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Revisiting *ad bellum* Proportionality: Challenging the Factors Used to Assess It

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I. INTRODUCTION

The requirement of *ad bellum* proportionality,¹ which restricts the use of military force, is a basic pillar of lawful self-defense.² Though it is sometimes described as “the essence of self-defence,”³ its substance and scope are disputed, the main controversies relating to its temporal scope and relative measurement. This article steps into the dispute from a different perspective by challenging the common factors used to assess it. To focus on these factors per se, the article will follow the prevailing legal wisdom regarding the two disputed issues. It accepts as a given that a defending State’s response should be aimed at halting and repelling the armed attack and be continuously restricted by, and proportionate to, this end during the entire belligerency. Taking this benchmark and its continuing application as a given makes it possible to focus in this article on the validity and desirability of the common factors used to assess the proportionality of a defensive response. Although the academic literature presents a near-consensus regarding these factors, this article challenges this consensus, arguing that they are, to a large extent, not normatively desirable and might be counter-effective as regards the de-escalation rationale of the proportionality requirement.

Parts II and III of this article lay the foundation for the normative discussion. Part II presents the controversies related to the current application of the *ad bellum* proportionality requirement. Although all agree that this requirement imposes a constraint upon the use of force, the benchmark of this constraint is disputed. What should the lawful use of force be proportionate to? A second dispute relates to the temporal scope of this requirement. As regards the latter, the prevailing approach is that the proportionality requirement applies continuously during the entire belligerency. Following this

1. International law related to war has two segments—*jus ad bellum* and *jus in bello*—each with its own proportionality requirement. The *ad bellum* rules refer to the right to exercise military force. The *in bello* rules—also known as the law of armed conflict or international humanitarian law (IHL)—regulate the conduct of those engaged in an armed conflict. See generally International Committee of the Red Cross, *What are jus ad bellum and jus in bello?* (Jan. 22, 2015), <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0>.

2. See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 ¶ 41 (July 8) (“The submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law.”).

3. IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 279 n.2 (1963).

common wisdom, Part III presents the near-consensual factors used to assess the proportionality of a defender's response. These restrictive factors include geographical location, scope of destruction, duration, selection of means, targets, and methods of warfare, and the effect on third States.

Their presentation brings us to the normative discussion. The first step in this discussion is the argument that the essence of *ad bellum* proportionality should derive from its strategic nature. Part IV, therefore, presents the different levels of war—strategic, operational, and tactical—and frames the *ad bellum* sphere as a strategic one. Part V then argues that the assessment of *ad bellum* proportionality, and its common halt and repel benchmark at the strategic level, should be carried out in light of its de-escalation rationale; its effects upon both adversaries—not only (or mainly) the victim State, as is currently assumed—should be considered. Given this mutual strategic constraint, Part VI asserts that the *ad bellum* proportionality factors suggested by the prevailing approach are, to a large extent, counter-effective and mistaken. In light of the inherent difficulties of this common version of continuing proportionality, the factors used to assess it, and the problematic extension of the *ad bellum* rules to the *in bello* sphere, Part VII suggests a more limited extension. Part VIII concludes.

The scope of this article is limited. It assumes lawful self-defense in response to an armed attack against a State in the context of Article 51 of the UN Charter.⁴ Since the common factors used to assess the proportionality of a defensive response, especially the geographical constraint, were framed mainly in the inter-State context, the article concentrates on all-out conflicts between States (international armed conflicts), though parts of its discussion relate to the currently widespread non-international armed conflicts as well.⁵

4. While Article 2(4) of the UN Charter prohibits the “threat or use of force” as a tool for resolving international disputes, Article 51 nonetheless contains an exception to this rule, recognizing the “inherent right” to use military force for individual or collective self-defense against an “armed attack.” For the scope of an armed attack triggering the right of self-defense in general, and the International Court of Justice’s “significant scale” threshold in particular, see Yishai Beer, *Regulating Armed Reprisals: Revisiting the Scope of Lawful Self-Defense*, 59 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 114 (2021).

5. For the legal classification of conflicts, see generally Terry Gill, *Classifying Conflict in Syria*, 92 INTERNATIONAL LAW STUDIES 353, 362–366 (2012); International Law Association, Commission on the Use of Force, *Final Report on the Meaning of Armed Conflict in International Law* (2010). For a more general principle of strategic proportionality, aimed at mitigating the hazards of war in all types of conflict, see Noam Lubell & Amichai Cohen, *Strategic Proportionality: Limitations on the Use of Force in Modern Armed Conflicts*, 96 INTERNATIONAL

Finally, an observation regarding terminology: This article often uses the traditional term “war” when it deals with belligerency in its military context. Legally, however, this term has been replaced in contemporary international law, to a large extent, by the broader concept, yet undefined, of “armed conflict,” which denotes fighting between States at a certain level of intensity, or intense fighting between States and organized armed groups (non-State actors).⁶

II. THE TIMING AND SCOPE OF *AD BELLUM* PROPORTIONALITY

A. *The Temporal Scope—The Two Conflicting Schools*

Traditionally, *jus ad bellum* and *jus in bello* were perceived as mutually exclusive. While the first determines the conditions under which States may resort to the use of armed force, the second regulates the law of armed conflict. Under this dichotomy, the *ad bellum* rules, including the proportionality requirement, are concerned only with the initial categorical decision whether resort to military force is justified in response to an armed attack, and they do not impose a continuing requirement. It is only the *in bello* rules that apply during the course of armed conflict. Christopher Greenwood presents this dichotomy: “Thus conceived, the two sets of rules operate in quite distinct spheres. Once hostilities commence, *ius ad bellum* ceases to be relevant and *ius in bello* takes control. This approach had some validity in the days when international law assumed a sharp distinction between peace and war.”⁷ Although Greenwood

LAW STUDIES 159 (2020). Dealing with all-out conflicts between States excludes, for example, the practice of dominant Western States, including the United States, Britain, and France, to respond to small-scale attacks with military acts “short of war” that are essentially reprisals. ANTONIO CASSESE, *INTERNATIONAL LAW* 371 (2d ed. 2005). For other limited attacks “short of war,” see *infra* text accompanying notes 11–13.

6. Currently, it is the actual occurrence of an armed conflict (and not a formal declaration of war) that triggers the application of IHL. See common arts. 2 and 3 of the Geneva Conventions of 1949. For example, the Geneva Convention relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287, Article 2 states that “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” Article 3 is more limited in scope and applies “[i]n the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.” *Id.* For the meaning of the term armed conflict, see *Final Report on the Meaning of Armed Conflict in International Law*, *supra* note 5.

7. Christopher Greenwood, *The Relationship between Ius ad bellum and Ius in bello*, 9 *REVIEW OF INTERNATIONAL STUDIES* 221, 221 (1983).

is critical of the current relevancy of this dichotomous perception, some writers argue that it is still valid law. For example, referring, *inter alia*, to the (pre-UN Charter) examples of the 1941 Japanese attack on Pearl Harbor that triggered the United States' entry into World War II and the 1939 German invasion of Poland that sparked that war, Yoram Dinstein argues: "There is no support in the practice of States for the notion that proportionality remains relevant—and has to be constantly assessed—throughout the hostilities in the course of war."⁸ However, the prevailing view in the academic literature—which to some extent can be traced to the judgments of the International Court of Justice—is that the requirement of proportionality in the exercise of self-defense continuously regulates the scope of warfare, thereby affecting war's conduct and scope, during the entire armed conflict.⁹ This "overarching approach" requires that a self-defendant not only abide by the *in bello* rules in its fighting, as required by the "limited" approach,¹⁰ but that it demonstrate that all military measures taken by it are also *ad bellum* proportionate.

