

RECONSIDERING REPRISALS

MICHAEL A. NEWTON*

ABSTRACT

The prohibition on the use of reprisals is widely regarded as one of the most sacrosanct statements of the jus in bello applicable to the conduct of modern hostilities. The textual formulations are stark and subject to no derogations. Supporters of the bright line ban describe it as a vital “bulwark against barbarity.” In the words of the International Committee of the Red Cross, the prohibition is “absolute,” despite the fact that the declarations of key states indicate residual ambiguity over the scope of permissible reprisals, particularly in the context of non-international armed conflicts. Reprisals are a recurring feature of state practice, though conducted under varying legal rubrics and shifting rationales. Reasonable reprisals grounded on an empirical assessment of their deterrent value or framed as appropriate punishment for prior acts of terror may be the most morally acceptable and humane strategy for serving a strategic imperative of civilized society. Limited reprisals may in practice be essential to counteract the growing threat of transnational terrorists. Reasonable reprisals may represent the best long term way to erode support for those who would mobilize terrorist actors to willfully ignore the rules protecting innocent civilians thereby violating the most basic human rights of their victims. This is especially true if nations create clear lines of agreed legal authorities supported by independent adjudication of the motives and methods employed in such reprisals. Peace-loving states should seek common ground to enhance efforts to protect innocent citizens from the effects of terrorist violence. Thoughtful and multilateral reassessment of the lawful scope and rationale for reasonable reprisals is overdue.

* Professor of the Practice of Law, Vanderbilt University Law School. For contact information see <http://law.vanderbilt.edu/newton>. The errors, omissions, and oversights of this essay are solely my own. I gratefully acknowledge the assistance and insight gleaned from the participants in the War Bound by Law Symposium at Duke University School of Law. Special appreciation is due to Laurence Helfer, Larry May, Michael Scharf, Mark Osiel, Ingrid Wuerth, Isaac Sanders, Ken Anderson, and Shane Darcy for their intellectual insights on this important topic.

INTRODUCTION

The prohibition against armed reprisals remains one of the most well established *jus in bello* benchmarks, at least in principle and in textual proscription. Acts of reprisal are strongly disfavored on the face of the Geneva Conventions and their Additional Protocols.¹ They are nevertheless, and have been, widespread in actual state practice,² albeit often carried out under alternative legal rubrics and shifting rationales. Rather than relying on a clear right of reprisals grounded in the law regulating the conduct of hostilities, states have most frequently resorted to the rhetoric of sovereign prerogative in defense of national security interests or other vital sovereign assets as the rationale for de facto reprisals. This shift into the de facto realm of *jus ad bellum* leaves many unanswered questions and assures that every decision to use force against terrorist actors is not only highly scrutinized, but also highly suspect when viewed through the *jus in bello* lens.³ From the perspective of the aspirational goals of humanitarian law, it might be considered heresy for any international lawyer to contemplate reconsideration of the normative rationale and scope for reasonable armed reprisals. That is precisely the purpose of this brief essay.

As former U.N. Secretary General Dag Hammarskjöld wrote, “[t]here is a point at which everything becomes simple and there is no longer any question of choice, because all you have staked will be lost if you look

1. See *infra* notes 31-49 and accompanying text. The Vienna Convention on the Law of Treaties specifically reinforces the provisions of the Geneva Conventions related to reprisals in the material breach provisions of Article 60. States may not invoke material breach as a ground for terminating a treaty or suspending its operation in whole or in part when another state has breached obligations related to “the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.” Vienna Convention on the Law of Treaties, art. 60(5), May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. (1969) (entered into force Jan. 27, 1980).

2. See, e.g., William V. O’Brien, *Reprisals, Deterrence and Self-defense in Counterterrorism Operations*, 30 VA. J. INT’L L. 462, 464-65 (1990); 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, 16-17 (2003) (discussing the U.S. bombings in Tripoli, Libya in response to what was characterized as a “pattern of indiscriminate violence” against U.S. citizens by Libya); *U.S. Explains Its Missile Attack on Iraq to Security Council*, Agence Fr.-Press, June 27, 1993, available at 1993 WL 10739350 (discussing the U.S. argument that the bombing of Iraqi targets in response to the assassination attempt on former president George H. W. Bush was an act of legitimate self defense); Amos N. Guiora, *Self-Defense - From the Wild West to 9/11: Who, What, When*, 41 CORNELL INT’L L.J. 631, 661-62 (2008) (discussing the targeting of al Qaeda linked targets in Sudan and Afghanistan by 79 cruise missiles in response to the bombings of U.S. embassies in Kenya and Tanzania).

3. See, e.g., William H. Taft IV, *Self-Defense and the Oil Platforms Decision*, 29 YALE L.J. 295 (2004).

back. Life's point of no return."⁴ September 11 removed any ability for responsible governments to hide behind a façade of complacent commercial pursuits because acts of transnational terrorism threaten the economic, social, and institutional foundations of states around the world. Phrased another way, the very foundations of modern society, grounded on respect for humanity dignity and the individual worth of each citizen, would be fundamentally altered if leaders succumb to the manipulation and the will of those who plan and orchestrate transnational terrorist acts. If indeed acts of terror can be categorized as deliberate attacks against the fabric of civilized society and the interests of peace-loving peoples, then the most fundamental obligation of governments is to ensure the survival of societal order by using every feasible method to deter their repetition and eradicate the threat of recurring terrorism.

The paradox is that the most humane way to preserve human lives and liberties in the larger sense may be to use limited armed reprisals that many would argue are, by definition, inhumane and seemingly random from the narrow perspective of the (often innocent) recipients. Thus, nearly a decade after the shock of the September 11 attacks, the civilized nations of the world struggle to articulate a common framework for repressing acts of transnational terror and for responding in a swift and unified manner when appropriate. In effect, the very certainty of the legal prohibition on reprisals creates an unsettling indeterminacy precisely because it reveals a chasm between the common sense of ordinary people who know that terrorists must be stopped if societal order is to endure and the conflicting obligations of governments to abide by settled international law while defending the lives and property within their jurisdiction.

One principle of international law and unity is absolutely clear. Terrorism in all its forms and manifestations constitutes one of the most serious threats to international peace and security, as well as perhaps the most pernicious threat to the fundamental human rights of private peace-loving citizens even nearly a decade after September 11. There is universal and strongly articulated support for the positivist legal premise that "any acts of terrorism are criminal and unjustifiable, regardless of their motivation, whenever and by whomsoever committed and are to be unequivocally condemned."⁵ The U.N. General Assembly reaffirms that

4. DAG HAMMARSKJÖLD, MARKINGS 66 (transl. Leif Sjöberg & W.H. Auden 1981).

5. S. C. Res. 14565, U.N. SCOR, 58th Sess., U.N. Doc. S/RES/1456 (2003). The United Nations Global Counterterrorism Strategy reiterates the "strong condemnation" of the international community and states the same principle as follows: "terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes."

“no terrorist act can be justified in any circumstances.”⁶ The security, stability, economic vitality, sovereignty, political independence, and citizen safety of all states should be protected against terrorist acts, irrespective of how democratic or human rights compliant the government in question. It is inconceivable that organized societies or the governments that are sworn to protect and defend their interests would merely shrug in resignation to the reality of ongoing transnational terrorism.

These cornerstones of legal and policy cohesion spawned an extremely rare fever of international unity in the aftermath of the al Qaeda attacks in New York and Washington, D.C. President Bush declared a state of national emergency,⁷ and the U.N. Security Council swiftly passed Resolution 1368 on a unanimous vote categorizing the attacks as a “threat to international peace and security,” affirming the “inherent right of individual or collective self-defense” expressed in Article 51 of the U.N. Charter, and specifically directing “all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks.”⁸ For the first time in its storied existence, the North Atlantic Treaty Organization (“NATO”) invoked the principle of Article 5 of the Washington Treaty, thereby recognizing that the attacks constituted an “armed attack” consistent with the treaty’s provisions that trigger NATO obligations to assist another member so attacked.⁹ NATO aircraft helped to fly combat air patrols over U.S. airspace in the immediate wake of the attacks.¹⁰

On September 20, 2001, President Bush addressed a joint session of Congress, aware that the world—and perhaps key figures in the terrorist network—were listening. He declared that “we are a country awakened to danger and called to defend freedom. Our grief has turned to anger, and anger to resolution. Whether we bring our enemies to justice, or bring justice to our enemies, justice will be done.”¹¹ The declaration of this clear

6. UNGAOR (62d Sess.), Agenda Item 108, Measures to eliminate international terrorism, 13 Nov. 2007, U.N. Doc. A/C.6/62/L.14.

7. Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001).

8. S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001). The Security Council stressed that “those responsible for aiding, supporting or harbouring [sic] the perpetrators, organizers and sponsors of these attacks will be held accountable.” *Id.*

9. Press Release, NATO, Invocation of Article 5 Confirmed (Oct. 2, 2001) <http://www.nato.int/docu/update/2001/1001/e1002a.htm> (last visited Nov. 10, 2009).

10. NATO and the fight against terrorism, http://www.nato.int/cps/en/natolive/topics_48801.htm (last visited May 21, 2010) (describing Operation Eagle Assist which lasted from October 2001 to May 2002 and was intended to free up U.S. air assets for strikes against Afghanistan, from which the September 11 attacks were planned and launched).

11. Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2001, 1 PUB. PAPERS 1140 (Sept. 20, 2001), available at <http://>

national goal was met by the thunderous applause of the assembled Congress and audience (which also included British Prime Minister Tony Blair). His words stirred citizens across America to strengthen a communal resolve and rededicate a mutual commitment to the goal of justice. President Bush further declared that the campaign against international terrorism¹² is more than just a fight to secure American freedoms because it is “civilization’s fight” in the sense that it will be waged on behalf of all the people who “believe in progress and pluralism, tolerance and freedom.”¹³ Congress responded by enacting the Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States (“AUMF”). The much discussed, and arguably much abused, AUMF authorized the president “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001”¹⁴ However, those who pose serious threats to the people and property of the United States will not always be associated with al Qaeda, nor within the domestic authority granted by the AUMF. Civilized nations that seek to deter terrorist acts in the future are forced to either make contorted arguments that will likely be rejected by a politicized United Nations as in the past, or simply disregard the textual prohibitions of the Geneva Conventions and

www.dartmouth.edu/~govdocs/docs/iraq/092001.pdf [hereinafter Joint Session]. Secretary of State Powell echoed a similar sentiment in his first public comments made in Lima, Peru:

A terrible, terrible tragedy has befallen my nation, . . . but . . . you can be sure that America will deal with this tragedy in a way that brings those responsible to justice. You can be sure that as terrible a day as this is for us, we will get through it because we are a strong nation, a nation that believes in itself.

BOB WOODWARD, *BUSH AT WAR 10* (2002).

12. For a definition of international terrorism, see 18 U.S.C. § 2331, providing that for the purposes of the federal criminal law, the term

“international terrorism” means activities that

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended –

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by assassination or kidnapping; and

(C) occur primarily outside the territory jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which the perpetrators operate or seek asylum.

13. Joint Session, *supra* note 11.

14. Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, 115 Stat. 224 (2001).

the Additional Protocols. Thus, the current complete ban on reprisals against non-state actors or the state officials that support and sponsor them may prevent future U.S. administrations from addressing emerging threats before many more lives are lost and transnational terrorists disrupt international order.

In tension with the paralysis spawned by the textual prohibitions of the *jus in bello*, the emotionalism of ordinary people following the immediate aftermath of the September 11 attacks generated a reality that is generally unnoticed, or at least tactfully overlooked by international law elites and academics. The esoteric discussion of “justice” in the context of terrorist acts does not provoke images of ardent advocacy before marbled benches or admiration for arguments regarding evidentiary exceptions. At a visceral level, both the immediate victims and the larger societal interests yearn for some sort of retribution. We know “justice” when we see it, and our human nature leads many to hope that terrorists will feel some measure of the pain that they inflicted on innocents. If commentators candidly acknowledged the conversations in families around the world affected by terrorist violence, they would concede that at some base level transnational terrorists who target and kill innocent victims on an indiscriminate basis deserve to be punished for that cruelty. Attacks on innocent victims stir an inevitable undercurrent of yearning for retribution, or even revenge, in its starkest form.

On the one hand, thoughtful modernists are aware that a quest for revenge on a personal or societal level is unseemly and likely counterproductive to lasting peace. Our moral compass would be troubled if we could contemplate a degree of pleasure from deliberate infliction of human suffering, even if we deemed it to be well earned and deserving based on a larger utilitarian calculus. Many citizens would be vaguely ashamed that part of our consciousness would exult in acts of retaliation. Even then, the undercurrent of emotion that “they got what they deserved” would bring a comforting assurance that the baseline of our civilized structures cannot be reshaped at the whim of terrorist actors. At the same time, organized civil society subconsciously rejects perspectives that postulate a moral or legal equivalence between an enemy that deliberately and repeatedly violates the basic norms of international law and a professional military that is required to “comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.”¹⁵ On the 60th anniversary of the Geneva

15. See, e.g., DEP'T OF DEFENSE, DIRECTIVE 2311.01E, DOD LAW OF WAR PROGRAM, ¶ 4.1 (9 May 2006), available at <http://www.dtic.mil/whs/directives/corres/pdf/231101p.pdf>. This Directive

Conventions, the U.S. permanent representative to the United Nations, for example, articulated the rationale for *jus in bello* norms that preserve appropriate discipline and the humanity of state actors because “those who take hostages, or send trucks bombs into apartment buildings, or rockets into civilian neighborhoods have no legitimacy.”¹⁶

Resuscitation of the law of reprisals has the potential to provide precisely the kind of pressure release valve to channel the cognitive cross currents noted above. To be clear, in my view reasonable and rational armed reprisals should not be confused with a wholly justifiable condemnation of collective punishments. It is not at all the purpose of this short essay to propose a sweeping regime of indiscriminate retaliation not rooted in the clear responsibility of individual wrongdoers. Given the extensive framework of developed humanitarian law, this essay postulates that the bright-line rule banning all reprisals under all circumstances creates imprecision that may actually facilitate further terrorist crimes by hindering effective state responses. The imperative to act on the basis of popular will may explain the prevalence of state action to retaliate against threats to persons and property, even when policy makers took great pains to carefully describe their actions by reference to more acceptable legal and moral frameworks. In a larger sense, a reconsideration of the law of reprisals could close the gap between the phraseology of international law and its practice in the gritty world of pragmatism in pursuit of imperative state interests. Reprisals are prohibited in theory, as will be explained in more detail below. Nevertheless, the generalized cloud of good will generated by the bright-line prohibition may foster further illegal acts on the part of non-state actors who feel as though they are unconstrained by the norms of international law, yet are simultaneously protected from state retaliation by the very treaties they disregard and exploit.

Furthermore, this essay in no way contemplates resuscitation of a genus of reprisals that would permit state actors to lash out against persons based on high emotion or the pressure of popular opinion whether or not

replaced the 1998 Directive that required that United States Armed Forces to “comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized.” This is a policy statement worthy of commendation that also makes pragmatic sense from the standpoint of the commander responsible for controlling the conduct of hostilities in a lawful manner; it must also be understood in the context of the clear jurisprudential rejection of any defense to war crimes based on an argument of *tu quoque* or lack of reciprocity by an opponent in an armed conflict. *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1-A, ¶ 250 (Appeals Judgment, 12 Nov. 2009) (upholding the Trial Chamber sentence of 29 years confinement).

16. Ambassador Susan E. Rice, Statement by Ambassador Susan E. Rice, U.S. Permanent Representative to United Nations, on 60th Anniversary of Geneva Conventions, Dec. 3, 2009 (on file with author).

there is a clearly defined operational purpose and concomitant consideration of the applicable principles of humanitarian law. Mere acts of emotive revenge never create the conditions of lasting peace. Acts of emotional revenge directed against innocent civilians are crimes under all circumstances, and ought to be seen as illegal and indeed imprudent as an operational matter precisely because they undermine the popular support that will be the decisive element in eliminating the phenomenon of terrorism in the next decade. Quite the contrary, when states do act, as they often have in the past thirty years since the complete ban on reprisals took root in the soil of the Additional Protocols, they are forced to defend their actions on alternative legal grounds. State action that constitutes what I believe would accurately be described as reprisals, such as, inter alia, the bombing of Tripoli, or the cruise missile strikes in Sudan¹⁷ and Afghanistan following the failed attempt to murder former president George H. W. Bush, is recognizable as such to the population of non-legal laypeople yet is normally justified using the rhetoric of lawful self defense conducted pursuant to the inherent right of sovereign states. Because there are no internationally defined standards for lawful reprisals, the corresponding commingling of *jus ad bellum* with *jus in bello* constraints has created legal uncertainty that clouds the legality of state responses to terrorist acts and hinders rapid responsiveness to protect people's basic rights.

