Chapter Four. Culmination of Antagonism: Peace-Building and Armed Reprisals in the Interwar Period

I. Introduction

The First World War highlighted the horrors of modern warfare and the pressing need to organise the international community in order to prevent the resurgence of conflicts of the same scale. The League of Nations was then created and aimed at the preservation of peace. However, while all efforts were directed towards the restriction of the *ius ad bellum*, the question of the limitation of the use of force in peacetime had mostly been neglected, if not deliberately avoided. It engendered situations where the international community was caught unprepared and unable to handle the case of military acts of reprisals adequately. In fact, by exploiting the loopholes of treaties and conventions, the reprisal-taking Powers could, in most cases, argue their way out of responsibility.

The present chapter intends to explain why the burning issue of armed reprisals failed to receive an adequate response despite the objectives of peace-building of the epoch. It is maintained here that, unlike the permissiveness that they demonstrated prior to WWI, the international lawyers condemned with one voice the practice of armed reprisals as being utterly incompatible with the legal documents of the time such as the Covenant of the League of Nations. Nevertheless, legal doctrine had not enough weight to dictate conduct to the great Powers which, for occupying a dominant position in the international community, opposed resistance against any initiative seeking to limit their right to armed reprisals.

II. State of Mind: The Peace Treaty of Versailles and Reprisals

1. Enforcement of War Reparations: The Ruhr Occupation, 1923–1925

After World War I, efforts at Versailles aimed at peace-building. It was within this frame of mind that the States present laid the foundations for an international organisation to preserve peace in future, viz. the League of Nations. However, beyond these lofty sentiments, the Allied Powers, espe-

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cially France, also wanted to make Germany pay for initiating the war as well as prevent its quick recovery. Indeed, the French Prime Minister Georges Clemenceau feared that Germany's recovery would present a new threat to France and culminate in another all-out war. Therefore, he urged to dictate hard terms to Germany.[720] That is why John Maynard Keynes accurately called the Peace Treaty of Versailles signed on 28 June 1919 a "Carthaginian Peace".[721]

With the Treaty of Versailles, reprisals reappeared in a major European peace treaty after their omission since the end of the eighteenth century.[722] Paragraph 18 of Annexe II to Part VIII (Article 231ff.) about war reparations read as follows:

> "The measures which the Allied and Associated Powers shall have the right to take, in case of voluntary default by Germany, and which Germany agrees not to regard as acts of war, may include economic and financial prohibitions and reprisals and in general such other measures as the respective Governments may determine to be necessary in the circumstances."[723]

This stipulation provided the Allied Powers with the necessary instruments to lawfully coerce Germany if it failed to perform its obligations to repair war damage.

As a matter of fact, between 1920 and 1921, the Allied Powers threatened the latter country five times to occupy its territories militarily and twice this menace was carried out as Germany was found in default. Thus, in March 1920 France occupied Frankfort and Darmstadt, and then in March 1921 the towns of Duisburg, Ruhrort and Düsseldorf were occupied by France, Great Britain and Belgium.[724] The Governments of the Allied Powers asserted that the invasion of the German right bank of the

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720 See John Maynard Keynes, *The Economic Consequences of the Peace* (New York: Harcourt, Brace and Howe, 1920), 32–5.

721 Ibid., 35.

722 Müller, *Wandlungen im Repressalienrecht* (above, n. 21), 80.

723 Charles Irving Bevans, *Treaties and other international agreements of the United States of America, 1776–1949*, 2nd vol. ([Washington]: [U.S. Department of State], 1969), 148.

724 John Maynard Keynes, *A Revision of the Treaty*: *being a Sequel to the Economic Consequences of the Peace* (New York: Harcourt, Brace and Howe, 1922), 57–8. Cf. Frederick M. Allemés and Ernest Joseph Schuster, 'The Legality or Illegality of the Ruhr Occupation', *TGS* 10 (1924), 61–87, at 64; Arnold D. McNair, 'The Legality of the Occupation of the Ruhr', *BYIL* 5 (1924), 17–37, at 32.

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Rhine was justified by the treaty in case of Germany's failure to fulfil any of its obligations.[725]

Therefore, when on 26 December 1922 and on 9 January 1923 the Reparation Commission declared Germany in voluntary default regarding timber and coal deliveries,[726] the French Government immediately sent a missive the following day to the German ambassador at Paris that announced the taking of measures pursuant to Paragraph 18 of Annexe II to Part VIII of the Treaty of Versailles.[727] Thus began the controversial Franco-Belgian occupation of the Ruhr region —Germany's economic lung— which lasted from January 1923 till August 1925.

For the French Government, it was clear that § 18 allowed the temporary occupation of Germany. Already at the Conference of London on 13 February 1920, Alexandre Millerand, the then French Prime Minister, defended this interpretation and pointed out that in any event such a step was authorised in international law given some precedents such as the British occupation of Corinto in 1896 or the French occupation of Mytilene in 1901.[728] Yet, France did not claim to act on the basis of the term 'reprisals' because the French wording of § 18, unlike the English ver-

725 Keynes, *A Revision of the Treaty* (above, n. 724), 58.

726 On 26 December 1922, the Reparation Commission unanimously noted that Germany had not executed all its obligations. As a result, it declared by a majority (the British delegate voting against) that this non-execution constituted a default. See Points 53–57 of the minutes of the meeting on 26 December 1922: Allied Powers and Reparation Commission, *Report On the Work of the Reparation Commission from 1920 to 1922* (London: His Majesty's Stationery Office, 1923), 260.
McNair, 'The Legality of the Occupation of the Ruhr' (above, n. 724), 20, argued that the first point was a pure question of fact and, hence, required merely the majority, while the second amounted to a question of interpretation and, thus, imposed a unanimous vote. See Paragraph 13 Sec. 3(*f*) and 4 of Annexe II to Part VIII of the Peace Treaty of Versailles. For a contrary opinion, see Allemés and Schuster, 'The Legality or Illegality of the Ruhr Occupation' (above, n. 724), 70.

727 See extract of the missive quoted in Karl Strupp, 'Ruhreinmarsch, der französisch-belgische', in Karl Strupp (ed.), *Wörterbuch des Völkerrechts und der Diplomatie*, 2nd vol. (Berlin/Leipzig: Walter De Gruyter & Co., 1925), 404–7, at 404–5.

728 Mr Millerand, minutes of the Conference of London, 13 February 1920: France, Ministère des Affaires étrangères and Commission des archives diplomatiques, *1921: Annexes (10 janvier 1920 – 31 décembre 1921)* (Documents diplomatiques français, 6; Bruxelles: P.I.E.-Peter Lang, 2005), 47. Cf. Paul Fauchille, *Traité de droit international public*, 2 vols. (8th edn., Paris: Rousseau & Cie, 1921–1926), 2nd vol., 1051–1052.

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sion,[729] strongly implied that the acts of reprisals had to be of economic or financial character.[730] That is why the French Government explained the occupation of the Ruhr valley as falling under the "other measures" referred to *in fine* since this expression allowed a broad interpretation and thus much leeway.[731]

Be that as it may, the occupation of the Ruhr was plainly an act of reprisals.[732] In fact, § 18 as a whole enshrined a right to reprisals.[733] It can even be argued that reprisals involving the use of force were actually permitted under the provision. Indeed, did not only the provision not exhaustively list all the measures which the Allied Powers might have recourse to —given the phrases "*may* include" and "*other* measures"—, but it also clearly specified that Germany agreed not to treat any such measures as acts of war.

However, this interpretation of § 18 was not unchallenged. Serious doubts regarding the legality of the Ruhr occupation were raised. It was contended that (1) France was not qualified to act unilaterally and (2) § 18 did not entitle a creditor State to occupy Germany's territory militarily.

729 According to Art. 440 Para. 3, both French and English were the authentic languages of the Peace Treaty of Versailles. See Bevans, *Treaties and other international agreements of the United States of America, 1776–1949* (above, n. 723), 233.

730 The relevant part of the provision read: "Les mesures […] peuvent comprendre des *actes* de prohibitions et *de représailles économiques et financières* et, en général, telles autres mesures que les Gouvernements respectifs pourront estimer nécessitées par les circonstances." (*J.O.R.F.*, 11 January 1920, 485 (emphasis added)). See further George A. Finch, 'The Legality of the Occupation of the Ruhr Valley', *AJIL* 17 (1923), 724–33, at 724 fn. 2; McNair, 'The Legality of the Occupation of the Ruhr' (above, n. 724), 22.

731 M. le président du conseil, *Chambre des députés*, 11 January 1923: *J.O.R.F.*, 11 January 1923, 19. See also André Tardieu, *La paix*, Préface de Georges Clemenceau (Paris: Payot & Cie, 1921), 371.

732 Cf. Fauchille, *Traité de droit international public* (above, n. 728), 2nd vol., 1051.

733 Fernand De Visscher, *La Renonciation du Gouvernement britannique au Droit de Représailles sur les Biens des Particuliers allemands*, extrait de la *Revue de Droit international et de Législation comparée* (1920, n° 3–4) (Bruxelles: M. Weissenbruch, 1920), 9.

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2. Question of the Legality of the Ruhr Occupation

(a) Right of Acting Unilaterally

The first objection is that § 18 did not authorise a creditor Power of Germany to act single-handedly because it stipulated that *the respective Governments* could determine the necessary measures "which *the Allied and Associated Powers* shall have the right to take".

Those 'respective Governments' were the *interested Powers* mentioned in § 17 of Annexe II to Part VIII of the Treaty of Versailles.[734] According to that stipulation,[735] the Reparation Commission —referred to in Article 233 and made up by the Allied Powers— was tasked with informing the *interested Powers*, i.e. the creditor States, of Germany's default and with recommending the best-suited course of action.[736] It then lied with this Commission to decide whether the non-execution by Germany of its obligations constituted a default, which, if so, would trigger the application of § 18.[737] At a meeting on 26 December 1922, the Reparation Commission

734 Allemés and Schuster, 'The Legality or Illegality of the Ruhr Occupation' (above, n. 724), 73; McNair, 'The Legality of the Occupation of the Ruhr' (above, n. 724), 23–4; Strupp, 'Ruhreinmarsch, der französisch-belgische' (above, n. 727), 406.

735 "In case of default by Germany in the performance of any obligation under this Part of the present Treaty, the Commission will forthwith give notice of such default to each of the interested Powers and may make such recommendations as to the action to be taken in consequence of such default as it may think necessary." (Bevans, *Treaties and other international agreements of the United States of America, 1776–1949* (above, n. 723), 147).

736 Ernest Joseph Schuster, KC, observed that the Reparation Commission failed to make recommendations in the present case, pursuant to § 17. Yet, he asserted that the Commission was not merely empowered to make recommendations, as the English text let it be understood ("*may* make recommendations"), but had, in fact, the obligation to do so according to the French version of the provision ("la Commission signalera immédiatement cette inexécution […] *en y joignant* toutes propositions […]."). That is why he maintained that the occupation of the Ruhr was illegal. See Allemés and Schuster, 'The Legality or Illegality of the Ruhr Occupation' (above, n. 724), 70.

737 Pursuant to § 12 Sec. 2 of Annexe II to Part VIII investing the Reparation Commission with the authority to interpret the provisions of this Part of the Treaty, the said Commission declared on 26 December 1922 that "default" in § 17 shared the same meaning as "voluntary default" in § 18. Yet, it did not give further explanation. See the formal interpretation of Paragraph 17, Point 1: Allied Powers and Reparation Commission, *Report On the Work of the Reparation Commission from 1920 to 1922* (above, n. 726), 263f. According to the French Gov-

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interpreted the phrase 'interested Powers' as meaning Great Britain, France, Italy and Belgium.[738]

Pursuant to § 18, the respective Governments could determine the measures which they deemed necessary in the light of the circumstances surrounding a default by Germany. In other words, they had merely a right to propose some actions, while the Allied and Associated Powers were responsible for deciding which measures should be taken. For Karl Strupp, this decision then fell to all the twenty-six signatory parties of the Treaty of Versailles mentioned in the Preamble, except Germany.[739] However, since this interpretation lacked practical effect, the British international law expert Arnold D. McNair contended instead that the power to take the measures was entrusted to a common organ like the Supreme Council or the Reparation Commission.[740]

It, thus, appeared that § 18 contained a collective right of reprisals.[741] A parallel can be established between this conclusion and the statement of the Supreme Council of the Allies, following the occupation by Romania in August 1919 of Hungarian territory and the ensuing seizure of Hungarian assets, that no isolated actions were allowed to collect reparation.[742]

Nevertheless, the French Government defended the right to act unilaterally. In support of this opinion, the French Prime Minister Raymond Poincaré directed attention to Great Britain's unilateral renunciation of the right to seize German property found in the United Kingdom in case

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ernment, a voluntary default existed "so long as Germany possessed any tangible assets". See Keynes, *A Revision of the Treaty* (above, n. 724), 58; and also Mr Millerand, minutes of the Conference of London, 13 February 1920: France, Ministère des Affaires étrangères and Commission des archives diplomatiques, *1921*: *Annexes (10 janvier 1920 – 31 décembre 1921)* (above, n. 728), 47. However, for Strupp, 'Ruhreinmarsch, der französisch-belgische' (above, n. 727), 405, it meant that the default had to be accompanied by Germany's specific intent to elude its treaty obligations. Cf. Keynes, *A Revision of the Treaty* (above, n. 724), 61.

738 Point 78 of the minutes of the meeting on 26 December 1922: Allied Powers and Reparation Commission, *Report On the Work of the Reparation Commission from 1920 to 1922* (above, n. 726), 263.

739 Strupp, 'Ruhreinmarsch, der französisch-belgische' (above, n. 727), 406.

740 McNair, 'The Legality of the Occupation of the Ruhr' (above, n. 724), 24.

741 Müller, *Wandlungen im Repressalienrecht* (above, n. 21), 81.

742 Cf. Allemés and Schuster, 'The Legality or Illegality of the Ruhr Occupation' (above, n. 724), 76f.; McNair, 'The Legality of the Occupation of the Ruhr' (above, n. 724), 24–5.

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of default.[743] In fact, the Chancellor of the Exchequer stated on that occasion that the British Government took this decision on its own because "the words of the paragraph [§ 18] clearly leave it "to the respective Governments" to determine what action may be necessary under the paragraph."[744] He even explained a year and a half later that the British Government understood Paragraph 18 "as conferring upon the individual Governments the right to take action independently".[745] For Poincaré, this was the proof of Great Britain's admission that § 18 permitted isolated actions.[746] Therefore, some lawyers argued that the Chancellor's statements estopped the British Government from protesting against an isolated action by France.[747] In addition, the French Government opposed that France did not act alone since Belgium was also taking part in the occupation and Italy was participating by sending a body of engineers.[748]

So, on this aspect, the opinion of the 'interested Powers' that § 18 did not preclude isolated actions actually seemed to prevail over the objection of legal scholars.

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743 Mr Raymond Poincaré to the Marquess of Crewe, 20 August 1923: France, Ministère des Affaires étrangères, *Diplomatic correspondence*: *Reply of the French Government to the note of the British Government of August 11, 1923 relating to reparations (August 20th, 1923)* (Paris: Imprimerie nationale, 1923), 12. See Great Britain, H.M. Government, 'Liability of German Property in the United Kingdom to Seizure under the Peace Treaty.', *The Board of Trade Journal and Commercial Gazette*, 21 October 1920, 479.

744 Mr Chamberlain, House of Commons, 28 October 1920: Great Britain, Parliament, *The Parliamentary Debates: Official Report. Second Session of the Thirty-First Parliament of the United Kingdom of Great Britain and Ireland. 11 George V. House of Commons* (133rd vol.; London: His Majesty's Stationery Office, 1920), col. 1922.

745 Mr Chamberlain, House of Commons, 24 May 1922: Great Britain, Parliament, *The Parliamentary Debates: Official Report*: *Fifth Session of the Thirty-First Parliament of the United Kingdom of Great Britain and Ireland. 12 & 13 George V. House of Commons* (154th vol.; London: His Majesty's Stationery Office, 1922), col. 1246W.

746 Cf. De Visscher, *La Renonciation du Gouvernement britannique au Droit de Représailles sur les Biens des Particuliers allemands* (above, n. 733), 9–14. But see Allemés and Schuster, 'The Legality or Illegality of the Ruhr Occupation' (above, n. 724), 75.

747 Finch, 'The Legality of the Occupation of the Ruhr Valley' (above, n. 730), 725–6; McNair, 'The Legality of the Occupation of the Ruhr' (above, n. 724), 32 and 37. See also, as a less explicit argument, Allemés and Schuster, 'The Legality or Illegality of the Ruhr Occupation' (above, n. 724), 67.

748 Mr Raymond Poincaré to the Marquess of Crewe, 20 August 1923: France, Ministère des Affaires étrangères, *Diplomatic correspondence* (above, n. 743), 12.

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(b) Allowed Measures

Another contentious point concerned the measures allowed under § 18. Indeed, the German Government claimed that those measures could only have an economic and financial nature.[749] The British Government agreed that the provision in question did not cover the military occupation of territory.[750]

However, the Reparation Commission never made use of its power to interpret the said paragraph, due to the firm opposition from the French Government. As a matter of fact, the British delegate to the Reparation Commission, Sir John Bradbury, called on 26 December 1922 for "the definite and authoritative interpretation of that paragraph."[751] Yet, the Chairman, the Frenchman Louis Barthou, replied that the question of the interpretation of § 18 did not fall within the competence of the Reparation Commission.[752] Even though Barthou's assertion might not be accurate, it should actually be noted that in any case § 13 Sec. 3*(f)* of Annexe II to Part VIII required a unanimous decision on questions of interpretation. As an alternative, the British Secretary of State for Foreign Affairs suggested that the legal interpretation of § 18 should be referred either to the Permanent Court of International Justice or arbitration. But again, this proposal was met with the French Government's flat refusal.[753] Against this background, any attempt to interpret § 18 had remained in the realm of speculation.

749 Müller, *Wandlungen im Repressalienrecht* (above, n. 21), 81.

750 "The highest legal authorities in Great Britain have advised His Majesty's Government that the contention of the German Government is well founded, and His Majesty's Government have never concealed their view that the Franco-Belgian action in occupying the Ruhr, quite apart from the question of expediency, was not a sanction authorised by the Treaty itself." (The Marquess Curzon of Kedleston to Count de Saint-Aulaire, 11 August 1923: France, Ministère des Affaires étrangères, *Diplomatic correspondence* (above, n. 743), 36–37, here quotation at 36).

