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When Should a Lawful War of Self-Defence End?

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Abstract

Though the UN Charter regulates the starting point of lawful self-defence, neither it nor customary law determines its lawful end. This article tries to draw the contours of such lawfulness based on the ad bellum *necessity rule. Under the prevailing law, the aggressor may gain control over ending the lawful war. Usually, whenever it stops its aggression and is willing to retreat, the assumption is that this brings the emergency situation to an end and negates the victim's temporary and exceptional right to fight. Contrarily, this article suggests that the keys to ending a war should mainly be left to the victim, who must present a convincing case that it has ended its self-defence at the first reasonable opportunity, according to its geostrategic considerations.*

1 Introduction

Victim states acting in their self-defence are allowed to fight only due to the necessity they are facing. The general rule enshrined in Article 2(4) of the Charter of the United Nations (UN) prohibits the 'use of force' as a tool for resolving international disputes. However, Article 51 contains an exception to this rule. It recognizes the 'inherent right' to use military force for individual or collective self-defence against an 'armed attack'. The victim's forcible response is allowed only as a last resort when there are no alternative peaceful means available to it.[1] Though the UN Charter regulates the starting point of a lawful self-defence against an armed attack,[2] it does not determine when

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[1] J. Gardam, *Necessity, Proportionality and the Use of Force by States* (2004), at 5–6; C. Gray, *International Law and the Use of Force* (4th edn, 2018), at 159; T. Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (2010), at 95.

[2] The term 'armed attack', which triggers the right of self-defence, has not been defined by the UN Charter and is far from clear. The common interpretation treats the term as having a narrower meaning than the prohibition of the 'use of force' in Article 2(4). Under this approach, merely unlawful hostile activity by an adversary, which nonetheless involves the use of 'force', does not automatically grant a victim state *carte blanche* to launch a military response in the course of self-defence. For the dispute regarding the quantitative threshold of an armed attack, see Beer, 'Regulating Armed Reprisals: Revisiting the Scope of Lawful Self-Defense', 59 *Columbia Journal of Transnational Law* (2020) 117.

such a war should legally end[3] unless the UN Security Council orders it.[4] From the utilitarian perspective of a defending state, it would stop fighting whenever it would be convenient for it – namely, when it suits its geostrategic circumstances and desires. However, legally, the victim state may have to stop its self-defence earlier. Since permission for it to use military force is exceptional and conditional upon the emergency situation, expiration of the latter should bring the self-defender back to the general track prohibiting it from using armed force. In the absence of a formal rule regarding war's legal conclusion, either in treaty law or in customary law, this article tries to draw the contours of such a lawful end of self-defence.

If lawful self-defence is continuously conditional on the existence of an emergency, the victim state (and its allies, if any) must stop fighting when there is no longer a necessity to continue exercising military force in self-defence. At that point, the norm requiring that the conflict be resolved by non-forcible measures should prevail over the exceptional temporary permission granted earlier to use military force in self-defence.[5] According to this approach, it is the victim's military necessity – allowing the use of force only as a last resort – that shapes the lawful scope and timing of self-defence. Whenever this necessity expires, the legality of self-defence does as well. This necessity rule – like all the other *ad bellum* rules that determine the right to fight and the conditions under which states may resort to the use of armed force[6] – is not mentioned in the UN Charter. Yet it reflects a well-accepted rule of customary international law.[7] If, as assumed, the *ad bellum* rules are applicable during the entire armed conflict, the necessity requirement is not only an enabler, which allows a defending state to resort to force, but also a continuing constraint upon the lawful scope of resorting to force that should determine its legal end.

Indeed, according to the prevailing view, the *ad bellum* restrictions of self-defence continuously regulate warfare during the entire armed conflict.[8] This 'overarching

[3] For the use of the term 'war' in this article, rather than 'armed conflict', see the text accompanying notes 18–19.

[4] Charter of the United Nations, Art. 51.

[5] The victim state may turn then to other channels – for example, the United Nations (UN) Security Council – and may well respond with non-military counter-measures – for example, economic measures – following the law of state responsibility. See GA Res. 56/83, 28 January 2002, Annex, Responsibility of States for Internationally Wrongful Acts, Art. 1.

[6] The prevailing law distinguishes between *jus ad bellum* and *jus in bello*. The former refers to the right to fight and determines the conditions under which states may resort to the use of armed force. The latter – also known as the law of armed conflict or international humanitarian law (IHL) – regulates the conduct of adversaries engaged in an armed conflict. See generally International Committee of the Red Cross, *What Are Jus ad Bellum and Jus in Bello?* (2015), available at www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0.

[7] See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA)*, Judgement, 27 June 1986, ICJ Reports (1986) 14, para. 176; see also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports (1996) 226, para. 41.

[8] See, e.g., Greenwood, 'The Relationship between *Ius Ad Bellum* and *Ius in Bello*', 9 *Review of International Studies* (1983) 221; Greenwood, 'Self-Defence and Conduct of International Armed Conflict', in Y. Dinstein and M. Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) 273; Gardam, *supra* note 1, at 162–179.

approach' requires that a self-defender not only abide by the *in bello* rules in its fighting but that it also demonstrates that all military measures taken by it were also legal *ad bellum*. If the latter necessity is viewed as an ongoing criterion used to validate a war of self-defence, the legality of fighting ends when that necessity expires.[9] Lawful fighting is not granted to the defender *carte blanche*, and it cannot be exercised at its sole discretion. By contrast, the 'limited approach'[10] dictates that the necessity requirement (as well as any other *ad bellum* rules) be met only at the beginning of a war of self-defence,[11] justifying the resort to war.[12] Accordingly, once lawful self-defence has been initiated, the *ad bellum* rules do not impose a continuing requirement. On this approach, the *ad bellum* and *in bello* rules are viewed dichotomously as separate legal spheres that should be kept apart. It is only the *in bello* rules that regulate the conduct of adversaries engaged in an armed conflict. If this view prevails, '[t]he condition of necessity does not stand in the way of waging a war of self-defence until the enemy is utterly crushed and no longer poses an effective military menace'.[13] The limited approach echoes the traditional, pre-Charter approach, perceived by some scholars (and states) as still valid today.[14] This is the legacy of a time when the victim, if it won the war, had full discretion in determining when its war of self-defence should end.

In contrast, the overarching approach grants the aggressor, to a large extent, control over ending the defender's lawful war. Usually, whenever it stops its aggression and is willing to retreat, if it has not actually done so, it negates the emergency situation and, with it, the victim's necessity to fight.[15] This article argues that both approaches are mistaken; the victim should not enjoy *carte blanche* in regard to when

[9] On the ongoing necessity criterion, see, e.g., A. Cassese, *International Law* (2nd edn, 2005), at 355; Gardam, *supra* note 1, at 155; Greenwood, 'Self-Defence', *supra* note 8, at 274–275.

[10] For the terms 'overarching' and 'limited' for the conflicting schools, see K. Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict* (2016), at 55–69. See also the discussion by Eliav Lieblich of the 'static' versus 'continuous application' approaches. Lieblich, 'On the Continuous and Concurrent Application of *ad bellum* and *in bello* Proportionality', in C. Kress and R. Lawless (eds), *Necessity and Proportionality in International Peace and Security Law* (2021) 41, at 44–48.

[11] See Y. Dinstein, *War, Aggression and Self-Defence* (6th edn, 2017), at 282. While Yoram Dinstein rejects the continuing application of proportionality in the course of 'war', he does accept it in cases 'short of war'. *Ibid.*, at 282–287. In his opinion, a defending state's response to a limited attack 'short of war', which he terms as either on-the-spot reactions or defensive armed reprisals, should itself not go beyond a limited use of defensive force. In the case of such a small-scale attack, proportionality points at an approximation in 'scale and effects' between the unlawful force and the lawful defensive response – namely, it is a continuing constraint. However, in a war, such a constraint is of no relevance, and the exercise of self-defence might bring about the destruction of the attacker's army. Greenwood, a leading advocate of the overarching approach, agrees too that, in a total war, the *ad bellum* proportionality does not function as a constraining element. See Greenwood, 'Self-Defence', *supra* note 8, at 278.

[12] It has been suggested that the term 'war' involves a comprehensive use of force assessed against four factors, applied individually or more commonly in combination. These factors are that force is employed 'across sizeable tracts of land or far-flung corners of the ocean'; 'over a protracted period of time'; 'entailing massive military operations'; and 'inflicting extensive human casualties and destruction to property'. See Dinstein, *supra* note 11, at 14.

[13] See *ibid.*, at 282.

[14] See *ibid.*, at 282–287; Kunz, *infra* note 76.

[15] See notes 84–95 in this article and accompanying text.

to end its fighting, but neither should the aggressor dictate its timing to the victim. Instead, this article does suggest that – through reinterpretation of the necessity principle – the key to the end of war should be left to the victim, but not without limits. In accordance with its geostrategic considerations, it should be required to put forward a convincing case that it has ended its self-defence at the first reasonable opportunity.

The article alternates between the positive discussion and the normative one and proceeds as follows. The next two sections present the positive rules and lay the foundation for the discussion of when a lawful war of self-defence ends. The second section presents, mainly from an *in bello* perspective, the decline of the formal approach and the crystallization of the contemporary view that the focus has shifted from formal requirements – that is, a peace treaty – to functional criteria. Given this functionality, the third section focuses on the question at the core of this article. When does a law-abiding self-defender's *ad bellum* necessity expire? *Prima facie*, a lawful war ends whenever its lawful aim has been accomplished. First, we shall discuss these aims only from the victim's perspective – on the assumption that the aggressor has not changed course during the entire fighting. Only then shall we discuss the possibility of the latter's regretting its aggression, as demonstrated by its deeds and intentions. The fourth section turns to the normative assessment and concentrates on the desired rule: who should conclude the war? This discussion shall deal with the normative considerations relevant to the two main *ad bellum* legal effects: determining the legality of war and the legal status of later rounds of hostilities between the adversaries. It suggests that the self-defender's necessity should be reinterpreted by focusing on its strategic interests. It establishes that, generally, it is normatively desirable to allow mainly the victim, and not the aggressor, the final say in regard to ending a war. But, since self-defence is based upon the military necessity in any specific circumstances, the victim should be allowed some temporal leverage in ending its lawful self-defence, subject to its fluctuating strategic circumstances. The fifth section looks at a real threat to this solution, the risk of misuse. To minimize this risk, we suggest that a duty to identify a specific attacker, together with the legality of fighting only against it, should prevent victim states from perpetually fighting a war against similar enemies, but not those who have attacked them – for example, in the 'war on terror'. The sixth section concludes.

