

ordinarily be characterized as illegal, the stringent conditions that apply to reprisal do not apply to retorsion.<sup>193</sup>

Retorsion is a general remedy available to States under international law and is not specific to the law of war. Retorsion might be used by States before, or in connection with, military operations (*e.g.*, an economic embargo). Retorsion, however, could also be used to seek to compel an adversary to adhere to the law of war.

## 18.18 REPRISALS

Reprisals are extreme measures of coercion used to help enforce the law of war by seeking to persuade an adversary to cease violations.

States may resort to reprisals only when certain conditions are met. In addition, there are certain treaty prohibitions on reprisal, and practical considerations may counsel against their use.

18.18.1 Definition of Reprisal. Reprisals are acts taken against a party: (1) that would otherwise be unlawful; (2) in order to persuade that party to cease violating the law.<sup>194</sup>

For example, during the Civil War, the United States authorized reprisals against Confederate forces for murdering and enslaving captured Union soldiers.<sup>195</sup> Reprisals against POWs are now prohibited.<sup>196</sup>

18.18.1.1 Reprisal – Notes on Terminology. Some older sources used “reprisal” in a narrower sense only to refer to taking possession of property of the enemy in response to

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<sup>193</sup> Refer to § 18.18.2 (Conditions for Lawful Reprisals).

<sup>194</sup> See GC COMMENTARY 227 (“Reprisals are measures contrary to law, but which, when taken by one State with regard to another State to ensure the cessation of certain acts or to obtain compensation for them, are considered as lawful in the particular conditions under which they are carried out.”); *United States v. Ohlendorf, et al.* (Einsatzgruppen Case), IV TRIALS OF WAR CRIMINALS BEFORE THE NMT 493 (“Reprisals in war are the commission of acts which, although illegal in themselves, may, under the specific circumstances of the given case, become justified because the guilty adversary has himself behaved illegally, and the action is taken in last resort, in order to prevent the adversary from behaving illegally in the future.”).

<sup>195</sup> Abraham Lincoln, General Order No. 252, Jul. 31, 1863, *reprinted in* Thos. M. O’Brien & Oliver Diefendorf, UNITED STATES WAR DEPARTMENT, II GENERAL ORDERS OF THE WAR DEPARTMENT, EMBRACING THE YEARS 1861, 1862 & 1863, 323 (1864) (“It is the duty of every government to give protection to its citizens, of whatever class, color, or condition, and especially to those who are duly organized as soldiers in the public service. The law of nations and the usages and customs of war, as carried on by civilized powers, permit no distinction as to color in the treatment of prisoners of war as public enemies. To sell or enslave any captured person on account of his color, and for no offense against the laws of war, is a relapse into barbarism and a crime against the civilization of the age. The Government of the United States will give the same protection to all its soldiers, and if the enemy shall sell or enslave anyone because of his color the offense shall be punished by retaliation upon the enemy’s prisoners in our possession. It is therefore ordered, That for every soldier of the United States killed in violation of the laws of war a rebel soldier shall be executed, and for every one enslaved by the enemy or sold into slavery a rebel soldier shall be placed at hard labor on the public works and continued at such labor until the other shall be released and receive the treatment due to a prisoner of war.”).

<sup>196</sup> Refer to § 18.18.3.2 (Reprisals Prohibited by the 1949 Geneva Conventions).

violations of the law of war.<sup>197</sup> Some older sources used the term “retaliation” to describe what is now commonly understood to be “reprisal.”<sup>198</sup>

The term “countermeasures” is sometimes used to cover that part of the subject of reprisals not associated with armed conflict, with the term “reprisals” or “belligerent reprisals” sometimes reserved for action taken during international armed conflict.<sup>199</sup>

18.18.1.2 *Acts That Would Otherwise Be Unlawful.* Reprisals involve acts that would otherwise be unlawful. For example, responding to illegal enemy action by withdrawing benefits extended to the enemy where such benefits are not legally required would not be characterized as a reprisal. Rather, such action would be characterized as retorsion, *i.e.*, unfriendly conduct that is not inconsistent with any international obligation of the State engaging in it even though it may be a response to an internationally wrongful act.<sup>200</sup>

18.18.1.3 *In Order to Persuade a Party to Cease Violating the Law.* Reprisals are intended to influence a party to cease committing violations at present and in the future. Reprisals are not revenge or collective punishment.