B. *The Scope of the Proportionality Requirement*

Both conflicting approaches concerning the temporal scope of the *ad bellum* rules have to establish the content of the proportionality requirement, a legal term that has multiple meanings. According to the limited approach, as advocated by Dinstein, since the constraining role of *ad bellum* proportionality in war concerns only the initial categorical decision on the use of force, a

8. YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 282 (6th ed. 2017). While Dinstein rejects the continuing application of proportionality in the course of war, he accepts it in cases "short of war." See *infra* text accompanying notes 11–12.

9. See, e.g., Greenwood, *The Relationship between Ius ad bellum and Ius in bello*, *supra* note 7, at 221; Christopher Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE* 273 (Yoram Dinstein & Mala Tabory eds., 1989); JUDITH GARDAM, *NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES* 162–79 (2004).

10. The terms: "overarching" and "limited" for the conflicting schools were coined by Kenneth Watkin. For his analysis, see KENNETH WATKIN, *FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT* 55–69 (2016). See also the discussion by Eliav Lieblich of the "static" versus "continuous application" approaches. Eliav Lieblich, *On the Continuous and Concurrent Application of ad bellum and in bello Proportionality*, in *NECESSITY AND PROPORTIONALITY IN INTERNATIONAL PEACE AND SECURITY LAW* (Claus Kress & Robert Lawless eds., forthcoming 2021).

“standard of reasonableness” should apply in its exercise.¹¹ The proportionality of the force exercised in self-defense should derive from the force used by the attacker. Thus, to prevent escalation, a defending State’s response to a limited attack “short of war,” which Dinstein terms on the spot reactions or defensive armed reprisals, should itself not go beyond a limited use of defensive force. In case of such an attack, “proportionality points at a symmetry or an approximation in ‘scale and effects’ between the unlawful force and the lawful counter-force”¹²—namely, it is a continuing constraint. However, in an all-out war, such a constraint is of no relevance, and the exercise of self-defense might bring about the destruction of the attacker’s army.¹³

Establishing the *ad bellum* proportionality requirement under the overarching approach seems to be more complicated since it faces two challenges. The first is to define its essence as a standalone continuing constraint imposed upon the use of a defending State’s military force; and the second, due to the mutual application of the *ad bellum* and the *in bello* rules, is to define how the proportionality requirement of the former aligns with that of the latter; any contradiction between the two proportionality requirements must be avoided and what they add to each other defined.

It might seem tempting to define *ad bellum* proportionality as a quantitative constraint on the amount of force used by a defender, strictly restricting it to the force used by the attacker. To that end—limiting the response to close symmetry to the provocation—some sort of objective, quantitatively based “counter-force meter” appears to be required. As Thomas Franck explains: “Put formulaically, most proportionality discourse occurs when A has done (or threatens to do) X to B, and B responds by doing Y to A. The issue then crystallizes as an inquest into whether countermeasure Y is ‘equivalent’ (i.e., proportionate) to X.”¹⁴ A quantitative reading of *ad bellum* proportionality, though endorsed by some writers and Security Council resolutions,¹⁵ is very problematic and, in many cases, irrelevant in terms of self-defense. Legally, the victim of an armed attack is entitled to defend itself. Strategically, there is no reason to expect it to be quantitatively proportionate in its use of

11. DINSTEIN, *supra* note 8, at 251 (“It is perhaps best to look at the demand for proportionality in the province of self-defence as a standard of reasonableness in the response to force by counter-force.”).

12. *Id.* at 282.

13. *Id.* at 282–87.

14. Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AMERICAN JOURNAL OF INTERNATIONAL LAW 715, 715 (2008).

15. GARDAM, *supra* note 9, at 162–79.

force, especially when its very survival is at stake.¹⁶ For example, if one State mounts a full-scale military invasion of another State's territory, on realpolitik and military-professional grounds, the defending State should not be expected to restrict itself to a "tit for tat" type of response. The defender's preferred military strategy would likely be to exercise overwhelming force whenever possible, thus ensuring its self-defense.¹⁷ An extreme example of this strategy was the American (Colin Powell's) doctrine, applied successfully in the First Gulf War, advocating the exercise of "overwhelming force quickly and decisively."¹⁸

The second conception of proportionality is the harms-benefits analysis of *ad bellum* proportionality, examining whether the benefits from resorting to force outweigh its costs.¹⁹ This analysis assumes that an exercise of necessary, minimal force in self-defense might be unlawful due to the damage caused by it. This conception of proportionality is not discussed in this article, which presumes the un-contingent lawfulness of the use of necessary force by a victim in its self-defense as a last resort. A rough analogy to self-defense in domestic criminal law might be of help to explain the rejection of the harms-benefits perception in the context of self-defense of States. If an innocent person is attacked by five persons endangering her life, she can lawfully exercise the minimum necessary force required to save herself, even where it is foreseen that her self-defense will cause the death of all five attackers. The legality of the victim's response is derived from the necessity,

16. Indeed, "extreme circumstances of self-defence" might affect not only *ad bellum* proportionality but, according to the ICJ majority opinion, even the *in bello* legality of the use of nuclear weapons. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 ¶ 105 (July 8).

17. For example, one of nine professional principles of war of the U.S. armed forces is the principle of mass, requiring the concentration of "the effects of combat power in time and space." See Headquarters, Department of the Army, FM 3-0, Operations A-2 (Feb. 27, 2008). The British Army's manual addresses this issue as "concentration of force," defining it as an action that "requires the decisive, synchronized application of effort and resource at the critical point in time and space to achieve the commander's intent. The nature of the force concentrated will depend on the mission . . ." U.K. Ministry of Defence, Army Doctrine Publication, Land Operations 1A-2. (Mar. 2017), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/33695/ADPOperationsDec10.pdf.

18. Colin Powell, *US Forces: Challenges Ahead*, 71 FOREIGN AFFAIRS 32, 37 (1992).

19. See, e.g., Lieblich, *supra* note 10, at 17, 22–24.

and if it is her last resort, the harm caused by it should not be a legal constraint as long as she exercises the minimal force.²⁰

In light of the problematic aspects of substantiating proportionality in quantitative terms and its harms-benefits analysis in the *ad bellum* context, a more promising way to interpret this requirement is by its traditional function of adjusting means to ends. A “means-ends” test of *ad bellum* proportionality would impose a legal constraint on the use of military force, requiring it to be evaluated and judged against the legitimate ends of the use of force in self-defense.²¹ Such an understanding of the proportionality requirement invites us to deal, in the next Part, with the spectrum of legitimate aims of a defending State.

C. Means-Ends Proportionality: The Legitimate Aims of Self-Defense

There are conflicting approaches to the question of the legitimate aims of a defensive war, stemming in part from the international community’s failure to maintain international peace and security by the centralized use of force, as envisioned by the drafters of the UN Charter.²² Although the prescribed remedy for the victim State in Article 37 of the UN Charter—referring the conflict to the Security Council—reflects the preference for authorized collective force over self-help, Article 51 of the Charter allows individual or

20. See *infra* text accompanying note 27. See also David Kretzmer, *The Inherent Right to Self-Defence and Proportionality in Jus ad Bellum*, 24 EUROPEAN JOURNAL OF INTERNATIONAL LAW 235, 278 (2013) (arguing that “[d]iscussions of proportionality in this context have dwelt more on the necessity issues”).

21. See Kretzmer, *supra* note 20, at 240 (arguing that “[p]roportionality will usually, but not exclusively, involve a means-end test”).