At worst, the current legal uncertainty emboldens terrorists because, while humanitarian law belongs to the armed forces of the world and imposes an inalterable professional obligation, the legal lacunae permit terrorist information operations to make it into a media tool to be manipulated and sensationalized. The incoherence in explaining sovereign responses to terrorist acts permits the legal structure to be portrayed as nothing more than a mass of indeterminate subjectivity that is nothing more than another weapon in the moral domain of conflict at the behest of the side with the best cameras, biggest microphones, and most compliant media accomplices. There is a very real danger that terrorist video tapes and leaked statements can create manipulation of an all too willing international media and therefore mask genuine violations of the law with spurious allegations and misrepresentations of the actual state of the law. Failure to articulate the correct state of the law in turn feeds into an undercurrent of suspicion and politicization that erodes the very foundations of humanitarian law. At the very least, the current legal

17. See, e.g., *El-Shifa Pharmaceutical Industries Co. v. United States*, 559 F.3d 578 (D.C. Cir. 2009) (affirming the dismissal of claims related to the 1998 bombing in Sudan on the basis that the President's publicly stated self defense rationale and the purported linkage of the pharmaceutical plants owners to terrorist organizations are non-justiciable political questions).

framework allows terrorist organizations and their sympathizers to portray state responses as legally questionable. In the future, reasonable reprisals grounded on an empirical assessment of their deterrent value or framed as appropriate punishment or retribution for prior acts of terror may be the best way of eroding support for those who would mobilize terrorist actors to willfully ignore the rules protecting innocent civilians and violate the most basic human rights of their innocent victims. Limited reprisals may well be the most moral and humanitarian response to the growing threat of transnational terrorism.

The current state of affairs requires international law to bear too much weight, and has the predictable consequence of causing critics to discount the larger endeavor to regulate conflicts. Commenting on the impractical aspects of Additional Protocol I, the eminent Dutch jurist Bert Röling (who served on the bench of the Tokyo International Military Tribunal) observed that treaty provisions ought not “prohibit what will foreseeably occur” because the “laws of war are not intended to alter power relations, and if they do they will not be observed.”¹⁸ The disconnects between aspirational legal rules and human experience are borne out in operational experience by states that act decisively to protect the lives and property of their citizens, which feeds an undercurrent of suspicion and politicization that could erode the very foundations of humanitarian law. This gap in turn leads to a cycle of cynicism and second-guessing that could weaken the commitment of some policy makers or military forces to actually follow the law.

More to the point, the absence of express authority to plan and conduct careful reprisals against those who plan and practice acts of transnational terror creates precisely the climate that may well generate additional acts of terrorism. Thus, a thoughtful reconsideration of reprisals is in order for those who seek to craft an international legal regime that is both effective at inducing compliance yet responsive to evolving international experience.¹⁹ This essay will conclude by framing the rationale for reconsideration of the flat prohibition on reprisals. Before considering the merits of what would be a highly controversial reconsideration, the next section will recount the historical basis for the prohibition and its current articulation in the authoritative texts governing *jus in bello*.

18. Bert Röling, *Criminal Responsibility for Violations of the Laws of War*, REVUE BELGE DE DROIT INT'L, 12, 25-26 (1976), quoted in GEOFFREY BEST, WAR & LAW SINCE 1945 391 (1997).

19. See, e.g., Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997).

I. THE LEX LATA OF REPRISALS

International law restricts the class of persons against whom violence may be applied during armed conflicts, even as it bestows affirmative rights to wage war in accordance with accepted legal restraints. Because of the central importance of these categorizations, the standards for ascertaining the legal line between lawful and unlawful participants in conflict provided the intellectual impetus for the evolution of the entire field of law relevant to the conduct of hostilities.²⁰ From the outset, states sought to prescribe the conditions under which they owe particular persons affirmative legal protections derived from the laws and customs of war. The recurring refrain in negotiations in this field for the past century can be described as “to whom do we owe such protections and under what circumstances do we owe them?” The constant effort to be as precise as possible in describing the classes of persons entitled to *jus in bello* protections is essential, because the same criteria prescribe the select class who may lawfully conduct hostilities with an expectation of immunity. Conversely, the law has attempted to clarify the proper scope of persons and property who may lawfully be subjected to the effects of hostilities.

In that vein, the doctrine of reprisals has been an aspect of the effort to regulate the conduct of conflict from the very onset of efforts to develop a positivist regime. The first comprehensive effort to describe the law of war in a written code (the Lieber Code) began as a request from the general-in-chief of the Union armies, motivated by his confusion over the distinction between lawful and unlawful combatants and the accompanying obligations of a responsible commander towards participants in conflict who are not associated with a sovereign state.²¹ Based on the stimulus of

20. The field is frequently described as international humanitarian law. This vague rubric is increasingly used as shorthand to refer to the body of treaty norms that apply in the context of armed conflict as well as the less distinct internationally accepted customs related to the treatment of persons. The core of the international law of war includes the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114 (replacing previous Geneva Wounded and Sick Conventions of 22 Aug. 1864, 6 July 1906, and 27 July 1929 by virtue of Article 59) [hereinafter Sick & Wounded Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217 (replacing Hague Convention No. X of 18 Oct. 1907, 36 Stat. 2371) [hereinafter Sick & Wounded at Sea Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3316 (replacing the Geneva Convention Relative to the Protection of Prisoners of War of 27 July 1929, 47 Stat. 2021) [hereinafter Prisoner of War Convention]; Geneva Convention Relative to the Protection of Civilians in Time of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 [hereinafter Civilians Convention].

21. Letter from General Halleck to Dr. Francis Lieber, Aug. 6, 1862, *reprinted in* RICHARD SHELLY HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR 2* (1983) (this letter is justifiably seen as

Confederate conduct, the Union army issued a disciplinary code governing the conduct of hostilities (known worldwide as the Lieber Code) as “General Orders 100: Instructions for the Government of the Armies of the United States in the Field” in April 1863.²² This was the first comprehensive military code of discipline that sought to define the parameters of permissible conduct during conflict. Then, as now, the laws and customs of war remain integral to the very notion of military professionalism by defining the class of persons against whom professional military forces can lawfully apply violence based on principles of military necessity and reciprocity.²³ The principle endures in the law that persons who do not enjoy lawful combatant status are not entitled to the benefits of legal protections derived from the laws of war (including prisoner of war status)²⁴ and are subject to punishment for their warlike acts.

Seeking to deter violations of the professional code of conflict, Article 27 of the Lieber Code contemplated reprisals (defined by the International Committee of the Red Cross (“ICRC”) as acts “not otherwise lawful”) based on the truism that

the catalyst that initiated more than a century of subsequent legal development around the world that led to the modern framework of international humanitarian law).

22. INSTRUCTIONS FOR THE GOVERNMENT OF THE ARMIES OF THE UNITED STATES IN THE FIELD (Government Printing Office 1898) (1863), *reprinted in* THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 3-23 (Dietrich Schindler & Jiri Toman eds., 1988) [hereinafter Lieber Code]. For descriptions of the process leading to General Orders 100 and the legal effect it had on subsequent efforts, see Grant R. Doty, *The United States and the Development of the Laws of Land Warfare*, 156 MIL. L. REV. 224 (1998), and George B. Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in the Field*, 1 AM. J. INT'L L. 13 (1907) (The Lieber Code was a disciplinary code originating in the need for clear command guidance to be promulgated, which in turn spawned more than a century of positivist legal evolution in the field of international humanitarian law regulating the conduct of hostilities and the rights of those participating in conflict or caught in the consequences of ongoing conflicts).

