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## Even Republics Must Sometimes Strike Back

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## Even Republics Must Sometimes Strike Back

*Jeremy Rabkin*\*

The general was frustrated. In the summer of 2011, General James Cartwright, Vice Chairman of the Joint Chiefs of Staff, put his concerns this way in a congressional hearing: “If it’s O.K. to attack me, and I’m not going to do anything other than improve my defenses every time you attack me, it’s very difficult to come up with a deterrent strategy.”<sup>1</sup> He happened to be speaking about dealing with cyber attacks, but he could have made a similar point about a wide range of security threats. Our reticence about retaliating in kind for cyber attacks seems to reflect wider uneasiness about using force in a retaliatory – or punitive – spirit.<sup>2</sup>

Yet some forms of military retaliation may be quite necessary to our national security. Whatever else one might say in assessing America’s military involvement in Afghanistan and Iraq in the past decade, the experience demonstrates the limits of American commitment to nation-building and on-the-ground policing. But the United States still faces threats from many sources. It cannot hope to reconstruct every country that has hostile intentions. Instead, it must find ways to punish countries that sponsor attacks on America or allow their own territory to be used for planning and launching attacks.

As the first section of this article explains, there are plausible legal grounds for inhibitions, given widely accepted understandings of

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<sup>1</sup> Thom Shanker & Elizabeth Bumiller, *Hackers Gained Access to Sensitive Military Files*, N.Y. TIMES, July 14, 2011, at A6.

<sup>2</sup> Certainly, hesitations about cyber retaliation reflect broad legal concerns. See Stewart Baker, *Denial of Service: Lawyers Are Crippling America’s Ability to Defend Against Cyberwar with Arcane Rules and Regulations, but War Waits for No Man*, FOREIGN POLICY, Sept. 30, 2011, available at [http://www.foreignpolicy.com/articles/2011/09/30/denial\\_of\\_service?page=full](http://www.foreignpolicy.com/articles/2011/09/30/denial_of_service?page=full).

the U.N. Charter and Protocol I to the Geneva Conventions.<sup>3</sup> But as the next section argues, the notion that force is only justified in self-defense – and in the narrowest understanding of self-defense – is at odds with the traditional view of the law of war. It is quite clearly at odds with the view embraced by the American Founders and subsequent American statesmen. The third section argues that limiting force to self-defense (in the narrowest sense) does not even comport with the implications of the U.N. Charter and the actual practice of nations since 1945. The concluding section argues that embracing the logic of retaliation does not require abandoning all humanitarian or legal constraints on the use of force, any more than domestic criminal justice must disavow retribution because it has curtailed capital punishment and repudiated “cruel and unusual punishment.”<sup>4</sup>

#### THE RESTRICTIVE VIEW OF LAWFUL FORCE

Commentaries on the law of war have, for many centuries, distinguished *jus ad bellum* (the law on resort to war) from *jus in bello* (law governing the conduct of military operations, once war has begun).<sup>5</sup> By separating these two sets of standards, commentators could insist that even a state fighting for a just cause (under *jus ad bellum*) was bound to observe proper restraints in its military tactics, even if the enemy had no just grounds for fighting. In recent decades, many commentators have come to see the U.N. Charter as imposing very severe limits on permissible resort to force. That view of *jus ad bellum* has encouraged an even more restrictive view of permissible tactics in the conduct of military actions.

The U.N. Charter obligates members to “settle their international disputes by peaceful means”<sup>6</sup> and to “refrain in their international relations from the threat or use of force against the territorial integrity

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<sup>3</sup> U.N. Charter; *Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter *Protocol I*].

<sup>4</sup> See U.S. CONST. amend. VIII (prohibiting “cruel and unusual punishment”). United States’ Supreme Court rulings applying this restriction to capital sentences include *Woodson v. North Carolina*, 428 U.S. 280 (1976) (prohibiting automatic applications of the death penalty for specified offenses); *Coker v. Georgia*, 433 U.S. 584 (1977) (prohibiting death penalty for rape conviction); *Atkins v. Virginia*, 536 U.S. 304 (2002) (prohibiting death penalty for defendants of subnormal intelligence); *Roper v. Simmons*, 543 U.S. 551 (2005) (prohibiting death penalty for defendants under age eighteen).

<sup>5</sup> Geoffrey Parker, *Early Modern Europe*, in *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* 42-51 (Michael Howard et al. eds., 1994).

<sup>6</sup> U.N. Charter art. 2, para. 3.

or political independence of any state.”<sup>7</sup> The Charter gives broad powers of coercion to the Security Council,<sup>8</sup> and for the most part, seems to give priority to the Council in deciding how armed forces should be deployed. If the Council has not called for wider measures, member states are limited to the exercise of the “inherent right of . . . self-defense if an armed attack occurs.”<sup>9</sup>

One of the most prominent commentaries on the Charter interprets this authorization quite narrowly: “[l]awful self-defense is restricted to the repulse of an armed attack and must not entail retaliatory or punitive action . . . the means employed for the defence have to be strictly necessary for repelling the attack.”<sup>10</sup> A more recent commentary draws out the implication for the scale of the response: “it is the repulsing of the attack giving rise to the right that is the criterion against which the response is measured.”<sup>11</sup> What is not necessary to repel an attack is, on this reading, an excessive use of force, hence prohibited by the Charter.

If the focus is on “repulsing” or “repelling” a specific attack, then it might seem to follow that the only permissible response is one that focuses all counter-force on the actual attackers. That is the view taken by the International Committee of the Red Cross (“ICRC”).<sup>12</sup> It emphasizes the restriction set out in Article 48 of the 1977 Protocol Additional to the Geneva Conventions (“*Protocol I*”): participants in international conflicts must “at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”<sup>13</sup>

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<sup>7</sup> U.N. Charter art. 2, para. 4.

<sup>8</sup> See U.N. Charter art. 39–50.

<sup>9</sup> U.N. Charter art. 51.

<sup>10</sup> 1 THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 677 (Bruno Simma et al. eds., 2d ed. 2002) [hereinafter CHARTER COMMENTARY]. The senior editor and contributor to this commentary, the German legal scholar Bruno Simma, was elected in 1996 to the U.N. International Law Commission (an advisory body, elected by the U.N. General Assembly), then elected a Justice of the International Court of Justice in 2002 – which indicates, at least, that the commentary was not seen as propounding unacceptably extreme doctrine by most U.N. member states.

<sup>11</sup> JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 156 (Cambridge Univ. Press 2004).

<sup>12</sup> See INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz et al. eds., 1987) [hereinafter ICRC COMMENTARY].

<sup>13</sup> *Protocol I*, supra note 3, at art. 48.

The United States and a range of other states have declined to ratify *Protocol I*.<sup>14</sup> Still, the ICRC insists that this provision simply codifies the basic premise of the law of armed conflict. In its 1987 commentary on *Protocol I*, the ICRC insists that “the basic rule of protection and distinction,” as laid down in Article 48, summarizes a long-standing principle which is, in fact, “the foundation on which the codification of the laws and customs of war rests,” tracing the first efforts at codification to the mid-nineteenth century and implying that the “custom” is very much older.<sup>15</sup> The claim is developed in *Customary International Humanitarian Law*, sponsored by the ICRC and published in 2005.<sup>16</sup> According to this study, there is now a universal rule limiting the conduct of war: “[t]he parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.”<sup>17</sup>

The ICRC Study elaborates the rule with this constraining definition of permissible “military” targets: “military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”<sup>18</sup> All sites or assets that do not fit that definition must be classified as “civilian objects,” which may not be the target of an attack.<sup>19</sup> And according to the ICRC, this limitation is so fundamental that it has become obligatory. States can

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<sup>14</sup> Other states that have not ratified include Israel, Turkey, India, Pakistan, and Indonesia. See *Protocol I*, *supra* note 3.

<sup>15</sup> ICRC COMMENTARY, *supra* note 12, at 598. The earliest source cited in support of this claim is the 1868 St. Petersburg Declaration, which stipulated that “the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy.” Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles, Nov. 29/Dec. 11, 1868, 138 Consol. T.S. 297 [hereinafter St. Petersburg Declaration]. But as the ICRC COMMENTARY acknowledges, this admonition was “concerned with preventing superfluous injury or unnecessary suffering to combatants” – the St. Petersburg Declaration sought to prohibit use of explosive bullets against soldiers in battle – “and was not aimed at specifically protecting the civilian population.” The ICRC COMMENTARY then claims that later treaties, such as the Hague Conventions of 1899 and 1907, and the Geneva Conventions of 1949, “deemed” the complete protection of civilian objects “to be generally accepted as a rule of law, though at that time it was not considered necessary to formulate it word for word.” In fact, the ICRC COMMENTARY cites no earlier source that directly and explicitly enunciates the sweeping principle announced in Article 48 of *Protocol I*.

<sup>16</sup> Jean-Marie Henckaerts & Louise Doswald-Beck, ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 25 (Cambridge Univ. Press 2005) [hereinafter ICRC STUDY].

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 29.

<sup>19</sup> *Id.* at 32 (“Civilian objects are all objects that are not military objectives.”).

no longer embrace general principles of restraint. They must accept all of these particular inferences from the general principles, without possibility of reservation or exception.<sup>20</sup>

The ICRC's narrow view of permissible targets follows quite logically from the restrictive reading of the U.N. Charter. Aside from other objections to the ICRC's admonitions,<sup>21</sup> it rests for this reason on a very questionable approach to self-defense. On the restrictive reading of the U.N. Charter, a state has no lawful recourse against violent incursions, even those that inflict significant civilian casualties, if the attacker does not actually seize and hold territory in the victim state. Suppose a hostile state sponsors terrorist attacks or launches missile attacks on another state. On the most restrictive reading of the Charter, the victim state must accept the casualties and the ensuing insecurity among its own people, as the necessary price for adhering to international law.<sup>22</sup>

The same reasoning implies that even a massive conventional attack, such as the Japanese strike on the United States' fleet at Pearl Harbor in 1941, provides no right to respond if the attackers withdraw from the territory of the victim state. Even if the initial attack violated international law, that initial violation gives the victim state no claim to respond militarily. The initial aggressor thus gets to choose the timing of the initial attack and, if that runs into trouble, the initial aggressor then gets to choose the best moment to call a halt – re-

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<sup>20</sup> Article 51 of *Protocol I* includes a prohibition on “[a]ttacks against the civilian population or civilians by way of reprisals.” *Protocol I, supra* note 3, art. 51, para. 6. Article 52 includes a separate prohibition of “reprisals” against “civilian objects.” *Protocol I, supra* note 3, art. 52, para. 1. The 1987 ICRC COMMENTARY insists that the prohibition of reprisals against civilians (or civilian objects) is “not subject to conditions and it therefore has a peremptory character [i.e., supersedes all other legal claims]; in particular it leaves out the possibility of derogating from this rule by invoking military necessity.” See ICRC COMMENTARY, *supra* note 12, para. 1984, at 626.

