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In Defence of the 'Halt and Repel' Formula? A Reply to Yishai Beer

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Abstract

In 'When Should a Lawful War of Self-Defence End?', Yishai Beer zooms in on the scenario where a state engaged in an act of aggression subsequently retreats from the victim state's territory. In particular, Beer challenges the idea that such behaviour terminates the victim state's right of self-defence since the key to ending a war should not be left to the aggressor. While the article is a welcome and thought-provoking addition to the debate, this reply questions the wisdom of abandoning the default 'halt-and-repel' approach to the termination of self-defence.

In 'When Should a Lawful War of Self-Defence End?', Yishai Beer takes a closer look at one salient aspect of the right of self-defence – namely, its point of termination. While the topic has not received the same degree of attention as the 'armed attack' requirement,[1] it has recently come to the fore, including in the *European Journal of International Law*,[2] in the wake of the 2020 Nagorno-Karabakh war. The latter conflict raised the question as to whether a state that is the victim of aggression can rely on the right of self-defence with a view to recovering occupied land years, or possibly decades, after the initial attack took place. The question that Beer addresses, however, is

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[1] But see J. Gardam, *Necessity, Proportionality and the Use of Force by States* (2004). For a more recent and in-depth analysis, see also C. O'Meara, *Necessity and Proportionality and the Right of Self-Defence in International Law* (2021).

[2] See Akande and Tzanakopoulos, 'Legal: Use of Force in Self-Defence to Recover Occupied Territory', 32 *European Journal of International Law* (*EJIL*) (2021) 1299; Ruys and Rodríguez Silvestre, 'Illegal: The Recourse to Force to Recover Occupied Territory and the Second Nagorno-Karabakh War', 32 *EJIL* (2021) 1287. See also the earlier discussion in the *EJIL* between David Kretzmer and Georg Nolte. Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in *Jus ad Bellum*', 24 *EJIL* (2013) 235; Nolte, 'Multipurpose Self-Defence, Proportionality Disoriented: A Response to David Kretzmer', 24 *EJIL* (2013) 283.

fundamentally different. Indeed, Beer zooms in on the scenario where an aggressor effectively stops its aggression and retreats from the victim state's territory. In particular, Beer challenges the conventional wisdom according to which the right to self-defence comes to an end in such a situation. Instead, the author argues 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'.[3] The article is a welcome and thought-provoking addition to the debate. Yet it also calls for a response.

The author starts by distinguishing between two juxtaposed approaches in legal doctrine. On the one hand, the 'prevailing' 'overarching approach' holds that 'the ad bellum restrictions of self-defence continuously regulate warfare during the entire armed conflict'. Accordingly, once the aggressor has halted the hostilities and retreated, the defender's aim of 'halt and repel' has been achieved, and its action in self-defence should end.[4] By contrast, the 'limited approach' – advocated most prominently by Yoram Dinstein[5] – holds that the necessity requirement must be met only at the beginning of a war of self-defence.[6] Once a war of self-defence is in motion, the victim can pursue it *ad libitum*, at its discretion – its conduct constrained only by the law of armed conflict. According to Beer, both approaches are mistaken: '[T]he victim should not enjoy carte blanche as regards when to end its fighting, but neither should the aggressor dictate its timing to the victim.' Instead, the keys to the war's end should be left mainly to the victim, albeit not without limits. In particular, necessity should be examined from the victim's perspective, having regard to 'both subjective and objective criteria'. The victim should thus 'be allowed some temporal leverage in ending its lawful self-defence, subject to its fluctuating strategic circumstances'.[7]

Before addressing the author's central thesis, a few preliminary observations are in order. First, Beer addresses the temporal scope of self-defence through the prism of the necessity requirement – in other words, the question is framed as one concerning when the 'necessity' to act in self-defence can be said to have lapsed. In the case law of the International Court of Justice, however, the fact that military operations continue long after the presumed armed attack began is rather conceived as an indicator of a lack of proportionality.[8] Admittedly, whether the issue is one relating to necessity or proportionality is mostly a semantic discussion, which is of little substantive consequence. Or perhaps the question whether self-defence can continue past the aggressor's retreat illustrates that there is not always a neat separation between the two criteria, in the sense that necessity would determine when defensive action would

3 Beer, 'When Should a Lawful War of Self-Defence End?', 33 *European Journal of International Law* (2022) 889, at 889.

4 *Ibid.*, at 890, 898.

