect the "conditions and limits laid down in international law for justifiable recourse to reprisals; that is, first of all, objectivity, subsidiarity,

3. FRITS KALSHOVEN, BELLIGERENT REPRISALS 1 (Leyden 1971).
4. *See id.* at 33 (providing a full definition).

and proportionality."[5] In addition to their law enforcement function, reprisals are seen as a forcible means of settling disputes between States and for securing redress from another State for its misdeeds.[6] These functions would be more properly classified, however, as subsidiary effects of the primary goal of law enforcement.

B. Closely Related Concepts

One must distinguish reprisals from the closely related concepts of retaliation and retorsion. The law of retaliation, the *lex talionis*, demands that a wrongdoer be inflicted with the same injury as that which he has caused to another.[7] The term *retaliation* does not find a place in modern legal terminology; instead, the word tends to mean any action taken in response to the earlier conduct of another State. Hence, one can view reprisals as measures taken in retaliation, although not in revenge, for an earlier unlawful act. Similarly, acts of retorsion are retaliatory in nature, although they differ from reprisals in that they are lawful responses to prior unfriendly, yet lawful, acts of another State. The aim of retorsion is to induce the other State to cease its harmful conduct. Examples of acts of retorsion include severance of diplomatic relations and withdrawal of fiscal or trade concessions.[8]

C. Belligerent Reprisals as Distinct from Armed Reprisals

One category of reprisals that must be distinguished from belligerent reprisals are armed or peacetime reprisals. These reprisals are measures of force, falling short of war, taken by one State against another in response to a prior violation of international law by the latter.[9] The legality of the resort to armed reprisals is within the proper remit of the *jus ad bellum*, although the actual military action taken must be "guided by the basic

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5. *Id.*

6. J.G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 549 (8th ed. 1977).

7. BLACK'S LAW DICTIONARY 913 (6th ed. 1990).

8. *See* STARKE, *supra* note 6, at 549.

9. *See generally* YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 215-26 (2d ed. 1994); Philip A. Seymour, *The Legitimacy of Peacetime Reprisal as a Tool Against State-Sponsored Terrorism*, 39 NAVAL L. REV. 221 (1990); Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 1 (1972).

norms of the *jus in bello*."[10] Despite their proximity, this articles confines its analysis to the law of belligerent reprisals.

II. Customary Rules Governing Recourse to Belligerent Reprisals

A number of conditions that must be met for an act to qualify as a legitimate reprisal are implicit in any correct definition of belligerent reprisals. For example, McDougal and Feliciano set out that legitimate "war reprisals" are "acts directed against the enemy which are conceded to be generally unlawful, but which constitute an authorized reaction to prior unlawful acts of the enemy for the purpose of deterring repetition of antecedent acts."[11] Two primary requirements emerge from this formulation: (1) the reprisal measures must be in response to a prior violation of international humanitarian law; and (2) they must be for the purpose of enforcing compliance with those laws. Customary international law also demands that any resort to belligerent reprisals must be in strict observance of the principles of proportionality and subsidiarity.

Early codifications of the laws of war specify that retaliatory actions must be in conformity with these basic principles. The Lieber Code[12] of 1863, although clearly not a treaty, is regarded as the first attempt to codify the laws of war. In this regard, the document acknowledges retaliation as a common wartime practice and attempts to set some basic limitations on the use of retaliatory measures:

> Article 27. The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.

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10. DINSTEIN, *supra* note 9, at 217.

11. MYRES S. MCDOUGAL & FLORENTINO P. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION 679 (New Haven 1961).

12. U.S. Dep't of Army, Gen. Orders No. 100, Instructions for the Government of Armies of the United States in the Field, art. 28(2) (Government Printing Office 1898) (1863) [hereinafter Lieber Code], *reprinted in* THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3 (Dietrich Schindler & Jiří Toman eds., 1988).

> Article 28. Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution. Unjust 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 war of savages.[13]

Although the Lieber Code does not expressly use the term reprisal, it is clear from these provisions that the retaliation taken must be in response to prior violations or "misdeeds" and that those measures are not for the purpose of revenge but "as a means of protective retribution," namely, to halt and prevent the recurrence of the original, or similar, offending acts.

In a similar vein, the *Oxford Manual* (*Manual*),[14] adopted by the Institute of International Law in 1880, gave express consideration to the issue of belligerent reprisals as a means of sanction. Article 84 of the *Manual* sets out *inter alia* that

> if the injured party deem the misdeed so serious in character as to make it necessary to recall the enemy to a respect for law, no other recourse than a resort to reprisals remains.
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> Reprisals are an exception to the general rule of equity, that an innocent person ought not to suffer for the guilty. They are also at variance with the rule that each belligerent should conform to the rules of war, without reciprocity on the part of the enemy.[15]

Having enumerated a right of retaliation, the *Manual* then proceeds to set a number of limits on the exercise of that right. It stipulates that resort to reprisals is prohibited when "the injury complained of has been repaired."[16] In deference to the principle of proportionality, Article 86 establishes that the "nature and scope" of the reprisal must "never exceed the measure of the infraction of the laws of war committed by the enemy."[17] Furthermore, the exercise of this right must be in observance of

13. *Id.* arts. 27-28.
14. INSTITUTE OF INTERNATIONAL LAW, OXFORD MANUAL (1880).
15. *Id.* art. 85.
16. *Id.*
17. *Id.* art. 86.

the "laws of humanity and morality," and the authorization for such measures can only be given by the commander in chief.[18]

The template for the customary law of belligerent reprisals can be found in these two historically important documents. The drafters of the Lieber Code and the *Manual* clearly endorsed the principles of proportionality, subsidiarity, and humanity. They also established that resort to belligerent reprisals must be for the purpose of law enforcement and that such measures must be in response to a prior violation of the laws of war. These next sections examine those various conditions and principles imposed on the use of belligerent reprisals.

A. Prior Violation

The stimulus for any reprisal action is an initial violation of the laws of armed conflict by the opposing party. Thus, the aggrieved party must establish that the actions of the aggressor were clearly unlawful before making any legitimate resort to a reprisal. Greenwood poses the question as to whether the original unlawful acts must be in violation of the same body of law as that set aside by way of belligerent reprisal.[19] Specifically, he asks if a State that is the victim of aggression (in violation of the *jus ad bellum*) may respond by employing unlawful methods of warfare (contrary to the *jus in bello*). Greenwood points out that the correct answer, in the negative, rests on the principle that the laws of armed conflict apply equally to all parties regardless of the legality of their resort to force.[20] Thus, belligerent reprisals may only be lawfully taken in response to a violation of international humanitarian law and not one of the *jus ad bellum*.

Establishing if there has been a violation of international humanitarian law may prove difficult in "real-war conditions"; communications and inter-belligerent relations, unsurprisingly, tend to be poor, and the tendency for allegations, counter-allegations, and denials runs quite high. The situation is further compounded when a dispute exists over the status of the legal rule purportedly violated. As Kalshoven outlines, although "the validity of a number rules of warfare cannot reasonably be denied[,] . . . other rules are of doubtful validity and, while wholeheartedly accepted by

18. *Id.*

19. Christopher Greenwood, *The Twilight of the Law of Belligerent Reprisals*, 1989 NETH. Y.B. INT'L L. 35, 40-41.

20. *Id.*

some, are just as emphatically rejected by others."[21] He suggests that in the absence of an independent fact-finding and adjudicating body, when uncertainty exists, "either of the parties is entitled to act on the ground of its own *reasonable* conception of the law governing the actions of both sides."[22] When disagreements exist as to facts or law, the justification for resort to belligerent reprisals may be unclear, and the party against whom the reprisal is taken might resort to a counter-reprisal in response to what it sees as unlawful action. This situation highlights one of the unfortunate traits of belligerent reprisals: they have the tendency to lead to further reprisals and an escalating level of violence and law-breaking.

A final point on the issue of prior violation is that the original unlawful action under consideration must be imputable to the party against whom the reprisal actions are subsequently taken. Greenwood sets out that allies of a violating State may also be the lawful subjects of reprisals "where they are themselves implicated in the violation and probably even where they have no direct involvement if the violation takes the form of a policy of conducting hostilities in a particular way."[23] Notably, a belligerent is precluded from taking reprisals against a State for the actions of non-State actors operating on the territory of that State. In 1948, the Italian Military Tribunal held in *In re Kappler* (the Ardeatine Cave case) that "the right to take reprisals arises only in consequence of an illegal act which can be attributed, directly or indirectly, to a State."[24] This case concerns retaliatory actions taken by German troops in response to a bombing carried out by a "secret military organization" in Rome in March 1944 that killed thirty-two German police. The Tribunal found that there was a prior violation imputable to the State. Although the secret organization, a corps of volunteers, was not a legitimate belligerent force, the Tribunal deemed the attack an unlawful act of warfare imputable to Germany because volunteers carried out the bombing "in consequence of orders of a general nature given by a section of the Military Directorate."[25]

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21. KALSHOVEN, BELLIGERENT REPRISALS, *supra* note 3, at 41.

22. *Id.* (emphasis added).

23. Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 43.

24. *In re* Kappler, Military Tribunal of Rome (20 July 1948) [hereinafter Ardeatine Cave Case], *in* 1948 ANN. DIG. & REP. OF PUB. INT'L LAW CASES 471, 472 (Hersch Lauterpacht ed., 1948).

25. *Id.* at 472.

B. Law Enforcement

The second major requirement of any resort to a belligerent reprisal is that it must be for the purpose of securing observance of the laws of armed conflict. One cannot discount the fact that the taking of reprisals may also be done in revenge or for the appeasement of an aggrieved public; such motivations, however, can only be tolerated by the presence of the original, genuine goal of law enforcement. Actions wanting in this law enforcement aspect cannot be properly viewed as lawful belligerent reprisals.

To conform with this requirement, a belligerent must pronounce that the course of action being taken is one of reprisal, aimed at bringing about the cessation of the unlawful conduct of the other party. An otherwise ignorant belligerent would view this action as itself unlawful and perhaps, in turn, seek to take reprisal action. There is a clear need for public notification, therefore, as reprisals which are "carried out in secret can have no deterrent effect and should, on that account be deemed illegitimate."[26] It is also suggested that a warning of reprisal measures should precede the taking of any action itself.[27] This threat of reprisal may be sufficient to halt the unlawful course of action; obviously, then, removing the need to take reprisals. In conformity with this law enforcement requirement, any course of reprisal action must be terminated once the targeted party has brought its conduct in line with the laws of armed conflict. Once the offender has desisted in its law-breaking, the previously injured party must itself return to observance of those laws.

C. Counter-Reprisals

Close adherence to the customary international law of belligerent reprisals disallows a subject of *lawful* belligerent reprisals to respond by taking counter-reprisals. Such actions would be unlawful because they are in response to acts which although *prima facie* unlawful, are deemed legitimate because of their law enforcement purpose. Therefore, no prior violation exists that would justify the taking of further reprisal measures. The Nuremberg Tribunal addressed this issue directly in the *Einsatzgruppen* case: "Under international law, as in domestic law, there can be no reprisal against reprisal. The assassin who is being repulsed by his intended victim

26. MCDOUGAL & FELICIANO, *supra* note 11, at 689.

27. G.I.A.D. Draper, *The Enforcement and Implementation of the Geneva Conventions of 1949 and the Additional Protocols of 1977*, 163 HAGUE RECUEIL II, at 9, 34 (1978).

may not slay him and then, in turn, plead self-defense."[28] The "prohibition of counter-reprisals," as such, is not a legal norm, but a mere consequence of strict observance of the law of belligerent reprisals. Bristol points out that the actual problem is the fact that assessment of the lawfulness of both the initial act and of the ensuing reprisal is almost always done unilaterally.[29]

D. Authorization

The authority to pursue a course of reprisal measures does not rest with all participants of an armed conflict. Such power, it has been contended, might only be exercised by "the commander in chief,"[30] by "a competent decision-maker,"[31] "by the authority of a government,"[32] or at "the highest political level."[33] According to the *1956 United States Department of the Army Field Manual*:

> [Reprisals] should never be employed by individual soldiers except by direct orders of a commander, and the latter should give such orders only after careful inquiry into the alleged offense. The highest accessible military authority should be consulted unless immediate action is demanded as a matter of military necessity, but in the latter event a subordinate commander may order appropriate reprisals upon his own initiative.[34]

Albrecht points out that a "subordinate commander" or "the highest accessible military authority" may in fact be "of almost any military rank depending on the circumstances."[35] Notwithstanding, it has been recommended that the level of authority should be based upon the "character and magnitude of the original illegality and of the reprisal measure contem-

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28. United States v. Ohlendorf, 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1, 493-94 (1950) [herinafter Ohlendorf Trial].

29. Major Matt C.C. Bristol III, *The Laws of War and Belligerent Reprisals Against Enemy Civilian Populations*, 21 A.F. L. REV. 397, 418 (1979).

30. OXFORD MANUAL, *supra* note 14, art. 86.

31. MCDOUGAL & FELICIANO, *supra* note 11, at 686.

32. Draper, *supra* note 27, at 34.

33. DIETER FLECK, THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICT 205 (Oxford 1995).

34. U. S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 497(d) (1956) [hereinafter AR 27-10].

35. A.R. Albrecht, *War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949*, 47 AM. J. INT'L L. 4, 590, 600 (1953).

plated in response."[36] There does not seem to be a clear customary rule on this issue, although for the most part, one could conclude that the authority to order reprisals must rest with a person in a position to assess the legality of the original act, to ensure that the goal of the reprisal is one of law-enforcement, and to oversee that the measures taken are in observance of the principles of subsidiarity, proportionality, and humanity.

E. Subsidiarity

The principle of subsidiarity demands that an aggrieved belligerent pursue less stringent forms of redress before resorting to belligerent reprisals. In seeking to induce an enemy to conform with the law, there are various alternatives to reprisal actions. For example, the injured party may make a formal complaint to the opposite party, requesting that it desist in its unlawful activities and that it initiate proceedings against the perpetrators of same. Similarly, protests to the enemy, appeals to international bodies, the rallying of public opinion behind the wronged party, or the threat of criminal prosecution may be sufficient to persuade the enemy to cease its lawless conduct. Probably one of the most effective means of securing observance of the laws of armed conflict, short of actual reprisals, is the *threat* of those reprisals. The efficacy of this threat, of course, relies on the ability and willingness of the injured party to actually take reprisal action.

In his discussion on the principle of subsidiarity, Kalshoven acknowledges that "the possibility cannot be excluded of situations where the fruitlessness of any other remedy but reprisals is apparent from the outset. In such exceptional circumstances . . . recourse to reprisals can be regarded as an ultimate remedy and, hence, as meeting the requirement of subsidiarity."[37] Hampson asserts that if the intention is to deter repetition of an offense, a belligerent would be reluctant to allow the enemy any time to "strike again."[38] When there is an immediate risk of further unlawful acts, and in particular, when any delay associated with the "prior exhaustion of alternative procedures entails grave danger," the subsidiarity requirement may legitimately be set aside.[39] Aside from instances in which the futility of alternative courses of action is readily apparent, the opinion of one commentator is worth considering: "[T]he use of reprisals in an armed conflict

36. MCDOUGAL & FELICIANO, *supra* note 11, at 686-87.

37. KALSHOVEN, BELLIGERENT REPRISALS, *supra* note 3, at 340.

38. Francoise J. Hampson, *Belligerent Reprisals and the 1977 Protocols to the Geneva Conventions of 1949*, 37 INT'L & COMP. L. Q. 818, 823 (1988).

