

## THE MORALITY OF REPRISALS

Much debate and confusion have been engendered by the lack of a clear definition of the term *reprisal*. Acts of various sorts have been justified by some as legitimate reprisals and condemned by others on the ground that they were illegitimate reprisals. In other cases, the defenders of an act have contended that what had been done was an act of self-defense, while their opponents have condemned them for committing acts of reprisal. (1) In the first sort of dispute, the parties share a common belief that some reprisals are legitimate, while in the second, they appear to share the opinion that no reprisals are legitimate, the only question to be settled being whether the acts can be characterized as self-defense and therefore legitimate, or as reprisals and therefore illegitimate. If the latter interpretation were correct, «self-defense» and «reprisals» would be normative, evaluative terms as well as descriptive ones.

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(1) Cf. the British government's defense of its attack on Fort Harib in Yemen on March 28, 1964. The Iraqi delegation to the UN contended that the attack was not an act of self-defense, as the British delegate had claimed, but «a premeditated attack of retaliation». On April 9, 1964, the Security Council condemned reprisals «as incompatible with the purposes and principles of the United Nations». During the debate, the delegate of the United Kingdom argued: «There is, in existing law, a clear distinction to be drawn between two forms of self-help. One, which is of a retributive or punitive nature, is termed 'retaliation' or 'reprisals'; the other, which is expressly contemplated and authorized by the Charter, is self-defence against armed attack... It is clear that the use of armed force to repel or prevent an attack—that is, legitimate action of a defensive nature—may sometimes have to take the form of a counterattack... [The attack on the Fort was a] protective action... It indeed would be a strange legal doctrine which deprived the people of the Federation [of South Arabia] of any right to be defended, or deprived those responsible for defending them from taking appropriate measures of a preventive nature... [Destruction of the fort] has no parallel with acts of retaliation or reprisals, which *have as an essential element the purposes of vengeance or retribution*. It is this latter use of force which is condemned by the Charter, and *not the use of force for defensive purposes such as warding off future attacks.*» (U.N. Sec. Council Off. Rec. 1109th meeting, April 7, 1964, S/PV. 1109, April 7, 1964, 4-5; emphasis added.)

According to some commentators, members of the United Nations are bound by the Charter to refrain from all acts of force against other member states, including such acts of reprisal as may entail the use of force. Prior to the establishment of the United Nations, it is said, every nation may have enjoyed the right to engage in reprisals when such acts were deemed necessary for the preservation of certain vital interests or for the punishment of acts of international delinquency; but the existence of the United Nations and its organs for the peaceful settlement of international disputes presumably vitiates any justification for acts of forcible reprisal to which appeal might formerly have been made.

As against this thesis, I shall argue that in the absence of certain conditions of international order, forcible reprisals are legally and morally permissible, and that like legitimate measures of self-defense, they are reserved to the member states of the United Nations. In order to establish this thesis, I shall first demonstrate that the dichotomy between «self-defense» and «retaliation» is misleading, for it suggests that the class of actions that might be taken in reaction to an international delinquency, whether threatened or actually carried out, is exhaustively covered by these two terms. In fact, if the language of international law is confined to self-defense and retaliatory reprisals, it is seriously impoverished, it is not true to long-established usage, and it fails to recognize at least one other class of acts which share some of the characteristics of self-defense and of retaliatory reprisals, but which differ significantly from both of them. This third category, which I shall call «reprisals proper» on the ground that that is the meaning which the term has traditionally borne, deserves to be considered separately from the others; for the acts subsumed under it differ substantially, both in their objective character and in their moral propriety, from them. Once the necessary distinction between self-defense, retaliatory reprisals, and reprisals proper have been drawn, I shall consider whether reprisals are morally justifiable and the extent to which they should be sanctioned under the law of nations.

### I. SELF-DEFENSE

The plea of self-defense arises in international law, as it does in municipal law, when the following conditions obtain:

1. A person *A* commits an act *e* which would under ordinary conditions be considered to be illegal against another person *B*.

2. *A* does *e* in an effort to prevent, divert, or thwart an illegal and potentially dangerous act that he reasonably assumes *B* is launching, or is about to launch, against *A*.

