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ARTICLES

Reprisal *Redux*

by James Larry Taulbee*

and

John Anderson†

Over the past thirty-five years few analysts have disputed the general proposition that the Charter of the United Nations prohibits the use of force except in self-defense. This prohibition presumably follows from the obligations to use peaceful means to settle disputes¹ and to refrain from the threat or use of force except in self-defense.² While not explicitly mentioned in the Charter, most have assumed that this general prohibition extended to armed reprisals as well.

However, the efficacy of the collective security regime established by the Charter depended upon the effectiveness of the Security Council in providing collective measures to protect vital interests and redress grievances. Needless to say, the political conditions necessary for consistent and effective Security Council action never materialized. The Security Council's failure to act as the framer of the Charter produced a spirited debate among scholars, statesmen and other interested parties over the scope of the right of self-defense permitted by article 51. What initially had been visualized as a subsidiary principle of order now was elevated to an important means of guaranteeing the integrity of state interests.

Legal scholars divided into two main camps: those who argued from a

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¹ U.N. CHARTER art. 2, para. 3.

² *Id.* at art. 2, para. 4; *id.* at art. 51.

community interest perspective and those who argued from a statist perspective. The community interest proponents assumed that narrowly circumscribing the circumstances which justified a legitimate use of force constituted the best way to minimize the use of force.³ The community interest in containing the use of violence superseded individual state interests in redressing particular wrongs.⁴ Conversely, statist argued that such restrictions were both unrealistic and dangerous: effective protection of state interest required a broader, discretionary approach.⁵ Nonetheless, both groups accepted as given the continuing validity of article 2(4),⁶ even though the collapse of the collective security arrangements of the Charter had effectively removed the possibility of collective sanctions as a means of redressing delicts within the community of nations.⁷

The vague and inconclusive debates within the Security Council on cases brought before it reinforced the sense of normative decay. In addition, the upsurge of violence in the Middle East and elsewhere during the 1960's and 1970's provided a stark contrast between normative theory and empirical practice. Derek Bowett noted:

Not surprisingly, as states have grown increasingly disillusioned about the capacity of the Security Council to afford them protection against what they would regard as illegal and highly injurious conduct directed against them, they have resorted to self-help in the form of reprisals and have acquired the confidence that, in so doing, they will not incur anything more than a formal censure from the Security Council. The law on reprisals is, because of its divorce from actual practice, rapidly degenerating to a stage where its normative character is in question.⁸

To any observer of contemporary international politics, Professor Bowett's declaration should not be surprising. What is surprising, however, is the relative lack of attention given to the problem. Apart from articles dealing with the occasional spectacular event, the Mayaguez for example, the literature on retaliation and reprisal is sparse. Evidently, contemporary scholars, jurists and statesmen have labelled invalid Guglielmo Ferrero's observation that the conscience of the world will not accept the causistry of subtle jurists rationalizing inaction in situations

³ I. BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 279, 373 (1963); Falk, *The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View*, in *THE RELEVANCE OF INTERNATIONAL LAW* 145 (S. Hoffmann & K. Deutsch eds. 1968).

⁴ See R. FALK, *THE END OF WORLD ORDER* chs. 8, 9, 13 (1983).

⁵ D. BOWETT, *SELF DEFENSE IN INTERNATIONAL LAW* 23-25 (1958); J. STONE, *LEGAL CONTROLS OF INTERNATIONAL CONFLICT* 185-200 (1959).

⁶ I. BROWNLIE, *supra* note 3, at 269-70.

⁷ Not since the initial phases of the Korean conflict has the Security Council imposed effective and meaningful sanctions against a state.

⁸ Bowett, *Reprisals Involving Recourse to Armed Force*, 66 *AM. J. INT'L L.* 1, 2 (1972).

which, to the uninitiated, appear to be violent breaches of the peace.⁹ We do not think this observation is invalid. Our purpose, then, will be to analyze the traditional law governing the use of reprisal, analyze the use of force short of war over the past few years to clarify situations and claims and then address the question of whether state practice has established a new set of normative guidelines to replace the absolute standards found in the Charter.

I. TRADITIONAL LAW AND REPRISAL

Commentators have long treated force short of war as a category of self-help regulated by the twin principles of necessity and proportionality.¹⁰ The anomaly, of course, is that nineteenth century international law presumably regulated the use of force short of war while the *resort to war* remained outside the scope of legal restraint.¹¹ Further, permissible self-help was generally identified in separate forms: (1) armed reprisals, (2) armed intervention and (3) pacific blockade.

In theory these three forms of self-help served as sanctions to enforce obligations where important interests were at stake. These interests did not usually involve the security of the state; yet, they were interests that states felt the need to preserve, though not at the cost of war. In practice, pacific blockade and armed intervention constituted doctrines without clear parameters that distinguished them from other measures of self-help which did not enjoy legal status.¹²

A survey of texts and arbitral decisions of the period reveals little agreement on either the nature of the interests nor the types of offensive conduct that might justify the resort to armed intervention or pacific blockade. Indeed, Verzijl and others dismissed pacific blockade and armed intervention as political doctrines used to justify the coercion of the weak by the strong.¹³ In contrast, a moderately well-defined doctrine relating to the use of armed reprisals can be traced, although commentators attribute a certainty to customary practice that seems unwarranted by the diplomatic record.¹⁴

⁹ F. GROB, *THE RELATIVITY OF WAR AND PEACE* 149 (1949).

¹⁰ See, e.g., 1 E. DE Vattel, *LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE: APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* 531-41 (1916) (reproduction of books I and II of the 1758 edition); 8 J. VERZIJL, *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE* 39-40 (1968).

¹¹ J. BRIERLY, *THE LAW OF NATIONS* 397-400 (H. Waldock 6th ed. 1963).

¹² See, e.g., W. HALL, *TREATISE ON INTERNATIONAL LAW* 82-86 (3d ed. 1890); 2 E. STOWELL & H. MUNRO, *INTERNATIONAL CASES: WAR AND NEUTRALITY* 3 (1916); 2 J. WESTLAKE, *INTERNATIONAL LAW* 6-10 (2d ed. 1913).

¹³ J. VERZIJL, *supra* note 10, at 43-48.

¹⁴ M. KAPLAN & N. KATZENBACH, *THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* 207-10 (1961).

By definition, reprisals are injurious acts that ordinarily would be illegal but which become legal acts of enforcement by dint of the target state's prior illegal act.¹⁵ In principle, then, reprisals are sanctions, permitted as a response by a state to any delinquency by another state. Vattel wrote: "Reprisals are used between nation and nation to do themselves justice when they cannot otherwise obtain it."¹⁶

Commentators generally have cited the *Naulilaa Case*¹⁷ as the decision that makes the definitive statement of the conditions under which acts of reprisal may be taken and the limitations upon such acts. First, the exercise of the customary right of reprisal required the establishment of target state's liability for a prior illegal act.¹⁸ Traditionally, because only states could be the subject of an international claim, it was not sufficient that the injury or damage resulted from an act which violated international law. It had to be shown that the target state was in some way responsible for the violation. Imputability served to establish the character of the connection between act and damage.¹⁹

The second condition for the lawful exercise of reprisal was the inability of the injured state to secure reparation from the offending state through peaceful means.²⁰ Given that the exercise of reprisal assumed that a peaceful resolution to a dispute would be sought first, until efforts at peaceful solution had proven unfruitful the necessity for forcible enforcement did not arise. Interestingly, the panel in *Naulilaa* cited no precedents for the requirement that the claimant states must first seek peaceful redress. This seems a curious omission because the requirement formed a necessary condition for the exercise of private reprisal and seemed well-established in nineteenth century practice.²¹

Taken together, these two conditions supposedly define necessity. The difficulty, however, is that they provide no guidance either to the

¹⁵ W. LEVI, *CONTEMPORARY INTERNATIONAL LAW: A CONCISE INTRODUCTION* 312 (1979); G. VON GLAHN, *LAW AMONG NATIONS* 553 (4th ed. 1981).

¹⁶ E. DE VATTEL, *THE LAW OF NATIONS* 283 (J. Chitty trans. & ed. 1852); see *Cushing v. United States*, 22 Ct. Cl. 1, 39 (1886) (quoting Vattel); see also Maccoby, *Reprisals as a Measure of Redress Short of War*, 2 *CAMBRIDGE L.J.* 60 (1924).

