Introduction

I. Outline of a Burning Issue

1. Contextualisation of a Remark by Karl Strupp

> "Si l'on voulait dresser, au domaine du droit des gens, une liste des matières théoriquement et pratiquement brûlantes, on ne pourrait en trouver aucune qui le serait plus que le droit des *représailles*."[1]

The passage above opens an article written by German legal scholar Karl Strupp for a *liber amicorum* in honour of Belgian jurist Ernest Mahaim. The topic of reprisals was not unknown to the latter. The previous year, Mahaim presided the Institute of International Law's 1934 session in Paris, which saw the adoption of a regulation governing reprisals in peacetime. In this article, Strupp stressed that the question of reprisals, and more precisely of 'armed' reprisals, had been an acute problem since the creation of the League of Nations and the subsequent adoption of the Kellogg-Briand Pact. He nevertheless acknowledged that the issue was not new and was already of practical interest prior to 1919. However, the situation had grown worse, in his opinion, with the renunciation of aggressive war during the interwar years. As a result, the employment of armed reprisals offered a dangerous alternative to circumvent that prohibition. The question of the distinction between armed reprisals and war had thus become of critical importance.[2]

In order to understand the issue which Strupp referred to, it is necessary first to define 'reprisals' and explain their raison d'être.

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1 Karl Strupp, 'Problèmes actuels du droit des représailles', in *Mélanges offerts à Ernest Mahaim par ses collègues, ses amis, ses élèves*, Liège, 5 Novembre 1935, 2nd vol. (Paris: Librairie du Recueil Sirey, 1935), 341–56, at 341 (emphasis in original).

2 Ibid., 341–2. Cf. Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge: CUP, 2005), 285–286 and 297. On Strupp, see Sandra Link, *Ein Realist mit Idealen – Der Völkerrechtler Karl Strupp (1886–1940)* (Studien zur Geschichte des Völkerrechts, 5; Baden-Baden: Nomos, 2003).

Etymologically, the word 'reprisals' goes back to Medieval Latin *reprehendere*, 'to retake', and evolved through the Italian *ripreso* (*<riprendere*) and the French *reprise* (*<reprendre*).[3] It originally meant the action of taking one's property back or its equivalent in nature or value.[4] Reprisals then pursued redress. Nevertheless, they came over time to be used for other goals such as law enforcement, deterrence, even punishment.[5] Hence, the pressure applied against the wrongdoer diversified and was not only limited to the mere retaking of property.[6]

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3 Peter Haggenmacher, 'L'ancêtre de la protection diplomatique. les représailles de l'ancien droit (XII^{e}-XVIII^{e} siècles)', *Relations internationales* 143/3 (2010), 7–12, at 9. See also Émile Littré, *Dictionnaire de la langue française*, 4th vol. (Paris/Londres: Libraire Hachette et Cie, 1874), 1647.

4 Cf. Grover Clark, 'The English Practice with Regard to Reprisals by Private Persons', *AJIL* 27 (1933), 694–723, at 702.

5 Cf. Federica Paddeu, *Justification and Excuse in International Law*: *Concept and Theory of General Defences* (Cambridge Studies in International and Comparative Law; Cambridge: CUP, 2018), 248–9.
In the *Naulilaa* case, a panel of Swiss arbitrators where called to answer the questions whether the responsibility of Germany was engaged for damage caused during WWI to neutral Portugal in its southwestern African colony of Angola, and whether reprisals might justify Germany's actions. On that occasion, the award in 1928 spelt out reprisals as "aim[ing] to impose on the offending State reparation for the offense or the return to legality in avoidance of new offenses." (*Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (Sentence sur le principe de la responsabilité*), Decision of 31 July 1928, RIAA 2 (1949), 1011–33, at 1026; extract translated in Andrew D. Mitchell, 'Does One Illegality Merit Another? The Law of Belligerent Reprisals in International Law', *MilLRev* 170 (2001), 155–77, at 156). Cf. Alfon Knetsch, 'Repressalien', in Paul Posener (ed.), *Rechtslexikon*. *Handwörterbuch der Rechts- und Staatswissenschaften*, mit Unterstützung durch zahlreiche Mitarbeiter, 2nd vol. (Berlin: Erich Weber Verlag, 1909), 379; Article 1 of the IIL's resolution governing reprisals in time of peace: Institut de Droit International (ed.), *Session de Paris, Octobre 1934* (Annuaire IDI, vol. 38; Bruxelles: Goemaere, 1934), 708.
Contemporary scholars have particularly emphasised the punitive character of the modern use of reprisals. See, e.g., Derek Bowett, 'Reprisals Involving Recourse to Armed Force', *AJIL* 66 (1972), 1–36, at 3; Robert W. Tucker, 'Reprisals and Self-Defence. The Customary Law', *AJIL* 66 (1972), 586–96, at 589. Cf. Neff, *War and the Law of Nations* (above, n. 2), 124. But when this punitive character prevails, the measure can hardly be regarded as peacetime reprisals. For instance, Ibid., 229, mentions instances of reprisals against savage tribes in the nineteenth century that, in truth, looked like punitive expeditions or small-scale wars.

6 Cf. Thomas Joseph Lawrence, *The principles of international law* (4th edn., Boston: D. C. Heath & Co., 1910), 337; Evelyn Speyer Colbert, *Retaliation in international law* (New York: King's Crown Press, 1948), 60–1.

According to Hans Kelsen, reprisals are "acts which, although normally illegal, are exceptionally permitted as reaction of one state against a violation of its right by another state."[7] So, reprisals imply the departure from the ordinary rules of international law in response to wrongful acts. They differ in such respect from other measures of coercion semantically or conceptually related. Retorsion, for example, is the unfriendly response by a State to another country's act or conduct. The difference with reprisals is, therefore, that the acts of retorsion are politically or morally discourteous, but do not constitute a breach of international law.[8] Another measure distinguishable from reprisals is self-defence, which means an immediate reaction to prevent or thwart an imminent or ongoing aggression. As to reprisals, there is, on the contrary, no requirement of temporal immediacy because the wrong is already done.[9] Finally, reprisals should not be confused with sanctions. Indeed, the former are a self-help method while sanctions are understood today as collective enforcement measures decided by an international organisation.[10]

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7 Hans Kelsen, *Principles of international law* (New York: Rinehart & company, 1952), 23.

8 The suspension of diplomatic relations is, e.g., an act of retorsion. See Thomas Giegerich, 'Retorsion', in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, published under the auspices of the Max Planck Institute for comparative public law and international law, 11 vols. (Oxford: OUP, 2012–2013; <http://www.mpepil.com>, accessed 15 December 2017); United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (United Nations Legislative Series, 25; New York: United Nations, 2012), 304–5.

9 Cf. Jean-Claude Venezia, 'La notion de représailles en droit international public', *RGDIP* 64 (1960), 465–98, at 474–477; Frits Kalshoven, *Belligerent Reprisals*, Preface by Jean Pictet (Scientific collection of the Henry Dunant Institute, 1; Leyden: Sijthoff, 1971), 26–7; Oscar Schachter, 'In Defense of International Rules on the Use of Force', *UChiLRev* 53 (1986), 113–46, at 132; Fiona Mckinnon, 'Reprisals as a Method of Enforcing International Law', *LJIL* 4 (1991), 221–48, at 231–232; The Chairman Pemmaraju Sreenivasa Rao, 2424th Meeting, 21 July 1995: United Nations, *Yearbook of the International Law Commission 1995*: *Summary records of the meetings of the forty-seventh session 2 May-21 July 1995*, 1st vol. (New York/Geneva: United Nations, 1997), 297 Para. 12.

10 Matthias Ruffert, 'Reprisals', in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, published under the auspices of the Max Planck Institute for comparative public law and international law, 8th vol. (Oxford: OUP, 2012–2013; <http://www.mpepil.com>, accessed 13 December 2017), 927–30, here at no. 9. See also Hans Kelsen, *Collective security under international law* (2nd reprint [originally published: International law studies, 49; Washington: United States GPO, 1957], Clark, New Jersey: The Lawbook Exchange, 2011),

In contemporary legal terminology, as well as colloquially, reprisals mean the retaliatory action during a war in response to the opponent's violation of the *ius in bello*.[11] Those 'belligerent' reprisals often correspond to the idea of 'retaliation', namely returning a tit for a tat as retribution: the *lex talionis*.[12] However, the present study is all about peacetime reprisals, known today as 'countermeasures' but referred herein to as 'reprisals' in accordance with their pre-WWII meaning.[13]

A distinction exists between acts of reprisals involving the use of force and non-forcible ones. An example of the latter kind is the non-fulfilment of treaty obligations.[14] The compatibility of non-forcible reprisals with a state of peace has never raised serious doubts. On the contrary, it was far

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104; United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (above, n. 8), 305.

11 On belligerent reprisals, see i.a. Louis Le Fur, *Des Représailles en temps de guerre*: *Représailles et Réparations* (Comité pour la Défense du Droit International; Paris: Recueil Sirey, 1919); Ellery C. Stowell, 'Military Reprisals and the Sanctions of the Laws of War', *AJIL* 36 (1942), 643–50; Kalshoven, *Belligerent Reprisals* (above, n. 9); Shane Darcy, 'The Evolution of the Law of Belligerent Reprisals', *MilLRev* 175 (2003), 184–251; Johannes Hebenstreit, *Repressalien im humanitären Völkerrecht* (Völkerrecht und Außenpolitik, 64; Baden-Baden: Nomos, 2004).

