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Wars of Recovery

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Abstract

Aggressor state A occupies territory belonging to victim state V. After decades, V decides to go to war to recover its territory, although hostilities have long subsided. Are such 'wars of recovery' lawful under international law? Should they be? Recent conflicts have generated a heated scholarly debate on this question, which has ended in stark disagreement. A permissive approach argues that wars of recovery are lawful instances of self-defence, while a restrictive view claims that situations of prolonged occupation are territorial disputes that should be settled peacefully. This article uncovers the theoretical premises that underlie both approaches. As it shows, the dilemma reflects a larger tension within the contemporary international law on the use of force – mainly, between its traditional focus on state rights such as territory and sovereignty and a competing view that seeks to place individual rights at the core of the legal regime. As the article shows, deciding on the question of wars of recovery requires making commitments in four normative spheres: instrumentally, it requires considering questions of international stability, and, non-instrumentally, it requires considering questions of justice as well as possible justifications for killing and sacrifice. These considerations, however, result in instability owing, among other factors, to the fluctuating effects of the passage of time, which follow our normative assumptions about the legal order. Ultimately, the article suggests that those engaging in debate on wars of recovery make explicit their normative assumptions on the ends of jus ad bellum *and that, in any case, even if wars of recovery would be deemed legal, they would still remain heavily contestable owing to strong competing reasons against them.*

1 Introduction

Imagine that A, an aggressor state, invades victim state V. After a while, hostilities between the parties subside – perhaps, an armistice agreement is signed – but A remains in control of a part of V's territory. Now imagine that after years, maybe even decades, V decides to go to war to recover its territory. Doing so, it kills people, such as A's soldiers and civilians caught as collateral damage. Moreover, it occasions great harm to its own soldiers and civilians and causes regional instability. Would V's war be

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lawful under international law? Should it be? These are far from theoretical questions. The situations in Nagorno-Karabakh, the Golan Heights and Northern Cyprus are several examples of occupations that remain long after major hostilities have ended. The Russian occupation of Crimea since 2014, and the possibility that additional Ukrainian territories would remain occupied following Russia's invasion in 2022, give renewed urgency to this question.

The recent interest in the question of recourse to force to recover long-occupied territories – wars to which I refer in this article as 'wars of recovery' – was sparked by the Nagorno-Karabakh war of 2020, in which Azerbaijan sought to recover territory occupied for decades by Armenia. A debate between international lawyers in the pages of the *European Journal of International Law*, which followed this conflict, ended in a stark disagreement.[1] A permissive view on wars of recovery holds that the passage of time alone cannot elapse states' right to self-defence, and, generally speaking, as long as territory is held, there is necessity to exercise such self-defence. An opposing, restrictive view, maintains that, once active hostilities recede and a certain amount of time passes, self-defence is unwarranted since there is no immediate necessity to resort to force. As in many doctrinal questions of international law – and as evident from the radically conflicting views held by leading international lawyers – the answer to this question is inconclusive.

When reflecting about the question normatively, many, I think, would feel that their intuitions are torn. On the one hand, if we take seriously the territorial integrity of states, it seems arbitrary that, just because X time has passed, V loses its right to recover its territory. If a state can defend its territory by force at T1, why can it not do so at T2? Moreover, would such a view not provide a perverse incentive for aggressors to hold territory for as long as they can? And is there not something profoundly unjust in such a result? On the other hand, we also think that war is intrinsically bad: preventing the 'scourge of war' is precisely what the international order is about.[2] After all, in such scenarios, killings have stopped and have not been going on for a long time. It seems odd to simply permit their resumption at a later point in time, merely by invoking the right of self-defence years later. Furthermore, in a world in which territorial disputes abound, would such a rule not result in rampant abuse?

This article seeks to take the debate on wars of recovery forward by uncovering the normative assumptions and commitments that are required to defend the competing doctrinal positions. To emphasize, the article is not about finding 'solutions' to the problem of wars of recovery. Nor does it purport to lay down the morally best law

[1] Compare Ruys and Rodríguez Silvestre, 'Illegal: The Recourse to Force to Recover Occupied Territory and the Second Nagorno-Karabakh War', 32 *European Journal of International Law* (*EJIL*) (2021) 1287; Ruys and Rodríguez Silvestre, 'Military Action to Recover Occupied Land: Lawful Self-defense or Prohibited Use of Force? The 2020 Nagorno-Karabakh Conflict Revisited', 97 *International Law Studies* (2021) 665; with Akande and Tzanakopoulos, 'Legal: Use of Force in Self-Defence to Recover Occupied Territory', 32 *EJIL* (2021) 1299.

[2] UN Charter, preamble.

on wars of recovery or to make a strong claim concerning the extent to which law should track morality, whether in general or in the context of the laws of war.[3] Rather, this article is more about properly understanding why the problem is so vexing, what moral intuitions may undergird the doctrinal disagreements and what commitments are needed to accept this or that position. In short, this article asks what it takes to believe that either approach is justified.[4]

In fact, as the article shows, this question goes to the core of the justification and purpose of modern *jus ad bellum*. Indeed, while the problem of wars of recovery is important in and of itself, there is a more general takeaway here: the dilemma on wars of recovery reveals, in its starkest terms, the normative tension within the contemporary international law on the use of force: mainly, between its traditional focus on a statist perception of self-defence, which is centred on state rights such as territory and sovereignty, and a creeping individualist sensibility, which seeks to place individual rights at the core of the international legal regime in its entirety. This statist/individualist tension has been reflected in a broad critique of international law, in recent years, by just war theorists who have thoroughly attacked the traditional, statist view.[5] However, this debate has generally not resonated in the thinking of mainstream international lawyers. Moreover, even within the debates in the ethics of war, most attention has been given to the morality of using force to defend states as such or to protect territorial integrity in the broad sense.[6] Yet, in general, scant attention was given to the specific questions that arise in the context of wars of recovery, such as the role of the passage of time since active hostilities have ended.[7] As this article reveals, by and large, in order to decide on the desirable solution to the problem of wars of recovery, we need first to commit to either a statist or individualist approach to self-defence – reflected in two competing constitutive principles of the international system: territorial integrity and individual rights – or, at least, to find a way to reconcile between them.

Perhaps the question at hand is not as difficult as it seems. An easy solution to the dilemma could be to argue that war is indeed bad but that prolonged occupation is hardly better. Occupation usually involves gross human rights violations, displacement and infringements of self-determination. The situations in the Occupied Palestinian Territories and Ukraine are sobering reminders of this truth. This reality militates in favour of the permissive view: usually, when a state would seek to recover long-lost territory, there is more than just territory involved, and, therefore, wars of recovery might be justified on both statist and individualist grounds. In this article, however, I seek to avoid this easy solution. Although prolonged occupations usually involve such violations, this assumption remains contingent. Furthermore, shifting

3 Compare A.A. Haque, *Law and Morality at War* (2017), at 9.

4 See Koskenniemi, 'What Is Critical Research in International Law? Celebrating Structuralism', 29 *Leiden Journal of International Law* (2016) 727, at 730.

5 For the seminal work, see J. McMahan, *Killing in War* (2009).

6 See generally C. Fabre and S. Lazar (eds), *The Morality of Defensive War* (2014).

7 For some recent engagements with the question by just war theorists, see Fabre, 'The Law vs. the Sword: Arthur Ripstein's Account of the Morality and Law of War', 40 *Criminal Justice Ethics* (2021) 256, at 259; McMahan, 'The Battle of the Lexicons', in S. Mohamed (ed.), *Rules for Wrongdoers: Law, Morality, War* (2021) 139, at 143–145.

the question towards violations of self-determination or oppression begs the question concerning the value of recovering territory in itself.

To isolate the question, therefore, assume that A is relatively benign.[8] It does not displace or torture people. Perhaps it even offers equal citizenship to the occupied population. Maybe, even, the local population prefers to be ruled by A since V is a cruel dictatorship or a failed state or because they have historical connections with A and the borders were arbitrarily drawn by a long-gone colonial power. Or assume that the occupied territory is generally uninhabited: it is merely a piece of territory with possible material or strategic worth but nothing that really affects immediate human life.[9] This assumption brings us back to square one: should recovering territory, absent ongoing hostilities or atrocities, justify resort to force? To be sure, I am not implying that such cases of benign occupation are very common.[10] But it is helpful to posit this scenario in order to test our views on the value of recovering territory. After we get a clearer sense about these views, we can proceed to ascertain the effects of human rights violations and oppression on the question of wars of recovery. Quite possibly, when there is widespread abuse of individual rights and repression of self-determination, or when the specific territory is crucial for the exercise of self-determination of the population in the rump state, the case for the permissive view would be stronger both on statist and individualist grounds.[11] But this discussion is for another article.

Relatedly, I do not deal here with situations in which the occupied population is engaged in armed resistance.[12] Without exhausting this issue, it is intuitively easier to justify resort to force by the rump state when there is already fighting in the territory, where people are presumably struggling against an unlawful occupation.[13] But, again, this begs the question of the value of territory within the possible justifications of wars of recovery. I also set aside situations in which a state's territory is completely occupied in a manner that quashes its political independence, at least de facto.[14] This is because, in such cases, the discussion of resort to force merges, to a large extent, with that concerning the justification to use force when self-determination is entirely extinguished.[15] But the salient question on wars of recovery is precisely that this is not the case. The state *qua* political entity is very much alive and well; it has only lost

[8] Crucially, nothing here implies that 'benign' occupation is not wrongful. The discussion here is merely about justifications to use for force to recover territory, and, in this context, the level of wrongfulness matters.

[9] In this sense, it does not include resources that are essential for the rump state's population. On resource wars, see Fabre, *supra* note 7, at 260.

[10] See A. Ripstein, *Kant and the Law of War* (2021), at 54–56.

[11] Compare Renzo, 'Political Self-Determination and Wars of National Defense', 15 *Journal of Moral Philosophy* (2018) 706, at 713.

[12] See generally M. Longobardo, *The Use of Armed Force in Occupied Territory* (2018).

[13] In ethical terms, this can be considered a case of defence of others.

[14] In international law such situations are sometimes known as *debellatio*. See, e.g., Kelsen, 'The Legal Status of Germany According to the Declaration of Berlin', 39. *American Journal of International Law* (*AJIL*) (1945) 518. For a discussion, see McMahan, 'What Rights May Be Defended by Means of War?', in Fabre and Lazar, *supra* note 6, 115, at 131–136.

[15] Compare Renzo, *supra* note 11.

a part of its territory,[16] and, recall, we assume for the sake of debate that at hand is a relatively benign occupant.

Another purportedly easy solution to the question of wars of recovery would be to simply 'ask the population' in the occupied territory. If the population genuinely wishes to remain under the occupant, this might be a weighty moral and legal reason militating in favour of the restrictive view. However, this would not solve the dilemma because it would simply breed new ones concerning the relations between self-determination, the prohibition on the use of force and the principle of territorial integrity. In this context, weighty reasons will pull us back again towards the permissive view: indeed, if unilateral secession is unlawful under peaceful conditions – regardless of the will of the local population – why would the population's will be determinative in situations where the occupation resulted from an act of aggression?[17] And would this not be a way to legitimate annexation of occupied territories?

With these caveats in mind, this article argues that any attempt to solve the problem of wars of recovery requires making commitments in regard to four key groups of normative considerations, relating to stability, justice, killing and sacrifice. The article then explores these commitments while exposing their inner tensions. Granted, while these four types of considerations are relevant to every debate on the resort to force, in the context of wars of recovery, there is an additional complication, stemming from the passage of time since the hostilities subsided. The normative complexity is further exacerbated in such cases since, in each one of these spheres, the passage of time plays different – occasionally conflicting – roles: sometimes pushing towards the restrictive view and sometimes towards the permissive approach.

Thus, the first group of relevant normative considerations are instrumental and relate to international stability. Undoubtedly, wars of recovery disturb an existing status quo. As time passes, this status quo is further entrenched. The question is therefore whether the desire to maintain international stability, as such, justifies maintaining an unlawful status quo. As the article shows, stability considerations alone offer scant support for either the restrictive or permissive approach.

