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THE U.S. POSITION ON BELLIGERENT REPRISALS UNDER THE LAW OF ARMED CONFLICT: PAST AND PRESENT

Colonel Thomas E. Brzozowski[1]

> *We shall not make a man suffer because he has sinned, but to keep him from sinning; nor shall punishment ever have an eye to the past but to the future. It is a measure not of anger but of precaution.*
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> -- Grotius, *The Law of War and Peace,* Book Two, Chapter XX (1625)

I. Introduction

In Shakespeare's Henry V, toward the end of the battle of Agincourt, French warriors kill a number of camp boys accompanying the British host. Shocked at the atrocity, one of Henry's knights cries out: "Kill the poys and the luggage! 'tis expressly against the law of arms: 'tis as arrant a piece of knavery, mark you now, as can be offer't; in your conscience, now, is it not?"[1] Henry, for his part, responds to the killings with the following command:

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[1] Currently serving as the Counsel for Domestic Terrorism in the Counterterrorism Section of the U.S. Department of Justice. He received his Bachelor of Arts in International Relations from the College of William & Mary in 1996, after which he was commissioned as a Second Lieutenant in the U.S. Army. Mr. Brzozowski spent three years as an artillery officer at Fort Bragg, North Carolina before he was selected to attend William & Mary Law School. After law school, he spent six years in Europe serving as an officer in the U.S. Army JAG Corps. He then left active duty and clerked for Judge Stanley Birch, Jr. at the U.S. Court of Appeals for the Eleventh Circuit in Atlanta, Georgia. Prior to taking up his present position, Mr. Brzozowski was an Assistant General Counsel in the FBI's Office of General Counsel. He also serves as a JAG officer in the U.S. Army Reserves.

[1] WILLIAM SHAKESPEARE, HENRY V, act 4, sc. 7.

> I was not angry since I came to France
> Until this instant. Take a trumpet, herald;
> Ride thou unto the horsemen on yon hill:
> If they will fight with us, bid them come down,
> Or void the field, they do offend our sight:
> If they'll do neither, we will come to them,
> And make them skirr away, as swift as stones
> Enforced from the old Assyrian slings:
> Besides, we'll cut the throats of those we have,
> And not a man of them that we shall take
> Shall taste our mercy. Go and tell them so.[2]

The practice of reprisal, it would seem, is at least as old as the Hundred Years' War.[3] Although prohibitions on the act have gained purchase in recent years, reprisals traditionally have been viewed as one, if not the only, available sanction of the law of armed conflict. Indeed, although the 1929 Convention Relative to the Treatment of Prisoners of War (1929 POW Convention) ultimately outlawed reprisals against prisoners of war, strong arguments were made at the time in favor of the provision.[4] They claimed no army "could reasonably be expected to renounce in war so effective and powerful a weapon for the redress or cessation of a reported intolerable wrong upon its own nationals at the hand of the enemy as immediate or threatened reprisal on enemy units in its own hands."[5] Henry V would have agreed.

This article concerns the U.S. position on belligerent reprisals under the law of armed conflict, and argues that its current view is inconsistent with the realities of the contemporary global security environment. Part I introduces the concept of reprisal in general terms and highlights the critical distinctions between the related models of armed reprisal and belligerent reprisal. Part II charts the diminishing support for belligerent reprisal under international law. Part III outlines the legal framework relied upon by the United States in support of its continued embrace of

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[2] *Id.*
[3] *See id.*
[4] Convention Relative to the Treatment of Prisoners of War art. 2(3), July 27, 1929, 47 Stat. 2021, 2 Bevans 932 [hereinafter 1929 POW Convention].
[5] Andrew D. Mitchell, *Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law*, 170 MIL. L. REV. 155, 162 (2001).

belligerent reprisal as a lawful sanction under the law of armed conflict. Part III also hypothesizes why the United States clings to belligerent reprisal against civilians and the civilian population as a means of redress under the law of armed conflict in the face of a countervailing trend to outlaw it altogether. In testing those hypotheses, Part IV concludes that the current global security paradigm has rendered belligerent reprisals obsolete.

The infusion of human rights law and the corresponding state obligations to individuals into the law of armed conflict has dramatically reduced the scope for any feasible U.S. resort to belligerent reprisal against civilians to enforce adherence to the law of armed conflict.[6]

Reprisal, generally, is a "means of state self-help in the international legal system."[7] The concept is more narrowly defined as a "prima facie unlawful measure[] 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."[8] This distinguishes reprisal from the *lex talionis*, or the law of retaliation, which "describes the rule by which one state may inflict upon the citizens of another state death, imprisonment, or other hardship, in retaliation for similar injuries imposed upon its own citizens."[9] International law recognizes several species of reprisal, all sharing general characteristics and operating under similar principles.[10]

Two classes of reprisal, commonly confused with each other, are armed reprisal and belligerent reprisal.[11] Armed reprisals are "those 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."[12] One example of an armed reprisal was the 1986 U.S. air strike

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[6] Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment (14 January 2000), at para. 535: The Court affirmed that "[V]iolations of IHL by one party cannot justify reprisals against the civilian population . . . reprisals against civilians are expressly prohibited under conventional and customary international law."

[7] *See* Sean Watts, *Reciprocity and the Law of War*, 50 HARV. INT'L L.J. 365, 384 (2009).

[8] Shane Darcy, *The Evolution of the Law of Belligerent Reprisals*, 175 MIL. L. REV. 184, 185 (2003).

[9] BLACK'S LAW DICTIONARY 913 (6th ed. 1990) (otherwise known in the Mosaic law as "an eye for an eye; a tooth for a tooth").

[10] Naulilaa Arbitration (Portugal v. Germany), Arbitral Award of 31 July 1928; see also ICRC, Rule 145, Customary IHL ("belligerent reprisals are subject to stringent conditions").

[11] Mitchell, *supra* note 5, at 156-57.