This article assumes that a state's right to self-defence is valid under Article 51 of the UN Charter, whether its attacker is a state (international armed conflict [IAC]) or a non-state actor[16] (fighting in non-international armed conflict

[16] While, under the prevailing approach, this right was limited before the events of 9/11 to fighting between states, after that a wider interpretation of the right of self-defence seemed called for, granting it to states fighting against terrorist groups. See SC Res. 1368, 12 September 2001, para. 1 ('*[r]ecognizing* the inherent right of individual or collective self-defence' against the 'terrorist acts' of 9/11); see also SC Res. 1373, 28 September 2001. For the scope of the legal change, if any, see, for example, Gray, *supra* note 1, at 206 ('before 9/11 it was clear that the right to use force in self-defence against terrorist attacks was controversial. But the almost universal support of states for a US right of self-defence in response to 9/11 may be seen as raising the question whether there has been a significant change in the law'). Even after 9/11, however, the legality of self-defence by a state fighting against a non-state actor is not accepted by all. See, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 136, para. 139. For minority views,

[NIAC]).[17] It focuses upon the transition point from lawful self-defence to its being prohibited and the dispute regarding such a transition. The scope of this article is limited. It concentrates on conflicts between states (IACs), though parts of its discussion relate to currently widespread NIACs. Finally, a last introductory observation is due regarding terminology: this article often uses the traditional term 'war' whenever it deals with belligerency in its military context.[18] It prefers this traditional term over the contemporary legal substitute, 'armed conflict' – first, because it deals in the next section with the legality of wars in the pre-Charter period, before the modern terms of armed conflict and (lawful response to an) armed attack were introduced.[19] Second, linguistically, the term 'war' seems better suited for our discussion. For example, it seems more intuitive to deal with war aims rather than with the aims of self-defence or of an armed conflict. Nevertheless, it should be clarified that, when this article deals with current law, anyone who prefers the modern legal term 'armed conflict' or military response to an armed attack can substitute it for 'war'.

2 What Legally Ends a War? The Decline of the Formal Aspects

A *The Traditional Requirements*

Traditionally, the opening and conclusion of wars have had formal and ceremonial aspects. The 1907 Hague Convention stipulated that there had to be a clear declaration of an intent to go to war before the commencement of hostilities: 'The contracting Powers recognize that hostilities between themselves must not commence

see, e.g., *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Reports (2004) 207, paras 14–19, Separate Opinion of Judge Higgins. For the mainstream positions on the legality of the use of defensive force against non-state actors and its lawful scope and the reasoning behind them, see Hakimi, 'Defensive Force against Non-State Actors: The State of Play', 91 *International Law Studies* (*ILS*) (2015) 1, at 1–16, 30 ('[t]he claim that international law absolutely prohibits defensive force against non-State actors is losing legal traction but not yet dead'). The Chatham House Principles of International Law on Use of Force in Self-Defence suggests a stronger, unequivocal statement of the law: 'There is no reason to limit a state's right to protect itself to an attack by another state. The right of self-defence is a right to use force to avert an attack. The source of the attack, whether a state or a non-state actor, is irrelevant to the existence of the right.' E. Wilmshurst, *Principles of International Law on the Use of Force by States in Self-Defence*, Chatham House, Working Paper no. ILP WP 05/01 (2005), at 11.

[17] For the legal classification of conflicts, see generally Gill, 'Classifying Conflict in Syria', 92 *ILS* (2016) 353, at 362–366.

[18] This preference, however, does not bear any implications regarding the 'war' versus 'limited attack short of war' discussion. See Dinstein, *supra* note 11.

[19] It usually denotes either fighting between states at a disputed intensity or intense and protracted fighting between a state and an organized armed group (non-state actors). See, e.g., International Law Association, Final Report on the Meaning of Armed Conflict in International Law (2010), available at www.rulac.org/assets/downloads/ILA_report_armed_conflict_2010.pdf. The existence of armed conflict triggers the application of IHL. See, e.g., Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287, common Arts 2 and 3.

without previous and explicit warning'.[20] In that era, there was no legal restriction on the use of force in the international arena,[21] and states were allowed to declare war for any reason: '[A] nation had a "right" to go to war when it believed that its vital interests called for such a remedy.'[22] In some cases, this mandatory communication was only a procedural obstacle that had to be surmounted. For example, on 23 July 1914, Austro-Hungary presented a 48-hour ultimatum to Serbia, demanding the suppression of anti-Austrian propaganda in Serbia and establishing an Austro-Hungarian inquiry into the assassination of Archduke Franz Ferdinand. Once Serbia failed to meet the terms of the ultimatum, the Austro-Hungarian government issued a formal declaration of war,[23] thus beginning World War I.

The formal tradition was also reflected by the *in bello* rules – in the termination of wars through peace treaties.[24] For example, the 1919 Treaty of Versailles followed World War I, and the 1947 peace agreements between the Allied powers and Italy, Romania, Hungary and Bulgaria followed World War II.[25] The formal aspects of peace treaties can also be seen in the ceremonies surrounding these treaties. For example, the Treaty of Versailles was signed in the Versailles Palace in 1919.[26] World War II ended on 2 September 1945, with Japan's official surrender aboard the USS *Missouri*.[27] The 1907 Hague Regulations also enabled belligerents to agree upon a temporary suspension of hostilities by an armistice.[28] Such armistices did not officially terminate the state of war between the belligerents. They were allowed to resume hostilities after

[20] Hague Convention Relative to the Opening of Hostilities 1907, 36 Stat. 2259, 1 Bevans 619, Art. 1. See generally Tyron, 'The Hague Conferences', 20 *Yale Journal of International Law* (*YJIL*) (1911) 470, at 481; Elliott, 'The Development of International Law by the Second Hague Conference', 8 *Columbia Law Review* (1908) 96, at 103–104.

[21] See, e.g., Dinstein, *supra* note 11, at 79.

[22] Fenwick, 'War without Declaration', 31 *American Journal of International Law* (*AJIL*) (1937) 694, at 694 (however, 'acts of force in the absence of a formal declaration of war were, in the decades preceding the [First] World War, confined to situations of emergency').

[23] Eagleton, 'The Form and Function of the Declaration of War', 32 *AJIL* (1938) 19, at 23; see also 'Austria-Hungary Issues Ultimatum to Serbia', *History.com*, available at www.history.com/this-day-in-history/austria-hungary-issues-ultimatum-to-serbia.

[24] Dinstein, 'The Initiation, Suspension, and Termination of War', in L.C. Green and M.N. Schmitt (eds), *International Law across the Spectrum of Conflict: Essays in Honour of Professor L.C. Green on the Occasion of His Eightieth Birthday* (2000) 131, at 134–135.

[25] Versailles Peace Treaty 1919, 225 Parry 188; Paris Treaty of Peace with Bulgaria 1947, 41 UNTS 21; Paris Treaty of Peace with Hungary 1947, 41 UNTS 135; Paris Treaty of Peace with Romania, 1947 42 UNTS 3; Paris Treaty of Peace with Italy 1947, 49 UNTS 3. Nazi Germany, however, did not sign a peace treaty, nor was any offered to it, but its remaining commanders signed unconditional surrender documents to the relevant Allied commanders in the different fronts where they surrendered. See, e.g., McManus, 'World War II: Invasion of Normandy to the Surrender of Germany', in G. Martel (ed.), *The Encyclopedia of War* (2012) available at https://doi.org/10.1002/9781444338232.wbeow706.

[26] 'Treaty of Versailles', *Encyclopaedia Britannica* (2020), available at www.britannica.com/event/Treaty-of-Versailles-1919.

[27] 'The Japanese Surrender', *Encyclopaedia Britannica Pacific War* (2020), available at www.britannica.com/topic/Pacific-War/The-Japanese-surrender.

[28] See Convention (No. IV) Respecting the Laws and Customs of War on Land (Hague Convention) 1907, 2 AJIL Supp (1908), Annex to the Convention: Regulations Respecting the Laws and Customs of War on Land, Art. 36.

the time, agreed upon by the parties to the armistice, had lapsed[29] or if the duration had not been determined when one of the parties gave 'due warning'.[30] In case of a 'serious violation of an armistice', Article 40 of the Hague Regulations allowed the injured party to renounce the armistice and renew the hostilities.[31]

The horrible experience of the two World Wars – and the failure of the restrictions on the commencement of war laid down after World War I, by both the Covenant of the League of Nations[32] and the Kellog-Briand Pact[33] – led to the UN Charter's Article 2(4). This article prohibits the threat or the use of force to resolve international disputes, which has rendered the practice of declarations of war obsolete.[34] In the same vein, the following subsection will present the prevailing legal view that, in concluding wars, the *in bello* focus has shifted from formal declarative requirements to functional criteria.

B *The Rise of Diversified Practices of War Suspensions*

Since the end of World War II, the legal practice of ending wars by official peace treaties has declined.[35] Instead, various acceptable practices have been recognized,[36] including armistices and ceasefires, unilateral declarations, the defeat of one of the parties or de facto extended termination of hostilities.[37] According to some scholars, however, the objective evidence – for example, extended cessation of hostilities – 'must unequivocally show that the Parties have not merely suspended hostilities, but have opted to terminate them'.[38] Armistices exemplify this *in bello* shift from formality, which required a peace treaty to end a war, to a more functional approach. Whereas, traditionally, an armistice was perceived only as a temporary suspension of hostilities during an ongoing war,[39] in contemporary international law, armistices generally bring an end to the hostilities, even in the

[29] *Ibid*, Art. 36.