<sup>21</sup> The U.S. government has questioned the “methodology” of the ICRC STUDY, which assumes that mere statements by government officials are an adequate guide to state practice. John B. Bellinger III & William J. Haynes II, *A U.S. Government Response to the International Committee of the Red Cross Study*, Customary International Humanitarian Law, 89 INT'L REV. RED CROSS 443, 445 (2007).

<sup>22</sup> The CHARTER COMMENTARY acknowledges that a State is bound to endure acts of force that do not reach the intensity of an armed attack, thus remaining devoid of any effective protection until the [Security Council] has taken remedial measures. . . . [I]t cannot be overlooked that, being caught in the ‘dilemma between security and justice’, the U.N. Charter deliberately gives preference to the former. See CHARTER COMMENTARY, *supra* note 10, at 792. In other words, even when retaliation might serve “justice,” states will find “security” from waiting for the Security Council to do “justice” on their behalf.

grouping its forces, as it may prove, only while awaiting a more opportune occasion for renewing the attack.

Other commentators urge a more accommodating view of the U.N. Charter. They hold that when an attack seems imminent, a targeted state may undertake preemptive measures, denying the imminent aggressor the advantage of choosing the most advantageous moment to launch its attack.<sup>23</sup> The same logic might allow a would-be victim to continue fighting, even when an enemy has withdrawn or never actually invaded the territory of the would-be victim. By such reasoning, the United States has claimed that it is lawful to strike terrorist bases to disrupt the capacity of terrorists to carry out future strikes.<sup>24</sup>

Even this more accommodating view of the Charter, however, does not answer the underlying challenge, so long as it remains entangled with the ICRC's restrictions on the conduct of military operations. If the defending state is limited to attacking "military targets," it bears the burden of identifying and then isolating the bases from which terrorists or other irregular forces may be operating. Terrorists and guerrillas do not always keep to fixed bases. When they do, they may deliberately situate themselves amongst "civilian objects," so that they cannot be attacked without violating the *Protocol I* rule against attacks "which may be expected to cause incidental loss of civilian life, injury to civilians, *damage to civilian objects* . . . which would be excessive in relation to the concrete and direct military advantage anticipated."<sup>25</sup>

In the ICRC view, it does not matter that terrorists aim to kill civilians in their own attacks. The restriction must still apply to states seeking to defend their civilian population from terrorist attacks. The International Court of Justice has still gone further, interpreting the Charter as prohibiting even strikes aimed solely at terrorist bases, if

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<sup>23</sup> See also D.W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 187-92 (1958); JULIUS STONE, AGGRESSION AND WORLD ORDER: A CRITIQUE OF UNITED NATIONS THEORIES OF AGGRESSION 44 (Univ. of California Press, 1958).

<sup>24</sup> Harold H. Koh, Legal Adviser, U.S. Dep't of State, The Obama Administration and International Law, Address at the Annual Meeting of the American Society of International Law (Mar. 25, 2010), available at <http://www.state.gov/s/l/releases/remarks/139119.htm>.

<sup>25</sup> See *Protocol I*, *supra* note 3, art. 51, para. 5; see also ICRC STUDY, *supra* note 16 at 29 (stating that this restriction in *Protocol I* has now become binding on all states as a matter of customary international law).

the bases are in another country and the host state does not exert direct control over the terrorist forces.<sup>26</sup>

On such readings, we remain in a situation where the rules seem to confer major advantages on the aggressor, even the most lawless aggressor. Forces that are most contemptuous of legal restraints get the benefit of rules that, in practice, would only constrain victim states that do care about international legality.

Such perverse consequences do not prove that the ICRC view is wrong. They certainly do not prevent the ICRC view from being taken seriously. From a certain point of view, it may still seem appropriate to insist on such encompassing humanitarian constraints, even when it appears likely that the rules will only constrain one side. One can see the logic of such restrictive views if one looks at domestic analogies.

Criminal law allows for personal self-defense, but only as a last resort. The traditional common law rule requires that, before resorting to force, a threatened individual must exhaust the opportunity to avoid confrontation by “retreat.”<sup>27</sup> We do not allow private victims to shoot at attackers already in flight because that may jeopardize the safety of bystanders. So, it can be argued that states have the obligation to avoid confrontation. If states allow themselves to pursue potential threats, they will risk more conflict and more harm to civilians. On the international plane, as in domestic settings, the right to self-defense must be constrained, one can argue, by the rights of third parties not to be dragged into violent confrontations.

However, in domestic settings, victims may hope that municipal police will eventually catch those who attacked them. The analogy would hold among states if the U.N. Security Council could be relied

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<sup>26</sup> See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, para. 139, at 62 (July 9).

Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State [but from terrorist organizations] . . . . Consequently, the Court concludes that Article 51 of the Charter has no relevance in this case.

*Id.*

<sup>27</sup> MODEL PENAL CODE § 3.04(2)(b) (1962).

The use of deadly force is not justifiable . . . unless the actor believes that such force is necessary to protect himself against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat; nor is it justifiable if . . . (ii) the actor knows that he can avoid the necessity of using such force with complete safety by retreating . . . except that: (A) the actor is not obliged to retreat from his dwelling or place of work . . .

*Id.*



upon to supply corrective force to constrain international aggressors. That reliance, of course, is wildly counter-factual. In the real world, the Security Council is generally paralyzed by differences among its five permanent members, any one of whom may veto a proposed response by the Council.<sup>28</sup> In over sixty years since its establishment, the Council has only given clear, direct authorization for military retaliation on three occasions – despite hundreds of disputes in which states resorted to force on their own.<sup>29</sup>

One might still argue that states have a moral duty to act *as-if* the Council were capable of providing collective measures of security because the duty of restraint is not a contingent duty from which states can be readily released. Even this argument might draw some support from the domestic analogy. The citizens' duty to rely on police and courts to punish offenders does not hinge on anything like certainty that they will do so in any particular case.<sup>30</sup> Citizens, in effect, have a civic obligation to give public authorities the benefit of their doubts. For the greater good of the community, private citizens are required to refrain from "taking the law into their own hands" through private retaliation.<sup>31</sup>

This moral appeal presumes, however, that the world is at least in the process of developing international controls on dangerous and lawless action, including such provocations as terrorism. If that presumption is taken away, it is unlikely that bystanders would be better off if states with the power to punish such provocations, or punish those states that abet and host them, always refuse to do so. A world without "private enforcement" of international standards would be a world where standards were not enforced. If powerful states adhere to the supposed moral imperative of restraint and that makes the world worse off, should their restraint still be seen as moral? Perhaps it is dereliction of duty. What makes the restrictive view of the U.N. Charter all the more suspect is that it is not, in fact, the traditional

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<sup>28</sup> Michael J. Glennon, *Platonism, Adaptivism, and Illusion in U.N. Reform*, 6 CHI. J. INT'L L. 613 (2006).

<sup>29</sup> *Id.* Reports' estimates of the number of international armed conflicts between 1945 and 1989 alone vary from two hundred to nearly seven hundred. The wide variation reflects the disagreement about when a limited exercise of force justifies the term "conflict." *Id.*

<sup>30</sup> "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989).

<sup>31</sup> See MODEL PENAL CODE § 3.07(2)(b). "The use of deadly force is not justifiable [in effecting arrest] unless . . . (iii) the actor believes that the force employed creates no substantial risk of injury to innocent persons . . ." *Id.*

view – even the traditional view of legal writers insisting on the obligation of natural law constraints in international affairs.

#### RECOGNITION OF PUNITIVE WAR BEFORE THE U.N. CHARTER

The view of war associated with the U.N. Charter has much appeal – at least on the surface – that it is often regarded as the culminating stage in centuries of development toward a more humane world. Ancient wars, as we read of them in the Bible or in the writings of Greek and Roman historians, were often fought to the total destruction of the enemy – all adult males slaughtered, all the women and children carried into slavery.<sup>32</sup> Medieval Crusaders still justified such wars of annihilation in the name of religion.<sup>33</sup> The Enlightenment recoiled from such barbarism. Our current view of war, as many suppose, is simply the final blossoming of our modern humanitarian outlook.

It is certainly true that statesmen and treatise writers condemned “aggression” for many centuries before the advent of the U.N. Charter. Michael Walzer’s *Just and Unjust Wars*, invoking earlier examples, describes “aggression” as the only crime that states can commit toward each other – without attributing that claim to the U.N. Charter.<sup>34</sup>

Still, the view of war now so often attributed to the U.N. Charter does not, in fact, reflect long-established understandings. While they condemned “aggression,” statesmen and treatise writers in earlier times took for granted that invasion was not the only “cause” that might justify an armed response. Classic treatises distinguished “offensive” from “defensive” wars, based on which side struck the first blow. Not every “offensive war” was considered “aggression,” however.<sup>35</sup> The side which first resorted to military action might well have had legitimate grievances, justifying recourse to a military response.

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<sup>32</sup> Robert Stacey, *The Age of Chivalry*, in *THE LAWS OF WAR*, *supra* note 5, at 27-28.

<sup>33</sup> *Id.*

<sup>34</sup> MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 51 (1977) (citing examples from the 1930s and nineteenth century, and from nineteenth century legal commentaries).