3. *A*'s preventive action *e* is proximate in time to *B*'s threatened attack.

Condition 3 is essential to self-defense. If *A* has strong reason to believe that *B* intends to murder him in September, *A* cannot attack *B* in August and claim self-defense. The reason for this is evident: since *B*'s aggression is not imminent, other avenues for escape from *B*'s murderous intentions remain open to *A*, including negotiation, appeal to the police for protection, and taking precautions to avoid *B*. Similarly, if *B* attacks *A* in August, and *A*, having escaped from the assault, responds with an assault of his own in September, *A* can hardly claim that his attack is an act of self-defense. Self-defense is a protective action designed to ward off an imminent danger, i.e., one that has already been launched or is about to be launched at any moment. Any act which follows it by any length of time whatever, cannot be considered an act of self-defense (2).

## II. RETALIATORY REPRISAL

An act fulfilling all of the following conditions would be a retaliatory reprisal:

1. A person *A* commits an act *e* which would under ordinary conditions be considered to be illegal against another person *B*.

2. *A* does *e* in response to an illegal act committed by *B* against *A* some time in the past.

3. *A*'s intention in doing *e* is to retaliate for *B*'s past offense.

These are the two possibilities recognized by those who argue as the British government did in the cases cited in note above. However, other possibilities do exist, and must be given some recognition in international law. The British government suggests that reprisals always have the characteristics outlined in II. Although it would not be incorrect to characterize some acts of the sort described under II as reprisals, since

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(2) The length of time separating self-defensive action and a threatened assault may vary somewhat. It is impossible to specify with precision the gap that might remain between the two while still allowing the one to be called self-defense. However, it is evident that the greater the gap, the greater the burden of proof upon the claimant.

the word has been used thus in the past, it would be incorrect to insist that *only* such cases as these qualify as reprisals. There is a third possibility which possesses some of the characteristics of acts of self-defense and some of those outlined under II.

### III. REPRISAL PROPER

An act fulfilling all of the following conditions would be a reprisal proper:

1. A person *A* commits an act *e* which would under ordinary conditions be considered to be illegal against another person *B*.
2. *A* does *e* in response to an illegal act committed by *B* against *A* some time in the past.
3. *A*'s intention in doing *e* is to prevent, divert, or thwart an illegal and potentially dangerous act that he reasonably believes that *B* is committing or is about to commit, or is likely to commit against *A*.

Reprisals proper differ from acts of self-defense in that in the former, *A*'s act is in response to a past delinquency by *B*, but they resemble acts of self-defense in that they are designed to prevent such delinquencies as *B* has committed from continuing or from being repeated—that is, they are forward-looking and non-retaliatory in intention. They differ from retaliatory reprisals in that they look toward the future, at least so far as their goals are concerned; but all reprisals resemble one another in that a past delinquency by *B* constitutes the occasion or justification for *A*'s act *e*.

In municipal law, individual citizens are not permitted to engage either in retaliatory behavior such as that which is described under II or in preventive reactions such as those described under III. The prohibition of such behavior derives from the fact that well-organized police forces, prosecutors, and courts are at the citizen's disposal and have generally proven themselves capable of responding to unlawful behavior with appropriate penalties designed both to satisfy the victim's demand for retributory justice and society's need for protection against persons who have demonstrated their hostile propensities, and deterrence of others who may be afflicted with similar inclinations. If society lacked effective instruments of law enforcement and was incapable of punishing wrongdoers—as it is incapable of preventing every dangerous assault—then the private citizen would surely be as justified in exercising his inherent right to defend himself against remote harms through punitive expeditions

against those who had violated the rules of civilized society as he is in defending himself against imminent harm under the doctrine of self-defense.