[30] See, e.g., Von Heinegg, 'Factors in War to Peace Transitions', 27 *Harvard Journal of Law and Public Policy* (2004) 843, at 849.

[31] Hague Convention, *supra* note 28, Art. 40.

[32] The Covenant of the League of Nations created a peaceful settlement mechanism, through which league members were to settle disputes peacefully. If the mechanism failed, member states were to wait three months before resorting to war. Covenant of the League of Nations 1919, 13 AJIL Supp. 128 (1919), Arts 12–16.

[33] The Kellogg-Briand Pact restricted recourse to war. However, the restriction was mainly declarative and did not encompass all uses of force. Treaty Providing for the Renunciation of War as an Instrument of National Policy 1928, 46 Stat. 2343, 2 Bevans 732, Arts 1–2.

[34] See, e.g., Y. Beer, *Military Professionalism and Humanitarian Law: The Struggle to Reduce the Hazards of War* (2018), at 154–155.

[35] See, e.g., D.A. Lewis, G. Blum and N.K. Modirzadeh, *Indefinite War: Unsettled International Law on the End of Armed Conflict* (2017), at 30–33.

[36] Kleffner, 'Scope of Application of International Humanitarian Law', in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law* (2013) 43, at 68–70.

[37] *Ibid.*, at 68–70.

[38] Dinstein, *supra* note 11, at 51; see also the objective evidence requirement in Greenwood, *infra* note 40.

[39] See text accompanying notes 28–31 in this article.

absence of a peace treaty.[40] Usually, once an armistice has been concluded, the belligerents are not allowed to continue fighting, and only a 'new' armed attack will enable them to resume hostilities.[41]

Accordingly, prominent states – for example, the United Kingdom (UK) and Australia – recognize that armistices can either suspend military operations or end wars[42] or at least 'provide an opportunity for preparing the end of an armed conflict'.[43] (The term 'ceasefire' that emerged in the post-Charter era has essentially replaced armistice as a temporary cessation of hostilities.[44] However, this term, widely used by United Nations (UN) Security Council resolutions aimed at bringing hostilities to an end,[45] does not have a clear legal definition[46] and has been used in reference to both temporary agreements[47] and, in many cases, ones of indefinite duration.)[48] The USA adheres to the traditional formal approach. It views both armistices and ceasefire agreements only as temporary suspensions of hostilities[49] as opposed to permanent peace treaties.[50]

[40] Lewis, Blum and Modirzadeh, *supra* note 35, at 32; Dinstein, *supra* note 11, at 44–45. For example, Security Council Resolution 95 (1951) rejected the Egyptian claim that the (1949) armistice with Israel did not end the state of war between the two states ('[c]onsidering that since the armistice regime, which has been in existence for nearly two and a half years, is of a permanent character'). See text accompanying notes 111–112 in this article and accompanying text. Some scholars still look for objective evidence. According to their approach, 'it has generally been accepted that a peace treaty or some other clear indication on the part of the belligerents that they regard the state of war has ended is required'. See, e.g., Greenwood, 'Scope of Application of Humanitarian Law', in D. Fleck (ed.), *The Handbook of International Law* (2nd edn, 2008) 62, para. 222; see also Dinstein, *supra* note 11, at 51.

[41] Kleffner, *supra* note 36, at 66.

[42] Dinstein, *supra* note 11, at 44–45; see, e.g., *The United Kingdom Manual of the Law of Armed Conflict* (2005), Art. 10.16–10.17; Joint Doctrine and Concepts Centre, *The Joint Service Manual of the Law of Armed Conflict*, Joint Service Publication no. 383 (2004), at 263, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf; Royal Australian Air Force, *Operations Law for RAAF Commanders 43* (2nd edn, 2004), Art. 5.8, available at https://airpower.airforce.gov.au/sites/default/files/2021-03/AAP1003-Operations-Law-for-RAAFCommanders.pdf.

[43] See the *German Law of Armed Conflict Manual* (2013), Art. 223–224; Federal Ministry of Defence, *Law of Armed Conflict Manual*, Joint Service Regulation no. 15/2 (2013), at 34–35, available at www.bmvg.de/resource/blob/93610/ae27428ce99dfa6bbd8897c269e7d214/b-02-02-10-download-manual-law-of-armed-conflict-data.pdf.

[44] See, e.g., Bell, 'Ceasefire', in *Max Planck Encyclopaedia of Public International Law* (2009); Dinstein, *supra* note 11, at 55.

[45] The UN Security Council can impose conditions on belligerents to ensure that a ceasefire is maintained. For example, in 1991, SC Resolution 687 conditioned the end of the Allied forces' military presence in Iraq on Iraq's disarmament and the deployment of a UN observer unit. Iraq violated the ceasefire conditions. SC Res. 687, 3 April 1991, para. 5; Von Heinegg, *supra* note 30, at 856–857; *cf*. Bell, *supra* note 44 (presenting SC Resolution 687 as an example of a ceasefire that was spoken of at the time as a peace treaty).

[46] For the inconsistent use of these terms, see generally Bailey, 'Cease-Fires, Truces, and Armistices in the Practice of the UN Security Council', 71 *AJIL* (1977) 461.

[47] *Department of Defense Law of War Manual* (2016), at 838; Dinstein, *supra* note 11, at 55–57.

[48] See, e.g., Kleffner, *supra* note 36, at 66.

[49] *Department of Defense Law of War* Manual, *supra* note 47, at 864.

[50] *Ibid.*, at 863 (mentioning that armistices often precede peace negotiations and treaties).

Australia not only prefers the objectiveness of peace treaties, as they are the 'clearest way of ending hostilities'[51] but also acknowledges that 'armed conflicts also end when a general armistice is declared'.[52]

Thus far, the *in bello* discussion has presented the decline of the formal aspects in regard to the ending of wars, but though the functional trend is clear, the scope of the shift is disputed. This is the background to our main discussion. The next section shall focus upon the question at the core of this article: in the absence of a sincere agreement between the adversaries to end the war, when does the law-abiding self-defender's *ad bellum* necessity end?[53] *Prima facie*, a lawful war ends whenever its lawful aim has been accomplished. First, I shall look at these aims only from the victim's perspective – on the assumption that the aggressor has not changed course and its aggressive aim throughout the fighting. Only then shall I deal with the possibility of the latter's regretting its aggression during the fighting, as demonstrated by its deeds and intentions.

3 The Legitimate Aims of Self-defence

A *An Analysis from the Unilateral Victim's Perspective*

There are conflicting approaches to the question regarding the legitimate aims of a defensive war. This dispute originates in part from the failure of the international community's centralized use of force to maintain international peace and security, as envisioned by the drafters of the UN Charter.[54] Indeed, there is a huge gap between the vision of the Charter and actual reality. In the absence of an effective centralized solution to an armed attack,[55] self-defence has been decentralized to the state level, and the result is reflected in the dispute relating to the legitimate aims of self-defensive wars. A limited aim for the use of force by a defending state seems to be compatible with the rhetoric of the UN Charter, while a relatively wider range of aims is more consistent with the practice of self-defender states.[56]

[51] *Royal Australian Air Force*, *supra* note 42, at 43.

[52] *Ibid*.

[53] The discussion in the next section is relevant to the prevailing-overarching view, according to which the *ad bellum* necessity applies throughout the entire war.

[54] Chapter VII of the UN Charter mandates the Security Council to take collective action against an aggressor. However, the veto right of the five permanent members, combined with the inability to establish a formal mechanism for the collective use of force, usually paralyzes the Security Council's ability to exercise collective action. One exception in which the United Nations (UN) did exercise its authority for collective enforcement action occurred on 7 July 1950, when the Security Council came to the defence of South Korea and issued a resolution authorizing collective action against North Korea's armed attack, under the flag of the UN and the joint command of the USA. See SC Res. 84, 7 July 1950. For another example of the exceptionally effective action of the Security Council in Somalia and in the First Gulf War, see, e.g., A. C. Arend and R. J. Beck, *International Law and the Use of Force* (1993), at 52–57.

[55] See, e.g., Beer, *supra* note 2, at 121–122.

[56] See Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in Jus ad Bellum', 24 *European Journal of International Law* (*EJIL*) (2013) 235, at 262.

The prevailing approach is conservative; it allows the victim only to halt an attack – and, if necessary, repel the aggressor's army – in returning to the situation that existed *ante bellum*.[57] The justification of this approach is clear. Since the use of military force by a victim state should be allowed only due to exceptional necessity, it should be limited in scope and time. The defending state is allowed to use only minimal force, during a minimal period, as required for its security and not the optimal amount it might have desired.[58] Under this approach, which is widely supported by academics, *opinio juris* and some judges in the International Court of Justice (ICJ), any action that exceeds the aim of returning to the territorial *status quo* is an unlawful armed reprisal disguised as self-defence.[59]

The contrary approach recognizes a broader range of potential lawful aims, allowing actions to prevent foreseen further attacks whenever necessary.[60] This wider and, to some extent, more realistic approach is due to inherent deficiencies in the halt-and-repel formula. For example, the latter does not seem to leave room for self-defence by the victim of an armed attack that has been completed: either when no ground forces were used by the attacker – for example, in a missile attack – or due to their withdrawal. Such sporadic attacks are typical of non-state actors operating in NIACs. In such a case, the restoration of the territorial *status quo* may not always be the reasonable end result for a law-abiding defending state. However, in some cases – such as an isolated case of aggression, mainly between states – it might be enough.

An example of the latter is the UK's military reaction to the Argentine occupation of the Falkland Islands in 1982. This conflict was mainly over the sovereignty of the islands.[61] It did not pose an actual threat to the lives of British citizens. The UK government's explicit aim – the expulsion of the invader – was consistent with the halt-and-repel formula.[62] However, the Falklands War is remarkable in that it was limited in scope. In other cases, where there is a repeat player – especially in NIACs – that is characterized by continuous attacks, the *status quo ante* is not stable. In such cases, the preservation of international peace and security[63] and the right of the victim state to defend itself should allow actions that deviate from the halt-and-repel formula; forestalling any further aggression and establishing some credible stability is a reasonable

[57] See, e.g., Gardam, *supra* note 1, at 156–159.