<sup>35</sup> See JEAN-JACQUES BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* 468 (P. Korkman ed., T. Nugent trans., Liberty Fund 2006).

We must therefore affirm, in general, that the first who takes up arms, whether justly or unjustly, commences an offensive war; and he who opposes him, whether with or without a reason, begins a defensive war. Those who look upon the word *offensive war* to be an odious term, as always implying something unjust; and who, on the contrary, consider a defensive war as inseparable from equity, confound ideas, and perplex a thing, which of itself

To cite an example that is still familiar to graduates of American high schools: the United States declared war on Britain in 1812 in response to British interference with American commerce on the high seas and the impressment of American sailors (seized on the high seas) into the British Navy.<sup>36</sup> America's ensuing war measures provoked a British invasion of American territory, but that was a consequence, not a cause, of the United States resorting to war.

As late as 1919, the Covenant of the League of Nations required members to submit their disputes to League efforts at mediation and, when possible, to international arbitration. The League Covenant did not, however, simply prohibit first resort to force.<sup>37</sup> That would have seemed to be asking too much in a world where it was understood that nations had rights, which they were entitled to defend.<sup>38</sup> To reduce all

seems to be sufficiently clear. It is with princes as with private persons. The plaintiff who commences a suit at law, is sometimes in the wrong, and sometimes in the right. It is the same with the defendant.

<sup>36</sup> 1 BRADFORD PERKINS, *THE CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS: THE CREATION OF A REPUBLICAN EMPIRE 1776-1865*, at 137-140 (W. Cohen ed., Cambridge Univ. Press 1993).

<sup>37</sup> Under Article 12, the Members of the League "agree" that in any dispute likely to lead to a rupture, they will submit the matter either to arbitration . . . or to enquiry by the [League's] Council, and they agree in no case to resort to war until three months after the award by the arbitrators . . . or the report by the Council.

League of Nations Covenant art. 12. Under Article 13, the Members agree "that they . . . will not resort to war against a Member . . . which complies" with an arbitration award. *Id.* at art. 13. But "[i]n the event of any failure to carry out such an award . . . , the Council shall *propose* what steps should be taken to give effect thereto." (emphasis added). *Id.* Under Article 15,

If the Council fails to reach a report which is unanimously agreed to by the Members thereof, other than the Representatives of one or more of the parties to the dispute, the Members of the League reserve to themselves the right to take such action as they shall consider necessary for the maintenance of right and justice.

*Id.* at art. 15. In other words, members reserved the right to resort to force when their just claims could not be resolved by arbitration or by efforts of the League or where such resolutions were not fully implemented.

<sup>38</sup> Nearly a decade after the negotiation of the League of Nations Covenant, most members of the League agreed (outside the framework of the League) to the General Treaty for the Renunciation of War, popularly known as the Kellogg-Briand Pact. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57. Signatories agreed that "the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin . . . shall never be sought except by pacific means." *Id.* at art. II. The agreement would have been entirely redundant if the Covenant of the League already prohibited resort to force in "all disputes or conflicts." The treaty said nothing about a right to self-defense – because the original negotiators (the U.S. Secretary of State and the French Foreign Minister) could not agree on a definition of the circumstances in which "self-defense" would still be appropriate. But no one seems to have imagined that by signing this pact, a state was giving up all rights to defend itself. Hence, Nuremberg prosecutors charged Nazi leaders with "conspiracy to commit aggression" in violation of the pre-war Kellogg-Briand Pact, but no one suggested that Poland or France were equally guilty for resisting German invasions. The Pact was

just causes of war to repelling all-out invasion would be equivalent to reducing all claims for police intervention to cases of armed assault. But in the domestic setting, of course, a whole range of injuries to property, reputation, or peaceful order are thought to justify police intervention and subsequent punishment under the criminal law.

Can we think of international military action as in some way equivalent to police intervention in domestic affairs? Or is that analogy already too punitive? Perhaps the first thing to notice is that even in relatively modern times, wars frequently ended with territorial concessions. Again, to cite familiar American examples: the United States made peace with Mexico in 1848, only after Mexico ceded vast territories in what is today the American Southwest. In 1899, the United States made peace with Spain, only after the latter ceded Puerto Rico, Guam, and the Philippines to the United States. Germany and Japan were forced to cede territory in the aftermath of World War II.

Before 1945, it was considered – at least by many writers – the natural result of just war that losers would provide some compensation to victors.<sup>39</sup> Apart from territorial concessions, the losers might have to provide financial restitution. It made sense since wars typically began as diplomatic disputes – in which one side (at least) claimed to have been wronged by the other, and accordingly demanded some form of satisfaction for the wrong done. Disputes commonly were settled by payment of money or some other acknowledgment. War

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not even considered a firm barrier to using force against unlawful German measures as the remilitarization of the Rhineland in 1936 or the annexation of Austria in 1938 (both contrary to the Versailles Peace agreement), so there was serious policy debate in London and Paris on how to respond. Churchill's postwar account, emphasizing the failure of will in London and Paris, says not a word about legal concerns. WINSTON S. CHURCHILL, *THE GATHERING STORM* 192-99, 272-76 (1948).

<sup>39</sup> See STEPHEN C. NEFF, *WAR AND THE LAW OF NATIONS: A GENERAL HISTORY* 210-214 (Cambridge Univ. Press 2005) (emphasizing prevailing view in the eighteenth and nineteenth centuries that victors were entitled to wide discretion in imposing peace terms); see also II LASSA OPPENHEIM, *INTERNATIONAL LAW* § 66, at 76-77 (1912).

No moral or legal duty exists for a belligerent to stop the war when his opponent is ready to concede the object for which war was [initially] made. . . . The risk the belligerents run, the exertion they make, the blood and wealth they sacrifice, the reputation they gain or lose through the changing fortune and chances of war – all these and many other factors work or may work together to influence the ends of a war so that eventually there is scarcely any longer a relation between them and the causes of the war. . . . and the [existing] rules of International Law by no means forbid such alteration or modification of the ends of a war. . . . [I]t could not be otherwise, and there is no moral, legal, or political reason why it should be otherwise.

*Id.*

could reasonably be seen as the last resort in a process analogous to litigation – with the aim of enforcing damage claims.

In some cases, the underlying grievance was an affront to the honor of the victim state, as seen through insults to its flag or its representatives in another country.<sup>40</sup> A military attack – as by shelling from naval guns, often directed at non-military installations, such as government buildings – was regarded as a suitable “remedy” in itself.<sup>41</sup> The point was to extract some “price” for the injury received, so the offending state would refrain from inflicting such injuries in the future.<sup>42</sup>

It hardly needs saying that powerful states might abuse their claimed rights of retaliation in such circumstances, but this view of the rights of war was not invented by great powers in the nineteenth century. It was already expounded upon by natural law theorists in the seventeenth century, by thinkers regarded as “modern” or at least “early-modern.” Such writers did not hesitate to use the language of “punishment” in relation to war measures.

Take, for notable example, the Dutch jurist Hugo Grotius, often considered the “father of the modern law of nations.” His great treatise, *De Jure Belli ac Pacis* (“The Law of War and Peace”) includes a long chapter on the just causes of war, along with a long chapter on unjust causes of war.<sup>43</sup> Among the just causes of war, according to Grotius, is punishment. Grotius also offers a catalog of sins for which

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<sup>40</sup> See E.S. COLBERT, RETALIATION IN INTERNATIONAL LAW 68-69 (1948). The Royal Navy bombarded a Brazilian port in 1861, after Brazilian authorities had arrested a British naval officer and his crew and then refused to apologize for the offense. Further, the United States occupied Vera Cruz in 1914 to retaliate for the arrest of American sailors by Mexican authorities. *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> If this seems extreme, we should think about attacks on embassies in recent times. When the revolutionary government of Iran allowed American diplomats in Tehran to be held hostage, the Carter administration approved a military raid to rescue these hostages – which had to be aborted when helicopters crashed en route. Would it have been obviously wrong to threaten – or to implement – cruise missile strikes against Iranian targets to make the Iranian government pay a price for continuing to hold the hostages? If the hostages had been released after ten months, without agreeing to any further arbitration, would it have been wrong to impose some penalty on Iran for the injury of the prolonged occupation of the embassy? Did the actual “settlement” encourage the new Iranian regime to think it could sponsor further terror measures with relative impunity?

<sup>43</sup> HUGO GROTIUS, *DE JURE BELLI AC PACIS* [ON THE LAW OF WAR AND PEACE] ch. 20 (James Brown Scott ed., Frank Kelsey trans., Clarendon Press 1925) (“On Punishment”); see also *id.* at ch. 21 (“On Sharing of Punishments”) (justifying retaliation on whole communities for decisions of their rulers).

guilty states may rightfully be punished by any sovereign strong enough to administer the just deserts.<sup>44</sup>

John Locke's *Second Treatise*, following the account offered by Grotius decades earlier, holds that the right to punish is not even limited to victims: in the state of nature, "every man . . . may bring such evil on any one, who hath transgressed that [L]aw [of Nature] as may *make him repent the doing of it*, and thereby deter him, and by his example others, from doing the like mischief."<sup>45</sup> This power is retained by government, acting toward outsiders, since "*the whole community is one body* in the state of nature, in respect of all other states or persons out of its community."<sup>46</sup>

The most influential eighteenth century treatise on the law of nations, written by the Swiss diplomat Emer de Vattel, follows Locke closely in its background assumptions and also in its acceptance that war can sometimes be punitive. According to Vattel, "it is lawful to take away the property of an unjust enemy . . . to weaken him or to punish him," and "the same reasons authorize a belligerent in destroying what he can not conveniently carry off," justifying in some circumstance even the commander who "lays waste to a country and destroys food and provender in order that the enemy may not be able to subsist there . . . ." <sup>47</sup> Vattel endorses "retaliation" in kind, when an enemy has refused quarter to surrendering troops,<sup>48</sup> and even approves punitive measures against another state to extract "reparation" for "attacks [on] its honor . . . ." <sup>49</sup>

The American Founders took these doctrines to heart. The Federal Constitution, aiming to establish a national government with ex-

<sup>44</sup> *Id.*

<sup>45</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 313 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690) (emphasis added).