39. MCDOUGAL & FELICIANO, *supra* note 11, at 688.

is such a serious step and may have such disastrous consequences that the requirement that all reasonable steps be taken to achieve redress by other means before reprisals is probably one that should be strictly insisted upon."[40]

F. Proportionality

Customary international law prescribes that the execution of any reprisal action must be done with adherence to the principle of proportionality. It is less clear, however, as to precisely what that belligerent reprisal must be proportionate to. An initial assessment might conclude that the reprisal must be proportionate to the original unlawful act that triggered the reprisal. Kalshoven adopts this position, and he stresses that this is the only acceptable legal approach to the proportionality issue.[41] Other commentators have advanced a different thesis on this issue; some contend that the reprisal action must be measured, not against the past illegality, but rather in light of the purpose of that action, namely, ensuring observance of the laws in force. McDougal and Feliciano, for example, assert that "the kind and amount of permissible reprisal violence is that which is reasonably designed so as to affect the enemy's expectations about the costs and gains of reiteration or continuation of his unlawful act so as to induce the termination of and future abstention from such act."[42] Both approaches have merit, although the latter may be open to abuse by an unscrupulous belligerent because it is more difficult to quantify.

A certain degree of discretion for parties on this issue is accepted, although this "freedom of appreciation . . . is restricted by the requirement of reasonableness."[43] A somewhat cautious approach is taken by Greenwood, who amalgamates the above two different approaches to proportionality and recommends that reprisals "should exceed neither what is proportionate to the prior violation nor what is necessary if they are to achieve their aim of restoring respect for the law."[44] Although straightforward rules have not been formulated for assessing the proportionality of any specific act, applying the principle is far from an insurmountable task.

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40. Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 47.

41. KALSHOVEN, BELLIGERENT REPRISALS, *supra* note 3, at 341.

42. MCDOUGAL & FELICIANO, *supra* note 11, at 682.

43. KALSHOVEN, BELLIGERENT REPRISALS, *supra* note 3, at 342.

44. Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 44.

In particular, one may take account of Kalshoven's approach; he advocates that in this area, proportionality "means the absence of obvious disproportionality, as opposed to strict proportionality."[45]

In situations in which all the other customary rules relating to belligerent reprisals have been met, it is often a failure to observe the principle of proportionality that has rendered the reprisal measures unlawful. *In re Kappler*, for example, exhibits one of the numerous claims of legitimate reprisal during the Second World War declared unlawful because of their blatant disproportionality. In *Kappler*, the Security Service headed by Lieutenant Colonel Kappler executed ten Italian prisoners for every German policeman killed in a particular bombing. In all, the Security Service retaliated for the bombing by executing 335 prisoners in the Adreatine caves; 320 killed for the thirty-two policemen killed in the bomb attack, ten for another German killed subsequently, and five others murdered "due to a culpable mistake."[46] The court concluded that the executions were disproportionate "not only as regards numbers, but also for the reason that those shot in the Ardeatine caves included five generals, eleven senior officers, . . . twenty-one subalterns and six non-commissioned officers."[47] In adopting both a quantitative and a qualitative approach to the requirement of proportionality, the court could not sustain the claim of a legitimate reprisal. In the *Einsatzgruppen* case, the ratio was even more disproportionate: the Nazis executed 2100 people purportedly in reprisal for the killing of twenty-one German soldiers. The tribunal found that this "obvious disproportionality" "only further magnifies the criminality of this savage and inhuman so-called reprisal."[48]

G. Humanity and Morality

The *Oxford Manual* recommends in Article 86 that measures of reprisal "must conform in all cases with the laws of humanity and morality."[49] While it seems doubtful that the "laws of morality" would sanction wars at all, the notion of "laws of humanity" does have some bearing on the issue of belligerent reprisals. Although the phrase "laws of humanity" is used in the Martens clause[50] and in articles of each of the four Geneva Conventions of 1949,[51] the term is somewhat archaic and has been

45. KALSHOVEN, BELLIGERENT REPRISALS, *supra* note 3, at 341-42.
46. Ardeatine Cave Case, *supra* note 24, at 471.
47. *Id.* at 476.
48. Ohlendorf Trial, *supra* note 28, at 493-94.
49. OXFORD MANUAL, *supra* note 14, art. 86.

replaced in modern usage by the phrase "principles of humanity." Kalshoven views the principle of humanity as one of "the fundamental principles governing justifiable recourse to belligerent reprisals," while noting abruptly that "inhumanity . . . is more or less by definition a characteristic of belligerent reprisals."[52] The principle of humanity demands that persons not directly engaged in combat should not be made the objects of reprisal attacks. The next section shows how the treaty law of belligerent reprisals has taken account of this principle in its progressive codification of numerous prohibitions of reprisals against specific classes of persons and objects.

III. International Treaty Law of Belligerent Reprisals

This section sets out the restrictions imposed by international treaties on the use of reprisal measures by belligerents during armed conflict. For the purpose of this study, examining the treatment of the issue by each relevant instrument in great detail is unnecessary, as several able commentators on the subject have already carried this out.[53] Tracing the development of the treaty law of belligerent reprisals will suffice, highlighting the various prohibitions on the use of reprisals with recourse to the legislative histories of those more relevant provisions.

While neither the Lieber Code nor the *Oxford Manual* are legally binding instruments, they do provide a useful illustration of the attitudes held towards belligerent reprisals at a time when the codification of the

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50. Convention (II) with Respect to the Laws and Customs of War on Land, pmbl., *signed at* The Hague, 29 July 1899, *reprinted in* A. PEARCE HIGGINS, THE HAGUE PEACE CONFERENCES AND OTHER INTERNATIONAL CONFERENCES CONCERNING THE LAWS AND CUSTOMS OF WAR: TEXTS OF CONVENTIONS WITH COMMENTARIES 206-56 (Cambridge 1909).

51. Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, art. 63, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, art. 62, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention III Relative to the Treatment of Prisoners of War, art. 142, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention IV Relative to the Protection of Civilians in Time of War, art. 158, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

52. Frits Kalshoven, *Human Rights, the Law of Armed Conflict, and Reprisals*, INT'L REV. RED CROSS 183, 189 (1971).

53. *See* KALSHOVEN, BELLIGERENT REPRISALS, *supra* note 3, at 45-114, 263-88; Edward Kwakwa, *Belligerent Reprisals in the Law of Armed Conflict*, 27 STAN. J. INT'L L. 49, 52-71 (1990).

laws of war was in its infancy. Both view reprisals as indispensable sanctions for violations of the law, yet, owing to the harshness of the measures, each insists that any resort to such must be subject to certain limitations.

The Hague Conventions of 1899 and 1907 avoided the issue of reprisals for "fear that express regulation might be interpreted as a legitimation of their use."[54] Some contend, however, that Article 50 of the 1907 Hague Regulations is the first primitive effort to codify the law of belligerent reprisals. That article reads: "No general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible."[55]

Kwakwa views Article 50 as a "clear, albeit feeble, attempt to grapple with the problem of belligerent reprisals."[56] Although this provision does not by any means outlaw reprisals and, moreover, while a belligerent may disregard the prohibition laid down therein in a legitimate act of reprisal, one cannot completely discount the relevance of Article 50 to this issue. The crux of this provision is that it aims to reduce instances of unwarranted cruelty inflicted on innocent persons; it is an attempt to outlaw acts of collective punishment. This desire to protect innocents is one of several major factors that have influenced the legal restriction on the use of belligerent reprisals.

A. Prisoners of War Convention, 1929

The aftermath of the First World War saw the first absolute prohibition on the taking of reprisals against a particular class of persons set down in international law. The 1929 Convention Relative to the Treatment of Prisoners of War states in Article 2, paragraph 3, that "[m]easures of reprisal against [prisoners of war] are forbidden."[57] Highly innovative at that time, this categorical prohibition of reprisals against prisoners of war brought about a situation in which "the illegality of such actions would be

54. KALSHOVEN, BELLIGERENT REPRISALS, *supra* note 3, at 67.

55. Hague Convention IV Respecting the Laws and Customs of War on Land, Annexed Regulations, art. 50, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Convention IV].

56. Kwakwa, *supra* note 53, at 54 n.23.

57. Geneva Convention Relative to the Treatment of Prisoners of War, art. 2, para. 3, July 27, 1929, 47 Stat. 2021, T.S. 846.

incontestable; and, more important, the frequency of such reprisals would certainly diminish considerably through the sheer force of the rule."[58]

During the Second World War, despite the existence of this rule, a number of incidents of reprisal measures were taken against prisoners of war.[59] One such incident involved the summary shooting of fifteen American prisoners of war by German troops in March 1944, near La Spezia in Italy. The United States Military Commission in Rome tried General Anton Dostler for ordering the execution.[60] The Commission rejected a defense of superior orders raised on Dostler's behalf and held that "under the law as codified by the 1929 Convention there can be no legitimate reprisals against prisoners of war. No soldier, and still less a Commanding General, can be heard to say that he considered the summary shooting of prisoners of war legitimate even as a reprisal."[61]

In the *High Command* case, the Nuernberg Military Tribunal viewed numerous provisions of the 1929 Convention as being "clearly an expression of the accepted views of civilized nations and [as] binding . . . in the conduct of the war."[62] Strangely, the list of nineteen various provisions so designated did not include the prohibition of reprisals contained in that treaty.[63] Article 2, paragraph 3, clearly was not a "codification of existing customary practice" at the time the Convention was introduced,[64] and this judgment also casts a shadow of doubt over the provision's status following World War II. Notwithstanding, Greenwood has asserted that the prohibition was accepted as being a customary norm of international law in the immediate aftermath of the war.[65] This uncertainty would not, however, have reduced by any degree the obligation imposed upon those parties who had ratified the Convention to observe the unequivocal prohibition of Article 2, paragraph 3, on the taking of reprisals against pris-

58. KALSHOVEN, BELLIGERENT REPRISALS, *supra* note 3, at 80-81.

59. *See id*. at 178-99.

60. Trial of General Anton Dostler, Commander of the 75th German Army Corps, United States Military Commission, Rome, Oct. 8-12, 1945, *in* 1 UNITED NATIONS WAR CRIMES COMMISSION, LAW REPORTS OF TRIALS OF WAR CRIMINALS 22 (London 1947).

61. *Id*. at 31.

62. United States v. von Leeb, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 535 (1950).

63. *See id*. at 536-38.

64. Kwakwa, *supra* note 53, at 55.

65. *See* Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 50; *see also* Theodor Meron, *The Geneva Conventions as Customary International Law*, 81 AM. J. INT'L L. 348, 360 (1987).

oners of war. A landslide of like reprisal provisions in each of the four Geneva Conventions of 1949 followed this first codification.

B. Geneva Conventions, 1949

The Geneva Conventions of 1949 expanded considerably the classes of persons against whom it is forbidden to take reprisals. The Third Geneva Convention reaffirmed the 1929 prohibition of reprisals against prisoners of war,[66] while the other Conventions introduced new provisions offering protection from reprisals to the wounded and sick under the First Geneva Convention;[67] for the wounded, sick, or shipwrecked protected by the Second Geneva Convention;[68] and for those civilian persons coming under the protection of the Fourth Geneva Convention.[69] These treaties were also innovative in that they expressly forbid the taking of reprisal measures against vessels, equipment, or property protected by the Conventions. Of note, the decision to include these expansive provisions was almost unanimous, with Kalshoven admitting surprise as to "how little discussion was needed to achieve these results."[70]

Article 46 of the First Geneva Convention sets out that "[r]eprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited."[71] The Official Commentary to this Convention affirms that this prohibition is absolute; therefore, it proscribes any reprisal measures whatsoever, including retaliations-in-kind "which public opinion, basing itself on the 'lex talionis,' would be more readily inclined to accept."[72]

Article 47 of the Second Geneva Convention is almost identical in its specific outlawing of reprisals: "Reprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention are prohibited."[73] Similarly, the Third Geneva Convention confirms in Article 13, paragraph 3, that "[m]easures of reprisal

66. Third Geneva Convention, *supra* note 51, art. 13(3).
67. First Geneva Convention, *supra* note 51, art. 46.
68. Second Geneva Convention, *supra* note 51, art. 46.
69. Fourth Geneva Convention, *supra* note 51, art. 33(3).
70. KALSHOVEN, BELLIGERENT REPRISALS, *supra* note 3, at 263.
71. First Geneva Convention, *supra* note 51, art. 46.
72. COMMENTARY: I GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 345 (Jean Pictet ed., 1952).
73. Second Geneva Convention, *supra* note 51, art. 47.

against prisoners of war are prohibited."[74] The Official Commentary attaches great importance to this provision and interprets the prohibition of reprisals as being "part of the general obligation to treat prisoners humanely."[75]

The restrictions placed on the use of reprisals by the Fourth Geneva Convention are regarded as the most significant development in the law of belligerent reprisals to arise at that time.[76] Article 33, paragraph 3, of the Fourth Geneva Convention has a clear humanitarian focus and establishes that "[r]eprisals against protected persons and their property are prohibited."[77] Pictet has lauded both the scope and the strength of this provision:

> The prohibition of reprisals is a safeguard for all protected persons, whether in the territory of a Party to the conflict or in occupied territory. It is absolute and mandatory in character and thus cannot be interpreted as containing tacit reservations with regard to military necessity.[78]
>
> The solemn and unconditional character of the undertaking entered into by the States Parties to the Convention must be emphasized. To infringe this provision with the idea of restoring law and order would only add one more violation to those with which the enemy is reproached.[79]

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74. Third Geneva Convention, *supra* note 51, art. 13, para. 3.

75. COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 142 (Jean Pictet ed., 1960).

76. Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 51.

77. Fourth Geneva Convention, *supra* note 51, art. 33(3). Article 4 of that treaty establishes that

> [p]ersons 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. 4.

78. COMMENTARY ON GENEVA CONVENTION IV OF 1949, RELATIVE TO THE PROTECTION OF CIVILIAN PERSON IN TIMES OF WAR 228 (Jean Pictet ed., 1958) [hereinafter COMMENTARY TO THE FOURTH GENEVA CONVENTION].

79. *Id.*

Article 33, paragraph 1, also lays a clear prohibition on the commission of acts of collective punishment against protected persons.[80] The treaty enumerates this prohibition separately from the prohibition of reprisals, although the Official Commentary recognizes their proximity, observing that reprisals involve the imposition of a "collective penalty bearing on those who least deserve it."[81]

Notably, this provision does not offer any protection from belligerent reprisals to the civilian population or civilian objects of a party to an international armed conflict. As the remit of Article 33, paragraph 3, is limited primarily to those civilians in occupied territory and civilian internees, the taking of proportionate reprisals against an enemy's civilian population would seem to be prima facie lawful in the light of the Fourth Geneva Convention. As shown below, however, this was one of the several lacunae in the law addressed by the Geneva Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974-1977).

