

PLUGGING THE GAP:
A RECONSIDERATION OF THE U.N. CHARTER'S
APPROACH TO LOW-GRAVITY WARFARE

BENJAMIN ZWEIFACH*

Abstract

There is a little discussed but critically important gap in the U.N. Charter's law of force regime. While Article 2(4) prohibits all threats and uses of force by a state or non-state actor, Article 51 only authorizes self-defense when an armed attack or "most grave" use of force has occurred—leaving a considerable spectrum of low-gravity coercion below that threshold, where a victim state may be violently assaulted, but have no lawful recourse to protect itself with military action.

This Paper explores the loophole in the Charter's regulatory architecture, and finds that it provides a safe harbor, protected from military counter-strikes, for those contemplating aggression. Designed to contain escalation in the aftermath of World War II, the 'force gap' reflects an intentional choice by the Charter's drafters to prioritize the interests of peace over justice; perpetuated by the Security Council's failure to fulfill its intended enforcement role in policing low-intensity conflict and the courts' consistently strict interpretation Article 51.

The Charter's regime makes less sense today, when isolated strikes by non-state actors and low-intensity coercion like targeted killing, terrorism, and cyber-warfare have replaced large-scale military invasions as the primary threats to geopolitical stability. For practical, legal, and normative reasons, therefore, the force gap

* Benjamin Zweifach is a former Government Fellow at the Israeli Ministry of Justice, Foreign Affairs Division, as well as a J.D. candidate for the Class of 2014, Yale Law School and a Senior Editor at *The Yale Journal*. The author thanks, first and above all, Alexandra Salvador and the rest of the editorial staff at the *Intercultural Human Rights Law Review* for their dedication and hard work. Gratitude is also owed to Professor Oona Hathaway at Yale Law School for her insights and suggestions.

requires repair. To provide a flexibility of responsive deterrent that is both appropriate and effective for addressing low-gravity warfare in the modern world, this Paper proposes that the international community do what many states, and, at times, the Security Council, appear to have quietly acknowledged as a necessary adjustment—and reform the law of countermeasures to permit force.

Introduction

Imagine a foreign kingdom. There, the Supreme Royal Edict prohibits physical violence of any kind amongst the realm's subjects, with one exception: if an individual comes under grievous attack, where a fellow subject draws a deadly weapon or otherwise seeks to inflict mortal injury upon the victim, that individual is permitted to fight back. If, however the assault is of a less severe nature—one, for instance, that features shoving, slapping, or punching—the victim is prohibited from using physical force *of any kind* to protect his or her person. Permissible response measures include verbal protest, threats of future legal and economic repercussions, and calls for law enforcement assistance from the Royal Police, who generally avoid intervening in such low-intensity altercations. In the majority of these non-lethal assault cases, victims are forced to either break the Royal Edict themselves, or absorb the harassment from their attackers.

Under any rubric, this fanciful security arrangement would, to the extent it forces individuals to accept physical abuse, constitute a violation of human rights. Yet this imperfect analogy happens to reflect the general parameters of the U.N. Charter's international force regime for states. The core principle of our *jus ad bellum* law is that unilateral aggression by one state upon another is prohibited, and may be met with necessary force in self-defense—a balance purportedly struck in Articles 2(4) and 51 of the Charter.¹ The

¹ Their codification is not limited to the U.N. Charter. Articles 21 and 22 of the 1948 Charter of the Organization of American States (*available at* http://www.oas.org/dil/treaties_A41_Charter_of_the_Organization_of_American_States.htm) as well as almost every other treaty and normative statement about the

International Court of Justice's 1986 *Nicaragua Paramilitary Activities* case confirmed, however, that a state is only permitted to invoke self-defense if, pursuant to the language of Article 51, there has been an "armed attack"—an incident the Court held must involve a "most grave" use of prohibited force.²

For all the scholarly commentary on the *Nicaragua* ruling,³ there has been almost no mention of a passing concern raised by Judge Jennings in dissent:

[A]n essential element in the Charter design is totally missing. . . 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.⁴

The characterization of a supposed gap in the United Nations Charter would seem to have ominous implications, but mostly, this "missing" piece of the *jus ad bellum* puzzle has been ignored. Indeed, the position of the United States appears to be that no such loophole exists, and that self-defense "potentially applies against any illegal use of force."⁵

use of force in international law contain similar provisions. The U.N. Charter's regulation of states' rights under the law of force, of course, has a profound bearing on the human rights of their citizenries.

² Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 101 (June 27) [hereinafter *Nicaragua*].

³ See John Norton Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 43 (1986) for a comprehensive summary of both the case and resulting scholarship.

⁴ *Nicaragua*, *supra* note 2, at 544 (dissenting opinion of Judge Jennings). See Theresa Reinold, *State Weakness, Irregular Warfare, and the Right to Self-Defense Post-9/11*, 105 AM. J. INT'L L. 244 (2011) for further commentary on the U.N. Charter's impracticably restrictive approach to self-defense.

⁵ Remarks of Harold Koh, U.S. State Department Legal Advisor, at OSCYBERCOM Conference in Ft. Meade, MD (Sept. 18, 2012) [hereinafter Remarks of Harold Koh]. See generally D. W. BOWETT, *SELF-DEFENSE IN INTERNATIONAL LAW* (1958) for a scholar's argument in favor of this position.

Whether or not such an approach makes normative sense, it is contrary to international law, and ignores the discrepancy between the level of force prohibited by Article 2(4) of the Charter, and that level which triggers a state's self-defense rights under Article 51. This "force gap" defines a circumstance where a state may be violently assaulted, but have no lawful military recourse, as long as the aggressor's coercive action is of a sufficiently low level of gravity to remain below Article 51's definition of an "armed attack."

That a legal architecture crafted to preserve order has in practice come to allow—and, for the belligerently minded, incentivize—low-intensity violence is a product of both rule design and enforcement failure.⁶ Since 1945, when a state (or non-state) actor has provoked another with physical harassment falling short of a full-scale act of war, the U.N. Security Council has rarely exercised its Chapter VII powers to deploy protective forces, and most frequently contented itself with a toothless condemnation of the Article 2(4) violation. Low-gravity force is becoming increasingly attractive to actors in the 21st century, and its legal regulation thus increasingly relevant. Terrorism continues to threaten countries with the specter of isolated strikes on their civilian populations, yet, with the Iraq war having largely discredited anticipatory self-defense as a legal rationale for large-scale military action, states have increasingly turned to limited, coercive measures like targeted killings, assassination, and cyber-warfare to achieve their security objectives.⁷

⁶ Certainly, this Paper does not mean to assert that there are no compelling disincentives to certain types of attack. On the contrary, such deterrents include international condemnation, possible forfeitures of economic and treaty benefits, and non-forcible sanctions. Nevertheless, as far as military consequences go, forcible coercion of a moderate grade provides a safe harbor for those contemplating aggression.

⁷ It should be pointed out that this pendulum swing in military action applies to the domestic legal setting as well, as humanitarian actions, like the U.S.'s recent involvement in Libya, are eagerly described as low-risk, low-intensity measures, so as to evade legal characterization as acts of war breaching Constitutional and statutory parameters. See, e.g., David Jackson, *Obama Team: Libya is Not a 'War,'* USA TODAY (May 24, 2011, 5:29 PM), <http://content.usatoday.com/communities/theoval/post/2011/03/obama-team-libya-is-not-a-war/> (noting the White House's insistence that the Libya intervention in May 2011 was not a war, but a "time-limited, scope limited military action").

Whether coincidental or strategically logical, it is precisely this type of simmering violence that falls within the loophole, permitting aggressor states to utilize a creative mix of harassment and war-by-proxies to strand their adversaries in a legal no-man's-land. There, below the Article 51 trigger, victim states are powerless to fight force with force, and are often driven to conduct shadow wars outside the light of international oversight.

It is time to address the U.N. Charter force gap. This Paper takes up ICJ Judge Jennings' interest in the unexplored, "large area" that lies between article 2(4) prohibited force and article 51's triggering force. In venturing into the breach, the Paper seeks to, as it were, map the landscape, investigate the origins of the formation, and determine what, if any, renovations are needed to plug this regulatory hole.

Part I argues for the existence of a gap in the U.N. Charter's force scheme. It lays out the current law's interpretation of Articles 2(4) and 51, analyzing the doctrinal parameters of unilateral force and self-defense; and demonstrates that there is substantial separation between the level of force involved in an unlawful act of coercion and that of an "armed attack." After categorizing some of the more common types of low-gravity military action, Part I ends by evaluating the options, under current law, available to a victim state that finds itself trapped within the force gap.

Part II traces how Judge Jennings' lacuna in *jus ad bellum* law came into being in the first place, and presents three contributing factors: first, the gap's conception as an intentional and conscious value choice by the Charter's drafters in San Francisco to prioritize geopolitical security over justice; second, the role of judicial interpretation in gradually wedging further and further apart what was probably intended to be a much narrower separation between Articles 2(4) and 51; and third, the Security Council's failure to fill the gap with a competent enforcement presence. Part II concludes that the interests responsible for circumscribing the right of self-defense are rooted in a history worthy of our continued consideration, and that the U.N.'s reluctance to involve itself in redressing low-level violence between states is understandable in the context of the "reprisals" tradition.

Part III considers whether the breach in the Charter needs to be repaired, and the different means by which the international community might do so. While some scholars have advocated for expanding the reach of Article 51 by lowering the ‘armed attack’ threshold, and others have proposed a more piece-meal approach to force regulation, the Paper eventually determines that the best legal and policy option is the legalization of the use of force in reciprocal countermeasures. It argues that forcible countermeasures would restore justice to the Charter’s regime; lend flexibility to international dispute resolution; contain escalation by deterring low-intensity violence; and mitigate military opportunism better than the current scheme.

Finally, Part IV takes up the illuminating case study of Iran and Israel’s ongoing shadow war, in which both states and their proxies are successfully exploiting the Charter’s gap. It applies the Paper’s suggestion for forcible countermeasures to two low-gravity incidents—one involving traditional violence by a non-state actor, and the other concerning the uniquely modern vehicle of cyber-attack—and demonstrates how such a re-calibration of our force regime’s incentive structure might, in one instance, increase the likelihood of a more just and secure outcome.

I. Demarcating the Force Gap

This Section provides an overview of the two central provisions of the U.N. Charter governing the use of force, Article 2(4) and Article 51. The level of force proscribed in Article 2(4) and necessary for an Article 51 ‘armed attack’ are not co-extensive. Here I endeavor to demarcate the force gap, and outline the law that applies to countries involved in low-intensity conflict.

A. *Article 2(4)'s Prohibition of the Use of Force*

At the time of the U.N. Charter's enactment in 1945, the notion of prohibiting all forcible conduct was novel, insofar as it expanded illegality to cover not only "war"—as it stood under the previous Kellogg-Briand Pact regime—but also "other forms of armed intervention not amounting to war."⁸ As such, scholars have recognized the non-use of force principle animating Article 2(4) as "the heart of the United Nations Charter"⁹ and the international order's "cornerstone."¹⁰ The general prohibition against force has since become a norm of customary international law,¹¹ and been enshrined in countless treaties, General Assembly declarations, and international legal instruments.¹²

Article 2(4) states, in relevant part, that member states "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."¹³ The language may appear straightforward at first glance, but nearly every term of significance has been the subject of

⁸ Nicaragua, *supra* note 2, at 151 (separate opinion of Judge Singh).

⁹ Bartram S. Brown, *Special Project: Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683, 1687-88 (2000).

¹⁰ Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1620 (1984).

¹¹ See Nicaragua, *supra* note 2, at 100 (holding that "the principle of non-use of force...may thus be regarded as a principle of customary international law").

¹² These include, but are not limited to: Definition of Aggression, G.A. Res. 3314 (XXIX), at 142-43, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 (Dec. 14, 1974) [hereinafter Definition of Aggression]; 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 123, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (Oct. 24, 1970) [hereinafter Declaration on Friendly Relations] (emphasizing that the threat or use of force "shall never be employed as a means of settling international issues"). Many treaties and conventions also emphasize the prohibition of the use of force, including the Pact of the Arab League, Charter of the Organization of American States art. 5, 18, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847.

¹³ U.N. Charter art. 2, para. 4.

scholarly debate at one time or another. The nature and size of the gap between Articles 2(4) and 51 is itself a function of, *inter alia*, the “force” proscribed by the former.

The dominant view, both in the United States and throughout the world, is that force requires some type of physical violence.¹⁴ Militarily weaker countries and a slim minority of scholars have relied on a more expansive, purposivist reading of the provision to argue that Article 2(4) also prohibits economic and political coercion, focusing their case on its sweeping emphasis on “integrity” and “political independence,” the proscription against threats, and, above all, the sweeping catch-all forbidding force “in any manner inconsistent with the purposes of the United Nations.”¹⁵

¹⁴ See Comm. on Offensive Info. Warfare et al., TECHNOLOGY, POLICY, LAW, AND ETHICS REGARDING U.S. ACQUISITION AND USE OF CYBERATTACK CAPABILITIES 253 (William A. Owens et al. eds. 2009) (“Traditional [law of armed conflict] emphasizes death or physical injury to people and destruction of physical property as criteria for the definitions of ‘use of force’ and ‘armed attack.’”) [hereinafter Comm. on Info. Warfare]; Oona A. Hathaway et al., *The Law of Cyber-Attack*, 100 CAL. L. REV. 817, 842 (2012) (“Nonetheless, the consensus is that Article 2(4) prohibits only armed force.”); Bert V. A. Röling, *The Ban on the Use of Force and the U.N. Charter*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 3, 3 (A. Cassese ed., 1986) (“It seems obvious to the present writer that the ‘force’ referred to in Art. 2(4) is military force.”); Matthew C. Waxman, *Cyber-Attacks and the Use of Force: Back to the Future of Article 2(4)*, 36 YALE J. INT’L L. 421, 427 (2011) (“The dominant view in the United States and among its major allies has long been that the Article 2(4) prohibition of force...appl[ies] to military attacks or armed violence.”); Quincy Wright, *Subversive Intervention*, 54 AM. J. INT’L L. 521, 528 (1960) (“It is clear that [the U.N. Charter’s provisions] prohibit only the threat or use of armed force or an armed attack. They cannot be construed to include other hostile acts such as propaganda, infiltration or subversion.”).

¹⁵ Historically, and not surprisingly, these advocates have tended to represent developing nations seeking protection from economic pressure and political subversion. For the minority view advocating a broader definition of force, see GRIGORI TUNKIN, LAW AND FORCE IN THE INTERNATIONAL SYSTEM 82 (Progress Publishers trans., 1985) (writing that “a narrow interpretation of [force] prevails in the literature of capitalist states according to which ‘force’ in the sense employed in the United Nations Charter refers only to armed force”); see also AHMED M. RIFAAT, INTERNATIONAL AGGRESSION: A STUDY OF THE LEGAL CONCEPT 120, 234 (1980). For the revitalization of the 2(4) debate in addressing cyber-warfare, see Hathaway, *supra* note 14, which posits that cyber-attack may well become an

Proponents of the dominant, narrower reading of 2(4) point to the Charter's historical context, structure, and negotiating history as indications that the drafters intended to regulate violence differently than other means of coercion. The central rationale for the U.N.'s formation was the prevention of future wars,¹⁶ and the meaning of the phrase "threat or use of force" may well have seemed self-evident to a collection of 1945 San Francisco delegates who had just witnessed Hitler's blitzkrieg of tanks and planes storm across European borders.¹⁷ The rest of the Charter's structure also exhibits a preoccupation with the prevention of armed belligerence: the preamble itself, for example, proclaims the goal that "armed force . . . not be used save in the common interest" and Articles 41-42 authorize the Security Council to take actions not involving armed force before resorting to military means.¹⁸

Considering the drafters' fixation with the threat of military

attractive weapon for the weak in asymmetric warfare, and that stronger states may gain an interest in broadening the interpretation of Article 2(4); Marco Roscini, *World Wide Warfare--Jus ad Bellum and the Use of Cyber Force*, 14 MAX PLANCK Y.B. UNITED NATIONS L. 85, 105 (2010); and Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT'L L. 885, 906 (1999).

¹⁶ See, e.g., Thomas J. Jackamo III, *From the Cold War to New Multilateral World Order: The Evolution of Covert Operations and the Customary International Law of Non-Intervention*, 32 VA. J. INT'L 929, 959 ("Indeed, the primary purpose of the formation of the United Nations was the prevention of war."); see also Vienna Convention on the Law of Treaties, art. 31(1), opened for signature May 23, 1969, 1155 U.N.T.S. 331 (asserting that international instruments should be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty *in their context and in the light of its object and purpose*") (emphasis added).

¹⁷ See Thomas M. Franck, *Who Killed Article 2(4)? or Changing Norms Governing the Use of Force by States*, 64 AM. J. INT'L L. 809, 812 (1970) [hereinafter Franck, *Who Killed Article 2(4)*]; cf. Stuart G. Baker, *Comparing the 1993 U.S. Airstrike on Iraq to the 1986 Bombing of Libya: The New Interpretation of Article 51*, 24 GA. J. INT'L & COMP. L. 99, 107-08 (1994) (noting that the meaning of the term "armed attack" would have been obvious to the Charter's drafters).

¹⁸ I would note here, however, that advocates of article 2(4)'s broad interpretation might view these same provisions as evidence that the drafters knew how and when to specify *armed* force, as opposed to more general force, yet employed no such qualification in article 2(4)'s prohibition.

unilateralism, it would have been unexpected for them to group lesser evils like political pressure and economic leverage under the same proscription. Propaganda, espionage, and economic pressuring were specters of 1975, not 1945, so comparatively irrelevant, in fact, that the Charter's *travaux préparatoires* show that the original delegates rejected a proposal to extend Article 2(4) to include economic sanctions.¹⁹ It makes sense, then, that this theory of *unarmed* force only gained traction as a Cold War era, revisionist reading of Article 2(4) that ignored the considerable evidence of the drafters' original intentions. Yet even at that time, the major world powers found a common advantage in demarcating the distinction between a "hot war" and a "cold war," and military force from unarmed coercion.²⁰ In the time since the Charter's enactment, international law makers have sought to further codify the non-use of force principle in additional treaties and declarations, tweaking Article 2(4)'s language to reflect the emerging consensus that 'force' means—and has always meant—armed force.²¹

The ICJ and other international courts have also subscribed to the armed violence viewpoint. As early as 1949, the Court held in the *Corfu Channel* case that the British navy's efforts to sweep mines in the territorial waters of Albania did not constitute a violation of Article 2(4), because no actual military force or threat thereof was

¹⁹ See Hathaway, *supra* note 14, at 842 n.90 (citing Daniel B. Silver, *Computer Network Attack as a Use of Force Under Article 2(4) of the United Nations Charter*, in *COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW* 73, 80-82 (Michael N. Schmitt & Brian T. O'Donnell eds., 2002)).