[12] Darcy, *supra* note 8, at 186.

against Libya in response to its bombing of a disco in Berlin.[13] Critically, *jus ad bellum*[14] governs a state's use of an armed reprisal.[15] Belligerent reprisals, on the other hand, "consist[] of … action[s] that would otherwise be unlawful but that in exceptional cases [are] considered lawful under international law when used as … enforcement measure[s] in reaction to unlawful acts of an adversary."[16]

In contrast to armed reprisals, belligerent reprisals are designed to coerce an adversary to comply with the law of armed conflict, or *jus in bello*.[17] One question that has generated some debate concerns whether a state that has been the victim of aggression (implicating *jus ad bellum*) can retaliate with a belligerent reprisal (governed by *jus in bello*). In other words, does a belligerent reprisal have to answer a *jus in bello* violation, or is it available to respond to a *jus ad bellum* violation as well? Christopher Greenwood sums up the majority position on the matter as follows:

> Although there have been suggestions to the contrary, to permit a State to respond to aggression by taking reprisals in the form of measures which would otherwise be contrary to the jus in bello would be incompatible with the principle that the jus in bello applies equally to all parties in a conflict regardless of the legality of their resort to force. . . The better view is therefore that belligerent reprisals may lawfully be taken only in response to a

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[13] Michael J. Kelly, *Time Warp to 1945 - Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law*, 13 J. TRANSNAT'L L. & POL'Y 1, 16 (2003).

[14] *Jus ad bellum* refers to the body of international law that governs the conditions under which states may lawfully resort to war or the use of armed force, including the prohibition and exceptions outlined in the United Nations Charter, such as self-defense or Security Council authorization. *What are Jus ad Bellum and Jus in Bello?,* INT'L COMM. OF THE RED CROSS (Jan. 22, 2015), https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0 [https://perma.cc/EYH2-LY8C].

[15] Mitchell, *supra* note 5 ("Armed reprisals are those 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. Critically, jus ad bellum governs a state's use of an armed reprisal.").

[16] *Customary International Humanitarian Law Database, Rule 145*, INT'L COMM. OF THE RED CROSS [hereinafter ICRC IHL Database], http://www.icrc.org/customary-ihl/eng/print/v1_rul_rule145 [https://perma.cc/AGR2-QNAB].

[17] International Committee of the Red Cross, Customary International Humanitarian Law database, Rule 145 ("belligerent reprisals . . . are those actions, otherwise unlawful, permitted in limited circumstances to induce an adversary to comply with the law of armed conflict (jus in bello)").

> prior violation of the law of armed conflict and not in retaliation for an unlawful resort to force.[18]

A belligerent reprisal, then, may occur only in the context of an existing armed conflict governed by *jus in bello* principles.

II. The Dwindling Vitality of Belligerent Reprisal Under International Law

As previously noted, the 1929 POW Convention was the first of several treaties containing express prohibitions against belligerent reprisals. In outlawing reprisals against prisoners of war, the 1929 POW Convention set in motion a trend towards the near-complete abolition of the measure as a viable sanction under the law of armed conflict.[19] After the brutality of World War II, the 1949 Geneva Conventions broadened the ban on reprisals, extending it beyond prisoners of war to additional classes of persons.[20] Each of the four Conventions contains language forbidding reprisals. Article 46 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (Geneva I) proscribes "[r]eprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention."[21] Article 47 of the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Geneva II) bars reprisals "against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment" protected under that Convention, and Article 13 of the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva III) restates the 1929 POW

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[18] Christopher Greenwood, *The Twilight of the Law of Belligerent Reprisals*, 1989 NETH. Y.B. INT'L L. 35, 41 (1989).

[19] 1929 POW Convention, *supra* note 4.

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

[21] Geneva I, *supra* note 20, art. 46.

Convention's prohibition of reprisals against prisoners of war.[22] However, the most essential development regarding reprisals under the 1949 Geneva Conventions was enshrined in Article 33 of the Geneva Convention Relative to the Protection of Civilians in Time of War (Geneva IV): "Reprisals against protected persons and their property are prohibited."[23]

The inclusion of protected persons as an additional class shielded by law from reprisals "represented a substantial departure from the law relating to belligerent occupation which had been in force during the Second World War."[24] As the civilian population of occupied territory suffered disproportionately from reprisals during WWII, many commentators viewed Article 33's mandate as a watershed development in the law of armed conflict.[25] It also reflected the infusion of nascent human rights law into *jus in bello* principles.[26] Jean Pictet celebrates this evolution in the law of armed conflict in his commentary on Article 33:

> The prohibition of reprisals is closely connected with the provisions which, by ensuring that the Convention is applied in all circumstances, give it the character of a primary duty based essentially on the protection of the human person. This paragraph, like the first one, marks a decisive step forward in the affirmation and defence of rights of individuals and there is no longer any question of such rights being withdrawn or attenuated as a result of a breach for which those individuals bear no responsibility. Finally, reprisals constituted a collective penalty bearing on those who least deserved it. Henceforth, the penalty is made individual and only the person who commits the offence may be punished. The importance of this development and its embodiment in the new Geneva Convention is clear.[27]

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[22] Geneva II, *supra* note 20, art. 47; Geneva III, *supra* note 20, art. 13.
[23] Geneva IV, *supra* note 20, art. 33.
[24] Greenwood, *supra* note 18, at 51.
[25] COMMENTARY ON GENEVA CONVENTION IV OF 1949, RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIMES OF WAR 228 (Jean Pictet ed., 1958) [hereinafter GENEVA IV COMMENTARY]; *see also* Greenwood, *supra* note 18, at 51; FRITS KALSHOVEN, BELLIGERENT REPRISALS 337-38 (2d ed. 2005).
[26] GENEVA IV COMMENTARY, *supra* note 25, at 228.
[27] GENEVA IV COMMENTARY, *supra* note 25, at 228.

Not everyone shared Pictet's sanguine view of Article 33. A.R. Albrecht, for example, writes that the provision is of "doubtful merit" and argues that "reprisals or the threat of reprisals against the local civilian population may be a vital measure in maintaining order amongst a hostile civilian population."[28] However, this conclusion does not represent the general consensus. Frits Kalshoven, the eminent authority on the law of belligerent reprisal, best articulates the academy's mainstream position:

> The present writer accepts without reservation the correctness of the prohibitions laid down in Articles 33 and 34 of the Fourth Convention, both in their general aspects and as regards the specific issue of the taking and execution of hostages. He is convinced that it would not be possible effectively to regulate the resort to reprisals against protected persons in occupied territory, and these measures are not in his view indispensible to the occupant. Moreover, a consideration of even more fundamental concern is that no matter what name be given to particular retaliatory measures against innocent members of an occupied population, these all amount to – or at any rate are experienced as – terrorism and hence are not only ineffectual in the long run, but are even likely to achieve the opposite of their intended effect. This being so, the end is far too uncertain of achievement to justify the means, a means so inhuman as to render inadmissible any reliance on that highly questionable maxim.[29]

Despite the considerable safeguards from reprisal afforded civilians under Article 33, Geneva IV, certain classes of civilians remained outside its protective umbrella—namely, the enemy civilian population of a party to an armed conflict located in territory still controlled by that enemy.[30] The new crop of prohibitions against reprisals in the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (AP I), written on 8 June 1977, addressed that apparent gap in a sweeping fashion. As distilled in the Commentary on the

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[28] KALSHOVEN, *supra* note 25, at 336.
[29] *Id.* at 337-38.
[30] Greenwood, *supra* note 18, at 51; Darcy, *supra* note 8, at 201.