¹⁷ *Responsabilité de L'Allemagne a Raison des Dommages Causés dans les Colonies Portugaises du Sud de L'Afrique* (Portugal v. Germany), 2 *R. Int'l Arb. Awards* 1011 (1928) [hereinafter cited as the *Naulilaa Case*]. See also *Portugal v. Germany* (The *Naulilaa Case*), 4 *Ann. Dig.* 526 (Special Arbitral Tribunal 1928).

¹⁸ *Naulilaa Case*, 2 *R. Int'l Arb. Awards* at 1027.

¹⁹ G. SCHWARZENBERGER, *INTERNATIONAL LAW* 617 (1957); Starke, *Imputability in International Delinquencies*, 19 *BRIT. Y.B. INT'L L.* 104 (1938).

²⁰ *Naulilaa Case*, 2 *R. Int'l Arb. Awards* at 1026-27.

²¹ E. COLBERT, *RETALIATION IN INTERNATIONAL LAW* 18, 42 (1948); Clark, *The English Practice with Regard to Reprisals by Private Persons*, 27 *AM. J. INT'L L.* 694, 695-96 (1933); de la Briere, *Evolution de la doctrine et de la pratique en matiere de represailles*, 22 *RECUEIL DE COURS* 252, 258 (1928).

nature of the interests that could be protected by armed reprisal or to the scope of injury to those interests that would provide an injured state with a legitimate claim to employ armed reprisal. Further, a full reading of *Naulilaa* sheds no further light on these questions. That the opinion in *Naulilaa* did not address these questions should come as no surprise to anyone familiar with the facts of the case. The absence of Portuguese liability with respect to the original action meant that *any* German reprisal, violent or non-violent, would have failed to meet any reasonable definition of necessity.

Texts of the pre-World War II era give little additional guidance. Most writers asserted that not every breach of international obligation justifies a resort to armed reprisal, but then failed to specify the nature of the delictual conduct that would permit a use of force in response. Oppenheim's position, for example, would seem to permit a forcible response to *any* delinquency that involved *willfully* malicious behavior.²²

This lack of specific guidance can be explained in various ways. In part, commentators of this era still saw an essential connection between the availability of force as a sanction and the preservation of state interests.²³ Also, unlike the Charter, the Covenant of the League of Nations did not prohibit coercive measures short of war.

Finally, the third *Naulilaa* requirement—that of response roughly proportional to the original delict²⁴—presumably limited the use of force. As with the conditions governing necessity, this *Naulilaa* standard did not address the practical tests by which proportionality may be measured. Scholars have suggested many standards, but the critical questions seem to be related to the *purpose* of the reprisal. Earlier practice distinguished between reparation and retaliation with the former being identified solely with reprisal. Clark, in his discussion of private reprisals in domestic legal systems noted that “[r]etaliati^on involves the use of force to *inflict an injury* in return for an injury inflicted; *reprisal* involves the use of force to *secure compensation for a loss by taking property*.”²⁵ Similarly, Hyde stated:

For the sake of clearness, and for the purpose of preserving solid distinctions of both historical and etymological worth, it is deemed wise

²² 2 L. OPPENHEIM, INTERNATIONAL LAW 137-51 (H. Lauterpacht 7th ed. 1952).

²³ N. Politis, rapporteur of the panel of the Institut de Droit International, summarized the opinion of the members by noting that “le droit des gens a dû très longtemps tolérer et même reconnaître comme légitimes les actes de représailles, parce qu’ils étaient nécessaires.” 38 ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL 26 (1934). See also F. HINSLEY, POWER AND THE PURSUIT OF PEACE 317-20 (1963) (discussion of the collective security regime under the League of Nations); M. KAPLAN & N. KATZENBACH, *supra* note 14, at 214.

²⁴ *Naulilaa Case*, 2 R. Int’l Arb. Awards at 1028.

²⁵ Clark, *supra* note 21, at 702.

to confine the use of the term 'reprisals' to the act of taking or withholding of any form of property of a foreign State or its nationals, for the purpose of obtaining, directly or indirectly, reparation on account of the consequences of internationally illegal conduct for which redress has been refused.²⁶

Many later writers did not maintain the distinction between retaliation and reparation, instead of treating reprisals as a general sanction. Consequently, the purpose of reprisal became two-fold: reparation and deterrence. For example, Hindmarsh argued that a state may take reprisals in order to "secure redress for, or prevent recurrence of acts or omissions which under international law constitute international delinquency."²⁷ The two separate and distinct purposes, reparation and deterrence, produced two vastly different standards for assessing proportionality of action. Securing redress suggests that proportionality must be measured by the extent of the damage stemming from the delict, whereas preventing recurrence (deterrence) suggests a more indeterminate standard based on a calculation of what might be necessary to "teach a lesson." On behalf of the broader definition, advocates have argued that, if reprisals serve as sanctions, and by inference order-maintaining acts, limiting actions to those necessary to achieve reparation may prove inadequate to dissuade the law-breaking state from undertaking similar actions in the future.²⁸ The dilemma stems from the fact that while the wrong done gives some tangible though rough basis by which to gauge proportionality, no equally simple and tangible standard exists by which to gauge the amount of force necessary to convince an errant state to abide

²⁶ 2 C. HYDE, INTERNATIONAL LAW 1662 (1945).

²⁷ A. HINDMARSH, FORCE IN PEACE 58 (1933). Compare this definition with Bowett, *supra* note 8, at 3: "[T]o impose reparation for the harm done, or to compel a satisfactory settlement of the dispute created by the initial illegal act, or to compel the delinquent state to abide by the law in the future."

²⁸ The Tribunal in the *Naulilaa* decision said:

[T]his definition does not require that the reprisals should be proportionate to the offence. On this point authors, unanimous until a few years ago, begin to be divided in their views. The majority regard a certain proportion between the offence and the reprisals as a necessary condition of the legitimacy of the latter. Others among the more modern authors no longer require this condition.

2 R. Int'l Arb. Awards at 1025-26. The Tribunal mentioned only Hatschek and Anzilotti in the minority group. However, on this point, one should note the more contemporary opinion of Professors McDougal and Feliciano who argue that reprisals should be "adapted and related, not so much to the past illegality but rather and primarily to the future purpose sought." M. McDOUGAL & F. FELICIANO, LAW AND MINIMUM PUBLIC WORLD ORDER 682 (1961) (emphasis added). This observation occurs in their discussion of *belligerent* reprisals, but accurately reflects their essential theoretical orientation. Compare F. KALSHOVEN, BELLIGERENT REPRISALS 33 (1971) ("to coerce the addressee to change its policy and bring it into line with the requirements of international law, be it in respect of the past, the present or the future"); A. HINDMARSH, *supra* note 27; Bowett, *supra* note 8, at 3.

by the rule at issue in future cases.²⁹

The more inclusive definition became generally accepted in the 1930's. Unfortunately, post-1945 scholars have given only passing notice to the problems caused by the joining of purposes, and time and events have militated against clarification.³⁰ First, the lack of state practice after the *Naulilaa* decision meant that the omissions and deficiencies of *Naulilaa* went largely unexamined.³¹ Second, the legal community became more concerned with the legal questions surrounding the *resort to war* than with the regulation of force short of war.³² Finally, the ratification of the Charter proscribed forcible reprisals and focused scholarly debate on the conditions attending the lawful exercise of self-defense.³³ Hence, *Naulilaa* still stands as a statement of relevant principles, but the operational criteria that serve as the essential link between statements of principle and application in context remain primitive in form.

II. THE CHARTER, SELF-DEFENSE AND REPRISAL

Self-defense, like reprisal, is a form of self-help and as such is also governed by necessity and proportionality.³⁴ The assumption that the Charter made forcible reprisals illegal while permitting self-defense assumes that clear distinctions may be drawn between the two. Yet, the presumption that forcible reprisals were outlawed has tended to foreclose

²⁹ One should note the parallel problem in assessing measures of self-defense: is proportionality measured by the amount of force necessary to *repel* the immediate danger or by the amount of force necessary to *remove* the danger? See *supra* notes 3 and 5.

³⁰ Contemporary texts cite the conditions laid down by the *Naulilaa* decision. More recent texts refer to Vietnam, the Mayaguez and the Middle East as situations where reprisals have occurred, but do little more. See, e.g., J. BRIERLY, *supra* note 11, at 410-12; I. BROWNLIE, *supra* note 3, at 279; W. GOULD, *AN INTRODUCTION TO INTERNATIONAL LAW* 590-93 (1957); L. OPPENHEIM, *supra* note 22; J. STONE, *supra* note 5; R. SWIFT, *INTERNATIONAL LAW: CURRENT AND CLASSIC* 479-84 (1969); G. VON GLAHN, *supra* note 15, at 553-59.