²⁰ See THOMAS M. FRANCK, *RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS*, 75 (2002). ("[D]uring the Cold War, a fairly bright line may be said to have been drawn between ... a state's export of revolution by direct or indirect military action ... and a state's export of revolution by propaganda, cultural subversion, and other non-military assistance.").

²¹ In 1974, for example, the U.N. General Assembly voted to clarify the scope of the prohibition against unilateral military force with the Definition of Aggression, which specifically prohibited "the use of *armed* force by a state against the sovereignty, territorial integrity, or political independence of another state." Definition of Aggression, *supra* note 12. JULIUS STONE, *CONFLICT THROUGH CONSENSUS: UNITED NATIONS APPROACHES TO AGGRESSION* 115-36 (1977) (describing the U.N. Definition of Aggression debate as a place-holder for disagreement over the customary norm of non-use of force embodied in art. 2(4)).

exerted.²² Its more recent *Nicaragua* decision held that, while the arming and training of third-party militants could be construed as forcible conduct, the “mere supply of funds to [them]. . . [did] not in itself amount to a use of force.”²³

Article 2(4)’s territorial component also warrants inquiry. One might conceivably deduce from the raw text (and some have) that, unless the forcible action is designed or motivated to affect “territorial integrity or political independence,” the infringement is not prohibited.²⁴ In fact, the traditional view is that the drafters did not intend to qualify the prohibition in this manner, leaving the aggressor’s design, or ultimate goal, in breaching enemy sovereignty totally irrelevant to the 2(4) analysis.²⁵ To interpret the proscription in any other way would permit militants to repeatedly strike an enemy in perpetuity, as long as the tactical operations were limited, and the trespassing troops held no ambitious plan for altering borders

²² *Corfu Channel (UK v. Alb.)*, Merits, 1949 I.C.J. REP. 4 (Apr. 9).

²³ *Nicaragua*, *supra* note 2, at 119. The *Nicaragua* court also held that the patrolling of the Nicaragua border by U.S. controlled forces *did not* constitute a threat of force under Article 2(4). *Id.* The Court did, however, find such activities to violate the duty of non-intervention, a norm that does not require forcible acts, and one distinct from the non-use of force. *See infra* Subsection I.D.

²⁴ For two applications of this view, *see* Anthony D’Amato, *Israel’s Air Strike Upon the Iraqi Nuclear Reactor*, 77 AM. J. INT’L L. 584, 588 (1983), which argued that the 1981 Israeli aerial strike on Iraq’s Osiraq nuclear reactor did not violate 2(4) because the attack was not directed against Iraq’s territorial integrity; and Gregory Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT’L L. J. 145, 166 (2000), which argues that military efforts to eliminate a terrorist threat in a sponsor-host country does not violate Article 2(4) because the use of force “is not directed against the persons or property of the host country, is not designed to gain or hold territory, and does not seek to overthrow or otherwise influence the nature of the host government.”

²⁵ *See* IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 265-68 (1963); Jackson Nyamuya Maogoto, *Walking an International Tightrope: Use of Force to Combat Terrorism—Willing the Ends*, 31 BROOK. J. INT’L L. 405, 412 (2006). *See infra* note 80, at 412 (stating that “an incursion into the territory of another state constitutes an infringement of Article 2(4), even if it is not intended to deprive that state of part of its territory or if the invading troops are meant to withdraw immediately after completing a temporary and limited operation”).

or toppling regimes.²⁶ Thus, scholars and nations have effectively interpreted the word “integrity” as “inviolability,” prohibiting almost any armed intrusion into a member state’s territory.

Finally, a third-party state can be implicated in another actor’s use of force if the third-party exercises “effective control” over the prohibited conduct.²⁷ Sometimes referred to as “indirect force,” this type of imputable violence usually occurs when a host state is either unwilling or unable to prevent another militia or terrorist group from using its territory as a base from which to attack an adversary. Although the ICJ has indicated that a “general situation of dependence and support” will not necessarily suffice to demonstrate use of force complicity,²⁸ states “owe[] an obligation not to allow knowingly [their] territory to be used for acts contrary to the rights of other States.”²⁹

Despite the relative consensus over Article 2(4)’s terms, application of the non-use of force principle to certain means of coercion can nonetheless prove difficult. Modern, low-intensity conflict features a variety of disruptive measures that occupy an intermediate status somewhere between forcible and non-forcible action.³⁰ Newly feasible technological coercion, such as information

²⁶ Even if you could argue that such behavior did not constitute force, it would certainly appear to be “inconsistent with the purposes of the United Nations.”

²⁷ Nicaragua, *supra* note 2, at 62. Scholars disagree on whether the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) lowered the requisite degree of control to an “overall control” standard in the *Tadic* case. See Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment of July 15, 1999, ¶137 (Int’l Crim. Trib. for the Former Yugoslavia July 15, 1999) [hereinafter *Tadic*].

²⁸ Nicaragua, *supra* note 2, at 64-65.

²⁹ *Corfu Channel*, *supra* note 22, at 22. In the *Corfu Channel* case, for example, the mere fact that Albania controlled the territorial waters in which unlawful forcible activity was occurring did not alone establish that the country was aware of the Article 2(4) breaches or approved of the, but the Court was still able to infer Albania’s knowledge of and responsibility for the exploded vessels from circumstantial evidence. See *id.* at 18. Whether and if a host state can contribute to an Article 51 ‘armed attack’ is a separate question entirely, and will be addressed in Subsection I.C.

³⁰ See Cristian DeFrancia, *Enforcing the Nuclear Nonproliferation Regime: The Legality of Preventive Measures*, 45 VAND. J. TRANSNAT’L L. 705, 760-61

disruption, industrial sabotage, and cyber-attacks present the potential to cripple an enemy's war-making infra-structure, yet do not fit the traditional criteria of Article 2(4) force. Equally difficult to cabin are unilateral law enforcement efforts like weaponry seizures and covert counter-proliferation tactics,³¹ which flirt with the distinction between military force and police action.³² Terrorism and rogue militancy have furthermore complicated the methodology of attributing force to sponsor states.

Under any reasonable construction of "force," however, it seems clear that the drafters of the U.N. Charter were not prepared to sanction the exercise of Article 51 rights in response to *any* violation of Article 2(4).

B. Article 51 and the "Armed Attack" Trigger

Article 51 of the U.N. Charter states, in relevant part, that "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."³³

(2012).

³¹ Some have attempted to classify covert activity as a form of aggression, *see Report of the International Law Commission to the General Assembly*, U.N. GAOR Supp. No.9, at 1-10, U.N. Doc. A/1858 (1951), *reprinted* in [1951] 2 Y.B. Int'l L. Comm'n 123, U.N. Doc. U.N. Doc. A/CN.4/SER.A/1951/Add.1, but others have expressed concern that such a breadth in the definition would inevitably lead to escalations in hostilities. ANN VAN WYNEN THOMAS & A. J. THOMAS, JR., *NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS* (1956).

³² *See* DeFrancia, *supra* note 30, at 760 (arguing that "questions may arise...as to the proper boundaries between military force and police action on the high seas...[and] it is not always clear whether measures designed to interfere with or interrupt illicit proliferation activities, such as cyber attacks, constitute forcible measures").

³³ U.N. Charter art. 51; U.N Charter article 39's provision for forcible action by the Security Council constitutes the only other clear exception to the Charter's peremptory prohibition on the use of force. Nevertheless, some scholars argue that a doctrine of unilateral humanitarian intervention exists, whereby states can use force to prevent a large-scale human rights tragedy. Proponents base their case on

Two main schools of thought dominate the debate over Article 51: the majority Restrictionist approach, which interprets the article's plain language to mean that a sovereign state can forcibly defend itself exclusively in the event of an *armed attack*;³⁴ and the Counter-Restrictionist perspective,³⁵ which asserts that Article 51's reference to the "inherent right" of sovereign states permits recourse to a broader, long-standing customary international law of self-defense, permitting anticipatory action.³⁶

Restrictionists assert that, if indeed, the Charter's drafters had *not* intended to alter customary international law doctrine, there would consequently have been no purpose to Article 51's existence,

the fact that the United Nations was formed to prevent not only the use of force, but also to "protect universal human rights;" as embodied in Articles 55 and 56 of the Charter, which call upon "[a]ll Members [to] pledge themselves to take joint action...for the achievement of...universal respect for, and observance of, human rights and fundamental freedoms for all." U.N. Charter art. 55(c); U.N. Charter art. 56. For a comprehensive examination of the humanitarian intervention doctrine, see David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253 (1992); Steve G. Simon, *The Contemporary Legality of Unilateral Humanitarian Intervention*, CAL. W. INT'L L.J. 117, 124 (1993).

³⁴ See BROWNLIE, *supra* note 25, at 280 (1963), for three illuminating examples of the Restrictionist approach; YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 168 (3d ed. 2001) (concluding that the choice of words in Article 51 was deliberately restrictive and that the right to self-defense was limited to an armed attack); and CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 98 (2d ed. 2004).

³⁵ See, e.g., Louis Rene Beres, *After Osama bin Laden: Assassination, Terrorism, and International Law*, 44 CASE W. RES. J. INT'L L. 93, 116 (discussing the legality of assassination of anticipatory self-defense) for examples of the Counter-Restrictionist approach; Michael J. Glennon, *The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter*, 25 HARV. J. L. & PUB. POL'Y 539 (2002); George K. Walker, *Anticipatory Collective Self-Defense in the Charter Era: What the Treaties Have Said*, 31 CORNELL INT'L L.J. 321 (1998); Timothy Kearley, *Regulation of Preventive and Preemptive Force in the United Nations Charter: A Search for Original Intent*, 3 WYO. L. REV. 663 (2003).

³⁶ Of great significance to the Restrictionist camp is the fact that "inherent right" was only added as a late draft to the Charter. See RUTH B. RUSSELL ASSISTED BY JEANETTE E. MUTHER, *A HISTORY OF THE UN CHARTER: THE ROLE OF THE UNITED STATES, 1940-1945*, 698-99 (1958). Although, as with all legislative history, this fact could also be turned around by Counter-Restrictionists, and taken to indicate the phrase's importance. *Id.*

rendering it superfluous.³⁷ It would seem improbable, in such a historical context, for Article 51's armed attack requirement to constitute nothing but a meaningless, reiteration of long-standing customary international law, when the drafters exhibited such a clear interest in making it more difficult for countries to go to war.³⁸ The dominant paradigm³⁹ therefore is to read the provision narrowly, and in favor of collective safety over individual escalation.

Though the ongoing debate over unilateral anticipatory self-defense warrants more extensive analysis, the subject is largely outside our line of inquiry, for it is the magnitude of a forcible action, rather than its temporal probability, which concerns us.⁴⁰ This

³⁷ See BROWNLIE, *supra* note 25, at 280; DINSTEIN, *supra* note 34, at 168 (concluding that the choice of words in Article 51 was deliberately restrictive and that the right to self-defense was limited to an armed attack); CHRISTINE GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 98 (2d ed. 2004).

³⁸ See, e.g., Jonathan I. Charney, *The Use of Force Against Terrorism and International Law*, 95 AM. J. INT'L L. 835, 836 (2001) ("To limit the use of force in international relations, which is the primary goal of the U.N. Charter, there must be checks on its use of self-defense... It is limited to situations where the state is truly required to defend itself from serious attack.")

³⁹ Dinstein, *supra* note 34, at 168 (stating that the "leading opinion among scholars" is that the right of self-defense does not extend beyond armed attack).

⁴⁰ For our purposes, it is sufficient to briefly note that, since the 2001 terrorist attacks, the United States has departed from the majority view, and adopted an expansive, Counter-Restrictionist interpretation of Article 51, one that many sovereign states and international law scholars deem to be unlawful preemption. See, e.g., Major Joshua E. Kastenberg, *The Use of Conventional International Law in Combating Terrorism: A Maginot Line for Modern Civilization Employing the Principles of Anticipatory Self-Defense and Preemption*, 55 A.F. L. REV. 87, 114-15 (arguing that "the current U.S. administration has incorporated the doctrine [of preemption] as part of its overall...policy, claiming the right to attack terrorists and supporters before they strike first").

The 2002 White House National Security Strategy of the United States asserted that, in the modern age of terrorism and weapons of mass destruction, the U.S. "can no longer solely rely on a reactive posture" and will not wait for threats to begin to materialize. Executed most famously in the Bush administration's justification for invading Iraq, this approach to anticipatory self-defense relied originally on the controversial legal theories of John Yoo and others, who have argued that the modern challenges of weapons of mass destruction demand that the traditional customary law of self-defense be relaxed. See John Yoo, *Using Force*, 71 U. CHI. L. REV. 729, 735 (2004) (arguing that the probability of an enemy's

Paper thus proceeds under the dominant Restrictionist interpretation of Article 51 that the validity of a self-defense claim turns upon the occurrence of an “armed attack.”⁴¹

possible attack, or its relative “imminence,” must be adjusted in the age of weapons of mass destruction and terrorists, whom a state is less likely to see amassing on a territorial border prior to a strike); *see also* Louis Rene Beres & Yoash Tsiddon-Chatto, *Reconsidering Israel’s Destruction of Iraq’s Osiraq Nuclear Reactor*, 9 TEMPLE INT’L & COMP. L. J. 437 (1995) (arguing that Israel’s strike on the Osiraq reactor and self-defense generally must be viewed by a different standard in the age of weapons of mass destruction).

The Obama administration has adopted the same legal position in favor of “inherent,” preemptive self-defense rights. In defending its policies of targeted killings and other anticipatory uses of force, the Obama Administration has publicly acknowledged that its interpretation of Article 51 is out of step with that of the global community, but maintains that the separation is progressively narrowing. *See* Remarks of John Brennan, Assistant to the President for Homeland Security and Counterterrorism, at Harvard Law School (Sept. 16, 2011).

⁴¹ It is important to note here that just because a state suffers an armed attack does not mean that it is entitled to unbridled retaliation. Customary international law mandates that a state only take those forcible measures that are necessary and proportionate. *See, e.g.*, Nicaragua, *supra* note 2, at 94 (noting that there is a “specific rule whereby self-defense would warrant only measures which are proportional to the armed attack and necessary to respond to it”). The fact that these principles and limitations on self-defense do not appear in Article 51 or anywhere else in the U.N. Charter is irrelevant, as the ICJ has consistently recognized their application. *See* Legality of the Threat or Use of Nuclear Weapons [Advisory Opinion] [1996] ICJ Rep. 226, ¶ 41 [hereinafter Legality of the Threat or Use of Nuclear Weapons]; Case Concerning Armed Activities on the Territory of the Congo (Congo v. Uganda), 2005 I.C.J. 168, 223 (Dec. 19) [hereinafter Armed Activities in the Congo] (dismissing as moot the inquiry into whether self-defense was in fact *exercised in circumstances of necessity and in a manner that was proportionate*) (emphasis added).

Both concepts are forward-looking, rather than retrospective, insofar as a state may only take forcible action that is proportional to the *threat posed* by the armed attack, and necessary to its larger military objectives in responding to that threat. *See, e.g.*, Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AM. J. INT’L L. 391, 405 (1993) (saying of the Persian Gulf War, “it appears that more was done than was proportionate to expelling Iraq from Kuwait”); Mary Ellen O’Connell, *Lawful Self-Defense to Terrorism*, 63 U. PIT. L. REV. 889, 902-903 (2002).

The great majority of scholars argue that acts of anticipatory or preemptive self-defense almost always violate the principle of proportionality, because the state will never have known the damage caused by the forestalled attack. *See, e.g.*,

The U.N. Charter provides no definition for the term, nor does any discussion of it appear in the *travaux préparatoires*, so one is left to consult the *Nicaragua* court's source materials, ICJ constructions, and state practice to clarify the peripheries of what constitutes an "armed attack." Many sovereign states adopting the broader, Counter-Restrictionist view on self-defense tend to treat Article 2(4) "force" and Article 51 "armed attack" as coextensive categories of coercion, the United States included.⁴² Under this view, a sovereign state would be entitled to invoke self-defense against any unlawful act of force, and presumably, invoke anticipatory self-defense against any credible (and unlawful) *threat* of force. While the sheer breadth of such a self-defense theory is understandably attractive to a state under constant threat of asymmetric warfare, the interpretation has very little support in either jurisprudence or scholarship.

On the contrary: international law distinguishes the mere use of force from the narrower category of "armed attack."⁴³ In its *Nicaragua* decision, the ICJ held that, in evaluating the individual and collective self-defense claims of a targeted state, it is "necessary to distinguish the most grave forms of the use of force (those constituting armed attack) from less grave forms."⁴⁴ If the "scale and effects"⁴⁵ of a given forcible event are not of a sufficient magnitude,

BROWNLIE, *supra* note 25, at 259 (asserting that "[i]n the great majority of cases to commit a state to an actual conflict when there is only circumstantial evidence of impending attack would be to act in a manner which disregarded the requirement of proportionality"); *but see* Kristen Eichensehr, *Targeting Tehran: Assessing the Lawfulness of Preemptive Strikes Against Nuclear Facilities*, 11 UCLA J. INT'L L. & FOREIGN AFF. 59, 75 (2006) (arguing that "proportionality can be measured as the least amount of force required to remove the threat [so that]...Israel's strike on Osiraq did meet the requirement of proportionality").

⁴² See Remarks of Harold Koh, *supra* note 5.

⁴³ See, e.g., *Armed Activities in the Congo*, *supra* note 41, at 223 (considering whether Uganda suffered armed attacks justifying self-defense at the hands of the DRC); *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, 331 (Nov. 6) [hereinafter *Oil Platforms*] (stating that in order to justify a claim of self-defense, the United States had to "show that those attacks [made on it by Iran] were of such a nature as to be qualified as "armed attacks"); *Nicaragua*, *supra* note 2.

⁴⁴ *Nicaragua*, *supra* note 2, at 101.