Additional Protocols, AP I outlaws reprisals against the following in international armed conflicts:

- Article 20 (*Prohibition of reprisals*) (persons and objects protected by Part II – *Wounded, sick and shipwrecked*);
- Article 51 (*Protection of the civilian population*), paragraph 6;
- Article 52 (*General protection of civilian objects*), paragraph 1;
- Article 53 (*Protection of cultural objects and places of worship*), subparagraph (c);
- Article 54 (*Protection of objects indispensable to the survival of the civilian population*), paragraph 4;
- Article 55 (*Protection of the natural environment*), paragraph 2;
- Article 56 (*Protection of works and installations containing dangerous forces*), paragraph 4.[31]

Although each article constitutes an advance on the gains made against reprisals under the 1949 Geneva Conventions, Article 51 is widely recognized as the most significant.[32] Born of a compromise between two competing proposals at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977 (Diplomatic Conference) – one to ban reprisals altogether and the other to proscribe reprisals generally but subject to exceptions depending on conditions and methods[33]— Article 51 is described by the *Commentary to the Additional Protocols* as "one of the most important articles in the Protocol."[34] In guaranteeing protection against reprisals to all civilians, the article both "confirms the customary rule that innocent civilians must be kept outside hostilities as far as

[31] COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST, 1949, at 986 (Yves Sandoz et al. eds., 1987) [hereinafter AP I COMMENTARY].

[32] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 51, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] ("Attacks against the civilian population or civilians by way of reprisals are prohibited.").

[33] AP I COMMENTARY, *supra* note 31, at 982.

[34] *Id.* at 615.

possible and enjoy general protection against danger arising from hostilities" and radically shrinks the compass of belligerent reprisal as a means of redress under the law of armed conflict.[35] For the 172 states party to AP I, the scope of lawful reprisals in cases of land warfare is now limited to:

> (1) members of an enemy's armed forces actively engaged in hostilities or other persons who are participating directly in hostilities even if they are not members of an enemy's armed forces; and (2) military objectives, meaning 'those objects which by their nature, locations, 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.[36]

Apart from a prohibition of reprisals against cultural property contained in the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954 (Hague Cultural Property Convention), no other treaty expressly bears on the law of belligerent reprisal.[37] Yet customary international law, in the form of "judicial decisions, the writings of jurists, diplomatic correspondence, and other documentary material concerning the practice of States," also informs the current status of belligerent reprisal under international law.[38] Although the subject of much debate, some authorities have argued that several customary norms relating to the belligerent reprisal have matured into binding expressions of customary international law.[39] These include the

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[35] *Id.*

[36] Mitchell, *supra* note 5, at 169; Greenwood, *supra* note 18, at 53. Some commentators have suggested that belligerent reprisals enjoy a greater field of application in the contexts of air and naval warfare. *See, e.g.*, Greenwood, *supra* note 18, at 53.

[37] Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240. The Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II), for example, does not address reprisals at all. *See generally* AP II, June 8, 1977, U.N. Doc. A/32/144, Annex II. The general consensus is that reprisals are not available in non- international armed conflicts. *See* Darcy, *supra* note 8, at 219; Greenwood, *supra* note 18, at 67-68.

[38] U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 6 (1976) [hereinafter FM 27-10].

[39] Jean-Marie Henckaerts, *Study on Customary International Humanitarian Law: A*

International Committee of the Red Cross's comprehensive *Study on Customary International Humanitarian Law* (*ICRC Study*)[40], the judicial opinions of international tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY), and scholarly compendiums addressing contemporary law of armed conflict issues like the *Tallinn Manual on the International Law Applicable to Cyber Warfare* (*Tallinn Manual*)[41] and the *Manual on International Law Applicable to Air and Missile Warfare* (*Air & Missile Manual*).[42] While these sources are not universally accepted as expressions of customary international law, they do capture the trajectory of the law in this area.

The stated purpose of the *ICRC Study* was "to determine which rules of international humanitarian law are part of customary international law and therefore applicable to all parties to a conflict, regardless of whether or not they have ratified the treaties containing the same or similar rules."[43] Applying a detailed methodology to discern state practice and *opinio juris*, the *ICRC Study* ultimately generated 161 "customary rules of international humanitarian law."[44] Rules 145-148 all deal exclusively with belligerent reprisals, but Rules 145 and 146 are particularly relevant for the purposes of this article.[45] Rule 145 provides that "[w]here not prohibited by international law, belligerent reprisals are subject to stringent

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Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict, 87 INT'L REV. RED CROSS 175, 177–212 (2005) ("The Study [on Customary International Humanitarian Law] ultimately generated 161 'customary rules' of international humanitarian law ... Several customary norms relating to belligerent reprisals have matured into binding expressions of customary international law.").

[40] JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, INT'L COMM. OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (VOLUME I: RULES) (2005) [hereinafter ICRC STUDY].

[41] TALLINN MANUAL ON THE INTERNATIONAL LAW APPLICABLE TO CYBER WARFARE (Michael N. Schmitt ed., 2013) [hereinafter TALLINN MANUAL].

[42] PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH (HPCR), MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2009) [hereinafter AIR & MISSILE MANUAL].

[43] Henckaerts, *supra* note 39, at 177.

[44] *Id.* at 198-212. The United States continues to study the ICRC's findings and has expressed reservations concerning the ICRC's methodology. *See, e.g.*, John B. Bellinger, III & William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INT'L REV. RED CROSS 443, 443-44 (2007).