³¹ Of events specifically characterized as forcible reprisals during the inter-war period, the only one on the scale of *Naulilaa*, was the Italian shelling of Corfu in 1923. J. BARROS, *THE CORFU INCIDENT OF 1923: MUSSOLINI AND THE LEAGUE OF NATIONS* (1965). See G. SCHWARZENBERGER, *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (2d ed. 1949); F. WALTERS, *A HISTORY OF THE LEAGUE OF NATIONS* (1952).

³² F. HINSLEY, *supra* note 23; W. SCHIFFER, *THE LEGAL COMMUNITY OF MANKIND* (1954); F. WALTERS, *supra* note 31; Niemeyer, *The Balance Sheet of the League Experiment*, 6 *INT'L ORGANIZATION* 551-56 (1952).

³³ L. GOODRICH, E. HAMBRO & A. SIMONS, *CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS* 43-55 (3d ed. 1961) [hereinafter cited as *COMMENTARY AND DOCUMENTS*]; R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 173-74, 197-210, 217-18 (1963).

³⁴ For discussions of necessity and proportionality within the Charter framework, see Baxter, *The Legal Consequences of the Unlawful Use of Force Under the Charter*, 62 *PROC. AM. SOC. INT'L L.* 74 (1968); Moore, *Legal Dimensions of the Decision to Intercede in Cambodia*, 65 *AM. J. INT'L L.* 53 (1971).

systematic comparison of the two.

Under the collective security arrangements of the Charter, self-defense was originally visualized as a temporary expedient, available to the target state until the enforcement machinery of the Charter could swing into action.³⁵ Judgment and punishment (retaliation/retribution) would then become the province of the Security Council as the authoritative representative and guardian of the broader community interest. The Charter signified an attempt to substitute collective judgment and enforcement for individual judgment and measures of forcible self-help. Reprisals became illegal because the right to authorize the use of force as a *sanction* now would reside with the community, not the individual member. In sum, just as the development of centralized institutions for judgment and enforcement eliminated the need for private reprisals within domestic legal systems, the Charter would eliminate the need for all forms of self-help (save self-defense) in the international legal system.

In light of the failure of the Security Council to operate as intended, the distinction between various forms of forcible self-help became important, particularly if one continues to assume that self-defense is legal while forcible reprisal is not. In theory, we can differentiate between the two in terms of purpose and time frame. The purpose of self-defense is to protect and prevent damage to the essential rights of territorial integrity and political independence necessary to the existence of a state. In contrast, reprisals have a punitive purpose, coming only after the harm has been done and other methods of resolving a dispute have failed to produce a satisfactory result. Self-defense, then, entails action immediately prior to or in immediate response to actions directed against the most vital interests of a state.³⁶ Reprisals consist of action taken only after deliberation.³⁷ Considering purpose and time, presumably the provocation that would give rise to the *necessity* for self-defense would be of a much different character than that which would justify reprisal.

³⁵ "It should be noted that under Article 51 the inherent right of self-defence is available until the Security Council has taken the measures to maintain international peace and security." R. HIGGINS, *supra* note 33, at 205; see also COMMENTARY AND DOCUMENTS, *supra* note 33, at 342-47. For a concise discussion of the theory of collective security, see I. CLAUD, *SWORDS INTO PLOWSHARES* ch. 12 (4th ed. 1984).

³⁶ We are well aware of the controversial status of anticipatory self-defense in contemporary debates over self-defense. Our position follows that of J. STONE, *supra* note 5, at 245. See *contra* L. HENKIN, *HOW NATIONS BEHAVE* 141-45 (2d ed. 1979). Under customary international law self-defense was justified when the necessity for action was "instant, overwhelming and leaving no choice of means, and no moment for deliberation." 2 J. MOORE, *A DIGEST OF INTERNATIONAL LAW* 412 (1906) (discussion of the destruction of the *Caroline* (Great Britain-United States 1837)). For an interesting discussion, see Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82-99 (1938).

³⁷ The requirement that states should just seek peaceful redress without success would seem to support this conclusion. See *Naulilaa Case*, 2 R. Int'l Arb. Awards 1011 (1928).

At first glance these distinctions seem to provide a clear separation, but critics have argued that upon close examination neither purpose nor time, nor any combination of the two, sufficiently differentiates reprisals from self-defense.³⁸ As noted above, the broader definition of reprisal adopted by most contemporary writers would permit a reprisal to force the law-breaking state to observe the law in future cases. If we include deterrence of future violations among the legitimate purposes of reprisal, then reprisals may reasonably be viewed as protective in purpose as well as punitive.

Moreover, Bowett³⁹ and Tucker⁴⁰ both argue that these distinctions hold only so long as the incidents occur as separate, distinct episodes where provocation and response can be identified with certainty. The traditional law rested upon the assumption that a normal—peaceful—relationship existed between the states involved, and so any departure from the norm could be readily demonstrated and identified. But, in the traditional law, peace meant only the absence of a formal state of war, so “peace” encompassed a wide continuum of relationships ranging from close alliance to intense hostility. In situations legally characterized as peace, states could engage in continuing action/reaction/counter-action retaliations in attempts to punish each other for self-judged violations of the law. In such situations, Bowett argues that the use of purpose and time frame to distinguish between self-defense and reprisal becomes less relevant to the extent that states view the actions in retaliation as having a protective purpose.⁴¹

It is necessary to evaluate these observations, however, in light of Tucker’s question: from the standpoint of the customary law, what would a right to take forcible reprisals add to the scope of the existing right to self-help that is not already contained within the right of self-defense?⁴² Tucker challenges the supposition that there are situations between “peace” and “aggression” that may require a limited use of force to resolve. In essence, Tucker contends that no distinction can be made between the conditions defining the necessity that would justify the resort to measures of self-defense and those which would justify a resort to measures of reprisal.⁴³

Self-defense and reprisal do share a structural similarity in that both are generally characterized as measures of self-help and thus are governed

³⁸ Bowett, *supra* note 8, at 3-5; Comment, *Reprisals and Self-Defense: The Customary Law*, 66 *Am. J. Int'l L.* 586 (1972).

³⁹ Bowett, *supra* note 8, at 3-5.

⁴⁰ Comment, *supra* note 38, at 591-92.

⁴¹ Bowett, *supra* note 8, at 3-4.

⁴² Comment, *supra* note 38, at 589.

⁴³ *Id.* at 589-90.

by the principles of necessity and proportionality. Tucker takes this structural similarity and the fact that both concepts are generally treated as measures of *enforcement* as sufficient evidence that the two are functionally equivalent and merely constitute interchangeable rationales, self-defense being preferred because the Charter legitimizes its use.⁴⁴

Self-defense and reprisal, as with many concepts that categorize social action, lack precise lines of demarcation since they overlap in marginal cases and may share some common parameters. Tucker's line of reasoning, however, does not square with state practice, historical or contemporary. As defined by the literature on the legitimate scope of self-defense, clearly the necessity that justifies force in self-defense comes from an immediate threat to the vital interests of the state such as territorial integrity and political independence.⁴⁵ While Tucker may minimize the difference between force used in response to a perceived threat to existence and the comparatively limited low-level use of force by a state in response to nuisance attacks by "irregular forces" from across a neighboring border,⁴⁶ statesmen still recognize self-defense and reprisal as entirely separate and well-defined with respect to scope and purpose,⁴⁷ even if, in obedience to the Charter, the distinction has been somewhat obscured by pragmatic decisions justifying actions in terms of the only "legitimate" rationale: self-defense.

Moreover, as Kaplan and Katzenbach have noted: "The world of the lawyers was divided into war and peace; the world of the statesman saw intermediary stages in the political process."⁴⁸ This divorce between the legal dichotomy and the practice of states has always placed a great strain on the ingenuity of the legal fraternity. It is in the attempt to deal with the lack of congruence between the world of the lawyer and the world of the statesman that Giradoux's description of international law as the training ground for the imagination⁴⁹ becomes most applicable.

This can be seen in the opinions of jurists who try to cope with the legal effects of executive decisions. In American practice, the claims arising out of the conflict with France from 1793 to 1800 furnish a number of

⁴⁴ *Id.* at 594.

⁴⁵ D. BOWETT, *SELF DEFENSE IN INTERNATIONAL LAW* 23-25, 181 (1959); 2 J. MOORE, *supra* note 36; J. STONE, *AGGRESSION AND WORLD ORDER* (1959).