C. Hague Cultural Property Convention, 1954

Five years after the landmark 1949 Geneva Conventions saw another important development of relevance to the burgeoning law of belligerent reprisals. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954,[82] introduced a series of far-reaching protections for cultural property during wartime. Included among these provisions is Article 4, paragraph 4, which establishes that the contracting parties "shall refrain from any act directed by way of reprisals against cultural property."[83] In contrast to the 1949 Geneva Conventions, this treaty makes it quite clear that its provisions are binding in both international and non-international armed conflicts.[84]

This "comprehensive and absolute" prohibition of reprisals against cultural property would have been most welcome forty years earlier in light of one particularly reprehensible reprisal action carried out during the

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80. *See* Fourth Geneva Convention, *supra* note 51, art. 33(1). Article 33(1) reads: "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited." *Id.*

81. COMMENTARY TO THE FOURTH GENEVA CONVENTION, *supra* note 78, at 228.

82. Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240.

First World War. In 1915, the German High Command burned to the ground the famous University of Louvain library in Belgium in reprisal for the alleged firing on German troops by Belgian civilians.[85] Had Article 4, paragraph 4, been in force at that time, it may have persuaded the perpetrators to choose an alternative reprisal target. Kalshoven has concluded that the introduction of the 1954 Hague Convention "represents an innovation comparable to that brought about by the Civilian Convention of Geneva of 1949."[86]

D. Additional Protocol I, 1977

The upward trend of prohibiting belligerent reprisals against certain persons and objects continued with the inclusion of a batch of new prohibitions in the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed

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83. *Id*. art. 4(4). Cultural property is defined in Article 1 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; 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 subparagraph (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. art. 1.

84. *Id.* arts. 18-19. Kalshoven contends that Article 19, requiring observance of "the provisions of the present Convention which relate to respect for cultural property" during an internal armed conflict, *id.* art. 19, may not categorically demand observance of the reprisal prohibition. He admits, however, that this is a "formalistic and consciously restrictive interpretation, in the face of an apparently clear text." KALSHOVEN, BELLIGERENT REPRISALS, *supra* note 3, at 276-77.

85. Kwakwa, *supra* note 53, at 54-55.

86. KALSHOVEN, BELLIGERENT REPRISALS, *supra* note 3, at 273.

Conflicts (Protocol I), 8 June 1977.[87] The issue of belligerent reprisals was a source of considerable debate and disagreement during the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977,[88] and in numerous academic writings thereafter.[89] Much of the discontent has been with the overall progressive narrowing of the scope for the taking of belligerent reprisals, rather than with the individual prohibitions themselves. As will be seen below, however, these individual prohibitions have also been subjected to a certain degree of criticism.

Part II of Protocol I, which offers protection to the wounded, sick, and shipwrecked, provides in Article 20 that "[r]eprisals against the persons and objects protected by this Part are prohibited."[90] This article is both a re-affirmation and an expansion of the rules set down in the First and Second Geneva Conventions. Protocol I extends the sphere of protected persons by widening the definitions of wounded, sick, and shipwrecked persons in Article 8,[91] and by including several new objects and persons for protection: medical personnel, religious personnel, medical units, medical transports and transportations, medical vehicles, ships, craft, and aircraft.[92] The delegates to the conference accepted these new prohibitions with "almost no discussion";[93] a reflection of the fact that they are a "logical extension" of the earlier prohibitions of reprisals against such persons and objects under Geneva law.[94]

Protocol I makes its most substantial contribution to the law of belligerent reprisals in Part IV of the instrument dealing with protections for the civilian population. The rules relating to belligerent reprisals in an international armed conflict set down in Part IV are as follows:

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87. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

88. For an in-depth discussion on the drafting of the reprisals provisions of Additional Protocol I, see S.E. Nahlik, *Belligerent Reprisals as Seen in the Light of the Diplomatic Conference on Humanitarian Law, Geneva, 1974-1977*, 42 L. & CONTEMP. PRAC. 2, 36, 43-66 (1978).

89. *See, e.g.*, Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 51-67; Hampson, *supra* note 38; Kwakwa, *supra* note 53, at 53-71; Frits Kalshoven, *Belligerent Reprisals Revisited*, 21 NETH. Y. B. INT'L L. 43, 47-73 (1990); Remigiusz Bierzanek, *Reprisals as a Means of Enforcing the Laws of Warfare: The Old and the New Law, in* NEW INT' L. ARMED CONFLICT 232, 247-57 (Cassese ed., 1979).

90. Protocol I, *supra* note 87, pt. II, art. 20.

Article 51 *Protection of the civilian population*

. . . .

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.[95]

. . . .

Article 52 *General Protection of civilian objects*

1. Civilian objects shall not be the object of attack or of reprisals.[96]

. . . .

Article 53 *Protection of cultural objects and of places of worship*

. . . .

(c) [It is prohibited] to make such objects the object of reprisals.[97]

. . . .

Article 54 *Protection of objects indispensable to the survival of the civilian population*

. . . .

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91. *See id*. art. 8. Article 8 states:

> (1) "Wounded" and "sick" mean persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility;
>
> (2) "Shipwrecked" means persons, whether military or civilian, who are in peril at sea or in other waters as a result of misfortune affecting them or the vessel or aircraft carrying them and who refrain from any act of hostility. These persons, provided that they continue to refrain from any act of hostility, shall continue to be considered shipwrecked during their rescue until they acquire another status under the Conventions or this Protocol.

Id.

92. *Id.* art. 20.

93. Nahlik, *supra* note 88, at 46.

94. Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 53.

95. Protocol I, *supra* note 87, art. 51(6).

96. *Id.* art. 52(1).

97. *Id*. art. 53(c).

> 4. These objects shall not be made the object of reprisals.[98]
>
> . . . .
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> Article 55 *Protection of the natural environment*
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> . . . .
>
> 2. Attacks against the natural environment by way of reprisals are prohibited.[99]
>
> . . . .
>
> Article 56 *Protection of works and installations containing dangerous forces*
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> . . . .
>
> 4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals.[100]

Save for Article 53, paragraph (c), which adds little to those prohibitions already established under the 1954 Hague Cultural Property Convention, each of these provisions is a significant development in the law of belligerent reprisals.

Undoubtedly, the most significant and most controversial provision is Article 51, paragraph 6, which renders unlawful the taking of reprisals against "the civilian population or civilians."[101] Whereas Article 33, paragraph 3, of the Fourth Geneva Convention only protects civilians who find themselves "in the hands of a Party to the conflict or Occupying Power of which they are not nationals,"[102] this new provision guarantees protection to *all* civilians. Thus, belligerents are now forbidden by Protocol I from taking reprisal measures against an enemy's civilian population.[103] Of equal importance is the applicability of this provision to the actual military hostilities of an international armed conflict, as opposed to only instances of occupation as under the Fourth Geneva Convention. The Official Commentary states that this prohibition is absolute and peremptory, and it

98. *Id.* art. 54(4).
99. *Id.* art. 55(2).
100. *Id.* art. 56(4).
101. *Id.* art. 51(6).
102. Fourth Geneva Convention, *supra* note 51, art. 4.
103. *See* Protocol I, *supra* note 87, art. 51(6).

would reject any claim that such actions might be permissible on grounds of military necessity.[104]

One author contends that the prohibition of reprisals in Article 51, paragraph 6, is negated by the previous provision in paragraph 5(b), which prohibits attacks "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."[105] Kwakwa claims that attacks justified by military necessity under this provision are legitimate and that because reprisals are otherwise illegitimate attacks which are justified *qua* reprisals, then, "[i]n effect, article 51(5)(b) seems to permit the very reprisals that are prohibited under article 51(6)."[106] Kwakwa's interpretation, however, is erroneous. The Official Commentary states clearly that a theory that this provision would authorize "any type of attack, provided that this did not result in losses or damage which were excessive in relation to the military advantage anticipated . . . is manifestly incorrect."[107] Moreover, the damage envisaged by that article is *incidental*; reprisals directed against civilians, if undertaken, would cause direct and deliberate loss of life, injury, or damage to civilian objects. One may conclude therefore, that the prohibition of reprisals against civilians in international armed conflicts is categorical and without exception under treaty law.

This landmark provision was followed by the prohibition in Article 52, paragraph 1, against making civilian objects the object of reprisals; these are curtly defined as "all objects which are not military objects."[108] This article is viewed as "a logical corollary of the prohibition concerning civilian persons."[109] In a similar vein, Article 54, paragraph 4, prohibits the taking of reprisals against those objects "indispensable to the survival of the civilian population."[110] Examples given of such objects include foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies, and irrigation works.[111] This article is closely related to the prohibition of reprisals against civil-

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104. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 626 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY TO THE ADDITIONAL PROTOCOLS].

105. Protocol I, *supra* note 87, art. 51(5)(b).

106. EDWARD KWAKWA, THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION 140-41 (Dordrecht/Boston/London 1992).

107. COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 104, at 626.

ians; a reprisal attack on those essential objects is tantamount to a violation of the latter provision.

Article 55, paragraph 2, prohibits attacks against the natural environment by way of reprisals.[112] Paragraph 1 of that article has as its aim the prevention of "widespread, long-term and severe damage" that would "prejudice the health or survival of the population."[113] One can see that the outlawing of reprisals against the environment also has at its root the protection of the welfare of the civilian population. Article 56, paragraph 4, of Protocol I prohibits reprisals against works and installations containing dangerous forces. The protected objects in question here are dams, dykes, and nuclear electrical generating stations, and also any military objectives "located at or in the vicinity of these works or installations" upon which an attack "may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population."[114] Once again, the overarching concern was the avoidance of any unnecessary suffering by the civilian population. In this respect, these reprisal provisions clearly show the humanitarian-guided desire to dispose of a sanction of the laws of armed conflict that would impose heavily on persons innocent of any unlawful activity.

E. Mines Protocol, 1980

The relative landslide of prohibitions against belligerent reprisals in Protocol I has been followed by just one other treaty ban on the taking of

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108. Protocol I, *supra* note 87, art. 52(1). Article 52, paragraphs 1 and 2, define military objects:

> 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.

109. Nahlik, *supra* note 88, at 48.

110. Protocol I, *supra* note 87, art. 54(4).

111. *Id.* art. 54(2).

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

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

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

reprisals. The 1980 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices[115] states in Article 2, paragraph 3, that "[i]t is prohibited in all circumstances to direct weapons to which this Article applies, either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians."[116]

This article affirms the prohibition that was laid down previously in Article 51, paragraph 6, of Protocol I, and simultaneously provides a clear illustration of one specific type of belligerent reprisal that, if directed against civilians, is plainly unlawful. The 1996 Amended Mines Protocol sets down that the "prohibitions and restrictions" of the instrument are applicable in both international and non-international armed conflicts.[117]

This section has outlined the codification of the law of belligerent reprisals, which has progressively reduced the persons and objects against which a belligerent may take prima facie unlawful action in response to earlier unlawful action and for the purpose of enforcing compliance with the law of armed conflict. The above provisions establish that under inter-

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115. Protocol II, Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, adopted at Geneva, Oct. 10, 1980, *entered into force* Dec. 2, 1983, 1342 U.N.T.S. 137-255 [hereinafter 1980 Mines Protocol]; *reprinted in* THE LAWS OF ARMED CONFLICT 179 (Dietrich Schindler & Jiří Toman eds., 1988).

116. Protocol I, *supra* note 87, art. 2(3). Article 2 defines those weapons to which this protocol applies:

> 1. "Mine" means any munition placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence, proximity or contact of a person or vehicle, and "remotely delivered mine" means any mine so defined delivered by artillery, rocket, mortar or similar means or dropped from an aircraft.
>
> 2. "Booby-trap" means any device or material which is designed, constructed or adapted to kill or injure and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.
>
> 3. "Other devices" means manually-emplaced munitions and devices designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time.

Id. art. 2(1)-(3).

117. Protocol on the Prohibitions or Restriction on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II), *amended* May 3, 1996, art. 1(3), U.S. TREATY DOC. NO. 105-1, at 37, 35 I.L.M. 1206.

national law, it is unlawful for the parties bound by those treaties to take reprisals against, *inter alia*, prisoners of war, the wounded, sick, and shipwrecked, medical and religious personnel, cultural property, the natural environment, works and installations containing dangerous forces, the civilian population, individual civilians, civilian objects, and any of those objects indispensable for a civilian population's survival. Impressive as this list may be, the opportunity does remain under international law for an aggrieved party to resort to belligerent reprisals against certain persons and objects. Moreover, some of those persons and objects protected during international armed conflicts may not be afforded the same safeguards during situations of internal armed conflict. The next section examines those few remaining lawful belligerent reprisals in international conflicts and explores the issue in the somewhat more controversial context of armed conflicts not of an international nature.

IV. Permissible Belligerent Reprisals Under International Treaty Law

A. International Armed Conflicts

Although international humanitarian law highly restricts the freedom to resort to belligerent reprisals in response to unlawful activity, the employment of such measures has not been totally outlawed. In a limited number of situations, the treaty law is silent on reprisals, thus inferring that their use in such instances would be lawful. It seems that the only remaining lawful targets of belligerent reprisals are military objectives or the armed forces of the enemy. One commentator, Nahlik, views the failure to include a proposed general prohibition of reprisals in Protocol I as having left open "a chink through which a wolf would be able to penetrate into our sheep-fold," meaning that an interpretation in bad faith might expose certain persons or objects to reprisals.[118] He enumerates the following as not covered by any specific reprisal prohibition: the remains of the deceased; enemies *hors de combat*; members of the armed forces and military units assigned to civil defense organizations; women and children vulnerable to rape, forced prostitution, or indecent assault; and undefended localities and demilitarized zones.[119]

While one can make such an interpretation, an instrument whose ultimate goal is one of "protecting the victims of armed conflicts"[120] could

118. Nahlik, *supra* note 88, at 56-57.
119. *Id*. at 56.

hardly sanction taking such reprisals, particularly against those in the fourth category. The Commentary to Protocol I states clearly that the Geneva Conventions and Protocol I "incontestably prohibit any reprisals against any person who is not a combatant in the sense of Article 43 and against any object which is not a military objective."[121] Nahlik here probably seeks to show the desirability of a general prohibition on reprisals, rather than to give specific examples of actual lawful reprisals.

Although the preponderance of literature on this issue concludes that military objectives and enemy armed forces are the only permissible targets of lawful belligerent reprisals,[122] one may assert that such a general rule applies only to land warfare, and that in instances of naval or air warfare, there is considerably more scope for the taking of reprisals. Part IV of Protocol I, which contains all the reprisal prohibitions (except those in Article 20), also contains an important provision, which states:

> The provisions of this Section [Part IV] 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.[123]

One author would view this provision as implying that the prohibitions on reprisals in Protocol I "do not apply to ship-to-ship, ship-to-air or air-to-air combat unless that has an incidental effect on civilians or civilian objects on land."[124] In this regard, he continues, it may be possible to make enemy merchant ships or civilian aircraft the objects of belligerent reprisals.[125] This divergence between the law of land warfare and that of air and naval warfare has been criticized on the grounds that "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."[126] While it would be clearly unlawful to make merchant ships or civilian aircraft the objects of attack,

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120. Protocol I, *supra* note 87, pmbl.

121. COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 104, at 987.

122. *See, e.g.*, *id*. at 627; Hampson, *supra* note 38, at 828-29; Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 65; Draper, *supra* note 27, at 35; Bristol, *supra* note 29, at 401.

123. Protocol I, *supra* note 87, art. 49(3).

124. Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 53-54.