The second group of normative considerations are non-instrumental and are the main focus of the article. This group of considerations is most revealing in terms of understanding the dilemma of wars recovery since it is characterized by being susceptible to fluctuation in accordance with the adoption of a statist or individualist point of view. The first of these considerations relates to justice. Indeed, justice is an exceedingly broad concept, which can encompass the debate in its entirety. In the context of wars of recovery, however, the salient question is whether the principle of corrective justice, according to which wrongdoers should not be rewarded, can and should affect our understanding of permissible force under international law. Concerning this question, the passage of time seems to aggravate injustice since the deprivation of the territory is longer and the aggressor gets to enjoy it more. However, as I demonstrate,

[16] See Stilz, 'Territorial Rights and National Defense', in Fabre and Lazar, *supra* note 6, 203, at 204.

[17] See, recently, Reference by the Lord Advocate of devolution issues under paragraph 34 of Schedule 6 to the Scotland Act 1998, [2022] UKSC 31, paras 85–89.

this reasoning holds only if we adopt a statist point of view and disintegrates when shifting to an individualist perspective. The second of the non-instrumental considerations concerns justifications for killing, and, specifically, whether the recovery of long-lost territory can justify intentionally killing and maiming people in war. The third is that of sacrifice. Here, the question is whether it can be justified to occasion harm to a state's own people in order to recover long-lost territory. Concerning the questions of both killing and sacrifice, the normative work of time exposes a key tension in contemporary international law and ethics: the passage of time disentangles between war in defence of life and war in defence of territory and requires us to take a stand on the primacy of either one. However, as we shall see, these two positions are themselves unstable.

The article concludes that, to advance the debate forward, it is required to make explicit our normative commitments regarding the ultimate ends of the laws on the use of force or to reconcile between them. It furthermore suggests that, even if we argued that wars of recovery were ultimately legal, it would not mean that the powerful reasons underlying the competing view would simply disappear. Therefore, wars of recovery would remain heavily contestable even if deemed lawful.

The article proceeds as following. Section 2 introduces the doctrinal debate on wars of recovery as well as its limits. Sections 3 and 4 address the normative commitments required to defend each of the positions. Section 3 discusses instrumental considerations relating to international stability. It reveals that these considerations fail to provide a stable basis for either position. Section 4 moves to discuss non-instrumental considerations relevant to the debate. It demonstrates that, in this context, the tension at the basis of the question of wars of recovery is chiefly one between statism versus individualism – a tension found within international law itself. The conclusion reflects on how to think of law when its normative underpinnings are conflicting and unstable.

2 The Doctrinal Debate and Its Limits

Article 2(4) of the UN Charter prohibits the use of force between states, while Article 51 permits resort to force in self-defence 'if an armed attacked occurs'.[18] In legal terms, the question of wars of recovery is remarkably simple: does the ongoing occupation of a state's territory, resulting from an unlawful use of force, amount to an ongoing armed attack that gives rise to a continuous right to self-defence, even if there is no active fighting in the territory?

A *Central Post-Charter Cases*

The question of wars of recovery is not new. Since the advent of the UN Charter, several conflicts have given rise to this dilemma, yet it has never been clearly resolved. One central case concerned the question whether Egypt and Syria could resort to force to take

[18] UN Charter.

back territories occupied by Israel in 1967, as they tried to do in the Yom Kippur War of 1973. The outlines of the contemporary restrictive and permissive views emerged, regarding this conflict, in the respective positions of Israeli international lawyer Nathan Feinberg and Egyptian jurist (and later World Bank executive) Ibrahim Shihata.[19] Feinberg and Shihata's arguments illustrated the factual and legal complexity that usually surrounds such cases. Feinberg argued that renewed hostilities by the Arab states contravened binding United Nations Security Council (UNSC) resolutions; that Israel defended itself in 1967 and, therefore, that a renewed attack by Arab states would constitute an aggression; that since the Arab states were unwilling to make peace, they could not invoke self-defence; and that, in any case, the concept of an 'armed attack' under the UN Charter can only be 'an isolated action' and not a continuous status quo such as a prolonged occupation.[20] Shihata, unsurprisingly, offered a different interpretation of the relevant UNSC resolutions, arguing that Israel was the aggressor in 1967 and was at fault for the political stalemate since that time. Interestingly, regarding the legality of wars of recovery, Shihata's primary argument was that recovery of territory does not require an invocation of Article 51 to begin with since the state merely exercises its 'inherent territorial jurisdiction' when doing so.[21] As a fallback position, he claimed that a 'broad reading of the UN Charter provision on self-defence… considers a continued forcible occupation … a "prolonged attack" under Article 51'.[22] Ultimately, however, the principled debate about wars of recovery was subsumed under the broader disagreements on the circumstances of the conflict.[23]

The Falklands Islands / Malvinas War of 1982 is often brought up as a paradigmatic war of recovery.[24] Argentina claimed that Britain's occupation of the islands in 1833 from the United Provinces of the River Plate – to which Argentina was a successor state – never resulted in valid title, while Britain argued, *inter alia*, that

[19] Compare Feinberg, 'The Legality of the Use of Force to Recover Occupied Territory', 15 *Israel Law Review* (1980) 160, with Shihata, 'Destination Embargo of Arab Oil: Its Legality under International Law', 68 *AJIL* (1974) 591.

[20] Feinberg, *supra* note 19, at 172; see also Skubiszewski, 'Use of Force by States. Collective Security. Law of War and Neutrality', in M. Sorensen (ed.), *Manual of Public International Law* (1968) 808; Wengler, 'L'interdiction de recourir a la force, Problemes et tendances', 7 *Revue Belge de Droit International* (1971) 401, at 407, cited in Feinberg, *supra* note 19, at 175.

[21] Shihata, *supra* note 19, at 607. This argument was also raised in other situations, such as by India in the context of its 1961 operation in Goa. See Schachter, 'The Rights of States to Use Armed Force', 82 *Michigan Law Review* (1984) 1620, at 1627. However, such an argument has not stood the test of time. See Ruys and Rodriguez Silvestre, 'Military Action', *supra* note 1, at 680–681 ('the mere fact that a State uses armed force within its own territory does not *a priori* prevent the application of the *jus ad bellum*, inasmuch as the force is (deliberately) *directed against* another State or its external manifestations').

[22] Shihata, *supra* note 19, at 607–608.

[23] See, e.g., Rostow, 'The Illegality of the Arab Attack on Israel of October 6, 1973', 69 *AJIL* (1975) 272; but see Dubuisson and Koutroulis, 'The Yom Kippur War – 1973', in T. Ruys, O. Corten and A. Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (2018) 189.

[24] Henry, 'The Falklands/Malvinas War – 1982', in Ruys, Corten and Hofer, *supra* note 23, at 361. Some additional, less-known examples could be the Senkaku-Diaoyu Islands and the Paracel Islands. See, respectively, Matsui, 'International Law of Territorial Acquisition and the Dispute over the Senkaku (Diaoyu) Islands', 40 *Japanese Annual of International Law* (1997) 3; Budd and Ahlawat, 'Reconsidering the Paracel Islands Dispute: An International Law Perspective', 39 *Strategic Analysis* (2015) 661.

with the passage of time it gained sovereignty there through prescriptive acquisition. Argentina invaded the Falkland Islands in April 1982 and, after initial success, was overwhelmed by British forces by June that year. In justification of its attack, Argentina claimed that Britain's occupation was a 'continuous aggression'.[25] Britain responded that Argentina was the aggressor, owing to its first use of force,[26] and claimed that Argentina's own occupation in the few weeks since April was a continuous armed attack that justified its recovery actions.[27] The UNSC condemned the invasion as a breach of the peace,[28] and most states criticized Argentina's resort to force, although many in the global South were sympathetic to its territorial claims.[29] Yet it is difficult to draw clear conclusions from this conflict. Britain's claim to sovereignty was based on pre-Charter international law, which makes it problematic to categorize its control over the islands as an unlawful occupation in contemporary terms.[30]

A more recent case was the Eritrean-Ethiopian war, which erupted in 1998. One claim advanced by Eritrea, in justification of its initial resort to force, was that Ethiopia was unlawfully occupying its territory in the border region of Badme. Ethiopia, in turn, argued that the invasion violated Article 2(4) of the Charter.[31] The Eritrea-Ethiopia Claims Commission sided with Ethiopia on this point, holding laconically that, since the borders surrounding Badme were never marked, the area was not unlawfully occupied but disputed. As the commission held, 'border disputes between States are so frequent that any exception to the prohibition of the threat or use of force for territory that is allegedly occupied unlawfully would create a large and dangerous hole in a fundamental rule of international law'.[32] On its face, this seems like a decisive triumph for the restrictive approach. Yet it cannot be the final word since at least conceptually there is a qualitative difference between genuine border disputes, which usually arise following the collapse of empire,[33] and situations where the occupied territory clearly belonged to another state.

The renewed debate on the legality of wars of recovery was spurred by the Nagorno-Karabakh war of 2020 between Azerbaijan and Armenia. In September 2020, Azerbaijan successfully resorted to force to recover the region, which has been occupied by Armenia since 1994 and held under the terms of a ceasefire agreement.[34] Notably, however, Azerbaijan itself did not invoke the notion of continuous armed

25 Henry, *supra* note 24, at 364.
26 *Ibid.*
27 *Ibid.*, at 375
28 SC Res. 502 (1982).
29 Henry, *supra* note 24, at 366–373.
30 To an extent, such difficulties to qualify historical claims to territory undergird the restrictive position's concern that the legality of wars of recovery would open the door to wars based on ancient disputes. See Schachter, *supra* note 21, at 1627–1628.
31 Eritrea-Ethiopia Claims Commission, *Jus Ad Bellum – Partial Award*, Ethiopia's Claims 1-8, 19 December 2005, reprinted in XXVI UNRIAA 457, paras 8–9.
32 *Ibid.*, para. 10.
33 Shapiro and Hathaway called these situations 'botched handoffs'. See O.A. Hathaway and S.J. Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (2017), at 355.
34 See RULAC, 'Military Occupation of Azerbaijan by Armenia', 12 August 2022, available at https://bit.ly/3Cq8tqa.

attack to justify its actions but alluded to a new act of aggression by Armenia.[35] The vast majority of states refrained from taking a clear legal stand on the conflict,[36] perhaps reflecting the inherent normative ambiguity of such cases. And, indeed, when international lawyers stepped in to clarify the legal fog, they reached strikingly opposing conclusions.

B *The Restrictive View*

Following the Nagorno-Karabakh war, Tom Ruys and Felipe Silvester Rodríguez Silvestre advanced a nuanced defence of the restrictive view.[37] Their analysis revolves around the meaning of armed attack under Article 51 of the UN Charter and, accordingly, of the requirement under customary international law that self-defence be necessary: meaning that force is used at last resort or in relation to an ongoing armed attack (also known as the 'immediacy' criterion).[38] Once an armed attack ends, obviously, there is no longer such necessity. On the restrictive view, when a territorial status quo is established for a prolonged period – even if it is in the form of an occupation – an armed attack is no longer ongoing, and, therefore, the right of self-defence lapses.[39]

In support of this view, Ruys and Rodríguez Silvestre invoke the widely accepted 'principle of non-use of force to settle territorial disputes',[40] which requires that all territorial disputes be settled peacefully.[41] Following authorities such as Oscar Schachter,[42] they categorize continuous occupation as a form of a territorial dispute, whether or not the occupant makes a legal claim to the territory.[43] This conclusion is fortified in cases where hostilities end with international lines of demarcation or armistice agreements. As Ruys and Rodríguez Silvestre emphasize, the UN General Assembly's Declaration on Friendly Relations asserts that force in violation of armistice agreements is prohibited, although it recognizes that such arrangements are only of a temporary character.[44]

In terms of policy, Ruys and Rodríguez Silvestre are mainly concerned with the effects of an opposite rule on international stability: as they argue, since the line between a genuine territorial dispute and an unlawful occupation is often blurry, it

[35] Ruys and Rodriguez Silvestre, 'Military Action', supra note 1, at 730–731.

