

# BELLIGERENT REPRISALS AS SEEN IN THE LIGHT OF THE DIPLOMATIC CONFERENCE ON HUMANITARIAN LAW, GENEVA, 1974–1977

STANISŁAW E. NAHLIK\*

## INTRODUCTION

Countries, nations, and men differ in many ways. Accordingly, one can hardly expect that their views would not differ. One of the major advantages of any international conference is that differing views on a given subject may be confronted and discussed *viva voce*. Whether a solution acceptable to everyone can be reached eventually is another matter. However, the very fact that the confrontation took place may constitute an important stage on the road to a future agreement, provided that each party understands the other's point of view. In addition, both points of view must have been recorded and made accessible for study by the scholar or diplomat who may be called upon to contribute his or her share in reaching the eventual agreement at another conference at some later stage.

Perhaps such is the case with belligerent reprisals, one of the most difficult problems not only of the law of armed conflict<sup>1</sup> but of the entire body of international law. At the Geneva Conference of 1974–1977, the issue of belligerent reprisals still proved to be somewhat controversial. In the discussion at the Conference, the United States and Polish delegations did not always see eye to eye: a comparison of the two points of view may thus be useful. This writer ventures to embark upon this difficult task not merely because he happened to take part in the discussion. Some of the most interesting stages of that discussion took place at the meetings of a working group, and these have not been officially recorded. Considering their importance, they should not be entirely lost to posterity. This writer hopes to present them, relying on his personal notes and, at certain times, on his recollections.

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\* Professor of Law, Jagellonian University, Cracow, Poland.

1. Since "war" as such has been eliminated from among the lawful means of interstate relations, the term "armed conflicts" is certainly the only proper expression, although occasionally the much shorter and simpler traditional expression "war" is still in use.

## I

## BEFORE THE GENEVA CONFERENCE OF 1974–1977

## A. Historical Background

Reprisals—measures essentially illegal but justifiable in specific cases by the fact that the adverse party had resorted to them first—were, and indeed still are, often considered one of the few efficacious sanctions in cases where no other possibility of securing justice is available. Such cases quite often seem to occur in war.

However, the essential injustice of reprisals consists in the fact that they are likely to bring suffering to persons that had nothing to do with the illegal act committed by the adverse party. This has already been pointed out in some of the classics of international law—such as the work of Victoria,<sup>2</sup> although Grotius seems to feel that suffering is justifiable.<sup>3</sup> Vattel, though he recommends magnanimity to belligerents, seems less decisive on the subject.<sup>4</sup>

That public opinion has shared this view of the inherent injustice of reprisals can hardly be shown more convincingly than in the public reaction to the bombardment by the British fleet of American towns—including the new capital city of Washington—in 1814. Vice-Admiral Cochrane, ostensibly “with extreme reluctance,” resorted to the bombardment in retaliation for damage purportedly caused by American troops on the British side of the United States-Canadian border. Secretary of State James Monroe protested energetically by his note of September 6, 1814, in which he stated that the American government had disavowed the officer responsible for the damages, and that to his mind the British action could only have been dictated by “revenge and cupidity,” since in recent times many European towns had been conquered and occupied by enemies, yet “no instance of such wanton and unjustifiable destruction ha[d] been seen.” “We must go back to distant and barbarous ages,” continued the Secretary of State, “to find a parallel for the acts of which I complain.”<sup>5</sup>

The reaction the case aroused in the British Parliament was even more striking. Sir James Mackintosh, taking the floor in the House of Commons on April 11, 1815, emphatically condemned the conduct of the British admiral. He asserted, “there was very imperfect evidence of outrage—no proof of re-

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2. F. DE VITORIA [Victoria], *OF THE INDIANS, OR ON THE LAW OF WAR MADE BY THE SPANIARDS ON THE BARBARIANS* 289–90 (Classics of International Law ed., J. Bate trans. 1917) (1st ed. Lyons 1557) (Latin, but a summarized translation appears at 164).

3. 3 H. GROTIUS, *THE LAW OF WAR AND PEACE* 624 (Classics of International Law ed., F. Kelsey trans. [of 1646 ed.] 1925) (1st ed. Paris 1624).

4. E. VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW* 280–81 (Classics of International Law ed., C. Fenwick trans. 1916) (1st ed. Paris 1758).

5. J. MOORE, *A DIGEST OF INTERNATIONAL LAW*, H.R. DOC. NO. 551, 56th Cong., 2d. Sess. 183 (1906).

fusal to repair—and demonstration of the excessive and monstrous iniquity of what was falsely called retaliation.” Besides, Sir Mackintosh continued, the very comparison between the capital of a state and half a dozen huts on the distant border “was an act of intolerable insolence, and implied as much contempt for the feelings of Americans as for the common sense of mankind.”<sup>6</sup>

To observe some proportion between the measures of retaliation resorted to and the injury inflicted by the adversary, to act humanely, to attack things rather than men—such were the conditions a belligerent resorting to reprisals had to observe according to most of the nineteenth-century publicists, even if the belligerent state recognized the principle of reprisals as perfectly lawful.<sup>7</sup> Perhaps Carlos Calvo<sup>8</sup> and Pasquale Fiore<sup>9</sup> came closest to condemning reprisals unconditionally, while others seemed of the opinion that such condemnation would hardly be realistic, considering the lack of other sanctions.

Naturally enough, reprisals, generally accompanied by reservations comparable to those already mentioned, made their appearance in many endeavors to codify the laws of war. The issue of reprisals thus found its due place in the instructions for the American Armed Forces drafted in 1863 by Francis Lieber, which set a model for nearly all future codifications;<sup>10</sup> in the Russian draft prepared as a basis for discussion at the Brussels Conference of 1874;<sup>11</sup> and in the Oxford Manual of the Laws of War adopted by the Institute of International Law in 1880.<sup>12</sup> This last text placed particular emphasis on the reservation of proportionality.

However, no general agreement on the subject could be reached. No specific mention of reprisals appears in any of the texts adopted at the official international conferences, whether at Brussels in 1874, or at The Hague in 1899 and 1907. Nevertheless, one might argue that some of the rules attached to the Fourth Convention of 1907 may have had a bearing on reprisals. These rules included prohibitions of general penalties “on the population because of the acts of individuals for which the population as a whole cannot be re-

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6. *Id.* at 200–201.

7. See J. BLUNTSCHLI, *DAS MODERNE VÖKERRECHT DER ZIVILISIERTEN STAATEN ALS RECHTSBUCH DARGESTELLT* 316 (1868); F. DE MARTENS, *TRAITÉ DE DROIT INTERNATIONAL* 156 (1887); J. MOORE, *supra* note 5, at 182; W. HALL, *A TREATISE ON INTERNATIONAL LAW* 360 (6th ed. 1909); I. H. HALLECK, *INTERNATIONAL LAW* 510 (4th ed. 1908). For examples of reprisals, see 2 C. HYDE, *INTERNATIONAL LAW* 1660 (2d ed. 1947).

8. 3 C. CALVO, *LE DROIT INTERNATIONAL THÉORIQUE ET PRATIQUE* 518–19 (5th ed. 1896).

9. 2 P. FIORE, *NOUVEAU DROIT INTERNATIONAL PUBLIC* 214 (1896).

10. The relevant articles (27 and 28) of Lieber's *Instructions for the Government of Armies of the United States in the Field* can be found in *THE LAWS OF ARMED CONFLICTS* 7 (D. Schindler & J. Toman eds. 1973). For details of Lieber's University lectures, see Baxter, *Le premier effort moderne de codification de droit de la guerre*, *REVUE INTERNATIONALE DE LA CROIX-ROUGE*, April–May 1963, at 3.

11. Plan of an International Convention Concerning the Laws and Customs of War, July 27, 1874, 4 Martens *Nouveau Recueil* 6 (2d ser.) 1879.

12. *Les lois de la guerre sur terre*, 5 *ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL* 149, 159 (1882).

garded as responsible,"<sup>13</sup> but also provided for the bombardment of even privileged objects if they should be used "for military purpose."<sup>14</sup>

In the course of World War I, resorts to reprisal were frequent, especially on the part of the Germans. Their scholarship corresponded to their practice. The German scholars maintained their position that reprisals were not subject to any limitations,<sup>15</sup> even though most of the eminent writers on international law from other countries had adopted a different opinion.<sup>16</sup>

In the period between the two World Wars, an important arbitral decision concerning reprisals was rendered. In the so-called *Naulilaa incident* case, the Mixed Arbitral Tribunal, composed of three neutral members, held that the Germans had exceeded the limits of legitimate reprisals by not having observed the rule of proportionality when retaliating against Portugal in response to some minor damage caused by the Portuguese in the German colonial territory in Africa.<sup>17</sup>

While the general trend in the writings of most of the interwar internationalists seems to have been directed against the practice of reprisals, a specific clause on reprisals was introduced in only one treaty, namely the Geneva Convention of 1929 relative to the Treatment of Prisoners of War. Its article 2, paragraph 3 states, "[m]easures of reprisal against them [prisoners of war] are forbidden."<sup>18</sup> Despite its brevity and its restriction to only one group of war victims, this provision had the merit of being the first treaty rule explicitly and unconditionally to prohibit reprisals.

#### B. The Impact of World War II: Reprisals in Treaty Law

Many of the atrocities committed in the course of World War II were tantamount to reprisals or counterreprisals, even if no such term had been used

13. Convention on the Laws and Customs of Land Warfare, Oct. 18, 1907, Annex, at art. 50, 3 Martens Nouveau Recueil 461, 501 (3d ser. 1910) [hereinafter cited as 1907 Hague Convention] (editor's translation). The same convention was signed earlier on July 29, 1899, 26 Martens Nouveau Recueil 949, 975 (2d ser. 1902) [hereinafter cited as 1899 Hague Convention].

