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# Retaliation and Reprisal

Shane Darcy\*

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The concepts of retaliation and reprisal have had a peripheral presence in the law governing the use of force in international relations. Their exact meaning and scope has often proved elusive and despite the apparent silence on the matter of relevant international treaties, the overwhelming weight of opinion is that a use of force by way of retaliation or reprisal is generally unlawful. This has not prevented occasional scholarly attempts to justify unilateral uses of force by resort to these legal doctrines. Reprisals in particular are a traditional act of self-help under international law, consisting of a breach of international law in response to a prior violation by another State and undertaken for the purpose of enforcing compliance. They are “unlawful acts that become lawful in that they constitute a reaction to a delinquency by another State”.<sup>1</sup> Retaliation, as will be shown, is a broader concept, which tends to evade precise definition. The general prohibition on the use of force in the Charter of the United Nations Charter outlaws any threat or use of force and prohibits such unless authorized by the Security Council or when States act in self-defence under Article 51.<sup>2</sup> Whether this prohibition covers reprisals or retaliatory action was seemingly clarified by the United Nations General Assembly in 1970, when it declared in Resolution 2625 that “States have a duty to refrain from acts of reprisal involving the use of force”.<sup>3</sup>

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\* Lecturer, Irish Centre for Human Rights, National University of Ireland Galway. The author wishes to acknowledge the research assistance provided by Natia Mueller and Menaka Nayer.

<sup>1</sup> Antonio Cassese, *International Law*, 2<sup>nd</sup> edn, Oxford University Press, 2005, p. 299.

<sup>2</sup> Article 2(4), Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

<sup>3</sup> General Assembly Resolution 2625 (XXV), 24 October 1970.

This chapter will explore the evolution of the law on the use of force as it relates to armed reprisals and retaliation, particularly since the adoption of the Charter of the United Nations in 1945. While the preponderance of scholars, and indeed States, view armed reprisals or countermeasures involving force as prohibited under international law, the doctrine would seem to retain appeal for those seeking to legitimise force not falling within the Charter's exceptions. The counterpart applicable in times of armed conflict, belligerent reprisal, has been restricted but not completely outlawed under international humanitarian law.<sup>4</sup> The chapter will examine the evolution of international law on the use of force relating to reprisals and consider claimed instances of State practice, as well as judicial and scholarly consideration of the lawfulness of such reprisals. It will conclude with a look at calls for the revival of reprisals or retaliation as permitted exceptions to the prohibition on the use of force. First, it is necessary to define the concepts of retaliation and reprisal as understood in international law.

### **I. Defining Retaliation and Reprisals**

Reprisals are a recognised yet controversial concept within international law, whereas retaliation is a term often employed in a broader non-legal sense and generally referring to “an attack or assault in return for a similar attack”.<sup>5</sup> The ten-volume *Max Planck Encyclopedia of Public International Law* has a detailed entry for reprisals but makes no mention of retaliation.<sup>6</sup> Kelsen defined reprisals as “acts, which although normally illegal, are exceptionally permitted as reaction of one state against a

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<sup>4</sup> See Shane Darcy, ‘The Evolution of the Law of Belligerent Reprisals’, 175 *Military Law Review* (2003) 184-251; Shane Darcy, ‘What Future for the Doctrine of Belligerent Reprisals?’, 5 *Yearbook of International Humanitarian Law* (2002) 107.

<sup>5</sup> *The Oxford Compact English Dictionary*, 2<sup>nd</sup> edn., Oxford University Press, 2003, p. 974.

<sup>6</sup> *The Max Planck Encyclopedia of Public International Law*, Oxford University Press, 2012, pp. 927-930.

violation of its right by another state”.<sup>7</sup> The aspect of unlawfulness is an essential element of reprisals, whereas retaliation can be used more broadly to include reprisals<sup>8</sup> or other unfriendly or hostile, yet lawful acts of retorsion.<sup>9</sup> Reprisals taken during a situation of armed conflict are described as belligerent reprisals,<sup>10</sup> while those resorted to during peacetime are referred to as peacetime, pacific or armed reprisals. Such reprisals are the primary focus of this chapter and can be considered as acts of forcible self-help, involving an unlawful use of force falling short of war, by one State in response to a prior violation of the *jus ad bellum* by another. Armed reprisals is the most suitable label for such actions,<sup>11</sup> given that they amount to “modes of putting stress upon an offending state which are of a violent nature, though they fall short of actual war”.<sup>12</sup>

The interchangeable and overlapping use of the terms reprisal and retaliation is a notable feature of scholarship on these subjects.<sup>13</sup> Evelyn Speyer Colbert, in what remains the sole monograph on this topic, used retaliation as a general term which also covered reprisals.<sup>14</sup> She observed that the meaning given to the concepts of retaliation, reprisal and retorsion “seem at times to be as varied as the writers dealing with them”.<sup>15</sup> T.J. Lawrence wrote in 1915 that reprisal “is used in a bewildering

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<sup>7</sup> Hans Kelsen, *Principles of International Law*, Rinehart & Company, New York, 1952, p. 23.

<sup>8</sup> See for example Evelyn Speyer Colbert, *Retaliation in International Law*, King’s Crown Press, New York, 1948; Richard A. Falk, ‘The Beirut Raid and the International Law of Retaliation’, 63 *American Journal of International Law* 3 (1969) 415.

<sup>9</sup> See for example Hubert Lesaffre, ‘Circumstances Precluding Wrongfulness in the Articles on State Responsibility: Countermeasures’, in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility*, Oxford University Press, 2010, 469, pp. 471-472; J.G. Starke, *Introduction to International Law*, 8<sup>th</sup> edn., Butterworths, 1977, p. 549.

<sup>10</sup> See generally Frits Kalshoven, *Belligerent Reprisals*, Martinus Nijhoff, 1971.

<sup>11</sup> Yoram Dinstein, *War, Aggression and Self-Defence*, 5<sup>th</sup> edn., Cambridge University Press, 2011, p. 244.

<sup>12</sup> T.J. Lawrence, *The Principles of International Law*, Sixth Edition, D.C. Heath & Co., 1915, p. 334.

<sup>13</sup> See for example Roberto Barsotti, ‘Armed Reprisals’, in Antonio Cassese (ed.), *The Current Legal Regulation of the Use of Force*, Martinus Nijhoff, 1986, 79, p. 79; Richard A. Falk, ‘The Beirut Raid’.

<sup>14</sup> Speyer Colbert, *Retaliation in International Law*, pp. 2-3, fn. 1.