12 Cf. Joseph-Mathias Gérard de Rayneval, *Institutions du droit de la nature et des gens*, 1st vol. (new edn., Paris: Rey et Gravier, 1832), 318; Andrés Bello, *Principios de derecho internacional* (2nd edn., Caracas: J. M. de Rojas, 1847), 127; Haggenmacher, 'L'ancêtre de la protection diplomatique. les représailles de l'ancien droit (XII^{e}-XVIII^{e} siècles)' (above, n. 3), 9. Peacetime reprisals were sometimes classified under 'retaliation' as umbrella term (see, e.g., Colbert, *Retaliation in international law* (above, n. 6), 2–3 fn. 1) or were accounted for in a reductive manner as the application of the talion (see, e.g., Theodor Schmalz, *Das europäische Völker-Recht*: *in acht Büchern* (Berlin: Duncker und Humblot, 1817), 213–6). This categorisation may be the source of confusion and does not correctly render the character of reprisals used in time of peace. Therefore, the concept of retaliation is reserved here for belligerent reprisals only.

13 The shift from 'reprisals' to 'countermeasures' followed the arbitration award in *Case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France*, Decision of 9 December 1978, RIAA 18 (2006), 471–93. See also United Nations, *Materials on the Responsibility of States for Internationally Wrongful Acts* (above, n. 8), 304; Federica Paddeu, 'Countermeasures', in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, published under the auspices of the Max Planck Institute for comparative public law and international law, 11 vols. (Oxford: OUP, 2012–2013; <http://www.mpepil.com>, accessed 13 December 2017), no. 2.

14 In the past, the expulsion or the dismissal of nationals of the wrongdoing country was often regarded as a measure of reprisals. See, thereupon, Carl Albert von Kamptz, *Beiträge zum Staats- und Völkerrecht*, 1st vol. (Berlin: Nicolai, 1815), 204–

less certain when reprisals involved the employment of armed force.[15] Nonetheless, 'armed' (or 'forcible') reprisals have usually been classified amongst the non-amicable mode of self-help 'falling short of war', i.e. enforcement methods not amounting to war.[16]

The existence of reprisals in international law flows from the anarchic state of international relations. From the absence of an international organisation or a supreme authority results the decentralisation of law enforcement. Thus, the doctrine of self-help teaches that every sovereign State is permitted to take the law into its own hands.[17]

In the light of these explanations, Strupp's previous remarks arouse interest and raise a number of questions. In fact, one may wonder why armed reprisals were allowed during the interwar period while the League of Nations can be described as "an organized international community".[18]

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6. More generally about non-forcible reprisals, see esp. Andrea de Guttry, *Le rappresaglie non comportanti la coercizione militare nel diritto internazionale* (Pubblicazioni della facoltà di giurisprudenza della università di Pisa, 90; Milano: Dott. A. Giuffrè, 1985); Omer Yousif Elagab, *The legality of non-forcible counter-measures in international law* (Oxford monographs in international law; Oxford: OUP, 1988).

15 See *infra*, Introduction I.2.

16 In German legal literature, armed reprisals are sometimes called *militärische Repressalien*. See, e.g., Josef L. Kunz, *Kriegsrecht und Neutralitätsrecht* (Wien: Julius Springer, 1935), 7ff.; Georg Kappus, *Der völkerrechtliche Kriegsbegriff in seiner Abgrenzung gegenüber den militärischen Repressalien* (Abhandlungen aus dem Staats- und Verwaltungsrecht mit Einschluss des Kolonialrechts und des Völkerrechts, 52; Breslau: M. & H. Marcus, 1936); Harald Heyns, *Die Anwendung von militärischen Repressalien unter Völkerbundmitgliedstaaten*, Inaugural-Dissertation zur Erlangung der Doktorwürde der Hohen Rechts- und Staatswissenschaftlichen Fakultät der Christian-Albrechts-Universität zu Kiel (Baruth/Mark-Berlin: J. Särchen, 1938). However, the attributive adjective 'military' may be misleading. The expression *nichtkriegerische Repressalien* —used, e.g., by Georg Jellinek, 'China und das Völkerrecht', *DJZ* 5 (1900), 401–4, at 402; Paul Schoen, 'Zur Lehre von den völkerrechtlichen nichtkriegerischen Mitteln der Selbsthilfe', *ZVölkR* 20 (1936), 14–64— is more suitable to highlight the separation between armed reprisals and belligerent reprisals (*Kriegsrepressalien*).

17 Cf. Yves de la Brière, 'Évolution de la doctrine et de la pratique en matière de représailles', *RdC* 22/II (1928), 237–94, at 278; Albert E. Hindmarsh, 'Self-Help in Time of Peace', *AJIL* 26 (1932), 315–26, at 320; Georges Scelle, 'Règles générales du droit de la paix', *RdC* 46 (1933), 327–703, at 671–673; Ruffert, 'Reprisals' (above, n. 10), no. 2.

18 See International Court of Justice, *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections*, Judgement of 21 December 1962, I.C.J. Reports (1962), 319–48, at 329.

A cursory look in legal doctrine of the time shows, though, that there were conflicting views on that issue. On the one hand, some lawyers supported the opinion that the resort to armed reprisals was incompatible with the new obligations imposed by the Covenant of the League of Nations.[19] Strupp himself considered that the progress achieved in the organisation of the international community of States and in the prevention and settlement of disputes forbade the recourse to armed reprisals, if not normatively at least morally.[20] On the other hand, two doctoral theses on reprisals from the early 1930s both concluded that in the actual state of international law reprisals were still needed and therefore should not be abolished.[21] Indeed, although the collective security system of the League prevented the occurrence of conflicts between States and encouraged their settlement, it was not flawless. The League of Nations was an organised international community, yet decentralised.[22] So, in the absence of an effective method to guarantee law compliance and law enforcement in the form

19 E.g. "S'emparer de force du territoire de son adversaire comme garantie du payement d'une dette dont on proclame soi-même, sans nul contrôle, l'existence et le montant, c'est la forme la plus caractéristique de l'anarchie juridique qui, tolérable en l'absence de toute organisation sociale, ne saurait être tolérée dans la Société des Nations." (Nikolaos Sokrates Politis, 'Les représailles entre Etats membres de la Société des Nations', *RGDIP* 31 (1924), 5–16, at 14). See also Louis Le Fur, 'Le développement historique du droit international. De l'anarchie internationale à une communauté internationale organisée', *RdC* 41/III (1932), 505–601, at 533–535.

20 Strupp, 'Problèmes actuels du droit des représailles' (above, n. 1), 341–51. See also Brière, 'Évolution de la doctrine et de la pratique en matière de représailles' (above, n. 17), 248–250 and 278–288.

21 Alfred Müller, *Wandlungen im Repressalienrecht*, Inaugural-Dissertation zur Erlangung der Doktorwürde der Hohen Rechts- und Staatswissenschaftlichen Fakultät der Georg-August-Universität zu Göttingen (Göttingen: [A. Stenger], 1933), 107; André Haumant, *Les représailles*, Thèse pour le doctorat en droit présentée et soutenue le 12 Mars 1934, à 14 heures (Paris: Marcel Giard, 1934), 218–9. Cf. Erich Schumann, *Die Repressalie*, Inaugural=Dissertation zur Erlangung der Doktorwürde der Rechts= und Wirtschaftswissenschaftlichen Fakultät der Universität Rostock (Rostock: Carl Hinstorff, 1927), 38–40. Shortly after WWII, Colbert, *Retaliation in international law* (above, n. 6), 199–206, reached a similar conclusion. She urged then to regulate the employment of peacetime reprisals rather than abandon that mode of redress.

22 Josef L. Kunz, 'Sanctions in International Law', *AJIL* 54 (1960), 324–47, at 327.

of sanctions, the resort to reprisals did not completely lose its significance.[23]

However, this explanation remains largely unsatisfactory because, during the era of the League of Nations, many States had consented to waive their sovereign right to resort to war. Although the efforts in that regard did not ultimately succeed to ban war for good from the international relations, many prominent nations strove to outlaw its resort. On the contrary, nothing alike was ever decided regarding the employment of armed reprisals. One would thus look in vain for a similar prohibition or at least regulation adopted by States at the time. This difference in treatment between the two activities is all the more intriguing that the question of the distinction between war and armed reprisals was a thorny issue during the interwar period.

2. Blurry Line between Armed Reprisals and War

For want of restriction, the resort to armed reprisals presented a dangerous solution for bypassing the prohibition of war. In this way, real wars could be waged in the guise of alleged reprisals.[24] This situation ensued from the classification of reprisals under the law of peace. It means that reprisals were deemed consistent with a state of peace, even when they involved the use of armed force.[25]

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23 Elisabeth Zoller, *Peacetime unilateral remedies*: *An analysis of countermeasures* (Dobbs Ferry, N.Y.: Transnational Publishers, 1984), 38. Cf. André Pépy, 'Après les ratifications du Plan Young. Révision et Sanctions', *RDI 5* (1930), 441–77, at 476; Hindmarsh, 'Self-Help in Time of Peace' (above, n. 17), 324–6.

24 Scelle, 'Règles générales du droit de la paix' (above, n. 17), 677; Kunz, *Kriegsrecht und Neutralitätsrecht* (above, n. 16), 8 fn. 37, and 11; Wilhelm Georg Grewe, *Epochen der Völkerrechtsgeschichte* (Baden-Baden: Nomos, 1984), 735; Neff, *War and the Law of Nations* (above, n. 2), 296–7.

