Chapter One. From Regulation to Deregulation up to the End of the Eighteenth Century

I. Introduction

Reprisals are an ancient measure that had evolved in time. This chapter focuses on the development of reprisals up to the end of the eighteenth century in order to get a clear image of the legal situation of this means on the eve of the next century. It is argued here that in the early years of the nineteenth century, reprisals were barely regulated as a consequence of uncontrolled State practice and the lack of suitable adaptation of the medieval law of reprisals. It is, indeed, in the Middle Ages that reprisals developed and became the subject of a highly sophisticated set of rules. On the contrary, the State practice of reprisals in the seventeenth and eighteenth centuries did not seem to have been governed by a clear regulation.

II. Elaboration of the Medieval Law of Reprisals

1. Emergence and Development of Reprisals in the Early and High Middle Ages

Reprisals were a medieval legal innovation that reached, in the last centuries of the Middle Ages, a high degree of sophistication, clarity and uniformity.[82] From the preliminary steps to their complete enforcement, they were governed by a well-elaborated legal framework.[83] Broadly speaking, the Sovereign granted his subject the right to seize property belonging to countrymen of the wrongdoer or even arrest them when justice could not be obtained in the latter's country for the wrong committed (e.g., unpaid

82 Cf. Colbert, *Retaliation in international law* (above, n. 6), 3.

83 See esp. Mas Latrie, *Du droit de marque ou droit de représailles au Moyen-Age* (above, n. 65).

debt or robbery).[84] Three elements emerge: self-help, collective responsibility and denial of justice.[85] It was thus a measure used to seek compensation when the victim and the wrongdoer were not subjects of the same suzerain.

Some authors have supported the view that reprisals already existed in Ancient Greece as an elaborate legal institution regulated by municipal law and treaties which differed from piracy and brigandage. Indeed, there was a self-help measure in that time which rested on the theory of community responsibility, in this extent comparable to medieval reprisals. A whole community could be held responsible for the wrong committed by one of its members against an alien when it failed to give the latter justice. As a consequence, property or persons of that community could be seized by the victim's own community.[86]

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84 Cf. Ibid., 4; Giulio Vismara, 'Repressalien(recht)', in Norbert Angermann, Robert-Henri Bautier, Robert Auty et al. (eds.), *Lexikon des Mittelalters*, 10 vols. (München/Zürich/Stuttgart/Weimar: Artemis & Winkler/LexMA-Verlag/J. B. Metzler, 1980–1999), 7th vol., col. 746; G. Fahl, 'Repressalie', in Wolfgang Stammler, Adalbert Erler, Ekkehard Kaufmann et al. (eds.), *Handwörterbuch zur deutschen Rechtsgeschichte*, 4th vol. (Berlin: Erich Schmidt, 1990), col. 911–913, here at 911–912; W. Ogris, 'Repressalienarrest', in Wolfgang Stammler, Adalbert Erler, Ekkehard Kaufmann et al. (eds.), *Handwörterbuch zur deutschen Rechtsgeschichte*, 4th vol. (Berlin: Erich Schmidt, 1990), col. 913–916; Neff, *War and the Law of Nations* (above, n. 2), 77.

85 Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 36.

86 See about the measure of 'reprisals' practised in Ancient Greece, i.a., Charles-Albert Lécrivain, 'Le droit de se faire justice soi-même et les représailles dans les relations internationales de la Grèce', *Mémoires de l'Académie de sciences, inscriptions et belles-lettres de Toulouse* 9 (9th ser.) (1897), 277–90; Rodolphe Dareste, *Nouvelles études d'histoire du droit* (Paris: Librairie de la société du recueil général des lois et des arrêts, 1902), 38–54; Coleman Phillipson, *The international law and custom of Ancient Greece and Rome*, 2nd vol. (London: Macmillan and Co., 1911), 349–66; Jean Rougé, *La marine dans l'Antiquité* (L'historien, 23; Paris: PUF, 1975), 161; Benedetto Bravo, 'Sulân. Représailles et justice privée contre des étrangers dans les cités grecques (*Étude du vocabulaire et des institutions*)', *Annali della Scuola Normale Superiore di Pisa. Classe di Lettere e Filosofia* 10 (3rd ser.)/3 (1980), 675–987; Andrew Lintott, '*Sula*–Reprisal by Seizure in Greek Inter-Community Relations', *The Classical Quarterly* 54 (2004), 340–53. Nevertheless, the distinction between piracy and this ancient form of reprisals is not necessarily easy to make as the former activity was also considered respectable at times. See A. H. Jackson, 'An Oracle for Raiders?', *ZPE* 108 (1995), 95–9.

But in the days of the Roman Empire, there was no such thing as reprisals.[87] According to medieval Italian lawyers Bartolus de Saxoferrato and Giovanni da Legnano,[88] who were the first to thoroughly deal with the topic of reprisals, the measure actually stemmed from the decay of the Roman Empire and the ensuing disappearance of a superior authority (previously, the Roman Emperor) who could dispense justice.[89] Nevertheless, statements of law by Emperors in the fifth and sixth centuries still reminded that Roman law did not admit vicarious liability, i.e. holding a third party responsible for someone else's debt or wrong.[90] The new Western European kingdoms also reaffirmed several times the principle of individual responsibility for one's own debt.[91] The reassertion of this principle, however, suggests that the rule was not often abided by.

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87 Mas Latrie, *Du droit de marque ou droit de représailles au Moyen-Age* (above, n. 65), 6.

88 For a biography and a bibliography of Bartolus, see Friedrich Carl von Savigny, *Geschichte des Römischen Rechts im Mittelalter*, 6th vol. (2nd edn., Heidelberg: J. C. B. Mohr, 1850), 137–84; Peter Weimar, 'Bartolus de Saxoferrato (1313/14–1357)', in Michael Stolleis (ed.), *Juristen. Ein biographisches Lexikon; Von der Antike bis zum 20. Jahrhundert* (München: C. H. Beck, 1995), 67–8; Axel Krauß, 'Bartolus de Saxoferrato (1313/14–1357)', in Gerd Kleinheyer and Jan Schröder (eds.), *Deutsche und Europäische Juristen aus neun Jahrhunderten. Eine biographische Einführung in die Geschichte der Rechtswissenschaft* (6th edn., Tübingen: Mohr Siebeck, 2017), 45–9. On Giovanni da Legnano, see Thomas Erskine Holland's 'Introduction' in Giovanni da Legnano, *Tractatus de Bello, de Represaliis et de Duello*, edited by Thomas Erskine Holland (The Classics of International Law, 8; Oxford: OUP, 1917).

89 Bartolus de Saxoferrato, *Omnium Iuris Interpretum Antesignani Consilia, Quaestiones et Tractatus*: *Nunc recens Quadragintaquatuoraliis Consiliis, tum Criminalibus, tum Ciuilibus, & vno Tractatu de Procuratoribus locupletata; Atque etiam, praeter alias Additiones ad hanc diem editas, Aureis Adnotationibus. Initia Consiliorum, Quæstionum,& Tractatuum ad literarum seriem subsequentia indicabunt*, 10th vol. (Venetiis: apud Iuntas, 1590), Proemium, here at fol. 119v; Legnano, *Tractatus de Bello, de Represaliis et de Duello* (above, n. 88), Cap. CXXIII, here at 155 (tr. at 307–308).

90 See *Cod. Just.*, XII, 60.4; *Cod. Just.*, XI, 57; Just. *Nov.*, LII, 1, quoted in Phillipson, *The international law and custom of Ancient Greece and Rome* (above, n. 86), 365–6.

91 An example is Clause 247 of the seventh-century Lombard law called *Edictum Rothari*, transcribed in Friedrich Bluhme, 'Edictus Langobardorum', in Georg Heinrich Pertz (ed.), *Monumenta Germaniae Historica. Inde ab anno Christi quingentesimo usque ad annum millesimum et quingentesimum*, Auspiciis Societatis aperiendis fontibus rerum germanicarum medii aevi (Hannover: Hahn, 1868), 1–225, at 60. In a letter written by Cassiodorus (*Variae*, IV, 10), the Ostrogothic ruler of Italy Theoderic the Great stressed this principle, too. He condemned the practice of '*pignoratio*' as a "monstrous perversion of all the rule of law" (Cas-

So, reprisals developed unchecked and probably gave rise to numerous abuses before norms were finally adopted to control their use.[92] Indeed, this means constituted an obstacle to trade and a serious threat to peace, although it allowed obtaining redress. Attempts were thus made to regulate reprisals and limit their adverse effects.[93] Through treaties and domestic law, a whole set of procedures and requirements were agreed upon with the aim of attaching guarantees to the use of reprisals and limiting their recourse. From the tenth centuries onwards, first in Northern Italy and then everywhere in Europe, the number of treaties containing a stipulation about reprisals multiplied.[94] This phenomenon followed the resumption of trade in the Mediterranean region around 950.[95] By the thirteenth century, a provision restricting reprisals was inserted into almost every treaty of friendship of the time.[96]

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siodorus, *The letters of Cassiodorus*: *being a condensed translation of the Variae epistolae of Magnus Aurelius Cassiodorus Senator*, With an Introduction by Thomas Hodgkin (London: Henry Frowde, 1886), 240–1).

92 Cf. Colbert, *Retaliation in international law* (above, n. 6), 12.

93 Del Vecchio and Casanova, *Le rappresaglie dei comuni medievali e specialmente in Firenze* (above, n. 65), 60–1.

94 For treaties including a reference to reprisals, see Ibid., 69–71; Hans Planitz, 'Studien zur Geschichte des deutschen Arrestprozesses. Der Fremdenarrest', *ZRG GA* 40 (1919), 87–198, at 171–175; Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 38 fn. 1.

95 Marie-Claire Chavarot, 'La pratique des lettres de marque d'après les arrêts du parlement (XIII^{e}-début XV^{e} siècle)', *Bibliothèque de l'école des chartes* 149 (1991), 51–89, at 54.

96 Spiegel, 'Origin and Development of Denial of Justice' (above, n. 61), 69. It is also by that time that the vulgar term 'reprisals' (*represalias*) began to prevail in legal documents over some legal expressions in Latin that were used earlier as synonyms, like '*pignoratio*' which refers to a pledge in Roman property law, or '*clarigo*', i.e. a demand for redress. Cf. Butler and Maccoby, *The Development of International Law* (above, n. 63), 173. In fact, in order to avoid misunderstanding, the Second Council of Lyon of 1274 spoke of "[…] *pignorationes, quas vulgaris elocutio repressalias nominat,* […]."(Sexti Decretal. Lib. V. Tit. VIII. Cap. Un., reproduced in Emil Ludwig Richter and Emil Friedberg, *Corpus Iuris Canonici*: *Editio Lipsiensis Secunda*, 2nd vol. (Graz: Akademische Druck- u. Verlagsanstalt, 1959), col. 1089). In the eighteenth century, Bynkershoek maintained that there was actually no suitable Latin equivalent to 'reprisals' since the measure did not exist under Roman law. See Bynkershoek, *Quaestionum juris publici libri duo* (above, n. 33), Book I Cap. 24, here 1st vol., 171 (tr. 2nd vol., 133).
In medieval England, reprisals were called 'withernam' when they were exercised between towns within the same realm, i.e. town-to-town reprisals. See thereupon D. A. Gardiner, 'The History of Belligerent Rights on the High Seas in the Four-

In most cases, a denial of justice was declared the condition *sine qua non* for reprisals.[97] As early as the ninth century, bilateral treaties like the agreement entered between the Lombard prince Sicard of Benevento and the Neapolitans in 836 made the recourse to self-help subject to such a requirement.[98] It meant that the victim had to exhaust first the local remedies in the wrongdoer's country before turning to his Sovereign for letters of reprisal. Later treaties often laid down the criteria to identify the existence of a denial of justice.[99] For example, the commitment made by James I of Aragon to the viscount and archbishop of Narbonne provided that a denial of justice would exist if the authorities of Narbonne failed to give a satisfactory answer within twenty-one days after receiving the official demand for redress sent by the Aragonese Crown on behalf of its subjects who did not obtain compensation. In such a case, reprisals could be granted.[100]

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teenth Century', *LQR* 48 (1932), 521–46, at 538; Clark, 'The English Practice with Regard to Reprisals by Private Persons' (above, n. 4), 704–5; Colbert, *Retaliation in international law* (above, n. 6), 14; J. Duncan M. Derrett, 'Withernam. A Legal Practice Joke of Sir Thomas More', *CathLaw* 7 (1961), 211–222 & 242; J. Duncan M. Derrett, 'Withernam. A Postscript', *CathLaw* 9 (1963), 124–37. This kind of reprisals was forbidden in 1275 under Edward I. See the First Statutes of Westminster, Clause 23, reproduced in Great Britain, *The Statutes of the Realm*, Printed by command of his majesty King George the Third. In pursuance of an address of the House of Commons of Great Britain. From Original Records and Authentic Manuscripts. 1st vol. (London: Dawsons of Pall Mall, 1810 [Reprinted 1963]), part "The Statutes", 33. Yet, instances of withernam were still documented in the seventeenth century. See, e.g., Katherine Maud Elisabeth Murray, *The Constitutional History of the Cinque Ports* (Publications of the University of Manchester: 235. Historical series, 68; Manchester: Manchester University Press, 1935), 176. That is why the Statutes of Westminster I can be regarded as a "noble experiment" lacking acceptation (Erwin F. Meyer, 'Anent the statute of Westminster I and liability', *Saint Louis LR* 17 (1931), 22–6).

97 Spiegel, 'Origin and Development of Denial of Justice' (above, n. 61), 66. Indeed, reprisals and denial of justice were closely linked to such an extent that denial of justice remained for a long time the main condition to resort to reprisals until the concept of international delinquency, i.e. illegality, replaced it. See Ibid., 63–4.

98 See Clause 8 transcribed in Bluhme, 'Edictus Langobardorum' (above, n. 91), 219. About the so-called *Pactum Sicardi* and its background, see Barbara M. Kreutz, *Before the Normans*: *Southern Italy in the Ninth and Tenth Centuries* (Philadelphia: University of Pennsylvania Press, 1996), 20–3.

99 Colbert, *Retaliation in international law* (above, n. 6), 28.

100 Mas Latrie, *Du droit de marque ou droit de représailles au Moyen-Age* (above, n. 65), 26f. and 58–59.

Sometimes the stipulation aimed to prevent reprisals by holding the sole wrongdoer or debtor responsible. A treaty concluded in 1216 between Florence and Bologna had precisely this content.[101] More pragmatically, Hanseatic cities concluded bilateral treaties that made judgements against the debtor or wrongdoer enforceable within the jurisdiction of both cities.[102] Another method to restrict the resort to reprisals was the creation by the contracting parties of a compensation fund financed through special duties levied on the goods of their merchants, such as in a treaty of 1218 between Florence and Perugia.[103]

Thirteenth-century treaties of peace and truces between France and England occasionally set up a conciliation commission, composed of magistrates called 'the keepers of the peace', that endeavoured to bring the complaints between subjects of both nations to an amicable agreement. This approach sought to prevent the resurgence of violence in the form of either new hostilities or reprisals. However, in case of failure and after a certain period of time had elapsed, the imposed restraint of violence ceased.[104]

In addition to treaty law, domestic law addressed the issue of reprisals, too. Sovereigns sometimes attempted to abolish reprisals within their realm. For instance, the Holy Roman Emperor Frederick II forbade in a

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101 Ibid., 49.

102 Karl Theodor Pütter, *Beiträge zur Völkerrechts-Geschichte und Wissenschaft* (Leipzig: Adolph Wienbrack, 1843), 151.

103 Colbert, *Retaliation in international law* (above, n. 6), 13. However, a tax levy on merchandise of trade to recompense the aggrieved individuals was not necessarily the best alternative to reprisals. Merchants often protested against such method. But the case of Jacques Cœur, 'argentier' of Charles VII of France, also shows that this process was used for personal enrichment. Indeed, Cœur, himself a victim of piracy and in this capacity entitled to compensation by way of reprisals, was accused in 1453 of extorting and acquiring large sums of money as commissioner and farmer of such a tax. See Kathryn Reyerson, 'Commercial law and merchant disputes. Jacques Coeur and the law of Marque', *Medieval Encounters* 9 (2003), 244–55.