<sup>15</sup> *Ibid.*

variety of senses”.<sup>16</sup> Reprisals are often defined as certain acts of retaliation,<sup>17</sup> given that are a response to a previous act, and in this broad sense, retaliation could also cover lawful acts of self-defence taken in response to an armed attack. The terms retaliation and reprisal were used interchangeably in the *Naulilaa* arbitration, discussed below, although it is clear that reprisals in a narrow legal sense is what were being addressed. The 1863 Lieber Code referred only to retaliation yet it is seen as “very much at the root of all subsequent international developments” concerning belligerent reprisals. The Code stated that “[t]he law of war can no more wholly dispense with retaliation than can the law of nations”.<sup>18</sup> International law has indeed sought to dispense with retaliation both as a term of art and as a legal concept where this involves a use of force by way armed reprisals. The chapter focuses principally on the more legally recognisable concept of armed reprisals.

The purpose of armed reprisals is law enforcement, as they are a mode of self-help for the protection of a State’s interests.<sup>19</sup> According to a 1934 resolution of the *Institut de droit international*:

Reprisals are measures of coercion, derogating from the ordinary rules of international law, decided and taken by a State, in response to wrongful acts committed against it, by another State, and intended to impose on it, by pressure exerted through injury, the return to legality.<sup>20</sup>

Other purposes have been ascribed to armed reprisals, although it is “open to doubt whether these other purposes (such as punishment, retaliation, deterrent) are

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<sup>16</sup> Lawrence, *The Principles of International Law*, p. 334.

<sup>17</sup> Brierly, *The Law of Nations*, Oxford University Press, 1963, p. 399; William V. O’Brien, ‘Reprisals, Deterrence and Self-Defense in Counter-Terror Operations’, 30 *Virginia Journal of International Law* (1989-1990), 421, p. 421, fn. 1.

<sup>18</sup> Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863.

<sup>19</sup> Hans Kelsen, ‘Collective Security and Collective Self-Defence under the Charter of the United Nations’, 42 *American Journal of International Law* (1948) 783, p. 783.

<sup>20</sup> *Institut de Droit International*, Session de Paris 1934, *Régime de représailles en temps de paix*, Article 1 (author’s translation).

legitimate”.<sup>21</sup> Some view armed reprisals as punitive actions,<sup>22</sup> others exclude punishment as a rationale,<sup>23</sup> whereas Antonio Cassese considered that reprisals “were aimed at either impelling the delinquent State to discontinue the wrongdoing, or at punishing it, or both”.<sup>24</sup> Frits Kalshoven has noted how the law enforcement function of reprisals can sit alongside the goals of punishment, redress, enforcing compliance and prevention, but subject to an important caveat:

It is submitted that reprisals can serve and actually are used to achieve all of these purposes including the prevention of future wrongs – with the sole exception, that is, of punishment in the narrow sense of revenge pure and simple: if that is the real purpose of a retaliatory action, it does not have the function of coercion characteristic of reprisals.<sup>25</sup>

A State seeking the cloak of legality once offered by armed reprisals would of course deny that the motivation behind a retaliatory use of armed force is revenge.

## II. The Evolving International Law regarding Reprisals

Positive international law addressing armed reprisals remains relatively thin on the ground and while the 20<sup>th</sup> century saw several important legal developments concerning reprisals, the law prior to then was “shrouded in doubt”.<sup>26</sup> T.J. Lawrence considered there to be “a great need of international legislation on the subject of

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<sup>21</sup> Karl Josef Partsch, ‘Reprisals’, Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Volume IV (1992), p. 201.

<sup>22</sup> Kinga Tibori Szabó, *Anticipatory Action in Self-Defence*, TMC Asser Press, 2011, p. 313; Derek Bowett, ‘Reprisals Involving Recourse to Armed Force’, 66 *American Journal of International Law* 1 (1972) 1, p. 3; Nina H. B. Jørgenson, *The Responsibility of States for International Crimes*, Oxford University Press, 2000, p. 173.

<sup>23</sup> Richard B. Lillich, ‘Forcible Self-Help under International Law’, 62 *International Law Studies Ser. US Naval War College* (1980) 129, p. 131.

<sup>24</sup> Cassese, *International Law*, p. 299.

<sup>25</sup> Kalshoven, *Belligerent Reprisals*, pp. 25-26. See also Bowett, ‘Reprisals Involving Recourse to Armed Force’, p. 3; David Kretzmer, ‘The Inherent Right to Self-Defence and Proportionality in Ius ad Bellum’, p. 21, forthcoming in *European Journal of International Law* (2012), electronic copy available at: <http://ssrn.com/abstract=2014282>.

<sup>26</sup> Georg Schwarzenberger, *International Law as applied by International Courts and Tribunals, Vol. II, The Laws of Armed Conflict*, Stevens & Sons, 1968, p. 39.

reprisals”.<sup>27</sup> This was despite the reprisal doctrine’s lengthy history, the beginning of which lay in the practice of private reprisals.<sup>28</sup> During the Middle Ages, private individuals were indemnified “for injuries and losses inflicted on them by subjects of other nations. Letters of marque were issued by the sovereign to those who had been wronged, and they were thereby authorized to recoup themselves by capturing vessels and cargoes of the offending nationality”.<sup>29</sup> Evelyn Speyer Colbert considered that until the end of the seventeenth century, “peace time retaliation was a weapon used for the most part to remedy the grievances of private men, was subject to fairly strict and uniform regulation, and was limited to the attainment of compensation for damages to the extent of damages received.”<sup>30</sup> The Constitution of the United States reflects this practice, conferring on Congress the authority to “declare War, grant Letters of marque and reprisal”.<sup>31</sup>

Private reprisals became less tolerable with the increasing role of the State and the emergence of State responsibility,<sup>32</sup> with public reprisals emerging as a coercive tool “to force the offending state to do justice”.<sup>33</sup> These armed reprisals comprised seizure of property or ships on the high seas, and even bombardment or occupation of territory in response to a previous wrong, such measures being considered as falling short of war.<sup>34</sup> Ian Brownlie felt that their value “lay in the possibility of gaining redress without creating a formal state of war”.<sup>35</sup> The actions comprising the reprisals

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<sup>27</sup> Lawrence, *The Principles of International Law*, p. 344.

<sup>28</sup> Brierly, *The Law of Nations*, Oxford University Press, 1963, p. 399. See further Emer de Vattel, *The Law of Nations*, Béla Kapossy and Richard Whatmore (eds.), Liberty Fund, Indianapolis, 2008, pp. 460-467.

<sup>29</sup> Lawrence, *The Principles of International Law*, p. 335.

<sup>30</sup> Speyer Colbert, *Retaliation in International Law*, pp. 3-4.

<sup>31</sup> Constitution of the United States, Article 1, Section 8(11).

<sup>32</sup> Lawrence, *The Principles of International Law*, p. 335.

<sup>33</sup> Speyer Colbert, *Retaliation in International Law*, p. 4.