18.18.2 *Conditions for Lawful Reprisals.* Customary international law permits reprisals, subject to certain conditions.

18.18.2.1 *Careful Inquiry That Reprisals Are Justified.* Reprisals shall be resorted to only after a careful inquiry into the facts to determine that the enemy has, in fact, violated the law.<sup>201</sup> In many cases, whether a law of war rule has been violated will not be apparent to the opposing side or outside observers. For example, a bombardment that results in the death of civilians may be the result of good faith, reasonable, mistake or may have been justified by the

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<sup>197</sup> See, e.g., WINTHROP, MILITARY LAW & PRECEDENTS 798 (“**Reprisal.** This further method, above specified, consists in the taking possession of property of the enemy or of his subjects, to be held as indemnity for injury inflicted in violation of the laws of war, or as security till a pecuniary indemnity be duly rendered.”).

<sup>198</sup> LIEBER CODE art. 27 (“The law of war can no more wholly dispense with retaliation than can the law of nations, of which it is a branch. Yet civilized nations acknowledge retaliation as the sternest feature of war. A reckless enemy often leaves to his opponent no other means of securing himself against the repetition of barbarous outrage.”).

<sup>199</sup> U.N. International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 128 (2001) (“As to terminology, traditionally the term ‘reprisals’ was used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach. More recently, the term ‘reprisals’ has been limited to action taken in time of international armed conflict; *i.e.* it has been taken as equivalent to belligerent reprisals. The term ‘countermeasures’ covers that part of the subject of reprisals not associated with armed conflict, and in accordance with modern practice and judicial decisions the term is used in that sense in this chapter.”).

<sup>200</sup> Refer to § 18.17 (Retorsion).

<sup>201</sup> LIEBER CODE art. 28 (“Retaliation will therefore never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover cautiously and unavoidably -- that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence and the character of the misdeeds that may demand retribution. Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages.”).

importance of destroying the military objective against which the bombardment was directed.

18.18.2.2 *Exhaustion of Other Means of Securing the Adversary's Compliance With the Law of War*. Other means of securing compliance with the law of war should be exhausted before resorting to reprisals.<sup>202</sup> For example, consideration should be given to using protests and demands, retorsion, or reasonable notice of the threat to use reprisals before resorting to reprisals.<sup>203</sup>

18.18.2.3 *National-Level Authorization for Reprisal*. Reprisals require a variety of conditions and implicate the rights and duties of a State under international law.<sup>204</sup> Thus, the authority to conduct reprisal is generally held at the national level.<sup>205</sup> Service members and units are not to take reprisal action on their own initiative.

18.18.2.4 *Proportionality in Reprisal*. To be legal, reprisals must respond in a proportionate manner to the preceding illegal act by the party against which they are taken.<sup>206</sup> Identical reprisals are the easiest to justify as proportionate, because subjective comparisons are not involved.<sup>207</sup>

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<sup>202</sup> 1956 FM 27-10 (Change No. 1 1976) ¶497b (“*Priority of Other Remedies*. Other means of securing compliance with the law of war should normally be exhausted before resort is had to reprisals. This course should be pursued unless the safety of the troops requires immediate drastic action and the persons who actually committed the offenses cannot be secured.”).

<sup>203</sup> Refer to § 18.10 (Methods for Responding to Violations of the Law of War by the Enemy).

<sup>204</sup> See Trial of Hans Albin Rauter, *Judgment*, XIV U.N. LAW REPORTS 89, 132 (Netherlands Special Court of Cassation, Jan. 12, 1949) (“In the proper sense one can speak of reprisals only when a State resorts, by means of its organs, to measures at variance with International Law, on account of the fact that its *opponent*—in this case the State with which it is at war—had begun, by means of one or more of its organs, to commit acts contrary to International Law, quite irrespective of the question as to what organ this may have been, Government or legislator, Commander of the Fleet, Commander of Land Forces, or of the Air Force, diplomat or colonial governor. The measures which the appellant describes ... as ‘reprisals’ bear an entirely different character, they are indeed retaliatory measures taken in time of war by the occupant of enemy territory as a retaliation not of unlawful acts of the State with which he is at war, but of hostile acts of the population of the territory in question or of individual members thereof, which, in accordance with the rights of occupation, he is not bound to suffer. Both types of ‘reprisals’ have this in common, that the right to take genuine reprisals as well as the alleged competence to take so called ‘reprisals’ may in principle belong only to the State which applies them, ... .”) (first ellipsis in original).