751 Point 38 of the minutes of the meeting on 26 December 1922: Allied Powers and Reparation Commission, *Report On the Work of the Reparation Commission from 1920 to 1922* (above, n. 726), 257.

752 Point 43 of the minutes of the meeting on 26 December 1922: Ibid.

753 The Marquess Curzon of Kedleston to Count de Saint-Aulaire, 11 August 1923: France, Ministère des Affaires étrangères, *Diplomatic correspondence* (above, n. 743), 36–7. An opinion shared by Allemés and Schuster, 'The Legality or Illegality of the Ruhr Occupation' (above, n. 724), 71.

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The phrase "such other measures" in Paragraph 18 could thus be construed *ejusdem generis* to hold that such other measures had to belong to the same class of measures like the "economic and financial prohibition and reprisals" mentioned in the same provision.[754] A German lawyer, for instance, pointed out that the phrase used "*such* other measures" instead of 'all', hence implying a connection with the previously enumerated remedies.[755]

Nevertheless, the main argument put forward by those who denounced the illegality of the occupation of the Ruhr region rested on a reading of § 18 in conjunction with Article 430. In Part XIV (entitled 'Guarantees') of the Treaty of Versailles, Art. 428–430 dealt with the military occupation of Germany. On the one hand, Articles 428 and 429 provided the occupation of the German territory situated to the west of the Rhine by the Allied forces for a duration of fifteen years and their progressive withdrawal from the occupied areas every five years. On the other hand, Art. 430 allowed the *re*occupation of territories if Germany "refuses to observe the whole or part of her obligations under the present Treaty with regard to reparation". So, on the basis of Art. 430, the German and British Governments argued that the 'other measures' in § 18 permitted a reoccupation of the whole or part of the evacuated territory narrowly delimited in the Treaty but certainly not the occupation of a territory lying on the right side of the Rhine.[756] In addition to some lawyers,[757] the British economist John Maynard Keynes concurred with this view too, explaining that otherwise Art. 430 would be devoid of meaning if § 18 authorised the occupation of any territory on the right bank of the Rhine.[758]

On the other hand, a publicist named George A. Finch argued that the Treaty of Versailles pursued the payment of the full amount of the reparations. Therefore, § 18 could not be restricted by Part XIV of the Treaty, especially as Articles 248 and 252 specified that all the assets of Germany

754 See upon this rule of construction McNair, 'The Legality of the Occupation of the Ruhr' (above, n. 724), 25–7.

755 Müller, *Wandlungen im Repressalienrecht* (above, n. 21), 82.

756 The Marquess Curzon of Kedleston to Count de Saint-Aulaire, 11 August 1923: France, Ministère des Affaires étrangères, *Diplomatic correspondence* (above, n. 743), 37–8; Müller, *Wandlungen im Repressalienrecht* (above, n. 21), 81–2.

757 Allemés and Schuster, 'The Legality or Illegality of the Ruhr Occupation' (above, n. 724), 79–80; McNair, 'The Legality of the Occupation of the Ruhr' (above, n. 724), 30; Strupp, 'Ruhreinmarsch, der französisch-belgische' (above, n. 727), 407.

758 Keynes, *A Revision of the Treaty* (above, n. 724), 60.

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were pledged to the payment of reparations. In other words, this meant that the assets and property outside the area described by Art. 428 and 429 might also be subject to seizure by the creditor States.[759] Moreover, it should be remarked that in January 1923, the first five-year time period had still not elapsed for the first evacuation of troops pursuant to Art. 429. Article 430 providing the reoccupation of the evacuated territories, thus, had no meaning. That is why Poincaré maintained that § 18 was complementary to Art. 430.[760]

The French Government also claimed that several precedents proved that the Allied Powers did not only threaten to occupy territories on the right bank of the Rhine by virtue of § 18 but actually did it. For France, the British Government was then precluded from raising such an objection since Great Britain had also participated in an occupation of German territories to the east of the Rhine.[761]

3. Outlook: The Unlikely Limitation of Armed Reprisals

It cannot be said with certainty that § 18 of the Peace Treaty of Versailles definitely permitted the employment of armed reprisals in the form of the occupation of the Ruhr region. There was, in fact, no unanimous and unequivocal interpretation of this provision. But the main great Power being interested in such a use of force, i.e. France, firmly opposed any narrow reading. The German Government, of course, could protest.[762] Still, the war guilt enshrined in Art. 231, the ensuing political isolation and the acceptance to pay reparations placed Germany —removed from the rank of great Power— in a position of inferiority which could be taken advantage of.[763] Indeed, the presence of such a stipulation in a peace treaty is not ano-

759 Finch, 'The Legality of the Occupation of the Ruhr Valley' (above, n. 730), 728–9.

760 Mr Raymond Poincaré to the Marquess of Crewe, 20 August 1923: France, Ministère des Affaires étrangères, *Diplomatic correspondence* (above, n. 743), 15. See also Finch, 'The Legality of the Occupation of the Ruhr Valley' (above, n. 730), 729.

761 Mr Raymond Poincaré to the Marquess of Crewe, 20 August 1923: France, Ministère des Affaires étrangères, *Diplomatic correspondence* (above, n. 743), 12–5. Cf. McNair, 'The Legality of the Occupation of the Ruhr' (above, n. 724), 31–7; Finch, 'The Legality of the Occupation of the Ruhr Valley' (above, n. 730), 730–1.

762 Cf. McNair, 'The Legality of the Occupation of the Ruhr' (above, n. 724), 36–7.

763 Cf. Colbert, *Retaliation in international law* (above, n. 6), 62.

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dyne and reveals the intent of the victors to reserve the right to compel the loser to pay its debts.

Against this background, it appears clear that a limitation of armed reprisals was, for most of the Allied Powers, not on the agenda since it was a convenient and intimidating means of coercion. Nevertheless, the case of the Ruhr occupation highlighted the danger that the resort to armed reprisals against a prominent European nation presented for the peace of Europe.[764]

III. Loophole in the Ius ad Bellum Mechanism of the League of Nations

1. System of the Covenant

(a) Organisation of the League of Nations

During the whole incident of the occupation of the Ruhr, the French Government inflexibly refused to let the League of Nations examine the issue. It argued, indeed, that § 18 of Annexe II to Part VIII of the Treaty of Versailles presented a clear legal basis for such an action.[765] On the other hand, the British Government claimed that the French course of action presented a threat of war which might disturb international peace. That is why it encouraged the referral of the matter to the League's bodies for settlement.[766] Notwithstanding, France dismissed this option, thus preclud-

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About the impact that the Plan Young should have had on the Allied Powers' right to use reprisals against Germany to secure the payment of reparations, see Pépy, 'Après les ratifications du Plan Young. Révision et Sanctions' (above, n. 23), 470–5; Müller, *Wandlungen im Repressalienrecht* (above, n. 21), 99–106.

764 The Marquess Curzon of Kedleston to Count de Saint-Aulaire, 11 August 1923: France, Ministère des Affaires étrangères, *Diplomatic correspondence* (above, n. 743), 41–2. See also the concern expressed by Sir John Bradbury that the interpretation of § 18 was of vital importance for the peace of Europe. See Point 38 of the minutes of the meeting on 26 December 1922: Allied Powers and Reparation Commission, *Report On the Work of the Reparation Commission from 1920 to 1922* (above, n. 726), 257.

765 Mr Raymond Poincaré to the Marquess of Crewe, 20 August 1923: France, Ministère des Affaires étrangères, *Diplomatic correspondence* (above, n. 743), 11.

766 The Marquess Curzon of Kedleston to Count de Saint-Aulaire, 11 August 1923: Ibid., 41–2.

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ing the League from looking into the situation.[767] But could the League of Nations really avert the use of armed reprisals?

The League of Nations was an intergovernmental organisation founded in 1919 which pursued international peace and security as well as the prevention of the resort to war.[768] It was the Covenant, enshrined in Part I of the Treaty of Versailles, that acted as the legal charter which created the League and defined its actions.[769]

Various organs composed the League.

The Assembly (Art. 3) was the general body where all the Member States were represented and met on an equal footing as each had one vote. It was competent to deal with a wide range of issues, either falling "within the sphere of action of the League or affecting the peace of the world", according to Art. 3 Para. 3.

The Council (Art. 4) was in a way the League's executive body.[770] It was initially imagined to be composed exclusively of the great Powers, but the Council finally came to also include lesser Powers.[771] Nevertheless, while the five great Powers —Great Britain, France, Italy, Japan and the United States— were granted a permanent seat, Article 4 Para. 1 provided only four temporary seats so that the great Powers would remain in majority. But owing to the absence of the United States from the League and the addition of two non-permanent seats in 1922 pursuant to Art. 4 Para. 2, the great Powers had been in minority within the Council.[772] The Council shared the same competence as the Assembly (Art. 4 Para. 4). And like the Assembly, the basic rule of decision-making was unanimity (Art. 5 Para. 1). This meant that a decision could never be taken against a great Power's will.[773]

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767 See Francis Paul Walters, *A History of the League of Nations* (London: OUP, 1952 [Reprint 1960]), 234–7.

768 See the Preamble of the Covenant of the League of Nations: Bevans, *Treaties and other international agreements of the United States of America, 1776–1949* (above, n. 723), 48.

769 Walters, *A History of the League of Nations* (above, n. 767), 40. Therefore, the date of birth of the League of Nations was on 28 June 1919 when the Peace Treaty of Versailles was signed. See Walther Schücking and Hans Wehberg, *Die Satzung des Völkerbundes* (2nd edn., Berlin: Franz Vahlen, 1924), 25.

770 Lassa Oppenheim, 'Le caractère essentiel de la Société des Nations', *RGDIP* 26 (1919), 234–44, at 235.

771 See Walters, *A History of the League of Nations* (above, n. 767), 45f.

772 Ibid., 46.

773 Cf. Frederick Pollock, *The League of Nations* (2nd edn., London: Stevens and sons, 1922), 106.

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The Assembly and the Council were the two main bodies of the League of Nations. The League's founders probably conceived the Assembly as a form of parliament which could counterbalance the executive power of the Council. Nevertheless, the real centre of gravity of the League lied in the Council.[774] It was made a central actor in the procedure for the settlement of disputes and the prevention of war. Hence, it meant for Oppenheim that the success of the League would mostly depend on the goodwill of the great Powers.[775]

Two more organs of significance formed the machinery of the League of Nations. On the one hand, there was the Secretariat (Art. 6–7). It was in many respects an innovative body which acted as the League's administrative link between the Assembly and the Council.[776] On the other hand, there was the Permanent Court of International Justice which was established in 1921 on the basis of Art. 14 of the Covenant.[777]

(b) Dispute Settlement Procedure

The Covenant provided the League of Nations with an institutional structure that promoted international cooperation and discussion. Besides this organisation, the maintenance of peace also passed through a detailed procedure for the settlement of disputes.

Articles 10 and 11 specifically pursued the prevention of war. The former provision laid down the principle of respecting and preserving the territorial integrity and the political independence of all Member States against external aggression. The idea was to condemn the changing of territory, policy or government through the use of force, e.g. in the form of

774 Oppenheim, 'Le caractère essentiel de la Société des Nations' (above, n. 770), 236; Hans Kelsen, *Peace through law* (1st edn. of 1944, Clark, New Jersey: The Lawbook Exchange, 2008), 49–50.

775 Oppenheim, 'Le caractère essentiel de la Société des Nations' (above, n. 770), 244. Cf. Alfred Zimmern, *The League of Nations and the Rule of Law, 1918–1935* (London: Macmillan and Co., 1936), 285.

776 Pollock, *The League of Nations* (above, n. 773), 113; C. Howard-Ellis, *The origin, structure & working of the League of Nations* (London: George Allen & Unwin, 1928), 108.

777 Walters, *A History of the League of Nations* (above, n. 767), 53–4.

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an armed intervention.[778] Each Member State had, therefore, a twofold obligation: on the one hand, a *negative* duty to refrain from undertaking anything against the territorial integrity or the existing political independence of a Member State; on the other, a *positive* duty to provide assistance against external aggression and to use all the necessary means to re-establish the situation prior to the aggression.[779] It was incumbent upon the Council to advise how each Member should fulfil its obligation when an external aggression was underway, threatened or feared. Notwithstanding the non-binding force of the recommendation, the Council had still to decide it unanimously.[780]

According to Art. 11 Para. 1, the League had a broad power to look into situations of war or threat of war and could decide a series of actions for the preservation of peace, irrespective of whether a Member of the League was directly involved or not. The Secretary General would then seize the Council at the request of any Member State. Art. 11 Para. 2 had a larger scope because it stipulated that any situation where the international peace or the good understanding between nations might be disturbed could be brought to the attention of either the Assembly or the Council by any Member State. Nevertheless, the role of the Council or the Assembly within the scope of Art. 11 was limited to propose solutions but in no case to impose them to the parties concerned.[781]

The *ius ad bellum* was thus not outlawed. Still, Articles 12 to 17 aimed to restrict the recourse to war. Pursuant to Art. 12, "any dispute likely to lead to a rupture" between Member States triggered for them the obligation to submit the issue either to arbitration, to judicial settlement or to the Council before resorting to war. The arbitrators or the PCIJ had reasonable time to examine the case and make the award or the judgement, whereas the Council had six months for issuing a report. Meanwhile, the parties had to refrain from resorting to war and were not allowed to claim that their honour or some vital interests were affected so as to prevent the settlement of the dispute.[782] Besides, after the award, decision or report was given, they

778 Cf. Pollock, *The League of Nations* (above, n. 773), 133; Miroslas Gonsiorowski, *Société des Nations et Problème de la Paix*, 2nd vol. (Paris: Rousseau & Cie, 1927), 281. The latter author also included acts of armed reprisals directed against the territorial integrity or the political independence.

779 Schücking and Wehberg, *Die Satzung des Völkerbundes* (above, n. 769), 458.

780 Pollock, *The League of Nations* (above, n. 773), 134; Gonsiorowski, *Société des Nations et Problème de la Paix* (above, n. 778), 288–290.

781 Ibid., 329–330.

782 Ibid., 342.

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had to respect another moratorium of three months before waging war.[783] In this way, peace was given every chance to succeed.

The choice between a judicial body —a panel of arbitrators or the PCIJ — and the Council depended on the parties. In fact, they were not bound to refer their dispute of legal character to an international tribunal unless there was a binding treaty of arbitration between them or they both had agreed to refer disputes to the jurisdiction of the PCIJ in accordance with Art. 36 of the Statute of the PCIJ.[784] As a consequence, if the parties did not agree to submit the dispute to an international tribunal, one of them could bring it to the attention of the Council pursuant to Art. 15.[785] In other words, the Council, i.e. a political agency, could be called to settle any disputes of political character as well as legal disputes. This anomaly was obviously a serious flaw in the Covenant.[786]

According to Art. 15, the Council had to investigate the case and mediate between the parties so that they could reach a settlement. However, it could not examine the merits of the request, i.e. whether the dispute would likely lead to a rupture, or declare itself incompetent and refer the case to an international tribunal.[787] Either the conciliation worked, and the Council, in that case, had to make a public statement about the facts of the dispute and the terms of the settlement; or the settlement failed, and the Council then had to publish a report containing some recommendations. The consequences were different and depended on whether the report was adopted unanimously or by a majority vote. A resort to war was

783 It should be noted that the Covenant created in this way a distinction between just and unjust war from a formal point of view. If the party complied with the procedure, the resort to war after the moratorium would be licit. Only Art. 10 of the Covenant took the justness of the cause of war into account. See Ibid., 332–335.

784 Ibid., 346.
Art. 13 Para. 2 defined legal disputes as relating "to the interpretation of a treaty, […] to any question of international law, […] to the existence of any fact which if established would constitute a breach of any international obligation, or […] to the extent and nature of the reparation to be made for any such breach".

785 Schücking and Wehberg, *Die Satzung des Völkerbundes* (above, n. 769), 588; Olof Hoijer, *Le Pacte de la Société des Nations*: *Commentaire théorique et pratique*, Préface de M. André Weiss (Paris: Spes, 1926), 266–7; Gonsiorowski, *Société des Nations et Problème de la Paix* (above, n. 778), 353.

786 See Hans Kelsen, 'The Old and the New League: The Covenant and the Dumbarton Oaks Proposals', *AJIL* 39 (1945), 45–83, at 58–59.

787 Schücking and Wehberg, *Die Satzung des Völkerbundes* (above, n. 769), 588–9; Hoijer, *Le Pacte de la Société des Nations* (above, n. 785), 267; Gonsiorowski, *Société des Nations et Problème de la Paix* (above, n. 778), 353–354.

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formally forbidden against the Member State which complied with the recommendations when the report was unanimously agreed. If, on the contrary, the report was adopted by a majority, only the moratorium of three months prevented the immediate resort to war for both parties.

Comparing the judicial procedure with the procedure before the Council, it appears that the former naturally had the advantage that the award or judgement bound the parties to the result. According to Art. 13 Para. 4, the resort to war was therefore prohibited against the Member State that abode by the judicial decision. The same effect flowed from the report agreed unanimously by the Council. Yet, the difficulty to reach unanimity within the Council meant that the restraint of war was flawed. Moreover, the Council's recommendations had no binding nature and did not settle the dispute.[788] That is why a party to the dispute might prefer the procedure laid down in Art. 15 over the judicial procedure of Art. 13.

The Covenant heretofore focused on disputes between Member States. Article 17 addressed the situation when a dispute occurred between a Member of the League and a non-Member or between two non-Members.[789] In the former case, the non-Member State received an invitation to accept the obligations of membership of the League. Either the obligations were accepted, and hence Articles 12 to 16 of the Covenant applied in order to settle the dispute, or the invited State refused. If the recourse to war against a Member of the League followed the refusal, the sanctions of Art. 16 applied.[790] However, if the dispute involved two non-Members and both refused to accept the obligations imposed by the Covenant, the

788 Kelsen, 'The Old and the New League: The Covenant and the Dumbarton Oaks Proposals' (above, n. 786), 59. Cf. Gonsiorowski, *Société des Nations et Problème de la Paix* (above, n. 778), 346–347.