<sup>46</sup> *Id.* at 411. (emphasis added). The immediate following sentence explains, as an example, that "controversies that happen between any Man of the Society with those that are out of it, are managed by the public; and an injury done to a Member of their Body, engages the whole [Society] in the reparation of it." *Id.* Locke does not say such "reparation" must be financial, rather than punitive.

<sup>47</sup> E. DE VATTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS [THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND SOVEREIGNS] 292, 293 (Charles Fenwick trans., Carnegie Inst. 1916) (1758) [hereinafter THE LAW OF NATIONS].

<sup>48</sup> *Id.* at 280-81.

<sup>49</sup> *Id.* at 79. Vattel took the trouble to address the objection that "honor" was not a sufficiently serious injury to justify retaliatory action. A nation's honor, he explains, is its reputation, which is part of its strength. The reputation for not accepting insult and injury meekly might still be relevant to a nation's strength and security.

clusive authority over foreign relations, does seek to constrain the war-making powers of the states. Article I, Section 10 denies states of the Union the power to “keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact . . . with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.” The Federal Government, by contrast, is expressly accorded the power to commit the United States to alliances; it can offer guarantees to foreign nations through an open-ended power to make treaties, which might commit the country to war without, itself, being attacked. Congress has the power to “raise and support armies” and to “provide and maintain a Navy[.]” without restriction to time of peace.<sup>50</sup> And where states can “engage” only in defensive wars, Congress has an open-ended power to “declare war.”<sup>51</sup>

The Philadelphia Convention chose the term “declare war” – instead of the original proposed phrase “make war,” to acknowledge that the President might be justified in responding to an attack without a declaration of war.<sup>52</sup> As Alexander Hamilton later explained, “when a foreign nation declares [war] . . . openly and avowedly makes war upon the United States, [that nation and America] are then by the very fact, *already at war*, and any declaration on the part of Congress is nugatory; it is at least unnecessary.”<sup>53</sup> The “plain meaning” of the clause giving power to Congress to “declare war,” Hamilton explained, is that “it is the peculiar and exclusive province of Congress, *when the nation is at peace*, to change that state into a state of war; whether from calculations of policy or from provocations or injuries received . . . .”<sup>54</sup>

Did the Framers understand “war” as having a punitive component? Andrew Kent has argued in compelling detail that the clause giving Congress the “power to define and punish offenses against the law of nations” was understood, at the time of the Founding, to provide authority to punish nations, not just individuals.<sup>55</sup> The Framers were certainly familiar with standard treatises of that era, according to

<sup>50</sup> U.S. CONST. art. I, § 8, cl. 12-13.

<sup>51</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>52</sup> 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-19 (Max Farrand ed., rev. ed. 1937).

<sup>53</sup> Alexander Hamilton, *The Examination Number 1* (Dec. 17, 1801), in 25 THE PAPERS OF ALEXANDER HAMILTON 455-56 (H.C. Syrett ed., 1977).

<sup>54</sup> *Id.*

<sup>55</sup> J. Andrew Kent, *Congress’s Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843 (2007).

which one nation had the right to punish another for infringement of its own rights.

The Constitution, itself, provides for military measures of a punitive nature. Separate from the power to “declare war,” Congress has the authority to “grant Letters of Marque and Reprisal.”<sup>56</sup> These “letters” were granted to private persons (usually ship captains), authorizing them to seize property from an enemy state. No one supposed that such “privateers” would concentrate their attacks on enemy warships or military installations. Privateers rarely had the firepower to take on foreign navies or armed formations. The idea was to raid the commerce of the enemy – that is, civilian shipping – as a way of imposing harm.<sup>57</sup> One appeal of the practice was that it was thought of as an alternative to all-out war and the clash of armies. Letters of marque were thus issued to American privateers in the 1790s, authorizing attacks on French merchant shipping in retaliation for French attacks on American shipping. But there was no declaration of war and such punitive measures proved sufficient to win French promises of acceptable future conduct.<sup>58</sup> Whereas letters of marque authorized the seizure of enemy goods, letters of reprisal authorized sheer destruction, even on land.<sup>59</sup>

Even in war between fellow Americans, the United States government did not subscribe to the view that “war” must avoid harm to civilians. One can see the point from the manual on the law of war issued to the Union Army in the American Civil War, often known as the “Lieber Code,” after its principal draftsman, the German émigré scholar, Francis Lieber.<sup>60</sup> The code approved “all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication . . . .”<sup>61</sup> So far from emphasizing any sharp distinction

<sup>56</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>57</sup> Nicholas Parrillo, *The De-Privatization of American Warfare: How the U.S. Government Used, Regulated, and Ultimately Abandoned Privateering in the Nineteenth Century*, 19 YALE J.L. & HUMAN. 1 (2007).

<sup>58</sup> ALEXANDER DE CONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797-1801*, at 124-130 (1966).

<sup>59</sup> Grover Clark, *The English Practice With Regard to Reprisals by Private Persons*, 27 AM. J. INT’L L. 694 (1933).

<sup>60</sup> General Orders, No. 100, Instructions for the Government of Armies of the United States in the Field, Adjutant General’s Office, Washington, April 24, 1863, available at [http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp) [hereinafter General Orders]. On the origins of the code, see RICHARD S. HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR 45-71* (1983). On its larger context in the intensifying struggle during the Civil War, see MARK GRIMSLEY, *THE HARD HAND OF WAR: UNION MILITARY POLICY TOWARD SOUTHERN CIVILIANS 1861-1865*, at 145-51 (1995) (emphasis added).

<sup>61</sup> General Orders, *supra* note 60, art. 15.



between military personnel and “civilians” – a term it does not use – the Lieber code urged commanders to “throw the burden of war . . . on the disloyal citizens,” while seeking to protect the “manifestly loyal citizens”<sup>62</sup> and held it “lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy.”<sup>63</sup> Not only the blockade of southern ports, but also General Sherman’s devastation of civilian agriculture in his march through Georgia in 1864 (along with the contemporaneous devastation of farms in the Shenandoah Valley by General Sheridan) were treated as consistent with the code.<sup>64</sup> So, too, was the Emancipation Proclamation, freeing slaves in those states, or portions of states, that would not submit to Union authority.<sup>65</sup> As the code explains, “Public war is a state of armed hostility between sovereign nations . . . whose constituents bear, enjoy, suffer, advance and retrograde together, in peace and in war.”<sup>66</sup>

Military tactics in the world wars were even less mindful of civilian claims, particularly with regard to property. “Enemy property” – civilian as well as government-owned – was seized by Allied governments when present in their own countries.<sup>67</sup> Allied naval blockades

<sup>62</sup> Lieber, *supra* note 60, at art. 156.

<sup>63</sup> Lieber, *supra* note 60, at art. 17.

<sup>64</sup> STEPHEN C. NEFF, *JUSTICE IN BLUE AND GRAY: A LEGAL HISTORY OF THE CIVIL WAR* 92-101 (2010) (emphasizing that both Sheridan and Sherman tried to maximize damage to property while trying to minimize direct loss of life to civilians).

<sup>65</sup> Lincoln’s Cabinet was well aware of the objection raised by former Supreme Court Justice Benjamin Curtis that the emancipation took property not only from those who actively supported the southern rebellion but also from those who might have sought to remain loyal to the Union. BENJAMIN CURTIS, *EXECUTIVE POWER* (1862), *reprinted in* 1 *UNION PAMPHLETS OF THE CIVIL WAR* 497 (Frank Freidel ed., Harvard University Press 1967). For the most recent survey of the legal issues involved in the emancipation, see STEPHEN C. NEFF, *JUSTICE IN BLUE AND GRAY: A LEGAL HISTORY OF THE CIVIL WAR* 128-49 (2010).

<sup>66</sup> Lieber, *supra* note 60, at art. 20.

<sup>67</sup> 1 CHARLES C. HYDE, *INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 537 (1922) (“The general right of confiscation is incidental to that broader right of a belligerent to endeavor to weaken the enemy by striking at its economic as well as purely military resources, and that irrespective of their actual availability to either contestant in the prosecution of the war.”); 2 CHARLES C. HYDE, *INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 236 (1922). As Hyde points out, German property confiscated by Allied powers was not returned to German owners, even after the First World War, because the Treaty of Versailles prohibited attempts at recovery. *Id.* at 523-24. There was no compensation to either Germany or Japan for World War II property seizures, either. For Supreme Court endorsement of these practices, see *Steehr v. Wallace*, 255 U.S. 239 (1921); *Central Trust v. Garvan*, 254 U.S. 554 (1921); *United States v. Chemical Foundation*, 272 U.S. 1 (1926); *Silesian-American Corp. v. Clark*, 332 U.S. 469 (1947); *Cities Service Co. v. McGrath*, 342 U.S. 330 (1952); *Handelsbureau La Mola v. Kennedy*, 370 U.S. 940 (1962) (Black, J., dissenting).

enforced prohibitions against trade with enemy states by seizing cargoes destined for Germany or Japan as “contraband” (when it was not simply sunk by military action). It was called “economic warfare” – the effort to weaken the enemy’s entire economy. Though the scope of blockade measures far exceeded all earlier limits, distinguished jurists acknowledged the collapse of earlier standards as an accommodation to new strategic realities.<sup>68</sup>

In the Second World War, bombing was extended from military bases and weapon depots to the factories producing military supplies and then to the residential areas where factory workers and others supporting the war effort might live.<sup>69</sup> At war’s end, the Nuremberg Tribunals declined to punish German commanders either for submarine attacks on merchant shipping or for bombing of “civilian” areas, as these practices had become standard war tactics for all sides in the Second World War.<sup>70</sup>

#### COERCIVE FORCE AFTER THE U.N. CHARTER

Did the U.N. Charter really put an end to previous understandings? The text of the Charter, itself, indicates the contrary. The final text of the Charter was settled at a conference in San Francisco in June of 1945, only a few weeks after Germany’s surrender, at a time when fierce battles were still continuing against Japan. The Charter takes for granted that international relations would still be governed by many of the concerns and tactics pursued during and before the Second World War.