<sup>205</sup> For example, 2004 UK MANUAL ¶16.19.2 (“This means that reprisals taken in accordance with the statement are permissible by and against the United Kingdom. However, commanders and commanders-in-chief are not to take reprisal action on their own initiative. Requests for authority to take reprisal action must be submitted to the Ministry of Defence and require clearance at Cabinet level.”).

<sup>206</sup> Refer to § 2.4 (Proportionality).

<sup>207</sup> Larry A. Hammond, Deputy Assistant Attorney General, *Possible Participation by the United States in Islamic Republic of Iran v. Pahlavi*, 4A OPINIONS OF THE OFFICE OF LEGAL COUNSEL 160, 163 (1980) (“Customary international law allows reprisals, which are breaches of a treaty’s terms in response to a breach by another party. To be legal, reprisals must respond in a proportionate manner to a preceding illegal act by the party against whom they are taken. Identical reprisals are the easiest to justify as proportionate, because subjective comparisons are not involved. Thus, in the current crisis, the taking of Iranian diplomats as ‘hostages’ (or a lesser restriction on their freedom of movement that approaches imprisonment) would clearly be a proportionate response; reducing the immunity of Iranian diplomats from criminal prosecution would be more difficult to justify.”).

However, the acts resorted to by way of reprisal need not be identical nor of the same type as the violations committed by the enemy. A reprisal should not be unreasonable or excessive compared to the adversary's violation.<sup>208</sup>

18.18.2.5 *Public Announcement of Reprisals*. In order to fulfill their purpose of dissuading the adversary from further illegal conduct, reprisals must be made public and announced as such.<sup>209</sup>

18.18.3 *Treaty Prohibitions on Reprisals*. Although reprisals are generally permissible under customary international law, certain treaties have prohibited certain types of reprisals.

18.18.3.1 *Reprisals Prohibited by the CCW Amended Mines Protocol*. It is prohibited in all circumstances to direct mines, booby-traps, and other devices, either in offense, defense, or by way of reprisals, against the civilian population as such or against individual civilians or civilian objects.<sup>210</sup>

18.18.3.2 *Reprisals Prohibited by the 1949 Geneva Conventions*. Reprisals against the wounded, sick, or shipwrecked persons, personnel, buildings, vessels, or equipment protected by the GWS or GWS-Sea are prohibited.<sup>211</sup> Such persons or property would include:

- combatant personnel who are wounded, sick, or shipwrecked;<sup>212</sup>
- medical personnel and chaplains;<sup>213</sup>

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<sup>208</sup> See Naulilaa Incident Arbitration, Portuguese-German Arbitral Tribunal, 1928, *reprinted and translated in* WILLIAM W. BISHOP, *INTERNATIONAL LAW: CASES AND MATERIALS* 904 (1971) ("The necessity of a proportion between the reprisals and the offense would appear to be recognized in the German answer. Even if one admitted that international law does not require that the reprisal be approximately measured by the offense, one should certainly consider as excessive, and thus illegal, reprisals out of all proportion with the act which motivated them. Now in this case ... there has been evident disproportion between the incident of Naulilaa and the six acts of reprisals which followed it. The arbiters conclude that the German aggressions of October, November and December, 1914, on the Angola frontier, cannot be considered as lawful reprisals for the Naulilaa incident ... , in view of the lack of sufficient occasion, of previous demand and of admissible proportion between the alleged offense and the reprisals taken.") (ellipses in original).

<sup>209</sup> Trial of Richard Wilhem Hermann Bruns and two others, III U.N. LAW REPORTS 15, 19 (By the Eidsivating Lagmannstrett and The Supreme Court of Norway, Mar. 20-Jul. 3, 1946) ("Reprisals were generally understood to aim at changing the adversary's conduct and forcing him to keep the general accepted rules of lawful warfare. If this aim were to be achieved, the reprisals must be made public and announced as such.").

<sup>210</sup> CCW AMENDED MINES PROTOCOL art. 3(7) ("It is prohibited in all circumstances to direct weapons to which this Article applies, either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians or civilian objects.").

<sup>211</sup> GWS art. 46 ("Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited."); GWS-SEA art. 47 ("Reprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention are prohibited.").

<sup>212</sup> Refer to § 7.3.1 (Definitions of Wounded, Sick, and Shipwrecked).