22. Chapter VII of the UN Charter charges the Security Council to take collective action against an aggressor. However, the veto right of the five permanent members, combined with the inability to establish a formal mechanism for the collective use of force, usually paralyzes its ability to exercise collective action. One exception in which the UN exercised its authority for collective enforcement action occurred on July 7, 1950, when the Security Council came to the defense of South Korea and issued a resolution authorizing collective action against North Korea’s armed attack, under the flag of the United Nations and the joint command of the United States. See U.N. Charter art. 7; S.C. Res. 84 (July 7, 1950). For another example of the exceptionally effective action of the Security Council in Somalia and in the First Gulf War, see, e.g., ANTHONY CLARK AREND & ROBERT J. BECK, INTERNATIONAL LAW AND THE USE OF FORCE 52–57 (1993).

collective self-defense only when States face either an actual attack²³ or, according to a solid yet disputed view, the imminent risk of an armed attack.²⁴ The tension between the vision of the Charter and reality—where, in the absence of an effective centralized solution to an armed attack, self-defense has been decentralized to the State level—is reflected in the dispute relating to the legitimate aims of self-defensive wars. A limited aim for the use of force by a defending State seems to be compatible with the rhetoric of the Charter, while a relatively wider range of aims is consistent with the practice of self-defendant States.²⁵

The prevailing approach is conservative; it allows the defendant only to halt and repel an ongoing attack. Self-defense is limited solely to stopping an ongoing attack—i.e., halting and repelling an attacker from the defender's territory, in order to return to the situation that existed antebellum.²⁶ Since the use of military force by a victim State should be allowed only in exceptional emergencies, it should be limited in scope and time. The defending State is allowed to use only the minimal force for the minimal period required for its security, not the optimal amount it might have desired.²⁷ According

23. U.N. Charter, Article 51 states: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.”

24. See, e.g., W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AMERICAN JOURNAL OF INTERNATIONAL LAW 525, 532–33 (2006) (referring to the High-Level Panel's recommendation favoring a loosening of the strict “armed attack” requirement as long as the threatened attack is imminent); U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*, U.N. Doc. A/59/2005 (Mar. 21, 2005) (stating that “[i]mmminent threats are fully covered by Article 51, which safeguards the inherent right of sovereign States to defend themselves against armed attack”). Kretzmer states that while “it is almost universally accepted that a state may not use force in order to prevent or deter future attacks, it is widely (but certainly not universally) acknowledged that it may do so to thwart an imminent attack.” Kretzmer, *supra* note 20, at 248.

25. See Kretzmer, *supra* note 20, at 262.

26. See, e.g., GARDAM, *supra* note 9, at 156–59 (“However, an assessment of what will achieve the end result of self-defence, ‘that of halting and repelling the attack’, consists neither merely of a comparison of weapons or the scale of force used . . . the action needed to halt and repulse an attack may well have to assume dimensions that would be disproportionate using such a comparison.” *Id.* at 260–61).

27. Christopher Greenwood, *Self-Defence*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 25–29, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e401?rskey=jN2zpb&result=1&prd=MPIL> (last updated Apr.

to this approach, widely supported by academics, *opinio juris*, and some International Court of Justice (ICJ) judges, any action that exceeds the aim of returning to the territorial status quo is an unlawful armed reprisal, disguised as self-defense.²⁸ The conflicting approach recognizes a broader range of potential lawful aims, whenever necessary, allowing actions aimed at preventing foreseen further attacks.²⁹ This wider and, to some extent, more realistic approach is due to inherent deficiencies in the halt and repel formula. For example, the latter doesn't seem to leave room for self-defense by the victim of an armed attack that has been completed, either when no ground forces were used by the attacker, e.g., in a missile attack, or by their withdrawal. Furthermore, in an ongoing state of armed conflict, the expulsion of an aggressor and restoration of the territorial status quo may not always be the reasonable end result for all law-abiding defending States, though in some cases—such as an isolated case of aggression—it might be enough.

An example of the latter is the UK's military reaction to the Argentine occupation of the Falkland Islands in 1982. This conflict was mainly over the sovereignty of the Islands.³⁰ It did not pose an actual threat to the lives of British citizens. The explicit *ad bellum* aim of the UK government—the expulsion of the invader—was consistent with the halt and repel formula.³¹

2011). To assume that the defending State is always allowed to exercise the minimum force required to regain its security is to reject the harms-benefits analysis of *ad bellum* proportionality, which assumes that such use of force might be unlawful if the harm caused by it outweighs its benefits. *See supra* text accompanying notes 19–20.

28. *See, e.g.*, Roberto Ago, Special Rapporteur to the International Law Commission, *Eighth Report on State Responsibility*, U.N. Doc. A/CN.4/318/Add.5-7 ¶¶ 120–21 (June 1980); Kretzmer, *supra* note 20, at 260–61; ANTONIO CASSESE, *INTERNATIONAL LAW* 355 (2nd ed. 2005); Enzo Cannizzaro, *Contextualizing Proportionality: jus ad bellum and jus in bello in the Lebanese War*, 88 *INTERNATIONAL REVIEW OF THE RED CROSS* 779, 785 (2006); Sina Etezazian, *The Nature of the Self-Defence Proportionality Requirement*, 3 *JOURNAL ON THE USE OF FORCE AND INTERNATIONAL LAW* 260, 267, 288 (2016); George Nolte, *Multipurpose Self-Defence, Proportionality Disoriented: A Response to David Kretzmer*, 24 *EUROPEAN JOURNAL OF INTERNATIONAL LAW* 287 (2013).

29. For the controversy over this approach, see, e.g., Kretzmer, *supra* note 20, at 239.

30. The Falklands campaign, which was the culmination of a two hundred year-long dispute between Argentina and the United Kingdom over the islands, began on April 2, 1982. The campaign lasted for approximately two weeks and cost over 1,000 lives. *See* U.K. Ministry of Defence, *Falklands 25: Background Briefing*, THE NATIONAL ARCHIVES, <http://archive.today/grTy> (last updated July 20, 2012).

31. *See, e.g.*, ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 232 (1995) (arguing that “[p]roportionality here cannot be in relation to any specific prior injury—it has to be in relation to the overall legitimate objective, of ending the aggression or reversing the invasion”).

However, the Falklands War is exceptional in having been strictly limited in scope and duration; other cases, especially in non-international armed conflicts, are characterized by continuous aggression where, by definition, the status quo ante is not stable. Restoring the status quo might be analogous to a cosmetic treatment of the underlying problems. Merely the fact that the status quo was not kept by the aggressor in the first place shows that an automatic return to square one—the situation as it was before the aggression—is not always a reasonable result. It depends on whether this status quo is, or at least has the potential to be, a solid ground rather than an unstable platform of shifting sands. In the case of continuing attacks, forestalling any further aggression and establishing some credible stability is a reasonable goal of a defending State. Indeed, the wider approach claims that when acting in self-defense, a State may take steps meant to prevent imminent future attacks, and according to some, to deter the aggressor from carrying out future attacks.³² Supporters of this approach claim that it takes the victim State's interests more seriously; since the international community has failed to protect States that have been attacked repeatedly, victim States should not restrict themselves to halting and repelling an armed attack.³³

This article focuses on substantiating the *ad bellum* proportionality requirement. To that end, it follows the common view as regards both its temporal scope and relative measurement. It takes the halt and repel end, despite its inherent problems, as the generic lawful war aim, to which the defendant's use of force should be proportionate, and accepts the overarching school, requiring a defending State to abide in its fighting, whenever it exercises its military force, by both the *in bello* and *ad bellum* rules. Given that the continuing proportionality requirement should be measured vis-à-vis the defender's halt and repel war aim, the discussion now turns to the essence of this requirement. How should we measure proportionality in practice?