<sup>34</sup> *Ibid.*

<sup>35</sup> Ian Brownlie, *International Law and the Use of Force by States*, Oxford University Press, 1963, p. 220 (footnote omitted).

were considered to be *prima facie* unlawful but justified for being taken in response to a prior unlawful act:

...it is assumed that a State has committed an international tort and, on request, refuses to make due reparation. Then, the State which has suffered the wrong is entitled to retaliate by way of measures which, in themselves, would also be tortious, but receive their legality from the unredressed prior wrong.<sup>36</sup>

While there was an absence of clear positive or customary rules governing reprisals, the law on the use of force was itself also underdeveloped, which adds complexity to the question of a reprisal's inherent unlawfulness. As Georg Schwarzenberger observed, “[s]o long as the right to resort to war was unlimited, it was hard to be dogmatic on rules limiting resort to compulsory measures short of war”.<sup>37</sup>

The rudimentary nature of international law on the use of force has prompted some scholars to question the legal basis of the institution of armed reprisals. Roberto Barsotti, for example, considered that “the features which distinguish the customary right of reprisal are anything but clear and unambiguous”.<sup>38</sup> He explains:

...at the time when resort to war was unconditionally permitted, the need to define and distinguish between the single measures short of war was not felt, since their lawfulness was never in doubt. Thus when the necessity to make this distinction arose (in consequence of the prohibition of war and even of the threat of use of force), it became apparent that that there was some uncertainty as to the essential characteristic of the reprisal.<sup>39</sup>

Antonio Cassese has commented similarly that:

...the requirement whereby armed reprisals are lawful only to the extent that they constitute a reaction to a wrong committed by another State presupposes the emergence of a rule prohibiting forcible intervention, that is, any interference in another State by the threat or use of force [...]. So long as such intervention was admitted, armed reprisals hardly made

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<sup>36</sup> Schwarzenberger, *International Law as applied by International Courts and Tribunals*, p. 48.

<sup>37</sup> *Ibid.*, p. 38.

<sup>38</sup> Barsotti, ‘Armed Reprisals’, p. 84.

<sup>39</sup> *Ibid.*



up a separate category, for it did not matter very much whether forcible measures short of war were to be labelled ‘intervention’ or ‘reprisal’.<sup>40</sup>

The permissiveness of the law on the use of force saw actions incorrectly labelled as reprisals,<sup>41</sup> with categorisations usually being made by jurists retrospectively.<sup>42</sup> J.L. Brierly was prompted to comment that even leading international law scholars “seem conscious of a certain unreality in the profession of the law to regulate reprisals”.<sup>43</sup>

The *Naulilaa* arbitration represents the only noteworthy judicial application of the concept of armed reprisals. Germany and Portugal had set up a Special Arbitral Tribunal after an incident in 1914 in which the Governor of German South-West Africa ordered reprisal attacks on Portuguese forts and posts, after two German officers and an official were killed by Portuguese soldiers. The Tribunal found the killings were due to a misunderstanding,<sup>44</sup> which did not qualify as a “violation of a rule of international law by the State against which the reprisals are directed”.<sup>45</sup> The Tribunal set out the following criteria governing resort to reprisals:

Reprisals are illegal if they are not preceded by a request to remedy the alleged wrong. There is no justification for using force except in cases of necessity. [...] Reprisals which are altogether out of proportion with the act that prompted them are excessive and therefore illegal. This is so even if it is not admitted that international law requires that reprisals should be approximately of the same degree as the injury to which they are meant to answer.<sup>46</sup>

The Tribunal also noted the “tendency to restrict the notion of legitimate reprisals and to prohibit any excess of their use”.<sup>47</sup> The *Naulilaa* decision is seen as setting out the established customary criteria for armed reprisals, including a prior violation of

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<sup>40</sup> Cassese, *International Law*, p. 300.

<sup>41</sup> Barsotti, ‘Armed Reprisals’, p. 84.

<sup>42</sup> Brownlie, *International Law and the Use of Force by States*, p. 220.

<sup>43</sup> J.L. Brierly, ‘International Law and Resort to Armed Force’, 4 *The Cambridge Law Journal* 3 (1932), 308, p. 309.

<sup>44</sup> *Portugal v. Germany (The Naulilaa Case)*, Special Arbitral Tribunal, 31 July 1928, *Annual Digest of Public International Law Cases* (1927/1928), 526, p. 526.

<sup>45</sup> *Ibid.*, p. 527.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

international law, an unmet demand for reparation and proportionality,<sup>48</sup> although its interpretation of the latter requirement has been queried.<sup>49</sup> Of course, the backdrop to the arbitration was Germany having been found internationally responsible for the First World War and obliged to make reparations under the Treaty of Versailles and accordingly, “[i]t was not accidental that the Tribunal dealt so confidently with reprisals as a legal institution”.<sup>50</sup>

The permissiveness of international law towards the use of force was progressively restricted from the beginning of the twentieth century.<sup>51</sup> Limitations on the use of force were notably set out in the Covenant of the League of Nations and the Kellogg-Briand Pact,<sup>52</sup> although it is unclear as to whether these new rules limited resort to reprisals, given that no express prohibition was included in the instruments.<sup>53</sup> A Special Committee of Jurists created by the Council of the League of Nations to examine the 1923 Corfu incident, where Italy had bombed and occupied Corfu as a reprisal for the assassination of Italian officials in Greece, concluded, quite unhelpfully, that “[c]oercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant”.<sup>54</sup> The obligation in the Covenant to settle disputes by pacific means could arguably have precluded armed reprisals where a peaceful resolution was not sought

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<sup>48</sup> Malcolm Shaw, *International Law*, 6<sup>th</sup> edn., Cambridge University Press, 2008, pp. 1129-1130; Anthony Arend Clark and Robert J. Beck, *International law and the use of force*, Routledge, 1993, p. 17.

<sup>49</sup> Partsch, ‘Reprisals’, p. 202.

<sup>50</sup> Schwarzenberger, *International Law as applied by International Courts and Tribunals*, p. 48.

<sup>51</sup> See for example Hague Convention II: Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, 18 October 1907.

<sup>52</sup> Covenant of the League of Nations, 28 April 1919, Articles 10-16; Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy, 27 August 1928, Articles I-II.

<sup>53</sup> Brownlie, *International Law and the Use of Force by States*, p. 220. See also Brierly, ‘International Law and Resort to Armed Force’, pp. 315-316. See however Schwarzenberger, *International Law as applied by International Courts and Tribunals*, p. 45; Hans Kelsen, ‘Collective Security and Collective Self-Defence under the Charter of the United Nations’, p. 787.