14. 1907 Hague Convention, *supra* note 13, at Annex, art. 27, 3 Martens Nouveau Recueil 461, 496 (3d ser. 1910); 1899 Hague Convention, *supra* note 13, 26 Martens Nouveau Recueil 949, 970 (2d ser. 1902). See also Plan of an International Declaration concerning the Laws and Customs of War, at art. 17, 4 Martens Nouveau Recueil 219, 221 (2d ser. 1879) (author's translation).

15. See, e.g., Wehberg, *Der Schutz der Kuntswerke im Kriege*, 2 MUSEUMSKUNDE 49 (1915); F. VON LISZT, *DAS VÖLKERRECHT SYSTEMATISCH DARGESTELLT* 457 (1st ed. 1925); K. STRUPP, *ÉLÉMENTS DU DROIT INTERNATIONAL PUBLIC* 344 (2d. ed. 1930).

16. See, e.g., de Visscher, *Les lois de la guerre et la théorie de la nécessité*, in *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* 74 (1917) [hereinafter cited as RGDIP]; A. PILLET, *LES CONVENTIONS DE LA HAYE* 221 (1918); Merignhac, *De la sanction des infractions au droit des gens*, in RGDIP, at 17-18; I. J. GARNER, *INTERNATIONAL LAW AND THE WORLD WAR* 488 (1920); de la Brière, *Evolution de la doctrine et de la pratique en matière de représailles* in 22 *RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL* 263 (1931) [hereinafter cited as RCADI]; C. HYDE, *supra* note 7.

17. Portugal v. Germany, 8 Trib. Arb. Mixtes 409, 425 (1928) (excerpted and translated in H. BRIGGS, *THE LAW OF NATIONS* 951, 953 (1953)). See also 5 *RECUEIL DES SENTENCES ARBITRALES* 1019, 1069.

18. Convention of July 27, 1929, Relative to the Treatment of Prisoners of War, 47 Stat. 2021, T.S. No. 846.

explicitly. Paradoxically, the civilian population found itself exposed to those atrocities to a far greater extent than were the members of armed forces, to whom (with the exception of a few fragmentary rules among those attached to the Fourth Convention of 1907) the bulk of the preexisting law of war was restricted. The concern for the treatment of civilians in case of an armed conflict was thus the major impulse at the root of the postwar Conference on Protection of Victims of War, convened at Geneva in 1949. The Convention relative to the Protection of Civilian Persons in Time of War was generally considered the principal achievement of that conference. The conference also provided the opportunity for revising and even redrafting rules concerning the protection of persons belonging to the armed forces of belligerents—especially the wounded, the sick, and the shipwrecked—as well as the prisoners of war. This time a specific clause on reprisals was inserted into each of the four Conventions that were eventually adopted. The wording of these clauses is as follows:

Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited.<sup>19</sup>

Reprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention are prohibited.<sup>20</sup>

Measures of reprisal against prisoners of war are prohibited.<sup>21</sup>

Reprisals against protected persons [civilian] and their property are prohibited.<sup>22</sup>

Yet another prohibition of reprisals was soon added to these clauses. The Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague on May 14, 1954, contains the following provision to this effect: “[t]hey [the High Contracting Parties] shall refrain from any act directed by way of reprisals against cultural property.”<sup>23</sup>

All these specific provisions on reprisals were finally strengthened by a provision of a more general character that was included in the Convention on

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19. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field of August 12, 1949, at art. 46, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31 [hereinafter cited as the First Convention].

20. Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea of August 12, 1949, at art. 47, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85 [hereinafter cited as the Second Convention].

21. Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949, at art. 13, para. 3, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135 [hereinafter cited as the Third Convention].

22. Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949, at art. 33, para. 3, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter cited as the Fourth Convention].

23. Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14, 1954, art. 4, para. 4, 249 U.N.T.S. 244. An extensive definition of “cultural property” is given in art. 1 of the Convention. For a detailed analysis of the provisions of the Convention, see Nahlik, *La protection des biens culturels en cas de conflit armé*, in 120 RCADI, *supra* note 16, at 120.

the Law of Treaties signed at Vienna on May 23, 1969. The Convention provides for the possibility of termination or suspension of a treaty as a consequence of its material breach by one of the parties. Such a possibility cannot, however, be invoked with respect "to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."<sup>24</sup>

Most of the authors commenting on the Geneva Conventions of 1949 considered the prohibition of reprisals one of the Convention's principal achievements. G. Draper referred to them as "a very significant contribution to the law of war," since "reprisals which were designed as a method of enforcing the law of war have become an excuse for the wholesale and cynical disregard of the law."<sup>25</sup> According to P. de la Pradelle, "[t]o admit reprisals in situations protected by the Geneva Conventions, would result in excusing any violation of their provisions."<sup>26</sup> J. Pictet, vice-president of the International Committee of the Red Cross,<sup>27</sup> acclaimed the prohibition of reprisals by the Geneva Conventions as "a great victory of humanity," especially because of the prohibition's "absolute character," which allowed no exceptions.

Many authors besides those commenting specifically on the Geneva Conventions concurred. According to the most popular English manual of international law, written by L. Oppenheim and supplemented by H. Lauterpacht, "reprisals instead of being a means of securing legitimate warfare may become an effective instrument of its wholesale and cynical violation in matters constituting the very basis of the law of war."<sup>28</sup> J. W. Bishop saw in reprisals "a two-edged weapon, with a tendency to invite counter-reprisals."<sup>29</sup> G. Gottlieb, another American scholar, proposed a revised version of the famous F. Lieber's Instructions and suggested including in it an absolute and unconditional prohibition of reprisals against civilian populations, as it was necessary "[t]o respect paramount moral principles *for their own sake*, regardless of reciprocity."<sup>30</sup>

Some of the authors of the postwar textbooks of the law of war, even if they have limited themselves to the presentation of the actual state of the law,

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24. Convention on the Law of Treaties of May 23, 1969, art. 60, para. 5, U.N. Doc. A/Conf/39/27 (1969). This Convention has not yet been ratified or acceded to by the requisite number of states for formal entry into force.

25. G. DRAPER, *THE RED CROSS CONVENTIONS* 98-99 (1958).

26. P. DE LA PRADELLE, *LA CONFÉRENCE DIPLOMATIQUE ET LES NOUVELLES CONVENTIONS DE GENÈVE DU 12 AOÛT 1949* 183 (1951) (author's translation).

27. Pictet, *Preface* to F. KALSHOVEN, *BELLIGERENT REPRISALS* vii-viii (1971).

28. L. OPPENHEIM, *2 INTERNATIONAL LAW* 565 (7th ed. 1952).

29. J. BISHOP, *JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW* 289 (1974).

30. *Proceedings of the 65th Annual Meeting of the American Society of International Law*, 4 AM. J. INT'L L. 220 (1971) (emphasis in original).

speak about the admissibility of reprisals with great hesitation.<sup>31</sup> M. Greenspan goes so far as to recognize that "the doctrine of reprisals in its present somewhat obscure and undefined state provides the chief loophole for the evasion, violation, and nullification of the laws of war."<sup>32</sup> In the light of the experiences of World War II, it is evident that the vagueness of the rules concerned constitutes "a major obstacle to the effective enforcement of the laws of war."<sup>33</sup>

We could hardly conclude this brief survey of selected opinions any better than by quoting F. Kalshoven, the author of what is probably the most extensive recent monograph on reprisals. After reviewing both the doctrine and practice of reprisals and then demonstrating against this background how ineffective nearly all the restrictions have proved to be, the Dutch scholar concludes that any situation "where a belligerent reprisal seems permissible presents the belligerent with an opportunity to violate a rule of the law of war with impunity." Kalshoven therefore thinks that an absolute prohibition of reprisals would be the only plausible solution, since "the balance of the merits and demerits of belligerent reprisals has now become so entirely negative as no longer to allow of their being regarded as even moderately effective sanctions of the laws of war."<sup>34</sup>

The Institute of International Law found that the whole body of the law of war was to a great extent outdated.<sup>35</sup> However, the Institute had serious doubts about how, if at all, the regulation of reprisals was to be included in its suggestions for change. E. Castrén, himself the author of an important textbook on the law of war, believed that "a reform of that institution [of reprisals] in the near future is not realistic."<sup>36</sup> J. P. A. François, who acted as the Institute's rapporteur on the law of war, limited himself in his final report to formulating the following suggestion concerning reprisals:

Recourse to reprisals in retaliation to acts committed during the war by the adverse party should be the object of a profound inquiry in order to determine in what way it would be possible to regulate such recourse in respect of the means of injuring the enemy. The parties to the conflict should not have recourse to reprisals unless the facts incriminated have been impartially clarified.<sup>37</sup>

These words recall the rules contained in the Conventions concluded at The Hague rather than those concluded at Geneva. Still, rules on the conduct

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31. See, e.g., 2 F. BERBER, *LEHRBUCH DES VÖLKERRECHTS* 235-38 (1962); E. CASTRÉN, *THE PRESENT LAW OF WARFARE AND NEUTRALITY* 69-72 (1954).

32. M. GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 408 (1959).

33. *Id.* at 533.

34. F. KALSHOVEN, *supra* note 27, at 367, 377.

35. 45 *ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL* (1954).

36. 47 *ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL* 528 (1957) (author's translation).

37. *Id.* at 533 (author's translation).

of hostilities and rules on the protection of victims of war are so closely inter-related that it would be impossible to regulate only one of these two branches of the law of war without having, to some extent, the other in mind as well.