[36] *Ibid.*

[37] See *ibid*; Ruys and Rodríguez Silvestre, 'Illegal', *supra* note 1; see also Knoll-Tudor and Mueller, *At Daggers Drawn: International Legal Issues Surrounding the Conflict in and around Nagorno-Karabakh*, 17 November 2020, available at https://bit.ly/3ciC8Hb.

[38] See C. Henderson, *The Use of Force and International Law* (2018), at 229–234; Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in *Jus Ad Bellum*', 24 *EJIL* (2013) 235, at 239.

[39] See Ruys and Rodríguez Silvestre, 'Illegal', *supra* note 1, at 1288–1289.

[40] *Ibid.*, at 1292.

[41] A comparable view was recently advanced by Arthur Ripstein, according to which all resort to war to solve disputes, including wars of recovery, is unjust because '[n]o legal order is entitled to appoint itself as overseer of another'. See Ripstein, 'Lecture I', in Mohamed, *supra* note 7, at 19, 39.

[42] Schachter, *supra* note 21, at 1627–1628.

[43] Ruys and Rodríguez Silvestre, 'Illegal', *supra* note 1, at 1292.

[44] *Ibid.*, at 1293–1294; GA Res. 2625 (XXV), 24 October 1970. For a similar understanding of armistice agreements, see Feinberg, *supra* note 26, at 161–162, 167–170.

is prudent to treat all of these cases as disputes subject to the principle of non-use of force. Otherwise, the prohibition on the use of force would lose much of its constraining power.[45] Consider the possible consequences: without any temporal limitation, states would now invoke self-defence to counter alleged, historical acts of aggression in the distance past. The past, so to speak, would never be settled.[46] While Ruys and Rodríguez Silvestre concede that, under their view, there is uncertainty regarding the point in time after which necessity for self-defence lapses, they argue that an alternative view, in which the right of self-defence can be 'revived' at any point – even after an armistice – would cause more instability.[47]

Ruys and Rodríguez Silvestre admit that their view results in a tension between 'justice' and 'peace'. On the one hand, if the victim cannot resort to force to maintain its territorial integrity, the aggressor might be rewarded, which seems unjust. On the other hand, the principle of territorial integrity must be balanced against international peace and security, which pushes towards restraining force.[48] To mitigate this tension, they relegate the problem of prolonged occupation to the UNSC or to unilateral, non-forcible sanctions.[49] While not central to their analysis, an individualist underpinning is revealed when Ruys and Rodríguez Silvestre note, in support of their position, the widespread deprivation of human life that results from resorts to force.[50]

C *The Permissive View*

The permissive view also finds support among leading international lawyers.[51] In a recent piece, Akande and Tzanakopoulos countered the restrictive view both conceptually and in terms of policy. As they claim, a continuous occupation that results from an armed attack cannot but be an integral part of that attack. Therefore, there is necessity for self-defence as long as such an occupation lasts.[52] This interpretation is strengthened by the fact that the UN General Assembly's Definition of Aggression categorizes unlawful occupation as a form of aggression, and the notion of aggression correlates with that of an armed attack.[53] To the extent that the passage of time affects this analysis, it militates against the restrictive view: this is because, as occupation is prolonged, this strengthens the conclusion that self-defence is necessary as it becomes more certain that the occupant will not withdraw peacefully.[54]

45 Ruys and Rodríguez Silvestre, 'Illegal', *supra* note 1, at 1293.
46 *Ibid.*, at 1288–1289; see also Ripstein, *supra* note 41, at 40.
47 Ruys and Rodríguez Silvestre, 'Illegal', *supra* note 1, at 1295.
48 In Ripstein's terms, the problem with wars of recovery would be that they 'initiate a condition in which force decides', rather than law, under a condition of relative peace. Ripstein, *supra* note 41, at 36.
49 Ruys and Rodríguez Silvestre, 'Illegal', *supra* note 1, at 1296.
50 *Ibid.*, at 1297.
51 Besides Akande and Tzanakopoulos, *supra* note 1, see O. Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (3rd edn, 2021), at 535; earlier on, see R.Y. Jennings, *The Acquisition of Territory in International Law* (1963), at 72.
52 Akande and Tzanakopoulos, *supra* note 1; for a comparable view, see Corten, *supra* note 51, at 766.
53 Akande and Tzanakopoulos, *supra* note 1, at 1303–1304.
54 *Ibid.*, at 1305–1306.

Interestingly, Akande and Tzanakopoulos understand the Declaration on Friendly Relations' rule on armistices in a manner completely different from Ruys and Rodríguez Silvestre.[55] As they emphasize, while armistices might suspend the necessity of self-defence in order to provide space for negotiations, the declaration itself emphasizes the 'temporary character' of armistice lines. Therefore, once the occupant in fact ceases to treat them as such – for instance, when it annexes the territory – necessity for self-defence is revived.[56] Akande and Tzanakopoulos are less concerned than Ruys and Rodríguez Silvestre that the permissive view will lead to invocations of self-defence in relation to ancient disputes. As they claim, it is quite possible to differentiate factually between genuine territorial disputes – that are indeed subject to the principle of non-use of force – and occupations resulting from unlawful armed attacks.[57] The determination would hinge on (i) whether the initial force was used to occupy territory that was previously held by the defending state and (ii) whether this initial force occurred in the era of the UN Charter, in which force became clearly unlawful. Only in such cases does the right to self-defence kick in to begin with.[58]

This is also the better interpretation, according to Akande and Tzanakopoulos, since it does not favour or reward aggressors,[59] and, by implication, it seems, does not incentivize further aggression. Moreover, by providing a bright-line rule, the permissive view presumes to provide more certainty than the restrictive view, which cannot tell us how much time would be considered 'prolonged' enough for the necessity of self-defence to lapse.[60]

D *The Limits of the Debate*

The doctrinal argument on wars of recovery, even when conducted on the highest level, is ultimately unsatisfying. First, it reveals a significant conceptual indeterminacy, as evidenced by the stark disagreement on some of the most basic concepts of the regime, such as whether continuous occupation is an armed attack. Turning to state practice to clarify things is unhelpful because – as is the case concerning many aspects of *jus ad bellum* – most states have been silent on wars of recovery.[61] This allows both sides of the debate to read practice in opposing ways: Ruys and Rodríguez Silvestre make the point that states have very rarely invoked the notion of continuous armed attack, and, even when they did, this was only a secondary argument.[62] Akande and Tzanakopoulos concede this point but respond that failure to invoke this

[55] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res 2625, UN Doc. A/8082, 24 October 1970.

[56] Akande and Tzanakopoulos, *supra* note 1, at 1306.

[57] *Ibid.*, at 1301.

[58] *Ibid.*, at 1302.

[59] *Ibid.*, at 1307.

[60] *Ibid.*, at 1303.

[61] On silence in the context *of jus ad bellum*, see generally D.A. Lewis, N.K. Modirzadeh and G. Blum, *Quantum of Silence: Inaction and Jus ad Bellum* (2019).

[62] Ruys and Rodríguez Silvestre, 'Illegal', *supra* note 1, at 1290–1291.

right might reflect state weakness rather than a positive view about the illegality of wars of recovery.[63]

Second, resorting to policy arguments is also inconclusive since the instrumental arguments advanced by the two positions cancel each other out. The restrictive approach claims that the permissive position would undermine the prohibition on the use of force since long-standing territorial disputes would now be resolved by force. The permissive approach responds that it is the restrictive view that would undermine the prohibition by incentivizing aggression. Similarly, both views emphasize the uncertainties inhering the other. The restrictive view points out the difficulty in distinguishing between unlawful occupation and genuine territorial disputes and the ambiguity of the moment in which – according to the permissive view – lines of demarcation cease to be temporary and can be disregarded. The permissive view responds that the restrictive view itself is based on a glaring uncertainty regarding the point in time after which the necessity of self-defence lapses.

Third, and perhaps most importantly, when law is indeterminate, we look for answers in the object and purpose of the regime or its general principles. However, in the case of wars of recovery each of the positions is easily undermined by a competing normative commitment that forms part of the international legal system itself.[64] Arguably, the restrictive view does not give enough weight to the statist assumptions of international law, and, in this particular context, the centrality of territorial integrity as an 'essential right' of the state.[65] On the other hand, the permissive view can be criticized as not concerned enough with the human costs of renewed hostilities: the UN Charter, it should be recalled, seeks not only to curtail acts of aggression but also to prevent 'the scourge of war' altogether.[66] To move beyond the doctrinal deadlock, it seems, we need to unpack this tension, revealing the normative commitments required to accept either position on wars of recovery.

3 Instrumental Considerations: Stability

The most prevalent instrumental consideration in the debate concerns the value of international stability. In the most general sense, stability considerations concern the value of a given status quo in relation to other interests. In the context of the law on the use of force, an argument for stability, essentially, is an argument for the primacy of the need to prevent the scourge of war over other considerations. This argument is based on a perception of the status quo as the lesser evil: although it might be unjust or unlawful, the consequences of upsetting it would be much worse.[67] As a point of departure, those who argue for the value of the status quo face a significant justificatory burden since, by definition, the status quo is a factual construct from which normative

[63] Akande and Tzanakopoulos, *supra* note 1, at 1307.
[64] See M. Koskenniemi, *The Politics of International Law* (2011), at 7–8.
[65] Shihata, *supra* note 19, at 608.
[66] UN Charter, preamble.
[67] See Schachter, *supra* note 21, at 1628.

reasons cannot be directly inferred.[68] This is all the more true regarding wars of recovery, where it is a given that the status quo is unlawful, albeit long-standing.

When discussing wars of recovery in these terms, stability may encompass two distinct meanings. The first is systemic stability. Here, the approach is rule consequentialist and concerns the possible ways in which any rule on wars of recovery would affect the stability of the international system as a whole.[69] The other way to approach stability – which can be called immediate stability – is act consequentialist, looking into the consequences of the immediate disruption of the status quo in a specific case.[70]

As this section shows, while the value of stability plays a central role in the international system,[71] stability considerations do not vindicate either position on wars of recovery. Indeed, at first glance, such considerations push towards the restrictive position. Stability, by definition, is a temporal concept, evaluated in terms of a lack of change across time. As more time passes, the status quo is further entrenched, and, accordingly, its disturbance is more disruptive. Yet this section demonstrates that stability considerations offer only weak grounds to support the restrictive view: first, stability arguments that draw from domestic law analogies to support the restrictive view on counts of public order cannot be transferred convincingly to the international level. Second, in terms of positive law, while international law indeed prefers stability over many competing values, this preference is far from absolute when there is a clear previous violation of the law. On the other hand, stability-based arguments also provide scant support for the permissive view. While instrumental arguments for the permissive view are usually phrased in terms of providing proper incentives, these prove to be epistemically unstable and ethically problematic.

A *Public Order*

When law gives weight to stability over other values, it often does so for public order considerations.[72] For this reason, some domestic jurisdictions provide certain protections for unlawful possessors of property, even in relation to title holders.[73] For example, sometimes reasonable force against an unlawful possessor would be permitted only for a limited time, after which recourse must be made to judicial remedies.[74]

[68] This is the famous is/ought problem. See, e.g., S.J. Shapiro, *Legality* (2011), at 45–47.

[69] See B. Hooker, 'Rule Consequentialism', in *Stanford Encyclopedia of Philosophy* (2016), available at https://stanford.io/3AGulv5; see also Holzgrefe, 'The Humanitarian Intervention Debate', in J.L. Holzgrefe and R. O. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003) 15, at 24.

[70] W. Sinnott-Armstrong, 'Consequentialism', in *Stanford Encyclopedia of Philosophy* (2021), available at https://stanford.io/3dXagZB.

[71] Indeed, the determinants of stability and 'balance of power' have been a central preoccupation in the discipline of international relations. See Deutsch and Singer, 'Multipolar Power Systems and International Stability', 16 *World Politics* (1964) 390.

