

Retaliation, Retribution, and Punishment and International Law

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by [Michael N. Schmitt](#) | Apr 18, 2024



On April 13, Iran launched a massive missile and drone attack on Israel. Hezbollah and Houthi attacks took place contemporaneously. Israel, alongside forces from France, the United Kingdom, the United States, and Jordan, successfully neutralized most of these threats, with several Arab States providing indirect support. Widespread denunciation of Iran's actions followed. For instance, the G7 "condemn[ed] in the strongest terms Iran's direct and unprecedented attack," expressed "full solidarity and support to Israel and its people," and reaffirmed its commitment toward Israel's security.

Iran's attack was a response to Israel's April 1 airstrike on individuals located inside Iran's Consulate in Damascus. The operation killed two senior Iranian Revolutionary Guard Generals, along with five other officers, a member of Hezbollah, and two Syrians. The day after the attack, Iran's supreme leader, Ayatollah Ali Khamenei, threatened, "We will make them regret this crime and other similar ones with the help of God." Iran's attack was an attempt to make good on that threat.

The question is, “What next?” Iranian officials claim its “operation yielded its complete result” and “there is no intention to continue it,” although it is far from certain that Iran is ready to put an end to its long-running “shadow war” with Israel. Meanwhile, Israel seems intent on responding. For instance, Lieutenant General Herzi Halevi, the Israel Defense Forces’ Chief of Staff, stated that “the launch of so many missiles and drones to Israeli territory will be answered with a retaliation.” In response to such statements, Iranian President Ebrahim Raisi has warned, “The slightest action against Iran’s interests will definitely be met with a severe, extensive and painful response.” The risk of escalation between Iran and Israel is palpable, as is the danger of the conflict sparking a regional conflagration.

The legal situation is highly complex, raising fraught issues surrounding attribution in the law of State responsibility, the self-defense conditions of necessity and proportionality, and temporal concerns over the requirements of imminency and immediacy. Yet, global discourse, including statements from the parties and media reporting, has been conducted almost entirely in the patois of retaliation, retribution, and punishment. There seems to be a widespread belief that responding forcefully is appropriate so long as your side is the “real victim.”

But that is *not* the law, and such attitudes are inherently escalatory. States that respond to other States’ hostile actions may *harbor* the desire to retaliate, seek retribution, or punish, but their actions must comport with legal standards that take no notice of such goals. This is true not only of the right of self-defense that the current events implicate, but also of the other response modalities provided for in international law (see summary here). To illustrate this point, I will examine four international law response options in this post: self-defense; reprisals; necessity; and countermeasures. The red thread running through all of them is a desire to return the situation to one of lawfulness and stability.

Self-Defense

As apparent from the text of UN Charter Article 51, the trigger for the right of a State to act in self-defense is the existence of an “armed attack.” Armed attacks always qualify as unlawful uses of force that violate Article 2(4) of the Charter, although by the prevailing view, only those rising to the level of an armed attack may be responded to forcibly (*Paramilitary Activities*, para. 191).

Numerous contentious issues surround the qualification of an action as an armed attack, such as whether an armed attack is the gravest form of the use of force (Department of Defense (DoD), *Law of War Manual*, § 1.11.5.2) and whether non-State actors may launch them (DoD, *Law of War Manual*, § 1.11.5.4; Schmitt, p. 104-06). Whatever their proper resolution in the abstract, there is no right to defend oneself against an act of self-defense. Any such action by the aggressor would simply be a continuation of an initial wrongful use of force.

More to the point for our purposes are the universally accepted requirements that a use of force in self-defense be both necessary and proportionate (see, e.g., *Paramilitary Activities*, paras. 194, 237; *Nuclear Weapons*, para. 41; *Oil Platforms*, paras. 43, 73-74, 76). The condition of necessity denotes a situation in which the victim State must resort to force to repel the armed attack; non-forcible alternatives will not suffice. This will usually be the case during the armed attack.