D. Bindschedler-Robert also dealt with the interface of these two branches of law in her report on the law of armed conflict submitted to the Conference convened to that effect at Geneva in 1969 by the Carnegie Endowment for International Peace.<sup>38</sup> Bindschedler did not seem to believe it would be realistic to prohibit reprisals absolutely, although she agreed that this would be the ideal solution. In her opinion, even the prohibitions contained in the Geneva Conventions of 1949 “do not . . . imply that an injured State cannot impose sanctions in response to the initial violation of the rules of protection; they only mean that the State must choose a different form of reprisals.” She thought, however, that one could try to extend the circle of persons to be protected and attempt to make the recourse to reprisals dependent on the fulfillment of certain conditions.<sup>39</sup>

In the ensuing discussion, only one speaker<sup>40</sup> dealt with reprisals in the proper sense of the term. The discussion instead centered on an altogether different problem: the distinction to be observed between reprisals and the *Tu quoque* reservation frequently invoked in excuse of illegal conduct against the party that *later* resorted to the same kind of conduct as well.<sup>41</sup>

#### C. Activities Preparatory to the Diplomatic Conference on Humanitarian Law

In contrast, the International Committee of the Red Cross (ICRC) was fairly explicit on the subject of reprisals, especially in its 1969 report submitted to the Twenty-first International Conference of the Red Cross held that year at Istanbul. The report was drafted by a committee of experts that met under the chairmanship of Professor J. Pictet, vice-president of the ICRC. After having invoked prohibitions already formulated in the Geneva Conventions of 1949, the ICRC advocated in principle setting an absolute prohibition of reprisals or, at the very least, making them dependent on the fulfillment of certain conditions. Such conditions would consist of: (1) impartial investigation and clarification of all facts involved; (2) proportionality; (3) reprisals to be of the same kind as the violation of law committed by the adverse party; and (4) respect of the “laws of humanity.”<sup>42</sup>

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38. *A Reconsideration of the Law of Armed Conflicts*, in 1 CONFERENCES ON CONTEMPORARY PROBLEMS OF INTERNATIONAL LAW I (1971).

39. *Id.* at 57–59.

40. *Id.* at 76.

41. *Id.* at 116–18.

42. *Réaffirmation et développement des lois et coutumes applicables dans les conflits armés, Rapport présenté par le Comité international de la Croix-Rouge*, in 21 CONFÉRENCE INTERNATIONALE DE LA CROIX-ROUGE 96–100 (1969) (author's translation).



While some of the experts favored an absolute prohibition of reprisals, others thought that such a prohibition would not be realistic and even had doubts about some of the restrictions suggested by the ICRC. Because of these divergences the ICRC limited itself in its conclusions to stressing the "principle of proportionality."<sup>43</sup>

The report of 1969 was soon followed by Resolution Number XIII, unanimously adopted by the Twenty-first Conference, requesting the ICRC to draft rules that would complete the humanitarian law then in force. In fact, this was only one of several stages in the work on "recodification" of that law initiated by the ICRC a few years before. In taking this step, the ICRC acted in compliance with a recommendation that had been submitted by the Twentieth International Conference of the Red Cross, held at Vienna in 1965.

In this brief survey it would be impossible to delineate all the successive developments. Let it suffice to say that in 1971 and 1972 the ICRC convened two sessions of experts appointed by various national Red Cross Societies, as well as two sessions of governmental experts, for assistance in its work. The first session, convening the governmental experts, was attended by representatives of some forty governments, the second, by seventy-seven.

In pursuance of this work, the ICRC was continually in close touch with the governments and the international organizations (especially the United Nations). The U.N. General Assembly consistently encouraged the ICRC to pursue its activities and maintained the issue on the agenda of all its consecutive sessions from 1968 onwards.<sup>44</sup> All this extensive preliminary work led to the drafting of two essential documents that were to be submitted to the Diplomatic Conference on Humanitarian Law.<sup>45</sup>

In view of the intensity of the preparatory work, the organizers of the Diplomatic Conference must have thought that the Conference would not do much more than simply confirm what had been prepared in advance with the assistance of so many government experts. This, however, was not the case. The Swiss Federal Council, in its capacity as the depositary of the Geneva

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43. *Id.*

44. The General Assembly of the United Nations adopted no less than 23 resolutions on this subject. For a list of these, see Final Act of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, done at Geneva on June 10, 1977, in INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC), 1 OFFICIAL RECORD OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA (1974-1977), at 3-4 (1978) [hereinafter cited as CDDH OFFICIAL RECORDS]. See also ICRC, REPORT ON THE WORK OF THE CONFERENCE OF GOVERNMENT EXPERTS ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA (24 May-12 June 1971), REPORT ON THE WORK OF THE CONFERENCE (1977).

45. International Committee of the Red Cross, Draft Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (1973) [hereinafter cited as Draft Protocol I]; Draft Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (1973) [hereinafter cited as Draft Protocol II].

Conventions of 1949, convened the Conference in 1974 for one session only, which was to last six weeks. However, discussions became so animated, and some problems proved to be so controversial, that three additional sessions had to be held, each lasting two to three months—despite the division of the Conference's work between three main committees.<sup>46</sup> The total duration of the Conference was thus extended to nearly nine months. The Final Act of the Conference was signed at Geneva on June 10, 1977, while the Protocols themselves<sup>47</sup> were open for signature only six months later.<sup>48</sup>

## II

### THE DIPLOMATIC CONFERENCE ON HUMANITARIAN LAW

Article 74 of the original draft submitted by the ICRC to the advisory group of government experts in 1972 unconditionally prohibited reprisals against any persons or things protected by the Protocol. Because of the divergences of views among the experts, however, the ICRC abandoned its original intent, and the final draft presented to the Diplomatic Conference contained no general provision on reprisals. Instead, specific clauses on reprisals were inserted in no less than five articles of Draft Protocol I. Main Committee II was to deal with one of these clauses; four others were delegated to Main Committee III. None were assigned at that time to Main Committee I, which was to deal with "general" questions.

#### A. Main Committee II

Article 20 of Draft Protocol I, the only one referred to Committee II, was the last of those pertaining to section I of part II, which dealt with "Wounded, Sick and Shipwrecked Persons." Its wording was as follows: "[m]easures of reprisals against the wounded, the sick and the shipwrecked, as well as against the medical personnel, units or means of transport mentioned in this Part, are prohibited."<sup>49</sup>

This provision was to replace both article 46 of the First Geneva Convention of 1949 and article 47 of the Second Convention. One would be inclined to say at first glance—as indeed some of the delegates did—that there was nothing new in draft article 20. This was not the case, however, since the definitions contained in article 8 of the Draft Protocol considerably extended the fundamental notions of the "wounded and sick,"<sup>50</sup> the "shipwrecked,"<sup>51</sup> and

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46. A fourth committee, the Ad Hoc Committee, was added later.

47. INTERNATIONAL COMMITTEE OF THE RED CROSS, PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (1977); also available in U.N. Doc. A/32/144, Annexes I & II [hereinafter referred to as Protocol I and Protocol II]. The Protocols are also reprinted as an appendix to this issue. 42 LAW & CONTEMP. PROB., Spring 1978, at 203.

48. Protocol I, *supra* note 47, at art. 92; Protocol II, *supra* note 47, at art. 20.

49. Draft Protocol I, *supra* note 45, at art. 20.

50. *Id.* at art. 1, para. (a).

51. *Id.* at para. (b).

the "medical personnel."<sup>52</sup> Each of these definitions no longer referred merely to persons connected in some way with the armed forces; each now referred to civilians as well. In particular, the first of the categories mentioned above was to comprise henceforth all "persons, whether military or civilian, who are in need of medical assistance and care," such as "the infirm, as well as expectant mothers, maternity cases and new-born babies." The second included those "who are in peril at sea as a result of the destruction, loss or disablement of the vessel or aircraft in which they were travelling." In both cases, a restriction was added that such persons must "refrain from any act of hostility." Besides, the Committee inserted into the article on definitions still more elements, so that the circle of persons and things protected was extended considerably.<sup>53</sup>

The Committee brought about an essential change when it accepted the amendment that the Australian delegation submitted.<sup>54</sup> This amendment replaced the enumeration of persons and things to be protected with a more general clause that specified no particular categories. From the juridical perspective, as well as in the interest of clarity, this was a most welcome correction: it went far towards a general prohibition of reprisals and an elimination of the possibility of any restrictive interpretation.

On the other hand, after some hesitation, the Committee rejected the suggestion in this same amendment that the term "reprisals" be replaced with the phrase, "measures in the nature of reprisals." The Committee thought that the classical term "reprisals" was understandable enough and incurred less risk of equivocal interpretation than would any enlargement.

The Committee had not the slightest doubt concerning the principle of the prohibition; the article in its simplified form was adopted by consensus.<sup>55</sup> Two years later, with almost no discussion,<sup>56</sup> the plenary reached the same consensus.<sup>57</sup> The final wording adopted is the following:

*Article 20—Prohibition of reprisals*

Reprisals against the persons and objects protected by this Part are prohibited.<sup>58</sup>

52. *Id.* at para. (c).

53. In its final version, article 8 (renamed "Terminology" instead of "Definitions") comprises 13 paragraphs instead of the original 6, some of which are subdivided into 3 or 4 subparagraphs.

54. 13 OFFICIAL RECORDS, *supra* note 44 at 101, para. 108 (1978) (CDDH/II/214).

55. For debates and votes on this subject, see 11 CDDH OFFICIAL RECORDS, *supra* note 44, at 189, 196–99 (CDDH/II/SR.20, paras. 44–64), and (CDDH/II/25, paras. 4–8). These two meetings took place on the fourteenth and the twenty-sixth of February, 1975. *See also* 13 CDDH OFFICIAL RECORDS, *supra* note 44, at 53, 101–02 (CDDH/221/Rev. 1, paras. 107–112) (report of Committee II of its work at the second session).

56. The delegate of Colombia expressed his regret that the Protocol did not contain a general clause on reprisals, and the delegate of Mexico said that he would submit a statement in writing on this subject. 6 CDDH OFFICIAL RECORDS, *supra* note 44, at 71, para. 34 (CDDH/ SR.37) (plenary meeting of May 24, 1977).

57. *Id.* at 65, 71.