To start with, the Charter authorizes the Security Council to impose enforcement “measures” not only on a state which has commit-

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<sup>68</sup> See Hersh Lauterpacht, *The Problem of the Revision of the Law of War*, 29 BRIT. Y.B. INT’L L. 360-82 (1952).

If the practice followed by both sides to the conflict is evidence of the legal position, then the traditional law on the subject, derived as it was from the notion of a legally relevant distinction between military and civilian needs, no longer exists. . . . In view of this there can be no question here of revising – or resuscitating – the law with the help of legal arguments drawn from the obsolete armoury of the past. The possibility must be envisaged that total war has irrevocably removed the foundations of a substantial part of this branch of the law and that juristic – or even political – efforts to give them a new lease of life may be in vain. *Id.* at 374-75. Lauterpacht was subsequently appointed to the International Court of Justice. Neither the Additional Protocols of 1977 nor any subsequent treaty has clarified whether any elements of pre-World War I law on naval blockade have survived the contrary practices of the world wars.

<sup>69</sup> MICHAEL BURLEIGH, MORAL COMBAT 484-501 (2011).

<sup>70</sup> TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 325-27, 399-409 (1992).

ted “aggression,” but also on a state regarded as having committed a “breach of the peace” or a mere “threat to the peace.”<sup>71</sup> The Charter contemplates substantial retaliation, not only for “armed invasion,” but for threats or injuries falling much short of that. Prominent statesmen in 1945 lamented that the German invasions of 1939-41 had been preceded by unlawful and intimidating measures, which had not been resisted at the time because they had not quite risen to the level of contested invasions.<sup>72</sup> Now, the Security Council would be authorized to provide collective security with retaliatory “measures” that would “include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication . . . .”<sup>73</sup>

The Charter describes these sanctions as “measures not involving the use of armed force” – that is, measures imposed prior to full-scale military conflict.<sup>74</sup> But these are measures which the target state would be expected to resist, as targets of such measures had commonly done in the past. How, for example, could the enforcing states assure a “complete interruption of economic relations” with the target state, unless they had some capacity to blockade the target state by sea? How could these states ensure “complete interruption” of “economic relations” by air or rail, without some means to disrupt rail links or shut down air traffic? Unless one presumes something like total obedience to resolutions of the Security Council by all nations in the world without further coercion – in other words, a world of total conformity to law as mere law – these measures “not involving the use of armed force” seem to imply the existence of coercive force in the background.

The Charter, thus, envisions the possibility of escalating from the initial blockade “measures” to such “actions by air, sea, or land forces as may be necessary. . . .”<sup>75</sup> Nothing in the Charter indicates that such “actions” must be aimed exclusively at “military objectives.” A subsequent provision specifies that, when there is need for “urgent military measures,” the Council may call upon “air force contingents” for

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<sup>71</sup> U.N. Charter art. 39.

<sup>72</sup> PAGE WILSON, *AGGRESSION, CRIME AND INTERNATIONAL SECURITY* 72-4 (2009).

<sup>73</sup> U.N. Charter art. 41.

<sup>74</sup> Surveys of the deliberations at San Francisco regarding article 41, report no concern that excessive sanctions might be improper or implicitly constrained by the Charter. LELAND M. GOODRICH ET AL., *CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS* 311-14 (3d rev. ed. 1969).

<sup>75</sup> U.N. Charter art. 42.

“international enforcement action,”<sup>76</sup> again without any indication that such “action” must be aimed exclusively at “military objectives” and never at “civilian objects.” If one thinks of these measures as enforcement of economic sanctions, they would logically be aimed at the channels of “economic relations,” disrupting civilian infrastructure more effectively than prior resolutions “not involving the use of armed force.” If one thinks of “actions by air, sea or land forces” as something like war, one would expect the war to be carried on by the means most recently deployed by Allied powers against Germany and still being actively deployed against Japan when the Charter was negotiated.<sup>77</sup> Every nation that participated in the San Francisco Conference in 1945 had, by then, endorsed the Allied war effort.<sup>78</sup>

One may argue that the framers of the Charter presumed – or at least hoped – that in future conflicts, such measures would only be wielded by the Security Council (or pursuant to resolutions of the Council). But where did the Council get the authority to wield such measures if not by delegation from the member states? And if the Council is generally paralyzed by disputes among the permanent members, any one of whom can block a Council resolution by unilateral exercise of its veto power, do states have no authority to resume the full range of powers associated with the “inherent right of [self-defence]”?<sup>79</sup>

Prominent commentators and some governments have accepted the idea that the Charter’s limitations do not apply to humanitarian intervention because the claim to rescue threatened civilian populations cannot be held hostage to divisions on the Security Council.<sup>80</sup> Some reasoning of this sort – expanding the Charter’s actual language to accommodate “felt necessities” – must be assumed by those who

<sup>76</sup> U.N. Charter art. 45.

<sup>77</sup> The drafting conference for the U.N. Charter convened on April 25 and concluded on June 26, 1945. Germany surrendered on May 8, 1945 and Japan on September 2, 1945. Article 107 of the Charter specified that none of its provisions would affect continuing war measures against “any State which during the Second World War has been an enemy of any signatory to the present Charter.” See U.N. Charter art. 107.

<sup>78</sup> To be eligible to attend – that is, to receive an invitation from the American organizers of the conference – a state had to have declared war against either Germany or Japan prior to the convening of the conference in April 1945. To be part of the “United Nations” was to be an ally of those engaged in these wars; the term itself had been in regular use during the war as alternate name for the Allies. STEPHEN C. SCHLESINGER, *ACT OF CREATION, THE FOUNDING OF THE UNITED NATIONS* 59 (2003).

<sup>79</sup> See U.N. Charter art. 51.

<sup>80</sup> See e.g., Jane Stromseth, *Rethinking Humanitarian Intervention*, in *HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS* 245 (J.L. Holzgrefe & R.O. Keohane eds., 2003).

defend the legality of the NATO intervention against Serbia in 1999 or even those who defend the scale of assistance which NATO gave to Libyan rebels in 2011 (stretching a Security Council resolution only authorizing protection for civilians, rather than offensive operations against the Gaddafi government).<sup>81</sup> Nations have stronger moral claims to defend themselves than to defend civilians elsewhere. Certainly, their claims to defend themselves are much older and better established.<sup>82</sup> A U.N. Charter that is no longer read to bar humanitarian interventions is not easily read as continuing to impose strict limits on the natural right of self-defense.

There are very strong grounds to read Articles 2(3) and 2(4) as prohibiting states from resorting to force in many kinds of disputes that states once commonly did try to settle by military action. Since 1945, states have not resorted to force to compel delinquent states to honor financial obligations, even though it was common practice in the early twentieth century to send gun boats to enforce debt payments, even to private creditors in the enforcing state.<sup>83</sup> However, Article 51 still recognizes an “inherent right to self-defense” – or as the French text states more broadly, *droit naturelle de legitime defense*.<sup>84</sup> It is a very great leap from the claim that states must renounce military remedies for *some* kinds of injuries to the conclusion that they can only use force to “repel” an all-out invasion. Once it is acknowledged that states can exercise the right of self-defense against other forms of “aggression” or “threats to peace,” it is no longer clear that military responses from a defending state must be confined to the military forces of the threatening state. What is the relevant “military objective” when the aim is to stop a hostile power from supporting or encouraging terrorist attacks?

In practice, actual governments do not always accept the narrow view of “self-defense” urged by academic commentators. Major states do embrace the understanding that “defense” may include retaliation – not merely the disarming of opposing forces. The clearest example involves so-called “belligerent reprisals” – wartime retaliation for violations of the law of war. The text of Additional Protocol I

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<sup>81</sup> S.C. Res. 1972, ¶ 4-5, U.N. Doc. S/RES/1972 (Mar. 17, 2011).

<sup>82</sup> See e.g., T.J. LAWRENCE, PRINCIPLES OF INTERNATIONAL LAW 127-28 (6th ed. 1910) (“An intervention to put a stop to barbarous and abominable cruelty . . . is destitute of technical legality, but it may be morally right . . .”).

<sup>83</sup> See e.g., COLBERT, *supra* note 40, at 66-68.

<sup>84</sup> GEORGE P. FLETCHER & JENS DAVID OHLIN, DEFENDING HUMANITY, WHEN FORCE IS JUSTIFIED AND WHY 65-71 (2008) (suggesting that the French text implies somewhat broader claims for intervention on behalf of others).

does purport to prohibit such reprisals against civilians and civilian objects, even when an enemy has previously and unlawfully directed attacks at such targets. The ICRC study of Customary Humanitarian Law insists that the prohibition on such reprisals has now become binding on all states, even those which are not parties to Protocol I, through incorporation into customary law.<sup>85</sup> Nonetheless, major states hold to the contrary, reserving the right to undertake reprisals in kind against enemies that do target civilians. The British government, one of the last to ratify Protocol I, published an emphatic rejection of the view that such reprisals have become unlawful.<sup>86</sup>

Surely, one might think, whatever they may say about limited reprisals, no civilized state is prepared to threaten mass death. As a matter of fact, most western states – and a number of others – included express reservations to Protocol I with respect to nuclear weapons.<sup>87</sup> If attacked by nuclear weapons, they reserve the right to respond in kind.<sup>88</sup> Even the International Court of Justice, in its 1996 Advisory Opinion on the Threat to Use Nuclear Weapons, could not muster a majority for the view that it would always be wrong to threaten the use of such weapons.<sup>89</sup> While all the Justices agreed that use of nuclear weapons should only be contemplated in extreme circumstances, the majority acknowledged that international law had not yet come to the point of prohibiting the threat to use such weapons in retaliation for an attack threatening the continued existence of a nation.