[58] See, e.g., Greenwood, 'Self-Defence', in *Max Planck Encyclopaedia of Public International Law* (2011), at 25–27.

[59] See, e.g., Kretzmer, *supra* note 56, at 260–261; Cassese, *supra* note 9, at 355; Cannizzaro, 'Contextualizing Proportionality: Jus ad bellum and Jus in bello in the Lebanese War', 88 *International Review of the Red Cross* (2006) 779, at 785; Etezazian, 'The Nature of the Self-defence Proportionality Requirement', 3 *Journal on the Use of Force and International Law* (*JUFIL*) (2016) 260, at 267, 288; Nolte, 'Multipurpose Self-Defence, Proportionality Disoriented: A Response to David Kretzmer', 24 *EJIL* (2013) 283, at 287.

[60] For the controversy over this approach, see, e.g., Kretzmer, *supra* note 56, at 239.

[61] The Falklands campaign began on 2 April 1982. It lasted for approximately two weeks and cost over 1,000 lives. See UK Ministry of Defence, 'Falklands 25: Background Briefing', National Archives, available at http://archive.today/grTy.

[62] See, e.g., R. Higgins, *Problems and Process: International Law and How We Use It* (1995), at 232.

[63] See UN Charter, preamble.

goal of a defending state. Indeed, the more comprehensive approach claims that, when acting in self-defence, a state may take steps meant to prevent imminent future attacks[64] and, according to some, to deter the attacker from carrying out future attacks.[65] Supporters of this approach claim that it takes the victim state's interests more seriously.[66] This conclusion is relevant mainly with regard to a repeat player. In such a case, especially in NIACs, the halt-and-repel formula seems futile against a non-state actor, and the victim's response might include deterrence considerations integrated into its self-defence, allowing it to take reasonable actions to prevent further attacks.

But deterrence is not a magic formula. There are areas in which it does not work in the sense that the desired result is not achieved (and the adversary is not deterred from acting)[67] or, in some cases, could not be achieved. In such cases, the victim state faces an undeterred repeat aggressor, yet it is still entitled to realize its self-defence. It may have exercised exceptional remedies that would allow it to widen its aims. Therefore, it has to be allowed to aim even further by incapacitating its adversary's capabilities. Furthermore, in the rare cases where even incapacitation is not enough – for example, due to its relatively temporary effect or the nature of the enemy – a total regime change may be appropriate,[68] as was the case with Nazi Germany.[69] Overall, however, incapacitation and regime change are the disputed exceptions, while the halt-and-repel formula is the only consensual war aim of a state acting in self-defence. Whatever the

[64] See, e.g., Reisman, and Armstrong, 'The Past and Future of the Claim of Preemptive Self-Defense', 100 *AJIL* (2006) 525, at 532–533 (referring to the High-Level Panel's recommendation favouring a loosening of the strict 'armed attack' requirement as long as the threatened attack is imminent); UN Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General, UN Doc. A/59/2005, 21 March 2005 (stating that '[i]mminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack'). David Kretzmer states that, while 'it is almost universally accepted that a state may not use force in order to prevent or deter future attacks, it is widely (but certainly not universally) acknowledged that it may do so to thwart an imminent attack'. Kretzmer, *supra* note 56, at 248–249.

[65] See, e.g., Schachter, 'The Right of States to Use Armed Force', 82 *Michigan Law Review* (1984) 1637, at 1638. For the paradox of deterrence – an essential yet problematic strategy – see, e.g., Beer, *supra* note 34, at 174–178.

[66] See Kretzmer, *supra* note 56, at 261–262. In this context, even state practice is disputed. Kretzmer points out that, when states have acted in self-defence in order to achieve additional aims, other states have refrained from criticizing their actions. *Ibid.*, at 264. Georg Nolte responds that this silence could also be the result of political considerations rather than proof of other states' support of this view of self-defence and that defending states prefer to highlight the 'halt and repel' aspects of their actions rather than other aspects. Nolte, *supra* note 59, at 287.

[67] In spite of its practical importance as a tool of defensive strategy, deterrence cannot be relied upon due to its essence – communication through threats – which is a problematic way of delivering messages in general and reflects a poor standard of inter-human relations in particular. The dramatic failure of one of the documented cases of deterrence – God's warning to Adam and Eve not to eat the fruit of the Tree of Knowledge – may serve as an example of its limits. See L. Freedman, *Deterrence* (2004), at 7.

[68] See, e.g., Beer, *supra* note 34, at 203–206.

[69] For the case of regime change in Nazi Germany, see, e.g., M. Walzer, *Just and Unjust Wars* (4th edn, 2006), at 113.

aim of a lawful self-defence is, it will determine its duration: how long the victim can validate its self-defence.[70]

Until now, we have looked at the aims of war as if they were one-sided, only from the perspective of a law-abiding self-defender. The implicit assumption was that the aggressor continues fighting until the war's end. At the same time, this end is determined either by the defender's unilateral decision (for example, by achieving its war aims)[71] or by the aggressor's victory. But since both adversaries are dynamic and, in many cases, adjust their war aims as the war progresses, the aggressor may change course during the fighting. Therefore, in the following subsection, I shall turn to deal with an aggressor whose intentions and deeds clearly show that it wants to stop fighting, as was the case with the Iraqi aggressor after its invasion of Iran.[72] The question to be dealt with is to what extent the aggressor's change of course should affect the law-abiding victim's behaviour.

B *When an Aggressor Changes Course and Stops Fighting, How Does It Affect the Victim?*

1 The Dispute

When an aggressor changes course during a military campaign and retreats, or is willing to return to the *status quo* line, there is a dispute regarding whether and how it should affect the war's duration in general, and the victim's self-defence aim in particular. *Prima facie*, the use of force by the self-defender is an exception to the rule prohibiting it,[73] which is justified by the necessity it faces. When the necessity ends, as is reflected in this case by the aggressor's deeds and intentions, fighting should stop. However, the limited school takes no notice of the aggressor's retreat. It argues that a state of war exists as long as the victim has not decided to conclude the conflict. Thus, even though hostilities have ceased, the legal status of war continues to prevail, and, legally, the self-defender can resume its use of force lawfully at any time unless it has agreed to stop fighting.[74] If new hostilities break out, the *ad bellum* legality of the defender's fighting does not have to be reassessed since its use of force is

[70] See, e.g., Gill, 'When Does Self-Defence End?', in M. Weller (ed.), *The Oxford Handbook of the Use of Force in International Law* (2015) 737. Referring to the continued, prolonged reliance by the USA on the right of self-defence in response to the attack by al-Qaida on 9/11, he asks: 'How long reliance upon self-defence remains operative? Does the right to exercise self-defence cease once an initial attack has been responded to or does the effectiveness of the response enter into the equation in the sense that until the threat has been neutralized the right to exercise self-defence remains operative? If the latter is the case, how should the existence of a continuing threat be assessed? Is it sufficient that the original attacker still has the capacity to launch a renewed attack and has not clearly demonstrated an intention to cease further attacks, or must there be concrete indications that a renewed attack is imminent or ongoing?' *Ibid.*, at 737.

[71] But see Gill, *supra* note 70, at 741–742 (arguing that if a significant period of time has passed and a new series of incidents occurs, it would be more realistic to treat it as a new armed attack).

[72] See subsection 2.B.2.

[73] UN Charter, Art. 2(4).

[74] See, e.g., Dinstein, *supra* note 11, at 284–285; J. Stone, *Legal Controls of International Conflict: A Treatise on The Dynamics of Disputes – and War-Law* (1954), at 245–246.

understood to be a continuation of its lawful self-defence.[75] Accordingly, Josef Kunz views self-defence as the right to repel an armed attack and engage in a justified and legal war until the defending state achieves victory by defeating the aggressor and forcing a peace treaty.[76]

The leading contemporary advocate of this limited approach is Yoram Dinstein, who claims that a self-defending state has the prerogative to decide when to end its lawful fighting, and it can put off doing so until it achieves 'victory'. Even though hostilities have been suspended, the state of war has not been repealed, and new hostilities do not need to be legally reassessed because their legality was evaluated at the first defensive use of force.[77] In his opinion, an aggressor's retreat and desire to return to the *status quo*, *per se*, does not affect this prerogative.[78] Once the aggressor has unleashed the monster of war, it can mainly be put back in its cage by the self-defender.[79] The cards are distributed 'fairly': while the aggressor took the war's opening move, the closing move is left to the self-defender. Dinstein demonstrates his opinion by Israel's 1981 attack on the Osiraq nuclear reactor in Iraq. He and other scholars claim that this attack was justified because of the ongoing state of war between Israel and Iraq, starting in 1948 when Iraq had attacked Israel, followed by the 1967 and 1973 wars.[80] Another example cited by him is that of the two Gulf Wars. In 1990, after the Iraqi invasion of Kuwait, UN Security Council Resolution 678 formed a collective self-defence coalition of countries that fought the first war against Iraq in 1991.[81] He argues that, following the first war, in the absence of a formal agreement between the belligerents, the state of war continued to exist and the coalition's status as a self-defending force remained. Thus, the 2003 second Gulf War was a continued act of lawful self-defence and not a response to a new armed attack.[82] This approach echoes the traditional pre-Charter view – stated, for example, at the beginning of the 20th century by Lassa Oppenheim – that belligerents are not obligated to stop hostilities once their opponent concedes.[83]

[75] See notes 77–83 in this article.

[76] Kunz, 'Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations', 41 *AJIL* (1947) 872, at 876–877.

[77] Dinstein, *supra* note 11, at 281–287 (though he concentrates mainly on the proportionality request, he talks about a war of self-defence in general).

[78] *Ibid.*, at 284–285.