104 Henry Wheaton, *Histoire des progrès du droit des gens en Europe et en Amérique depuis la paix de Westphalie jusqu'à nos jours*: *Avec une introduction sur les progrès du droit des gens en Europe avant la paix de Westphalie*, 1st vol. (4th edn., Leipzig: F. A. Brockhaus, 1865), 80; Mas Latrie, *Du droit de marque ou droit de représailles au Moyen-Age* (above, n. 65), 49; Nys, *Le droit de la guerre et les précurseurs de Grotius* (above, n. 61), 36–37 and 43. See, e.g., the truces of June 1228 and July 1255: Jean Dumont, *Corps universel diplomatique du droit des gens*, 8 vols. (Amsterdam: P. Brunel, R. et G. Wetstein, les Janssons à Waesberge, L'Honoré et Chatelain, 1726–1731), 1st vol., Part I, 166 and 398.

constitution of September 1231 from taking reprisals or waging private war on one's own initiative. In order to maintain peace in his dominion, each claim had, therefore, to be brought before a competent judicial body.[105]

By the thirteenth century, local regulations largely began to impose the procurement of a licence authorising the taking of reprisals.[106] It was equivalent in many respects to the *auctoritas* necessary for a just war.[107] The victim's Sovereign alone —namely the King, in France and England; the Podestà, in Florence; the Doge, in Venice and Genoa; etc.— or his delegates could allow reprisals.[108] The idea naturally was to examine the justice of the demands and prevent the escalation of private violence, which could

105 Deutsches Institut für Erforschung des Mittelalters and Wolfgang Stürner, *Monumenta Germaniae Historica*: *Inde ab anno Christi Quingentesimo usque ad annum millesimum et quingentesimum* (Legum sectio IV. Constitutiones et acta publica imperatorum et regum, 2 Suppl.; Hannover: Hahn, 1996), 158–9. Another decree of the same month provided the penalty for the transgressors: those who undertook a private war had to be deprived of all their goods; in case of reprisals, it would be the half. See Ibid., 159–60.

106 Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol, 110. The letter of reprisal granted by John I of England to John of Rye in 1216 is one of the earliest examples. See Verein für Hansische Geschichte and Konstantin Höhlbaum, *Hansisches Urkundenbuch*, 1st vol. (Halle: Buchhandlung des Waisenhauses, 1876), 48.

107 Neff, *War and the Law of Nations* (above, n. 2), 78.

108 Mas Latrie, *Du droit de marque ou droit de représailles au Moyen-Age* (above, n. 65), 18. Since 1353, the King of England had the exclusive right to allow reprisals. See Edward III's Ordinance of the Staples, Clause 17, reproduced in Great Britain, *The Statutes of the Realm* (above, n. 96), part "The Statutes", 339. In France prior to the fifteenth century, some authorities more or less independent like the viscount of Béarn could authorise reprisals. It was also true for some cities like Marseille. See Joseph Eiglier, *Étude historique sur le droit de marque ou de représailles à Marseille aux XIII^ème^, XIV^ème^ & XV^ème^ siècles* (Marseille: Aschero et Sacomant, 1888). In 1443, under Charles VII, the power to grant reprisals was limited to the King and the parlements "parce que pluseurs marques ont esté par cy-devant adjugées pour peu de chose, & que matiere de marque doit estre discutée par grant deliberacion & bon conseil" (Eusèbe Jacob de Laurière, Denis-François Secousse, Louis-Guillaume de Villevaut et al., *Ordonnances des Roys de France de la Troisième Race*, 21 vols. (Paris: Imprimerie Royale, 1723–1849), 13th vol., 368). It finally became a regalian privilege in 1485. See, i.a., Jean Bodin, *Les six livres de la République* (Paris: Chez Iacques du Puys, Librairie Iuré, 1576), Book I, ch. 10, here at 216; René Choppin, *Trois livres du domaine de la couronne de France*: *Composez en latin […]. Et traduits en langage vulgaire sur la derniere impression de l'an 1605. Avec une table alphabetique fort ample des*

lead to general warfare.[109] Without such a licence, the acts of violence against aliens amounted to piracy.[110] This licence made clear that the ruler delegated to the victim a small portion of his sovereign powers to accomplish a law enforcement purpose.[111]

The licence is called either 'letter of reprisal' (when reprisals were executed within the territory of the Sovereign allowing them) or 'letter of marque' (when the seizure was carried out beyond the boundary —*marca* — of his jurisdiction).[112] These letters teach a great deal about the procedure governing the practice of reprisals. They usually set out the reasons justifying their granting (initial wrong and denial of justice) and specified the conditions under which reprisals were allowed and carried out (target group, amount to be seized and control of the authorities).[113]

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matieres, & choses plus remarquables y contenuës. (Paris: Chez Estienne Richer, 1634), 377; *Guidon de la mer*, ch. X, Art. 1, reproduced in Jean-Marie Pardessus, *Collection de lois maritimes antérieures au XVIII.e siècle*, 2nd vol. (Paris: Imprimerie Royale, 1831), 410–411.

109 Butler and Maccoby, *The Development of International Law* (above, n. 63), 174–5. The unpunished murder of a Norman sailor in a brawl with English sailors in the port of Bayonne (back then part of the English realm) in 1292 led to a series of retaliating acts on both sides after the King of France flippantly told the Norman seamen to take the matter into their own hands. The Normans then captured an English ship and hung part of the crew on the spot. The English retaliated against French ships without the authorisation of their King. War eventually broke out between both nations. See Robert Plumer Ward, *An Enquiry Into the Foundation and History of the Law of Nations in Europe, from the Time of the Greeks and Romans, to the Age of Grotius*, 1st vol. (London: J. Butterworth, 1795), 295–6; Charles Mac Farlane, *The Cabinet History of England: Being an Abridgment, by the Author, of the Chapters Entitled "Civil and Military History" in "The Pictorial History of England," with a Continuation to the Present Time*, 3th vol. (London: Charles Knight and Co., 1845), 45–7. Such an incident might have prompted Sovereigns to generalise the requirement of a licence to resort to reprisals.

110 Butler and Maccoby, *The Development of International Law* (above, n. 63), 175; Clark, 'The English Practice with Regard to Reprisals by Private Persons' (above, n. 4), 702.

111 Neff, *War and the Law of Nations* (above, n. 2), 80.

112 Jan H. W. Verzijl, *International law in historical perspective*, 12 vols. (Nova et vetera iuris gentium / Publications of the Institute for International Law of the University of Utrecht; Series A. Modern International Law, vols. 4, 6–14, 16, 19; Leiden: A. W. Sijthoff, 1968–1998), Part IX-C, 153. But see Mas Latrie, *Du droit de marque ou droit de représailles au Moyen-Age* (above, n. 65), 12.

113 For a more detailed account of these requirements, see Clark, 'The English Practice with Regard to Reprisals by Private Persons' (above, n. 4). See also Colbert, *Retaliation in international law* (above, n. 6), 32–3; Hohl, 'Bartolus a Saxoferrato:

Beyond that and in order to prevent adverse effects on trade caused by reprisals, domestic law also provided for immunities from reprisals in favour of foreign merchants.[114] These exemptions were granted to some particular merchants, to all those belonging to a certain nation or generally to any merchant going to this fair or that market.[115] When the 'parlement' of Paris condemned in 1272 the Countess of Flanders, who had ordered the seizure of a Welsh merchant's wool on account of the unredressed grievances of her subjects in England, it was not because the parlement did not recognise her the right to grant reprisals, although she was at the time a vassal of the King of France, but because she violated the immunity that she had granted to all merchants travelling to and returning from a fair in Lille.[116]

Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 115 fn. 1. As illustration, Clark referred to a letter of reprisal dated from 1295 that was granted by Edward I of England to a Gascon subject who suffered losses at the hands of Portuguese people. Translated by Reginald Godfrey Marsden, *Documents relating to law and custom of the sea*, 2 vols. (Publications of the Navy Records Society, 49–50; London: Navy Records Society, 1915–1916), 1st vol., 38–41, from the Latin original.

114 Paul-Louis Huvelin, *Essai historique sur le droit des marchés & des foires* (Paris: Arthur Rousseau, 1897), 442–3.

115 Mas Latrie, *Du droit de marque ou droit de représailles au Moyen-Age* (above, n. 65), 45. For examples from the first half of the fourteenth century, see Colbert, *Retaliation in international law* (above, n. 6), 40–1. See also, e.g., the privileges granted by the Kings of France in favour of the Jews in 1360 (Art. 5) and the Lombards of Paris in 1382 (Art. 17). Laurière et al., *Ordonnances des Roys de France de la Troisième Race* (above, n. 108), 3rd vol., 475; 6th vol., 656, respectively. This was done in consideration of their commercial significance as bankers and pawnbrokers. Mas Latrie, *Du droit de marque ou droit de représailles au Moyen-Age* (above, n. 65), 20. In England, the Magna Carta of 1215 ensured foreign merchants the right to enter, reside in and leave the kingdom without suffering exactions, except in wartime (Magna Carta, Clause 41, reproduced in Great Britain, *The Statutes of the Realm* (above, n. 96), part "Charters of Liberties", 11). Wheaton, *Histoire des progrès du droit des gens en Europe et en Amérique depuis la paix de Westphalie jusqu'à nos jours* (above, n. 104), 81, implied that this immunity protected against reprisals, too.

116 Arthur Auguste Beugnot, *Les Olim ou registres des arrêts rendus par la cour du roi sous les règnes de Saint Louis, de Philippe le Hardi, de Philippe le Bel, de Louis le Hutin et de Philippe le Long* (Collection de documents inédits sur l'histoire de France publiés par ordre du roi et par les soins du ministre de l'instruction publique. Première série: Histoire politique; Paris: Imprimerie Royale, 1839), 914–916, § LXXXI. See, thereupon, Mas Latrie, *Du droit de marque ou droit de représailles au Moyen-Age* (above, n. 65), 20; Chavarot, 'La pratique des lettres de marque d'après les arrêts du parlement (XIII^{e}–début XV^{e} siècle)' (above, n. 95),

Exemptions were also granted to some other categories of persons such as students.[117] Another important immunity was declared in favour of ecclesiastical men and their property. Indeed, after pointing out that reprisals were "forbidden by civil regulation as iniquitous and contrary to laws and natural equity" ("*tanquam graves legibus et aequitati naturali contrariae civili sint constitutione prohibitae*"), the Second Council of Lyon in 1274 placed an interdict on their use against ecclesiastical persons or their goods on pain of excommunication.[118] Finally, certain commodities could also be declared free of reprisals.[119]

56–7. It was frequent to grant merchants such protection against reprisals during fairs and on their journey to and from there. See, e.g., G. Des Marez, 'La lettre de foire au XIII[e] siècle. Contribution à l'étude sur les origines des papiers de crédit.', *RDILC* 31 (1899), 533–44, at 541f. Such an immunity even became customary (Saxoferrato, *Omnium Iuris Interpretum Antesignani Consilia, Quaestiones et Tractatus* (above, n. 89), Qu. 7, Ad octauum, 23, here at fol. 123v). See, however, Henry Joosen, *Représailles exercées contre des marchands malinois aux foires de Champagne (1300–1305)*, extrait de la Chronique Mensuelle « Mechlinia » (Malines: H. Dierickx-Beke Fils, 1934).

117 At the Diet of Roncaglia in November 1158, Frederick I Barbarossa gave the *Privilegium Scholasticum*. It did not only grant students at Bologna protection during their stay and their journey to and from the university, but also immunity from reprisals. See Deutsches Institut für Erforschung des Mittelalters and Ludwig Weiland, *Monumenta Germaniae Historica*: *Inde ab anno Christi Quingentesimo usque ad annum millesimum et quingentesimum* (Legum sectio IV. Constitutiones et acta publica imperatorum et regum, 1; Hannover: Hahn, 1893), 249. However, according to this text, the privilege applied only in case of '*delictum*'. Heinz Koeppler, 'Frederick Barbarossa and the Schools of Bologna. Some Remarks on the 'Authentica Habita'', *The English Historical Review* 54 (1939), 577–607, at 597–600., on the other hand, argued that the authentic privilege dealt with '*debitum*' since it was a much common source of complaint. Cf. Winfried Stelzer, 'Zum Scholarenprivileg Friedrich Barbarossas (Authentica „Habita")', *DAEM* 34 (1978), 123–65. See also Honoré Bonet, *L'arbre des batailles*, publié par Ernest Nys (Bruxelles/Leipzig: C. Muquardt, Merzbach et Falk, 1883), Part 4, Ch. LXXXVI, here at 192–194.

118 Sexti Decretal. Lib. V. Tit. VIII. Cap. Un., reproduced in Richter and Friedberg, *Corpus Iuris Canonici* (above, n. 96), col. 1089. This rule was the 28th canon adopted by the Second Council of Lyon. It was repeated, often literally, by successive provincial Councils. See Charles Du Fresne Du Cange, *Glossarium mediæ et infimæ latinitatis*, Conditum a Carolo Du Fresne, domino Du Cange, auctum a monachis ordinis S. Benedicti cum supplementis integris D. P. Carpenterii, Adelungii, aliorums suisque digessit G. A. L. Henschel sequuntur glossarium gallicum, tabulæ, indices auctorum et rerum, dissertationes: Editio nova aucta pluribus verbis aliorum scriptorum a Léopold Favre, Toustain, Le Pelletier, Dantine et al., 7th vol. (new edn., Niort: L. Favre, 1886), 134, on 'Repræsaliæ';

As can be seen, reprisals had become by the thirteenth century a well-established legal institution.[120] The practice spread all over Europe. In many respects, the development of a law of reprisals can be regarded as a progress in medieval legal thinking rather than a relic of barbaric times since it resulted from a plural and multicultural experience.[121]

2. Theory: Bartolus de Saxoferrato's Tractatus Represaliarum

(a) Significance for the Law of Reprisals

Although there were many restrictions and procedural rules governing reprisals, the practice was far from homogenous. It lacked standardisation. In this context, Bartolus de Saxoferrato, a renowned Italian law professor at Perugia who wrote on a wide variety of legal subjects, completed in 1354, three years before his demise, a treatise dedicated to the theory of reprisals: the *Tractatus Represaliarum*.[122] His interest in this topic might

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Louis Boisset, 'Les conciles provinciaux français et la réception des décrets du II[e] concile de Lyon (1274)', *RHEF* 69 (1983), 29–59, at 49.

119 Mas Latrie, *Du droit de marque ou droit de représailles au Moyen-Age* (above, n. 65), 21–2; Colbert, *Retaliation in international law* (above, n. 6), 41. For instance, the charter granted by the King Peter III of Aragon to the city of Barcelona in 1283 provided that victuals brought to that city by land or sea could not be seized by way of reprisals. See Antonio de Capmany y de Montpalau, *Memorias históricas sobre la marina, comercio y artes de la antigua ciudad de Barcelona*, publicadas por disposicion y a expensas de la Real Junta y Consulado de Comercio de la misma ciudad, Real Junta y Consuldado de Comercio de Barcelona, 2nd vol. (Madrid: en la imprenta de don Antonio de Sancha, 1779), 42f., Cap. XIII.

120 Hindmarsh, 'Self-Help in Time of Peace' (above, n. 17), 316; Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 38.

121 Andrés Díaz Borrás, 'Marca, arte de la mercadería y protorganización de la estructura recaudatoria en la Valencia del trescientos', *Anuario de Estudios Medievales* 41 (2011), 3–29, at 7.

122 Saxoferrato, *Omnium Iuris Interpretum Antesignani Consilia, Quaestiones et Tractatus* (above, n. 89), fol. 119v–124v. See esp. Proemium, here at fol. 119v. A French translation of Bartolus's *Tractatus Represaliarum* has recently been completed by Dominique Gaurier of the University of Nantes and is available in PDF since June 2019 on the website https://globalhistoryofinternationallaw.files.wordpress.com/. The document is titled '*Tractatus Bartoli Represaliarum* – une traduction' and includes an introduction by the translator.

have been aroused by the frequency of reprisals in his days and the urgent need to regulate and limit their use.[123]

Bartolus's *Tractatus Represaliarum* is the first academic work to examine the matter of reprisals thoroughly and explain the practice of his time in a coherent manner.[124] Lawyers have largely acknowledged the importance of this study for the institution of reprisals.[125] In fact, the *Tractatus* was quickly positively received by his contemporaries. For instance, Albericus de Rosate (†1360) praised Bartolus's work in these terms: "*De istis repræsaliis fecit pulcherrimum tractatum Bart. de Saxoferrato, qui mihi postea superuenit, & ponam in fine operis ad eius laudem.*"[126] Bartholus's fame as a jurisconsult and the intrinsic quality of the theory of reprisals, which he developed by leaning on municipal statutes and the practice of his time, can mainly account for the positive reception of his treatise.[127] So, in the middle of the eighteenth century, Ludovico Antonio Muratori could still write "*Bartolus, Jurisperitorum suo tempore princeps, in istud argumentum invasit, ediditque Tractatum de Represaliis, quem veluti loco Legis habuere post illum nati.*"[128]

123 Cf. Ibid., Proemium, here at fol. 119v; Jasonne Grabher O'Brien, 'In Defense of the Mystical Body. Giovanni da Legnano's Theory of Reprisals', *RLT* 1 (2002), 25–55, at 26.