However, retaliation, retribution, and punishment occur *after* an attack. This raises the question of timing, specifically, whether there still is a need to respond forcibly at the time of the response. It is an issue sometimes treated as a separate self-defense condition of *immediacy*. Compliance with this condition is one way to distinguish a lawful response from an unlawful one.

In only limited circumstances does international law allow after-the-fact forcible responses. Of course, there are practical considerations *vis-à-vis* fashioning such responses. For instance, a State may need time to gather evidence supporting the attribution of an attack, seek assistance from other States, or prepare its forces before it can successfully respond. However, the critical legal factor in assessing such responses is whether further attacks will occur. If not, there is no longer an armed attack against which to defend; it is over. A forcible response in such a case would violate the immediacy requirement and be nothing more than retaliation, retribution, or punishment. Frustrating though this may be to the victim State, its right to use force in self-defense has evaporated.

If further attacks can reasonably be expected, the question becomes whether there are non-forcible measures, such as negotiation or referral of the matter to the UN Security Council, that might, in the circumstances, effectively prevent or deter them. Of course, given the stakes, States need only act reasonably. For instance, as Yoram Dinstein has noted, necessity “does not mean the injured State must embroil itself in prolonged wheel-spinning negotiations” (*War, Aggression and Self-Defence*, 6th ed., p. 269). Nevertheless, if the victim State reasonably concludes that non-forcible measures would prove futile, the necessity criterion remains satisfied. It need not await future attacks that prove the accuracy of its foresight before acting defensively. It will be responding to an ongoing *campaign* at the armed attack level.

Any such response must be proportionate. Whereas necessity is about *whether* the victim State must use force to meet the armed attack, proportionality is about *how much* force may be used. It is a standard of reasonableness that requires no more force be used than needed to prevent further attacks, either by depriving the adversary of the means to conduct them or by convincing it to refrain from doing so. Exceeding the threshold transforms the response into unlawful retaliation, retribution, or punishment.

These are challenging standards to apply in practice. But the law is clear: only the victim State may resort to force; that defensive force must be necessary in the sense that viable, non-forcible alternatives are unavailable; after-the-fact responses are permissible only when the victim State reasonably concludes that more attacks will take place; and the degree of force used in self-defense must not exceed that called for in the circumstances to prevent further attacks. The intent of these rules is also clear. It is to return the situation to one in which neither party is using force.

Reprisals

Reprisals, which are only available to the parties to an international armed conflict, are acts (actions or omissions) that would otherwise violate international humanitarian law (IHL), the paradigmatic example being attacking civilian objects. Despite the general unlawfulness of the act in question, the law temporarily sanctions the IHL violation in order to persuade a party that is already violating IHL to stop. As I have noted [elsewhere](#), “the acceptance of reprisal as a self-help tool is a historical response to the absence of a reliable and timely IHL enforcement mechanism. In theory, the availability of reprisals will both deter future IHL violations and compel the termination of those that are underway.”

In that reprisals involve an intentional breach of the law by the victim State, the law imposes stringent limitations upon them. The most significant of these is that their only permissible purpose is to force the enemy to comply with its IHL obligations (DoD, *Law of War Manual*, § 18.18.1.3). Thus, an action motivated by retaliation, retribution, or punishment can never qualify as a reprisal; its unlawful character remains intact. Additionally, because the purpose is to compel the enemy to end its unlawful conduct, an action that is unlikely to prove successful does not amount to a reprisal. And reprisals cannot be launched in anticipation of enemy violations or in the absence of a reasonable belief that a violation that already has taken place is but one in a related series of violations. Again, absent enemy conduct that the purported reprisal is meant to stop, it is actually nothing more than retaliation, retribution, or punishment, and therefore still unlawful. Finally, as soon as the enemy complies with its IHL obligations, the right to engage in reprisals expires.

It must be emphasized that the option of engaging in reprisals is now strictly limited by customary and treaty law, a subject I dealt with in an earlier *Articles of War* [post](#). However, the limitation on reprisals to those designed to coerce the enemy back into IHL compliance is further exemplification that international law has no place for retaliation, retribution, or punishment and works only to enhance overall lawfulness and a return to stability.

