Regulating Armed Reprisals: Revisiting the Scope of Lawful Self-Defense

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Who must bear the effects of a small-scale military attack, the aggressor or the victim? The ICJ's decisions and some prominent state practices suggest contradictory answers. The ICJ has prohibited a forcible response by the victim state, thus placing the brunt burden of the attack on the victim. By restricting the right of self-defense only in response to armed attacks of "significant scale," the ICJ requires the victim to refrain from a military response even where its security cannot be restored by peaceful means or with the help of the Security Council. The United States and other prominent states, however, have chosen to exercise their right of self-defense in response to attacks below the ICJ threshold, as long as they deemed such reactions necessary to protect themselves from future attacks.

This article analyzes the latter approach to challenge the Court's absolute prohibiting rule. It examines the dispute surrounding the positive rule and proposes a novel normative discussion. In a reality where centralized use of force by the Security Council is usually impractical, and non-forcible measures are not always effective, the article endorses the regulation of defensive reprisals, arguing that they may not only be ex-post appropriate but also ex-ante desirable. The use of force should be considered as a last resort when the small-scale attack is carried out by a potential repeat offender, and the attacker is unlikely to be

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deterred by other means. In such a case, this article argues that a restricted reprisal, rather than appeasement by any means, is the more effective way to contain further belligerency.

INTRODUCTION

This article challenges the rule, laid down by the International Court of Justice (ICJ), that permits self-defense only in response to armed attacks of a "significant scale,"[1] and rejects a forcible response by a state that was a victim of a small-scale attack. Under this approach, the potential responses by a victim state to a belligerent act that is below this threshold should be limited to non-forcible measures. The use of military force is not part of the toolbox that the Charter grants to such a victim. The validity of the significant-scale threshold is disputed by prominent states, and this article supports these states' practice and argues that this legal rule is not normatively desirable.

Article 2(4) of the United Nations Charter (the "Charter") prohibits the "use of force" as a tool for resolving international disputes.[2] Article 51 of the Charter, however, contains an exception to this rule, recognizing the "inherent right" to use military force for individual or collective self-defense against an "armed attack."[3] However, the term "armed attack," which triggers the right of self-defense, has not been defined by the Charter and is far from clear.

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1. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 195 (June 27).

2. It seems commonly accepted that "Article 2(4) is so worded that it is not simply a prohibition of recourse to war, it is a prohibition of any use of force against the territorial integrity or political independence of another state, irrespective of whether that use of force amounts to war." Christopher Greenwood, *The Relationship Between Ius Ad Bellum and Ius In Bello*, 9 REV. INT'L STUD. 221, 222 (1983). Though this wide interpretation of the prohibition of the threat or use of force is common in light of the Charter's objective and seems to be consistent with its aim, Oscar Schachter seems to be ambivalent towards it. He argues that in spite of the literal change, Article 2(4) was probably meant to prohibit war:

> [W]e know that the principle was intended to outlaw war in its classic sense, that is, the use of military force to acquire territory or other benefits from another state. Actually, the term 'war' is not used in article 2(4). It had been used in the League of Nations Covenant . . . . but it had become evident in the 1930's that states often engaged in hostilities without declaring war . . . . The term 'force' was thus a more factual and wider word to embrace military action.

Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1624 (1984).

3. U.N. Charter art. 51. Another exception to the rule is pursuant to a Security Council authorization. U.N. Charter art. 42.

The common interpretation treats the term as having a narrower meaning than the prohibition of the "use of force" in Article 2(4). Under this approach, a mere unlawful hostile activity by an adversary, which nonetheless does use "force," does not automatically grant a victim state *carte blanche* to launch a military response in the course of self-defense. Indeed, the ICJ has bridged this wording gap by establishing the significant-scale threshold for an armed attack.

This article focuses on a special case along the armed attack-peace spectrum—an *armed reprisal*, which is a "military action short of war in response to a single and small-scale armed action by another state."[4] If one accepts the ICJ's "significant-scale" threshold for an armed attack, then a belligerent act by a victim in response to a small-scale attack below that threshold is, in the absence of an armed attack, a case of reprisal.[5] Small-scale attacks do not trigger the right of self-defense and are perceived by the ICJ as unlawful acts "in time of peace."[6] Though armed reprisals in response to small-scale attacks are common in the international arena, to a large extent, they are treated as the stepchild of the *ad bellum* rules,[7] categorically prohibited under the prevailing view. Instead of outlawing armed reprisals, this article calls for their regulation. It argues that, in appropriate cases, armed reprisals are not only ex-post appropriate but should be regarded as ex-ante desirable.

States may be attacked militarily on an "insignificant" scale. The victim state, which is entitled to regain its security, may turn to

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4. ANTONIO CASSESE, INTERNATIONAL LAW 371 (2d ed. 2005). The reprisals discussed here should be distinguished from *in bello* reprisals which are known as belligerent reprisals. *See infra* note 141 and accompanying text.

5. The absence of an armed attack might also be due to difficulties in attributing the attack to a specific attacker. For example, in the *Oil Platforms* case, the ICJ held that the United States had failed to prove that the attacks on its ships were carried out by Iran. Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶¶ 51, 64 (Nov. 6). Legally, even if there is an armed attack, the use of force by the victim might also amount to a reprisal if its object is punishment and not self-defense, as might be evident, for example, if it follows an armed attack that has ended, and the attacker has been completely repulsed, or if it comes long after the attack. *See, e.g.*, TOM RUYS, 'ARMED ATTACK' AND ARTICLE 51 OF THE UN CHARTER 99–108 (2010).

6. For the ICJ's statement in its *Nuclear Weapons Advisory Opinion*, that "[t]he Court does not have to examine, in this context, the question of armed reprisals in time of peace," see *infra* note 47.

7. The prevailing law as it relates to war distinguishes between *jus ad bellum* and *jus in bello*. The former refers to the right to fight and determines the conditions under which states may resort to the use of armed force. The latter—also known as the law of armed conflict or International Humanitarian Law (IHL)—regulates the conduct of adversaries engaged in an armed conflict. *See generally*, INT'L COMM. OF THE RED CROSS, *What Are* Jus Ad Bellum *and* Jus In Bello*?*, *in* INTERNATIONAL HUMANITARIAN LAW: ANSWERS TO YOUR QUESTIONS 8 (2015).

law enforcement channels and may well respond with nonmilitary (e.g., economic) countermeasures following the Law of State Responsibility.[8] When such a response may reasonably contain the conflict, it should be the only lawful measure. When it cannot, a total prohibition of forcible response by the victim state, if abided by, may encourage the aggressor to continue its aggressive behavior. If not abided by, the victim's response may trigger a dual fault: first, an escalated, disproportional response since reprisals are not regulated; and second, a widening of the unacceptable gap between the positive rules and states' actual practice.

Indeed, the prescribed remedy for the victim under Article 37 of the Charter—referring the conflict to the Security Council—corresponds to the expectation in domestic law that an injured person will approach the police; it reflects the preference for authorized collective force over self-help. However, the Security Council, the apparent surrogate for the domestic police in the international arena, is in many cases a malfunctioning body that cannot fulfill its mission effectively. It was largely paralyzed during the Cold War,[9] and although it subsequently became more active in exercising its responsibility for maintaining international peace and security, it has largely failed to fulfill its policing functions under Chapter VII of the U.N. Charter.[10] Given that the reformation of the Security Council is not

8. G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts, art. 1 (Jan. 28, 2002) [hereinafter Articles on State Responsibility]. *See* discussion *infra* Section II.A.

9. The veto right of the five permanent members, combined with the inability to establish a formal mechanism for the collective use of force, paralyzed the Security Council's ability to exercise its authority during the Cold War. One exception in which the U.N. did exercise its authority as regards collective enforcement action occurred on July 7, 1950, when the Security Council came to the defense of South Korea and issued a resolution authorizing collective action against North Korea's armed attack, under the flag of the United Nations and the joint command of the United States. S.C. Res. 84 (July 7, 1950). For the exceptions of the Korean War and subsequently Somalia and the First Gulf War, s*ee, e.g.*, ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 52–57 (1993).

10. For example, regarding the ongoing atrocities in Syria, since they began in 2011, the Council has failed, to a large extent, in both its investigative and policing roles. Russia, in an unyielding alignment with the Syrian regime of Bashar al-Assad, has blocked attempts to investigate the scope of the carnage—e.g., the Assad regime's use of chemical weapons—and prevented the use of force by the Council to stop the civil war. *See generally*, Roy Allison, *Russia and Syria: Explaining Alignment with a Regime in Crisis*, 89 INT'L AFFS. 795, 798 (2013). Regarding the Russian veto of a U.N. resolution on extending the Syria chemical weapons probe, see also Rick Gladstone, *Russia Blocks U.N. Move to Renew Syria Chemical Weapons Inquiry*, N.Y. TIMES, Oct. 24, 2017, at A6. On the Libyan civil war, the Security Council's performance is a mixed bag. It could be considered to have fulfilled its investigative role, having assigned the matter to the ICC for investigation via S.C. Res. 1970, ¶ 4 (Feb. 26, 2011). However, in S.C. Res. 1973 (Mar. 17, 2011) it failed to act to

feasible in the foreseeable future and in the absence of an effective centralized response to a "small-scale attack," especially when carried out by a potential repeat offender, the victim state's security becomes compromised. If the victim state employs only nonmilitary countermeasures, as arguably required by law, it might invite the aggressor to strike again. Where, despite these measures, there is a high probability of a repeat attack, as clearly demonstrated by the offender's actions and declarations, and no centralized remedy exists under international law (i.e., intervention by the Security Council), the victim in many cases cannot afford strategic inaction. As Judge Jennings astutely observed in *Military and Paramilitary Activities in and Against Nicaragua*:

> The original scheme of the United Nations Charter, whereby force would be deployed by the United Nations itself, in accordance with the provisions of Chapter VII of the Charter, has never come into effect. Therefore, an essential element in the Charter design is totally missing. In this situation it seems dangerous to define unnecessarily strictly the conditions for lawful self-defense, so as to leave a large area where both a forcible response to force is forbidden, and yet the United Nations employment of force, which was intended to fill that gap, is absent.[11]

The victim state needs an effective tool to prevent any recurrence of the attack. Both morally and practically, the "inherent right" of the victim to protect itself cannot be denied. This reality explains the potential for reprisals to become an effective response. Unfortu-

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stop the atrocities. *See, e.g.*, Julian Borger, *Libya No-Fly Resolution Reveals Global Split in UN*, GUARDIAN (Mar. 18, 2011), https://www.theguardian.com/world/2011/mar/18/libya-no-fly-resolution-split [https://perma.cc/8D8A-S6DD]. Regarding the Second Gulf War in Iraq, by contrast, the Council seems to have overreacted by authorizing the use of military force and failing to exercise its responsibility for maintaining international peace and security. The Council's investigation, which was carried out in 2002–2003, reached the conclusion that no weapons of mass destruction (WMDs) were present in Iraq, but that did not stop the Security Council from bowing to pressure from the United States in 2002 to go through with Resolution 1441, which authorized the use of force to disarm Iraq. *See, e.g.*, Michael J. Glennon, *Why the Security Council Failed*, 82 FOREIGN AFFS. 16, 17–18 (2003).

Although the Council, to a large extent, has not fulfilled its international policing functions, its discussions and decisions are important in their own right—for example, in legitimizing specific military operations. *See, e.g.*, Monica Hakimi, *The* Jus Ad Bellum*'s Regulatory Form*, 112 AM. J. INT'L L. 151, 151 (2018) (arguing that "a form of legal regulation is embodied in decisions at the UN Security Council that condone but do not formally authorize specific military operations").

11. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 533–34 (June 27) (Jennings, J., dissenting).

nately, this widespread self-help pattern is usually considered to be unlawful.

This article challenges the absolute rejection of forcible response to a small-scale attack, even if necessitated and proportional. The law of self-defense permits forcible responses only in emergencies, traditionally only when states face either an imminent risk of an armed attack or an actual attack. Yet, the emergency exception should not negate permissibility of defensive actions in response to small-scale attacks when law enforcement or any other non-forcible response is not effective. The fact that such an attack has already occurred cannot be taken only as an ex-post, historical phenomenon as it may have future effects upon the victim's self-defense, indicating, in some cases, existence of a pattern in the aggressor's behavior.

By outlawing reprisals categorically, the prevailing approach turns a blind eye to the reality and misses an opportunity to regulate a potentially moderate tool, which is already utilized in practice and might be normatively desirable.[12] The current relegation of defensive reprisals beyond the scope of legal scrutiny might seem to be another example of Michael Walzer's observation that "[t]he lawyers have constructed a paper world, which fails at crucial points to correspond to the world the rest of us still live in."[13] Were it to be regulated, the focus regarding the resort to force in reprisals should not be upon the actual occurrence of an armed attack but rather on the traditional constraining criteria of the use of force: necessity and proportionality.

This article is an effort to bridge the gap between the real and the legal world in relation to reprisals from both the normative and positive perspectives. Its scope, however, is limited. It concentrates on the permissibility of self-defense in response to a small-scale attack against a state in the context of Article 51.[14] It does not engage with related but separate *in bello* issues, for example, the threshold and scope of an "armed conflict" that triggers the application of *jus in bello*, in both international and non-international armed conflict.[15]

12. Indeed, in defensive wars, the constraining force of the *ad bellum* proportionality is generally limited. *See* discussion *infra* Section V.B.

13. MICHAEL WALZER, JUST AND UNJUST WARS xxv (5th ed. 2015) (relating to legal positivism in the post-U.N. Charter age).

14. For the Charter and preexisting custom on the use of force, see, for example, RUYS, *supra* note 5, at 7–19. This article assumes that "force" in the meaning of Article 2(4) has been used against the victim state, but it doesn't deal with the precise meaning of this concept. For that purpose, see generally, Tom Ruys, *The Meaning of Force and the Boundaries of the* Jus Ad Bellum*: Are Minimal Uses of "Force" Excluded from UN Charter Article 2(4)?*, 108 AM. J. INT'L L. 159 (2014).

15. For example, see common Articles 2 and 3 of the Geneva Conventions of 1949.

The discussion further assumes that a state's right of self-defense is valid, whether its attacker is a state or a non-state actor.[16]

Geneva Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

Article 2 states that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." Article 3 is more limited in scope and applies "[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties." Indeed, in non-international armed conflicts there is a higher threshold for determining the existence of an armed conflict. *See, e.g.*, NOAM LUBELL, EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 89 (2010). For the link between armed conflict and armed attack, see *id.* at 88–92. For the legal classification of conflicts, see generally, Terry D. Gill, *Classifying the Conflict in Syria*, 92 INT'L L. STUD. 353, 362–66 (2016). For the meaning of armed conflict in both international and non-international armed conflicts, see generally, Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Int'l L. Ass'n, FINAL REPORT ON THE MEANING OF ARMED CONFLICT IN INTERNATIONAL LAW (2010).