25 Nonetheless, numerous textbooks on international law covered the topic of reprisals in the second part or volume devoted to war. The idea was to stress the distinction between the so-called 'pacific' means of coercion and war. So, e.g., John Westlake explained that "[t]he consideration of measures [short of war] will naturally precede the detailed consideration of war, as being more akin to the subject of the preceding volume [on Peace], but first of all war must be defined or those measures could not be distinguished from it." (John Westlake, *International Law*, 2nd vol. (2nd edn., Cambridge: CUP, 1913), 1). Cf. Lassa Oppenheim, *International Law*: *A Treatise*, 2nd vol. (London: Longmans, Green, and Co., 1905), V. In other words, an excluding definition applied to the concept of war. Since

As a result, the employment of armed reprisals possessed obvious advantages over the resort to war. British legal scholar Thomas Erskine Holland mentioned that reprisals "are strictly limited in scope; they cease, when their object has been attained, without the formalities of a treaty of peace; and, no condition of "belligerency" existing between the Powers immediately concerned, third Powers are not called upon to undertake the onerous obligations of "neutrality.""[26] From a constitutional law viewpoint, the resort to reprisals could also be decided by the Executive alone, without the prior permission of the Parliament, which only was required to declare war.[27] The limited scope of armed reprisals also made them more beneficial to the target country than a war, which could take on dramatic proportions and bring about many calamities.[28] Besides, reprisals would cease immediately after the fulfilment of the demands for which the reprisal-taking State undertook the operation. In other words, the target country would

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reprisals and the other measures short of war remained within the confines of peace, a forcible action not labelled as such could only mean war; and vice versa.

26 Letter of 18 December 1902: Thomas Erskine Holland, *Letters to "The Times" upon War and Neutrality (1881–1920)*: *With some commentary* (3rd edn., London: Longmans, Green, and Co., 1921), 14. About the legal implications of war, see Alan N. Salpeter and Jonathan C. Waller, 'Armed Reprisals during Intermediacy – A New Framework for Analysis in International Law', *VillLRev* 17 (1971), 270–312, at 271 fn. 5.

27 "La collaboration des deux pouvoirs sera effective dans les véritables guerres, mais les gouvernements, de nos jours, prennent souvent l'initiative des hostilités, sans vouloir engager la guerre proprement dite; par exemple, sous forme de représailles violentes, de blocus pacifiques, d'expéditions, même occupations du territoire étranger." (Marius Maurel, *De la Déclaration de Guerre*: *Étude d'Histoire Diplomatique, de Droit Constitutionnel et de Droit Public International*, Préface de A. Mérignhac (Paris: Librairie générale de droit & de jurisprudence, 1907), 203f.). See also Frantz Despagnet, *Cours de droit international public* (4th edn., Paris: Libraire de la société du Recueil Sirey, 1910), 782.

28 The reprisal-taking States were well aware of that aspect, as it is apparent from a British Memorandum of 1902 drafted in the context of the blockade of Venezuela: "The various [coercive] measures mentioned are, no doubt, all of them, in essence acts of war; if Venezuela chose so to treat them, she would be justified in taking that course. It is, however, plainly in her interests not to regard them in this light, and they form a convenient *mitior usus* which is suitable to the case of a recalcitrant petty State in controversy with Great Powers of overwhelming strength, who, while desiring to obtain proper redress, are unwilling to dismember or destroy a puny antagonist." (British Memorandum of 29 November 1902 on pacific blockade reproduced by Lothar Kotzsch, 'Die Blockade gegen Venezuela vom Jahre 1902 als Präzedenzfall für das moderne Kriegsrecht', *ArchVölkR* 5 (1955–1956), 410–25, at 423).

not be compelled to meet other demands.[29] The prevailing pacific sentiment also accounts for the use of reprisals as a substitute for war.[30] In fact, reprisals were not only milder than war, but morally more acceptable too. Finally, the reprisal-taking States were not to abide by the rules of the *ius in bello*. That is why Fritz Grob argued in his major work *The Relativity of War and Peace* (1949) that military operations were named armed reprisals as sheer legal casuistry in order to avoid calling them war and hence falling under the scope of some rules of the law of war.[31]

The resort to reprisals had thus undeniable advantages and different legal implications than war. However, the distinction between reprisals and war was no easy matter. French jurist Yves de la Brière characterised reprisals as an unnamed war of small scale that did not break the state of peace.[32] He thus meant that armed reprisals looked like war but had distinct legal effects. Such description reveals the singular place of armed reprisals within international law for lying half-way between peace and war.[33] In fact, not only lay people could not distinguish armed reprisals

29 Colbert, *Retaliation in international law* (above, n. 6), 98–9.

30 Elagab, *The legality of non-forcible counter-measures in international law* (above, n. 14), 14.

31 Fritz Grob, *The Relativity of War and Peace*: *A Study in Law, History, and Politics*, Foreword by Roscoe Pound (New Haven: Yale University Press, 1949), 237–47.

32 Brière, 'Évolution de la doctrine et de la pratique en matière de représailles' (above, n. 17), 272.

33 In the Eighth Philippic, Section 4, Cicero stated "*Inter bellum et pacem medium nihil*", that is, between peace and war no intermediacy [exists]. This maxim has governed international law since at least Hugo Grotius who adopted it as an invariable principle. See Hugo Grotius, *Le droit de la guerre et de la paix*, Traduction de Jean Barbeyrac, 2 vols. (Bibliothèque de Philosophie politique et juridique: Textes et Documents; Caen [Amsterdam]: Centre de Philosophie politique et juridique de l'Université de Caen [chez Pierre de Coup], 1984 [1724]), Book III Ch. XXI § I.3, here at 2nd vol., 971. See also Lord Macnaghten in *Janson v. Driefontein Consolidated Mines* (1902): "[…] the law recognises a state of peace and a state of war, but that it knows nothing of an intermediate state which is neither the one thing nor the other—neither peace nor war." (Frederick Pollock and A. P. Stone, *The Law Reports or The Incorporated Council of Law Reporting. House of Lords, Judicial Committee of the Privy Council, and Peerage Cases*: *1902.* (London: William Clowes and sons, 1902), 497). Armed reprisals could thus not escape from the dichotomy: they had to be either warlike or pacific. As a result, they fell within the law of peace. Kunz, *Kriegsrecht und Neutralitätsrecht* (above, n. 16), 8. Cornelius van Bynkershoek stated too that "[…], *Repressaliis locum non esse, nisi in Pace,* […]." (Cornelius van Bynkershoek, *Quaestionum juris publici libri duo*, 2 vols. (The Classics of International Law, 14; [1st edn. of 1737], Oxford: Claren-

from war, but jurists too.[34] For example, Great Britain, Germany and Italy began to blockade the coasts of Venezuela in December 1902. The action

don Press, 1930), Book I Cap. 24, here 1st vol., 173 (tr. 2nd vol., 134)). So, legal doctrine ruled out the existence of a so-called 'state of reprisals'. See, e.g., Friedrich Heinrich Geffcken, 'La France en Chine et le droit international', *RDILC* 17 (1885), 145–51, at 145; Ernest Nys, *Le droit international*: *Les principes, les théories, les faits*, 3rd vol. (Bruxelles/Paris: Alfred Castaigne; Albert Fontemoing, 1906), 89.

Notwithstanding, few authors supported the opinion that an intermediate state, a *status mixtus*, under which armed reprisals would come, existed in international law. Shortly before the Second World War, Carl Schmitt believed to have identified, both *de facto* and *de jure*, the existence of a state of intermediacy. See Carl Schmitt, '„Inter pacem et bellum nihil medium"', *ZAkDR* (1939), 594–5. A few years later, Georg Schwarzenberger held the view based on his assessment of State practice that the alternative of peace and war was actually a construction *de lege ferenda*. In fact, the absence of an objective criterion to separate both concepts, owing to the legality of the limited use of force in peacetime, gave him the certainty that "The doctrine of the alternative character of peace and war, […], minimizes or ignores the reality of State practice which has created rules pertaining neither to those of peace or war, but constituting a *status mixtus*." (Georg Schwarzenberger, 'Jus Pacis Ac Belli? Prolegomena to a Sociology of International Law', *AJIL* 37 (1943), 460–79, quotation at 474). Armed reprisals appertained thus to this state of intermediacy for they were "neither *pax bellicosa* nor *bellum pacificum*". See Georg Schwarzenberger, *Power Politics*: *A Study of World Society*, published under the auspices of the London Institute of World Affairs (The Library of World Affairs, 18; 3rd edn., London: Stevens & sons, 1964), 190–1. Cf. Georg Schwarzenberger, '[Book Review: *Retaliation in International Law*, by Evelyn Speyer Colbert]', *IntAff* 25 (1949), 336–7.

In 1954, Philip C. Jessup, having chiefly in mind the context of the Cold War, also urged to drop the old division in order to acknowledge a third intermediate status characterised by: (1) the permanent hostility between the parties; (2) the impossibility to settle the issues all at once owing to their fundamental and deep-rooted nature; (3) the avoidance of war to settle the disputes. He could glimpse some consequences, even benefits, of such intermediacy. See Philip C. Jessup, 'Should International Law Recognize an Intermediate Status between Peace and War?', *AJIL* 48 (1954), 98–103. The second characteristic surely prevents the classification of armed reprisals under such a third state. Nevertheless, the U.S. legal scholar observed regarding the measures short of war that "It does not seem to have been particularly helpful to have discussed some such situations as non-amicable modes of redress short of war, perhaps because of the uncertainty about the legal definition of war itself. The difficulty seems to arise from the legal necessity of fitting every situation into one of the two traditional categories of peace or war." (Ibid., 100).