[45] Rule 147 outlaws reprisals against protected objects and Rule 148 denies parties to non-international armed conflicts the right to belligerent reprisal. *See* Henckaerts, *supra* note 39, at 211.

conditions."[46] This Rule recognizes that, despite a trend towards an outright ban on belligerent reprisals, the measure still might be lawful if directed against "permitted categories of persons" and it meets five narrowly drawn circumstances.[47] The first condition requires that "[r]eprisals . . . only be taken in reaction to a prior serious violation of international humanitarian law, and only for the purpose of inducing the adversary to comply with the law."[48] The second restricts reprisals to a "measure of last resort" available only when no other lawful measures are at hand.[49] The third condition subjects belligerent reprisals to the principle of proportionality and the fourth rule dictates that "any decision to resort to reprisals must be taken at the highest level of government."[50] Finally, the fifth requirement commands that "reprisal action . . . cease as soon as the adversary complies with the law."[51]

Of note, the *ICRC Study* also mentions burgeoning national case-law and official statements in support of the notion that "reprisals must not be inhumane."[52] This "humanity" principle, although falling well short of universal acceptance, is entertained by several authorities on belligerent reprisal, including Greenwood and Kalshoven.[53] Although both ultimately conclude that customary international law now contains no such express requirement, each recognizes its potential import in discerning the emergence of a customary norm prohibiting reprisals against an enemy's civilian population.[54] Kalshoven best captures the impact of this emerging human rights principle on the law of belligerent reprisal:

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[46] *Id.* at 210. Kalshoven characterizes these conditions under the rubric of "subsidiarity" and "proportionality"—subsidiarity meaning recourse to belligerent reprisal only should be taken as a matter of last resort and proportionality taking its established meaning. *See* KALSHOVEN, *supra* note 25, at 340-42; *see also* Greenwood, *supra* note 18, at 43-47.
[47] ICRC IHL Database, *supra* note 16.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.* Despite U.S. reservations concerning the methodology used by the ICRC, U.S. policy on reprisals generally tracks the five conditions outlined in the ICRC Study. *See* FM 27-10, *supra* note 38, para. 497.
[52] ICRC IHL Database, *supra* note 16.
[53] FRITS KALSHOVEN, BELLIGERENT REPRISALS 342–44 (2d ed. 2005) ("A number of rules of the law of war have a marginal character . . . their purpose is . . . the prevention of what is generally felt to be below the standard ... from the viewpoint of humanity, even in the context of warfare . . . . The humanity principle is entertained by several authorities on belligerent reprisals.").
[54] Greenwood, *supra* note 18, at 47-48; KALSHOVEN, *supra* note 25, at 342-44.

> Another remark is that belligerent reprisals will obviously tend to be in conflict with elementary humanitarian considerations. A number of rules of the law of war have a marginal character, in that their purpose is not so much the realization of some kind of ideally chivalrous combat as the prevention of what is generally felt to be below the standard of what can be tolerated from the viewpoint of humanity, even in the context of warfare. Consequently, a reprisal transgressing such a marginal norm is bound to constitute an inherently inhuman act. In this light, particular importance attaches to the question of whether a rule might have developed to the effect that such sub-marginal acts would be prohibited even by way of reprisal.[55]

On its face, Rule 146 merely restates the Geneva Conventions' prohibition on reprisals against protected persons.[56] The Rule, however, also addresses, albeit indirectly, whether civilians or a civilian population outside the shelter of the Geneva Conventions lawfully might be the target of a belligerent reprisal.[57] After observing that "[e]nforcement action based on attacking civilians . . . does not fit well either with the development of human rights law and the importance given to the right to life," the *ICRC Study* arrives at the following mixed conclusion regarding belligerent reprisals against civilians:

> Because of existing contrary practice, albeit very limited, it is difficult to conclude that there has yet crystallized a customary rule specifically prohibiting reprisals against civilians during the conduct of hostilities. Nevertheless, it is also difficult to assert that a right to resort to such reprisals continues to exist on the strength of the practice of only a limited number of States, some of which is also ambiguous. Hence, there appears, at a minimum, to exist

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[55] KALSHOVEN, *supra* note 25, at 43.
[56] ICRC IHL Database, *supra* note 16, Rule 146.
[57] *Id.* ("Reprisals against protected persons are prohibited; the Rule further discusses, albeit indirectly, the targeting of civilians or civilian populations outside the protections of the Geneva Conventions as possible subjects of belligerent reprisals.").

a trend in favor of prohibiting such reprisals.[58]

The *ICRC Study* arrived at this indeterminate position after an extended consideration of Article 51(6) of AP I and its role in the evolution of a customary norm relating to belligerent reprisals against civilians.[59] On balance, the general consensus among modern commentators in the aftermath of the *ICRC Study* is that reprisals have a valuable part to play in deterring and/or preventing the recurrence of breaches of humanitarian law, on condition that they are kept within defined limits.[60] In other words, although reprisals have, during the twentieth century, been increasingly restricted and curtailed in the scope of permissible objects of such action, the doctrine as a concept remains a valid part of the law of armed conflict, particularly in response to methods and means of warfare against combatants and military objectives.[61]

Although still viable under international law, the space for belligerent reprisals against civilians, the *ICRC Study* submits, has become infinitesimally small.[62] This view of the diminishing role of belligerent reprisals is presented in a more robust and, not surprisingly, controversial fashion by the ICTY in its opinion in *Prosecutor v. Kupreskic*.[63] Although subject to much criticism within the academy, the ICTY's opinion merits consideration not as the last word on the matter of belligerent reprisal (given its limited precedential value) but as another voice in the larger conversation on the future of that measure under the law of armed conflict.[64] In describing reprisals against civilians as an "inherently … barbarous means of seeking compliance with international law," the ICTY struggles to reconcile an otherwise lawful sanction under the law of armed

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[58] *Id.*

[59] ICRC STUDY, *supra* note 40, r. 146 cmt. ("The Study considers Article 51(6) of AP I at length in evaluating whether customary international law now prohibits belligerent reprisals against civilians, arriving at an indeterminate position.").

[60] David Turns, *Implementation and Compliance* in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 354, 367 (Elizabeth Wilmshurst & Susan Breau eds., 2007).

[61] *Id.*

[62] ICRC STUDY, *supra* note 40.

[63] Prosecutor v. Kupreskic, IT-95-16-T, Judgement (Jan. 14, 2000).