<sup>54</sup> See Kalshoven, *Belligerent Reprisals*, pp. 5-6. See however Tibori Szabó, *Anticipatory Action in Self-Defence*, p. 86.

first, according to Brierly, although he considered that reprisals might remain permissible in response to a breach of either the Covenant or Pact themselves.<sup>55</sup> In 1931, the Permanent Court of International Justice referred to the general concept of pacific reprisals as an “alleged right”.<sup>56</sup> The aforementioned *Institut de Droit International* resolution in 1934 on armed reprisals declared that they were forbidden in the same way as recourse to war was.<sup>57</sup>

The developments in international law at the end of the Second World fundamentally altered the legal landscape for States with regard to the use of force, as well as the permissible conduct of armed forces during wartime and the domestic protection of human rights. The Nuremberg Tribunal convicted leading Nazis in 1946 for waging wars of aggression, in addition to war crimes and crimes against humanity.<sup>58</sup> At the London Conference on Military Trials leading to the creation of the Nuremberg Tribunal, the French delegate took issue with a proposed definition of aggression, for it would “dispose of the whole question of reprisals - the question of reprisals in international law is one existing for the last 500 years and you cannot wipe it out in just one word”.<sup>59</sup> The parallel process of creating an international organization aimed at ensuring global peace and security, the United Nations, saw the adoption of a treaty incorporating the most far-reaching restrictions to date on the use of force.

The Charter of the United Nations is of course the key international treaty governing the use of force in international relations and it is largely viewed as having

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<sup>55</sup> Brierly, *The Law of Nations*, p. 412 (footnote omitted).

<sup>56</sup> Permanent Court of International Justice, *Railway Traffic Between Lithuania and Poland* (Advisory Opinion) 15 October 1931, General List No. 39, p. 114.

<sup>57</sup> *Institut de Droit International*, Session de Paris 1934, *Régime de représailles en temps de paix*, Article 4.

<sup>58</sup> International Military Tribunal (Nuremberg), *Judgment and Sentences*, 1 October 1946, reprinted in 41 *American Journal of International Law* 1 (1947), 172.

<sup>59</sup> ‘Minutes of 25 July 1945’, *Report of Robert H. Jackson United States Representative to the International Conference on Military Trials*, London, 1945, Washington: United States Department of State, 1949, p. 381.

prohibited resort to the doctrine of armed reprisals. The Charter obliges States parties to settle international disputes by peaceful means, “in such a manner that international peace and security, and justice, are not endangered”.<sup>60</sup> Moreover, Article 2(4) sets out the related rule:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

With Security Council authorised force under Article 42 and self-defence under Article 51 being the only exceptions to Article 2(4), a plain reading of the Charter rules would strongly suggest that reprisals involving force were prohibited by this new legal regime. This is the most accepted interpretation of States, United Nations bodies, international courts and the majority of scholars, as discussed below. A 1946 Commentary on the Charter states that obligation in Article 2(3) is such that “[i]t is obvious that this rules out recourse to certain measures short of war which involve the use of force, such as armed reprisals”.<sup>61</sup>

The records of the diplomatic conferences leading to the adoption of the Charter do not reveal any overt discussion of the question of armed reprisals. The doctrine does not seem to have even been discussed at either Dumbarton Oaks or San Francisco, even though the proposed rules on the use of force were obviously subjected to detailed negotiations.<sup>62</sup> The Charter provisions on the use of force largely mirror the Dumbarton Oaks proposals and the obligation of states to settle disputes by peaceful means was “not controversial” at the 1944 Dumbarton Oaks conference.<sup>63</sup>

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<sup>60</sup> Article 2(3), Charter of the United Nations, 26 October 1945, 1 UNTS XVI.

<sup>61</sup> Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations; Commentary and Documents*, Boston: World Peace Foundation, 1946, p. 67.

<sup>62</sup> On the powers of the Security Council, for example, see Robert C. Hilderbrand, *Dumbarton Oaks: The Origins of the United Nations and the Search for Postwar Security*, University of North Carolina Press, 1990, pp. 122-158.

<sup>63</sup> *Ibid.*, p. 85.

The Norwegian delegation to the San Francisco conference had suggested that the Dumbarton Oaks formulation on the prohibition on the use of force should make it clear that the prohibition of the threat or use of force extended to actions “not approved by the Security Council as a means of implementing the purposes of the organization”.<sup>64</sup> The reasons given by the delegation were that:

The plea might be put forward that force or threat of force used by a member state in order to secure the fulfillment of a final international award or a recommendation by the Security Council would not be inconsistent with the purpose of the Organization.<sup>65</sup>

At San Francisco, the United States delegate clarified that “the intention of the authors of the original text was to state in the broadest terms an absolute all-inclusive prohibition; the phrase “or in any other manner” was designed to insure that there should be no loopholes”.<sup>66</sup> The relevant Rapporteur confirmed that the Norwegian view, that “the unilateral use of force or similar coercive measures is not authorised or admitted”, was covered in the final text adopted,<sup>67</sup> which is as appears in the final Article 2(4) of the Charter. With regard to the absence of any provision explicitly directed at armed reprisals, Michael J. Kelly considers that the pre-eminence given to the maintenance of international peace and security meant that “it seemed unnecessary to specifically issue a death sentence on the old reprisal doctrine”.<sup>68</sup>

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<sup>64</sup> *Amendments and Observations on the Dumbarton Oaks Proposals, Submitted by the Norwegian Delegation, May 3, 1945*, Doc. 2 G/7 (n)(1), *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, Volume III, United Nations Information Organization, 1945, p. 366.

<sup>65</sup> *Ibid.* See also Summary Report of Seventh Meeting of Committee I/1, 16 May 1945, Doc. 382, I/1/19, *Documents of the United Nations Conference on International Organization*, Volume VI, p. 304.

<sup>66</sup> Summary Report of Eleventh Meeting of Committee I/1, 4 June 1945, Doc. 784, I/1/27, *Documents of the United Nations Conference on International Organization*, Volume VI, pp. 334-335.

<sup>67</sup> Report of Rapporteur of Committee 1 to Commission I, Doc. 885, I/1/34, 9 June 1945, *Documents of the United Nations Conference on International Organization*, Volume VI, p. 400. The Rapporteur’s report was adopted by 36 votes to nil, see Summary Report of Fifteenth Meeting of Committee I/1, 11 June 1945, Doc. 926, I/1/36, *Documents of the United Nations Conference on International Organization*, Volume VI, p. 423.

<sup>68</sup> Michael J. Kelly, ‘Time Warp to 1945 – Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law’, 13 *Journal of Transnational Law and Policy* 1 (2003), 1, p. 12.