Two decades later, Alan N. Salpeter and Jonathan C. Waller worked on the assumption that armed reprisals fell within a status of intermediacy. They argued for the adoption of a new standard to evaluate the use of this means because they considered both customary law and the United Nations rule inadequate. See

was undertaken at first by way of reprisals, but under the pressure of third States, the blockading Powers were forced to acknowledge the existence of a state of war. However, no declaration of war followed. Thomas E. Holland struggled to label the true nature of the state of things which superseded the acts of reprisals. In the absence of an accurate legal classification, he called it a state of "war *sub modo*" while warning against the obliteration of the dividing line between peace and war.[35]

In that case, the reprisal-taking States recognised the existence of war. Nevertheless, such admission was infrequent and for lack of a declaration of war by either party to the conflict or armed resistance by the assailed country, the war would not break out. In fact, the use of objective criteria usually proved unavailing to delineate the limit between the two activities. Some lawyers advocated, therefore, the identification of armed reprisals with war.[36] However, it was the subjective test that was commonly applied. So, if none of the States directly involved in the dispute had manifested a hostile intention, the absence of *animus belligerendi* defined the action as reprisals.[37] This test was a valid criterion which, nevertheless, could too easily lead to abuse, i.e. the oppression of the weak by the strong followed by the denial of the existence of war.

In comparison to war, armed reprisals appear as quite permissive while there was no inherent difference between the two activities. It is, therefore, beyond understanding why a separation between war and armed reprisals was held onto. The resort to armed reprisals allowed the maintenance of a fiction, namely that forcible measures like bombardment or military occupation could also be compatible with peace. Until today, the distinction has not been completely dropped.

Salpeter and Waller, 'Armed Reprisals during Intermediacy – A New Framework for Analysis in International Law' (above, n. 26).

34 Cf. Neff, *War and the Law of Nations* (above, n. 2), 226f.

35 Thomas Erskine Holland, 'War *Sub Modo*', *The Law Quarterly Review* 19 (1903), 133–5, at 135.

36 See, e.g., Paul Pradier-Fodéré, *Traité de droit international public européen et américain, suivant les progrès de la science et de la pratique contemporaines*, 9 vols. (Paris: A. Durand et Pedone-Lauriel, 1885–1906), 6th vol., 488; Théophile Funck-Brentano and Albert Sorel, *Précis du droit ges gens* (2nd edn., Paris: E. Plon, Nourrit et Cie, 1887), 229; Nys, *Le droit international* (above, n. 33), 89. Cf. Peter Wagner, *Zur Lehre von den Streiterledigungsmitteln des Völkerrechts. Eine historisch-kritische und thetische Untersuchung* (Darmstadt: Chr. Haun, 1900), 67.

37 See, e.g., Westlake, *International Law* (above, n. 25), 2.

3. Pre-1919 Practice

In view of the above remarks, the distinction between armed reprisals and war patently fell short of clarity. Nevertheless, this cannot be reduced to an issue specific to the League of Nations era. Strupp asserted that the creation of the League of Nations was the triggering factor which made reprisals grow quantitatively and qualitatively.[38] However, even by his own testimony, the issue about armed reprisals predated 1919. Thomas E. Holland's comments are symptomatic of a problem that had deeper roots.

The nineteenth century may be regarded as a landmark in the history of reprisals. Charles De Visscher —Belgian lawyer, who during his career held prominent positions including member of the PCA, judge of the PCIJ and later of the ICJ— called it "l'époque classique des représailles". He explained that the characteristics of nineteenth-century reprisals were their separation from war and their highly politicised nature. Indeed, the acts of reprisals in that century were intrinsically hostile. Notwithstanding, they seldom amounted to war because the target country was generally not in position to hit back. In fact, the asymmetric relations of power allowed the stronger reprisal-taking State to claim the absence of war with the weaker target country, regardless of the high degree of violence. Besides, the recourse to reprisals pursued chiefly opportunistic ends.[39]

The many instances of armed reprisals that occurred throughout the nineteenth century seem to confirm this pattern invariably. The reprisal-taking State was always a mighty Western Power, mainly France or Great Britain that were the leading States of that century.[40] On the other side, armed reprisals applied only to the smaller and weaker Powers. They were either peripheral European States —namely Greece, the Two Sicilies, Portugal and the Ottoman Empire— or Asian or American nations. These target countries were usually regarded as half-civilised, viz. "neither wholly re-

38 Strupp, 'Problèmes actuels du droit des représailles' (above, n. 1), 341.

39 Charles De Visscher, *Théories et réalités en droit international public* (Paris: A. Pedone, 1953), 348.

40 For example, in his authoritative study of pacific blockade, the German legal scholar and diplomat Horst P. Falcke identified six cases of pacific blockade by way of reprisals. All were established by either France or Great Britain, three cases each. See Horst P. Falcke, *Le blocus pacifique*, trans. Ant. Contat (Leipzig: Rossberg, 1919), 234–7.

spectable nor wholly responsible members of the family of nations".[41] Their recognition as full members of the family of civilised nations was a slow process throughout the nineteenth century.[42] Hence, when armed reprisals were contemplated or decided, the diplomatic correspondence often abounded with contemptuous remarks about the internal political, financial and economic situation of the target country: corruption, despotic government, political unrest, protectionism, etc.[43]

Based on this asymmetric power relation, the great Powers resorted to armed reprisals to enforce their demands, with a very low probability that the target country would treat them as acts of war. Furthermore, some lawyers approved this practice because it did not cause the outbreak of war and presented a lesser evil than war. Therefore, they rejected the objection that this mode of redress was inequitable on the grounds that the employment of such measure between Powers of equal strength would inevitably lead to war.[44] So, the separation between armed reprisals and war rested on mere factual and political asymmetry.

The second characteristic is that nineteenth-century reprisals took on a highly politicised aspect. The demands that the reprisal-taking country pressed against the target country sought redress for the violation of rights.

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41 Colbert, *Retaliation in international law* (above, n. 6), 62–3. On the concept of 'civilisation', see Liliana Obregón, 'The Civilized and the Uncivilized', in Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law* (Oxford: OUP, 2012), 917–39.
On the other hand, savage or barbarian nations were considered outside the sphere of international law. Washburn emphasised this when he told about the so-called pacific blockade that Great Britain instituted against the Kingdom of Dahomey (actual Benin) in 1876, thus diminishing the importance of the case. See Albert H. Washburn, 'The Legality of the Pacific Blockade', *Colum. L. Rev.* 21 (1921), 55–69/227–241/442–459, at 240.

42 Héctor Gros Espiell, 'La doctrine du Droit international en Amérique Latine avant la première conférence panaméricaine (Washington, 1889)', *JHistIntlL* 3 (2001), 1–17, at 4.

43 See, e.g., Mr Sanford to Mr Cass, 10 August 1857: Henry S. Sanford, *The Aves Island Case*: *with the Correspondence Relating Thereto and Discussion of Law and Facts, Being the Official Documents published by Order of the Senate of the United States* (Washington: [s.n.], 1861), 238–9.

44 Cf. Lucien de Sainte-Croix, *Étude sur l'exception de dol en droit romain/La déclaration de guerre et ses effets immédiats; Étude d'histoire et de législation comparée*, Thèse pour le doctorat; L'acte public sur les matières ci-après sera soutenu le Mercredi 20 Janvier 1892, à 2 heures et demie (Paris: Arthur Rousseau, 1892), 225; Letter of 18 December 1902: Holland, *Letters to "The Times" upon War and Neutrality (1881–1920)* (above, n. 26), 14.

However, political considerations were generally at stake, hiding in the background. Reprisals as a lawful mode of self-help could serve as a legalistic camouflage.[45] Depending on the angle from which it is viewed, a case of armed reprisals could thus be called an instance of armed intervention.[46] The concept of 'gunboat diplomacy', i.e. "the threat or use of naval

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45 "Denn während die äusseren Anlässe sich oft als rein äusserliche Faktoren darstellen, sind die Motive in den meisten Fällen hochpolitischer Art, sei es, dass sie auf das Prestige des Staates zurückgreifen oder etwa Ausdehnungsgelüsten entspringen." (Ernst Hiller, 'Die Friedensblockade und ihre Stellung in Völkerrecht', Inaugural-Dissertation verfasst und der Hohen Rechts- und Staatswissenschaftlichen Fakultät der Bayer. Julius-Maximilians-Universität Würzburg zur Erlangung der staatswissenschaftlichen Doktorwürde (Würzburg, Hohe Rechts- und Staatswissenschafltiche Fakultät der Bayer. Julius-Maximilians-Universität Würzburg, 1923), 88). See also Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963), 220.