[79] See, e.g., D. Rodin, *War and Self-Defense* (2002), at 112 (arguing that a self-defender 'may prosecute its war to final victory even after the point at which this is no longer necessary to reverse or frustrate the initial unlawful use of force which provided the justification for the war').

[80] See Dinstein, *supra* note 11, at 51–52; Beres and Tsiddon-Chatto, 'Reconsidering Israel's Destruction of Iraq's Nuclear Reactor', 9 *Temple International and Comparative Law Journal* (1995) 437; Beres, 'Preserving the Third Temple: Israel's Right of Anticipatory Self-Defense under International Law', 26 *Vanderbilt Journal of Transnational Law* (1993–1994) 111, at 117–120. But compare the Security Council's rejection of the Egyptian argument (in 1951) that a state of war existed between it and Israel, due to the 1948 war between the parties. See notes 111–112 in this article and accompanying text.

[81] SC Res. 678, 29 November 1990.

[82] Dinstein, *supra* note 11, at 281.

[83] L. Oppenheim, *International Law: A Treatise (2)*, edited by H. Lauterpacht (7th edn, 1952), at 225, para. 66.

In sum, the limited school checks the legality of war at its starting point and then fixes a self-defending state's status for the duration of the conflict, allowing the original victim to hold the legal key to ending the war. In contrast to the limited school, which sets the self-defending status once and for all, the overarching school posits a continuing challenge: instead of taking a snapshot at the war's opening, it screens the entire military campaign. However, the prevailing view in the post-Charter era is generally clear: once the aggressor has halted the hostilities and retreated, the defender's aim of 'halt and repel' has been achieved, and its war of self-defence should end. According to this overarching school, all of the victim state's defensive acts must be constrained by the *ad bellum* rules, including the necessity principle.[84] Even though it may have started in self-defence, a war loses its legality in the absence of a necessity to pursue it. Self-defence is not a permanent continuing status – allowing the self-defender complete discretion regarding its scope – but, rather, a relative status, contextually based. Once there is no longer a necessity to fight for self-defence, the hostilities must end:[85] '[C]ustomary practice supports the view that self-defence may not continue past the point in time that is necessary to deal effectively with the armed attack(s).'[86] According to this view, the challenge is identifying when the necessity to fight ends – when it becomes clear that such a necessity no longer exists.

Alternatively, in many cases, due to the 'fog of war',[87] there is no precise point but, rather, an accumulation of indications that the defender's necessity to continue fighting has declined – for example, when the aggressor has indicated its desire to end the hostilities[88] and has retreated from the foreign territory or has effectively stopped hostilities.[89] Presenting this approach, Judith Gardam states that, depending on the circumstances, 'the failure to acknowledge peaceful overtures could transform a legitimate response in self-defence into an aggressive use of force'.[90] Though she focuses upon the proportionality requirement as it applies to the victim, she acknowledges that sometimes this situation is dealt with as part of its necessity, and she states that this transformation occurs when the victim's response 'continues past the point in time that is necessary to deal effectively with the armed attack'.[91]

Accordingly, Tom Ruys states that the defensive response should end when it does not meet with any armed resistance or when hostilities have ceased: 'In such

[84] See note 15 in this article and accompanying text.

[85] See, e.g., O. Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (2010), at 486; Gardam, *supra* note 1, at 155; Kaikobad, 'Self-Defence, Enforcement Action and the Gulf Wars, 1980–88 and 1990–91', 63 *British Yearbook of International Law* (1992) 299, at 336–337; Green, 'The Ratione Temporis Elements of Self-defence', 2 *JUFIL* (2015) 97, at 111–113 (Green argues: 'In the context of the necessity criterion, it cannot be "necessary" to continue to respond in self-defence once there is no longer an attack to respond to'). *Ibid.*, at 112.

[86] Ruys, *supra* note 1, at 119.

[87] Indeed, '[w]ar is the realm of uncertainty'. C.V. Clausewitz, *On War*, translated and edited by M. E. Howard and P. Paret (1984), at 101 (see also 'a fog of greater or lesser uncertainty').

[88] Kaikobad, *supra* note 85, at 336–337.

[89] See, e.g., Greenwood, 'Self-Defence', *supra* note 8, at 275.

[90] Gardam, *supra* note 1, at 155.

[91] *Ibid.*, at 167.

situations, once the armed attack has been successfully repelled, the defending state cannot actively resume or reopen hostilities.'[92] According to Kaiyan Kaikobad, 'where the aggressor State indicates a willingness to end hostilities either by clear statements or necessary implication, or where the manifestations of aggression disappear, there is in principle a duty to end defensive measures'.[93] Kaikobad mentions three exceptions to the victim's duty to end the defensive measures in light of the aggressor's behaviour: first, if the aggressor's proposal to end hostilities is not genuine and there is evidence that the aggressor will exploit it to resume hostilities – for example, by regrouping;[94] second, if the restoration of the territorial *status quo* is not possible or, at least, cannot be guaranteed and, third, if the authorization to use military force in collective self-defence is under Chapter XII of the UN Charter. The presumption is that the defensive acts are lawful until the UN's conditions have been satisfied or the unconditional surrender of the aggressor.[95]

The overarching school establishes a correlation between the aggressor's deeds and intentions and the legality of a war that began as a lawful war of self-defence. The legality of a self-defender's continued fighting is subject to its respective classification as such. However, the initial classification – as an attacker and a self-defender, respectively – is not fixed for the entire military campaign but, rather, affected by the war's dynamic. This dynamic may give rise to pendulum movements where the attacker's and defender's classification keeps changing – in some cases, more than once – as the war develops. In the following subsection, we will present this pendulum movement and its *ad bellum* legal effect in the case of the Iran-Iraq war.

2 The Iran–Iraq War's Pendulum: The Search for Changing Aggressors and Victims

The Iraq–Iran war serves as an example of the changing classification of an attacker and self-defender throughout a war. This war broke out when Iraqi forces attacked Iran on 22 September 1980, with a combined aerial and ground offensive on two main fronts along their common border: in the central area, not far from Baghdad, and in the south, near Basra. The Iraqi offensive gained some Iranian territory, but it progressed slowly, and the Iraqi forces lost many combatants and large amounts of military equipment.[96] Within a week, on 28 September, the president of Iraq, Saddam Hussein, decided to halt the progress of Iraqi forces and announced his desire to negotiate a settlement, but without agreeing to withdraw all of his troops from Iran.[97] Though there was no indication that Iraq's ceasefire offer was made to allow it to regroup for future acts of aggression, merely the territorial occupation of Iran's soil entitled it to reject that offer legally. At this stage, Iran claimed that its war was a defensive one that would end fairly only after it achieved victory by repelling the Iraqi forces from Iranian territory and punishing Iraq by forcing

92 See Ruys, *supra* note 1, at 120 (though, like Gardam, he deals with it in the proportionality context).
93 Kaikobad, *supra* note 85, at 337.
94 *Ibid.*, at 337–338.
95 *Ibid.*, at 339.
96 See P. Razoux, *The Iran-Iraq War*, translated by Nicholas Elliott (2015), at 32–44.
97 *Ibid.*, at 43–44.

Saddam Hussein to give up power.[98] Legally, Iran was a self-defender state fighting to regain its occupied territory, though its war aim – requiring punishment and regime change in Iraq – was unlawful.

After almost two years of fighting, in June 1982, Saddam Hussein announced his willingness to reach a ceasefire and agreed to Iranian demands to withdraw from Iranian territory, pay reparations to Iran and accept responsibility for starting the war. However, he did not agree with the Iranian demand that he step down or that he repatriate 100,000 Shiites from Iran to Iraq. Iran refused to accept these conditions. Regardless, Iraqi forces withdrew from the remaining Iranian territories under their control.[99] At this stage, the return to the territorial *status quo* and adoption by Iraq of a defensive strategy may have legally obligated Iran to accept the ceasefire and stop fighting.[100] Its necessity to defend itself lawfully would seem to have ended. However, the war went on and, consequently, after 1982, the classification of the adversaries seems to have changed. Iranian forces became an aggressor initiating an armed attack against Iraq and succeeded in gaining Iraqi territory, while Iraq fought in its self-defence.[101] The pendulum movement regarding their classification continued. After six years, in 1988, Iraq regained control of its territory and captured Iranian territory near the central border, though it later retreated.[102] During the war, Iran refused to comply with several nonbinding UN resolutions that called for the cessation of hostilities. Only in July 1988 did Iran accept the mandatory UN Security Council Resolution 598, which led to the end of hostilities.[103]

Even though the classification of the belligerents as aggressor and defender, respectively, changed during this war, under the limited approach, Iraq was the aggressor throughout the campaign and Iran was the permanent victim of this war. Under this latter classification, Iran was entitled to its right to self-defence, and its military actions were *ad bellum* lawful during the entire war.[104] In contrast, according to the prevailing overarching approach, Iran probably lost its self-defender status between 1982 and 1988 once it was no longer necessary for it to continue fighting for the sake of its self-defence, and any further use of force by it was unlawful.[105] It probably regained its victim status towards the end of the war, following the final Iraqi offensive. These altering classifications are crucial to the overarching school because each classification carries with it different rights and obligations. For example, the legality of the self-defender's continued fighting is subject to its respective classification as such.

98 See, e.g., Kaikobad, *supra* note 85, at 341–342; see also Amin, 'The Iran-Iraq Conflict: Legal Implications', 31 *International and Comparative Law Quarterly* (1982) 167, at 186. Sayed Amin argues that, at this stage, 'the Iraqis, having failed their objective of a quick victory, campaigned diplomatically', while Iran preferred to continue fighting. *Ibid.*

99 See Razoux, *supra* note 96, at 217–219.

100 See Kaikobad, *supra* note 85, at 342.

101 *Ibid.*, at 363.

102 See F.G. Gause, *The International Relations of The Persian Gulf* (2009), at 73–84.

103 SC Res. 598, 20 July 1987; see also Dinstein, *supra* note 11, at 285; Ferretti, 'The Iran-Iraq War: United Nations Resolution of Armed Conflict', 35 *Villanova Law Review* (1990) 197, at 226–234.