Leading scholars of international law are unhesitatingly of the view that reprisals involving the use of force are prohibited by the Charter. For Brierly, “it is beyond argument that armed reprisals ... would be a flagrant violation of international law”.<sup>69</sup> Ian Brownlie was of the opinion that that armed reprisals are now illegal, that the “[u]nambiguous prohibition of forcible reprisals was finally accomplished by the Charter of the United Nations”.<sup>70</sup> Armed reprisals are “considered indisputably contrary to Art. 2(4)”, according to Antonio Cassese,<sup>71</sup> while Georg Schwarzenberger asserted that “[t]he formulation chosen was intended to remove any doubt that, in future, not only wars in the technical sense, but also *de facto* wars and forcible measures short of war should be illegal”.<sup>72</sup> Frits Kalshoven was a little more circumspect:

while it is saying too much that the coming into force of the Charter has removed any uncertainty concerning the legitimacy or illegitimacy of reprisals involving the use of armed force in time of peace, it cannot be denied that the Principles laid down in Article 2, sections 3 and 4, point strongly towards the prohibition of such use”.<sup>73</sup>

The *Commentary on the Charter of the United Nations* considers it to be particularly important “that reprisal, once the most frequently used form of force, is today likewise only admissible in so far as it does not involve the use of armed force”.<sup>74</sup> Even though armed reprisals are viewed as outlawed under the Charter,<sup>75</sup> non-forcible

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<sup>69</sup> Brierly, *The Law of Nations*, p. 415.

<sup>70</sup> Brownlie, *International Law and the Use of Force by States*, p. 223. See also *ibid.*, pp. 281, 348, 431; Ian Brownlie, *Principles of Public International Law*, Seventh Edition, Oxford University Press, 2008, p. 466.

<sup>71</sup> Antonio Cassese, ‘Return to Westphalia? Considerations on the Gradual Erosion of the Charter System’, in Antonio Cassese (ed.), *The Current Legal Regulation of the Use of Force*, 505, p. 514.

<sup>72</sup> Schwarzenberger, *International Law as applied by International Courts and Tribunals*, p. 51.

<sup>73</sup> Kalshoven, *Belligerent Reprisals*, pp. 6-7.

<sup>74</sup> Bruno Simma *et. al.*, *The Charter of the United Nations; A Commentary*, 2<sup>nd</sup> edn., Volume I, p. 794.

<sup>75</sup> See also Hans Kelsen, ‘Collective Security and Collective Self-Defence under the Charter of the United Nations’, p. 784; Tibori Szabó, *Anticipatory Action in Self-Defence*, p. 113; Stephen C. Neff, *War and the Law of Nations*, Cambridge University Press, 2005, p. 318; Oscar Schachter, *International Law in Theory and Practice*, Martinus Nijhoff, 1991, p. 127.

reprisals or countermeasures are permitted “when carried out by economic, financial or other peaceful means”.<sup>76</sup>

The practice of international organisations would seem to support this “most widely-accepted interpretation” of the Charter.<sup>77</sup> In 1964, the Security Council adopted a resolution regarding British military action in Yemen, in which it “*Condemns* reprisals as incompatible with the purposes and principles of the United Nations”.<sup>78</sup> The United Kingdom did not dispute the unlawfulness of reprisals, but rather challenged the categorisation of the military action in question as either a reprisal or retaliation.<sup>79</sup> The Security Council condemned an attack by Israel on villages in Southern Lebanon in 1969 as a violation of the Charter and of previous resolutions, and declared that:

such actions of military reprisal and other grave violations of the cease-fire cannot be tolerated and that the Security Council would have to consider further and more effective steps as envisaged in the Charter to ensure against repetition of such acts.<sup>80</sup>

The General Assembly has also viewed armed reprisals as inconsistent with the Charter of the United Nations in a resolution adopted twenty five years to the day after the entry into force of the Charter. The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States sets out that “States have a duty to refrain from acts of reprisal involving the use of force”.<sup>81</sup> The General Assembly’s 1981 Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States proclaimed that the duty

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<sup>76</sup> Partsch, ‘Reprisals’, p. 202. See also Brierly, *The Law of Nations*, p. 416; Schwarzenberger, *International Law as applied by International Courts and Tribunals*, p. 58; Neff, *War and the Law of Nations*, p. 318; Schachter, *International Law in Theory and Practice*, pp. 185-186.

<sup>77</sup> Barsotti, ‘Armed Reprisals’, p. 79.

<sup>78</sup> Security Council Resolution 188, S/Res/188, 9 April 1964.

<sup>79</sup> Barsotti, ‘Armed Reprisals’, p. 91.

<sup>80</sup> Security Council Resolution 270, S/Res/270, 26 August 1969, paragraph 4. See also Security Council Resolution 111, S/3538, 19 January 1956, paragraph 2; Security Council Resolution 171, S/5111, 9 April 1962, paragraph 2.

<sup>81</sup> General Assembly Resolution 2625 (XXV), 24 October 1970.

of States to refrain from armed intervention and interference also covers “acts of reprisal involving the use of force”.<sup>82</sup> The Final Act of the Conference on Security and Co-operation in Europe obliges participating states to “refrain in their mutual relations from any act of reprisal by force”.<sup>83</sup>

The International Court of Justice has occasionally commented on the legality of armed reprisals. In the *Nuclear Weapons Advisory Opinion*, the Court observed that:

Certain States asserted that the use of nuclear weapons in the conduct of reprisals would be lawful. The Court does not have to examine, in this context, the question of armed reprisals in time of peace, which are considered to be unlawful.<sup>84</sup>

This statement has been criticised for not explicitly declaring armed reprisals to be unlawful,<sup>85</sup> although the Court’s statement can be interpreted as doing so. In *Nicaragua v. United States*, the Court drew on Resolution 2625, finding that it “affords an indication of [States’] *opinio juris* as to customary international law”, and it identifies reprisals as a prohibited “less grave form of the use of force”.<sup>86</sup> The Court addressed the meaning of an armed attack in the context of self-defence and held that “a use of force of a lesser gravity cannot ... produce any entitlement to take collective counter-measures involving the use of force”, and that such acts “could only have justified proportionate counter-measures on the part of the State which had been the

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<sup>82</sup> General Assembly Resolution 36/103, 9 December 1981, Section II(c).

<sup>83</sup> Final Act, Conference on Security and Co-operation in Europe, Helsinki, 1 August 1975.

<sup>84</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, General List No. 95, paragraph 46. India in its submission to the Court seemed to consider reprisals as not being unlawful (“when a State commits such a wrongful act or delict, the use of force by way of reprisal would have to be proportionate”), although it also argued that “reprisals could not involve acts which are *malum in se* such as certain violations of human rights, certain breaches of the laws of war and rules in the nature of *jus cogens*”. See *Letter dated 20 June 1995 from the Ambassador of India, together with Written Statement of the Government of India*, p. 2.

<sup>85</sup> Cassese, *International Law*, p. 303.

<sup>86</sup> *Case Concerning Military and Paramilitary Activities In and Against Nicaragua*, (*Nicaragua v. United States of America*), Merits, 27 June 1986, General List No. 70, paragraph 191.



victim of these”.<sup>87</sup> It held in particular, that such action “could not justify intervention involving the use of force”.<sup>88</sup>

The *Oil Platforms* case is probably the closest the Court could have come to date to addressing armed reprisals, and although the final majority judgment is silent on the subject, several of the judges broached the issue.<sup>89</sup> Alain Pellet raised reprisals when he addressed the Court on behalf of Iran:

You could never accept that, on the pretext that one of the Parties has violated (even by force) the obligation to respect freedom of commerce in their mutual relations, the other Party is entitled to do likewise: these are the very foundations of contemporary international law, built on the prohibition of the use of force in international relations, which you would undermine, thus resurrecting the old right of armed reprisal and at the same time enshrining the right of the strongest to take the “law” into its own hands, a so-called law which is off-limits to the weak. That cannot be the position of the principal judicial organ of the United Nations.