16. While the prevailing approach limited this right to fighting between states before the events of 9/11, after that a wider interpretation of the right of self-defense seemed called for, granting it to states fighting against terrorist groups (non-state actors). This change received its legal backing in Security Council Resolution 1368, "*[r]ecognizing* the inherent right of individual or collective self-defence" against the "terrorist acts" of 9/11. S.C. Res. 1368, ¶ 1 (Sept. 12, 2001); *see also* S.C. Res. 1373 (Sept. 28, 2001). For the scope of the legal change, if any, see, for example, CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 206 (4th ed. 2018):

> [B]efore 9/11 it was clear that the right to use force in self-defence against terrorist attacks was controversial. But the almost universal support of states for a US right of self-defence in response to 9/11 may be seen as raising the question whether there has been a significant change in the law.

Indeed, even after 9/11, the legality of self-defense by a state fighting against a non-state actor is not accepted by all. For discussions on the limitation of the right to self-defense only against armed attacks by military forces of states, see, for example, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 139; for minority views, see, for example, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 207 ¶¶14–19 (separate opinion by Higgins, J.). For the mainstream positions on the legality of use of defensive force against non-state actors and its lawful scope and the reasoning behind them, see Monica Hakimi, *Defensive Force Against Non-State Actors: The State of Play*, 91 INT'L L. STUD. 1, 1–16, 30 (2015) ("The claim that international law absolutely prohibits defensive force against non-State actors is losing legal traction but not yet dead."). The Chatham House *Principles of International Law on Use of Force in Self-Defence* suggests a stronger, unequivocal statement of the law:

> There is no reason to limit a state's right to protect itself to an attack by another state. The right of self-defence is a right to use force to avert an attack. The

This article proceeds as follows: Part I presents the ICJ's disputed "armed attack" threshold, which is the prevailing standard that determines a victim's right of self-defense. Part II deals with the illegality of reprisals, namely the exercise of military force by a victim in response to a small-scale attack below the ICJ's threshold, contrasting their use in some prominent states' practice, including the traditional American response when engaged by small-scale attacks, with their prevailing prohibition. The normative discussion begins in Part III, focusing on reprisals against potential repeat offenders. It argues that a victim state ought to have a last-resort belligerent alternative, wholly aimed at the restoration of its security, and points at the generic "tit-for-tat" strategy as a starting point in looking for an effective and moderate response tool for the victim. Part IV revisits the positive law. It challenges the absolute legal prohibition of reprisals by rejecting the mistaken conception of reprisals as being tantamount to punishment. Part V concludes the normative discussion. Addressing the potential risk that reprisals will escalate the conflict, Part V argues that defensive reprisals, if allowed in appropriate cases, might deter aggressors; their total prohibition, on the other hand, might incentivize aggressors to repeat their attacks. Reprisals can be justified if militarily necessitated as a defensive tool of last resort and if they are proportionally tailored and should be endorsed if the probability of them containing the conflict is high.

I. THE DISPUTED ARMED ATTACK THRESHOLD

A. The ICJ Approach: The "Scale and Effects" Criterion

In the influential *Nicaragua* case, the ICJ discussed the validity of an act of self-defense. It conditioned the right to self-defense on the scale and effects of the attacker's use of force.[17] In the Court's opinion, an insignificant attack against a victim state such as a "mere frontier incident" does not amount to an "armed attack" within the meaning of Article 51 of the Charter, and the injured state is therefore prohibited from exercising its right of individual or collective self-defense. Thus, the Court limited the term "armed attack" by ex-

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> source of the attack, whether a state or a non-state actor, is irrelevant to the existence of the right.

Elizabeth Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defence* 11 (Chatham House, Working Paper No. ILP WP 05/01, 2005) [hereinafter *Chatham House Principles*].

17. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 195 (June 27).

cluding small-scale attacks from its definition and, following the different wording, by construing the term more narrowly than the prohibition of the "threat or use of force" in Article 2(4).[18] The Court stated:

> [T]he prohibition of armed attacks may apply to the sending by a State of armed bands to the territory of another State, if such an operation, because of its scale and effects, would have been classified as an armed attack rather than as a mere frontier incident had it been carried out by regular armed forces. But the Court does not believe that the concept of "armed attack" includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States.[19]

In *Oil Platforms*, the ICJ followed its *Nicaragua* precedent, holding that only "the most grave forms of the use of force" are to be considered armed attacks, triggering the right of self-defense under Article 51.[20] Acknowledging this threshold, the Court stated: "The question is therefore whether [the mining of the USS Samuel B. Roberts by Iran] sufficed in itself to justify action in self-defense, as amounting to an 'armed attack.'"[21] Similarly, the Partial Award of

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18. The quantitative threshold of gravity for the right of self-defense was established earlier in Article 3(g) of the Definition of Aggression, adopted by the General Assembly in Resolution 3314. G.A. Res. 3314 (XXIX), annex, Definition of Aggression, art. 3(g) (Dec. 14, 1974). For support for the proposition that this definition reaffirms the gap between Articles 2(4) and 51 of the U.N. Charter see, for example, RUYS, *supra* note 5, at 149–52.

19. *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. 14, ¶ 195. The Court's distinction between mere frontier incidents and armed attacks might be explained, however, in light of its concern with collective self-defense and its desire to limit third-state involvement. *See, e.g.*, GRAY, *supra* note 16, at 180–81.

20. *See* Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 51 (Nov. 6). By comparison, Ruth Wedgwood's view is that the gravity criterion for an armed attack was originally established by the Court only in regard to the actions of irregular forces; however, in its later application, in the *Oil Platforms* decision, the ICJ clearly indicated that the gravity threshold is required for an armed attack by regular forces as well. *See* Ruth Wedgwood, *The ICJ Advisory Opinion on the Israeli Security Fence and the Limits of Self-Defense*, 99 AM. J. INT'L L. 52, 57 (2005).

21. Oil Platforms, 2003 I.C.J. 161, ¶ 72 ("The Court does not exclude the possibility that the mining of a single military vessel might be sufficient to bring into play the 'inherent right of self-defence.'"). For the additional requirement of "specific intention of harming" by the attacker, see *id.* ¶ 64.

the Eritrea-Ethiopia Claims Commission followed the "mere frontier incident" exclusion of the *Nicaragua* case, stating that "[l]ocalized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack for purposes of the Charter."[22] The Commission further held that "[minor] incidents involv[ing] geographically limited clashes between small Eritrean and Ethiopian patrols along a remote, unmarked, and disputed border . . . were not of a magnitude to constitute an armed attack by either State against the other within the meaning of Article 51 of the UN Charter."[23]

Indeed, the ICJ's "armed attack" threshold, disallowing a victim state to exercise counter force in response to small-scale attacks, appears to aim at containing conflicts and strengthening the stability of the international order. The goal is to prevent the escalation of relatively minor conflicts into a persistent forcible cycle[24] and to limit third-state involvement under the pretext of collective self-defense.[25] This threshold arguably reflects the goal of the UN Charter to limit the use of military force to exceptional, emergency situations in scope and time. This line of reasoning will be scrutinized later in the normative discussion in Part V.

B. The Narrower Approach: Challenging the Threshold

The ICJ's "scale and effects" threshold has not been universally accepted. Additionally, an examination of pre-1986 state practices and supporting *opinio juris* has revealed that the threshold has not been perceived by all as reflecting the customary international law.[26] For example, the traditional American view is that an armed attack need not surpass any threshold of intensity. Challenging the

22. Eritrea-Ethiopia Claims Commission, PCA Case Repository No. 2001-02, Partial Award, *Jus Ad Bellum*, Ethiopia's Claims 1–8, ¶ 1 (Dec. 19, 2005), https://pcacases.com/web/sendAttach/763 [https://perma.cc/X92U-YNVU].

23. *Id.* ¶ 12. The "scale and effects" threshold has also been accepted by the Tallinn Manual for determining a cyber armed attack: "A State that is the target of a cyber operation that rises to the level of an armed attack may exercise its inherent right of self-defence. Whether a cyber operation constitutes an armed attack depends on its scale and effects." TALLINN MANUAL 2.0 ON THE LAW APPLICABLE TO CYBER OPERATIONS, r. 71, at 339 (Michael N. Schmitt ed., 2017). For a discussion related to this threshold, see *id.* at 339–48.

24. *See, e.g.*, RUYS, *supra* note 5, at 149 (rationalizing a de minimis threshold).

25. *See, e.g.*, GRAY, *supra* note 16, at 156–57.

26. *See, e.g.*, JAMES A. GREEN, THE INTERNATIONAL COURT OF JUSTICE AND SELF-DEFENCE IN INTERNATIONAL LAW 112–21 (2009). For the threshold's disputed status, see, for example, David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in* Jus Ad Bellum, 24 EUR. J. INT'L L. 235, 243 (2013).

Nicaragua judgment, Judge Sofaer, then Legal Adviser at the U.S. Department of State, argued that the United States has "always construed the phrase 'armed attack' in a reasonable manner, consistent with a customary practice that enables any State effectively to protect itself and its citizens from every illegal use of force aimed at the State."[27] Similarly, following the rejection of this consistent American approach in the *Oil Platforms* case, William H. Taft, then Legal Adviser at the U.S. Department of State, criticized the Court's decision:

> [T]he United Nations Charter specifically recognizes a right to defend against an "armed attack," and it contains no suggestion that only certain armed attacks qualify. Nor do collective self-defense treaties referring to "armed attack" suggest any gravity requirement. The gravity of an attack may affect the proper scope of the defensive use of force (that is, its proportionality . . .), but it is not relevant to determining whether there is a right of self-defense in the first instance.[28]

A similar approach was adopted by the drafters of the Chatham House *Principles of International Law on Use of Force in Self-Defence* (the "Principles"). The Principles, written by major British experts in international law, including former legal advisers at the Foreign and Commonwealth Office,[29] stated that "[a]n armed attack means any use of armed force, and does not need to cross some threshold of intensity."[30] The authors mention that certain statements from the International Court of Justice "suggest that there may be instances of the use of force which are not of sufficient gravity as to scale and effect to constitute an armed attack for the purpose of self-

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27. Abraham D. Sofaer, *The Sixth Annual Waldemar A. Solf Lecture in International Law: Terrorism, the Law, and the National Defense*, 126 MIL. L. REV. 89, 94 (1989). He further argued:

> A view of the meaning of 'armed attack' that restricts it to conventional, ongoing uses of force on the territory of the victim State would as a practical matter immunize those who attack sporadically or on foreign territory, even though they can be counted on to attack specific States repeatedly.

Id. at 95–96.

28. William H. Taft, IV, *Self-Defense and the* Oil Platforms *Decision*, 29 YALE J. INT'L L. 295, 300 (2004) (citations omitted). *See also* Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 98 AM. J. INT'L L. 579, 597–601 (2004).

29. *See* Kretzmer, *supra* note 26, at 243 n.42.

30. *See Chatham House Principles*, *supra* note 16, at 6. However, the Principles do require a threshold in the case of attacks by non-state actors ("The attack or imminent attack by non-state actors must be large-scale."). *Id.* at 13.

defence . . . . But these statements are not generally accepted."[31]

Between the ICJ and the Anglo-American conflicting views, some voices endorse establishing a threshold for an armed attack but dispute its relative location. Yoram Dinstein, for example, does not accept that any use of armed force should be considered an armed attack, as the Chatham House experts suggest, nor does he endorse elevating the armed attack threshold, as does the ICJ. In his opinion, the crossing of this statutory threshold should be defined consequentially, whenever the use of force produces "some painful consequences."[32] Accordingly, he contests the axiom asserted by the *Nicaragua* case, that "a mere frontier incident" is by definition below the threshold of an armed attack. In his opinion, if such an incident produces painful consequences it legitimizes the exercise of self-defense by the victim state under Article 51.[33]

In sum, the contour of the armed attack threshold is disputed. It ranges from any use of armed force at one pole,[34] followed along the spectrum by a consequential approach, which demands painful consequences, to the opposite pole, the ICJ's demand of scale and effects.[35]

On the ICJ's assumption that an exercise of military force by

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31. *Id.* at 6 n.9.

32. YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 206 (6th ed. 2017) [hereinafter 6TH ED. 2017]. In a former edition of his book, Dinstein seems to designate a higher threshold than "some painful consequences" for an armed attack, requiring instead "serious consequences, epitomized by territorial intrusions, human casualties or considerable destruction of property." YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 208 (5th ed. 2012). For the different voices regarding the relative location of the armed attack threshold, see, for example, RUYS, *supra* note 5, at 139–57.

33. *See* DINSTEIN, 6TH ED. 2017, *supra* note 32, at 209–11. Similarly, Dinstein criticizes the Eritrea-Ethiopia Claims Commission for the exclusion of "[l]ocalized border encounters between small infantry units." *Id.* at 210; s*ee also supra* note 23 and accompanying text.

34. For a rejection of the view that any unlawful use of force permits a proportionate defensive response, see RUYS, *supra* note 5, at 148 (referring, inter alia, to Dinstein's example of the unlawfulness of a forcible response to a breaking into a state's diplomatic bag).

35. Though this range might seem wide, David Kretzmer concludes that even according to those who demand a threshold it is not fixed very high. *See* Kretzmer, *supra* note 26, at 243. Indeed,

> [I]n practice it appears that the gravity threshold attached to armed attacks is not markedly high, and would include most uses of force likely to cause casualties or significant property damage. As such, if there is a gap between 'use of force' and 'armed attack', it would be relatively narrow.

INT'L LAW ASS'N [ILA], COMM. ON THE USE OF FORCE, FINAL REPORT ON AGGRESSION AND THE USE OF FORCE 6 (2018).

a victim in response to a small-scale attack is classified as a reprisal according to the gravity threshold, Part II deals with the prevailing prohibition of reprisals and contrasts it with some prominent states' actual practice.

II. PROHIBITION OF REPRISALS—THE POSITIVE RULE AND STATES' PRACTICE

A. The Prevailing Total Prohibition

It is generally accepted that reprisals are outlawed by the Charter.[36] As Derek Bowett stated in 1972, "[f]ew propositions about international law have enjoyed more support than the proposition that, under the Charter of the United Nations, the use of force by way of reprisals is illegal."[37] Various Security Council resolutions have consistently condemned reprisals "as incompatible with the purposes and principles of the United Nations," and General Assembly resolutions have consistently reflected this approach.[38] For example, one such resolution, adopted on October 24, 1970, stated bluntly: "States have a duty to refrain from acts of reprisal involving the use of force."[39] Ian Brownlie points out that "[t]he provisions of the Charter relating to the peaceful settlement of disputes and non-resort to the use of force are universally regarded as prohibiting reprisals which involve the use of force."[40] Christine Gray echoes this approach, stating that "[r]eprisals are generally agreed to be unlawful."[41]

Indeed, the International Law Commission's Articles on State Responsibility, allowing a victim state to take necessary and propor-

36. *See, e.g.*, GRAY, *supra* note 16, at 160–61 (analyzing the illegality of the U.S. counterattack on Iran in the *Oil Platforms* case).

37. Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1, 1 (1972).