5 Y. Dinstein, *War, Aggression and Self-Defence* (6th edn, 2017), at 282.

6 Beer, *supra* note 3, at 891.

7 *Ibid.*, at 892, 911, 915.

8 *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Merits, Judgment, 27 June 1986, ICJ Reports (1986) 14, para. 237; *Case Concerning Armed Activities on the Territory of the Congo*, Merits, Judgment, 19 December 2005, ICJ Reports (2005) 168, paras 3.173ff. For an example from state practice, see *United Nations Yearbook* (1965), at 142.

be permissible, whereas proportionality would be the standard to evaluate what can be done in self-defence.[9]

Second, the article focuses on 'wars', specifically 'wars of self-defence'. Precisely what this concept means remains, however, unclear. We know that the legal concept of 'war' has never been clearly defined; that formal declarations of war are mostly a thing of the past and that formal peace agreements are the exception rather than the rule. What is more, in the UN Charter era, the term 'war' has been supplanted by the broader concepts of 'use of force' and 'armed attack' (in the *jus ad bellum*) as well as 'armed conflict' (in the *jus in bello*). Traditionally, the term 'war' is reserved for armed conflicts between states that are of a particularly large scale, thus excluding more circumscribed cross-border operations, which are presumably far larger in number, either between states or against a non-state armed group abroad. Somewhat surprisingly, however, the article asserts that, while it primarily 'concentrates on conflicts between states', 'parts of its discussion relate to currently widespread NIACs [non-international armed conflicts]'.[10] It subsequently adds that 'it seems more intuitive to deal with war aims rather than with the aims of self-defence' but that 'anyone who prefers the modern legal term "armed conflict" or military response to an armed attack can substitute it for "war"'.[11] In spite of the 'intuitive', if somewhat confusing, reliance on the concept of 'war', and notwithstanding the article's ostensible focus on large-scale interstate conflicts involving the deployment of ground troops, the foregoing would seem to suggest that the article's proposed understanding of necessity is considered valid across the board for all recourses to self-defence, large and small.[12]

Third, the author accepts that the 'halt-and-repel' approach to self-defence represents the 'prevailing view in the post-Charter era', while stressing that the analysis seeks to explore what 'the desired rule' should look like.[13] In other words, the author stresses the *lex ferenda* character of the analysis, which is ultimately based, not on an assessment of past state practice but, rather, on normative considerations – considerations that merit a closer look. The normative argument can be summed up as follows. First, the 'halt-and-repel' formula is not 'realistic' and is 'inherently deficient' because it supposedly 'does not 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'. This is particularly problematic in case of 'sporadic attacks … typical of non-state actors'. Second, the traditional approach is said to provide the aggressor with the 'unilateral option of stopping' the war. It is therefore seen as an 'open-ended invitation to aggressors to free ride on the shoulders of victim states. It creates a 'win-win' situation for aggressors.[14]

[9] T. Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (2010), at 123–124.

[10] Beer, *supra* note 3, at 893.

[11] *Ibid.*, at 893.

[12] In marked contrast, however, Yoram Dinstein differentiates between 'wars of self-defence', on the one hand, and 'measures short of war' and acknowledges a strict application of the necessity and proportionality criteria in respect of the former. Dinstein, *supra* note 5.

[13] Beer, *supra* note 3, at 906.

[14] *Ibid.*, at 907.