Judge Elaraby viewed the United States action as military reprisals and felt that the Court should have addressed the “illegality of reprisals in international law”.<sup>90</sup> He felt that an ICJ pronouncement on the matter “would have, no doubt, added authority to the illegality of such practice”, and he considered that the judgment was a missed opportunity “to reaffirm, clarify, and, if possible develop, the law on the use of force in all manifestations”.<sup>91</sup> Judge Simma lamented the Court’s failure to address counter-measures involving force.<sup>92</sup> He addressed the question of how a State might respond to a use of force not rising to the level of armed attack, taking the view that when this was addressed in *Nicaragua*, “by such proportionate counter-measures the Court

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<sup>87</sup> *Ibid.*, paragraph 249.

<sup>88</sup> *Ibid.*

<sup>89</sup> *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, 6 November 2003, I.C.J. Reports 2003, p. 161. It has been argued that the judgment implicitly finds the United States military action to be unlawful reprisals, see Christine Gray, *International Law and the Use of Force* (3<sup>rd</sup> edn.), Oxford University Press, 2008, p. 153.

<sup>90</sup> Dissenting Opinion of Judge Elaraby, paragraph 1.2.

<sup>91</sup> *Ibid.*

<sup>92</sup> Separate Opinion of Judge Simma, paragraph 12.

cannot have understood mere pacific reprisals”.<sup>93</sup> He advocates a concept of defensive military action that falls short of “full-scale self-defence”.<sup>94</sup>

The International Law Commission has had to address armed reprisals when preparing the *Articles on State Responsibility*, given the continued validity of non-forcible reprisals, now renamed counter-measures.<sup>95</sup> The Commission was persuaded that developments since 1945 confirmed that the prohibition of armed reprisals or forcible countermeasures had “acquired the status of a customary rule of international law”.<sup>96</sup> Accordingly, the regime of countermeasures in the *Articles* excludes measures affecting “[t]he obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations”.<sup>97</sup> This prohibition on the use of force includes armed reprisals and “definitively consolidates the inclusion of their peaceful character in the definition of countermeasures”.<sup>98</sup> During the preparatory work of the *Articles*, the Commission observed, and dismissed, a line of thinking which has claimed the continuing legitimacy or indeed legality of armed reprisals as part of self-defence.

The Commission stated:

The contrary trend, aimed at justifying the noted practice of circumventing the prohibition by qualifying resort to armed reprisals as self-defence, does not find any plausible legal justification and is considered unacceptable by the Commission. Indeed, armed reprisals do not present those requirements of immediacy and necessity which would only justify a plea of self-defence.<sup>99</sup>

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<sup>93</sup> *Ibid.*

<sup>94</sup> See also Yoram Dinstein, *War, Aggression and Self-Defence*, p. 254. See however James Green, *The International Court of Justice and Self-Defence in International Law*, Hart, 2009, pp. 54-56, where he seeks to distinguish forcible countermeasures and armed reprisals.

<sup>95</sup> *Third report on State responsibility, by Mr. Gaetano Arango-Ruiz, Special Rapporteur*, A/CN.4/440 and Add.1, 19 July 1991, pp. 11-12.

<sup>96</sup> International Law Commission, *Summary record of the 2424<sup>th</sup> Meeting*, 21 July 1995, I *Yearbook of the International Law Commission* (1995) p. 297. See also International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries* (2001), Vol. II, Part Two, *Yearbook of the International Law Commission*, p. 132.

<sup>97</sup> Article 50(1)(a). See also Lesaffre, ‘Circumstances Precluding Wrongfulness’, p. 469.

<sup>98</sup> Denis Alland, ‘The Definition of Countermeasures’, in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility*, 1127, p. 1130. See however Kretzmer, ‘The Inherent Right to Self-Defence and Proportionality in *Ius ad Bellum*’, p. 22.

<sup>99</sup> International Law Commission, *Summary record of the 2424<sup>th</sup> Meeting*, 21 July 1995, I *Yearbook of the International Law Commission* (1995) p. 297 (footnotes omitted).

The final section of this chapter addresses the attempts, by scholars primarily, to revive the doctrine of reprisals and to challenge the accepted view that the Charter's rules do not tolerate such a use of force.

### III. The Futile Case for Revival

From the time of the adoption of the Charter, scholars have occasionally claimed that armed reprisals are not absolutely prohibited by the treaty's rules on the use of force and peaceful settlement of disputes.<sup>100</sup> Armed reprisals might be seen as a "a necessary evil"<sup>101</sup> or even a "desirable tool",<sup>102</sup> with one argument being that it would be "preferable to maintain legal standards to govern the resort to coercion short of war, rather than abandon all such resort to force to a blanket condemnation".<sup>103</sup> Such positions are taken, it is claimed, because of "U.N. impotence to provide its members with protection against illegal uses of force".<sup>104</sup> Derek Bowett's 1972 *American Journal of International Law* article has been particularly influential in the revival debate.<sup>105</sup> Bowett suggested a "credibility gap" between State practice and the norm prohibiting reprisals, and argued that "a total outlawry of armed reprisals, such as the drafters of the Charter intended, presupposed a degree of community cohesiveness

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<sup>100</sup> See for example Speyer Colbert, *Retaliation in International Law*, p. 200; Barry Levenfeld, 'Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal Under Modern International Law', 21 *Columbia Journal of Transnational Law* 1 (1982-1983), 1, p. 35; Alberto R. Coll, 'Legal and Moral Adequacy of Military Responses to Terrorism', 81 *American Society of International Law Proceedings* (1987) 297, pp. 302-303; O'Brien, 'Reprisals, Deterrence and Self-Defense in Counter-Terror Operations', p. 470; Arend Clark and Beck, *International law and the use of force*, p. 186.

<sup>101</sup> Partsch, 'Reprisals', p. 201.

<sup>102</sup> Levenfeld, 'Israel's Counter-Fedayeen Tactics in Lebanon', p. 35.

<sup>103</sup> *Ibid.* See also Lillich, 'Forcible Self-Help under International Law', p. 133; Speyer Colbert, *Retaliation in International Law*, p. 201.

<sup>104</sup> Coll, 'Legal and Moral Adequacy of Military Responses to Terrorism', pp. 302-303. See also Falk, 'The Beirut Raid and the International Law of Retaliation', p. 428; Lillich, 'Forcible Self-Help under International Law', pp. 130-132; Speyer Colbert, *Retaliation in International Law*, p. 1; Thomas M. Franck, *Recourse to Force; State Action Against Threats and Armed Attacks*, Cambridge University Press, 2002, pp. 110, 132-133; O'Brien, 'Reprisals, Deterrence and Self-Defense in Counter-Terror Operations', p. 470.