⁴⁶ Comment, *supra* note 38.

⁴⁷ Compare the difference between the basis for state claims (self defense) and the language of Security Council deliberation/decision in the "Synopsis of Selected Reprisal Incidents" in Bowett, *supra* note 8, at 33-36.

⁴⁸ M. KAPLAN & N. KATZENBACH, *supra* note 14, at 207. For a review and critique of the issues raised by the war-peace dichotomy, see McDougal & Feliciano, *The Initiation of Coercion: A Multi-Temporal Analysis*, 52 AM. J. INT'L L. 241 (1958).

⁴⁹ J. GIRAUDOUX, *TIGER AT THE GATES* 45 (1955).

examples.⁵⁰ The Congress and the President authorized certain specific protective actions, e.g., the seizure of armed vessels and the retaking of American vessels captured by any such armed vessel. The French effort consisted of issuing commissions to privateers to raid American commerce. Neither state considered itself formally at war, the French describing their actions as a "mark of just discontent."⁵¹ In one of the first cases arising out of these circumstances, *Bas v. Tingy*,⁵² Justice Washington noted:

But hostilities may subsist between two nations more confined in its nature and extent being limited as to places, persons and things; and this is more properly termed *imperfect war*; because not solemn, and because those who are authorised to commit hostilities, act under special authority, and can go no further than to the extent of their commission.⁵³

Later in the century, addressing the question with respect to the cases which came to be known as the "French spoliation claims," Judge Davis said:

Acts of retaliation are admitted to be justifiable under certain circumstances. They may exist when the two nations are otherwise at peace, but they are in their nature acts of warfare. They depart from the field of negotiation into that of force To term the decrees of France and the acts of their privateers under them "acts of reprisal does not alter the facts or the legal position. That position has been defined by the Supreme Court of the United States as limited partial war. We, following the path indicated by that tribunal have defined it as "limited war in its nature similar to a prolonged series of reprisals."⁵⁴

Judge Davis examined intent and intensity to establish the character of the American and French actions. American intent, as expressed in the authorization to use force, limited American actions to the protection of American commerce in the form of capturing French privateers or other commerce raiders and recovering American ships taken as prizes. The legislation did not permit American seizures of equivalent value from French commerce.⁵⁵ More to the point, however, and in answer to Tucker's contention, Presidents Washington and Adams clearly perceived the situation as something more than guarding the coastline against smugglers and pirates and of such a significantly different magnitude as to require ex-

⁵⁰ For a thorough discussion, see F. GROB, *supra* note 9, at 17; Comment, *The French Spoliation Claims*, 6 AM. J. INT'L L. 359-86, 629-49, 830-57 (1912).

⁵¹ Gray v. United States, 21 Ct. Cl. 340, 372 (1886). For a short discussion, see F. GROB, *supra* note 9, at 21; Comment, *supra* note 38, at 361.

⁵² 4 U.S. (4 Dall.) 37 (1800).

⁵³ *Id.* at 40.

⁵⁴ Hooper v. United States, 22 Ct. Cl. 408, 456 (1887).

⁵⁵ *Id.* at 427-28, 439.

ceptional measures involving the use of force, but not of sufficient magnitude to require a declaration of war.⁵⁶ Both sides stressed the limited nature of the conflict and, by implication, the *comparatively* limited nature of the interests at stake.⁵⁷ The fact that reprisals and self-defense may both serve as a protective purpose implies nothing about the importance of the immediate interests to be protected relative to other interests at stake. The perceived immediacy of threat (intensity) that defines the necessity governing reprisals remains quite distinct from that which gives rise to the necessity governing self-defense. If time frame and purpose do not provide an adequate distinction, purpose and intensity do.

This conclusion does slight one aspect of the Bowett-Tucker argument. Judge Davis refers to a series of reprisals,⁵⁸ and the Bowett-Tucker critique of purpose as a differentiating factor utilizes "reprisals-in-series"⁵⁹ to suggest the impossibility of drawing clear distinctions between self-defense and reprisals. Actually, Bowett's observation illustrates not so much the difficulty of separating reprisals from self-defense as the more fundamental problem of jurisprudence that comes from treating reprisals as general sanctions. The *Naulilaa* paradigm does assume that delict and response can be identified with certainty and that the target of the reprisal does not resist by responding in kind. In other words, the paradigm assumes that a reprisal is a specific response to a specific violation of the law.⁶⁰ If reprisals are to be considered as sanctions, they must then serve the function of providing a definitive answer to questions of right and wrong. However, given that the absence of authoritative and impartial third-party observers allows each state the freedom to characterize events according to its own interpretation of the issues and that a target government generally will have the capacity to resist any use of force and retaliate in kind, considered reflection suggests that the single action/single reaction sequence exemplified by *Naulilaa* may be the exception rather than the rule. Onuf argues, in consequence, a reprisals-series cannot have legal meaning because the essential idea runs counter to the specific delict/specific sanction assumption central to the definition of reprisals as sanctions.⁶¹

Again, as argued above, difficulties that seem to abound in hypothetical examples tend to dissipate somewhat when analyzing specific situa-

⁵⁶ *Id.* at 428-29.

⁵⁷ M. ZAHNISER, UNCERTAIN FRIENDSHIP: AMERICAN-FRENCH RELATIONSHIPS THROUGH THE COLD WAR 75-80 (1975).

⁵⁸ *Hooper v. United States*, 22 Ct. Cl. 408, 431-33 (1887).

⁵⁹ See *supra* notes 38-47 and accompanying text.

⁶⁰ This observation is inherent in the definition of reprisal as a sanction; i.e., a reprisal may not be undertaken against a reprisal. 2 L. OPPENHEIM, *supra* note 22.

⁶¹ N. ONUF, REPRISALS: RULES, RITUALS, RATIONALES 9-11 (Monograph No. 42, 1974) (Center of International Studies, Princeton University).

tions. First, the delict-sanction framework does not, in principle, preclude a series of actions to compel a solution. Second, despite speculation, there are relatively few, if any, historical reprisals series described as such.⁶² Third, to the extent that "reprisals-in-series" does describe the contemporary problem, the traditional reprisals framework may have little relevance. This possibility shall now be examined.

III. DEFINING THE CONTEMPORARY CONTEXT

To extend Kaplan and Katzenbach's observation to contemporary discussions on the use of force, the Charter divided the world of contemporary international law into self-defense and aggression, and the intensity and persistence of the controversy over the scope of self-defense reflects the inadequacy of this new legal dichotomy. In post-1945 literature, attempts to distinguish between *de jure* and *de facto* war,⁶³ material war and formal war,⁶⁴ and advocacy for *status mixtus* (or intermediacy)⁶⁵ illustrate dissatisfaction with the Charter formulation and again suggest that Tucker's position does not coincide with the canon of political practice.

In the past forty years, the activities of "national liberation movements" have become a major concern. By whatever name, these groups or movements seek to overthrow existing governments. Prior to 1945, if and when threats to established governments emerged from within national territory, the state employed its internal police forces, national guard or military to subdue the movement. Customary norms of international law treated the situation as a matter primarily within domestic jurisdiction.⁶⁶ The important point here is the assumption that "statehood" as a legal concept implied certain competencies and obligations as well as granting privileges and rights. If states could not, or would not, perform their obligation to subdue these threats, then the affected state had a right to redress the situation.⁶⁷ Thus, if an adjacent state failed to prevent guerrilla operations from within its territory, the target government retained the right to enforce the fundamental duty of respect for territorial integrity

⁶² Onuf provides no historical examples, only alluding occasionally to the contemporary Middle East.

⁶³ Wright, *When Does War Exist?*, 26 AM. J. INT'L L. 368 (1932).

⁶⁴ L. KOTSCH, *THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW* 52 (1956).

⁶⁵ Jessup, *Should International Law Recognize an Intermediate Status Between Peace and War*, 48 AM. J. INT'L L. 100 (1954); Schwarzenberger, *Jus Pacis ac Belli?*, 37 AM. J. INT'L L. 473 (1943). For an extended and confused discussion linking reprisals to intermediacy, see Comment, *Armed Reprisals During Intermediacy—A New Framework for Analysis in International Law*, 17 VILL. L. REV. 270 (1971).

⁶⁶ G. VON GLAHN, *supra* note 15, at 84-86; *infra* note 69.