32. See Kretzmer, *supra* note 20; *infra* note 67.

33. See Kretzmer, *supra* note 20, at 261–62. See also DINSTEIN, *supra* note 8, at 285 (arguing that confining the right of self-defense only to the amount of force necessary to repel is unrealistic). In this context even State practice is disputed. Kretzmer points out that when States have acted in self-defense in order to achieve additional aims, other States have refrained from criticizing their actions. Kretzmer, *supra* note 20, at 264. Nolte responds that this silence can also be a result of political considerations rather than proof of other States' support of this view of self-defense and that defending States prefer to highlight the “halt and repel” aspects of their actions rather than other aspects. Nolte, *supra* note 28.

III. ASSESSING *AD BELLUM* PROPORTIONALITY— THE “GENERAL ACCORD”

Cristopher Greenwood has suggested substantiating the *ad bellum* necessity and proportionality requirements by using several constraining factors.³⁴ Judith Gardam, who followed him, elaborates on his suggestion by pointing at the “general accord” regarding the proportionality assessment by the following factors: “geographical and destructive scope of the response, the duration of the response, the selection of means and methods of warfare and targets and the effect on third states.”³⁵

Referring to the geographical dimension of an armed conflict and the emerging legal rule, Cristopher Greenwood states: “The traditional assumption that the outbreak of war between two states necessarily involved hostilities between their armed forces whenever they might meet, even if it was thousands of miles away from the scene of the dispute, can no longer be regarded as valid.”³⁶ The new restricted rule is reflected in the “accepted view,” suggested by Gardam, that under the Charter system, “generally speaking, proportionality requires that forceful actions in self-defence must be confined to the area of the attack that they are designed to repel.”³⁷ Greenwood, however, accepts an exception to the geographical constraint. When the scope and extent of a conflict increases, the defending State may

34. Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, *supra* note 9, at 275, 277.

35. GARDAM, *supra* note 9, at 162. Compare Tom Ruys, who focuses on only three factors in assessing the proportionality of a defensive action—the geographical aspect of the defensive response, its duration, and the range of targets—while the type of weapons, in his view, is more related to IHL. TOM RUYS, “ARMED ATTACK” AND ARTICLE 51 OF THE U.N. CHARTER: EVOLUTIONS IN CUSTOMARY LAW AND PRACTICE 118–23 (2010). Though Greenwood refers to both the necessity and proportionality *ad bellum* requirements, Gardam attributes the constraining factors to only the proportionality requirement. This article follows Gardam’s analysis of proportionality, considering the necessity requirement to enable the use of force by a victim State only as a last resort, when non-forcible measures have failed to restore its security. But see Lubell & Cohen, who argue that the second level of necessity deals with the issue of whether a specific type and amount of force is necessary to achieve the legitimate belligerent’s aim. See Lubell & Cohen, *Strategic Proportionality: Limitations on the Use of Force in Modern Armed Conflicts*, *supra* note 5, at 168.

36. Greenwood, *The Relationship between Ius ad bellum and Ius in bello*, *supra* note 7, at 223.

37. GARDAM, *supra* note 9, at 163. Gardam mentions, however, that O’Connell affirms this geographical limit on hostile actions at sea while doubting whether this restraint is dictated by legal rather than political considerations. *Id.* See also Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, *supra* note 9, at 276–78. For the possible exception of the sinking of the Argentine cruiser *General Belgrano*, see *infra*, note 105.

widen its reasonable defensive reaction—i.e., the measures used in its fighting and its geographic arena—in light of the changing circumstances. “In a case where a conflict between States had already reached the level of total war, the proportionality requirement would no longer dictate that defensive measures should be confined to a restricted geographical area.”³⁸

Regarding the temporal scope, Gardam argues that an act of self-defense that has otherwise been regarded as proportional may become disproportional if it is no longer necessary to respond to the armed attack.³⁹ She uses the example of the *Nicaragua* case, in which the ICJ rejected the United States’ claim of self-defense, which “continued long after the period in which any presumed armed attack by Nicaragua could reasonably be contemplated.”⁴⁰

Though the means and methods of warfare in general, and the definition of military objective⁴¹ and the distinction rule⁴² in particular, are specifically regulated by the *in bello* rules, Gardam points to the parallel application of both the *ad bellum* and *in bello* proportionality requirements. This approach, which is supported by a majority of commentators, requires States to take into account, from an *ad bellum* perspective, the expected “scale of civilian casualties, the level of destruction of the enemy forces, and finally damage to territory, the infrastructure of the target state and the environment generally.”⁴³ Regarding the additional contribution of *ad bellum* proportionality to

38. Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, *supra* note 9, at 278. In a former article, Greenwood didn’t mention total war but argued “that in a conflict on the scale of the Second World War it is unlikely that the continuing application of the *ius ad bellum* would have any real significance.” Greenwood, *The Relationship between Ius ad bellum and Ius in bello*, *supra* note 7, at 223. Ruys goes even further by widening the exception to the geographical constraint. *See* RUYS, *supra* note 35, at 119 (“any geographical limitation must be interpreted in a flexible manner. Especially, in case of repeated and/or large-scale attacks which threaten the very existence of the State, or in the case of a reciprocal escalation of the armed conflict, this factor may gradually lose its constraining function.”).

39. GARDAM, *supra* note 9, at 167. *See also* Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, *supra* note 9, at 275–76.

40. Military and Paramilitary Activities in and Against Nicaragua (*Nicar. v. U.S.*), Judgment, 1986 I.C.J. 14, ¶ 237 (June 27).

41. Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 52(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API].

42. The distinction between those who may be attacked lawfully and those who are protected is enshrined in Article 48 of API as a basic rule. It has two aspects—one relating to individuals, found in Article 51(2), and one relating to objects, found in Article 52.

43. GARDAM, *supra* note 9, at 168.

the rule of *in bello* proportionality, and to prevent any contradiction between the two, Christopher Greenwood suggests that the former requires strategic proportionality—prohibiting the escalation of conflict—while *in bello* proportionality deals with the tactical level:⁴⁴ prohibiting excessive collateral damage to civilian life and property.⁴⁵

Indeed, the rationale for the proportionality constraint of self-defense in general, and the suggested factors in particular, seems to be the “preservation of international order and the minimization of the use of force.”⁴⁶ The desire is to control the flames of the fire ignited by the initial attack and prevent the escalation of the conflict by unnecessary responsive measures, disguised as self-defense.⁴⁷

The discussion thus far has presented the prevailing legal approach, according to which a defending State’s response should be aimed at halting and repelling the armed attack and continuously restricted by the specific factors of *ad bellum* proportionality. Although there seems to be a “general accord” regarding the relevance of these factors in assessing the proportionality of defensive responses,⁴⁸ the following discussion will argue that they are not normatively desirable as *ad bellum* constraints on the scale and effects of defensive action and might even be counter-effective as regards their de-escalation rationale. In presenting this normative argument, the levels of war and the characterization of the *ad bellum* sphere as focused mainly on strategic issues will first be introduced, then the discussion will go on to argue that the essence of *ad bellum* proportionality should derive from its function as a strategic constraint.

44. The “overarching” approach is not monolithic in this regard and it is Greenwood who suggests the strategic attributes of *ad bellum* proportionality. Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, *supra* note 9, at 278–79. Regarding the choice of weapons, Greenwood argues: “A state may not employ its more destructive weaponry if it can achieve the legitimate objectives of self-defence with the lesser weapons available to it.” *Id.* at 280. For other limitations imposed by the overarching approach—regarding belligerent reprisals, a belligerent occupant, and conduct towards neutrals—see *id.* at 281–85.

45. The API considers as indiscriminate, and therefore prohibited, “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” API, *supra* note 41, art. 51(5)(b).

46. Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, *supra* note 9, at 278 n.22.

47. For the de-escalation rationale, see, e.g., GARDAM, *supra* note 9, at 171 n.154 and accompanying text; Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, *supra* note 9, at 279; RUYSS, *supra* note 35, at 118.