[64] *See generally* Christopher Greenwood, *Belligerent Reprisals in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, *in* INTERNATIONAL AND NATIONAL PROSECUTION OF CRIMES UNDER INTERNATIONAL LAW: CURRENT DEVELOPMENTS 539, 549 (Horst Fischer et al. eds., 2001); Turns, *supra* note 60, at 369.

conflict with a growing human rights tradition.[65] The victor, by the court's lights, is the sanctity of the individual.

> [T]he reprisal killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can safely be characterized as a blatant infringement of the most fundamental principles of human rights. It is difficult to deny that a slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred. As a result belligerent reprisals against civilians and fundamental rights of human beings are absolutely inconsistent legal concepts. . .
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> It should be added that while reprisals could have had a modicum of justification in the past, when they constituted practically the only effective means of compelling the enemy to abandon unlawful acts of warfare and to comply in future with international law, at present they can no longer be justified in this manner . . .
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> Due to the pressure exerted by the requirements of humanity and the dictates of public conscience, a customary rule of international law has emerged on the matter under discussion.[66]

Two additional sources with some bearing on the current status of belligerent reprisal under the law of armed conflict are the *Tallinn Manual* and the Program on Humanitarian Policy and Conflict Research's (HPCR) *Air & Missile Manual*. Although purporting to reflect customary international law concerning their respective topics, these instruments have not yet achieved that end.[67] Nevertheless, they represent some of the most current thinking on law of armed conflict issues, including

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[65] *Kupreskic*, IT-95-16-T, ¶ 528.
[66] *Id.* ¶ 529-31.
[67] Michael N. Schmitt, *International Law in Cyberspace: The Koh Speech and Tallinn Manual Juxtaposed*, 54 HARV. INT'L L.J. 13, 15 (2012) ("The Tallinn Manual consists of 'rules' adopted unanimously by the International Group of Experts that are meant to reflect customary international law."); AIR & MISSILE MANUAL, *supra* note 42, at 7.

belligerent reprisal. Rule 46 of the *Tallinn Manual*, for example, provides as follows:

> Belligerent reprisals by way of cyber operations against:
>
> (a) prisoners of war;
>
> (b) interned civilians, civilians in occupied territory or otherwise in the hands of an adverse party to the conflict, and their property;
>
> (c) those hors de combat; and
>
> (d) medical personnel, facilities, vehicles, and equipment are prohibited.
>
> Where not prohibited by international law, belligerent reprisals are subject to stringent conditions.[68]

Most interestingly, the *Tallinn Manual*, citing the *ICRC Study*'s conclusion, states that the lack of an established rule of customary international law prohibiting belligerent reprisals against civilians, expressly allows for their use in precisely that manner (subject to existing state obligations under AP I, art. 51(6)).[69] Indeed, the *Manual* even illustrates how a belligerent reprisal against a civilian population lawfully might be executed:

> Consider a situation in which the armed forces of State A are bombing military medical facilities in State B, which is not a Party to Additional Protocol I. In response and after repeated demands to desist, B's Prime Minister approves a cyber attack against a power generation facility used exclusively to provide power to the civilian population. The cyber attack is intended solely to compel State A to refrain from continuing to attack medical facilities, and the Prime Minister has issued strict orders to cease reprisal operations as soon as State A does so. State B's belligerent reprisals would comply with this Rule [although the same result will not hold for a Party to Additional Protocol I for which Article 52(1) prohibits

[68] TALLINN MANUAL, *supra* note 41, at 149-50.
[69] *Id.,* Rule 46 & commentary at 149–51.

reprisals against civilian objects].[70]

On the other hand, the HPCR *Air & Missile Manual* is notable for the absence of any reference to belligerent reprisal.[71] Although the *Manual*'s stated objective is "to produce a restatement of existing law applicable to air or missile operations in international armed conflict," it contemplates no means for a state to exercise a reprisal of any kind.[72]

Moreover—and in contrast to the *Tallinn Manual*— the *Air & Missile Manual* appears to outlaw all attacks against civilians or civilian objects without reservation.[73] This sweeping prohibition could be interpreted as a necessary result of the principles adopted in the *Manual*'s General Framework, principles which are cast in language reminiscent of the human rights tradition: "In cases not covered by this Manual, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."[74] The disparate treatment afforded to the concept of belligerent reprisal by each *Manual* underscores the unsettled nature of the law regarding the scope and continued viability of the sanction under the law of armed conflict.

III. The United States Maintains Support for the Use of Belligerent Reprisals Against Civilians

A useful starting point for discerning the rationale behind the U.S. position on belligerent reprisal is the 1863 *Instructions for the Government of Armies of the United States in the Field*, authored by Francis Lieber and issued to the Union Army at President Lincoln's direction as General Orders No. 100 (the Lieber Code).[75] Although it has no precedential value, the Lieber Code represents one of the earliest efforts to codify the law of armed conflict and, as such, provides unique insight into how the concept of belligerent reprisal was considered in an earlier era. Reprisal, or

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[70] *Id.* at 151.
[71] *See generally* AIR & MISSILE MANUAL, *supra* note 42 ("The HPCR Air & Missile Manual is notable for its complete omission of belligerent reprisals from its text and framework.").
[72] *Id.* at 6.
[73] *Id.* at 10 (Rule 11 holds that "[a]ttacks directed against civilians or civilian objects are prohibited").
[74] *Id.* at 7.
[75] Headquarters, U.S. Dep't of Army, Gen. Order No. 100 (1898) [hereinafter Lieber Code].

retaliation as characterized by the Code, was recognized as "the sternest feature of war."[76] Yet its necessity was unquestioned: "The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch . . . . A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage."[77] Acknowledging the sanction's severity, the Lieber Code imposed strict limitations on its lawful use:

> 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.[78]

These limitations are mirrored in Rule 145 of the ICRC Study and in the *U.S. Army's Field Manual 27-10, The Law of Land Warfare* (FM 27-10), and have matured into an expression of customary international law.[79]

As previously noted, express statements of the official U.S. position on the use of belligerent reprisal under the law of armed conflict are in short supply. Perhaps the most widely cited source of U.S. policy on the matter is FM 27-10, a U.S. Army field manual. In a section dedicated to reprisals, FM 27-10 defines the term and outlines certain limitations on its use, which are roughly in accord with those widely accepted as customary international law.[80] A few features of the field manual's treatment of reprisals merit particular attention. After observing that "[o]ther means of securing compliance with the law of war should normally be exhausted before resort is has to reprisals," FM 27-10 tacks on an interesting addendum to that generally recognized principle: "Even when appeal to the enemy for redress has failed, it may be a matter of policy to consider,