What is permissible in the most extreme circumstances might well be regarded as improper in less extreme circumstances, but the principle that retaliation is a lawful response might still apply. One might think less terrible means of retaliation would, after all, be much

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<sup>85</sup> HENCKAERTS, *supra* note 16.

<sup>86</sup> UK MINISTRY OF DEFENCE, *MANUAL OF THE LAW OF ARMED CONFLICT* 422-23 (2004). An accompanying commentary rejects as “unconvincing” the claim that reprisals against civilian objects are now prohibited. As to “the assertion that there is a prohibition in customary law” against such reprisals, the manual claims such assertion “flies in the face of most of the state practice that exists” in this area (i.e., states do not act as if they believed there is such a prohibition). *Id.* at 423 n.62.

<sup>87</sup> Such declarations, excluding nuclear weapons from the requirements of Protocol I (or limiting application of Protocol I to “conventional weapons”), were filed by Canada, Italy, Germany, United Kingdom, Spain, and expressed by the United States on signing. *DOCUMENTS ON THE LAWS OF WAR* 502, 504, 506, 509-10, 512 (Adam Roberts & Richard Guelff, eds., 3d ed. 2000).

<sup>88</sup> *Id.*

<sup>89</sup> *See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 266 (July 8).*

easier to justify than such horrifyingly extreme measures as attacks with nuclear weapons. Some forms of retaliation could be vastly more limited, however, while still going beyond the mere disabling of opposing military forces, let alone limited solely to “repulsing” an actual attack in progress.

A few governments have openly embraced the concept of peacetime reprisals. They claim that a practice which was generally accepted before 1945 – reprisal as a lesser alternative to war – was not entirely abolished by the U.N. Charter. Israel is a preeminent example, claiming the right to retaliate on surrounding nations for terrorist attacks on Israeli civilians, without treating such retaliation as all-out war. At least some well-regarded commentators view the practice as entirely lawful.<sup>90</sup>

Other nations have embraced the practice of peacetime reprisals, though not the terminology. The United States struck government offices in Tripoli in 1987 in response – one might as well say, in retaliation – for Libyan involvement in a terror attack on American servicemen in Berlin.<sup>91</sup> In justifying the American air strikes, President Reagan’s speech, as Gabriella Blum has pointed out, indulged freely in the rhetoric of moral blame associated with punishment, not merely the language of threat reduction associated with limited claims of self-defense.<sup>92</sup> In the late 1990s, the United States and Britain repeatedly resorted to air strikes against Iraqi targets in response to Saddam Hussein’s renegeing on previous agreements to allow U.N. inspectors to monitor Iraqi military facilities.<sup>93</sup> These strikes were endorsed by European leaders, though they surely savored more of punishment than of self-defense against some immediate threat.<sup>94</sup>

The full-scale invasion of Iraq in 2003, toppling the government of Saddam Hussein for failing to adhere to conditions of the 1991 cease-fire agreements, was highly controversial. Still, it was supported by a coalition that embraced nearly one-third of U.N. Members and

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<sup>90</sup> YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 221-31 (4th ed. 2005).

<sup>91</sup> *Id.* at 229.

<sup>92</sup> In justifying the American air strike, President Reagan said it would “not only diminish Colonel Qadhafi’s capacity to export terror, it will provide him with incentives and reasons to alter his criminal behavior.” See Address to the Nation on United States Airstrikes Against Libya, 1 PUB. PAPERS 468, 469 (Apr. 14, 1986).

<sup>93</sup> Lothar Brock, *The Use of Force in the Post-Cold War Era: From Collective Action Back to Pre-Charter Self-Defense*, in Michael Bothe, et al., *REDEFINING SOVEREIGNTY, THE USE OF FORCE AFTER THE COLD WAR* 33-34 (2005) (criticizes the claims made at the time that such actions were motivated by preemptive self-defense).

<sup>94</sup> *Id.*

two-fifths of the Permanent Members of the Security Council. Even if one thinks the invasion was an excessive response, it does not follow that the proper course was to have done nothing. The obvious alternative was to engage in more air strikes of the kind implemented in the late 1990s, that is, punitive measures rather than all-out war.

Economic sanctions, the favored alternative to military interventions, are not inherently less provocative. Japan was provoked to declare war against the United States in 1941 by an oil embargo, at a time when Germany refrained from declaring war, even while the United States' Navy was attacking German U-Boats in the North Atlantic.<sup>95</sup> Withholding normal economic relations may have comparable effects to imposing a blockade in war.<sup>96</sup> Prolonged economic sanctions may impose more civilian suffering than limited military interventions.<sup>97</sup>

So, if retaliatory military strikes conflict with common interpretations of the U.N. Charter, it is not obvious that restrictive interpretations of the Charter ought to prevail. Whatever the hopes of 1945, the practice of nations is not consistent with such restrictive interpretations. As the Vienna Convention on the Law of Treaties acknowledges, the actual practice of signatories to a treaty is relevant to interpreting the ongoing meaning of treaty provisions.<sup>98</sup> The U.N. Charter is, in fact, a treaty, which cannot escape this sort of informal reinterpretation to bring it into line with prevailing practice among the signatories.<sup>99</sup>

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<sup>95</sup> ROBERT FERRELL, *AMERICAN DIPLOMACY* 626-33 (1969) (reviewing claims that the Roosevelt administration deliberately goaded Japan into attacking).

<sup>96</sup> See data on effects of United States' sanctions, such as exclusion from United States banking system.

<sup>97</sup> A Columbia University researcher, for example, estimated that increased child mortality rates in Iraq during the economic sanctions regime were "most likely" in the range of 227,000. Richard Garfield, *Morbidity and Mortality Among Iraqi Children*, COLUMBIA INTERNATIONAL AFFAIRS ONLINE 1, 34-35 (1999), available at <http://reliefweb.int/sites/reliefweb.int/files/resources/A2E2603E5DC88A4685256825005F211D-garfie17.pdf>. Most estimates of total civilian casualties from the outset of the invasion of Iraq in 2003 until 2009, when major NATO combat roles came to an end, offer figures well below 200,000.

<sup>98</sup> Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 art. 31, para. 3 ("There shall be taken into account [in interpreting treaties] . . . (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation . . .")

<sup>99</sup> MICHAEL J. GLENNON, *THE FOG OF LAW* 86-87 (2010). For an extended proposal for reinterpreting the Charter more permissively, in order to accommodate actual practice, see ANTHONY CLARK AREND & ROBERT J. BECK, *INTERNATIONAL LAW AND THE USE OF FORCE* 177-202 (1993). But the original understanding did not necessarily exclude retaliatory strikes; certainly that was not clearly understood by commentators at the time. See, e.g., Charles Fenwick, *Intervention: Individual and Collective*, 39 AM. J. INT'L L. 645, 657-58 (Oct. 1945).



There is all the more reason for reinterpreting Charter restrictions because the Charter is so difficult to amend. The United States Constitution, which has a deliberately cumbersome amending process, has still been formally amended six times since 1945. The Charter has received only one formal adjustment (raising membership on the Security Council from 9 to 15) despite many high-level efforts to revise the Charter to accommodate major changes in world politics. Meanwhile, the decisions of the United States Supreme Court have introduced authoritative changes in the understanding of the United States Constitution (as in abolishing racial segregation and other forms of discrimination and applying the Bill of Rights to the States). The International Court of Justice has no comparable capacity to impose authoritative reinterpretations of the Charter.<sup>100</sup> It has been particularly marginalized in dealing with provisions on national self-defense, given the reluctance of states to submit disputes about armed conflict to the Court.

The least one can say is that there remains room for debate regarding the legality of military retaliation. That debate cannot be closed off by dogmatic invocations of pronouncements by the International Red Cross or an older generation of academic commentators. Resolutions of the U.N. General Assembly and a proposed amendment to the Statute of the International Criminal Court illustrate international support for restrictive readings of Charter limitations, but they are not, in themselves, definitive guides to international law.<sup>101</sup> Something as fundamental as the right to self-defense – which the Charter itself recognizes as an “inherent” or “natural” right – cannot be bound by interpretive restrictions merely on the say-so of diplomats raising their hands at international conferences.

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<sup>100</sup> According to its own Statute, the ICJ decides only the case before it: “The decision of the Court has no binding force except between the parties and in respect of that particular case.” Statute of the International Court of Justice art. 59 (June 26, 1945), available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

<sup>101</sup> The U.N. General Assembly adopted a “Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations” which asserts that “[s]tates have a duty to refrain from acts of reprisal involving the use of force,” but the same Declaration asserts that, “[n]o State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights . . . .” G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8082, (Oct. 24, 1970) (adopted without vote). There is no reason to accept that the former prohibition has any more validity than the latter; slogans adopted by the acclamation in the General Assembly are not international law. For critical analysis of the proposed International Criminal Court amendment, defining aggression, see GLENNON, *supra* note 99.

The experience of ages is that when there is no price for aggression, there is likely to be more of it. Restricting the range of permissible responses to aggressive acts should not be a matter settled by implication or by merely plausible interpretations of treaties from bygone eras. Where international practice remains unsettled, international law must be recognized as uncertain, particularly when it comes to questions of defending against unlawful force. There is too much at stake. When an American President is urged to consider retaliatory strikes as necessary to protect American security, those who urge such measures cannot be dismissed as advocates of lawless policy.

#### HUMANITARIAN CONSTRAINTS DO NOT EXCLUDE PUNITIVE MEASURES

Meanwhile, something like the practice of reprisal or retaliation endures, even if commentators – when not condemning such practice – prefer to characterize them as “countermeasures.”<sup>102</sup> Official United States military doctrine takes a broad view of where self-defense may be exercised – as in response to attacks on U.S. nationals overseas. It also insists that military action may go beyond targeting an enemy’s military forces to reach anything that affects the enemy’s “war fighting capacity” which might reach a very broad range of targets indeed.<sup>103</sup> American commanders have acknowledged that they consider the psychological impact of targets on the civilian population in the hope of achieving “shock and awe” among civilians as well as opposing military forces,<sup>104</sup> but there is no public acknowledgement that

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<sup>102</sup> David J. Bederman, *Counterintuiting Countermeasures*, 96 AM. J. INT’L L. 817, 831 (2002).