48. See *supra* text accompanying notes 34–35.

IV. THE *AD BELLUM* SPHERE—AT THE STRATEGIC LEVEL

A military campaign is conducted in light of a strategy, or what Liddell Hart calls its “Grand Strategy.”⁴⁹ The grand strategy deals with “policy,” which is decided by a State’s leaders—in liberal democracies, by the elected civilian leadership. This higher level of strategy “coordinates and directs all the resources of a nation, or band of nations, towards the attainment of the political object of the war.”⁵⁰ The exercise of military force, which is only one of several tools that the grand strategy can employ, is a matter of military strategy, which deals with on-the-ground military activities in a concrete conflict and is aimed at the fulfillment of governmental policy. At the level of military strategy, the political objectives of a State are transformed into military objectives,⁵¹ with the aim of meeting those policy goals. It is this military strategy that affects the lower levels of war: operational and tactical. Indeed, military activity is usually classified into three hierarchical levels: strategic, operational, and tactical. Under common definitions, the strategic level of war “determines national or multinational (alliance or coalition) strategic security objectives and guidance, then develops and uses national resources to achieve those objectives.”⁵² The operational level is the “level of war at which campaigns and major operations are planned, conducted, and sus-

49. B.H. LIDDELL HART, *STRATEGY* 321–22 (2d ed. 1991).

50. *Id.* at 322. Compare the British Army Doctrine definition of “National Strategy” that “sets out a path, using the diplomatic, economic and military instruments of power, to achieve government policy goals.” U.K. Ministry of Defence, Army Doctrine Publication, Land Operations 2–11(a) (Mar. 31, 2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/605298/Army_Field_Manual__AFM__A5_Master_ADP_Interactive_Gov_Web.pdf.

51. “The military contribution to strategy is the application of military resources to achieve national strategic objectives . . .” U.K. Ministry of Defence, *supra* note 50, at 2-11b. *See also* LAWRENCE FREEDMAN, *STRATEGY: A HISTORY* 206 (2013) (“[t]he underlying principle was that at each level the objectives would be passed down from the higher. At the level of grand strategy, a conflict was anticipated, alliances forged, economies geared, people braced, resources allocated, and military roles defined. At the level of strategy, the political objectives were turned into military goals; priorities and specific objectives were agreed upon and allocations of men and equipment made accordingly.”).

52. Joint Chiefs of Staff, *Strategic Level of Warfare*, Joint Publication 1-02, DOD Dictionary of Military and Associated Terms 203 (Aug. 2021), <https://www.jcs.mil/Doctrine/Joint-Doctrine-Pubs/Reference-Series/>.

tained to achieve strategic objectives within theaters or other operational areas.”⁵³ The tactical level is the “level of war at which battles and engagements are planned and executed to achieve military objectives assigned to tactical units or task forces.”⁵⁴

The *ad bellum* sphere deals with strategic issues and is dominated by State leaders, who decide whether to cross the *ad bellum* Rubicon and start an armed attack or respond to such an attack,⁵⁵ and who define their respective war aims.⁵⁶ The UN mandate, as reflected in its Charter, is “to maintain international peace and security”⁵⁷ by preserving the status quo; as such, it is strategically oriented and aimed at decision-makers. Accordingly, the crime of aggression in the Rome Statute, which allows the criminal prosecution of leaders, is defined as “the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.”⁵⁸ Indeed, aggression is an *ad bellum* decision, decided on by leaders in the strategic sphere.

53. *Operational Level of Warfare*, *id.* at 161.

54. *Tactical Level of Warfare*, *id.* at 210.

55. In many cases, even a “mere frontier incident” in which a few of the victim’s soldiers were killed—which, according to the ICJ, does not amount to an “armed attack” and the injured State is therefore prohibited from exercising its right of individual or collective self-defense—is decided on by a State’s leaders, with the exception of on-the-spot soldiers’ initiatives, e.g., firing by a drunken soldier. For the “mere frontier incident” exclusion, see *Nicaragua*, 1986 I.C.J. 14, ¶ 195.

56. Similarly, Greenwood states: “The *ius ad bellum* is addressed to the leaders of a state, its policy makers both civilian and military. The application of the *ius in bello* is far wider. It imposes obligations not only upon the senior officers of a state’s armed forces and the members of its government but upon all servicemen, whatever their rank, and, indeed, upon the entire civilian population.” Greenwood, *The Relationship between Ius ad bellum and Ius in bello*, *supra* note 7, at 231.

57. U.N. Charter pmb.

58. International Criminal Court, Assembly of States Parties, Review Conference, The Crime of Aggression, ICC Res. RC/Res.6, annex I, art. 8 bis(1) (June 11, 2010); See also the definition of aggression by the UN General Assembly, Definition of Aggression, G.A. Res. 3314 (XXIX), annex (Dec. 14, 1974).

The argument that the *ad bellum* sphere is a strategic one is not novel; for example, it has been argued and disputed in the *San Remo Manual*.⁵⁹ As mentioned above, Christopher Greenwood, a leading advocate of the overarching approach, has leveraged the strategic nature of *ad bellum* proportionality to distinguish it from tactical *in bello* proportionality.⁶⁰ Similarly, Tom Ruys asserts that “[i]n terms of the *Ius ad Bellum*, it is the forceful response as a whole that must be scrutinized, instead of singling out specific attacks, implying that one should often look at strategic and political decisions at the highest levels of command.”⁶¹ Kenneth Watkin, referring to some experts reported in the *San Remo Manual*, concludes: “self-defense principles appear particularly well suited to operate at the strategic level.”⁶²

The operation of self-defense at the strategic level and its effects on the proportionality requirement will be discussed in the next Part.

V. SUBSTANTIATING *AD BELLUM* PROPORTIONALITY AND ITS HALT AND REPEL BENCHMARK AT THE STRATEGIC LEVEL

A. Introduction

The war aims⁶³ of a State reflect its strategic purposes and are determined at the strategic level—by the leaders of a belligerent State or, in the case of non-international armed conflicts, by the leaders of the non-State actor. Typically, an aggressor State’s strategy will be to occupy territory and gain control over its adversary’s resources and/or nationals. In contrast, a law-abiding defending State’s strategy would probably seek to restore its security. Substantiating

59. SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA ¶ 4.5 (Louise Doswald Beck ed., 1995), at 77. For an analysis of the controversy, see WATKIN, *supra* note 10, at 74. Watkin points out that “what is striking in the *San Remo Manual* is the acknowledgment of the ‘levels of war’ and their possible relevance to how principles related to the State exercise of self-defense might impact on the conduct of hostilities.” *Id.* at 75.

60. *See supra* note 44 and accompanying text. See also Watkin, who argues that “it is within this [levels of war] framework that the two different approaches to the application of self-defense principles can be best analyzed and resolved.” WATKIN, *supra* note 10, at 75.

61. RUY, *supra* note 35, at 110.

62. WATKIN, *supra* note 10, at 77.

63. As mentioned above, though the term “war” has to a large extent been replaced in contemporary international law by the concept of “armed conflict,” this article uses the traditional term whenever it deals with military concepts, such as war aims. *See supra* note 6 and accompanying text.

the generic “halt and repel” war aim at the strategic level is an entirely different proposition than at the tactical level. At the tactical and operational levels, a defender engages with the ways and means of responding to an attack—how to “halt and repel” the attacker’s “boots on the ground.” At the strategic level, however, halt and repel should reflect the handling of the conflict as a matter of policy (grand strategy) by the defending State and the transformation of its defensive-political objectives into military objectives (military strategy).