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[76] *Id.* art. 27.
[77] *Id.*
[78] *Id.* art. 28.
[79] ICRC IHL database, *supra* note 16; FM 27-10, *supra* note 38, para. 497.
[80] FM 27-10, *supra* note 38, para. 497.

before resorting to reprisals, whether the opposing forces are not more likely to be influenced by a steady adherence to the law of war on the part of their adversary."[81] This qualification seemingly indicates an appreciation for and a hedge against "the fact that those to whom [a belligerent reprisal] is applied may have so little sense of measure that they will reply with still other violations and start down the incline that leads to a war of savagery."[82]

Two other facets of FM 27-10's provisions on reprisals are significant. First, in a short paragraph addressing those persons against whom reprisals are permitted, FM 27-10 initially cabins off those persons against whom reprisals are outlawed, including prisoners of war and protected civilians.[83] However, the final sentence of that paragraph provides an example of persons against whom reprisals might be permitted: "[R]eprisals may still be visited on enemy troops who have not yet fallen into the hands of the forces making the reprisals."[84] Of note is the absence of any direct reference to an enemy's civilian population. In another section, FM 27-10 explicitly adopts proportionality as a necessary condition for the exercise of any reprisal: "The acts resorted to by way of reprisal need not conform to those complained of by the injured party, but should not be excessive or exceed the degree of violence committed by the enemy."[85] The requirement is important when considered in the context of other quasi-official statements of the U.S. position on the use of belligerent reprisals against civilians.

In a conference at American University's Washington College of Law, Abraham Sofaer proffered some additional insight into the rationale behind U.S. support of belligerent reprisal against civilians as a valued deterrent measure:

> To take another example, article 51 of Protocol I prohibits any reprisal attacks against the civilian population, that is, attacks that would otherwise be forbidden but that are in response to the enemy's own violations of the law and are intended to deter future violations. Historically,

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[81] *Id.*
[82] E. Stowell, *Military Reprisals and the Sanctions of the Laws of War*, 36 AM. J. INT'L L. 643, 649 (1942).
[83] FM 27-10, *supra* note 38, para. 497.
[84] *Id.*
[85] *Id.*

> reciprocity has been the major sanction underlying the laws of war. If article 51 were to come into force for the United States, an enemy could deliberately carry out attacks against friendly civilian populations, and the United States would be legally forbidden to reply in kind. As a practical matter, the United States might, for political or humanitarian reasons, decide in a particular case not to carry out retaliatory or reprisal attacks involving unfriendly civilian populations. To formally renounce even the option of such attacks, however, removes a significant deterrent that presently protects civilians and other war victims on all sides of a conflict.[86]

The comments of a U.S. delegate to the Diplomatic Conference also shed some light on the rationale behind continuing U.S. loyalty to the sanction:

> In the event of massive and continuing violations of the Conventions and the Protocol, this series of prohibitions of reprisals may prove unworkable. Massive and continuing attacks directed against a nation's civilian population could not be absorbed without a response in kind. By denying the possibility of a response and not offering any workable substitute, the Protocol is unrealistic and, in that respect, cannot be expected to withstand the test of future armed conflict.[87]

This "public pressure" justification differs from the deterrent explanation offered by Sofaer but both ostensibly informed the U.S. view on AP I, Article 51(6) as expressed by Michael Matheson, then Deputy Legal Advisor to the U.S. State Department, in 1987: "[The United States does] not support the prohibition on reprisals in article 51 and subsequent

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[86] Abraham D. Sofaer, *The Position of the United States on Current Law of War Agreements*, 2 AM. U. J. INT'L L. & POL'Y 460, 469 (1987).

[87] Greenwood, *supra* note 18 (citing VI OFFICIAL RECORD OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS 224, CDDH/SR.58, Annex (1974-77)).

articles . . . and [does] not consider it a part of customary law."[88] Although it has been suggested "that the Matheson analysis is no longer considered 'authoritative,'" it still represents the clearest picture of U.S. policy on the status of AP I, Article 51(6) as an expression of customary international law.[89]

IV. U.S. Position on Belligerent Reprisal Is Inconsistent with the Realities of the Contemporary Global Security Environment

The continued utility of this policy is best tested in the crucible of practical application. We will examine the U.S. position on belligerent reprisal in the context of two scenarios: (1) the *Tallinn Manual*'s illustration of a cyber-attack deployed as a belligerent reprisal; and (2) the use of nuclear weapons by the United States as a belligerent reprisal.

A. *Tallinn Manual* Scenario

The *Tallinn Manual*'s illustration of a belligerent reprisal presupposes a state of armed conflict between State A and B and an initial violation of the law of armed conflict by State A – the bombing of State B's military medical facilities.[90] These facts thus neatly satisfy the established rule that "[r]eprisals . . . only be taken in reaction to a prior serious violation of international humanitarian law, and only for the purpose of inducing the adversary to comply with the law."[91] However, as many commentators have noted, this threshold determination is usually not so readily ascertainable.[92] For example, imagine if State A flatly denied bombing State B's military medical facilities or perhaps argued that the medical facilities were shielding some other lawful military objective. Given the lack of any independent fact-finding entity to sort out the facts, the

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[88] Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L. & POL'Y 415, 426 (1987).
[89] Charles Garraway, *"England Does Not Love Coalitions" Does Anything Change*, 82 INT'L L. STUD. 233, 238 (2006).
[90] TALLINN MANUAL, *supra* note 41, at 151. For the purposes of this analysis, assume that "State B" is a placeholder for the United States.
[91] ICRC IHL Database, *supra* note 16.
[92] Darcy, *supra* note 8, at 189-90; Greenwood, *supra* note 18, at 40-43.

resulting uncertainty entitles "either of the parties . . . to act on the grounds of its own reasonable conception of the law governing the actions of both sides."[93] Based on these facts, State A might view the cyber-attack not as a lawful reprisal, but as an illegal act in violation of the law of armed conflict. State A might then feel justified in conducting a reprisal against State B – and so on, and so on, as reprisal begets reprisal.