<sup>213</sup> Refer to § 7.8 (Respect and Protection of Categories of Medical and Religious Personnel).

- medical units and facilities;<sup>214</sup> and
- hospital ships.<sup>215</sup>

Measures of reprisal against POWs are prohibited.<sup>216</sup>

Reprisals against protected persons under the GC and their property are prohibited.<sup>217</sup>

#### 18.18.3.3 *Reprisals Prohibited by the 1954 Hague Cultural Property Convention.*

Parties to the 1954 Hague Cultural Property Convention shall refrain from any act directed by way of reprisals against cultural property.<sup>218</sup> Cultural property is defined in the 1954 Hague Cultural Property Convention.<sup>219</sup>

#### 18.18.3.4 *AP I Provisions on Reprisals.* AP I prohibits attacks by way of reprisal

against:

- the civilian population or civilians;<sup>220</sup>
- civilian objects;<sup>221</sup>
- objects indispensable to the survival of the civilian population such as foodstuffs, crops,

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<sup>214</sup> Refer to § 7.10 (Military Medical Units and Facilities).

<sup>215</sup> Refer to § 7.12.1 (Types of Hospital Ships and Coastal Rescue Craft).

<sup>216</sup> GPW art. 13 (“Measures of reprisal against prisoners of war are prohibited.”); The Dostler Case, Trial of General Anton Dostler, I U.N. LAW REPORTS 22, 31 (U.S. Military Commission, Rome, Oct. 8-12, 1945) (“under the law as codified by the 1929 Convention there can be no legitimate reprisals against prisoners of war. No soldier, and still less a Commanding General, can be heard to say that he considered the summary shooting of prisoners of war legitimate even as a reprisal.”); Winston Churchill, Prime Minister, United Kingdom, *Oral Answers to Questions*, Oct. 13, 1942, HANSARD, 383 HOUSE OF COMMONS DEBATES § 1501 (“The Geneva Convention upon the treatment of prisoners of war does not attempt to regulate what happens in the actual fighting. It is confined solely to the treatment of prisoners who have been securely captured and are in the responsible charge of the hostile Government. Both His Majesty’s Government and the German Government are bound by this Convention. The German Government by throwing into chains 1,370 British prisoners of war for whose proper treatment they are responsible have violated Article 2 of the aforesaid Convention. They are thus attempting to use prisoners of war as if they were hostages upon whom reprisals can be taken for occurrences on the field of battle with which the said prisoners can have had nothing to do. This action of the German Government affronts the sanctity of the Geneva Convention which His Majesty’s Government have always been anxious to observe punctiliously.”). Refer to § 9.3.2 (Persons Entitled to POW Status).

<sup>217</sup> GC art. 33 (“Reprisals against protected persons and their property are prohibited.”). Refer to § 10.3 (Protected Person Status).

<sup>218</sup> 1954 HAGUE CULTURAL PROPERTY CONVENTION art. 4(4) (“They [High Contracting Parties] shall refrain from any act directed by way of reprisals against cultural property.”).

<sup>219</sup> Refer to § 5.18.1 (Definition of Cultural Property).

<sup>220</sup> AP I art. 51(6) (“Attacks against the civilian population or civilians by way of reprisals are prohibited.”).

<sup>221</sup> AP I art. 52 (“1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.”).

livestock, drinking water installations and supplies, and irrigation works;<sup>222</sup>

- the natural environment;<sup>223</sup> and
- works and installations containing dangerous forces, namely dams, dykes, and nuclear electrical generating systems.<sup>224</sup>

The United States has expressed the view that AP I's provisions on reprisal are counter-productive and that they remove a significant deterrent that protects civilians and war victims on all sides of a conflict.<sup>225</sup> The United Kingdom has taken a reservation to AP I's prohibition on certain attacks by way of reprisal.<sup>226</sup> Egypt, Germany, and Italy also reserved the right to react to serious violations of AP I with any means permitted by international law to prevent further violations.<sup>227</sup> France has declared that it will apply the provisions of paragraph 8 of Article 51

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<sup>222</sup> AP I art. 54 ("2. ...objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works... 4. These objects shall not be made the object of reprisals.").

<sup>223</sup> AP I art. 55(2) ("Attacks against the natural environment by way of reprisals are prohibited.").