⁴⁵ *Id.* at 103.

then that breach of Article 2(4)'s force prohibition does not rise to the level of an Article 51 armed attack, and hence, does not trigger the victim state's right to defend itself with force. Under the specific facts of *Nicaragua*, for example, the ICJ deemed various bits of armed skirmishing to not exceed Article 51's threshold, describing them, instead, as "mere frontier incident[s]"⁴⁶ Such low-gravity acts of provocation therefore fall into the U.N. Charter's force gap, where the aggressor state has clearly breached international law, but is nevertheless shielded from the possibility of a (lawful) military response by the coerced state.⁴⁷

The *Nicaragua* court grounded its bifurcated interpretation of Article 51 mostly in the 1974 U.N. Definition of Aggression⁴⁸ as

⁴⁶ *Nicaragua*, *supra* note 2, at 103; *see also* DeFrancia, *supra* note 30, at 760 (acknowledging that "the concept of the use of force under the UN Charter is broader than that of armed attack"); Hathaway, *supra* note 14, at 844 (noting that "there may be acts that violate Article 2(4)'s prohibition on the use or threat of force that do not rise to the level of an armed attack, and hence do not trigger the right of self-defense under Article 51"); Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT'L L 715, 720 (2008) (noting that the right of self-defense depends on "whether the provocation was of such magnitude as to warrant a full-scale military response" and that "a small border incursion, for example, might not justify a war"); L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 156 (H. Lauterpacht ed., 7th ed. 1952) (asserting that "the [U.N.] Charter confines the right of armed self-defence to the case of an armed attack as distinguished from ... various forms of *unfriendly conduct falling short of armed attack*." (emphasis added)); Carsten Stahn, *Terrorist Acts As "Armed Attack": The Right to Self-Defense, Article 51 (1/2) of the UN Charter, and International Terrorism*, 27 FLETCHER F. WORLD AFF. 35 (2003) (arguing that *Nicaragua* introduced a gravity requirement to the use of force and armed attack); Yutaka Arai-Takahashi, *Shifting Boundaries of the Right of Self-Defence-Appraising the Impact of the September 11 Attacks on Jus Ad Bellum*, 36 INT'L LAW. 1081, 1084 (2002) (stating that armed attacks fall within the broader category of the use of force).

⁴⁷ The *Nicaragua* Court explicitly noted that its holding would not be addressing or judging anticipatory self-defense. *Nicaragua*, *supra* note 2, at 103. Also, the Court acknowledged the gap between Art. 2(4) and Art. 51 force with eyes wide open. *See id.* at 127 ("[S]uch activities may well constitute a breach of the principle of the non-use of force and an intervention in the internal affairs of a State, that is, a form of conduct which is certainly wrongful, but is of lesser gravity than an armed attack.").

⁴⁸ *Nicaragua*, *supra* note 2, at 103 (citing art. 3(g) of the Definition of

well as the 1970 Declaration on Friendly Relations, both of which had already acknowledged an element of relativity in the regulation of armed force.⁴⁹ As “an interpretation by the General Assembly of the meaning of the provisions of the United Nations Charter governing the use of armed force”⁵⁰ the Definition of Aggression proved particularly influential in the Court’s holding. The Definition refers to “acts of aggression *and other uses of force* contrary to the Charter of the United Nations,”⁵¹ suggesting that “acts of aggression” may well approximate armed attacks, insofar as they both constitute the most extreme category of aggravated force;⁵² indeed, the Definition’s preamble goes on to proclaim that “aggression is the most serious and dangerous form of the illegal use of force,”⁵³ consistent with Article 51’s treatment of armed attacks. The ICJ itself has often used the terms aggression and armed attack (essentially) interchangeably, as, for example, in its evaluation of self-defense claims in the *Armed Activities in the Congo*.⁵⁴

Aggression, *supra* note 12); *id.* at 101 (describing how, “alongside certain descriptions which may refer to aggression, [the Declaration on Friendly Relations] includes others which refer only to less grave forms of the use of force”).

⁴⁹ See Definition of Aggression, *supra* note 12, art. 2 (noting that certain acts of armed force by one state might not be justified if other acts were deemed to be “not of sufficient gravity”).

⁵⁰ Nicaragua, *supra* note 2, at 345 (Judge Schwebel, dissenting on other grounds).

⁵¹ Nicaragua, *supra* note 2, at preamble (emphasis added).

⁵² See U.N. Charter, art. 39. Article 39 of the U.N. Charter does refer to the Security Council’s authority to determine the existence of an “act of aggression” and respond accordingly. This can arguably support the notion of aggression resembling armed attack (as aggravated forms of force requiring S.C. intervention), or rebut it, insofar as it demonstrates that the Charter drafters chose to use the term “act of aggression” in Article 39, but not Article 51.

⁵³ Definition of Aggression, *supra* note 12, preamble.

⁵⁴ See *Armed Activities in the Congo*, *supra* note 41, at 223 (holding that, because “the attacks did not emanate from armed bands or irregulars... within the sense of Article 3(g) of... the Definition of Aggression... [t]he Court is of the view that... the legal and factual circumstances for the exercise of a right of self-defence by Uganda against the DRC were not present”); Nicaragua, *supra* note 2, at 341 (dissenting opinion of Judge Schwebel) (labeling the header for his section debating the definition of armed attack, “The Court’s Conclusion is at Odds with

Further, the Definition of Aggression's non-exhaustive list of action considered to be 'aggression' may help populate the field of "armed attack:" invasions, military occupations, bombardment, blockades, and military force resulting in territorial acquisition,⁵⁵ in addition to various other species and circumstances, including the catch-all provision lifted by the ICJ in its *Nicaragua* opinion, "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."⁵⁶

Yet no authoritative test exists for identifying an armed attack beyond *Nicaragua*'s vague parameters.⁵⁷ What is reasonably clear, however, is that the weight of authority demonstrates a meaningful gap between the trigger for Article 51 and the "less grave" uses of force that run afoul of Article 2(4).

C. *Categories of Low-Gravity Force*

What kinds of actions then constitute "low-gravity" events in the terminology of *Nicaragua*? One can certainly glean some characteristics from the body of cases, treaties, and state practice, albeit with an accompanying disclaimer: the following categories are neither definitive nor exhaustive, and despite my efforts to

the General Assembly's Definition of Aggression").

⁵⁵ See Definition of Aggression, *supra* note 12, art. 3.

⁵⁶ Definition of Aggression, *supra* note 12, art. 3(g). Also significant is the Definition's drafting history: whereas a 'Thirteen Power' draft circulated by a collection of small and middling powers explicitly rejected the notion of individual and collective self-defense against *indirect* force, the prevailing 'Six Power' draft did recognize such prerogatives. See *Nicaragua*, *supra* note 2, at 342 (dissenting opinion of Judge Schwebel) (arguing that the General Assembly endorsement of indirect force as a form of aggression should have prompted the *Nicaragua* Court to hold the Nicaraguan contras' activity to have constituted an armed attack).

⁵⁷ See Jay P. Kesan & Carol M. Hayes, *Mitigative Counterstriking: Self-Defense and Deterrence in Cyberspace*, 25 HARV. J. L. & TECH 415, 516-17 (2012) (discussing "Pictet's Test," which considers the scope, duration, and intensity of an attack), for an illuminating analyses of the different factors one might use to evaluate a given attack's severity.

substantiate them in court judgments and international custom, constitute a fairly speculative taxonomy of low-gravity acts. They are merely meant to provide a broad sketch of possible force gap behavior.

1. *Violence of Limited Destructive Magnitude*

The most obvious iteration of “low-gravity” force is that which a state consciously and purposefully perpetrates, but which fails to “occur on a significant scale.”⁵⁸ There is room for disagreement on what counts as “significant;” but, whereas some scholars maintain that most grades of forcible coercion meet the requirements of an ‘armed attack’ (excepting only minimally consequential, isolated incidents), the more commonly held view is that Article 51 can be triggered only by significantly destructive military operations that threaten state sovereignty.⁵⁹

Thus, if an act of force does not destroy a reasonably meaningful amount of property, lives, or infrastructure, or is negligible in its strategic consequences, it likely constitutes a low-gravity forcible event. Examples of this genus would include unauthorized flyovers into foreign airspace; mining of territorial waters; and cross-border kidnappings or special operations.⁶⁰ Even the famous U.S. seal team’s temporary breach of Pakistan’s sovereignty in order to kill Osama bin Laden would be a candidate

⁵⁸ Nicaragua, *supra* note 2, at 103-104.

⁵⁹ For an example of the former camp, see Dinstein, *supra* note 34, at 176 (arguing that “unless the scale and effects are trifling, below the *de minimis* threshold ... [t]here is certainly no cause to remove small-scale armed attacks from the spectrum”); and, for the latter, see Antonio Cassese, *The International Community’s “Legal” Response to Terrorism*, 38 INT’L & COMP. L.Q. 589, 596 (1989) (stating that “[a]rmed attack’ in this context means a very serious attack either on the territory of an injured State or on its agents or citizens”), and Mikael Nabati, *International Law at a Crossroads: Self-Defense, Global Terrorism, and Preemption (A Call to Rethink the Self-Defense Normative Framework)*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 771, 778 (2003) (opining that the threshold is sufficiently high such that many acts of terrorism would fall short).

⁶⁰ See Nicaragua, *supra* note 2, at 128 (finding that each of these acts by the contras constituted a violation of Article 2(4) but not an armed attack).

for Category 1.

One should note, however, that the number of such low-magnitude strikes could prove relevant: the ICJ has held that even if individual incidents of force fail *Nicaragua's* significance test, the cumulative impact of a chain of such smaller acts can elevate the pattern of assaults to an armed attack, thus triggering the right of self-defense.⁶¹

2. *Spontaneous Confrontations*

While Category 1 is determined largely by *effect*, Category 2 of low-gravity force is shaped by *context*. The ICJ and U.N. rarely bless Article 51 claims to self-defense that are predicated on spontaneous, un-planned eruptions of violence, presumably because the nature of an armed attack requires some degree of centralized, malicious intent on the part of the aggressor state.⁶² A useful analog from the realm of domestic criminal law, perhaps, is the distinction between manslaughter and murder. A violent act is not guaranteed to fall short of the Article 51 trigger by simple virtue of its lacking extensive premeditation; but a random clash between military appendages that results from spur-of-the-moment reaction or low-level officers following protocols is less likely to be classified as an armed attack than, for instance, a carefully conducted offensive into enemy territory.⁶³

⁶¹ See *Armed Activities in the Congo*, *supra* note 41, at 223 (suggesting the relevance of evaluating the “series of deplorable attacks” as “cumulative in character”); *Oil Platforms*, *supra* note 43, at 192 (holding that “taken cumulatively...[the series of attacks on U.S. ships in the Persian Gulf] do not seem to the Court to constitute an armed attack on the United States”). See also *Stahn*, *supra* note 46, at 46 (highlighting the importance of the cumulative armed attack rule to terrorism).

⁶² See, e.g., *Oil Platforms*, *supra* note 43, at 192 (holding that an exchange of armed violence between U.S. naval vessels and Iranian oil installations and mines did not amount to an armed attack); *Nicaragua*, *supra* note 2, at 103 (reasoning that a “mere frontier incident” between individual bands of irregulars does not constitute an armed attack).

⁶³ See *BROWNIE*, *supra* note 25, at 279 (asserting that “sporadic” acts of

These incidents oftentimes tend to manifest themselves at sea, where militaries are more isolated from their homeland and sovereignty is usually not under imminent threat.⁶⁴ Still, this does not mean that all forcible coercion occurring beyond a state's territorial boundaries are per se low-gravity; as indeed, it is generally agreed that an attack on a military base or embassy abroad *can* trigger Article 51 self-defense, if it is sufficiently severe.⁶⁵ Whether attacks on civilian foreign nationals abroad would do the same is unsettled.⁶⁶

3. *Non-Physical Acts of Coercion and Interference Measures*

Acts of coercion that barely straddle the force threshold will almost always qualify as low-gravity acts.⁶⁷ Interdiction, seizures, and information disruptions may be kinetic enough to qualify as force, but are always unlikely to cause enough physical destruction

violence by peripheral or irregular forces would “seem to fall outside the concept of armed attack”).

⁶⁴ See e.g., *Guyana v. Suriname*, Arbitral Tribunal Constituted pursuant to Article 287, and in Accordance with Annex VII of the United Nations Convention on the Law of the Sea (Perm. Ct. Arb. 2007) ¶ 445 [hereinafter *Guyana v. Suriname*] (holding that expulsion of an oil platform from disputed territory violated the prohibition of the use of force); *Oil Platforms*, *supra* note 43.

⁶⁵ Article 3(d) of the Definition of Aggression classifies assaults against military units stationed abroad as acts of aggression, which suggests that attacks of this variety can also qualify as armed attacks. See *Definition of Aggression*, *supra* note 12.

⁶⁶ The governing case for such a scenario would have been the 1976 raid by Israeli commandoes to free civilian hostages held at Uganda's Entebbe airport. Uganda was believed to have been complicit in the hijacking of an airplane outside Israeli airspace and subsequent taking of Israeli hostages, which Israel deemed an armed attack triggering self-defense. Although the Security Council was unable to come to a consensus on the legality of Israel's actions, a majority viewed them as a violation of the U.N. Charter's prohibitions against the use of force since Israel itself was not directly attacked. See Major Jason S. Wrachford, *The 2006 Israeli Invasion of Lebanon: Aggression, Self-Defense, or Reprisal Gone Bad?*, 60 A. F. L. REV. 29, 40 (2007).

⁶⁷ See DeFrancia, *supra* note 30 and accompanying text (describing those intermediate interference and law enforcement measures which may or may not be regarded as forcible).

to amount to an armed attack.⁶⁸ Mere *threats* of military violence occupy the force gap by their very definition, insofar as Article 2(4) forbids such provocations, and yet threats alone can never justify self-defense under the majority, Restrictionist interpretation of Article 51.⁶⁹

Cyber-attacks and other forms of information warfare represent a recently emergent class of weaponry, and are particularly challenging to classify, a task the Paper will more comprehensively tackle in Part IV. For now, suffice it to say that there is widespread disagreement over how to evaluate the impact of these non-traditional vehicles for delivering force, with a methodology called the “effects-based” approach recently appearing to gain ground.⁷⁰ Interestingly, nearly all of the scholars and governments who have addressed the issue have framed their analysis around the distinction between cyber-attacks that are non-forcible versus those constituting armed attacks, when a large spectrum of severity exists between the two extremes. Most of the state-authored cyber-attacks thus far have been of a non-forcible variety, but future cases where an information disruption causes real, but not catastrophic physical damage, would likely qualify as a low-gravity assault, falling into the Charter loophole.

⁶⁸ See *id.* at 761 (noting that “when interdiction and interference measures do qualify as uses of force, they will likely occupy this low-gravity use of force”).

⁶⁹ *Guyana v. Suriname*, *supra* note 64. Counter-Restrictionist advocates of anticipatory self-defense would almost certainly disagree that threats can never justify self-defense. See Subsection I.B.1, *supra*.

⁷⁰ See OFFICE OF GENERAL COUNSEL, *An Assessment of International Legal Issues in Information Operations*, U.S. DEP’T OF DEF 1, 25(1999), available at <http://www.au.af.mil/au/awc/awcgate/dod-io-legal/dod-io-legal.pdf> (stating that “it is far from clear the extent to which the world community will regard computer network attacks as “armed attacks” or “uses of force”...[and that classification will] probably depend more on the consequences of such attacks than on their mechanisms”); Hathaway, *supra* note 14, at 848 (advocating an effects based approach that “defines a small core of harmful cyber-attacks that rise to the level of an armed attack...[and] focuses the armed attack analysis on a limited set of criteria--particularly severity and foreseeability”); *but see* Waxman, *supra* note 14, at 434-35 (asserting that computer-based intelligence collection, espionage, and passive cyber-operations that do not “produce destructive consequences analogous to a kinetic military attack” would never trigger self-defense rights).

4. *State Sponsorship of “Indirect Force” and Non-State Actors*

Our final, Category 4 of low-gravity force involves forcible coercion by proxy groups and non-state actors. As borderline members of the international community, non-state actors have less of an incentive to obey legal norms like the prohibition of the use of force, and, historically, such subnational entities have demonstrated a preference for asymmetric, small-scale assaults. Courts and institutional bodies had, before September 11, 2001, been reluctant to attribute ‘most grave’ conduct to either non-state actors⁷¹ or the states that sponsored and hosted them. Arming or training a subnational actor is not, in itself, sufficient to implicate a state in an armed attack, while it may well be sufficient to implicate the sponsor in an Article 2(4) violation in certain cases.⁷² *Nicaragua’s* “effective control test” had, for decades, provided a strict nexus requirement for determining whether a host state can be held responsible for a terrorist group’s acts, requiring a close, operationally communicative relationship to exist for it to be targetable with defensive measures.

Yet the world community’s recognition of al Qaeda (and Afghanistan’s Taliban government) as the legitimate authors of an armed attack on the United States in 2001 indicated a stark departure

⁷¹ See Advisory Opinion on the Legal Consequences of the Construction on a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136 (July 9) [hereinafter *Palestinian Wall Case*] (holding that Israel’s claim of self-defense against the Palestinians is rejected as a result of the fact that the “attacks against it are not imputable to a foreign state”); *Armed Activities in the Congo*, *supra* note 41, at 223 (holding that Congo’s self-defense claim must be rejected because the attacks against it came from the non-state actor ADF, and not the actual DRC government); *but see* *Palestinian Wall Case*, *supra*, at 215 (dissenting opinion of Judge Higgins) (“There is . . . nothing in the text of Article 51 that thus stipulates that self-defence is available only when an armed attack is made by a State. That qualification is rather a result of the Court so determining in [*Nicaragua*].”).

⁷² See *Nicaragua*, *supra* note 2, at 119 (holding that, while the U.S.’s provision of financial and logistical support to the Nicaraguan contras constituted an unlawful use of force, the Court could *not* say that “the provision of arms to the opposition in another State constitutes an armed attack on that State”).

from this framework;⁷³ and recent state practice has reflected a broader theory of self-defense by other nations against “indirect” sponsors of armed attacks.⁷⁴ Without question, this trend reflects an increasingly pliable rubric for calibrating host-state involvement in Article 51 “most grave” force, one that more closely resembles the “overall control test” adopted by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the *Tadić* case.⁷⁵

Thus, Category 4 probably sweeps a narrower percentage of forcible attacks within its ambit than it would have eleven years ago, when terrorism by non-state actors was associated with skirmishing and small-scale acts of violence. Still, there remain a substantial number of scholars who argue that only states are capable of launching Article 51 armed attacks; and there is no guarantee that international courts will follow the recent trajectory of state practice on the issue.⁷⁶ For now, while significant recent shifts have left the

⁷³ See S.C. Res. 1368, UN Doc. S/RES/1368 (Sept. 12, 2001) (authorizing necessary self-defense in response to the 9/11 attacks in New York City and Washington, D.C., and hence implying that al Qaeda’s conduct is an Article 51 ‘armed attack’). Before launching the 2001 Afghanistan offensive, there was no inquiry at all, by NATO or the United States, into whether the Taliban exercised operational control over the al Qaeda terrorist organization, a detail that apparently proved irrelevant. *Id.* Almost without question, the Taliban’s association with al Qaeda and involvement in the terrorist attacks would have failed the “effective control” test from *Nicaragua*. *Id.*

⁷⁴ Israel’s cross-border attacks into Lebanon against Hezbollah; Turkey’s incursions into Iraqi territory to attack Kurdish bases, and Russia’s cross-border attacks on alleged Chechnyan terrorist bases in Georgia all fit this description. See also Jordan J. Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT’L L. & POL’Y 237, 238 (2010) (“The vast majority of writers agree that an armed attack by a non-state actor on a state, its embassies, its military, or other nationals abroad can trigger the right of self defense”).

