

Reflections on the Legality of Attacks Against the Natural Environment by Way of Reprisals

Stavros-Evdokimos Pantazopoulos^{*}

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* Legal and Policy Analyst, Conflict and Environment Observatory; PhD candidate in Law, EUI. I would like to express my gratitude to the Institute for Education and European Culture for its generous support, which facilitated significantly the research for this paper. The views expressed herein are the author's exclusively and do not necessarily reflect the views of the Conflict and Environment Observatory, nor can they be attributed to it.

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Abstract

The paper examines the concept of belligerent reprisals and assesses the legality of attacking the environment by way of reprisals. The law of belligerent reprisals, which is linked to the principle of reciprocity, allows one belligerent State unlawfully injured by another to react by means of what under normal circumstances would constitute a violation of the *jus in bello*, so as to induce the violating State to comply with the law. The instances of lawful recourse to reprisals have been considerably limited, since their application is either explicitly prohibited against certain protected persons and objects, including against the natural environment, or is subject to stringent conditions according to customary International Humanitarian Law (IHL).

Despite its narrowing scope, the doctrine of reprisals remains a valid concept under the existing legal framework. For one, the state of affairs under customary international law with respect to reprisals directed at civilian objects (including against parts of the environment), subject to certain rigorous conditions, remains unclear. To complicate matters even further, any proposition on the status of reprisals in the context of a non-international armed conflict (NIAC) is shrouded in controversy, as there is no relevant treaty provision. In this regard, the present author endorses the approach espoused in the International Committee of the Red Cross (ICRC) Study on Customary IHL, namely to altogether prohibit resort to reprisals in the context of a NIAC.

Turning to the status of reprisals against the natural environment under customary IHL, it is argued that a prohibition of attacks against the natural environment by way of reprisals is in the process of formation with respect to the use of weapons other than nuclear ones. All things considered, the International Law Commission (ILC) was confronted with an uncomfortable situation in the context of its work on the 'Protection of the Environment in Relation to Armed Conflicts'. By sticking to the *verbatim* reproduction of Article 55(2) of Additional Protocol I, the ILC chose the proper course of action, since any other formulation would not only undercut a significant treaty provision, but might also result in the normative standard of conduct being lowered.

A. Introduction

The concept of *reprisals* is now used almost exclusively with reference to *jus in bello*.¹ Recourse to reprisals is considered a lawful means of enforcement, subject to applicable legal conditions. The law of belligerent reprisals allows one belligerent State, unlawfully injured by another, to react by means of what under normal circumstances would constitute a violation of the *jus in bello*, so as to induce the violating State to comply with the law.² Moreover, recourse to reprisals is lawful “[...] only in response to a prior violation of the law of armed conflict and not in retaliation for an unlawful resort to force”.³ As a form of self-help, belligerent reprisals are linked to the principle of reciprocity, bearing in mind, nevertheless, that “[t]he obligation to respect and ensure respect for international humanitarian law (IHL) does not depend on reciprocity”,⁴ as the

¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 246, para 46 (“The Court does not have to examine, in this context, the question of armed reprisals in time of peace, which are considered to be unlawful”). *Report of the International Law Commission to the Fifty-Third Session*, UN Doc. A/56/10, 23 April-1 June and 2 July-10 August 2001, 128, para. 3 (“As to terminology, traditionally the term ‘reprisals’ was used to cover otherwise unlawful action, including forcible action, taken by way of self-help in response to a breach. More recently, the term ‘reprisals’ has been limited to action taken in time of international armed conflict; i.e. it has been taken as equivalent to belligerent reprisals. The term ‘countermeasures’ covers that part of the subject of reprisals not associated with armed conflict, and in accordance with modern practice and judicial decisions the term is used in that sense in this chapter.”).

² S. Oeter, ‘Methods and Means of Combat’, in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed. (2013), 115, 228; B. Zimmermann ‘Part V, Section II - Repression of Breaches of the Conventions and of this Protocol’, in Y. Sandoz, C. Swinarski & B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August of 1949* (1987), 982, paras 3426-3427; In the *List case* (The Hostages Trial) in the late 1947/48, the U.S. Military Tribunal at Nuremberg held: “A reprisal is a response to an enemy’s violation of the laws of war which would otherwise be a violation on one’s own side”. *United States v. List, et al*, Judgment, in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, Volume XI/2, 19 February 1948, 1230, 1248.

³ C. Greenwood, ‘The Twilight of the Law of Belligerent Reprisals’, 20 *Netherlands Yearbook of International Law* (1989), 35, 41-42.

⁴ J. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law: Volume I: Rules* (2009), 498, Rule 140 [Henckaerts & Doswald-Beck, Rules]; see, for example, Egypt, ‘Declaration and Notification Made Upon Ratification of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)’, 9 October 1992, para. 3, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=AF3791A0FF167FFDC1256402003FB393>

International Committee of the Red Cross (ICRC) Study on Customary IHL has authoritatively clarified.⁵

Parts of the environment, the silent victim of warfare,⁶ lend themselves to being targeted by way of reprisals, given the traditional anthropocentric approach – in the sense of aiming to alleviate *human* suffering – that transverse the entire field of IHL. In abstract terms, it could be claimed that targeting a forest or a nature reserve, so as to induce the violating enemy State to comply with IHL is preferable to directing attacks at the civilian population with the same aim in mind.⁷

A real-life scenario, which has partly inspired this paper, stems from the targeting of fifteen pine trees located closely to a purported *Jaish-e-Mohammad* (JeM) terrorist camp in Balakot in Pakistan by Indian armed forces on the 26th of February 2019. Even though India has never made this proclamation, the Balakot attack could, perhaps, be viewed as a response to the 14th of February 2019 Pulwama suicide attack, in which 40 young recruits of the Central Reserve Police Force were killed, with JeM claiming responsibility.⁸ The Balakot airstrike could be interpreted as an attack against the natural environment by way of reprisals, but India has not yet employed such a line of argument. Moreover, the application of the doctrine of reprisals to this real-life case should be excluded, as the Indian armed forces have reportedly missed the target, namely members of JeM, instead of intentionally targeting the forest reserve.⁹

(last visited 27 April 2020); (“The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.”).