<sup>103</sup> The description of permissible targets appears in COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS ¶ 8.1.1., available at [http://www.fichl.org/uploads/media/US\\_Navy\\_Commander\\_s\\_Handbook\\_Annotated\\_Supplement\\_1997.pdf](http://www.fichl.org/uploads/media/US_Navy_Commander_s_Handbook_Annotated_Supplement_1997.pdf). For criticism, claiming the United States standard goes far beyond what Protocol I or customary law would permit, see Frits Karlsruven, “Noncombatant Persons: A Comment to Chapter 11 of the COMMANDER’S HANDBOOK,” in THE LAW OF NAVAL OPERATIONS 310 (Horace B. Robertson, ed., 1999).

<sup>104</sup> For example, General Michael Short, speaking at the outset of NATO’s air campaign against Serbia in 1991, acknowledged his eagerness to target civilian morale:

I felt that in the first night the power should have gone off and major bridges around Belgrade should have gone into the Danube and the water should be cut off so the next morning the leading citizens of Belgrade would have got up and asked, ‘Why are we doing this?’ And asked [Serb President] Milosevic the same question.

C.R. Whitney, *Air Wars Won’t Stay Risk Free*, *General Says*, N.Y. TIMES, June 18, 1999, at A1, available at <http://go.galegroup.com/ps/i.do?id=GALE%7CA149940812&v=2.1&u=flstuniv&it=r&p=AONE&sw=w>. Two years later, however, General Short described this effect to “make the Serb population unhappy with their senior leadership because they allowed this to happen” as merely “a spin-off – a peripheral result – of [his] targeting a valid military objective.” Michael

retaliatory strikes may have the principal aim of inflicting punishment on another society.

It may not be of urgent importance to agree on terminology, but the resort to evasive terminology here seems to reflect inhibiting qualms. It is therefore worth trying to address the most common objections to the revival of traditional views.

Perhaps the most common objection is that, if we accept the logic of punitive measures, we will end up abandoning all humanitarian constraint. What makes this objection seem plausible is that the aim of retaliation is, in fact, to inflict harm, rather than simply disable the opposing military force, so the ensuing harm is more likely to affect civilians. That was true of economic warfare in earlier times.<sup>105</sup> It has been the experience with at least some economic sanctions of more recent times.<sup>106</sup> Still, it does not at all follow that a state which embraces retaliatory strikes must discard all humanitarian restraint.

To start with, retaliation might seek to limit civilian loss of life. Retaliatory air strikes, for example, might target buildings when they are least likely to be occupied or might be preceded by advance warning to civilians to evacuate the intended targets. The state engaged in retaliation might also hold itself to some notion of proportionality – doing enough damage to make its point, but not all the damage its own capacities might allow it to unleash. In other words, retaliation might be bound by traditional notions of discrimination and proportionality, without committing to the precise limits in Protocol I, as interpreted by the International Red Cross.

In debates about domestic criminal justice, many commentators hold that capital punishment should be abandoned, but they do not,

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Short, *Operation Allied Force from the Perspective of a NATO Air Commander*, in *LEGAL AND ETHICAL LESSONS OF NATO'S KOSOVO CAMPAIGN 29* (Andru E. Wall ed., Naval War College 2002).

<sup>105</sup> Germany estimated some 700,000 civilian deaths from the Allied blockade of Germany in the First World War. British estimates put the number at about 800,000. ALEXANDER GILLESPIE, 2 *A HISTORY OF THE LAWS OF WAR* 73 (2011) (“The Customs and Laws of War with Regard to Civilians in Times of Conflict”).

<sup>106</sup> U.N. agencies estimated that economic sanctions on Iraq during the 1990s caused several hundred thousand deaths. The claim that 567,000 children had died, published in the British medical journal *The Lancet* was much disputed. See *Health Effects of Sanctions on Iraq*, 346 *THE LANCET* 1439 (DEC. 2, 1995). No one disputes that children suffered disproportionately from the effects of the U.N. approved sanctions. Meanwhile, sanctions on Serbia in the early 1990's imposed such extreme economic dislocation that average income dropped by half while unemployment and poverty rose to nearly half of the population. Serbia experienced “economic meltdown,” but not “the humanitarian catastrophe that gripped Iraq.” DAVID CORTRIGHT & GEORGE A. LOPEZ, *THE SANCTIONS DECADE: ASSESSING UN STRATEGIES IN THE 1990S* 46-47, 73-74 (2000).

for that reason, disavow the general principle of retributive punishment. The same pattern has appeared in international criminal justice. Advocates for the International Criminal Court insist the institution is necessary to “end impunity” for the worst violators of human rights – that is, to ensure punishment.<sup>107</sup> They do not think the general aim of retribution – nor even the hope of effective deterrence – is negated because the ICC Statute excludes capital punishment.<sup>108</sup>

The historic view of war measures was somewhat similar. Oppenheim’s treatise, for example, specifically disavowed “wanton” destructiveness and “useless violence,” while still embracing such severe measures as the cutting off of food supplies to civilians.<sup>109</sup> Contemporary commentators who urge more active measures of retaliation make similar distinctions. General Charles Dunlap, for example, has urged that the United States consider that, in military actions against tyrannical enemies, it might be appropriate to target civilian amenities, such as hotels and vacation resorts, used by the enemy elite. He still urges restraints that would avoid substantial loss of life among civilians.<sup>110</sup>

A more general objection is that war is fundamentally about coercion, not “punishment,” and to admit the latter as a respectable motive will open the way to more extreme tactics in the spirit of vengeance. In the domestic setting, it is argued, “punishment” is determined by dispassionate judges, after the accused has been afforded opportunity for trial; police are not supposed to “punish” suspects in

<sup>107</sup> The Preamble to the Rome Statute (establishing the International Criminal Court) affirms that the signatory states are, “[d]etermined to put an end to impunity for the perpetrators of [the most serious] crimes.” Preamble to the Rome Statute of the International Criminal Court, UNITED NATIONS TREATY COLLECTION, [http://untreaty.un.org/cod/icc/statute/99\\_corr/cstatute.htm](http://untreaty.un.org/cod/icc/statute/99_corr/cstatute.htm).

<sup>108</sup> See Statute of the International Criminal Court, 37 I.L.M. 999, 1046, art. 77 (1998).

<sup>109</sup> See 2 OPPENHEIM’S INTERNATIONAL LAW 187 (3d ed. 1912).

In former times invading armies frequently used to fire and destroy all enemy property they could not make use of or carry away. . . . in the nineteenth century it became a universally recognized rule of International Law that all useless and wanton destruction of enemy property, be it public or private, is absolutely prohibited.

*Id.* On the other hand, “general devastation of a locality, be it a town or a larger part of enemy territory is permitted. . . . in exceptional cases,” but “it is impossible to define once and for all the circumstances which make a general devastation necessary . . . .” 2 OPPENHEIM’S INTERNATIONAL LAW 190 (2d ed. 1912).

<sup>110</sup> Charles Dunlap, Jr., *The End of Innocence: Rethinking Non-combatancy in the Post-Kosovo Era*, STRATEGIC REV. 9, 14-15 (2000). Dunlap defends the proposal in a recent collection. Charles Dunlap, Jr., *International Humanitarian Law Facing New Challenges, in TARGETING HEARTS AND MINDS: NATIONAL WILL AND OTHER LEGITIMATE MILITARY OBJECTIVES IN MODERN WAR* 117-26 (Wolf Heintschel von Heinegg & Volker Epping eds., 2007).

the course of apprehending them. By analogy, so the argument goes, an enemy still outside our custody is not a fit subject for punishment. Military action, like action by police, is meant to subdue an enemy. That is why military actions, such as air strikes, are invariably ended when enemy resistance ceases. To continue them would be sheer brutality.

There is some force in these concerns, but they do not justify a sharp conceptual distinction between “coercion” and “punishment.” After all, domestic criminal justice is also about coercion. That is why even convicted felons are sometimes given pardons or reprieves, before satisfying their full sentence under the law, when judged to be no longer dangerous. Prosecutors sometimes accept plea bargains in which defendants promise to forswear objectionable behavior, or provide some form of restitution, without even admitting guilt. On the other side, wars are often followed by measures – like occupation of territory or continuing trade restrictions – that look much like punishment to the defeated side.<sup>111</sup>

A more sophisticated or legalistic objection is that no nation has the power to punish another because the principle of sovereign equality prohibits one nation from sitting in judgment on another.<sup>112</sup> One might respond by noting that the jurists who first propounded the doctrine of sovereign equality did not acknowledge this implication. As noted earlier, Grotius, Vattel, and Locke – to which we might add, Pufendorf, Burlamaqui and others<sup>113</sup> – did, in fact, embrace the notion that aggrieved nations were entitled to “punish” offending nations.

It was Immanuel Kant, in the early nineteenth century, who emphasized that punishment can only be imposed by a superior and then drew the conclusion that, since all sovereign states are juridically equal, no nation can properly punish another.<sup>114</sup> Starting from the same premise, however, Kant dismissed any reliance on international law, insisting that only an armed peace federation could ensure justice among nations.<sup>115</sup> That is not a doctrine with much appeal to contemporary advocates for international justice. If no nation can judge an-

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<sup>111</sup> In the late spring of 1919, German delegates at the Versailles Peace Conference protested that “hundred of thousands” of civilians had died as the result of the continuation of the Allied blockade on Germany – which prevented even imports of food and medicine – after the armistice of November 11. GILLESPIE, *supra* note 105 at 73-74.

<sup>112</sup> DAVID RODIN, WAR AND SELF-DEFENSE 175-79 (2002).

<sup>113</sup> Kent, *supra* note 55, at 851.

<sup>114</sup> *Perpetual Peace*, in KANT'S POLITICAL WRITINGS 102-05 (Hans Reiss ed., H.B. Nisbet trans., Cambridge 1970).