104 Dinstein, *supra* note 11, at 285.

105 See, e.g., T. Gazzini, *The Changing Rules on the Use of Force in International Law* (2005), at 147.

3 The Legal Effects

The end of war does have legal effects, two of which have been mentioned above and are most relevant to our discussion. The first effect enables a final *ad bellum* determination of the aggressor or an alternating determination of the aggressor throughout the conflict, as in the Iraq–Iran war.[106] The limited approach classifies the adversaries respectively as aggressor-attacker and victim-defender at the beginning of the armed attack. Their classification remains fixed until the end of the war, and the defender is allowed broad discretion to determine this end. In contrast, the overarching school's classification of the adversaries is contingent on the end of the act of aggression. According to this school, when an aggressor changes course and retreats to the *status quo* line, it generally determines the end of lawful self-defence. The victim is not allowed to continue fighting, which does not seem necessary anymore. Whenever determined – whether fixed or alternating – aggression is unlawful under the *ad bellum* rules and may incur substantial consequences. The victim state, followed by its allies in the case of collective self-defence, may turn to non-military countermeasures – for example, economic sanctions – following the law of 'state responsibility'[107] or personal criminal consequences for the crime of aggression under the Rome Statute for 'person[s] in a position effectively to exercise control over or to direct the political or military action of a State'.[108]

The second effect concerns the legality of renewed hostilities between the adversaries after an armistice agreement has been signed or a manifested *de facto* end of hostilities has occurred. The question is whether a new round of hostilities is a continuation of the original war[109] or constitutes an independent case; if the latter, only a new armed attack would allow the victim state to respond forcibly in self-defence under the *ad bellum* rules. Terry Gill has explained this view: 'While the underlying causes of tension and hostility may well have a common root, this does not mean that all uses of force over a period of years between the opposing sides can be lumped

[106] See subsection 2.B.2.

[107] The victim state may respond by exercising its right to self-defence and may well respond with non-military countermeasures following the law of state responsibility. See note 5 in this article.

[108] Rome Statute of the International Criminal Court (Rome Statute) 1998, 2187 UNTS 90, Art. 8 bis(1); see also the definition of aggression by the UN General Assembly's definition of aggression. GA Res 3314 (XXIX), (1974), at 142.

[109] See, e.g., Dinstein's approach in notes 77–83 in this article and accompanying text. However, Tom Ruys argues that the prohibition on the use of force applies even if the war has not reached a formal end, but only an actual one. Ruys, 'Part 1 The Cold War Era (1945–89)', in T. Ruys, O. Corten and A. Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (2018) 338. A modern example of this debate can be found in the ongoing conflict between the USA and Iran. Since 2019, these states have launched several relatively minor attacks against each other, including the January 2020 targeted killing of Iranian General Qasem Soleimani. Tensions between the two countries can be traced back to the 1979 Islamic revolution in Iran. The attacks can be understood as standalone attacks and therefore classified as illegal uses of force, unless they were launched in self-defence. However, if we accept Dinstein's view, they can also be understood as part of an ongoing state of war that has never reached a formal end and therefore legally continues to exist. See Watkin, 'The United States and Iran: Hard Questions About Self-Defence', 4 *Phillipe Kirsch Institute Global Justice Journal* (2020) available at https://globaljustice.queenslaw.ca/news/the-united-states-and-iran-hard-questions-about-self-defence.

together and treated as a single attack and response thereto, since there have been significant intervals of time between separate (series of) incidents and uses of force.'[110]

The legality of a later round of hostilities, following an armistice agreement, was addressed in 1951 by UN Security Council Resolution 95, regarding Egypt's assertion of belligerent rights after the 1949 armistice agreement with Israel.[111] This agreement ended the 1948 war between the two states. However, Egypt claimed that the armistice with Israel did not end the state of war between the two states. A self-proclaimed self-defender in the 1948 war, Egypt argued that it was entitled to exercise belligerent rights by interfering with Israeli shipping in the Suez Canal and the Gulf of Aqaba without the need for a new *ad bellum* justification. The Security Council resolution reflects the international community's rejection of Egypt's claim of self-defence. It determined that the armistice between Egypt and Israel had ended the war between the two states and that they were not actively belligerent anymore.[112] This Security Council resolution is consistent with the prevailing overarching view; it gives weight to the de facto end of hostilities between the adversaries as establishing the unlawfulness of the Egyptian claim. The fact that there is no formal peace agreement between Egypt and Israel does not allow the former to continue fighting permanently. Once the hostilities have ended, any lawful use of force is subject to a new justification by the *ad bellum* rules.

Thus far, the discussion has dealt with the end of wars mainly from an *ad bellum* positive rules perspective. The following section will concentrate upon the desired rule – who should conclude the war – and deal with the normative considerations and challenges relevant to the two *ad bellum* legal effects discussed above and the respective responses to them by the overarching and limited schools.

4 Normative Considerations: When Should a Lawful War of Self-defence End?

A *The Two Schools' Mistaken Approach*

The two schools seem to be mistaken regarding the desired end of a lawful war of self-defence. The limited school grants the victim state the unwarranted option of punishing the aggressor by pursuing its self-defence until the latter's defeat.[113] This is a step too far for the defender's proclaimed self-defence, even if the aggressor did not change course during the conflict and is continuing its aggression. Self-defence is not an indefinite endeavour. It should end when the defender satisfies its lawful war aim and ensures its security in the near future or even, according to some, in the foreseen

[110] See Gill, *supra* note 70, at 742.

[111] SC Res. 95, 1 September 1951.

[112] See note 40 in this article; see, e.g., Greenwood, 'Relationship', *supra* note 8, at 224; Ruys, *supra* note 1, at 288–289.

[113] See notes 76–83 in this article and accompanying text.

future. Furthermore, the victim's self-defence is usually secured if the aggressor has changed course during the fighting and retreated to the *status quo* line. If the victim could legally ignore it, this would create a disincentive to the aggressor – which either has changed its course of action or is considering doing so – to stop its aggression, even though it has decided that continued fighting is futile. Thus, whether the aggressor changes course (or is considering doing so), the *carte blanche* granted to the original victim to continue its self-defence may create an incentive for it to fight even in cases where this is not necessary for its self-defence.

On the other hand, the overarching school grants the aggressor, who initiated a war, the unilateral option of stopping it. Allowing an aggressor to take the initiative unilaterally throughout the war, and to decide at its own discretion when to resume or stop it, is mistaken. It is an open-ended invitation to aggressors to free ride on the shoulders of victim states. It creates a 'win-win' situation for aggressors. They have every incentive to adopt a strategy of starting a war, waiting to see the results and then deciding whether to carry on with it or backtrack and stop it. At a low cost,[114] they are insured against the most substantial self-created risks deriving from their own act of aggression. One aspect of the problem is that the risk takers – the initial aggressors – do not pay the full premium for their activity; the other aspect of the problem is that it is paid for by the victims who bear the primary risk! This is a clear incentive for lack of accountability on the part of aggressors.[115] As such, it is unacceptable. Aggressors should not unilaterally have the power to decide either the scope of war or its duration. Whenever an aggressor decides to cross the *ad bellum* Rubicon and initiate an armed attack, it should bear at least a substantial part of the unknown consequences of its illegal activities. That would deter it in the first place.

Normatively, our rejection of the option currently granted to aggressors by the prevailing overarching school dictates that it is not the aggressor that should have the final say on when to end a war. Once it has started a war, the war should not be contained and confined solely at its will. Rather, it should be mainly the victim who is entitled to contain it. However, the victim's response should be constrained. It should be reasonable in light of its lawful war aim *vis-à-vis* the aggressor's continued intentions and deeds throughout the conflict and in light of its geostrategic considerations.[116] The scope of lawful self-defence is not universal but, rather, local. A victim state should be allowed to continue fighting as long as it has a reasonable and lawful war aim, in light of its military strategy and circumstances, provided that the UN Security Council has not ordered it to stop.[117] Looking at the situation from the defender's perspective,

[114] Indeed, aggression has its own cost, and an aggressor may face countermeasures – for example, economic sanctions, either unilateral or multilateral, for example through Security Council resolutions. For the state responsibility rules and personal criminal costs, see text accompanying notes 107–108 in this article.

[115] For a moderate version of such criticism, see Green, *supra* note 85, at 113–114 ('[a] strict requirement for states to desist defensive force as soon as the attack being responded to is over "unfavourably stacks the cards in favour of the aggressor," in that a belligerent state could launch an armed attack knowing that the worst possible outcome for it would be a mere return to the ante bellum status quo').

[116] See, e.g., Beer, *supra* note 34, at 189.

[117] UN Charter, Art. 51.

its necessity should dictate the scope of its lawful self-defence. It cannot destroy the aggressor's army at its sole discretion. Its self-defence should not be unreasonably extended beyond the minimum necessary to take measures that extricate it from the emergency situation brought on by the aggressor.[118]

Thus, it is preferable to leave the keys to the war's end mainly to the victim rather than to the aggressor. This conclusion is stronger where the classification of the victim has remained such throughout the entire campaign. First, it is the aggressor who initiated the war and created the emergency situation. The justification for letting the victim have the final say regarding the war's end is not to punish the aggressor; rather, since the aggressor has proved that it does not abide by the law in the first place, it simply does not make sense to award it the keys to the campaign's end. But this reasoning is valid only where the victim has remained so during the entire military campaign. Second, and this justification is valid in the case of an alternating victim as well – namely, it applies to an original aggressor that has later become a victim of aggression – it is the victim's necessity that should end the war, and this necessity should be examined from the victim's perspective, which includes both subjective and objective criteria[119] (for example, geostrategic considerations, military doctrine, economics and culture).[120] This conclusion holds even where there are alternating aggressors and defenders, as in the Iran–Iraq war.[121] In such a case, where the original aggressor clearly changed course during a war and later became a victim that exercised its self-defence, it is the second justification that validates the current victim having the final say regarding the war's end.