A substantial part of the halt and repel strategy of a defending State should reflect its commitment to fulfilling its primary obligations towards its nationals to protect their safety, at least in the foreseeable future.⁶⁴ In the current international legal system—where punishing aggressors is a centralized function of the international community⁶⁵ that cannot be carried out by the victim,⁶⁶ and the legality of deterrence is disputed⁶⁷—substantiating the essence of a strategic halt and repel mission requires a delicate balance. Aggressors should be denied any incentive to attack, and victim States allowed to exercise their self-defense. The latter, however, should limit their use of force to defensive purposes, and they are not allowed to manipulate their war aim beyond the minimum required to ensure their security.⁶⁸ Thus, the

64. For example, the United States National Security Strategy of 2017 begins with “the determination to protect the American people, the American way of life, and American interests.” President of the United States, National Security Strategy of the United States of America 7 (Dec. 2017), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905-2.pdf>.

65. See the discussion related to the crime of aggression, *supra* text accompanying note 58.

66. See also Derek Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 3 (1972) (arguing that “punishment is a matter for society as a whole, whereas self-defense must still be permitted to the individual member, as an interim measure of protection and subject to a subsequent evaluation of the correctness of the individual’s judgment as to the necessity for self-defense by the organized community of states”).

67. Although deterrence is central to the management of global security, in current international law, if not actually rejected, it is perceived with mistrust and suspicion. For a discussion of the inherent difficulties of deterrence theory and its legal application, see generally YISHAI BEER, *MILITARY PROFESSIONALISM AND HUMANITARIAN LAW: THE STRUGGLE TO REDUCE THE HAZARDS OF WAR* 174–78 (2018). For the dispute related to the legality of deterrence, see, e.g., Kretzmer, *supra* note 20.

68. See, e.g., SAN REMO MANUAL, *supra* note 59. Article 4 states: “The principles of necessity and proportionality apply equally to armed conflict at sea and require that the

constraining rationale of the halt and repel aim should have two addressees: not only the self-defendant (as currently assumed by the prevailing approach) but the attacker as well. Both should be constrained in the context of the halt and repel formula. This mutual requirement has different consequences for each addressee. The defending State's war strategy should be limited to ensuring its security. To that end, a proportional halt and repel formula should function as both an enabler and a constraint, allowing the defender to use the military force required to regain its security while limiting it to only the minimal force and limited time required to accomplish that goal.⁶⁹ At the same time, although the legal framework of self-defense excludes punishment considerations, it should deny attackers any incentive to continue their aggression. The dynamic nature of war—which derives to a large extent from the subjective attributes of the adversaries and their reactions to each other's actions—should be reflected when substantiating the applicable constraints on both adversaries.

From this strategic perspective, and following the means-end test of *ad bellum* proportionality, it will be argued in the following discussion that the limited and overarching approaches are both mistaken in how they deal with the dynamic of the defending State's changing war aims. The mistake of the limited approach is to allow a self-defendant too much freedom in its responsive use of force by affording it over-elasticity in its war aims, up to and including the total destruction of the attacker's military force. The mistake of the overarching approach is adhering to a rigid aim throughout the campaign, despite the changing strategic circumstances. The discussion below will demonstrate the argument that unnecessary legal protection should not be granted to attackers at the strategic level. Although defending States are required to use only the minimal force during the limited time necessary to exercise their defense, attackers don't deserve to be assured in advance of their victims' limited war aim. In the realm of war—which is the kingdom of uncertainty⁷⁰—attackers should be denied the privilege of strategic certainty regarding the expected lawful response of the victims of their aggression.

conduct of hostilities by a State should not exceed the degree and kind of force, not otherwise prohibited by the law of armed conflict, required to repel an armed attack against it and to restore its security.”

69. As mentioned earlier, *supra* note 35, this article considers the necessity requirement as enabling the use of force by a victim State only as a last resort, when non-forcible measures have failed to restore its security.

70. Indeed, “[w]ar is the realm of uncertainty.” CARL VON CLAUSEWITZ, ON WAR 101 (Michael Eliot Howard & Peter Paret trans., indexed ed. 1984). See also, “a fog of greater or lesser uncertainty.” *Id.*

B. *Limiting the Change of a Defending State's War Aims is Justified only at the Grand-Strategy Level*

The current dispute in the academic literature regarding the flexibility, if any, of a defending State's war aims during a conflict stems primarily from the disagreement between the overarching approach and the limited approach over the temporal application of the *ad bellum* rules.

In the overarching view, the aims of a war of self-defense cannot be changed in the course of the hostilities. Once the initial aim of securing self-defense has been achieved, and the aggressor doesn't create new just causes, there is no justification for continued fighting.⁷¹ Any extension of a war aim beyond the minimum required for self-defense, as was envisioned at the beginning of the military campaign, would be deemed disproportionate since *ad bellum* proportionality continues to apply during the entire conflict.⁷²

At the other end of the spectrum, under the limited approach, the aims of war are dynamic. Once it has been determined that *ad bellum* proportionality was maintained at the outset of the conflict, just cause has been established, and therefore the victim's fighting is considered to be a continuing legal act of self-defense throughout the hostilities. The aims of war evolve and are clarified during the conflict. They can be expanded or broadened without affecting its legality.⁷³ An example of States' practice that supports the dynamic view can be found in the response of the coalition in the First Gulf War. Initially, it responded to Iraq's armed attack against Kuwait as a matter of collective self-defense, but this aim was later expanded through the imposition of restrictions on Iraq, which included disarmament and no-fly zones.⁷⁴ This seems to follow the practice in the pre-Charter era when the law did not prohibit belligerents from changing the aims of war during combat and adjusting them to dynamic changes in their strategic circumstances.⁷⁵

71. See Lieblich, *supra* note 10, at 10.

72. Greenwood, *The Relationship between Ius ad bellum and Ius in bello*, *supra* note 7, at 223. Greenwood agrees, however, that when a war becomes a total one the aims of the war may change and the application of *ius ad bellum* is no longer significant. See *supra* note 38 and accompanying text.

73. DINSTEIN, *supra* note 8, at 280–87. According to Dinstein, the expansion of the aims of war is lawful in “war” but not in situations “short of war.” *Id.*

74. See, e.g., *id.*, at 286–87.

75. LASSA OPPENHEIM, 2 INTERNATIONAL LAW: A TREATISE ¶ 66 (1912).

In light of the suggested reading of *ad bellum* proportionality as being applicable to both sides at the strategic level, both schools appear to be mistaken. The dynamic character of wars is a given and derives inherently from the fact that both adversaries are fighting for their survival and act dynamically throughout a conflict. As reality changes during a conflict, it affects each belligerent's war aim, which is adjusted accordingly. Thus, what the halt and repel aim entails will fluctuate in accordance with the conflict's developments. To assume that the defending State's aim remains fixed throughout the conflict, as the overarching approach generally does, is incompatible with the dynamic reality. That reality, however, should not lead to awarding the defender *carte blanche*, as suggested by the limited approach, i.e., complete freedom to adjust its evolving war aims—up to and including the destruction of the aggressor's entire military—unless stopped by the Security Council.⁷⁶

Under the suggested approach, the tension between the dynamic reality of wars and the rigidity of war aims would be resolved by distinguishing between the different strategic levels of war. It is the grand strategy of the defending State—to ensure its territorial integrity and security—that should remain constant during the entire conflict, whereas its military strategy and the war aims deriving from it might be adjusted in accordance with the changing reality. The stability of the defender's war aim at the grand strategy level would preclude opportunistic behavior due to, for example, its initial success in its self-defensive war. Opportunistic adjustment of the war aim following such success is beyond what is required to meet the basic requirements for the State's security and would be deemed disproportionate. However, the defender's war aim at the strategic level requires a certain margin of flexibility, allowing it to exercise its right of self-defense in the dynamic reality. Attackers should therefore be denied any certainty or immunity regarding their victims' responses, as long as the latter use the minimal force required to exercise their right of self-defense. The defenders' strategic-defensive maneuvers should not be rigidly restricted.