58. Protocol I, *supra* note 47, at art. 20.

### B. Main Committee III

The task of Committee III was perhaps more difficult—not merely because it had to deal with four clauses instead of one, but also because some of the problems involved were essentially new.

The four articles in question were inserted into part IV of Draft Protocol I, entitled “Civilian Population.” It was therefore necessary to compare them with the Fourth Convention of 1949. The problem of reprisals appeared there in only one article—article 33, which dealt with individual responsibility of persons protected. The effect of this article was to prohibit all collective penalties and all pillage. Its third and last paragraph reads as follows: “Reprisals against protected persons and their property are prohibited.”<sup>59</sup>

The context in which this provision was placed may indicate that only individuals and, consequently, their private property were meant. Draft Protocol I gave the prohibition of reprisals a much wider scope. The statements in the texts of the four articles as they appeared in Draft Protocol I are as follows:

*Article 46. Protection of the civilian population*

...  
4. Attacks against the civilian population or civilians by way of reprisals are prohibited.

*Article 48. Objects indispensable to the survival of the civilian population*

...  
... These objects shall not be made the object of reprisals.

*Article 49. Works and installations containing dangerous forces*

1. . . . These objects shall not be made the object of reprisals.

*Article 66. Objects indispensable to the survival of the civilian population*

... . They shall not be the object of reprisals.

One easily can see the ways in which the protection was widened. Draft article 46 applied not merely to individual persons but to the civilian population as a whole. Besides, it covered a much wider field: the actual conduct of hostile military operations, as opposed to the context in which the provision of the Fourth Convention had been placed, which had limited its application to persons within the territory already occupied by enemy forces.

Three remaining articles entered fields that had been totally untouched by any prohibition of reprisals until then. Draft articles 48 and 66—the first to be applied in the conduct of military operations, the second, under occupation—were meant to ensure that the civilian population would not be deprived of “food-stuffs, food-producing areas, crops, livestock, drinking water supplies and irrigation works.” Draft article 49 had yet another purpose: to prevent such catastrophic disasters as could be caused by attacks di-

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59. Fourth Convention, *supra* note 22, at art. 33, para. 3.

rected against such installations as "dams, dykes and nuclear generating stations."

The Committee did not register the slightest doubt about these provisions and adopted all of them with almost no discussion.<sup>60</sup> It merely found that it would be superfluous to speak about objects necessary to the survival of civilians in two different places and blended the two articles into one.<sup>61</sup>

Although Committee III left these provisions essentially unchanged, it did add three more supplementary clauses dealing with reprisals to the Protocol. The first extended the prohibition of reprisals to *all* civilian objects.<sup>62</sup> The "general protection" of such objects was provided for in draft article 47,<sup>63</sup> which had not contained any mention of reprisals in its original text. During the Diplomatic Conference, two amendments aimed at including a prohibition of reprisals in this article were submitted. One of them, briefly introduced by Professor Mencer of Czechoslovakia, was also sponsored by the delegation of the German Democratic Republic.<sup>64</sup> The other was jointly submitted by the delegations of Austria, Egypt, Mexico, the Netherlands, Norway, the Philippines, and the Union of Soviet Socialist Republics.<sup>65</sup> Professor Kalshoven<sup>66</sup> of the Netherlands, introducing the amendment in the name of all its sponsors, said, *inter alia*, that

there should be either no prohibition at all but simply general restrictions, or else outright prohibition. . . . In fact, reprisals could rarely be confined to civilian *objects* alone and the infliction of suffering on the civilian population would be virtually inevitable. The sponsors were therefore in favour of deciding for or against complete prohibition.<sup>67</sup>

It followed from this reasoning that the prohibition of reprisals against civilian objects should be considered merely a logical corollary of the prohibition concerning civilian persons.

In the course of an animated discussion that dealt with many questions arising from draft article 47, thirteen delegates spoke about reprisals.<sup>68</sup> Most

60. See 15 CDDH OFFICIAL RECORDS, *supra* note 44, at 259, 275-84 (CDDH/215/Rev. 1, paras. 58, 71-77, 84-95) (report of Committee III of its work at the second session). The articles concerned were discussed, though not in reference to the clause on reprisals.

61. See 15 CDDH OFFICIAL RECORDS, *supra* note 44, at 259, 275-84 (CDDH/III/408, paras. 49, 53) (draft report of Committee III of its work at the fourth session).

62. The notion of these objects as formulated by the Committee became much wider than that of the Draft Protocol. Under Protocol I, *supra* note 47, at art. 52 (which replaced art. 47 of Draft Protocol I, *supra* note 45), "Civilian objects are all objects which are not military objectives as defined in paragraph 2." The presumption is thus in favor of an object being a civilian one.

63. 15 CDDH OFFICIAL RECORDS, *supra* note 44, at 484 (CDDH/407/Rev.1).

64. *Id.* at 113 (CDDH/III/58).

65. *Id.* (CDDH/III/57).

66. Author of the monograph on reprisals cited in note 27 *supra*.

67. 14 CDDH OFFICIAL RECORDS, *supra* note 44, at 113-14 (CDDH/III/SR.14, para. 26) (emphasis added).

68. For these speeches, see 14 CDDH OFFICIAL RECORDS, *supra* note 44, at 109-25 (CDDH/III/SR.14, CDDH/III/SR. 15) (meetings of the sixth and the tenth of February, 1975).

of them supported the idea of prohibition as it appeared in the two amendments mentioned previously and in yet a third one, submitted by a group of Arab countries.<sup>69</sup> The draft article with amendments was eventually assigned to a working group. Ambassador Aldrich of the United States, rapporteur of Committee III and chairman of the working group, resubmitting to the Committee the text as redrafted by the working group, asked for a separate vote on the clause concerning reprisals. In that vote, fifty-eight delegations voted for the prohibition of reprisals, three voted against, and nine abstained.<sup>70</sup> The clause was thus adopted, by a very strong majority, with the following wording: "Civilian objects shall not be the object of attack or of reprisals."

Committee III also inserted two entirely new articles among the provisions concerning the civilian population, namely article 47 *bis* on protection of cultural property and places of worship,<sup>71</sup> and article 48 *bis* on protection of the natural environment.<sup>72</sup> The Committee had not hesitated to include a prohibition of reprisals in either of these articles.<sup>73</sup>

### C. Plenary Meetings

Two years later, all of those provisions, after being passed by the drafting committee, had yet to be adopted in the plenary meeting. In that body, draft article 46, the first of the articles previously adopted by the Committee that contained a prohibition of reprisals, aroused some discussion. In particular, the delegate of France was of the opinion that it exceeded the scope of the humanitarian law and was likely to limit the right of legitimate self-defense. He therefore asked for a roll call vote. However, he found himself totally isolated; he was the only one to vote against article 46, while seventy-seven delegations voted in favor of the article, and sixteen abstained.<sup>74</sup>

The representative of the United Kingdom also expressed some reservations about the article, though he did not go as far as the French delegate.<sup>75</sup>

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69. *Id.* at 112 (CDDH/III/63).

70. *Id.* at 217, 219 (CDDH/III/SR.24, para. 16) (meeting of February 25, 1975).

71. This article was based on an amendment to draft article 47, submitted jointly by the delegations of Greece, the Holy See, Jordan, Spain, Uruguay, and Venezuela. 15 CDDH OFFICIAL RECORDS, *supra* note 44, at 277 (CDDH/III/17/Rev.2). *See id.* at 307 for final text.

72. At the basis of this article were two amendments, one submitted by Czechoslovakia, the German Democratic Republic, and Hungary (CDDH/III/64), and the other, by Australia (CDDH/III/60). 3 CDDH OFFICIAL RECORDS, *supra* note 44, at 220-21. *See* 15 CDDH OFFICIAL RECORDS, *supra* note 44, at 309, for the final text.

73. *See* CDDH/214/Rev.1, paras. 68-70, 78-83 (report of Committee III of its work during the second session).

74. 6 CDDH OFFICIAL RECORDS, *supra* note 44, at 141, 161-63 (CDDH/SR.41) (meeting of May 26, 1977).

75. *Id.* at 164.

The delegate of Poland took this opportunity to speak on the problem of reprisals as a whole.<sup>76</sup> Among delegates that submitted their remarks in connection with draft article 46 in writing, five spoke about reprisals, all of them in support of the prohibition.<sup>77</sup> The representative of the German Democratic Republic considered this clause so important that his government would find any reservation to it incompatible with the object and purpose of the Protocol.

The delegate from France also had some doubts about article 47; in particular, he thought it was not realistic to impose on belligerents the duty to limit attacks to military objectives. However, he did not persist in requesting any additional roll call votes. The article was eventually adopted by seventy-five votes to none, with seven abstentions.<sup>78</sup> Of the written statements, only Australia's opposed the prohibition of reprisals against civilian objects, although the very same statement supported the prohibition of reprisals against persons.<sup>79</sup>

All other articles containing the prohibition of reprisals were adopted by consensus.<sup>80</sup> The article concerning protection of the natural environment again aroused some remarks from the French delegate, this time in writing only. In this statement, he said that if the article had been put to a vote, he would have abstained, for the article could have a direct bearing on "a State's organization and conduct of defence against an invader."<sup>81</sup> On the other hand, several delegates expressed their satisfaction with the clauses that were adopted—in particular, the delegate of Byelorussia, with the clause on protection of the natural environment,<sup>82</sup> and the representative of Rumania, with the one regarding protection of installations containing dangerous forces.<sup>83</sup>

Since the drafting committee made a few minor changes in the texts submitted to it, it may be useful to reproduce the final wording of articles as adopted by the Conference at its plenary meetings, renumbered accordingly:

*Article 51. Protection of the civilian population*

....

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

*Article 52. General protection of civilian objects*

1. Civilian objects shall not be the object of attack or of reprisals.

....

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76. *Id.* at 166. This speech will be commented upon later, in another context. See p. 62 *infra*.