38. CASSESE, *supra* note 4, at 372 n.24.

39. G.A. Res. 2625 (XXV), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, at 122 (Oct. 24, 1970).

40. IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 281 (1963); *see also id.* n.4 (presenting the commentators' views).

41. GRAY, *supra* note 16, at 160. For a general description of the UN Charter as prohibiting resort to armed reprisals and the practice of international organizations that would seem to support it, see Shane Darcy, *Retaliation and Reprisal*, *in* THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 879, 886–91 (Marc Weller ed., 2015).

tionate temporary countermeasures "against a State which is responsible for an internationally wrongful act [against it],"[42] restrict the scope of the response.[43] The countermeasures should be non-forcible ones,[44] and ought to aim only to induce the offending state to comply with its obligations,[45] i.e., cessation of the wrongful act and reparation for the injury.[46]

This broad near-consensus regarding the unlawful status of reprisals is reflected in the ICJ's judgments. In its *Nuclear Weapons Advisory Opinion*, the Court has stated, albeit in what might be regarded as an *obiter dictum*, that "[t]he Court does not have to examine, in this context, the question of armed reprisals in time of peace, which are considered to be unlawful."[47] Nonetheless, this assertion has not been accepted by all; the discussion that follows will present some of the conflicting views and states' practice, challenging the prevailing view.

B. Cracks in the Consensus on Prohibition

Despite the near-unanimous consensus regarding the total prohibition of reprisals, some states and scholars contest it by disputing the substance of the prevailing law.[48] In addition to the Anglo-American approach presented earlier,[49] two examples will be presented here. One follows the conventional wisdom that the sole basis for the unilateral use of force in the post-Charter era is within the framework of Article 51, and calls for the legalization of reprisals within its contours. The other approach calls for the legalization of

42. Articles on State Responsibility, *supra* note 8, art. 49(1).

43. "Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State." *Id.* art. 49(2). For the requirement of proportionality regarding them, see *id.* art. 51.

44. *See id.* art. 50(1)(a) (stating that countermeasures shall not affect "[t]he obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations").

45. *See id.* art. 49(1).

46. *See, e.g.*, JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 281–87 (2002).

47. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 46 (July 8).

48. *See generally* Bowett, *supra* note 37; William V. O'Brien, *Reprisals, Deterrence and Self-Defense in Counterterror Operations*, 30 VA. J. INT'L L. 421 (1990).

49. For the American approach, see *supra* notes 27–28 and accompanying text; for the English approach, as reflected by the Chatham House Principles, see *supra* notes 29–31 and accompanying text, and see discussion *infra* Section II.C, addressing the American practice that gained traditional support from the United Kingdom.

reprisals by creating an exception to Article 51.[50] Yoram Dinstein, who argues that the Article 51 threshold should focus on consequences,[51] advocates for legalizing armed reprisals—which Dinstein terms "defensive armed reprisal"—as a form of self-defense that reflects a measure of counter-force, "short of war," against a small-scale armed attack.[52] Ruys too supports a minimal threshold that would allow self-defense against small-scale attacks[53] but suggests terming such a response not a reprisal, due to its perception as unlawful, but by a "neutral denominator" such as, for example, "restricted *post facto* self-defence."[54]

Judge Simma, in his separate opinion in the *Oil Platforms* case, suggested a different source of legality of the modest counter-force measures. He acknowledged that a full-scale military response by a defending state is lawful under Article 51 of the Charter, but he also recognized the legitimacy of a limited military response, outside the scope of this Article, pursuant to general international law governing "proportionate counter-measures."[55] Judge Simma suggested differentiating between two levels of armed attacks:

> [F]irst, the level of 'armed attacks' in the substantial, massive sense . . . [a]gainst such armed attacks, self-defence in its not infinite, but still considerable, variety would be justified. But we may encounter also a lower level of hostile military action, not reaching the threshold of an 'armed attack' within the meaning of Article 51 of the United Nations Charter. Against such hostile acts, a State may of course defend itself, but only within the more limited range and quality of responses . . . and bound to necessity, proportionality and immediacy in time in a particularly strict way.[56]

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50. The approach that States may have a right to use force in self-defense, which does not meet the requirement of Article 51, seems to reflect a minority view. *See, e.g.*, Kretzmer, *supra* note 26, at 241 n.33.

51. *See supra* note 32 and accompanying text (requiring "some painful consequences").

52. In addition to "defensive armed reprisals," Dinstein calls for legalization of two other measures short of war, in the context of what he dubbed "the modalities of individual self-defence": (1) "on the spot reactions" and (2) the "protection of nationals abroad." DINSTEIN, 6TH ED. 2017, *supra* note 32, at 261–63, 275–79.

53. *See* RUYS, *supra* note 5, at 148–49, 176.

54. *Id.* at 183.

55. Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 16 (Nov. 6) (separate opinion of Judge Simma, referring to the *Nicaragua* judgment).

56. *Id.* ¶ 13 (separate opinion of Judge Simma).

Other writers have suggested legalizing bypasses around Article 51. For example, Cassese endorses the legalization of an immediate armed reaction to a small-scale attack, even though, in his opinion, such reprisals are not authorized by Article 51.[57] He emphasizes, however, that the reprisals must meet the conditions of necessity, proportionality, and immediacy.[58] Franck calls for general advocacy of self-help as a remedy of last resort in exceptional cases; though prohibited by the Charter, such responses may be justified by the evident legitimacy of their cause.[59]

The near-unanimous consensus regarding the positive law invites us to look at the law's applicability in the coming discussion. Indeed, state practice is of dual importance in our context, both due to its inherent importance in establishing customary law and due to its relevance in examining and scrutinizing the prohibition's practical interpretation and application.[60]

C. Superpowers' Practice Through the Prism of the American Experience

Antonio Cassese points out that the practice of dominant Western states, including the United States, Britain, and France, is to respond to small-scale attacks by military acts "short of war" that are essentially reprisals.[61] States' ambivalence—one could say their hy-

57. *See* CASSESE, *supra* note 4, at 371–73 ("[F]or otherwise the aggrieved state might turn out to be impotent . . . ").

58. *Id.*

59. *See* THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 109–12, 131–33 (2002).

60. State practice is considered the objective element required to establish customary law; the subjective element is *opinio juris* explicitly supporting this practice. *See, e.g.*, Michael Wood & Omri Sender, *State Practice*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 2 (Rüdiger Wolfrum ed., 2015). For the tension between actual state practice, especially if widely supported, and a prohibiting legal rule, see generally Hakimi, *supra* note 10, at 153. Referring to the U.S. attack in April 2017 on a Syrian airfield in response to the alleged use by the Syrian regime of chemical weapons against its people, she points out:

> Most commentators claimed that the U.S. action in Syria was unlawful because it could not plausibly be justified under the general standards. The problem with this claim is that states themselves treated it as if it were lawful. Their broad support meant that the prohibition of the use of force lacked both operational relevance and normative bite.

Id.

61. *See* CASSESE, *supra* note 4, at 371, n.23 (pointing at the practice of Britain, Israel, the United States, France, and Portugal). An example of a reprisal is the French strike in 2004. There, most of the Ivory Coast's Air Force was destroyed just days after Ivorian jets

pocrisy with regard to the legality of reprisals—is reflected in many cases by those states' justification of their own acts of reprisal, while criticizing other states when they resort to the very same practices.[62] These states often disguise their own reprisals under the generic camouflage of self-defense. As Dinstein notes, "[s]ince the entry into force of the Charter of the United Nations, the record is replete with measures of defensive armed reprisals implemented by many countries (including all Permanent Members of the Security Council), although statesmen frequently shy away from the expression 'reprisals.'"[63] In such cases, self-defense becomes a convenient euphemism whenever reprisal is exercised by actors who believe themselves to be "the good guys." Similarly opportunistic, the undefined term "reprisal" is often used as a generic code, denoting unlawfulness.[64] In the face of this reality, it is useful to recall Judge Simma's reflection on the huge gap between the rhetoric of the law related to the use of

killed nine French soldiers in an attack on the French peacekeeping force camp in Bouake. *See* Rory Carroll & Jon Henley, *French Attack Sparks Riots in Ivory Coast*, GUARDIAN, Nov. 8, 2004, https://www.theguardian.com/world/2004/nov/08/france.westafrica [https://perma.cc/TG86-9B98]. Britain, too, for its part, has engaged in reprisals. For example, on March 28, 1964, British planes attacked Yemeni territory (around the town of Harib) as a reprisal for Yemen's attacks on the British protectorate of Aden. The British attack was dubbed a reprisal and condemned by the Security Council in S.C. Res. 188 (Apr. 9, 1964). Hakimi too points out: "In practice, any severity threshold for an armed attack appears to be marginal. States sometimes use defensive force, without repercussion, in response to very low levels of force." Hakimi, *supra* note 16, at 16. But also consider the statement issued in September 2019 by the French Ministry of Defense, regarding the application of international law in cyberspace. The statement adopts the position of the *Nicaragua* judgment, *supra* note 1, that armed attacks are the "most grave" forms of the use of force. It determines the threshold at which a cyber use of force qualifies as an armed attack, thereby affording the victim state a right of self-defense, as being cyber operations that cause substantial loss of life or significant physical or economic damage. *See* Michael Schmitt, *France's Major Statement on International Law and Cyber: An Assessment*, JUST SEC. (Sept. 16, 2019), https://www.justsecurity.org/66194/frances-major-statement-on-international-law-and-cyber-an-assessment/ [https://perma.cc/NXW7-MPRM].

62. CASSESE, *supra* note 4, at 371–72. *See generally*, Bowett, *supra* note 37; O'Brien, *supra* note 48; W. Michael Reisman, *The Raid on Baghdad: Some Reflections on Its Lawfulness and Implications*, 5 EUR. J. INT'L L. 120, 126 (1994) (referring to the American approach towards Israel between 1953 and 1979). When it comes to U.S. practice, however, Reisman concludes: "The United States has it both ways by insisting that activities that it has undertaken that might be characterized as reprisals come under Charter Article 51. That makes them lawful and legitimately unilateral." Reisman, *supra*, at 129.

63. DINSTEIN, 6TH ED. 2017, *supra* note 32, at 272.

64. "It cannot be said that the Security Council, or even its individual members, have ever been particularly specific in their reasons for characterizing the Israeli actions as reprisals rather than self-defense." Bowett, *supra* note 37, at 7 (referring to the condemnation of Israeli operations in 1953–1966). He points out that occasional references were made to the "punitive" character of the actions, their disproportionality, the lack of sufficient "provocation," or their "premeditation." *Id.*

force and the actual practice:

> Everybody will be aware of the current crisis of the United Nations system of maintenance of peace and security, of which Articles 2(4) and 51 are corner-stones . . . . [M]ore and more, legal justification of use of force within the system of the United Nations Charter is discarded even as a fig leaf, while an increasing number of writers appear to prepare for the outright funeral of international legal limitations on the use of force.[65]

The American approach, which is discussed here because of its consistency over the years and its relative transparency, will serve to demonstrate the actual strategic behavior of a dominant state, indeed the leading superpower. The traditional American legal interpretation of what amounts to an armed attack was presented earlier in the examples of the *Nicaragua* and *Oil Platforms* cases;[66] the following are a few examples of its actual practice in the 1980s and 1990s.

On April 5, 1986, Libyan agents bombed a discotheque in West Berlin, which was popular among U.S. service personnel.[67] Two U.S. soldiers and a Turkish civilian were killed; 229 persons were injured.[68] The Reagan Administration ordered a U.S. reprisal consisting of an air raid that took off from bases in Britain, with the permission of the British government, causing considerable damage to the Libyan targets and substantial collateral damage.[69] The United States claimed, with the endorsement of the United Kingdom, that in light of Libyan leader Colonel Gadhafi's long string of terrorist threats,[70] the raid was a necessary and proportionate act of self-defense, intended to disrupt and deter a pattern of terrorist threats and aggression against the United States.[71] While most states rejected the

65. Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 6 (Nov. 6) (Simma, J., concurring).

66. *See supra* notes 27–28 and accompanying text (the opinions expressed by both Judge Sofaer and William H. Taft, Legal Advisers at the U.S. Department of State in 1985–1990 and 2001–2005, respectively).

67. *See* O'Brien, *supra* note 48, at 463–64. An earlier example of the Reagan Administration's practice of reprisal is the attack on Syrian and Lebanese irregular positions near Beirut, in December 1983, in response to the killing of 241 marines in Beirut a month earlier. *See* Reisman, *supra* note 62, at 130.

68. O'Brien, *supra* note 48, at 463–64.

69. *Id.*

70. Two weeks prior to the discotheque attack American vessels in the Gulf of Sidra bombed a missile site and sank a Libyan boat, responding "on-the-spot" to an attack by Libyan missiles. *See, e.g.*, FRANCK, *supra* note 59, at 89–90.

71. *See* O'Brien, *supra* note 48, at 465–66. He further notes that this Anglo-American

future-oriented deterrence argument, due to its preemptive attributes, France joined the United Kingdom and the United States in vetoing a Security Council resolution condemning the American air raid.[72]

The American strategy in the Persian Gulf in 1987–1988, partly reflected in the *Oil Platforms* case, is another example of a reprisal dubbed as self-defense. The United States responded to the Iranians' small-scale attacks—firing missiles at a Kuwaiti vessel flying the U.S. flag and striking a U.S. naval vessel by a mine, wounding sixteen crewmen—by destroying Iranian offshore oil platforms.[73] Though this action was presented as self-defense, Michael Reisman concludes: "[T]he much more plausible view is that it was an act of reprisal."[74] William O'Brien too asserts that the American actions "that would have been branded as illegal reprisals in other circumstances went unchallenged."[75]

In 1993, the United States bombed Iraqi intelligence headquarters in Baghdad in response to a failed assassination plot, directed and pursued by the Iraqi Intelligence Service against former U.S. President George H.W. Bush, during his visit to Kuwait.[76] The reprisal was justified by the United States as self-defense, "consistent with Article 51 of the Charter."[77] "The U.S. action was generally met with approval in Western capitals and in Russia," and only China questioned the legality of the raid in the discussion at the Security Council.[78] Indeed, as Reisman concludes: "Despite the fact that the United States sought to characterize the Baghdad raid as an act of self-defence, the raid fits at least as comfortably, if not more so, under the classic rubric of reprisal."[79]

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approach "was a very rare instance of acceptance of the basic Israeli position" condemned earlier by these states. *See id*. at 466; *see also supra* notes 62–64 and accompanying text.

72. *See* GRAY, *supra* note 16, at 196. *See also* Mary Ellen O'Connell, *The Popular but Unlawful Armed Reprisal*, 44 OHIO N.U.L. REV. 325, 341 (2018) (arguing that although the Reagan administration justified its use of military force in terms of the Charter, "[t]he case simply did not fit the requirements of self-defense").

73. *See* Taft, *supra* note 28, at 296–97.

74. Reisman, *supra* note 62, at 126.

75. O'Brien, *supra* note 48, at 469.

76. For a full description of the assassination plot and the reprisal raid, see Reisman, *supra* note 62, at 120–22.

77. *Id*. at 121 (citing General Colin Powell, then Chairman of the U.S. Joint Chiefs of Staff and referring to President Clinton's "Addresses to the Nation on the Iraq Strike").