⁵ Henckaerts & Doswald-Beck, *Rules*, *supra* note 4, Rule 140.

⁶ See indicatively, S. Freeland, ‘Crimes Against the Environment: The Silent Victim of Warfare’ (2015), available at <https://theconversation.com/crimes-against-the-environment-the-silent-victim-of-warfare-50215> (last visited 27 April 2020).

⁷ It is remarkable that such a claim could rest on the unchallenged assumption of humans’ superiority.

⁸ India Today, ‘Exclusive: Balakot Airstrike Mission was Codenamed Operation Bandar’ (2019), available at <https://www.indiatoday.in/india/story/balakot-airstrike-codename-operation-bandar-1553450-2019-06-21> (last visited 27 April 2020).

⁹ M. Howell, G. Doyle & S. Scarr, ‘Satellite Images Show Buildings Still Standing at Indian Bombing Site’ (2019), available at <https://uk.reuters.com/article/uk-india-kashmir-pakistan-airstrike-insi/satellite-images-show-madrassa-buildings-still-standing-at-scene-of-indian-bombing-idUKKCN1QN02Z> (last visited 27 April 2020); M. Hellyer, N. Ruser & A. Bachhawat, ‘India’s Strike on Balakot: A Very Precise Miss?’ (2019), available

Taking a step back and approaching the matter from a broader perspective, it could plausibly be argued that the doctrine of reprisals against the natural environment has fallen into desuetude, given the absence of relevant practice. Having said that, the UK's consistent (and persistent) reference to the prohibition of reprisals against the natural environment in the context of the United Nations (UN) International Law Commission's (ILC) relevant work¹⁰ should dispel any doubts about the putative fall of reprisals into disuse.

Against this background, the present paper examines the concept of belligerent reprisals and the legality of employing them against the environment¹¹ and is divided into five main sections, with three of them addressing the legality of reprisals within IHL and the remaining two dealing with recourse to reprisals against the environment. More specifically, the second section of the paper is dedicated to the treaty prohibitions of reprisals, while the third section considers the limitations attached to the lawful recourse to reprisals under customary international law. The next section addresses the taking of reprisals in the context of a non-international armed conflict (NIAC), while the fifth section delves into the prohibition of reprisals against the natural environment. The following section deals with the work undertaken by the ILC in the context of the topic *Protection of the environment in relation to armed conflicts*, which was included in its programme of work at its sixty-fifth session (2013). The ILC's work culminated in the recent adoption on first reading of 28 Draft Principles and my analysis will focus on Draft Principle 16, which prohibits attacks against the natural environment by way of reprisals. The last section concludes.

at <https://www.aspistrategist.org.au/indias-strike-on-balakot-a-very-precise-miss> (last visited 27 April 2020).

¹⁰ *GA Sixth Committee, Summary Record of the 24th Meeting*, UN Doc A/C.6/70/SR.24, 10 November 2015, 5, para. 21; *GA Sixth Committee, Summary Record of the 28th Meeting*, UN Doc A/C.6/71/SR.28, 1 November 2016, para. 25; E. Haxton, 'Statement by Mr. Edward Haxton, Assistant Legal Adviser, Foreign & Commonwealth Office' (2019), para. 6 available at <https://papersmart.unmeetings.org/media2/23329031/-e-united-kingdom-statement.pdf> (last visited 27 April 2020).

¹¹ To be precise, reprisals are not directed against the natural environment as such. Rather, they constitute an attack targeting the natural environment by way of reprisals. I thank one of the anonymous reviewers for this point. Bearing in mind this distinction, I use the shorthand *reprisals against the natural environment* throughout this paper, as also used, for example, in the commentaries of the ILC's relevant work. See *Report of the International Law Commission to the Seventy-First Session*, UN Doc. A/74/10, 29 April-7 June and 8 July-9 August 2019, 257, commentary to Draft Principle 16, para 2.

B. Treaty Prohibitions of Reprisals

Certain belligerent reprisals are specifically outlawed by the four 1949 Geneva Conventions and Additional Protocol I, which apply to international armed conflicts (IACs). Article 46 of Geneva Convention I stipulates that “[r]eprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited”.¹² Article 47 of Geneva Convention II provides for as follows, “[r]eprisals against the wounded, sick and shipwrecked persons, the personnel, the vessels or the equipment protected by the Convention are prohibited”.¹³ For its part, Geneva Convention III prohibits recourse to reprisals against prisoners of war.¹⁴ Geneva Convention IV postulates in Article 33 that “[r]eprisals against protected persons and their property are prohibited.”¹⁵

In the same vein, Article 4(4) of the Hague Convention on Cultural Property provides that High Contracting Parties “[...] shall refrain from any act directed by way of reprisals against cultural property”.¹⁶ In addition, pursuant to Article 3(2) of Protocol II of the Convention prohibiting Certain Conventional Weapons, “[i]t is prohibited in all circumstances to direct weapons to which this Article applies, either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians.”¹⁷

Additional Protocol I has significantly expanded the scope of the traditional prohibitions of reprisals.

1. Article 20 forbids reprisals against persons and objects protected in Part II (dealing with wounded, sick, shipwrecked, medical and

¹² *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, Art. 46, 75 UNTS 31 [Geneva Convention I].

¹³ *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, Art. 47, 75 UNTS 85 [Geneva Convention II].