77. Those of Australia, the German Democratic Republic, Byelorussia, the Ukraine, and Sweden. See 6 CDDH OFFICIAL RECORDS, *supra* note 44, at 175-204 (CDDH/SR.41, Annex *passim*).

78. *Id.* at 141, 156 (CDDH/SR.41).

79. *Id.* at 175, 176.

80. *Id.* at 205, 206, 208 (CDDH/SR.42).

81. *Id.* at 175, 186 (CDDH/SR.41, Annex).

82. *Id.* at 177.

83. *Id.* at 196.

*Article 53. Protection of cultural objects and of places of worship*

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

.....  
(c) to make such objects the object of reprisals.

*Article 54. Protection of objects indispensable to the survival of the civilian population*

.....

4. These objects shall not be made the object of reprisals.

*Article 55. Protection of the natural environment*

.....

2. Attacks against the natural environment by way of reprisals are prohibited.

*Article 56. Protection of works and installations containing dangerous forces*

.....

4. It is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 the object of reprisals.

#### D. Main Committee I

Since there was no general provision on reprisals in the Draft Protocol I as submitted by the ICRC, the original agenda of Committee I contained nothing to that effect either. The situation changed when two amendments were tabled during the Conference itself—one submitted by the Polish delegation, another, by the French delegation, both aimed at the introduction of a general clause on reprisals into the Protocol. However, the contents of these two amendments were mutually exclusive. The Polish amendment read as follows:

*New article 70 bis. Reprisals*<sup>84</sup>

Measures of reprisals against persons and objects protected by the Conventions and by the present Protocol are prohibited.<sup>85</sup>

The French amendment, on the other hand, had the following wording:

*New article 74 bis. Reprisals*<sup>86</sup>

1. In the event that a party to a conflict commits serious, manifest and deliberate breaches of its obligations under this Protocol, and a party victimized by these breaches considers it imperative to take action to compel the party violating its obligations to cease doing so, the victimized party shall be entitled, subject to the provisions of this Article, to resort to certain measures which are designed to repress the breaches and induce compliance with the Protocol, but which would otherwise be prohibited by the Protocol.

84. This title was supplied by the Secretariat of the Conference.

85. CDDH/III/103; later combined with Syrian Arab Republic Amendment CDDH/I/GT/113, 10 CDDH OFFICIAL RECORDS, *supra* note 4, at 219. This amendment was dated October 1, 1974; it was thus formulated between sessions I and II.

86. This title was supplied by the Secretariat of the Conference. One could risk guessing that it was done without the knowledge of the French delegation, which was rather anxious to avoid the term "reprisals."



2. The measures described in paragraph 1 of this Article may be taken only when the following conditions are met:
  - (a) The measures may be taken only when other efforts to induce the adverse party to comply with the law have failed or are not feasible, and the victimized party clearly has no other means of ending the breach;
  - (b) The decision to have recourse to such measures must be taken at the highest level of the government of the victimized party; and
  - (c) The party committing the breach must be given specific, formal, and prior warning that such measures will be taken if the breach is continued or renewed.
3. If it proves imperative to take these measures, their extent and their means of application shall in no case exceed the extent of the breach which they are designed to end. The measures may not involve any actions prohibited by the Geneva Conventions of 1949. The measures must cease, in all events, when they have achieved their objective, namely, cessation of the breach which prompted the measure.<sup>87</sup>

These two amendments appeared on the agenda of Committee I *after* the draft articles containing specific prohibitions of reprisals had already been adopted or were going to be adopted by either Committee II or Committee III. Thus, the question how to coordinate the work of all the three committees was raised in both Committee II and Committee III. The proper solution would have been to appoint a mixed working group.<sup>88</sup> However, the General Committee of the Conference did not deem it appropriate to create any new body and decided at its meeting of April 26, 1976 (at the very beginning of the third session) to assign the whole question of reprisals to Committee I, which, however, was to keep in mind decisions already taken by the other two committees. The events that took place within Committee I were thus to constitute a sort of interlude between the work that already had been done on reprisals in the other two committees and the work later to be done in plenary meetings.

M. Girard, who introduced the French proposal, admitted that it "raised a question of principle." The purpose of the amendment was essentially humanitarian, since it would allow the victim of a violation to act as soon as the

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87. 9 CDDH OFFICIAL RECORDS, *supra* note 44, at 58–66 (CDDH/I/221/Rev.1). This version was dated April 22, 1976, and was discussed in full committee. It was referred to Working Group B, and was twice redrafted—as CDDH/I/GT/107 and CDDH/I/GT/107/Rev.1. These later versions differed from the original in two essential ways. In paragraph 1, the question concerned breaches only of draft articles 46–50 of the Protocol by the adverse party. In paragraph 4 (of version CDDH/I/GT/107), or paragraph 3 of CDDH/I/GT/107/Rev.1, it was said that the measures should be "of the same nature" as those to which the adverse party resorted and that they would not include "any of the actions which may not be taken against the categories of persons . . . protected by the Geneva Conventions of 1949 and by this Protocol." (Under CDDH/I/GT/107/Rev.1, "objects" are also included.) 10 CDDH OFFICIAL RECORDS, *supra* note 44, at 218. In all objectivity, it seems difficult not to see the incoherence of these provisions.

88. See 6 CDDH OFFICIAL RECORDS, *supra* note 44, at 243 (CDDH/SR.43, para. 1); 11 CDDH OFFICIAL RECORDS, *supra* note 44, at 565 (CDDH/II/SR.50, para. 1); 14 CDDH OFFICIAL RECORDS, *supra* note 44, at 171, 173 (CDDH/III/SR.20, paras. 13, 15).

violation had been committed. This possibility of immediate action would constitute an advantage in comparison with individual penal sanctions, which, as a rule, could be applied only after the conflict had ended. It was essential to the speaker that "the machinery of sanctions should come into action, but at the time when the rule was broken, and when that breach could cause a serious and perhaps decisive upset in the balance of forces." In order to avoid placing "the combatant who respected the law in a position of inferiority to the combatant who violated it," it would be important to give the victimized party "the possibility under the Conventions of deterring the party committing the breach from continuing its action, or of obliging it to respect the law." Still, the French representative agreed that such a possibility "would have to be limited by strict conditions." Girard went on to specify some of these conditions; they corresponded to the generally established ones.<sup>89</sup>

In the course of the ensuing discussion, seven speakers decisively supported the French proposal—namely the delegates of Canada, Switzerland, Belgium, the United Kingdom, the Federal Republic of Germany, the Republic of [South] Korea, and the United States.<sup>90</sup> According to Mr. Miller of Canada, the proposal would do no more than codify a rule that already existed in practice.<sup>91</sup> To Colonel Draper of the United Kingdom, the proposal intended to make of humanitarian law "a living reality rather than a series of hopeful aspirations"; he stated further that "the intention was to repress breaches and induce compliance with the Protocol."<sup>92</sup> Professor Partsch of the Federal Republic of Germany maintained that the French delegation deserved "credit for having had the courage to raise a difficult and controversial question"; and further, that the proposal "had the merit of seeking to limit reprisals contractually, which was clearly an advance." The speaker stressed "the principle of proportionality," which he considered to be "now universally recognized."<sup>93</sup> Professor Bindschedler of Switzerland, though generally supporting the French proposal, suggested, however, that it would be advisable to widen the circle of persons and objects to be excluded from any measures suggested.<sup>94</sup>

Although some other delegates—those of Iraq, Argentina, Venezuela, Italy, Spain, and Egypt—found the French proposal worthy of serious consideration, they articulated serious reservations about it that would hardly in-

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89. 9 CDDH OFFICIAL RECORDS, *supra* note 54, at 55, 58–60 (CDDH/I/SR.46, paras. 15–27).

90. *See id.* at 55, 63–66 (CDDH/I/SR.46, paras. 45–55); *id.* at 83, 89–94 (CDDH/I/48, paras. 25–28, 54).

91. *Id.* at 55, 63–65 (CDDH/I/SR.46, paras. 45–49).

92. *Id.* at 67, 73 (CDDH/I/SR.47, paras. 33–34).

93. It is interesting to note that on this last point the speaker departed from the stand previously taken by many German scholars. *See id.* at 83 (CDDH/I/SR.48, paras. 2–8).

94. *Id.* at 55, 65 (CDDH/I/SR.46, paras. 50–52).

clude them among the proposal's supporters.<sup>95</sup> The representative of the Netherlands considered the proposal rather premature.<sup>96</sup>

Thirteen delegates, representing Libya, the Ukraine, Poland, the German Democratic Republic, the Union of Soviet Socialist Republics, Norway, Austria, Hungary, Byelorussia, Rumania, Uganda, the Holy See, and Mongolia, took the floor to speak unreservedly against the French proposal.<sup>97</sup> Almost all these delegates said that the mere omission of the term "reprisals" did not change the essential nature of the measures that had been suggested. Mr. Rechetniak of the Ukraine saw in them an obvious application of the traditional *jus talionis*;<sup>98</sup> Mr. Kąkolecki of Poland considered them a step backwards in comparison with the Geneva Conventions.<sup>99</sup> To Professor Graefrath of the German Democratic Republic, it was also an endeavor to revise the articles that already had been adopted by two other committees. Graefrath also predicted that in the event of disparity of forces between belligerents, the measures advocated by France would clearly be to the advantage of the stronger of them and work against the weaker.<sup>100</sup> Mr. Bobylev of the U.S.S.R. and Mr. Eide from Norway feared that any such measures would primarily make the innocent suffer.<sup>101</sup> According to Mr. Kussbach of Austria, the proposal confused two concepts: responsibility of states under international law and responsibility of individuals under criminal law.<sup>102</sup> Mr. Kiralyi of Hungary pointed to the potential danger of decisions being taken arbitrarily by a party on the basis of purely subjective criteria.<sup>103</sup> Mr. Baba of Uganda cautioned against the same danger and asked how the party applying the suggested measures could be sure that they would deter the adverse party from actions such as the ones taken initially instead of embittering the adversary still more.<sup>104</sup> The most vigorous attack came from Msgr. Luoni, representing the Holy See, who denounced the French proposal as incompatible with the fundamental principles of humanitarian law. Luoni asserted:

Indeed, to admit that a party to a conflict could, in certain more or less well-defined cases, have recourse to reprisals would sanction the idea that that lamentable practice was legitimate and would change it from a deplorable *de*

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95. *Id.* at 55, 60-61 (CDDH/I/SR.46, paras. 29-31, 32-35); *id.* at 67, 72-78 (CDDH/I/SR.47, paras. 28-32, 47-51); *id.* at 83, 85-89 (CDDH/I/SR.48, paras. 9-13, 18-23).