When war breaks out, the necessity principle relates to the last resort of the victim to respond forcibly. By the same token, necessity should relate symmetrically to the war's conclusion. In this context, it should be read as the first reasonable point in time where the victim has other real alternatives than to continue fighting in its self-defence. During all of its fighting, the defender has to show that it does not have any real choice but war to defend itself.[122] Indeed, the permission to resort to forcible measures should expire whenever the victim has other reasonable options.

Thus, a self-defender should stop fighting whenever it has taken the minimum measures to extricate itself from the emergency situation brought on by the aggressor. But if it has stopped fighting because of temporary military weakness *vis-à-vis* the

[118] See, e.g., Green, *supra* note 85, at 113–114; see also Greenwood, 'Self-Defence', *supra* note 8, at 274–276. Greenwood argues that some extensions of the fighting or its byproducts may be lawful – for example, the occupation of the aggressor's territory if it is the defendant's only way of resisting the aggressor's extreme threat, but only for as long as the threat continues to exist. *Ibid.*, at 282.

[119] But compare the International Court of Justice's (ICJ) decision in the *Oil Platforms* judgment. *Case Concerning Oil Platforms (Iran v. United States)*, Judgement, 6 November 2003, ICJ Reports (2003) 161, para. 73 ('the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any "measure of discretion"').

[120] For a general discussion of the effect of cultural attributes upon strategic behaviour and the way they shape military doctrines, see, e.g., D. Adamsky, *The Culture of Military Innovation* (2010).

[121] See subsection 2.B.2.

[122] For the defender's burden of proof, see notes 140–144 in this article and accompanying text.

attacker – for example, in the case of a surprise attack – it has not yet realized its strategic self-defence.[123] Therefore, the legal status of delayed rounds between the adversaries – whether in continuation of the original war or opening a new one – should be analysed accordingly. Legally, the status of a delayed round should not be based solely upon the aggressor's unilateral wish or measurement of the time-lapse. Rather, it should be reasonable in light of the victim's strategic circumstances. Therefore, the discussion in the following subsection, dealing with the legality of later rounds, invites us to consider the reasonableness of the scope of the victim's response.

B *The Legality of Later Rounds of Renewed Hostilities*

Prohibiting later rounds of renewed hostilities as unlawful use of force should be based upon a strong indicator of closure of the earlier war – after the victim has been allowed to exercise its self-defence. The legal rule should be based mainly upon the objective criteria – for example, the actual reality of suspended hostilities – but it should leave some room for the victim's subjective criteria (for example, its military doctrine). This closure therefore should not be left to the aggressor alone. It should leave satisfying leverage for the self-defender to fully exercise its defence at all levels of war: strategic, operational and tactical.[124] The law should relate to a situation where an act of aggression leaves a seriously injured victim without sufficient capability to mount a strategic response but only an on-the-spot tactical reaction. For such a victim, exercising its self-defence in the strategic sense is a time-consuming endeavour. Self-defence, like any other *ad bellum* matter, is a strategic matter, and, as such, it should be examined from a strategic perspective.[125] For example, suppose that the aggressor attacks the victim state by surprise; if the self-defender has a territorial buffer zone that can mitigate the offensive blow, it may benefit from a strategic or an operative pause before continuing the war. As was demonstrated in World War II[126] and the Napoleonic War,[127] a state like Russia is

[123] See note 124 in this article.

[124] It is common practice for militaries to distinguish between three levels of war: strategic, operational and tactical. Under common definitions, the strategic level of war determines national security objectives and uses national resources to achieve those objectives. The operational level is the level at which campaigns and major operations are planned, conducted and sustained to achieve strategic objectives. And the tactical level is the level of war at which engagements are planned and executed. See, e.g., Beer, *supra* note 34, at 122–124.

[125] For the argument that *ad bellum* decisions are taken mainly at the strategic level, see, e.g., L. Doswald-Beck (ed.), *San Remo Manual in International Law Applicable to Armed Conflicts at Sea* (1995) 77, para. 4.5; Watkin, *supra* note 10, at 75–77; Ruys, *supra* note 1, at 110.

[126] For Adolph Hitler's forces, after having swiftly advanced on the Netherlands, Belgium and France, the depth of Russian territory proved too much, their advance being stopped at its deepest point, still some 60 miles from Moscow. See, e.g., E.N. Luttwak, *Strategy: The Logic of War and Peace* (2nd edn, 2001), at 21–23.

[127] Though Napoleon managed to reach Moscow, it did him little good, proving the usefulness of strategic depth. The Russians left the city barren in accordance with 'scorched earth' tactics and retreated hundreds of kilometres to Kaluga. Napoleon's supplies and forces became thin and exhausted until he was forced to withdraw. See C. Malkasian, *A History of The Modern Wars of Attrition* (2002), at 17–19.

big enough to absorb such an aggressive blow.[128] Legally, to stop such a surprise attack in its first stage without allowing enough time for the victim's response would mean that the law does not allow the victim to realize its self-defence. If the victim's initial military passiveness was due to its strategic circumstances, it will not have been given its day to defend itself in real time. Though, formally, it was entitled to protect itself, it actually could not exercise its self-defence. In such a case, a legal extension would be required for the almost hypothetical right of self-defence to be exercised in practice. Otherwise, it would be a mistake to conclude from the victim's passiveness that the war has ended.

The suggested rule should strike a balance between potential conflicting interests. Certainly, a victim should not be allowed to leverage the initial aggression by claiming an unlimited right of self-defence, without any temporal constraint.[129] However, what may appear to be a new round may, in fact, be an integral part of the legitimate – yet delayed – response to the initial attack. Whenever a fire is not extinguished, and a new flame erupts from the whispering coals, it would be a mistake to treat it automatically as a new fire. Whenever there is a satisfactory causal link between the initial attack and the defender's later response, we have to see the latter as an integral part of its defence. The legal system should enable the victim to mount a late response to the aggression, whenever appropriate.

An analogy can be drawn from the immediacy requirement, determining when the right of self-defence expires if not exercised in due time. This principle requires a temporal link between the initial attack and the response in self-defence. If the right to act in self-defence is not exercised immediately, it expires.[130] The immediacy requirement prevents states from settling accounts and using past acts of aggression against them as justifications for the current use of force.[131] Thus, in the *Nicaragua* case, the ICJ rejected the necessity of the USA's use of force because it occurred months after the alleged armed attack had been repulsed.[132] Though the immediacy requirement's scope is unclear, most scholars take a lenient stance, allowing states reasonable time for preparations at their strategic level: collecting intelligence, planning their military response to the attack, gathering resources for that purpose and trying to solve the conflict by peaceful means.[133] State practice supports this flexibility in regard to the timing of the response. For example, in the Falkland Islands conflict, the UK was not criticized by the international community for the interval of a few weeks between the Argentinian attack and the response.[134] However, the longer the victim waits

[128] For the case of West Germany during the Cold War and South Korea during the Korean War, which did not have any strategic depth, see, e.g., Luttwak, *supra* note 126, at 139–142.

[129] See, e.g., Bothe, 'Terrorism and the Legality of Pre-emptive Force', 14 *EJIL* (2003) 227, at 235–236.

[130] See, e.g., Ruys, *supra* note 1, at 99. Ruys sees immediacy as a second component of the necessity criterion, alongside the first component of 'last resort'. *Ibid.*, at 95.

[131] See, e.g., *Ibid.*, at 99; Schachter, 'The Lawful Resort to Unilateral Use of Force', 10 *YJIL* (1985) 291, at 292.

[132] *Nicaragua* case, *supra* note 7, para. 237.

[133] See, e.g., Gardam, *supra* note 1, at 150.

[134] *Ibid.*, at 151.

to respond, the more it should engage in efforts to resolve the conflict by peaceful means.[135]

The same strategic considerations relevant to the opening of war seem to prevail here at its closure, allowing the victim not only a delayed response at war's beginning but also a delayed response in regard to ending it. A victim state that was attacked by surprise and stopped fighting after the aggressor overcame its tactical resistance should be allowed time to collect intelligence, plan its military-strategic response and gather resources, including reserves in the rear for that purpose. Alternatively, it should be allowed a pause to resolve the conflict peacefully. However, if the victim state fails to do so peacefully and starts its counterattack, utilizing all of its strategic resources, this should not be considered a new round but, rather, a continuation of the same war. An analogy should be drawn between the temporal leverage granted to the victim in exercising its lawful self-defence under the immediacy criterion and the time given to it to end the fighting, subject to its fluctuating strategic circumstances.

On the other hand, the victim does not have a right to punish the aggressor whenever it wants. It should be entitled to exercise its self-defence only as a necessary measure. Indeed, this is a right granted to it and is never meant to be an obligation. Though the victim should be given its chance to exercise its self-defence – and as was demonstrated above, this may be deferred due to its strategic situation – that does not mean that it has *carte blanche* to use its military force whenever it wants. There should be a requirement for a causal link between the attack and the response. From the victim's perspective, it should be proven that its response was an act of self-defence – in the middle of an emergency – and not purely an act of revenge aimed at teaching the aggressor a delayed lesson.[136]

The aim of the prevailing overarching approach is to reduce the hazards of war by shortening it. *Prima facie* stopping a belligerency appears to be justified when the aggressor is willing to end the hostilities and return to the *status quo ante*.[137] However, leveraging the first window of opportunity to end the war should not be based on the aggressor's unilateral considerations. First, as discussed above, it distorts the aggressor's cost–benefit calculations and incentivizes it to attack.[138] Second, if the *status quo* is not stable, restoring it, especially in the case of NIACs, may be analogous to a cosmetic treatment of the underlying problems. Merely the fact that the aggressor did not keep this *status quo* in the first place may indicate that an automatic return to square one – the situation as it was before the aggression – is not always a reasonable, let alone desirable, result. Its attractiveness depends on whether this *status quo* is, or at least has the potential to be, a solid ground rather than an unstable platform of shifting sands. For example, in the case of potential continuing attacks by the same attacker, which is typical of (but not exclusive to) NIACs, forestalling any further aggression and establishing credible stability is a reasonable goal of a defending state.