125. *Id*. at 54.

it cannot be stated conclusively that such cannot be made the objects of a reprisal attack, especially in light of the fact that "there are hardly any specific rules relating to sea or air warfare, and insofar as they do exist, they are controversial or have fallen into disuse."[127] It is worth noting Green's approach, while not conclusive, to the shortcomings in air warfare laws:

> It must be remembered at all times that, where there are no specific rules relating to air warfare as such, the basic rules of armed conflict . . . as well as the general rules governing land warfare and the selection of targets, are equally applicable to aerial attacks directed against enemy personnel and ground or sea targets.[128]

The only residual means of reprisal are said to consist of "either the unlawful use of a lawful weapon or the use of an unlawful weapon."[129] Because armed forces and military objectives are legitimate targets under the laws of armed conflict, it is the choice of weapons and methods of combat that would form the unlawful aspect of any reprisal action taken against them. Those taking reprisals may not disregard restrictions on weapons or methods of warfare in place specifically to protect certain groups of persons, where those categories of persons are already immune from reprisals by virtue of belonging to that category. For example, Article 4, paragraph 2, of the Mines Protocol outlaws the laying of mines in areas that contain a concentration of civilians, such as a city, town, or village.[130] While this rule covers a method of warfare, it may not be broken by way of reprisal because this would be in contravention of the prohibition on reprisals against the civilian population as set down in Article 51, paragraph 6, of Protocol I. Where the prohibited weapons or means of warfare have no effect on protected persons, however, the question as to whether they

126. Andrew D. Mitchell, *Does One Illegality Merit Another?: The Law of Belligerent Reprisals in International Law*, 170 MIL. L. REV. 155, 170 (2001).

127. COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 104, at 606. Mitchell points out that the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (Louise Doswald-Beck ed., 1995), "which represents the only major attempt to restate the law of armed conflicts at sea," failed to deal in any way with the issue of belligerent reprisals. Mitchell, *supra* note 126, at 170 n.78.

128. Leslie C. Green, *Aerial Considerations in the Law of Armed Conflict*, *in* ESSAYS ON THE MODERN LAW OF WAR 577, 594-95 (1999).

129. Hampson, *supra* note 38, at 829.

130. 1980 Mines Protocol *supra* note 115; *see* Kalshoven, *Belligerent Reprisals Revisited*, *supra* note 89, at 70.

might be employed by way of reprisal in response to prior unlawful action is somewhat more difficult to answer.

The employment of prohibited weapons or methods of combat will first and foremost be a breach of the particular treaty that established the illegality of their use. Article 60, paragraph 2, of the Vienna Convention on the Laws of Treaties establishes that "a material breach of a multilateral treaty by one of the parties entitles . . . a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting state."[131] Paragraph 5 of that same article makes it clear, however, that this rule does not apply to "provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."[132] Therefore, one may lawfully disregard a rule that does not protect the human person *and* is found in a treaty of a humanitarian character when a previous material breach by the other party already suspended the operation thereof. In such a case, there is no need to justify this breach with the excuse of reprisal, as the responding party was no longer bound by that particular set of laws. Kalshoven points out that the suspension of the operation of a treaty or a part thereof goes further than a reprisal as it "effectively frees the 'party specially affected' from all its obligations connected with the suspended (part of the) treaty."[133]

Where a treaty or part thereof may not be suspended in response to a material breach, the rules of that instrument may be abandoned by way of belligerent reprisal provided the target of that action is either enemy armed forces, military objects, or, as is most likely, a combination of both. Moreover, this reprisal must obey the customary rules governing resort to reprisals: there must have been a prior violation; the reprisal must be for the purpose of enforcing compliance with the law; it must cease when the illegality has ended; and as the International Committee of the Red Cross

131. Vienna Convention on the Law of Treaties, art. 60(2), *opened for signature* May 23, 1969, *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter Vienna Convention], *reprinted in* 8 I.L.M. 679 (1969).

132. *Id*. art. 60(5).

133. Kalshoven, *Belligerent Reprisals Revisited*, *supra* note 89, at 71.

has re-affirmed, such a resort to reprisals must be in full observance of the established principles of subsidiarity, proportionality, and humanity.[134]

On this issue, discussion frequently reverts to the 1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.[135] Upon ratification of this instrument, numerous States parties made reservations stipulating that they would cease to be bound by the provisions of the Gas Protocol when an enemy State, who had also ratified, acted in disregard of the rules set down therein.[136] The effect of these reservations is that the Gas Protocol has been reduced to operating on the basis of reciprocity, a notion that sits uncomfortably within the realm of modern international humanitarian law, and that is not subject to those customary restrictions placed on the use of reprisals. What of a situation in which a belligerent is a victim of unlawful conduct that is not in breach of the Gas Protocol: may that party retaliate by way of a reprisal which violates that instrument? Greenwood asserts that because the reservations serve to "undermine, if not destroy, any absolute character the prohibitions in the Gas Protocol might have possessed[,] . . . measures derogating from those prohibitions might also be justified under the doctrine of reprisals."[137] He also points out that the fact that a belligerent may not normally have ready access to prohibited weapons hinders any resort to the use of such armaments for the purpose of reprisal.[138]

When discussing the subject of weapons and means of warfare, one cannot avoid the omnipresent spectre of nuclear weapons. Without argument these are the ultimate weapons of mass destruction; their deployment has had and would again have, if used, devastating effects for the whole of humanity. While the nuclear debate is demonstrably broader than the issue

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134. COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 104, at 984.

135. Protocol for the Prohibition of the Use of Asphyxiation, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, *signed* June 7, 1925, *entered into force* Feb. 8, 1928 [hereinafter Gas Protocol], 94 L.N.T.S. 65 (1929), *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 115, at 115.

136. For a list of ratifications and reservations, see *id*. at 121-27. On 10 February 1978, Ireland withdrew the reservation it made to the 1925 Gas Protocol upon ratification of that instrument on 29 August 1930. *Id*. at 118.

137. Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 54.

138. *Id*. at 65.

of belligerent reprisals, for the sake of completeness, this article must briefly address the issue here.

In its advisory opinion on the issue of nuclear weapons, the International Court of Justice (ICJ) stated that it did not have to "pronounce on the question of belligerent reprisals save to observe that in any case any right of recourse to such reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality."[139] Any use of nuclear weapons in reprisal would invariably come into conflict with the customary principle of proportionality. Envisaging a nuclear reprisal being proportional to any prior unlawful non-nuclear act is quite difficult. Singh and McWhinney state that the use of nuclear weapons "as a reprisal for any normal violation of the laws of war would clearly be excessive."[140] In this respect, Lauterpacht has maintained that resort to the use of nuclear weapons "must be regarded as permissible as a reprisal for its actual prior use by the enemy or his allies."[141] Advocating the use of reprisals-in-kind would satisfy the proportionality requirement, but any contemporary use, it may first seem, would run afoul of the numerous reprisal prohibitions set down in the treaty law of armed conflict. The negotiations leading to Protocol I, however, were carried out on the basis that any reference to weapons applied only to conventional weapons, and not to nuclear weapons. This so-called "nuclear understanding" led to States entering a number of declarations upon the signing of Protocol I, to the effect that the instrument did not place any restrictions on the use of nuclear weapons.[142]

Singh and McWhinney have discussed the subject of nuclear reprisals vis-à-vis the protections offered by the Geneva Conventions, in which no such understanding seems to have existed. They would maintain that

> if the first user of nuclear weapons destroys protected persons and property, there would appear to be justification to retaliate in

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139. Adviosry Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 259, para. 46 (July 8).

140. NAGENDRA SINGH & EDWARD MCWHINNEY, NUCLEAR WEAPONS AND CONTEMPORARY INTERNATIONAL LAW 172 (Dordrecht/Boston/London 1989).

141. 2 LASSA OPPENHEIM, INTERNATIONAL LAW 350-51 (Hersch Lauterpacht ed., 7th ed. 1952). Oppenheim also held the somewhat contentious view that a nuclear reprisal "may be justified against an enemy who violates the rules of the law of war on a scale so vast as to put himself altogether outside the orbit of considerations of humanity and compassion." *Id.*

142. See, for example, the understanding of the United States made on signing Protocol I, *reprinted in* DOCUMENTS ON THE LAWS OF WAR 512 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

> kind, both as a measure of self-defence and in reprisal, even though the provisions of the Geneva Conventions were being violated. This would appear a warranted conclusion because, short of surrender to the first user of these prohibited weapons, the victim would have retaliation in kind as the only remedy. As the first user would be clearly guilty of a crime, to allow him the laurels of victory by surrendering to him with a stockpile of nuclear weapons, which cannot be used by the victim for fear of violation of the provisions of the Geneva Conventions, would be to encourage the first use of the prohibited weapon. Thus, short of destruction of the human race and the world, the only permissible use of thermo-nuclear weapons would appear to be retaliation in kind alone.[143]

Advocating an approach based on reciprocity, these writers seem to focus on military supremacy, rather than humanitarian concerns, as evidenced when they speak of allowing the enemy "the laurels of victory by surrendering to him."[144] These authors understand the difficulty of fitting the use of nuclear weapons into the framework of legitimate belligerent reprisals; they discuss retaliation in kind, as opposed to reprisal in kind, as the only remedy available. Belligerent reprisals are a sanction of the laws of war primarily; any remedying characteristic must be subordinate to this central function. In the event of a nuclear confrontation, the doctrine of belligerent reprisals, if it was even raised, would offer little justification for the use of these weapons of mass destruction.

Because the majority of the literature on belligerent reprisals focuses on those reprisals that are prohibited, there is little discussion on the issue of permissible reprisals during international armed conflicts. Only a few commentators, notably Greenwood and Kalshoven, have broached this thorny issue. Perhaps writers have deliberately avoided the issue, as it was by the drafters of the Hague Conventions of 1899 and 1907, in fear that such a discussion "might be interpreted as a legitimation of their use."[145] Although the law of naval and air warfare does seem to leave room for reprisals, one may conclude that in any land operations of an international armed conflict, the sphere of permissible belligerent reprisals is limited to

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143. SINGH & MCWHINNEY, *supra* note 140, at 174.

144. *Id*.

145. KALSHOVEN, BELLIGERENT REPRISALS, *supra* note 3, at 67.

the use of certain prohibited weapons or methods of warfare against military objectives, including the armed forces of an enemy belligerent.

B. Internal Armed Conflicts

The treaty law on the use of belligerent reprisals during non-international armed conflicts is notorious by its absence. Apart from the reprisal prohibitions contained in the 1954 Hague Convention on Cultural Property and the 1996 Amended Mines Protocol, there are no other express treaty provisions restricting the use of reprisals in internal armed conflicts. Neither common Article 3 of the 1949 Geneva Conventions[146] nor Additional Protocol II to those conventions,[147] the veritable nuclei of the law of internal armed conflicts, contain any reference, prohibitory or otherwise, to belligerent reprisals. This section examines that treaty law pertaining to internal conflicts and seeks to decipher the treatment, if any, of the issue of belligerent reprisals within that regime.

Article 3, common to each of the 1949 Geneva Conventions, is the only article in those landmark instruments that deals in any way with the issue of non-international armed conflicts. This article establishes a number of rules which must be observed, as a minimum, in armed conflicts which are not of an international character. It stipulates that persons who are taking no active part in hostilities "shall in all circumstances be treated humanely."[148] To give effect to this statement, common Article 3, paragraph 1, demands that "the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to [those] above-mentioned persons:

> (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and

146. *See, e.g.*, Fourth Geneva Convention, *supra* note 51, art. 3 [hereinafter Common Article 3].

147. Additional Protocol II to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *adopted* June 8, 1977, *entered into force* Dec. 7, 1978, U.N. Doc. A/32/144 Annex II, 1125 U.N.T.S. 609 [hereinafter Protocol II].

148. Common Article 3, *supra* note 146 (stating in paragraph 1 that such persons would include members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause; and demanding in paragraph 2 that "the wounded and sick shall be collected and cared for").

> degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.[149]

The language of this article is precise and unambiguous; there is no room for doubt as to the definite and concrete nature of the various prohibitions laid down therein. One must ask, however, whether those strict rules in common Article 3 can be set aside in response to a violation of those same or other rules by an enemy to persuade the offending party to observe them.

The International Committee of the Red Cross (ICRC) has adopted the stance that disregarding any of this article's provisions by way of reprisals is impermissible. The official commentary gives the reasoning behind this approach:

> [T]he acts referred to under items (a) to (d) are prohibited absolutely and permanently, no exception or excuse being tolerated. Consequently, any reprisal which entails one of these acts is prohibited, and so, speaking generally, is any reprisal incompatible with the "humane treatment" demanded unconditionally in the first clause of sub-paragraph (1).[150]

Although desirable from a humanitarian perspective, this interpretation is hardly that which the signatories, who were notoriously reluctant to concede to interference in their domestic affairs, would have envisioned. States would be highly unwilling to restrict their capacity to resort to belligerent reprisals against a potential law-breaking force that is operating against them within their own borders; as Kalshoven observes, the "implicit waiver of such a power cannot lightly be assumed."[151] One may

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149. *Id.*

150. COMMENTARY TO THE FOURTH GENEVA CONVENTION, *supra* note 78, at 39-40. Article 3, paragraph 1, states:

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

Common Article 3, *supra* note 146, para. 1.

also contend that the absolute nature of a particular rule is irrelevant where reprisals are concerned; they consist of actions which are prima facie unlawful, that is to say, belligerent reprisals, when taken, deliberately break the rules. Unless there is a rule that specifically outlaws their use, reprisals, however objectionable, may for the most part legitimately continue on their (prima facie) law-breaking course.

On this issue Moir sides with the approach taken by the ICRC, concurring that "the protection afforded by common Article 3 would thus accord with the position [of reprisals] in international armed conflicts."[152] Kalshoven is a bit more hesitant, drawing the safer conclusion that this difficult question cannot be satisfactorily answered.[153]

Rather than resolve the issue, Protocol II served only to add to the uncertainty surrounding the issue of belligerent reprisals in internal armed conflicts. The silence in Protocol II on the subject of belligerent reprisals was clearly not an oversight on the part of the delegates to the 1974-1977 Diplomatic Conference at Geneva. Nahlik points out that the draft of Protocol II submitted by the ICRC had originally included several reprisal prohibitions, but that these and other provisions had to be discarded "when it was clear that Protocol II could be saved only at the price of being considerably shortened."[154] Some delegates argued that the doctrine of reprisals has no place in an internal armed conflict because reprisals are interstate law enforcement devices, and thus could not apply between a government and a rebel force; that a rebel force might be given the power to take reprisals against a government was seen as out of the question.[155]

Once again it is necessary to consider the extent to which, if any, this instrument might restrict the use of belligerent reprisals during a non-international armed conflict. The argument pertaining to common Article 3 regarding the absolute nature of its prohibitions has similarly been proffered to support the contention that Protocol II contains an implicit ban on the taking of reprisals. Article 4, paragraph 2, is an expansion of the rules

151. KALSHOVEN, BELLIGERENT REPRISALS, *supra* note 3, at 269.
152. LINDSAY MOIR, THE LAW OF INTERNAL ARMED CONFLICTS 241 (2002).
153. KALSHOVEN, BELLIGERENT REPRISALS, *supra* note 3, at 269.
154. Nahlik, *supra* note 88, at 64.
155. *Id*. at 63.

set out by its predecessor in 1949; it prohibits "at any time and in any place whatsoever":

> (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) slavery and the slave trade in all their forms; (g) pillage; (h) threats to commit any of the foregoing acts.[156]

The ICRC, in view of the "absolute obligations" of this article, contends that "there is in fact no room left at all for carrying out 'reprisals' against protected persons."[157] The commentary also gives considerable credence to the inclusion of a prohibition against acts of collective punishment; this is seen as "virtually equivalent to prohibiting 'reprisals' against protected persons."[158] Kalshoven would favor the stance of the ICRC that reprisals are forbidden in internal armed conflicts, but he would base his argument on different grounds. He is not convinced that a prohibition of collective punishment is analogous to a prohibition of reprisals; he points out that the purpose of reprisals is not punishment but law enforcement. Instead, he would like to see reprisals prohibited on account of "their general futility and escalating effect."[159]

One cannot conclusively argue, however, that either common Article 3 or Protocol II prohibit belligerent reprisals. Kalshoven reluctantly concludes that he "would not venture to argue . . . that *as a matter of law*, measures resembling reprisals against the civilian population are prohibited in internal armed conflicts."[160] However undesirable reprisals may be from a humanitarian perspective, a strictly legal interpretation of the foregoing instruments would show that their use during a non-international armed conflict is not completely proscribed. At this point in the discussion, it is

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156. Protocol II, *supra* note 147, art. 4(2).

157. COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 104, at 1373. They acknowledge that "[f]or reasons of a legal and political nature, there are no provisions prohibiting 'reprisals' in Protocol II." *Id.*

158. *Id*. at 1374.

159. Kalshoven, *Belligerent Reprisals Revisited*, *supra* note 89, at 78.

160. *Id*. at 79 (emphasis added).

necessary to examine the current state of the customary international law of belligerent reprisals to address properly the question of their legality.

V. Belligerent Reprisals and Customary International Law

The foregoing sections have examined the extent to which the treaty law of belligerent reprisals either prohibits or permits the use of reprisals as a sanction of the laws of armed conflict. One must bear in mind that as conventional law, the above provisions are only binding on the parties who have ratified those instruments in which the reprisal provisions are found, except where those particular provisions are deemed to be declaratory of customary international law. There are several other important effects that flow from a rule being characterized as one of customary international law. In addition to binding states that are not parties to an instrument, a customary rule must be observed even if an enemy has broken that same rule. A party may not circumscribe a particular customary rule, which is also a treaty rule, by denouncing the instrument in which that rule is found. It has also been established that reservations to a treaty do not affect a party's obligations under provisions therein that reflect custom, as that party would already be bound by those provisions independently of that instrument.[161] This section examines the customary status of the various norms relating to belligerent reprisals and seeks to establish which, if any, of those rules are in fact customary norms.

A. State Practice

The Statute of the International Court of Justice in Article 38, paragraph 1(b), describes international custom "as evidence of a general practice accepted as law."[162] Primarily, therefore, it is State practice "which is accepted and observed as law . . . [that] builds norms of customary international law."[163] The acceptance that a particular rule is binding as law, the *opinio juris*, must accompany State practice to bring about the creation

161. THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 7 (Oxford 1989).

162. STATUTE OF THE INT'L COURT OF JUSTICE art. 38, para. 1(b).

163. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, *supra* note 161, at 1.

of custom. In the context of belligerent reprisals, as in many other contexts, accurately establishing State practice is often difficult.

The ICTY acknowledged this problem in the infamous *Prosecutor v. Tadić* case:

> When attempting to ascertain State practice with a view to establishing the existence of a customary rule or general principle, it is difficult, if not impossible, to pinpoint the actual behaviour of the troops in the field for the purpose of establishing whether they in fact comply with, or disregard certain standards of behaviour. This examination is rendered extremely difficult by the fact that not only is access to the theatre of military operations normally refused to independent observers (often even to the ICRC) but information on the actual conduct of hostilities is withheld by the parties to the conflict; what is worse, often recourse is had to misinformation with a view to misleading the enemy as well as public opinion and foreign Governments.[164]

In the context of the present article, the term "reprisal," despite having a highly-specific legal meaning, frequently surfaces in NGO reports and in media dispatches to connote the broader notion of retaliation, which exacerbates this difficulty.

Although a comprehensive assessment of the State practice relative to belligerent reprisals is outside the scope of this article, it is necessary to make a number of observations on this issue. First, the International Court of Justice has addressed this specific issue, holding that "[it] does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule."[165] This finding allows a certain latitude between the rules and the practice. In this respect, Meron has observed that "for human rights or humanitarian conventions[,] . . . the gap between norms stated and actual practice tends to be especially wide."[166] Where the practice is completely at odds with the rule in question, however, it is obvious that the rule has not crystallised into custom. Second, some have argued that the motives of the State in ques-

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164. Prosecutor v. Tadić, No. IT-94-1-AR2, para. 112 (Oct. 2, 1995) (Appeals Chamber).

165. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 98 (June 27) (Merits).

166. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, *supra* note 161, at 43.

tion are irrelevant in determining *opinio juris*; "What counts is that a State has openly taken position or revealed a sense of legal obligation, regardless of the underlying motivation."[167] Finally, the relevance of State practice has been qualified as being only "a subsidiary means whereby the rules which guide the conduct of States are ascertained."[168] Baxter advocates that "[t]he firm statement by the State of what it considers to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts."[169]

On the subject of belligerent reprisals, the State practice in the war between Iran and Iraq from 1980 to 1988 is worth considering. At that time, and at the time of this article, neither State was a party to Protocol I, although they had ratified the four Geneva Conventions. Despite pleas by the United Nations Security Council and the ICRC,[170] both parties to the conflict reserved the right to take reprisals in response to violations of the laws of war by their opponent. Kalshoven asserts that the so-called "reprisal bombardments" were not genuine reprisals, but willful attacks on the civilian population of the enemy, "with the reprisal argument merely serving as a flimsy excuse."[171] This duplicitous use of the reprisals doctrine may render this evidence of State practice useless.

While assessing State practice with regard to conduct during international armed conflicts may be difficult, to do so with respect to internal armed conflicts may be next to impossible. States, for example, would understandably be hesitant towards claiming the right to take reprisals against civilians in their own territory. In this respect, Kalshoven points out that

> [t]he actions of parties to several recent internal armed conflicts regrettably serve to reinforce the impression that more than one government interprets the vacuum in the treaty law in force as an

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167. Georges Abi-Saab, *The 1977 Additional Protocols and General International Law: Some Preliminary Reflections*, *in* ASTRID J.M. DELISSEN & GERARD J. TANJA, HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD: ESSAYS IN HONOUR OF FRITS KALSHOVEN 115, 124 (Dordrecht 1991).

168. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRIT. Y.B. INT'L L. 275, 300 (1965-1966), *cited in* MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, *supra* note 161, at 43.

169. *Id.*

170. U.N. Doc S/RES/0540 (1983); 1983 ICRC ANNUAL REPORT 58 (Geneva 1983).

171. Kalshoven, *Belligerent Reprisals Revisited*, *supra* note 89, at 62.

> indication that in such a situation, whether of the Article 3 or Protocol II variety, their right to take reprisal-type measures (although of course not so named) continues unabated.[172]

Due to the inherent difficulties in assessing State practice during conflict situations and owing to the limited scope of this article, other factors must also be considered in examining the customary status of the law of belligerent reprisals. Specifically, this next section examines the level of ratification of treaties containing those rules and any reservations thereto; the approach to the issue taken by international organizations; the treatment of belligerent reprisals in major military manuals; and most importantly, some recent ICTY jurisprudence pertaining to the issue at hand.

B. Adoption of Instruments

In assessing the customary character of treaty provisions, considering the number of States that have adopted the particular instrument in which those provisions are found is worthwhile. Abi-Saab maintains that "the larger the conventional community, the more the treaty approximates the status of general international law."[173] The Geneva Conventions of 1949 have received almost universal ratification, and in this regard, many of the norms set out therein are declaratory of customary international law. Few, if any, would disagree that the prohibition of reprisals in the four Geneva Convention are now well-established customary rules. Currently, 160 States are parties to Protocol I.[174] Although not as numerous as those to the Geneva Conventions, this is still a substantial figure, and such a level of acceptance would strengthen any claim toward the customary character of norms set out therein. The 1980 Mines Protocol has had eighty ratifications, while the 1996 Amended Mines Protocol has been ratified by a staggering sixty-five States since its adoption only six years ago.[175]

Meron advocates that for any particular treaty, its "ratifications should be evaluated from the perspective of the relevance and weight of

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172. *Id*. at 77.

173. Abi-Saab, *supra* note 167, at 117.

174. *See* International Committee of the Red Cross, *Treaty Database*, *at* http://www.icrc.org/ihl (last visited Aug. 20, 2002) [hereinafter ICRC *Treaty Database*]. Although over 100 States have ratified the Hague Cultural Property Convention of 1954, *id.*, it is more pertinent to focus on the like prohibition of reprisals against cultural property in Protocol I to decipher the customary nature of this rule.

175. *Id*.

the ratifying states."[176] In this respect, one must note that four of the five permanent members of the United Nations Security Council have ratified or acceded to Protocol I: China, Russia, the United Kingdom, and most recently, France. Seventeen of the nineteen members of NATO have also become parties to the protocol. While these are indeed major military powers, one must also consider those States that have not signed Protocol I. The United States is the most obvious example of a State that has refused to ratify this instrument. Other significant military powers who have not become party to Protocol I include Iran, Iraq, India, Pakistan, Israel, and Turkey.[177]

The United States has based her refusal on various grounds. Among these, the instrument's treatment of reprisals has been "singled out for particularly severe criticism."[178] The United States position has been set out thus:

> The Joint Chiefs of Staff, after a careful and extensive study, concluded that Protocol I is unacceptable from the point of view of military operations. The reasons . . . include the fact . . . that it eliminates significant remedies in cases where an enemy violates the Protocol. The total elimination of the right of reprisal, for example, would hamper the ability of the United States to respond to an enemy's intentional disregard of the limitations established in the Geneva Conventions of 1949 or Protocol I, for the purpose of deterring such disregard.[179]

As the world's foremost superpower, the reluctance of the United States to accept the reprisal provisions in Protocol I may cast doubt on any claim that those prohibitions might be customary in nature.

C. Reservations

In assessing the customary nature of the rules pertaining to belligerent reprisals, one must consider whether States parties to the relevant treaty

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176. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, *supra* note 161, at 74.

177. *See* ICRC *Treaty Database*, *supra* note 174.

178. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, *supra* note 161, at 66.

179. Abraham D. Sofaer, *The Rationale for the United States Decision*, 82 AM. J. INT'L L. 784, 785 (1988).

provisions have entered any reservations. It would seem that if a particular rule is reservable, this considerably weakens any assertion that this rule is customary. Meron contends that "[u]nquestionably, reservations may adversely affect the claims to customary law status of those norms which they address."[180] States, however, do not have unfettered discretion in this reserving process because they must adhere to the rules set out in Article 19 of the Vienna Convention of the Law of Treaties:

> A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
> (a) the reservation is prohibited by the treaty;
> (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
> (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.[181]

Regarding the present discussion, neither the Geneva Conventions nor the Additional Protocols contain any article dealing with reservations. The permissibility of reservations to those treaties thus rests upon paragraph (c) of Article 19, which stipulates that the reservation must be compatible with the "object and purpose" of the instrument.[182] To date, none of the parties to the four Geneva Conventions has made a reservation toward the reprisal provisions contained therein. The reprisal provisions of Protocol I, however, have been the subject of one reservation and a number of declarations.[183] From the perspective of their effect on the customary international law status of those reprisal prohibitions, "the number and depth of the reservations actually made must be considered."[184] Also, the compatibility of these reserving statements with the object and purpose of Protocol I must be examined.

Upon ratification of Protocol I on 27 February 1986, Italy made the following declaration: "Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under interna-

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180. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, *supra* note 161, at 16.

181. Vienna Convention, *supra* note 131, art. 19.

182. *Id*. art. 19(c).

183. ICRC *Treaty Database*, *supra* note 174.

184. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, *supra* note 161, at 16.

tional law in order to prevent any further violation."[185] Germany, upon its ratification on 14 February 1991, made a declaration almost identical to that made earlier by Italy.[186] Egypt, upon ratification of Protocol I, declared that "on the basis of reciprocity[,] . . . it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation."[187] France acceded to Protocol I on 11 April 2001 and made the following declaration:

> The Government of the French Republic declares that it will apply the provisions of Article 51, paragraph 8, in such a way that the interpretation of those will not be an obstacle to the employment, in conformity with international law, of those means which it estimates are indispensable for protecting its civilian population from serious, manifest and deliberate violations of the Geneva Conventions and this Protocol by the enemy.[188]

While these declarations are somewhat ambiguous, they do seem to indicate that these States will resort to reprisals in the face of serious violations of humanitarian law against their civilian populations. The wording of each statement incorporates the customary requirements of prior violation and of law enforcement pertaining to the use of belligerent reprisals. The assertion that the means pursued will be in observance of international law seems to imply that those States view customary international

185. Protocol I, *supra* note 87, Reservations, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 142, at 507.

186. *See id.* at 505.

187. *Id*. at 504.

188. See the International Committee of the Red Cross Web site, *supra* note 174 (author's translation of French text). Article 51, paragraph 8, of Protocol I reads: "Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57." Protocol I, *supra* note 87, art. 51(8).

law as permitting the use of reprisals against those targets which Protocol I seeks to protect.

Much less ambiguous is the strong reservation entered by the United Kingdom upon ratification of Protocol I on 28 January 1998:

> The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise there to and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.[189]

Without any direct reference to the doctrine, it is clear that the United Kingdom here fully endorses the use of belligerent reprisals against the persons and objects protected by Part IV of Protocol I, when they are undertaken in conformity with the established customary requirements for such use, and when in response to "serious and deliberate attacks" in violation of Articles 51-55.

Is the United Kingdom's reservation compatible with the object and purpose of Protocol I? Notably, at the Diplomatic Conference a representative of the German Democratic Republic declared that his government would find any reservation to Article 51, paragraph 6, incompatible with

189. DOCUMENTS ON THE LAWS OF WAR, *supra* note 142, at 511.

the object and purpose of the Protocol.[190] The "object and purpose" of Part IV of Protocol I is predominantly the protection of the civilian population. As such, one could view this as one of the main goals of the entire instrument. It has been argued that belligerent reprisals are a means to achieving that goal and are therefore compatible with the object and purpose of Protocol I.[191]

Hampson believes that the issue of compatibility of a reservation depends on the attitude and actions of non-reserving States.[192] Article 20, paragraph 5, of the Vienna Convention sets out that "a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation."[193] As no State has objected to the United Kingdom's reservation or the various declarations, this may indicate their compatibility with the object and purpose of Protocol I. Indeed, academic opinion on this issue seems to consider reservations to the reprisal prohibitions of Protocol I as being permissible.[194]

One must take account of the effect of these statements on the customary status of the reprisal prohibitions. The clear statement of the United Kingdom's reservation and the implied posture from the four declarations is that these States do not consider themselves precluded from taking belligerent reprisals against those targets protected by Protocol I. While this implies that the reprisal provisions are not rules of custom, the existence of these statements cannot be seen as conclusive in that regard. The reason Italy, Germany, Egypt, and France refrained from taking the firmer position of making a reservation to the articles prohibiting reprisals against certain persons and objects is uncertain. Furthermore, the presence of just one reservation, arguably, is insufficient to defeat a claim of custom. Despite the fact that "[c]haracteristically, states do not object to reservations made

190. Nahlik, *supra* note 88, at 50.

191. *See* Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 64.