[72] See Emerich, 'Why Protect Possession?', in E. Descheemaeker (ed.), *The Consequences of Possession* (2014) 30, at 42–43 (discussing the classic debate between Savigny and Jhering on the justifications for possessory protections).

[73] For a general analysis of possession, see the contributions in E. Descheemaeker (ed.), *The Consequences of Possession* (2014).

[74] This is the case in Israel, where the law allows reasonable force to be used against an unlawful possessor for 30 days. See Real Estate Law (1969) (Israel), Art. 18(b).

Arguably, the key rationale for such arrangements is one of systemic stability: the desire to reduce as much as possible self-help and extrajudicial violence and to encourage recourse to adjudication as a means to strengthen the centralized monopoly on violence.[75] On this approach, law might tolerate a person's natural instinct, so to speak, to protect their property against an ongoing or very recent incursion, but, once time passes and the dust settles, the public interest to reduce self-help should prevail, and people should be expected to regain their composure.

Unsurprisingly, some supporters of the restrictive position seek to draw parallels between such domestic doctrines on possession and the international level.[76] And, indeed, the expectation that the passage of time should push towards peaceful settlements of disputes has some pedigree in international law. For example, the idea that, as time passes, people – and states – can be expected to refrain from force has underlined the League of Nation's system of pacific settlement of disputes, which famously established a 'cooling-off' period for international disputes, based on the assumption that war was irrational and that, after time passes, cooler heads would prevail.[77]

Nonetheless, it is doubtful whether analogies from domestic public order considerations do much work for the restrictive position. In domestic settings, law operates under the presumption that effective mechanisms of enforcement are in place and legitimate force is centralized.[78] In international law, conversely, relying on this rationale alone seems exceedingly formalistic, considering both the dearth of collective and effective dispute resolution mechanisms and the still-prevalent perception of the individual state as the primary enforcement unit of international law.[79] In other words, the logic of stability in terms of reduction of self-help seems weaker in a decentralized legal system, which is built precisely on individual enforcement as a central pillar.[80]

Arguably, protection of possession in domestic settings can also be justified in light of the legitimate expectations of third parties, who might be unaware of the illegality and cannot be expected to determine the legal situation before every interaction with

[75] For a helpful survey of European jurisdictions, see 'Self-help', in S.M. Santisteban and P. Sparkes (eds), *Protection of Immovables in European Legal Systems* (2015) 206. Another justification for the restriction of self-help is to prevent situations in which a private person is subject to the determining choice of another. See Ripstein, *supra* note 10, at 12.

[76] M. Kohen, *Possession contestée et souveraineté territoriale* (1997), para. 115. For more on the tradition of private law analogies in international law, see H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1927); see also Ripstein, *supra* note 10, at 34–36.

[77] See, e.g., Tams, 'Experiments Great and Small: Centenary Reflections on the League of Nations', 62 *German Yearbook of International Law* (2019) 93, at 104.

[78] See Anter, 'The Modern State and Its Monopoly on Violence', in E. Hanke, L. Scaff and S. Whimster (eds), *The Oxford Handbook of Max Weber* (2019) 226.

[79] See, e.g., H. Kelsen, *Principles of International Law* (1952), at 13–15, 20–23. Although international law has become more centralized in certain aspects, the idea of the state as the basic unit of enforcement is still the reality of the law.

[80] I address the issue of war as an enforcement mechanism in the context of justice considerations. Importantly, this is not to say that the lack of enforcement mechanisms justifies wars of recovery. The argument here is merely that the analogy with the rationale of the domestic law of possession is false since the relations between states on the international level simply do not mirror those in domestic settings. See Ripstein, *supra* note 10, at 39–41.

a possessor.[81] On the international level, an argument from stability can be made on the basis of such expectations: as time passes, more people are likely to rely on the territorial status quo, mainly in terms of investment and trade.[82] Allowing the title holder to resort to force to recover the property even after years harms these interests. However, this logic too has less purchase on the international sphere. As opposed, perhaps, to the situation in domestic law, third parties that seek to make transnational investments have all the access to information regarding the unlawful situation at hand. Moreover, international law imposes a duty of non-recognition in relation to unlawful occupation:[83] it would make no sense that law would impose such a duty, on the one hand, yet take into account the reliance interests of third parties in relation to wars of recovery. In sum, one would be hard-pressed to predicate the restrictive view on analogies to domestic laws on the protection of possessors aiming to reduce self-help, which are based on the assumption of a centralized monopoly on violence.

B *Stability as a Central Value of International Law*

If not by analogy to domestic law, can the value of stability be inferred from within the international legal system? And, if so, how does this fare for the legality of wars of recovery? Admittedly, stability is a central value in international law. In some prominent theories of international law, the idea of a 'minimum order' – manifested not only in a low level of violence, but also in a low *expectation* of violence – is the *sine qua non* condition for any other goal of the international system.[84] Sometimes stability is even viewed as a synonym for peace itself.[85] For example, 'peacekeeping' missions extend beyond the administration of peace treaties and include monitoring cease-fire arrangements and status quo arrangements.[86] It is in this sense that Hersch Lauterpacht argued that peace can be 'morally indifferent', involving 'the sacrifice of justice on the altar of stability and security'.[87]

Indeed, international law often prefers the status quo over other important values, even as imperative as justice or self-determination. Perhaps the key example is that

[81] Some have labelled possession as a form of communicating rights to third parties. See Emerich, 'Possession', in M. Graziadei and L. Smith (eds), *Comparative Property Law: Global Perspectives* (2017) 171, at 179–180.

[82] See, e.g., Human Rights Watch, 'Europe: Ban Trade with Illegal Settlements – Trade with Settlements in Occupied Territories Contributes to Rights Abuses', 21 February 2022, available at https://bit.ly/3RccT8j.

[83] See, e.g., Kassoti and Duval, 'Setting the Scene: The Legality of Economic Activities in Occupied Territories', in A. Duval and E. Kassoti (eds), *The Legality of Economic Activities in Occupied Territories* (2020) 1.

[84] See, e.g., W.M. Reisman, *The Quest for World Order and Human Dignity in the Twenty-First Century: Constitutive Process and Individual Commitment* (2013), at 442. Ripstein calls this 'the priority of peace' that places security over justice. Ripstein, *supra* note 41, at 41.

[85] See H. Lauterpacht, *The Function of Law in the International Community* (1933), at 438.

[86] See, e.g., UN Peacekeeping, 'Helping to Bring Stability in the Middle East', UNTSO Fact Sheet, available at https://peacekeeping.un.org/en/mission/untso. In some cases, the United Nations Security Council (UNSC) has imposed an open-ended cease-fire even if a state has occupied territories of another, arguably on the view that active hostilities are worse. See Feinberg, *supra* note 26, at 162.

[87] Lauterpacht, *supra* note 85, at 438; cited in Ripstein, *supra* note 10, at 3, n. 6.

the principle of territorial integrity under the UN Charter is not predicated on any presumption that specific borders have moral significance. Law's reasoning here is markedly one of systemic stability: if boundaries could be challenged simply because they are unjust, mass instability would ensue.[88] The power of this intuition was reflected recently in the resistance to Vladimir Putin's historical claims in relation to Ukraine, based on what he perceives as the arbitrariness of the Russia-Ukraine borders.[89] Similarly, systemic stability has been the key justification for the principle of *uti possidetis*, which entrenches colonial boundaries, even if these cut through peoples along imperial interests.[90] Still more, the same reasoning underlines the limits of the right to self-determination in the post-colonial era. While, normatively, self-determination could justify secession from existing states, unilateral secession is almost universally rejected in international law.[91] In sum, since the preference of stability over other values is a key feature of international law, the restrictive position would certainly not be wrong in invoking it as a supporting principle.

Yet there are limits to international law's embrace of de facto stability and, accordingly, to the ability to justify the restrictive position in such terms. While, as shown above, international law often prioritizes the status quo in relation to other competing interests, contemporary international law does not usually grant the 'benefit of stability', so to speak, to situations in which a new state of affairs violates previously established positive law.[92] For example, while in the past, a state could gain title over territory simply by establishing a new factual status quo through the passage of time,[93] nowadays the baseline against which stability is assessed is the legal principle of territorial integrity – which precludes unilateral changes in boundaries, regardless of time.[94] This challenges the appeal of the value of stability when justifying the restrictive position: those invoking it would face an uphill battle explaining why the factual stability of prolonged occupation should override the legally protected stability violated by the aggression.

Perhaps, then, invoking the interest of stability in wars of recovery says something much narrower. Maybe, it is not about maintaining systemic stability but simply about

[88] See, e.g., UNSC, Kenya's Statement on the Russian Invasion of Ukraine, 8970th Meeting, UN Doc. S/PV.8970, 21 February 2022, at 8–9.

[89] *Ibid.*; Address by the President of the Russian Federation, 24 February 2022, available at http://en.kremlin.ru/events/president/news/67843.

[90] G. Nesi, 'Uti Possidetis Doctrine', in *Max Planck Encyclopedias of International Law* (2018), para. 9, available at https://bit.ly/3chZahe; compare Bâli, 'Sykes-Picot and 'Artificial' States', 110 *AJIL Unbound* (2016) 115.

[91] See generally Lefkowitz, 'International Law, Institutional Moral Reasoning, and Secession', 37 *Law and Philosophy* (2018) 385. The value of stability is also found in the duty of non-aggravation. See Ratner, 'The Aggravating Duty of Non-Aggravation', 31 *EJIL* (2021) 1307.

[92] This is not only the case in relation to territory. International criminal law, for instance, also generally prefers accountability over the instability that may ensue following the prosecution of major criminals. See Davidson, 'Human Rights Realism', 54 *Vanderbilt Journal of Transnational Law* (2021) 31.

[93] L. Oppenheim, *International Law* (1912), vol. 2, para. 239.

[94] See, e.g., European Union External Action, Declaration by the High Representative on Behalf of the EU on the Golan Heights, 27 March 2019, available at https://www.eeas.europa.eu/node/60274_en; see Hathaway and Shapiro, *supra* note 33.

immediate stability: meaning, the death and destruction caused by wars of recovery in relation to the previous, relatively quiet status quo. But, if this is the case, the term stability does not do much work. It is merely another way to object to killing and sacrificing people in order to recover long-lost territory, an issue discussed later in this article.

C *Stability and Proper Incentives*

As shown above and perhaps counterintuitively, invoking stability – whether in terms of public order considerations or as a central value of international law – does not necessarily vindicate the restrictive view. If this is the case, can stability considerations push towards the permissive view? It seems that the permissive approach's best argument from stability is really about incentives. Since the restrictive position rewards aggressors,[95] it creates an incentive not only to invade territories but also to keep them for as long as possible. By encouraging such actions, the argument goes, the restrictive approach itself undermines international stability. The better law, in terms of stability, would allow wars of recovery since in the long run this will lessen aggression.

The basic problem, however, with instrumental, incentive-based arguments is that they are fraught with epistemic limitations. Can we reasonably surmise that a permissible view would necessarily deter aggression and therefore reduce wars or, as proponents of the restrictive view argue, would only push states to reignite dormant conflicts? Indeed, a consequentialist, deterrence-based approach to wars of recovery would have to recognize that future, uncertain advantages should be significantly discounted in relation to the certain harms that war would cause right here, right now. In this sense, it is likely that wars of recovery would be disproportionate, in the harms-benefit sense, even from a consequentialist view.[96]

But there is a more principled objection to the argument from deterrence, which is uncovered if we shift our position towards an individualist perspective. Indeed, instrumental justifications for wars of recovery imply a permission to kill and maim people, right here, right now, to deter third parties from future acts of aggression. If the people killed right here, right now, are not made liable to killing on the basis of other justifications – which the argument from stability alone does not provide – it can be said that they are used merely as means.[97] Some may argue that, on the international level, we must be less Kantian and more pragmatic about deterrence because of the absence of centralized enforcement.[98] Yet, if we adopt such an approach regarding wars of recovery, we would then undermine other non-consequentialist rules of international law, such as the prohibition on torture,[99] or the absolute prohibition on intentionally attacking civilians or civilian objects, regardless of anticipated benefits that might be

[95] Akande and Tzanakopoulos, *supra* note 1, at 1307.