These assumptions nonetheless call for some observations. First, it is questionable that, under the 'prevailing' approach, self-defence is necessarily excluded immediately upon the 'completion' of an armed attack. Thus, few, if any, authors are likely to argue that a state that suffers a salvo of missile strikes loses its right of self-defence once these missiles hit the ground. Importantly, the 2018 report of the International Law Association's (ILA) Committee on the Use of Force acknowledges that there is significant support and practical reason to accept that the UN Charter should be read as accepting that self-defence measures may take into account the need to ensure that the attacker has not simply momentarily refrained from operations while the attacks are in fact set to continue in the near future. It would appear therefore that, while self-defence cannot justify an 'all-out' war to destroy the enemy, the forcible measures can include the need to defend the state from the continuation of attacks and not only repel the attack of the moment. This is separate from the debate over anticipatory action when there has not previously been an actual armed attack; rather, it is a question of whether the risk of further attacks can be seen as a continuation of the initial armed attack and prevention of these being a part of the same self-defence action.[15] Put differently, the article's central thesis may well be based on an overly narrow reading of the 'prevailing' approach. If a more flexible interpretation is adopted along the lines of the ILA's Committee on the Use of Force report, it becomes considerably more difficult to argue why a separate, third approach would be needed to replace the 'halt-and-repel' approach to protect the victim state.

Relatedly, presenting the lapse of the right of self-defence as a question of 'who' holds the keys – the aggressor or the victim state – strikes the reader as somewhat deceptive. If an aggressor state withdraws its forces following a large-scale ground invasion, this is not simply a 'unilateral decision' of the former state. Rather, such conduct will be the consequence of a chain of events following the initial armed attack and the victim's defensive riposte and will oftentimes simply reflect the fact that the victim has been successful in pushing back the enemy forces beyond the border through the reaction of its armed forces (and possibly of those states coming to its aid). To insist that the victim state should be able to continue its exercise of self-defence simply because the termination of such a right 'cannot be left in the hands of the aggressor' challenges the dividing line between self-defence and (unlawful) punitive reprisals – notwithstanding the author's insistence to the contrary.[16] To further drive the point home, it can be said that, surely, if an aggressor state were to withdraw its troops and

[15] International Law Association, Committee on the Use of Force, Final Report on Aggression and the Use of Force (2018), at 11, available at www.ila-hq.org/images/ILA/DraftReports/DraftReport_UseOfForce.pdf; see also Green, 'The *Ratione Temporis* Elements of Self-defence', 2 *Journal on the Use of Force and International Law* (2015) 97, at 116 (citing Quigley, 'The Afghanistan War and Self-Defence', 37 *Valparaiso University Law Review* (2002–03) 541, at 550: 'The default position therefore remains that "[a]rmed force used in self-defence typically [must have a] defined objective to reverse the armed attack, such as driving a foreign army back to a certain line", but that this must be interpreted so as to allow the exercise of self-defence to extend to limited measures to disable the enemy to the point that it cannot simply rest, regroup and resume').

[16] Beer, *supra* note 3, at 911. Elsewhere, the author insists that the aggressor should 'pay the full premium for their activity'. *Ibid.*, at 907.

offer an unconditional surrender to the victim state, it would be absurd to argue that the victim can continue its exercise in self-defence simply because the termination of that right cannot be triggered 'unilaterally' by the aggressor? In the end, the question is not one of 'who decides' but, rather, whether the factual context is such that the necessity of self-defence persists or not.