[135] See, e.g., *ibid.*, at 150–151; Ruys, *supra* note 1, at 102.

[136] For the victim's duty to lift this burden of proof, see notes 140–144 in this article and accompanying text.

[137] See notes 91–95 in this article and accompanying text.

[138] See notes 114–115 in this article and accompanying text.

Thus far, this article has tried to offer a reinterpretation of the necessity principle by focusing upon the strategic interests of the defender. It has been argued that it is normatively desirable to allow mainly the victim, not the aggressor, the final say regarding war's end as well as the reasonableness of the victim in doing so. However, to conclude this discussion, we have to look at a real threat to this solution. Awarding mainly the victim the privilege of deciding when to end the war may trigger the risk of its misuse.

5 The Risk of Misuse

Granting the victim discretion to end the war when its *ad bellum* necessity is satisfied poses the risk of its misuse. Victim states may take advantage of the situation and leverage the continuation of the war opportunistically to justify their illegal use of force. In NIACs, this problem of misuse by the victim is even more significant. Victim states that want to protect their citizens from a non-state actor – its proxies or subsidiaries – may define their opponents in broad terms that allow them to fight even where the original group that attacked them no longer exists. For example, following 9/11, it has been argued against the USA that it leveraged its war against al-Qaida indefinitely by widely labelling its opponents as 'networks of terrorist organizations like al-Qa'ida'.[139] This definition leaves an opening for the indefinite application of international humanitarian law, even after the defeat of al-Qaida itself.

In order to reduce the risk of misuse by a victim state, that state's discretion should come with a constraint based on the general rule of self-defence. In any armed conflict, the victim, which argues that it must exercise military force in self-defence, should bear the burden of corroborating the facts. Under the prevailing rule, a defending state that wants to exercise its self-defence must prove that an attack, which qualifies as an 'armed attack',[140] has been made upon it and that the attacker was responsible for it.[141] To justify its response, it has to establish the attacker's identity and convince both the public (domestic and international) and the international community (and, if necessary, its organs) that the attacker intentionally attacked it in its state capacity.[142] The victim's duty to establish the facts and collect intelligence regarding its adversary's intentions and actual belligerent actions is not an easy task.[143]

[139] Blank, 'The Extent of Self-defense against Terrorist Groups: For How Long and How Far', 47 *Israel Yearbook on Human Rights* (2017) 265, at 302, referring to White House, Report on the Legal and Policy Frameworks Guiding the United States' Use of Military Force and Related National Security Operations, December 2016, at 11, available at https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf. Blank calls for a clearer definition of a conflict with terrorist groups and success in such conflicts, which will help determine when such an armed conflict has ended. *Ibid.*, at 304.

[140] For a discussion of what constitutes an 'armed attack', see generally Beer, *supra* note 2.

[141] See *Oil Platforms*, *supra* note 119.

[142] The Iranian argument that it did not mean to attack an American vessel was accepted by the ICJ in the *Oil Platforms* case. *Ibid.* For a discussion as to whether proving the aggressive intention of the attacker is a prerequisite for determining the existence of an armed attack, see Ruys, *supra* note 1, at 158–168.

[143] Compare the objection of the Articles on State Responsibility: 'A State taking counter-measures acts at its peril, if its view of the question of wrongfulness turns out not to be well founded.' J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002), at 285.

However, it is consistent with the burden of proof required from the victim in any act of self-defence.[144] Similarly, to minimize the risk of escalation, the victim state, which argues that it has exercised its military force in self-defence, should bear the heavy burden of verifying the facts, in general, and proving its necessity, in particular. Thus, in NIACs, victim states fighting in self-defence bear the burden of proving that it is necessary for them to continue fighting, but only against their identified attacker. Fighting terror requires specification. It does not justify perpetual war. Victim states cannot fight perpetually against their enemies, broadly defined, including their proxies and subsidiaries, in the name of self-defence unless the latter have initiated an armed attack against them or are expected to do so imminently.[145] Fighting in the future against enemies that are currently not identified cannot be justified by currently lawful self-defence.

Such in-depth study of the attacker by the victim, required in any self-defence, is not too complicated and impractical. This imperative – to know your enemy's deeds and intentions before counter-attacking it – is an essential professional requirement from the intelligence of any military faced with an adversary. This knowledge of the enemy, which is required from the victim in order to meet this burden of proof, may solve another problem concerning misuse: when an aggressor pretends to be a victim.[146] This is a substantial risk in regard to our proposal, which prefers the victim over the aggressor in deciding who ends a war, especially in the case of alternating victims (as in the Iran–Iraq war).[147] However, under the prevailing rule – which requires a defending state that exercises its self-defence to prove that an 'armed attack' has been made against it by an identified attacker[148] – the attacker's identity should be well known at any stage of the war.

Furthermore, a victim that argues that its geostrategic circumstances support its necessity to continue fighting in its own self-defence must be transparent about these circumstances and its military considerations. This obligation of transparency, followed by the burden of proving that the continuation of the war is justified, applies not only to the original victim but also to an alternating victim state. If the original aggressor becomes a victim in the course of the fighting, as was the case with Iraq in its war against Iran, the heavy burden of justifying the war's continuation lies upon the current victim. This victim must convince the international bodies that the continuation of the war is justified for its self-defence due to its strategic circumstances and that its use of force is not a pretext for new aggression.

In sum, requiring transparency of the self-defender's relevant *ad bellum* circumstances and its considerations in regard to wartime decision-making, together with the burden of proving it is the victim, should make it possible to minimize the risk of

144 See, e.g., I. Brownlie, *International Law and the Use of Force by States* (1963), at 214–215.

145 See note 64 in this article.

146 This risk is one of the reasons for the equal application of the *in bello* rules to both attackers and defenders, since quite commonly each side accuses the other of being the aggressor. See, e.g., Greenwood, 'Self-Defence', *supra* note 8, at 287.

147 See subsection 2.B.2.

148 See notes 141–142 in this article and accompanying text.

abuse. The victim should stop fighting when it is no longer necessary for its self-defence. This holds especially with regard to victim states that do not want to end their fighting against non-state actors. This is where the importance of transparency, together with the burden of proving the right of self-defence, which lies on the party claiming it, is paramount. Furthermore, in regard to constraining a victim state from unnecessarily continuing its war of self-defence, the UN Charter grants the UN Security Council the authority to stop it.[149] Thus, although the keys to ending a war would generally be entrusted to the victim state, the international community would still hold two powerful brakes that could be applied against the victim whenever it continues its original war of self-defence unnecessarily. The first would be based upon the transparency and burden of proof requirements. The second would be based upon the Security Council's authority to inspect and, if necessary, intervene and even stop the fighting. The two brakes are independent of each other, so even when the Security Council is impotent, as it has been most of the time since its formation,[150] the first brake would still apply.

6 Concluding Remarks

In a world where the formal aspects of ending a war have declined while the functional criteria are on the ascendant, I have tried to draw the contours of where a law-abiding self-defender's *ad bellum* necessity, which justifies its continued fighting, ends. My discussion supports a new equilibrium between the aims and willingness of aggressors and victim states in determining the end of war. This end should neither be based upon the aggressor's will nor given to the victim state's discretion without any limitation. The *ad bellum* argument – which claims that, in a war started in self-defence, the victim state may ignore the aggressor's later willingness to retreat to the *status quo* line, if it has not done so yet, and continue fighting until the absolute defeat of the aggressor – goes too far. Though the self-defender primarily should have the final say regarding the war's end, its response should be constrained and reasonable, affected by both subjective criteria (for example, the victim state's military doctrine) and objective ones (for example, its geostrategic considerations). This article has tried to offer a reinterpretation of the necessity principle by focusing on the strategic interests of the defender. From this perspective, it suggests an evolution rather than a revolution.

The war aims of law-abiding victim states are limited. While the generic halt-and-repel formula is the only aim in consensus, there are cases – for example, when the aggressor is a repeat player, especially where a non-state actor is involved (in NIACs) – in which the legitimate war aims should be expanded. In other cases, they should be restricted – for example, when the aggressor changes course during the fighting and wants to return to the *status quo* line. A war's aims are usually non-static; rather, those of the respective adversaries are dynamic and constantly being adapted to the war's progress and the changing strategic reality. The scope

[149] UN Charter, Art. 51.

[150] Indeed, the Security Council's performance in fulfilling its mission is mixed. See note 54 in this article.

of self-defence is affected by the aggressor's decisions and actions during the fighting. Indeed, the legality of the victim's self-defence and its scope derive from the necessity to fight. If, as suggested, self-defence is contextually based,[151] then there is no universal answer with respect to its scope. It is based on the military necessity in specific circumstances. We have suggested drawing an analogy from the immediacy requirement, which allows the victim some temporal leverage in exercising its lawful self-defence, to the time given to it to end the fighting, subject to its fluctuating strategic circumstances.

To reduce the risk of misuse, the burden of proving not only the attacker's identity, as in any case of self-defence, but also its necessity to continue fighting lies upon the victim state. Furthermore, this should be followed by a transparency requirement from the victim in regard to the relevant *ad bellum* circumstances and its considerations in wartime decision-making. These requirements will deter attackers from using the rhetoric of self-defence as a pretext for their aggression as well as victim states from leveraging their self-defence beyond what is necessary to continue fighting and take revenge on their attackers. Especially, victims should not be allowed to manipulate the legal system due to not wanting to end their wars with non-state actors. In NIACs, victim states should be allowed to fight only against identified attackers. They cannot wage a perpetual war on terror in general. Fighting in self-defence requires the specification of the attackers; it is lawful only if it is a necessary response to an armed attack by an identified attacker or one who intends to do so imminently.[152] Potential victims cannot perpetually fight against enemies that have not committed an armed attack against them (either directly or by way of attribution). Such wars cannot be justified as lawful self-defence.

[151] See text accompanying notes 119–120 in this article.
[152] See note 64 in this article.