192. Hampson, *supra* note 38, at 833.

193. Vienna Convention, *supra* note 131, art. 5.

194. *See* Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 64; Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, *in* THEODOR MERON, WAR CRIMES LAW COMES OF AGE 175, 183 (Oxford/New York 1998). One author has drafted a reservation to Article 51 for suggested use by the United States, quite similar to the United Kingdom reservation. He asserts that this would be "defensible as not incompatible with the object and purpose of the Protocol." George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 17 (1991).

by other states,"[195] the distinct lack of any objections to these statements, and their very presence, might indicate a widely-held opinion that the reprisal provisions of Protocol I are not declaratory of customary international law.

D. International Organizations

On 9 December 1970, the General Assembly of the United Nations adopted Resolution 2675 (XXV) on the Basic Principles for the Protection of Civilian Populations in Armed Conflicts.[196] Paragraph 7 of the resolution sets out that "[c]ivilian populations, or individual members thereof, should not be the object of reprisals."[197] While General Assembly resolutions are a source of soft rather than hard law, the Appeals Chamber of the ICTY in *Tadić* held that Resolution 2675 was "declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind."[198] This statement continued that "at the same time, [this resolution was] intended to promote the adoption of treaties on the matter, designed to specify and elaborate upon such principles."[199] This latter assertion, that forthcoming treaties will "specify and elaborate" on those principles, may seem to weaken their status as principles of customary law. It is doubtful that a customary rule prohibiting belligerent reprisals against civilian populations in both international and internal armed conflicts existed in 1970; the treaty law at the time only extended to civilians in the hands of an adversary, while almost a decade later Protocol II deliberately remained silent on the subject of reprisals in non-international conflicts.

The position taken by the ICRC toward belligerent reprisals has been discussed frequently above, but will be briefly reiterated here. The Committee's most important postulation is that the prohibitions against reprisals in the four Geneva Conventions and Protocol I relevant to international armed conflicts extend to internal armed conflicts by virtue of the absolute and concrete nature of the prohibitions in common Article 3 and Article 4,

195. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, *supra* note 161, at 25.

196. G.A. Res. 2675, U.N. GOAR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970), *reprinted in* THE LAWS OF ARMED CONFLICT, *supra* note 12, at 267-68.

197. *Id.* para. 7.

198. Prosecutor v. Tadić, No. IT-94-1-AR2, para. 112 (Oct. 2, 1995) (Appeals Chamber).

199. *Id*.

paragraph 2, of Protocol II. The views of the ICRC, while ultimately humanitarian in nature, must be accorded their due weight considering the massive contribution this organization has made to the codification of international humanitarian law.[200]

E. Military Manuals and National Legislation

Military manuals are an important source for gauging the attitude of States toward particular rules of international humanitarian law. Similarly, national legislation implementing the laws of armed conflict into domestic law often show the particular norms which that State feels its own troops are bound to observe. Meron's opinion is that

> manuals of military law and national legislation providing for the implementation of humanitarian law norms as internal law should be accepted as among the best types of evidence of [state] practice, and sometimes as statements of *opinio juris* as well. This is especially so because military manuals frequently not only state government policy but establish obligations binding on members of the armed forces, violations of which are punishable under military penal codes.[201]

The 1956 United States Department of the Army Field Manual sets out that country's position as regards belligerent reprisals:

> Reprisals against the persons or property of prisoners of war, including the wounded and sick, and protected civilians are forbidden (GPW, art. 13, GC; art. 33) . . . . However, reprisals may still be visited on enemy troops who have not yet fallen into the hands of the forces making the reprisals.[202]

One of the most recent United States Army manuals, the *2002 Operational Law Handbook*, reaffirms that "the U.S. position is that reprisals are prohibited only when directed against protected persons as defined in the Geneva Conventions."[203] Similarly, the 1958 United Kingdom manual

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200. On the role of the ICRC, see Theodor Meron, *Editorial Comment: The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT'L L. 238, 244-49 (1996).

201. MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, *supra* note 161, at 41.

202. FM 27-10, *supra* note 34, at 497.

also does not endorse a prohibition of reprisals against all civilians.[204] The stances espoused by the United States and United Kingdom manuals are commensurate with the stances those States have adopted toward Protocol I. A detailed examination of the manuals of all the numerous military powers and a comprehensive survey of the relevant national legislation would further reveal the extent to which States consider that they are lawfully permitted to take belligerent reprisals.

F. Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia

The International Criminal Tribunal for the former Yugoslavia (ICTY) has twice addressed the issue of belligerent reprisals: in *Prosecutor v. Martić (Rule 61)*[205] and in the later case of *Prosecutor v. Kupreskic*.[206] The *Martić* case was effectively what is known as a Rule 61 procedure, a process whereby the indictment against an accused not yet in custody is submitted to the Trial Chamber to determine whether "there are reasonable grounds for believing that the accused has committed all or any of the crimes charged."[207] This procedure does not make any determinations of guilt or innocence; it merely reaffirms the indictment, and an international arrest warrant is issued if the court is satisfied that the necessary "reasonable grounds" are present.[208]

Milan Martić was the president of the "self-proclaimed Republic of Serbian Krajina."[209] Martić allegedly ordered attacks against civilians in the Croatian capital, Zagreb, in retaliation for an assault on 1 May 1995, by Croatian Forces against the territory of the Republic. The Army of the Republic carried out two attacks on 2 and 3 May 1995, using Orkan rockets

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203. INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 422, OPERATIONAL LAW HANDBOOK 20 (2002).

204. Christopher Greenwood, *Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, *in* Horst Fishcer, INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS 15 (Claus Kress & Sascha Rolk Lüder eds., 2001) (author's draft on file).

205. No. IT-95-11-R61 (Mar. 8, 1996) (Decision) (Jorda, J. (presiding); Odio Benito, J.; Riad, J.), 108 I.L.R. 39 (1996).

206. No. IT-95-16-T (Jan. 14, 2000) (Judgment) (Cassese, J. (presiding); May, J.; Mumba, J.).

207. RULES OF PROCEDURE AND EVIDENCE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA R.61, para. (c), U.N. Doc. IT/32/Rev.7 (as amended) (1996).

208. *Id.* R. 61, para. (d).

209. *Martić*, 108 I.L.R. at 40.

armed with cluster-bomb warheads, resulting in numerous civilian deaths and injuries in Zagreb.[210] Martić, as president, was accused of having ordered those attacks or, alternatively, with command responsibility for the attacks for failing "to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[211] During this procedure, the Trial Chamber addressed the issue of belligerent reprisals, and although brief, this discussion could have serious implications for the law of belligerent reprisals.

Having discussed the unlawfulness of attacks against civilians, the Trial Chamber then asked whether such attacks might be legal if they were carried out in reprisal.[212] Viewing the prohibition of attacks on civilians as applicable in all circumstances, the Chamber claimed that "no circumstances would legitimise an attack against civilians even if it were a response proportionate to a similar violation."[213] The Chamber cited Article 1 common to the four Geneva Conventions, which instructs parties "to respect and to ensure respect for the Conventions in all circumstances,"[214] in support of this assertion. The Chamber then contended that this prohibition on reprisals is applicable in all armed conflicts and that various instruments serve to "reinforce" this interpretation.[215] Referring to the inclusion of a reprisal prohibition in General Assembly Resolution 2675; the "unqualified prohibition" in Article 51, paragraph 6, of Protocol I; and the absolute and non-derogable nature of the prohibitions, including that against collective punishments in Article 4, paragraph 2(b), of Protocol II, the Trial Chamber concluded that "the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour of

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210. *Id*.

211. STATUTE OF THE INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991, art. 7, para. 3, U.N. Doc. S/25704, at 36, Annex (1993); S/25704/Add.1, U.N. Doc. S/RES/827 (1993) [hereinafter STATUTE OF THE ICTY].

212. *Martić*, 108 I.L.R. at 46, para. 15.

213. *Id*.

214. *See, e.g.*, Fourth Geneva Convention, *supra* note 51, art. 1.

215. *Martić*, 108 I.L.R. at 47, para. 16.

the other party, is an integral part of customary international law and must be respected in all armed conflicts."[216]

This conclusion has serious ramifications for the law of belligerent reprisals. It claims that the prohibition of reprisals against civilians, as set down in Protocol I, is a norm of customary international law, and, thus, binding on all parties, irrespective of whether they have ratified that instrument. Also, it contends that there is a like prohibition implicit in Article 4 of Protocol II relative to non-international armed conflicts and, moreover, that this reprisal prohibition is also a rule of customary international law. The Trial Chamber went into very little detail before arriving at such a major conclusion. Therefore, the strong stance that it has taken on the issue of belligerent reprisals, one quite similar to that espoused by the ICRC, is considerably weakened. The Trial Chamber's assertions are unconvincing because there is little concrete support for the conclusion it reached. In particular, the brief arguments relating to Protocol II, previously discussed above, seem to hold little water.

Two of the foremost experts on belligerent reprisals, Professors Kalshoven and Greenwood, have heavily criticized the conclusions concerning the doctrine of reprisals reached by the ICTY in *Prosecutor v. Martić*. Kalshoven, notoriously an ardent opponent of any use of belligerent reprisals, rather than welcoming the court's approach in *Martić*, derides the Trial Chamber's findings as unsubstantiated.[217] Similarly, Greenwood views the assertions of the ICTY in this case as unfounded and "open to criticism on several grounds."[218]

First, they see the reference by the Chamber to Article 1 of the Geneva Conventions as misplaced in the context of belligerent reprisals. This article refers only to the norms contained in the Convention, "none of which deal with the protection of the civilian population against the effects of hostilities, or *a fortiori* with the issue of reprisals in that context."[219] An attempt to find justification for a broad prohibition of reprisals in common

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216. *Id*. at 47, paras. 16-17.

217. *See* FRITS KALSHOVEN, TWO RECENT DECISIONS OF THE YUGOSLAVIA TRIBUNAL (forthcoming 2003) (manuscript at 8, on file with author).

218. Christopher Greenwood, *Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, in* HORST FISCHER, CLAUS KRESS & SASCHA ROLF LÜDER, INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS 539, 555 (Berlin 2001).

219. KALSHOVEN, TWO RECENT DECISIONS OF THE YUGOSLAVIA TRIBUNAL, *supra* note 217, at 7.

Article 1 is bound to fail because were it to imply such a prohibition, the reprisal provisions contained in each of the four Conventions would effectively be deemed redundant.[220] As Greenwood points out, the Fourth Geneva Convention offers protection to a limited category of civilians; the population of Zagreb did not fall into this category of protected persons as they were not "in the hands of a Party to the conflict or Occupying Power of which they [were] not nationals."[221] On the subject of internal armed conflicts, Kalshoven again registers his disagreement that the prohibition of collective punishments in Article 4, paragraph 2(b), of Protocol II implies a prohibition of reprisals against the civilian population. He stipulates that "this specific clause belongs to the realm of Geneva-style 'humane treatment,' not to that of the Hague-style protection of civilian populations 'against the dangers arising from military operations.'"[222]

Kalshoven concludes that the Trial Chamber failed to show conclusively that customary international law prohibits reprisals against the civilian population or that the treaty prohibitions of reprisals apply outside of situations of international armed conflicts.[223] Both of the above eminent authors concur that the issue of reprisals should not have been dealt with at all in the *Martić* case, considering that for a Rule 61 procedure, it would have been sufficient to set out the evidence that may have established the accused's responsibility and "the matter of a possible excuse could have been left to the time the defence was actually raised."[224] Although the Prosecutor did initiate the discussion on the doctrine of belligerent reprisals,[225] one must wonder why the Trial Chamber decided to address this problematic issue, especially in light of the fact that it was superfluous for those particular proceedings. Were the judges so distressed by the possibility of such an unjust practice being carried out that they felt it necessary

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220. Greenwood, *Belligerent Reprisals in the Jurisprudence of the ICTY, supra* note 218, at 555.

221. *Id*. at 555.

222. KALSHOVEN, TWO RECENT DECISIONS OF THE YUGOSLAVIA TRIBUNAL, *supra* note 217, at 7.

223. *Id*. at 8.

224. *Id*. at 18; *see also* Greenwood, *Belligerent Reprisals in the Jurisprudence of the ICTY, supra* note 218, at 555.

225. *See* KALSHOVEN, TWO RECENT DECISIONS OF THE YUGOSLAVIA TRIBUNAL, *supra* note 217, at 5-7.

to interpret the instruments creatively to hold belligerent reprisals against civilians as being completely outlawed?

After *Martić*, the ICTY once more addressed the issue of belligerent reprisals in *Prosecutor v. Kupreskic*.[226] The accused in *Kupreskic*,[227] all Croatian Defence Council (HVO) soldiers, were charged with nineteen counts, including persecution as a crime against humanity committed against the Bosnian Muslim population of Ahmici, Central Bosnia, from October 1992 to April 1993, and murder, inhumane acts, and cruel treatment for an attack on that village on 16 April 1993.[228] The attack of 16 April 1993, was directed against the Muslim population of Ahmici; 116 people were killed, the majority of whom were civilians; Muslim houses and mosques were destroyed; and the remaining Muslim population forced to flee. The Trial Chamber found that the attack by the Croatian HVO against Ahmici, a village with no Muslim military forces or establishments, "was aimed at civilians for the purpose of ethnic cleansing."[229] The defense "indirectly or implicitly" relied on the argument of *tu quoque*, claiming that the attacks were justifiable because the Muslims carried out similar attacks against the Croat population.[230] The Trial Chamber rejected this argument outright, commenting that "[t]he defining characteristic of modern international humanitarian law is . . . the obligation to uphold key tenets of this body of law regardless of the conduct of enemy combatants."[231] Although the Defense team did not raise the defense of belligerent reprisals, the Trial Chamber noted the close relationship between this doctrine and the principle of *tu quoque* and also ruled reprisals out as a possible defense in this case.[232] Notwithstanding, the court then proceeded to examine the issue of reprisals in some detail.

At the outset of the discussion, the Trial Chamber, having pointed to the customary rule that civilians in the hands of an adversary may not be made the subjects of reprisals, asked whether the broader prohibitions of Protocol I, "assuming that they were not declaratory of customary international law, have subsequently been transformed into general rules of inter-

226. Prosecutor v. Kupreskic, No. IT-95-16-T (Jan. 14, 2000) (Judgment).

227. Zoran Kupreskic, Mirjan Kupreskic, Vlatko Kupreskic, Drago Josipovic, Dragan Papic, and Vladimir Santic. *See id.*

228. *Id.* annex A (Amended Indictment).

229. *Id.* paras. 333-38.

230. *See id.* paras. 511, 515.

231. *Id.* para. 511.

232. *Id.*

national law."[233] Acknowledging a distinct lack of State practice to support a positive answer, the Trial Chamber then ventured to state:

> This is however an area where *opinio iuris sive necessitatis* may play a much greater role than *usus*, as a result of the . . . Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitati*s, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.[234]

Here, the Trial Chamber effectively negates the need for State practice to confirm the formation of custom, instead concluding that principles of humanity and the dictates of the public conscience may be the foremost ingredients for establishing that particular rules are customary in nature.