46 Intervention is the interference by a State in the internal or external affairs of another State (William Edward Hall, *A treatise on international law* (4th edn., Oxford: Clarendon Press, 1895), 297). About intervention, see i.a. Adolph von Flöckher, *De l'intervention en droit international* (Paris: A. Pedone, 1896); Percy Henry Winfield, 'The History of Intervention in International Law', *BYIL* 3 (1922–23), 130–49; Percy Henry Winfield, 'The Grounds of Intervention in International Law', *BYIL* 5 (1924), 149–62; Charles G. Fenwick, 'Intervention. Individual and Collective', *AJIL* 39 (1945), 645–63; Miloš Vec, 'Intervention/Nichtintervention. Verrechtlichung der Politik und Politisierung des Völkerrechts im 19. Jahrhunderts', in Ulrich Lappenküper and Reiner Marcowitz (eds.), *Macht und Recht. Völkerrecht in den internationalen Beziehungen* (Otto-von-Bismarck-Stiftung Wissenschaftliche Reihe, 13; Paderborn: Ferdinand Schöningh, 2010), 135–60. Acts of reprisals also take the character "of a limited interference in the sphere of interests of another state" (Kelsen, *Principles of international law* (above, n. 7), 25). However, while reprisals are a response to the violation of rights, intervention seeks to defend interests not guaranteed by international law. As a result, there is a risk that reprisals serve as a flimsy pretext to pursue concealed illegitimate interests. Cf. Flöckher, *De l'intervention en droit international* (above, n. 46), 5–6; Kelsen, *Principles of international law* (above, n. 7), 25; Louis Delbez, *La notion de guerre*: *Essai d'analyse dogmatique* (Paris: A. Pedone, 1953), 94.
For example, the French intervention of 1861 in Mexico was "partly in nature of reprisals" (Robert Phillimore, *Commentaries Upon International Law*, 3rd vol. (2nd edn., London: Butterworths, 1873), 43). Indeed, Great Britain, France and Spain decided to jointly take coercive measures on account of the Mexican Government's failure to provide redress for damages sustained by their nationals, such as unpaid bonds. The protection of their nationals in the future was also one of their chief concerns. See the Convention of London signed between them on 31 October 1861: Friedrich Wilhelm August Murhard, Karl Murhard, J. Pinhas et al., *Nouveau recueil général de traités, conventions et autres transactions remarquables, servant à la connaissance des relations étrangères des puissances et États dans leurs rap-*

force to secure diplomatic concessions",[47] reflects this idea of intervention when the claimant State blockaded some ports or portions of the coast of the respondent State with gunboats, as a means of pressure. That expression, however, is not a legal concept. In fact, a blockade bereft of belligerency is known in international law as 'pacific blockade' and describes either an act of reprisals or an intervention.[48] Reprisals were actually acts ambivalent in nature.

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ports mutuels. Continuation du grand Recueil de feu M. de Martens, 20 vols. (Goettingue: Librairie de Dieterich, 1843–1875), 17th vol., Part 2, 143. They agreed in that convention that the coercive measures could neither lead to the acquisition of territory or of special advantages nor interfere in the Mexican internal affairs (Art. 2). However, Spain and Great Britain withdrew their participation when it became obvious that France endeavoured to place on the Mexican imperial throne a European monarch (Francis Wharton, *A digest of the international law of the United States, taken from documents issued by Presidents and Secretaries of State, and from decisions of federal courts and opinions of Attorneys-General*, 3rd vol. (Washington: GPO, 1886), 97–99).

47 David Nicholson, 'Gunboat Diplomacy', in James C. Bradford (ed.), *International Encyclopedia of Military History*, Preface by Professor Jeremy Black (London/New York: Routledge, 2006), 574–5, at 574. Cf. Lea Heimbeck, *Die Abwicklung von Staatsbankrotten im Völkerrecht*: *Verrechtlichung und Rechtsvermeidung zwischen 1824 und 1907* (Studien zur Geschichte des Völkerrechts, 28; Baden-Baden: Nomos, 2013), 167 fn. 1. See, i.a., Anthony Preston and John Major, *Send a gunboat! A study of the gunboat and its role in British policy, 1854–1904* (London: Longmans, Green and Co., 1967); Miriam Hood, *Gunboat Diplomacy, 1895–1905*: *Great Power Pressure in Venezuela* (2nd edn., London: George Allen & Unwin, 1983); James Cable, *Gunboat diplomacy*: *Political applications of limited naval force.* (Studies in International Security, 16; 3rd edn., Basingstoke: Palgrave Macmillan, 1994); Andrew Graham-Yooll, *Imperial Skirmishes*: *War and Gunboat Diplomacy in Latin America* (Brooklyn, N.Y./Northampton, Mass.: Interlink Books, 2002). 'Gunboat diplomacy' refers to the resort to military measures by European States and the United States for political purposes. This is not a legal concept.
The concept of 'coercive diplomacy' is more general. See, thereupon, Alexander L. George, *Forceful Persuasion*: *Coercive Diplomacy as an Alternative to War*, Foreword by Ambassador Samuel W. Lewis (Washington, D.C.: United States Institute of Peace Press, 1991).

48 Cf. Oppenheim, *International Law* (above, n. 25), 43; Falcke, *Le blocus pacifique* (above, n. 40), 234; Ludwig Weber, 'Blockade, pacific', in Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*. *Use of Force, War and Neutrality, Peace Treaties (A–M)*, 3rd vol., Max Planck Institute for Comparative Public Law and International Law (Amsterdam/New York/Oxford: North-Holland Publishing Company, 1982), 51–3, here at 51.

Also, the resort to armed reprisals against another country required a great deal of caution and tact. For instance, the pacific blockade by way of reprisals that Great Britain instituted against Greece in 1850 seriously endangered the stability and peace of Europe. France and Russia, in their capacity as co-guarantors of the Greek independence, harshly protested against the British course of action.[49] According to De Visscher, the growing rivalry between the great Powers in all regions of the globe was precisely the strongest political incentive for the limitation, even prohibition, of armed reprisals.[50]

Finally, a last aspect of the pre-1919 practice is the absence of clear-cut regulation governing armed reprisals. Thomas J. Lawrence underlined the "great need of international legislation on the subject of reprisals."[51] As a matter of fact, apart from the 1887 Declaration on Blockade in the Absence of a State of War —i.e. pacific blockade— by the IIL and the Drago-Porter Convention of 1907, peacetime reprisals never were regulated by multilateral treaties.[52] Although the underlying principle of reprisals was sound, the question of their limitation raised a problem.[53] However, it does not mean that the resort to armed reprisals was not subject to any conditions. There were some tacitly recognised limits on armed reprisals in State practice and legal doctrine. For example, private innocent persons and their property ought to be spared.[54] The State that suffered a prior infringement of rights ought also to make a formal demand for redress be-

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49 About this incident, see Derek Taylor, *Don Pacifico*: *The Acceptable Face of Gunboat Diplomacy* (London/Portland, Oregon: Vallentine Mitchell, 2008).

50 De Visscher, *Théories et réalités en droit international public* (above, n. 39), 349–50. Cf. Haumant, *Les représailles* (above, n. 21), 156.

51 Lawrence, *The principles of international law* (above, n. 6), 344. See also Jan de Louter, *Le droit international public positif*, 2nd vol. (Bibliothèque internationale du Droit des Gens; Oxford: OUP, 1920), 205.

52 Paddeu, *Justification and Excuse in International Law* (above, n. 5), 237. See also Louter, *Le droit international public positif* (above, n. 51), 201.

53 Robert Redslob, *Histoire des grands principes du droit des gens*: *Depuis l'Antiquité jusqu'à la veille de la Grande Guerre* (Paris: Rousseau et Cie, 1923), 466.

54 See esp. Charles Sumner's interesting speech in the U.S. Senate on 18 July 1868: Charles Sumner, *The works of Charles Sumner*, 15 vols. (Boston: Lee and Shepard, 1875–1883), 12th vol., 481–501. Cf. Pasquale Fiore, *Nouveau droit international public suivant les besoins de la civilisation moderne*, traduit de l'Italien et annotée par Charles Antoine, 2nd vol. (2nd edn., Paris: A. Durand et Pedone-Lauriel, 1885–1886), 666; Edwin Montefiore Borchard, 'Reprisals on Private Property', *AJIL* 30 (1936), 108–13; Ignaz Seidl-Hohenveldern, 'Reprisals and the taking of private property', in Redactie van het Nederlands Tijdschrift voor Internationaal Recht (ed.), *De Conflictu Legum*. *Bundel opstellen aangeboden aan Roeland Duco*

fore resorting to reprisals.[55] Despite those conditions, armed reprisals were actually known for being excessive and abusive.[56] This situation contrasts with the ancient practice of reprisals in force before the nineteenth century.[57]

II. Leading Question

The overall picture of armed reprisals that emerges from this tour d'horizon is one where a lack of clarity over the subject prevailed. Armed reprisals were shrouded in ambiguity. They appear to fall within that part of international law where there are more grey zones than absolute certainties.[58] As a consequence, armed reprisals gave rise to numerous abuses of all kinds from the early nineteenth century until 1945.

Kollewijn & Johannes Offerhaus ter gelegenheid van hun zeventigste verjaardag (Leiden: A. W. Sijthoff, 1962), 470–9.

55 See, e.g., August von Bulmerincq, 'Die Staatsstreitigkeiten und ihre Entscheidung ohne Krieg.', in Franz von Holtzendorff (ed.), *Handbuch des Völkerrechts. Auf Grundlage Europäischer Staatspraxis*, 4th vol. (Hamburg: A.-G. (vormals J. F. Richter), 1889), 3–127, at 87–90; Oppenheim, *International Law* (above, n. 25), 34–41.

56 Despagnet, *Cours de droit international public* (above, n. 27), 782–3; Louter, *Le droit international public positif* (above, n. 51), 202; Simon Maccoby, 'Reprisals as a Measure of Redress Short of War', *CLJ* 2 (1924–1926), 60–73, at 69. Some authors insisted on a requirement of proportionality between the damage suffered and the damage inflicted. See, e.g., Robert Piédelièvre, *Précis de droit international public ou droit des gens*, 2nd vol. (Paris: F. Pichon, 1895), 87–88; Oppenheim, *International Law* (above, n. 25), 39–40; Louter, *Le droit international public positif* (above, n. 51), 201. However, since armed reprisals were not used to secure compensation but rather to exert pressure on the target country with a view to reaching a satisfactory agreement, "a standard for proportionality would not be easy to establish[, should international regulation of reprisals be attempted.]" (Colbert, *Retaliation in international law* (above, n. 6), 77).

57 Cf. Ibid., 60–1. Neff, *War and the Law of Nations* (above, n. 2), 217: "There can be few ironies greater than the fact that, in this area of practice which descends so directly from the just-war outlook of the Middle Ages, with its stress on justice and the rule of law, the hard face of power politics should be so ubiquitously present."