⁶⁷ G. VON GLAHN, *supra* note 15, at 84-86.

and political independence. The lack of ideological fervor combined with the small number of recognized states kept the law closely attuned to objective political reality.⁶⁸

Today, neither of these conditions continue. Guerrilla forces seeking to overthrow established governments often operate from safehavens located in adjoining states sympathetic to their cause.⁶⁹ The guerrilla insurgents may control some limited areas and population within the safehaven state, functioning somewhat as a government in exile, but in most cases they do not.⁷⁰ Nor do these guerrilla forces operate as traditionally defined revolutionaries by securing and controlling specific geographic areas and populations within the target government's territory. The state of refuge often pleads lack of competence or knowledge (i.e., Lebanon), leaving the target state no viable legal recourse beyond measures taken within its own borders.

The literature on the Middle East graphically illustrates the problem. The Arab-Israeli-Palestinian relationship fits none of the traditional categories, yet much of the impetus to revise current Charter prohibitions comes from incidents in this ongoing confrontation. The lack of appropriate terminology results in cumbersome, imprecise and idiosyncratic descriptions such as quasi-belligerency,⁷¹ para-war⁷² or simply that a no war, no peace status exists.⁷³ The importance of this prior consideration can be

⁶⁸ The traditional law also provided guidance on how other states within the community were to deal, if at all, with revolutionary forces within another state. Two specific norms, insurgent recognition and recognition of insurgents as a belligerent power, defined the legal obligations for surrounding states as well as for the revolutionary forces. See, e.g., the Alabama Claims Arbitration where the tribunal ruled that Great Britain was liable for damages caused by the Confederate ship *Alabama*: "[T]he due diligence referred to in the first and third of the said rules ought to be exercised by neutral governments in exact proportion to the risk to which either of the belligerents may be exposed from a failure to fulfill the obligations of neutrality on their part." 1 J. MOORE, HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS 654 (1898). For a discussion, see 2 G. SCHWARZENBERGER, INTERNATIONAL LAW 563 (1968).

⁶⁹ Particular examples of this would be the Palestine Liberation Organization operating from bases in Lebanon, the FLN (Algeria) from bases in Morocco and the current situation where SWAPO (among other groups) has used bases in territories adjacent to Republic of South Africa for staging areas. See *infra* note 89.

⁷⁰ The most obvious example, is that of the Palestine Liberation Organization in Southern Lebanon during the 1970's.

⁷¹ Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415 (1969). An impressive collection of commentary and documents on the Arab-Israeli situation is 1-3 THE ARAB-ISRAELI CONFLICT (J. Moore ed. 1974).

⁷² Dinstein, *The Legal Issues of "Para-War" and Peace in the Middle East*, in 2 THE ARAB-ISRAELI CONFLICT 158 (J. Moore ed. 1974).

⁷³ Stone, *No War, No Peace in the Middle East*, in 2 THE ARAB-ISRAELI CONFLICT 141 (J. Moore ed. 1974). See also the exchange between Falk and Stone, *id.* at 283.

seen in Richard Falk's analysis of the Israeli raid on the Beirut Airport.⁷⁴ Falk mixes examples and principles drawn from the practice of states ostensibly at war with those drawn from the practice of states ostensibly at peace without any clear explanation of the criteria used to make the selection. Still, Falk admirably summarizes the problem:

The customary international law of reprisal does direct inquiry at more specific features of the context than does an assessment of the compatibility between the Beirut raid and Charter norms. At the same time, an inquiry using the concepts of the traditional law must necessarily yield inconclusive results because there is no agreed way to frame the basic issues relating to the relationship between liberation activity and the target of a reprisal claim.⁷⁵

Falk accurately notes that the fundamental difficulty with any inquiry in this area is the lack of agreed concepts. Some terms, such as guerrilla, have a long history of use, but do not have any technical definition in international law because their historical roles did not give rise to contexts that required assigning a specific and separate legal status to them.⁷⁶ Others embody ideological prejudgments of legitimacy. Falk eschews the task of constructing technical categories, opting instead to treat all characterizations as jural equivalents.⁷⁷ His subsequent analysis proves somewhat unsatisfactory because these characterizations do not evoke common logical referents.

Bowett's analysis suffers from a similar deficiency. Bowett leans heavily on the Israeli-Palestinian context because he relies on incidents that have been brought before the Security Council, but he still assumes that the "peacetime" reprisal framework is appropriate, if inadequate.⁷⁸ Falk proposes a set of general guidelines to evaluate actions in context,⁷⁹ which Bowett endorses, with some qualification, while suggesting the

⁷⁴ Falk, *supra* note 71.

⁷⁵ *Id.* at 434.

⁷⁶ Baxter has argued that "*guerrilla* is most usefully applied in a legal context to armed hostilities by private persons or groups of persons who do not meet the qualifications established in . . . the Geneva Prisoner of War Convention of 1949 or corresponding provisions of the earlier Conventions." Baxter, *So-Called "Unprivileged" Belligerency: Spies, Guerrillas and Saboteurs*, 28 BRIT. Y.B. INT'L L. 333 (1951). For another attempt to distinguish guerrillas and terrorists, see G. SCHWARZENBERGER, *INTERNATIONAL LAW AND ORDER* 219-21 (1971). Schwarzenberger argues that none of the terms used to describe irregular forces has any technical meaning in international law. We have suggested the term *guerrilla insurgent* as the most neutral and accurate. Taulbee, *Retaliation and Irregular Warfare in Contemporary International Law*, 7 INT'L LAW. 195-96 (1973).

⁷⁷ Falk, *supra* note 71, at 415. For a critique of this decision, see Taulbee, *Guerrilla Insurgency and International Law*, 12 INDIAN J. INT'L L. 187 n.6 (1972).

⁷⁸ Bowett, *supra* note 8.

⁷⁹ Falk, *supra* note 71, at 441-42.

need for improved institutional procedures for collecting relevant data for Security Council consideration.⁸⁰ Falk's brilliant attempt to re-interpret and elaborate the customary law by specifying procedural criteria for evaluating each claim in light of "community expectations,"⁸¹ however, has not held up over the past decade because the peacetime reprisal framework, even as redefined by Falk's "second order" inquiry, does not address the essence of the situation. Nonetheless, for purposes of analysis it is worth reproducing here:

(1) That the burden of persuasion is upon the government that initiates an official use of force across international boundaries;

(2) That the governmental user of force will demonstrate its defensive character convincingly by connecting the use of force to the protection of territorial integrity, national security, or political independence;

(3) That a genuine and substantial link exists between the prior commission of provocative acts and the resultant claim to be acting in retaliation;

(4) That a diligent effort be made to obtain satisfaction by persuasion and pacific means over a reasonable period of time, including recourse to international organization;

(5) That the use of force is proportional to the provocation and calculated to avoid its repetition in the future, and that every precaution be taken to avoid excessive damage and unnecessary loss of life, especially with respect to innocent civilians;

(6) That the retaliatory force is directed primarily against military and para-military targets and against military personnel;

(7) That the user of force make a prompt and serious explanation of its conduct before the relevant organ(s) of community review and seek vindication therefrom of its course of action;

(8) That the use of force amounts to a clear message of communication to the target government so that the contours of what constituted the unacceptable provocation are clearly conveyed;

(9) That the user of force cannot achieve its retaliatory purposes by acting within its own territorial domain and thus cannot avoid interference with the sovereign prerogatives of a foreign state;

(10) That the user of force seek a pacific settlement to the underlying dispute on terms that appear to be just and sensitive to the interests of its adversary;

(11) That the pattern of conduct, of which the retaliatory use of force is an instance, exhibits deference to considerations (1) to (10), and that a disposition to accord respect to the will of the international community be evident;

(12) That the appraisal of the retaliatory use of force take account of the duration and quality of support, if any, that the target government

⁸⁰ Bowett, *supra* note 8, at 27-32.

⁸¹ Falk, *supra* note 71, at 441-42.

has given to terroristic enterprises.⁸²

Falk's reconstruction has the merit of providing explicit operational criteria for evaluating necessity and proportionality. The framework seeks to constrain the occasions, intensity, duration and scope of force used in retaliation and represents a fusion of traditional concepts with the modern idea of community review. The result redefines the right of an individual state to use violence in a manner that minimizes the devolution from generally agreed interpretations of Charter norms. Falk cannot be faulted for a solution that seeks to contain violence by encouraging restraint because the effectiveness of international law depends heavily upon self-interested restraint.