¹⁴ *Convention (III) Relative to the Treatment of Prisoners of War*, 12 August 1949, Art. 13(3), 75 UNTS 135 [Geneva Convention III], (“[m]easures of reprisal against prisoners of war are prohibited”).

¹⁵ *Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, Art. 33(3), 75 UNTS 287 [Geneva Convention IV].

¹⁶ *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954, Art 4(4), 249 UNTS 240 [Hague Convention on Cultural Property].

¹⁷ *Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices*, 10 October 1980, Art 3(2), 1342 UNTS 168 [Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices].

religious personnel, medical units and transportation, etc.).¹⁸ The principal purpose of this provision is to cover persons and objects not protected from reprisals by Geneva Conventions I and II, especially civilian wounded and sick as well as civilian medical establishments, vehicles, etc.

2. Article 51(6) prohibits attacks against the civilian population or civilians by way of reprisals.
3. Article 52(1) states that civilian objects shall not be the object of reprisals.
4. Article 53(c) does not permit making historic monuments, works of art or places of worship – constituting the cultural or spiritual heritage of peoples – the object of reprisals.
5. Article 54(4) protects objects indispensable to the survival of the civilian population from being made the object of reprisals.
6. Article 55(2) prohibits attacks against the natural environment by way of reprisals.
7. Article 56(4) rules out making works or installations containing dangerous forces (namely, dams, dykes and nuclear electrical generating stations) – even where they are military objectives – the object of reprisals.

In light of the above-cited treaty prohibitions, the concept of belligerent reprisals maintains its validity within the law of armed conflict, especially with regard to the choice of means and methods of warfare, employed against enemy combatants and military objectives.¹⁹ Nevertheless, it should be underlined that the ambit of reprisals has been considerably limited. The recourse to reprisals is

¹⁸ *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, Art. 20, 1125 UNTS 3 [Additional Protocol I].

¹⁹ D. Turns, 'Implementation and Compliance', in E. Wilmshurst & S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007), 354, 367. See also C. Pilloud & J. Pictet, in Sandoz, Swinarski & Zimmermann, *supra* note 2, 627, para. 1985; A. D. Mitchell, 'Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law', 170 *Military Law Review* (2001), 155, 169; S. Darcy, 'The Evolution of the Law of Belligerent Reprisals', 175 *Military Law Review* (2003) 184, 250 [Darcy, Evolution of the Law of Belligerent Reprisals] ("For States parties to those treaties, during an international armed conflict, the only remaining scope for permissible belligerent reprisals is in the choice of weapons or means of warfare employed against an enemy's armed forces and military objectives"). According to Dinstein, treaty law does not abrogate "[...] the possibility of employing prohibited weapons against

either explicitly prohibited against certain protected persons and objects,²⁰ or is subject to stringent conditions under customary IHL, to which the next section turns.

C. Limitations on the Lawful Recourse to Reprisals

As treaties do not provide for such limitations, the limitations attached to the lawful recourse to reprisals are found in customary international law. Pursuant to the ICRC Study on Customary IHL, “[w]here not prohibited by international law, belligerent reprisals are subject to stringent conditions”.²¹ Dinstein acknowledges the existence of five pertinent conditions,²² which coincide with the findings of the ICRC Study. The said limitations are the following:

(i) Protests or other attempts to secure compliance of the enemy with the law of armed conflict must be undertaken first (unless the fruitlessness of such steps ‘is apparent from the outset’²³).

(ii) A warning must generally be issued before resort to belligerent reprisals.²⁴

enemy combatants by way of belligerent reprisals.” Y. Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, 3rd ed. (2016), 293-294.

²⁰ Because “[...] there is no justification for the violation of such protected persons or objects to become a means of enforcement”. S. Vöneky, ‘Implementation and Enforcement of International Humanitarian Law’, in Fleck, *supra* note 2, 647, 660, para. 1408.

²¹ Henckaerts & Doswald-Beck, Rules, *supra* note 4, 513, Rule 145.

²² Dinstein, *supra* note 19, 290, para. 806.

²³ *Ibid.* See also F. Kalshoven, *Belligerent Reprisals*, 2nd ed. (2005), 340 [Kalshoven, Belligerent Reprisals], “[...] protests, warnings, appeals to third parties and other suitable means must have remained without effect, or so obviously been doomed to failure that there was no need to attempt them first.”

²⁴ Upon ratification of Additional Protocol I, the United Kingdom stated that in the event of violations of Articles 51–55 of Additional Protocol I by the adversary, the United Kingdom would consider itself entitled to take measures otherwise prohibited by these Articles, noting, however, that this would be the case “[...] only after [a] formal warning to the adverse party requiring cessation of the violations has been disregarded”. UK, ‘Declarations and Reservations Upon Ratification of Additional Protocol I’, 28 January 1998, 2020 UNTS 77-8, section (m) Re: Article 51-55. See also *Prosecutor v. Kupreškić*, Judgement, IT-95-16-T, 14 January 2000, para. 535 [“It should also be pointed out that at any rate, even when considered lawful, reprisals are restricted by [...] the principle whereby they must be a last resort in attempts to impose compliance by the adversary with legal standards (which entails, amongst other things, that they may be exercised only after a prior warning has been given which has failed to bring about the discontinuance of the adversary’s crimes) [...]”].