The *Tallinn Manual*'s reprisal example does appear uncontrovertibly to fulfill the fourth and fifth conditions for lawful belligerent reprisals, namely that "any decision to resort to reprisals must be taken at the highest level of government" and that "reprisal action . . . cease as soon as the adversary complies with the law."[94] Equitable satisfaction of the second and third rules, however, is questionable. The second condition for lawful belligerent reprisals restricts reprisals to a "measure of last resort" available only when no other lawful measures are available.[95] Also known as the principle of subsidiarity, the rule demands that State B exhaust all means of redress before resorting to belligerent reprisals, unless it is apparent that all other possible remedies would be fruitless. In the *Tallinn Manual* scenario, the only measures State B took before its cyber-attack were "repeated demands [for State A] to desist."[96] It is not clear, given the limited information in the example, whether State B might have successfully availed itself of other alternatives before resorting to the cyber-attack, measures like appealing to international bodies, rallying public opinion against State A, or even simply threatening a cyber-attack or other reprisal. The efficacy of other means of redress notwithstanding, it is clear that the nature of belligerent reprisal demands that the effort be made. As Greenwood observes, "the use of reprisals in an armed conflict 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 are ordered is probably one which should be strictly insisted upon, unless delay will endanger the safety of troops or civilians."[97]

Whether State B's cyber-attack satisfies the third condition for a lawful belligerent reprisal is probably the most difficult to assess. Commanding that any reprisal be executed in accordance with the

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[93] KALSHOVEN, *supra* note 25, at 41.
[94] ICRC IHL Database, *supra* note 16.
[95] *Id.*
[96] TALLINN MANUAL, *supra* note 41, at 151.
[97] Greenwood, *supra* note 18, at 47.

principle of proportionality, the third rule requires that the cyber-attack "not be excessive or exceed the degree of violence committed by the enemy."[98] Although Kalshoven argues that in the context of proportionality, "belligerents are left with a certain freedom of appreciation" in terms of the form of a reprisal, he also warns that this freedom, "which in law is restricted by the requirement of reasonableness, …in practice can lead to arbitrariness and excessive reactions."[99] Is attacking a civilian power generation facility proportional to State A's attacks on State B's military medical facilities? More information is required. How many civilians rely on the power facility? Is it winter or summer? Where is State A located? Is State A developed or undeveloped? Shutting down Moscow's power facility in February, for example, qualitatively differs from attacking the facility of a small town in southern Iran in the fall. Whatever the case may be, "the assessment of proportionality [in the context of a belligerent reprisal] may become almost impossible to achieve on anything other than a very crude scale."[10090] Calculations of this nature come uncomfortably close to those inherent in the *lex talionis*: an eye for an eye, a tooth for a tooth.

B. Nuclear Scenario

A close examination of the legality of the use of nuclear weapons by the United States against an enemy civilian population as a belligerent reprisal is subject to several stipulations regarding the current state of the law on the issue.[101] First, on the question of whether the threat or use of nuclear weapons under any circumstances is permitted under international law, the International Court of Justice held that "[t]here is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such."[102] Second, any "threat or use of nuclear weapons should also be compatible

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[98] FM 27-10, *supra* note 38, para. 497.
[99] KALSHOVEN, *supra* note 25, at 342.
[100] Greenwood, *supra* note 18, at 45.
[101] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 8, ¶ 105(2)(B) (July 8) [hereinafter *Nuclear Weapons Opinion*].
[102] *Id.* at *96, para. 105(2)(B) (July 8). A ruling by the ICJ can be considered persuasive authority in international law, although "[t]he decision of the Court has no binding force except between the parties and in respect to that particular case." Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1179.

with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons."[103] Finally, and perhaps most importantly, the United States, upon signing AP I, stated two understandings, the first of which concerned nuclear weapons: "It is the understanding of the United States of America that the rules established by this Protocol were not intended to have any effect on and do not regulate or prohibit the use of nuclear weapons."[104] In sum, (1) nuclear weapons are not banned under international law and their use in an armed conflict is governed, as is any other weapon, by the principles of law of armed conflict and (2) AP I, Article 51(6)'s proscription on belligerent reprisals against civilian populations contemplates only the use of conventional arms, not nuclear weapons.[105]

With this legal framework in place, consider the following scenario: the United States is engaged in armed conflict with State A, a nuclear state. During hostilities, State A conducts a chemical attack against U.S. forces. Might the United States respond with a belligerent reprisal in the form of a nuclear attack against State A's civilian population? The narrow facts of this scenario expose the confused nature of the current U.S. position on belligerent reprisal. As it stands, there is no outright ban on the use of nuclear weapons in a *jus in bello* context.[106] Yet U.S. support for the use of belligerent reprisal against an enemy civilian population appears to center on the use of nuclear weapons in situations governed by *jus ad bellum* principles. Reserving the right to use nuclear weapons as a deterrent measure, or in response to public pressure, appears to implicate concepts other than belligerent reprisal, such as reciprocity and retaliation in kind.[107] Indeed, extant U.S. statements on belligerent reprisal reflect a distinctly Cold War mentality. The mutually assured destruction (MAD) model is an almost perfect example of reciprocity in action: "Actions justified by failure of reciprocal observance regard the law in question as extinguishable or entirely inapplicable in the event of breach."[108] Thus, the

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[103] *Nuclear Weapons Opinion*, *supra* note 101, at *97.
[104] George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 2 (1991).
[105] Darcy, *supra* note 8, at 214.
[106] *Nuclear Weapons Opinion*, *supra* note 101, ¶ 105(2)(B) (July 8).
[107] KALSHOVEN, *supra* note 25, at 347-48, 362-63.
[108] Watts, *supra* note 7, at 385.

first use of nuclear weapons by a state would render any existing obligation by the victim state to refrain from their use null and void. The victim state would then be free to use nuclear weapons in response, but such use would be by operation of reciprocity, not belligerent reprisal.