What of the claim that the prevailing 'halt-and-repel' formula ought to be thrown overboard because it lacks deterrent effect and rewards aggression? To some extent, this assumption is inevitably speculative. When state leaders are contemplating a 'war of aggression', it is far from obvious that they will pay much attention to the lawful scope for a riposte in self-defence by the victim state. Rather, there will presumably be other political, economic, geostrategic considerations – including the target's military capacities or the possibility that third states will come to its assistance in the exercise of the right of collective self-defence – that will have a far greater impact on that decision-making process. Nor does the candidate aggressor state have an effective guarantee that the (initial) victim state would restrict its exercise of self-defence to what is permitted under the 'overarching' approach (as the Iran–Iraq war, to which the author refers, well illustrates). It must also be kept in mind that a lawful exercise of individual or collective self-defence is not the only instrument in the international law toolbox to deter aggression. Rather, a state contemplating a use of force may also expose itself to diplomatic and economic sanctions, within or without the United Nations (UN) Security Council, in addition to suffering reputational costs. The prospect of individual criminal responsibility for the crime of aggression may also give political and military leaders pause before embarking on an unlawful military campaign (notwithstanding the limited jurisdiction of the International Criminal Court in respect of this crime and the immunity issues related to the prosecution of foreign officials at the national level). It is moreover worth observing that the International Law Commission's Articles on State Responsibility acknowledge that a state that is the victim of internationally wrongful conduct may impose countermeasures not just to ensure the cessation of a continuing wrongful act but also to ensure reparation.[17] In other words, countermeasures may exceptionally continue even after an aggressor state has terminated its unlawful use of force.

While the above observations raise doubt as to whether there is a need to supplant the prevailing 'halt-and-repel' approach to self-defence, what to make of the alternative proposed by Beer? Throughout the article, the author refers to the need to consider the victim state's 'geostrategic considerations' and to allow it 'some temporal leverage in ending its lawful self-defence, subject to its fluctuating strategic circumstances'.[18] The victim

[17] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, UN Doc. A/56/83, 10 August 2001, at 131 ('[i]n many cases the main focus of countermeasures will be to ensure cessation of a continuing wrongful act, but they may also be taken to ensure reparation, provided the other conditions laid down in chapter II are satisfied. Any other conclusion would immunize from countermeasures a State responsible for an internationally wrongful act if the act had ceased, irrespective of the seriousness of the breach or its consequences, or of the State's refusal to make reparation for it').

[18] Beer, *supra* note 3, at 892, 911.

'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'. To this end, one must examine necessity from the victim's perspective and consider 'both subjective and objective criteria (for example, geostrategic considerations, military doctrine, economics, and culture'. In the end, self-defence must be halted 'at the first reasonable point in time where the victim has other real alternatives than to continue fighting in its self-defence'.[19]

When read in a strict fashion, the abovementioned criteria may not be far removed from, and can even be encapsulated in, the 'halt-and-repel' formula as interpreted, for instance, by the ILA's Committee on the Use of Force report, cited earlier. Thus, indications that an aggressor's withdrawal merely serves the purpose of regrouping forces before recommencing hostilities, or that further attacks are otherwise imminent, could indeed qualify as 'strategic' considerations that influence whether or not an exercise of self-defence may continue. Even so, it is difficult to escape the impression that the suggested criteria – when used in lieu of the halting and repelling formula – are rather vague and indeterminate (even extending to matters of 'economics and culture') and openly embracing subjective considerations, thereby lending themselves to a far broader and abusive reading. Yet, as Georg Nolte reminds us, determinacy is particularly important for the law of self-defence: 'For the language of law to maintain a behaviour-orienting effect … it is necessary that the applicable terms are as descriptive, illustrative, fact-oriented and verifiable for all as possible. "Armed attack" and even "halting and repelling" … are such terms.'[20] Against this, it does not take much imagination – having regard, for example, for Israel's presence in the West Bank and the Golan Heights or Turkey's presence in Syria's Afrin region – to see how more malleable and subjective criteria, for example, could be used to justify a state creating and maintaining so-called 'buffer zones' across its border, supposedly to protect it from cross-border attacks. A scenario of long-term occupation and even creeping annexation may in turn loom over the horizon.