124 But see Nys, *Le droit de la guerre et les précurseurs de Grotius* (above, n. 61), 44.

125 See, i.a., Del Vecchio and Casanova, *Le rappresaglie dei comuni medievali e specialmente in Firenze* (above, n. 65), XXII–XXIV; M. H. Keen, *The Laws of War in the Late Middle Ages* (Studies in political history; London/Toronto: Routledge & Kegan Paul/University of Toronto Press, 1965), 219; Ziegler, *Völkerrechtsgeschichte* (above, n. 62), 109. Grewe, *Epochen der Völkerrechtsgeschichte* (above, n. 24), 145, called Bartolus's *Tractatus Represaliarum* a "höchst scharfsinnigen und eingehenden Darstellung des Repressalienrechtes".

126 Commentarium de Statutis Lib. I Qu. LIII, in Albericus de Rosate, Bartolus de Saxoferrato, Giorgio Natta et al., *Tractatus de statutis, diversorum autorum et JC. in Europa præstantiisimorum*, (Francofurti: ex officina Wolffgangi Richteri, curante Iohanne Theobaldo Schönvvettero & Conrado Meulio ciuibus, 1606), 32.

127 Del Vecchio and Casanova, *Le rappresaglie dei comuni medievali e specialmente in Firenze* (above, n. 65), XXIII–XXIV; Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 132.

128 Disseratio LV De Represaliis: Ludovico Antonio Muratori, *Antiquitates italicæ medii ævi, sive dissertationes*: *De Moribus, Ritibus, Religione, Regimine, Magistratibus, Legibus, Studiis Literarum, Artibus, Lingua, Militia, Nummis, Principibus, Libertate, Servitute, Fœderibus, aliisque faciem & mores Italici Populi referentibus post declinationem Rom.*, 4th vol. (Mediolani: ex Typographia Societatis Palatinæ in Regia Curia, 1741), col. 758.

For centuries, the *Tractatus* remained authoritative.[129] Generations of jurists were influenced, directly or indirectly, by the theory of reprisals laid down by Bartolus.[130] Indeed, Giovanni da Legnano,[131] Martinus Garatus

129 Haggenmacher, 'L'ancêtre de la protection diplomatique. les représailles de l'ancien droit (XII^{e}-XVIII^{e} siècles)' (above, n. 3), 11.

130 See Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 132–138.

131 Legnano, *Tractatus de Bello, de Represaliis et de Duello* (above, n. 88), Cap. CXXII–CLXVII, at 155–174 (tr. at 307–331).

Laudensis,[132] Johannes Jacobus Canis,[133] Honoré Bonet,[134] etc. [135] —just to name a few— dealt with reprisals in similar terms as Bartolus. [136]

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132 Martinus Garatus Laudensis, 'De Represaliis', in Franciscus Zilettus (ed.), *Tractatus illustrium in utraque tum pontificii, tum cæsarei iuris facultate Iurisconsultorum, De Fisco, & eius Priuilegiis. Ex multis in hoc volumen congesti, additis plurimis, etiam nunquam editis, hac nota designatis; & multò, quàm antea, emendatiores redditi; Summariis singulorum Tractatuum locupletißimis illustrati. Indices accessere ita lucupletes, ut omnes materiæ, quæ sparsim leguntur, facillimè distinctæ Lectoribus appareant*, 12th vol. (Venetiis: [s.n.], 1584), fol. 279r- fol. 281r.

133 Johannes Jacobus Canis, 'De Represaliis', in Franciscus Zilettus (ed.), *Tractatus illustrium in utraque tum pontificii, tum cæsarei iuris facultate Iurisconsultorum, De Fisco, & eius Priuilegiis. Ex multis in hoc volumen congesti, additis plurimis, etiam nunquam editis, hac nota designatis; & multò, quàm antea, emendatiores redditi; Summariis singulorum Tractatuum locupletißimis illustrati. Indices accessere ita lucupletes, ut omnes materiæ, quæ sparsim leguntur, facillimè distinctæ Lectoribus appareant*, 12th vol. (Venetiis: [s.n.], 1584), fol. 275r–fol 279r.

134 Bonet, *L'arbre des batailles* (above, n. 117), Part 4, Ch. LXXIX–XC, here at 180–196.

135 In the seventeenth and eighteenth centuries, an impressive amount of doctoral theses on reprisals —where Bartolus's influence can be identified— were defended at Dutch, German and Swiss universities. See a list in Dietrich Heinrich Ludwig von Ompteda, *Litteratur des gesammten sowohl natürlichen als positiven Völkerrechts*, 2nd vol. (Regensburg: bey Johann Leopold Montags sel. Erben, 1785), 609–13; Carl Albert von Kamptz, *Neue Literatur des Völkerrechts seit dem Jahre 1784; als Ergänzung und Fortsetzung des Werks des Gesandten von Ompteda* (Berlin: Duncker und Humblot, 1817), 316–7; Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 136 fn. 5. The enthusiasm for this topic can be explained by the fragmentation of the Holy Roman Empire into numerous independent principalities and the ensuing question whether reprisals between German Princes were allowed (Ibid., 1st vol., 136–137). See, e.g., Adam Friedrich Glafey, *Vernünfft- Und Völcker-Recht: Worinnen die Lehren dieser Wissenschafft auf demonstrative Gründe gesetzet/ und nach selbigen die unter souverainen Völckern/ wie auch denen Gelehrten biß daher vorgefallene Strittigkeiten erörtert werden, Nebst einer Historie des vernünfftigen Rechts/ worinnen nicht nur die Lehren eines jeden Scribenten in Jure Naturæ angezeigt und examinirt werden, sondern auch eine vollständige Bibliotheca Juris Naturæ & Gentium zu befinden ist, welche die biß anhero in dieser disciplin heraus gekommene Bücher, Dissertationes, Deductiones und andere pieçes volantes nach ihren Materien in Alphabetischer Ordnung darlegt*, Samt einen vollständigen Real-Register (Franckfurt/Leipzig: Christoph Riegel, 1723), Book VI, Ch. 1, § 21, here at 7–8, for a negative answer to this question. Cf. Georg Friedrich von Martens, *Précis du droit des gens moderne de l'Europe fondé sur les traités et l'usage: Pour servir d'introduction à un cours politique et diplomatique* (2nd edn., Gottingue: Librairie de Dieterich, 1801), 378.

The importance of Bartolus's treatise is indisputable and therefore makes it essential to examine now the major aspects of his theory of reprisals, leaving the questions of detail aside.

(b) Justification of Reprisals

Bartolus addressed first the problematic question of the justification of the use of reprisals. It was no easy task as this remedy involved despoiling innocent persons. This posed a dilemma. On the one hand, the victim deserved justice. On the other, there was the principle that one should not be held vicariously liable for another's debt.[137]

Firstly, Bartolus wondered whether reprisals were morally (*in foro conscientiae*) permitted. He pointed out in this respect that natural law (*ratio naturali*) condemned reprisals. Yet, Saint Augustine of Hippo and Saint Thomas of Aquinas's theory of just war helped to legitimise their use. The question of the legitimacy of reprisals *in foro conscientiae* could actually be solved if the three cumulative conditions which made war 'just' were met, viz. *authoritas superioris* (the superior's permission), *causa iusta* (a just cause) and *intentio recta* (a rightful intention). Bartolus mainly laid great emphasis on the last requirement. Indeed, reprisals could be morally illicit in the absence of a rightful intention, notwithstanding the superior's consent and the justice of the cause.[138] However, his successors did not really insist on the condition of the *intentio recta*, probably because subjective criteria are hard to prove.[139]

Finally, reprisals could also be justified from a legal viewpoint (*in foro civili*). Bartolus drew here again an analogy with the legality of war under *ius divinum* (divine law) and *ius gentium* (law of nations).[140] Indeed, war

136 Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 132–135. Also Keen, *The Laws of War in the Late Middle Ages* (above, n. 125), 219.

137 Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 61.

138 Saxoferrato, *Omnium Iuris Interpretum Antesignani Consilia, Quaestiones et Tractatus* (above, n. 89), Qu. 1, Ad primum, 3, here at fol. 119v–120r. On the just-war doctrine, see Neff, *War and the Law of Nations* (above, n. 2), 49–54.

139 Markus Schrödl, *Das Kriegsrecht des Gelehrten Rechts im 15. Jahrhundert: Die Lehren der Kanonistik und der Legistik über De bello, de represaliis et de duello* (Rechtsgeschichtliche Studien, 14; Hamburg: Dr. Kovač, 2006), 211.

140 Saxoferrato, *Omnium Iuris Interpretum Antesignani Consilia, Quaestiones et Tractatus* (above, n. 89), Qu. 1, Ad secundum, 5, here at fol. 120r.

could be regarded as a salutary remedy originating from God and used to restore peace and tranquillity.[141] As to the Roman *ius gentium*, war was lawful when an authority having no superior agreed on its resort.[142] But a just cause, like the defence of one's own body or of the 'mystical' body, was also needed.[143] A mystical body referred to a community composed of various members who together formed one sole body.[144] This concept especially calls to mind the allegory on the frontispiece of Thomas Hobbes's *Leviathan*. As a result, the whole body could repel an attack on one part, e.g. one of its citizens.[145] For Bartolus, reprisals were thus fully tantamount to war: "*nam concedere represalias est indicere bellum*".[146]

So, in order to be lawful, reprisals had to fulfil the two main conditions of the just-war theory: the superior's consent and the just cause.

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141 Joachim von Elbe, 'The Evolution of the Concept of the Just War in International Law', *AJIL* 33 (1939), 665–88, at 672.

142 Ibid., 672–3.

143 Saxoferrato, *Omnium Iuris Interpretum Antesignani Consilia, Quaestiones et Tractatus* (above, n. 89), Qu. 1, Ad secundum, 5–6, here at fol. 120r.

144 The expression 'mystical' body (*corpus mysticus*) is borrowed from Legnano, *Tractatus de Bello, de Represaliis et de Duello* (above, n. 88), Cap. CXXIII, at 155 (tr. at 308). For his part, Bartolus spoke of "*corpus […] de uno corpore mixto*." (Saxoferrato, *Omnium Iuris Interpretum Antesignani Consilia, Quaestiones et Tractatus* (above, n. 89), Qu. 1, Ad secundum, 5, here at fol. 120r).

145 Ibid., Qu. 1, Ad secundum, 6, here at fol. 120r. According to Giovanni da Legnano, reprisals were considered a particular war waged in defence of one part of the mystical body. It differed from self-defence which pursued the defence of an individual's own body. See Legnano, *Tractatus de Bello, de Represaliis et de Duello* (above, n. 88), Cap. LXXIX, at 130 (tr. at 277). See further O'Brien, 'In Defense of the Mystical Body. Giovanni da Legnano's Theory of Reprisals' (above, n. 123), 31. Reprisals were thus the response of the mystical body. Seen from this angle, reprisals had little to do with the right to feud, contrary to what claimed Pütter, *Beiträge zur Völkerrechts-Geschichte und Wissenschaft* (above, n. 102), 149.

146 Saxoferrato, *Omnium Iuris Interpretum Antesignani Consilia, Quaestiones et Tractatus* (above, n. 89), Qu. 3, Ad secundum, 3, here at fol. 121r. See also Bonet, *L'arbre des batailles* (above, n. 117), Part 4, Ch. LXXXII, here at 183.

(c) Conditions

i) Superior's Consent

Reprisals, in the same conditions as just war, could only be allowed by an authority which had no superior. Indeed, the theory of just war taught that "*bellum iustum non potest indicere, nisi ille qui superiorem non habet*".[147] The same maxim applied to reprisals, too. Since the emergence of reprisals was the consequence of the disappearance of a superior authority able to provide justice, it thus logically implied that only an overlord could permit them.

However, given the political situation in the Italian peninsula in Bartolus's time, it was not necessarily easy to say who the overlord was.[148] Thence, it was not unusual to distinguish between ruler *de jure* and ruler *de facto*. The Pope and the Holy Roman Emperor were often recognised as being superior *de jure* in many dominions. Yet, their authority was not firmly established *de facto* everywhere. Such was the case of the Emperor who resided in Germany. Although he was the *de jure* overlord, he did not wield the *de facto* power in some parts of his Empire like the Italian territories.[149] As a result, the Italian cities (*civitas*) where the Emperor's *de facto* authority failed were entitled to grant reprisals.[150]

147 Saxoferrato, *Omnium Iuris Interpretum Antesignani Consilia, Quaestiones et Tractatus* (above, n. 89), Qu. 3, Ad secundum, 3, here at fol. 121r.

148 See thereupon Cecil Nathan Sidney Woolf, *Bartolus de Sassoferrato: His position in the history of medieval political thought* (Cambridge: CUP, 1913), esp. 203–207.

149 Saxoferrato, *Omnium Iuris Interpretum Antesignani Consilia, Quaestiones et Tractatus* (above, n. 89), Qu. 2, Ad quintum, here at fol. 121r.

150 Ibid., Qu. 3, Ad secundum, 4, here at fol. 121r. According to Bartolus, this power to grant reprisals was delegated through statutes by the citizens to the podestà or lord.

ii) Just Cause

In addition, reprisals required a just cause (*causa iusta*).[151] It means first that the initial injustice should be quite grave because reprisals were an odious measure and a subsidiary remedy.[152] Bartolus did not specify the nature of this injustice, but it could be in all likelihood either a wrong or a debt. This reading can be inferred from the passage where he said that reprisals were legal when the target nation neglected to give justice and to enforce payment of the debt ("*qui iustitiam facere, & debitum reddere neglegit*").[153]

Following an injustice, the victim had then to bring his claim before the local judge of the wrongdoer.[154] If he obtained justice, the question of reprisals would not even arise. On the contrary, if he suffered a denial of justice, the recourse to reprisals would have a just cause.

A denial of justice could be of two kinds: either the absence of judgement or an iniquitous decision.[155] There was a denial of justice in the former case when the judges at all levels of the judicial hierarchy, including the ruler, remained elusive and avoided rendering justice.[156] Bartolus did not answer after which delay the victim could deem justice to be denied. He merely stated that reprisals could be granted when this denial was duly recognised in the victim's country.[157] In the latter case, the exhaustion of the local remedies was also the rule: the victim had to appeal to the superi-

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151 About the Roman-law origin of the just cause for reprisals, see Jacob Giltaij, 'Roman law and the *causa legitima* for reprisal in Bartolus', *Fundamina* 20 (2014), 349–56.

152 Saxoferrato, *Omnium Iuris Interpretum Antesignani Consilia, Quaestiones et Tractatus* (above, n. 89), Qu. 2, Ad quartum, here at fol. 121r.

153 Ibid., Qu. 1, Ad secundum, 4, here at fol. 120r. Cf. Colbert, *Retaliation in international law* (above, n. 6), 18.

154 Saxoferrato, *Omnium Iuris Interpretum Antesignani Consilia, Quaestiones et Tractatus* (above, n. 89), Qu. 2, Ad primum, here at fol. 120v. Nevertheless, there were exceptions to this rule. See Qu. 2, Ad secundum, here at fol. 120v.

155 There were in practice other forms of denial of justice that could be imagined. For instance, when no legal action was available to the plaintiff in the wrongdoer's country (e.g., to Christians before Ottoman judges), the result was an obvious denial of justice. See Mas Latrie, *Du droit de marque ou droit de représailles au Moyen-Age* (above, n. 65), 25. Justice could also be deemed denied when the wrongdoer's overlord was unable or intentionally obstructed the enforcement of the judgement (Colbert, *Retaliation in international law* (above, n. 6), 20–1).

156 Saxoferrato, *Omnium Iuris Interpretum Antesignani Consilia, Quaestiones et Tractatus* (above, n. 89), Qu. 2, Ad tertium, 9, here at fol. 120v.

157 Ibid., Qu. 2, Ad primum, here at fol. 120v.

or instances. However, if the unjust judgement was confirmed on appeal or there was no existing appellate instance, justice could rightly be considered denied.[158]

The next step consisted then of confirming the existence of the denial of justice. To this end, the records of the first judge could be requested. If he refused to produce them, he would commit an injustice. Witnesses could also be called in order to prove the denial.[159] In general, the ruler of the victim sent an official demand for redress. The categorical refusal or the persistent silence by the authorities of the wrongdoer's nation would confirm the denial of justice.[160]

Only then would the cause be just. The consequence was, therefore, that every individual subject of the delinquent country could be held responsible, not because of the initial wrong but precisely because of the denial of justice.[161] The parallel between reprisals and just war is also evident here. Indeed, reprisals could target innocent persons, just like in war innocents could be captured.[162] This flowed from the concept of 'mystical body' after which all the individual members had to bear the burden of the community. The use of reprisals thus aimed to incite the nation found at fault to guarantee the legal protection of aliens within its jurisdiction.[163]

158 Ibid., Qu. 2, Ad tertium, here at fol. 120v–121r. See also Qu. 6, Ad primum, here at fol. 122v; Qu. 2, Ad quintum, here at fol. 121r.

