Part V Revival of Classical Concepts?, Ch.40
Retaliation and Reprisal
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Chapter 40  Retaliation and Reprisal

I. Introduction

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’.¹ Retaliation is a broader concept, which tends to evade precise definition. The general prohibition on the use of force in the UN 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 51.² Whether this prohibition covers (p. 880) reprisals or retaliatory action was seemingly clarified by the UN 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’.³ 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 UN Charter 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 legitimize 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.⁴ 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.

II. Defining Retaliation and Reprisals

Reprisals are a recognized 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’.⁵ The Max Planck Encyclopedia of Public International Law has a detailed entry for reprisals, but makes no mention of retaliation.⁶ Kelsen defined reprisals as ‘acts, which although normally illegal, are exceptionally permitted as reaction of one state against a violation of its right by another state’.⁷ The aspect of unlawfulness is an essential element of reprisals, whereas retaliation can be used more broadly to include reprisals⁸ or other (p. 881) unfriendly or hostile, yet lawful acts of retorsion.⁹ Reprisals taken during a situation of armed conflict are described as belligerent reprisals,¹⁰ 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 international law by another. ‘Armed reprisals’ is the most suitable label for such actions,¹¹ 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'.

The interchangeable and overlapping uses of the terms reprisal and retaliation is a notable feature of scholarship on these subjects. Evelyn Speyer Colbert, in what remains the sole monograph on this topic, used retaliation as a general term which also covered reprisals. 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’. T. J. Lawrence wrote in 1915 that reprisal ‘is used in a bewildering variety of senses’. Reprisals are often defined as certain acts of retaliation, given that they 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 Nautilus arbitration, discussed in Section III, although it is clear that reprisals in a narrow legal sense is what was being addressed. The 1863 Lieber Code referred only to retaliation yet it is the precursor to many subsequent developments in international law concerning belligerent reprisals. The Code stated that ‘The law of war can no more wholly dispense with retaliation than can the law of nations’. 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 of armed reprisals. This chapter principally focuses on the more legally recognizable 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. 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.

Other purposes have been ascribed to armed reprisals, although it is ‘open to doubt whether these other purposes (such as punishment, retaliation, deterrence) are legitimate’. Some view armed reprisals as punitive actions, whereas Antonio Cassese considered that reprisals ‘were aimed at either impelling the delinquent state to discontinue the wrongdoing, or at punishing it, or both’. Frits Kalshoven 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.

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.

III. The Evolving International Law Regarding Reprisals

Positive international law addressing armed reprisals remains relatively thin on the ground. While the 20th century saw several important legal developments concerning reprisals, the law prior to then was ‘shrouded in doubt’. T. J. Lawrence considered there to be ‘a great
need of international legislation on the subject of reprisals’,\textsuperscript{27} despite the reprisal doctrine’s lengthy history, the beginning of which lay in the practice of private reprisals.\textsuperscript{28}

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’.\textsuperscript{29} Evelyn Speyer Colbert considered that until the end of the 17th 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.’\textsuperscript{30} The US Constitution reflects this practice, conferring on Congress the authority to ‘declare War, grant Letters of marque and reprisal’.\textsuperscript{31}

Private reprisals became less tolerable with the increasing role of the state and the emergence of state responsibility,\textsuperscript{32} with public reprisals emerging as a coercive tool ‘to force the offending state to do justice’.\textsuperscript{33} 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 classified as falling short of war.\textsuperscript{34} Ian Brownlie considered that their value ‘lay in the possibility of gaining redress without creating a formal state of war’.\textsuperscript{35} The actions comprising the reprisals were considered to be prima facie unlawful but justified for being taken in response to a prior unlawful act:

\begin{quote}

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 (p. 884) way of measures which, in themselves, would also be tortious, but receive their legality from the unredressed prior wrong.\textsuperscript{36}
\end{quote}

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, ‘So 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’.\textsuperscript{37}

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’.\textsuperscript{38} He explains:

\begin{quote}

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 there was some uncertainty as to the essential characteristic of the reprisal.\textsuperscript{39}
\end{quote}

Antonio Cassese has commented similarly that:

\begin{quote}

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 up a separate category, for it did not matter
\end{quote}
very much whether forcible measures short of war were to be labelled ‘intervention’ or ‘reprisal’.  

The permissiveness of the law on the use of force saw actions incorrectly labelled as reprisals, with categorizations usually being made by jurists retrospectively. 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’.  

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, which did not qualify as a ‘violation of a rule of international law by the State against which the reprisals are directed’. 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.  

The Tribunal also noted the ‘tendency to restrict the notion of legitimate reprisals and to prohibit any excess of their use’. The Naulilaa arbitral award is seen as setting out the established customary criteria for armed reprisals, including a prior violation of international law, an unmet demand for reparation, and proportionality, although its interpretation of the latter requirement has been queried. 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, ‘It was not accidental that the Tribunal dealt so confidently with reprisals as a legal institution’.  