⁷⁵ See *Tadić*, *supra* note 27, ¶137; Stahn, *supra* note 46, at 47.

⁷⁶ Karl M. Meessen, for example, submits that the Charter was designed to regulate interaction between states, and that the armed attack requirement was “clearly coined to preserve or restore peace with regard to the only type of attacks known at the time of the Charter’s drafting,” Karl M. Meessen, *Unilateral Recourse to Military Force Against Terrorist Attacks*, 28 YALE J. INT’L L. 341, 346 (2003).

law of *jus ad bellum* complicity fairly unsettled, “indirect force” by third parties remains less likely to trigger Article 51 than the military acts of nation-states.

D. Responses to Force Gap Provocations

How do states respond to force gap provocations under the prevailing regime? The choices are unappealing, and indeed, confirm that the force gap is a problem not just of governance but of security.

1. Deferral

For a nation harassed by an ongoing series of *de minimis* assaults in an asymmetric military setting, one strategy is to defer action until multiple breaches of Article 2(4) amount to a cumulative “armed attack,” worthy of a full response. This has arguably been Israel’s strategy against rocket-firing militants in the West Bank for almost a decade. As the paramilitary wing of Palestinian radicals, called the al Aqsa Martyrs’ Brigade, has peppered southern Israel on an almost consistent basis with dysfunctional and inconsequential rockets, Israel has chosen not to respond to every single salvo, but instead, launched occasional, but decidedly robust, military operations every few years to knock out the rocket sites, citing as cause the large number of accumulated rockets fired since the previous Israeli response.⁷⁷

⁷⁷ See e.g., *The Operation in Gaza- Factual and Legal Aspects*, THE STATE OF ISRAEL 1, (2009), available at <http://www.jewishvirtuallibrary.org/jsourc/Peace/GazaOpReport0709.pdf> (arguing that Israel had “a right and an obligation to take military action against Hamas in Gaza to stop Hamas’ almost incessant rocket and mortar attacks...[including] some 12,000 rockets and mortar shells between 2000 and 2008...[with] nearly 3,000 rockets and mortar shells in 2008 alone”) for one example of this military and legal tactic.

2. *Police Action*

Alternatively, law enforcement presents another path for a state finding itself stranded in the force gap, particularly in cases involving terrorism and non-state actors, where it can be an effective tool, and sometimes, the only one available.⁷⁸ If the perpetrators are operating without the direct sponsorship of a state, they may be treated as criminals subject to domestic law enforcement; and, in the case of terrorism, states are legally required to either try or else extradite them, under various multilateral U.N. treaties.⁷⁹

3. *International Relief*

Victim states can also seek forcible or non-forcible assistance from the Security Council. If it finds there to be a threat to the peace, breach of the peace, or an act of aggression, the Council may take action on behalf of the targeted country. This assistance can take the form of anything from a mere condemnation of the aggressor's action,⁸⁰ to orders aiding with extradition and law enforcement,⁸¹ to

⁷⁸ See Jost Delbrück, *The Fight Against Global Terrorism: Self-Defense or Collective Security as International Police Action? Some Comments on International Legal Implications of the "War Against Terrorism,"* 44 GER. Y.B. INT'L L. 9, 19-24 (2001) for an analysis of international police action in the war on terror.

⁷⁹ See Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 565; Convention for the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641; see generally U.S. DEPARTMENT OF STATE OFFICE FOR COUNTERTERRORISM, INTERNATIONAL TERRORISM CONVENTIONS (1998), available at <http://www.state.gov/j/ct/>.

⁸⁰ See S.C. Res. 660, U.N. SCOR, 45th Sess., U.N. Doc. S/RES/660, at 19 (1990) (condemning Iraq's invasion of Kuwait and calling upon its withdrawal to its own territory).

⁸¹ See, e.g., S.C. Res. 1267, U.N. SCOR 4015th mtg. 1999 (voicing its disapproval of Afghanistan continuing to shelter al Qaeda and ordering the Taliban to hand over Osama bin Laden); S.C. Res. 731, U.N. SCOR, 3033rd mtg. 1992 (imposing sanctions on Libya until it agreed to extradite those responsible for the Pan Am bombings in Scotland).

sanctions under Article 41 of the U.N. Charter. The Security Council has historically been reluctant to deploy international force in cases of clear armed attacks, and it would be highly unlikely to send, or bless with its approval, military reinforcements for a state suffering low-grade coercion. This is not particularly surprising. While armed invasions may not be difficult to recognize, low-gravity attacks are often short-term, intermittent and sufficiently idiosyncratic in nature that the Security Council might not be expected to investigate and remediate these assaults in a timely fashion. Resolutions expressing the support of the international community of nations are not insignificant, nor obviously, are economic sanctions, but the Security Council is ill-equipped to police low-intensity breaches of sovereignty, particularly cyber-attacks.

4. *Countermeasures*

But the most direct way a state can address low-gravity attack is by deploying non-forcible countermeasures, which the Draft Articles on State Responsibility define as “measures that would otherwise be contrary to the international obligations of an injured State vis-à-vis the responsible State, if they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation.”⁸²

These unilateral, otherwise illegal self-help tools usually feature some type of economic coercion, and provide a means by which one state can respond to another’s international violation without resorting to military confrontation.⁸³ Since their inclusion in

⁸² United Nations International Law Community Draft Articles on Responsibility of States for Internationally Wrongful Acts, U.N. GAOR, 53d Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001), at 129 [hereinafter Draft Articles].

⁸³ In the *Gabcíkovo-Nagymaros Project* case, for example, the ICJ heard a dispute in which Czechoslovakia responded to Hungary’s breach of a public works and flooding treaty by diverting the Danube River—shared by both nations—along a new route, and building alternative public works alongside it. *Gabcíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25) [hereinafter *Gabcíkovo-Nagymaros Project*].

the Draft Articles,⁸⁴ countermeasures have proved controversial; yet advocates insist that, in the absence of a centralized enforcement authority for international law, countermeasures are a necessary, default instrument of dispute resolution.⁸⁵

They don't come without strings attached, however, and the Draft Articles impose fairly strict limitations on their use, far tighter, for example, than the proportionality and necessity principles fettering *jus ad bellum* self-defense. Before deploying any countermeasures, an injured state is required to first call upon the violating state⁸⁶ to desist its wrongful activity and notify it of the impending countermeasures.⁸⁷ Countermeasures are generally agreed to never involve the use of force,⁸⁸ nor can they ever justify the

⁸⁴ See JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 48 (Cambridge 2002) ("Concerns [regarding the provisions on countermeasures] were expressed at various levels. The most fundamental related to the very principle of including countermeasures in the text, either at all or in the context of the implementation of State responsibility.").

⁸⁵ See, e.g., N. Jansen Calamita, *Sanctions, Countermeasures, and the Iranian Nuclear Issue*, 42 VAND. J. TRANSNAT'L L. 1393, 1419 (2009).

⁸⁶ The Draft Articles do not specify how a state may use countermeasures against a non-state actor, but, as Professor Oona Hathaway notes, injurious international law violations by non-state actors often implicate the obligations of the states hosting them. See Hathaway, *supra* note 14, at 857 n.171 (citing Corfu Channel, *supra* note 22, at 22 (holding that states are required "not to allow knowingly its territory to be used for acts contrary to the rights of other States")). To determine *when* and under what conditions a state bears responsibility for the acts of a non-state agent, the Draft Articles do provide some guidance. See Draft Articles, *supra* note 82, at 65.

⁸⁷ Draft Articles, *supra* note 82, at 135.

⁸⁸ There is some limited pushback here by judges and scholars, but the overwhelming majority view is that countermeasures are, by definition, non-forcible. See CRAWFORD, *supra* note 84, at 283 (noting that the use of the term "countermeasures" in the Draft Articles is confined to the non-forcible part of reprisals). See also GA Res. 2625, U.N. GAOR, 6th Comm., 25th Sess., Annex, at 122, U.N. Doc. A/8082 (1970) (resolving that "states have a duty to refrain from acts of reprisal involving the use of force"); Nicaragua, *supra* note 2, at 101; Corfu Channel, *supra* note 22, at 108-09; Guyana v. Suriname, *supra* note 64, ¶445 (denying Suriname's claim that its expulsion of an oil platform was a legitimate countermeasure, as a result of its forcible aspects, which were "more akin to a threat of military action").

violation of fundamental human rights or *jus cogens* norms.⁸⁹ They must additionally be “commensurate with the injury suffered”—not only proportional in effect, but preferably reciprocal in nature.⁹⁰ Finally, the countermeasures must be temporary and, as much as is feasible, reversible: once the violating state has ceased its wrongful action and reparations have been made, the legal relations between the two adversarial states must return to the status quo ante,⁹¹ and any countermeasures deployed after the instigating state has discontinued its injurious behavior are no longer countermeasures, but illegal reprisals.⁹²

Although most of the cases on countermeasures involve states responding to non-forcible violations; but there is nothing that says that countermeasures cannot be deployed as a response to military force.⁹³ Thus, even if low-gravity force does not trigger a state’s right to self-defense, it presumably *does* constitute an “internationally wrongful act” violating both Article 2(4) and the customary international law of non-intervention, which prohibits states from interfering in the affairs of other states.⁹⁴ The targeted

⁸⁹ Draft Articles, *supra* note 82, at 131.

⁹⁰ *Id.* at 129; Gabčíkovo-Nagymaros Project, *supra* note 83, at 56; Case Concerning Air Services Agreement of 27 March 1946 (U.S. v. Fr.), 18 R. Int’l Arb. Awards 417, 444-45 (Perm. Ct. Arb. 1980) [hereinafter Case Concerning Air Services]; Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa (Port. v. Germ.), 2 R. INT’L ARB. AWARDS 1013, 1028 (1928).

⁹¹ See Gabčíkovo-Nagymaros Project, *supra* note 83 (listing reversibility among the restrictions on the use of countermeasures).

⁹² Reprisals are instances of illegal force used in a retaliatory manner, after the previous injury has been inflicted. See, e.g., STANIMIR A ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 17-18 (1996) (“Because of their nature reprisals come after the event and when the harm has already been inflicted.”).

⁹³ See e.g., BROWNLIE, *supra* note 25, at 279 (explaining that, even if certain levels of indirect force cannot justify armed action, “indirect aggression and the incursions of armed bands can be countered by measures of defence which do not involve military operations across frontiers”).

⁹⁴ See G.A. Res. 37/10, U.N. Doc. A/RES/37/10 (Nov. 15, 1982); G.A. Res. 25/2625, U.N. Doc. A/RES/25/2625 (Oct. 24, 1970). The ICJ has held that, where the intervention involves armed force, the norm is coterminous with Article 2(4). See Nicaragua, *supra* note 2, at 109-110 (“[A]cts constituting a breach of the

state would then be entitled to respond with lawful countermeasures—but not reprisals—until the aggressor returns to legal compliance by terminating its low-gravity coercion.

And yet, there is a logical inconsistency here. If law enforcement countermeasures must be commensurate and reciprocal to the precipitating violation, but the wrongful behavior consists of military force violating Article 2(4) of the U.N. Charter, then the state under low-gravity assault cannot reply with a countermeasure that is both non-forcible *and* commensurate. It is an important paradox to which the Paper will return in Part III.

II. The Origins of the Force Gap

Before considering whether and how to bridge the force gap, one must first explore its origins. To the extent that the gap reflects a thoughtful limitation on the retaliatory capabilities of states, imposed by the drafters of the U.N. Charter, those limitations may or may not remain worthy of consideration. To the extent it is a product of enforcement and administrative failure, the contemporary scholar must consider whether and to what extent the global community should expect those deficiencies to persist.

A. The Drafting Choice

There is every reason to believe that an intentional choice was made in San Francisco to accept a gap in the post-World War II force regime: while breaking the peace would certainly not be tolerated, nor would over-reacting to a limited infraction. The path to war had to be blocked with as many obstacles as possible, even if such a framework placed victim states at an apparent disadvantage in certain contingencies. The drafters of Article 51 did not overlook the principle of self-defense, but chose to limit it.

customary principle of nonintervention will also, if they directly or indirectly involve the use of force, constitute a breach of the principle of non-use of force in international relations.”

1. *Shifting From Peace to Justice*

The Charter's general tendency is to move security responsibilities *away* from individual member states and vest them in the United Nations.⁹⁵ This is for good reason. Almost every territorial invasion by the Axis Powers during World War II was justified with pretexts of self-defense. Consider, for example, Nazi Germany's invasion of the Soviet Union in 1941. In a proclamation explaining the rationale for attack, Hitler announced: "Today, about 160 Russian divisions stand at our border. There have been steady border violations for weeks, and not only on our border, but in the far north, and also in Rumania. Russian pilots make a habit of ignoring the border, perhaps to show us that they already feel as if they are in control."⁹⁶ In other words, the Führer's official explanation for a massive German blitzkrieg was the presence of Soviet forces *near* Nazi territory. Military aggression clothed in anticipatory self-defense was not just one of the many issues concerning the Charter's drafters in 1945. It was the very reason for their presence in San Francisco.⁹⁷

This concern may have been entirely justified, but limitations on self-defense inevitably come with their own costs. The fact that a sovereign state can come under unlawful military attack, but be legally barred from using force to protect itself, seems to violate basic notions of reciprocity, fairness, and equity; and while the drafters' design also presents troubling pragmatic implications, such as the lack of a military deterrent to lower-gravity aggression, the

⁹⁵ See David Sloss, *Forcible Arms Control: Preemptive Attacks on Nuclear Facilities*, 4 CHI. J. INT'L L. 39, 54 (noting that "the UN Charter embodies a strong preference for collective action under Security Council auspices, rather than individual (or even collective) self-defense that is not authorized by the Security Council").

⁹⁶ *Der Führer an das deutsche Volk 22. Juni 1941*, in DER GROßDEUTSCHE FREIHEITSKAMPF. REDEN ADOLF HITLERS, VOL. 3 51-61 (Philipp Bouhler ed., Munich: Franz Eher)(1942).

⁹⁷ See Jackamo, *supra* note 16 (noting that "the primary purpose of the formation of the United Nations was the prevention of war").

modern critic's more fundamental discomfort with the force gap is sovereignty-based. Indeed, the drafter's choice reflects a core principle animating the Charter, requiring that states sacrifice autonomy in the interests of commitment and security, and the document contains provisions that bind the prerogatives of member states even more than Article 51.⁹⁸

We have witnessed something of a paradigm shift in international law since 1945. Entitlements like self-determinism, democratic legitimacy, and human rights were not the highest priorities in 1945, when geopolitical stability was the order of the day, and new institutions of international law were created largely as instruments of communal welfare,⁹⁹ rather than small claims courts. The majority of scholars writing on the subject will note that U.N. enforcement measures were not intended to bring about justice or provide easily accessible remedies for wronged parties, but to prevent and contain security crises.¹⁰⁰ Anthony Arend and Robert Beck have argued that today's retreat from communitarian values and movement towards sovereign rights and self-help is a reflection of the ultimate failures of the Twentieth Century's international governing order.¹⁰¹ We have entered what Arend and Beck call a new "post-Charter period" of distrust in collective action,¹⁰² one

⁹⁸ For example, Article 2(6) is a fairly radical provision designed to bind even non-signatories to the U.N. Charter, which stands in direct conflict with Article 35 of the 1969 Vienna Convention on the Law of Treaties (proclaiming that a state can only take on an obligation in writing, unless it has become customary international law).

⁹⁹ In addition to the United Nations, the post-War years also saw the formation of the International Monetary Fund, the World Health Organization, and many more multilateral institutions. For a discussion of the communitarian values driving this moment in history, see Anthony Arend & Robert Beck, *International Law and the Recourse to Force: A Shift in Paradigms*, in *INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS* 285-315 (2nd ed. 2003).

¹⁰⁰ See, e.g., John D. Becker, *The Continuing Relevance of Article 2(4): A Consideration of the Status of the U.N. Charter's Limitations on the Use of Force*, 32 *DENV. J. INT'L L. & POL'Y* 583, 601 (2004); OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 129-31 (1991) [hereinafter SCHACHTER, *INTERNATIONAL LAW*].

¹⁰¹ Arend & Beck, *supra* note 99, at 286.

¹⁰² *Id.* at 287.

where sub-global units—like states and citizens—pursue individual expression, sometimes to the detriment of the world order.

2. *The Reprisal Doctrine*

The great irony is that this “new,” decentralized emphasis on inter-state justice, where states forego multilateral channels to right wrongs and pursue remedies individually, resembles in some respects the *pre*-Charter legal regime. Before two world wars had shaken the globe’s firmament with the horrifying costs of total war, nations relied largely upon the threat and use of armed violence to enforce legal obligations in what was termed the reprisal doctrine.¹⁰³ When a political or legal dispute arose, it wasn’t submitted to some multinational, centralized bureaucracy, but resolved through confrontation and *just war*, where might made right, and spoils functioned as remedies. Jackson Nyamuya Maogoto aptly describes how the sheer scope of 20th century aggression brought an end to the reprisal model of international law:

Reciprocity was fundamental to the international law regime on the use of war in its formative stages. . . States could punish another state that threatened the balance, an armed attack, in whatever context, triggered all the rights of self-preservation. International law was in essence primarily enforced through reciprocal entitlement violations (underpinned by military force)—if state A violated an entitlement of state B, state B was justified in violating an entitlement of state A. However, development of military technology exposed the danger of potential escalations of entitlement violations leading to international anarchy, hence the need to replace politics with legal principles as the yardstick for governing war or

¹⁰³ For a historical analysis of the pre-Charter *just war* approach to settling legal disputes with military confrontation, *see generally* HEDLEY BULL, *THE ANARCHICAL SOCIETY* (2d ed. 1995).

resort to war.¹⁰⁴

The modern critique of the force gap presupposes that a victim state under low-gravity attack is not only capable of responding with restraint, but indeed, *likely* to respond with restraint; yet, in crafting Article 51, the Charter's drafters confronted a historical tradition of retaliatory escalation, when reprisals were not simply vehicles of defense, but also a "form of self-help . . . for states to get compensation for their losses, punish their offenders, and deter future violations."¹⁰⁵ Before the Charter, invoking legitimate self-defense entitled a claimant to almost *carte blanche* freedom in its use of force, as a nation under attack essentially played policeman, judge, and jury for the crimes of its aggressor. Not surprisingly, this limitless discretion proved dangerous, opening the door to legally sanctioned, disproportionate responses to violations.¹⁰⁶ The term "self-defense" carries an innocuous modern connotation, but the Charter confronted a historical record in which an unlimited right of self-defense posed even more of a threat to peace, perhaps, than unilateral aggression itself.