789 Till its admission in 1926, Germany was not a Member of the League. Any dispute between Germany and the Allied Powers arising from the Treaty of Versailles and not touching upon the payment of war reparations were thus liable to bring into operation Art. 17 of the Covenant. See Keynes, *A Revision of the Treaty* (above, n. 724), 61–3. However, the invitation in this provision had to be agreed unanimously, according to Gonsiorowski, *Société des Nations et Problème de la Paix* (above, n. 778), 392. So, France, with its permanent seat on the Council, could prevent the sending of an invitation to Germany at the time of the occupation of the Ruhr region. Of course, pursuant to Art. 11, any Member State could bring the dispute to the attention of either the Council or the Assembly. But again, unanimity would have stood here in the way of the adoption of recommendations.

790 Paradoxically, the sanctions provided in Art. 16 would not apply against the Member State that resorted to war against the non-Member which refused the invitation. See Ibid., 394.

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Council remained competent to take measures and make recommendations in order to prevent the outbreak of hostilities and to reach a settlement. This provision confirmed the role of the League as guardian of the world's peace.[791]

Finally, the League had at its disposal a system of sanctions against the Covenant-breaking States.[792] Article 16 aimed to prevent the resort to war and the aggrieved State taking the law into its own hands. That is why the violation of the Covenant was made a matter of general concern for all the Members of the League. Indeed, Art. 16 Para. 1 provided that a resort to war by a Member State in disregard to the obligations under Art. 12, 13 or 15 was *ipso facto* an act of war against all other Members. This circumstance compelled the latter to immediately throw a 'cordon sanitaire' around the Covenant-breaking State through a set of financial, commercial and isolationist measures. So, any relation of financial and commercial character with the assailant State had to be severed, prohibited and prevented and this applied as well for the intercourse that the nationals of the Member States and third States had with those of the Covenant-breaking State. Besides, Art. 16 Para. 2 allowed the taking of military sanctions, too.

However, the application of Art. 16 was not without raising practical questions.[793] In fact, the enforcement of the economic boycott provided in the first paragraph was imagined as a kind of pacific blockade.[794] Based on the report of an International Blockade Committee set up in 1921 to answer a series of questions,[795] the Assembly adopted guidelines for the application of Art. 16, amongst which Clause 18 recommended in support of

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791 Cf. Thomas Joseph Lawrence, *Lectures on the League of Nations*: *delivered in the University of Bristol* (Bristol: J. W. Arrowsmith, 1919), 65.

792 See thereupon Henri Vauzanges, *Les Sanctions internationales dans la Société des Nations*, Thèse pour le doctorat de la Faculté de Droit de l'Université de Paris, présentée et soutenue le Vendredi 28 mai 1920 à 3 heures 1/2 (Paris: Jouve & Cie, 1920). See also Hindmarsh, 'Self-Help in Time of Peace' (above, n. 17), about the historical evolution from individual self-help through state coercive methods towards international sanctions.

793 See Hoijer, *Le Pacte de la Société des Nations* (above, n. 785), 304; John Fischer Williams, 'Sanctions under the Covenant', *BYIL* 17 (1936), 130–49, at 134.

794 Already in the nineteenth century, the Italian legal scholar Pasquale Fiore regarded pacific blockade as a form of coercion which an organised international society could decide against a wrongdoing State. See Fiore, 'L'organisation juridique de la société internationale' (above, n. 652), 241.

795 This Committee was composed of representatives of Cuba, Spain, Norway and Switzerland as well as of the four permanent Members of the Council, i.e. France, Great Britain, Italy and Japan. See League of Nations, Permanent Secretariat, 'Letter from the Secretary-General to the Members of the League con-

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the economic measures the establishment of an effective blockade entrusted to some Member States.[796] A few years later, the Protocol for the Pacific Settlement of International Disputes specified that the cooperation mainly depended on the geographical position and the importance of the armed force of each Member State.[797] The leading naval powers were thus mostly responsible for the enforcement of this economic blockade.[798] There still remained some doubts regarding the enforcement of such a blockade against non-Member States.[799]

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cerning the Obligations arising out of Article 16 of the Covenant.', *LNOJ* 2 (1921), 220–1; League of Nations, Permanent Secretariat, 'Circular letter from the Secretary-General to the Members of the International Blockade Committee.', *LNOJ* 2 (1921), 430–5, at 430–432.

796 League of Nations, Assembly, 'Resolutions and Recommendations adopted on the Reports of the Third Committee.', *LNOJ* 6 (1921), Special Supplement, 23–6, at 26. As remarked Williams, 'Sanctions under the Covenant' (above, n. 793), 145, "[…] such a blockade though economic in its effect is not purely economic in its methods."

797 Art. 11 Para. 2 of the Protocol for the Pacific Settlement of International Disputes adopted by the Fifth Assembly of the League of Nations on 2 October 1924.

798 See Amos E. Taylor, 'Economic Sanctions and International Security', *UPaLRev* 74 (1925), 155–68, at 168.

799 See Williams, 'Sanctions under the Covenant' (above, n. 793), 146–7. In Great Britain, members of the Government were of the opinion that, on the question of the establishment of a blockade as part of the collective peace system, the United States, for being the main third State of the time, should be consulted. See, e.g., Viscount Cecil of Chelwood, House of Lords, 5 December 1934: Great Britain, Parliament, *The Parliamentary Debates (Official Report): Fourth Session of the Thirty-Sixth Parliament of the United Kingdom of Great Britain and Northern Ireland. 25 George V. House of Lords* (95th vol.; London: His Majesty's Stationery Office, 1935), col. 135–136. Indeed, according to Viscount Cecil, "It is quite plain now, as I understand International Law, that *the doctrine of pacific blockade is exploded*, and that *if you wish to interfere with the free use of the sea in order to put pressure on another country, you must do it by virtue of belligerent rights*. Of course that is true of the League as it is true of individual countries, […]." (Ibid., col. 136 (emphasis added)). That is why the success of the economic sanctions was largely conditional on the attitude of the powerful economic third States like the United States. Cf. the British Government's statement, Sixth (Public) Meeting of the Council of the League, 12 March 1925: League of Nations, Council, 'Thirty-Third Session of the Council. Held at Geneva from Monday, March 9th, to Saturday, March 14th, 1925.', *LNOJ* 6 (1925), 429–628, at 447.
Yet, the Secretary-General considered in a report in 1927 that a pacific blockade instituted by the League could take three different ways: (1) third States might consent to the interference of the blockading Powers with their own ships; (2) the League might declare war in order to enjoy the rights of belligerents to-

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(c) Deficiency Regarding Armed Reprisals

The Covenant of the League of Nations spoke of "war", "act of war", "resort to war", "threat of war", "external aggression" and "dispute likely to lead to a rupture". However, amongst this host of phrases, no mention was made of reprisals. And yet, the various drafts of the Covenant submitted by U.S. President Woodrow Wilson contained a provision which, although not referring explicitly to reprisals, precisely aimed to limit their use.[800] Indeed, if such a provision had been adopted, the resort to armed reprisals would have then brought about the application of sanctions against the Covenant-breaking State, in the same way as a recourse to war. Nevertheless, the stipulation was amended —purportedly an insignificant change— so that the "hostile step short of war" were omitted outright.[801]

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wards ships under the flags of third States; or (3) third States might consider applicable the laws of neutrality without a declaration of war. The report added that in the last two possibilities the existence of a state of war would be acknowledged for the practical relationship between third States and the Covenant-enforcing States albeit the latter would not be at war with the Covenant-breaking State. See League of Nations, Secretary-General, 'Annex 964. Legal position arising from the enforcement in time of peace of the measures of economic pressure indicated in Article 16 of the Covenant, particularly by a maritime blockade. Report by the Secretary-General of the League submitted to the Council on June 15th, 1927 [C. 241. 1927 V]', *LNOJ* 8 (1927), 834–45, at 839. See further Appendix II, a study by Émile Giraud about pacific blockade prior to the foundation of the League of Nations: Ibid., 841–5.

800 Art. VII read: "If any Power shall declare war or begin hostilities, or take any hostile step short of war, against another Power before submitting the dispute involved to arbitrators as herein provided, or shall declare war or begin hostilities, or take any hostile step short of war, in regard to any dispute which has been decided adversely to it by arbitrators chosen and empowered as herein provided, the Contracting Powers hereby bind themselves not only to cease all commerce and intercourse with that Power but also to unite in blockading and closing the frontiers of that power to commerce or intercourse with any part of the world or to use any force that may be necessary to accomplish that object." (David Hunter Miller, *The drafting of the Covenant*, With an introduction by Nicholas Murray Butler, 2nd vol. (New York/London: G. P. Putnam's sons, 1928), 14, 101 and 149).

801 Schwarzenberger, 'Jus Pacis Ac Belli? Prolegomena to a Sociology of International Law' (above, n. 33), 476.

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Did it mean that the lack of restrictive limitation allowed the legitimate use of armed reprisals under the system of the Covenant?[802]

Before the creation of the League, the unilateral resort to self-help was justified by the existing anarchy in international relations.[803] Indeed, Bartolus de Saxoferrato explained the need for reprisals from the absence of a superior authority.[804] However, with the League of Nations, the body of the civilised States was structured, and the *ius ad bellum* was drastically restricted. Against this background and in the light of the spirit of the Covenant, the resort to armed reprisals by a single Member State without the League's consent seemed, at least, morally reprehensible.[805]

In fact, the Covenant as a whole also imposed on the Member States the duty to prefer the procedure governing the settlement of disputes over war and reprisals.[806] Besides, some of the general terms used by the Covenant could possibly fill the lacuna left by the absence of an explicit legal provision limiting or outlawing armed reprisals. Thence, the use of armed reprisals might have been regarded as a threat of war in the light of Art. 11.[807]

The phrase "dispute likely to lead to a rupture" in Art. 12 provided perhaps a stronger argument. Insofar as the target country might respond to armed reprisals, what would lead to war, their resort was necessarily the consequence of a dispute likely to amount to a rupture.[808] Nevertheless, this reading depended on the meaning of "rupture". The framers' drafts of the Covenant originally spoke of disputes "which cannot be satisfactorily settled or adjusted by the ordinary processes of diplomacy".[809] In this light, a "dispute likely to lead to a rupture" might refer to a dispute which could not be settled through diplomatic means. The parties would then be bound to submit it to the League according to Article 12, and the resort to

802 See Alberto Guani, 'Les mesures de coercition entre membres de la Société des Nations envisagées spécialement au point de vue américain', *RGDIP* 31 (1924), 285–90, at 289.
803 Cf. Gonsiorowski, *Société des Nations et Problème de la Paix* (above, n. 778), 337.
804 See *supra*, at 51.
805 Gonsiorowski, *Société des Nations et Problème de la Paix* (above, n. 778), 335f. and 339.
806 Cf. Karl Strupp, *Das völkerrechtliche Delikt* (Handbuch des Völkerrechts, 3/3; Stuttgart: W. Kohlhammer, 1920), 222–3.
807 But see Elagab, *The legality of non-forcible counter-measures in international law* (above, n. 14), 27.
808 Gonsiorowski, *Société des Nations et Problème de la Paix* (above, n. 778), 339.
809 See Miller, *The drafting of the Covenant* (above, n. 800), 100, 123, 135, 143, 147, 234, 267, 311 and 330.

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war as well as the employment of reprisals would be forbidden in the meantime. On the other hand, if "rupture" were comprehended as the rupture of diplomatic relations, the provision of the Covenant would not affect the resort to armed reprisals since the parties to the dispute usually did not interrupt the conduct of diplomatic relations.[810]

Therefore, it can be said that the conformity of armed reprisals with the Covenant appeared dubious, although not unlikely for all that.[811]

2. Baptism of Fire for the Covenant: The Italian Bombardment and Occupation of Corfu, 1923

(a) The Facts

The question of the conformity of armed reprisals within the Covenant had, until 1923, only a theoretical interest. However, a few months after the French occupation of the Ruhr valley, another event gave it practical meaning: the Italo-Greek dispute.[812]

In the context of the redrawing of the borders in the Balkans after World War One, the Conference of Ambassadors —an authority representing the Principal Allied and Associated Powers signatory of the Peace Treaties— assigned a commission led by the Italian general Tellini to delineate the Greek-Albanian frontier.[813] At the end of August 1923, the bodies of General Tellini and his Italian staff were found assassinated on Greek territory nearby Ioannina, yet close to the Albanian border.

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810 Cf. Olof Hoijer, *La solution pacifique des litiges internationaux avant et depuis la Société des Nations*: *Étude de Droit International et d'Histoire Diplomatique* (Paris: Spes, 1925), 401.

811 Non-forcible reprisals, on the other hand, did not raise issues since they were less likely to lead to a rupture. See Charles De Visscher, 'L'interprétation du pacte au lendemain du différend italo-grec', *RDILC* 51 (1924), 213–230 & 377–396, at 385–6; Guani, 'Les mesures de coercition entre membres de la Société des Nations envisagées spécialement au point de vue américain' (above, n. 802), 286; Gonsiorowski, *Société des Nations et Problème de la Paix* (above, n. 778), 339–400; Elagab, *The legality of non-forcible counter-measures in international law* (above, n. 14), 27–8.

812 For a historical account of the incident, see James Barros, *The Corfu incident of 1923*: *Mussolini and the League of Nations* (Princeton, New Jersey: PUP, 1965).

813 See Hoijer, *La solution pacifique des litiges internationaux avant et depuis la Société des Nations* (above, n. 810), 418–20.

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Eager to confirm Italy's place amongst the leading nations of the world, the answer of Mussolini was not long in coming.[814] Greece was held entirely responsible for the crime. An ultimatum was addressed to the Greek Government. The Italian Government demanded redress in the form of official apologies, a criminal investigation supervised by an Italian agent, the culprits' condemnation to death, and the payment of an indemnity of 50 million lira.[815] However, the Greek Government was not disposed to accept the conditions altogether but consented to express official regrets, honour the victims, salute the Italian flag as well as pay equitable damages to the victims' family. However, it rejected the other demands on the grounds that it would be a dishonour and an infringement on the sovereignty of Greece.[816]

Mussolini did not deem the reply satisfactory. He, thus, ordered the bombardment of Corfu and its temporary occupation as a pledge until the fulfilment of the demands contained in the ultimatum.[817] The Greek Government, therefore, seized both the Conference of Ambassadors and the Council of the League of Nations.[818]

(b) Discussion in the Council

The Greek Government brought the issue to the attention of the Council by virtue of Art. 15 of the Covenant. Before the Council, Greek international law expert Nicolas Politis, who represented his Government, men-

814 See Barros, *The Corfu incident of 1923* (above, n. 812), 33–4. Nevertheless, the relations between Greece and Italy had been marked since 1912 by suspicion and hostility. This mutual animosity may explain why the incident raised much indignation in Italy and was seen as an insult to its national prestige. See David Jayne Hill, 'The Janina-Corfu Affair', *AJIL* 18 (1924), 98–104, at 99–100.

815 See extract of the Italian demands reproduced in Hoijer, *Le Pacte de la Société des Nations* (above, n. 785), 288.

816 Ibid., 288–9. See further Nicolas Politis's explanations before the Council: Eighth Meeting of the Council of the League, 4 September 1923: League of Nations, Council, 'Twenty-Sixth Session of the Council. Held at Geneva from Friday, August 31st, to Saturday, September 29th, 1923.', *LNOJ* 4 (1923), 1261–513, at 1284.

817 Hoijer, *Le Pacte de la Société des Nations* (above, n. 785), 289. Nevertheless, Corfu was at the time a neutralised territory. See thereupon Quincy Wright, 'The Neutralization of Corfu', *AJIL* 18 (1924), 104–8.

818 Hoijer, *La solution pacifique des litiges internationaux avant et depuis la Société des Nations* (above, n. 810), 421.

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tioned the application of the sanctions provided in Article 16 because the case might lean towards it. Indeed, he maintained that acts of violence should be appraised objectively without considering how the assailant State described them, viz. *non ex nomine sed ex re*. That is why he strongly implied that Italy had committed acts of war in defiance of the obligations imposed by the Covenant.[819]

Antonio Salandra, the Italian delegate who was also a legal scholar, considered the allusion to Art. 16 offensive because Italy had not intended to commit an act of war. He asserted that there was neither a danger of war nor a suspension of diplomatic relations, notwithstanding that Italy had been compelled to act forcibly. For Salandra, the taking of a pledge by Italy had been necessary since Greece was an unreliable State. Indeed, he called the assassination of Tellini's staff an offence against the prestige and national honour of Italy as well as a serious violation of international law. He, thus, accused the Greek Government of being trying to shift the public opinion's attention from this crime to the acts of violence in Corfu. Italy had had, therefore, the right to take guarantees and to act for the defence of its national honour. In fact, he argued that the League of Nations membership did not imply a renunciation of such a right; otherwise, no State would like to join the League. Finally, Salandra denied the competence of the Council to examine the issue since it clearly fell within the jurisdiction of the Conference of Ambassadors.[820]

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819 Sixth (Private) Meeting of the Council of the League, 1 September 1923: League of Nations, Council, 'Twenty-Sixth Session of the Council. Held at Geneva from Friday, August 31st, to Saturday, September 29th, 1923.' (above, n. 816), 1277–8. Politis published an article in the *RGDIP* in which he clarified his theory of the incompatibility of armed reprisals with the Covenant. He supported the view that there would be, i.a., a paradox if the reprisal-taking State could resort to violent measures while professing to have peaceful intent. In such a case, the target country might be liable to the sanctions provided in Art. 16 of the Covenant if it resisted and war ensued. Thus, he contended that armed reprisals should be assimilated to acts of war in the light of the Covenant on the basis of an objective criterion. See Politis, 'Les représailles entre Etats membres de la Société des Nations' (above, n. 19). About Politis's legal views regarding war and aggression, see Nicholas Tsagourias, 'Nicolas Politis' Initiatives to Outlaw War and Define Aggression, and the Narrative of Progress in International Law', *EJIL* 23 (2012), 255–66.

820 Sixth (Private) Meeting of the Council of the League, 1 September 1923: League of Nations, Council, 'Twenty-Sixth Session of the Council. Held at Geneva from Friday, August 31st, to Saturday, September 29th, 1923.' (above, n. 816), 1278–9; Ninth (Public) Meeting of the Council of the League, 5 September 1923: Ibid., 1287–8.