<sup>105</sup> Bowett, 'Reprisals Involving Recourse to Armed Force', 1.

and, with it, a capacity for collective action to suppress any resort to unlawful force which has simply not been achieved”.<sup>106</sup> He asserted that “[t]he law of reprisals is, because of its divorce from actual practice, rapidly degenerating to a stage where its normative character is in question”.<sup>107</sup> The Security Council has condemned retaliatory actions, but often for differing reasons, which is problematic for Bowett, “if the principle is that *all* reprisals are illegal”.<sup>108</sup> There may be scope for “reasonable” legitimate armed reprisals he claims, “that certain reprisals will, even if not accepted as justified, at least avoid condemnation”.<sup>109</sup> He was clear to point out in his article that “*if this trend continues*, we shall achieve a position in which, while reprisals remain illegal *de jure*, they become accepted *de facto*”.<sup>110</sup> He added, however, that:

it is possibly premature to suggest that the principle is now jeopardized. The principle as part of the broader prohibition of the use of force, is *jus cogens*, and no spasmodic, inconsistent practice of one organ of the United Nations could change a norm of this character.<sup>111</sup>

As a member of the International Law Commission, Bowett articulated the similar view in later years that armed reprisals were “not admissible countermeasures”, because of the peremptory status of the prohibition on the use of force in Article 2(4).<sup>112</sup>

Claims of state practice sit at the crux of Bowett’s article and others arguing that the prohibition of armed reprisals is out of step with how States actually use force.<sup>113</sup> It is argued that customary international law,<sup>114</sup> or at least State practice,<sup>115</sup>

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<sup>106</sup> *Ibid.*, pp. 1-2.

<sup>107</sup> *Ibid.*, p. 2.

<sup>108</sup> *Ibid.*, p. 7.

<sup>109</sup> *Ibid.*, pp. 10, 20.

<sup>110</sup> *Ibid.*, pp. 10-11 [emphasis added].

<sup>111</sup> *Ibid.*, p. 22.

<sup>112</sup> International Law Commission, *Summary record of the 2423<sup>rd</sup> Meeting*, 20 July 1995, I *Yearbook of the International Law Commission* (1995) p. 295.

<sup>113</sup> See also Kelly, ‘Time Warp to 1945 – Resurrection of the Reprisal and Anticipatory Self-Defense Doctrines in International Law’, pp. 12-19; Dinstein, *War, Aggression and Self-Defence*, p. 252.

serve to weaken the norm prohibiting reprisals. Clearly absent from these assertions has been the element of *opinio juris*, with States almost never labelling military actions as reprisals. The 1923 Italian bombardment stands as one of the few twentieth century examples of a State representative unambiguously categorizing action as an armed reprisal.<sup>116</sup> There are a few isolated examples,<sup>117</sup> but nothing approaching a widespread practice, and States invariably justify unilateral actions under self-defence, rather than reprisals. Barsotti considers that the frequent recourse to self-defence suggests that States “are aware of the illegality of their conduct if it is described in any other way”.<sup>118</sup> Moreover, scholars have noted that Israeli military operations against neighbouring States “are generally taken to constitute the main nucleus of modern practice on armed reprisals”.<sup>119</sup> Employment of the language of reprisals or retaliation, as with self-defence (which is seemingly favoured by Israel), may serve to portray military action as being responsive in nature.<sup>120</sup> The Security Council itself, as well as individual members, has frequently condemned Israeli actions as unlawful reprisals or retaliation contrary to the United Nations Charter.<sup>121</sup> Roberto Barsotti provides a most persuasive rebuttal to Bowett’s “reasonable”

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<sup>114</sup> Levenfeld, ‘Israel’s Counter-Fedayeen Tactics in Lebanon’, p. 46.

<sup>115</sup> Coll, ‘Legal and Moral Adequacy of Military Responses to Terrorism’, pp. 302-303.

<sup>116</sup> Kalshoven, *Belligerent Reprisals*, pp. 4-5.

<sup>117</sup> For the sole examples of reprisals, as opposed to retaliation, referred to by Falk and Bowett see Falk, ‘The Beirut Raid and the International Law of Retaliation’, p. 429; Bowett, ‘Reprisals Involving Recourse to Armed Force’, p. 13, fn. 48. See however Barsotti, ‘Armed Reprisals’, pp. 87, 91.

<sup>118</sup> Barsotti, ‘Armed Reprisals’, p. 91.

<sup>119</sup> *Ibid.*, p. 88. See also Lillich, ‘Forcible Self-Help under International Law’, p. 131; O’Brien, ‘Reprisals, Deterrence and Self-Defense in Counter-Terror Operations’, p. 421; Dinstein, *War, Aggression and Self-Defence*, p. 254.

<sup>120</sup> For example see O’Brien, ‘Reprisals, Deterrence and Self-Defense in Counter-Terror Operations’, pp. 426-433, 441, 443, describing reactive measures as “counterterror” and “counterforce” actions. See, however, the example on pp. 432-433, where an action was viewed as preventive, but that “political considerations may have been more influential in determining the timing and character of the raids”.

<sup>121</sup> See for example United Nations Security Council, 1502<sup>nd</sup> Meeting, 18 August 1969, S/PV.1502, paragraph 74. See also Bowett, ‘Reprisals Involving Recourse to Armed Force’; Gray, *International Law and the Use of Force*, pp. 236-237; O’Brien, ‘Reprisals, Deterrence and Self-Defense in Counter-Terror Operations’, pp. 435-437.

reprisals suggestion,<sup>122</sup> and holds that there is “absolutely no sign of an *opinio juris* in the conduct of the States in question, but there is even evidence of an awareness of the unlawfulness of reprisals, which is stated explicitly above all when other States carry out retaliatory action”.<sup>123</sup>

As noted by the International Law Commission, there have been claims that reprisals are permitted under the rubric of self-defence,<sup>124</sup> although this is not a well-supported contention given the clear distinctions between the two concepts.<sup>125</sup> The Acting United States Secretary of State, Kenneth Rush, touched on this in 1974 while endorsing the norm prohibiting reprisals in Resolution 2625:

The United States has supported and supports the foregoing principle. Of course, we recognized that the practice of States is not always consistent with this principle and that it may sometimes be difficult to distinguish the exercise of proportionate self-defence from an act of reprisal. Yet, essentially for reasons of the abuse to which the doctrine of reprisals particularly lends itself, we think it desirable to endeavor to maintain the distinction between lawful self-defence and unlawful reprisals.<sup>126</sup>

It is argued that overlap between the concepts in practice is primarily a matter of fact rather than law.<sup>127</sup> The matter is complicated by the broadening of self-defence by some States in an attempt to shelter unilateral uses of force going beyond what is acceptable under the Charter.<sup>128</sup> Yoram Dinstein contends that his controversial concept of “defensive armed reprisals” is permitted under Article 51 and customary

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<sup>122</sup> Barsotti, ‘Armed Reprisals’, pp. 94-97.