Article 51's armed attack trigger may best be understood, therefore, not as a drafting oversight but a reasoned response to history.¹⁰⁷ The world had just witnessed the disastrous consequences of "self-help" dispute resolution, and placed its trust in international institutions to keep the peace, in a time before our multilateral bodies had come under fire for their ineffectiveness. Put differently, "justice over peace" had been exposed as a losing strategy by the time the U.N. Charter was laid before the delegates in San Francisco, and

¹⁰⁴ Maogoto, *supra* note 25, at 419 n.74.

¹⁰⁵ *Id.* at 420.

¹⁰⁶ *Id.*

¹⁰⁷ See Nicaragua, *supra* note 2, at 151 ("The logic behind this extension of the principle of non-use of force to reprisals has been that if use of force was made permissible not as a lone restricted measure of self-defence, but also for other minor provocations demanding counter-measures, the day would soon dawn when the world would have to face the major catastrophe of a third World War, an event so dreaded in 1946 as to have justified concrete measures being taken forthwith to eliminate such a contingency arising in the future.").

“peace over justice” still looked possible, with the aid of a centralized security apparatus.

Whether the Security Council is, or in fact ever was, capable of remediating low-gravity assaults is a separate question. But the drafters of the U.N. Charter appear to have been unwilling to invest in member states an unlimited right of self-defense in response to every assault, and for good reason.

B. *The Interpretation Factor*

The breadth of the Charter’s force gap will always be determined by interpretations of Articles 2(4) and 51. If anything, the gap has been growing since 1945, as courts and scholars have stretched apart what was probably intended to be a more negligible crack of daylight between prohibited force and the self-defense trigger.

First, scholars have suggested that expansive readings of the force prohibition have made Article 2(4) impractical for states seeking flexibility in addressing legal disputes. The norm’s enforcement has indisputably seen erosion in certain contexts—there is an almost ceaseless proposal for extralegal exceptions, such as unilateral humanitarian intervention¹⁰⁸—but at the lowest thresholds of *de minimis* force, courts have arguably calibrated too liberally. Christian DeFrancia, for example, maintains that, by sweeping minimally coercive law enforcement into the ambit of unlawful force, courts discourage states from more tactical pressure application, which decreases the probability of negotiated settlements and (ironically) increases the probability of escalation.¹⁰⁹ DeFrancia calls these tools “intermediate status preventive measures;” and argues that, in taking them off the table, harsh constructions of the

¹⁰⁸ See, e.g., Scheffer, *supra* note 33; Simon, *supra* note 33.

¹⁰⁹ See DeFrancia, *supra* note 30, at 770 (submitting that “whether any coercive police activities [against a violating state] can meaningfully exist with such a broadly applied prohibition on force is unclear...[and that] such a wide conception risks subsuming all acts of sovereign law enforcement into Article 2(4)”).

prohibition have made delicate geopolitical tasks like counter-proliferation far more difficult.¹¹⁰

An illuminating example is a recent case between Guyana and Suriname, wherein an ad hoc tribunal determined that a remarkably low-gravity incident involving the expulsion of an oil platform from a contested territory breached the use of force prohibition.¹¹¹ In the case, Surinamese navy boats warned supervisors of the oil rig that it was encroaching into Surinamese waters, and that it must leave the area within twelve hours or “face consequences.”¹¹² The arbitrators rejected Suriname’s characterization of the warning as a lawful, non-forcible countermeasure to a specific violation of a Guyana’s international legal obligation not to drill in a disputed area of the continental shelf,¹¹³ holding that the measures were “more akin to a[n unlawful] threat of military action rather than a mere law enforcement activity.”¹¹⁴ Critics like DeFrancia thus insist that, under such an expansive characterization of forcible activity, there is virtually no effective police action that does not breach Article 2(4)—particularly at sea, where coercion usually requires some degree of small-scale posturing—thus depriving decision-makers of a more nuanced approach to dispute resolution.¹¹⁵

Narrow readings of Article 51 have expanded the force gap as well. As previously discussed,¹¹⁶ the dominant juristic view on the defensive use of force is highly restrictive under *Nicaragua*. From the moment the ICJ case was decided, the dissenting judges contended that the court’s restrictive ‘scale and effects’ test betrayed the Charter’s interest in protecting states from acts of aggression; and, in an era of increasing nationalist and revolutionary instability, rendered Article 51 increasingly obsolete by effectively excluding

¹¹⁰ DeFrancia, *supra* note 30, at 760-61 (arguing that certain types of police and international law enforcement acts like seizures of banned weaponry on the high seas should legally and practically not be included as uses of force).

¹¹¹ *See* Guyana v. Suriname, *supra* note 64.

¹¹² *Id.* at ¶ 434.

¹¹³ *Id.* at ¶ 441.

¹¹⁴ *Id.* at ¶ 445.

¹¹⁵ DeFrancia, *supra* note 30, at 770.

¹¹⁶ *See* Subsection I.B.2, *supra*.

indirect acts of force, like the arming and training of armed bands, from armed attacks.¹¹⁷ In their view, such a thin scope of armed attack asks far too much of victim states, given the fact that, first, U.N. enforcement of armed breaches is relatively anemic, and second, most of the significant conflicts of the past half-century were initially precipitated by sub-Article 51 grades of violence.¹¹⁸

There is also a potential de-legitimization problem: even for those not holding the viewpoint of the United States¹¹⁹ (and a minority of jurists)¹²⁰ that force alone qualifies as an armed attack, the stricter facets of *Nicaragua's* gravity test have become less realistic in the age of low-intensity, sporadically violent terrorism, and hence, less authoritative. As one scholar puts it, “the practical reality is that it is exceedingly difficult to check the escalation of violence once it has been initiated,” and any narrow interpretive theory of Article 51 “is doomed to fail, because political leaders will listen to generals, not lawyers, when responding to an armed

¹¹⁷ *Nicaragua*, *supra* note 2, at 341 (dissenting opinion of Judge Schwebel) (claiming that the Court’s holdings on the definition of ‘armed attack were “inconsistent with the large and authoritative body of State practice and United Nations interpretation”); (Judge Jennings dissenting) (arguing that the Court’s narrow view of armed attack went too far, and was “neither realistic nor just in the world where power struggles are in every continent carried on by destabilization, interference in civil strife, comfort, aid and encouragement to rebels, and the like”). *Id.*

¹¹⁸ *See Nicaragua*, *supra* note 2, at 343 (dissenting opinion of Judge Schwebel) (“[I]t may be added that from at least the Spanish Civil War onwards, the most endemic and persistent forms of resorts to armed force ... have been in contexts caught as ‘aggression’ [and consequently, armed attack] by the Soviet and Six Power drafts [which passed the General Assembly], but condoned more or less fully by the Thirteen Power Draft [which was rejected].”).

¹¹⁹ *See* Remarks of John Brennan, *supra* note 40 (reiterating that the U.S. does not recognize the existence of any force gap whatsoever).

¹²⁰ *E.g.*, *Oil Platforms*, *supra* note 43, at 331-32 (separate opinion of Judge Simma) (expressing the view that, “against such smaller-scale use of force [short of armed attack], defensive action -- by force also ‘short of’ Article 51 -- is to be regarded as lawful”); *Nicaragua*, *supra* note 2, at 348 (dissenting opinion of Judge Schwebel) (“It would be a misreading of the whole intention of Article 51 to interpret it by mere implication as forbidding forcible self-defence in resistance to an illegal use of force not constituting an ‘armed attack’.”).

attack.”¹²¹ Before September 11, a single, isolated incident seemed incapable of causing destruction sufficiently grave to trigger Article 51; whereas now, non-state actors and proxy organizations are arguably just as likely to threaten a state’s security as a large-scale military, prompting intense scrutiny of the Court’s “effective control” standard for third-party complicity in the acts of affiliated groups.¹²²

Arguably, the concerns driving the narrow interpretation of Article 51’s scope can be alleviated by reasonable application of the principles of necessity and proportionality.¹²³ A state suffering minor provocations along its border or minimally coercive oil platform expulsions cannot lawfully use those disturbances as justification for a devastating counter-assault that leads to escalation, no matter how liberally it construes Article 51. Its response would, regardless, constitute a violation of international *jus ad bellum* law. Still, those principles have never been understood as particularly robust in the real world of escalating conflict,¹²⁴ and should not justify a finding that prohibited force under Article 2(4) and “armed attack” under Article 51 mean the same thing.

The historical abuse of self-defense and self-help was real, and the effort to divert low-gravity events away from the path to war was and is a worthy goal. The fact that the United Nations has proven incapable of affording redress for these more minor assaults does not mean that we should abandon the effort.

¹²¹ Sloss, *supra* note 95, at 52. For further commentary on the U.N. Charter’s impracticably restrictive approach to self-defense, see Reinold, *supra* note 4.

¹²² See, e.g., Stahn, *supra* note 46, at 42 (noting that, following the world’s overwhelming approval in attributing al Qaeda’s 9/11 attack to the Taliban with scant evidence of complicity, “it may be of greater consequence to admit openly that the requirement of attributability ...[no longer] play[s] a role in the definition of armed attack”).

¹²³ The principles of proportionality, distinction, and necessity appear in numerous multilateral treaties and are part of customary international law.

¹²⁴ See Sloss, *supra* note 95, at 52.

C. *The Enforcement Problem*

To be sure, the force gap would be a non-issue if in fact the Security Council provided a vehicle for addressing low-gravity assaults. In the words of *Nicaragua*'s dissenting Judge Jennings, "the United Nations' employment of force, which was intended to fill that [low-gravity force] gap, [has been] absent."¹²⁵

In ratifying the Charter, Oscar Schachter has explained, states agreed to give up a certain amount of their sovereign recourse to force, in return for an implicit guarantee of U.N. protection via enforcement mechanisms, particularly in military contingencies of marginal intensity.¹²⁶ Alas, not only has the Security Council failed to police low-gravity incidents; it also has not taken collective action against Article 51-level aggression with anything resembling consistency. Although the Security Council has admittedly shown recent signs of life in response to conflicts in Africa, the international community's purported instrument of enforcement was, for all intents and purposes, incapable of invoking Chapter VII until the 1990s, the main exception being the U.N.'s defense of South Korea (allowed only by the fortuitous absence of the Soviet Union from the Council during voting).¹²⁷

In his article *Who Killed Article 2(4)?*, Tom Franck attributes this disappointing phenomenon to a number of factors, including the veto privilege; fracturing of political alliances among the Council's permanent voting members during the Cold War; the lack of an independent military with which to halt aggression; and the rise of "small-scale" warfare in the second half of the Twentieth Century,¹²⁸

¹²⁵ *Nicaragua*, *supra* note 2.

¹²⁶ See SCHACHTER, *INTERNATIONAL LAW*, *supra* note 100, at 129 (arguing, additionally, that, inasmuch as the U.N. has betrayed this bargain, "states should be released from this renouncement").

¹²⁷ See, e.g., Becker, *supra* note 100, at 586 (tracing the history of Security Council inaction since what proved to be a distinctly atypical intervention in the Korean peninsula).

¹²⁸ See Franck, *Who Killed Article 2(4)*, *supra* note 17, at 811 (1970); but see Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 AM. J. INT'L L. 821 (1971) (arguing that the failures of Article 2(4) are

a period which another scholar, Albert R. Coll, has called “the era of violent peace” for its then-unrecognizable mix of unconventional, restrained violence falling somewhere between peace and war.¹²⁹

According to Franck, Chapter VII was designed specifically for intervening in conventional invasions, such as those of the Nazis in World War II, or Korea ten years later; and *not* for the guerilla-style revolutionary struggles of the Cold War era.¹³⁰ These small-scale, oftentimes internal, struggles often involved subtle alliances that were unsuited to the kind of black-and-white blame assignment required by Charter enforcement.¹³¹ As a result, one state’s encouragement of a guerilla, non-state movement would rarely rise to the level of an easily demonstrable Article 2(4) violation, simply by virtue of its less than kinetic conspicuousness, the *Nicaragua* case being a clear example of such confusion. Aggression less typically begins now with the massing of tanks and infantrymen along a state’s border, and determining which state or shadowy non-state actor is the aggressor, in any given low-gravity confrontation, is almost never conclusive. The U.N. rarely deploys fact-finding missions to investigate allegations of an Article 2(4) breach and when it does, the findings are usually dismissed as politicized and illegitimate.¹³² This shift in military tactics thus paralyzed an

disproportionately visible, relative to its successes, because, by definition a norm meant to deter wrongful behavior succeeds by the *absence* of events).

¹²⁹ Alberto R. Coll, *International Law and U.S. Foreign Policy: Present Challenges and Opportunities*, Autumn 1988 WASH. Q. 111 (defining violent peace as “a state of affairs in which a wide spectrum of unconventional and highly creative modes of violence ... are used against an adversary, while maintaining the pretense that no open war is occurring”). Coll explains that a state conflict was down-graded in its scale and intensity at the height of the Cold War, to the point that force itself has been converted into ambiguous, albeit illicit, activities that include support for guerilla warfare, aid to proxy terrorist groups, and support for acts of assassination and political intimidation against foreign leaders. *Id.*

¹³⁰ Franck, *Who Killed Article 2(4)*, *supra* note 17, at 812.

¹³¹ Becker, *supra* note 100, at 588; Franck, *Who Killed Article 2(4)*, *supra* note 17, at 811 (explaining how “small-scale warfare operates differently than conventional warfare ... [and] neither the form of warfare nor the assistance and support provided to it fits into conventional international legal concepts and categories”).

¹³² Franck was writing in the 1970s, yet an excellent example of this de-

international security apparatus that, according to Mr. Franck, didn't quite know how to regulate wars outside the bounds of traditional armed conflict.¹³³

To take just one instance of the Security Council's failure to adequately fill the Charter's low-gravity gap, let us consider the 1972 military exchange between Israel and Lebanon. The Palestinian Liberation Organization (PLO) had, at the time, launched a series of small-scale, albeit, destructive terrorist attacks on Israeli civilians from a base in Lebanon. In knowingly providing sanctuary for the armed group and facilitating their transportation, Lebanon's government was breaking their international obligations under *Corfu Channel*,¹³⁴ and probably violating Article 2(4), by meeting *Nicaragua's* "effective control" test.¹³⁵ However, even if the PLO's activity could be classified as an 'armed attack' under what would later become the "cumulative incidents" theory of self-defense,¹³⁶

legitimization of the United Nations is the U.N.-commissioned "Goldstone Report," wherein a fact-finding team made an assessment of the Israeli-Hamas conflict in Gaza in January 2009. Following the firestorm of criticism directed at the report's indictments of Israeli tactics, policy, and generally disproportionate military response, Richard Goldstone eventually recanted much of the report. See Richard Goldstone, *Reconsidering the Goldstone Report on Israel and War Crimes*, Wash. Post, Apr. 1, 2011, available at http://articles.washingtonpost.com/2011-04-01/opinions/35207016_1_drone-image-goldstone-report-israeli-evidence.

¹³³ Some scholars claim to have detected a pattern in the Security Council's extraordinary inconsistency in addressing aggression. Jackson Nyamuya Maogoto, for example, argues that in the late 1980s, the Council appeared to adopt a policy of generally tolerating those reprisals and breaches of Article 2(4) that could be presented as "reasonable" under extralegal criteria. This alleged practice of condemning only flagrant violations of Article 2(4) and not proportionate, albeit, illegal acts of force would contradict the U.N. Charter and, in effect, affirm the rights of states to resort to *just war*-style self-help. See Maogoto, *supra* note 25, at 424.

¹³⁴ *Corfu Channel*, *supra* note 22, at 22.

¹³⁵ *Nicaragua* was still over a decade away from being decided, but we may presume its standard for third-party complicity in wrongful conduct was already part of customary international law.

¹³⁶ See *Armed Activities in the Congo*, *supra* note 41, at 223 (suggesting the relevance of evaluating the "series of deplorable attacks" as "cumulative in character"); *Oil Platforms*, *supra* note 43, at 192 (holding that "taken cumulatively...[the series of attacks on U.S. ships in the Persian Gulf] do not seem to the Court to constitute an armed attack on the United States").

Lebanon's involvement was probably insufficient for such a charge, particularly decades before September 11, 2001.

The situation therefore, presented exactly the kind of low-gravity assault requiring a Security Council presence to fill the force gap. Yet, besides issuing a toothless warning reminding Lebanon of its third-party responsibilities, the Council did nothing.¹³⁷ Not surprisingly, a few weeks later, Israel sent artillery, tanks, planes, and ground forces into Lebanon to strike at PLO bases, prompting the Security Council to issue Resolution 313, ordering that "Israel immediately desist and refrain from any ground and air military action against Lebanon and forthwith withdraw all its military forces from Lebanese territory."¹³⁸ Israel treated the order with the same nonchalance Lebanon had exhibited towards the Council's instructions, and, months later, was back in Lebanon attacking PLO bases.¹³⁹

The stream of Lebanon-facilitated terrorist strikes on Israel probably did not constitute an 'armed attack' under the law at the time,¹⁴⁰ but remained an intolerable violation of the U.N. Charter all the same. Something or someone had to halt the unlawful provocations, yet the Security Council's efforts were anemic, which effectively forced Israel to either absorb the ongoing terrorism, or violate the U.N. Charter, not unlike our mythical subject in this Paper's Introduction.

If there were a robust enforcement mechanism capable of deterring low-gravity violations of Article 2(4), there would be no

¹³⁷ See Maogoto, *supra* note 25, at 422.

¹³⁸ S.C. Res. 313, ¶ 1, U.N. Doc S/RES/313 (Feb. 28, 1972).

¹³⁹ See Maogoto, *supra* note 25, at 422. For a biting critique of the U.N.'s failures in Lebanon, both by its resolutions and UNIFIL, see UN Watch, *Lebanon and the Many Faces of the UN*, UN WATCH (July 26, 2006), <http://www.unwatch.org/site/apps/n1/content2.asp?c=bdKKISNqEmG&b=1314451&ct=2842505>. See also Hassan M. Fattah & Warren Hoge, *U.N. Force in Lebanon Offers Harsh Realities and Lessons*, N.Y. TIMES (July 19, 2006), <http://www.nytimes.com/2006/07/19/world/middleeast/19lebanon.html> (discussing the ineffectiveness of UNIFIL).