The permissiveness of international law towards the use of force was progressively restricted during the 20th century. Limitations on the use of force were notably set out in the Covenant of the League of Nations and the Kellogg–Briand Pact, although it is unclear whether these new rules limited resort to reprisals, given that no express prohibition was included in these instruments. 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 ‘Coercive 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’. The obligation in the Covenant to settle disputes by pacific means could arguably have precluded armed reprisals where a peaceful resolution was not sought first, according to Brierly, although he considered that reprisals might remain permissible in response to a breach of either the Covenant or the Pact themselves. In 1931, the Permanent Court of International Justice referred to the general concept of pacific reprisals as an ‘alleged right’. 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.  

The developments in international law at the end of the Second World War 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. 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’. 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 UN Charter is of course the key international treaty governing the use of force in international relations and it is largely viewed as having 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’. 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-authorized 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, UN bodies, international courts, and the majority of scholars, as discussed later. A 1946 Commentary on the Charter states that the obligation in Article 2(3) is such that ‘It is obvious that this rules out recourse to certain measures short of war which involve the use of force, such as armed reprisals’.

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. 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. 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’. 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 fulfilment of a final international award or a recommendation by the Security Council would not be inconsistent with the purpose of the Organization.

At San Francisco, the US 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’. 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, 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’.

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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’.\(^{69}\) Ian Brownlie was of the opinion that the ‘Unambiguous prohibition of forcible reprisals was finally accomplished by the Charter of the United Nations’.\(^{70}\) Armed reprisals are ‘considered indisputably contrary to Art. 2(4)’, according to Antonio Cassese,\(^{71}\) while Georg Schwarzenberger asserted that ‘The 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’.\(^{72}\) 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.\(^{73}\)

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’.\(^{74}\) Even though armed reprisals are viewed as outlawed under the Charter,\(^{75}\) non-forcible (p. 889) reprisals or countermeasures are permitted ‘when carried out by economic, financial or other peaceful means’.\(^{76}\)

The practice of international organizations would seem to support this ‘most widely-accepted interpretation’ of the Charter.\(^{77}\) 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’.\(^{78}\) The UK did not dispute the unlawfulness of reprisals, but rather challenged the categorization of the military action in question as either a reprisal or retaliation.\(^{79}\) 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.\(^{80}\)

The General Assembly has also viewed armed reprisals as inconsistent with the UN Charter in a resolution adopted 25 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’.\(^{81}\) The General Assembly’s 1981 Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States proclaimed that the duty of states to refrain from armed intervention and interference also covers ‘acts of reprisal involving the use of force’.\(^{82}\) The Final Act of the Conference on Security and Cooperation in Europe obliges participating states to ‘refrain in their mutual relations from any act of reprisal by force’.\(^{83}\)

The International Court of Justice (ICJ) 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.\footnote{p. 890} This statement has been criticized for not explicitly declaring armed reprisals to be unlawful,\footnote{85} although the Court’s statement can be interpreted as doing so. In Nicaragua, the Court drew on Resolution 2625 (XXV), finding that it ‘affords an indication of [States’] \textit{opinio juris} as to customary international law’, and it identifies reprisals as a prohibited ‘less grave form of the use of force’.\footnote{86} 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 victim of these.’\footnote{87} It held in particular, that such action ‘could not justify intervention involving the use of force’.\footnote{88}

The \textit{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.\footnote{89} 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 US action as military reprisals and felt that the Court should have addressed the ‘illegality of reprisals in international law’.\footnote{90} 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’.\footnote{91} Judge Simma lamented the Court’s failure to address countermeasures involving force.\footnote{92} He addressed the question of how (p. 891) 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 cannot have understood mere pacific reprisals’.\footnote{93} He advocates a concept of defensive military action that falls short of ‘full-scale self-defence’.\footnote{94}

The International Law Commission (ILC) has had to address armed reprisals when preparing the Articles on State Responsibility, given the continued validity of non-forcible reprisals, now renamed countermeasures.\footnote{95} 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’.\footnote{96} Accordingly, the regime of countermeasures in the Articles excludes measures affecting ‘The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations’.\footnote{97} This prohibition on the use of force includes armed reprisals and ‘definitively consolidates the inclusion of their peaceful character in the definition of countermeasures’.\footnote{98} 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.99

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.