58 Cf. Jellinek, 'China und das Völkerrecht' (above, n. 16), 402; Julius Stone, *Legal controls of International Conflict*: *A Treatise on the Dynamics of Disputes- and War-Law* (London: Stevens & sons, 1954), 285.

In 1935, when Strupp referred to armed reprisals as a burning issue, he believed that there was a dangerous loophole in international law. The use of armed reprisals presented, in many regards, a menacing alternative to war since it allowed evasion of the restrictions on the *ius ad bellum* as well as the limitations on the conduct of war. War could then be waged under the guise of reprisals. Also, before the creation of the League of Nations, nineteenth-century armed reprisals were no less controversial. They were resorted to abusively by great Powers against weak States because of the existing asymmetric relations of power between them. In the light of the absence of armed resistance, the reprisal-taking country could deny the existence of war.

Thus, during about a century and a half, the topic of armed reprisals was a burning issue, which, however, failed to be suitably addressed and resolved. The measure was considered as being permissive under international law, yet paradoxically no clear-cut regulation limited the right to reprisals involving the use of force; only vague and general principles governed it. This state of legal uncertainty was obviously the strongest recommendation of armed reprisals for powerful States. It reveals the inherent weakness (or strength) of this mode of redress.

The existence of a gap is particularly odd in the interwar era. In fact, the waging of war was subject to restrictions, whereas armed reprisals, despite the semblance to war, remained unconcerned by these efforts of limitation and regulation. Besides, the recourse to armed reprisals in that period seemed unwarranted given the system of collective security of the League of Nations (and notwithstanding the flaws of that system). It was only in 1945 that this loophole was closed when the UN-Charter enshrined the prohibition of the use of force in time of peace.[59]

The whole situation, thus, makes one wonder *why the law of armed reprisals remained in a legal limbo of international law from the outset of the nineteenth century up to 1945*.

This is a question about the longevity of a nebulous situation in international law. Emphasis is laid on the practice and theory of reprisals in order to identify the factors which may account for this legal limbo. Therefore, delicate issues such as the definition of the concept of war lie outside of the scope of the present investigation.[60] Likewise, the evolution of the law of

59 Brownlie, *International Law and the Use of Force by States* (above, n. 45), 223.

60 Cf. Schwarzenberger, '[Book Review: *Retaliation in International Law*, by Evelyn Speyer Colbert]' (above, n. 33), 336.

war and the law of neutrality are not covered by this question. The aim is to provide a global and coherent image of the history of armed reprisals.

III. State of Research

The fact that armed reprisals remained in a state of legal vagueness is a question of international legal history. Thus, the first step is to consult the general works on this topic.[61] Yet, an observation stands out: the narrative of the history of reprisals lacks cohesion and is descriptive rather than analytical. The general evolution of this measure is usually fragmented into three or four epochs which are remotely related. In each of them, reprisals are said to be characterised by certain distinguishing traits and by the general trend that emerged from the practice. However, the underlying reasons for the transformations of reprisals are often overlooked.[62] For example, the exclusive use of reprisals by great Powers against weak or small countries in the nineteenth century is said to contrast with the practice in

61 The history of reprisals also has a practical interest for various institutions of international law since it provides the key to understanding them. As a matter of fact, the topic of reprisals is one of the most curious chapters of the history of the development of international relations (Ernest Nys, *Le droit de la guerre et les précurseurs de Grotius* (Bruxelles/Leipzig: C. Muquardt, Merzbach et Falk, 1882), 38; Ernest Nys, *Les origines du droit international* (Bruxelles: Alfred Castaigne, 1894), 63). For example, the concept of denial of justice in international law, the international responsibility of States and the diplomatic protection of nationals abroad have a historical connection with reprisals. See, i.a., Charles De Visscher, 'Le déni de justice en droit international', *RdC* 52/II (1935), 369–442, at 370–374; Alwyn Vernon Freeman, *The International Responsibility of States for Denial of Justice* (New York: Kraus, 1938 [Reprod. 1970]), 53–67; Hans W. Spiegel, 'Origin and Development of Denial of Justice', *AJIL* 32 (1938), 63–81; Jan Paulsson, *Denial of Justice in International Law* (Hersch Lauterpacht memorial lectures, 17; Cambridge: CUP, 2005), 10–37; Haggenmacher, 'L'ancêtre de la protection diplomatique. les représailles de l'ancien droit (XII^{e}-XVIII^{e} siècles)' (above, n. 3).

62 Cf. Karl Josef Partsch, 'Repressalie', in Karl Strupp and Hans-Jürgen Schlochauer (eds.), *Wörterbuch des Völkerrechts*, begründet von Professor Dr. Karl Strupp, 3 vols. (2nd edn., Berlin: Walter De Gruyter & Co., 1960–1962), 3rd vol., 103–6, at 103; Grewe, *Epochen der Völkerrechtsgeschichte* (above, n. 24), 145–147, 237–240, 428–433, 616–622 and 733–735; Karl-Heinz Ziegler, *Völkerrechtsgeschichte*: *Ein Studienbuch* (Kurzlehrbücher für das Juristische Studium; 2nd edn., München: C. H. Beck, 2007), 109–110, 128, 154, 185 and 205; Ruffert, 'Reprisals' (above, n. 10), nos. 3–5.

the eighteenth century.[63] Stephen C. Neff refers to the nineteenth-century practice as a new species of reprisals that blended components of special and general reprisals previously used.[64] Still, there is no explanation why only great Powers had recourse to armed reprisals against weak and small States.

Monographs exclusively dedicated to the whole history of reprisals can be counted on the fingers of one hand.[65] In 1933, before the outbreak of WWII, German lawyer Alfred Müller wrote a doctoral thesis on the history of this measure. His historical investigation sought to answer the question of the legitimacy of reprisals in his time. He highlighted the increasing tendency to restrict the employment of this measure, mainly through treaties. Nevertheless, he concluded that, as long as the international community remained in an anarchical state, reprisals should not be deprived of relevance.[66] Evelyn Speyer Colbert's *Retaliation in international law* (1948) — unquestionably, the reference work on reprisals from a historical viewpoint— reaches a similar conclusion, but as the result of a different argument. Colbert engaged in an analysis based on primary sources of State practice from the early days of the institution of reprisals until the signature of the UN-Charter. It led her to assert that, unlike the medieval private reprisals which were governed by a uniform body of rules, modern public reprisals in time of peace, viz. reprisals as employed from the outset of the nineteenth century until 1945, were essentially lawless. Thence,

63 See, e.g., Geoffrey Butler and Simon Maccoby, *The Development of International Law* (Contributions to international law and diplomacy; London: Longmans, Green and Co., 1928), 181.

64 Neff, *War and the Law of Nations* (above, n. 2), 225–6.

65 There are, nevertheless, a great number of studies focusing on one specific aspect, one variety or an epoch of reprisals. It is particularly true regarding the old institution of 'private' or 'special' reprisals that developed in the Middle Ages and disappeared in the eighteenth century. A private individual that suffered an unredressed wrong could be granted a royal licence, in the form of a so-called letter of reprisals, for a limited goal, namely the seizure of property belonging to the countrymen of the original wrongdoer up to the value of the loss. See esp. René de Mas Latrie, *Du droit de marque ou droit de représailles au Moyen-Age*: *suivi de pièces justificatives* (2nd edn., Paris: Baur, 1875); Alberto Del Vecchio and Eugenio Casanova, *Le rappresaglie dei comuni medievali e specialmente in Firenze*: *Saggio storico* (Bologna: Nicola Zanichelli (Cesare e Giacomo Zanichelli), 1894); Friedrich Rudolf Hohl, 'Bartolus a Saxoferrato: Tractatus Represaliarum. Seine Bedeutung für die Entwicklungsgeschichte des Repressalienrechts' (Bonn, Rheinische Friedrich-Wilhelms-Universität Bonn, 1954).

66 Müller, *Wandlungen im Repressalienrecht* (above, n. 21). Cf. Haumant, *Les représailles* (above, n. 21).

strong Powers resorted to this method to pursue national policies. But notwithstanding the abuses to which such a lack of regulation might lead, she believed that, as a means of law enforcement, reprisals had lost none of their practical use for the international legal system.[67]

These works make it possible to collect valuable information on armed reprisals in their historical manifestation. Yet, they cannot account for the failure to solve the burning issue around the measure. Colbert's insightful study and Müller's work explain the maintenance of armed reprisals as the inevitable and necessary consequence of an anarchic state in the international relations, as the result of the deficiency of international law to prevent their use. Nevertheless, they do not suggest that this phenomenon might have other causes.

Another line of explanation could flow from the angle of the relation between armed reprisals and war. This aspect has often been studied in order to establish the precise meaning of the latter activity.[68] Two books are worth mentioning: Lothar Kotzsch's *The concept of war in contemporary history and international law* (1956) and Stephen C. Neff's *War and the Law of Nations* (2005).

Kotzsch looked into the evolution of reprisals secondarily, i.e. intending to define the concept of war as accurately as possible. He pointed out that the subjective test of *animus* prevailed in the nineteenth century for want of a factual criterion that could aptly separate armed reprisals and war. As a consequence, no state of war arose in the absence of an *animus belligerendi* on either side. However, because of their superiority of force, the great Powers could deny being at war and compel the target countries of inferior rank to yield and accept armed reprisals as not being tantamount to war. For the interwar years, Kotzsch observed that the question of the distinction between war and armed reprisals was full of inconsistencies. In the early days of the League of Nations, it was the objective test which enabled to determine the existence of war. Nevertheless, a shift occurred, and the subjective test superseded the objective one without depriving it entirely of all relevance on a subsidiary basis. Furthermore, since the blockade of Venezuela in 1902–1903, third States could bring about a state of war through the application of the law of neutrality, when the coercive mea-

67 Colbert, *Retaliation in international law* (above, n. 6). In the second part of her work, Colbert looked at the case of belligerent reprisals and the use of reprisals against or by neutral States in wartime.