159 Ibid., Qu. 4, Ad quintum, here at fol. 121v.

160 Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 113.

161 Saxoferrato, *Omnium Iuris Interpretum Antesignani Consilia, Quaestiones et Tractatus* (above, n. 89), Qu. 10, Ad primum, here at fol. 124r.

162 Ibid., Qu. 6, Ad quartum, 6, here at fol. 122v.

163 Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 96.

(d) Execution

If granted,[164] reprisals had a compensatory character since they were limited to the value of the loss sustained plus costs.[165] In other words, a criterion of proportionality applied.

During this phase, the superior authority was in charge of supervising the lawful execution of reprisals. Bartolus pointed out that the letter holder was, in principle, not entitled to carry out reprisals by seizing persons and goods himself, except in some derogatory cases.[166] Even so, the authorities controlled almost the whole procedure. For example, the letter holder could, in some cases, arrest a countryman of the wrongdoer. But then the captive had to be brought before a judge unless the letter holder was expressly authorised to detain the alien in his own jail.[167] Regarding the seizure of property, the presence of a judge was not necessary.[168] However, a judge had to oversee the sale and appraisal of those goods.[169] The reason

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164 The ruler had no obligation to grant reprisals. In fact, common good could actually take precedence over private interests. See Ibid., 1st vol., 114–115. Nevertheless, according to Bartolus, there was a tacit (social) contract between the citizen and the *civitas*. In echange for bearing the burdens of the nation, the citizen deserved defence and protection from the *civitas*. See Saxoferrato, *Omnium Iuris Interpretum Antesignani Consilia, Quaestiones et Tractatus* (above, n. 89), Qu. 5, Ad primum, 2, here at fol. 122r.

165 Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 123.

166 Saxoferrato, *Omnium Iuris Interpretum Antesignani Consilia, Quaestiones et Tractatus* (above, n. 89), Qu. 9, Ad primum, here at fol. 124r.

167 Ibid., Qu. 9, Ad secundum, 2, here at fol. 124r.

168 Ibid., Qu. 9, Ad secundum, 3, here at fol. 124r.

169 Ibid., Qu. 9, Ad tertium, here at fol. 124r. Such supervision was, of course, not for free. As Bartolus stressed, procedural costs had to be withheld from the sale: "*Dico etiam quod in comparatione eius, quod quis recipit, debet fieri detractio expensarum factarum*" (Ibid). Hohl signaled that these costs varied between 10 and 30 % (Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 127). British Admiralty judges expressed an opinion in 1652 regarding letters of reprisal. They signaled that normally 10 % were reserved for the State. See Marsden, *Documents relating to law and custom of the sea* (above, n. 113), 2nd vol., 14. See also Art. 2 of French letters patent, dated 6 August 1582, reproduced in Sylvain Lebeau, *Nouveau code des prises*: *ou recueil des édits, déclarations, lettres patentes, arrêts, ordonnances, réglemens et décisions sur la Course et l'administration des Prises, depuis 1400 jusqu'au mois de mai 1789 (v. st.); suivi de toutes les lois, arrêtés, messages, et autres actes qui ont paru depuis cette dernière époque jusqu'à présent*, 1st vol. (Paris: Imprimerie de la République, an VII), 21.

for so many precautions against abuses was, of course, the risk of counter-reprisals.[170]

3. Risks of Abuse

The medieval law and theory of reprisals convey the general image of a minutely regulated institution which sought to prevent, at any cost, the commission of abuses by private individuals. Indeed, the three above conditions of (a) the Sovereign's consent, (b) the just cause and (c) the proportionality aimed to impede the taking of reprisals in an impulsive, unilateral and excessive way. This also explains why the role played by the authorities was so central in controlling the enforcement of reprisals.

In fact, when the execution fell upon the letter holder, excesses could be committed under the guise of reprisals. For example, Louis XII of France complained in late 1509 that, for the last twenty years, expired letters of reprisal had been used by French individuals against Spanish citizens and vice versa, much to the detriment of trade between both countries.[171] Such cases were, nevertheless, the exception rather than the general rule.[172]

However, the regulation of reprisals seemed to contain a serious loophole because the importance of political considerations in the decision-making to resort to reprisals had not been taken enough into account. This flaw left the door open to abuse; this time not by the victim but by the superior authority. For instance, the political character of reprisals was quite apparent when a prominent citizen of an Italian city who was elected podestà of another, was either barred from taking office or dismissed while in office. The hindrance or dismissal was felt as a national insult in the home city and could give rise to reprisals motivated politically.[173]

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170 See Saxoferrato, *Omnium Iuris Interpretum Antesignani Consilia, Quaestiones et Tractatus* (above, n. 89), Qu. 10, Ad tertium, here at fol. 124v.

171 René de Maulde La Clavière, *La diplomatie au temps de Machiavel*, 1st vol. (Paris: Ernest Leroux, 1892), 232–233.

172 Colbert, *Retaliation in international law* (above, n. 6), 47.

173 See Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 100–101.

As a matter of fact, the Sovereign of the victim enjoyed a broad discretionary power. It could either grant or refuse to grant letters of reprisal, suspend their enforcement and even revoke them.[174] He was actually under no obligation to authorise reprisals.[175] Policy generally dictated such decisions, depending on whether rivalry or friendly relationship with the nation at fault was on the agenda.[176] Reprisals could likewise be granted lightly to private individuals without the condition of a denial of justice being fulfilled.[177] This requirement was more easily omitted when the ruler himself or a high lord suffered an injustice. In such a case, the claims were not brought before the local judge of the wrongdoer but directly to the overlord. When in 1445 a royal galley loaded of grain was captured by pirates from Genoa, the King of France sought redress from the Genoese authorities but failed. Thus, he ordered the sequestration of the property of Genoese people found in Languedoc.[178] This confusion of identity between the grantee of reprisals and the grantor presented the apparent danger that an all-out war was likelier to break out.

So, the more reprisals involved policy, the more they lost their original compensatory function.[179] They, indeed, were guided by questions of prestige and commercial supremacy rather than by the pursuit of redress for

174 Ibid., 1st vol., 113–115. See also Mas Latrie, *Du droit de marque ou droit de représailles au Moyen-Age* (above, n. 65), 51; Colbert, *Retaliation in international law* (above, n. 6), 33–4.

175 However, according to eighteenth-century French jurist René-Josué Valin, the Sovereign who refused to issue a letter of reprisal on the pretext that war might ensue, would tarnish his reputation and violate his duty of justice. See René-Josué Valin, *Nouveau commentaire sur l'Ordonnance de la marine du mois d'août 1681*: *Où se trouve la Conférence des anciennes Ordonnances, des Us & Coutumes de la Mer, tant du Royaume que des Pays étrangers, & des nouveaux Réglemens concernans la Navigation & le Commerce maritime. Avec des Explications prises de l'esprit du Texte, de l'Usage, des Décisions des Tribunaux & des meilleurs Auteurs qui ont écrit sur la Jurisprudence nautique. Et des Notes historiques & critiques, tirées de la plupart des divers Recueils de Manuscrits conservés dans les dépôts publics*, dédié à S. A. S. M.gr le Duc de Penthièvre, Amiral de France., 2nd vol. (La Rochelle: chez Jérôme Legier, 1766), 419.

176 Mas Latrie ingenuously believed, though that the granting of reprisals was seldom biased or illegal. See Mas Latrie, *Du droit de marque ou droit de représailles au Moyen-Age* (above, n. 65), 15f.

177 Cf. Colbert, *Retaliation in international law* (above, n. 6), 47f.

178 Maulde La Clavière, *La diplomatie au temps de Machiavel* (above, n. 171), 229. See also at 237.

179 Cf. Colbert, *Retaliation in international law* (above, n. 6), 47; Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 104–105.

injustice.[180] Against this background, the importance of the rules governing reprisals that aimed to maintain them within tolerable limits cannot be minimised.[181]

However, the medieval law of reprisals was about to lose a large amount of relevance following the emergence of the modern State around the sixteenth century. Indeed, reprisals became a public matter as the process of centralisation of power led to the politicisation of all spheres of international relation and consequently to a decline in standards.

III. Politicisation of Reprisals (XVIth–XVIIIth c.)

1. Transition from Private to Public Reprisals

(a) Diplomatic Interposition of the Sovereign

With the development of the modern State system, reprisals underwent slow transformations. They, indeed, progressively stopped involving a relation between private individuals to become solely a State-to-State matter.[182] This process especially had an impact on the conditions governing reprisals. The result was that the medieval law of reprisals became ill-adapted to the new circumstances, which led to a decline in standards. This was particularly true in respect of the *causa iusta*.

Bartolus laid great emphasis on the element of just cause. A denial of justice was the fundamental requirement to allow reprisals. On the contrary, the initial wrong had little importance. It was nothing more than the triggering event. For Bartolus, it did not matter whether the wrong arose from a debt or an injury, so long as it was of certain gravity. The next step was the most important: the victim had to bring his claim before the local judge of the wrongdoer. However, sixteenth-century Italian lawyer Alberico Gentili observed that, if a public person committed the wrong, judicial

180 Ibid., 1st vol., 105.

181 Cf. Colbert, *Retaliation in international law* (above, n. 6), 49–50; Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 107–108.

182 Haumant, *Les représailles* (above, n. 21), 51f.

remedies were unavailable to the victim.[183] The distinction depending on whether the wrongdoer turned out to be a private individual or a public authority heralded the development of reprisals into a political coercive measure and the replacement of denial of justice by the notion of international delinquency.[184]

Even so, denial of justice as a requisite for reprisals did not immediately lose relevance. In fact, lawyers kept stressing the importance of this condition. The two main classes of denial of justice were the delay of justice and the manifestly unjust judgement.[185] In the former class, justice was generally regarded as abusively neglected after "a fit time".[186] But there was no clear criterion unless expressly provided by treaty. As for the second class, judgements were *prima facie* just because a presumption of impartiality should prevail in case of doubt.[187] Nevertheless, Bynkershoek pointed out that both the plaintiff and his Sovereign too readily regarded an unfavourable decision as being unjust.[188]

In theory, the victim could turn to his Sovereign and call him for assistance only after a denial of justice had occurred. The monarch would then interpose on behalf of his aggrieved subject by seeking to obtain redress from the wrongdoing community through the action of the national am-

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183 "*quam circa represalias: ubi distinguitur, quod aut iniuria facta a priuato est, et petenda iustitia sit a magistratu loci unde iniuria est; aut a publico facta est, et tum dentur represaliae nec petita iustitia prius*." (Alberico Gentili, *De Iure Belli Libri Tres* (Oxford: Clarendon Press, 1877), Lib. II Cap. I, here at 127).

184 Spiegel, 'Origin and Development of Denial of Justice' (above, n. 61), 73–4. See also Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 139.

185 "Justice is held to be denied, not only if judgment can not be obtained against a guilty person, or a debtor, within a reasonable time, but also if in a clear case a judgment is given which is obviously contrary to law, since the authority of the judge has not the same validity against foreigners as against subjects." (Richard Zouche, *Iuris et Iudicii Fecialis, Sive, Iuris Inter Gentes, et Quaestionum de Eodem Explicatio*: *Qua Quae ad Pacem & Bellum inter diversos Principes, aut Populos spectant, ex praecipuis Historico-jure-peritis, exhibentur*, 2 vols. (The Classics of International Law, 1; Washington: Carnegie Institution, 1911), 2nd vol., 33). See also Grotius, *Le droit de la guerre et de la paix* (above, n. 33), Book III Ch. II § V.1, here at 2nd vol., 747.

186 Charles Molloy, *De Jure Maritimo et Navali*: *Or, A Treatise of Affairs Maritime and of Commerce. In Three Books.* (7th edn., London: Printed for John Walthoe junior, and J. Wotton, 1722), 27.

187 Ibid., 32.

188 Bynkershoek, *Quaestionum juris publici libri duo* (above, n. 33), Book I Cap. 24, here 1st vol., 176 (tr. 2nd vol., 136).

bassador at the foreign Court.[189] The Sovereign's interposition was a precursor of diplomatic protection that had been customarily in use since the fourteenth century at least and figured as a requirement in treaties since the sixteenth century.[190] It precisely aimed to confirm the existence of a denial of justice.[191]

However, against the background of the emergence of modern States, it was no longer a denial of justice that constituted a *causa iusta* for reprisals, but the neglect of the foreign Sovereign to compel the author of the injustice to make reparation.[192] Indeed, Articles 1 and 2 under Title X on the letters of reprisal in Louis XIV's *Grande ordonnance de la marine d'août 1681* did not say a word about a prior denial of justice sustained by the victim, but stipulated that the ambassadors of France were charged with pressing the claims.[193] According to maritime law expert René-Josué Valin who commented the Ordinance, the issuance of letters of reprisal could only

189 Robert Kolb, 'The Protection of the Individual in Times of War and Peace', in Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford: OUP, 2012), 317–37, at 333.

190 Colbert, *Retaliation in international law* (above, n. 6), 24–5.

191 Gabriel Bonnot de Mably, *Le droit public de l'Europe, fondé sur les traités*: *Précédé des principes de négociations, pour servir d'Introduction*, avec des Remarques Historiques, Politiques & Critiques par Mr. Rousset, 2nd vol. (2nd edn., Amsterdam/Leipzig: Arkstée & Merkus, 1773), 444.

192 For example, Francisco de Vitoria wrote in his *De Jure Belli* at § 41: "[…], although […] Sovereign might initially be blameless, yet it is a breach of duty, as St. Augustine says, for them to neglect to vindicate the right against the wrongdoing of their subjects, […]. There is, accordingly, no inherent injustice in the letters of marque and reprisals which princes often issue in such cases, because it is on account of the neglect and breach of duty of the other prince that the prince of the injured party grants him this right to recoup himself even from innocent folk." (Translation by James Brown Scott, *The Spanish Origin of International Law*: *Francisco de Vitoria and His Law of Nations* (Oxford: Clarendon Press, 1934), LXIV). Cf. Balthazar Ayala, *De Jure et Officiis Bellicis et Disciplina Militari Libri III*, 2 vols. (The Classics of International Law, 2; Washington, D.C.: The Carnegie Institution of Washington, 1912), 2nd vol., 31–33; Grotius, *Le droit de la guerre et de la paix* (above, n. 33), Book III Ch. II §§ I.3 – 4 and II.1 – 4, here at 2nd vol., 743–744; Francis Hutcheson, *A Short Introduction to Moral Philosophy*: *in Three Books; Containing the Elements of Ethicks and the Law of Nature*, translated from the Latin (2nd edn., Glasgow: Robert & Andrew Foulis, 1753), 320–1; Louis de Jaucourt, 'Représailles', in Denis Diderot and Jean Le Rond d'Alembert (eds.), *Encyclopédie ou Dictionnaire raisonné des sciences, des arts et des métiers.*, 14th vol. (Neufchastel: chez Samuel Faulche & Compagnie, [1751–1765]), 142–3.

193 See Valin, *Nouveau commentaire sur l'Ordonnance de la marine du mois d'août 1681* (above, n. 175), 416–420.

follow from the ambassadors' unsuccessful attempt at the foreign court to obtain satisfaction.[194] In the so-called Jay Treaty of 1795 between Great Britain and the United States, it also was no longer about a citizen being denied justice personally.[195]

In this context, the interposition of his Sovereign was indispensable for the victim. But by doing so, the claims left the private sphere to be fully endorsed by the State.[196] Thus, German scholar Christian Wolff regarded the question of reprisals as an issue between two States. He, indeed, explained that the refusal by the wrongdoing nation to repair an injury done to the other nation or its citizens justified the lawful taking of reprisals.[197]

The result of this evolution was the exclusion of the subjects from the procedure. Before turning to his ruler, the aggrieved individual was no longer formally bound to first exhaust all local remedies in the wrongdoer's country. Thence, the disappearance of this condition made likelier a resort to reprisals guided by political considerations, given that the merits of the claim did not have to be examined by a judicial body, but by the central authority of the State. Such a situation left the door open for power struggle as the State demanding redress on behalf of its citizen expected the delinquent State to yield unconditionally. Nonetheless, Valin ingenuously believed that a powerful nation like France never traded on its superiority to press claims, although he acknowledged that this dominant position certainly made a rupture of peace less likely.[198]

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194 Ibid., 2nd vol., 419.

195 "Article 22. It is expressly stipulated that neither of the said Contracting Parties will order or Authorize any Acts of Reprisal against the other on Complaints of Injuries or Damages until the said party shall first have presented to the other a Statement thereof, verified by competent proof and Evidence, and demanded Justice and Satisfaction, and the same shall either have been refused or unreasonably delayed." (David Hunter Miller, *Treaties and other international acts of the United States of America*, 2nd vol. (Washington, D. C.: GPO, 1931–1948), 261).