¹⁴⁰ Post-9/11, it is possible that Lebanon could be viewed as legitimately complicit in an armed attack, and thus, subjected to lawful self-defense under Article 51.

force gap. And yet it is hardly a surprise that the Security Council or any international organization would prove incapable of providing an efficient response to the intermittent, variegated and rapidly evolving tactics of low-gravity assaults. Still, that does not mean we must either live with the force gap, or abandon the field entirely to extra-legal self-help, all of which brings international law into disrepute and creates risks to the very global security that the Charter was meant to preserve.

III. Plugging the Force Gap

The force gap was not fashioned by accident. It has roots in legitimate concerns about the historical abuse of “self-defense” by individual states, and yet it disserves the Charter’s fundamental interests in global security and the respect for law and international institutions. The international governing paradigm has shifted since 1945 from an emphasis on security to one of fairness. We are no longer *solely* interested in preventing the next world war, but also compelled by claims of individual and national injury, of grievances and remedies for those grievances.¹⁴¹ Indeed, the force gap actually works *against* the interests of security in today’s increasingly multilateral world, populated by shadowy threats, proxy non-state actors, and low-intensity violence that increase the chances of military escalation.¹⁴²

The question is how to fill the gap. One answer, this Paper submits, is to officially recognize what some states and even courts have already moved towards accepting: that member states must be permitted to devise *forcible* countermeasures to the threats that they face, and to legitimize those responses by adhering to the remainder of the law of countermeasures schema. In so doing, we will in effect be permitting an efficient, free-market response to a rapidly evolving array of security threats that do not lend themselves to regulation by

¹⁴¹ See Arend & Beck, *supra* note 99, at 285-315.

¹⁴² Accord Sloss, *supra* note 95, at 52 (explaining that “the practical reality is that it is exceedingly difficult to check the escalation of violence once it has been initiated”).

a central security structure, but will be doing so under the rubric of international law.

A. *Other Proposals for Reforming the Force Regime*

An ideal solution to the Charter's loophole would achieve a number of outcomes: it would, first, provide states under low-gravity attack with an effective, immediate form of help independent of the Security Council; second, serve the interests of justice by enforcing Article 2(4); third, deter potential aggressors from employing low-intensity violence with the expectation that any counter-attack would fall outside international law; fourth, avoid expanding self-defense into an easily abused pretext for disproportionate reprisals; and, fifth, preserve and enhance international law's legitimacy.

Even among those who have found the status quo inadequate, very few scholars or jurists have offered proposals of how to "plug" the force gap.¹⁴³ Some have suggested expanding the working definition of 'armed attack' in Article 51;¹⁴⁴ the U.S. has essentially revised the definition by fiat.¹⁴⁵ The current trend in state practice, following September 11, is towards adopting a more expansive interpretation of Article 51, particularly when non-state actors are involved.¹⁴⁶

Carsten Stahn, for example, has advocated such an approach, pushing for what he dubs an 'Article 51 ½.' Stahn sees an emerging right to self-defense against all terrorist attacks as just the most recent example in a series of claimed exceptions to the prohibition of the use of force—one that includes, for instance, what some have

¹⁴³ In fact, quite often these proposals—which I am framing as answers to the force gap quandary—were originally prescribed for other ills in our international law of force. I, nevertheless, present them here as viable options for those intent on bolstering the Charter's force regime.

¹⁴⁴ See Stahn, *supra* note 46, at 38 (calling for a new 'Article 51 ½,' whereby states are entitled to take action in other legally prohibited circumstances, and then appeal to the Security Council in a virtually meaningless, *ex post facto* procedure).

¹⁴⁵ See Remarks of Harold Koh, *supra* note 5 (reiterating that the U.S. position that any forcible conduct constitutes an armed attack).

¹⁴⁶ See *supra* text accompanying notes 73-74.

referred to as the “right to protect” foreign populations from gross humanitarian crises at the hands of their sovereigns¹⁴⁷—and argues that an expanded conception of Article 51 is preferable to this continued erosion of Article 2(4).¹⁴⁸ By broadening the spectrum of force justifying self-defense, Stahn thus hopes to further “isolate the Glennonists of international law, who call into question the viability of the Charter rules on the use of force.”¹⁴⁹ Like other scholars advocating for an expansion of Article 51’s scope, including the Counter-Restrictionists,¹⁵⁰ Stahn is not so much concerned with the security threats created by the force gap, as much as what he regards as the Charter regime’s splintering legitimacy.

However, the substantial disadvantages to such an approach are precisely those that concerned the Charter’s drafters: namely, that extending the right of self-defense makes it easier for states to abuse the Article by justifying disproportionately violent reprisals. Scholars like Stahn respond that the bedrock *jus ad bellum* principles of proportionality and necessity would mitigate such concerns,¹⁵¹ yet

¹⁴⁷ NATO’s intervention in Libya is such a case of threatened human rights violations, although the Security Council authorized international action in that situation, rendering an extralegal exception to Article 2(4) unnecessary.

¹⁴⁸ Stahn’s basic argument is that there has been a shift towards unilateral circumventions of Security Council authorizations in the context of terrorism, and that relaxing Article 51 to fit the reality of state practice would restore legitimacy to the force regime. *See* Stahn, *supra* note 46, at 41 (“The legal practice in the aftermath of the September 11 attacks has shown that a relaxation of the requirements of Article 51 may provide an incentive for states to circumvent the mechanism of the Council, and to opt for the less burdensome option of unilateral self-defense.”). Critics might allege, however, that Stahn’s legal strategy is ineffective, insofar as it resembles the famous proverb of giving a mouse a cookie, only to hope that it does not ask for a glass of milk. *Id.*

¹⁴⁹ *Id.* at 38. Mr. Stahn goes on to explain that his reform “avoids the perpetuation of the Kosovo dilemma, namely, the emergence of categories of uses of force that may be said to be illegal but justifiable.”

¹⁵⁰ *See, e.g.,* Beres, *supra* note 35; Glennon, *supra* note 35; Kearley, *supra* note 35; Walker, *supra* note 35 (all advocating for a broad definition of “inherent right” in Article 51, which would arguably include the right of anticipatory self-defense, according to the so-called *Caroline* doctrine).

¹⁵¹ Stahn, *supra* note 46, at 38 (arguing that concerns of abuse “may be attenuated by a reasonable application of the principles of necessity and proportionality, which are the cornerstones of the permissibility of the use of force

this ignores the dangerous precedent set in stretching the Charter's self-defense rights. A state's invocation of Article 51 represents something more than a corrective response to the inflictions of past and present injury; it essentially constitutes a declaration of war by the defending state, and perhaps just as importantly, it brands the provocateur's illegal, albeit, low-gravity action as acts(s) of war, when it may well constitute nothing more than an expulsion of an oil rig from disputed territory.¹⁵² Not only does this elevate and politicize a limited forcible exchange in the eyes of the world, it also changes the legal character of the confrontation and triggers legal obligations of the two parties that may be inappropriate for circumstances of low-intensity, contained violence.¹⁵³

As an alternative to rewriting (or ignoring) the limitations of Article 51, we could attempt a piecemeal regulation of low-gravity armed force. This would require either U.N. resolutions or international treaties tailored towards specific types of characteristically "less grave" forcible conduct, such as cyber-attacks, information warfare, and *indirect force* (third-party complicity in the conduct of non-state actors), among others. An international definition of cyber-attacks, for example, could be modeled after the Definition of Aggression and provide at least *some* guidance to threatened states for when and in what manner they are entitled to respond to cyber-attacks with defensive action.¹⁵⁴

in self-defense").

¹⁵² See *Guyana v. Suriname*, *supra* note 64, ¶ 445 (finding that Suriname's threatened expulsion of an oil platform constituted a "threat of military action" breaching U.N. Charter Art. 2(4)).

¹⁵³ Common Article 2 of the 1949 Geneva Conventions, for example, denotes the treaty's application to "all cases of declared war or of any armed conflict that may arise between two or more high contracting parties, even if the state of war is not recognized." Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31, art. 2. While some types of low-gravity violence might not trigger application of the Conventions, a state's claim of an Article 51 right to self-defense would almost certainly trigger their application.

¹⁵⁴ See, e.g., Hathaway, *supra* note 14, at 881 ("States could adopt a clear definition of cyber-attack, cyber-crime, and cyber-warfare in the context of a comprehensive binding treaty, nonbinding declaration, or through independent agreements in anticipation of more broad-based future cooperation."); ROBERT K.

Yet this strategy would not change the existing gap in the U.N. Charter, but merely fill in some of the empty space below the Article 51 trigger. Arguably, it would not even constitute *reform* of *jus ad bellum* law in the narrow sense of altering the fundamentals of the regime, but would have to operate under the somewhat Glennonite premise that certain classes of modern weaponry, personnel, and organizations deliver “force” in a manner so unanticipated by the U.N. Charter that international legislators must go outside the architecture of their founding document to build more targeted, precise agreements.

B. The Case for Forcible Countermeasures

This Paper proposes that the most efficient, balanced, and impactful path for reforming the force regime is one that has been hinted at and even tacitly practiced by states in the past, but never openly acknowledged as lawful: the re-calibration of the law of countermeasures to encompass forcible coercion, in the limited circumstances of repelling low-gravity assault.

1. Revisiting Force in Our Existing Law of Countermeasures

The majority of scholars, jurists, and states subscribe to the conception of “countermeasures” detailed in the ILC’s Draft Articles on State Responsibility, as non-forcible acts by which a state can respond to violations of international law and bring the violators

KNAKE, COUNCIL ON FOREIGN RELATIONS, INTERNET GOVERNANCE IN AN AGE OF CYBER INSECURITY 21-23 (Council Special Report 56, 2010) (recommending that the U.S. pursue international legal agreements to limit cyber-attacks); Duncan B. Hollis, *Why States Need an International Law for Information Operations*, 11 LEWIS & CLARK L. REV. 1023 (2007) (arguing that new international instruments are needed to regulate cyber-operations); *but see* Waxman, *supra* note 14, at 450 (arguing that the asymmetrical power dynamics of countries “will [make it] difficult to achieve such regulation through international use-of-force law or through new international agreements to outlaw types of cyber-attacks”).

back into legal compliance.¹⁵⁵ James Crawford, the Special Rapporteur of the International Law Commission has clarified that the term “countermeasures,” as used in the Draft Articles on State Responsibility, is confined only to the non-forcible part of reprisals.¹⁵⁶

However, the notion of forcible countermeasures may not be all that far outside the bounds of international law, particularly when it comes to responding to another state’s forcible coercion. In addition to a minority of scholars,¹⁵⁷ courts have acknowledged that permissible countermeasures by an injured state may straddle the line between law enforcement and force, in certain circumstances. For example, the aforementioned *Guyana v. Suriname* tribunal noted that “in international law, force may be used in law enforcement activities, provided that such force is unavoidable, reasonable and necessary;”¹⁵⁸ and the 1946 *Air Services Agreement* court explained that “if a situation arises which . . . results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through countermeasures.”¹⁵⁹ As a different writer has observed, the *Air Service Agreement* court’s use of the phrase “within the limits set by the general rules of international law pertaining to the use of armed force” is ambiguous; and, depending on its linguistic scope, might

¹⁵⁵ See GA Res. 2625, U.N. GAOR, 6th Comm., 25th Sess., Annex, at 122, U.N. Doc. A/8082 (1970) (resolving that “states have a duty to refrain from acts of reprisal involving the use of force”); Nicaragua, *supra* note 2, at 101; Corfu Channel, *supra* note 22, at 108-09; Guyana v. Suriname, *supra* note 64.

¹⁵⁶ CRAWFORD, *supra* note 84, at 283.

¹⁵⁷ See, e.g., CONSTANTINE ANTONOPOULOS, THE UNILATERAL USE OF FORCE BY STATES IN INTERNATIONAL LAW 321-22 (1997); Arai-Takahashi, *supra* note 46, at 1085 (suggesting that international law permit countermeasures that employ the use of force short of an armed attack); DeFrancia, *supra* note 30, at 770 (arguing that low-gravity uses of force might be better considered “under legal regimes of intervention or countermeasures, providing space for those areas of law to develop practical applications”); Maogoto, *supra* note 25, at 424 (arguing that “under recent UN practices, the status of reprisals may be viewed as illegal de jure but accepted de facto, provided they meet the requirement of proportionality”).

¹⁵⁸ Guyana v. Suriname, *supra* note 64, ¶ 445.

¹⁵⁹ Case Concerning Air Services, *supra* note 90, at 337.

“tacitly recognize the entitlement to invoke a counter-measure involving the use of force short of an armed attack.”¹⁶⁰

As I will detail below, ICJ judges have also, at times, advocated on behalf of permitting forcible countermeasures or, put differently, the rights of a state under low-gravity attack to respond with force, until the aggressor state ceases its coercion. Indeed, the Court itself has hinted that the use of limited force by states in the course of self-help and law enforcement can be legal. In *Nicaragua*—its landmark case on *jus ad bellum* doctrine—the ICJ addressed the issue in ambivalent terms:

While an armed attack would give rise to an entitlement to collective self-defence, a use of force of a lesser degree of gravity cannot . . . produce any entitlement to take collective counter-measures involving the use of force. The [low-gravity] acts of which Nicaragua is accused. . . *could only have justified proportionate counter-measures on the part of the State which had been the victim of these acts*, namely El Salvador, Honduras or Costa Rica. They could not justify counter-measures taken by a third State, the United States, and particularly could not justify intervention involving the use of force.¹⁶¹

The Court appears to suggest here that, whereas a third state cannot respond to a low-gravity attack with collective counter-measures involving force, the victim state under assault may be entitled to such a response. In context, it is difficult to read the passage any other way: the Court’s analysis in the case centered upon acts that were distinctly military in nature, specifically, low-gravity “frontier incidents” which would have permitted a “proportionate,” forcible response by Honduras, Costa Rica, or El Salvador, but not a third party like the United States.¹⁶²

¹⁶⁰ Arai-Takahashi, *supra* note 46, at 1085.

¹⁶¹ Nicaragua, *supra* note 2, at 127 (emphasis added).

¹⁶² ICJ Judge Schwebel (in dissent) noted his disorientation at this section of the majority opinion, and interpreted it a bit differently: “State B, the victim State,

In the more recent *Oil Platforms* case of 2003, ICJ Judge Simma (in a separate opinion) interpreted the *Nicaragua* passage in essentially the same manner, writing that, by “ ‘proportionate counter-measures’ the [*Nicaragua*] Court [could] not have understood mere pacific reprisals . . . in the terminology used by the [ILC Draft Articles], called ‘countermeasures’ . . . [but could] only have meant what I have just referred to as *defensive military action short of full-scale self-defence*.”¹⁶³

Judge Simma’s interest in the *Nicaragua* dicta resulted from his own frustration with the Court’s approach in *Oil Platforms*. The case dealt with a violent exchange between Iran and the United States, in which two American naval vessels, the *Sea Isle City* and the *Samuel B. Roberts*, were allegedly sunk by Iranian mines, to which the U.S. reacted by attacking Iranian oil platforms. In Judge Simma’s view, the majority opinion created the erroneous impression that if an offensive assault did not rise to the level of an Article 51 armed attack, then the victim state would have no recourse to defensive military action. *Nicaragua*, he argued, left some room for victim states under low-gravity assault to maneuver militarily; insofar as, against such smaller-scale uses of force—for example, the laying of mines or an attack upon individual oil platforms—defensive action “by force also ‘short of’ Article 51 [should] be regarded as lawful.”¹⁶⁴ Judge Simma went on to fill in his framework:

I would suggest a distinction between (full-scale) self-defence within the meaning of Article 51 against an “armed attack” within the meaning of the same Charter

is entitled to take countermeasures against State A, of a dimension the Court does not specify . . . while State C is not thereby justified in taking counter-measures against State A which involve the use of force.” *Id.* at 350.

¹⁶³ *Oil Platforms*, *supra* note 43, at 332 (emphasis added).

¹⁶⁴ *Id.* at 331-32. Judge Simma continued on to say that “hence, the [*Nicaragua*] Court drew a distinction between measures taken in legitimate self-defence on the basis of Article 51 of the Charter and lower-level, smaller-scale proportionate counter-measures which do not need to be based on that provision.” *Id.*

provision on the one hand and, on the other, the case of hostile action . . . below the level of Article 51, justifying proportionate defensive measures on the part of the victim, equally short of the quality and quantity of action in self-defence expressly reserved in the United Nations Charter.¹⁶⁵

In other words, if State B were to militarily coerce State A with an intensity that did not justify Article 51 self-defense, State A would not be entitled to launch an armed attack against State B, but *would* be entitled to respond with low-gravity force of its own that would be “bound to necessity, proportionality, and immediacy in time in a particularly strict way.”¹⁶⁶ In essence, Judge Simma was articulating the argument for filling the Charter’s loophole with forcible countermeasures. In his view, this framework was not a proposal for reform, but instead, an accurate reading of *Nicaragua* that the majority in *Oil Platforms* failed to recognize.¹⁶⁷

But the strongest support for forcible countermeasures lies not in judicial opinions, but state practice, which has begun to quietly legitimize them. A number of scholars have noted that, beginning in the 1980s, the Security Council appeared to adopt a policy of tolerating the use of low-gravity defensive force when it deemed it to be “reasonable.”¹⁶⁸ Whether this trend toward treating forcible counter-measures as “illegal de jure but accepted de facto, provided they meet the requirement of proportionality,”¹⁶⁹ is a tacit recognition of the force gap, is unclear, but there is little doubt that,

¹⁶⁵ *Id.* at 332.

¹⁶⁶ *Oil Platforms*, *supra* note 43, at 333.

¹⁶⁷ While I cannot agree with Judge Simma in that assessment—either in 2012, or 2003, at the time of *Oil Platforms*—this Paper’s closing advocacy for forcible countermeasures as an available self-help tool to states under low-gravity assault is modeled, in large part, after the Judge’s opinion.

¹⁶⁸ See, e.g., Barry Levenfield, *Israel’s Counter Fedayeen Tactics in Lebanon: Self-Defense and Reprisal under Modern International Law*, 21 COLUM. J. TRANSNAT’L L. 7, 35 (1982); Michael Franklin Lohr, *Legal Analysis of U.S. Military Responses to State-Sponsored International Terrorism*, 34 NAVAL L. REV. 1, 18 (1985); Maogoto, *supra* note 25, at 424.

¹⁶⁹ Lohr, *supra* note 168.

by condemning only those reprisals the Council finds unreasonable, it has begun to relax the Charter's blanket prohibition of forcible self-help by states, as members have begun to push the envelope with the extralegal, internationally ignored use of force in responding to small-scale sovereignty breaches.¹⁷⁰ (It is important to note here that by "forcible countermeasures," we do not mean armed reprisals, which connote punitive retaliation for an infringement, rather than carefully calibrated law enforcement adhering to the stringent countermeasures framework.)