<sup>224</sup> AP I art. 56(1) ("Works or installations containing dangerous forces, namely dams, dykes and nuclear energy generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population."); AP I art. 56(4) ("It is prohibited to make any of the works, installations or military objects mentioned in paragraph 1 the object of reprisals.").

<sup>225</sup> *The Position of the United States on Current Law of War Agreements: Remarks of Judge Abraham D. Sofaer, Legal Adviser, United States Department of State, January 22, 1987*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 460, 469 (1987) ("To take another example, article 51 of Protocol I prohibits any reprisal attacks against the civilian population, that is, attacks that would otherwise be forbidden but that are in response to the enemy's own violations of the law and are intended to deter future violations. Historically, reciprocity has been the major sanction underlying the laws of war. If article 51 were to come into force for the United States, an enemy could deliberately carry out attacks against friendly civilian populations, and the United States would be legally forbidden to reply in kind. As a practical matter, the United States might, for political or humanitarian reasons, decide in a particular case not to carry out retaliatory or reprisal attacks involving unfriendly civilian populations. To formally renounce even the option of such attacks, however, removes a significant deterrent that presently protects civilians and other war victims on all sides of a conflict.").

<sup>226</sup> United Kingdom, *Statement on Ratification of AP I*, Jan. 28, 1998, 2020 UNTS 75, 77-78 ("*(m) Re: Articles 51-55* The obligations of Article 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949, nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.").

<sup>227</sup> Egypt, *Statement on Ratification of AP I*, Oct. 9, 1992, 1712 UNTS 435, 439 ("The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Protocols Additional I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Protocols Additional I and II with all means admissible under international law in order to

insofar as their interpretation does not constitute an obstacle to the use, according to international law, of the means which it considers indispensable for the protection of its civilian population against grave, clear and deliberate violations of the 1949 Geneva Conventions and of AP I by the enemy.<sup>228</sup>

18.18.4 Practical Considerations in the Use of Reprisals. Apart from the strict legal requirements for the resort to reprisal, it will be important to consider the potential practical consequences of the use of reprisals that may counsel strongly against taking such measures. Practical considerations, including longer-term military or political consequences, may include the following factors:

- Taking reprisals may divert valuable and scarce military resources from the military struggle and may not be as effective militarily as steady adherence to the law.
- Reprisals will usually have an adverse impact on the attitudes of governments not participating in the conflict.
- Reprisals may only strengthen enemy morale and will to resist.
- Reprisals frequently lead only to further unwanted escalation of the conflict by an adversary or a vicious cycle of counter-reprisals.
- Reprisals may render resources of an adversary less able to contribute to the rehabilitation of an area after the cessation of hostilities.<sup>229</sup>

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prevent any further violation.”); Germany, *Statement on Ratification of AP I*, Feb. 14, 1991, 1607 UNTS 526, 529 (“The Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation.”); Italy, *Statement on Ratification of AP I*, Feb. 27, 1986, 1425 UNTS 438, 440 (“Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation.”).

<sup>228</sup> France, *Statement on Ratification of AP I, translated in SCHINDLER & TOMAN, THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS* 800, 801 (2004) (“The Government of the French Republic declares that it will apply the provisions of paragraph 8 of Article 51 insofar as their interpretation does not constitute an obstacle to the use, according to international law, of the means which it considers indispensable for the protection of its civilian population against grave, clear and deliberate violations of the Geneva Conventions and of the Protocol by the enemy.”).

<sup>229</sup> 1976 AIR FORCE PAMPHLET 110-31 ¶10-7d (“In addition to the legal requirements which regulate resort to reprisals, there are various practical factors which governments will consider before taking reprisals. The relative importance of these factors depends upon the degree and kind of armed conflict, the character of the adversary and its resources, and the importance of states not participating in hostilities. These considerations including the following: (1) Taking reprisals may divert valuable and scarce military resources from the military struggle and may not be as effective militarily as steady adherence to the law. (2) Reprisals will usually have an adverse impact on the attitudes of governments not participating in the conflict. (3) Reprisals may only strengthen enemy morale and will to resist. (4) Reprisals frequently lead only to further unwanted escalation of the conflict by an adversary. Accordingly, an adversary’s ability to retaliate is an important factor. (5) Reprisals may render resources of an adversary less able to contribute to the rehabilitation of an area after the cessation of hostilities. (6) The threat of reprisals is usually more effective than their actual use. (7) Reprisals, to be effective, should be carried out speedily