196 Maulde La Clavière, *La diplomatie au temps de Machiavel* (above, n. 171), 251.

197 "there is no place for reprisals, except when another people does an injury to us or to our citizens, and, *when asked*, is unwilling to repair it within a proper time, that is, without delay." (Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum*, 2nd vol. (The Classics of International Law, 13; Oxford: Clarendon Press, 1934), § 589 (emphasis added)).

198 Valin, *Nouveau commentaire sur l'Ordonnance de la marine du mois d'août 1681* (above, n. 175), 419.

There is, however, one remarkable case in the history of the law of nations where the complaining State was compelled to recognise the condition of denial of justice: the *Silesian Loan* case.[199] This episode is in many respects illustrative of power struggle and the transition from denial of justice to the Sovereign's interposition as a condition for permitting reprisals.

In 1751, at the time of the War of the Austrian Succession, Frederick II of Prussia withheld the last instalment he owed English lenders, pursuant to Article 7 of the Treaty of Breslau of 11 June 1742 by which Prussia committed to paying a loan contracted by Emperor Charles VI in exchange for the cession of the Duchy of Silesia. This act was justified as lawful reprisals in response to judgements of the English Admiralty courts which declared Prussian vessels and cargoes —albeit Prussia remained neutral during the war— good prizes for transporting contraband of war. A commission of jurisconsults set up by the Prussian monarch, indeed, considered that the English Admiralty courts did not offer sufficient guarantees of impartiality. So, since the appeal to the High Court of Admiralty would remain unavailing for the aggrieved Prussian nationals, the issue could only be treated from Sovereign to Sovereign.[200] The commission, therefore, concluded that Frederick II was rightfully entitled to confiscate by way of reprisals the debt he owed since all diplomatic remonstrances to obtain redress had been frustrated.

However, in Great Britain, the Law Officers of the Crown drafted an answer that asserted, amongst other things, that reprisals could only be allowed when justice was "absolutely denied, *in Re minime dubiâ*, by all the

199 The following account of the facts is based on Karl von Martens, *Causes célèbres du droit des gens*, 5 vols. (2nd edn., Leipzig: F. A. Brockhaus, 1858–1861), 2nd vol., 97–168; and Ernest Mason Satow, *The Silesian loan and Frederick the Great* (Oxford: Clarendon Press, 1915). See also Henry Wheaton, *History of the Law of Nations in Europe and America; From the Earliest Times to the Treaty of Washington, 1842* (New York: Gould, Banks & Co., 1845), 206–17.

200 Thereupon, the commission's report stated the following: "§ 47. Quand deux puissances se trouvent avoir entr'elles quelques différends, on ne peut d'aucun des deux côtés en appeler aux lois du pays, parce que l'une des deux parties ne les reconnait point; l'affaire se traite alors par voie de négociation, et de cour à cour, et le différend ne se decide du consentement des deux parties, que selon le droit des gens, ou par des principes qui s'y trouvent fondés." (reproduced in Martens, *Causes célèbres du droit des gens* (above, n. 199), 2nd vol., 125).

Tribunals, and afterwards by the Prince."[201] For Emer de Vattel, the whole answer was "un excellent morceau de Droit des Gens"[202], and, for Montesquieu, "une réponse sans réplique"[203]. As a result, the Prussian commission corrected its statement and explained that the action was actually not an act of reprisals, but rather an offsetting transaction. This argument probably aimed to avoid addressing the question of denial of justice as a condition for reprisals, which would put Frederick II in an uncomfortable position from a legal perspective.[204] But the issue was not settled until a declaration was added to the Treaty of Westminster of 16 January 1756. On the one hand, Frederick II agreed to pay the last instalment; on the other, George II of Great Britain promised the payment of twenty thousand pounds sterling to extinguish the claims of Prussian subjects.

In this case, the principle that justice ought to be absolutely denied for allowing reprisals was strongly reaffirmed. Still, it remained in theory. The facts are here more eloquent: Sovereigns proceeded to reprisals whenever they deemed the exhaustion of local remedies from the aggrieved subjects useless. Indeed, from the moment when reprisals stopped being treated as an issue between private individuals to become a State-to-State matter, the question of denial of justice lost all its relevance. Another interesting element here is also that Frederick II did not admit the illegality of the reprisals. Instead, he withheld the payment until the final settlement in

201 Satow, *The Silesian loan and Frederick the Great* (above, n. 199), 82. A couple of years later, the Archdeacon of Essex Thomas Rutherforth echoed this statement of law that local remedies ought to be exhausted for the lawful resort to reprisals. See Thomas Rutherforth, *Institutes of Natural Law*: *Being the Substance of a Course of Lectures on Grotius De Jure Belli Et Pacis read in S. Johns College, Cambridge*, 2nd vol. (Cambridge: J. Bentham, 1756), 598–600.

202 Emer de Vattel, *Le Droit des Gens. Ou Principes de la Loi naturelle, Appliqués à la conduite & aux affaires des Nations & des Souverains*, 1st vol. (Londres: [s.n.], 1758), 318 fn. (a).

203 Letter Nr. 72 to Father Guasco, 5 March 1753: Charles Louis de Montesquieu, *Œuvres complètes de Montesquieu*: *avec des notes de Dupin, Crevier, Voltaire, Mably, Servan, La Harpe, etc., etc.* (Paris: chez Firmin Didot frères, fils et Cie, 1857), 668. The report of the Law Officers has actually been acclaimed as a "legal masterpiece". See, e.g., Van Vechten Veeder, *Legal Masterpieces*: *Specimens of Argumentation and Exposition by Eminent Lawyers*, 1st vol. (St. Paul, Minn.: Keefe-Davidson Company, 1903), 20–32.

204 In all likelihood, there was also a desire to avoid open hostility between both countries as the reference to 'reprisals' might lead to that. In fact, the relationship between Frederick II and his uncle George II was already strained due to personal dislike and conflicting territorial claims in the Holy Roman Empire. See Satow, *The Silesian loan and Frederick the Great* (above, n. 199), 132–5.

1756. It shows that Sovereigns did not feel compelled to observe the rules to the letter. In fact, they acted as judge in the case of their aggrieved subjects.[205] This evolution definitely represented a step back from the medieval law of reprisals as political considerations were likelier to influence the decision on their resort.

(b) Progressive Exclusion of Private Individuals from the Execution

With the consolidation of the central power from the sixteenth century onwards, reprisals became less necessitated as inland security increased.[206] Besides, aliens had easier access to justice and enjoyed better protection from their homeland through diplomatic protection.[207] Nevertheless, when the Sovereign failed to obtain redress for the wrong suffered by his subjects, he could then allow the resort to reprisals.

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205 Johann Jacob Moser, *Versuch des neuesten Europäischen Völker=Rechts in Friedens= und Kriegs=Zeiten*: *vornehmlich aus denen Staatshandlungen derer Europäischen Mächten, auch anderen Begebenheiten, so sich seit dem Tode Kayser Carls VI. im Jahr 1740. zugetragen haben*, 8th vol. (Frankfurt am Mayn: Varrentrapp Sohn und Wenner, 1779), 502.

206 Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 141.

207 De Visscher, *Théories et réalités en droit international public* (above, n. 39), 348; Antônio Augusto Cançado Trindade, 'Denial of justice and its relationship to exhaustion of local remedies in international law', *PhilipLJ* 53 (1978), 404–20, at 404f.; Paulsson, *Denial of Justice in International Law* (above, n. 61), 14. Cf. Colbert, *Retaliation in international law* (above, n. 6), 58; F. Parkinson, 'Reprisals in international maritime law. A historical paradigm', *Marine Policy* 12 (1988), 276–85, at 282. About the link between diplomatic protection and reprisals, see Alwyn Vernon Freeman, 'Recent Aspects of the Calvo Doctrine and the Challenge to International Law', *AJIL* 40 (1946), 121–47, at 139; Haggenmacher, 'L'ancêtre de la protection diplomatique. les représailles de l'ancien droit (XII^{e}-XVIII^{e} siècles)' (above, n. 3). Also, the Prussian commission of jurists in the Silesian Loan case stressed that "Le roi […] ne peut, sans manquer à ses devoirs de souverain et à sa gloire, refuser de protéger ses sujets" (Martens, *Causes célèbres du droit des gens* (above, n. 199), 2nd vol., 128).

In the Middle Ages, the authorities closely supervised the execution of reprisals. In fact, according to Bartolus, reprisals should be made within the ruler's territory.[208] However, this was detrimental to trade because reprisals were usually made in ports.[209] Sovereigns thus prohibited reprisals in such places, like Ferdinand II of Aragon in an ordinance dated 18 March 1511.[210] During the negotiations with France in 1599, British diplomat Sir Henry Neville advocated the addition of a provision by which reprisals would be allowed only at sea. He explained that this was to the benefit of English merchants since there were more English goods in France than the reverse. He also put forward another argument: the English superiority at sea. Therefore, it would be harder for the French to make reprisals. Still, Neville pointed out that the French diplomats sup-

208 Bartolus considered that reprisals must be carried out within the ruler's jurisdiction who granted them unless there was an express derogation. The reason he brought forward was that the exercise of reprisals on the territory of the delinquent State would hardly fail to be seen as a *casus belli* or as a cause of major disturbance.See Saxoferrato, *Omnium Iuris Interpretum Antesignani Consilia, Quaestiones et Tractatus* (above, n. 89), Qu. 8, Ad tertium, here at fol. 123v. However, Giovanni da Legnano disagreed with this view. He argued that reprisals could be made abroad just like an act of self-defence. Moreover, he stressed that the wrongdoing country could be quite remote and that no property belonging to members of that nation could be found within the territory of the ruler who granted reprisals. See Legnano, *Tractatus de Bello, de Represaliis et de Duello* (above, n. 88), Cap. CXXXI, at 161 (tr. at 315). Indeed, reprisals were possible mostly when a "reciprocity of intercourse" existed (Koeppler, 'Frederick Barbarossa and the Schools of Bologna. Some Remarks on the 'Authentica Habita'' (above, n. 117), 595). But as reprisals became over time a method of coercion rather than compensation, the question of "reciprocity of intercourse" lost relevance since the idea behind reprisals was to compel the wrongdoing nation to give redress, and not to secure compensation oneself. That is why Great Britain chose to blockade the coasts of Venezuela in 1902 because the Venezuelan mercantile marine was not large enough to exert enough pressure by seizing and sequestrating merchant vessels. See British Memorandum of 29 November 1902, reproduced in Kotzsch, 'Die Blockade gegen Venezuela vom Jahre 1902 als Präzedenzfall für das moderne Kriegsrecht' (above, n. 28), 423.

209 Colbert, *Retaliation in international law* (above, n. 6), 44–5. See a letter of ca. 1484, reproduced in Henry Elliot Malden, *The Cely papers*: *Selections from the correspondence and memoranda of the Cely family, merchants of the Staple; A.D. 1475–1488* (London: Longmans, Green, and Co., 1900), 146, in which the Lord Lieutenant of Calais refused to execute reprisals against several Flemish merchants as that might adversely affect trade in the said port.

210 Maulde La Clavière, *La diplomatie au temps de Machiavel* (above, n. 171), 233.

ported this proposition on account of the adverse effect of reprisals on trade when taken on land or in ports.[211]

As a result, reprisals moved from land to the high seas at a time when maritime trade was growing.[212] So, at the turn of the seventeenth century, treaties and national law confined the enforcement of reprisals to the high seas.[213] This shift probably made the resort to reprisals easier to decide because the country that allowed them was less likely to see its trade directly impacted.

Now, since the State navy was still modest in size at the beginning of the Early Modern Times, the enforcement of the letters of reprisal was generally entrusted to private individuals: either the letter holder himself, when he had the means to do so, or a third party to whom the letter was sold.[214] This is what the *Guidon de la mer*, an anonymous sixteenth-century French compilation of practices relating to maritime trade, told in Article 3 of

211 Sir Henry Neville to Mr Secretary Cecyll, 18 July 1599: Edmund Sawyer, *Memorials of Affairs of State in the Reigns of Q. Elizabeth and K. James I.: Collected (chiefly) from the Original Papers Of the Right Honourable Sir Ralph Winwood, Kt. Sometime one of the Principal Secretaries of State. Comprehending likewise the Negotiations of Sir Henry Neville, Sir Charles Cornwallis, Sir Dudley Carleton, Sir Thomas Edmondes, Mr. Trumbull, Mr. Cottington and other, At the Courts of France and Spain, and in Holland, Venice, &c. Wherein the Principal Transactions of those Times Are faithfully related, and the Policies and Intrigues of those Courts at large discover'd. The whole digested in an exact Series of Time. To which are added Two Tables: One of the Letters, the other of the Principal Matters*, 1st vol. (London: Printed by W. B. for T. Ward, 1725), 73–4.

212 Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 141–142.

213 Clark, 'The English Practice with Regard to Reprisals by Private Persons' (above, n. 4), 720. See, e.g., the Anglo-French treaty of 29 March 1632, Art. 2: Dumont, *Corps universel diplomatique du droit des gens* (above, n. 104), 6th vol., Part I, 33; the Anglo-French treaty of 3 November 1655, Art. 3: Ibid., 6th vol., Parts II & III, 121. In a letter to the Lords of the Admiralty, Charles I of England authorised in 1637 the High Court of Admiralty to grant any English subject, who "have been or shalbe robbed, pillaged, or dampnified at sea or in port, by the said French King, or any of his subjects", letters of reprisal. The only constraint was that the seizure of ships and property had to take place exclusively "upon the seas, but not in any port or harbour, unlesse yt be the shipps or goods of the party that did the wronge" (Marsden, *Documents relating to law and custom of the sea* (above, n. 113), 1st vol., 501. See also Ibid., 2nd vol., 3–4 and 27).

214 Cf. Mas Latrie, *Du droit de marque ou droit de représailles au Moyen-Age* (above, n. 65), 36–7; Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 141–142; Neff, *War and the Law of Nations* (above, n. 2), 81.

Chapter X about the letters of marque or reprisal.[215] In addition to the private origin of the claim, it explains why international law historiography usually calls them 'private reprisals' in order to make a distinction with acts of reprisals carried out by the State.[216]

However, the public force was sometimes mobilised to exercise reprisals on the high seas on behalf of private individuals. For example, Edward Popham, general of the English fleet, was directed in 1650 to execute letters of reprisal against the French on behalf of their holder since "many of the English soe spoyled are not able to undergoe the charge of setting forth ships of their owne to make seizures by such letters of marque; and for that by the law used amongst nations any state may in such case cause justice to be executed by their owne immediate officers and ministers immediately where they finde it requisite".[217] As a matter of fact, private individuals were required by the English Council of State in 1652 to equip a ship "which shall not be of the burden of 200 tons at least, and carry in her twenty guns at least" in order to execute letters of reprisal.[218]

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215 "Le plus frequent usage se pratique pour les marchands depredez sur mer, trafiquans en estrange pays, lesquels, en vertu d'icelle, trouvent par mer aucuns navires des sujets de celuy qui a toleré la premiere prise, l'abordant, s'ils sont les plus forts, mettent en effet leurs represailles." (Pardessus, *Collection de lois maritimes antérieures au XVIII.e siècle* (above, n. 108), 411).

216 Colbert, *Retaliation in international law* (above, n. 6), 9. See, e.g., De Visscher, 'Le déni de justice en droit international' (above, n. 61), 371, quoting Littré, *Dictionnaire de la langue française* (above, n. 3), 1647; Grewe, *Epochen der Völkerrechtsgeschichte* (above, n. 24), 237–8; Elagab, *The legality of non-forcible countermeasures in international law* (above, n. 14), 6; Neff, *War and the Law of Nations* (above, n. 2), 108.

217 Marsden, *Documents relating to law and custom of the sea* (above, n. 113), 2nd vol., 8. Another example is the seizure of French ships by two English warships at Cromwell's behest. Villemain tells the story of a Quaker merchant who turned to the Lord Protector after his vessel was confiscated in France. Cromwell sent the Quaker with a letter summoning Mazarin to give back the vessel and cargo within three days. After the failure of his mission, the Quaker returned to see Cromwell who then ordered reprisals on the former's behalf. The merchant was repaid on the sale of the prizes. As for the residue, the Lord Protector put it into the hands of the French ambassador. See Abel-François Villemain, *Histoire de Cromwell*: *D'après les mémoires du temps et les recueils parlementaires.* (Bruxelles: Meline, Cans et comp., 1851), 331.

218 Samuel Rawson Gardiner, *Letters and papers relating to the First Dutch War, 1652–1654* (Publications of the Navy Records Society, 13; [London]: Navy Records Society, 1899), 359.