So, despite the fact that countermeasures, as understood in the ILC's Draft Articles and current law, are *de jure* non-forcible, we can note that courts, scholars, and nation states have all, to a degree, acknowledged low-level military action as a *de facto*, lawful response to Article 2(4) violations. As the next subsection argues, they are also the most effective and efficient way of filling the force regime's loophole.

2. *Practical Advantages of Forcible Countermeasures*

The international community's open acknowledgment of the lawfulness of forcible countermeasures—and repeal of all appropriate treaty provisions restricting countermeasures to being non-forcible¹⁷¹—would offer multiple advantages. First, and most importantly, forcible countermeasures would provide states with a credible deterrent against low-gravity Article 2(4) violations. There is currently little immediate *security* downside¹⁷² to harassing a rival

¹⁷⁰ *Id.*

¹⁷¹ There are numerous international treaty provisions and resolutions banning unilateral reprisals, but the most prominent provisions in need of elimination would likely be Draft Articles, *supra* note 82, art. 50(1)(a) (stating that "[c]ountermeasures shall not affect... the obligation to refrain from the threat or use of force"); and GA Res. 2625, U.N. GAOR, 6th Comm., 25th Sess., Annex, at 122, U.N. Doc. A/8082 (1970) (resolving that "states have a duty to refrain from acts of reprisal involving the use of force").

¹⁷² As explained in the Introduction, this is not to say that there are no downsides to attacking a state with low-gravity force—merely that there is no risk of a lawful military response by the victim. *See generally* Remarks of Harold

with forcible coercion not rising to the Article 51 self-defense trigger, and the legalization of forcible countermeasures would eliminate this permission for low-intensity violence, and presumably give pause to those states considering a cross-boundary kidnapping, cyber-attack, or mining of territorial waters.

This reform could prove particularly effective in dealing with non-state actors, many of whom have demonstrated a blatant disregard for legal and normative deterrents like Article 2(4), and even tactically deployed their adversaries' compliance with rules against them as another tool of asymmetric warfare, in what has been called "lawfare."¹⁷³ Yet this strategy relies upon a general lack of institutional enforcement, a reliance that would be frustrated by the credible threat of forcible countermeasures to low-gravity breaches of international law. For state sponsors of terror such as Iran, there would be one more disincentive to associating with subnational militants, as low-gravity strikes by proxies could more likely trigger a military response permitted by international law.

Second, this approach lends more flexibility to states in resolving their disputes, and the space to develop practical protocols for threat response. When the interests of communitarian security permit it, states should not be denied a just and immediate remedy to an injury inflicted upon them, whether on a small or large scale; and, under a forcible countermeasures regime, they would not be. In the *Oil Platforms* case, for instance, U.S. naval vessels would not have been forced to choose between passive acceptance of isolated, Iranian mining attacks and (what would effectively constitute) a declaration of full hostilities under Article 51 self-defense; nor would Suriname be powerless to lawfully respond to Guyana's violation of mutually agreed territorial boundaries.¹⁷⁴ As previously discussed, the Charter's current force regime forces states under low-gravity assault into one of two boxes: either swallowing aggression against its sovereignty or concocting failing legal arguments that the small-

Koh, *supra* note 5; Bowett, *supra* note 5.

¹⁷³ See generally Leila Nadya Sadat & Jing Geng, *On Legal Subterfuge and the So-Called 'Lawfare' Debate*, 43 CASE W. RES. J. INT'L L. 153 (2010).

¹⁷⁴ *Contra* Guyana v. Suriname, *supra* note 64 (holding that Suriname's threat to expel a Guyana oil rig constituted a violation of Article 2(4)).

scale coercion justifies a sweeping response.¹⁷⁵ Moreover, by allowing states to innovate (under certain principles) in response to low-gravity warfare, we would remove the Security Council from the impossible task of trying to regulate the highly fact-specific and dynamic low-gravity aggression that tends to populate the force gap.

Third, forcible countermeasures are less vulnerable to abuse than Article 51 actions.¹⁷⁶ Whereas *jus ad bellum* requires self-defensive measures to be proportional and necessary; countermeasures are curbed by additional, more restrictive parameters, which include the following: a state must notify its adversary of the impending countermeasures before they happen; the measures cannot violate any fundamental human rights, rights that might be placed in jeopardy by an Article 51 response; the measures must, as much as possible, not only be proportional, but temporary, reversible, and reciprocal to the original violation, and must desist immediately upon the aggressor states' return to legal compliance,¹⁷⁷ all of which mitigates against the possibility of military escalation. The reciprocity requirement, in particular, would preclude states from lawfully deploying a forcible countermeasure in response to *anything except an Article 2(4) violation*.

Finally, legalizing forcible countermeasures to address *de minimis* acts of force would encourage a law enforcement, rather than armed conflict, mindset. Displaced oil rigs, border trespasses, and other minor incidents should, whenever possible, not be elevated to acts of war; and, in the absence of a centralized enforcement authority for international law, countermeasures offer a default instrument of dispute resolution. Even beyond the practical (and critical) facets distinguishing a forcible countermeasure from an Article 51-predicated military operation, branding it as the former avoids triggering global politicization and regional treaty obligations,

¹⁷⁵ See, e.g., DeFrancia, *supra* note 30, at 761 (noting that interdiction and seizures on the high seas force states into one of two uncertain positions, because "legal consequences relating to the degrees of gravity in the use of force are not well developed under international law").

¹⁷⁶ But see *supra* text accompanying note 150, laying out Carsten Stahn's argument for expanding the definition of "armed attack" under Article 51.

¹⁷⁷ See *supra* text accompanying notes 86-92.

which decreases the likelihood of escalation.

IV. *Case Study: A Force Gap Analysis of the Israel-Iran Shadow War*

The purpose of this section is to use a real-world example of low-intensity conflict between adversaries to illustrate how the force gap can affect war-making, and how the introduction of forcible countermeasures may alter the strategic and legal calculus for the better.

Israel and Iran have been engaging in what one might call an indirect, proxy war through surrogates for decades.¹⁷⁸ In addition to developing what has been characterized as an allegedly military nuclear program, Iran's Shiite government has funneled financial support, military training, and weapons like the Katyusha and Zelzal rockets through Syria and Lebanon to terrorist groups like Hezbollah, which use them to assault Israel.¹⁷⁹ The Jewish state has responded to northern border incursions by Hezbollah with military force multiple times, and has (possibly) engaged in covert counter-proliferation activities like cyber-attacks and the assassination of nuclear scientists in an effort to bring Iran's spinning centrifuges to a halt.¹⁸⁰

¹⁷⁸ In addition to other frequent threats, Iran's President Mahmoud Ahmadinejad has called for Israel's destruction in a series of highly publicized remarks; and Israel views the Islamic Republic of Iran as an existential threat, both as a result of its still-developing nuclear program and its financial and military support for terrorist groups like Hezbollah. *See e.g., Mahmoud Ahmadinejad: Israel's existence 'insult to all humanity,'* THE TELEGRAPH (Aug. 17, 2012), available at <http://www.telegraph.co.uk/news/worldnews/middleeast/iran/9483030/Mahmoud-Ahmadinejad-Israels-existence-insult-to-all-humanity.html>.

¹⁷⁹ *See, e.g.,* Charles Goldsmith, *Iran builds rockets to arm Hezbollah, Deter Sanctions*, BLOOMBERG NEWS (Aug. 4, 2006), available at <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aMrliCQRWnMo>.

¹⁸⁰ *See, e.g.,* Waxman, *supra* note 14, at 423 (noting that "it has been widely reported that a computer code dubbed Stuxnet, perhaps created and deployed by the United States or Israel, infected and significantly impaired Iran's uranium enrichment program by disrupting parts of its control system"); Ken Dilanian, *Iran's Nuclear Program and the New Era of Cyber War*, L.A. TIMES, at A1 (Jan. 17, 2011); David E. Sanger, *Iran Fights Malware Attacking Computers*, N.Y.

This Section takes two particular incidents that are distinctly modern in character, and potentially occupy two of our “low-gravity” categories from Subsection I.C, and compares how the U.N. Charter’s current and proposed force regime would apply to the factual circumstances.¹⁸¹ For purposes of analysis, we shall grant that the acts in question are openly attributable, rather than covert, and that they are not justifiable by past actions and threats.¹⁸²

A. *Hezbollah’s 2006 Border Mischief*

1. *Facts*

On July 12, 2006, a Hezbollah ground contingent ducked through a “dead zone” in the border fence with Israel and crossed into the Golan Heights with the goal of kidnapping an Israeli soldier.¹⁸³ Whether the mission was independently motivated or came from central Hezbollah command was initially unclear, though it would later come to light that the non-state actor’s leader Sheik Hassan Nasrallah had ordered “Operation Truthful Promise,” named after his pledges over the prior year to kidnap IDF servicemen.

Before successfully abducting two soldiers back to Lebanon,

TIMES 410 (Sept. 26, 2010); Karl Vick & Aaron J. Klein, *Who Assassinated an Iranian Nuclear Scientist? Israel isn’t Telling*, TIME (Jan. 13, 2012), <http://www.time.com/time/world/article/0,8599,2104372,00.html>; See, e.g., DAN RAVIV AND YOSSI MELMAN, *SPIES AGAINST ARMAGEDDON* (2012), for a riveting and informative account of Israel’s efforts to covertly interrupt Iran’s nuclear program.

¹⁸¹ Please note that this subsection is apolitical and not meant, in any way, to draw normative conclusions on the righteousness or immorality of either side of this conflict, but merely an exercise in legal exegesis.

¹⁸² This is not an insignificant assumption, given that one of the uniquely problematic challenges of cyber-warfare is evidentiary proof of deployment and traceability. See Jack Goldsmith, *Cybersecurity Treaties: A Skeptical View*, KORET-TAUBE TASK FORCE ON NATIONAL SECURITY AND LAW 10-12 (2011), available at <http://media.hoover.org/sites/default/files/documents/FutureChallengesGoldsmith.pdf> (noting the difficulty of collecting evidence on the origins of a cyber-attack).

¹⁸³ Wrachford, *supra* note 66, at 47.

the militants attacked a patrol of two Israeli Humvees patrolling the border near Zar'it, killing three soldiers and injuring two more.¹⁸⁴ Israel's military immediately dispatched a rescue team to the area and, after confirming that two soldiers were missing, sent a tank, armored personnel carrier, and helicopter into southern Lebanon. The tank hit a large land mine, killing its four-man crew, before another Israeli soldier was killed and two injured by mortar fire as they tried to recover the bodies.¹⁸⁵

The Israeli Prime Minister called the seizure of soldiers an "act of war," and promised a "very painful and far-reaching response," delivered in the coming days.¹⁸⁶ In the war's opening stages, Israel targeted mostly Hezbollah rocket stockpiles, but proceeded to damage substantial amounts of Lebanese infrastructure, including Beirut's Rafic Hariri airport.¹⁸⁷ The IDF initiated a naval blockade and ground invasion, as Hezbollah fired rockets into the northern Golan Heights of Israel and the Galilee, in addition to engaging Israeli forces as they drove deeper into Lebanon. The "2006 Lebanon War" would continue into early August,¹⁸⁸ and eventually result in the casualties of over 1,100 Lebanese and 150 Israelis, as well as the displacement of close to a million Lebanese and half a million Israelis from the region.¹⁸⁹

We should note that the precipitating abduction did not occur in a vacuum. Since 1982, Israel had been responding to sporadic incursions by Hezbollah, which had received political support from Syria, as well as military, financial, and at times, operational support

¹⁸⁴ *Lebanon-UNIFIL Background*, UNITED NATIONS, <http://www.un.org/depts/DPKO/Missions/unifil/unifilB.htm> (last visited Mar. 20, 2013) [hereinafter *Lebanon UNIFIL*].

¹⁸⁵ *Id.*

¹⁸⁶ Israeli Ministry of Foreign Affairs Statement, *PM Olmert: Lebanon is responsible and will bear the consequences* (July 12, 2006), available at <http://www.mfa.gov.il/MFA/Government/Communiques/2006/>.

¹⁸⁷ Wrachford, *supra* note 66, at 47-48.

¹⁸⁸ Three days after an August 11 Security Council resolution demanding "the immediate cessation by Hezbollah of all attacks and the immediate cessation by Israel of all offensive military operations," the two sides agreed to a cease-fire. S.C. Res. 1701, U.N. Doc. S/RES/1701 (Aug. 11, 2006).

¹⁸⁹ *Lebanon UNIFIL*, *supra* note 184.

from Iran. Similar to the situation with the PLO in the 1980s, Lebanon had not prevented Hezbollah from carrying out its operations. Indeed, the Security Council had spent the years between 2000 and 2006 repeatedly calling upon Lebanon to exercise control over its southern territory.¹⁹⁰

Although fairly small in number, Hezbollah has leveraged its size by engaging in suicide attacks, cross-border kidnapping, and other forms of guerilla and asymmetric warfare, with special units for intelligence, anti-tank warfare, explosives, engineering, communications, and rocket launching.¹⁹¹ At the time of the July 2006 seizures, kidnappings by both sides had become a fairly routine part of the so-called “rules of the game” between the two military forces, used in negotiations for release of prisoners and other concessions.¹⁹² Sheik Hassan Nasrallah had apparently not expected such a military response from Israel—which, in recent years, had typically answered an isolated, low-intensity incursion, like the one on July 6th, with a carefully restrained response and invitations to enter into negotiations for the prisoners. Hezbollah’s leader would later state that he “would not have ordered the abduction of two Israeli soldiers if he had known it would lead to a large war.”¹⁹³

¹⁹⁰ On September 2, 2004, for instance, UNSCR 1559 stated that the Council was “[g]ravelly concerned at the continued presence of armed militias in Lebanon, which prevent the Lebanese Government from exercising its full sovereignty over all Lebanese territory.” S.C. Res. 1559, U.N. Doc. S/RES/1559 (Sept. 2, 2004).

¹⁹¹ See Steven Erlanger & Richard A. Opiel, Jr., *A Disciplined Hezbollah Surprises Israel With Its Training. Tactics and Weapons*, N.Y. TIMES (Aug. 7, 2006), http://www.nytimes.com/2006/08/07/world/middleeast/07hezbollah.html?pagewanted=all&_r=0. Hezbollah’s tactics have included the use of “lawfare,” or the exploitation of an enemy’s compliance with international law for strategic advantage. *Id.*

¹⁹² In 2004, for example, Israel released hundreds of Palestinian and Lebanese imprisoned terrorists in exchange for a kidnapped Israeli businessman and the bodies of three Israeli soldiers. See Wrachford, *supra* note 66, at 45, 46.

¹⁹³ See *State Department Surprised by Hezbollah*, FOX NEWS (Aug. 28, 2006), http://www.foxnews.com/printer_friendly_wires/2006Aug28/0,4675,USLebanon,00.html; Wrachford, *supra* note 66, at 47 n.131.

2. *Jus ad bellum Analysis Under Current Force Regime*

We begin our inquiry with Hezbollah's status as a non-state actor aided by larger states: since 9/11/2001, the international community has come to agree that sub-national entities and their host-states *are* capable of triggering self-defense,¹⁹⁴ so neither Hezbollah nor Lebanon is necessarily disqualified from the possibility of launching an Article 51-level attack. By comparison, Iran and Syria, are unlikely to be found complicit in any Hezbollah armed attack, as the provision of weapons and financial support are not alone sufficient to implicate third-parties in acts of 'most grave' force—although both countries *would* be capable of complicity in breaching Article 2(4).¹⁹⁵

As for the incursion itself, there is no question that such behavior constituted an unlawful use of force; the only debatable issue is its gravity. As an isolated incident, the contingent's killing and abduction of Israeli soldiers probably did not "occur on a significant scale" sufficient to amount to an armed attack, more closely resembling a "mere frontier incident."¹⁹⁶ Israel could certainly assert, under *Armed Activities in the Congo* and *Oil Platforms*, that the violent trespassing was just one forcible event in a long pattern of unlawful conduct that cumulatively constituted an armed attack justifying self-defense.¹⁹⁷

State practice would in all likelihood rebut such an argument, however. In nearly identical events in 1978, 1981, and 1982, Israel

¹⁹⁴ *Supra* I.C.4. See also Paust, *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*, 19 J. TRANSNAT'L L. & POL'Y 237, 238 (2010) ("The vast majority of writers agree that an armed attack by a non-state actor on a state, its embassies, its military, or other nationals abroad can trigger the right of self defense").

¹⁹⁵ Nicaragua, *supra* note 2, at 119 (holding that, while the U.S.'s provision of financial and logistical support to the Nicaraguan contras constituted an unlawful use of force, the Court could *not* say that "the provision of arms to the opposition in another State constitutes an armed attack on that State").

¹⁹⁶ Nicaragua, *supra* note 2, at 103.

¹⁹⁷ See *supra* I.C.1.

had previously struck targets in Lebanon following a number of terrorist attacks by the PLO, yet the Security Council had consistently condemned Israel's self-defense justifications, labeling the counter-strikes as illegal reprisals to small-scale assaults.¹⁹⁸ In 1982, for example, Israel asserted that the PLO's assaults from Beirut had triggered its Article 51 rights, and that "Lebanon's incapacity or unwillingness to control the inhabitants in its territory also amounted to an armed attack." The Security Council rejected the claim, declaring instead that "the use of force by Israel was found to be of preemptive or punitive character. . .not dictated by the necessity to repel an attack; the Israeli actions were considered in the nature of reprisals rather than self-defense."¹⁹⁹

Hence, the 2006 incursion probably fell into the Charter's force gap, like Hezbollah's previous acts of border violence, thus foreclosing from Israel any legal military options in response. Under the existing Charter regime, the mere dispatch of a rescue team into Lebanese territory to pursue the abducted soldiers would technically violate the prohibition of the use of force,²⁰⁰ leaving Israel in the peculiar "large area" referred to by ICJ Judge Jennings,²⁰¹ where self-help is unavailable, and yet U.N. enforcement is nowhere to be found.

In retrospect, then, it is no surprise that Sheik Nasrallah essentially admitted that Hezbollah was counting on Israel's compliance with the law, and taking advantage of the force regime loophole. With no third party policing Article 2(4) breaches and no (legal) means of a military reply by Israel, the non-state actor was mostly undeterred from the "snatch-and-run" provocation. In this particular instance, the legal context left Israel with little flexibility in resolving the dispute, and few remedial options; the least unattractive of which was to claim Article 51 self-defense against an

¹⁹⁸ See Wrachford, *supra* note 66, at 41-42.