[96] Compare Rodin, 'Myth of National Self-Defense', in Fabre and Lazar, *supra* note 6, 69, at 81–82.

[97] For a contemporary discussion of the Kantian categorical imperative, see D. Parfit, *On What Matters: Volume One* (2013), at 212–232; compare Renzo, *supra* note 11, at 712–713.

[98] Stilz, *supra* note 16, at 227.

[99] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85, Art. 2(2).

accrued, such as deterrence.[100] It seems, therefore, that a complete normative debate on wars of recovery must move beyond instrumental considerations.

4 Non-Instrumental Considerations and the Statist-Individualist Divide

As the previous section has demonstrated, purely instrumental arguments from stability are far from determinative on wars of recovery as they provide only shaky grounds for either approach. Furthermore, an instrumental approach to the question raises principled problems that call for a non-instrumental analysis. This section discusses wars of recovery in relation to such considerations – namely, considerations of corrective justice and considerations relating to the justifications needed for killing and sacrificing. These considerations raise fundamental questions on the relationship between defence of territory and other important values and, in the specific case of wars of recovery, also regarding the effect of the passage of time on these considerations.

A *Corrective Justice*

In the debate on wars of recovery, instrumental considerations of stability are frequently juxtaposed against considerations of justice. While the former appeals to the factual status quo, the latter is normative, asking whether considerations of justice push towards this or that approach. Justice, of course, is a broad concept that can encompass the debate in its entirety. We might ask, for example, whether in a particular situation a war of recovery would better serve justice if particular borders are historically unfair or vice versa. However, this section focuses on one narrow aspect of corrective justice, most pertinent to the question of wars of recovery:[101] the widely accepted notion that a wrongdoer should not enjoy the fruit of their wrong. This idea is to an extent reflected in international law in the general principle of *ex injuria jus non oritur*.[102] If considerations of stability intuitively push towards the restrictive view, considerations of justice of this type, on their face, tip the scale in favour of the permissive view. However, as this section shows, this is the case only if we adopt a statist perception of justice. An individualist account pushes us back, again, towards the restrictive view.

1 Statist Justice

One of the most powerful intuitions underpinning the permissive view stems from basic notions of corrective justice: it seems manifestly unjust that the right to self-defence would vanish simply because the aggressor succeeds in holding on to the territory for

[100] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts 1977, 1125 UNTS 3, Arts 48, 52(2).

[101] On corrective justice as referred to here, see Weinrib, 'Corrective Justice in a Nutshell', 52 *University of Toronto Law Journal* (2002) 39.

[102] See, e.g., H. Lauterpacht, *Recognition in International Law* (1947), at 420–426.

a long time. To Akande and Tzanakopoulos, this is even a doctrinal tie-breaker: ultimately, the permissive view should be preferred precisely because it would not favour the aggressor.[103] Arguably, the passage of time aggravates the injustice: other conditions being equal, it seems that, as the deprivation of an important right is prolonged, the harm to the victim state – being barred from enjoying that right – increases.[104] On top of this, assuming that the aggressor benefits from holding the territory, justice is further undermined by the passage of time since, as more time passes, the aggressor derives more enjoyment from its wrongdoing.

The restrictive position is at pains to respond to this argument. Ruys and Rodríguez Silvestre acknowledge that the restrictive view prefers peace (*qua* stability) over justice. Yet they argue that this tension is somewhat resolved since 'the mere fact that States cannot resort to armed force to undo internationally wrongful conduct of which they have been the victim should not be taken to imply that the wrongdoing State obtains an actual right, a legal entitlement, from its wrongful behavior'.[105] In this way, they reconcile between the restrictive view and the principle of *ex injuria jus non oritur*. However, it seems that here – as in its analogy with the domestic law on possession – the restrictive position suffers from an excessive reliance on 'law on the books'. While it is certainly true that prolonged occupation does not create title, it must be conceded that, more often than not, the victim state would have limited real-world, non-forcible options to recover its territories. It is hardly needed to repeat the structural weakness of international law's collective enforcement mechanisms, whether forcible or non-forcible.[106] While Russia's invasion of Ukraine met an impressive array of sanctions, this has not been the case in other cases of prolonged occupation,[107] and there are doubts regarding the effectiveness of these sanctions.[108] Arguably, leaving the victim state with unilateral, non-forcible countermeasures as the only available legal means to counter occupation of its territories hardly satisfies real-world notions of justice.

It seems, then, that, as long as our view of justice is between states as such, the permissive view on wars of recovery is strengthened. But, as we shall see, once considerations of individualist justice enter the fray, this changes markedly.

[103] Akande and Tzanakopoulos, *supra* note 1, at 1307; see also E. Lauterpacht, *Jerusalem and the Holy Places* (1968), at 46, cited in Shihata, *supra* note 19, at 600 (the fear is that the 'illegitimacy of the position thus established is sterilized by the prohibition upon the use of force to restore the lawful sovereign').

[104] Of course, this assumption is not absolute and follows the value we assign to territory. If we see territory as a 'regular' object, it could be said that, as time passes, the importance of the deprivation lessens.

[105] Ruys and Rodríguez Silvestre, 'Military Action', *supra* note 1, at 734.

[106] As evident in the recent pushback by some states against the International Law Commission's Draft Conclusions on *Jus Cogens*, as some powerful states were unwilling to acknowledge even the duty to co-operate to bring an end to violations of *jus cogens* (including aggression). See Y. Zhang, 'Summoning Solidarity through Sanctions: Time for More Business and Less Rhetoric', *Völkerrechtsblog* (2022), available at https://bit.ly/3R5WHFo.

[107] For such a critique, see R. Wilde, 'Hamster in a Wheel: International Law, Crisis, Exceptionalism, Whataboutery, Speaking Truth to Power, and Sociopathic, Racist Gaslighting', *Opinio Juris*, 17 March 2022, available at https://bit.ly/3AONlZz.

[108] See, e.g., N. Turak, 'Russia's Ruble Hit Its Strongest Level in 7 Years Despite Massive Sanctions. Here's Why', *CNBC*, 23 June 2022, available at https://cnb.cx/3QQd758.

2 Individualist Justice

As the previous section showed, arguments from corrective justice between states seem to vindicate the permissive view. The key problem in this account, however, lies precisely in its treatment of war as an instrument of justice between states, while glossing over its effects over individuals. War as an instrument of corrective justice can be discussed on at least two levels: as a means to ensure legal rights ('remedial wars') and as punishment for previous wrongdoing ('punitive wars'). Admittedly, 'wars of justice' are far from foreign to international legal thinking. Historically, enforcement of legal rights, remedying legal wrongs or punishing states that 'deserved' to be attacked were widely recognized as just causes for wars under natural law.[109] Even according to later, positivist approaches, wars (or lesser uses of force) could be perceived as valid sanctions against international delicts.[110] But this is no longer the case. In contemporary international law, the only permissible cause for war is self-defence. Resorts to force for remedial or punitive reasons, whether labelled as forcible reprisals or countermeasures, have been explicitly made illegal.[111]

International law's shunning of wars of justice arguably reflects a departure from a strict statist disposition – which views war as a valid legal sanction between sovereigns – to a more individualist perspective.[112] From an individualist point of view, wars as instruments of justice are problematic for several reasons. Most fundamentally, absent an otherwise valid defensive cause, wars of justice involve non-defensive killings, and, therefore, those targeted are not liable to be killed.[113] Moreover, as pointed out by David Luban, the enemy's soldiers intentionally killed in wars of punishment are usually not responsible for the wrongful conduct.[114] Even if they are somewhat morally responsible, it is certainly not in a manner that can be punishable by death, if such punishment could ever be justified. Now, if war is meant not as a form of retributivist punishment but, rather, as a remedial sanction meant to induce state compliance, the argument does not fare better: we are now using those killed merely as means.[115] To sum up this point, since wars of justice have been outlawed – and for good moral

[109] For a survey of these approaches, see Luban, 'War as Punishment', 39 *Philosophy & Public Affairs* (2012) 299, at 305–312; Ripstein, *supra* note 10, at 5–8.

[110] See generally Kelsen, *supra* note 79, at 25–44.

[111] International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10 (2001), Art. 41; Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), 24 October 1970, annex.

[112] It is true that it is also possible to object to 'wars of justice' from a statist perspective. As Ripstein argues, following Immanuel Kant, the key wrong in such wars is that one nation imposes its judgment on another and that no nation has a right to enter unilaterally into a condition where force, rather than words, decide. Ripstein, *supra* note 41, at 39. It is beyond the scope of this article to discuss this theory, beyond pointing out that if self-judgment is a grave wrong, then, supposedly, international law should also prohibit countermeasures and unilateral sanctions.

[113] See generally Tadros, 'Punitive Wars', in H. Frowe and G. Lang (eds), *How We Fight: Ethics in War* (2014) 18; see also Fabre, *supra* note 6, at 259.

[114] Luban, *supra* note 109, at 305.

[115] See 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* (2020) 41, at 54.

reasons – injecting considerations of justice such as the principle of *ex injuria jus non oritur* into the proper interpretation of self-defence reintroduces into *jus ad bellum* considerations that have been expressly excluded.

Furthermore, once we shift from the statist view towards a more individualist perception of justice, the passage of time – which is, recall, the defining characteristic of wars of recovery – plays a different role. If, on the statist view, time aggravates the injustice of the deprivation of the territory, from an individualist perspective – conversely – it seems that, as time passes, relying on justice considerations to justify resort to war becomes more problematic. To the extent that the level of responsibility of the aggressor's soldiers plays any role in our ability to justify war, in a war of recovery the aggressor's soldiers stationed now in the territory – those that would be killed and maimed by our decision – are further removed from those that have participated in the actual fighting that led to the occupation. Even if they bear some responsibility for maintaining the situation, it is probably smaller than that of those who took part in the initial aggression.[116] Granted, it might be true that, also from an individualist perspective, the passage of time can aggravate injustice if we consider the harm caused by the occupation to individuals in the non-occupied part of the victim state (at least if we assume that they would have derived some enjoyment from the territory). But to argue that such harm in itself would justify resort to force would require lifting a heavy burden of justification.[117]

In sum, like considerations of stability, considerations of justice are not determinative regarding the question of wars of recovery, mainly because statist and individualist perceptions of justice pull us in opposing directions. From a statist point of view, justice seems to push towards the permissive view: the passage of time increases interstate injustice. From an individualist perspective, however, wars of recovery are problematic to begin with, and the passage of time only exacerbates these problems because it seems to reduce individual responsibility. Setting aside stability and justice, we are confronted by a core question: what commitments are required to believe that wars of recovery are defensive?

B *Justifications for Killing*

In all wars of self-defence, even if fought perfectly legally under *jus in bello*, combatants are attacked and killed, and incidental harm is caused to civilians. In the context of wars of recovery, this gives rise to a normative question of paramount importance: can killings committed when embarking on such wars be properly considered defensive? Specifically, the question is whether it could be justified to kill people strictly to recover territory and, moreover, after a relatively peaceful status quo has been established.[118]

[116] I do not presume here to address the entire complexity of the relations between time and responsibility. See, e.g., Campos, 'Intergenerational Justice Today', 13 *Philosophy Compass* (2018).

[117] On aggregation of harm, see note 146 below. Recall that, for our purpose, we assume that the rights of individuals in the territory controlled by the aggressor are not significantly infringed.

[118] Granted, war causes societal harm much wider than the direct intentional and incidental killing it entails. This problem ties into a broader question relating to the content of proportionality under *jus ad bellum* in both law and ethics as well as its relations to *jus in bello* proportionality. This is beyond the scope of this article. For a discussion of these issues, see Lieblich, *supra* note 115.