Over time, as reprisals became more and more tightly linked with the affairs of State, Sovereigns stopped issuing letters of reprisal to private individuals. In France, since the Ordinance of 1681 until the end of the eighteenth century, merely four licences were granted.[219] In Great Britain, the issuance of the last letters of reprisal appears to be in 1738 to merchants aggrieved by Spain, in accordance with the Anglo-Spanish treaties of 1667

219 Joseph-Nicolas Guyot, 'Représailles (lettres de)', in Philippe-Antoine Merlin (ed.), *Répertoire universel et raisonné de jurisprudence. Réduit aux objets dont la connaissance peut encore être utile, et augmentée 1° des changemens apportés aux lois anciennes par les lois nouvelles, tant avant que depuis l'année 1814; 2° de dissertations, de plaidoyers et de réquisitoires sur les unes et les autres*, 15th vol. (5th edn., Paris: Garnery, 1828), 48–9, at 49. See further the correspondence regarding the execution of the letter of reprisal of 1702 granted to the Abbé de Polignac against the Danzigers (Lebeau, *Nouveau code des prises* (above, n. 169), 306–7); the text of the 1778 letter of reprisal issued in favour of two merchants of Bordeaux against the British (Wilhelm Georg Grewe, *Fontes historiae iuris gentium*, In Zusammenarbeit mit dem Institut für Internationales Recht an der Freien Universität Berlin, 2nd vol. (Berlin: Walter de Gruyter, 1988), 507–509); and the text of the decree adopted by the French National Convention by which Joseph Caudier was granted a letter of reprisal against the citizens of Genoa (Guyot, 'Représailles (lettres de)' (above, n. 219), 49).
However, regarding the licence given in 1778, Georg Friedrich von Martens, *Essai concernant les Armateurs, les Prises et sur tout les Reprises. D'après les loix, les traités, et les usages des Puissances maritimes de l'Europe* (Gottingue: Jean Chretien Dieterich, 1795), 30 fn. (e), considered it null on account of the war between France and Great Britain that had already begun since 17 June 1778. See the letter to the Admiral of France, 5 April 1779 (Athanase Jean Léger Jourdan, François André Isambert, Decrusy et al., *Recueil général des anciennes lois françaises: Depuis l'an 420 jusqu'à la Révoution de 1789*, 29 vols. (Paris: Belin-Leprieur, 1821–1833), 26th vol., 65; and also Balthazard-Marie Émérigon and Pierre-Sébastien Boulay-Paty, *Traité des assurances et des contrats à la grosse d'Émérigon, conféré et mis en rapport avec le nouveau code de commerce et la jurisprudence; suivi d'un vocabulaire des termes de marine et des noms de chaque partie d'un navire*, 1st vol. (2nd edn., Rennes: Molliex, 1827), 75–76). Moreover, both sides ordered general reprisals. See Louis XVI of France's issuance of general reprisals, 10 July 1778 (Jourdan et al., *Recueil général des anciennes lois françaises* (above, n. 219), 25th vol., 354; the British Order in Council allowing general reprisals against the French, 29 July, mentioned in the preamble of an Act reproduced in Danby Pickering, *The Statutes at Large: From Magna Charta To the End of the Eleventh Parliament of Great Britain, Anno 1761.*, 32nd vol (Cambridge: Charles Bathurst, 1778), 178). In those circumstances, the letter of reprisal actually amounted to a privateering commission.

and 1670.[220] But apart from these exceptions, it was the State alone that conducted reprisals in defence of its nationals.[221] Thus, reprisals ceased to imply a private issue as a result of the complete exclusion of the individual victims, from the procedure and the execution. Reprisals then became a means of coercion in the hands of States.

After the eighteenth century, no letter of reprisals was ever granted. There were, however, attempts by private individuals to obtain such a licence, but their efforts remained in vain.[222] Some international lawyers also argued that obsolescence does not mean abrogation, thence suggesting

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220 See Newcastle's note to the Spanish ambassador at London on this subject (Marsden, *Documents relating to law and custom of the sea* (above, n. 113), 2nd vol., 283–285). See also Grewe, *Epochen der Völkerrechtsgeschichte* (above, n. 24), 430.

221 "Il est même rare aujourd'hui qu'un état accorde de telles lettres de represailles, en tems de paix, tandis que d'un côté les traités même bornent les cas où l'on pourrait user de ce moyen, et de l'autre, s'ils existent, c'est plutôt l'état qui use de represailles en faveur de ses sujets." (Martens, *Précis du droit des gens moderne de l'Europe fondé sur les traités et l'usage* (above, n. 135), 382). See also Domenico Alberto Azuni, *Droit maritime de l'Europe*, 2nd vol. (Paris: L'Auteur/Ant. Aug. Renouard, 1805), 440; Friedrich Saalfeld, *Handbuch des positiven Völkerrechts* (Tübingen: C. F. Osiander, 1833), 186. Cf. Mr Sanford's report on special reprisals addressed to Mr Cass, 16 August 1857: Sanford, *The Aves Island Case* (above, n. 43), 261.

222 An example is the legal proceedings initiated by the French citizen Rougemont against the French State before the Conseil d'État. He was shipowner of a privateer that captured several enemy ships in 1810 and 1811. But as they were brought to the port of neutral Algiers, the dey, who alleged the violation of his rules of neutrality, confiscated them and gave them back to their respective owners. However, these prizes were later confirmed as good by the French prize courts. Rougemont then turned to the Ministry of Foreign Affairs in order to receive compensation from the French State or, on a subsidiary basis, to be granted a letter of reprisal which he could enforce himself against the Regency of Algiers. This latter demand was motivated on the argument that the Ordinance of Marine of 1681 was still in force. Nevertheless, both appeals he introduced before the Conseil d'État were dismissed in 1823 and 1826. See Louis-Antoine Macarel, *Recueil des arrêts du Conseil, ou Ordonnances royales rendues en Conseil d'État, sur toutes les matières du contentieux de l'administration*: *Année 1823*, 5th vol. (Paris: Bureau d'administration du recueil, 1823), 674–8; and Louis-Antoine Macarel, *Recueil des arrêts du Conseil, ou Ordonnances royales rendues en Conseil d'État, sur toutes les matières du contentieux de l'administration*: *Année 1826*, 8th vol. (Paris: Bureau d'administration du recueil, 1826), 225–7.
In another instance, the so-called *Aves Island* case (1854–1861), Boston merchants who collected guano on an uninhabited island were evicted *manu militari* by Venezuelan soldiers. The victims then pressed the U.S. Government for many years to seek redress. At a point, they urged the Executive to grant them a

that letters of reprisal could still be granted to private individuals.[223] Nevertheless, those who maintained this opinion were a minority. Most legal scholars considered that private reprisals (a practice they viewed as inherited from barbaric times) had entirely fallen into disuse.[224]

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letter of reprisal against Venezuela. Despite their insistence, no such licence was issued. See Sanford, *The Aves Island Case* (above, n. 43), for the correspondence. The fact is that the United States never authorised an individual to resort to special reprisals (John Bassett Moore, *A digest of international law*: *As embodied in diplomatic discussions, treaties and other international agreements, international awards, the decisions of municipal courts, and the writings of jurists, and especially in documents, published and unpublished, issued by Presidents and Secretaries of State of the United States, the opinions of the Attorney-General, and the decisions of courts, federal and state*, 7th vol. (Washington: GPO, 1906), 122).

223 See, e.g., Alphonse de Pistoye and Charles Duverdy, *Traité des prises maritimes*: *dans lequel on a refondu le traité de Valin en l'appropriant à la législation nouvelle*, Ouvrage contenant un grand nombre de décisions inédites de l'ancien Conseil des prises, et les actes émanés en 1854 des gouvernements belligérants et neutres, 1st vol. (Paris: Auguste Durand, 1855), 91; Phillimore, *Commentaries Upon International Law* (above, n. 46), 30. In support of their argument, they referred to legal provisions in national code that reminded the time when letters of reprisal were still in use. For example, Article 350 of the French *Code de commerce* of 1807 took up literally the wording of the provision in the Ordinance of Marine concerning the insurer's liability in case of loss caused, i.a., by reprisals. See thereupon Robert-Joseph Pothier and Jean-Julien Estrangin, *Traité du contrat d'assurance de Pothier*: *avec un discours préliminaire, des notes et un supplément* (Marseille: Sube et Laporte, 1810), 70 fn. (a) and 97. But see Ferdinand de Cussy, *Phases et causes célèbres du droit maritime des nations*, 2 vols. (Leipzig: F. A. Brockhaus, 1856), 1st vol., 125–126.

224 See, e.g., Théodore Ortolan, *Règles internationales et diplomatie de la mer*, 1st vol. (4th edn., Paris: Henri Plon, 1864), 359; Travers Twiss, *The law of nations considered as independent political communities: On the rights and duties of nations in time of war* (2nd edn., Oxford: Clarendon Press; London: Longmans, Green, and Co, 1875), 25; Carlos Calvo, *Le droit international théorique et pratique*: *précédé d'un exposé historique des progrès de la science du droit des gens*, 3rd vol. (4th edn., Paris: Guillaumin et Cie, 1888), 519–520 (§ 1811). Cf. Cussy, *Phases et causes célèbres du droit maritime des nations* (above, n. 223), 1st vol., 125–126.

2. Public Character of Reprisals

(a) General Aspects

The involvement of the State in the claims of its citizens —e.g., itself by exercising reprisals— sometimes made it hard to differentiate between 'public' and 'private' reprisals. In fact, the State would more and more treat an injury sustained by a subject as a direct injury to its dignity.[225] This was especially true when the subject represented the State. So, when the secretary of the Dutch ambassador to England was imprisoned in 1665, the province of Holland put the English ambassador's secretary in jail by way of reprisals.[226] Repeated attacks on subjects could also be regarded as a wrong committed against the whole State. In such cases, private claims were no longer treated individually but wholesale. Finally, States could resort to reprisals when it suffered a wrong or a loss personally.[227]

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225 Butler and Maccoby, *The Development of International Law* (above, n. 63), 178.

226 Bynkershoek, *Quaestionum juris publici libri duo* (above, n. 33), Book I Cap. 24, here 1st vol., 177f. (tr. 2nd vol., 137). See further Cornelius van Bynkershoek, *Traité du Juge Competent des Ambassadeurs, Tant pour le Civil, que pour le Criminel* (La Haye: Thomas Johnson, 1723), 263–4. This form of reprisals, by which a person rather than property was arrested until the wrongdoing community gave satisfaction, was referred to by the Greek learned term 'androlepsia' (Grotius, *Le droit de la guerre et de la paix* (above, n. 33), Book III Ch. II § III.1, here at 2nd vol., 745. See also Neff, *War and the Law of Nations* (above, n. 2), 123). Examples of androlepsia were not uncommon in the seventeenth and eighteenth centuries. For instance, Johann Jacob Moser told that the King of Prussia arrested two Russian officers in his service as reprisals —actually in retalation— for the imprisonment of the baron of Stackelberg by the Empress of Russia in 1740 (Moser, *Versuch des neuesten Europäischen Völker=Rechts in Friedens= und Kriegs=Zeiten* (above, n. 205), 504–5). The peculiarity of this case is that Stackelberg was a Russian subject who served as an officer in the Prussian army. It is precisely on this latter basis that androlepsia followed, not on a bond of 'nationality'. For other examples of androlepsia, see Alphonse Rivier, *Principes du droit des gens*, 2nd vol. (Paris: Arthur Rousseau, 1896), 196.

227 See "[…], le Souverain demande justice, ou use de réprésailles, non seulement pour ses propres affaires, mais encore pour celles de ses Sujets, qu'il doit protéger, & dont la Cause est celle de la Nation." (Vattel, *Le Droit des Gens. Ou Principes de la Loi naturelle, Appliqués à la conduite & aux affaires des Nations & des Souverains* (above, n. 202), 534).

From the sixteenth century until the early years of the nineteenth century, the most genuine public cause of complaint justifying a resort to reprisals was perhaps the infringement of neutrality law.[228] The neutral Sovereign initially granted letters of reprisal to his aggrieved subjects, e.g. when the prize courts of a warring nation condemned their ship and cargo.[229] However, the violation of neutral rights affected the neutral State directly too and gave it the unquestionable right to make reprisals on its own account against the wrongdoing warring party.[230] Such a course of action was not without danger, as the latter could treat it as an act of war.[231] Therefore, neutrals sometimes allied together to apply joint pressure by

228 About neutral reprisals, see Colbert, *Retaliation in international law* (above, n. 6), 107–23; Verzijl, *International law in historical perspective* (above, n. 112), Part IX-B, 36–38; Stephen C. Neff, *The rights and duties of neutrals*: *A general history* (Melland Schill studies in international law; Yonker, N.Y./Manchester: Juris Publishing/Manchester University Press, 2000), 71–3.

229 See the example cited by Zouche, *Iuris et Iudicii Fecialis, Sive, Iuris Inter Gentes, et Quaestionum de Eodem Explicatio* (above, n. 185), 1st vol., 131–132 (tr. 2nd vol., 125–126).

230 Cf. Martin Hübner, *De la Saisie des Batimens Neutres, ou Du Droit qu'ont les Nations Belligérantes d'arrêter les Navires des Peuples Amis*, 1st vol. (La Haye: [s.n.], 1759), 45–49; Joseph-Mathias Gérard de Rayneval, *De la liberté des mers*, 1st vol. (Paris: Treuttel et Wurtz/Arthus Bertrand/Delaunay, 1811), 250. For nineteenth-century opinions, see, i.a., Cesareo Fernandez, *Nociones de derecho internacional maritimo* (Habana: Imprenta del tiempo, 1863), 37; Laurent-Basile Hautefeuille, *Des droits et des devoirs des nations neutres en temps de guerre maritime*, 3rd vol. (3rd edn., Paris: Guillaumin et Cie, 1868), 346; Richard Kleen, *Lois et usages de la neutralité*: *D'après le droit international conventionnel et coutumier des États civilisés*, 1st vol. (Paris: A. Chevalier-Marescq, 1898), 130. Article 10 of the Fifth Hague Convention of 1907 respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land also seems to confirm this right: "The fact of a neutral Power resisting, even by force, attempts to violate its neutrality cannot be regarded as a hostile act."

231 Colbert, *Retaliation in international law* (above, n. 6), 115. That is why Thomas Jefferson warned against the recourse to reprisals in May 1793 in the so-called *The Little Sarah* affair. Indeed, when a French privateer ship purchased in Philadelphia captured a British vessel, the neutral United States were held responsible by Great Britain. Jefferson said on that occasion: "the making of reprisal on a nation is a very serious thing. […] when reprisal follows it is considered as an act of war, & never yet failed to produce it in the case of a nation able to make war." (Paul Leicester Ford, *The Works of Thomas Jefferson*, 12 vols. (New York/London: G. P. Putnam's sons, 1904–1905), 7th vol., 335). However, a neutral nation could not eternally tolerate the violation of its neutrality. Therefore, the Harvard Draft on the Rights and Duties of Neutral States in Naval and Aerial War of 1939 expressly provided at Article 14 that "A neutral

way of reprisals on the delinquent belligerent.[232] This method allowed them to assert their rights and demand the recognition of some principles of neutrality law while not getting involved in the ongoing war.[233] Conversely, a belligerent also had a right to exercise reprisals against a neutral country that failed to maintain perfect impartiality.[234]

State shall not be deemed to have violated Article 4 of this Convention [i.e. the duty of impartiality laid upon neutrals] by resorting to acts of reprisal or retaliation against a belligerent because of illegal acts of the latter." (Harvard Research in International Law (ed.), *Drafts of conventions prepared for the codification of international law*: *I. Judicial Assistance, II. Rights and Duties of Neutral States in Naval and Aerial War, III. Rights and Duties of States in Case of Aggression*, Under the Auspices of the Faculty of the Harvard Law School, *AJIL* 33 (1939), Suppl., 329).

232 The bilateral treaties of alliance between neutral nations commonly contained a provision concerning the resort to joint reprisals until satisfaction would be obtained by all. See, e.g., the Articles of the Dano-Swedish Treaty of Stockholm of 17 March 1693 (Dumont, *Corps universel diplomatique du droit des gens* (above, n. 104), 7th vol., Part II, 325–327); Art. 7–8 of the Conventions of 9 July 1780 between Russia and Denmark, and 1 August 1780 between Russia and Sweden (Francis Taylor Piggott and George William Thomson Omond, *Documentary history of the armed neutralities, 1780 and 1800*: *together with selected documents relating to the war of American independence 1776–1783 and the Dutch war 1780–1784* ("Law of the Sea" Series, 1; London: University of London Press, 1919), 235–236, 242); Art. 12 of the Convention of 27 March 1794 between Denmark and Sweden-Norway (James Brown Scott, *The armed neutralities of 1780 and 1800*: *A collection of official documents preceded by the views of representative publicists* (Carnegie Endowment for International Peace: Division of International Law; New York: OUP, 1918), 443).