96. *Id.* at 83, 86 (CDDH/I/SR.48, paras. 14-16).

97. *Id.* at 55, 60-63 (CDDH/I/SR.46, paras. 28, 36-40, 41-44); *id.* at 67, 70-80 (CDDH/I/SR.47, paras. 20-27, 39-41, 42-46, 52, 53-58, 59-60); *id.* at 83-95 (CDDH/I/SR.48, paras. 1, 29, 30-39, 57).

98. *Id.* at 61-63 (CDDH/I/SR.46, paras. 36-40).

99. *Id.* at 63 (CDDH/I/SR.46, para. 41).

100. See Graefrath, *Dritte Sitzung der Genfer Konferenz zur Weiterentwicklung des humanitären Völkerrechts*, in DEUTSCHE AUSSENPOLITIK 1976, at 156.

101. 9 CDDH OFFICIAL RECORDS, *supra* note 44, at 74-76 (CDDH/I/SR.47, paras. 49-56).

102. *Id.* at 78 (CDDH/I/SR.47, para. 52).

103. *Id.* at 79 (CDDH/I/SR.47, para. 56).

104. *Id.* at 90 (CDDH/I/SR.48, para. 29).

*facto* practice to one regulated by law, which would be inadmissible. . . . It was, however, unthinkable from the legal standpoint that any means which were themselves a violation of humanitarian law could be codified. That would be neither more nor less than a revised and amended law of retaliation.<sup>105</sup>

In his reply, M. Girard expressed regret over the disagreement his proposal had caused: this, he felt, was due to a misunderstanding. He explained that he did not want to elude any prohibitions—he would be only too happy if the measures suggested would never have to be applied and thought that the mere menace would prove sufficient to dissuade the adverse party from violating its obligations under international law. However, he “could not agree that humanitarian law should result in protecting those who violated it at the expense of those who respected it.”<sup>106</sup>

After the discussion of the French proposal, when the time came to discuss the Polish one, Mr. Kąkolecki restricted himself to stating briefly that whatever had been said in reference to the French proposal applied indirectly to the Polish proposal. He thus considered as his supporters all those who had spoken against the proposal of the French delegation.<sup>107</sup> The Polish proposal was supported by a few other delegates;<sup>108</sup> Mr. Bettauer of the United States was at that meeting the only one to expressly oppose it.<sup>109</sup>

At that juncture, Committee I stopped discussing the problem of reprisals and eventually decided to refer the issue as a whole to its Working Group B, for further consideration.<sup>110</sup> It was there, from April 19 to 21, 1977, that what was perhaps the most interesting discussion of the subject took place.<sup>111</sup>

#### E. Working Group B

This time, the discussion was inaugurated by the representative of Poland,<sup>112</sup> whose delegation had limited itself in the full committee to some very brief introductory remarks towards the end of the meeting at which the French proposal was discussed.

The delegate of Poland first said that the very fact that his delegation was represented this time by a person who normally took part in the work of another committee<sup>113</sup> could perhaps be construed as having a symbolic meaning—namely, that the problem of reprisals, though referred to Committee I for consideration, had never ceased to interest the other committees.

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105. *Id.* at 91 (CDDH/I/SR.48, paras. 32, 37).

106. *Id.* at 83, 93–94 (CDDH/I/SR.48, paras. 46–51).

107. *Id.* at para. 53.

108. *Id.* at paras. 52, 55, 56.

109. *Id.* at para. 54.

110. *Id.* at 349 (CDDH/I/SR.66, paras. 3–4) (meeting of April 14, 1977).

111. Since the meetings of the working groups are not recorded, the author has taken the liberty of referring in the following paragraphs to his personal notes.

112. The delegate was the author.

113. The author was the Chairman of Main Committee II.

The speaker explained, "It is alas well-known how often recourse to reprisals—in retaliation for the conduct, whether proven or only imputed, of the adverse party—was invoked in justification of most atrocious cruelties perpetrated against the innocent." "The fundamental injustice of reprisals consists in that very fact—of their being usually directed against the innocent," he continued, classing this among the inherent features of reprisals. "They are thus equivalent to a collective punishment," he declared, "the very notion of which must be abhorrent to any civilized man." "We are—and always shall be—in favor of punishing grave breaches committed by individuals, provided, however, that such punishment be inflicted on those who have been found personally guilty of such breaches."

"There are many cases in which reprisals entirely failed their purported aim," the Polish delegate continued—"they usually led to counter-reprisals and, in the final analysis, to an escalation of atrocities inexorably contributing to make of an armed conflict a truly Dantesque hell." He then reminded his fellow delegates that many distinguished Western writers—some of whom he quoted—had been against reprisals. Reprisals had also been prohibited by a number of treaty rules and had been solemnly condemned in many resolutions of the U.N. General Assembly. He thought, therefore, that the predominant trend in contemporary international law was towards the elimination of reprisals. "It would be," he said, "a paradoxical step backwards if the recourse to reprisals, under whatever name, were to be authorized by our Protocols. Far from protecting the victims of armed conflicts, any such provision would encourage the belligerent arbitrarily to make them suffer."

The representative of Poland regretted that his own initiative to refer the whole problem of reprisals to a mixed working group had failed. As the matter now stood, after several articles containing a specific clause on reprisals had been adopted in either Committee II or Committee III, during which time neither committee was conversant with the work done by the other, several categories of persons and objects were not covered by any prohibition of reprisals.

The speaker named some of these categories: remains of the deceased,<sup>114</sup> enemies *hors de combat*,<sup>115</sup> occupants of aircraft,<sup>116</sup> members of the armed forces and military units assigned to civil defense organizations,<sup>117</sup> women and children vulnerable to rape, forced prostitution, or indecent assault,<sup>118</sup> and, finally, undefended localities and demilitarized zones.<sup>119</sup> Could such persons

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114. Protocol I, *supra* note 47, at art. 34.

115. *Id.* at art. 41.

116. *Id.* at art. 42.

117. *Id.* at art. 67.

118. *Id.* at arts. 76, 77. Note that the prohibition contained in article 51, paragraph 6, protects civilians only against attacks, defined in article 49.

119. *Id.* at arts. 59, 60.

and objects be exposed to reprisals? An interpreter in bad faith would be able to argue that they could, given the lack of a specific prohibition of reprisals in any of the provisions mentioned above, when highly specific prohibition does appear in articles on the protection of other persons and objects. The chief reason the Polish delegation insisted so vigorously on the inclusion of a *general* prohibition in Protocol I was to exclude the possibility of any such interpretation.

So as not to reopen the discussion in the main committees that already had adopted specific prohibitory clauses, the speaker suggested that if the Polish proposal should be adopted, the Drafting Committee might be entrusted with the task of deleting the specific prohibitions that would, in such a case, become redundant.

To retain the prohibition of reprisals against certain categories of persons and objects yet fail to prohibit reprisals against others that deserve a similar protection would be tantamount, concluded the representative of Poland, "to leav[ing] open not the door perhaps, but at the very least a chink through which a wolf would be able to penetrate into our sheep-fold."

Ambassador Paolini, who in 1977 replaced M. Girard as the head of the French delegation, limited himself in the working group to a rather short speech. He merely reminded the audience of what his predecessor had said previously. The French delegation next presented a somewhat redrafted text, in which some of the remarks made in the former discussion were taken into consideration. The term "reprisals" did not appear anywhere; the proposal merely spoke about "exceptional measures in the event of grave breaches." Such measures would be applied in exceptional situations when it would be impossible for a government not to react against "grave, manifest and deliberate" violations of law committed by the adverse party.<sup>120</sup> These "exceptional measures" should thus be considered to have been taken in the exercise of the right of legitimate self-defense, which could not be denied to anyone. The exercise of this right would be subject to several conditions: rigorous observation of the principle of proportionality;<sup>121</sup> obligation to warn the adverse party of the measures that are intended;<sup>122</sup> insurance that the measures would be of the same kind as those to which the adverse party itself had resorted;<sup>123</sup> cessation of measures as soon as they achieve their aim;<sup>124</sup> and the decision to apply them to be taken "at the highest level of the government."<sup>125</sup> The speaker finally assured the working group that such prohibitions as those formulated both in the Conventions and in the Protocol would be retained.

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120. 10 CDDH OFFICIAL RECORDS, *supra* note 44, at 217, 218 (CDDH/I/GT/107/Rev.1).

121. *Id.* at para. 3.

122. *Id.* at para. 2(c).

123. *Id.* at para. 3.

124. *Id.*

125. *Id.* at para. 2(b).

Considering the Polish proposal, M. Paolini expressed the opinion that it would "overburden [*surchargerait*]" the text of the Protocol, in which several prohibitions already were to be found: the Polish proposal would not, so far as he could see, add anything new and would therefore be redundant.<sup>126</sup>

After these two introductory statements, more than forty speakers asked for the floor, and three full days had to be devoted exclusively to what became a general debate on reprisals. Each of the proposals submitted found supporters and opponents. So did nearly every suggestion made in the discussion. The following are some of the most interesting points that were raised.