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Politis responded that the Greek Government was ready to accept in advance the decision of the Council but disclaimed responsibility in the absence of proof to the contrary. He laid great emphasis then on the importance for the League to come up to the world's expectations by settling the issue. The League had set up a procedure that made the seizure of guarantees unnecessary. Hence, no interested party to a dispute could evade its duties under the Covenant by putting forward the League's incompetence. He insisted that the future success of the League would depend on the decision of the Council in the present case.[821]

As a matter of fact, this issue was seen from the outset as a power struggle between a great Power and a weak State. Therefore, the minor European Powers challenged the permissive interpretation of the Covenant asserted by the Italian delegation. That is why Hjalmar Branting, Sweden's representative on the Council and co-recipient of the Nobel Peace Prize in 1921, acted as the champion of the small European Powers when he told that "These States have a vital interest in ensuring that a breach of the provisions of the Covenant should not be allowed to pass without protest and without energetic steps being taken."[822] On that occasion, they could enjoy the support of Great Britain. British representative Lord Cecil of Chelwood agreed with this view that both great and small Powers were to abide by the obligations flowing from the Covenant.[823] However, Salandra denied that Italy had acted as a great Power against a little State with the aim of obtaining something from the latter. He confined himself to concurring with the statement that all Member States were equal regardless of their respective strength.[824]

The small Powers insisted that the Council was competent to settle the dispute.[825] Yet, Salandra's persistent refusal to recognise the jurisdiction of the League on a matter involving a Member's national honour and dignity

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821 Ninth (Public) Meeting of the Council of the League, 5 September 1923: Ibid., 1288–90.

822 Sixth (Private) Meeting of the Council of the League, 1 September 1923: Ibid., 1280.

823 Sixth (Private) Meeting of the Council of the League, 1 September 1923: Ibid., 1279.

824 Sixth (Private) Meeting of the Council of the League, 1 September 1923: Ibid., 1281.

825 See the opinions expressed by the representatives of Great Britain, Belgium, Sweden and Uruguay who considered that the League was competent. Tenth (Public) Meeting of the Council of the League, 6 September 1923: Ibid., 1298–300.

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paralysed the action of the League.[826] Indeed, all the elements indicate that Italy did not want to lose control over the issue, just like France refused a few months earlier to refer the dispute with Germany to the League. So, the Italian argument that the Conference of Ambassadors was competent patently aimed to prevent the interference of other countries, especially of small Powers which within the Council had their say in the matter.[827] Moreover, a settlement of the dispute through the Conference of Ambassadors had several advantages.[828] Firstly, the Italian Government would not run the risk of being subject to sanctions. Secondly, the issue would be settled between peers. Finally, the meetings of the Conference of Ambassadors were not public, unlike the discussions in the Council where private meetings were hardly justifiable given the significance of the case.

As a result, the dispute was settled by the Conference of Ambassadors in September 1923. Although the members of the Council applauded the solution and credited the Council with the settlement,[829] Branting remarked that the competence of the Council had actually been denied and that the bombardment and occupation of Corfu had not been punished. He argued that the confidence in the League's work had consequently been shaken and Italy's example might set a dangerous precedent.[830] Regarding this latter comment, Salandra contended that Italy did not act differently from past examples of France and Great Britain. Besides, he mentioned Schücking and Wehberg's authoritative commentary on the Covenant to assert that armed reprisals were a recognised institution of international law and

826 See Tenth (Public) Meeting of the Council of the League, 6 September 1923: Ibid., 1299.

827 In fact, Salandra claimed that "as small nations, they [Belgium and Sweden] have no interest in the question." According to him, this was because Belgium and Sweden were countries where political assassination did not exist. See Tenth (Public) Meeting of the Council of the League, 6 September 1923: Ibid., 1300. This argument is quite flimsy and evidently shows that Italy feared a coalition of small Powers against Italy.

828 Cf. Nicolas N. Petrascu, *Les Mesures de Contrainte Internationale qui ne sont pas la Guerre entre États Membres de la Société des Nations*, Thèse pour le doctorat de la Faculté de Droit de l'Université de Paris présentée et soutenue le mardi 24 mai 1927, à 2 heures (Paris: Jouve & Cie, 1927), 160–1.

829 See Thirteenth (Public) Meeting of the Council of the League, 17 September 1923: League of Nations, Council, 'Twenty-Sixth Session of the Council. Held at Geneva from Friday, August 31st, to Saturday, September 29th, 1923.' (above, n. 816), 1305–10.

830 Thirteenth (Public) Meeting of the Council of the League, 17 September 1923: Ibid., 1306.

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remained allowed for want of a provision in the Covenant that forbade them.[831]

However, Salandra's explanations did not convince Branting for whom armed reprisals were no longer permissible under the new international law introduced by the Covenant, which had superseded the old one.[832]

From a general point of view, it can be said that the Council overcome by hypegiaphobia preferred to act out of deference to Italy, lest it withdrew from the League, and thence let, at the cost of its prestige, the Conference of Ambassadors decide upon the case.[833] This incident proved the Council's ineptitude to settle conflicts involving a great Power.[834] Furthermore, the Council clearly failed to adopt a firm stance on the use of armed force.

In fact, it is argued that Italy, with the support of France, obviously tried to prevent "any authoritative criticism of coercive measures short of war in view of the Corfu and Ruhr occupations."[835] It is also likely that they actually pursued more than just the censure of their recent conduct: they probably wanted to protect in the long run their prerogative as great Powers to make use of armed reprisals. As a matter of fact, when Salandra justified before the Council the bombardment and occupation of Corfu by way of reprisals against Greece, he said that "Italy, who has recently taken her place in world history, has merely followed illustrious examples [i.e. those

831 Fourteenth (Public) Meeting of the Council of the League, 18 September 1923: Ibid., 1313–1314, here quotation at 1314. Salandra referred to the first edition of Schücking and Wehberg's work. In the second edition published after the Corfu incident, the two German legal scholars did no longer support such a view. Cf. Schücking and Wehberg, *Die Satzung des Völkerbundes* (above, n. 769), 508–10.

832 Fourteenth (Public) Meeting of the Council of the League, 18 September 1923: League of Nations, Council, 'Twenty-Sixth Session of the Council. Held at Geneva from Friday, August 31st, to Saturday, September 29th, 1923.' (above, n. 816), 1316.

833 Cf. Hill, 'The Janina-Corfu Affair' (above, n. 814), 103; Ciriaque Georges Ténékidès, 'L'évolution de l'idée des mesures coercitives et la Société des Nations', *RDILC* 53 (1926), 398–418, at 402; Brownlie, *International Law and the Use of Force by States* (above, n. 45), 221.

834 But for a contrary view, see Manley O. Hudson, 'How the League of Nations Met the Corfu Crisis', *League of Nations* 6 (1923), 176–98, at 196–198.

835 Quincy Wright, 'Opinion of Commission of Jurists on Janina-Corfu Affair', *AJIL* 18 (1924), 536–44, at 538.

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of France and Great Britain]."[836] More or less, he made explicitly the connection between the employment of armed reprisals and the status of great Power. Moreover, Mussolini instructed him to warn the French and British representatives in private against the consequences that the Council's enquiry into the case might bring about: the automatic submission to that organ of all the affairs involving national honour and prestige.[837] Mussolini's instruction meant that the great Powers should strive together to retain a privileged position within the League and prevent reprehension for their doings. Indeed, if the League could examine any case where a great Power made resort to armed reprisals, it would signify the end of their privilege.

836 Fourteenth (Public) Meeting of the Council of the League, 18 September 1923: League of Nations, Council, 'Twenty-Sixth Session of the Council. Held at Geneva from Friday, August 31st, to Saturday, September 29th, 1923.' (above, n. 816), 1314.
To justify the legality of the bombardment and occupation of Corfu, Italy rested its argumentation, i.a., on precedents. See Barros, *The Corfu incident of 1923* (above, n. 812), 101–2. This justification aimed perhaps to speak to the great Powers and to remind them of the privilege they had. But the reference to precedents predating the signature of the Covenant actually did not produce the effect expected on the Council because Italy failed to demonstrate that the League's charter did not make a clean slate of the old international law. Moreover, the mention by Italy of the U.S. occupation of Veracruz in 1914 irritated the United States that refused to see any parallel between that incident and the Italo-Greek conflict. See Ibid., 102 fn. 65. In juristic writings, the precedents were viewed as irrelevant on account of the new international situation. Even the U.S. international legal scholar Manley Ottmer Hudson, who regarded the settlement of the whole issue as a success on the part of the League though, wrote that "it is […] clear that the action was a jeopardizing of the peace of the world; *that the precedents antedating the establishment of the League did not justify it*; […]." (Hudson, 'How the League of Nations Met the Corfu Crisis' (above, n. 834), 185 (emphasis added)). See also Hill, 'The Janina-Corfu Affair' (above, n. 814), 98, calling for the repudiation of precedent in international affairs.

837 Barros, *The Corfu incident of 1923* (above, n. 812), 99f.

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(c) Armed Reprisals Questioned

i) Interpretation of the Covenant by the Special Commission of Jurists

The incident had shown the loophole in the Covenant. In consequence, the Council unanimously resolved on 20 September 1923 to submit some controversial questions to a group of legal experts.[838] It, however, took some time before the members of the Council agreed on the phrasing of the questions as the Italian delegate did not consent to a wording referring even slightly to the Greco-Italian dispute.[839] A Committee of Jurists was then tasked to draft the questions. One of them —the question about the conformity of reprisals with the Covenant— was rephrased as follows:

> "IV. Are measures of coercion which are not meant to constitute acts of war consistent with the terms of Articles 12 to 15 of the Covenant when they are taken by one Member of the League of Nations against another Member of the League without prior recourse to the procedure laid down in these articles?"[840]

The wording did not raise any serious objection.[841] However, the members of the Council disagreed on whom should answer the questions. On the one hand, Great Britain and most of the small Powers wanted to submit the questions to the PCIJ for an advisory opinion which would enjoy high moral authority. On the other hand, Italy and France considered that the fourth question relating to reprisals was unsuitable for an examination by the PCIJ since the question was not entirely legal but actually contained a

838 Fifteenth (Public) Meeting of the Council of the League, 20 September 1923: League of Nations, Council, 'Twenty-Sixth Session of the Council. Held at Geneva from Friday, August 31st, to Saturday, September 29th, 1923.' (above, n. 816), 1317.

839 See Sixteenth (Private) Meeting of the Council of the League, 22 September 1923: Ibid., 1320–5. In the course of the discussion, Salandra explained that the acts of reprisals allowed were not listed and hence "all that international law has done is to classify the various attitudes taken up by States." (Ibid., 1324). However, Lord Cecil pointed out that a school of jurists challenged the legality of the coercive measures short of war (Ibid., 1323).

840 Eighteenth (Private) Meeting of the Council of the League, 26 September 1923: Ibid., 1328.

841 See Eighteenth (Private) Meeting of the Council of the League, 26 September 1923: Ibid., 1329–30.

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significant amount of political character.[842] Thus, it was decided to submit all the questions to a Special Commission of Jurists.[843]

On 24 January 1924, this Commission communicated the replies. The answer to Question IV read:

> "Coercive measures which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately having due regard to all the circumstances of the case and to the nature of the measures adopted, whether it should recommend the maintenance or the withdrawal of such measures."[844]

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842 See Eighteenth (Private) Meeting of the Council of the League, 26 September 1923: Ibid., 1330–2. Cf. Frances Kellor and Antonia Hatvany, *Security against war*, 2nd vol. (New York: The Macmillan Company, 1924), 637–639.

843 See Twentieth (Private) Meeting of the Council of the League, 27 September 1923: League of Nations, Council, 'Twenty-Sixth Session of the Council. Held at Geneva from Friday, August 31st, to Saturday, September 29th, 1923.' (above, n. 816), 1338–45; Twenty-Second (Private) Meeting of the Council of the League, 28 September 1923: Ibid., 1349–52. This Special Commission of Jurists was composed by Adatci (Japan), Lord Buckmaster (Great Britain), Buero (Uruguay), de Castelo Branco Clark (Brazil), Fromageot (France), van Hamel (Director of the Legal Section of the Secretariat of the League of Nations), Rolandi Ricci (Italy), Undén (Sweden), Marquis de Villaurrutia (Spain), De Visscher (Belgium).

844 Sixth (Public) Meeting of the Council of the League, 13 March 1924: League of Nations, Council, 'Twenty-Eight Session of the Council. Held at Geneva from Monday, March 10th, to Saturday, March 15th, 1924.', *LNOJ 5* (1924), 495–744, at 524. Four other questions were asked about the application of Art. 15 of the Covenant and the responsibility of a State for a political crime. The Special Commission of Jurists gave the following answers: (1) The Council was not bound to examine whether a dispute submitted pursuant to Art. 15 was in fact "likely to lead to a rupture"; (2) Where a dispute was already referred to arbitration or judicial proceedings, the Council could not be seized; (3) Apart from Paragraph 8 of Art. 15, no exceptions could prevent the Council's examination of a dispute likely to lead to a rupture, not even the argument that the national honour or some vital interests were affected; (4) A State could be imputed the commission of a political crime within its national territory when it had failed to prosecute the culprits and had neglected to take the suitable preventive measures commensurate with the importance of the foreigner and the circumstances of his presence. See Sixth (Public) Meeting of the Council of the League, 13 March 1924: Ibid., 524. Regarding the latter answer to Question V, it is clear that when a State failed to its international obligations, it committed an international delinquency that justified the resort to reprisals. This was the only question that had nothing to do with the interpretation of the Covenant but

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Although the Council adopted the replies unanimously, Branting and the Uruguayan representative on the Council (Alberto Guani) entered a reservation regarding the enigmatic answer to the fourth question. On behalf of their Government, they stated that they did not recognise the use of armed reprisals as being compatible with the Covenant.[845]

The answer of the Special Commission of Jurists to the fourth question was couched in puzzling terms which actually met Italy's expectations. Indeed, as the Greek lawyer Kuriakos Tenekidēs correctly stressed, the Commission did not condemn the resort to armed reprisals but left the Council a wide margin of appreciation to judge the lawfulness of coercive measures in relation to the Covenant, as far as they did not constitute acts of war. Still, the answer did not provide any relevant criterion to distinguish acts of war from coercive measures.[846] In addition to the examination of the legality of armed reprisals on a case-by-case basis, the Commission also recognised the competence of the Council to recommend the withdrawal or maintenance of such measures. This last aspect was a question of procedure mostly independent of the question of the compatibility of those measures short of war with the Covenant.[847]

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dealt with a general principle of international law. See De Visscher, 'L'interprétation du pacte au lendemain du différend italo-grec' (above, n. 811), 388f. Strupp, who published in 1920 a study on international delinquency, entirely concurred with the Special Commission's answer on this point. See Karl Strupp, 'L'incident de Janina entre la Grèce et l'Italie', *RGDIP* 31 (1924), 255–84, at 280–1.

845 Sixth (Public) Meeting of the Council of the League, 13 March 1924: League of Nations, Council, 'Twenty-Eight Session of the Council. Held at Geneva from Monday, March 10th, to Saturday, March 15th, 1924.' (above, n. 844), 526. Guani who used to teach law at Montevideo expounded on his views in an article published in the *RGDIP*. Broadly similar to Politis's ideas, Guani also judged the recourse to military or naval force by way of reprisals as being tantamount to an act of war. See Guani, 'Les mesures de coercition entre membres de la Société des Nations envisagées spécialement au point de vue américain' (above, n. 802).

846 Ténékidès, 'L'évolution de l'idée des mesures coercitives et la Société des Nations' (above, n. 833), 403. Cf. Wright, 'Opinion of Commission of Jurists on Janina-Corfu Affair' (above, n. 835), 541–2, who believed that the coercive measures short of war could be legitimate under certain circumstances left to the appreciation of the Council. Nevertheless, Wright failed to provide the applicable criterion.

847 De Visscher, 'L'interprétation du pacte au lendemain du différend italo-grec' (above, n. 811), 388.

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ii) Renewal of the Doctrinal Debate

International lawyers spoke out in large number against the sibylline answer to the fourth question, which entrusted a large discretionary power to the Council. Some even suspected that political considerations might have biased the answer of the Special Commission of Jurists.[848] For Petrascu, the answer of that Commission was evasive and transformed a question of principle into a matter dealt on a case-by-case basis. Under these circumstances, the fear that a State might take advantage of its close relationship with the Council to avoid condemnation for a resort to armed reprisals could not be allayed.[849] This observation was especially true as far as the great Powers were concerned since they were permanent members of the Council. So, the use of armed reprisals might actually remain unpunished when a great Power had recourse to them.

The answer to the fourth question was sharply criticised by one of the very own jurists of the said Commission. Indeed, Belgian international lawyer Charles De Visscher regarded as incomplete the first part of the answer because it did not provide the criterion for distinguishing between lawful and unlawful coercive measures short of war. Nevertheless, in his opinion, the employment of armed reprisals was, in every instance, hardly lawful. He argued in fact that the peaceful settlement procedure of Art. 12 to 15 had drastically restricted the *ius ad bellum*. In this context, armed reprisals were no longer a milder method than war to settle irreconcilable differences, and their use before the exhaustion of that procedure and the end of the moratorium would then amount to a violation of the Covenant. That is why he maintained that the criterion to apply could not be subjective —i.e., depending on the reprisal-taking State's *animus*— or contingent —i.e., whether the target country did not resist— but had to be purely objective. So, only the intrinsic nature of the acts had to be assessed. It was, thus, a question of principle which could not differ from case to case. Altogether, the Council had no power to declare lawful an act of armed reprisals.[850]

848 See, e.g., Schücking and Wehberg, *Die Satzung des Völkerbundes* (above, n. 769), 509.

849 Petrascu, *Les Mesures de Contrainte Internationale qui ne sont pas la Guerre entre États Membres de la Société des Nations* (above, n. 828), 188–90.

850 De Visscher, 'L'interprétation du pacte au lendemain du différend italo-grec' (above, n. 811), 377–88.

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De Visscher's view should be regarded not as an authorised commentary but rather as a kind of separate opinion. Yet, the vast majority of legal scholars agreed with him that the use of armed reprisals was utterly incompatible with the Covenant and that a distinction between armed reprisals and acts of war on a subjective basis could only lead to abuses.[851] As a result, the view prevailed that armed reprisals should be assimilated to acts of war from a strictly objective standpoint devoid of subjective considerations.[852] A resort to military or naval force by way of reprisals should thus be treated as tantamount to war in the light of the League's charter.