23. *Unlawful Belligerency After September 11: History Revisited and Law Revised*, in NEW WARS, NEW LAWS ? APPLYING THE LAWS OF WAR TO 21ST CENTURY CONFLICTS 75 (David Wippman & Matthew Evangelista eds., 2005). For detailed discussion of the role of attorneys and the military culture that seeks disciplined compliance with the professional norms governing the conduct of hostilities see Michael A. Newton, *Modern Military Necessity: The Role & Relevance of Military Lawyers*, 12 ROGER WILLIAMS U. L. REV. 869 (2007) and Leslie C. Green, *What is – Why is There – The Law of War*, in ESSAYS ON THE MODERN LAW OF WAR 1 (2d. ed. 1999).

24. This statement is true subject to the linguistic oddity introduced by Article 3 of the 1907 Hague Regulations, which makes clear that the armed forces of a state can include both combatants and non-combatants (meaning chaplains and medical personnel), and that both classes of military personnel are entitled to prisoner of war status if captured. See Regulations annexed to Hague Convention IV Respecting the Laws and Customs of War on Land, 1907, art. 3 (“the armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war”), entered into force Jan. 26, 1910, *reprinted in* DOCUMENTATION ON THE LAWS OF WAR 73 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) [hereinafter DOCUMENTS ON THE LAWS OF WAR].

The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.²⁵

Framed as a necessary measure in order to preserve some recourse for responding to brutalities committed by enemy forces, Lieber recognized that reprisals ought of right to be a last recourse, and one that he characterized as “the sternest feature” of war. Given the horrors of warfare in his era, Lieber’s caution should be given great credence. Even in the context of 1863, Professor Lieber recognized the dangerous moral hazards that reprisal could engender by observing that

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 wars of savages.²⁶

Reprisals in practice have the duality of being a historically well-established mechanism for deterring violations of the law of armed conflict even as they provide an ostensible rationale for otherwise unthinkable atrocity. This is indeed a “curious position,” because while their use by definition involves conduct that would otherwise constitute grievous violations of humanitarian law, their deterrent value is undermined by the potential for grievous retaliatory abuses.²⁷

As only one of many possible illustrations of the moral and legal complexities inherent in reprisals, historians often cite the German atrocity committed on June 10, 1944 in which all 642 inhabitants of the French town of Oradour-sur-Glane were executed in reprisal for the killing of one German officer by resistance fighters (legally unprivileged belligerents whose combatant activities constituted a war crime prior to the 1949 Geneva Conventions). According to German accounts, the reprisal followed the German discovery of 73 German soldiers who were tortured and murdered in the town of Tulle following their surrender to a partisan

25. Lieber Code, *supra* note 22, art. 27.

26. *Id.*, art. 28.

27. *See generally* FRITS. KALSHOVEN, BELLIGERENT REPRISALS (2d. ed. 2007).

force. The Germans hung nearly a hundred men based on suspicions that they were involved in the massacre of German prisoners because, in the words of one German officer, the partisans “butchered with bestial cruelty, tortured, mutilated and ignominiously treated an opponent who was protected by the Geneva Convention and international law, as well as by the Franco-German armistice of 1940, and who furthermore had surrendered. Thus they placed themselves beyond the bounds of the laws of warfare and of humanity.”²⁸

It is easy to see why one legal expert who participated in the negotiations for the 1977 Additional Protocols to the Geneva Conventions referred to Oradour-sur-Glane and opined that “reprisals achieve nothing,” and “never result in the triumph of the rule of law” even when ostensibly justified by enemy war crimes.²⁹ In any event, permissible reprisals can never be warranted on the basis of simple revenge or retaliation, and the Oradour-sur-Glane facts illustrate the difficulty of distilling a pure motive for any given act of reprisal. Indeed, it is clear that a claim of reprisal can in fact serve as a subterfuge for widespread and deliberate attacks against civilians.³⁰ Such orchestrated state murder in the form of intentional attacks against the civilian population is the essence of barbarity in warfare and impermissible under any legal rationale in any type of conflict under any conceivable circumstances.

Reprisals against prisoners of war were forbidden by the 1929 Geneva Convention, and omitted from the 1929 Convention dealing with the wounded and sick only “due to an oversight.”³¹ The subsequent ICRC proposal to ban reprisals against all wounded and sick, prisoners of war, and civilians was “approved unanimously and without opposition of any

28. The Story of Oradour-sur-Glane, <http://www.scrapbookpages.com/Oradour-sur-Glane/Story/SSversion02.html> (last visited Feb. 27, 2010).

29. Konstantin Obradovic, *The Prohibition of Reprisals in Protocol I: Greater Protection for War Victims*, 520, 526 INT. REV. OF THE RED CROSS (Nov. 20 1997).

30. The example of state practice in the war between Iran and Iraq from 1980 to 1988 is also worth considering. At that time, and at the time of this essay, neither state was a party to Protocol I, although they had ratified the four Geneva Conventions. Despite pleas by the United Nations Security Council and the ICRC, both parties to the conflict reserved the right to take reprisals in response to violations of the laws of war by their opponent. Kalshoven asserts that the so-called “reprisal bombardments” were not genuine reprisals, but willful attacks on the civilian population of the enemy, “with the reprisal argument merely serving as a flimsy excuse.” This duplicitous use of the reprisals doctrine may render this evidence of State practice useless. Shane Darcy, *The Evolution of the Law of Belligerent Reprisals*, 175 MIL. L. REV. 184, 222 (2003) (citing Frits Kalshoven, *Belligerent Reprisals Revisited*, 21 NETH. Y. B. INT’L L. 43, 62 (1990); U.N. Doc S/RES/0540 (1983); 1983 ICRC Annual Report 58 (Geneva 1983)).

31. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, ¶ 807, at 242 (Y. Sandoz, Ch.Swinarski & B. Zimmermann eds., 1987) [hereinafter ICRC Commentary on Protocol I].

sort” during the next round of multilateral negotiations.³² Thus, all four of the 1949 Geneva Conventions contain express prohibitions³³ on reprisals, the most notable of which is the extension to the civilian occupants of occupied territory who are legally categorized as “protected persons” within the meaning of the Fourth Geneva Convention.

Given the abuses in World War II, courts developed a sophisticated framework for evaluating claims of reprisal raised as an affirmative defense during war crimes prosecutions. There were many successful prosecutions in post-war military commissions in which national authorities evaluated and rejected defense claims of legitimate reprisal.³⁴ In one representative but unreported case, a German general officer was convicted in 1947 for placing allied prisoners of war alongside an oil refinery in lower Silesia allegedly as a reprisal (though he could not specify for what acts) and refusing them access to air raid shelters when the Allies bombed the legitimate military target, thereby committing the crime of murder.³⁵ Based on this pattern of state practice, one of the field’s most preeminent experts summarized the requirements for a permissible reprisal in the wake of the 1949 Geneva Conventions as follows:³⁶

- 1) It must be a response to a prior violation of international law which is imputable to the state against which the reprisal is directed;³⁷
- 2) It must be reasonably proportionate;
- 3) It must be undertaken for the purpose of putting an end to the enemy’s unlawful conduct and preventing further illegalities and not for mere revenge; and
- 4) Since reprisals are a subsidiary means of redress, no other effective means of redress must be available.

Other authoritative sources indicate that in addition to the above considerations, reprisals must be based on reasonable notice as appropriate to the circumstances, must be publicized (presumably to facilitate their

32. *Id.*

33. Sick & Wounded Convention, *supra* note 20, art. 46; Sick & Wounded at Sea Convention, *supra* note 20, art. 47; Prisoner of War Convention, *supra* note 20, art.13; Civilians Convention, *supra* note 20, art. 33.

34. For a summary of this line of cases, see SHANE DARCY, COLLECTIVE RESPONSIBILITY AND ACCOUNTABILITY UNDER INTERNATIONAL LAW 139-48 (2007).

35. UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 155, ¶ 8.29 n.103 (2004).

36. Christopher Greenwood, *The Twilight of Belligerent Reprisals*, in *ESSAYS ON WAR IN INTERNATIONAL LAW* 295, 299 (2006).