The judgment proceeded to point out that reprisals often strike at innocent persons, in violation of the most fundamental of all human rights. In light of the infusion of human rights principles into the humanitarian law regime, the Trial Chamber felt that "belligerent reprisals against civilians and fundamental rights of human beings are absolutely inconsistent legal concepts."[235] As a means of enforcing the laws of armed conflict, belligerent reprisals are no longer necessary because they have been superceded by judicial prosecutions and punishments of persons in violation of those laws, a means which has proved "fairly efficacious" at ensuring compliance and, to a more limited extent, for the deterrence of the most blatant violations of international humanitarian law.[236] In support of the conclusion that a customary rule has emerged "on the matter under discussion," the Trial Chamber noted the inclusion of reprisal provisions in several

233. *Id*. para. 527.
234. *Id*.
235. *Id*. para. 529.
236. *Id*. para. 530.

army manuals that only allow reprisals against enemy armed forces, thus *a contrario*, "admitting that reprisals against civilians are not allowed."[237]

The Trial Chamber cited General Assembly Resolution 2675, the high number of ratifications of Protocol I, the views of the ICRC, and the *Martić* decision in support of the view that the rules in Protocol I concerning reprisals against civilians are declaratory of customary international law.[238] The Chamber also advanced that States involved in recent international or non-international armed conflicts had normally refrained from claiming a right to take reprisals against civilians in combat areas, except by those parties to the Iran-Iraq war and by France and the United Kingdom, but only *in abstracto* and hypothetically, by way of the former's (then) refusal to ratify and the latter's strong reservation to Protocol I.[239]

The Chamber then set out how the International Law Commission (ILC) has authoritatively confirmed, albeit indirectly, the existence of a customary rule prohibiting reprisals against civilians in international armed conflicts. The Commission noted that common Article 3 to the Geneva Conventions "prohibits any reprisals in non-international armed conflicts with respect to the expressly prohibited acts as well as any other reprisal incompatible with the absolute requirement of humane treatment."[240] The Trial Chamber asserted that it follows that reprisals against civilians in combat zones are also prohibited due to the customary nature of common Article 3 and that this article "encapsulates fundamental legal standards of overarching value applicable both in international and internal armed conflicts" in accordance with the International Court of Justice decision in the *Nicaragua* case.[241] The Trial Chamber then stated that "it would be absurd to hold that while reprisals against civilians entailing a threat to life and physical safety are prohibited in civil wars, they are allowed in international armed conflicts as long as the civilians are in the combat zone."[242] In concluding the discussion on belligerent reprisals, the

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237. *Id*. para. 532. The Trial Chamber also acknowledged that some manuals specifically sanction reprisals against civilians not in the hands of the enemy belligerent. *Id.*

238. *Id*.

239. *Id*. para. 533.

240. *International Law Commission, Comments on Former Article 14 of the Second Part of the Draft Articles on State Responsibility*, [1995] 2 Y.B. Int'l L. Comm'n 72, para. 8, U.N. Doc. A/CN.4/SER.A/1995/Add.1, pt. 2 (State responsibility), *quoted in Kupreskic*, No. IT-95-16-T, para. 534.

241. *Kupreskic*, No. IT-95-16-T, para. 534 (citing Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 113-44, paras. 218-19 (June 27) (Merits)).

242. *Id*.

Trial Chamber set out the requirements that any resort to lawful belligerent reprisals must meet.[243] It also notes that both parties to the conflict in question were signatories to Protocol I and the Geneva Conventions and, thus, bound by their provisions, including those that prohibit resort to belligerent reprisals against certain targets.[244]

The Trial Chamber's conclusion that a customary rule exists, without State practice, prohibiting reprisals against civilians in international armed conflicts is quite a brave and lofty statement. Having first set out a rule for the establishment of custom, the court weaved together various pieces of evidence and concluded that the above treaty law provisions have been transformed into customary international law. Unsurprisingly, both Professors Greenwood and Kalshoven denounced this judgment with much the same vigor with which they criticized the *Martić* decision.[245] Meron, with considerable foresight, had stated that "[a]lthough Cassese's opinion will please most advocates of international humanitarian law, many military experts on the law of armed conflict will probably disagree."[246]

Setting aside momentarily the actual reasoning of the Trial Chamber that led to its conclusion, it is questionable whether it was necessary for the Chamber to examine the issue of belligerent reprisals at all, and having done so, whether the customary nature of the provisions of Protocol I were of any bearing to the case in hand. Greenwood points out that both belligerents in this conflict were parties to Protocol I and bound by its provisions, therefore, whether the provisions prohibiting reprisals against civilians and civilian objects in that instrument were declaratory of custom was irrelevant. He also points out that because Ahmici was under the control of Croatia, the civilian population could have availed of the protection of Article 33 of the Fourth Geneva Convention, a "universally accepted and uncontroversial provision."[247] Furthermore, the Defense team never raised a defense of reprisal, and in any event, the attack did not meet any of the customary requirements governing recourse to reprisals, namely, being undertaken for the purpose of law enforcement and carried out in

243. *Id*. para 535.

244. *Id.* para 536.

245. KALSHOVEN, TWO RECENT DECISIONS OF THE YUGOSLAVIA TRIBUNAL, *supra* note 217, at 9-17; Greenwood, *Belligerent Reprisals in the Jurisprudence of the ICTY, supra* note 218, at 549-54.

246. Theodor Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 239, 250 (2000).

247. Greenwood, *Belligerent Reprisals in the Jurisprudence of the ICTY, supra* note 218, at 549.

adherence of the principles of proportionality and subsidiarity. Kalshoven views the discussion of reprisals as "out of order, or at best, as being based on the flimsy excuse of the 'indirect or implicit reliance' by the Defence on *tu quoque*."[248]

Nevertheless, the Trial Chamber chose to concern itself with whether Article 51, paragraph 6, and Article 52, paragraph 1, of Protocol I, prohibiting reprisals during international armed conflicts against civilians and civilian objects respectively, are declaratory of customary international law. The emphasis placed on the Martens clause by the Trial Chamber has not been met with much approval by the various commentators on this case. Meron contends that "given the scarcity of practice and diverse views of states and commentators, the invocation of the Martens clause can hardly justify [the Trial Chamber's] conclusion."[249] Greenwood finds no indication that States or courts treat the clause in the manner the Chamber suggests; in particular, he takes offense at the reference to the ICJ's *Advisory Opinion on Nuclear Weapons* in which the World Court, although having established that the Martens clause states a principle of customary international law, did not treat that clause as "relieving [the court] of the need to establish that not only *opinio juris* but also state practice existed in support of a rule of customary international humanitarian law."[250] And on the issue of State practice, the Trial Chamber "cited virtually no State practice at all and what it did cite does not support the conclusions it drew."[251]

The tirade of criticism does not cease there: Kalshoven makes little of the Trial Chamber's assertion that the prosecution of war criminals has led to a decline in the incidence of blatant violations of international humanitarian law.[252] Greenwood finds that the high number of ratifications of Protocol I does not transform that instrument's provisions into customary rules: "the fact that States are prepared to accept an obligation in treaty form in no way suggests that they regard that same obligation as

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248. KALSHOVEN, TWO RECENT DECISIONS OF THE YUGOSLAVIA TRIBUNAL, *supra* note 217, at 16.

249. Meron, *The Humanization of Humanitarian Law*, *supra* note 246, at 250.

250. Greenwood, *Belligerent Reprisals in the Jurisprudence of the ICTY*, *supra* note 218, at 554 (construing Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 259, para. 84 (July 8); *see also* KALSHOVEN, TWO RECENT DECISIONS OF THE YUGOSLAVIA TRIBUNAL, *supra* note 217, at 13.

251. Greenwood, *Belligerent Reprisals in the Jurisprudence of the ICTY*, *supra* note 218, at 550.

252. *See* FRITS KALSHOVEN, TWO RECENT DECISIONS OF THE YUGOSLAVIA TRIBUNAL, *supra* note 217, at 13-14.

binding upon them anyway by virtue of customary law; indeed it may suggest the opposite."[253] While not disregarding the views of the ICRC, Greenwood makes it clear that it is State practice and not the practice of the ICRC that creates customary international law.[254]

The Trial Chamber's blithe assertion that States have normally refrained from claiming a right of reprisal, except for Iraq and a few others, is also met with hostility. Kalshoven takes issue with the reference to "numerous" international conflicts and points out that during internal armed conflicts, States would obviously hesitate to *claim* a right of reprisal against their own civilians.[255] Greenwood rejects the dismissal of the United Kingdom's reservation as being only hypothetical; instead, he views this as a clear statement of the United Kingdom's view of the non-customary nature of the reprisal provision of Protocol I.[256] The Trial Chamber's findings on this issue, one author damningly concludes, "may be founded on quicksand."[257]

The Trial Chamber's attempts to grapple with the issue of reprisals against civilians during internal armed conflicts is marked by a similar lack of success. The court simply ignores the lack of any reference to reprisals in Protocol II; instead, the Chamber focuses on common Article 3 and the ILC's interpretation of this provision. Kalshoven points out that this article does not govern the conduct of hostilities; therefore, the Chamber's view that "reprisals against civilians in the combat zone are also prohibited" is unfounded.[258] Moreover, he derides the Trial Chamber for disregarding the fact that the original attempts to include reprisal prohibitions against the civilian populations in Protocol II failed miserably at the time.[259]

As has been shown, two of the most prominent experts on belligerent reprisals are highly dissatisfied with the approach taken by the ICTY toward the doctrine. Commenting on *Kupreskic*, Professor Kalshoven

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253. Greenwood, *Belligerent Reprisals in the Jurisprudence of the ICTY, supra* note 218, at 552.

254. *See id.*

255. KALSHOVEN, TWO RECENT DECISIONS OF THE YUGOSLAVIA TRIBUNAL, *supra* note 217, at 14.

256. Greenwood, B*elligerent Reprisals in the Jurisprudence of the ICTY, supra* note 218, at 552-53.

257. KALSHOVEN, TWO RECENT DECISIONS OF THE YUGOSLAVIA TRIBUNAL, *supra* note 217, at 15.

258. *Id*.

259. *Id*.

concludes that "none of the arguments advanced by the Trial Chamber have succeeded in convincing me that the prohibition of reprisals against the civilian population has acquired any greater force than as treaty law under Protocol I, or that it extends, whether as conventional or customary law, to internal armed conflicts as well."[260] Professor Greenwood draws the similar conclusion that

> [t]he reasons advanced in support of [the ICTY's] assertion in the two decisions are unconvincing. . . . The conclusion that [the relevant provisions of Protocol I] have become customary law in the years since 1977 flies in the face of most of the State practice which exists and is built upon the shaky foundations of an unduly extensive interpretation of the Martens Clause in one case and common Article 1 of the Geneva Conventions in the other. . . . It is to be hoped that the decisions will not be followed on this point either in the ICTY or, in due course, in the ICC.[261]

The issue of belligerent reprisals did not arise when the *Kupreskic* case went to the Appeals Chamber of the ICTY, and no proceedings have yet been taken against Milan Martić as the warrant for his arrest is still outstanding.[262]

With regard to these two particular decisions, establishing if they are binding is necessary. The discussion of belligerent reprisals in both instances is *obiter dicta*, and as such, not generally binding as precedent. The Trial Chamber in *Kupreskic* acknowledged that Article 38, paragraph 1(d), of the Statute of the International Court of Justice states that judicial decisions are "subsidiary means for the determination of rules of law."[263] The Chamber also establishes that decisions such as its would only have "persuasive authority concerning the existence of a rule or principle."[264] Nonetheless, in the future, factual circumstances permitting, any defense of reprisal that might be raised before the ICTY is likely to fall foul of these two decisions, and moreover, the judges in such a case might be unwilling

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260. *Id*. at 16.

261. Greenwood, *Belligerent Reprisals in the Jurisprudence of the ICTY*, *supra* note 218, at 556.

262. Prosecutor v. Kupreskic, No. IT-95-16-A, at 168-73 (Oct. 23, 2001) (Appeal). On appeal, three of the defendants had their convictions reversed. *See id*.

263. Prosecutor v. Kupreskic, No. IT-95-16-T, para. 540 (Jan. 14, 2000) (Judgment).

264. *Id*.

to dispute the earlier findings of their colleagues in relation to belligerent reprisals.

While the approach taken by international tribunals towards customary international law has not always gone uncriticized, [265] it has been recognized that international judicial decisions discussing the customary law nature of international humanitarian law instruments have the tendency

> to ignore, for the most part, the availability of evidence concerning state practice scant as it may have been, and to assume that humanitarian principles deserving recognition as the positive law of the international community have in fact been recognized as such by states . . . . The more heinous the act, the more willing the tribunal will be to assume that it violates not only a moral principle of humanity but also a positive norm of customary law.[266]

In this regard, Meron has concluded that despite the "perplexity over the reasoning and, at times, the conclusions of a tribunal, both states and scholarly opinion in general will accept judicial decisions confirming the customary character of some of the provisions of the Geneva Conventions as authoritative statements of the law."[267] Considering the level of criticism that has been directed at the *Martić* and *Kupreskic* findings and the general hostility of some States towards the reprisal provisions of Protocol I,

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265. For example, Meron has previously made critical comments of the approach taken by the International Court of Justice in the *Nicaragua* case:

> The *Nicaragua* Court's discussion of the Geneva Conventions is remarkable, indeed, for its complete failure to inquire whether *opinio juris* and practice support the crystallization of Articles 1 and 3 into customary law . . . . Nevertheless, it is not so much the Court's attribution of customary law character to both Articles 1 and 3 of the Geneva Conventions that merits criticism. Rather, the Court should be reproached for its near silence concerning the evidence and reasoning supporting this conclusion.

MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW, *supra* note 161, at 36-37 (construing Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (Merits)).

266. *Id*. at 41-42.

267. *Id*. at 43.

acceptance of these two decisions as authoritative statements of the law seems unlikely.

G. Concluding Remarks on the Customary Nature of the Law of Belligerent Reprisals

This section sought to assess the customary character, if any, of the various treaty rules prohibiting recourse to belligerent reprisals. In doing so, this section highlighted the difficulty in assessing State practice, and thus various other subsidiary means of gauging the establishment of custom were examined. The first and safest conclusion one can draw is that the reprisal provisions of the four Geneva Conventions of 1949 (the third of which incorporates the reprisal prohibition of the 1929 Prisoners of War Convention) have undoubtedly crystallized into norms of customary international law. The almost universal ratification of these treaties and the unanimity of academic and judicial opinion confirms that all States are bound, as customary law, to observe the prohibitions of reprisals in international armed conflicts against *inter alia* the wounded, sick, and shipwrecked, as well as prisoners of war and civilians in the hands of the enemy.

It is much less conclusive, however, whether the controversial reprisal provisions of Protocol I, applicable in international armed conflicts, have also been transformed into rules of customary law. On the one hand, the substantial number of ratifications of this instrument, coupled with the opinions of various international organizations and the ICTY, might lead one to conclude that the reprisal provisions, in particular those prohibiting reprisals against enemy civilians and civilian objects, may be considered to have acquired customary status. On the other hand, the refusal of a number of major military powers, most notably the United States, to ratify Protocol I, and the entering of reservations or statements of similar effect by several States parties serve to weaken, if not defeat, any claims that those reprisal prohibitions are of a customary character.