(iii) The decision to launch belligerent reprisals cannot be taken by an individual combatant, and must be left to a higher authority.²⁵

(iv) Belligerent reprisals must always be proportionate to the original breach of the law of armed conflict.²⁶

²⁵ The condition at hand is found in many military manuals. See among others, the U.S. Naval Handbook, according to which “[t]he President alone may authorize the taking of a reprisal action by U.S. forces”. Department of the Navy, *The Commander’s Handbook on the Law of Naval Operations* (2017), 6.2.4.3. Pursuant to the Australian manual of the law of armed conflict, “[a]s reprisals entail state responsibility, they must be authorised at the highest level of government”. Australia, *The Manual of the Law of Armed Conflict* (2006), 13.18. The Canadian manual of the law of armed conflict provides for the following, “[i]t must be authorized by national authorities at the highest political level as it entails full State responsibility. Therefore, military commanders are not on their own authorized to carry out reprisals.” National Defence Canada, *The Law of Armed Conflict at the Operational and Tactical Levels* (2001), 1507.2 and 6h. See also *Prosecutor v. Kupreškić*, *supra* note 24, para. 535; *Prosecutor v. Martić*, IT-95-11-T, Judgement, 12 June 2007, para. 466.

²⁶ In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ held that “[...] in any case any right of recourse to such reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality”. *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, 246, para. 46. Interestingly, two competing theories of proportionality claim applicability within the reprisals doctrine: according to the first, reprisals should be proportionate to the original violation, while, pursuant to the second, reprisals must be proportionate to the desired goal, namely the enforcement of the law of armed conflict. P. Sutter, ‘The Continuing Role for Belligerent Reprisals’, 13 *Journal of Conflict and Security Law* (2008) 1, 93, 100-102. However, State and judicial practice point towards the acceptance of the former theory. See Australia, *The Manual of the Law of Armed Conflict*, *supra* note 25, 3.18; National Defence Canada, *The Law of Armed Conflict at the Operational and Tactical Levels*, *supra* note 25, 1507.3, 1507.6; Italy, *Manuale di diritto umanitario* (1991), Vol. I, para. 23, cited in J.-M. Henckaerts & L. Doswald-Beck (eds), *Customary International Humanitarian Law: Volume II: Practice* (2005), 3338, para. 218 [Henckaerts & Doswald-Beck, *Practice*]; Ministry of Defence of the United Kingdom, *Manual of the Law of Armed Conflict* (2004), 421, 16.17; Department of the Navy, *supra* note 25, 6.2.4.1; Ordinanza del Giudice per l’Udienza Preliminare presso il Tribunale Militare di Roma, 07.12.1995, Sect. 4 [*Hass and Priebke case*, Judgement in Trial of First Instance]; Sentenza della Corte Militare di Appello di Roma, 07.03.1998 [*Hass and Priebke case*, Judgement on Appeal]; Sentenza della Corte Suprema di Cassazione, 16.11.1998 [*Hass and Priebke case*, Judgement in Trial of Third Instance] cited in Henckaerts & Doswald-Beck, *Practice*, 3341, paras 233-5; *Prosecutor v. Kupreškić*, *supra* note 24, para. 535. As Kalshoven notes, proportionality as a condition for lawful recourse to reprisals amounts to the absence of obvious disproportionality, which means that belligerents are left with a certain freedom of discretion, subject to being restrained by the requirement of reasonableness. Kalshoven, *Belligerent Reprisals*, *supra* note 23, 341-2.

(v) Once the enemy desists from its breach of the law of armed conflict, belligerent reprisals must be terminated.²⁷

D. Reprisals in a Non-International Armed Conflict

The legal status of reprisals in the context of a NIAC has attracted great controversy.²⁸ Notwithstanding the fact that there were proposals to include specific prohibitions of reprisals in NIACs during the Diplomatic Conference that led to the adoption of the Additional Protocols,²⁹ Additional Protocol II does not enclose any reference to reprisals.³⁰ Following a permissive approach pursuant to the *Lotus* decision of the Permanent Court of International Justice,³¹ this lacuna seems to permit great freedom at States' disposal and potentially to those non-state armed groups that have the operational capacity to engage in such reprisal action. Nonetheless, as Kalshoven has astutely observed "[...] an absence of prohibitions does not necessarily mean permissibility, let alone advisability".³²

Most authors argue that the prohibition of reprisals in the context of a NIAC derive from specific treaty provisions, namely common Article 3 of the Geneva Conventions and Article 4 of Additional Protocol II.³³ It could also be

²⁷ Australia, *The Manual of the Law of Armed Conflict*, *supra* note 25, 13.18; National Defence Canada, *The Law of Armed Conflict at the Operational and Tactical Levels*, *supra* note 25, 1507.3, 1506b; *Hass and Priebke case*, Judgement on Appeal, *supra* note 26, para. 24, cited in Henckaerts & Doswald-Beck, *Practice*, *supra* note 26, 3354, para. 313; *Prosecutor v. Kupreškić*, *supra* note 24, para. 535.

²⁸ For example, the possibility of reprisals being applicable during a non-international armed conflict could be entirely ruled out by virtue of their exclusive application to inter-state relations. S. V. Jones, 'Has Conduct in Iraq Confirmed the Moral Inadequacy of International Humanitarian Law? Examining the Confluence between Contract Theory and the Scope of Civilian Immunity During Armed Conflict', 16 *Duke Journal of Comperatative & International Law* (2006) 2, 249, 292-293.

²⁹ Henckaerts & Doswald-Beck, *Rules*, *supra* note 4, 528.

³⁰ *Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 UNTS 609 [Additional Protocol II].

³¹ The Case of the S.S. *Lotus*, Judgment, PCIJ Series A, No 10 (1927).

³² F. Kalshoven, 'Belligerent Reprisals Revisited', 21 *Netherlands Yearbook of International Law* (1990), 43, 80 [Kalshoven, Belligerent Reprisals Revisited].