37. For the more exhaustive United Kingdom enunciation of the criteria for legitimate reprisals based on the caselaw of the era and state practice see UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 35, 419, ¶ 16.17.

deterrent effects), authorized only “at the highest level of government” (presumably to exclude emotive acts of personal revenge), and must be discontinued after the enemy eschews the egregious conduct that warranted reprisals in the first place.³⁸

The ink was hardly dry on the texts of the 1949 Geneva Conventions when the ICRC began to advocate a further expansion of the law. The Protocols Additional to the Geneva Conventions resulted from four widely attended diplomatic conferences held from 1974 to 1977. As noted above, the law of war continually evolves in response to the needs of states conducting conflict. The Protocols culminated the efforts to provide textual application of the Geneva Conventions even in the context of armed conflicts between a High Contracting Party and non-state actors, such as guerrillas, insurgents, and so-called freedom fighters.³⁹ These fundamental modifications to the well-established law of combatant immunity would have arguably been impossible without the backdrop and international division caused by the Cold War. However, as in previous efforts to shape the law of war around the reality of ongoing military and political realities, the effort to draw sharp legal distinctions between protected civilians and persons who could be lawfully targeted was the “driving concern” behind the modern evolution embodied in the 1977 Protocols.⁴⁰

Additional Protocol I was intended to be an all encompassing source for updated rules for determining combatant status, as it was meant to govern international armed conflicts, and to “reaffirm and develop” the measures intended to protect the victims of armed conflict drawn from the 1949 Geneva Conventions by completing their humanitarian imperative.⁴¹ Protocol I in essence combined the Hague strand of international humanitarian law (dealing with constraints on the means and methods for conducting hostilities) with the Geneva strand (primarily focused on achieving humanitarian goals). Despite the overtly politicized context in which it was negotiated, it represented the end state of the law of combatancy by attempting to reduce the combatant category to its irreducible minimum while maximizing the class of persons and objects

38. *Id.*

39. See Michael A. Newton, *Exceptional Engagement: Protocol I and a World United Against Terror*, 42 TEX. INT'L L. J. 323, 342-56 (2009).

40. BEST, LAW AND WAR, *supra* note 18, at 257.

41. Protocol I Additional to the Geneva Conventions of 12 Aug. 1949 (Relating to the Protection of Victims of International Armed Conflicts), art. 1, para 3, Dec. 12, 1977, U.N. Doc. A/32/144 Annex I, *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I].

protected from the adverse effects inherent in all armed conflicts.⁴² In light of these normative goals, it should not shock the reader to realize that Additional Protocol I extended the preexisting prohibitions on reprisals to include:

- 1) The entire population of civilians not taking direct part in hostilities, irrespective of their location;⁴³
- 2) Civilian objects;⁴⁴
- 3) Historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples;⁴⁵
- 4) Objects indispensable to the survival of the civilian population such as foodstuffs, crops, livestock, drinking water installations and supplies, and irrigation works;⁴⁶
- 5) The natural environment;⁴⁷
- 6) Works or installations containing dangerous forces, namely dams, dykes, and nuclear electrical generating stations.⁴⁸

The official ICRC Commentary notes that the ban on all forms of reprisal in Protocol I “removes the only doubt that might remain with regard to the absolute character of the obligations imposed on Parties to the conflict.”⁴⁹

Additional Protocol I attempted to elevate non-state actors to the status of lawful combatants, but the efficacy of those textual promises has been eroded to a vanishing point by states’ unified and repeated opposition.⁵⁰ In the real world, the effort to decriminalize terrorists’

42. See Civilians Convention, *supra* note 20, art. 4. The legal category of “protected persons” was not originally intended to be an all-inclusive category of civilians even on the face of the Convention. Article 4 of the Fourth Geneva Convention provides a definition of the legal term of art “protected persons” that limits the applicability of the protections afforded by the other provisions of the Convention as follows (using admittedly odd grammar):

Art. 4. Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

43. Protocol I, *supra* note 41, art. 51(6).

44. Protocol I, *supra* note 41, art. 52(1).

45. Protocol I, *supra* note 41, art. 53(c).

46. Protocol I, *supra* note 41, art. 54(4).

47. Protocol I, *supra* note 41, art. 55(2).

48. Protocol I, *supra* note 41, art. 56(4).

49. ICRC Commentary on Protocol I, *supra* note 31, ¶ 814, at 242.

50. See Newton, *supra* note 39, at 347-56 (documenting the refusal of some states to accept the legal premise and its rejection by others in the form of understandings and reservations attached to ratifications of Protocol I); MARK OSIEL, *THE END OF RECIPROCITY: TERROR, TORTURE, AND THE LAW OF WAR* 186-88 (2009).

conduct—so long as it complied with applicable *jus in bello* constraints in the context of wars of national liberation—ran aground on the shoals of sovereign survival. In practical terms, the Protocol I provisions regarding combatant status for non-state actors in international armed conflicts have only residual value as “agitational or rhetorical” tools because they have never been applied.⁵¹ At the same time, the striking silence in the law applicable to non-international armed conflicts means that any effort to describe a “combatant engaged in a non-international armed conflict” is an oxymoron. By extension, there is no form of “combatant immunity” in the context of non-international armed conflicts.⁵² Terrorists and their supporters have no form of automatic legal license or protection from prosecution, even for acts that would be perfectly permissible when conducted by combatants in an international armed conflict. There simply is no legal category of “combatant” in a non-international armed conflict irrespective of the moral imperatives claimed by one party or the other to warrant hostile activities.⁵³ This premise remains valid even when non-state actors perpetrate violence seeking to accomplish goals similar to those of the sovereign state.⁵⁴ Non-state actors who participate in hostilities remain subject to appropriate sanctions.

51. BEN SAUL, *DEFINING TERRORISM IN INTERNATIONAL LAW* 76 (2006).

52. David P. Forsythe, *Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts*, 72 *AM. J. INT'L L.* 272, 284 (1978).

53. In fact, a wide range of states coalesced around the effort to defeat the diplomatic draft applicable to non-international armed conflicts that was tabled in 1975 by the ICRC and supported by the U.S. and other western European nations. The group of states, which included Argentina, Honduras, Brazil, Mexico, Nigeria, Pakistan, Indonesia, India, Romania, and the U.S.S.R, succeeded in raising the threshold for the application of Additional Protocol II, which was designed to regulate non-international armed conflicts, precisely because of fears that extending humanitarian protections to guerillas and irregular forces might elevate the status of rebel groups during such conflicts. ELEANOR C. MCDOWELL, *DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 1975*, U.S. Department of State Publication 8865, 803-6 (1976). The United States also succeeded in eliminating subjective qualifiers such as “significant” or “important” that might have permitted some states to selectively apply the provisions of Protocol II. *Id.* at 806.

54. See Andreas E. Feldmann & Maiju Perala, *Assessing the Causes of Nongovernmental Terrorism in Latin America*, 46 *LATIN AM. POL. AND SOC'Y* 101, 104 (2004).

This article defines terrorism as ‘the use or threat of use of anxiety-inducing extranormal violence for political purposes by any individual or group, whether acting for or in opposition to established governmental authority, where such action is intended to influence the attitudes and behavior of a target group wider than victims. (Mickolus et al. 1989a xiii).’ For the purpose of this work, terrorist incidents are restricted to actions that purposely seek to spread terror in the population either by directly targeting noncombatants or by destroying infrastructures that may affect the life and well-being of the civilian population at large. . . . Insurgent, revolutionary, and right-wing terrorism are generally included under the terrorism rubric.

Id.

Similarly, it is conceivable that non-state actors could be subject to appropriate punishments in the form of reprisals because the textual ban is not at present an all-consuming incontrovertible norm. While the 1949 Conventions and Additional Protocol I regulate armed conflicts conducted between “two or more High Contracting Parties” and contain the textual language noted above, the ICRC Customary International Law Study determined that “it is difficult to conclude that there has yet crystallized a customary rule specifically prohibiting reprisals during the conduct of hostilities.”⁵⁵ The treaty provisions applicable to non-international armed conflicts (certainly the dominant mode of modern conflict) are silent with respect to specific prohibitions on reprisals because the delegates negotiating Protocol II could not reach consensus on the issue.⁵⁶ At the other extreme, though four states spoke to affirm the permissibility of limited reprisals under specifically enumerated circumstances, the ICRC correctly concluded that there is “insufficient evidence that the very concept of lawful reprisal in non-international armed conflict has ever materialized in international law.”⁵⁷

Widespread and consistent state practice following the treaty prohibitions described above tends to undercut the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) Trial Chamber’s assertion in *Prosecutor v. Kupreskic* that reprisals are subject to “universal revulsion” based on the premise that they are “inherently a barbarous means of seeking compliance with international law.”⁵⁸ Setting aside the many instances of state practice [recitation of which would be far beyond the scope of this short essay] that would indicate recourse to reprisals in fact if not in phraseology, the lack of uniform acceptance even of the stark treaty prohibitions belies their nature as customary norms. For example, the Italian government made the following declaration upon ratification of the Protocol: “Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I and in particular Articles 51 and 52 with all means admissible under international law.”⁵⁹ The German,⁶⁰ Egyptian,⁶¹ and French⁶² governments all made declarations

55. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Vol. I 523 (2005) [hereinafter ICRC Study].