Several speakers expressed their doubts about the French representative's contention that many of the reservations formulated during the former discussion had been taken into consideration in the new version of the French proposal. The delegates of the Holy See, Vietnam, and Byelorussia remarked that the mere addition or deletion of one word or another, or even the change of the title in the proposed new article, did not change what had all along constituted its very essence: the admissibility of arbitrarily resorting to measures otherwise prohibited. The representative of Vietnam went so far as to say that the replacement of the term "reprisals" by another served no other purpose than to "deceive public opinion [*tromper l' opinion publique*]."

The delegate of Switzerland said that the acceptance of the French proposal would be an advantage to the middle-sized and small states. He was, however, opposed by the representatives of the German Democratic Republic and Venezuela. These delegates maintained that this was far from accurate: the developed countries that possess modern weapons to which smaller states have no access would be the only winners.

The Swiss delegate also contended that no comparison should be made between the measures suggested and the collective penalties: the former were applicable to states, the latter to individuals. That opinion was labeled a mere sophism by the delegate of Poland. The man in the street would suffer in exactly the same way in either capacity; as an individual or as a citizen of his state he would become, without any personal guilt, the victim of retaliatory measures.

The assertion of the representative of France that the acceptance of his proposal would mark progress in the development of humanitarian law found its chief opponents in the delegates of Mexico and Tunisia. The first said that this could open the way to total anarchy; the second maintained that to place the article submitted by France next to those protecting human persons would be equivalent to taking away with the left hand what was given with the right.

The same two delegates strongly objected to the contention of the Cana-

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126. The summary of M. Paolini's speech also is based on personal notes taken by the author.

dian, Belgian, and United States delegates, who had praised the "realistic" approach of the French proposal. The Tunisian and Mexican delegates maintained that, to the contrary, it would be unrealistic to think that the suggested article would not lead to the most cynical misuses.

The delegates of the United Kingdom, Australia, and the Federal Republic of Germany thought that the mere threat of the application of "exceptional measures" would have a salutary effect, in that it would dissuade belligerents from violating the law. This opinion, however, was contradicted by several speakers. The delegates of Finland and Spain feared an escalation of atrocities; the delegate from Mexico foresaw the danger of giving a pseudolegal weapon to the disloyal belligerent that would seek to elude commitments. The representative of the Holy See resisted the creation of a loophole through which any reprisals eventually would be able to slip. The delegates of Vietnam and Nigeria claimed that leaving so much to the arbitrary judgment of the party concerned, which would be guided by purely subjective criteria, was an enormous risk. Those from Venezuela and the Philippines feared the risk of widely divergent interpretations of so controversial a text.

Some divergencies of a more formal nature also arose. For instance, the representative of the United Kingdom saw no relation whatsoever between the measures suggested and those prohibited by the Charter of the United Nations, while the Syrian delegate found them to be contrary to article 2, paragraph 4 of the Charter.

In addition, some delegates questioned whether it would be possible in practice to observe the provisions of both the Geneva Conventions and the Protocol, despite the reservations contained in the French proposal. The efforts of the United States representative did not render too great a service to the cause of the French proposal, which he otherwise supported by expressly providing, in a kind of subamendment,<sup>127</sup> for the possibility of evading some of the prohibitions if these had first been violated by the adverse party.

A procedural point was raised by the representative of the German Democratic Republic: Was it still possible to question prohibitions that already had been adopted in due form by Committee II and Committee III?

Another formal question concerned the very authority of the Conference to deal with a problem which, to a considerable degree, exceeded the scope of the "Geneva law" (protection of victims of armed conflicts) and merged with that of the "Hague law" (conduct of hostilities). Allusions to this problem were made, in various contexts, by the delegates of the United States, Poland, Yugoslavia, and Iraq.

Also among the formal issues considered by the group was the position of

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127. This proposal is mentioned in the Committee's report, CDDH/405/Rev.1, Annex II, para. 6, as CDDH/I/ GT/109. 10 CDDH OFFICIAL RECORDS, *supra* note 44, at 217, 218.



some of the speakers, especially those representing Vietnam and the Philippines, that the Polish proposal had merit in its very brevity. The Swedish representative expressed another interesting opinion: the French proposal would have constituted remarkable progress if it had been put forward a hundred years ago; in the second half of the twentieth century, however, it was retrograde.

The delegate of Poland, taking the floor again towards the end of the discussion, observed that none of the supporters of the French proposal, nor even the French representative himself, had answered two of his fundamental questions: Would reprisals be permissible against persons or objects protected by the Protocol but not covered by any of the specific prohibitions of reprisals? and What kind of measures were meant as being "exceptional"—would any kind of weapons be excluded, or would the party resorting to "exceptional measures" be allowed to use any of them?

In the course of the discussion, an additional development transpired. Professor Abdine of Syria reintroduced a proposal that Syria had made at the first session of the Conference. This stipulated that in the event of any grave breach of either the Geneva Conventions or the Protocol, the parties would act, jointly or severally, in conformity with the Charter of the United Nations and in cooperation with the appropriate organs of that organization. The Polish delegation agreed, at one point, to add the text of this amendment as a second paragraph to its original proposal, which would thus become the first paragraph of the joint proposal.<sup>128</sup>

After the debate described above, it became perfectly clear that a consensus could not be reached on either of the two essentially divergent texts. The working group therefore decided to refer the matter back to Committee I, where a formal vote would have to be taken. Whatever the result, it was clear that any victory would be a Pyrrhic one.

#### F. Main Committee I Again

When the question next appeared on the agenda of the full committee, M. Paolini, for the French delegation, and Mr. Kąkolecki, for the Polish delegation, took the floor to announce that they were withdrawing their respective proposals.<sup>129</sup>

This, however, was a compromise the Syrian delegation did not endorse.<sup>130</sup> Consequently, the Syrian part of what originally had been a Polish

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128. *Id.* at 217, 219 (CDDH/I/GT/113).

129. 9 CDDH OFFICIAL RECORDS, *supra* note 44, at 417-18 (CDDH/I/SR.72, paras. 3, 4, 11) (meeting of May 13, 1977).

130. *Id.* at para. 5.

amendment was independently put to the vote. After it was adopted by a vote of forty-one to eighteen, with seventeen abstentions,<sup>131</sup> it became article 89 of the final text of Protocol I. It reads:

In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.

Without knowing of the unrecorded debate in the working group, one would hardly guess that this innocent provision is the only remnant of two endeavors to insert in the Protocol a general clause on reprisals!

The vote on the Syrian amendment was followed by a few interesting explanations of vote that were submitted in writing.<sup>132</sup> The delegations of France and Poland declared that they had withdrawn their respective proposals exclusively in the "spirit of compromise" without abandoning their original positions.<sup>133</sup> Two other delegates expressed their regrets at the withdrawal of proposals they had supported—the delegate of Cameroun, the French proposal; the delegate of Syria, the Polish proposal.<sup>134</sup> The representative of the Holy See was disappointed that Committee I had "lost the opportunity of stating clearly, precisely and unequivocally that reprisals are prohibited by humanitarian law."<sup>135</sup>

The explanations given by the delegations of Mexico and Yugoslavia were particularly significant. Had the vote taken place, the delegate of Mexico would have voted not only against the French proposal but against the Polish one as well since, in his opinion, it did not go far enough: the mention of the "protected" persons and objects could be construed as allowing reprisals against those who were not specifically protected by the Geneva Conventions or the Protocol.<sup>136</sup> The delegation of Yugoslavia would have voted for the Polish proposal, although it considered the proposal too modest in scope and thus "should still have been worried about the question of reprisals against the adversary in combat." The Yugoslavian delegation also expressed deep regret that the lack of any general provision on reprisals "leaves us in the fog of customary law."<sup>137</sup>

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131. *Id.* at para. 7.

132. *See id.* at 427, 435–59 (CDDH/I/SR.73, Annex *passim*).

133. *Id.* at 427, 443–44, 452 (CDDH/I/SR.73).

134. *Id.* at 427, 453–55.

135. *Id.* at 427, 447.

136. *Id.* at 427, 449–50.

137. *Id.* at 427, 456–57 (CDDH/I/SR.73, Annex). For a short survey of what the Committee did on reprisals, see its report of its work during the fourth session, 10 CDDH OFFICIAL RECORDS, *supra* note 44, at 181, 184–85 (CDDH/405/Rev.1, paras. 20–30).

### G. Plenary Meeting

Since no general provision on reprisals was to be found in the texts the Conference had to approve in plenary meetings, some delegations took the opportunity to say a few words about the problem of reprisals as a whole—or, quite often, their reasons for joining the consensus—when specific prohibitory clauses were raised in the plenary meetings. Speaking in reference to draft article 46 (article 51 in the final text), the representative of Poland<sup>138</sup> explained that, “[t]he whole article, with its general rules, would fill some of the gaps in existing rules of a more specific character. It represented a coherent whole.” This speaker added that his delegation likewise was supporting unreservedly all the following articles—wherever a prohibition of reprisals had been inserted.<sup>139</sup>

According to the Swedish delegate, “[t]he rules laid down in Articles 46 to 50 are to be considered as a ‘package’ including important and clearly expressed rules, where humanitarian considerations are balanced in a very good way against military requirements.”<sup>140</sup> In another context, the same delegate observed that “the threat of reciprocal treatment would always be real to those who violated the rules of humanitarian law . . . but that a formal legalization of reprisals would be an invitation to misuse and abuse.”<sup>141</sup>

For Professor Alghunaimi, who spoke on behalf of Egypt, the whole group of articles in question represented “an advance in the reaffirmation and development of international humanitarian law.” He was “fully aware that by prohibiting reprisals those articles were a departure from the customary rules of international law.” His delegation accepted them in compliance with “the philosophy of Islam and the ethics of Arab chivalry.”<sup>142</sup> The delegation of Qatar expressed a similar view.<sup>143</sup>

Only the delegation of Australia opposed all prohibitions of reprisals that concerned a category of *objects*, although it unreservedly supported all rules prohibiting reprisals against *persons*. Reprisals, to that delegation, were not acts of vengeance but sanctions the availability of which “may persuade an adversary not to commit violations of the law in the first place.” Therefore, the Australian delegation abstained in the vote on draft article 47 (article 52 of the final text) and also would have abstained in the vote on several subsequent articles (accepted by a consensus it did not want to oppose) if they had been put to the vote.<sup>144</sup> But this was an isolated voice. No other delegation

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138. The author.