In the context of non-international armed conflicts, it has already been shown that the relative silence of common Article 3 and Protocol II have left the lawfulness of belligerent reprisals in that context open to some debate. Here again, the ICRC, the United Nations General Assembly, and the ICTY would view the treaty provisions applicable in international conflicts as also applying to conflicts of an internal nature. To prove that such a customary rule exists, without the presence of any clear conventional rule

or substantial State practice to that effect, would be an almost insurmountable task.

Interestingly, none of the statutes of recently created international tribunals have deemed the taking of reprisals against any persons or objects as a violation of the laws of armed conflict. The Statutes of the ICTY, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the highly comprehensive Rome Statute for the International Criminal Court have all refrained, by this omission, from commenting on the legality of reprisals.[268]

At this point, it may be concluded that the treaty law of belligerent reprisals prohibits the taking of reprisals against a far greater number of categories of persons and objects in comparison with the established customary law of belligerent reprisals. The tendency for conventional law to be more developed and far-reaching than customary law is quite normal, particularly in an area that limits the actions that States may lawfully take during an armed conflict. Given that the progressive codification of norms prohibiting recourse to belligerent reprisals that began almost seventy-five years ago has left little scope for the taking of reprisals, one can easily envisage that over time, customary international law will follow suit. As a matter of urgency, the cloud of ambiguity that presently surrounds reprisals in internal armed conflicts must be dispelled. A binding multilateral treaty that would clarify which classes of persons or objects against whom belligerent reprisals may or may not lawfully be taken during an internal armed conflict is presently most desirable.

VI. Observations and Conclusions

The previous sections of this article have delineated the requirements to be met in any recourse to belligerent reprisals and have examined the extent of the conventional and customary law limitations on their use. Thus far the discussion has refrained from commenting on the desirability

268. *See* STATUTE OF THE ICTY, *supra* note 211; STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR GENOCIDE AND OTHER SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF RWANDA (1994), U.N. Doc. S/Res/955 (1994); STATUTE OF THE SPECIAL COURT FOR SIERRA LEONE (2000) (established pursuant to Security Council Resolution 1315, of 14 August 2000), *available at* http://www.sierra-leone.org/specialcourtstatute.html; ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (1998) (entered into force 1 July 2002) [hereinafter ROME STATUTE], U.N. Doc. A/CONF.183/9 (1998).

of belligerent reprisals as an enforcement tool of the laws of armed conflict. The controversial nature of the doctrine of belligerent reprisals is evident in the divergent approach to the issue taken by States and as reflected in the scholarly writings on the matter. Much of the debate centers on the effectiveness of reprisals as a sanction of the laws of armed conflict. On the one hand, belligerent reprisals are viewed as one of the only remaining options available to a State in the face of gross and persistent violations of international humanitarian law. On the other hand, reprisals are often seen as undesirable because their use frequently leads to an escalation of hostilities as assailed opponents take counter-reprisals, thus causing further violations to ensue.[269] Also, it is claimed that reprisals by their nature allude to the notion of collective responsibility, and their use is thus "contrary to the principle that no one may be punished for an act that he has not personally committed."[270] This section examines the various arguments made for and against the doctrine of belligerent reprisals.

In tandem with support for the doctrine has been a palpable hostility towards the codification of rules prohibiting reprisals against certain classes of persons or objects. For example, although the reprisal provisions of the Geneva Conventions were adopted with little opposition at that time, one author commented in 1953 that

> [o]n the one hand, the trials [after the Second World War] have transformed the previously sketchy rules on reprisals into a more comprehensive and elaborate system of control. On the other hand, the Geneva Conventions have provided for almost the complete abolition of reprisals in the very area for which the rules of control were formulated.[271]

More recently, enmity towards the doctrine on the part of States is apparent in the reservation of the United Kingdom to the reprisal prohibitions of Protocol I, the similar declarations of a number of other States, and the United States' refusal to ratify that instrument on account of its near "total elimination of the right of reprisal."[272] Some commentators also seem to favor the retention of a limited right to take reprisals against a law-breaking enemy. Kwakwa contends that belligerent reprisals "serve a crucial function. In the present world order, politically independent constitu-

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269. *See, e.g.*, KALSHOVEN, CONSTRAINTS ON THE WAGING OF WAR, *supra* note 2, at 65; COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 104, at 983.

270. COMMENTARY TO THE ADDITIONAL PROTOCOLS, *supra* note 104, at 983.

271. Albrecht, *supra* note 35, at 590.

272. Sofaer, *supra* note 179, at 785.

ent states need a mechanism to enforce the rules of international law."[273] He also points out that the presence of the sanction of reprisals may act as a deterrent to future violations of humanitarian law.[274] In this regard, he concludes that a formal prohibition of reprisals might actually encourage violations, and that however desirable such a ban might be, "it may well be untenable, since it tends to give a significant military advantage to the aggressor side in a conflict."[275] The present writer, however, fails to see how the observance of the prohibition of reprisals would place a belligerent at a significant military disadvantage. The perceived military advantage is gained only through violating the laws of armed conflict; on this reasoning, therefore, one could imply that the observance of any of that regime's rules is likely to be disadvantageous for a party to an armed conflict.

Proponents of the doctrine of belligerent reprisals claim that such measures are the only sanction available against an enemy who commits gross and persistent violations of humanitarian law against a party's civilian population. Obviously, a belligerent that finds itself in such a situation is not precluded from retaliating with all its military might against the legitimate military objective of the enemy. If the aggrieved party so desires, it may by way of reprisal lawfully employ a number of outlawed methods or means of warfare against that enemy to bring about a cessation of the original violative activity. The supporters of the doctrine, however, would argue that in a situation involving unlawful attacks against their civilian population, a reprisal in kind is the only means of securing effective compliance with the law.

While it is undeniable that a belligerent's civilian population, for the most part, is an Achilles heel, one must consider whether the choice of response is of the type espoused by the *lex talionis* rather than one guided by the underlying reprisal objective of law enforcement. While public opinion in the injured State would undoubtedly demand a response in kind, opponents of the doctrine would call for some foresight before resorting to such reprisals because frequently they tend to further inflame the situation, rather than bring about the desired goal of compliance. Also, while considering public opinion in the aggrieved State, it is also necessary to take account of the wider opinion of other States and of international organizations. Bierzanek contends that "the obsolete concept of reprisals is in fla-

273. Kwakwa, *supra* note 53, at 74.
274. *Id*.
275. *Id*. at 76.

grant contradiction with the international law of the contemporary, increasingly integrated international community, for it presupposes that States have, under international law, duties only with regard to one another and not with respect to the international community as a whole."[276]

Much of the opposition to the use of belligerent reprisals is based on its perceived ineffectiveness as a sanction of the laws of armed conflict. A resort to reprisal measures is likely to lead to counter-reprisals and the so-called "escalating spiral of violence." It is not difficult to envisage a ruthless belligerent, who has already chosen the path of targeting civilians, refusing to cease these attacks in the face of similar attacks on its own populace. Moreover, that belligerent may be inclined to step up the intensity of its attacks in response to those reprisals. Furthermore, because the assessment of the prior violation is almost always done unilaterally, a party against whom reprisal measures are taken may view these as original violations that would then be seen of themselves as legitimizing the taking of reprisal action.[277] Or, that State may simply choose to retaliate without even considering the relevance or applicability of the doctrine of reprisals. The age-old mantra that violence begets violence would appear to be of marked relevance in the current context.

It is also apparent that reprisals against the civilian population or other classes of protected persons impose hardship and suffering on persons innocent of any transgressions. While lawful belligerent reprisals carried out strictly for law enforcement purposes would not be instances of collective punishment, those employed retributively would clearly contravene the prohibitions against non-individual punishment.[278] Notwithstanding, Bierzanek maintains that even legitimate reprisals are based on an "obsolete idea of collective responsibility."[279] It is this striking at innocence that

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276. Bierzanek, *supra* note 89, at 244.

277. *See* McDOUGAL & FELICIANO, *supra* note 11, at 681.

278. For example, Article 50 of the Hague Regulations, annexed to the 1907 Hague Convention, establishes that "[n]o general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible." Hague Convention IV, *supra* note 55, Annexed Regulations, art. 50.

Article 33(1) of the Fourth Geneva Convention provides a more concrete and absolute prohibition of collective punishment by emphasising the principle of individual responsibility: "No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited." Fourth Geneva Convention, *supra* note 51, art. 33(1).

279. Bierzanek, *supra* note 89, at 257.

is at the heart of humanitarian law's efforts to prohibit belligerent reprisals against a wide range of persons and objects.

It has also been argued that despite the numerous conventional and customary rules governing the use of belligerent reprisals, the doctrine is "vulnerable to perversion and abuse" in view of the significant powers which it allows to belligerents.[280] Geoffrey Best offers some cautious words of advice on this subject: "One of the earliest lessons that the student of the law of war has to learn is to be on his guard when he hears the word [reprisal]. Deeper hypocrisy and duplicity attach to it than to any other term of the art."[281]

Belligerents with a penchant for violating the laws of armed conflict would undoubtedly seek the comfort of a doctrine, irrespective of whether circumstances permitted its application, which might ultimately legitimize their unlawful activity. When the risk of such treachery exists, the prohibitions of reprisals against particularly vulnerable classes of persons are especially welcome. Furthermore, the doctrine of belligerent reprisals often serves as a convenient cloak for retaliatory action motivated by revenge rather than by a desire to see an enemy conform with the law. A device deliberately directed at innocent persons has a tendency to provoke similar violent responses and is highly susceptible to ruthless manipulation. Such a device cannot rightly have a place within the humanitarian law regime.

On the whole, one might argue that much of the criticism of the ongoing trend of prohibiting belligerent reprisals is based on the absence of other effective methods of enforcing compliance with the laws of armed conflict, rather than the actual outlawing of reprisals themselves. Greenwood has commented that "the removal of even an imperfect sanction creates problems unless something is put in its place."[282] Professor Draper has commented that the prohibition of reprisals, as one of the oldest means of law enforcement, places a heavy strain upon the residual methods of law enforcement.[283] As pointed out at the beginning of this article, the human-

280. McDOUGAL & FELICIANO, *supra* note 11, at 681.

281. GEOFFREY BEST, LAW AND WAR SINCE 1945, at 203 (Oxford 1994).

282. Greenwood, *The Twilight of the Law of Belligerent Reprisals*, *supra* note 19, at 56.

283. Draper, *supra* note 27, at 35.

itarian law regime is notably lacking in adequate methods of enforcing compliance with those laws.

There are, however, a number of enforcement mechanisms that may be pursued in lieu of belligerent reprisals.[284] Primarily, the investigation and prosecution of persons who have committed humanitarian law violations is the most desirable sanction of the laws of war available. Most national legislation provides for the prosecution of members of that State who have violated humanitarian law. States parties to the Geneva Convention are required to "investigate, prosecute or extradite persons suspected of committing 'grave breaches,' irrespective of their nationality or the place where the crime was committed."[285] Following the recent entering into force of the Rome Statute of the International Criminal Court,[286] the forthcoming creation of that organ may herald in a new era in prosecutions for violations of the laws of armed conflict. Although criminal prosecutions would be less immediate than reprisal measures, if they are to prove effective in securing compliance, then observance of the principle of subsidiarity demands that aggrieved parties adopt this less stringent and more humane means.

Other potential means of securing compliance include exerting diplomatic pressure on States or making appeals to international bodies or organizations. Although the International Humanitarian Fact-Finding Commission created under Article 90 of Protocol I has yet to commence its work, when it does so, and if given enough support by the international community, it may prove highly successful at restoring "an attitude of respect for the Conventions and this Protocol."[287] If a State so desires, it may clearly pursue alternative methods of enforcing compliance. Given that the majority of academic opinion on the issue of belligerent reprisals seems to point to the ineffectiveness of reprisals as a sanction of the laws of armed conflict, an alternative course may in fact be the only acceptable

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284. *See generally id.* at 9; Thomas J. Murphy, *Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions and Geneva Protocol 1 of 1977*, 103 MIL. L. REV. 3 (1984).

285. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 45 (Cambridge 2001).

286. ROME STATUTE, *supra* note 268.

287. Protocol I, *supra* note 87, art. 90(2)(c)(ii). The Commission came into being when twenty States parties to Protocol I agreed to accept the competence of the Commission in accordance with Article 90, paragraph 1. At the time of writing, over sixty States parties had declared their acceptance of the Commission's competence. ICRC *Treaty Database*, *supra* note 174.

route. The foremost expert on belligerent reprisals, the oft-quoted Professor Kalshoven, completes his treatise, *Belligerent Reprisals*, by stating that

> the conclusion seems inescapable that the balance of the merits and demerits of belligerent reprisals has now become so entirely negative as no longer to allow of their being regarded as even moderately effective sanctions of the laws of war, . . . in the whole of the international legal order, they have become a complete anachronism.[288]

The findings of Professor Kalshoven are difficult to disagree with. Belligerent reprisals have no place in the modern humanitarian law of armed conflict, a regime that has as its overarching goal the mitigation of the harshness and the excesses that are synonymous with war.

Concluding Remarks

The goal of this article was to explore the evolution of the law of belligerent reprisals. It has shown that international law treaties have steadily restricted the right of belligerents to employ a classic wartime practice over the past seventy-five years. For States parties to those treaties, during an international armed conflict, the only remaining scope for permissible belligerent reprisals is in the choice of weapons or means of warfare employed against an enemy's armed forces and military objectives. As this study has also highlighted, however, there is a glaring absence of conventional law governing the use of reprisals during non-international armed conflicts. The ICRC and, more recently, the International Criminal Tribunal for the former Yugoslavia have sought to extend the application of the reprisal prohibitions pertaining to international conflicts to conflicts that are internal in nature. While this is indeed desirable from a humanitarian perspective, and especially in view of the sanction's ineffectiveness, without the presence of treaty provisions expressly prohibiting the use of reprisals, the approaches adopted by these two institutions are unsustainable. Although already expressed above, it is necessary to reiterate the view that there is an urgent need for clarification of the extent of any right to take belligerent reprisals in this area of the law of armed conflict.

While it has become apparent that the treaty law of belligerent reprisals has all but completely prohibited the use of belligerent reprisals in

288. KALSHOVEN, BELLIGERENT REPRISALS, *supra* note 3, at 377.

international conflicts, the customary law governing recourse to reprisals seems markedly less far-reaching. Recent over-zealous judicial opinions aside, it seems that the customary international law of belligerent reprisals is *moving* towards a similar level of prohibition as that guaranteed by treaty law, albeit in the face of some noted hostility. The universal ratification of the Geneva Conventions and the strong acceptance of Protocol I, although clearly not an overwhelming groundswell of support, indicate a steady acceptance by States of those restrictions on their right of reprisal. The stern opposition of a small, albeit powerful, number of States to the reprisal prohibitions of Protocol I is one of the strongest factors hindering the crystallization of those provisions into norms of customary international law.

There remains a long way to go before international law might impose a complete prohibition on the use of belligerent reprisals during armed conflicts. In the context of internal armed conflicts, the resistance to any rules limiting a right of reprisal is quite apparent. The presently uncontested right of belligerents to employ certain prohibited methods of warfare against military objectives and enemy armed forces by way of reprisal is also unlikely to be forfeited in the near future. Although international law has advanced significantly in the abolition of the right of reprisal since the two World Wars, presently there remains a noticeably broad and thus undesirable scope for the employment of this archaic and ineffective "sanction" of the laws of armed conflict.