The answer of the Special Commission of Jurists seemed to support such an interpretation as it was added that the Council ought "to decide immediately *having due regard* […] *to the nature of the measures adopted*" whether the coercive measures short of war should be maintained or withdrawn. Although this part of the answer dealt with the expediency of the measures

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851 Cf. Guani, 'Les mesures de coercition entre membres de la Société des Nations envisagées spécialement au point de vue américain' (above, n. 802); Politis, 'Les représailles entre Etats membres de la Société des Nations' (above, n. 19); Schücking and Wehberg, *Die Satzung des Völkerbundes* (above, n. 769), 508–10; Maccoby, 'Reprisals as a Measure of Redress Short of War' (above, n. 56), 71–3; Stéphan Ph. Nicoglou, *L'Affaire de Corfou et la Société des Nations*, Préface de M. Georges Scelle (Dijon: Libraire générale Félix Rey, F. Mettray et A. Dugrivel, 1925), 64–79, esp. 72–79; Hoijer, *Le Pacte de la Société des Nations* (above, n. 785), 218; André Nicolayévitch Mandelstam, 'La conciliation internationale d'après le Pacte et la jurisprudence du Conseil de la Société des Nations', *RdC* 14/IV (1926), 333–648, at 346–348; Ténékidès, 'L'évolution de l'idée des mesures coercitives et la Société des Nations' (above, n. 833), 410–2; Gonsiorowski, *Société des Nations et Problème de la Paix* (above, n. 778), 339–341; Petrascu, *Les Mesures de Contrainte Internationale qui ne sont pas la Guerre entre États Membres de la Société des Nations* (above, n. 828), 190.
Rafael Erich, international law professor at Helsinki and former Finnish Prime Minister, reached an analogous conclusion based on a broad interpretation of Art. 10 of the Covenant. This provision was for him the cornerstone of the League because it contained the ban on aggression and defined the protected interests of the Member States, namely their integrity and independence. Hence, the Council could not take into consideration the intent of the author of reprisals when one of these interests was affected. See Rafael Waldemar Erich, 'Quelques observations sur les mesures de coercition "pacifiques"', *RDI* 4 (1926), 16–9. Yet, according to Lowell, 'The Council of the League of Nations and Corfu' (above, n. 581), 171–2, the term 'aggression' in Art. 10 did not apply to acts of reprisals because nothing indicated that the framers of the Covenant meant to include them under this phrase.

852 Edouard Descamps, 'Le droit international nouveau. L'influence de la condamnation de la guerre sur l'évolution juridique internationale', *RdC* 31/I (1930), 399–559, at 518.

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employed rather than their propriety, it strongly hints that the Council had to apply an objective test.[853]

It should be stressed that the authors did not necessarily condemn armed reprisals *per se* but merely their resort before the exhaustion of the remedies provided for in the Covenant and the moratorium of three months.[854] As a matter of fact, the Covenant did not outlaw war, but solely the early recourse to war. The same was true for armed reprisals.

Nevertheless, some authors challenged the opinion of the assimilation of armed reprisals to war because they claimed that the use of force was allowed in peacetime, too. Therefore, there was a clear-cut distinction to be drawn between these two activities, and the only criterion capable of keeping the demarcation unblurred was, in fact, the subjective test of *animus*. Indeed, British international lawyer Arnold McNair believed that, in the absence of *animus belligerendi* and a declaration of war, there was no state of war, unless the defendant State elected to regard the measures of reprisals as war. Yet, he understood the limits of this theory in the context of the Covenant. That is why McNair held the view that only the reprisal-taking State should be subject to the sanctions of the Covenant if the target country decided to resist forcibly. He also proposed amending the Covenant by substituting the term 'war' for the more general expression of 'recourse to force' used in the Drago-Porter Convention.[855]

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853 Erich Kaufmann, 'Règles générales du droit de la paix', *RdC* 54/IV (1935), 313–620, at 583 fn. 1.

854 See, e.g., Hoijer, *La solution pacifique des litiges internationaux avant et depuis la Société des Nations* (above, n. 810), 430–1; Fauchille, *Traité de droit international public* (above, n. 728), 1st vol., Part. III, 696; Alfred Verdross, 'Règles générales du droit international de la paix', *RdC* 30/V (1929), 275–517, at 493–496.

855 McNair, 'The Legal Meaning of War, and the Relation of War to Reprisals' (above, n. 605), esp. 38–46. Cf. Cavaglieri, 'Règles générales du droit de la paix' (above, n. 459), 578–9; Scelle, 'Règles générales du droit de la paix' (above, n. 17), 677. Both authors also believed that armed reprisals could be differentiated from war by applying the subjective test. However, Cavaglieri used to defend in 1915 the opposite view, namely that armed reprisals were inherently acts of war and that the intent of the assailant State had no influence to define the action. See Arrigo Cavaglieri, 'Note critiche su la teoria dei mezzi coercitivi al difuori della guerra', *RivDirInt* 9 (1915), 23–49 & 305–342. Yet, his opinion shifted in the course of fourteen years because he considered that the subjective test of *animus* corresponded more precisely to international practice which permitted the use of coercion short of war as something compatible with a state of peace. Nevertheless, Scelle critically pointed out that strong Powers could easily pretext the absence of *animus belligerendi* to deny the existence of a state of war and thus take advantage of the fiction that peace was not broken.

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Perhaps the most noteworthy opinion in this group was expressed by the prolific German international legal scholar Karl Strupp for whom a right to reprisals prevailed over the obligations imposed by the Covenant. Indeed, he explained that the resort to reprisals was the legitimate response of an aggrieved State to a wrongful act imputed to another country. For him, international delinquency justified derogation from Art. 10 of the Covenant. Moreover, he stressed that the resort to reprisals could not be conditional to the exhaustion of the procedure described in the Articles 12 and 15 because these provisions aimed, in his opinion, solely at the limitation of the recourse to war. The issue leading to some acts of reprisals could be referred anyway to the attention of the Council, but this did not justify any assimilation of armed reprisals to war. The answer of the Special Commission of Jurists to the fourth question should thus be read as asking whether the coercive measures short of war were justified or not by the right of reprisals —what would make them either licit or illicit.[856]

Still, with the notable exception of Strupp, lawyers mainly spoke with one voice against the resort to armed reprisals by way of derogation from the Covenant.

iii) Opinion of the Small Member States

Since the League's end was the preservation of peace, many Member States had believed until the Corfu incident that coercion was no longer allowed under the Covenant.[857] An author said: "With a League of Nations ready to inquire and adjudge in cases of grievance, there should be no reason why a large nation should be at liberty to resort to forcible measures of compulsion against a smaller one."[858] All the more so as the hegemons guaranteed the world peace.[859] However, the Corfu incident highlighted

856 Strupp, 'L'incident de Janina entre la Grèce et l'Italie' (above, n. 844), 280–4.

857 This was Politis's opinion before the Council when he said: "I thought that between Members of the League of Nations there was no longer any place for measures such as an ultimatum and coercion." (Sixth (Private) Meeting of the Council of the League, 1 September 1923: League of Nations, Council, 'Twenty-Sixth Session of the Council. Held at Geneva from Friday, August 31st, to Saturday, September 29th, 1923.' (above, n. 816), 1281).

858 Lowell, 'The Council of the League of Nations and Corfu' (above, n. 581), 174.

859 Hill, 'The Janina-Corfu Affair' (above, n. 814), 100.

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the fact that the League's machinery did not apply to the great Powers in the same way as to the other Member States.[860]

The issue of the compatibility of armed reprisals with the Covenant was thus far more than just an academic topic. In fact, many minor countries expressed their concern and disapproval with the report of the Special Commission of Jurists. Faced with such an outcry, the Council was urged by the Assembly to invite all the Governments of Member States to send their criticisms.[861]

In the end, twenty-one Member States replied.[862] The split between great and small Powers was visible. On the one hand, the four permanent Members of the Council —Great Britain, France, Italy and Japan— did not present any observations; they unreservedly approved the Commission's answers.[863] On the other, twelve small Powers raised objections against the reply to the fourth question.[864] The number of replies and their extent, which sometimes took the form of a real memorandum, reveal that this aspect of the report was the most disputed and perhaps the most important for the Governments of small States, but arguably also for the future of the League.

The twelve Governments in question vehemently expressed their concern that considerations of expediency might govern the legality of coercive measures short of war because of the absence of standards which specified when measures of coercion short of war could be considered consistent with the Covenant. They feared that this lacuna might put them at risk of being abusively targeted by strong Powers. Thus, most of them unsur-

860 Cf. Ibid., 101.

861 Sixteenth (Public) Meeting of the Council of the League, 26 September 1925: League of Nations, Council, 'Thirty-Fifth Session of the Council. Held at Geneva from Wednesday September 2nd, to Monday, September 28th, 1925.', *LNOJ* 6 (1925), 1297–548, at 1393.

862 Most of them were European States, four American (Brazil, Cuba, Salvador, Uruguay), one African (South Africa) and one Asian (Siam).

863 For German international law scholar Erich Kaufmann, the approval by these nations —as well as Belgium, Brazil and Spain— was conclusive to raise the reply of the Special Commission of Jurists as a source of positive international law since they were the main actors in respect of coercion. See Kaufmann, 'Règles générales du droit de la paix' (above, n. 853), 583.

864 Viz. Denmark, Finland, Greece, Hungary, the Netherlands, Norway, Poland, Salvador, Siam, Sweden, Switzerland and Uruguay.

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prisingly defended the inconsistency of the measures short of war with the letter and spirit of the Covenant.[865]

It was unprecedented that so many States simultaneously criticised the practice of armed reprisals with such severity.[866] Therefore, the Council could not turn a blind eye on the reactions of the Member States. It had a choice to make: either a new Committee should be appointed to formulate new answers, or the Council could simply take into consideration the replies of the Member States as a kind of guidance to read the answers of the Special Commission of Jurists. This latter option was preferred as the Japanese delegate specified that the Council had never intended to impose the Commission's answers as an authoritative statement of law.[867]

The Council, thus, succeeded in retaining a large margin of appreciation. The chief criticism of small States that the legality of coercive measures short of war could not be determined in advance due to the absence of criterion was not met at all by the Council. The Council was then free to choose between the subjective and the objective test in order to decide

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865 See Annex 858: League of Nations, Council, 'Thirty-Eight (Extraordinary Meeting) and Thirty-Ninth Sessions of the Council. Held at Geneva on Friday, February 12th, 1926, at 3 p.m; and from Monday, March 8th, to Thursday, March 18th, 1926.', *LNOJ* 7 (1926), 491–642, at 597–612. In addition to the twelve Governments, the Polish Government also pointed out the deficiency of the answer of the Special Commission of Jurists to the fourth question on account of the absence of criteria. Yet, Poland considered that coercive measures involving armed force like the occupation of territory were not in itself incompatible with the Covenant. See the observations of the Polish Branch of the International Law Association, Annex 858: Ibid., 605.

866 Interestingly, around the same period, the adoption of a convention declaring the illegality of reprisals in peacetime was advocated, and the matter was even brought to the attention of the Council. See League of Nations, Permanent Secretariat, *Proposed Convention declaring the Illegality of Peace-Time Reprisals*, The President Secretary General of the International Federation of the League of Nations Societies, Brussels – Forward copy of a resolution adopted by the Representative Council of the International Federation of League of Nations Societies at Lausanne on 29 October drawing the attention of the League Council to the resolution adopted by the Federation in Warsaw in July 1925 recommending the drawing up of such a Convention (Geneva, 1925; <http://biblio-archive.unog.ch/detail.aspx?ID=224823>, accessed 13 November 2018). However, no such convention came to fruition.

867 Fifth (Public) Meeting of the Thirty-Ninth Session of the Council of the League, 17 March 1926: League of Nations, Council, 'Thirty-Eight (Extraordinary Meeting) and Thirty-Ninth Sessions of the Council. Held at Geneva on Friday, February 12th, 1926, at 3 p.m; and from Monday, March 8th, to Thursday, March 18th, 1926.' (above, n. 865), 519–20.

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whether the resort to such measures amounted to a breach of the Covenant.[868] Moreover, the observations of small States had a non-binding character for the Council, which could thus assess freely on a case-by-case basis the compatibility of the measures employed with the Covenant.

As a result, the legal situation of armed reprisals in relation to the Covenant was not clarified at all despite the outcry against their use. This lacuna seemed to benefit the great Powers since they more than anyone else enjoyed a close relationship with the Council and could in this capacity persuade its members to waive the application of sanctions. This link obviously placed them in a privileged position in comparison to the other Member States.

3. The Spectre of Armed Reprisals Looming over the League

(a) The Greek-Bulgarian Incident, 1925

Following the Italian bombardment and occupation of Corfu, the League addressed the question of reprisals, but failed to lift a great deal of uncertainty regarding the resort to this measure in relation to the Covenant. In the years that followed, the opportunity to fill the lacuna was never to present itself again. And yet, the issue still remained highly relevant for the League as shown by the Greek-Bulgarian conflict of 1925 and the Japanese invasion and occupation of Manchuria in the early 1930s.

The former case occurred a bit more than a year after the settlement of the Italo-Greek conflict, during the period of time within which the Member States could communicate their observations on the report of the Special Commission of Jurists. On 22 October 1925, the Bulgarian Government appealed to the League following the outbreak of hostilities with Greece. Greek forces had invaded Bulgaria, taken control of several posts on the Bulgarian side of the frontier and even bombarded the town of Petrich. This military action was the consequence of a regrettable incident on the border between the two countries where a Greek sentry lost his life. Greece claimed the right to legitimate defence on account of a Bulgarian

868 Kotzsch, *The concept of war in contemporary history and international law* (above, n. 69), 160.

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attack on Greek outposts.[869] However, in the light of the demands of the Greek Government, the whole operation can be viewed as partially having the character of reprisals, too. Indeed, Greece sent an ultimatum asking the Bulgarian Government for a formal apology, the punishment of those responsible and the payment of a large sum of money for redress.[870]

The Council immediately enjoined a ceasefire and the withdrawal of troops behind the respective national frontiers.[871] In private, the representatives of the great Powers contemplated the application of sanctions against Greece.[872] Nevertheless, both parties involved in the conflict complied with the Council's recommendation. A commission of enquiry was then set up by the Council to clarify the causes of the conflict and establish the responsibility of each Government.[873] This commission came to the conclusion that the responsibility was divided, but provided for substantial damages to be paid by Greece because of destructions and injuries resulting from the military invasion.[874]

Greece and Bulgaria approved the settlement. Yet, the Greek representative raised the question of the legitimacy of the coercive measures in the present case to compel the payment of reparations and force the withdrawal of the Bulgarian troops. Indeed, he contended that the resort to such

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869 Cf. the telegrams sent by the Bulgarian and Greek Governments to the Secretary-General on 22 and 24 October 1925, read to the Council of the League, First (Public) Meeting, 26 October 1925: League of Nations, Council, 'Thirty-Sixth (Extraordinary) Session of the Council. Held at Paris from Monday October 26th, to Friday October 30th, 1925.', *LNOJ* 6 (1925), Part II, 1691–722, at 1696–1697; as well as the statement of the facts by Bulgarian representative Mr Marfoff and Greek representative Mr Carpanos at the Second (Public) Meeting of the Council of the League, 27 October 1925: Ibid., 1701–1704 and 1704–1706.

870 See Ténékidès, 'L'évolution de l'idée des mesures coercitives et la Société des Nations' (above, n. 833), 406.

871 See the First (Public) Meeting of the Council of the League, 26 October 1925: League of Nations, Council, 'Thirty-Sixth (Extraordinary) Session of the Council. Held at Paris from Monday October 26th, to Friday October 30th, 1925.' (above, n. 869), 1697–700.

872 James Barros, *The League of Nations and the Great Powers*: *The Greek-Bulgarian Incident, 1925* (Oxford: Clarendon Press, 1970), 78–81.

873 Fourth (Public) Meeting of the Council of the League, 29 October 1925: League of Nations, Council, 'Thirty-Sixth (Extraordinary) Session of the Council. Held at Paris from Monday October 26th, to Friday October 30th, 1925.' (above, n. 869), 1711–3.

874 See Annex 815: League of Nations, Council, 'Thirty-Seventh Session of the Council. Held at Geneva from Monday, December 7th, to Wednesday, December 16th, 1925.', *LNOJ* 7 (1926), 101–366, at 196–210.

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measures had not been intended to constitute a violation of the Covenant.[875] Nevertheless, the Council confirmed the amount of the indemnity owed by Greece.[876]

While this affair presents parallels with the Corfu incident, there were also differences.[877] One of the most striking was the role played by the Council and the success of its intervention. Unlike in 1923, the executive body of the League did not tergiversate. It adopted recommendations at once and the application of Art. 16 of the Covenant was even on the table. In fact, the Council faced in this case neither serious legal and jurisdictional issues nor a question of high politics because only two small Member States were involved.[878]

But beyond that and most importantly, the Council did not display as much permissiveness towards the use of coercive measures short of war as at the time of the bombardment and occupation of Corfu. As a matter of fact, Greece was held responsible for the invasion of the Bulgarian territory and the shelling of Petrich, whereas, for the very same kind of violent acts, Italy did not suffer any consequences in 1923. Furthermore, the Council even adopted a report submitted by the representatives of Great Britain, Belgium and Japan, which laid down the principle that "where a territory is violated without sufficient cause, reparation is due, even if at the time of the occurrence it was believed by the party committing the act of violation that circumstances justified the action."[879]

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875 See the statement of Mr Rentis, First (Public) Meeting of the Council of the League, 7 December 1925: Ibid., 115.

876 Twelfth (Public) Meeting of the Council of the League, 14 December 1925: Ibid., 172–7.

877 For a comparison, see Ténékidès, 'L'évolution de l'idée des mesures coercitives et la Société des Nations' (above, n. 833), 408–10.

878 Walters, *A History of the League of Nations* (above, n. 767), 315. Cf. Schwarzenberger, *Power Politics* (above, n. 33), 363–9, who explained that the League of Nations was able to settle disputes between small States, providing that the great Powers mediated between the parties and the conflict was geographically close to them. But when these parameters were not met (e.g., the dispute between small States was not within their reach or two great Powers clashed), the League was powerless. As for conflicts like the Corfu incident between a great Power and a small one, the success of the League's action depended largely on the great Power's reasonableness and the attitude of the other great Powers.