56. DARCY, *supra* note 34, 166-71.

57. ICRC Study, *supra* note 55, at 527.

58. *Prosecutor v. Kupreskic*, No. IT-95-16-T, ¶ 528 (Jan. 14, 2000) (Judgment).

59. *Reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 24, at 507.

60. *Id.* at 505 (the German declaration regarding serious and systematic violations of the laws and customs of war is virtually identical to the Italian declaration quoted in the text above, and ostensibly preserves the right to engage in limited reprisals, particularly in non-international armed conflicts).

61. *Id.* at 504.

indicating that resort to reasonable reprisals in extreme circumstances could be warranted to respond to ongoing violations by an adversary.

In addition, the United Kingdom emphasized in its own statement that any adversary must “scrupulously observe” the obligations of humanitarian law, and accordingly “serious and deliberate attacks” against the civilian population will entitle its forces to “take measures otherwise prohibited by the Articles” to the extent that such measures are “necessary for the sole purpose of compelling the adverse party to cease committing violations.”⁶³ Thus, it is logically and legally consistent that none of the constitutive documents of international or internationalized tribunals formed over the past two decades have deemed the taking of reprisals against any persons or objects as an articulated violation of the laws of armed conflict.⁶⁴ The Statutes of the ICTY, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the highly comprehensive Rome Statute for the International Criminal Court have all refrained, by this omission, from commenting on the legality of reprisals.

In short, the *lex lata* does not appear to support the sweeping conclusion of the ICTY Trial Chamber that “the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour [sic] of the other party, is an integral part of customary international law and must be respected in all armed conflicts.”⁶⁵ Partly on

62. Darcy, *supra* note 30, 226 (The government of the French Republic declares that it will apply the provisions of Article 51, paragraph 8 in such a way that the interpretation of those will not be an obstacle to the employment, in conformity with international law, of those means which it estimates are indispensable for protecting its civilian population from serious, manifest, and deliberate violations of the Geneva Conventions and this Protocol by the enemy).

63. UK MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT, *supra* note 35, 421, ¶ 16.19.1 (further clarifying that appropriate reprisals must be proportionate to the nature of the enemy violations, constrained by the preexisting prohibitions of the 1949 Conventions, based on formal authority from the “highest level of government” and only occur following formal warnings).

64. This point becomes apparent after comparison of the various constitutive documents of the ad hoc and internationalized tribunals, as well as the Rome Statute of the International Criminal Court. *See also* Darcy, *supra* note 30, 244.

65. Prosecutor v. Martić, Review of the Indictment Under Rule 61, Case No. IT-95-11, ¶ 19 (8 Mar. 1996). The addition of an entirely new international convention in 1949, designed to create legal entitlements on behalf of the civilian population, gave rise to the dualistic view of status that persists in some quarters to this day. The ICRC took the position in its official commentary that because there “is no intermediate status” between combatant and civilian, every person in enemy hands “must have some status under international law.” ICRC, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: VOLUME 4, 51 (Int’l Comm. of the Red Cross 1958) (“Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.”).

the basis of the state practice commingled with the express declarations of states, one distinguished human rights scholar concluded that “it cannot be stated categorically that the doctrine of reprisals is not of relevance in noninternational [sic] armed conflicts.”⁶⁶ As a result, despite superficial appeals to overriding humanitarian imperatives, a thoughtful assessment of the rational basis for reviving the hard law of reprisals is in order. Thoughtful reassessment is far from a cry for a rush to reinvigorated and rampant reprisals. It also bears repeating that in my view it is overly simplistic to conflate consideration of a potential role for reprisals in the wake of September 11 with a movement to reinforce the primitive law of retaliation, *lex talionis*, which demands equal and exact injury as a form of revenge against an adversary. Similarly, as the example of the atrocities at Oradour-sur-Glane illustrates, the debate over the utility of reprisals ought not to degenerate into coarse calls for collective retribution and cannot provide the subterfuge for the intentional murder of innocents.⁶⁷

II. WHY REPRISALS MIGHT BE RATIONAL TOOLS OF STATE POWER

Reasonable reprisals may represent the best long-term way to erode support for those non-state actors who would willfully ignore the humanitarian rules protecting innocent civilians, thereby violating the most basic human rights of their victims. The resurgence of deliberate terror aimed at western civilization destroyed any residue of the naïve notion that there is a bright legal line neatly dividing armed conflicts into distinct geographic combat zones in which innocent civilians (who are legally protected from deliberate hostilities) are never commingled with combatants who may lawfully be targeted and killed.⁶⁸ The attacks transformed an esoteric problem that was important only to specialists in the law of armed conflict into a tactical and legal problem highly relevant to current operations. Al Qaeda and its supporters acted as private citizens in declaring war on American citizens and values,⁶⁹ and carried out their

66. DARCY, *supra* note 34, 171 (noting also that the divergence of opinion expressed by the ICRC, the ICTY, and scholars and the lack of prohibition contained in Protocol II indicates that the absolutist stance of the ICRC reflects a “precautionary attempt motivated by humanitarian concerns” rather than an embedded legal prohibition that is reflective of the developed state of law).

67. *See infra* notes 27-31 and accompanying text.

68. This dualistic view of the law was privately expressed by the International Committee of the Red Cross and publicly expounded by a number of commentators on the law of armed conflict.

69. Osama bin Laden has made more than fifty declarations of war against the United States (summary of statements on file with author). In the official fatwa signed by Bin Laden and four others on February 23, 1998 he asserted that

attacks with a purposeful intensity that rose to the level of armed conflict by any common sense definition. Moreover, the conflict against al Qaeda and its supporters is an armed conflict governed by the law of armed conflict within the meaning of the term as accepted by the ICTY.⁷⁰

However, despite rhetoric referring to a struggle for liberation and self determination, no nation would ever accept the normative proposition that a private group of terrorists acted with a legally cognizable expectation of combatant immunity. Indeed, the essence of asymmetric warfare is achieved when professionalized military forces confront an enemy who seeks to gain an otherwise impossible military parity through exploitation of a deliberate disregard for humanitarian law.⁷¹ The hallmark of modern combat operations is that non-state actors deliberately exploit civilians to gain significant tactical and strategic advantages. A small group of non-state actors can inflict harm to innocent victims and the structures of ordered society that is far disproportionate to their numbers or

The ruling to kill the Americans and their allies—civilians and military—is an individual obligation for every Muslim who can do it in any country—this until the al-Aqsa Mosque [Jerusalem] and the Holy Mosque [Mecca] are liberated from their grip, and until their armies withdraw from all the lands of Islam, defeated, shattered, and unable to threaten any Muslim. This is in accordance with the word of the Most High—“Fight the pagans all together as they fight you all together,” and the word of the Most High “Fight them until there is no more tumult or oppression, and all religion belongs to Allah.”

And the Most High said “And why should you not fight in the cause of Allah and on behalf of those oppressed men, women and children who cry out Lord! Rescue us from this town and its oppressors. Give us from Your Presence some protecting friend. Give us from Your Presence some defender.”

By Allah’s leave, we call on every Muslim who believes in Allah and wishes to be rewarded to comply with Allah’s order to kill the Americans and seize their money wherever and whenever they find it. We also call on Muslim ulema, leaders, youths, and soldiers to launch the raid on the Devil’s Army—the Americans—and whoever allies with them from the supporters of Satan, and to rout them so that they may learn a lesson.

THE AL QAEDA READER 13 (Raymond Ibrahim, ed. and transl. 2007).

70. Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on Defense Motion for Interlocutory Appeal on Jurisdiction), ¶ 70 (Oct. 2, 1995) (“an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”).