233 About those neutral alliances or leagues, see, i.a., Johann Eustach von Görtz, *Mémoire, ou précis historique sur la neutralité armée et son origine, Suivi de pièces justificatives* (Basle: J. Decker, 1801); Martens, *Causes célèbres du droit des gens* (above, n. 199), 3rd vol., 254–309; 4th vol., 219–302; Carl Bergbohm, *Die bewaffnete Neutralität, 1780–1783*: *Eine Entwicklungsphase des Völkerrechts im Seekriege* (Berlin: Puttkammer & Mühlbrecht, 1884); Carl Jacob Kulsrud, *Maritime Neutrality to 1780*: *A History of the Main Principles Governing Neutrality and Belligerency to 1780* (Boston: Little, Brown, and Company, 1936); Thorvald Boye, 'Quelques aspects du développement des règles de la neutralité', *RdC* 64/II (1938), 157–231, at 166–190.

234 Grotius, *Le droit de la guerre et de la paix* (above, n. 33), Book III Ch. I § V.5 – 8, here at 2nd vol., 717–719. Grotius did not explicitly refer to reprisals, but it flows from his explanation that the belligerent could obviously resort to this means as a form of compensation and coercion. See also Edward James Castle, *The law of commerce in time of war*: *with particular reference to the respective rights and duties of belligerents and neutrals* (London: William Maxwell & son, 1870), 54; Ludwig Gessner, *Le droit des neutres sur mer* (Bibliothèque diplomatique;

The fact that reprisals became 'public' had an impact on the law governing them. In the Middle Ages, rules were laid down by the Princes in order to limit reprisals and keep them within the bounds of what was acceptable. Yet, since the State no longer played the role of an authority of control but instead got directly involved in the procedure and execution of reprisals as main actor, those rules ceased to be treated as binding. As already seen, a denial of justice was no more required; the failure to obtain redress through diplomatic ways became the condition for reprisals. In fact, political considerations were pervasive.[235]

In this context, the plaintiff State felt the refusal to provide redress as a personal insult. It might explain why public reprisals did not observe a requirement of proportionality between the wrong and the amount of force employed and were principally used as a form of coercion applied on the wrongdoing nation, similar to some kind of punishment.[236] The so-called 'general' reprisals, a particular class of public reprisals, precisely followed this logic.

General reprisals consisted of the authorisation given by a Sovereign to all his subjects and the public fleet to capture property and persons from the rival country.[237] The proof of a personal loss was not necessary to make use of this right to fall upon property and persons of the enemy country.

2nd edn., Berlin: Charles Heymann, 1876), 125–7; Robert W. Tucker, *The Law of War and Neutrality at Sea* (U.S. Naval War College International Law Studies, 50; Washington: GPO, 1957), 261–2; Verzijl, *International law in historical perspective* (above, n. 112), Part IX-B, 38. The principle that a belligerent could make reprisals against the neutral party that committed a violation of neutrality was inserted into the Harvard Draft, at Article 24: "A belligerent may not resort to acts of reprisal or retaliation against a neutral State except for illegal acts of the latter, and a State is not to be charged with failure to perform its duties as a neutral State because it has not succeeded in inducing a belligerent to respect its rights as a neutral State." (Harvard Research in International Law (ed.), *Drafts of conventions prepared for the codification of international law* (above, n. 231), 419).

235 Cf. De Visscher, *Théories et réalités en droit international public* (above, n. 39), 348.

236 Cf. Colbert, *Retaliation in international law* (above, n. 6), 54–5; Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 142–143.

237 Cf. Grewe, *Epochen der Völkerrechtsgeschichte* (above, n. 24), 238; Neff, *War and the Law of Nations* (above, n. 2), 108. Orders of general reprisals were usually written in these terms: "his said Highnes, […], doeth further alsoe by these presents grant, […] universall reprisals against all and all manner of shipps and goods whatsoever belonging to the said the King of Spaine, and all and every his subjects whatsoever, both of Spaine and Flanders, and all other his dominions

The British Admiralty judges defended this opinion in 1652: general reprisals "may be issued, without proof of losses to individuals, against the Dutch, for redress of public losses, and to curb their insolences."[238]

This measure was much resorted to throughout the seventeenth and eighteenth centuries.[239] Although the reprisal-ordering country and the target country were still officially at peace due to the absence of a declaration of war, in many respects an order of general reprisals looked like a privateering commission in time of peace.[240] That is why general reprisals were often regarded as initiating the war, albeit it did not necessarily entail

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and territories whatsoever; and doth hereby give full licence and authority that the said shipps and goods, and all shipps and goods whatsoever, belonging to the said king or his subjects, and every of them, may bee surprised and seized, either at sea or in ports or in land, and wheresoever they may be found, surprized, or seized, by the fleet and shipps of this Commonwealth or any other shipps or vessels to bee specially authorized and commissionated by the advice of his Councell, […]." (English Order in Council of 1655: Marsden, *Documents relating to law and custom of the sea* (above, n. 113), 2nd vol., 23–24).

238 Ibid., 2nd vol., 14. See also Neff, *War and the Law of Nations* (above, n. 2), 108.

239 See, e.g., general reprisals ordered in 1655 by England against Spain (Marsden, *Documents relating to law and custom of the sea* (above, n. 113), 2nd vol., 23–24); in 1664 by England against the Netherlands (Ibid., 2nd vol., 48–50), starting the Second Anglo-Dutch War; in 1689 by England against France (Ibid., 2nd vol., 123–124); in 1739 by Great Britain against Spain (Ibid., 2nd vol., 286), initiating the hostilities which culminated in the so-called War of Jenkin's Ear; in 1779 by Great Britain against Spain (James Dodsley, *The Annual Register: Or a View of the History, Politics and Literature, for the Year 1779*, 22nd vol. (London: Printed for J. Dodsley, 1780), 361–2). The last example —in fact, an isolated event since general reprisals were no longer in use by the nineteenth century— was the British Order in Council of 29 March 1854 marking Great Britain's entry into the Crimean War. See Francis Taylor Piggott, *The Declaration of Paris, 1856: A Study -documented-* ("Law of the Sea" Series of Historical and Legal Works, 4; London: University of London Press, 1919), 243–4.

240 Reprisals and privateering shared a common origin. See, i.a., W. L. Rodgers, 'Future International Laws of War', *AJIL* 33 (1939), 441–51, at 443; Verzijl, *International law in historical perspective* (above, n. 112), Part IX-C, 153; David J. Starkey, *British privateering enterprise in the eighteenth century* (Exeter Maritime Studies, 4; Exeter: University of Exeter Press, 1990), 20–1; Ziegler, *Völkerrechtsgeschichte* (above, n. 62), 128. Since the Middle Ages, Sovereigns had granted individuals privateering commissions —often called indistinctly 'letter of marque', 'letter of reprisal' or 'letter of marque or reprisal'— in order to augment the naval force in wartime. Cf. Charles La Mache, *La guerre de course dans le passé, dans le présent et dans l'avenir* (Paris: A. Pedone, 1901), 17; Marsden, *Documents relating to law and custom of the sea* (above, n. 113), 1st vol., XXVI–XXVII; Neff, *War and the Law of Nations* (above, n. 2), 109. Furthermore, general reprisals were similar to privateering because the seizure was not limited to a

all the legal consequences attached to war.[241] In any case, the use of a belligerent measure under the guise of reprisals highlights the political nature of general reprisals.[242]

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certain amount for compensation and because a share of the spoils went to the captor —one half of the prize, according to the opinion of the British Admiralty judges in 1652. See Marsden, *Documents relating to law and custom of the sea* (above, n. 113), 2nd vol., 14; Verzijl, *International law in historical perspective* (above, n. 112), Part IX-C, 156; Neff, *War and the Law of Nations* (above, n. 2), 108–9.

This led to some confusion between reprisals as a means for obtaining redress and privateering activities. See, e.g., William Oke Manning, *Commentaries of the law of nations* (London: S. Sweet, 1839), 111–6; [Anonymous], 'The law relating to letters of marque and reprisals.', *The Legal Observer, or Journal of Jurisprudence* 19 (1839–1840), 481–2; B. F., 'The International Law of Embargo and Reprisal', *The Law Magazine; Or Quarterly Review of Jurisprudence* 24 (1840), 73–9. That is why it has been asserted that the Declaration of Paris respecting maritime law of 16 April 1856 abolished not only privateering but also special or general reprisals. See, e.g., Mr Sanford's report on special reprisals addressed to Mr Cass, 16 August 1857: Sanford, *The Aves Island Case* (above, n. 43), 262; Frederick Edwin Smith and Norman Wise Sibley, *International law as interpreted during the Russo-Japanese War* (2nd edn., London: T. Fisher Unwin, William Clowes and sons, 1907), 354f.; Percy Bordwell, *The Law of War Between Belligerents*: *A History and Commentary* (Chicago: Callaghan & Co., 1908), 18; Fahl, 'Repressalie' (above, n. 84), col. 912; Mckinnon, 'Reprisals as a Method of Enforcing International Law' (above, n. 9), 223. Cf. Pierre Bravard-Veyrières, *Des prises maritimes d'après l'ancient et le nouveau droit tel qu'il résulte du traité de Paris et de la déclaration du 16 avril 1856*, avec des notes par P. Royer-Collard (Paris: Cotillon, 1861), 21.

241 For statesmen, there was overall no difference between general reprisals and open war. See the opinion of Johan de Witt who was Grand Pensionary of Holland in the seventeenth century, quoted by Twiss, *The law of nations considered as independent political communities* (above, n. 224), 31; Albert Gallatin to Edward Everett, 5 January 1835: Henry Adams, *The Writings of Albert Gallatin*, 2nd vol. (Philadelphia: J.B. Lippincott, 1879), 477. See also Georg Friedrich von Martens, *Précis du droit des gens moderne de l'Europe, fondé sur les traités et l'usage*, Auquel on a joint la liste des principaux traités conclus depuis 1748 jusqu'à présent avec l'indication des ouvrages où ils se trouvent, 2nd vol. (Gottingue: chez Jean Chret. Dieterich, 1789), 328f. In the judgement of *The Maria Magdalena*, pronounced on 11 January 1779, the Judge of the High Court of Admiralty, Sir James Marriott, also argued that an order of general reprisals was tantamount to a declaration of war (Edward Stanley Roscoe, *Reports of prize cases determined in the High Court of Admiralty, before the Lords Commissioners of Appeals in prize causes, and before the Judicial Committee of the Privy Council, from 1745 to 1859*, 1st vol. (London: Stevens and sons, 1905), 23). Cf. with the opinion of seventeenth-century English jurist Sir Matthew Hale who became Chief Justice of the King's Bench (Matthew Hale, *Historia Placitorum Coronæ*: *The History of the Pleas*

(b) Blurring of the Line between War and Peace

By ceasing to aim at compensation, reprisals became a form of coercion used by the State. In the process, they could no longer be differentiated from other measures, especially war. Indeed, reprisals were rarely proportionate to the offence, and their employment was often arbitrary.

However, reprisals had always shared a close affinity with war. The whole law of reprisals laid down in the Middle Ages was largely modelled on the just-war theory.[243] For medieval jurists, reprisals were thus equivalent to war.[244] Yet back then, the concept of war covered a broader spectrum of measures: from war in the true sense to 'particular' forms such as reprisals, self-defence and duel.[245] But as a military revolution began in the sixteenth century, war became "far more disruptive than it had been be-

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of the Crown, 1st vol. (new edn., London: T. Payne, H. L. Gardner, W. Otridge, E. and R. Brooke and J. Rider, J. Butterworth, W. Clarke and Son, R. Phenet, J. Cuthell, J. Walker, J. Bagster, and R. Bickerstaff, 1800), 161–2). However, in other judgements, Sir Marriott attributed to general reprisals legal effects different from those of a declaration of war. See *The Pere Adam*, judgement of 13 November 1778 (George Hay and James Marriott, *Decisions in the High Court of Admiralty*: *During The Time of Sir George Hay, and of Sir James Marriott, Late Judges of That Court. Michaelmas Term, 1776, to Hilary Term, 1779.*, 1st vol. (London: R. Bickerstaff, 1801), 141); *The Renard*, judgement of 9 December 1778 (Roscoe, *Reports of prize cases determined in the High Court of Admiralty, before the Lords Commissioners of Appeals in prize causes, and before the Judicial Committee of the Privy Council, from 1745 to 1859* (above, n. 241), 19). Another legal effect, according to U.S. President Thomas Jefferson, was that hostilities could be ended by merely repealing the order of general reprisals, whereas the termination of war required the signature of a peace treaty (Thomas Jefferson to Lieutenant Governor Levi Lincoln, 13 November 1808: Ford, *The Works of Thomas Jefferson* (above, n. 231), 11th vol., 74).

242 Colbert, *Retaliation in international law* (above, n. 6), 57.

243 Grewe, *Epochen der Völkerrechtsgeschichte* (above, n. 24), 145–6; Neff, *War and the Law of Nations* (above, n. 2), 80; Ziegler, *Völkerrechtsgeschichte* (above, n. 62), 110. This remained true beyond the Middle Ages. For example, Diego de Covarrubias still dealt in the sixteenth century with reprisals in the same just-war fashion (Diego de Covarrubias y Leyva, *Opera omnia*: *in duos tomos divisa* (Genève: Gabriel de Tournes & filiorum, 1724), 636).

244 See, e.g., Legnano, *Tractatus de Bello, de Represaliis et de Duello* (above, n. 88), Cap. II, at 79 (tr. at 217); Bonet, *L'arbre des batailles* (above, n. 117), Part 4, Ch. LXXXII, here at 183.

245 Haggenmacher, 'L'ancêtre de la protection diplomatique. les représailles de l'ancien droit (XII^{e}-XVIII^{e} siècles)' (above, n. 3), 11.

fore."[246] As a consequence, the maintenance of peaceful relations was no longer possible during a conflict and, hence, war and peace separated into two different states of affairs.[247] In this context, reprisals could not be assimilated to war anymore since their use did not completely disrupt the state of peace. In fact, unlike 'perfect' war (*bellum plenum*) which implied an armed conflict between two nations as a whole ("*ex bellis plenis quæ populi populis inferunt*", according to Hugo Grotius), reprisals amounted to an 'imperfect' form of war, i.e. the enforcement of a right through the limited resort to force.[248]

Nevertheless, the opinion that reprisals were compatible with peace — although it was acknowledged that they might prelude war[249]— related mainly to 'private' reprisals as a means to obtain compensation, which fol-

246 Randall Lesaffer, 'The classical law of nations (1500–1800)', in Alexander Orakhelashvili (ed.), *Research Handbook on the Theory and History of International Law* (Cheltenham/Northampton, Mass.: Edward Elgar, 2011), 408–40, at 427.

247 Ibid., 428.

248 Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, 2 vols. (The Classics of International Law, 3; Oxford: Clarendon Press, 1923–1925), 1st vol., 444. See also Jean-Jacques Burlamaqui, *Principes du droit politiques*, 2nd vol. (Bibliothèque de Philosophie politique et juridique: Textes et Documents; Caen [Amsterdam]: Centre de Philosophie politique et juridique de l'Université de Caen [chez Zacharie Chatelain], 1987 [1752]), 56–57; Jaucourt, 'Représailles' (above, n. 192), 142; Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (above, n. 197), § 603. But cf. with the opinion of the Supreme Court of the State of New York about imperfect war in the judgement *The People v McLeod* (July 1841) related to the famous *Caroline* affair (John Lansing Wendell, *Reports of Cases Argued and Determined in the Supreme Court of Judicature and in the Court for the Trial of Impeachments and the Correction of Errors of the State of New-York*, 25th vol. (2nd edn., New-York: Published by the reporter, 1850), 576–7). About imperfect war, see further Neff, *War and the Law of Nations* (above, n. 2), 119–120 and 122–126; Kathryn L. Einspanier, 'Burlamaqui, the Constitution and the Imperfect War on Terror', *GeoLJ* 96 (2007–2008), 985–1026, at 988–990.

249 See, e.g., Francisco de Vitoria's *De Jure Belli*, § 41, translated by Scott, *The Spanish Origin of International Law* (above, n. 192), LXIV; Samuel von Pufendorf, *Le droit de la nature et des gens*, Traduction de Jean Barbeyrac, 2nd vol. (Bibliothèque de Philosophie politique et juridique: Textes et Documents; Caen [Bâle]: Centre de Philosophie politique et juridique de l'Université de Caen [chez E. & J. R. Thourneisen], 1987 [1732]), 466. But cf. Pothier and Estrangin, *Traité du contrat d'assurance de Pothier* (above, n. 223), 97.
Since reprisals could lead to an all-out war between the reprisal-taking country and the target country, nineteenth-century criminal laws frequently provided harsh punishment for those citizens who, by their acts or behaviour, gave rise to reprisals (Roy Emerson Curtis, 'The Law of Hostile Military Expeditions as Applied by the United States', *AJIL* 8 (1914), 224–55, at 240). See, e.g., § 136 of the

lowed a well-elaborated set of rules.[250] The situation was different for public reprisals.