¹⁹⁹ *Id.*

²⁰⁰ Of course, whether the Security Council would actually condemn such a seemingly reasonable and proportionate response is unclear, of course, as this type of action might belong to the group of tacitly tolerated armed reprisals despite their being *de jure* illegal, see III.B.1.

²⁰¹ See *supra* note 4 and accompanying text.

incursion that it probably knew the international community would characterize as a low-gravity event, insufficient under the *Nicaragua* standard for justifying self-defense.²⁰²

3. *Jus ad bellum* Analysis with Forcible Countermeasures

Let us now consider the Israel-Hezbollah scenario under the reformed regime. To be sure, the actors likely grounded most of their behavior in political calculations and not legal realities, but by plugging the force gap, we can seek to re-package the regime's incentive structure enough to change the calculus of the two parties.

First, a Hezbollah command that is mindful of an Israeli entitlement to forcible countermeasures would be less likely to order the border intrusion. Nasrallah's own comments and his organization's record of "lawfare" tactics (exploiting asymmetric legal compliance) both indicate that Hezbollah would be more responsive to the credible threat of a reciprocal, in-kind military response than the mere existence of a legal prohibition. Certainly the group may well have behaved in precisely the same manner, but one of the more basic strategic advantages of subnational entities in armed conflict is their willingness to exploit anemic law enforcement, and the specter of forcible countermeasures would present *some* consequence to breaking international law.

If the attack nevertheless had gone forward, Israel would have been authorized to act in a manner "commensurate with the injury suffered," and with a measure as proportionate, reversible, and reciprocal as possible, and only after informing Hezbollah and Lebanon of its intentions.²⁰³ In this case, that lawful action could include a rescue operation sent into sovereign Lebanese territory to recover the abductees, and possibly a limited airstrike against

²⁰² Different scholars would likely offer different opinion in evaluating Israel's proportionality and necessity compliance in counter-striking against Lebanon. It is important to remember, however, that the *jus ad bellum* proportionality calculus is prospective, and therefore cannot be achieved with a mere comparative ratio of body-counts at the end of conflicts.

²⁰³ See *supra* I.D.4; III.B

Hezbollah rocket stockpiles (so as to neutralize the Hezbollah border threat, the way that the incursion neutralized the Israeli border patrols), but nothing more.

Such forcible countermeasures would offer Israel a path that is neither toothlessly ineffective, nor illegal. It would be far preferable to a larger ground invasion, the likes of which a less restrictive, Article 51 self-defense claim might authorize, but which would surpass the bounds of a permissible, reciprocal countermeasure. Under the U.N. Charter's existing regime, Israel had little incentive to circumscribe its military response, since any and all degrees of force would inevitably constitute an unlawful response to the low-gravity incursion; whereas, with the force gap plugged, a restrained military answer would become more attractive for its lawful legitimacy.

As for those states potentially implicated by Hezbollah's precipitating violation, Syria and Iran could not be targeted by forcible countermeasures. Although sponsor-states have a far more relaxed nexus requirement for use-of-force breaches than they do for armed attacks,²⁰⁴ countermeasures require that those individuals targeted be *precisely* those responsible for the initial wrongful behavior, and thus capable of returning to a status quo of legal compliance.

B. Stuxnet at Natanz

1. Facts

As early as 2008, a cyber-worm called "Stuxnet" began infecting computer systems around the world, and in 2009, word spread that Iran's uranium enrichment capacities at its nuclear facility in Natanz had been diminished by technical difficulties.²⁰⁵

²⁰⁴ See Nicaragua, *supra* note 2; *supra* I.C.4.

²⁰⁵ See Hathaway, *supra* note 14, at 819 n.1. ("The seeds for this attack were apparently sown well before 2010. The worm was first detected in 2008, when it infected networks around the world. It did no damage to most systems. At first, it

This piece of malicious software was purportedly the first cyber vehicle specifically designed to disrupt physical infrastructure like nuclear reactors and power grids.²⁰⁶

All but revealed as a joint venture between the U.S. and Israel, designed and tested at the Israeli Dimona complex in the Negev desert, the worm²⁰⁷ would eventually destroy up to one thousand of Iran's centrifuges, or around ten percent of Iran's nuclear infrastructure, between November 2009 and January 2010.²⁰⁸ It functioned by causing an infected Iranian IR-1 rotor to physically accelerate from its normal operating frequency of 1,064 Hz to 1,401 Hz before abruptly slowing back down in velocity, which stressed the aluminum centrifuges until they expanded and destroyed the machine by coming into contact with the rest of its mechanical structure.²⁰⁹ The Institute for Science and International Security (or

was assumed that the attack, which appeared to target nuclear facilities in Iran, was not successful. Yet, in the fall of 2010, reports spread that Iran's uranium enriching capabilities had been diminished." See also Ken Dilanian, *Iran's Nuclear Program And A New Era of Cyber War*, L.A. TIMES (Jan. 17, 2011), <http://articles.latimes.com/2011/jan/17/world/la-fg-iran-cyber-war-20110117>; David E. Sanger, *Iran Fights Malware Attacking Computers*, N.Y. TIMES, Sept. 26, 2010, at 4.

²⁰⁶ Hathaway, *supra* note 14, at 819 n.1 ("Stuxnet is the first computer virus known to be capable of specifically targeting and destroying industrial systems such as nuclear facilities and power grids."); Kesan, *supra* note 57, at 441 ("The Stuxnet worm is the first known rootkit that affects industrial control systems.").

²⁰⁷ See Kesan, *supra* note 57, at 441 ("There are three main categories of cyberattacks: distribution of malicious software (such as viruses, Trojan horses, and worms), unauthorized remote intrusions, and DoS attacks. There is some overlap among these three categories of attacks, since Trojan horses may be used to enable unauthorized remote intrusions, and viruses may be used to create armies of zombie computers to execute Distributed Denial of Service ("DDoS") attacks.") for a detailed and enlightening description of the different types of cyber-attacks.

²⁰⁸ See David Albright, Paul Brannan & Christina Walrond, *Did Stuxnet Take Out 1,000 centrifuges at the Natanz Enrichment Plant?*, REPORT, INSTITUTE FOR SCIENCE AND INTERNATIONAL SECURITY (Dec. 22, 2010), available at http://isis-online.org/uploads/isis-reports/documents/stuxnet_FEP_22Dec2010.pdf [hereinafter ISIS Report].

²⁰⁹ Holger Stark, *Mossad's Miracle Weapon: Stuxnet Virus Opens New Era of Cyber War*, DER SPIEGEL (Aug. 8, 2011), <http://www.spiegel.de/international/world/mossad-s-miracle-weapon-stuxnet-virus-opens-new-era-of-cyber-war-a-778912.html>.

ISIS) would later suggest in a December 2010 report that, while Stuxnet did not destroy as many of Iran's nuclear centrifuges as it intended, it did "set back Iran's progress."²¹⁰

Although Stuxnet was apparently never forensically traced back to particular perpetrators, cyber-experts have maintained that its technological sophistication could only have been crafted by a nation-state,²¹¹ and we will assume for purposes of analysis that Israel launched the cyber-attack in an effort to halt Iran's development of a nuclear weapon. Critical for our purposes is the fact that, despite the Iranian Ministry of Industries' official comment, that "an electronic war has been launched against Iran,"²¹² the state has yet to officially label the cyber-attack as an act of war; indeed, reports indicate that Iran initially rushed to install new centrifuges in an effort to *conceal* the embarrassing industrial failure.²¹³

As an act of covert counter-proliferation, the launching of the virus was not isolated. Israel is also widely believed to have been behind the assassination of four Iranian scientists tasked with engineering the underground facilities at Natanz and Qum, which in turn, appeared to have prompted the suspiciously similar attempted assassinations of Israeli diplomats and the Saudi ambassador to the United States.²¹⁴ Both countries have been accused of farming out the targeted killings to proxy groups and local surrogates operating

²¹⁰ ISIS Report, *supra* note 208.

²¹¹ See, e.g., Kesan, *supra* note 57, at 447 (suggesting that the worm was probably "too sophisticated and complicated to be undertaken by a private group"); Josh Halliday, *Stuxnet Worm is the 'Work of a National Government Agency,'* GUARDIAN (Sept. 24, 2010), available at <http://www.guardian.co.uk/technology/2010/sep/24/stuxnet-worm-national-agency>; John Markoff, *A Silent Attack, but Not a Subtle One*, N.Y. TIMES (Sep. 27, 2010).

²¹² Atul Aneja, *Under cyber-attack, says Iran, Chennai, India*, THE HINDU (Sep. 26, 2010).

²¹³ See ISIS Report, *supra* note 208; see also Waxman, *supra* note 14, at 444 (noting that "Iran has likewise been very reticent about Stuxnet, its effects, and Iran's knowledge of the code's source").

²¹⁴ See, e.g., Andrew R.C. Marshall & Peter Apps, *Iran 'Shadow War' Intensifies, Crosses Borders*, REUTERS (Feb. 16, 2012), available at <http://www.reuters.com/article/2012/02/16/us-iran-israel-security-idUSTRE81F1E720120216>.

according to the states' instructions.²¹⁵

2. *Jus ad bellum Analysis Under Current Force Regime*

As previously discussed, the international law of cyber-attack is unsettled, with no definitive answer as to whether a worm like the Stuxnet virus is either 1) a non-forcible breach of the customary duty of non-intervention; 2) a low-gravity forcible assault; or 3) an armed attack triggering self-defense. Scholars do not even agree on how to go about classifying a given computer intrusion, with a substantial number arguing that Article 2(4) applies only to armed, kinetic force, and that computer interference must thus, by definition, be non-forcible in character.²¹⁶

This "instrument-based" approach²¹⁷ to evaluating state coercion, however, appears to currently be declining among scholars and states, in favor of an "effects-based" methodology, which analyzes the proximate result of any coercive act, cyber-attacks included.²¹⁸ The effects-based method essentially broadens the scope of Article 2(4), such that, if a cyber-assault has a destructive impact similar to that of a physical military strike, then it may be evaluated like a traditional weapon of war. Moreover, such strategically broad readings of the force prohibition may prove inevitable, because of its relatively minor cost and asymmetric appeal, cyber-warfare is more attractive to non-state actors and weaker states; whereas those larger states with developed infrastructures are most vulnerable to information-attacks, and therefore inclined to expansively interpret Article 2(4) to prohibit them.²¹⁹

²¹⁵ Marshall & Apps, *supra* note 214.

²¹⁶ See *supra* I.C.3.

²¹⁷ Schmitt, *supra* note 15.

²¹⁸ This technique is more in line with recent ICJ decisions on the irrelevance of an act's weaponry to its force-status. See *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 41, at 244.

²¹⁹ See WALTER GARY SHARP, SR. *CYBERSPACE AND THE USE OF FORCE* 129-33 (Aegis Research Corporation 1999) (advocating that the United States make this strategic, interpretive move); *supra* note 96 and accompanying text.

Under the effects-based approach, Stuxnet would likely constitute a forcible attack. The physical, mechanical damage to Iranian military assets may have been equivalent to that of a low-grade bombing run over the reactor site in Natanz, and Stuxnet's mark was not limited to electronic disruptions, such as computer data collection or viral interference with communications.²²⁰ On the contrary, it destroyed military infrastructure in a tangible, kinetic way. Whether it was severe enough to constitute a "most grave" armed attack under *Nicaragua*, however, is admittedly less certain, and probably doubtful. Certainly one could argue that destroying ten percent of (one type of) a state's weaponry amounts to a substantial impact, severe enough even to trigger a state's self-defense rights. On the other hand, there were no casualties associated with the Stuxnet infection; nor any malicious fighting or violence to human agents involved; and, above all, Iran failed to report Stuxnet as an armed attack justifying self-defense, a critically important factor (if not an absolutely necessary prerequisite) for triggering Article 51, under *Nicaragua*, *Armed Activities in the Congo*, and their progeny.²²¹

Under this appraisal of the facts,²²² the Stuxnet cyber-attack may have breached Article 2(4), but probably did not reach the Article 51 armed attack trigger, thus potentially falling into the Charter's force gap, like the Hezbollah border incident. If so, Iran would be legally barred from responding with a similar cyber-attack,

²²⁰ Article 41 of the U.N. Charter labels the "interruption of . . . telegraphic, radio, and other means of communication" as a "measure [] not involving the use of armed force," which would suggest, once again, that only physical destruction of property, assets, or people could make a cyber-attack a forcible form of coercion."

²²¹ *Armed Activities in the Congo*, *supra* note 41, at 222 (rejecting Uganda's self-defense claim, in part, because "it did not ever claim that it had been subjected to an armed attack by the armed forces of the DRC"); *Nicaragua*, *supra* note 2, at 105 (holding that, for purposes of inquiry into armed attack claims, "the absence of a report may be one of the factors indicating whether the State in question was itself convinced that it was acting in self-defence" in response to an armed attack").

²²² Different scholars utilizing different versions of the effects-based approach could certainly arrive at different conclusions.

destroying the source of the Stuxnet bug, or exercising any type of armed force in retaliation; though it would certainly be entitled to employ the kinds of non-forcible “passive defenses”²²³ to cyber-assault—such as firewalls—that do not constitute aggressive coercion.

3. *Jus ad bellum Analysis with Forcible Countermeasures*

The principal flaw of the existing regime’s application to cyber-warfare is its prohibition on the use of those “active defenses” that effectively deter potential cyber-aggressors.²²⁴ In a case like Stuxnet’s, despite the fact that the computer infection breached Article 2(4), Iran would likely be prohibited from launching active defenses against the source of the virus, even if those defenses were limited to an equally destructive impact as Stuxnet. Most scholars and states simply ignore this reality, and advocate for the permissibility of any and all countermeasures to a cyber-strike, as long as the reprisals remain below the level of an armed attack. For instance, the U.S. Defense Department’s Office of General Counsel has argued for the lawfulness of responding to a low-gravity act of forcible sabotage thus: “If the provocation is not considered to be an armed attack, a similar response will also presumably not be considered to be an armed attack.”²²⁵

Yet, under *de jure* current law, if a cyber-attack that violates Article 2(4) does not rise to the level of an armed attack—in this case, due to Stuxnet’s less than grave physical effect—then the

²²³ See, e.g., Kesan, *supra* note 57, at 470 (summarizing the different types of “passive defenses” to cyber-attacks which do not involve active coercion and damage to the source of the attack).

²²⁴ See, e.g., Hathaway, *supra* note 14, at 859 (noting that, “in order for a countermeasure to be effective, the targeted actor must find the countermeasure costly--ideally costly enough to cease its unlawful behavior”); Kesan, *supra* note 57, at 470 (distinguishing between those active defenses that are ineffective).

²²⁵ Office of Gen. Counsel, Department of Defense, *An Assessment of International Legal Issues in Information Operations* (1999), reprinted in *COMPUTER NETWORK ATTACK AND INTERNATIONAL LAW* 459, 484-85 (Michael N. Schmitt & Brian T. O’Donnell eds., U.S. Naval War College 2002).

victim state has no right to reciprocate the act of force; whether or not the response is “similar” is irrelevant.²²⁶ Thus, the U.S.’s position must either reflect a fundamental misunderstanding of *jus ad bellum* law, or a new, extralegal stance, increasingly common among larger states, in favor of forcible countermeasures.

Cyber-warfare thus presents an excellent example of state practice appearing to tacitly adopt the proposal of this Paper (and Judge Simma’s *Oil Platforms* opinion). It is not difficult to understand members’ eagerness to side step the letter of the current regime. It offers few military disincentives to a non-state actor, small state, or other entity seeking to leverage asymmetric warfare upon larger militaries via low-gravity cyber-attack (admittedly difficult to reliably calibrate, given the unsettled nature of the law of cyber-warfare), since their targets are prohibited from responding in any way that damages the software of the original perpetrator. Until there is an international mechanism or treaty for policing cyberspace, forcible countermeasures—either in a *de jure* or *de facto* manner—present one of the few forms of deterrence against cyber-attacks.

Conclusion

This Paper has sought to scrutinize the spectrum of state force below Article 51’s ‘armed attack’ trigger. Designed to discourage destabilizing retaliation, the U.N. Charter’s force regime was animated with a concern for security over justice, leaving a ‘force gap’ wherein states could come under low-gravity assault, but be barred from forcible response. This loophole in the regulatory architecture is the result not only of intentional prioritization, but also the Security Council’s inability to fulfill its intended enforcement role in policing low-intensity conflict, and courts’ interpretation of the Charter, in keeping with the ICJ’s *Nicaragua* holding.

The gap made more sense in 1945 than it does now, when

²²⁶ Note that this analysis proceeds under the “effects-based” approach to measuring the severity of a cyber-attack.

isolated strikes by non-state actors and low-intensity coercion like targeted killing, terrorism, and cyber-warfare have replaced large-scale military invasions as the primary threat to geopolitical stability. The current Charter regime permits assaults below a certain threshold of magnitude, providing a safe harbor that is protected from military response, for those contemplating aggression. I have therefore proposed that the international community do what many states, and, at times, the Security Council, appear to have quietly acknowledged as a necessary adjustment, and reform the law of countermeasures to permit force.

There are, of course, alternative paths to plugging the force gap. Whether by amendment or by interpretation, Article 51 could authorize self-defense in response to any use of force, subject to the principle of proportionality. Of course, as the framers of Article 51 were all acutely aware, “self-defense” has been invoked to justify some of history’s most consequential invasions. Article 2(4) could be construed narrowly to remove force short of armed attack from its ambit, but this hardly seems the time for international law to retreat from any effort to address an increasingly wider range of forms of aggression. And we could call upon the Security Council to assert jurisdiction over, and shape remediation for, the widening range of illegal uses of force short of armed attack, but experience tells us that this is not calculated to succeed, for reasons having to do not only with the nature of the United Nations but also with the type of conduct at issue, often intermittent, difficult to investigate, and ever-changing in tactics.

Of course, leaving it to member states to devise their own forcible counter-measures is not without significant risk. The free market of states devising responses to other states brought us two world wars; restrictions on self-defense, however inequitable and imperfect, have no such legacy. And for international law to have any modulating effect, direct or indirect, on the volley between low-gravity assaults and forcible countermeasures, the international community must not only agree on limiting principles such as in-kind reciprocity, but also devise a mechanism for their enforcement.

That said, there is a problem here to be solved. The force gap has become increasingly destabilizing over recent decades, as we’ve

entered “the era of low-intensity warfare,”²²⁷ and with the advent of cyber-warfare and other non-traditional modes of assault, it will continue to do so. Forcible countermeasures hold promise for providing a flexibility of responsive deterrent that is appropriate and effective for addressing and ultimately limiting low-gravity warfare in the modern world.

²²⁷ See, e.g., Baker, *supra* note 17; Alberto R. Coll, *supra* note 129, at 107.