879 Twelfth (Public) Meeting of the Council of the League, 14 December 1925: League of Nations, Council, 'Thirty-Seventh Session of the Council. Held at Geneva from Monday, December 7th, to Wednesday, December 16th, 1925.' (above, n. 874), 173. This statement of the Council was unmistakably related to the Treaty of Mutual Guaranteed recently signed at Locarno by Germany, Bel-

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The Council's opinion was a clear condemnation of the use of force in peacetime, which some Member States saw as a reversal of jurisprudence.[880] Indeed, the Council seemed to have adopted the objective test in the present case. However, the answer of the Special Commission of Jurists to the fourth question allowed a case-by-case examination. So, it cannot be deduced that the Council ruled out the subjective test for good.[881]

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gium, France, Great Britain and Italy. Indeed, Art. 2 of the said agreement provided that attacks, invasions or resorts to war were forbidden, with some exceptions though. Art. 3 contained too the undertaking to settle "by peaceful means" disputes "which it may not be possible to settle by the normal methods of diplomacy." (Locarno Treaty, 16 October 1925: League of Nations, Permanent Secretariat, *Publication of Treaties and International Engagements Registered with the Secretariat of the League of Nations* (LNTS 54; [Geneva]: [League of Nations], 1926–1927), 293). Thus, this treaty also had a restrictive effect on the resort to armed reprisals. Cf. Hans Wehberg, 'Le problème de la mise de la guerre hors la loi', *RdC* 24/IV (1928), 145–306, at 197; Müller, *Wandlungen im Repressalienrecht* (above, n. 21), 91–7.

880 In fact, the Greek and Swedish Governments stressed the departure of the Council from its previous attitude at the time of the Corfu incident in their reply to the Council's enquiry regarding the answers of the Special Commission of Jurists. They regarded it as evidence that the Council came around to the opinion of the incompatibility of the measures of coercion short of war with the provisions of the Covenant. See Annex 858: League of Nations, Council, 'Thirty-Eight (Extraordinary Meeting) and Thirty-Ninth Sessions of the Council. Held at Geneva on Friday, February 12th, 1926, at 3 p.m; and from Monday, March 8th, to Thursday, March 18th, 1926.' (above, n. 865), 600 and 607. T. P. Conwell-Evans, *The League Council in Action*: *A Study of the Methods employed by the Council of the League of Nations to prevent War and to settle International Disputes* (London: OUP, 1929), 89, concurred with the view that the experience of the Greco-Bulgarian conflict conferred from then on a narrow interpretation on the answer to the fourth question.

881 As a matter of fact, other bodies of the League still regarded the subjective criterion of *animus* as a valid test. For instance, the Secretary-General said about the coercive measures that the Member States could take under the sanctions Article of the Covenant: "It may be noted here that, from the legal point of view the existence of a state of war between two States depends upon their intention and not upon the nature of their acts. Accordingly measures of coercion, however drastic, which are not intended to create and are not regarded by the State to which they are applied as creating a state of war, do not legally establish a relation of war between the States concerned." (League of Nations, Secretary-General, 'Annex 964. Legal position arising from the enforcement in time of peace of the measures of economic pressure indicated in Article 16 of the Covenant, particularly by a maritime blockade. Report by the Secretary-General of the League submitted to the Council on June 15th, 1927' (above, n. 799), 834).

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(b) Japan's Invasion of Chinese Manchuria

The Kellogg-Briand Pact of 1928 proclaimed the renunciation of war as an instrument of national policy (Art. 1) and enjoined the parties to settle their disputes solely through 'pacific means' (Art. 2).[882] However, peace was jeopardised again in the early 1930s.

In 1931, hostilities between Japan and China broke out in Manchuria.[883] Japanese troops marched into Manchuria in the night of 18 to 19 September 1931, attacked Chinese barracks and took control of the town of Mukden (now Shenyang). Japan justified the invasion by claiming self-defence as a result of the attack by Chinese fighters on a portion of train tracks be-

882 General Treaty for Renunciation of War as an Instrument of National Policy, 27 August 1928: League of Nations, Permanent Secretariat, *Publication of Treaties and International Engagements Registered with the Secretariat of the League of Nations* (LNTS 94; [Geneva]: [League of Nations], 1929), 63.
Most authors shared the view that while Art. 1 outlawed only war in the narrow sense, Art. 2 actually introduced a restriction of the use of armed reprisals. Cf. Axel Møller, 'The Briand-Kellogg Pact', *NordJIntLaw* 3 (1932), 94–107, at 95–98; Quincy Wright, 'When does war exist?', *AJIL* 26 (1932), 362–8, at 367–368; Müller, *Wandlungen im Repressalienrecht* (above, n. 21), 98–9; Quincy Wright, 'The Meaning of the Pact of Paris', *AJIL* 27 (1933), 39–61, at 52–53 and 55. German international lawyer Hans Wehberg, however, argued that the means of settlement referred to in Art. 2 were in fact *pacific* insofar as they did not *relate to war*. See Wehberg, 'Le problème de la mise de la guerre hors la loi' (above, n. 879), 258 fn. 2; and the concurring opinion of Pépy, 'Après les ratifications du Plan Young. Révision et Sanctions' (above, n. 23), 469–73. But cf. American Institute of International Law, 'Texts of Projects', *AJIL* 20/4 (1926), Supplement, 300–87, at 382–383; J. L. Brierly, 'International Law and Resort to Armed Force', *CLJ* 4 (1932), 308–19, at 314f.; Gottschalk, 'Die völkerrechtlichen Hauptprobleme des Mandschureikonflikts' (above, n. 74), 215–28. Still, Wehberg advocated that the outlawing of war should be accompanied concretely by the ban on measures involving military force in time of peace like the military occupations of territory (Wehberg, 'Le problème de la mise de la guerre hors la loi' (above, n. 879), 271–3).

883 The dispute between both countries in the region had deep roots. See Carl Walter Young, *Japan's Special Position in Manchuria*: *Its Assertion, Legal Interpretation and Present Meaning* (Japan's Jurisdiction and International Legal Position in Manchuria, 1; Baltimore: The Johns Hopkins Press, 1931); League of Nations, Commission of Enquiry into the Sino-Japanese Dispute, *Appeal by the Chinese Government*: *Report of the Commission of Enquiry* (Series of League of Nations Publications, VII. Political. 1932. VII. 12; [Geneva]: [s.n.], 1932), 13–61.

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longing to a Japanese railway company.[884] That is why China made a formal appeal to the Council on 21 September, pursuant to Article 11 of the Covenant.[885]

The Commission of Enquiry set up by the Council submitted a report and concluded that the incident that night did not justify the Japanese military operations to be called measures of legitimate self-defence.[886] Indeed, the hostilities with China had continued to the point that Japan occupied the whole Manchuria and, as a consequence thereof, a new independent State called Manchukuo had been created.[887] However, because of the Council's indecisiveness, China asked for the transfer of the issue to the Assembly which quickly threw itself into the examination of the case wholeheartedly and ultimately adopted the report of the Commission of En-

884 See the Japanese statement of facts and plea: Ibid., 67–9; and Japanese Delegation to the League of Nations, *Japan's Case in the Sino-Japanese Dispute*: *As Presented Before the Special Session of the Assembly of the League of Nations. Geneva, 1933* ([s.l.]: [s.n.], [1933]), 11 and 43. On the Japanese international law discourse in the context of the Manchurian conflict, see further Urs Matthias Zachmann, *Völkerrechtsdenken und Außenpolitik in Japan, 1919–1960* (Studien zur Geschichte des Völkerrechts, 29; Baden-Baden: Nomos, 2013), 159–203.

885 League of Nations, Commission of Enquiry into the Sino-Japanese Dispute, *Appeal by the Chinese Government* (above, n. 883), 5. However, China imposed at the same time an economic boycott on Japanese trade by way of reprisals. This exacerbated the conflict. See League of Nations, Assembly, 'League of Nations Assembly Report on the Sino-Japanese Dispute', *AJIL* 27/3 (1933), Supplement: Official Documents, 119–53, at 145. About the legality of the measure, cf. Kenzo Takayanagi, 'On the Legality of the Chinese Boycott', *Pacific Affairs* 5 (1932), 855–62; Yuen-Li Liang, 'Some Legal Issues in the Sino-Japanese Controversy before the League Assembly.', *The China Law Review* 6 (1933), 213–24, at 220–224. The latter article was published in German too: Yuen-Li Liang, 'Rechtsprobleme des Mandschureikonflikts', *ZVölkR* 17 (1933), 1–12, at 8–12.

886 League of Nations, Commission of Enquiry into the Sino-Japanese Dispute, *Appeal by the Chinese Government* (above, n. 883), 6–10 and 71. See about the so-called Lytton report, Arthur K. Kuhn, 'The Lytton Report on the Manchurian Crisis', *AJIL* 27 (1933), 96–100.

887 League of Nations, Commission of Enquiry into the Sino-Japanese Dispute, *Appeal by the Chinese Government* (above, n. 883), 97. The creation of Japan's Manchurian puppet State was the event which prompted the U.S. Secretary of State Henry L. Stimson to lay down the principle of the non-recognition of territorial conquests —the so-called Stimson Doctrine. See thereupon Quincy Wright, 'The Stimson Note of January 7, 1932', *AJIL* 26 (1932), 342–8; David Turns, 'The Stimson Doctrine of Non-Recognition. Its Historical Genesis and Influence on Contemporary International Law', *Chinese JIL* 2 (2003), 105–43.

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quiry, which caused the withdrawal of Japan from the League in March 1933.[888]

Japan's withdrawal represented a bitter failure for the League and heralded its end. In fact, the Council's reluctance to declare the existence of war in the Far East had weakened the League.[889] The confidence of many small Powers in the Covenant system had been shaken and led them to suspect that the Council and more precisely the great Powers had some sympathy with Japan's action.[890]

The conflict rekindled the issue around armed reprisals and more generally the use of force in peacetime.[891] Indeed, once again, the absence of formal war, i.e. in the legal or technical sense, prevented the application of sanctions against the Covenant-breaker.[892] Although the Japanese military operation in Manchuria was not an act of reprisals,[893] the employment of

888 See Walters, *A History of the League of Nations* (above, n. 767), 487–95.

889 See Elbridge Colby, 'Was There War in the East?', *GeoLJ* 21 (1932–1933), 315–26, at 323–326.

890 Walters, *A History of the League of Nations* (above, n. 767), 499.

891 On the question of the distinction between the use of force in time of peace and war, see, e.g., George Grafton Wilson, 'Use of Force and War', *AJIL* 26 (1932), 327–8; Kunz, *Kriegsrecht und Neutralitätsrecht* (above, n. 16), 7–11; Kappus, *Der völkerrechtliche Kriegsbegriff in seiner Abgrenzung gegenüber den militärischen Repressalien* (above, n. 16).

892 In fact, on the existence of war depended the automatic enforcement of Art. 16 of the Covenant. See Hersch Lauterpacht, '"Resort to War" and the Interpretation of the Covenant during the Manchurian Dispute', *AJIL* 28 (1934), 43–60, at 44–45. However, Japan avoided calling its action war and China refrained from declaring war lest it would be treated as being the Covenant-breaker. In addition, no third States openly considered that war had begun and made a declaration of neutrality. See Clyde Eagleton, 'The attempt to define war', *IntlConciliation* 15 (1933), 233–87, at 254–255. About the term 'aggression', see Quincy Wright, 'The Concept of Aggression in International Law', *AJIL* 29 (1935), 373–95. Nevertheless, the Lytton report strongly implied the existence of war: "It is a fact that, *without a declaration of war*, a large area of what was indisputably the Chinese territory has been forcibly seized and occupied by the armed forces of Japan […]." (League of Nations, Commission of Enquiry into the Sino-Japanese Dispute, *Appeal by the Chinese Government* (above, n. 883), 127 (emphasis added)).

893 According to Crawford M. Bishop, the killing of Captain Nakamura by Chinese forces about 27 June 1931 might have justified the exercise of reprisals. Yet, not only did the Japanese action exceed mere reprisals, but also China acknowledged its responsibility for the crime and was willing to give redress without delay. See Crawford M. Bishop, 'International Law and the Manchurian Question', *GeoLJ* 21 (1932–1933), 306–14, at 308–310. Japan claimed instead to have acted in self-defence.

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armed reprisals remained a dangerous method of waging war in disguise and thence evading the restrictions imposed by the Covenant and the Kellogg-Briand Pact.[894] In this context, the delegates of small States to the Assembly vigorously condemned the resort to armed force under the Covenant.[895]

Other conflicts around the same time also contributed to this general concern.[896] For example, in July 1932, the situation on the frontier between Bolivia and Paraguay in the strategic Chaco region worsened. Bolivian troops captured three Paraguayan frontier outposts by way of reprisals because of alleged Paraguayan attacks.[897] This event led to the outbreak of the Chaco War.[898]

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894 Cf. Scelle, 'Règles générales du droit de la paix' (above, n. 17), 677; Kunz, *Kriegsrecht und Neutralitätsrecht* (above, n. 16), 8 fn. 37; Grewe, *Epochen der Völkerrechtsgeschichte* (above, n. 24), 735; Neff, *War and the Law of Nations* (above, n. 2), 296–7. See further Gottschalk, 'Die völkerrechtlichen Hauptprobleme des Mandschureikonflikts' (above, n. 74), 194–215.

895 See the statements of the delegates of Colombia, Sweden, Finland, Denmark, Switzerland, Czechoslovakia, Uruguay, Panama, Salvador, Haiti, Bolivia at the Second, Third, Fourth and Fifth Meetings of the General Commission, from 4 to 8 March 1932: League of Nations, Assembly, 'Records of the Special Session of the Assembly convened in virtue of Article 15 of the Covenant at the Request of the Chinese Government.', *LNOJ* (1932), Special Supplement No. 101, 1st vol., 48–50, 52–53, 55, 57, 66–67, 71–73 and 77. The great Powers, on the other hand, did not have the courage to challenge this view and hence remained silent. See Eagleton, 'The attempt to define war' (above, n. 892), 280.

896 The Leticia dispute between Peru and Colombia in 1932–1933 led to hostilities which were not justified as reprisals by either side. But see Kunz, *Kriegsrecht und Neutralitätsrecht* (above, n. 16), 8 fn. 34. Nevertheless, the absence of a declaration of war prior to the outbreak of the hostilities, the denial of the existence of a state of war by the parties involved and the failure of the League of Nations and other third States to qualify the conflict as war threw a veil of doubt over the reality of a clear-cut line demarcating peace from war. About the Leticia conflict, see L. H. Woolsey, 'The Leticia Dispute between Colombia and Peru', *AJIL* 27 (1933), 317–24; J.-M. Yepes, 'L'Affaire de Leticia entre la Colombie et le Pérou. Étude Historique et Juridique', *RDI* 11 (1933), 133–71.

897 Telegram from the Bolivian Government to the President-in-Office of the Council, 3 August 1932: League of Nations, Permanent Secretariat, 'Documentation concerning the Dispute between Bolivia and Paraguay', *LNOJ* 13 (1932), 1573–86, at 1578. Paraguayan representative Caballero de Bedoya, however, protested against this argumentation: "Private justice between States in the form of reprisals can hardly be justified, now the League of Nations exists, more particularly between two of its Members." (Sixth (Public) Meeting of the Council of the League, 3 February 1933: League of Nations, Council, 'Seventieth Session of the Council. Held at Geneva from Tuesday, January 24th, to Friday, Febru-

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Those incidents provoked a reaction in legal doctrine. In fact, many authors contended that the use of force should be purely and simply identified with war, based on the objective test which erased the distinction between the two activities, for the sake of the provisions on the renunciation of war in the Covenant and the Kellogg-Briand Pact.[899] Even Strupp, who previously supported the subjective test of *animus*, rallied behind this view following the Sino-Japanese conflict in the Far East which made him realise that armed reprisals should be regarded as equivalent to the resort to war.[900]

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ary 3rd, 1933.', *LNOJ* 14 (1933), 173–381, at 261). The same later declared: "In the present dispute, *Bolivia invaded our territory while carefully avoiding a declaration of war, upon the pretext of acts of armed coercion, reprisals and measures of military constraint carried out in time of peace*. These are illicit acts condemned by international law and, with still more reason, prohibited to the Members of the League. The Covenant has done away with this real international anarchy by withdrawing from the States the unusual right of taking justice into their own hands. *In order to bring that state of hypocrisy to an end, Paraguay had to declare war and thus she might once more appear, on a superficial examination, as the aggressor*." (Fifth (Public) Meeting of the Council of the League, 20 January 1934: League of Nations, Council, 'Seventy-Eighth Session of the Council. (Part II). Held at Geneva from Monday January 15th, to Saturday, January 20th, 1934.', *LNOJ* 15 (1934), 237–71, at 248 (emphasis added)).

898 On the Chaco War, see Walther L. Bernecker and Florian B. Meister (eds.), *Der Kampf um die «grüne Hölle»: Quellen und Materialien zum Chaco-Krieg (1932–1935)*, unter Mitarbeit von Michael Herzig (Zürich: Chronos, 1993). See further Charles G. Fenwick, 'The Arms Embargo against Bolivia and Paraguay', *AJIL* 28 (1934), 534–8.

899 See Brierly, 'International Law and Resort to Armed Force' (above, n. 882), 314; John Fischer Williams, 'The Covenant of the League of Nations and War', *CLJ 5* (1933), 1–21, at 14–17; Hindmarsh, 'Self-Help in Time of Peace' (above, n. 17), 325.