In international legal terms, the question can be phrased as one relating to the content of the necessity requirement for self-defence: should it ultimately be a statist concept, alluding simply to the necessity to defend territorial rights, or, rather, an individualist notion, pertaining to what is necessary to defend individual rights? If territorial integrity is the ultimate subject of defence, the permissive view is on firm ground. If individual rights are at the centre of self-defence, however, the restrictive position is *prima facie* strengthened. Moreover, as is shown in section 4.C, even if there is a way, under an individualist approach, to justify killing in wars of recovery, it can be countered by considerations relating to the justifications required to sacrifice life while doing so.

This section first shows that, on the statist tradition of international law, justifications for killing are not the concern of *jus ad bellum*, which is perceived as dealing with state rights. Since, among these rights, utmost importance is attributed to territorial integrity, the mere passage of time would not lead to the diminishment of the right to self-defence. However, on an individualist view – which has permeated both ethics and, in recent years, international law – it is exceedingly hard to justify killing to recover territory, especially as time passes. As this section shows, in contemporary ethics of war, one suggested way to reconcile between killing in defence of territory and killing in defence of life is by viewing long-term occupation of territory as a conditional threat against the lives of those that would seek to recover it. This, in turn, can inform the interpretation of justifications for killing under international law. Yet the conditional threat argument raises questions concerning the justifications for sacrificing lives, which are addressed in section 4.C.

1 Statist Tradition

The permissive view can derive some support from the statist assumptions underpinning self-defence in traditional international law. The latter generally sidesteps the normative question relating to the justification for killing by framing *jus ad bellum* as primarily concerned with state rights rather than with the rights of individual victims of war.[119] On this view, questions of killing are strictly confined to the realm of *jus in bello*, under which killing combatants, and incidentally (but proportionally) harming civilians, is considered lawful.[120] Furthermore, within the understanding of state rights, 'territory' is assigned supreme importance, the protection of which per se necessitates forcible self-defence. Recently, the centrality of this idea was reflected, for instance, in Western officials' frequent emphasis that the allies will defend, against possible Russian aggression, 'every inch of NATO *territory*' – not the lives of NATO's soldiers or civilians.[121]

[119] On the traditional view regarding aggression, see T. Dannenbaum, *The Crime of Aggression, Humanity, and the Soldier* (2018), at 70–77; Fabre and Lazar, 'Introduction', in Fabre and Lazar, *supra* note 6, at 1.

[120] For a view of *jus in bello* as providing legal permissions, see, e.g., Schmitt and Watts, 'The Decline of International Humanitarian Law *Opinio Juris* and the Law of Cyber Warfare', 50 *Texas International Law Journal* (2015) 189.

[121] See, e.g., D. Vergun, 'Allies Will Protect, Defend Every Inch of NATO Territory, Says Secretary General', *US Department of Defense*, 3 March 2022, available at https://bit.ly/3QSfEvw (emphasis added).

But why is territory deemed so important in international law? Arguably, this has much to do with the anthropomorphization of states in traditional international legal thinking. A foundational idea in international law – which can be found in the writings of thinkers from Francisco de Vitoria to Thomas Hobbes – draws a rough analogy, in the international sphere, between the state and an individual.[122] From this analogy, in turn, 'fundamental rights and duties of states' are drawn.[123] In modern times, this idea is manifested in the famous *Lotus* principle, which constructs the state as a private person by assigning to sovereignty the characteristics of individual liberty.[124] Often, the individual analogy goes a step further towards a quasi-corporeal view of the state. On this view, the state has both a soul – manifested in its sovereignty– and physical aspects, such as territory, which are akin either to its body or at least to an object of existential importance.[125] The upshot is that, when a state suffers an assault on its territorial integrity, this can be analogized to 'an individual's confronting a wrongful threat to life or limb'.[126]

These analogies can certainly seem anachronistic, and few nowadays would use such terms explicitly. A more modern incarnation jettisons the corporeal analogy, while maintaining the view of the state's singular character. Thus, Michael Walzer views the state as possessing unique moral worth as a guarantor of the 'common life' of the community. Territory, within this view, is the necessary space for this common life to exist.[127] The state's unique moral worth leads to permissions to use force – for example, in defence of territory – that cannot be reducible to what would be permitted for individual people in domestic settings.[128] Such analogies must still be central, even if implicit, to international law since, without them – and absent an alternative theory – it is extremely difficult to explain why territory as such can be defended by force.[129] Indeed, it is still taken for granted in international law that a state can

[122] See Dickinson, 'Analogy between Natural Persons and International Persons in the Law of Nations', 26 *Yale Law Journal* (1916–1917) 564, at 566–570 (surveying this analogy in early international law); see, e.g., T. Hobbes, *Hobbes: Leviathan*, edited by R. Tuck, rev. student ed. (1996), at 156 (commonwealths once instituted take on the personal qualities of men); compare the Kantian view in Ripstein, *supra* note 10, at 38–40.

[123] See generally Dickinson, *supra* note 122.

[124] See *Case of the S.S. Lotus (France v. Turkey)* PCIJ 1927, Series A, No. 10. For a critique, see Waldron, 'The Rule of International Law', 30 *Harvard Journal of Law and Public Policy* (2006) 15, at 20–26.

[125] See Hobbes, *supra* note 122, at 9 (a state 'is but an Artificiall Man … in which, the Sovereignty is an Artificiall Soul, as giving life and motion to the whole body'). Even those critical of the individual analogy referred to territory as an 'element essential to the existence of an international person'. Dickinson, *supra* note 122, at 584; compare Ripstein, *supra* note 10, at 59–63 (criticizing the view of territory as either body or territory in favour of the view that it is the space where legal jurisdiction exists).

[126] McMahan, *supra* note 14, at 118. It should be added that many who made the individual analogy viewed territory as akin to property. See Dickinson, *supra* note 122, at 577–578. However, this would raise the question, discussed below, as to why self-defence to recover territory *qua* property can be justified.

[127] M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (5th edn, 2015), at 56–57.

[128] For a recent articulation of traditional views, see Benbaji, 'Distributive Justice, Human Rights, and Territorial Integrity: A Contractarian Account of the Crime of Aggression', in Fabre and Lazar, *supra* note 6, at 159.

[129] The centrality of loss of territory to the concept of necessity is exemplified in Greenwood's view that '[t]he fact that the attacking State offers to cease its attack does not render the use of force unnecessary if, for example, the attacking State would thereby be left in occupation of part of the victim State's territory'. C. Greenwood, 'Self-Defence', in *Max Planck Encyclopedias of International Law* (2011), para. 27, available at https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e401.

resist an ongoing invasion by force, even if the stated goal of the aggressor is 'merely' territorial gain.[130] Likewise, aggression is defined as the use of armed force not only against the sovereignty or political independence of a state but also against its territorial integrity.[131]

Returning to the specific question of wars of recovery, these mostly add to the equation the passage of time since the territory was initially occupied. Now, if the state's territory is analogized to its limb, or otherwise possesses unique moral worth essential for the common life of the community, there is obviously necessity for self-defence for as long as it is held. Since the state is the point of imputation of rights, the fact that there are no ongoing hostilities within the occupied territory is inconsequential. Furthermore, the passage of time, on this view, cannot play a mitigating role but is an aggravating factor. If holding territory is comparable to an infringement of bodily autonomy or an equally important right, the passage of time clearly strengthens the necessity of self-defence: a long-term deprivation of such important rights is obviously more harmful than a short-term one. In sum, if we adopt the traditional statist view of territory, the permissive approach is conceptually and theoretically sound. The problem is, however, that this view has been undermined significantly in contemporary moral thought, and this, in turn, has also begun to trickle into legal doctrine.

2 Individualist Revisionism: Territory as a Lesser Interest

The reason that our intuitions on wars of recovery might pull us away from the traditional account is that its analogies – while, indeed, common in legal thought – are by no means unassailable. Accordingly, in the last two decades or so, 'revisionist' just war theorists have increasingly challenged the basic premises of traditionalism: mainly, for our purposes, its analogy between states and individuals; its view that states have transcendental moral value; and the idea that wars are not subjected to the same moral rules that apply in everyday interactions.[132] More recently, this has led revisionists to question the normative basis for treating the defence of national territory as such as something that justifies killing people.[133] Although little of this vibrant philosophical debate has found its way into international law, one of its basic premises – the unease with a strictly statist view of *jus ad bellum* – has begun to resonate. Significant work has called into question in recent years the view of aggression as a strictly interstate crime rather than a crime against individuals.[134] Additionally, some contemporary developments in legal doctrine challenge the bifurcation between *jus ad bellum* and individual rights. Most notably, in 2018, the Human Rights Committee's General Comment 36

[130] See e.g., Henderson, *supra* note 38, at 212.
[131] GA Res. 3314 (XXIX), 14 December 1974.
[132] For an outline of the debate, see Lazar and Frowe, 'The Ethics of War', in S. Lazar and H. Frowe (eds), *Oxford Handbook of the Ethics of War* (2018) 1.
[133] See generally Lazar, 'National Defense, Self-Defence, and the Problem of Political Aggression', in Fabre and Lazar, *supra* note 6, at 11.
[134] Dannenbaum, *supra* note 119 at 77–79; Jackson and Akande, 'The Right to Life and the *Jus ad Bellum*: Belligerent Equality and the Duty to Prosecute Acts of Aggression', 71 *International and Comparative Law Quarterly* (2022) 453.

opined that all killings that result from an act of aggression are *ipso facto* violations of the right to life, even if they might be legal under *jus in bello*.[135] In the context of the Russian invasion of Ukraine, some have argued for the recognition of defending combatants as victims of human rights violations.[136] Yet these developments have not addressed directly how an individualist view of *jus ad bellum* should affect the legality of territorial defence – both generally and in situations of wars of recovery.[137]

The ethical conundrum on territorial defence is this: wars in defence of territory involve intentional and incidental killings. Usually, however, we think that killing would be proportionate only if necessary to protect vital interests – namely, life and limb (and, perhaps, what we need to lead a 'minimally decent life').[138] Unless we ascribe to national territory transcendental characteristics – which, of course, revisionists reject – it is unclear why territory as such constitutes such an interest.[139] Thus, killing in defence of territorial integrity, if not connected to the immediate protection of life, seems to be morally disproportionate.[140] If true, this has astounding consequences for the morality of positive international law on self-defence. This problem has therefore led to much preoccupation with what philosophers call 'lesser', 'political' or 'bloodless' aggressions or invasions – meaning, aggressions aimed against loosely defined political rather than vital interests.[141] In such cases, the aggressor seeks to control a state's political apparatus or to grab its territory but will only resort to killing if encountering active resistance.[142] Such aggression is contrasted by philosophers with murderous or 'genocidal' aggression, in which killing soldiers or eliminating the local population is a key objective.[143]

Philosophers of war have responded to this problem in several ways. Some, such as David Rodin, have argued that the right to self-defence against bloodless invasions must be predicated on 'myth' since there can be no justification for killing to secure rights or interests that are lexically inferior to the right to life. Accordingly, he called

[135] Human Rights Committee, General Comment no. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, UN. Doc. CCPR/C/GC/36, 30 October 2018, para. 70. This reasoning was applied by at least one United Nations (UN) special rapporteur. See Human Rights Council, Report of the Special Rapporteur on Extrajudicial, Summary of Arbitrary Executions, UN Doc. A/HRC/44/38, 29 June 2020, Annex, para. 81; see also ECtHR, *Georgia v. Russia (II)*, Appl. no. 38263/08, Judgment of 21 January 2021, paras 26–31, Concurring Opinion of Judge Keller. This is also noted by Ruys and Rodríguez Silvestre, 'Military Action', *supra* note 1, at 736.

[136] R. Goodman and K. Harper, 'Toward a Better Accounting of the Human Toll in Putin's War of Aggression', *Just Security*, 24 May 2022, available at https://bit.ly/3wuWUKG; E. Lieblich, 'Not Far Enough: The European Court of Human Rights' Interim Measures on Ukraine', *Just Security*, 7 March 2022, available at https://bit.ly/3QRgOYl.