(p. 892) IV. 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 pacific settlement of disputes.100 Armed reprisals might be seen as a ‘necessary evil’101 or even a ‘desirable tool’,102 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’.103 Such positions are taken, it is claimed, because of ‘U.N. impotence to provide its members with protection against illegal uses of force’.104 Derek Bowett’s 1972 American Journal of International Law article has been particularly influential in the revival debate.105 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 and, with it, a capacity for collective action to suppress any resort to unlawful force which has simply not been achieved’.106 He asserted that ‘The law of reprisals is, because of its divorce from actual practice, rapidly degenerating to a stage where its normative character is in question’.107 The Security Council has condemned retaliatory actions, but often for different reasons, which is problematic for Bowett, ‘if the principle is that all reprisals are illegal’.108 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’.109 He was clear to point out that ‘if this trend continues, we shall achieve a position in which, while reprisals remain illegal de jure, they become accepted de facto’.110 He added, however, that:(p. 893)

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.111

As a member of the ILC, 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).112

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.113 It is argued that customary international law,114 or at least state practice,115 serves 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 20th-century examples of a state representative unambiguously categorizing action as an armed reprisal.116 There are a few isolated examples,117 but nothing approaching 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’. 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’. 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. The Security Council itself, as well as individual members, has frequently condemned Israeli actions as unlawful reprisals or retaliation contrary to the UN Charter. Roberto Barsotti provides (p. 894) a most persuasive rebuttal to Bowett’s ‘reasonable’ reprisals suggestion, 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’.

As noted by the ILC, there have been claims that reprisals are permitted under the rubric of self-defence, although this is not a well-supported contention given the clear distinctions between the two concepts. The Acting US Secretary of State, Kenneth Rush, touched on this in 1974 while endorsing the norm prohibiting reprisals in Resolution 2625 (XXV):

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-defense and unlawful reprisals.

It is argued that overlap between the concepts in practice is primarily a matter of fact rather than law. 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. Yoram Dinstein contends that his controversial concept of ‘defensive armed reprisals’ is permitted under Article 51 and customary international law, while accepting the general rule that armed reprisals are themselves unlawful. 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. 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’, the target of military action ‘may be (p. 895) entirely different and far away’, while proportionality remains the ‘quintessential’ or ‘decisive’ factor in assessing legality.

Aside from the lack of convincing legal grounds underpinning the argument that armed reprisals are not contrary to the UN 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’. Reprisals or retaliatory action have invariably been the preserve of more powerful and usually Western states, which highlights the inherent risks of shaping an international legal doctrine solely in the 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 from them compliance with unreasonable demands’, to create a casus belli or gain a military advantage over an enemy before war breaks out. 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’. 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.\textsuperscript{139} Derek Bowett found that the strongest argument against armed reprisals is their ‘degenerating effect’,\textsuperscript{140} and firmly concluded that ‘reprisals have proved to be productive of greater violence rather than a deterrent to violence’.\textsuperscript{141}

There are, of course, imperfect alternatives available, including non-forcible countermeasures and sanctions, which are less likely to be counterproductive.\textsuperscript{142} 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’,\textsuperscript{143} and hark back (p. 896) 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’.\textsuperscript{144} The case for the revival of armed reprisals remains unpersuasive, and its failure to gain any significant acceptance by states serves in fact to reinforce the widespread support for the established norms on the use of force.

\textbf{Footnotes:}

\begin{itemize}
\item \textsuperscript{*} The author wishes to acknowledge the research assistance provided by Natia Mueller and Menaka Nayer.
\item \textsuperscript{1} Antonio Cassese, \textit{International Law} (2nd edn, Oxford: Oxford University Press, 2005), 299.
\item \textsuperscript{2} UN Charter, Art 2(4), 24 Oct 1945, 1 UNTS XVI.
\item \textsuperscript{3} GA Res 2625 (XXV) of 24 Oct 1970.
\item \textsuperscript{5} \textit{The Oxford Compact English Dictionary} (2nd edn, Oxford: Oxford University Press, 2003), 974.
\item \textsuperscript{7} Hans Kelsen, \textit{Principles of International Law} (New York: Rinehart & Co, 1952), 23.
\item \textsuperscript{10} See generally Frits Kalshoven, \textit{Belligerent Reprisals} (Leiden: Martinus Nijhoff, 1971).
\item \textsuperscript{11} Yoram Dinstein, \textit{War, Aggression and Self-Defence} (5th edn, Cambridge: Cambridge University Press, 2011), 244.
\end{itemize}

14 Speyer Colbert, Retaliation in International Law, 2-3 fn 1.

15 Speyer Colbert, Retaliation in International Law, 2-3 fn 1.

16 Lawrence, The Principles of International Law, 334.


18 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 Apr 1863.


20 Institut de Droit International, Session de Paris 1934, Régime de répresaillies en temps de paix, Article 1 (author’s translation).