The framework has failed as an adequate procedural guide for two fundamental reasons. First, it is asymmetrical in application because the total onus of justification and restraint falls upon the state initiating a retaliatory strike. These struggles may be conducted with limited means, but they are for total ends insofar as the government under attack is concerned. In this situation what do Paragraphs (4) and (10) signify? For a guerrilla insurgent group that identifies its purpose as "national liberation," what settlement short of capitulation would be "just and sensitive to its interests?"

This point leads to the second deficiency. The "will of the community" as evidenced in Security Council action and inaction reflects a divergence between the declaratory views of states and their behavior in fact; that is, a divergence between rhetoric and reality which also undermines the basis for self-interested restraint. Contemporary declaratory statements clearly indicate that a government has a positive duty to take all measures within its means to control guerrilla/terrorist attacks launched from its national territory against other states. General Assembly Resolution 2625 provides an unequivocal statement of government obligations:

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.⁸³

⁸² *Id.*

⁸³ Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 123, U.N. Doc. No. A/8028 (1970). On Dec. 14, 1974, the General Assembly adopted a definition of aggression that included the following actions in article 3(g): "The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State or such gravity as to amount to the acts listed above, or its substantial involvement therein." G.A. Res. 3314, 39

In reality a double standard exists because Third World statesmen tend to see these prohibitions as selectively operative, binding on the two super-powers (though not equally) and those states which once controlled colonies, but not on those who act in the name of anti-colonialism, anti-racism or other "liberation" rationales. Many believe that active enforcement of the prohibition on these activities would legitimize inequitable regimes by depriving those who would resist of their only viable alternative because they lack sufficient strength to fight using conventional means.⁸⁴ This attitude is embodied in the last effort to revise the law of armed conflict. According to protocol I, article I, international armed conflict now extends to incidents "in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."⁸⁵ Article 85 describes as a

U.N. GAOR Supp. (No. 31) at 144, U.N. Doc. A/9631 (1974). However, article 7 states: Nothing in this definition, and in particular article 3, could in any way prejudice the right of self-determination, freedom and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in . . . [G.A. Res. 2625], particularly peoples under colonial and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support

Id. (emphasis added). See also 29 U.N. GAOR Supp. (No. 19) at 5, U.N. Doc. No. A/9619 (1974) (explanatory notes for articles 3 and 5 prepared by the Special Committee on the Question of Defining Aggression).

In 1974, acting Secretary of State Kenneth Rush expressed the position of the United States:

[R]esolution 2625 also contains the following categorical statement: "States have a duty to refrain from acts of reprisal involving the use of force." That injunction codifies resolutions of the Security Council which have so affirmed [W]e think it desirable to endeavor to maintain the distinction between acts of lawful self-defense and unlawful reprisal.

Rovine, *Contemporary Practice of the United States Relating to International Law*, 68 AM. J. INT'L L. 736 (1974); see also 70 DEP'T ST. BULL. 498 (1974) (commentary of Robert Rosenstock on G.A. Res. 3314).

⁸⁴ See *Fourth Conference of Heads of State or Government of Non-Aligned Countries: Declaration on the Struggle for National Liberation (Algiers, September 5-9, 1973)*, in 1 O. JANKOWITSCH & K. SAUVANT, *THE THIRD WORLD WITHOUT SUPERPOWERS: THE COLLECTED DOCUMENTS OF THE NON-ALIGNED COUNTRIES* 207 (1978); *Resolution No. 1 on Apartheid and Racial Discrimination in South Africa*, in *id.* at 238; *Fifth Conference of Heads of State or Government of Non-Aligned Countries (Colombo, August 1976): Political Declaration*, in *id.* at 747, 755-67; *Resolution No. 1: South Africa*, in *id.* at 837; *Resolution No. 2: Support and Solidarity Fund for the Liberation of Southern Africa*, in *id.* at 842; *Resolution No. 3: Namibia*, in *id.* at 843; *Resolution No. 4: Non-Recognition of South African Bantustans*, in *id.* at 846; *Racial Discrimination and Apartheid on the African Continent*, in *id.* at 847.

⁸⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 1, reprinted in 16 I.L.M. 1391 (1977); see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), reprinted in *id.* at 1442. For an extended commentary, see Farer,

"grave breach" the "practices of *apartheid* and other inhuman and degrading practices involving outrages upon personal dignity based upon racial discrimination."⁸⁶

Beyond the extension of protected status to combatant's insurgent wars, this value-laden terminology implicitly bestows legitimacy on insurgency directed against "colonial domination," "alien occupation," "racist regimes" and, in particular, "*apartheid*."⁸⁷ The text provides no definitions for the operative terms. Taken in context with Security Council practice over the past ten years, we can infer that aiding, abetting or even open sponsorship of insurgencies so characterized will not incur condemnation. Since 1972 cases treated by the Security Council have dealt primarily with the violence connected with the dissolution of the Portuguese holdings in Africa and the ongoing challenge to the white redoubt in the Republic of South Africa. In these cases the Security Council has applied the following logic:

(1) Self-determination is the right of all peoples, but particularly those peoples subjected to the evils of "colonial domination," "alien occupation," "racist regimes" or "*apartheid*."

(2) The peoples subjected to these evils have an unquestioned right to use force to secure self-determination.

(3) Target state responses, which involve armed force and cross an international border, to insurgents who invoke these rationales will automatically be labelled aggression by the Security Council. (See Appendix).

Yehuda Blum has noted that the consequence is to require the government under attack to deal with the guerrilla raiders and their sponsors as if peace existed, while placing no correspondent obligations for restraint on the guerrillas and their sponsors, which in effect allows the guerrillas to operate as if war existed.⁸⁸ Not unexpectedly, this perception tends to undermine rather than emphasize the incentives for restraint

Humanitarian Law and Armed Conflict: Toward the Definition of International Armed Conflict, 71 COLUM. L. REV. 37 (1979); Green, *The New Law of Armed Conflict*, 15 CAN. Y.B. INT'L L. 3, 11-12 (1977); Schwarzenberger, *From the Laws of War to the Law of Armed Conflict*, 21 CURRENT LEGAL PROBS. 239 (1968).

⁸⁶ Protocol I, *supra* note 85, at art. 85 (emphasis in original); see also Green, *supra* note 85, at 19-20.

⁸⁷ G.A. Res. 3314, *supra* note 83.

⁸⁸ Blum, *The Beirut Raid and the International Double Standard: A Reply to Professor Falk*, 64 AM. J. INT'L L. 73 (1970). In the Arab-Israeli case the concept of belligerency in its traditional sense has been applied by the Arab states. With the exception of Egypt, the Arab states regard Israel, not as a state, but as a belligerent entity. See *Seminar of Arab Jurists on Palestine*, in 1 THE ARAB-ISRAELI CONFLICT 337 (J. Moore ed. 1974); Akehurst, *State Responsibility for the Wrongful Acts of Rebels: An Aspect of the Southern Rhodesian Problem*, 43 BRIT. Y.B. INT'L L. 49 (1970); Schindler, *State of War, Belligerency, Armed Conflict*, in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT 3 (A. Cassese ed. 1979).

that do exist. Governments will not follow policies of restraint if they perceive no positive change issuing from restraint. Over the past five years both Israel and the Republic of South Africa have moved away from incident specific retaliation to overt "forward" strategies aimed at removing the cause despite the avalanche of criticism that has accompanied the change in policy.⁸⁹

IV. REDEFINING THE CONTEXT: INSURGENTS AS A BELLIGERENT POWER

From the standpoint of the traditional customary law, the normative set which governed the exercise of peacetime reprisals never applied to the Arab-Israeli-Palestinian interaction nor to many of the other situations which involved the ongoing use of indirect coercion. To reiterate a crucial point, Falk⁹⁰ and Bowett⁹¹ attempted to construct a position that minimized derogation from the community prerogatives of the Charter; that is, they attempted to minimize the conditions, other than in self-defense, under which a state might unilaterally resort to force against a neighbor. This approach ruled out the resurrection of the law governing insurgent/belligerent recognition as an appropriate framework. Nonetheless, the law governing insurgent/belligerent recognition needs to be examined.