³³ See Henckaerts & Doswald-Beck, *Rules*, *supra* note 4, 526-527. According to Kalshoven, the more convincing arguments against the recourse to reprisals in the context of a NIAC are the following: "[...]their dubious efficacy, their escalating effect, the harm they do both to the people chosen as targets and to one's own standard of civilization – in one

claimed that certain prohibitions apply by analogy from the law of IAC, since the underlying cardinal principles of IHL retain their validity irrespective of the type of armed conflict.³⁴ Another line of legal reasoning, pursuant to which reprisals are prohibited in the context of a NIAC, can be drawn from international human rights law. Accordingly, given the uncertain status of reprisals under the law of NIAC, their legality should be judged by reference to the other applicable legal regime, namely international human rights law. Consequently, the human rights-based approach carries the potential to outlaw reprisals by States. On the other hand, it is self-limiting in that it cannot proscribe reprisals undertaken by non-state armed groups, since it is not well-established whether and to what extent the latter are bound by international human rights law. In this regard, the most apposite path seems to be the potential customary or *jus cogens* status of the IHL norms at stake.³⁵ On a final note, it should be mentioned that the debate concerns mostly recourse to reprisals against civilians rather than civilian objects.³⁶

In any case, relevant State practice is scarce and no safe conclusion can be drawn, even though the ICRC Study refers to an absolute prohibition on reprisals during a NIAC.³⁷ As Turns convincingly argues, the concept of reprisals is nowhere to be found under the law of NIAC and thus the ICRC Study's relevant prohibition seems to regulate a non-existent concept.³⁸ Having said that, no *opinio juris* demonstrating the existence of a customary right to resort to belligerent reprisals in a NIAC can be deduced from the relevant practice.³⁹ In addition, transposing the doctrine of belligerent reprisals from the legal regime of IAC to that of NIAC would not only be counterintuitive, as the latter was not

word their general undesirability.”, F. Kalshoven, *Reflections on the Law of War: Collected Essays* (2007), 790 [Kalshoven, *Reflections on the Law of War*]. However, the above reasons are rooted in policy and/or moral considerations, rather than being grounded on *legem latam*.

³⁴ Kalshoven, ‘Belligerent Reprisals Revisited’, *supra* note 32, 78 and N. Quéniévet, ‘The Moscow Hostage Crisis in the Light of the Armed Conflict in Chechnya’, 4 *Yearbook of International Humanitarian Law* (2001), 348, 361, cited in V. Bílková, ‘Belligerent Reprisals in Non-International Armed Conflicts’, 63 *International & Comparative Law Quarterly* (2014) 1, 31, 56, footnotes 138, 139.

³⁵ S. Darcy, *Collective Responsibility and Accountability under International Law* (2007), 180, 182 [Darcy, *Collective Responsibility and Accountability*].

³⁶ See Darcy, ‘Evolution of the Law of Belligerent Reprisals’, *supra* note 19, 205; Kalshoven, *Reflections on the Law of War*, *supra* note 33, 790.

³⁷ Henckaerts & Doswald-Beck, *Rules*, *supra* note 4, Rule 148.

³⁸ Turns, *supra* note 19, 372.

³⁹ Bílková, *supra* note 34, 54.

designed to accommodate the doctrine of belligerent reprisals, but would also appear digressive, given the mounting efforts at the international scene to limit the scope of reprisals under the law of IAC.⁴⁰

All in all, taking into account the potential of abuses against the civilian population, civilian objects and the natural environment, it is argued that the endeavour to accommodate the doctrine of reprisals within the law of NIAC should be resisted,⁴¹ and hence an absolute lack of a right to resort to reprisals in the context of a NIAC is the appropriate approach to the topic at hand, as also envisaged by the ICRC Study and in line with the lack of any treaty law reference.

E. Prohibiting Recourse to Reprisals Against the Environment

The prohibition under consideration should be considered through two different lenses: first, parts of the environment could benefit from a prohibition of reprisals where they qualify as civilian objects and to the extent States bear an obligation not to take retaliatory measures against civilian objects. Second, reprisals against the environment are explicitly forbidden as such.

As mentioned above, there are several treaty prohibitions of reprisals against specifically protected objects under the existing normative landscape.⁴² Nevertheless, by virtue of existing contrary, albeit very sparse, practice, it would be far-fetched to reach the conclusion that a rule specifically prohibiting reprisals against civilian objects in all situations – to the extent they do not qualify as civilian property that is protected under Article 33 of Geneva Convention IV – is part and parcel of customary law.⁴³

As far as an explicit prohibition of taking reprisals against the environment is concerned, Article 55(2) of Additional Protocol I establishes an absolute prohibition of attacks against the natural environment by way of reprisals.⁴⁴ This absolute prohibition is inspired by an ecocentric approach, since the protection it furnishes to the environment is independent of any potential harm inflicted on

⁴⁰ *Ibid.*, 64.

⁴¹ See *ibid.*, 65.

⁴² See above section B.

⁴³ And *vice versa*, it is equally difficult to claim with certainty that a right to resort to reprisals against civilian objects still exists by means of the (sometimes equivocal) practice of only certain States. Henckaerts & Doswald-Beck, *Rules*, *supra* note 4, 525 and instances of State practice cited therein.

⁴⁴ Art 55(2), Additional Protocol I.

human health or to the survival of the (human) population, as, for example, is required by the second sentence of Article 55(1) of Additional Protocol I.⁴⁵ In this respect, as one eminent commentator has observed “[t]he interest in preserving the natural environment [...] is shared by the whole of mankind”, and for this reason “[t]he fact that one Belligerent Party has already caused unlawful damage to the natural environment cannot possibly justify compounding the injury by the other side”.⁴⁶ Notwithstanding the above remarks, it should be clarified that Article 55(2) of Additional Protocol I does not outlaw a lawful reaction to enemy violations, but rather an unlawful attack.⁴⁷ This would include, for example, the employment of means and methods of warfare that stand in contravention of the environment-specific rules stipulated in Articles 35(3) and 55(1) of Additional Protocol I. Accordingly, the prohibition under examination does not cover attacks which have indirect impacts on the environment nor attacks directed at the environment, where the latter or parts of it qualify as military objectives.⁴⁸

This treaty provision, however, does not exhaust the issue at hand. Turning to the identification of the relevant customary law norm, the state of affairs is not entirely clear. On the one hand and as far as *opinio iuris* is concerned, certain States have included the prohibition on attacks against the natural environment by way of reprisals in their military manuals.⁴⁹ On the other hand, “[i]n 1987,

⁴⁵ The second sentence of art 55(1), Additional Protocol I reads as follows: “This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population”.