Necessity

An oft-ignored response option is taking action based on the “plea of necessity,” a peacetime response option (see [Arimatsu/Schmitt](#)). Necessity is a “circumstance precluding wrongfulness” in the law of State responsibility. It permits States to sometimes act in a

manner that would otherwise be unlawful when doing so is “necessary,” as that term is understood in this body of law (and as distinguished from necessity in the context of self-defense). Situations allowing for acting on this basis are extremely rare.

Article 25 of the International Law Commission’s Articles on State Responsibility (ASR) restates this “secondary rule” of customary international law. It provides, in relevant part, that necessity precludes the wrongfulness of a State’s otherwise unlawful act (which may be an action or omission) if it “is the only way for the State to safeguard an essential interest against a grave and imminent peril.” An example would be hacking back in response to a hostile cyber operation targeting critical infrastructure, even when doing so might disable cyber infrastructure in another State to which the hostile operation cannot be attributed, thereby violating its sovereignty.

The fact that acts based on necessity are permissible only when they are the sole way to put an end to the peril echoes self-defense’s necessity condition; the same concerns animate both. Along the same lines, the prohibition on resorting to the plea of necessity unless facing a grave and imminent (or underway) threat to an essential interest (e.g., health, national security, government functioning) exemplifies international law’s desire to avoid actions that cross legal lines except in the most extreme of circumstances.

Taking action based on necessity is also prohibited in situations in which doing so would “seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole” (ASR, art. 25). This requirement precludes basing forcible actions on the plea of necessity. It also reflects international law’s desire to maintain stability in the international system, for it does not allow for responses that might be expected to exacerbate matters.

Countermeasures

Like self-defense and necessity, qualification as a “countermeasure” is a “circumstance precluding the wrongfulness” of an action that would otherwise be unlawful under international law (ASR art. 22). An example would be closing the territorial sea to innocent passage by a State that itself has interfered with the right of innocent passage by States flagged in the former.

In a broad sense, countermeasures operate much like reprisals during an international armed conflict, for countermeasures are only available to a State that has been the victim of another State’s “internationally wrongful act” (international law violation) and must be designed to “induce that State to comply with its obligations” (ASR, art. 49). The obligations in question are to comply with international law’s “primary rules” and provide appropriate reparations to make good the harm the responsible State has wrongfully caused. As soon as the wrongful conduct to which a countermeasure responds ceases, so does the right to take

further countermeasures except when reparations are due and have not been provided (ASR, art. 53). There is no room for justifying a purported countermeasure based on a perceived need to retaliate, seek retribution, or punish.

Because the conduct underlying countermeasures is otherwise unlawful, international law imposes strict limitations and demanding requirements on them. For instance, the rule of proportionality in the law of State responsibility (as distinct from self-defense) requires that countermeasures “be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question” (ASR, art. 51). Moreover, before taking a countermeasure, the State must usually provide notice that it is going to do so to allow the responsible State to desist (ASR, art. 52). Finally, countermeasures are not available if the dispute between the States is already pending before a court or tribunal that can render binding decisions about it (ASR, art. 52).

Again, these rules illustrate the extent to which international law responses seek to stabilize situations through mechanisms designed to cause States to comply with their international law obligations.

Concluding Reflections

I am not naive. I understand that States (including my own) often feel a need to express themselves in terms of retaliation, retribution, and punishment for reasons of domestic and international consumption. In many cases, they do so out of very justifiable outrage. Such “tough talk” can have a valuable cathartic effect on a society that is suffering. A fair argument can also be made that in certain circumstances, the harsher the tone, the greater the deterrent value of a threat. And I realize that States that speak in these terms do not necessarily disregard the requirements of international law. Their legal advisers may be providing sophisticated analysis and sound legal advice, and their leaders may be seeking to comply with that advice.

But it is self-evident that fiery hyperbole can also aggravate a situation, whether by escalating the terms of the conflict or by States painting themselves into a corner that prevents de-escalation. If this is to be avoided, both sides must understand that international law has no place for responses based on retaliation, retribution, or punishment. This is so no matter how condemnable the conduct to which they reply.

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