Most writers distinguish between recognition of "insurgents as a belligerent power" and "insurgency." John Bassett Moore, for example, defined "insurgency" as an intermediate stage between tranquility and civil war and argued that insurgency represented no more than a domestic proclamation calling public attention to a hazardous situation.⁹² In Moore's view, insurgency did not confer international personality on the "insurgents" because, at best, insurgency described a transitory phase in an unstable political situation.⁹³ While recognition of "insurgency" did not confer international personality, such recognition often did have important effects on the status of the "insurgents" with respect to the *municipal* law of the recognizing state. States granted recognition to insurgents in large part as a means to avoid categorizing participants as common criminals because existing international law did not extend the benefits of belligerent status to mere political revolts.⁹⁴

Recognition of insurgents as a belligerent power had a two-fold purpose. First, recognition required states to enforce neutral rights with re-

⁸⁹ See *A Strangled State*, THE ECONOMIST, Sept. 17, 1983, at 35.

⁹⁰ Falk, *supra* note 71.

⁹¹ Bowett, *supra* note 8.

⁹² 1 J. MOORE, A DIGEST OF INTERNATIONAL LAW 242 (1906).

⁹³ *Id.*

⁹⁴ C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 198, 203 (2d ed. 1945).

spect to both parties in the conflict.⁹⁵ Second, recognition gave the rebels international personality and thus made them, rather than the target government, legally responsible for any of their acts that adversely affected third party interests.⁹⁶ The norms associated with belligerent status stipulated that the rebels must have a political arm which controlled and effectively administered a defined geographic region, in other words must possess the qualities of a *de facto* state.⁹⁷ A declaration of belligerent status permitted a third party state to guard its own interests without having to take the step of granting full recognition as a state to the rebel faction. Even so, third party recognition granting belligerent status in the absence of recognition by the target government was often viewed as an act of intervention.⁹⁸ Granting insurgents belligerent status sets up a situation where the target state could enforce *belligerent* rights against any state that failed to enforce its *neutral* duties. The nineteenth century law assumed that states, by definition, could and would protect their own interests. Third party states had a duty to intern or eject guerrilla bands (or target government troops) that fled across a border into their territory. If not, the affected party could claim a right of *belligerent* reprisal.⁹⁹

The purpose of the traditional law was to contain and isolate the violence resulting from internal contests for legitimacy. The insurgency/belligerency framework has the virtue of explicitly stating the responsibility of states to maintain impartiality and neutrality and of providing injured states with a clear-cut rationale for redress if obligations are not met. However, to use the insurgency/belligerency framework a state would

⁹⁵ H. KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* 413 (R. Tucker 2d ed. 1966).

⁹⁶ *Id.* at 414.

⁹⁷ *Id.* at 412; see also E. LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* 181, 187 (1947); Fitzmaurice, *Law of Treaties*, 2 Y.B. INT'L L. COMM. 20, 32 (1958).

⁹⁸ Lauterpacht distinguishes between *de facto* and *de jure* recognition of insurgents as belligerent communities, arguing that *de jure* recognition, while the lawful government still offers resistance, constitutes "a drastic interference with the independence of the State concerned." E. LAUTERPACHT, *supra* note 97, at 95; see also 1 J. MOORE, *supra* note 92, at 73. While there may be political reasons for distinguishing between *de facto* and *de jure* recognition, both give rise to the same *legal* effects. One of the earliest and most compelling arguments pointing up the anomalies of this distinction can be found in Baty, *So-Called "De Facto" Recognition*, 31 YALE L.J. 469 (1922). Besides, if a target government has not itself declared a state of insurgency or belligerency, it is likely to consider any type of recognition of the rebel forces an unfriendly act. See *The Lilla*, 15 F. Cas. 525 (D. Mass. 1862) (No. 8348); see also J. SCOTT, *CASES ON INTERNATIONAL LAW* 542 (1922). Judge Ammoun, in the *Namibia* case, has argued that the traditional ideas of recognition no longer apply; the claim to belligerency flows exclusively from the right of self-determination, though without belligerent rights toward third parties. 1971 I.C.J. 92.

⁹⁹ H. KELSEN, *supra* note 95, at 154-62. For an excellent discussion of the political and legal problems associated with the concept of neutrality under the Charter, see Norton, *Between the Ideology and the Reality: The Shadow of the Law of Neutrality*, 17 HARV. INT'L L.J. 249 (1976). On *belligerent* reprisals, see generally F. KALSHOVEN, *supra* note 28.

have to grant the guerrillas a legally recognized status that by implication would enhance the legitimacy of the challenge, particularly since few contemporary movements meet the formal recognition tests of the traditional law.¹⁰⁰ For third party states the problem is often ideological and linked to the bloc identification of the competing parties.¹⁰¹ Hence, third party perception of the appropriate response is not conditioned by the idea of neutrality, but by contemporary variants of *bellum justum*.

As a result, in the contemporary environment the insurgency/belligerency framework suffers from the same deficiencies that afflict the reprisals framework. We are faced with the same conundrum and answer. It would seem clear that under some circumstances, such as the absence of a binding Security Council decision, the customary law ought to be applicable. Yet, in situations where the traditional customary law may be most applicable, states will abjure use because, at present, rationales emphasizing "rights" override those emphasizing duties. In the most likely cases, "wars of national liberation" that challenge existing independent governments and governments dominated by racial minorities, assertions of belligerent right would find even less consensual support than the assertion of a right to reprisal because of the nature of the duties imposed upon third party states and the consequent right of target states to resort to unilateral force to compel others to perform their obligations. As Norton argues:

These situations would involve heavily normative considerations, however, and most likely preclude reliance on the customary law of neutrality. Civil wars of many sorts will undoubtedly continue to pose a major international problem but the institution of neutrality is thus unlikely to play a significant role in the resolution of that problem.¹⁰²

V. REPRISAL RESURGENS?

The thrust of our argument to this point is clear: neither traditional customary law nor Charter law applies to the small scale use of force that characterizes many of the contemporary challenges to the legitimacy of governments. The assumptions of symmetry, reciprocity and responsibility that provided the underpinnings of the status quo guarded by the traditional law no longer hold true. In fact, if these conditions did hold for the present, the divorce between Charter prohibitions and state be-

¹⁰⁰ This situation produced much of the impetus toward revising the law of armed conflict. See Green, *supra* note 85.

¹⁰¹ See *supra* notes 84-86 and accompanying text.

¹⁰² Norton, *supra* note 99, at 310. For an extended discussion of the contradictions discussed here and above, see Salmon, *Les Guerres de Liberation Nationale*, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 55 (A. Cassese ed. 1979).

havior would be less pronounced because the successful operation of the Charter depends upon an even-handed assessment and application of state responsibility. As has been noted, third world states have emphasized the ideal of strict responsibility in principle but have refused to apply it in practice. The legal order in this case is caught between the need to be past oriented to preserve the values of predictability and stability and the need to be future oriented to promote the values of justice and equity. At the moment, the majority of states seem quite willing to sacrifice the former to the latter. Francis Boyle concisely summarized the perspective, stating, "Why should states and people who believe they are oppressed and will be destroyed by the existing status quo accept the illegitimacy of the threat or use of force to save themselves from it?"¹⁰³

In the absence of a perception that the legal order provides equitable and effective remedies and to the extent that the members of that order have a commitment to and actively support and pursue revolutionary and revisionist goals, it is tempting to argue that states *ought* to have greater latitude in resorting to self-help because lawbreakers *ought* to be punished and legitimate governments *ought* to be able to protect their rights. If the prohibitions do not work, one should issue licenses. Yet, this must be balanced against an assessment of what a rationale legitimizing retaliatory self-help would accomplish.

The argument for expanding the right to use self-help beyond self-defense obviously rests upon the belief that the use of force is necessary to maintain state rights and that the use of armed force in reprisal has, on the whole, served to vindicate the legal order. Perhaps this corresponded to reality in the period before the consolidation of the modern centralized state and the development of any widespread acceptance of an international legal order, but private reprisals have been outlawed since 1856,¹⁰⁴ and post-World War I opinions on the general function of reprisals became increasingly critical. Bierzanek, drawing upon the debates of the Institut de Droit International on the practice of peacetime as well as belligerent reprisals, notes:

In the light of experience reprisals—particularly armed reprisals—proved to be an extremely unsatisfactory sanction . . . They became more often a pretext for justifying the illegitimate conduct of a large State in imposing its will on a smaller State rather than a means for enforcing observance of the rules of international law.¹⁰⁵

¹⁰³ Boyle, *International Law in Time of Crisis: From the Entebbe Raid to the Hostages Convention*, 75 Nw. U.L. Rev. 769, 821 (1980).

¹⁰⁴ The last vestige of private reprisals was "privateering." The states most directly involved abolished the practice in the Declaration of Paris (April 1856). F. HINSLEY, *supra* note 23, at 232-33.