<sup>123</sup> *Ibid.*, p. 92.

<sup>124</sup> See for example Franck, *Recourse to Force*, pp. 65-68; O’Brien, ‘Reprisals, Deterrence and Self-Defense in Counter-Terror Operations’, p. 470.

<sup>125</sup> Kalshoven, *Belligerent Reprisals*, p. 27. See however David Kretzmer, ‘The Inherent Right to Self-Defence and Proportionality in *Ius ad Bellum*’, p. 23; Gray, *International Law and the Use of Force*, pp. 150-151; Neff, *War and the Law of Nations*, p. 330.

<sup>126</sup> Department of State File No. P74 0071-1935, reprinted in 68 *American Journal of International Law* (1978) 736. See also American Law Institute, *Third Restatement of the Law; The Foreign Relations Law of the United States*, Volume II, 1987, p. 383.

<sup>127</sup> Kalshoven, *Belligerent Reprisals*, p. 27.

<sup>128</sup> See for example Gray, *International Law and the Use of Force*, pp. 197-198. See also Bowett, ‘Reprisals Involving Recourse to Armed Force’, pp. 2-10; Kretzmer, ‘The Inherent Right to Self-Defence and Proportionality in *Ius ad Bellum*’, p. 29; Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors*, p. 52; Simma et. al., *The Charter of the United Nations*, p. 794.

international law, while accepting the general rule that armed reprisals are themselves unlawful.<sup>129</sup> These defensive armed reprisals are justified in response to an armed attack, “in circumstances satisfying all the requirements of valid self-defence”, including necessity, proportionality and immediacy.<sup>130</sup> The issues of immediacy and appropriate targets are, however, treated more flexibly by Dinstein in his conception of armed reprisals than would be generally accepted under self-defence. With defensive armed reprisals, “the responding State strikes at a time and a place different from those of the original armed attack”,<sup>131</sup> the target of military action “may be entirely different and far away”,<sup>132</sup> while proportionality remains the “quintessential” or “decisive” factor in assessing legality.<sup>133</sup>

Aside from the lack of convincing legal grounds underpinning the argument that armed reprisals are not contrary to the United Nations Charter, there are other reasons why the case for a revival of armed reprisals is weak. The reprisals doctrine holds obvious appeal for States seeking to subvert the strictures of the Charter, for it “provides justification on legal grounds for acts ordinary illegal”.<sup>134</sup> Reprisals or retaliatory action have invariably been the preserve of more powerful and usually Western States,<sup>135</sup> which highlights the inherent risks of shaping an international legal doctrine solely in light of the interests of the major military powers. Militarily strong States are unlikely to “give way under violent and coercive pressure” in the form of a reprisal, and armed reprisals “may be used to inflict injury on small states, and extort

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<sup>129</sup> Dinstein, *War, Aggression and Self-Defence*, pp. 245, 250.

<sup>130</sup> *Ibid.*, pp. 245, 247.

<sup>131</sup> *Ibid.*, p. 245. See also *ibid.*, p. 249.

<sup>132</sup> *Ibid.*, p. 245.

<sup>133</sup> *Ibid.*, pp. 248, 254. See further Cassese, *International Law*, pp. 301-303, 371-373; Arend Clark and Beck, *International law and the use of force*, p. 186; O'Brien, ‘Reprisals, Deterrence and Self-Defense in Counter-Terror Operations’, p. 476; Neff, *War and the Law of Nations*, p. 330; Kretzmer, ‘The Inherent Right to Self-Defence and Proportionality in *Ius ad Bellum*’, p. 30; Separate Opinion of Judge Simma, paragraph 13.

<sup>134</sup> Speyer Colbert, *Retaliation in International Law*, p. 1.

<sup>135</sup> Barsotti, ‘Armed Reprisals’, p. 90.

from them compliance with unreasonable demands”,<sup>136</sup> to create a *casus belli* or gain a military advantage over an enemy before war breaks out.<sup>137</sup> Ian Brownlie described reprisals as a weapon of the Great Powers for pursuit of national policy and considered it doubtful that “any non-European state or small power has resorted to forcible reprisal or pacific blockade”.<sup>138</sup> The unilateral nature of armed reprisals means that “an aggrieved state is the judge in its own case” and there is thus a significant potential for abuse of the doctrine, not to mention further retaliation and greater instability.<sup>139</sup> Derek Bowett found the strongest argument against armed reprisals is their “degenerating effect”,<sup>140</sup> and firmly concluded that “reprisals have proved to be productive of greater violence rather than a deterrent to violence”.<sup>141</sup>

There are of course imperfect alternatives available, including non-forcible countermeasures and sanctions, which are less likely to be counterproductive.<sup>142</sup> A reinstatement of the doctrine of armed reprisals would undermine the established rules of international law on the use of military force and facilitate unilateral resort to force that would actually threaten international peace and security. Reprisals would comprise “a regression to the ‘just war’ theory”,<sup>143</sup> and hark back to a “primitive model of society from which the spirit of cooperation and a growing belief in the importance of social values have progressively brought us further away”.<sup>144</sup> The case for the revival of armed reprisals remains unpersuasive, and its failure to gain any

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<sup>136</sup> Lawrence, *The Principles of International Law*, pp. 343-344. See also Brierly, *The Law of Nations*, p. 400.

<sup>137</sup> Speyer Colbert, *Retaliation in International Law*, p. 55.

<sup>138</sup> Brownlie, *International Law and the Use of Force by States*, p. 220. See also Speyer Colbert, *Retaliation in International Law*, p. 200.

<sup>139</sup> Speyer Colbert, *Retaliation in International Law*, pp. 200-201. See also Lesaffre, ‘Circumstances Precluding Wrongfulness’, p. 469; Denis Alland, ‘The Definition of Countermeasures’, p. 1129.

<sup>140</sup> Bowett, ‘Reprisals Involving Recourse to Armed Force’, p. 16.

<sup>141</sup> *Ibid.*, p. 32.

<sup>142</sup> Barsotti, ‘Armed Reprisals’, p. 101. See also Kalshoven, *Belligerent Reprisals*, p. 10.

<sup>143</sup> Jackson Nyamuya Maogoto, ‘War on the Enemy: Self-Defense and State Sponsored Terrorism’, 4 *Melbourne Journal of International Law* (2003), 406, p. 428.

<sup>144</sup> Barsotti, ‘Armed Reprisals’, p. 102.



significant acceptance by States serves in fact to reinforce the widespread support for the established norms on the use of force.