78. *Id*. at 122 (citing British Foreign Secretary, Douglas Hurd, who expressed the apparent general view that "[t]his operation was a justified and proportionate exercise of the right of self-defence and a necessary warning to Iraq that state terrorism cannot and will not be tolerated").

79. *Id*. at 125.

Similarly, in 1998, the United States responded to terrorist attacks on its embassies in Tanzania and Kenya with missile attacks on an Al-Qaeda training camp in Afghanistan and a pharmaceutical plant in Sudan (which allegedly was producing chemicals for terrorist activities).[80] While the United States argued that it was exercising its right of self-defense and that its aim was to prevent and deter further attacks, the international response was generally muted.[81]

The United States designates its military reaction to small-scale attacks as a necessitated and proportional act not amounting, from its military perspective, to an all-out war. A typical strategic justification for such reprisals is that they deter a pattern of threats or attacks[82] by monitoring, preferably reducing, the risk of further attacks and escalation. In some cases, the self-defense argumentation has been followed by an implicit, or even explicit message of (unlawful) punishment. Indeed, these reprisals and their justification often do have an air of "teaching a lesson," as, for example, the explanation by President Bill Clinton after the 1993 Baghdad bombing:

> [T]he Iraqi attack against President Bush was an attack against our country and against all Americans. We could not and have not let such action against our nation go unanswered . . . . A firm and commensurate response was essential to protect our sovereignty, to send a message to those who engage in state-sponsored terrorism, to deter further violence against our people, and to affirm the expectation of civilized behavior among nations.[83]

This mixture of strategic, quasi-legal, and *realpolitik* reasons is categorically rejected by conventional legal wisdom. Examining the American response in the 1998 attack on an Al-Qaeda training camp and a pharmaceutical plant as well as the other episodes mentioned earlier, Gray concludes: "[T]he actions look more like reprisals, because they were punitive rather than defensive."[84] Though le-

80. For a description of the terrorist attacks on the U.S. embassies and the reprisal raid, see GRAY, *supra* note 16, at 204–05.

81. *Id.*

82. *See, e.g.*, O'Brien, *supra* note 48, at 465 (referring to the U.S. attack against Libya).

83. William J. Clinton, Address to the Nation on the Strike on Iraqi Intelligence Headquarters, 29 WEEKLY COMP. PRES. DOC. 1180 (June 26, 1993), at 1181.

84. GRAY, *supra* note 16, at 205. It should be noted, however, that Gray's analysis of these events is in the context of the right of states to use force in self-defense against terrorist attacks and the legality of preemptive military acts against them, *id.* at 198. Cassese, referring to the U.S. attacks against Libya, Baghdad, Afghanistan and Sudan, points out the abuse of Article 51 in these cases, which had a "strong *punitive* connotation and also pursued

gally rejected by the orthodox approach, the American practice reflects, to a large extent, other prominent states' practices. Tom Ruys, who supports a *de minimis* threshold, concludes that states' practices indicate that even small-scale attacks involving the use of (possibly) lethal force may trigger Article 51:

> In the end, customary practice suggests that, subject to the necessity and proportionality criteria, even small-scale bombings, artillery, naval or aerial attacks qualify as 'armed attacks' activating Article 51 UN Charter, *as long as they result in, or are capable of resulting in destruction of property or loss of lives*. By contrast, the firing of a single missile into some uninhabited wasteland as a mere display of force, in contravention of Article 2(4) UN Charter, would arguably not reach the gravity threshold.[85]

Indeed, the practice of reprisals has created a huge gap between prominent states' actual practice and the prevailing law.

D. The Credibility Gap

This discrepancy between the legal rhetoric and states' practice led Derek Bowett to conclude back in the early 1970s that "the law on reprisals is, because of its divorce from actual practice, rapidly degenerating to a stage where its normative character is in question."[86] In the face of such an unacceptable reality, he warned: "In recent years . . . this norm of international law has acquired its own 'credibility gap' by reason of the divergence between the norm and the actual practice of states."[87] Furthermore, the damage done is not limited to the credibility of the legal system but extends also to the integrity of the international community as a whole, due to the actual engagement of states (including all Permanent Members of the Security Council) in armed reprisals,[88] while criticizing resort to such reprisals by other states.[89]

Indeed, in the absence of an *opinio juris*, the practice of influ-

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a primarily *deterrent* purpose." CASSESE, *supra* note 4, at 356.

85. RUYS, *supra* note 5, at 155.

86. Bowett, *supra* note 37, at 2. See also *supra* note 65 and accompanying text for Judge Simma's reflection on the huge gap between the rhetoric of the law related to the use of force and actual practice.

87. *Id*. at 1.

88. *See supra* text accompanying notes 62–63.

89. *See* DINSTEIN, 6TH ED. 2017, *supra* note 32, at 272.

ential states does not become lawful under customary law. Furthermore, it cannot reflect customary law because it is objected to by many states, while even those that practice reprisals usually justify it by claiming self-defense.[90] However, the very fact that states, including Western democratic states that define themselves as law-abiding, openly practice disobedience to the law, as it is generally perceived, raises a concern. The law's relative ineffectiveness invites an inquiry into the desirability of the total prohibition of reprisals. Alternatively, the following normative discussion may convince the reader that it is necessary to revisit the positive law and consider rejecting the ICJ's sufficient gravity approach, allowing states to protect themselves against unlawful small-scale attacks within the contours of Article 51.[91] However, it is adherence to both the ICJ's threshold and the blanket prohibition of reprisals that creates the credibility gap.

Part III examines the source of this creditability gap. Does the deviation from the law reflect states' transgression, where states breach a normatively desirable law due to a matter of convenience and self-opportunism? Or does this gap reflect a "vote of no confidence" by states, denoting that the problem lies, at least in part, in the normative deficiencies of the law or its traditional interpretation itself?

III. SHOULD REPRISALS AGAINST POTENTIAL REPEAT OFFENDERS BE LAWFUL? A PROLOGUE TO THE NORMATIVE DISCUSSION

A. Introduction

The prevailing *ad bellum* rules are not pacifistically oriented. They recognize the basic right of a state to defend itself and its obligation towards its citizens to secure and, if necessary, restore the security of the state after an attack.[92] Morally and legally, preference should be awarded by the victim state to the less forcible alternative in its response. However, when law enforcement is irrelevant and non-forcible measures do not seem to contain the conflict and prevent the attacker from further belligerent acts against the victim, it would

90. *See* discussion Section II.C.

91. *See, e.g.*, *supra* note 85 and accompanying text.

92. Only pacifism outlaws all wars. For the Christian-pacifist doctrine of turning the other cheek, see *infra* note 103. *But cf.* OLIVIER CORTEN, THE LAW AGAINST WAR: THE PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW 550 (2012) (arguing that the *ad bellum* rules "institute a 'law against war' principle").

be neither moral nor practical to leave the victim of a small-scale attack without any effective remedy.

Instead, the responses by a victim of a small-scale attack with a high probability of recurrence should be gradual. They may start with non-forcible measures, consistent with the Law of State Responsibility, and the application of law enforcement tools.[93] Alternatively, and in some cases simultaneously, the victim may look for a centralized solution offered by the international community through the Security Council.[94] However, if none of these gradual steps seems to deter the attacker from repeating its attacks, requiring the victim state to endure them passively and play the role of a sitting duck[95] is neither moral nor practical. The victim ought to have a last-resort belligerent alternative, albeit constrained and proportional, wholly aimed at restoration of its security.[96] In many cases, the "tit-for-tat" strategy—namely a credible, proportional threat of reprisal and, if necessary, its exercise[97]—is an effective responsive tool for containing the violence. The next discussion will present this strategy, its advantages, and its flaws.

B. Tit-for-Tat Strategy: A Potentially Effective and Moderating Strategy

Robert Axelrod has demonstrated that the prisoner's dilemma in game theory is highly suitable for describing the choices faced by two states in the international arena; and that a tit-for-tat strategy is a very effective strategy to pursue in that arena if the condition of repeat interactions is met.[98] Axelrod's focus on the prisoner's dilemma during the Cold War was aimed at promoting cooperation as the most advantageous strategy in a bipolar world.[99] A player in a tit-for-tat

93. *See supra* note 8.

94. *See supra* text accompanying notes 9–11.

95. *See, e.g.*, Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 600–601 (1963).

96. No doubt, the victim state's response has to comply with the *in bello* rules, as well.

97. See also the biblical expression of this strategy: "[A]n eye for eye, tooth for tooth, hand for hand, foot for foot." *Exodus* 21:24.

98. Robert Axelrod, *Effective Choice in the Prisoner's Dilemma*, 24 J. CONFLICT RESOL. 3, 3–4 (1980).

99. Axelrod describes an experiment in which he invited game theory experts from all over the world to compete in a computerized prisoner's dilemma tournament that would mimic the choices faced by the two Cold War superpowers in deciding whether or not to cooperate. He concludes: "TIT FOR TAT was again sent in by the winner of the first round . . . . Again, it won." ROBERT AXELROD, *Preface* to THE EVOLUTION OF COOPERATION (rev. ed. 2006).

situation "ought to reciprocate positive actions in the interest of mutually beneficial cooperation, and retaliate when his partner fails him in order to persuade his partner that he cannot get away with it."[100]

The traditional player on the international arena is a state that reacts to what another state does. For example, in the case of an agreement between two states, if both states cooperate and fulfill their part of the agreement, they will continue to get along well, so long as there are repeated interactions.[101] An incentive to defect from the agreement may arise if the first side to defect gains an advantage over its opponent by unilaterally breaking with the terms of the agreement. That apparent advantage is bound to be short-lived, however, since, once interactions continue, the other side will defect as well, leaving both sides worse off.[102] Much like defection, absolute unilateral abidance by the terms of the agreement, no matter what the other side does, is also a short-lived and ineffective strategy to pursue. Suppose a victim state decides to adhere to a course of cooperation and responds to an aggressor without violence, turning the other cheek instead.[103] Once the defecting party realizes through repeat interactions that the other side intends to abide by the agreement no matter what, it has an incentive to continue violating the terms of the agreement. The defecting state soon learns that its defection incurs no cost, leaving it better off, while the victim learns the hard way that continued abidance by the agreement on its part leads to it being increasingly worse off. Ultimately, then, the victim state will defect too, leaving both parties worse off.

This analysis is not contingent upon the severity of the defection; the fact that a defection was minor—for example, a small-scale attack—does not mean it should be left unanswered, either by the victim state or by a third party (e.g., the Security Council), when the defecting state is or has the potential to be a repeat offender.[104] The international relations lesson is very clear: As long as states continue to cooperate and interact, they will be better off. In repeat interactions, if one side defects the other is usually compelled to defect as

100. AZAR GAT, WAR IN HUMAN CIVILIZATION 94 (2006).

101. Axelrod, *supra* note 98, at 4.

102. *Id*. If, however, the condition of repeat interactions is not met—e.g., when a war is drawing towards its close—the temptation to defect increases steeply. *See, e.g.*, MARK OSIEL, THE END OF RECIPROCITY 267–69 (2009).

103. The phrase originates from the Sermon on the Mount in the New Testament, in which Jesus says: "You have heard that it was said, 'An eye for an eye, and a tooth for a tooth.' But I tell you, do not resist an evil person. If someone strikes you on the right cheek, turn to him the other also." *Matthew* 5:38–39.

104. Axelrod, *supra* note 98, at 4.

well, sending both sides either back to the cooperation track or into a spiral of endless defections, leading to a poor result that, in many cases, nobody wants.

Although tit-for-tat, in the form of a computerized game, illustrates essential patterns of inter-state relationship and reflects a very effective strategy between two states, it is too simplistic to model reality. This strategy, which unrealistically assumes that the parties to a conflict are fully informed, has its own deficiencies when the parties are not informed. For example, it can quickly lead down a slippery slope of unending reactions due to misunderstanding ("I did not mean to attack you"[105]), or a dispute about an event or sequence of events that caused the conflict ("You started it"[106]), or a misattribution of defection to a party ("I did not do it"[107]). These failures of tit-for-tat strategy between two states—and indeed they become more complicated in a multiplayer world with diverse incentives and disincentives[108]—are adjunct to yet another problematic foundation of the strategy: the unrealistic presumption that the parties to a conflict are rational, in the sense that each adversary's rationality is correctly understood by its counterpart.

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105. For example, the Iranian argument that it did not mean to attack an American vessel was accepted by the ICJ in the Oil Platforms case:

> The Court notes first that . . . [a] missile fired from (it is alleged) more than 100 km away could not have been aimed at the specific vessel, but simply programmed to hit some target in Kuwaiti waters . . . . There is no evidence that the minelaying alleged to have been carried out by the *Iran Ajr*, at a time when Iran was at war with Iraq, was aimed specifically at the United States.

Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 64 (Nov. 6)

106. The Cuban missile crisis was a case of a dispute over the event or sequence of events that constituted the first defection. While the Unites States considered the Soviet Union's placing of short-range ballistic missiles in Cuba to be a defection from Cold War standards requiring a tit-for-tat response, the Soviet Union saw the placing of missiles by the Unites States in Italy and Turkey earlier as the defection that started it all. *See, e.g.*, GRAHAM ALLISON & PHILIP ZELIKOW, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS 92 (1999); *U.S. and Soviet Reach Accord on Cuba; Kennedy Accepts Khrushchev Pledge to Remove Missiles Under U.N. Watch*, N.Y. TIMES, Oct. 29, 1962.

107. For example, when a state is attacked by a non-state actor and the attack cannot be imputed to the "host" state. *See, e.g.*, Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 249 (June 27) ("The acts of which Nicaragua is accused, even assuming them to have been established and imputable to that State, could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts.").

108. Indeed, the world of international relations does not consist of just two players, and in the complexities of the real world, one reaction by a defecting state might affect or be counter-reacted by another state or a group of states with changing patterns of interaction. *See, e.g.*, Robert Axelrod & Robert O. Keohane, *Achieving Cooperation under Anarchy: Strategies and Institutions*, 38 WORLD POL. 226, 246 (1985).

Furthermore, by having to follow through on its threat in a tit-for-tat strategy, a state may also hurt itself in the process. For example, in international trade, this might eventually mean limiting its trade vis-à-vis the defaulting country, either directly or indirectly (through a tariff war), thus hurting the state's own economy in order to compel obedience.[109] In armed conflicts, this means committing the victim state to belligerency. Another deficiency of the tit-for-tat approach is the possibility of an escalation when the other party is not afraid of the consequences of a short-term defection, for example, if it has nothing to lose. In other cases, the defector is bound by its own deeds and declarations to go down the slippery slope, for example, when the leaders of a nation rise to power on the strength of war-mongering declarations and are forced to follow through on their rhetoric or lose credibility.[110] In that instance, a short-term defection from an agreement that is undertaken to temporarily lull constituents might turn into a series of defections with no end in sight, resulting in substantial, even catastrophic, losses to both sides.[111]

The tit-for-tat strategy is usually deficient with regard to non-state actors fighting states. A tit-for-tat strategy is essentially based upon mutual deterrence, aimed at maintaining the status quo: both sides deter one another from short-term defection. But in order to deter a non-state actor from violating the rules, it must first have an incentive to comply with them. As regards the *ad bellum* rules, non-state actors usually do not respect the peaceful status quo, nor do they adhere to the *in bello* rules.[112] Non-state actors usually claim that the disparity of arms prevents them from complying with the law of armed conflict, as it would leave them on an uneven battlefield.[113]

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109. *See generally* Barbara Dluhosch & Daniel Horgos, *(When) Does Tit-for-tat Diplomacy in Trade Policy Pay Off?*, 36 WORLD ECON. 155 (2013).