68 See, e.g., Kappus, *Der völkerrechtliche Kriegsbegriff in seiner Abgrenzung gegenüber den militärischen Repressalien* (above, n. 16).

sures interfered with their rights. This had the effect of producing a change from material towards formal war.[69]

Despite being enlightening in regard to the distinction between armed reprisals and war, Kotzsch's explanations about the evolution of reprisals are quite concise.

Neff, on the other hand, offers a much more comprehensive panorama of the history of reprisals. He endeavours to show that the ambiguous relation of reprisals with war had existed from the Middle Ages until 1945. Neff specifically pinpoints that reprisals had been resorted to mainly as a form of law enforcement that rested on the medieval just-war tradition. He, thus, regards nineteenth-century reprisals as pursuing redress by armed means, unlike war which aimed at the subjection of the target State to the assailant Power's will. Indeed, reprisals differed from war owing to several factors: i.a., a limited scope, proportionality, the non-termination of treaties and the absence of impact on third States. However, he recognises that the line between the two activities was not always clear-cut and that armed reprisals were sometimes employed as a substitute for war, particularly by the great Powers. The absence of contest by the target State —since it took two to make a war— as well as the absence of *animus belligerendi* prevented armed reprisals from being classified as war. Neff points out that many lawyers protested against the abuses to which armed reprisals led; still, no general project to restrict this means succeeded to gather support. Unfortunately, Neff fails to provide an explanation.[70]

The attention of scholars has too often been drawn to the tight relationship between armed reprisals and war. The separate regime governing the two activities explains why States turned to armed reprisals as a more permissive measure than war, particularly when there was an asymmetry of power. But it does not answer the question of the absence of clarification on the law of armed reprisals.

Olivier Barsalou suggests in an article from 2010 that during the interwar years, international lawyers created a set of norms aiming at governing the use of armed reprisals. Thereby, they legalised the employment of this method, which led international law to incorporate the idea of violence as a source of authority, whereas the end of the whole international legal system is the eradication of violence. As an illustration of this tension, he

69 Lothar Kotzsch, *The concept of war in contemporary history and international law* (Études d'histoire économique, politique et sociale, 18; Genève: E. Droz, 1956), esp. 127–141 and 146–171.

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

used the Italian bombardment and occupation of the Greek island of Corfu in 1923 by way of reprisals. The legitimisation of violence, in fact, provided a legal justification to commit abuses in situations of asymmetric imbalance and to wage war in disguise.[71] However, Barsalou's article is too reductive as the author does not rely on an extensive study of contemporary legal doctrine. Indeed, the regulation adopted by the IIL in 1934 contradicts his argument. The Institute agreed upon the drastic restriction of the recourse to armed reprisals in the same way as the *ius ad bellum*, thence depriving the measure of practical relevance and condemning the use of force in peacetime just like war.

Finally, the master's thesis of Ross Williamson (2013) aims to explain the rise and fall of the practice of pacific blockade through the lens of identity performances. The author argues that the measure emerged as the result of multiple identities in tension. Indeed, when three European Powers (Great Britain, France and Russia) blockaded and then destroyed the Ottoman fleet in the bay of Navarino in 1827, they acted as Christian nations in support of the Hellenic Republic against the Muslim oppressor. Nevertheless, as members of the Concert of Europe, they refrained from calling their action an act of war. Williamson thus links the legitimisation of pacific blockade to the identity of great Powers. In fact, great Powers resorted to pacific blockade as a demonstration of force against States considered so inferior that it was not worth the expense of hostilities. In this way, they could assert power in the form of informal imperialism over the latter countries. Lastly, he contends that the normative changes that followed WWI prompted the disappearance without abrogation of pacific blockade. The great Powers could no longer perform their identity through this measure. Williamson therefore concludes that the fortunes of a norm depend mostly upon the normative environment and that international law precisely played an ambivalent role by allowing hierarchies and at the same

71 Olivier Barsalou, 'The History of Reprisals Up to 1945. Some Lessons Learned and Unlearned for Contemporary International Law', *MLLWR* 49 (2010), 335–71. Cf. Minerva Jean A. Falcon, 'Reprisals', *PYIL* 10 (1984), 26–37, at 30–31: "Turning now to the norms governing the more controversial use of armed force during peacetime, it might be mentioned that the evolution of norms to govern such types of reprisals did not follow the seemingly easier path followed by that of norms governing belligerent reprisals. Doctrine was laid down willy-nilly as certain questions began to be asked. One of the first of such questions raised was whether the resort to armed force during peacetime could constitute a legitimate reprisal. This question was raised in the *Corfu Affair* of 1923."

time challenging them.[72] Yet, Williamson's study can be criticised for placing too much emphasis on realpolitik and for leaving out the legal aspects of the topic of pacific blockade altogether. Besides, he fails to identify that pacific blockade fell within the broader pattern of coercion in time of peace. Hence, there were still cases of armed reprisals in the interwar period although pacific blockade vanished after 1919.

So, notwithstanding the interest that armed reprisals and more generally the use of force in peacetime arises in legal literature, the state of research is unsatisfactory. No direct explanation can account well enough for the persistence of the burning issue of armed reprisals in international law and the state of neglect that characterised the customary right of armed reprisals.

By analogy, however, Lea Heimbeck's study on the concepts of 'legal avoidance' (*Rechtsvermeidung*) and 'normatization' (*Verrechtlichung*) may enlighten as to this situation. She, indeed, identifies that two different strategies met the handling of State bankruptcy in international law throughout the nineteenth century. On the one hand, 'normatization' pursued the implementation of norms in order to fill the legal lacuna in some fields of human interaction. On the other hand, actors (mainly powerful nations) could also deliberately omit to introduce law, and let non-legal considerations (i.e. financial, economic, and political ones) decide on the course of action to be adopted on a case-by-case basis. The question of State bankruptcy in nineteenth-century international law was such a topic where the absence of norms enabled powerful creditor States to resort to some forms of coercion and pursue the control of the small debtor countries through informal imperialism.[73] But where Heimbeck suggests that the employment of armed reprisals was the consequence of legal avoidance in the field of State bankruptcy, it should be noted that the 'law' of reprisals itself was not much clearer. It is in fact not incongruous to argue

72 Ross Williamson, 'A Friendly Demonstration of Force. Pacific Blockade, International Law and State Identity, 1827 to 1921', Thesis submitted to the Faculty of Graduate and Postgraduate Affairs in partial fulfillment of the requirements for the degree of Master of Arts in Legal Studies (Ottawa, Ontario: Carleton University, 2013; <http://www.curve.carleton.ca>, accessed 27 December 2017).

73 Heimbeck, *Die Abwicklung von Staatsbankrotten im Völkerrecht* (above, n. 47); Lea Heimbeck, 'Legal Avoidance as Peace Instrument. Domination and Pacification through Asymmetric Loan Transactions', in Thomas Hippler and Miloš Vec (eds.), *Paradoxes of Peace in Nineteenth Century Europe* (Oxford: OUP, 2015), 111–27.

that the ill-defined legal situation of armed reprisals was *per se* subject to a voluntary omission of law-making.[74]

Therefore, a comprehensive and interpretative history of armed reprisals is still to be written. A study on such a topic may yield fascinating discoveries and shed light on a blind spot in the history of international law.[75]

IV. Research Hypotheses

In the light of all the remarks and reflections outlined above, some hypotheses can be formulated:

1. By the end of the eighteenth century, the absence of a clear legal regime governing reprisals was the result of their transformation into a measure of the law of nations applied only between States and the ensuing obsolescence of the well-elaborated medieval law of reprisals.
2. During the period 1831–1863, armed reprisals remained in a legal grey zone as this measure was shaped into an informal privilege of the great Powers.
3. The lack of clarity regarding the resort to armed reprisals between 1848–1912 was the consequence of the faint-heartedness of most legal scholars to deal too critically with a measure which they regarded as a lesser evil than war, this being why they did not seriously challenge the State practice.

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74 An interwar German lawyer strongly hinted that the League of Nations intentionally avoided solving the question of the compatibility of armed reprisals with the Covenant: "Daß eine solche bedeutsame Frage nach mehr denn 12 jährigem Bestand des Bundes nicht positiv rechtlich eindeutig geregelt wurde, kennzeichnet die Übergangsnatur des gegenwärtigen Rechtszustandes in besonderem Maße. *Der Völkerbund ist hier einer verantwortungsschweren Aufgabe bisher offensichtlich mit Absicht aus dem Weg gegangen*, wodurch die Zweifel über die entwicklungsmäße Reife der Staaten, ja über die Möglichkeit überhaupt, die Selbsthilfe im zwischenstaatlichen Leben in all ihren gewaltsamen Formen auszuschalten, stark unterstrichen wurden." (Egon Gottschalk, 'Die völkerrechtlichen Hauptprobleme des Mandschureikonflikts', *ZVölkR* 17 (1933), 188–259 & 289–341, here at 209–210 (emphasis added)). He, indeed, suggested that the lack of objective criteria for the distinction between war and armed reprisals was the result of a politically intended twilight ("*eines politisch gewollten Halbdunkels*") that allowed the United States and the European Powers to deny the existence of a state of war and the ensuing consequences (Ibid., 203–5).

75 Cf. Denyse Chast, '[Book Review: *As Represalias. Estudo de historia do direito português sécs. XV e XVI*, by Ruy de Albuquerque]', *RID comp.* 28 (1976), 621–2, at 621.