900 "Gerade der Ostasienkonflikt erleichtert eine Stellungnahme, ob unter der Herrschaft von Völkerbund und Kelloggpakt noch *kriegerische* (militärische) Repressalien als zulässig zu erachten sind. Unter *starker Ueberschätzung des Willens der in Betracht kommenden Staaten, der die Abgrenzung zwischen Krieg und Repressalie unzweifelhaft allein ermöglicht, habe ich bisher die kriegerischen Repressalien für zulässig angesehen. Ich vermag diese Auffassung nicht aufrechtzuerhalten: Das Kollektivinteresse und das Prinzip von Treu und Glauben erweisen sich heute als stärker*. Sie führen beide Gesamtinteresse der Staaten der Welt dahin, auch ohne daß ein besonderer neuer Rechtssatz notwendig wäre (so sehr er wünschenswert ist!), *Handlungen, die nach objektiven Gesichtspunkten als kriegerische erscheinen müssen* (wie dies unzweifelhaft im östlichen Konflikt der Fall ist), *als mit Geist und Inhalt von Völkerbunds- und Kelloggpakt unvereinbar und demgemäß als unzulässig erscheinen zu lassen*." (Karl Strupp, *Grundzüge des positiven Völkerrechts* (Der Staatsbürger: Sammlung zur Einführung in das öffentliche Recht, 2/3; 5th edn.,

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However, the problem was chiefly terminological since the renunciation of war in the Covenant and the Kellogg-Briand Pact received a restricted interpretation. Indeed, the terms 'war' and 'resort to war' were understood as meaning war in the legal sense, viz. a state of war resulting from a declaration of war. This meaning then deprived these legal instruments of practically all value because armed reprisals and other *acts* of war fell outside their scope.[901] So, as U.S. law professor Clyde Eagleton rightly observed, either the existing rules should be amended by replacing the term 'war' by 'armed force', or it should be agreed on an enlarged and more precise definition of war. For him, the solution lied in the amendment of the existing treaties.[902]

On the other hand, Hersch Lauterpacht proposed a broader interpretation of 'resort to war' which he called "a constructive state of war". He, indeed, argued that the existence of a state of war could result not only from the express or implied *animus belligerendi* of the parties, but also from the recognition of belligerency by a third State. The blockade of Formosa in 1884 and the one of Venezuela in 1902–1903 were evidence in favour of this interpretation which, he believed, reconciled the letter of the Covenant with its spirit, without proceeding to an unwarranted extension of the meaning of the League's charter.[903]

Bonn/Köln: Ludwig Röhrscheid, 1932), 200 (emphasis in original)). See also Karl Strupp, 'Les règles générales du droit de la paix', *RdC* 47/I (1934), 263–595, at 571–572.

901 Cf. Edwin Montefiore Borchard, '"War" and "Peace"', *AJIL* 27 (1933), 114–7; Eagleton, 'The attempt to define war' (above, n. 892).

902 Ibid., 286–7. See also the similar opinion of the representative of El Salvador at the Fifth Meeting of the General Commission, 8 March 1932: League of Nations, Assembly, 'Records of the Special Session of the Assembly convened in virtue of Article 15 of the Covenant at the Request of the Chinese Government.' (above, n. 895), 1st vol., 71.

903 Lauterpacht, '"Resort to War" and the Interpretation of the Covenant during the Manchurian Dispute' (above, n. 892), esp. 51–55. Cf. Wright, 'When does war exist?' (above, n. 882); Eagleton, 'The attempt to define war' (above, n. 892), 265–273 and 283. However, reprisals could normally not affect third States at all, unlike war. See Cavaglieri, 'Règles générales du droit de la paix' (above, n. 459), 578–81.

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IV. Involvement of the Institute of International Law

1. Session of Paris, 1934

Following the reopening of the discussion of the use of force in peacetime so much at an inter-state level as in legal doctrine, the Institute of International Law resolved to examine the compatibility of reprisals within the current international law and to determine the applicable rules as well as the *lex ferenda* on this topic.[904] Politis was appointed rapporteur to this end and the results of the preparatory work by the fourth commission were presented to the Institute at the session of Paris which took place in mid-October 1934.[905]

In a draft resolution, the fourth commission expressed the opinion that there was an urgent need to adapt the legal regime of reprisals to the new international state of affairs. Indeed, it pointed out that, while the resort to reprisals had in the past been justified by the deficiencies of international law and the absence of organisation of the international community, the recent improvements in the peaceful settlement of disputes and the limitation of war had made reprisals mostly undesirable.[906] Therefore, the commission submitted a draft regulation which aimed to fill the existing lacuna in international law and thereby prevent the arbitrariness of Governments.[907]

Articles 1 and 2 of the draft dealt with the scope. The first provision defined reprisals as illegal measures decided and taken by a State, yet exceptionally permitted in response to wrongful acts committed against it by another State, for the purpose of compelling the latter to return to legality. This return to legality could take the form of either reparation or the cessa-

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904 Politis's preliminary report: Institut de Droit International (ed.), *Session de Paris, Octobre 1934* (above, n. 5), 23. But cf. "Der Jurist kann aber nur das geltende Recht darstellen, sowie kritisch auf Schwächen hinweisen; es ist aber nicht seines Amtes, noch steht es in seiner Macht, das Recht zu verbessern." (Kunz, *Kriegsrecht und Neutralitätsrecht* (above, n. 16), 11).

905 See Politis's preliminary report and questionnaire as well as the proposal of drafts and the responses of all the members of the fourth commission in Annexes I and II: Institut de Droit International (ed.), *Session de Paris, Octobre 1934* (above, n. 5), 23–161. That commission was formed by Sir Thomas Barclay, Maurice Bourquin, Yves de la Brière, Jacques-Louis-Eugène Dumas, Rafael Erich, Herbert Kraus, André Mandelstam, Henri Rolin, Karl Strupp, Östen Undén, Charles De Visscher, Bohdan Winiarski.

906 See Ibid., 3–6.

907 Concluding observation in Politis's report: Ibid., 22.

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tion of the illegal conduct. As for Art. 2, it distinguished reprisals from other coercive measures like retorsion or self-defence.[908] In plenary session, the Institute adopted, after a long discussion, a slightly modified definition which removed the impression that reprisals were intended as acts of revenge, by substituting "respect for law" for the phrase "return to legality". Regarding the second Article, the Institute did not touch on the substance of the provision. It merely revised the form and added the international sanctions to the list of measures distinct from reprisals.[909]

Articles 3 to 5 can be regarded as forming the crux of the draft regulation. Indeed, Art. 4 forbade the resort to armed reprisals in the same conditions as war. According to the foregoing provision (Art. 3), armed reprisals were, unlike non-forcible reprisals, those which involved the use of force in any form whatsoever. Of course, Art. 4 did not contain a total ban on the resort to armed reprisals. Nevertheless, by making them subject to the same limitations as war and without making it necessary to list all the exceptions authorising them, the fourth commission hoped that States would judge the prohibition acceptable. Finally, Art. 5 made the general resort to reprisals, i.e. both armed and non-forcible reprisals, depend upon the failure of the peaceful means of dispute settlement. So, reprisals could not be employed unless no peaceful remedies remained available.[910]

The examination of Art. 3 by the Institute in plenary session gave rise to a discussion on the substance and the form of this provision. On the one hand, Greek jurist Stelio Seferiades contended that armed reprisals should not be merely assimilated with war but instead fully identified with it from a legal point of view. Indeed, since armed reprisals were in effect acts of war, they should then be assessed objectively. On the other hand, the members of the Institute disagreed with him and argued that a distinction actually existed between the two activities. War, in fact, aimed to bend another State to one's will through the destruction of its military forces while armed reprisals had a limited object, namely to coerce the target country into respecting the law. That is why the use of armed reprisals did not interrupt the diplomatic relations unlike war and thus pertained to a state of

908 See the commented draft regulation for both provisions: Ibid., 6–13.
909 See the minutes of the plenary session regarding Articles 1 and 2: Ibid., 629–58. The members of the Institute, however, stumbled over the distinction between reprisals and self-defence.
910 Ibid., 13–9.

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peace. Furthermore, as Politis pointed out, no State would adhere to the regulation of the Institute if armed reprisals were identified to war.[911]

Apart from that, many members of the Institute questioned the definition of armed reprisals in Art. 3 as being too vague. So, suggestions were made to replace the expression "resort to force in any form whatsoever" with something such as "resort to violence", "resort to an act of war" or "resort to military means". Yet, Politis disagreed with these amendments and maintained instead that the phrase "resort to force" should be kept in order to harmonise the Institute's regulation with the other international texts like the joint declaration of 11 December 1932 where France, Great Britain, Germany and Italy reaffirmed that "they will in no circumstance attempt to resolve any present or future differences between the signatories by resort to force."[912] As he explained further, the term "resort to force" did not include the measures of police taken within a State's territory, e.g. forced eviction. Indeed, armed reprisals referred only to the use of "military, naval or aerial" force by a State against another State.[913]

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911 Ibid., 659–62. About Seferiades, see Thomas Skouteris, 'The Vocabulary of Progress in Interwar International Law. An Intellectual Portrait of Stelios Seferiades', *EJIL* 16 (2006), 823–56.

912 Art. 3: United States, Department of State, *Papers Relating to the Foreign Relations of the United States*: *The Paris Peace Conference*, *1919*, 13th vol. (Washington: U.S. GPO, 1947), 311. It is noteworthy that at the Conference for the Reduction and Limitation of Armaments held at Geneva several States wanted this declaration to be declared a universal principle, i.e. not limited to European States. Yet, Great Britain took a firm stand against such extension. See Acting Chairman of the American Delegation (Gibson) to the Secretary of State, 15 February and 2 March 1933: United States, Department of State, *Foreign Relations of the United States*: *Diplomatic Papers*, *1933*, 1st vol. (Washington: U.S. GPO, 1950), 14–16 and 21. But when U.S. President Franklin D. Roosevelt promoted the adoption of a pact of non-aggression forbidding the use of armed force beyond the national boundaries the British Government worried that the sending of ships for the protection of British nationals abroad might from now on be interpreted as an aggression. See President Roosevelt's message to Various Chiefs of State, 16 May 1933: Ibid., 145; Chairman of the American Delegation (Davis) to the Secretary of State, 30 May 1933: Ibid., 175–6; Great Britain, H.M. Government, *Cabinet 38 (33). Conclusions of a Meeting of the Cabinet held at 10 Downing Street, on Wednesday, 31st May, 1933, at 11.0 a.m.* (1933; <http://filestore.nationalarchives.gov.uk/>, accessed 8 January 2019), at 141 and 145. The British reaction confirms that Great Britain regarded the use of force in peacetime as a great Power's privilege.

913 Institut de Droit International (ed.), *Session de Paris*, *Octobre 1934* (above, n. 5), 662–7.

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After the adoption of the definition of armed reprisals, the fourth Article prohibiting their resort under the same conditions as war was voted without difficulty.[914] It was the central provision of the regulation.[915]

As to Article 5, a member of the Institute expressed concern that a State might claim the impossibility of reaching a settlement through peaceful means in order to resort to reprisals. Therefore, a new wording which had the merit of laying the onus of proof on the complaining State was proposed by Henri Rolin and adopted by the Institute.[916]

The draft regulation consisted of four more provisions which were passed with few modifications.[917] Article 6 laid down six conditions for reprisals to be lawful: (a) a final demand must be made to the wrongdoing State; (b) reprisals must be proportionate to the wrong; (c) the rights of third States and individuals must be spared as much as possible; (d) the laws of humanity and the dictates of public conscience must be respected; (e) the object of reprisals could not change during their employment; (f) reprisals must end as soon as the goal is achieved.[918]

Article 7 permitted the use of counter-reprisals only in the event of a breach of Art. 6 and providing the requirements enumerated in that provision were observed.[919]

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914 Ibid., 667–8. At its thirty-eight conference held at Budapest a month earlier, the International Law Association agreed on an interpretation of the Kellogg-Briand Pact which condemned the resort to armed force for the settlement of issues: "Whereas by their participation in the Pact sixty-three States have abolished the conception of war as a legitimate means of exercising pressure on another State in the pursuit of national policy and have also renounced any recourse to armed force for the solution of international disputes:— […] (2) A signatory State which threatens to resort to armed force for the solution of an international dispute or conflict is guilty of a violation of the Pact." (International Law Association (ed.), *Report of the Thirty-Eighth Conference held at Budapest in the Hungarian Academy of Science, September 6th to 10th, 1934*, 38th vol. (London/Reading: The Eastern Press, 1935), 67). That is why German lawyer Walter Simons pointed out that Article 4 of the draft resolution was in line with the text of the International Law Association.

915 Institut de Droit International (ed.), *Session de Paris, Octobre 1934* (above, n. 5), 683.

916 Ibid., 668–75.

917 Ibid., 675–92.

918 Ibid., 19–20.

919 Ibid., 20–1. Cf. Verdross, 'Règles générales du droit international de la paix' (above, n. 854), 492–3.

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Article 8 placed the use of reprisals under the supervision of the international community or the League of Nations when the issue involved Member States.[920] This article was viewed as a progressive step forward because it declared the use of reprisals a matter of international public order in the same way as war since the Kellogg-Briand Pact. For Politis, this provision was consistent with the evolution of international law of the last two decades.[921]

Finally, Article 9 stipulated that the Permanent Court of International Justice was competent to interpret the regulation unless the interested parties agreed to submit this interpretation to an arbitral tribunal.[922]

The resolution and regulation were passed by a clear majority of 53 in favour, 3 against and 6 abstentions.[923] It was the first time in a century and a half at least that a legal text which substantially restricted the employment of armed reprisals was adopted. This result was made possible mainly thanks to the rapporteur Politis who during the whole debate was a leading figure and refused amendments which might have diminished or altered the significance of the regulation.

2. Criticisms

The assimilation of armed reprisals with war when it came to their legality was, without doubt, the greatest success of the Institute's regulation. In 1935, in a contribution in a book honouring the Belgian international legal scholar Ernest Mahaim who presided the session of Paris, Strupp applauded the solution reached by the Institute as the only one in compliance with international morality, good faith and the spirit of both the Covenant of the League of Nations and the Kellogg-Briand Pact. He believed that this regulation would likely put an end to abuses and the

920 Institut de Droit International (ed.), *Session de Paris, Octobre 1934* (above, n. 5), 21–2.

921 See Ibid., 683–90. About Art. 8, Politis drew the attention of the Institute to Francisco de Vitoria who recognised for the subjects of a monarch the right to disobey him if the Sovereign decided to wage an unjust and unlawful war. For Politis, "[c]'est aller très loin, à une époque où le devoir d'obéissance des sujets envers leur souverain était entendu d'une manière particulièrement stricte. C'est aller beaucoup moins loin aujourd'hui que de demander à l'Institut de consacrer l'idée d'un contrôle international sur l'exercice des représailles." (Ibid., 689).

922 Ibid., 22.

923 Ibid., 694.

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hypocrisy of States which were too frequent when armed reprisals were involved.[924]

However, not all of the authors shared this optimism. Right before the Institute put the regulation to the vote, Politis's fellow countryman Michel Stavro Kebedgy announced his abstention because it would be evincing too much optimism to believe that States would voluntarily abide by the law. He believed, indeed, that States followed their own interests and so would depart from the adopted rules while others would simply turn a blind eye on the latter's action. So, because of this persistent mentality, a detailed regulation of peacetime reprisals was for him as vain as any attempt to limit the right to use force.[925]

Kebedgy's opinion was shared by Thomas Baty, who also abstained. In an article ominously called 'The Threatened Chaos in the Law of Nations', he looked with apprehension at the recent innovations in the field of international law. He argued that in time of nationalism (when the existence and authority of international law were constantly questioned), legal scholars should proclaim the accepted principles rather than imply that no law existed at all. He illustrated his view with the IIL's regulation on reprisals. Indeed, he regarded armed reprisals as being (1) absurd since they blurred the line between war and peace, (2) dangerous because they encouraged States to resort to violence in dubious cases, and (3) unjust as strong Powers always exercised them against weaker nations. That is why he criticised the Institute for not having identified armed reprisals with war. He contended that the regulation of the Institute actually recognised armed reprisals, e.g. in the form of a bombardment or occupation of territories, as compatible with a state of peace, instead of reaffirming the sacred principle of territorial integrity of States.[926]

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924 Strupp, 'Problèmes actuels du droit des représailles' (above, n. 1), 346–51.

925 Institut de Droit International (ed.), *Session de Paris, Octobre 1934* (above, n. 5), 693.

926 Thomas Baty, 'The Threatened Chaos in the Law of Nations', *The Contemporary Review* 148 (1935), 65–71. He believed that these innovations were doomed to be futile for "Every chancery in the world will make short work of these elaborate regulations, and the only consequence will be a demonstration of how far academic opinion is out of touch with reality." (Ibid., 67). But the fact that the Institute adopted a regulation which somehow approved armed reprisals really concerned him: "That an academic body of the highest distinction should unanimously accept a doctrine which leads straight to international anarchy is a disturbing sign of the times." (Ibid., 70). About Baty's opinion that the use of force against a State in breach of the principle of territorial integrity was inconsistent with a state of peace, see Thomas Baty, 'Abuse of Terms: "Recognition": "War"',

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Baty's harsh criticism may be questionable. However, he was not alone to express disapproval of the rules adopted by the Institute which still permitted —in narrowly limited cases— the resort to armed reprisals. Others also called for the outright ban on armed reprisals.

Seferiades was one of those radical international lawyers who defended the identification of armed reprisals and war. In an article clarifying his opinion on the issue, he pointed out that several legal scholars, including Politis at the time of the Italian occupation of Corfu,[927] supported the same view. Yet, the regulation of the Institute confirmed the existence of a legal distinction between the two activities. It just assimilated armed reprisals to war as to the sanctions. This result meant that armed reprisals remained an available remedy falling short of war, i.e. being governed by the law of peace. The *ius in bello* did not then apply. Consequently, the inhabitants who would spontaneously take up arms to resist the occupation by way of reprisals of their territory could not be treated as belligerents in accordance with Article 2 of the Annexe to the Fourth Hague Convention respecting the Laws and Customs of War on Land. A bombardment by way of reprisals would likewise evade the provisions of the Fourth and Ninth Hague Conventions.

Another aspect that Seferiades developed was the absence of criteria enabling the distinction of armed reprisals from war. He stressed, for instance, that the diplomatic relations were not necessarily severed following the outbreak of war, whereas they are sometimes interrupted even in time of peace. Furthermore, he remarked that neither the goal of reprisals, viz. the return to respect for the law, nor their limited scope could serve to differentiate armed reprisals from war. On the one hand, the goal of both reprisals and a 'just' war was appreciated subjectively as being legitimate by the State resorting to the measure. On the other hand, the scope of armed reprisals could be said to be limited insofar as the target country was weaker than the reprisal-taking country and had then no choice but to capitulate when facing the latter's military. Nevertheless, as Seferiades observed, this was no legal criterion. So, he contended that no party to the conflict could characterise the measures as being of the nature of reprisals.

AJIL 30 (1936), 377–99, at 395–397 and more largely 381–397. Cf. Thomas Baty, 'Danger-Signals in International Law', *YaleLJ* 34 (1925), 457–79.