110. This slippery slope can be illustrated by the trade or tariff wars of the 1930s. In the late 1920s, President Hoover campaigned on a platform of protectionism for agricultural produce to protect American farmers and followed through with the enactment of the Smoot Hawley Tariffs Act on agricultural and other goods to stay true to his promise and appease his constituents. The resulting trade wars were one of the catalysts of the Great Depression. *See Protectionism—The Battle of Smoot-Hawley*, ECONOMIST, Dec. 18, 2008.

111. *See* Axelrod & Keohane, *supra* note 108, at 226; *id.* at 245.

112. *See, e.g.*, M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with the Law of Armed Conflict by Non-State Actors*, 98 J. CRIM. L. & CRIMINOLOGY 711, 715 (2008).

113. *Id.* at 785. For the general principle of equal application of the *in bello* rules, see Gabriella Blum, *On a Differential Law of War*, 52 HARV. INT'L L.J. 163, 168–173 (2011). Blum, however, observes:

> The fiction of sovereign equality undoubtedly features in IHL. An alien reading it might be led to believe that the rules were designed to regulate wars between equals, similar to the way that boxing rules regulate matches between

They see the violation of the law as a weapon meant to even the odds. One such example is described by Eyal Benvenisti, who notes the use by non-state actors of the civilian population as cover, in a way that renders the distinction between combatant and noncombatant difficult if not moot.[114] A general explanation for their typical disregard of the law is termed by Cherif Bassiouni as "the politics of hate,"[115] where non-state actors are motivated by racism or religious fervor that prevents them from complying with the law of armed conflict. As he puts it, the politics of hate are the first stage in the process of dehumanization and vilification of members of the opposing party, which leads to noncompliance with the law.[116] Many non-state actors fail to comply with the prevailing law in the first place, which makes it hard to deter them from breaching it and undermines the underlying rationale for a tit-for-tat strategy.[117]

Although a tit-for-tat strategy has its own deficiencies and flaws, it is still considered a very powerful enforcing tool because it recognizes retaliation not as an optimal solution, but rather as a rational second-best choice.[118] The following discussion suggests that in appropriate cases, a tit-for-tat strategy may serve as a reference for an effective and moderate responsive tool for the victim of a small-scale attack. Part IV continues the normative discussion, revisiting the positive law and censuring its primal sin: the absolute legal prohibition of reprisals. If reprisals against small-scale attacks are al-

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> opponents of equal weight, and soccer rules govern matches between teams of eleven members on each side. Reality is, of course, very different . . . . [E]xisting legal constraints make lawful fighting much easier for the powerful than for the weak.

Id. at 171.

114. Eyal Benvenisti, *The Law on Asymmetric Warfare, in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 931, 931 (Mahnoush H. Arsanjani et al. eds., 2011).

115. Bassiouni, *supra* note 112, at 778.

116. *Id.* at 779.

117. *See, e.g.*, Benvenisti, *supra* note 114, at 932 (arguing that "[s]ymmetric wars are self-regulated based on the threat of tit-for-tat" while "in asymmetric warfare, the dynamic of reciprocity and retaliation is lacking").

118. *See, e.g.*, GAT, *supra* note 100, at 94–96 (referring to the prisoner's dilemma, while explaining the strategic selection of a rational-belligerent choice despite its being inferior to an optimal choice).

> [I]n the absence of an authority that can enforce mutually beneficial cooperation on people, or at least minimize their damages, the cycle of retaliation is often their only rational option. If they do not retaliate, they might invite new injuries. However, although it is their rational course of action, retaliation is often not their optimal one. It may expose them to very heavy costs.

Id. at 96.

ways considered illegal, the deterring threat of retaliation against defection is not effective, incentivizing small-scale attackers.

IV. REVISITING THE HOMOGENOUS PERCEPTION OF REPRISALS AND THEIR ILLEGALITY IN THE POSITIVE LAW

A. Rejecting the Mistaken Equation Between Reprisals and Punishment

The prevailing approach, which categorically prohibits reprisals, focuses largely on timing and views them as an ex-post punishment for harm already done by an illegal act of the attacker. This framing and outlawing of reprisals is consistent with the timing of traditional self-defense, which is lawful only due to its ex-ante defensive attributes. Under international law, only the use of force in actual self-help is privatized to the state level, allowing a proportional military response in self-defense in due circumstances as a last resort. The ex-post punishment apparatus against attackers, on the other hand, has remained globally centralized. Derek Bowett, who pointed out the difference between the two, has presented the prevailing perception equating reprisals with unlawful ex-post punishment:

> Self-defense is permissible for the purpose of protecting the security of the state and the essential rights—in particular the rights of territorial integrity and political independence—upon which that security depends. In contrast, reprisals are punitive in character: they seek to impose reparation for the harm done, or to compel a satisfactory settlement of the dispute created by the initial illegal act, or to compel the delinquent state to abide by the law in the future. But, coming after the event and when the harm has already been inflicted, reprisals cannot be characterized as a means of protection. This distinction would fit neatly into the general theory that punishment is a matter for society as a whole, whereas self-defense must still be permitted to the individual member, as an interim measure of protection and subject to a subsequent evaluation of the correctness of the individual's judgment as to the necessity for self-defense by the organized community of states.[119]

The absolute equation of reprisals with ex-post punishment

119. Bowett, *supra* note 37, at 3.

and their consequential prohibition should be challenged. In many cases, especially where the unlawful attack was an isolated one, such equating is correct. However, in cases where a repeat attack or a potential one is highly probable, such equation is unwarranted. Reprisals are not homogenous by nature, and branding them as uniformly unlawful is mistaken. While treating all reprisals as homogenous is undesirable, distinguishing between punitive and defensive reprisals based on the relevant circumstances presents a challenge. This article argues for a differentiation between two types of reprisals: those that are predominantly *punitive* and those that are predominantly *defensive*. Only the former should be unlawful, while the latter should be legalized, in appropriate cases.[120] Indeed, defining what appropriate cases are is the hardest and most controversial part of legalizing certain armed reprisals. However, the ex-post timing of the response should not be an exclusive variable in prohibiting it. Reprisals that are aimed primarily at preventing future attacks are defensive by nature and should generally be legalized. Current disregard for the circumstances of reprisals is not justified, nor does it promote the credibility of the law in terms of abidance by it. Categorically outlawing reprisals oriented towards future self-defense triggers a counter-effect, allowing states to persevere in their hypocrisy, as noted by Cassese and Dinstein.[121]

The following discussion tries to break down the arguably homogenous facade of all reprisals, with the aim of fine-tuning their classification into two categories. For that purpose, it tries to draw a lesson from two extensions related to lawful self-defense. The first, which allows an anticipatory strike, relates to the timing of self-defense. The second, accumulation of events, allows the accumulation of pre-arranged small-scale past attacks to legitimize an act of self-defense by the victim.

B. The Timing and Scope Extensions of Self-Defense

These two extensions of the law of self-defense, anticipatory strike and accumulation of events, are relevant to our discussion. In an effort to legalize a defensive, future-oriented reprisal based upon a past small-scale attack, some attributes of both could be invoked. This observation is not meant to create a new extension of a full-scope self-defense, but to rather support the consideration of limited

120. Similarly, according to the Articles on State Responsibility, lawful "[c]ountermeasures are taken as a form of inducement, not punishment." CRAWFORD, *supra* note 46, at 286.

121. *See supra* notes 62–63 and accompanying text.

and more restricted use of military force in a reprisal.

In the face of an armed attack, a defending state is not restricted to an ex-post-military response delivered only after absorbing the aggressor's blow. Though the legality of an anticipatory strike is disputed, it is widely acknowledged that a state may use force to thwart an imminent attack against it. According to the prevailing view, lawful self-defense allows proactivity against an imminent armed attack whenever the attack is underway.[122] A defending state is not obliged to remain a sitting duck when confronted by an imminent threat against it. Under the common view, the "armed attack" requirement extends to include an imminent one as well. For example, the departure of the Japanese fleet toward its combat destination before attacking Pearl Harbor represents the crossing of the "legal Rubicon" of an armed attack;[123] in such a case, the threatened attack is considered, due to the circumstances, as actually occurring and the defending state can lawfully intercept it:

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122. The positive law surrounding an anticipatory strike is not fully clear; it is the subject of an intense legal and academic debate. There are legal opinions—relying mainly upon the reference in the U.N. Charter's Article 51 to the "inherent" right of self-defense—arguing that the Article preserves its earlier, pre-Charter characteristics under customary international law, allowing, *inter alia*, anticipatory self-defense in cases where a state believes that another state is going to attack it. This expansionist view of self-defense has been advocated mainly by American and British jurists. *See, e.g.*, CASSESE, *supra* note 4, at 358. *See also* W. Michael Reisman, & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525, 527–30 (2006); Anthony Clark Arend, *International Law and the Preemptive Use of Military Force*, 26 WASH. Q. 89, 92 (2003).

The prevailing view argues the opposite: that the meaning of Article 51 is conclusive and clear, stating that the right of self-defense, between states, arises strictly in cases where an armed attack has already occurred. See, e.g., GRAY, *supra* note 16, at 170 (noting that "the majority of states rejected anticipatory self-defense before the 9/11 attacks" and that "[t]hese differences persisted after 9/11"). *See also* CASSESE, *supra* note 4, at 361. But even if the exclusivity of the Article regarding the legality of self-defense be adopted, that should not automatically exclude the legalization of an anticipatory strike in certain circumstances. The condition of an occurring armed attack should not be read as imposing a mandatory passive strategy upon the victim state, requiring it to absorb the aggressive blow like a sitting duck. The reactivity requirement seems neither necessary nor justified. *See, e.g.*, Reisman, & Armstrong, *supra*, at 532–33 (referring to the High-Level Panel's recommendation favoring a loosening of the strict "armed attack" requirement as long as the threatened attack is imminent); U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 124 U.N. Doc. A/59/2005 (Mar. 21, 2005) (stating that "[i]mminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack"). Kretzmer states that while "it is almost universally accepted that a state may not use force in order to prevent or deter future attacks, it is widely (but certainly not universally) acknowledged that it may do so to thwart an imminent attack." Kretzmer, *supra* note 26, at 248–49.

123. *See* DINSTEIN, 6TH ED. 2017, *supra* note 32, at 231–32 (describing the example of the Japanese attack on Pearl Harbor).

> [T]he right of self-defence can be invoked in response to an armed attack at an incipient stage, as soon as it becomes evident to the victim State (on the basis of hard intelligence available at the time) that the attack is actually in the process of being mounted. There is no need to wait for the bombs to fall—or, for that matter, for fire to open—if it is certain that the armed attack is under way (even in a preliminary manner). The victim State can lawfully (under Article 51) intercept the armed attack, with a view to blunting its edge.[124]

Legalizing a proactive defensive strike to thwart an imminent attack differs substantially from allowing a reprisal. While the former relates to an imminent armed attack that triggers the victim's right of self-defense, the latter, under the ICJ's ruling, is the victim's response to an actual small-scale attack that does not rise to the threshold of an armed attack. However, the lesson to be drawn from this body of law is relevant to those reprisals which are mainly oriented towards future self-defense. With regard to a repeat attacker or a potential one, though another attack is not imminent but rather highly probable,[125] this lack of certainty might be offset, to a limited extent, by the other extension of self-defense, the accumulation of events, which anchors the defending state's legitimacy to respond militarily due to its attacker's past aggression.

This disputed extension accommodates under the rubric of self-defense one large action in response to a series of pre-arranged small-scale attacks suffered by a state.[126] The accumulation of small-

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124. *Id.* at 228.

125. For the argument that the imminence of the threat should be adjusted to both the attacker's and the defending state's specific and unique strategic circumstances, see YISHAI BEER, MILITARY PROFESSIONALISM AND HUMANITARIAN LAW: THE STRUGGLE TO REDUCE THE HAZARDS OF WAR 100–07 (2018).

126. In the *Oil Platforms* case, the United States has justified its use of force as self-defense against a series of small Iranian attacks. Though Judge Simma, in a separate opinion, rejected the accumulation of events theory, the Court didn't reject it and ruled that the United states had neither shown that the attacks were imputable to Iran nor that they amount to an armed attack against the United States. *See* Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 16 (Nov. 6) ("Even taken cumulatively, and reserving, as already noted, the question of Iranian responsibility, these incidents do not seem to the Court to constitute an armed attack on the United States."). Indeed, the theory could be susceptible to allegations of disproportionality, as a defending state might perform a significant act of self-defense in response to the latest, yet smallest, of attacks. *See, e.g.*, GRAY, *supra* note 16, at 164–65. The theory does, however, gain considerable support with regard to attacks by irregulars and armed bands frequently relying on hit-and-run tactics, thus avoiding a significant attack that would justify self-defense. *See, e.g.*, RUYS, *supra* note 5, at 168–69.

scale attacks may justify the victim's use of force as self-defense and the proportionality of its response. However, it is associated with small-scale events that have already occurred. The focus is on the historical series of attacks that cumulatively are perceived as an armed attack.

It is necessary to distill from these two extensions the attributes that are relevant to legitimizing a limited, proportionate use of force, when the past behavior of the aggressor and the other circumstances may necessitate the proportionate forcible response by a victim state. As one example, in the case of a "mere frontier incident" in which a few of the victim's soldiers are killed and a highly probable risk of future attack exists. Indeed, this brings the normative discussion to the most challenging issue related to defensive reprisal: to what extent is it desirable to project the future behavior of an attacker from its past and thereby legitimize a proportionate military response which is necessary from the victim's perspective? Put differently, avoiding the reprisals discourse, is it normatively desirable, contrary to the sufficient gravity approach of the ICJ, to establish *a priori* a minimal threshold for an armed attack—or even to abolish this threshold altogether[127]—which would allow states, if necessary, to protect themselves by exercising military force proportionally against unlawful small-scale attacks?

The discussion thus far has alternated between the positive and normative spheres. I will now turn to conclude the normative discussion.