139. 6 CDDH OFFICIAL RECORDS, *supra* note 44, at 141, 166 (CDDH/SR.41, paras. 130–31).

140. *Id.* at 199.

141. *Id.* at 205, 210 (CDDH/SR.42, at para. 35).

142. *Id.* at 205, 209–10 (CDDH/SR. 42, at para. 31).

143. *Id.* at 219, 234 (CDDH/SR.42, Annex).

144. *Id.* at 175 (CDDH/SR.41, Annex).

among those that had supported the French proposal in the working group made any similar statement.

#### H. The Problem of Reprisals in Protocol II

Draft Protocol II, relating to the protection of victims of noninternational armed conflicts, contained two clauses prohibiting reprisals: one, "against the wounded, the sick and the shipwrecked as well as against medical personnel, medical units and means of medical transport";<sup>145</sup> and the other, "against the civilian population or civilians."<sup>146</sup>

Doubts were raised as soon as the first of these provisions appeared on the agenda of Main Committee II. One group of delegates wanted to assure the victims of noninternational conflicts a protection analogous to that which the victims of international conflicts enjoyed. Others thought that, to the contrary, reprisals were an institution applicable only to international relations; applying the same criteria to conflicts not having an international character did not seem possible to these delegates. Yet another group of delegates sought a compromise solution by trying to substitute for the term "reprisals" some other expression—for example, "measures of retaliation comparable to reprisals." Aware of the possibility of similar discrepancies in the work of other committees, the Chairman of Committee II sought to set up a small mixed group, composed of no more than two delegates from each Committee, which would try to elaborate a solution acceptable to everyone. For various reasons, however, such a mixed group was never convened.<sup>147</sup>

In the meantime, Main Committee III was confronted with exactly the same problem. Here, however, the reaction was entirely different. While the ICRC draft Protocol limited itself to prohibiting reprisals only against the civilian population, Committee III introduced such a prohibition into articles dealing with the protection of certain categories of objects as well. Nevertheless, all those clauses were put into square brackets, for the Committee decided to postpone the vote on them "until the question had been resolved for draft Protocols I and II in general."<sup>148</sup>

Main Committee I, after considering the problem within its Working Group B, drafted a general provision on the subject, which would cover, on

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145. Draft Protocol II, *supra* note 45, at art. 19.

146. *Id.* at art. 26, para. 4.

147. For the story of the problem in Committee II, see 11 CDDH OFFICIAL RECORDS, *supra* note 44, at 281, 290–91 (CDDH/II/SR.28, paras. 59–64); *id.* at 327, 335–37 (CDDH/II/SR.32, paras. 49–59); *id.* at 339–47 (CDDH/II/SR.33, paras. 1–50); *id.* at 551, 562–65 (CDDH/II/SR.49, paras. 69–78). See also the Committee's report of its work during the second session, 13 CDDH OFFICIAL RECORDS, *supra* note 44, at 59, 132 (CDDH/221/Rev.1, paras. 177–81).

148. 15 CDDH OFFICIAL RECORDS, *supra* note 44, at 263, 291 (CDDH/215/Rev.1, paras. 127, 134, 141, 151–52). On the referral of the whole problem to Committee I, see the report of Committee III of the fourth session, CDDH/III/406, para. 70.

the one hand, persons in the power of the adverse party—all the sick, wounded, and shipwrecked, as well as the civilian population; and, on the other hand, objects that would be indispensable for the survival of civilians and objects containing dangerous forces.<sup>149</sup> This article, adopted by a rather feeble majority,<sup>150</sup> ran as follows: "The provisions of Parts II and III and of articles . . . shall not, in any circumstances or for any reason whatsoever, be violated, even in response to a violation of the provisions of the Protocol."<sup>151</sup>

However, toward the end of the fourth session of the Conference, Protocol II as a whole (for reasons that lead beyond the scope of the present study) was opposed by a comparatively strong group of delegations. After much negotiation, when it was clear that Protocol II could be saved only at the price of being considerably shortened, none of the articles that the supporters of Protocol II succeeded in saving contained any clause on reprisals under any denomination. At the most, the prohibition of "collective punishments" and of "taking of hostages," listed among the "fundamental guarantees,"<sup>152</sup> could perhaps be considered to give the victims of noninternational conflicts some minimum protection against measures comparable to reprisals.

#### CONCLUSION

Let us try to forget which particular delegations were fighting at Geneva to insert a general prohibition of reprisals in Protocol I<sup>153</sup> and which were pushing for a provision expressly authorizing the resort to reprisals when certain conditions are met. To discuss the matter objectively, as a purely academic question, let us refer to the first of the proposals mentioned above as "solution A," to the second as "solution B."

Had solution A been adopted, it would have become perfectly clear that *all* persons and *all* objects protected by the Geneva Conventions and by the Protocol are immune to reprisals. To this writer, it would have been advisable to add one more item, namely the "remains of deceased,"<sup>154</sup> as the question could be raised whether they should be classified as "persons" or "objects" or perhaps even a distinct category somewhere between the two.

As the matter now stands, only specific categories of persons and objects are protected from reprisals. Even if those categories comprise *most* of the persons and objects mentioned in the Protocol, *some* have been excluded. This

149. For a survey of the work done by Committee I, see its report in 10 CDDH OFFICIAL RECORDS, *supra* note 44, at 202 (CDDH/405/Rev.1, paras. 125–130).

150. By 33 votes to 15, with 28 abstentions. For discussion preceding this vote, see 9 CDDH OFFICIAL RECORDS, *supra* note 44, at 427–30 (CDDH/I/SR.73, paras. 8–23).

151. 10 CDDH OFFICIAL RECORDS, *supra* note 44, at 234 (CDDH/I/GT/95).

152. Protocol II, *supra* note 47, at art. 4, para. 2.

153. Protocol II, concerning noninternational conflicts, would pose entirely different problems; it is therefore not considered in the following remarks.

154. Protocol I, *supra* note 47, at art. 34.

writer, in a speech to Working Group B of Main Committee I, enumerated the ones that had been omitted. No one answered his question about the legal position of these persons and objects, although many supporters of solution B took the floor after him. The possibility of an *a contrario* reasoning (*inclusio unius est exclusio alterius*), allowing persons or objects not covered specifically by any of the prohibitory clauses to be lawfully exposed to reprisals, cannot be excluded. Should such interpretation occur, the lack of a general prohibitory provision would prove, too late, how misguided the Conference had been. To quote the words of the delegation of the Holy See, the Conference lost the "opportunity of stating clearly, precisely and unequivocally that reprisals are prohibited by humanitarian law."<sup>155</sup>

As for solution B, what a dangerous loophole it would have left in the prohibition of reprisals, if it had been adopted, can easily be argued. What an encouraging field for any *mala fide* interpretation! The more conditions and reservations, the more temptations—and opportunities—for evasion. And what a paradox: anyone evading the prohibition of reprisals would be able to invoke an express authorization of a treaty on humanitarian law. Fortunately no loophole of this sort has been left open—not explicitly, at any rate.

But what if a state, in a given case, has absolutely no other means of reacting against a "manifest and deliberate" violation of law by the unscrupulous enemy than a recourse to a similar action? Let the state then, in case of doubt, invoke the plea of unavoidable necessity or legitimate self-defense (possibly before some tribunal or commission) rather than let it invoke an express and, though perhaps well-meant, double-edged clause of a treaty boasting of its "humanitarian" nature. The law of our times is haunted by the danger of overcodification. Already well-known in many countries in the field of domestic law, this trend persists in trying to invade international law as well. Let us not become the victims of that danger. There are things better left uncodified: the potential offender should not be given what might easily be construed as an escape clause.

On the other hand, solution B could perhaps play a useful role in a field where as yet *no* prohibition of reprisals has ever been introduced:<sup>156</sup> in the law pertaining to the conduct of military operations, frequently referred to as the "law of The Hague." The state of that law is certainly much more confused and chaotic<sup>157</sup> than is the state of the "Geneva law." This may be due, in part, to the fact that no body exists to develop this branch of law as the International Committee of the Red Cross does with respect to the Geneva law.

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155. 9 CDDH OFFICIAL RECORDS, *supra* note 44, at 427, 447 (CDDH/1/SR.73, Annex).

156. See, e.g., E. CASTRÉN, *supra* note 31, at 70; M. GREENSPAN, *supra* note 32, at 408; F. KALSHOVEN, *THE LAW OF WARFARE* 112–13 (1973).

157. See, e.g., KUNZ, *The Chaotic Status of the Laws of War and the Urgent Necessity for Their Revision*, 45 AM. J. INT'L L. 37 (1951); E. CASTRÉN, *supra* note 31, at 20.

The International Law Commission of the United Nations expressly declined to deal with the *jus in bello* altogether.<sup>158</sup> Perhaps the government of the Netherlands, in its capacity as the depositary of the Hague Conventions, could be induced to take the initiative of convening first a group of experts and then a diplomatic conference. Should that ever happen, solution B could provide welcome progress over the existing law at that juncture.

To this writer's mind, an ideal goal would be: solution A (prohibition) for the Geneva law; solution B (regulation) for the law of The Hague. Will that ever be attained? It would, in any event, be worth striving for. Scholars, as well as governments and international organizations, would be well-advised to embark on this difficult but interesting and important task.

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158. See the report of that Committee on its first session held in 1949, pt. 1, ch. 1, para. 18. U.N. Doc. A/925.