24 Cassese, International Law, 299.


27 Lawrence, The Principles of International Law, 344.


29 Lawrence, The Principles of International Law, 335.

30 Speyer Colbert, Retaliation in International Law, 3-4.

31 US Constitution, Art 1, Section 8(11).

32 Lawrence, The Principles of International Law, 335.

33 Speyer Colbert, Retaliation in International Law, 4.

34 Speyer Colbert, Retaliation in International Law, 4.


38 Barsotti, ‘Armed Reprisals’, 84.

39 Barsotti, ‘Armed Reprisals’, 84.

40 Cassese, *International Law*, 300.

41 Barsotti, ‘Armed Reprisals’, 84.


44 *Portugal v. Germany* (*The Naulilaa Case*), Special Arbitral Tribunal, 31 July 1928 (1927–8) *Annual Digest of Public International Law Cases* 526.

45 *The Naulilaa Case*, 527.

46 *The Naulilaa Case*, 527.

47 *The Naulilaa Case*, 527.


52 Covenant of the League of Nations, 28 Apr 1919, Arts 10–16; Treaty between the United States and other Powers providing for the renunciation of war as an instrument of national policy, 27 Aug 1928, Arts I–II.


60 UN Charter, Art 2(3).


63 Hilderbrand, Dumbarton Oaks, 85.


70 Brownlie, International Law and the Use of Force by States, 223. See also at 281, 348, 431; Ian Brownlie, Principles of Public International Law (7th edn, Oxford: Oxford University Press, 2008), 466.


72 Schwarzenberger, International Law as applied by International Courts and Tribunals, 51.

73 Kalshoven, Belligerent Reprisals, 6-7.


77 Barsotti, ‘Armed Reprisals’, 79.


79 Barsotti, ‘Armed Reprisals’, 91.


82 GA Res 36/103 (9 Dec 1981), Section II(c).


84 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, General List No 95, para 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, 2.

85 Cassese, International Law, 303.


87 Nicaragua, Merits, para 249.

88 Nicaragua, Merits, para 249.

89 Case Concerning Oil Platforms (Iran v. US), Judgment of 6 Nov 2003, ICJ Rep 2003, 161. It has been argued that the judgment implicitly finds the US military action to be unlawful reprisals, see Christine Gray, International Law and the Use of Force (3rd edn, Oxford: Oxford University Press, 2008), 153.

90 Dissenting Opinion of Judge Elaraby, para 1.2.

91 Dissenting Opinion of Judge Elaraby, para 1.2.

92 Separate Opinion of Judge Simma, para 12.

93 Separate Opinion of Judge Simma, para 12.

94 See also Dinstein, War, Aggression and Self-Defence, 254. See, however, James Green, The International Court of Justice and Self-Defence in International Law (Oxford: Hart, 2009), 54–6, where he seeks to distinguish forcible countermeasures and armed reprisals.


97 Art 50(1)(a). See also Lesaffre, ‘Circumstances Precluding Wrongfulness’, 469.


Partsch, ‘Reprisals’, 201.

Levenfeld, ‘Israel’s Counter-Fedayeen Tactics in Lebanon’, 35.

Levenfeld, ‘Israel’s Counter-Fedayeen Tactics in Lebanon’, 35. See also Lillich, ‘Forcible Self-Help under International Law’, 133; Speyer Colbert, Retaliation in International Law, 201.


Bowett, ‘Reprisals Involving Recourse to Armed Force’, 22.


See also Kelly, ‘Time Warp to 1945’, 12–19; Dinstein, War, Aggression and Self-Defence, 252.

Levenfeld, ‘Israel’s Counter-Fedayeen Tactics in Lebanon’, 46.


Kalshoven, Belligerent Reprisals, 4–5.

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’, 429; Bowett, ‘Reprisals Involving Recourse to Armed Force’, 13 fn 48. See, however, Barsotti, ‘Armed Reprisals’, 87, 91.

120 eg see O’Brien, ‘Reprisals, Deterrence and Self-Defense in Counter-Terror Operations’, 426–33, 441, 443, describing reactive measures as ‘counterterror’ and ‘counterforce’ actions. See, however, the example at 432–3, 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’.


123 Barsotti, ‘Armed Reprisals’, 92.


127 Kalshoven, Belligerent Reprisals, 27.


129 Dinstein, War, Aggression and Self-Defence, 245, 250.

130 Dinstein, War, Aggression and Self-Defence, 245, 247.

131 Dinstein, War, Aggression and Self-Defence, 245. See also 249.

132 Dinstein, War, Aggression and Self-Defence, 245.


134 Colbert, Retaliation in International Law, 1.

135 Barsotti, ‘Armed Reprisals’, 90.


137 Colbert, Retaliation in International Law, 55.


140 Bowett, ‘Reprisals Involving Recourse to Armed Force’, 16.

141 Bowett, ‘Reprisals Involving Recourse to Armed Force’, 32.


144 Barsotti, ‘Armed Reprisals’, 102.