V. THE NORMATIVE DESIRABILITY OF PROPORTIONATE DEFENSIVE REPRISALS

A. Introduction

Automatically equating reprisals with ex-post punishment carries a price. It demands an "all or nothing" approach in shaping the legality of forcible response to an unlawful attack: either to legitimize a self-defensive war in which, as will be argued in this Part, the constraining force of the proportionality requirement is limited, or to prohibit it entirely. This bipolar approach disregards a wide spec-

127. See discussions *supra* Sections I.B and II.C on the Anglo-American approach in theory and practice, respectively. See also my suggestion, according to which an intentional use of military force against a victim state should be considered an armed attack that might allow forceful responses in self-defense, if necessitated and proportionate, *infra* Sections V.C and V.D.

trum of responsive reactions and fails to afford the victim, whenever necessary, an elastic and proportional defensive tool. The preference for non-military countermeasures in response to small-scale attacks should certainly be endorsed, but only to the extent that such countermeasures are effective in deterring the offender. When they are not, the total outlawing of proportional defensive reprisals is neither desirable normatively nor realistic from a strategic point of view. Indeed, when evaluating the magnitude of a threat to a victim state presented by a small-scale attack, all the relevant attributes of the adversaries should be taken into consideration: the geographic dimensions of the conflict, the balance of power between the adversaries in all dimensions (military, economic, social, and cultural), and their international standing and allies (including collective self-defense agreements, if any).[128]

I will argue that the desire to contain a conflict should not inspire a blanket prohibition of reprisals, but rather allow a victim some flexibility in its defensive reactions, including, whenever necessitated, a proportional military reaction to small-scale attacks. Paradoxically, the current rules may push a law-abiding victim state, which reasonably feels the strategic necessity to respond militarily for its security but could settle for a modest, proportionate response, into full-scale war, as the only way to legalize its military response. The absolute prohibition of an early, relatively modest, fine-tuned and proportional reprisal may trigger a late all-out war of self-defense in response to an armed attack. Indeed, this is the traditional American argument: "If States were required to wait until attacks reached a high level of gravity before responding with force, their eventual response would likely be much greater, making it more difficult to prevent disputes from escalating into full-scale military conflicts."[129] Alternatively, since states are not willing "to wait until attacks reach a high level of gravity," the current rule enables them to leverage the euphemism of self-defense and its related hypocrisy.[130] Though self-defense is contingent upon the attacker's crossing the armed attack threshold, this threshold can be got around by the victim.[131] Legaliz-

128. For the importance of the strategic perspective on the contours of self-defense in the special case of an "imminent" threat, see BEER, *supra* note 125, at 100–01.

129. Taft, *supra*, note 28, at 300–01. Similarly, the gravity threshold encourages aggressors to initiate small-scale attacks, knowing that the victim state will not be lawfully entitled to respond with military force.

130. For states' hypocrisy with regard to the legality of reprisals, and the American practice particularly, see discussion *supra* Section II.C.

131. This threshold can be got around by the victim through provocation, or manipulation that would trigger escalation. Alternatively, the victim can wait for a natural escalation, see the tit-for-tat discussion, *supra*, notes 97–108 and accompanying text, or just

ing reprisals might afford a way out of this escalating all-out war trap.

The expediency of such a "belligerent valve," allowing a relatively modest belligerent act, while restricting its scope, is demonstrated by the pre-Charter (1837) *Caroline* dispute between the United States and Britain. In that case, British troops from British-controlled Canada attacked an American ship (the *Caroline*) docked on the American side of the Niagara River, claiming that the ship was being used to support Canadian rebels.[132] Daniel Webster, then-U.S. Secretary of State, defined the scope of the self-defense right and its limits in a way that is currently accepted as representing customary international law. This right arises only when there is a "necessity of self-defence . . . instant, overwhelming, leaving no choice of means and no moments for deliberation," and the military response by the victim state should be proportional ("nothing unreasonable or excessive").[133] In the *Caroline* dispute days, there was no legal restriction upon resort to force: a state could start a war without legal justification, though the practice emerged of providing a political justification.[134] The historical importance of this precedent establishing the requirements of necessity and proportionality seems to have been accepted due to its political effects. It afforded both adversaries, the United States and the United Kingdom, a political solution that legitimized a reprisal, determining when a victim's proactive response would not be considered an act of war. Indeed, in the latter half of the nineteenth century, several states resorted to reprisals in attempts to settle their differences without recourse to war.[135] The political legacy of *Caroline* is relevant today: the case demonstrates the pos-

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get around by euphemism.

132. *See, e.g.*, Christopher Greenwood, *The Caroline*, *in* THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 1 (R. Wolfrum ed. 2009).

133. *Id*. at ¶ 5.

134. *See generally* JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 38–44 (2004).

135. *Id*. at 31 (arguing that "during the latter part of the nineteenth century and the early twentieth century . . . the practice developed of States resorting to hostile measures not amounting to war [which] took the form of reprisals, pacific blockade and intervention"). For the historical development, see also BROWNLIE, *supra*, note 40, at 220 (commenting that the historic value of reprisals "lay in the possibility of gaining redress without creating a formal state of war"). The Naulilaa Arbitration (Portugal v. Germany), which followed a 1915 attack by Germany on Portuguese territory in Africa (now Angola), established the following three conditions for legitimizing reprisals in the pre-Charter era: a breach of international law against a victim state; an unsatisfied request that the injury be redressed by the violator; and proportionality of the reprisal to the violating act. *See* Julia Pfeil, *Naulilaa Arbitration (Portugal v. Germany), in* THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 10–13 (R. Wolfrum ed., 2007); GARDEM, *supra*, note 134, at 46–48.

sibility of an exit strategy from a belligerent act, a political exit that isolates the belligerent incident from the two states' otherwise peaceful bilateral relationship. Within the contours of the prevailing law, if reprisals are legitimized as suggested, it would afford an exit from an all-out war, allowing a victim state to contain the belligerency by engaging in a relatively modest act of reprisal.

The prevailing view does not seem to ascribe appropriate weight to the effect of an isolated attack below the ICJ's "armed attack" threshold, where there is a serious threat of recurrence but no manifest certainty. However, strategic and *realpolitik* considerations may sway a victim state to assign substantial weight to such an isolated, small-scale attack.[136] In some cases, a small-scale attack poses a substantial strategic threat to the victim. The apparently modest effect of the attack that does not rise to the level of an armed attack, as required by the ICJ, may in fact be aggravated due to the defending state's strategic circumstances.[137] While the prevailing law gives the victim partial remedies, it disregards its plight in cases where the remedies are not effective, and military necessity, from the victim's defensive perspective, dictates that it respond militarily to such an attack. Indeed, Oscar Schachter has focused upon this defensive demand:

> When a government treats an isolated incident of armed attack as a ground for retaliation with force, the action can only be justified as self-defense when it can be reasonably regarded as a defense against a new attack. Thus, "defensive retaliation" may be justified when a state has good reason to expect a series of attacks from the same source and such retaliation serves as a deterrent or protective action. However, a reprisal for revenge or as a penalty (or "lesson") would not be defensive.[138]

The suggested aim of defensive reprisal is to preserve the victim state's security and to prevent the offender from repeating its at-

136. *Cf.* Bowett, *supra* note 37, at 10–17. Bowett distinguishes between the *de jure* unlawful status of reprisals and their *de facto* partial acceptance, whenever they are "reasonable" in light of their circumstances. For his "criteria of reasonableness," see *infra* note 174 and accompanying text.

137. *See* Taft, *supra* note 129 and accompanying text. Furthermore, there are small-scale attacks which, with respect to the attacker's—usually a non-state actor—military capabilities, are an all-out belligerent effort.

138. Schachter, *supra* note 2, at 1638. Similarly, in response to the 9/11 attacks, the United States and the United Kingdom exercised their self-defense right by military actions aimed at preventing and deterring further Al-Qaeda attacks. *See, e.g.*, RUYS, *supra*, note 5, at 104.

tack. Under the *ad bellum* necessity principle, the victim may be allowed to regain its security by using forcible measures only as a matter of last resort if non-forcible measures taken in good faith can't preserve the status quo that prevailed prior to the attack.[139] On the victim lies the burden of establishing in a definite manner that an attack was launched against it by a specific attacker and that the reprisal was justified as a matter of last resort. It has to convince both the public (domestic and international) and the international community (and, if necessary, its organs) that it was justified to respond militarily in light of its relevant circumstances.[140] The victim's reprisal can be justified if, in addition to being militarily necessitated, it is proportionally tailored. The next discussion will deal with the contours of proportional reprisal.

B. The Contours of Proportional Reprisal

Defensive reprisal, aimed at preserving the victim state's security and preventing the offender from repeating its attack, requires moderation. It should be aimed at containing the conflict rather than escalating it, and at returning the adversaries to the law abidance track. To some extent, it resembles the *in bello* legal exception of "belligerent reprisal" where a reciprocity demand, aimed at returning a transgressor adversary to the legal track and backed by acts of retaliation in the form of conduct which would otherwise be unlawful during a war, has been partially accepted.[141] Furthermore, if bellig-

139. GRAY, *supra* note 16, at 157–58. For the general rule of *ad bellum* necessity, see, e.g., DINSTEIN, 6TH ED. 2017, *supra* note 32, at 249–51.

140. For the victim's burden of establishing that an attack was launched against it by a specific attacker, see Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 51 (Nov. 6); *see also supra* note 105 and accompanying text. For the scope of this burden, see discussion *infra* Section V.E.

141. Such reprisals are only allowed when aimed at preventing the transgressor of the *in bello* rules from continuing to breach them; in any case, they are not allowed as a retaliatory or penal measure and are completely forbidden once the war has ended. The "traditional" rule under the Geneva Convention is relatively permissive, allowing "acts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war, for the purpose of enforcing future compliance with the recognized rules of civilized warfare." U.S. DEP'T OF THE ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 497 (July 1956). However, certain reprisals—e.g., against prisoners of war, the wounded or the sick—are specifically prohibited by the Geneva Conventions. *See, e.g.*, YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 257–61 (2010). However, the 1977 Protocol I, which supplements the Geneva Conventions, is much more restrictive. Protocol I Additional to The Geneva Conventions of 12 August 1949, Relating to The Protection of Victims of International Armed Conflicts 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. According to

erent reprisals are partially lawful despite the setback to the humanitarian rationale of the *in bello* rules, namely to humanize war's environment for combatants and non-combatants alike,[142] then all the more so restricted armed reprisals. In appropriate cases, the latter are consistent with the *ad bellum* rationale of maintaining international peace and security and should be allowed.[143]

The *ad bellum* challenge is to tailor a deterring yet proportional reprisal. It should be effective as a preventive measure but restricted in scope; it has to be fine-tuned and proportional to the threat of a repeat attack that it aims to prevent. Its scale should follow the logic of the tit-for-tat strategy. This is not to say that the response by the victim should be strictly in-kind, i.e., quantitatively based, as measured by a "counter-force meter." It has to send a deterring signal directed at the attacker's cost-benefit analysis, convincing it that the costs of the belligerency will exceed its benefits. The focus should be not only on measuring the "amount" of force used, but also on its effect. Indeed, tailoring a deterring defensive reprisal to an attacker's unique attributes is a challenging and delicate task. It is a process that requires the victim to analyze, from the attacker's perspective, the cost/benefit balance of its attack and the value it attributes to its assets.[144] Among the potential lawful military objectives, the deterring signal should be directed at the military assets that the attacker might lose if it repeats its unlawful attacks. These are the military assets that might be leveraged to deter it.

If reprisals are to be regulated, not only should the scope of the response be limited, but the *in bello* targeting rules applicable to all uses of force in an armed conflict should also receive much greater scrutiny in defensive reprisals. Although this article deals with the *ad bellum* sphere—reprisals in general, their required proportionality in particular—an additional *in bello* moderating requirement is asked

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Article 51(6), a reprisal can be aimed only against combatants (except for wounded soldiers, prisoners of war, and any other person or object specifically protected from reprisal by the Geneva Conventions and Protocol I) and, in any case, is not allowed as a retaliatory or penal measure. The new restrictions imposed upon belligerent reprisals under Protocol I are controversial. Leading Western democracies that have signed Protocol I have reserved the right not to be bound by the new norm prohibiting reprisals against civilians to varying degree, in case the in bello rules are violated by the enemy in the form of deliberate and serious attacks mounted against civilians. For the conflicting views relating to the disputed norm prohibiting belligerent reprisals against civilians, see BEER, *supra* note 125, at 4–6.

142. *See generally* GEOFFREY BEST, HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICT (1983).

143. *See* U.N. Charter, Preamble.

144. Such in-depth knowledge is a basic professional requirement of any military faced with an adversary. *See generally* BEER, *supra* note 125, at 161–62, 191–92.

for in reprisals, to minimize the risk of escalation. In order to contain the conflict, as required by the suggested defensive reprisal, strict targeting rules based upon the distinction rule must be adhered to. Especially the *in bello* proportionality threshold, which allows unintended collateral damage to civilians, while the intentional killing of civilians or targeting of their objects is strictly forbidden, should be much more restrictive in reprisals, since it is balanced against the very limited "concrete and direct military advantage anticipated" from them.[145]

Because the suggested lawful reprisal should be restricted, the harm inflicted on the victim should serve as a benchmark and a starting point against which a specific deterring yet proportional reprisal is balanced. Thus, the subjective deterrence-based element of *ad bellum* proportionality should be cautiously added to the objective yardstick of the harm inflicted upon the victim[146]—increasing or decreasing its reprisal's scale—while the burden of proof that the response was proportional lies with the victim state. It is, in fact, a heavy burden: to convince the international community, through all available channels, that the reprisal was justified, defensive and necessitated as a last resort, and that it was proportional.

Ironically, it is relatively easy to measure proportionality vis-à-vis the threat to the victim in the case of reprisals, which are generally considered to be unlawful. In contrast, *ad bellum* proportionality which constrains the use of force by the victim and is an explicit condition for the lawful exercise of self-defense, to a large extent, is a more problematic principle to apply. It is generally measured vis-à-

145. The proportionality rule prohibits "an attack which may be expected to cause incidental loss of civilian life . . . which would be excessive in relation to the concrete and direct military advantage anticipated." Protocol I, *supra* note 141, art. 51 ¶ 5(b). *See also* O'Brien, *supra* note 48, at 477 ("Discrimination in counterterror measures should be maximized by target selection and Rules of Engagement governing operations."). The *in bello* necessity rule might also constrain the military force exercised in defensive reprisals, though to a lesser extent. While the prevailing necessity principle usually justifies the mere use of lethal force, normatively however, and mainly due to the restricted aim of reprisal, it should also limit the defending state from excessive use of force. *See generally* Yishai Beer, *Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity*, 26 EUR. J. INT'L L. 801 (2015). The discussion above assumes the existence of armed conflict that triggers the application of the *in bello* (IHL) rules. For the meaning of armed conflict, see *supra* note 15 and accompanying text.

146. Similarly, proportionality under the Articles on State Responsibility "must be assessed taking into account not only the purely 'quantitative' element of the injury suffered, but also 'qualitative' factors such as the importance of the interest protected by the rule infringed and the seriousness of the breach." CRAWFORD, *supra* note 46, at 296. *But see* Kretzmer, *supra* note 26, at 271 (arguing "[i]f deterrence, the test of proportionality will be the 'tit for tat' test.").

vis the threat,[147] as against the lawful war aim of preventing it. Evaluating proportionality in the use of military force as against the ends of the defending state exercising this force triggers the uncertainty relating to the legality of these "ends."[148] Indeed, the essence of this proportionality, which is a legal term that has multiple meanings, is disputed.