⁴⁶ Dinstein, *supra* note 19, 294, para. 817 (emphasis added). Later, the same author qualifies the quoted proposition by adding a criterion of degree: (“The present writer takes it as settled law that, should State B mount belligerent reprisals, these must not detrimentally affect human rights, the natural environment or important cultural property. But there is no reason why every inanimate civilian object must be shielded from belligerent reprisals”). *Ibid.*, 295, para. 818.

⁴⁷ M. N. Schmitt, ‘Humanitarian Law and the Environment’, 28 *Denver Journal of International Law and Policy* (1999-2000) 3, 265, 277.

⁴⁸ W. H. Boothby, *Weapons and the Law of Armed Conflict*, 2nd ed. (2016), 85.

⁴⁹ Australia, *The Manual of the Law of Armed Conflict*, *supra* note 25, 5.50 (“[a]ttacks against the environment by way of reprisal are prohibited”); National Defence Canada, *supra* note 25, 1507.4.i; Danish Ministry of Defence & Defence Command Denmark, *Military Manual on International Law Relevant to Danish Armed Forces in International Operations* (2016), 425, para. 2.16; Germany, Bundesministerium der Verteidigung, *Joint Service Regulation (ZDv) 15/2 Law of Armed Conflict* (2013), 60, para 434; New Zealand Defence Force, *Manual of Armed Forces Law*, 2008, 17.10.4(e); Spain, Ministerio de Defensa, *Orientaciones - El Derecho de los Conflictos Armados*, Vol. I (2007), para. 3.3.c.(5); Ministry of Defence of the United Kingdom, *supra* note 26, 16.19.1, 16.19.2. The ICRC Study

the Deputy Legal Adviser of the U.S. Department of State affirmed that the U.S. did not support ‘the prohibition on reprisals in Article 51 AP I and subsequent articles’ and did not consider it part of customary law”.⁵⁰

Unsurprisingly, in its written statement submitted to the ICJ in the *Nuclear Weapons* case in 1995, the U.S. stated that:

“Various provisions of Additional Protocol I contain prohibitions on reprisals against specific types of persons or objects, including [...] the natural environment (Article 55(2)) [...]. These are among the new rules established by the Protocol that [...] do not apply to nuclear weapons.”⁵¹

More recently, the 2016 updated U.S. Law of War Manual reiterates the view that the provisions on reprisals enshrined in Additional Protocol I are counterproductive for they “[...] remove a significant deterrent that protects civilians and war victims on all sides of a conflict”, even though it goes on to highlight the importance of practical considerations “[...] that may counsel strongly against taking such measures”.⁵²

Along the same lines, Guideline 13 of the 1994 ICRC Guidelines on the Protection of the Environment in Times of Armed Conflict mentions that

further references the following: Croatia, Ministry of Defence, *Law of Armed Conflicts Compendium* (1991), 19; Hungary, *Military Manual* (1992), 35; *Hass and Priebke case*, Judgement on Appeal, *supra* note 26, para. 25; Kenya, *Law of Armed Conflict Manual*, 1997, Précis No. 4, 4; Netherlands, *Military Manual*, 1993, at IV-6, cited in Henckaerts & Doswald-Beck, *Practice*, *supra* note 26, 3473-3474, paras 1090, 1095, 1096, 1097, 1099, respectively.

⁵⁰ *Ibid.*, 3478, para. 1125, citing M. J. Matheson, ‘The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions’, 2 *American University Journal of International Law & Policy* (1987) 2, 415, 426.

⁵¹ Henckaerts & Doswald-Beck, *Practice*, *supra* note 26, 3478, para. 1125, 1126, citing Matheson, *supra* note 50, 426, together with ‘Letter dated 20 June 1995 from the Acting Legal Adviser to the Department of State, together with Written Statement of the Government of the United States of America’, 31, submitted to the *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1.

⁵² United States of America, *Department of Defense War Manual* (2015, updated 2016), 1115, 1116, 18.18.3.4, 1117, 18.18.4.

attacks against the natural environment by way of reprisals are prohibited for State parties to Additional Protocol I to the Geneva Conventions.⁵³

Moreover, the ICRC Study refers only to protected objects under the Geneva Conventions and the Hague Convention on Cultural Property,⁵⁴ thus, not including the prohibition on reprisals against the natural environment, which was introduced in Additional Protocol I. This is a clear indication that even the ICRC does not consider the prohibition on reprisals against the natural environment to form part of customary international law. The position adopted by the ICRC seems understandable given the controversy with regard to environmental reprisals.⁵⁵

Accordingly, States non-parties to Additional Protocol I are not bound by such a prohibition and quite tellingly, the USA has expressed itself against a customary prohibition.⁵⁶ Furthermore, certain State parties to Additional Protocol I have attached reservations to the provision under examination (for example the UK), which means that they are not bound by the prohibition of reprisals against the natural environment.⁵⁷

⁵³ H.-P. Gasser, 'Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict', 78 *International Review of the Red Cross* (1996) 2, 230, 235, guideline 13. The ICRC Guidelines are currently being updated and their revised version is expected to be issued in 2020.

⁵⁴ Henckaerts & Doswald-Beck, *Rules*, *supra* note 4, 523, Rule 147.

⁵⁵ Turns, *supra* note 19, 368.