71. Walter Laquer, *The Terrorism to Come*, HOOVER INSTITUTION POLICY REVIEW, 3-4, (Aug. & Sept. 2004).

When regular soldiers do not stick to the rules of warfare, killing or maiming prisoners, carrying out massacres, taking hostages or committing crimes against the civilian population, they will be treated as war criminals. If terrorists behaved according to these norms they would have little if any chance of success; the essence of terrorist operations now is indiscriminate attacks against civilians. But governments defending themselves against terrorism are widely expected not to behave in a similar way but to adhere to international law as it developed in conditions quite different from those prevailing today. Terrorism does not accept laws and rules, whereas governments are bound by them; this, in briefest outline, is asymmetric warfare. If governments were to behave in a similar way, not feeling bound by existing rules and laws such as those against the killing of prisoners, this would be bitterly denounced.

Id.

technological inferiority. Al Qaeda and its supporters accordingly forfeited the rights that would normally accrue to civilian persons caught in the midst of hostilities, chief among them the right to be free from deliberate efforts at targeting them.⁷²

The clarity with which international law categorizes and condemns discrete manifestations of terrorism nevertheless masks the indeterminacy of the underlying definitional framework. "Terrorism" is a concept caught in a kaleidoscope of conflicting sociological, political, psychological, moral, and legal perspectives. The paradox in a post-September 11 world is that the U. N. Security Council *requires* nations to "accept and carry out"⁷³ resolutions that oblige them to act against "terrorists" and "terrorism." Breaking down the macro problem of terrorism into identifiable manifestations, nation states have negotiated and ratified a web of occasionally overlapping multilateral conventions built on the cornerstone of the sovereign enforcement of applicable norms. The persistence of transnational terrorism as a feature of the international community shows that the plethora of conventional criminal approaches is no panacea.⁷⁴ September 11 highlighted this striking systematic failure that has been reinforced by the repeated attacks orchestrated to intentionally destroy civilian lives and infrastructure in inter alia Spain, England, Indonesia, India.

Nevertheless, the commingling of *jus ad bellum* norms with *jus in bello* constraints may result in a deadly policy paralysis for states that seek to adhere to the framework of international law even as they protect the lives and property of their citizenry. States will predictably find themselves facing an adaptable enemy that may not be targeted on the basis of self defense due to an unproven and perhaps unprovable lack of imminency, even as they are hindered from rapid *jus in bello* targeting due to the highly

72. The law of armed conflict provides that lawful attacks may only be directed at military objectives (which includes enemy combatants). Civilians may not be deliberately attacked unless they directly participate in hostilities. See Protocol I, *supra* note 41, art. 51 (2 & 3). Celebrated in international law as the principle of distinction, the president of the ICRC opined that this principle is "crucial." Dr. Jakob Kellenberger, International Humanitarian Law at the Beginning of the 21st Century, 26th Round Table in San Remo on the Current Problems of International Humanitarian Law: "The Two Additional Protocols to the Geneva Conventions: 25 Years Later –Challenges and Prospects," (Sept. 5, 2002), <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/EFC5A1C8D8DD70B9C1256C36002EF1E> (last visited May 21, 2010).

73. U.N. CHARTER, art. 25.

74. See generally M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM: MULTILATERAL CONVENTIONS (1837-2001) (2001) (providing the text of numerous terrorism related international agreements, which in turn help to document the historical trends in extending positivist regulation over the prohibited range of terrorist acts); M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy Oriented Assessment*, 43 HARV. INT. L. J. 83, 90 (2001).

contested nature of the direct participation criteria that might permit uncontroversial operations. At the same time, the confluence of human rights protections with the provisions flowing from humanitarian law poses another serious political and pragmatic difficulty under the status quo. The laws and customs of warfare of course operate against the backdrop of human rights norms that elevate the prohibition on extrajudicial executions to a non-derogable, unwavering requirement. This is absolutely appropriate because the American conception of state power flows from the very obligation of governments to defend and protect the lives, rights, and property of the citizenry.

However, the conflation of humanitarian purposes derived from both the laws and customs of war and from human rights law to seek maximum protection for humanity could be seen as particularly inapplicable in light of the terrorist objective of deliberately inflicting casualties and maximizing the suffering of innocent humans, of whatever age, gender, or ethnicity. Nevertheless, human rights objections prevent most states from lauding the killing of specific al Qaeda figures “even when that struggle is backed by U.N. Security Council resolutions authorizing force, . . . and even given the widespread agreement that the United States had both an inherent right and legal authorization to undertake military action against the perpetrators of the [September 11] attacks.”⁷⁵

A set of measured responses culminating in reasonable reprisals might in theory be the best way to balance the humanitarian goals of the competing bodies of law. Rather than forcing states to seek recourse in pleas of unavoidable necessity or legitimate self defense, a clear-eyed reappraisal of the scope and utility of reprisals could produce straightforward *jus in bello* criteria for responding to unlawful acts of terror. I do not intend to oversimplify the argument into a simple, and completely illegitimate, *tu quoque* argument. Indeed, that is precisely the point. Whether al Qaeda or some future terrorist group disregards the fundamental precepts of civilized warfare the legal obligations that inhere to law abiding, or at least accepting, states remain fixed and constant. To that end, sovereign states should consult together with the aim of creating an agreed upon multilateral framework for carefully calibrated responses. The “reasonable responses” postulated by this essay are those grounded on an empirical assessment of their deterrent value or framed as appropriate punishment for prior acts of terror. The archaic phraseology of the Lieber Code in this respect seems to resonate in the modern context; i.e., acts

75. Kenneth Anderson, *Targeted Killing in U.S. Counterterrorism Strategy and Law*, in LEGISLATING THE WAR ON TERROR: AN AGENDA FOR REFORM 346, 364 (Benjamin Wittes ed., 2009).

designed “as a means of protective retribution”⁷⁶ rather than emotional vengeance could be permissible. The dichotomy of the Lieber formulation is that acts aimed at prospective deterrence as well as those seeking to impose a retrospective punishment would be permissible. This would be even more acceptable under the oversight of some neutral adjudicative body to which states present the facts warranting their lawful exercise of a calibrated right of reasonable reprisal. As noted above, in the long run this reliance on a reconsidered *jus in bello* framework may be the most morally acceptable and humane strategy for serving a strategic imperative of protecting the peace and property of innocent persons.

Proponents of the blanket ban on reprisals would argue that the term “reasonable reprisals” is itself oxymoronic. Indeed, the ICTY Trial Chamber in *Prosecutor v. Martić* inferred that any reprisal conducted in the context of a non-international armed conflict would violate customary international law as well as the provision of Additional Protocol II guaranteeing civilians and those *hors de combat* the right to be treated humanely “in all circumstances” and “without any adverse distinction.”⁷⁷ According to this line of logic, any conceivable reprisal, for any reason, and applying any agreed upon framework for implementation would violate the “absolute and non-derogable” right to humane treatment. The ICTY Trial Chamber in *Prosecutor v. Kupreskić* later wrote in a similar vein that “the 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” which in turn compelled the conclusion that “belligerent reprisals against civilians and the fundamental rights of human beings are absolutely inconsistent legal concepts.”⁷⁸

The perspective taken by the ICTY Trial Chambers (and echoed by the ICRC in the Customary Law Study) takes the narrowest possible view of the human rights of the innocent victims of terrorist attacks. It might

76. See *infra* notes 21-27 and accompanying text.

77. *Prosecutor v. Martić*, *supra* note 64, ¶ 18.

78. *Prosecutor v. Kupreskić*, *supra* note 58, ¶ 529. Though the Trial Chamber acknowledged a distinct lack of state practice to support a finding that reprisals are prohibited as a matter of customary international law, the Trial Chamber was undeterred and in essence fashioned its own unique template for discerning the existence of international law:

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

well be said that the ad hoc Tribunal Trial Chambers adopted the view that the human rights of the victims of indiscriminate terrorist attacks are automatically subordinated to the rights of the persons subject to reprisals, irrespective of the calibrated nature of the framework for reprisals accepted by states, or the nature of the precedent warnings, or the stated purposes. The Trial Chambers also seem to forget that the military commissions in the wake of World War II provided detailed legal templates for evaluating permissible reprisals from unlawful war crimes (for such issues as, *inter alia*, the scope of permissible proportionality in responding to enemy violations). It is also clear that the ICTY decisions took no notice of evolving technology that may change the form or focus of future reprisals. My point is that a bright-line “bulwark against brutality” prevents any good-faith dialogue on the means and methods for balancing humanitarian objectives with the overriding strategic imperative of deterring terrorist attacks or punishing those who orchestrate indiscriminate violence intentionally directed against civilians.