For being ordered by the Sovereign after the failure of diplomatic negotiations and for being conducted by the State's armed forces or the whole nation, the resemblance of reprisals to war was troubling.[251] At a time when war used to begin in the vast majority of cases without a formal declaration,[252] the resort to reprisals was thus not insignificant. It actually could aim at the intimidation of the target country in the hope that the latter would submit to the demands. Reprisals could be used likewise to secure a dominant position over the opponent in anticipation of overt hostil-

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Allgemeines Landrecht für die Preussischen Staaten of 1794 (Prussia, *Allgemeines Landrecht für die Preussischen Staaten*, 4th vol. (2nd edn., Berlin: Pauli, 1794), 1193f.); Art. 84 and 85 of Napoleon's Penal Code of 1810 (reproduced in Pistoye and Duverdy, *Traité des prises maritimes* (above, n. 223), 91); Art. 123 of the Peruvian Penal Code (mentioned in Paul Pradier-Fodéré, 'Note sur la question du Luxor', in Institut de Droit International (ed.), *Session d'Oxford – Septembre 1880* (Annuaire IDI, vol. 5; Bruxelles: C. Muquardt, Merzbach et Falk, 1882), 183–200, at 189); the Norwegian law of 16 May 1904 (referred to in Maurel, *De la Déclaration de Guerre* (above, n. 27), 173 fn. 1).

250 See, e.g., Molloy, *De Jure Maritimo et Navali* (above, n. 186), 31; Glafey, *Vernünfft- Und Völcker-Recht* (above, n. 135), Book VI, Ch. 1, § 14, here at 4; Valin, *Nouveau commentaire sur l'Ordonnance de la marine du mois d'août 1681* (above, n. 175), 417; Bynkershoek, *Quaestionum juris publici libri duo* (above, n. 33), Book I Cap. 24, here 1st vol., 173 (tr. 2nd vol., 134). See further Clark, 'The English Practice with Regard to Reprisals by Private Persons' (above, n. 4), 711.

251 At a time when the use of public reprisals was still not fully established, it is not surprising that their enforcement was regarded as amounting to war. A French ambassador stressed this feature before the British Parliament in 1652: "Ce droit [viz. the right of reprisals] a été introduit et réservé par les traités de paix, pour réparer les pertes de ceux à qui la justice est déniée, en leur permettant de se venger sur le bien des particuliers, mais il est encore inouï qu'aucune nation l'ait étendu sur le bien d'un Prince, ni qu'on ait employé les forces publiques pour le mettre à exécution. Il n'y aurait point autrement de différence entre une déclaration de guerre et des lettres de marques." (France, Ministère des Affaires étrangères, *Recueil des instructions données aux ambassadeurs et ministres de France depuis les traités de Westphalie jusqu'à la Révolution française*, 24th vol. (Paris: E. De Boccard, 1929), 159). The French ambassador here complained that reprisals were executed by the public force and targeted ships belonging to the King of France. Therefore, he did not see any difference between war and reprisals.

252 See John Frederick Maurice, *Hostilities Without Declaration of War*: *An Historical Abstract of the Cases in which Hostilities have occurred between civilized Powers prior to Declaration or Warning. From 1700 to 1870* (London: Her Majesty's Stationery Office, 1883), 4.

ities: by weakening the adversary materially, by gaining time to forge alliances or by letting the target country bear the responsibility of declaring war.[253]

Such employment of reprisals created situations where two contesting States were engaged in hostilities on a large scale but were not at war *de jure*. The so-called sixteenth-century 'Wars of Reprisals' are good examples where two countries, viz. France and England (1547–1549) and England and Spain (1563–1573), committed depredations in ports or on the high seas against each other under the pretext that subjects were denied justice for their loss.[254] Those episodes of violence, in fact, introduced an ambiguous state of affairs. By the middle of the eighteenth century, the use of reprisals thus pertained to an intermediate state between peace and war.[255]

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253 Cf. Colbert, *Retaliation in international law* (above, n. 6), 55; Grewe, *Epochen der Völkerrechtsgeschichte* (above, n. 24), 431.

254 Cf. Thomas Alfred Walker, *A history of the law of nations*, 1st vol. (Cambridge: CUP, 1899), 187–8; Colbert, *Retaliation in international law* (above, n. 6), 48; Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (above, n. 65), 1st vol., 143; Grewe, *Epochen der Völkerrechtsgeschichte* (above, n. 24), 238. See further the secret instructions which were given: Germain Lefèvre-Pontalis, *Correspondance politique de Odet de Selve, ambassadeur de France en Angleterre (1546–1549)*, publiée sous les auspices de la Commission des Archives Diplomatiques (Inventaire analytique des archives du Ministère des affaires étrangères; Paris: Félix Alcan, 1888), 450; Michael Oppenheim, *A history of the administration of the royal navy and of merchant shipping in relation to the navy*: *From MDIX to MDCLX with an introduction treating of the preceding period*, 1st vol. (London and New York: John Lane The Bodley Head, 1896), 104f.

255 Maurice, *Hostilities Without Declaration of War* (above, n. 252), 5; Julian Stafford Corbett, *England in the Seven Years' War*: *A Study in Combined Strategy*, 1st vol. (London: Longmans, Green, and Co., 1907), 24.
Sir William Scott's judgement in *The Boedes Lust* (1804) illustrates perfectly the ambiguity of the use of coercion such as reprisals. In this case, Great Britain placed an embargo upon all Dutch ships in English harbours following the declaration of war against France on 16 May 1803. The idea behind this measure was to compel the Batavian Republic to remain neutral and not side with France. Nevertheless, war eventually broke out between the said Republic and Great Britain. A legal issue was raised before the High Court of Admiralty whether prior to the beginning of war the ships had been merely sequestrated or confiscated as good prizes. Sir William Scott pronounced the confiscation for the following grounds: "[The seizure] was at first equivocal; and if the matter in dispute had terminated in reconciliation, the seizure would have been converted into a mere civil embargo, so terminated. That would have been the retroactive effect of that course of circumstances. On the contrary, if the transactions end in hostility, the retroactive effect is directly the other way. It impresses the

(c) Vattel's Pertinent Remark

It is clear that the resort to reprisals was far from being justified in each case. Indeed, the decision to make use of this measure was sometimes guided by considerations of a purely political and strategic nature. For example, jealousy over the French expansion in North America drove Great Britain to capture all kinds of French ships between 1754 and 1756 despite the absence of an order of general reprisals or a declaration of war. It was ultimately in 1756 that the Seven Years' War officially began.[256] By not declaring war and resorting to so-called reprisals, Great Britain manifestly aimed to put the onus of the declaration of war on France, prevent a Spanish attack and receive the support of Dutch troops pursuant to a defensive alliance agreement.[257]

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direct hostile character upon the original seizure. It is declared to be no embargo; it is no longer an equivocal act, subject to two interpretations; there is a declaration of the *animus*, by which it was done, that it was *done hostili animo*, and is to be considered as an hostile measure *ab initio*. The property taken is liable to be used as the property of persons, trespassers *ab initio*, and guilty of injuries, which they have refused to redeem by any amicable alteration of their measures. This is the necessary course, if no particular compact intervenes for the restitution of such property taken before a formal declaration of hostilities." (Christopher Robinson, *Reports of Cases Argued and Determined in the High Court of Admiralty*: *Commencing with the Judgments of the Right Hon. Sir William Scott. Michaelmas Term, 1798*, 6 vols. (Boston: Little, Brown and Company, 1853), 5th vol., 246 (emphasis in original)). Cf. Sir William Scott's judgement of 19 July 1799 in *The Herstelder* case (Ibid., 1st vol., 116–119). In other words, the use of embargo was tantamount to a conditional declaration of war. Reprisals in that epoch and already in the eighteenth century followed the same logic. They constituted a double-edged sword. On *The Boedes Lust* case, see Horst Sasse, 'Boedes Lust-Fall', in Karl Strupp and Hans-Jürgen Schlochauer (eds.), *Wörterbuch des Völkerrechts*, begründet von Professor Dr. Karl Strupp, 3 vols. (2nd edn., Berlin: Walter De Gruyter & Co., 1960–1962), 1st vol., 219.

256 See Alfred Thayer Mahan, *The influence of sea power upon history, 1660–1783* (12th edn., Boston: Little, Brown and Company, 1890), 283–5; John Westlake, 'Reprisals and War', *The Law Quarterly Review* 25 (1909), 127–37, at 129–130; Grewe, *Epochen der Völkerrechtsgeschichte* (above, n. 24), 430f.

257 Colbert, *Retaliation in international law* (above, n. 6), 56. Yet, France was not ready to bear that responsibility. The King of France, therefore, required the restitution of the French vessels and made some amicable offers, but stressed that Great Britain's refusal would be tantamount to an open declaration of war (François-Joachim de Pierre de Bernis, *Memoirs and letters of Cardinal de Bernis in two volumes*, with an introduction by C.-A. Sainte-Beuve. Translated by Katharine Prescott Wormeley. Illustrated with portraits from the original, 1st vol. (New York: P. F. Collier & Son, [1901]), 222).

Those occurrences inspired the famous Swiss international lawyer Emer de Vattel[258] a reflection on the use of reprisals in his days:

> "Il est des cas cependant, où les Réprésailles seroient condamnables, lors même qu'une Déclaration de Guerre ne le seroit pas; & ce sont précisément ceux dans lesquels les Nations peuvent avec justice prendre les armes. Lorsqu'il s'agit dans le différend, non d'une voie de fait, d'un tort reçu, mais d'un droit contesté; après que l'on a inutilement tenté les voies de conciliation, ou les moyens pacifiques d'obtenir justice, c'est la Déclaration de Guerre qui doit suivre, & non de prétendues Réprésailles, lesquelles, en pareil cas, ne seroient que de vrais actes d'hostilité, sans Déclaration de Guerre, & se trouveroient contraires à la foi publique, aussi bien qu'aux devoirs mutuels des Nations."[259]

Vattel made a shrewd observation in this quote. Indeed, he stressed here the hypocrisy of the employment of reprisals. He argued that in the situations where a declaration of war was a legitimate option (e.g., when a right was challenged), the use of reprisals should be precluded because it would be a cowardly way to begin the hostilities. That is why he called them '*pretended* reprisals' since they fooled nobody about their true nature and their real implications. These pretended reprisals were actual acts of war.[260]

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258 On Vattel, see Emmanuelle Jouannet, 'Emer de Vattel (1714–1767)', in Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford: OUP, 2012), 1118–21.

259 Vattel, *Le Droit des Gens. Ou Principes de la Loi naturelle, Appliqués à la conduite & aux affaires des Nations & des Souverains* (above, n. 202), 540–541. Joseph Chitty's English translation of this passage reads: "There are cases, however, in which reprisals would be justly condemnable, even when a declaration of war would not be so: and these are precisely those cases in which nations may with justice take up arms. When the question which constitutes the ground of a dispute, relates, not to an act of violence, or an injury received, but to a contested right,—after an ineffectual endeavour to obtain justice by a conciliatory and pacific measures, it is a declaration of war that ought to follow, and not pretended reprisals, which, in such a case, would only be real acts of hostility without a declaration of war, and would be contrary to public faith as well as to the mutual duties of nations." (Emer de Vattel, *The Law of Nations; Or Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns*, edited by Joseph Chitty (6th edn., Philadelphia: T. & J. W. Johnson, 1844), 289).

260 During the peace negotiations of the Seven Years' War, Louis XV's Chief Minister Étienne-François de Choiseul demanded the restitution of the French ships captured before the declaration of war in 1756. His observations about the British reprisals curiously echoed Vattel's remark. Indeed, he argued that if

This remark concludes the part on reprisals in his *Law of Nations*. It thus makes the reader wonder to what extent reprisals were still valid as a compensatory measure in the second half of the eighteenth century. In fact, the impression which comes out of Vattel's comment is that the use of reprisals no longer obeyed clear rules; in other words, that States employed reprisals in a discretionary and arbitrary manner to apply pressure on the target country without bearing the responsibility for declaring war.

However, it does not mean that Vattel disapproved reprisals altogether. He regarded them as a milder measure; war being the *ultima ratio*.[261] But the case had to lend itself to their use. He actually explained that reprisals aimed at compensation. So, the claims giving rise to them had to be capable of a pecuniary statement. It did not matter whether those claims resulted from a debt or an injury suffered by either the State itself or its subjects, as long as they were well-ascertained, undeniable and assessable in money terms.[262] For Vattel, it was thus clear that the resort to reprisals was not allowed for political claims.[263]

Only when a claim could be valued in money terms was the recourse to reprisals commendable and preferable to war as a means of settlement of dispute.[264] Still, Vattel knew that their use did not mean that the issue would be terminated without a hitch. He, indeed, noted that war was like-

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Great Britain had motives for complaint against France on account of hostilities in the American colonies, the adequate response was not to engage into dubious reprisals but rather to declare war. On this basis, the refusal to return the captures was considered by Choiseul unlawful (The French Memorial, 15 July 1761: Étienne-François de Choiseul, *An Historical Memorial of the Negotiation of France and England, From the 26th of March, 1761, to the 20th of September of the same Year*, With the Vouchers. Translated from the *French Original*, published at *Paris* by Authority (London: Printed for D. Wilson, and T. Becket and P. A. Dehondt in the Strand, 1761), 51–3).

However, Moser, *Versuch des neuesten Europäischen Völker=Rechts in Friedens= und Kriegs=Zeiten* (above, n. 205), 501–2, considered that nobody could judge the justice of reprisals because of the independence of the Sovereigns between each other. In fact, he argued that reprisals were preferable when the Sovereign wanted to avoid waging an all-out war.

261 Vattel, *Le Droit des Gens. Ou Principes de la Loi naturelle, Appliqués à la conduite & aux affaires des Nations & des Souverains* (above, n. 202), 539.

262 Ibid., 1st vol., 531 and 534.

263 Westlake, 'Reprisals and War' (above, n. 256), 129–30. But cf. Spiegel, 'Origin and Development of Denial of Justice' (above, n. 61), 76–7.

264 Vattel, *Le Droit des Gens. Ou Principes de la Loi naturelle, Appliqués à la conduite & aux affaires des Nations & des Souverains* (above, n. 202), 540. See further on peaceful settlement of international disputes in Vattel's, Lucius Caflisch, 'Vattel

lier to happen when reprisals targeted a Power of strength equal to the reprisal-taking State.[265]

IV. Interim Conclusion

The legal situation of reprisals was far from being clear-cut at the end of the eighteenth century. Indeed, the transformation of reprisals from a measure of private international law into one of public international law greatly affected the law governing them. Reprisals, which were initially used to protect private interests, soon became resorted to by States as an instrument of public policy. And yet, the rules were not adapted to fit the political reality of sovereign States.

Throughout the Middle Ages, the concern prevailed that reprisals, if they could not be abolished entirely, had at least to be strictly regulated. The idea behind the elaboration of rules governing reprisals was the conciliation of two interests: on the one hand, the public interest consisted in the protection of commerce and the preservation of peace; on the other, the defence of private interests when no compensation could be obtained by judicial means, hence the reason why reprisals were a necessary evil. The result was the adoption of restrictions at both local and international levels in the form of procedural norms which regulated in detail all the aspects of the practice. This process of 'normatization' was then consolidated and standardised through the work of influential jurists like Bartolus de Saxoferrato, who modelled the law of reprisals on the law of just war.

However, the centralisation of power, as a consequence of the creation of modern States which began in the sixteenth century, led to the politicisation of reprisals and thence to the dismantling of this legal framework. Indeed, States became the only actors in the whole procedure of reprisals, excluding the individuals at all stages and turning the question of reprisals into an affair of State. Sovereigns often departed from the strict observance of the rules of the law of reprisals in order to achieve their own political

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and the peaceful settlement of international disputes', in Vincent Chetail and Peter Haggenmacher (eds.), *Vattel's International Law in a XXI^st^ Century Perspective* (Graduate Institute of International and Development Studies, 9; Leiden/Boston: Martinus Nijhoff Publishers, 2011), 257–66; Hersch Lauterpacht, *The Function of Law in the International Community* (1st edn. of 1933, Oxford: OUP, 2011), 7–9.

265 Vattel, *Le Droit des Gens. Ou Principes de la Loi naturelle, Appliqués à la conduite & aux affaires des Nations & des Souverains* (above, n. 202), 540.

goals. In this context, the political considerations concretely superseded the legal rules governing reprisals. In State practice, these rules had then been reduced to abstract principles, i.e. mere guidelines for the use of reprisals.

Therefore, when the nineteenth century began, it can be said that the employment of reprisals was no longer subject to a clear-cut regulation but was instead governed by vague standards and influenced by national policy.