Strategically, in an all-out war, it is unrealistic to expect any proportionality relating to the amount of force exercised by the aggressor in the military counter-response of the self-defending army. Nor should there be any realistic expectation of quantitatively proportionate use of means and methods in such a war (as long as they are lawful under the law of armed conflict). For example, if one state mounts a full-scale military invasion of another state's territory, on *realpolitik* and professional military grounds, the defending state should not be expected to restrict itself to a quantitatively proportional response in pursuing its lawful war aim to "halt and repel" while restoring its security.[149] The defending state's likely military strategy of choice is to exercise overwhelming force whenever and wherever possible, thus ensuring its victory. Indeed, this was the American (Colin Powell's) doctrine, which was applied successfully in the First Gulf War, advocating the exercise of "overwhelming force quickly and decisively."[150]

Whereas in the conventional case of lawful self-defense the *ad bellum* proportionality is a problematic principle to apply, in the context of reprisals it is easier to measure, and there is a much higher probability of a proportional response in the form of a limited reprisal to a small-scale attack. This is because there is a direct connection

147. BROWNLIE, *supra* note 40, at 366.

148. Kretzmer, *supra* note 26, at 282 ("Even when it is accepted that the appropriate test of proportionality is a 'means-end' test, in the absence of agreement on these ends it is obviously impossible to agree on the necessary means to achieve them.").

149. *See, e.g.*, GARDAM, *supra* note 134, at 160–61.

150. Colin L. Powell, *US Forces: Challenges Ahead*, 71 FOREIGN AFFS. 32, 37 (1992). Indeed, American strategy has long leaned toward the use of overwhelming force, a choice influenced by the country's sheer size, wealth, and production capabilities. "World War II both shaped and revealed American strategic culture as no other war with the exception of the Civil War. Two dominant characteristics stand out: the preference for massing a vast array of men and machines and the predilection for direct and violent assault." Eliot A. Cohen, *The Strategy of Innocence? The United States, 1920–1945*, *in* THE MAKING OF STRATEGY: RULERS, STATES AND WAR 428, 464 (Williamson Murray et al., eds., 1994). However, the proportionality requirement in the First Gulf War was reflected in the conduct of General Powell, who argued against the complete destruction of the Iraqi army, convincing President George H.W. Bush to end the ground war after one hundred hours. *See, e.g.*, ELIOT A. COHEN, SUPREME COMMAND: SOLDIERS, STATESMEN AND LEADERSHIP IN WARTIME 194–98 (2003).

between the reprisal's aim—to prevent the threat of a repeat attack—and the moderate use of force required by the victim, aimed only at achieving that end. This is the essence of the tit-for-tat strategy, which rejects the exercise of "overwhelming force" as a response because that would trigger a counter-effect.[151] In an all-out war, even though the defending state was dragged into a belligerency, it will fight to "win" the war (within its lawful war aims[152]), paying relatively little heed to the obscure proportionality requirement. In a regulated reprisal, however, the victim's aim should be very limited—it would only be allowed to keep the delicate balance of deterrence by sending a moderate signal to the attacker to deter it from repeating its attacks.

C. The High Potential for Deterrence of Proportional Reprisals

Furthermore, in reprisals, it is not only proportionality that is more easily attainable, but deterrence, too. While deterrence is often complicated strategically and difficult to achieve because of its inherent ambiguity, in reprisals it has a better chance of succeeding due to its relatively clear message.

Deterrence is a tool for enforcing compliance with the law and promoting the containment of potential conflicts.[153] It is pivotal in strategic thinking and, in many cases, an essential component of the national defense strategy of law-abiding states. It plays a substantial role in the management of global security and is "woven into many elements of foreign and national security policy."[154] Due to its function, deterrence could be perceived as appealing to the prevailing legal system, shaped by the UN Charter and characterized by the absence of a well-functioning central law-enforcement body, which aims at preserving the international status quo.[155] However, although

151. Similarly, under the Articles on State Responsibility, a disproportionate response will not be perceived as inducing the transgressor state to comply with its obligations but rather as having a punitive aim. *See* CRAWFORD, *supra* note 46, at 296.

152. For the full spectrum of war aims—their legality in general, and the validity of the generic lawful aim to "halt and repel" in particular—see Yishai Beer, *Military Strategy: The Blind Spot of International Humanitarian Law*, 8 HARV. NAT'L SEC. J. 252, 333, 352–354 (2017).

153. It discourages "the enemy from taking military action by posing for him a prospect of cost and risk outweighing his prospective gain . . . . [T]he deterrent value of military forces is their effect in reducing the likelihood of enemy military moves." GLENN H. SNYDER, DETERRENCE AND DEFENSE: TOWARD A THEORY OF NATIONAL SECURITY 3 (2015).

154. PATRICK M. MORGAN, DETERRENCE NOW xix (2003).

155. The Charter prefers the preservation of the objective reality over any "subjective" cause and claim of any party. Michael Walzer points out that this principle is consistent

deterrence is central to the management of global security,[156] in current international law, it is perceived with mistrust and suspicion. Its bad reputation may stem in part from its inherent limitations as a strategy—indeed, the mere notion of manipulating or even controlling an adversary's will is problematic[157]—and from it being perceived as an unlawful punitive measure. Having already dealt with the punitive attribute of reprisals, this article will now discuss the general limitations of deterrence as a strategy and examine how most of these shortcomings may not exist in the context of the fine-tuned deterrence by reprisal.

Despite its practical importance as a tool of defensive strategy, deterrence, in general, cannot be relied upon as its exclusive component. Communication through threats, which is the essence of deterrence, is a problematic way of delivering messages. Lawrence Freedman discusses this challenge, offering by way of example the dramatic failure of the first documented case of deterrence—God's warning to Adam and Eve not to eat from the fruit of the Tree of Knowledge.[158] In practice, most earthly strategic relations are complex. Every message sent by a state is aimed at more a broad audience, not just its direct adversary. There are larger, multiple audiences, both within the state's own national political system (constituents) and abroad (i.e., allies, friends and foes, and the international community as a whole). None of these groups is homogenous. Any language used in this context has both explicit and implicit content, and the understanding of both is subjective and to a large extent dependent on culture and context. When it comes to reprisals, however, many of the communication problems inherent to delivering threatening messages disappear. In reprisals, the threatening messages are

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with the just war tradition: "Just war theory, as it is usually understood, looks to the restoration of the status quo ante—the way things were, that is, before the aggression took place". MICHAEL WALZER, ARGUING ABOUT WAR 92 (2004).

156. Deterrence is initially aimed at preventing wars. Indeed, a nuclear war between the two superpowers during the Cold War was avoided. Many thinkers credit this achievement, at least partially, to mutual deterrence. *See generally* LAWRENCE FREEDMAN, DETERRENCE 10–13 (2004). Another example is the Korean War, which demonstrated that even during a bloody war in which the superpowers are totally involved, military destructive power can be restricted to conventional means and precise and concrete channels: "The Korean War was furiously 'all-out' in the fighting, not only on the peninsular battlefield but in the resources used by both sides. It was 'all-out' though, only within some dramatic restraints: no nuclear weapons, no Russians, no Chinese territory, no Japanese territory, no bombing of ships at sea or even airfields on the United Nations side of the line." THOMAS C. SCHELLING, ARMS AND INFLUENCE 31 (1966).

157. For a discussion of the inherent difficulties of deterrence theory and its application, see generally BEER, *supra* note 125, at 174–78.

158. FREEDMAN, *supra* note 156, at 7.

relatively direct and concrete, based upon the transparency, logic, and effectiveness of the tit-for-tat strategy. When this strategy is employed, a substantial part of the fog surrounding communication disappears. Both the carrots and the sticks usually are known to the adversaries in advance, and they can adjust their behavior accordingly. Thus, if an offender is standing on the edge and vacillating over which path to follow that would best serve its interest, it may be induced by a proportional reprisal (or the threat of it) to take the track of law abidance.

This potential efficiency of reprisals, in appropriate cases, and their morality may lead to support a fine-tuned version of the traditional American approach,[159] under which the intentional use of military force against a victim state should be considered an armed attack that might allow forceful responses in self-defense, if necessitated and proportionate. This approach rejects not only the ICJ's significant-scale threshold but also Ruys's *de minimis* distinction between "small-scale bombings, artillery, naval or aerial attacks [that] qualify as 'armed attacks' activating Article 51 UN Charter, as long as they result in, or are capable of resulting in destruction of property or loss of lives," and "the firing of a single missile into some uninhabited wasteland."[160] In contrast to Ruys' view, there are undoubtedly situations in which the intentional firing of a single missile into the victim's uninhabited wasteland creates a strategic threat to it, which might induce the victim to fire back a single missile into some uninhabited wasteland of its attacker. Consider, for example, if Russia had intentionally fired a ballistic missile without explosives at a deserted place in Nevada during the Cold War. Indeed, in a world where "it is even more necessary to think of warfare as a process of violent bargaining," keeping in mind that actions "speak louder than words on many occasions,"[161] the United States might have had to respond to such a deterring signal.[162] A necessitated and proportionate response aimed at containing the conflict might have been to inform Russia in advance and fire a similar missile at a deserted place—e.g., in Siberia. Such a response would be, in many cases, necessary, morally justified and efficient, and should be lawful as well.

D. The Consistency of a Proportional Defensive Reprisal with the

159. *See supra* text accompanying notes 27–28.

160. RUYS, *supra* note 5, at 155–57.

161. SCHELLING, *supra* note 156, at 33, 88.

162. Indeed, "a mere display of force" as well as "a mere frontier incident," see *supra* note 32 and accompanying text, should be contextually analyzed and not automatically ignored.

Requirement of Ad Bellum *Proportionality*

The proposal to legalize a proportional reprisal in response to a small-scale attack, whenever appropriate, is consistent with the general demand for a proportional response by the victim of an armed attack. Indeed, the timing of *ad bellum* proportionality is currently disputed. The common view in the academic literature, which to some extent can be traced to the judgments of the ICJ, is that the requirement of proportionality in the exercise of self-defense sequentially regulates the choice of means and methods of warfare, thereby affecting war's conduct and scope.[163] According to this view, a defending state must not only abide by the *in bello* rules but also demonstrate that all military measures taken by it during the course of self-defense were also *ad bellum* proportionate. Such an interpretation of the proportionality requirement is more consistent with granting a defending state the right to a wide spectrum of proportional reactions to attacks not contingent upon the significant-scale threshold of an "armed attack." The armed attack threshold appears to be more consistent with Dinstein's conflicting view according to which *ad bellum* proportionality is not a continuing requirement, but rather concerns only the initial categorical decision whether resort to war is justified in response to an armed attack. Relying, inter alia, on the (pre-UN Charter) examples of the 1941 Japanese attack on Pearl Harbor that triggered the Pacific War with the United States and the 1939 German invasion of Poland that sparked World War II, he argues: "There is no support in the practice of States for the notion that proportionality remains relevant—and has to be constantly assessed—throughout the hostilities in the course of war."[164]

Proportionality that is enforced selectively, affording immunity from military response to a small-scale attacker, especially when it seems to be considering another attack, doesn't seem to be effective

163. *See, e.g.*, GARDAM, *supra* note 134, at 162–79 (arguing that "proportionality in *ius ad bellum* requires a consideration of such matters as the geographical and destructive scope of the response, the duration of the response, the selection of means and methods of warfare and targets and the effect on third States"). Greenwood notes:

> State practice in this century has blurred the distinction between peace and war . . . this change in state practice regarding armed conflicts has been reflected in the development of *ius ad bellum* and *ius in bello*. The former is no longer confined to regulating the right of states to go to war. It regulates the use of force as a whole.

Greenwood, *supra* note 2, at 221–22.

164. DINSTEIN, 6TH ED. 2017, *supra* note 32, at 282. For an analysis of both approaches, see KENNETH WATKIN, FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT 55–69 (2016).

or moral. Rather, the "two-way" proportionality should prevail in relation to the use of force, by both victim and offender, along the entire war-peace spectrum. From a normative perspective, mutual proportionality of the attacks and the responses to them, whatever their scale, does support the validity of the demand for *ad bellum* proportionality.

The discussion thus far has demonstrated that in order to achieve its moderating aim, a defensive reprisal must meet the requirements of necessity and proportionality. Yet it has to meet another challenge that might undermine that aim: the potential risk that it will trigger a counter-effect, escalating the conflict rather than containing it. This slippery slope argument will be the subject of the coming discussion.

E. The Slippery Slope Counter-Argument

Reprisals could have a counter-effect. Instead of moderating a conflict, they can be the match that ignites the belligerent fire, triggering further escalation, especially when the facts related to the belligerency are unclear. Under a factual fog, an apparent victim may actually be the aggressor. Defensive reprisals could be abused and manipulated by ostensible defending states as a pretext for aggression. Furthermore, in extreme circumstances involving prolonged conflicts, both adversaries may bona fide perceive themselves as victims of each other's aggression. In these cases, "violence begets violence,"[165] or may beget it. The factual fog should certainly be cleared to avoid either the opportunistic misuse of it as a pretext for aggression or any misunderstanding related to the small-scale attack.

Reducing the risk of a counter-effect—i.e., a descent down the slippery slope of escalating reactions—requires that all the facts, including the event or sequence of events that triggered the small-scale attack as well as the identity of the attacker and the intentionality of the attack, be well established. When the facts regarding the attack are disputed, the apparent attacker will typically argue: "I did not do it," or "I did not mean to attack you," or "You started it."[166] If the actions and capacities of the adversaries and their intentions are not clear, the tit-for-tat strategy's underlying assumption of transparent moves and interactions is inapplicable. When the substantial

165. MARTIN LUTHER KING JR., STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY 74 (2010). *See also* Bowett, *supra* note 37, at 16 n.67 (referring to Lord Caradon's statement: "Violence solves nothing. Violence does not prevent violence. Violence breeds more violence").

166. For the deficiencies of the tit-for-tat strategy, see *supra* Section III.B.

facts of a small-scale attack against a state are not in dispute, however, the logic of the strategy, reciprocating positive actions, and retaliating against defection in the interest of mutually beneficial cooperation, does apply.