[137] For a recent contribution that engages human rights and self-defence, see F. Mégret, 'To Surrender or to Fight On? A Human Rights Perspective on Self-Defense', *Jus Cogens* (2022).

[138] Renzo, *supra* note 11, at 718.

[139] In this context, rather than an organic character, some have ascribed to territory characteristics closer to property. See Stilz, *supra* note 16, at 204–206.

[140] McMahan, *supra* note 14, at 126.

[141] See Lazar, *supra* note 133, at 13–14; McMahan, *supra* note 14, at 126–131.

[142] As put by McMahan, lesser aggressors are 'motivated by ends that do not require killing … or even physically harming anyone'. McMahan, *supra* note 14, at 117.

[143] Rodin, *supra* note 96, at 75.

for a radical change in our understanding of international law to permit self-defence only against genocidal aggressions.[144] Others have been more wary of destabilizing the long-standing consensus on territorial defence in international law, leading them to question the purely individualist account of war.[145] Still others have deployed sophisticated reasoning to claim that threats to territory are not really against less-vital interests – for example, by arguing that lesser harms to a vast number of people aggregate into a greater harm that justifies lethal response[146] or by linking territorial defence with political self-determination as a vital interest.[147]

Each one of these responses raises further questions, and, of course, we cannot exhaust the debate here. As the next section shows, in this context, one especially promising way out attempts to reconcile the defence of territory and life by constructing territorial defence as the defence of life against a conditional threat. For now, however, it suffices for our purpose to point out that, while the ethical problem concerning the moral worth of territory applies to any case of territorial defence, wars of recovery put it into its sharpest relief. Perhaps, even, wars of recovery provide the most realistic case of this dilemma.[148] This is because in usual, real-life cases of territorial defence – think of the invasion of Ukraine as a paradigmatic example – the aggressor attacks through the ongoing use of kinetic weapons, killing many combatants and civilians (whether incidentally or intentionally), either as a means to achieve a political goal or as an end in itself. Although there is always room for speculation whether the violence would stop should the victim choose to surrender, it is much easier in such usual scenarios to reconcile territorial self-defence with the immediate defence of life.[149] In wars of recovery, conversely, it is the defender that is initiating the fighting at that specific moment, with no direct threat to life posed by the aggressor. In such cases, the protection of territory and the defence of life – the non-vital and the vital interests – become disentangled.

The normative effect of the passage of time, on this approach, strengthens the restrictive position. It is not – as the permissive approach alleges that the restrictive approach implies – that time alone somehow dilutes the victim's title. Rather, as more time passes after hostilities subside, it becomes clearer that killings have indeed stopped and, other things being equal, less likely that, absent further intervention, they will be renewed. The passage of time serves as a proxy for the likelihood of violence and thus contributes to the severance of the vital and lesser interests. While it is impossible to know the aggressor's full intentions during the active hostilities stage, as more time

[144] See generally *ibid*.

[145] Lazar, *supra* note 133, at 20–21, 35–39.

[146] Frowe, 'Can Reductive Individualists Allow Defence against Political Aggression?', in P. Vallentyne, S. Wall and D. Sobel (eds), 1 *Oxford Studies in Political Philosophy* (2015) 173, at 187; Emertion and Handfield, 'Understanding the Political Defensive Privilege', in Fabre and Lazar, *supra* note 6, at 40. For critiques of the aggregation argument, see Lazar, *supra* note 133, at 32–33.

[147] Renzo, *supra* note 11. Note, however, that Renzo defends this view 'only to the extent that retaining control over its territory or its culture is instrumental to, or constitutive of, V's capacity to exercise political self-determination', a question towards which he is explicitly agnostic. *Ibid.*, at 713.

[148] For a discussion of the critique that the bloodless invasion scenario is purely hypothetical and is thus not worthwhile, see Lazar, *supra* note 133, at 22–24.

[149] On surrender and human rights, see Mégret, *supra* note 137.

passes without hostilities it is easier to say in confidence that the 'more terrible harms' of war 'can be avoided altogether if the victims choose not to fight'.[150]

It is also arguable that, as years pass, it is easier to conceive the loss of a specific part of the territory as a 'political' loss to most of the citizens of the rump state rather than anything that resembles a vital interest. This is not to deny the strong nationalist attachment people might have for long-lost territory. It only reveals that, as time passes, it becomes harder to make a clear connection between territory and a vital interest of the type that can justify killing and maiming.[151] As put by Anna Stilz, the importance of territory, on an individualist view, is grounded in people's 'located life-plans'.[152] Whether this value alone can justify killings is beyond the scope of this article. To the extent that it is, however, it is less plausible that, as years pass, territory continues to play such a role for individuals in the rump territory.[153] Granted, a minority of philosophers argue that killing to protect less-than-vital interests, such as territory, can be permissible if the person is culpable for the threat. Yet, even on this view, levels of culpability play a role in the analysis.[154] To begin with, the level of culpability of aggressing soldiers is a debatable question in the ethics of war.[155] Nonetheless, as was previously discussed in relation to justice considerations, even if we assume that soldiers are culpable for participating in aggression, and even if we assume that this level of culpability makes them liable to killing, it seems that the culpability of soldiers positioned in the occupied territory today is much lower than of those participating in the initial aggression.

Indeed, the moral dilemma of wars of recovery is captured neatly by the methodological individualism of revisionist just war theory, and the allusion to statist perceptions of territorial integrity under international law simply cannot lift this normative burden. Killing and maiming for 'pure' defence of territory is hard to justify as is, but the task only becomes more difficult as time passes since active hostilities ended.

3 Individualist Revisionism: Conditional Threats

The previous section demonstrated the case against wars of recovery from an individualist perspective. However, in fact, it turns out that the permissive approach can also find support in individualist revisionism, and, moreover, support that is not weakened by the passage of time. Some revisionists attempt to reconcile defence of territory with defence of life by conceiving lesser aggressions as conditional threats. Conditional threats are two staged: the aggressor issues a direct threat against the victim's lesser interest, backed by a contingent threat to the vital interest. The classic example is a street mugging: A demands of B to suffer a lesser harm (your money!),

[150] McMahan, *supra* note 14, at 127.

[151] Recall, we are not dealing with situations in which the occupant deported people and 'return' is considered. We are dealing with the rights and interests of the people in the rump territory.

[152] Stilz, *supra* note 16, at 209.

[153] Note that, as part of our hypothetical, we assume that the occupant has not displaced people from the occupied territory, so the question of return, passage of time or the role of force in this context does not arise. See generally Tadros, 'Inheriting the Right of Return', 21 *Theoretical Inquiries in Law* (2020) 343.

[154] On this view, see Lazar, *supra* note 133, at 15–16.

[155] McMahan, *supra* note 14, at 128.

under the threat that resistance or failure to comply will generate a much greater harm (or your life!).[156] Conceptualizing lesser aggressions in this manner has allowed philosophers to justify defence of territory not as such but, rather, as a defence against a conditioned threat against individuals. Territorial defence is simply reframed as a defence against the aggressor's actual or imminent lethal response to the defender's attempt to resist its invasion.[157]

Wars of recovery can easily be conceptualized as responses to conditional threats. State A took the territory by force and now demands that State B suffer the loss of its territory under the threat that any attempt to recover it would result in a lethal response through the resumption of hostilities. If B sends its troops into its territory to reassert its control, it is clear for all practical purposes that A would attack them, whether or not B's troops open fire first.[158] On this view, recourse to force to recover occupied territory could be justified precisely because of the anticipation of the aggressor's deadly response.[159]

The conditional threat argument is quite powerful in its ability to recalibrate territorial defence as defence of life, including in situations of wars of recovery. Intuitively, many would think that there is nothing glaringly wrongful in attempts to counter a conditional threat and that an innocent person should not be blameworthy – or, at least, not in a manner that would justify legal liability – for whatever takes place if the wrongdoer decides to carry out their threat if resisted. It is true that there are reservations in moral theory about resistance to conditional threats in terms of their escalatory potential.[160] It seems reasonable that, if a mugger threatens me and demands 10 dollars, I should comply and disengage rather than resist and lead to an escalation at the end of which I kill them.[161] However, it is doubtful whether the same logic applies in wars of recovery: territory, even if considered a 'less vital interest', is not of negligible worth, and the aggressor is not a random street mugger from which complete disengagement is possible. Most importantly, the mere passage of time does not change the conditional threat analysis because time does not alleviate the indirect threat in any meaningful way. When territory is continuously occupied, the conditional threat is ever-present; in a sense, it constitutes the holding of the territory.

[156] Rodin, *supra* note 96, at 76; Lazar, *supra* note 133, at 24; Hurka, 'Proportionality in the Morality of War', 33 *Philosophy and Public Affairs* (2005) 34, at 54–55; McMahan, *supra* note 14, at 146–152; Bazargan-Forward, 'Dignity, Self-Respect, and Bloodless Invasions', in B.J. Strawser, R. Jenkins and M. Robillard (eds), *Who Should Die? The Ethics of Killing in War* (2017) 142.

[157] See, e.g., Fabre, 'Cosmopolitanism and Wars of Self-Defence', in Fabre and Lazar, *supra* note 6, 90, at 99; Dannenbaum, *supra* note 119, at 104–105.

[158] For the complications of this argument, see Lazar, *supra* note 133, at 26–31.

[159] McMahan, *supra* note 14, at 147–148.

[160] This dilemma is behind the controversy behind 'stand your ground' laws in criminal law. See Ward, 'Stand Your Ground and Self-Defense', 42 *American Journal of Criminal Law* (2015) 89.

[161] See McMahan, *supra* note 14, at 147ff. Some point out that, when response to a conditional threat causes harm to innocent third parties beyond the attacker (that is, the enemy's civilians), this might push the weight towards refraining from defence. See Mapel, 'National Defense and Political Independence', in Lazar and Frowe, *supra* note 132, 204, at 204.

In sum, the conditional threat argument seems to provide a compelling way to anchor the permissive view on individual rather than state rights. It furthermore enjoys a significant 'fit' with the traditional statist assumptions of positive international law on territorial defence.[162] However, this is true only at first glance since the normative debate does not end with the possible justifications of killing. The question of sacrifice also must be considered.

C *Justifications for Sacrifice*

The conditional threat argument might explain how killing in defence of territory can be reconciled with individualist morality and, therefore, why the permissive approach can be justified not only on statist grounds but also in individualist terms. However, when leaders decide to challenge the aggressor in a war of recovery, they choose to occasion harm to others – meaning, their own soldiers and civilians.[163] The question is therefore whether morality and international law indeed grant a carte blanche for such sacrifices, even if we assume that killings in wars of recovery are otherwise permissible. At the end of the day, the possible justification for sacrifice is another arena where statist and individualist approaches lead us in different ways. While international law's statist tradition militates towards disregarding these considerations in the context of *jus ad bellum*, this cannot be true when adopting an individualist approach, under which the sacrifice of lives cannot be simply set aside. On this view, the effects of decisions to resort to force on a state's own soldiers and citizens must be a central consideration.