4. Despite the creation of the League of Nations that entailed a turnaround in legal doctrine, the great Powers strove in the interwar to keep armed reprisals in a state of unclarity by opposing resistance to any attempts to restrict their privilege.

V. Sources

As a work of legal history, close scrutiny of both contemporaneous primary and secondary sources is essential, especially for a topic like the present one. Indeed, the narrative about the general use of force told since the end of WWI by international legal scholarship has often emphasised the existence of a legal vacuum in the nineteenth century.[76]

The present study focuses on both State practice and legal theory.

State practice relies almost exclusively on precedents. Many cases which were called acts of reprisals by statesmen or which have been labelled as such in international law manuals are examined here.[77] Great importance is given to materials that provide evidence for the practice of the two leading reprisal-taking States, namely France and Great Britain.

Amongst the sources upon which the analysis of the cases is based is the diplomatic correspondence, such as the one printed in the *British and Foreign State Papers* (BFSP). In fact, the diplomatic transactions give an insight into the great Powers' diplomacy and discourse and allow the sounding out of the motivations and the attitude of the actors to a dispute where a resort to armed reprisals occurred or was contemplated. Diplomatic reports on the political and economic situation of the target countries also help to comprehend the causes of the issue and the whole course of action. In addition, certain aspects of international law were frequently discussed in diplomatic dispatches.

This State practice, however, was often questioned. In this respect, the national parliamentary debates are interesting, too. Indeed, the recourse to reprisals was, unlike war, not subject to approval by the Legislative branch.

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76 See thereupon Agatha Verdebout, 'The Contemporary Discourse on the Use of Force in the Nineteenth Century. A Diachronic and Critical Analysis', *JUFIL* 1 (2014), 223–46.

77 The resort to armed reprisals was a relatively sporadic phenomenon, contrary to what one may think. Cf. Michael Tomz, *Reputation and International Cooperation: Sovereign Debt across Three Centuries* (Princeton, New Jersey/Oxford: PUP, 2007), who demonstrates that military force was employed to collect sovereign debts throughout the nineteenth century in a significantly small amount of cases.

Still, when a case of reprisals led to an international crisis, the national parliament felt compelled to examine the Government's foreign policy. This is precisely what happened following the British reprisals against Greece in the so-called *Don Pacifico* case in 1850. It was unusual at the time in Great Britain to discuss questions of foreign policy in either House.[78] So, those debates which contained a great deal of foreign policy statements and comments about international law actually reveal the tension caused by State practice. In the same vein are the conference proceedings like those of the Second Hague Peace Conference of 1907 and, for the interwar period, the minutes of the sittings of the League of Nations's political organ, viz. the Council.[79]

Finally, legal theory plays a non-negligible role. The writings of lawyers are enlightening as to the perception of the State practice with respect to the resort to armed reprisals. Following the development of international law as a science,[80] legal doctrine began in the wake of the *Don Pacifico* affair to look into the situation of reprisals, principally in the form of pacific blockade. The opinion of legal scholars on this topic can be found in monographs, general books on international law and in articles published in the most renowned journals of the time. There are also many post-graduate theses on reprisals and pacific blockade, mainly from French and German universities, which attests to the great interest for reprisals during four decades (from 1890 to 1940).[81] The works of the Institute of International Law is to be scrutinised too, because they contain the views of the

78 Taylor, *Don Pacifico* (above, n. 49), 220.

79 The *League of Nations Official Journal* (LNOJ) published the official documents of that intergovernmental organisation. For instance, the whole discussion about the Corfu crisis of 1923 in the Council is reproduced in this periodical.

80 See Martti Koskenniemi, *The Gentle Civilizer of Nations*: *The Rise and Fall of International Law, 1870–1960* (Cambridge, New York: CUP, 2002).

81 See, i.a., Charles Barès, *Le blocus pacifique* (Toulouse: G. Berthoumieu, 1898); Louis Ducrocq, *Représailles en temps de paix*: *Blocus pacifique suivi d'une étude sur les affaires de Chine (1900–1901)*, Thèse pour le doctorat de la Faculté de droit de Paris, soutenue le 20 Mars 1901, à 1 heure (Paris: A. Pedone, 1901); Jean Teyssaire, *Le blocus pacifique*, Thèse de Faculté de droit de l'université de Paris pour le doctorat présentée et soutenue le Mardi 8 Novembre 1910, à une heure et demie (Beauvais: Imprimerie centrale administrative, 1910); Robert Roth, *Die Repressalie*: *Eine völkerrechtliche Studie*, Inaugural=Dissertation der juristischen Fakultät der Friedrich=Alexanders=Universität zu Erlangen (Nürnberg: Benedikt Hitz, 1918); Pao Jin Ho, 'Reprisals in international law', Master of Arts in Political Science (Urbana, Ill.: University of Illinois, 1922); Hiller, 'Die Friedensblockade und ihre Stellung in Völkerrecht' (above, n. 45); Jakob Baenziger, *Die Repressalien im Völkerrecht*, Dissertation zur Erlangung der Würde eines Doktors beider Rechte

most distinguished legal experts who dealt with the issue of armed reprisals.

VI. Structure

Four chapters make up the investigation and divide it chronologically. This periodisation aims to highlight the crucial stages in the evolution of armed reprisals up to the point where the issue had reached a dead end at the time of the League of Nations and could only be ended through a drastic step: their prohibition, pursuant to Art. 2(4) of the UN-Charter.

The first chapter deals with the development of reprisals prior to the nineteenth century. It seeks to show the process of deregulation up to the end of the eighteenth century that undermined the rules governing reprisals and to explain the malleability of the law of reprisals in the following century. It, thus, begins with the emergence of reprisals and the first norms that were adopted in the High Middle Ages to restrict the new practice. Great emphasis is laid on Bartolus de Saxoferrato's tractate which thoroughly theorised reprisals. This theorisation allowed a high degree of standardisation for the rules governing reprisals. The chapter then addresses the decline of this theory following the emergence of the modern State. That part pinpoints to what extent the State practice departed from the well-accepted regulation of reprisals and widened the gap with legal theory.

The second chapter covers the period 1831–1863. The present Writer believes that these dates delimit at best the crucial epoch of formation of armed reprisals as a State practice employed exclusively by great Powers against smaller States. The year 1831 provides the first example of armed reprisals of this kind: the French operation against Portugal. The British reprisals against Brazil in 1863 close the period of development as no sig-

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vorgelegt der hohen juristischen Fakultät der Universität Freiburg in der Schweiz (Zug: J. Kündigs Erben, 1925); Schumann, *Die Repressalie* (above, n. 21); Pao Jin Ho, 'Pacific blockade with special reference to its use as a measure of reprisal', Doctor of Philosophy in Political Science (Urbana, Ill.: University of Illinois, 1925); Müller, *Wandlungen im Repressalienrecht* (above, n. 21); Haumant, *Les représailles* (above, n. 21); Robert von Förster, *Schiedssprechung und Repressalie*, Inaugural-Dissertation zur Erlangung der juristischen Doktorwürde der Rechts- und Staatswissenschaftlichen Fakultät der Universität zu Göttingen (Würzburg: Konrad Triltsch, 1936); Heyns, *Die Anwendung von militärischen Repressalien unter Völkerbundmitgliedstaaten* (above, n. 16).

nificant case of armed reprisals were recorded thereafter in textbooks during more than twenty years until 1884. Besides, the subsequent instances of armed reprisals in the late nineteenth century and in the first half of the twentieth century followed closely the same pattern and were justified on the basis of precedents that mostly came from the period 1831–1863. Indeed, the most emblematic cases of this measure are from that period. During these three decades, the practice of reprisals also saw innovations like the use of blockades short of war by way of reprisals, later known as pacific blockades. Finally, another salient feature of the epoch considered in this chapter is the absence of doctrinal interest. For those reasons, the State practice is of particular relevance to understand the reshaping of reprisals by the great Powers.

The next chapter is devoted to the general dispute over armed reprisals that arose in legal doctrine. It, thus, focuses on the opinion of lawyers. Indeed, throughout the third quarter of the nineteenth century, there was a lively debate in doctrine about the legality of pacific blockade. This legal discussion originated from the late 1840s when precursors raised awareness on the dangerous development of armed reprisals. Yet, it is only from the 1860s onwards that the place of pacific blockade in international law was seriously challenged. In 1887, however, the IIL confirmed pacific blockade to be a legitimate institution of international law. The position of legal scholars is thoroughly examined here to understand the real issues of the debate and to highlight the considerations that prevailed. In this context, the observations and criticisms of fierce opponents of armed reprisals are of great interest. The last part of the chapter considers the controversy about the blockade of Venezuela in 1902–1903. This incident had not only an impact on State practice with the adoption of the Drago-Porter Convention of 1907 but also divided legal scholars.

The last chapter deals with the epoch of the League of Nations. The importance that the topic of armed reprisals gained in this period is examined in details, both in legal doctrine and in State practice. Two cases (namely the French occupation of the Ruhr in 1923 and the Italian bombardment and occupation of the island of Corfu in the same year) are studied to bring out the attitude of the great Powers following the resort to acts of armed reprisals. Of great interest is the reaction of the other States and the statements they made on those occasions. In addition, the opinions of lawyers are analysed because they began to criticise more than ever the resort to armed reprisals. One of the detractors of this measure was the Greek lawyer Nicolas Politis who was entrusted with the task of drafting a regulation governing reprisals in peacetime for the IIL's session of Paris in

1934. The works and debates of the Institute will be the subject of close scrutiny, too.

By following this structure, it is hoped to provide a consistent story of armed reprisals which clarifies the grey areas about the persistence of this measure in spite of the changes in international law.