However, what is nearly self-evident with regard to natural persons becomes questionable and puzzling when applied to states. A cursory examination of recent discussions of the right of self-defense in international law reveals the rampant confusion that prevails. According to one exegesis of Article 51 of the Charter of the United Nations, no state is justified in resorting to measures of self-defense unless an armed attack has actually taken place; a mere threat of aggression does not constitute such a justification. On this reading, a resort to armed force in anticipation of an armed attack is «clearly and explicitly» ruled out (3). Others maintain that actual physical violation of the claimant state's territories is not necessary to justify self-defense; rather, the launching of an armed attack by pulling the trigger or by sending nuclear submarines or missiles on their way is sufficient to justify measures of self-defense. Under this latter doctrine, even a small border incident would presumably count as an armed attack, while the imminent threat of a nuclear holocaust would not. As McDougal and Feliciano point out, this is «to make an absolutistic fetish of certain irrelevant aspects of modality.» (4). The member states of the United Nations would be expected to make sitting ducks of themselves and of their people in order to adhere to the letter of the Charter. If this were in fact the meaning of the Charter, and if any government ratified it seriously intending to carry out its provisions as thus interpreted, that government would surely deserve to be impeached or overthrown, for it would have violated the most basic trust of its people and forfeited its right to their loyalty by agreeing to sacrifice their lives before employing all available means to save them. Further, under this confused interpretation, self-defense is actually reduced to pure retaliation; for in the event of a threatened nuclear attack against the United States, for example, the American government would be expected to wait until the missiles were launched and on their way to its largest cities before striking back —presumably with such second-strike capacity as it could muster. An analogous doctrine in municipal law would

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(3) Cf. KUNZ: «Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations», 41 A. J. I. L., 878 (1947), cited in McDUGAL AND FELICIANO: *Law and Minimum World Order* (1961), 233. See the discussion and other citations there.

(4) Cf. SINGH: «The Right of Self-Defense in Relation to the Use of Nuclear Weapons», 5 *Indian Yb. of Int. Affairs*, 3 (1956), cited in McDUGAL AND FELICIANO, *op. cit.*, 239.

require the citizen to wait until a shot e was fired at him before he dared employ violent measures against his attacker under threat of conviction for unwarranted aggression —assault or perhaps murder— if he used such means in anticipation of what he interpreted to be a murderous attack. Such a doctrine would impose an impossible burden upon the innocent citizen, a choice between suicide on the one hand and conviction and punishment for a serious crime on the other. If states are to have the rights of territorial integrity and national survival, this doctrine is as intolerable on the international level as it is on the municipal.

There is no need to dwell upon an exegesis of Article 51 here, for it is evident that the Charter of the United Nations did not confer rights of self-defense, which the Charter itself recognizes as an «inherent» or natural right. The right of self-defense being necessary for the preservation of any state in the face of acts of aggression against it by others, it must be reserved — particularly in a world that lacks both order and an effective international instrument for the protection of states that have come under deadly attack. Limitations upon this right and other rights essential to the preservation of states cannot be imposed by any outside agency; nor can they be transferred to any body without firm guarantees that that agency possesses the will, the determination, and the power to prevent all acts of aggression and to settle international disputes in accordance with universally accepted standards of law and justice. One such right must remain the right to punish international delinquencies with the intention of preventing their recurrence, particularly when such delinquencies threaten the territorial integrity of a state, the lives and property of its nationals, or its other vital interests.

Hans Lauterpacht once observed that «[I]t is a commonplace of human nature that evil-doers are checked by retaliation, and that those who are inclined to commit a wrong against others are often prevented by the fear of retaliation.» (5). Reprisals proper are not purely retaliatory, for they are forward-looking, designed to coerce the offending state into bringing its delinquency to an end. In the absence of a court that both enjoys a reputation for moral probity and possesses compulsory process and a means of enforcing its decisions, nations often have no alternative but to resort to measures of self-help, measures which the framers of the Charter of the United Nations had hoped to outlaw and make unnecessary, but which the history of the UN clearly reveals the organization to be incapable of achieving. Conditions being what they are, there can be no

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(5) LAUTERPACHT: *Oppenheim's International Law*, 7th Ed. (1952), 135.

blanket moral or legal condemnation of reprisals. Some reprisals must be permissible, for without the right to resort to them, peace-loving nations would be at the mercy of those who are more inclined to engage in international outlawry.

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