Finally, the reasoning of the ICTY Trial Chambers would seem to discount any calculus of larger moral utility. The current lack of effective measures to incentivize non-state armed groups (or terrorist groups) towards recognition and compliance with international humanitarian law is one of the most insoluble dilemmas facing commanders and policy makers. As noted above, deliberate attacks against innocent civilians are crimes under all circumstances, both for state and non-state actors. However, national security authorities of all states need viable tools in order to protect the economic and social structures of civilized society. Thoughtful multilateral dialogue on the permissible scope of reprisals directed against those who fund, plan, and support terrorist acts could well avoid allegations of collective punishment and create a disincentive for terrorist attacks. In other words, the concept of “innocent persons” as it relates to terrorist acts ought to be an important element of transnational dialogue. The absence of any international agreement (or even discussion) of the scope and utility of permissible reprisals against those who perpetrate terrorist acts permits propagandized exploitation of any state responses, which in turn may spread extremist vows for revenge and further endanger innocent civilians.

Assuming that states agreed to a careful delineated multilateral framework for engaging in limited reprisals undertaken only for proper motivations and under proper supervision, the relative good achieved by the reprisal would certainly be a relevant consideration. To reiterate, the current presumption of blanket prohibition prevents rational discussions and good faith evaluation of state actions. Effective reprisals may be the most moral way to prevent larger atrocities and the concomitant suffering

of many more innocent victims. Experience since the 1970s indicates that the permission and guidance of an authority figure is the primary enabling mechanism which molds people into groups capable of violent operations.⁷⁹ History is replete with examples of leaders whose personal influence became the essential element leading to military operational effectiveness.⁸⁰ Empirical data is beginning to point clearly to authority figures as a major factor in the success or failure of a given military operation, and the importance of the authority figure is inflated in an asymmetric conflict. The possibility of reasonable reprisals based on a priori consensus criteria may well be the most effective method for incentivizing non-state actors to comply with the *jus in bello*, or for efficiently sanctioning violations and preventing even more egregious suffering by innocent victims.

The U.S. doctrine for counterinsurgency operations expressly highlights this point as follows: “Movement leaders provide strategic direction to the insurgency. They are the ‘idea people’ and the planners. They usually exercise leadership through force of personality, the power of revolutionary ideas, and personal charisma. In some insurgencies, they may hold their position through religious, clan, or tribal authority.”⁸¹ Reprisals that kill a dozen persons but result in the protection of thousands would seem to have a compelling moral imperative. Deliberate attacks on such movement leaders would foreseeably be controversial under the normal *jus in bello* paradigm given the debates over whether and under what circumstances terrorist leaders or other key leaders of non-state groups lose their status as protected civilians who are never subject to being intentionally targeted. Thus, international law should clarify an alternative *jus in bello* prong that could permit such attacks in limited circumstances.

79. DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY 143 (Little Brown and Company 1995) (“Someone who has not studied the matter would underestimate the influence of leadership in enabling killing on the battlefield but those who have been there know better. A 1973 study by Kranss, Kaplan, and Kranss investigated the factors that make a soldier fire. They found that the individuals who had no combat experience assumed that ‘being fired upon’ would be the critical factor in making them fire. However, veterans listed ‘being told to fire’ as the most critical factor.”).

80. See JOHN KEEGAN, THE FACE OF BATTLE 114 (Penguin Books 1983) (“For the English [at Agincourt], the presence of the King would also have provided what present-day soldiers call a ‘moral factor’ of great importance. The personal bond between leader and follower lies at the root of all explanations of what does and does not happen in battle: and that bond is always strongest in martial societies”); see also *id.* at 277 (noting that commanders were the most important human factor in willing the masses to fight in the First World War) [hereinafter *Face of Battle*].

81. DEPARTMENT OF THE ARMY, FIELD MANUAL NO. 3-24, MARINE CORPS WARFIGHTING PUBLICATION NO. 3-33.5, COUNTERINSURGENCY, at 1-12, ¶ 1-61 (Dec. 15, 2006), available at <http://usacac.army.mil/CAC/Repository/Materials/COIN-FM3-24.pdf>.

Reprisals which either kill or incapacitate the key terrorist leader(s) may have a disproportionate effect both in deterring future atrocities and in punishing those responsible for past acts. To reiterate, the broad and non-derogable prohibition on reprisals prevents open discussion about these moral implications.

CONCLUSION

Reasonable reprisals grounded on an empirical assessment of their deterrent value or framed as appropriate punishment for prior acts of terror may be the most humane strategy for serving the strategic imperatives of civilized society confronted with a persistent and adaptive terrorist enemy. Hugo Grotius opined that “punishment of an evil suffered is a just cause for waging warfare,”⁸² and that ancient sentiment might well accord with the modern common sense of citizens who suffered at the hands of indiscriminate terrorist violence. It is beyond the scope of this essay to enumerate the contours of what would constitute reasonable reprisals or to elaborate on the circumstances that would warrant their use. That is properly the province of state delegates in the real world of countervailing interests and colliding spheres of influence. One scholar laments that a multilateral treaty that defines terms and identifies the appropriate class of persons or objects that can lawfully be the subjects of reprisals during non-international armed conflicts “is presently most desirable.”⁸³

In my view, states should unite to craft a deliberate multilateral approach to regulating reprisals that embodies a consensus view of the appropriate contexts and reasonable constraints that would limit an otherwise pernicious practice. The failure to create such a treaty forces states to articulate their own rationales for what are in fact reprisals. This practice, in turn, creates additional uncertainty given the vicissitudes of political postures and the shifting stance of varying judicial panels. Reliance on state action and reaction to shape a new customary international law of reprisals in turn leads to the real possibility that a more expansive regime will be crafted in practice than would otherwise receive consensus approval in specified treaty text. In the absence of comprehensive treaty provisions related to permissible reprisals, it is clear to me that *categorical* rejection of any concept of reasonable reprisals serves to short circuit rational discourse on the issue. The resulting

82. Anthony F. Lang, Jr., *Authority and the Problem of Non-State Actors*, in ETHICS, AUTHORITY, AND WAR: NON-STATE ACTORS AND THE JUST WAR TRADITION 46, 56-60 (Eric A. Heinze & Brent J. Steele eds., 2009).

83. Darcy, *supra* note 34, at 244.

uncertainty almost guarantees that state responses to terrorist acts will be hindered and less effective than would otherwise be possible.

It may well be true that reprisals are inadvisable and inappropriate on operational grounds or on a policy basis to prevent their value as a propaganda tool. As noted above, the spare language of the treaties does not settle the issue in the real world of practice. Diplomats debating the role and scope of reasonable reprisals may also conclude that they really do not materially advance efforts to induce compliance of non-state actors with humanitarian law. Such issues could only be clarified through detailed negotiations that are forestalled at present by reflexive acceptance of the textual prohibitions.

Nonetheless the laws and customs of warfare were never intended to provide a shield behind which terrorists would be free to gnaw away at the values of freedom and peace. Private efforts to wage war fall outside the structure of law that binds sovereign states together on the basis of reciprocity and shared community interests. In the modern vernacular, those who commit acts in contravention of the applicable conventions are termed terrorists, regardless of their ideological or religious motivations.⁸⁴ Thus, as noted above, no state in the world willingly accepts the normative proposition that international law bestows upon private citizens an affirmative right to become combatants whose warlike activities are recognized and protected. The right to engage in appropriate reprisals is more than a residual appendage of sovereignty. It reflects the very essence of sovereign survival and respect for the dignity and individual worth of humans in the context of civilized society. Surely the peace-loving states of the world can find common ground in the common pursuit to protect persons from the effects of lawless terrorist violence. Thoughtful and multilateral reassessment of the lawful scope and rationale for reasonable reprisals is overdue.

84. *See, e.g.*, International Convention for the Suppression of the Financing of Terrorism, 2175 U.N.T.S. 197, art. 6, U.N. Doc. A/RES/54/109 (Dec. 9, 1999) (requiring acceding states to “adopt such measures as may be necessary, including, where appropriate, domestic legislation, to ensure that criminal acts within the scope of this Convention are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature.”).