In order to minimize the risk of escalation, the victim state, which argues that it must exercise military force, should bear the burden of corroborating the facts. To justify its response, it has to establish the attacker's identity and convince the international community that the attacker intentionally attacked it, in its state capacity.[167] Practically, the main onus upon the victim is to clarify the attacker's identity and show that the attack was aimed against it. That the attack was intentional may sometimes be assumed in the absence of any concrete steps by the attacker to prove otherwise, which would shift the burden of proof onto it. Thus, in the case of a "mere frontier incident"[168] aimed against a state in which a few of the victim's soldiers were killed, if the attacker doesn't investigate the incident and explain it—for example, by demonstrating that the attack was carried out by a drunk sniper and holding the individual responsible—a reasonable assumption might be that it was carried out intentionally.[169]

In Section V.B, it was mentioned that it is up to the victim state to make the case that the attacker is not willing to take on responsibility for its unlawful activities, and bear their consequences, following the Law of State Responsibility.[170] In addition, as discussed earlier in this Part, the victim state bears the burden of establishing that the reprisal was justified and necessitated as a last defensive resort; and that due to both adversaries' relevant circumstances, a proportional reprisal might play a deterring role, moderating the conflict rather than escalating it.[171] It is time to add a precondition to this heavy burden: it is the victim's duty to establish the facts.[172]

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167. Indeed, the Iranian argument that it did not mean to attack an American vessel was accepted by the ICJ in the *Oil Platforms* case. *See* Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161 (Nov. 6). For a discussion as to whether proving the aggressive intention of the attacker is a prerequisite for determining the existence of an armed attack, see RUYS, *supra* note 5, at 158– 68.

168. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 195 (June 27).

169. *But see* BROWNLIE, *supra* note 40, at 366 (commenting, pre-*Nicaragua* judgment, on the suggested exclusion, by "some writers," of "frontier incident" from the definition of an armed attack: "The distinction is only relevant in so far as the minor nature of an attack is prima facie evidence of absence of intention to attack").

170. For example, by making full reparation or issuing a formal apology pursuant to Articles 31(1) and 37(2) of the Articles on State Responsibility. *See* discussion *supra* Section II.A.

171. *See supra* note 146 and accompanying text.

172. Similarly, according to the Articles on State Responsibility, "[a] State taking

Although collecting intelligence regarding an adversary's intentions and actual belligerent actions is not an easy task, nor in many cases is its disclosure to the public, it is consistent with the burden of proof required from the victim in any act of self-defense. A defending state must prove that the attack, which qualifies as an "armed attack," has been made upon it and that the attacker was responsible for it.[173] To that end, new military technologies that have triggered developments in real-time intelligence gathering should be utilized. In a small-scale attack, when the attacker's identity, actions, and intentions are transparent, the only question left is the substantive legitimacy of reprisal against it. Here, the main risk is not that "violence begets violence," but rather that unanswered violence might create a vacuum, inviting aggressors to engage in more violence. From this perspective, some reprisals might breed further violence, but defensive ones, if strategically necessitated and proportional, may help put a stop to it.[174]

CONCLUDING REMARKS

The desire to reduce belligerency in general, and to prohibit military responses to small-scale attacks in particular, should be endorsed whenever it doesn't create an incentive for aggressors to repeat their attacks. A victim state deserves to have a law that doesn't turn a blind eye to its actual defensive concerns. To refer the victim of a small-scale attack to the Security Council, hoping that this body will protect it, is in many cases a naïve, if not cynical, solution. Requiring the victim to prefer non-forcible measures is justified only if

countermeasures acts at its peril, if its view of the question of wrongfulness turns out not to be well founded." CRAWFORD, *supra* note 46, at 285.

173. *See* Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 51 (Nov. 6). Imposing the duty to establish the facts on the victim state might nullify another delegitimizing argument against reprisals: that recourse to reprisals is generally a manipulative tool, available only to the strong and against the weak. *See, e.g.*, Darcy, *supra* note 41, at 895. Indeed, a superpower might be the victim in a small-scale attack and, if these facts are proven, it would be entitled to defend itself, in appropriate cases.

174. Some commentators outline the conditions for the potential de facto acceptance of reprisals. Bowett suggests "kinds of criteria of reasonableness" and, referring to Richard Falk's "framework," he mentions, inter alia, the insistence upon burden of proof; a demand for a substantial link between the provoking act and the counter-response; efforts at peaceful settlement; proportionality; confinement to military targets; international community review; the necessity of going beyond territorial self-defense; respect for the will of the international community; and taking account of responsibility for guerrilla activities. *See* Bowett, *supra* note 37, at 27–28. See also O'Brien's "[r]equirements for reasonable, legally permissible counterterror measures of legitimate self-defense," focusing upon deterrence, proportionality, necessity and discrimination. O'Brien, *supra* note 48, at 477.

moderate forcible measures are also legitimized whenever the victim faces a substantial threat of a repeat attack and cannot restore its security by relying upon law enforcement or any other non-military means. A law-abiding victim state cannot be expected to accept being pushed into a dead end. Defensive reprisals, if allowed, may deter aggressors; their total prohibition, on the other hand, may incentivize attackers to repeat their attacks. The prescribed treatment by the prevailing law should be perceived as signaling the first steps to be taken by a victim, not the last. If neither non-forcible measures nor the Security Council help the victim restore its security, it ought to have a lawful, forcible alternative. This is desirable not only morally but also practically. The leaders of a victim state, who are obliged to protect the sovereignty of their state and the safety of its inhabitants,[175] often have no other *realpolitik* alternative but to respond militarily. This is the case even with ordinarily law-abiding states,[176] when their essential security interests are jeopardized.[177] The essence of lawful self-defense is that the use of force should be analyzed in light of its strategic context.[178] Thus, rather than encouraging victim states to euphemistically leverage the concept of self-defense, international law should regulate reprisals in the appropriate cases. At the same time, it should reduce belligerency hazards by applying a restricted version of both the *ad bellum* and *in bello* rules of necessity and proportionality to reprisals.

The prevailing view is that the use of military force by a victim state should be allowed only in emergency situations. However, the assumption—indeed, the absolute *ad bellum* presumption—that a small-scale attack will never amount to an emergency is problemat-

175. *See, e.g.*, THE WHITE HOUSE, NATIONAL SECURITY STRATEGY (2015), http://nssarchive.us/wp-content/uploads/2015/02/2015.pdf [https://perma.cc/5QKW-53C6].

176. See the American experience, discussed *supra* Section II.C. *See also* John Lawrence Hargrove, *The* Nicaragua *Judgment and the Future of the Law of Force and Self-Defense*, 81 AM. J. INT'L L. 135, 139 (1987) ("Any suggestion that there are any acts of unlawful force between states that international law forbids a state from defending against . . . degrades the concept of international law, and diminishes the inducement for a responsible political leader to take its constraints seriously into account in conflict situations.").

177. Security threats affect states' behavior, and this reality should have legal effect. Indeed, it has been admitted by the ICJ, albeit with regard to the most extreme threat (and while conflating *ad bellum* and *in bello* types of considerations), that it "cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake." Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *supra* note 47, ¶ 105.

178. *See, e.g.*, BEER, *supra* note 125.

ic.[179] Though a small-scale attack per se cannot justify an anticipatory strike as a matter of self-defense, the impossibility to contain the attack by law enforcement tools is a very relevant circumstance in determining the probability of another forthcoming one. A high probability of recurrence of an attack constitutes a threat to the victim's defense, even if the next potential blow, standalone, would not be considered imminent. Indeed, as Part III demonstrates, there are scenarios where forbearing to respond by force invites further escalation by an aggressor. Although the open wound of a small-scale injury does not usually require emergency medical treatment, if not treated properly by either the injured or by a third party, it could become infected and cause havoc. Healing requires effective measures. While a small-scale attack does not always spark an emergency, an ineffective treatment might.

The macro question is who has to bear the effects of a small-scale attack and who is requested to pay the premium for containing the belligerency. The current law places the burden to a large extent on the victim, who is required to contain the belligerency even where its security cannot be restored by peaceful means or with the help of the Security Council. Under the suggested approach, it is the attacker rather than the victim who pays the price of its aggression or at least a substantial part of it. In appropriate cases, the attacker should be deterred by military force. Such deterrence, rather than appeasement by any means, would be an effective way to contain further belligerency.

The prevailing law has maintained its loyalty to an idealistic world in which peace is posited as the dominant norm. However, when a state or an organized non-state actor is not willing to compromise and attacks a state on a small scale,[180] there is not always a peaceful status quo to either keep or return to. Indeed, peace is the desired end, but its existence is contingent upon lack of belligerency. Facts can't be replaced by expectations.[181] That the peaceful status

179. For example, an attacking non-state actor may mobilize its full military capacity—from its perspective, an all-out war—and yet produce only a small-scale attack. This has the potential to create an emergency because it is an all-out war from the non-state actor perspective. Since the victim cannot respond to it, the attacker is encouraged to increase its efforts in the next round, relying upon the "legal immunity" it received in the first round of attacks.

180. The *in bello* threshold for non-international armed conflict requires the parties to have a minimum degree of organization sufficient to conduct and coordinate operations and a degree of intensity that rises above internal unrest, sporadic violence or terrorist incidents. *See supra* note 15.

181. *See also* O'Brien, *supra* note 48, at 470 ("Security Council practice [of condemning Israeli reprisals] has assumed a situation in the Middle East where peace exists and any recourse to force is not justified . . . .").

quo was not kept by the small-scale attacker in the first place shows that an automatic return to square one is not always desirable or attainable. Therefore, once a small-scale attack has occurred, and law enforcement and non-forcible countermeasures have proved to be ineffective, the situation cannot be perceived as peaceful, nor can it be accepted that "the aggrieved state might turn out to be impotent . . . ."[182] The case for regulating armed reprisals demonstrates that it might be better to legalize a modest forcible response to a small-scale attack, where a restricted version of both the *ad bellum* and *in bello* rules of necessity and proportionality apply, by allowing the victim, in appropriate cases, an exit strategy from all-out war.[183]

Although the main focus of this article is on the normative aspects of reprisals, it has also discussed their relevant positive rules as well.[184] The prevailing law, which determines whether the use of military force by a victim state is legal, is contingent upon the disputed scope of an "armed attack." If this requirement establishes a

182. CASSESE, *supra* note 57.

183. *See also* Richard A. Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT'L L. 415, 435 (1969) ("We need to evolve a legal framework that is able to deal with a situation of prolonged quasi-belligerency. Such a framework would at least have the advantage of overcoming the dichotomy between war and peace, and would be more sensitive to the continuities of terroristic provocation and retaliatory response such as are evident in the Middle East.").

184. My discussion in this article is limited to the legitimacy of resort to force in reprisals. The potential criminal aspects of reprisals are beyond its scope. It should be noted, however, that the Rome Statute has defined an act of aggression widely, as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." Though this definition, according to the prevailing view, seems to include reprisals as an act of aggression, the "crime of aggression" has a "gravity and scale" threshold, which might in many cases exclude reprisals from the scope of criminal liability due to their limited scope and effect. See Rome Statute of the International Criminal Court, art. 8, July 17, 1998, 2187 U.N.T.S. 3, which states:

> Crime of aggression means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

From a policy perspective, Tom Ruys notes that the crime of aggression should not include reprisals—in his opinion, even disproportionate ones—as that would politicize the court and lead to a decline in its legitimacy. *See* Tom Ruys, *Defining the Crime of Aggression: The Kampala Consensus*, 49 MIL. L. & L. WAR. REV. 95, 120 (2010). Ruys contends that the right choice was made in limiting the scope of the crime of aggression as "[l]imiting the jurisdiction *ratione materiae* to 'wars of aggression' would probably have reduced the risk of future challenges to the Court's legitimacy, yet it would also have excluded jurisdiction over various other manifest violations of the Charter rules, such as unprovoked cross-border attacks or disproportionate armed reprisals." *Id.*

threshold that is not crossed by a small-scale attack, the call for justifying last-resort, necessitated, and proportional reprisals, while placing the burden of proof on the victim state, is predominantly normative. If an armed attack means the use of armed force by an attacker that does not need to cross the ICJ's substantial threshold of gravity, this discussion combines both positive and normative considerations.

The normative discussion and its focus upon the need for states to protect themselves against small-scale attacks leads to a few positive alternatives. The first is to reject the ICJ's gravity threshold for an "armed attack," and to either abolish it altogether or support a minimal threshold that allows, whenever necessitated, proportionate self-defense against small-scale attacks.[185] A low threshold would nullify the need to regulate reprisals since it would practically enable, whenever necessary, proportional self-defense against any use of force.[186] Focusing upon the necessity and proportionality requirements as the main constraining elements of the defending state's military response to a small-scale attack reflects the *Caroline* legacy in customary international law. Indeed, as James Green points out, in customary law, the primary means of assessing the lawfulness of an avowed self-defense claim are the criteria of necessity and proportionality and not the occurrence of an armed attack.[187] A second alternative is to adopt Judge Simma's approach regarding the legitimacy of a limited military response based upon the general international law governing "proportionate countermeasures."[188] And third, it may be suggested that though reprisals generally should remain unlawful, they might fall into the categories of justification or excuse.[189] How-

185. *See, e.g.*, RUYS, *supra* note 53 and accompanying text.

186. For the scope of the low threshold, see the spectrum of conflicting views, *supra* notes 27–34.

187. *See* GREEN, *supra* note 26, at 63–64 ("This '*Caroline* conception' of the customary law on self-defence, assessed by reference to criteria of necessity and proportionality, can therefore be seen as contrasting with the Court's conception of customary international law, which focuses upon Article 51's armed attack requirement."). Green notes, however, that "it is incorrect to claim that the ICJ 'introduced' this concept ['armed attack as a grave use of force'] into international law. Instead, it developed and compounded it." *Id.* at 128.

188. Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 16 (Nov. 6) (separate opinion of Judge Simma, referring to the *Nicaragua* judgment).

189. Whereas a justification usually relates to acts that are exceptional but warranted by law, an excuse relates to wrongful acts that are excusable due to their special circumstances (i.e., mental illness of the wrongdoer). *See, e.g.*, Kent Greenawalt, *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897 (1984). See also Cassese's recommendation to consider anticipatory self-defense as legally prohibited, while admittedly knowing that there may be cases where it may be justified on moral and political grounds. CASSESE, *supra* note 4, at 362. Though reprisals by third parties in the context of collective self-defense have not been dealt with in this article, it should be noted that "justifications always flow down to third parties, who by definition receive the benefits of the original

ever, the prevailing approach tries unrealistically to enforce both the relatively high threshold of an "armed attack" and the total prohibition of reprisals. Not surprisingly, then, it has to pay the price of the "credibility gap," discussed earlier.[190]

The case for regulating necessitated and proportional defensive reprisals, which have to comply with the restrictive *in bello* targeting rules as well, does not suggest an optimal solution, but rather deals with second-best ones. In a reality where the centralized use of force by the Security Council is usually not practical and non-forcible responsive measures are not always effective, this article calls for the regulation of restricted defensive reprisals by victim states aimed at restoring their security. Militarily necessitated and proportionally tailored reprisals aimed at deterring aggressors from repeat attacks and carried out transparently, professionally, and in good faith might deter small-scale aggressors from further attacks. The suggested regulation, to be applicable in appropriate cases, would probably not promote violence but rather help contain it.

actor's justification. Excuses, by contrast, do not flow down to third parties." Jens David Ohlin, *The Doctrine of Legitimate Defense,* 91 INT'L L. STUD. 119, 141 (2015) (referring to GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 143 (1998)).

190. *See supra* notes 86–89 and accompanying text.