1 Statist Tradition

As is the case regarding the discussion of killing, a traditional, statist view militates in favour of the permissive approach: indeed, positive *jus ad bellum* largely holds that, once there is a valid cause for self-defence, the anticipated harm to the defending state or its own people is excluded from the analysis.[164] Accordingly, proportionality under the traditional law on the use of force refers to what is required to halt and repel an armed attack, not to a universal harms-benefit calculus.[165] As put by Frédéric Mégret, contemporary *jus ad bellum* is 'other-regarding' in the sense that it only encompasses harm to others.[166] On this view, for a war of recovery to be proportionate, it suffices that the force does not exceed what is necessary to oust the aggressor from the territory.[167] Theoretically, the exclusion of considerations of sacrifice from decisions on resort to force could be predicated either on the traditional jurisprudential view of states as the only valid subjects of international law – and, relatedly, that issues of *jus ad bellum* implicate state rights only; –or, alternatively, on

[162] See R. Dworkin, *Law's Empire* (1986), at 67–68.
[163] On occasioning harm, see H.L.A. Hart and T. Honoré, *Causation in the Law* (2nd edn, 1985), at 194–204.
[164] Mégret, *supra* note 137, at 5–6.
[165] See Lieblich, *supra* note 136.
[166] Mégret, *supra* note 137, at 6.
[167] On *jus ad bellum* proportionality in general, see Kretzmer, *supra* note 38.

the view that decisions about sacrifices are 'reasons of state', relegated to the political realm of each society.[168]

Be that as it may, the passage of time, under this approach, is immaterial: if harm to a state's own people, occasioned by a decision to go to war, is excluded from international law to begin with, the fact that time has passed since the territory was lost does not alter the situation. Considerations that are categorically excluded from the calculus in T1 cannot magically reappear in T2. Yet, while still central in international legal thinking, the assumptions that underlie the exclusion of the question of sacrifice from international law can no longer be taken for granted.

2 Individualist Revisionism

Recall that, under individualist assumptions, the most promising way to justify resort to force in wars of recovery is through the conditional threat paradigm. However, philosophers have levelled significant critiques against this move. If not in relation to the killing of others, they have pointed out the moral problems when occasioning harm to the state's own people when resisting such a threat. In just war theory – and as opposed to positive *jus ad bellum* –proportionality requires considering not only the harm to the enemy (discussed in this article under the justifications for killing) but also the harm to a state's own people if it decides to go to war.[169] As Henry Shue argues, taking proportionality seriously must require taking such harms into account.[170] When such a holistic view of proportionality is applied, resisting a direct threat to a 'lesser' interest, if we foresee that the aggressor would harm vital interests in response, might be disproportionate.[171] For this reason, Rodin argues that a conditional threat in itself can never justify national self-defence. As he claims, although the harms to vital interests in such cases are mediated by the aggressor's agency – and mediated harms are usually discounted when analysing proportionality – this is offset by the special duty of care that a state owes to its own people. This duty is violated when the state occasions harm to their vital interests in order to defend territorial integrity.[172] To Rodin, then, since it is impossible to justify such a sacrifice in individualist terms, the conditional threat argument collapses into the same transcendental analogies of the state to which revisionists object.[173]

Some, within the individualist school, have questioned this conclusion. Jeff McMahan claims that, if the local population supports the response against the conditional threat, the problem might be mitigated.[174] Helen Frowe argues that the harms mediated by the aggressor's response should be heavily discounted when considering the proportionality of defence, while rejecting that special duties of care are pertinent

[168] On reason of state and its critique, see Lauterpacht, 'The Grotian Tradition in International Law', 23 *British Year Book of International Law* (1946) 1, at 30–35.

[169] McMahan, *supra* note 14, at 124–125.

[170] See generally Shue, 'Last Resort and Proportionality', in Lazar and Frowe, *supra* note 132, at 260.

[171] McMahan, *supra* note 14, at 148–149.

[172] While Rodin acknowledges that deterrence considerations should push towards allowing self-defence against conditional threats, these benefits are distant and uncertain and should accordingly be discounted. Rodin, *supra* note 96, at 80–87.

[173] *Ibid.*, at 88.

[174] McMahan, *supra* note 14, at 130.

to this analysis.[175] Saba Bazargan-Forward suggests that conditional threats in the context of a so-called 'bloodless invasion' do not violate lesser 'political' interests but, typically, 'our interests in retaining the capability of living recognizably meaningful lives'.[176]

Be that as it may, it is clear that, under any credible individualist approach, the question of sacrifice cannot be simply disregarded – as the statist position implies – even if one would make an argument that they can be overridden. Now, if we agree that the issue of sacrifice must be considered in any way in terms of proportionality, does the passage of time, in the context of wars of recovery, play a normative role in such an analysis? In other words, are wars of recovery different from 'regular' cases of territorial defence when it comes to the justifications for sacrifice? It seems that the effects of time here are similar to those that apply regarding killing: the passage of time further disentangles the protection of territory and protection of life, and, if defence of life is the only justification to kill, it would be difficult to justify sacrificing lives for anything lesser.[177] Furthermore, as is the case concerning killing, the political nature of the loss of the territory is more clearly pronounced as time passes. It seems less justifiable for a state to sacrifice its own people for the sake of territory that no longer plays a prominent role in their 'located life-plans'.

Interestingly, while traditionalist thinking confines such considerations strictly to the realm of ethics, considerations of sacrifice are in fact making some strides in international law. We have already seen the burgeoning recognition that *jus ad bellum* indeed implicates individual rights. Especially pertinent for the question of sacrifice is the Human Rights Committee's view, in General Comment 36, that 'states that fail to take all reasonable measures to settle their international disputes by peaceful means might fall short of complying with their positive obligation to ensure the right to life'.[178] On the basis of General Comment 36, some argue that waging an illegal or otherwise unnecessary war can violate the human rights of the state's own population.[179] Admittedly, the entry of considerations of sacrifice into international law is a nascent development, and its scope and implications are very far from clear. Crucially, arguments that unnecessary wars may violate the rights of a state's own people do not alone grant content to the necessity standard of self-defence, leaving open the question whether necessity implies statist defence of territory or individualist defence of life. Yet the recognition that the question of sacrifice might play a role in international law puts pressure on the statist assumptions underlying *jus ad bellum*. To the extent that human rights discourse would continue to develop in this direction, the

[175] See Frowe, *supra* note 146.

[176] Bazargan-Forward, *supra* note 156, at 145. Note, however, that our scenario presupposes a 'benevolent' occupant.

[177] See also Mégret, *supra* note 137, at 12.

[178] See also Mégret and Redaelli, 'The Crime of Aggression as a Violation of the Rights of One's Own Population', 9 *Journal on the Use of Force and International Law* (2022) 99.

[179] *Ibid.*; see also Lieblich, 'The Humanization of *Jus ad Bellum*: Prospects and Perils', 32 *EJIL* (2021) 579, at 606–611. Recently, and in the context of the Russian invasion of Ukraine, Frédéric Mégret has directly raised the question whether international human rights law can entrench a duty to end wars of self-defence even at the cost of accepting territorial losses. See Mégret, *supra* note 137.

unease with wars of recovery will become more and more accentuated, and those embarking on them would face a heavier burden of justification.

5 Conclusion

On Joseph Raz's influential account, law is authoritative when, if we follow it, we will be more likely to act in accordance with the reasons applying to us than if we had acted on our independent judgement.[180] In simple terms, law fulfils its role if it guides us towards moral behaviour.[181] But to assess whether law is successful in doing so, we need a general account of what would be morally right. As this article has revealed, the question of wars of recovery exacerbates unresolved ethical problems concerning the justification of self-defence and the value of territory. These, in turn, diminish law's authority, regardless of the position we take.

Indeed, the tension is not only a moral one, but – unsurprisingly – one that permeates into the legal system. In the context of wars of recovery, the specific difficulty stems from the fact that, in interpreting the notion of 'necessity' under self-defence, two competing constitutive principles of the international legal system – territorial integrity and individual rights – pull us in two opposing directions, which call for different justifications. As long as this is so, each of the positions on wars of recovery undermines the other not only in moral terms but also from within law itself. On Ronald Dworkin's view, a rule loses its integrity when it cannot be connected to other rules by an underlying general principle,[182] and, as Thomas Franck argued, such normative incoherence damages a rule's legitimacy.[183] This seems to be precisely the problem of the current debate on wars of recovery. Because of the underlying conflicting principles, both positions do not seem legitimate enough to be authoritative.

Therefore, in order to decide on the desirable solution to the problem of wars of recovery, we need an argument on why primacy should be given to either a statist or individualist approach to self-defence or, at least, a credible way to reconcile between them. On the most immediate level, the conclusion of this article is therefore a simple one: international lawyers engaging in the debate regarding wars of recovery should be reflective and explicit on the underlying principles that they are following.[184]

Nonetheless, it should be conceded that this irresolution is unlikely to disappear in international law since it is one of its most fundamental tensions. Perhaps, then, one way forward is to be open to non-binary concepts that go beyond legal/illegal

[180] J. Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (2009), at 136–137.
[181] Compare Haque, *supra* note 3, at 44–46.
[182] See R. Dworkin, *Law's Empire* (1986), at 220–221; see also Franck, 'Legitimacy in the International System', 82 *AJIL* (1988) 705, at 741.
[183] Franck, *supra* note 182.
[184] Compare Dworkin, 'The Model of Rules', 35 *Chicago Law Review* (1967) 14, at 15. Because there is a dialectical relation between our assessment of law and morality, this also requires more recognition and engagement with ethical costs and benefits of these principles. Indeed, although it might be possible to separate between law and morality analytically, the two are both part of our normative world and thus affect each other. For a legal realist take, see, e.g., Morgenthau, 'Positivism, Functionalism, and International Law', 34 *AJIL* (1940) 260, at 268.

dichotomies. Acknowledging that the question of wars of recovery lacks an authoritative answer, Ruys and Rodríguez Silvestre lament that there is no room for compromise, no 'middle ground' between the competing views.[185] However, this might not necessarily be the case. Importantly, even if, ultimately, the permissive position will prevail in terms of positive law, this should not be the end of normative inquiry. This is because any possible individualist reason against wars of recovery would 'continue to exist in the background', even if, in positive law, statist considerations would override them.[186] In John Gardner's terms, it could be said that, in such a case, wars of recovery would remain *prima facie* wrongs in the sense that, even if they were considered 'legal', they still 'leave a remainder of conflicting reasons that were, regrettably, not conformed to'.[187]

In my view, even if a category of acts – such as wars of recovery – can find some doctrinal grounding, in cases where the underlying law is normatively unstable and is undermined by strong, competing reasons against acting, we should embrace non-binary legal concepts that reflect law's normative instability. One possible way to do so would be to view wars of recovery at most as non-prohibited.[188] As Judge Bruno Simma observed in the ICJ's advisory opinion in *Kosovo*, a lack of a clear prohibition does not necessarily entail full permissibility because the absence of an express prohibition does not always '[carry] with it the same colour of legality'; rather, there are 'possible degrees of non-prohibition, ranging from "tolerated" to "permissible" to "desirable"'.[189] Accordingly, Judge Simma called for the recognition of a non-binary legal concept of toleration, which breaks from the binary understanding of permission/prohibition and which allows for a range of non-prohibited options. That an act might be 'tolerated' would not necessarily mean that it is 'legal' but, rather, that it is 'not illegal'.[190]

The legal debate on wars of recovery is likely to continue as long as international law oscillates between statism and individualism. However, even if the former gained the upper hand, non-binary concepts of non-prohibition or toleration could open up space for contestation of wars of recovery, in specific instances, as 'legal but illegitimate' – to paraphrase, by inversion, the famous words of the Independent International Commission on Kosovo.[191]

[185] Ruys and Rodriguez Silvestre, 'Military Action', *supra* note 1, at 732–733.

[186] See Paddeu, 'Military Assistance on Request and General Reasons against Force: Consent as a Defence to the Prohibition of Force', 7 *Journal on the Use of Force and International Law* (2020) 227, at 235–236, building on J. Gardner, *Fletcher on Offences and Defences' Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (2007), at 144.

[187] Gardner, *supra* note 186, at 145, cited in Paddeu, *supra* note 186, at 236.

[188] In another context, see Haque, *supra* note 3, at 32. Another way in which to understand non-prohibitions is through the Razian concept of 'weak permissions'. See *ibid.*, at 32, citing J. Raz, *Practical Reasons and Norms* (1999), at 86.

[189] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Reports (2010) 403, Declaration of Judge Simma, para. 8, cited in Haque, *supra* note 3, at 31–32.

[190] *Kosovo*, *supra* note 189, at 9.

[191] The Independent International Commission on Kosovo famously characterized NATO's intervention in Kosovo in 1999 as 'illegal but legitimate'. Independent International Commission on Kosovo, The Kosovo Report: Conflict, International Response, Lessons Learned (2000), at 4.