⁵⁶ J. B. Bellinger III & W. J. Haynes II, 'A US government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law', 89 *International Review of the Red Cross* (2007) 2, 443, 455-457; United States of America, *Department of Defense War Manual*, *supra* note 52, 378, 6.10.3.1.

⁵⁷ UK, 'Declarations and Reservations upon Ratification of Additional Protocol I', *supra* note 24, section (m) Re: Article 51-55 ("The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise there to and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party,

Turning to the challenging issue of nuclear weapons, certain State parties to Additional Protocol I have attached reservations and declarations, mainly claiming, even if implicitly, a general exemption of nuclear weapons from its scope.⁵⁸ To be more precise, three States possessing nuclear weapons, namely France, the UK and the USA (non-party to Additional Protocol I) have steadily objected to the application of the rule in relation to the use of nuclear weapons. Taking into account that their interests are “specially affected”⁵⁹ in this regard, the environment-specific provisions of Additional Protocol I cannot be considered to reflect customary law to the extent they concern the use of nuclear weapons.⁶⁰ As a consequence, the position reflected in the ICRC Study, namely that Articles 35(3) and 55(1) of Additional Protocol I have been elevated into customary law and therefore only the above three States are not bound as far as the use of nuclear weapons is concerned,⁶¹ because they are persistent objectors,⁶²

and if that warning has been disregarded, of any measures taken as a result”). Italy has also attached a relevant reservation, pursuant to which, “Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation”. Italy, ‘Declarations Made at the Time of Ratification, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)’, 27 February 1986, available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=E2F248CE54CF09B5C1256402003FB443> (last visited 4 May 2020).

⁵⁸ See *Report of the International Law Commission to the Sixty-Eighth session*, UN Doc. A/71/10, 2 May-10 June and 4 July-12 August 2016, 337, paras 4-5. These State parties are Belgium, Canada, France, Germany, Ireland, Italy, the Netherlands, Spain, and the United Kingdom. See J. Gaudreau, ‘Les réserves aux Protocoles additionnels aux Conventions de Genève pour la protection des victimes de la guerre’, 85 *International Review of the Red Cross* (2003) 1, 143, 159-162.

⁵⁹ See *North Continental Shelf (Federal Republic of Germany v. Denmark)*, Judgment, ICJ Reports 1969, 3, para. 73 (“With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that [...] a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.”).

⁶⁰ G. H. Aldrich, ‘Customary International Humanitarian Law – An Interpretation on Behalf of the International Committee of the Red Cross’, 76 *British Yearbook of International Law* (2005), 503, 516; Dinstein, *supra* note 19, 238-239; Oeter, *supra* note 2, 129, para. 403.

⁶¹ Henckaerts & Doswald-Beck, *Rules*, *supra* note 4, 154-155.

⁶² According to the persistent objector rule, “[...] a State which manifests its opposition to a practice before it has developed into a rule of general international law can, by virtue

is not correct. To this end, Scobbie insightfully notes that had the authors of the ICRC Study consistently applied the methodology they employed elsewhere with respect to the role of *pecially affected* States in the formation of customary IHL, then the corresponding rule 45 should not have been accorded customary status.⁶³ In other words, the rejection of a norm by *pecially affected* States, for our purposes nuclear-weapon States, precludes the formation of relevant customary international law from the outset. Therefore, the consistent and persistent objections of the relevant specially affected States, further evidenced through their non-signature of the recently adopted *Treaty on the Prohibition of Nuclear Weapons*,⁶⁴ has hindered the evolution of the two provisions into custom,⁶⁵ at least with regard to the use of nuclear weapons.⁶⁶ Extending this reasoning to the recourse to reprisals against the natural environment, such a prohibition does not reflect customary international law as far as the use of nuclear weapons is concerned.

Turning to the issue of conventional weapons, whereby nuclear-weapon States do not amount to *pecially affected* States, it is submitted that the prohibition of attacks against the natural environment by way of reprisals still does not reflect customary international law, but on this occasion not because of its dismissal by *pecially affected* States, as its rejection by nuclear-weapons States does not carry particular weight in this respect. Instead, Article 55(2) of Additional Protocol I does not form part and parcel of customary international law due to the up-

of that objection, exclude itself from the operation of the new rule". M. Mendelson, 'The Formation of Customary International Law', *Recueil des Cours de l'Académie de Droit International* (1998) 155, 227.

⁶³ I. Scobbie, 'The Approach to Customary International Law in the Study', in Wilmshurst & Breau, *supra* note 19, 15, 36. In Guldahl's words, "[i]t may be, however, that the authors have, perhaps inadvertently, introduced a new and additional qualification for the application of persistent objection to international humanitarian law [...]". C. Guldahl, 'The Role of Persistent Objection in International Humanitarian Law', 77 *Nordic Journal of International Law* (2008) 1, 51, 83.

⁶⁴ *Treaty on the Prohibition of Nuclear Weapons*, 7 July 2017 (not yet in force), available at https://treaties.un.org/doc/Treaties/2017/07/20170707%2003-42%20PM/Ch_XXVI_9.pdf (last visited 27 April 2020).

⁶⁵ See K. J. Heller, 'Specially-Affected States and the Formation of Custom', 112 *American Journal of International Law* (2018) 2, 191, 235 ("The most defensible position, therefore, is that a potential rule cannot pass into custom unless it is supported by a majority of specially-affected states").