The U.S. "nuclear understanding" to AP I also complicates any assessment of the current U.S. view on belligerent reprisal. Given the U.S. understanding that nuclear weapons are outside AP I's ambit, the U.S. insistence on a right to conduct a nuclear belligerent reprisal against an enemy's civilian population is difficult to appreciate. Cold War "nuclear exceptionalism" was predicated on "[t]he assumption … that use of nuclear weapons, or a non-nuclear attack of sufficient scale to provoke self-defense using nuclear weapons, would occasion a large-scale and reciprocal suspension of much of the law of war."[109] Hence the "deterrent" and "public pressure" justifications proffered by the United States for the retention of the right to exercise a belligerent reprisal against an enemy's civilian population. But, given the U.S. nuclear reservation, it would seem that a nuclear response by the United States to a nuclear attack by an aggressor state would not violate AP I, Article 51(6), even if the treaty bound the United States. A nuclear response outside the treaty's compass could not be characterized as a reprisal. This drains the current U.S. position on belligerent reprisal, largely intended to safeguard its nuclear prerogative, of much of its plausibility.

Setting aside the U.S. understanding concerning nuclear weapons discussed above, any use of such arms in the course of a belligerent reprisal must satisfy the five conditions established under customary international law for use of that sanction. At first blush, proportionality would seem to be the most challenging requirement to meet, yet, in a nuclear context, the rule commanding that "reprisal action … cease as soon as the adversary complies with the law" also likely would prove trying.[110] Returning to the nuclear scenario set out above, any belligerent reprisal by the United States must not be "excessive or exceed the degree of violence committed by the enemy."[111] The United States may view State A's use of chemical weapons as such a serious violation of the law of armed conflict that only a nuclear response is appropriate. Yet this illustrates two inherent difficulties when addressing proportionality in the context of nuclear weapons. First, the "freedom of appreciation" afforded belligerents in

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[109] *Id.* at 431.
[110] ICRC IHL Database, *supra* note 16.
[111] FM 27-10, *supra* note 38, para. 497.

determining proportionality "implies a certain discretion for belligerents to decide that violations of the law of war committed by their opponents are so extremely grave as to make the use of nuclear weapons in reprisal permissible."[112] The United States might view State A's use of chemical weapons as deserving of a nuclear response, whereas State A might have a lesser threshold for a nuclear reprisal. This discretion invites uncertainty, and uncertainty in a nuclear exchange can quickly spiral out of control.

The second problem with proportionality concerns the actual function assigned by the United States to a nuclear belligerent reprisal against State A's civilian population. Is the use of a nuclear weapon against a civilian population truly a proportionate response to a chemical attack? Or is the use of such a measure more of "a signal in the military-political power relations" between the United States and State A?[113] Its use a message to State A that further escalation up the ladder of violence will continue if its conduct necessitates it?[114] If so, then the United States could not couch its nuclear response as a belligerent reprisal, "the purpose of which [is] to effect a de-escalation in the level of unlawful violence on the part of the enemy."[115]

Finally, it seems exceedingly unlikely that the United States would contemplate a nuclear strike even after sustaining a chemical attack in light of former Secretary of Defense Robert Gates' remarks following the release of the Obama Administration's 2010 Nuclear Posture Review ("NPR"): "[T]ry as we might, we could not find a credible scenario where a chemical weapon could have the kind of consequences that would warrant a nuclear response."[116]

As noted earlier, the rule requiring that a reprisal cease once an adversary complies with the law would present unique difficulties in the aftermath of a nuclear strike. It is almost certain that any nuclear attack on State A's civilian population would generate significant radioactive fallout, which could remain a potent hazard for months or years.[117] While it could be argued that the lingering effects of a nuclear strike cannot be

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[112] KALSHOVEN, *supra* note 25, at 549-50.
[113] *Id.* at 377.
[114] *Id.*
[115] *Id.*
[116] *U.S. "Negative Security Assurances" at a Glance*, ARMS CONTROL ASS'N, http://www.armscontrol.org/factsheets/negsec [https://perma.cc/8QWV-8XTD].
[117] Charles J. Moxley Jr. et al., *Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty*, 34 FORDHAM INT'L L.J. 595, 624-38 (2011).

considered as an ongoing assault on State A, the extended harm visited on noncombatants must be considered in any proportionality analysis.

On balance, the use of a nuclear weapon on an enemy civilian population cannot be justified as a lawful belligerent reprisal, as understood by the law of armed conflict. There is no obvious means by which such a weapon could satisfy the proportionality requirement for a lawful belligerent reprisal. Indeed, the majority of examples concerning the resort to nuclear weapons in a belligerent reprisal contemplate their use against military objectives, not civilian populations.[118] As argued above, the only instances in which civilian populations might be subject to a nuclear attack are governed by the concepts of reciprocity or retaliation-in-kind, not belligerent reprisal. Kalshoven's conclusion on the matter is as follows:

> The development of nuclear weapons . . . has brought about a state of affairs where recourse to belligerent reprisals can entail consequences so disastrous for the enemy civil population and, indeed, for humanity in general, that here the idea of law enforcement has to give way to the sheer inhumanity inherent in such reprisals.[119]

V. Conclusion

The current U.S. view on belligerent reprisal is out of step with the bulk of the international community's thinking on the issue. It ignores the advent of a new global security paradigm, in which the importance of state obligations to each other are matched by a state's obligations to its citizenry. Moreover, the notion that the United States can at once champion the application of the rule of law to the horrors of armed conflict and, at the same time, reserve the right to violate that compact by intentionally killing noncombatants is a concerning one. "The objective effectiveness of measures of retaliation against the enemy civil population," Kalshoven concludes, "is decidedly negative."[120] Indeed,

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[118] *See, e.g* Nuclear Weapons Opinion, *supra* note 101, at *27 (July 8); Paula B. McCarron & Cynthia A. Holt, *A Faustian Bargain? Nuclear Weapons, Negative Security Assurances, and Belligerent Reprisal*, 25 FLETCHER F. WORLD AFFS. 203, 204 (2001).
[119] KALSHOVEN, *supra* note 25, at 376.
[120] *Id*. at 358.

> [w]eighing this dubious effectiveness against the unquestionable inhumanity of the form of retaliation under consideration leads to [the ultimate] conclusion [that] . . . retaliatory attacks on the enemy civil population as such, irrespective of the weapons with which they are carried out, are so much at variance with the fundamental concepts of the law of reprisals that they can hardly be regarded as anything but highly reprehensible.[121]

There is still space for belligerent reprisals under the law of armed conflict, but not against civilians or the enemy's civilian population. To recognize as much is to embrace the wisdom of Grotius and forswear the vengeful justice of Henry V.

[121] *Id*. at 358-59.

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