That opportunistic adjustment of war aims is deemed to be disproportionate, and as such prohibited, can be illustrated by the changes in the war aims of the Korean War. The United States' original war aim, under the flag of the United Nations, was oriented entirely toward South Korea's self-defense: to drive the North Koreans back to the partition line and restore the

76. See *supra* note 13 and accompanying text.

status quo ante.⁷⁷ This aim was a classic example of halt and repel. As the war progressed, however, and after the American victory at Inchon, the American war aims changed dramatically at both the grand strategy and the military strategy levels. In terms of military strategy, the war boundaries needed to be adjusted due to the crossing of the 38th parallel beyond the initial borders, while in terms of grand strategy, the aim had become the conquest of the entire country and the creation of a new, unified and democratic Korean government.⁷⁸ The suggested approach may view this change in the American military strategy as legally justified within the halt and repel framework if it was a temporary stage, aimed at preserving South Korea's security by preventing the North Koreans from launching a future attack. However, the grand strategy's opportunistic adoption of regime change as its aim cannot be justified.⁷⁹ Any such change, establishing aims that go beyond the basic requirements for the defending State's security, should be considered unlawful.⁸⁰ However, the flexibility required to exercise South Korea's self-defense should have dictated allowing the United States to adapt its military strategy to the dynamic war reality.

Although defenders should be constrained by allowing them to use only the minimum force in exercising their defense, attackers are not entitled to be assured in advance of their victims' strategic war aim. The next discussion focuses on the suggested enabling function of *ad bellum* proportionality, which, from a normative standpoint, should allow a defending State to exercise its defense without unnecessary constraints.

77. Legally, the Korean example is not a case of (collective) self-defense since its legality derives from the Security Council authorization. It is used only for the sake of demonstration. For the Security Council resolution authorizing collective action against North Korea's armed attack, under the flag of the United Nations and the joint command of the United States, see *supra* note 22.

78. MICHAEL WALZER, *JUST AND UNJUST WARS* 118 (5th ed. 2015).

79. *Id.* at 118–20. Walzer further argues that while proportionality is about adjusting means to ends, the unacceptable tendency in wartime is to adjust ends to means (referring to Melzer). *Id.* at 120. In extreme circumstances, however, regime change would not reflect opportunistic behavior, and it should be a lawful war aim—e.g., in the case of Nazi Germany. See, e.g., Beer, *supra* note 67, at 203–6.

80. Ironically, from a military perspective, the opportunistic change in the American grand strategy had its own cost. The U.S. Army overshot its culmination point of success. EDWARD N. LUTWAK, *STRATEGY: THE LOGIC OF WAR AND PEACE* 25–26 (2nd ed. 2001).

C. *The Suggested Enabling Function of ad bellum Proportionality: Allowing the Defending State to Exercise its Defense in a Dynamic War Environment*

A strategic reading of *ad bellum* proportionality would deny attackers any incentive to extend their acts of aggression further. This is especially true in light of the current equal application of the *in bello* rules on both attackers and defenders, which to some extent might reward aggressors.

An attacker initiates the belligerency by selecting the time and place convenient to it. In many cases, its attack surprises the victim and might gain it substantial strategic, operational, and/or tactical advantages, at least in the short term.⁸¹ Legally, however, a self-defending army does not enjoy any “offsetting” legal privileges in combat, even where its relative position may be inferior due to the illegal armed attack it faces. It must obey the same *in bello* rules applicable to its aggressor. The legal system does not compensate the defending State for any operational or tactical loss it might incur as a result of its opponent’s armed attack. An aggressor’s defiance of the prohibition of the “threat or use of force,” found in Article 2(4) of the UN Charter, is not legally punished in real-time, nor are its soldiers, by the imposition of constraints in combat.⁸² The *in bello* rules that apply to the aggressor during combat are not influenced by its original sin; they are neutral, allowing the aggressor’s soldiers to fight on the battleground against the defender’s soldiers in an atmosphere of “fair play,” regardless of the “unfair”—in fact, illegal—cause for which they are fighting. Although the aggressor is in a better position at the start of the war, the contest continues under the same

81. This is dependent, of course, on the general circumstances and on the aggressor’s ability to realize those advantages and the defending State’s ability to counter them. See BEER, *supra* note 67, at 100–101.

82. Though aggression is not legally punished in real-time it is unlawful under the *ad bellum* rules and might incur substantial *ex-post* consequences deriving, for example, from “state responsibility,” and it is considered a crime under the Rome statute. See *supra* note 58 and accompanying text.

rules even though the operational cards were not dealt fairly. Although morally there may be a case for offsetting the advantage the aggressor has,⁸³ practically there is a strong justification for preferring equal application of the *in bello* rules.⁸⁴

Even though the equal application of the *in bello* rules is justified, because of the bias it embodies, the legal system should create, in all of its other rules, a legal environment that is hostile towards aggression. Promoting law abidance is naturally to be expected from any legal system. Given the de-escalation rationale of the halt and repel constraint and the equal application of the *in bello* rules, the law should deny the aggressor any other real-time benefits that may derive from its aggression while allowing the defending State to exercise its self-defense. The prevailing view fails, to a large extent, to fulfill this expectation.

Indeed, international law grants remedies to the victim State. However, these are partial and, in many cases, not effective in real-time. First, Article 37 of the UN Charter allows the victim to refer the conflict to the Security Council, reflecting the preference for authorized collective force over self-help. However, this Council is, in many cases, a malfunctioning body that cannot fulfill its mission effectively. It was largely paralyzed during the Cold War,⁸⁵ and although it subsequently became more active in exercising its responsibility for maintaining international peace and security, it has mostly failed to fulfill its policing functions under Chapter VII of the UN Charter.⁸⁶ Second, the International Law Commission's Articles on State Responsibility

83. For the moral view that preference should be awarded to a military fighting a just war, see, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 379 (1st ed. 1971) (“[W]here a country’s right to war is questionable and uncertain, the constraints on the means it can use are all the more severe. Acts permissible in a war of legitimate self-defense, when these are necessary, may be flatly excluded in a more doubtful situation.”). For the view that the victim’s combatants should be favored and the aggressor’s punished, see, e.g., Jeff McMahan, *Innocence, Self-Defense, and Killing in War*, 2 *JOURNAL OF POLITICAL PHILOSOPHY*, 193, 193–95 (1994) (attacking the “orthodox view” and arguing that if combatants participate in a war that is unjust and if they were not forced to fight, they don’t have a moral right to kill enemy soldiers on the basis of self-defense). For support for the common approach, which treats all soldiers on the battlefield as morally equal, see, e.g., WALZER, *supra* note 78, at 338–46.

84. First, this separation creates a reciprocal incentive for soldiers of both sides to fight “fairly” and obey the law. Second, this set of rules is applicable not only in cases where one can easily recognize the innocent party but also in the more common case where each side accuses its opponent of being the aggressor. See, e.g., Greenwood, *Self-Defense and the Conduct of International Armed Conflict*, *supra* note 9, at 287.