¹⁰⁵ Bierzanek, *Reprisals as a Means of Enforcing the Laws of Warfare: The Old and*

The problem, of course, is that the use of force to vindicate rights does not always mean that the rights so protected stem from legal obligations. Indeed, the danger of widening the scope of self-help is in widening the possibility of abuse for political advantage. The probability of this becomes greater if retaliation can be used to "teach a lesson." Contemporary experience would seem to confirm the negative assessment of Bierzanek. In no case over the past twenty-five years has force, justified as reprisal, been used by equal against equal.¹⁰⁶

Given these conditions, it is one thing to argue that the prohibition on the use of force has been ineffective and quite another to argue that a particular normative set ought to serve as a substitute. One should be wary of responding with novel rationales that give normative blessing to major derogations from existing obligations simply because the relevant organs resist enforcing those obligations in a specific situation. If anything, American lawyers seem too quick to justify exceptions before examining long-term impacts. One should ask what alternative normative formulation will yield solutions considered equally applicable to guerrilla insurgent conflicts in the Middle East, Southern Africa, Central America and Southeast Asia?

This essay began by accepting at face value Derek Bowett's observation about the parlous state of the law. Bowett's analysis used data drawn primarily from the Middle East because other guerrilla insurgencies had generated little grist for Security Council consideration.¹⁰⁷ In Bowett's defense, he did use the evidence most readily available, and the resurgence of violence in the area was, and continues to be, of great concern. However, over the past ten years the concern with guerrilla insurgent activity has been dominated by only three situations: the continuing Arab-Palestinian struggle, the liquidation of Portuguese colonial holdings, and attacks on the white redoubts in Rhodesia and South Africa.¹⁰⁸

In the first case, we have argued that the peacetime reprisal framework has never provided an adequate characterization for the confrontation between Israel and its challengers because community support for

the New Law, in *THE NEW HUMANITARIAN LAW OF ARMED CONFLICT* 237 (A. Cassese ed. 1979). Along these same lines, see the arguments in F. GROB, *supra* note 9, at 243.

¹⁰⁶ See G. VON GLAHN, *supra* note 15, at 558-59

¹⁰⁷ Bowett, *supra* note 8.

¹⁰⁸ Obviously this does not exhaust the roll call of situations where force has come into play. Other guerrilla insurgencies exist, for example in Burma, Laos and Thailand, but these have remained localized. The guerrilla insurgency in Burma has been more or less active since World War II. At the time of this writing, we count 21 active conflicts. Apart from those instances mentioned in the text, the issues of retaliation discussed here are *potentially* relevant only to those conflicts in Central America (Nicaragua, Honduras, El Salvador), but even here the questions tend to concern the parameters of permissible aid, not those of retaliation.

the symmetry of obligation essential to the effective operation of the traditional normative set is missing. In fact the situation has moved from one of "like kind" retaliation to overt intervention and open warfare. The Portuguese claims resulted from a last ditch defense of their colonial empire. As such they were systematically rejected by the Security Council and represent, at the least, the ante-penultimate scenes in the legitimate anti-colonial movement. In the cases of South Africa and Rhodesia, a negotiated settlement ended the Rhodesian insurgency, leaving South Africa alone. Because South Africa has been virtually stripped of its membership rights in the General Assembly, it is difficult to envision widespread support for *any* rationale that would extend to South Africa the right to use unilateral force in retaliation across a recognized border against guerrilla insurgent movements operating from contiguous territories.

Outside of these situations, the most disquieting uses of force have not been in connection with guerrilla insurgencies. The most disturbing trend is the increased willingness of the community to tolerate large-scale overt violence against isolated or unpopular governments: Tanzania on Uganda, China on Vietnam, and Iraq on Iran. We would suggest that the real pressure on article 2(4) of the Charter is not the incidence of practices connected with guerrilla insurgency but the normative silence that followed these overt attacks. The real crisis in the contemporary law comes not from the marginal cases of low level guerrilla violence but from a community refusal to make a good faith effort to deal with paradigm cases of overt aggression.

VI. REPRISE

We cannot dispute the observation that the security structure erected by the Charter seems increasingly irrelevant to the control of conflict in the contemporary world and that, in consequence, states see an increased need for measures of self-help. We have also argued that analytically and practically, reprisals can be distinguished from self-defense. We, however, resist the conclusion that the legal order *ought* to recognize and authorize the resort to reprisal through an explicit rationale.

Arguments that turn on the necessity of altering current prohibitions to be in conformity with the reality of state practice are inherently unpersuasive for three reasons:

(1) Those arguments rest upon events and situations that are transitory or which are not amenable to control through legal means;

(2) The idea that the law should authorize what it cannot constrain is especially pernicious; and finally,

(3) The continuing impact of the three-fold ideological split that has undermined the effectiveness of the United Nations has also precluded

evolution of a new rationale that would be equally acceptable to all parties.

The burden of proof still remains with those who would sacrifice the long-range vision of the Charter to the short term demands of states. In the short run, we argue that the prudent course is to tolerate certain practices when necessity demands rather than investing them with the sanctity of a legal rule. The seeming disorder of contemporary life should not diminish the vision of the Charter. We fail to see the positive gains of retreating from the formulations of the Charter. Conversely, we should note that legitimizing force as a means of retaliation might be giving normative blessing to political chaos.¹⁰⁹

Realists may argue that this position merely leads to manipulation and cynicism about the nature and applicability of international law because the Charter demands too much. As a position, however, we much prefer the cynicism which arises from frustration with "utopia" to that which arises from the perception of international law as the obedient servant of state desires. If hypocrisy is the due that vice pays to virtue, the set of virtues that hypocrites feel obliged to honor in passing does make a difference. The changes in the last forty years have not diminished the goals of the Charter; rather, they have pointed up their desirability.

¹⁰⁹ Hoffmann, *International Law and the Control of Force*, in *THE RELEVANCE OF INTERNATIONAL LAW* 36 (S. Hoffman & K. Deutsch eds. 1968).

*Appendix***Selected Incidents Before the Security Council Involving the Use of Force: 1971-82**

Incident	Nature	Argument in Justification	Security Council Action
Senegal 19 June 1971	Portuguese anti-tank mine kills officials.	Portugal claimed self defense and also claimed that the mine not Portuguese. Did not appear at Security Council.	Condemnation of Portugal. Direct Portugal to halt all such acts. Act not preceded by attempt to resolve the issue peacefully.
Zambia 5 October 1971	South African police violated Zambian border.	South African forces were pursuing terrorists into sanctuary.	No condemnation, but admonished to observe territorial integrity.
Senegal 12 October 1972	Portuguese forces attack outpost	Command error, those responsible would be punished	Condemns Portugal
Zambia January 1973	South Africa/Rhodesia close borders and send troops across the border.	Self defense in response to terrorist attacks from bases in Zambian territory.	Condemns both South Africa and Rhodesia
Portuguese Timor 7 December 1974	Indonesia attacks East Timor	Indonesia used troops only to restore order in East Timor because Portugal said could not	SC calls for cease fire and the withdrawal of troops; calls on Portugal to speed movement to independence.
Angola April 1976	South African forces into Angola	To protect nationals working on dams in Angola because Portugal said she could not.	Condemned South Africa for aggression
Zambia 11 July 1976	Attack on Zambian border	South Africa disavowed any knowledge of the incident.	Condemned South Africa for the attack.
Mozambique January - May 1977	Rhodesian land/air attacks against border villages	None given	Condemns aggressions by S. Rhodesia and condemns S. Africa for supporting Rhodesia.

Incident	Nature	Argument in Justification	Security Council Action
Angola 8 - 13 March 1979	South African air force and ground troops attack refugee centers of SWAPO	None given	Condemned South African aggression for an armed invasion of Angola
Angola 8-16 March 1979	South African attacks on SWAPO refugee centers	To destroy SWAPO bases in Angola	Condemned South Africa for violations of sovereignty and territorial integrity.
Angola 28 October 1979	South African forces attacked SWAPO camps.	Attack on SWAPO bases to prevent hit and run border raids.	Condemned South Africa for aggression.
Zambia January 1980	South African raids into Zambia	Attack on SWAPO bases in Zambia in retaliation for terrorist attacks	Condemnation of South Africa
Angola 26 June 1980	South African raids into Angola	Against SWAPO bases	Condemnation of South Africa
Angola 27 August 1981	South African raid into Angola	To destroy SWAPO bases	Condemnation of South Africa vetoed by the United States