⁶⁶ K. Hulme, 'Natural Environment', in Wilmshurst & Breau, *supra* note 19, 204, 233. In the case at hand, the opposition of a sufficiently important group of States has prevented a general rule coming into being at all, as the practice is not sufficiently representative. See Mendelson, *supra* note 62, 227.

to-date lack of a widespread and representative practice. Nevertheless, taking into account the increasing endorsement of this prohibition by States⁶⁷ and the mounting outlawing of reprisals, it is submitted that such a prohibition is in the process of acquiring the status of customary international law.⁶⁸

F. The ILC Draft Principle 16 on the Prohibition of Reprisals⁶⁹

Draft Principle 16 is a *verbatim* reproduction of the text of Article 55(2) of Additional Protocol I,⁷⁰ and unsurprisingly this principle became the object of controversy during the debates in the ILC. It is no coincidence that the former and the current ILC Special Rapporteurs single out Draft Principle 16 among the Draft Principles that apply during armed conflict, since it “[...] was initially by far the most difficult principle to maintain”.⁷¹ Regarding the legal status of this Draft Principle, some members of the ILC countenanced that the prohibition of reprisals reflects customary international law, whereas other members, and delegations participating in discussions before the UN General Assembly Sixth Committee⁷² were reluctant to go further than recognizing that the provision exists only as a treaty rule under Additional Protocol I. In light of the above, some members of the ILC were concerned that Draft Principle 12, which has been renumbered to Draft Principle 16, could be construed as being applicable to non-parties to Additional Protocol I, since the latter instrument has not been universally ratified. A heated debate also ensued on the applicability of Draft

⁶⁷ See *supra* note 49.

⁶⁸ Needless to say that when such a customary international law rule will be formed, it will not be binding upon the persistently objecting States.

⁶⁹ This part is based on an earlier piece regarding the work of the ILC. See S.-E. Pantazopoulos, ‘Protection of the Environment During Armed Conflicts: An Appraisal of the ILC’s Work’, 34 *Questions of International Law* (2016), 7, especially 20-21.

⁷⁰ “Attacks against the natural environment by way of reprisals are prohibited.” *Protection of the Environment in Relation to Armed Conflicts: Text and Titles of the Draft Principles Provisionally Adopted by the Drafting Committee on First Reading*, UN Doc A/CN.4/L.937, 6 June 2019, Draft Principle 16.

⁷¹ This issue, M. Jacobsson & M. Lehto, ‘Protection of the Environment in Relation to Armed Conflicts – An Overview of the International Law Commission’s Ongoing Work’, 10 *Goettingen Journal of International Law* (2020) 1, 36.

⁷² *Report of the International Law Commission to the Sixty-Seventh Session (2015), Topical Summary of the Discussion Held in the Sixth Committee of the General Assembly During its Seventieth Session, Prepared by the ILC Secretariat*, UN Doc. A/CN.4/689, 28 January 2016, 14, para. 65.

Principle 16 in NIACs, bearing in mind that the entire set of the ILC Draft Principles are purported to generally apply to armed conflicts irrespective of their classification. It is quite telling that the commentaries devote three paragraphs exposing the opposing views on the issue under consideration without affording primacy to any of them.⁷³

In view of the above, it is evident that the ILC was confronted with an uncomfortable situation. To its credit, it did not shy away from the challenge, accurately clarifying that “[...] the inclusion of this draft principle can be seen as promoting the progressive development of international law, which is one of the mandates of the Commission”.⁷⁴ The concomitant implication is that the treaty rule enshrined in Article 55(2) of Additional Protocol I and its faithful reproduction in Draft Principle 16 do not reflect customary international law. Having said that, the ILC chose the proper course of action by sticking to the *verbatim* reproduction of Article 55(2) of Additional Protocol I, for any other wording would be “[...] too precarious, as it could be interpreted as weakening *the existing rule under the law of armed conflict*”.⁷⁵

G. Concluding Remarks

To sum up, the doctrine of reprisals is a valid concept under the existing legal framework, notwithstanding the fact that treaty prohibitions of reprisals against specific categories of persons and objects, including against the natural environment, have considerably limited their scope. At the same time, the state of affairs under customary international law with respect to reprisals directed at civilian objects (including against parts of the environment), subject to certain rigorous conditions, remains unclear.⁷⁶ To complicate matters even further, any proposition on the status of reprisals in the context of a NIAC seems to be wishful thinking, as there is no relevant treaty provision. In this regard, the present author endorses the ICRC Study’s approach, namely to altogether prohibit resort to reprisals in the context of a NIAC. Moving on to the status of

⁷³ See *Report of the International Law Commission to the Seventy-First session*, UN Doc. A/74/10, 29 April-7 June and 8 July-9 August 2019, 259, paras 7-9.

⁷⁴ *Ibid.*, 260, para. 10.

⁷⁵ *Report of the International Law Commission to the Sixty-Eighth Session*, *supra* note 58, 339, para. 10 (emphasis added).

⁷⁶ For a comprehensive treatment of this issue within the relevant jurisprudence of the ICTY addressing legitimacy concerns, see M. Kuhli & K. Günther, ‘Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals’, 12 *German Law Journal* (2011) 5, 1261.

reprisals against the natural environment under customary international law, it has been argued that no relevant prohibition exists regarding the use of nuclear weapons. To the contrary, an emerging customary international law prohibition of attacks against the natural environment by way of reprisals is in the process of formation with respect to the use of weapons other than nuclear ones.

Turning to recent developments in this field, the ILC may have taken the correct stance on such a delicate matter, namely by adopting Draft Principle 16 on first reading. To put it differently, if Article 55(2) of Additional Protocol I is part and parcel of customary international law, then the ILC's approach should be commended. Even if this is not the case, which is the present author's view in light of the controversy surrounding the use of nuclear weapons, the provision should be retained as it stands, since any other formulation would be an unfortunate departure from a significant treaty provision, and might result in the normative standard of conduct being lowered.

All things considered, belligerent reprisals epitomize an outdated means of enforcement under IHL, which lends itself to abuses and further escalation of violence. In light of the increasing humanization of IHL and the obvious relevance of the environment to humanity, the scope of this anachronistic form of self-help, which is intertwined with a bilateralist vision of international law, should be further constrained.