The author acknowledges the risk of misuse, but he finds that it is sufficiently managed by two 'brakes' that operate independently of one another – namely, (i) the UN Security Council's authority to inspect and, if necessary, intervene and even stop the fighting and (ii) the requirements of transparency and burden of proof, which dictate that the victim also 'convince the international bodies that the continuation of the war is justified for its self-defence due to its strategic circumstances'.[21] As to the former, in an ideal world, the UN Security Council would always assume its responsibility under the UN Charter by effectively confronting any case of aggression without delay, thus eclipsing the need for any invocation of self-defence. The reality, however, is starkly different and indicates that the Security Council is only rarely capable of taking meaningful action in the face of interstate use of force.[22] Rising tension among

[19] *Ibid.*, at 908.

[20] Nolte, *supra* note 2, at 289.

[21] Beer, *supra* note 3, at 913.

[22] In a similar vein, see Green, *supra* note 14, at 111 ('in most cases … this limitation will not come into play, because the Council only rarely involves itself in ongoing self-defence actions [even in its more 'enlightened' post-Cold War incarnation]').

the great powers suggests that the degree of deadlock can only be expected to increase in the future. As to the latter 'brake', the need for the state acting in self-defence to 'make its case' before the international community, and the exchange of views (approving, condemning or other) that such discourse may give rise to, is – certainly for lack of a more functional Security Council – an important factor contributing to the 'compliance pull' of the UN Charter regime on the use of force. As the Nuremberg tribunal reminds us, 'whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced'.[23] This discursive process nonetheless has its limits, especially where a state is not forthcoming with information or provides a manipulated version of the facts, as has been observed all too often in the past (including in the context of the 2003 Iraq war). The relevance and effectiveness of this discursive process is, however, dangerously eroded when a state using self-defence is moreover allowed to invoke indeterminate criteria and rely on 'subjective' elements that are increasingly self-judging and beyond meaningful independent review.

The example of the Iran–Iraq war (1980–1988) illustrates the challenges and risks at stake. Indeed, the author notes that, after having invaded and occupied part of Iranian territory, Iraq later withdrew from Iran and sought a ceasefire (in 1982). The author presents this as a case of an 'aggressor whose intentions and deeds clearly show that it wants to stop fighting'. Contrary to the 'prevailing overarching approach', the author does not believe that this course of events terminated Iran's right of self-defence. Instead, he argues that Iran bore the burden of proof to justify that the continuation of the war was 'justified for its self-defence due to its strategic circumstances'.[24] It would have been interesting to hear from the author more concretely on what elements in such a situation could have justified a continuation of the right of self-defence and after how many months or years this right would have expired altogether. The lack of further answers in this direction may reflect the indeterminacy of the criteria proposed. What we do know, however, is that the Iran–Iraq war raged on for another six years following Iraq's withdrawal, with a total death toll estimated at more than a million lives.[25]

In the end, Yishai Beer deserves praise for a careful and thought-provoking analysis of an issue that is – as one scholar puts it – 'deceptively straightforward'[26] – that is, when the right of self-defence ends. Beer is right in questioning the simplistic idea that the factual 'completion' of an armed attack necessarily results in the immediate expiry of the right of self-defence in all circumstances as well as in drawing attention to the strategic position of the victim state. Whether the arguments brought forward confirm the need to abandon the default 'halt-and-repel' approach, however, is a different matter altogether. The present author finds more convincing the position expressed

[23] *Nuremberg Trial* (International Military Tribunal, 1946), 1 IMT 171, at 208.

[24] Beer, *supra* note 3, at 913.

[25] I. Black, 'Iran and Iraq Remember War That Cost More Than a Million Lives', *The Guardian* (23 September 2010).

[26] Green, *supra* note 14, at 113.

in this journal some 10 years ago by Nolte, who stressed the 'continuing benefits' of the latter approach as combining 'descriptive force with a plausible purpose'.[27] Or, as Nolte put it, 'there is wisdom in maintaining the "halting and repelling theory" as the anchor for the interpretation and application of the right of self-defence'.[28]

[27] Nolte, *supra* note 2, at 290.
[28] *Ibid.*, at 287.