927 Politis wrote in 1924 that "Il est donc impossible de nier que les représailles violentes constituent incontestablement des actes de guerre". (Politis, 'Les représailles entre Etats membres de la Société des Nations' (above, n. 19), 14).

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Otherwise, it would be (1) arbitrary;[928] (2) anti-legal since only the strong Powers could claim that the measures did not amount to war; and (3) dangerous that violent actions, thus, might evade the laws of war.

For all these reasons, the identification of armed reprisals and war was, in his opinion, the only acceptable solution. That is why he disapproved the IIL's Paris regulation, although he voted in favour of its adoption in 1934. He pointed out that the mission of the Institute as an independent scientific body consisted primarily of figuring out the *ius condendum* and formulating the principles corresponding to the legal conscience of the civilised world.[929]

However, while part of the legal scholars condemned what they regarded as the shortfall of the regulation, some States deemed the rules of the Institute too far-reaching because armed reprisals were assimilated with war. Indeed, the legal department of the French Ministry of Foreign Affairs maintained that the resolution of the IIL was no statement of current international law, and considered instead the answer of the Special Commission of Jurists to the fourth question at the time of the Corfu incident as the only valid rule of law, namely that measures short of war "may or may not" be consistent with the Covenant. Therefore, the note concluded the question of the illegality of armed reprisals as follows:

> "En fin de compte, on n'est pas sur un terrain très solide pour soutenir que les représailles armées sont toujours illicites…"[930]

This opinion might actually have been shared by the Governments of the other main reprisal-taking Powers. It evidences anyway the deep gulf existing between legal doctrine and State practice on such a subject: while the legal community hoped to fill a great lacuna in international law, the great Powers strove to retain the right to resort to armed reprisals.

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928 Cf. "The legal designation applied by one or other of the interested Parties to the act in dispute is irrelevant […]." (Permanent Court of International Justice, *Case concerning certain German interests in Polish Upper Silesia (The Merits)*, judgement of 25 May 1926, Collection of Judgments. Publications of the Permanent Court of International Justice (1926), Series A – No. 7, at 22).

929 Stelio Séfériadès, 'La question des représailles armées en temps de paix, en l'état actuel du droit des gens', *RDILC* 63 (1936), 138–64.

930 Note of 4 June 1937, reproduced in Alexandre-Charles Kiss, *Répertoire de la pratique française en matière de droit international public*, 6th vol. (Paris: Éditions du Centre National de la Recherche Scientifique, 1969), 9.

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V. Epilogue

1. An Insoluble Issue?

On the eve of WWII, the employment of armed reprisals remained largely unrestricted in international law in spite of all the efforts of the legal community and many Governments of small States that tried to limit it or even ban it. Indeed, some lawyers still continued to regard reprisals as a legitimate measure of self-help.[931] Furthermore, the Institute's regulation did not put an end to armed reprisals in State practice. When, e.g., on 29 May 1937 —in the midst of the Spanish Civil War— Republican Spain launched an air raid against the German cruiser *Deutschland*, German warships shelled the Spanish port of Almería by way of so-called reprisals.[932] Nevertheless, this action should be instead categorised as an act of war, notwithstanding the absence of war between the two countries. In fact, it may be recalled that Germany did not recognise the Spanish Republican Government[933] and got involved in the Spanish Civil War since the early stages of the conflict in support of Franco's faction, which led to the infamous bombing of Guernica on 26 April 1937, just a month before the shelling of Almería.

The differentiation between pacific measures and acts of war was, indeed, quite delicate in the interwar period. For the German legal scholar Carl Schmitt, this ensued from the existence of an intermediate state between peace and war since the Versailles Peace Conference, whereas both concepts traditionally used to mutually exclude each other. So, what did not constitute war belonged to peace and vice versa, except for some rare anomalous situations lying halfway between war and peace like Thomas E. Holland's concept of 'war *sub modo*'. However, after WWI, the Allied Pow-

931 See, e.g., J.-P.-A. François, 'Règles générales du droit de la paix', *RdC* 66/IV (1938), 5–294, at 252–255.

932 See Mr Juan Negrín, Third (Private, then Public) Meeting of the Ninety-Eighth Session of the Council of the League, 16 September 1937: League of Nations, Council, 'Ninety-Eighth and Ninety-Ninth Sessions of the Council. Held at Geneva from Friday, September 10th, to Thursday, September 16th, 1937; and from Wednesday, September 29th, to Tuesday, October 5th, 1937.', *LNOJ* 18 (1937), 877–1324, at 914; Viktor Böhmert, 'Die Beschießung des befestigten Hafens Almeria, eine gerechte Selbsthilfemaßnahme', *ZVölkR* 21 (1937), 297–307; Brownlie, *International Law and the Use of Force by States* (above, n. 45), 222; Grewe, *Epochen der Völkerrechtsgeschichte* (above, n. 24), 735.

933 Brownlie, *International Law and the Use of Force by States* (above, n. 45), 222 fn. 1.

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ers wishing to continue the war through other means drew up legal documents as the Peace Treaty of 1919, the Covenant of the League of Nations and the Kellogg-Briand Pact which provided them with a flexible legal basis to decide case-by-case if war or peace was involved. The result was the institutionalisation of an intermediate state where non-military acts like propaganda could achieve a high degree of hostility while, conversely, the *animus belligerendi* of some military acts could be denied. And yet, paradoxically, only the subjective test was really relevant to separate war from peace. Schmitt, thus, argued that such an intermediate state created chaos in international law because it emptied the fundamental concept of peace of any meaning. Therefore, he regarded the abrogation of the Peace of Versailles and its replacement with a new order genuinely dedicated to peace as the only way to get rid of that *status mixtus*.[934]

Schmitt appeared to have correctly understood the problem posed by armed reprisals as an act of force compatible with a state of peace. However, although he identified the existence of a legal lacuna in that regard, his response to the issue was manifestly inadequate.

The question of armed reprisals passed in the interwar years from trifling to extremely sensitive. As a result, the problem could not simply be removed by the adoption of a regulation by an academic body, even as prominent as the Institute of International Law might have been. It required a legal text. Nevertheless, right before the beginning of WWII, no solution appeared to efficiently address the burning issue of the resort to armed reprisals. In this sense, the epoch of the League of Nations can rightly be regarded as a period of transition.[935]

2. Prohibition of the Use of Force under the UN-Charter

This legal text finally came in 1945 in the form of the unambiguous ban on the use of any kind of force in peacetime. Article 2 Para. 4 of the UN-Charter —called by Judge Nabil Elaraby "the most important principle in

934 Schmitt, '„Inter pacem et bellum nihil medium"' (above, n. 33).

935 Cf. Politis, 'Les représailles entre Etats membres de la Société des Nations' (above, n. 19), 16; Gottschalk, 'Die völkerrechtlichen Hauptprobleme des Mandschureikonflikts' (above, n. 74), 209f.; Kotzsch, *The concept of war in contemporary history and international law* (above, n. 69), 162; Paddeu, *Justification and Excuse in International Law* (above, n. 5), 238–44.

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contemporary international law to govern inter-State conduct" and "the cornerstone of the Charter"[936]— reads:

> "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

During the drafting of the Charter, no express reference was made to armed reprisals.[937] Nevertheless, the provision was drafted with the apparent intention of precluding any resort to force in time of peace.[938] That is why the view prevails in legal doctrine that the unilateral use or threat of armed reprisals is prohibited under this Article.[939] Indeed, the "peaceful

936 Dissenting Opinion of Judge Elaraby, International Court of Justice, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgement of 6 November 2003, I.C.J. Reports (2003), 290–305, at 291, Para. 1.1.

937 Shane Darcy, 'Retaliation and reprisal', in Marc Weller, Alexia Solomou and Jake William Rylatt (eds.), *The Oxford Handbook of the Use of Force in International Law* (Oxford handbooks; Oxford: OUP, 2015), 879–96, at 887.

938 See the statement of the Delegate of the United States during the Conference at San Francisco in 1945: "The intention of the authors of the original text was to state in the broadest terms as an absolute all-inclusive prohibition; the phrase "or in other manner" was designed to insure that there should be no loopholes." (Summary Report of Eleventh Meeting of Committee I/1, 4 June 1945, Doc. 784, I/1/27: United Nations, *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, 6th vol. (London/New York: United Nations Information Organizations, 1945–1955), 335).

939 See, i.a., Philip C. Jessup, 'Force under a Modern Law of Nations', *ForeignAff* 25 (1946), 90–105, at 101; Philip C. Jessup, *A modern law of nations: An introduction* (New York: The Macmillan Company, 1948), 175; C. H. M. Waldock, 'The regulation of the use of force by individual States in international law', *RdC* 81 (1952), 451–517, at 493; Delbez, *La notion de guerre* (above, n. 46), 99; De Visscher, *Théories et réalités en droit international public* (above, n. 39), 350; Paul Guggenheim, *Traité de Droit international public*, avec la collaboration de Denise Bindschedler-Robert, 2nd vol. (Genève: Librairie de l'Université, Georg & Cie, 1954), 91; Stone, *Legal controls of International Conflict* (above, n. 58), 286–7; Kotzsch, *The concept of war in contemporary history and international law* (above, n. 69), 270; Derek William Bowett, *Self-defence in international law* (Manchester: Manchester University Press, 1958), 13 and 99; Constantine John Colombos, *The international law of the sea* (4th edn., London: Longmans, 1959), 409; Partsch, 'Repressalie' (above, n. 62), 104; Rosalyn Higgins, 'The Legal Limits to the Use of Force by Sovereign States United Nations Practice', *BYIL* 37 (1961), 269–319, at 314; Brownlie, *International Law and the Use of Force by States* (above, n. 45), 223 and 281; Kalshoven, *Belligerent Reprisals* (above, n. 9), 6–7; Falcon,

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means" of dispute settlement, mentioned in Art. 2(3), do not seem to cover armed reprisals.[940]

The UN-Charter has successfully avoided making the same mistake as the Covenant of the League of Nations, which almost exclusively focused on war and, thus, left a gap in favour of the employment of armed reprisals.

However, there have been attempts to revive armed reprisals under Art. 51 of the UN-Charter —the only exception to the ban on the use of force in case of self-defence.[941] But all the UN organs have confirmed several times that armed reprisals fall within the scope of Art. 2(4).[942] It means

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'Reprisals' (above, n. 71), 34; Ramón Paniagua Redondo, 'Las represalias en el derecho internacional. Perspectiva histórica', *RevJurCat* 83 (1984), 149–70, at 167; Zoller, *Peacetime unilateral remedies* (above, n. 23), 38f.; Guttry, *Le rappresaglie non comportanti la coercizione militare nel diritto internazionale* (above, n. 14), 10–1; Roberto Barsotti, 'Armed reprisals', in Antonio Cassese (ed.), *The Current legal restraints of the use of force* (Developments in International Law; Dordrecht: Martinus Nijhoff, 1986), 79–110, at 79; Michael J. Kelly, 'Time warp to 1945 – Resurrection of the reprisal and anticipatory self-defense doctrines in international law', *JTransnatLawPol* 13 (2003), 1–39, at 12; Neff, *War and the Law of Nations* (above, n. 2), 318; Mary Ellen O'Connell, *The Power and Purpose of International Law*: *Insights from the Theory and Practice of Enforcement* (Oxford: OUP, 2011), 163; Darcy, 'Retaliation and reprisal' (above, n. 937), 886–7; Math Noortmann, *Enforcing International Law*: *From Self-help to Self-contained Regimes* (London/New York: Routledge, 2016), 38.

940 Leland M. Goodrich and Edvard Hambro, *Charter of the United Nations*: *Commentary and Documents*, published under the auspice of the London Institute of World Affairs (The Library of World Affairs, 10; 2nd edn., London: Stevens & sons, 1949), 94f. and 102. Chapter VI of the Charter (Art. 33 to 38) deals in greater detail with the procedure for the pacific settlement of disputes while Chapter VII (Art. 39 to 51) relates to the sanctions that the UN can adopt in response to threats to the peace, breaches of the peace, and acts of aggression.

941 Cf. Bowett, 'Reprisals Involving Recourse to Armed Force' (above, n. 5); Tucker, 'Reprisals and Self-Defence. The Customary Law' (above, n. 5); Burton M. Leiser, 'The Morality of Reprisals', *Ethics* 1975 (1985), 159–63; Barsotti, 'Armed reprisals' (above, n. 939); Jeffrey Allen McCredie, 'The April 14, 1986 Bombing of Libya. Act of Self-Defense or Reprisal?', *CaseWResJIntlL* 19 (1987), 215–42, at 238–239; Kelly, 'Time warp to 1945 – Resurrection of the reprisal and anticipatory self-defense doctrines in international law' (above, n. 939).

942 The jurisprudence of these organs was always unequivocal. For the opinion of the General Assembly, see GA Res 2625 (XXV) (24 October 1970), Annexe; GA Res 36/103 (9 December 1981), Annexe: Art. 2 Sec. II(c). For the opinion of the Security Council, see SC Res 111, S/3538 (19 January 1956), Para. 4; SC Res 188 (9 April 1964), Para. 1. See Barsotti, 'Armed reprisals' (above, n. 939), 79–80, for

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that the resort to armed reprisals in violation of the ban is to be treated as an act of aggression (but not as war).[943]

The only point which the Charter has not solved is the question of the differentiation between war and armed reprisals. In fact, they are technically still distinct from each other, albeit the division has lost part of its practical significance.[944] As a result, when the use of force is permitted, armed

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further concurring opinion expressed by the Secretary-General and delegates of Member States.

The ICJ has also repeatedly condemned the employment of forcible self-help and more precisely armed reprisals under the Charter: *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgement of 9 April 1949, I.C.J. Reports (1949), 4–169, at 35 (see also Dissenting Opinion of Judge Sergei Krylov, Ibid., 76–7. Cf. Olaoluwa Olusanya, *Identifying the Aggressor under International Law*: *A Principles Approach* (Bern: Peter Lang, 2006), 96, who tells that the judgement pronounced armed reprisals illegal); *Military and Paramilitary Activities in and against Nicaragua* (*Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgement of 27 June 1986, I.C.J. Reports (1986), 14–150, at 101, Para. 191, and at 127, Para. 249; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, I.C.J. Reports (1996), 226–67, at 246, Para. 46; Dissenting Opinion of Judge Elaraby, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgement of 6 November 2003, I.C.J. Reports (2003), 290–305, at 294–295, Para. 1.2; Separate Opinion of Judge Simma, Ibid., 324–61, at 331–332, Para. 12.

Finally, when working on the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, the International Law Commission stated that armed reprisals were utterly forbidden, even under customary international law. See Roberto Ago, 1619th Meeting, 25 June 1980: United Nations, *Yearbook of the International Law Commission 1980*: *Summary records of the meetings of the thirty-second session 5 May-25 July 1980*, 1st vol. (New York: United Nations, 1981), 185, Para. 5; The Chairman Pemmaraju Sreenivasa Rao, 2424th Meeting, 21 July 1995: United Nations, *Yearbook of the International Law Commission 1995* (above, n. 9), 297 fn. 3, Para. 12. But see Nicholas Tsagourias, 'Necessity and the Use of Force. A Special Regime', *NYIL* 41 (2010), 11–44, at 26, who holds the view that armed reprisals remain lawful as a rule of customary international law.

943 Neff, *War and the Law of Nations* (above, n. 2), 318f. On the definition of aggression, see GA Res 3314 (XXIX) (14 December 1974).

944 Kunz, 'Sanctions in International Law' (above, n. 22), 331. In fact, "the UN Charter succeeded, at one fell swoop, in eliminating the legal relevance of the distinction between wars and forcible reprisals, which had so bedevilled lawyers in the interwar period." Neff, *War and the Law of Nations* (above, n. 2), 318. However, it is interesting to remark that if armed reprisals and war have to be distinguished anyway, no objective criteria could be used. As a consequence, the subjective test of the *animus* is the only criterion available. Cf. Delbez, *La notion*

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reprisals can be preferable to war for being a lesser means of pressure to vindicate claims.[945]

In summary, the coming into force of the UN-Charter sounded the death knell for armed reprisals in peacetime.

VI. Interim Conclusion

During the period between the two World Wars, the issue of armed reprisals reached unprecedented proportions. Indeed, the resort to this measure blurring the thin line between war and peace seriously compromised the work of peace that was of such a great importance after WWI. The use of force in peacetime spread confusion as to the limits of the state of peace.

However, there was strong reluctance and resistance from the great Powers to waive their inherent privilege to resort to military acts, without incurring the liability and the consequences of committing an aggression or beginning war. In fact, the compromises that they made in favour of peace were not followed by their renunciation of the right to armed reprisals. This reluctance manifested within as well as outside the system of the League of Nations. For example, France justified the occupation of Germany's Ruhr valley as a means of reprisals allowed under the Treaty of Versailles as well as the general law of nations. Indeed, the great Powers exploited the loopholes in the Covenant of the League of Nations, the Treaty of Versailles and the other legal documents that they drafted, in order to evade the *ius ad bellum* restrictions. For instance, Italy did it to avoid the sanctions of the Covenant for the bombardment and occupation of the Greek island of Corfu by way of reprisals. The strategy of Italy in that case consisted of (a) challenging the jurisdiction of the League of Nations by preferring a settlement through the Conference of Ambassadors made up of peers, and (b) preventing the Council of the League from deciding on sanctions and laying down a general principle condemning armed reprisals. This last aspect was facilitated by the reply of a Special Commission of Jurists which conferred the power on the Council to decide on a

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de guerre (above, n. 46), 97–8; Guggenheim, *Traité de Droit international public* (above, n. 939), 92; Venezia, 'La notion de représailles en droit international public' (above, n. 9).

945 Stone, *Legal controls of International Conflict* (above, n. 58), 288.

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case-by-case basis the compatibility of acts of armed reprisals with the Covenant.

As a result, many small States and, more significantly, the legal community opposed their ambitions. The antagonism between legal theory and the opinion of the leading reprisal-taking States reached a breaking point. Legal scholars strove to see the employment of armed reprisals condemned in the same way as the resort to war. Some even supported the view that there was no difference at all between the two activities. However, all their efforts failed. Not due to a lack of will, but because their opinions did not receive approval in the highest political circles of the great Powers. Only the traumatic experience of WWII made the latter countries see the necessity to propose a collective security, purged of the flaws that marred the system of the Covenant. Therefore, the resort to armed reprisals is prohibited under the Charter of the United Nations, just like any unpermitted use of force in peacetime.

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