<sup>115</sup> *Id.* at 104.

other, how can courts of one nation try international war criminals from other nations? Well into the twentieth century, major treatises insisted that this was indeed improper.<sup>116</sup> By the same reasoning, it is not even clear how international tribunals can undertake such trials. The authority of international tribunals has been delegated to them by sovereign states. If sovereign states have no authority to judge other states, they cannot delegate such authority to an international institution.<sup>117</sup>

The preference for international trials rests on the assumption that such trials will only punish those who are guilty. That assumption may be quite optimistic. Indictments, by putting obstacles in the path of compromise, may prolong conflicts with consequent harm to innocent civilians.<sup>118</sup> Even in the domestic setting, we allow corporations to be punished with such sanctions as treble damages and other “punitive damages” though it is known in advance that innocent stockholders and employees will suffer in consequence.

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<sup>116</sup> See 2 OPPENHEIM’S INTERNATIONAL LAW 342-43 (3d ed. 1912).

Violations of rules regarding warfare are war crimes only when committed without an order of the belligerent government concerned. If members of the armed forces commit violations by order of their government, they are not war criminals and may not be punished by the enemy; the latter may, however, resort to reprisals.

*Id.* The restriction only makes sense on the premise - still widely accepted in the context of civil litigation - that courts of one state may not judge the legal validity of measures adopted by another state.

<sup>117</sup> One can argue that the issue disappears when the home state of the accused consents to the jurisdiction of the international tribunal (or the national tribunal of a foreign state). That argument leaves questions about cases where the Security Council has authorized the ICC to take jurisdiction over states that have not ratified the ICC Statute (as happened with Sudan and Libya) or agreed to the resolution establishing an ad hoc tribunal (as with Serbia and the International Criminal Tribunal for the Former Yugoslavia). The deeper question is whether a state can waive consent in such an open-ended way - allowing international authorities to impose punishment for measures, which the state itself viewed as necessary in self-defense - and still remain sovereign. One can say that private individuals have consented to the exercise of criminal justice on themselves, when they consented to be part of a state with powers to enforce criminal justice. That was Kant’s argument. But the whole point of that account is that private individuals have consented to establish a superior over themselves, so they are no longer sovereign individuals. If “consent” to the ICC Statute or the U.N. Charter has comparable significance, the ICC or the U.N. Security Council must be viewed as organs of an international peace federation through membership in which states have lost their sovereignty. That is not quite how defenders of these institutions commonly depict them.

<sup>118</sup> For arguments that the ICC has prolonged conflict in Uganda (where the government failed to disarm the Lord’s Resistance Army with an amnesty offer, after the ICC refused to accept it) and Sudan (where the President, after indictment by the ICC, expelled most NGO observers and participants in conflict resolution efforts), see DAVID HOILE, *THE INTERNATIONAL CRIMINAL COURT: EUROPE’S GUANTANAMO BAY?* 30, 32, 191 (2011).

Still, punitive military measures do risk more severe harm to the innocent. The point is serious. It is certainly grounds for postponing and constraining punitive measures. But it is not, in itself, a compelling basis for disavowing all resort to retaliatory measures. In the first place, it is true of all military action that it can harm innocent bystanders. The possibility that harm will go beyond its intended targets is not usually considered a decisive objection to war measures.

Retaliation aimed at civilians or civilian objects may seem to raise objections that do not apply (or apply as fully) to attacks on military targets, because in the latter case, the harm to civilians is unintended even if frequently quite foreseeable. In the Red Cross view of the world, civilians are inherently innocent, hence always to be protected against intentional targeting. But is it so that civilians are always innocent? To insist that only the actual perpetrators of wrongful actions are guilty is to reduce whole populations beneath the level of human agency, to regard them as so many cogs in a mechanism directed by others. That is not how earlier writers viewed this question. The very term “civilian”, in the sense of non-military, did not come into general use until the nineteenth century.<sup>119</sup> Classic treatises on the law of nations assumed that whole populations might share, at least in some degree, the guilt for policies of their rulers. After all, a government could not commit aggression if its own people did not provide at least passive support by accepting its governing authority.

One can argue that civilians, particularly in a dictatorship, cannot easily change their government, but it is even more true that soldiers under military command cannot easily question the strategy and tactics laid down by their superiors. It is still thought proper to attack military units to force armies to change their stances – to withdraw, to

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<sup>119</sup> Though earlier usages (with very different meanings) can be traced to late medieval times, the Oxford English Dictionary reports the first use of “civilian” – in this sense of non-military – in 1794 and subsequent examples from decades later. OXFORD ENGLISH DICTIONARY ONLINE (Oxford University Press 2012), <http://www.oed.com.ezproxy.fiu.edu/view/Entry/33577> (last accessed Aug. 13, 2012) (noting that in 1794 a “civilian” was “not a regular soldier”). The first use of such derivative terms as “civilian casualty” and “civilian target” did not, according to the Oxford English Dictionary, appear until the early twentieth century. *Id.* The 1899 and 1907 Hague Conventions on the Law and Custom of War use the term “civilian” only once – in a provision stipulating that “civilian” messengers for military communications should, if captured, receive the same treatment as military prisoners. *First Peace Conference of The Hague, 1899*, INTERNATIONAL HUMANITARIAN LAW: TREATIES & DOCUMENTS, <http://www.icrc.org/ihl.nsf/FULL/150?OpenDocument>; *Second Peace Conference of The Hague, 1907*, INTERNATIONAL HUMANITARIAN LAW: TREATIES & DOCUMENTS, <http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument>.

retreat, ultimately to stop fighting. It is common practice in war to encourage soldiers on the opposing side to desert, appealing to the individual choice of line soldiers, even though they are under military discipline. If those soldiers do not surrender or desert, they face continuing (and often lethal) attacks from the opposing forces. In a similar way, a determined enemy may appeal to civilians to rise against their own government.

After years of pressure on civilians, through economic warfare, Germans did take to the streets and force the overthrow of the Kaiser's government before the end of the First World War.<sup>120</sup> The following generation of Germans continued to obey a far more evil government, down to the bitter end. It was, arguably, quite just that they bore the cost of that support in ruined cities. Certainly, the destruction of German cities achieved one of the classic aims of corrective justice – suppressing the nation's appetite for such crimes by hammering home the catastrophic costs of aggressive war.

It remains true that retaliatory measures may prove counterproductive, hardening the resolve of the targeted population, rather than undermining their support for the existing government and its policies. That is also true, however, of military measures approved by the Red Cross, such as direct attacks on an opposing army. Offensives often fail and end up weakening the attackers more than the defenders, as proved true in so many tragic Allied offensives in the First World War and in many offensive campaigns of the Union Army in the American Civil War. Commanders in war must pay close attention to their particular circumstances. What one has a legal right to do is not necessarily the right thing to do in every situation. Grotius devoted a whole chapter of his treatise to emphasizing the point.<sup>121</sup> It may be true in some cases that an attack on civilian infrastructure will weaken civilian support for reckless measures by the government (or by a terror network hosted by surrounding civilians).

After all the arguments and counterarguments, retaliatory measures will be, at best, a very rough sort of justice. That is reason for caution and constraint in exercising retaliation. It is not sufficient reason for denying a right to retaliate. It may be, in fact, that the right

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<sup>120</sup> HEW STRACHAN, *THE FIRST WORLD WAR* 324-25 (2004); DAVID STEVENSON, *THE FIRST WORLD WAR AS POLITICAL TRAGEDY* 384-87, 401-04 (2004).

<sup>121</sup> “[W]e must proceed to correct an error, in order to prevent anyone from thinking that where a right has been adequately established, either that war should be waged forthwith or even that war is permissible in all cases.” HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 567 (Francis W. Kelsey trans., 1925) (noting “warnings not to undertake war rashly”).



to retaliate will be exercised with more caution, precisely because it is associated with the risks of military action.

One can see the point by looking at the International Criminal Court, which acts on the initiative of a prosecutor who is not accountable to any government and has no formal authority to temper prosecution policy in relation to adverse policy consequences. Questioned about the possibility that his attempt to prosecute the Sudanese Head of State would prolong war in Sudan, Prosecutor Luis Moreno-Ocampo explained that his responsibility was “judicial” – that is, solely to the law: “I have no political responsibility,” he insisted.<sup>122</sup> A government which launches retaliatory military strikes cannot pretend that its decision follows simply from “law.” It cannot disclaim any regard for consequences. An actual government, particularly in a democratic state, will always be required to answer more questions than an international civil servant. That is no reason to disarm governments when they need to answer injury and threat with retaliatory force.

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<sup>122</sup> Thalif Deen, *Catch Me if You Can: Sudan's Case and ICC Tragicomedy*, SUNDAY TIMES, Mar. 29, 2009, available at <http://sundaytimes.lk/090329/Columns/inside.html>. In a speech to the Tenth Session of the Assembly of States Parties to the ICC Statute, the Prosecutor elaborated:

[S]ome of the leaders sought by the [International Criminal] Court threatened to commit more crimes to retain power, blackmailing the international community with a false option: peace or justice. The efficiency of the Court will depend on how political leaders and conflict managers react to such blackmails. To contribute to peace and security, the Office of the Prosecutor has to hold the legal limits, it cannot be blackmailed.

Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Address to the Assembly of States Parties at the Tenth Session of the Assembly of States Parties (Dec. 12, 2011), [http://www.icc-cpi.int/NR/rdonlyres/7F1DD418-2E1A-4216-BFA5-D8F618AF95/284107/ASPLMOFinalrevised\\_2\\_.pdf](http://www.icc-cpi.int/NR/rdonlyres/7F1DD418-2E1A-4216-BFA5-D8F618AF95/284107/ASPLMOFinalrevised_2_.pdf). The Prosecutor makes no effort to explain how it can be that efforts to “hold the legal limits” can never threaten peace or why there can never be a trade-off between peace and justice. The Federalist defended the presidential pardon power on precisely the grounds that a “well-timed offer of pardon” – toward rebels or conspirators within the country – might do more to secure peace than attempts to enforce the law. Why a global court – with no troops of its own – will always do better to enforce “legal limits” is hard to understand.