85. See *supra* note 22.

86. See Beer, *supra* note 4, at 118–19 (notes 9–10).

allow a victim State to take necessary and proportionate temporary countermeasures “against a State which is responsible for an internationally wrongful act [against it],”⁸⁷ yet they restrict the scope of the response.⁸⁸ The countermeasures—aimed only at inducing the offending State to comply with its obligations,⁸⁹ i.e., cessation of the wrongful act and reparation for the injury⁹⁰—should be non-forcible ones.⁹¹ Third, though the crime of aggression in the Rome Statute allows the criminal prosecution of leaders,⁹² this is an ex-post punitive measure whose effectiveness in real-time is partial in general and dependent on international law enforcement capabilities, which are lacking.⁹³ Fourth, some privileged victim States may enjoy collective self-defense, but this right is contingent upon third States’ willingness to help, and in any case it is not a universal right granted to all self-defending States.⁹⁴

Indeed, in light of the partial effectiveness of these remedies and their usually belated effect, it would be natural to expect the law to deny the aggressor any real-time benefits that may derive from its aggression. Although the *ad bellum* constraining factors allegedly apply simultaneously to both adversaries, in practice they apply mainly, or even only, to the law-abiding defender’s reactive measures. Constraining the defending State’s response geographically and restricting the means used by it—in fact, stabilizing the belligerency arena by accepting the proactivity of the attacker as given and allowing only reactivity to the victim—may trigger a counter-effect. It is con-

87. UN Int’l Law Comm’n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001 YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, vol. II, pt. 2, art. 49(1) [hereinafter Articles on State Responsibility].

88. “Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.” *Id.* art. 49(2). For the requirement of proportionality regarding them, see *id.* art. 51.

89. *See id.* art. 49(1).

90. *See, e.g.*, JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 281–87 (2002).

91. *See* Articles on State Responsibility, *supra* note 87, art. 50(1)(a) (stating that countermeasures shall not affect “[t]he obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations”).

92. *See supra* note 58.

93. The malfunctioning of the International Criminal Court is manifested vis-à-vis an aggressor who is a superpower or enjoys the protection of such a State. For the argument—in fact speculation—that the ICC is targeting “weak” Africans leaders, see, e.g., Rowland J. V. Cole, *Africa’s Relationship with the International Criminal Court: More Political than Legal*, 14 MELBOURNE JOURNAL OF INTERNATIONAL LAW 670 (2013).

94. *See, e.g.*, DINSTEIN, *supra* note 8, at 301–28.

trary to the de-escalation rationale and, in many cases, tantamount to incentivizing aggressors. These faults invite us to revisit the common reading of *ad bellum* proportionality from a strategic perspective.

The notion of a proportional response in general, and its constraining attributes in particular, is based on a linear logic that determines what an appropriate response to a given action should be. In human relations there is usually a linear connection between certain conduct and its consequences. A proportional, linear response to an action is usually expected in this interaction, and even in disputed issues—e.g., commercial conflicts—a moderate response might prevent an escalation. However, such linear behavior is not always rewarding in belligerency, where the adversaries are reacting to each other's actions in their fight for survival. Linear responses in a war might be expected and penalized by the adversary and are, in many cases, counter-effective. This may explain why military strategy, sometimes even grand strategy, invites the unexpected, confounding straightforwardly logical actions and possibly rewarding a surprising, unforeseen course of action. Edward Luttwak asserts: "It is only in the realm of strategy, which encompasses *the conduct and consequences of human relations in the context of actual or possible armed conflict*, that we have learned to accept paradoxical propositions as valid."⁹⁵ To illustrate, he cites the Roman saying, "If you want peace, prepare for war." In the Roman view, the preferred deterrence strategy for States that want peace was not to adopt linear peaceful means but rather the opposite.⁹⁶ A strategy might reject the usually expected linear connection between the desired end and the means to achieve it. This unique attribute of military strategy doesn't mean that a defending State should always act paradoxically,⁹⁷ but rather that it should not be forced to respond always as anticipated. Under strict linearity, however, the attacker enjoys the benefits that derive from its power to determine the war arena and the scope of the conflict. These benefits might incentivize it to escalate the conflict, in sharp contrast to the expectation that the legal system should prevent—or at least neutralize—any benefit derived by the attacker from its aggression. It is possible to deny an attacker any benefits deriving from a linear response by applying the de-escalation rationale of the strategic halt and repel requirement and its restrictions to both belligerents. The desire to constrain the belligerency

95. LUTTWAK, *supra* note 80, at 2.

96. *Id.* at 1–2.

97. Acting paradoxically carries its own costs and risks. Executing such actions is difficult at the grand strategy level in democracies, where leaders are oriented towards linear actions that appeal to the common sense of their constituents.

should apply symmetrically. The following Part will present the argument that, to a large extent, the constraining factors of *ad bellum* proportionality, as suggested by the overarching school, fail to fulfill this expectation of de-escalation.

VI. THE MISTAKE OF THE OVERARCHING APPROACH:
THE CONSTRAINING FACTORS OF *AD BELLUM* PROPORTIONALITY
INCENTIVIZE THE ATTACKER

A. *The Counter-Effectiveness of the Geographical Constraint*

From a strategic point of view, limiting the geographical boundaries of the defensive response to the site of confrontation chosen by the attacker will not always de-escalate the belligerency, as expected by the overarching view, but rather may fuel it. In what follows, I present the normative argument that the constraining factors of linear *ad bellum* proportionality might reward the attacker and incentivize it, mainly with regard to the geographical factor.

Military strategy is contextually based. Every State has its own unique attributes—e.g., its geography, economy, and culture. A State's geography is an important factor in determining its military doctrine and strategy.⁹⁸ If a defending State does not have a territorial buffer zone that can mitigate a surprise attack, it faces much greater danger from such an attack, which might even become an existential threat to it. Russia's territory, as was demonstrated in World War II and earlier in the Napoleonic Wars, was expansive enough to absorb such an aggressive blow; West Germany (during the Cold War) and South Korea, due to their geographic circumstances, could not afford to do so.⁹⁹

The geographical constraint, as advocated by the overarching approach, requires the defending State's reactive forceful actions to be confined to the arena selected proactively by the attacker. *Prima facie*, this confinement seems to be justified in light of the *ad bellum* constraints' purpose—to de-escalate the conflict. Actually, however, this restriction could have the counter-effect of incentivizing the attacker's aggression, especially if it is strictly

98. However, geography alone does not exclusively explain the patterns of war and strategy of a given military, although it plays an important role in it. The way militaries fight and their doctrines and even military tactics "are usually the product of social and economic factors rather than of purely military ones." MARTIN VAN CREVELD, *COMMAND IN WAR* 19 (1985).

99. See the discussion in BEER, *supra* note 67, at 100–101.

imposed. The attacker has selected the belligerent arena due to the advantages it offers. To confine the defender's response to this comfort zone of the attacker is to cater to the attacker's preferences. To a large extent, this rule exempts the attacker from having to invest its military resources in channeling the defending State's response to its preferred combat arena and gathering intelligence regarding where the self-defendant's counterattack may strike. Restricting the belligerent arena geographically to the area of the initial attack gives the attacker insurance against a counter-surprise by the defender; ironically, it even requires the victim to pay the premium for that insurance. In many cases, it amounts to giving the aggressor an incentive to attack and should not be acceptable.

Furthermore, restricting the geographical arena of lawful self-defense differentiates between victim States. It gives an advantage to strong militaries, enabling them to exercise their self-defense, while it hamstringing and, in some cases, even disables weaker victims. A strong defending army may adopt—in some cases, prefer—a frontal counterattack in the attacker's chosen belligerent arena, where its military is located. The advantages that stem from utilizing its overwhelming force prevail over the risk of fighting an enemy that is unsurprised, prepared, and waiting for the counterattack. For example, American strategy has long leaned toward the use of overwhelming force, a choice influenced by the country's sheer size, wealth, and production capabilities. "World War II both shaped and revealed American strategic culture like no other war with the exception of the Civil War. Two dominant characteristics stand out: the preference for massing a vast array of men and machines and the predilection for direct and violent assault."¹⁰⁰ However, weaker armies, when called upon to mount a response in self-defense aimed at halting and repelling the attacker, will often try to avoid an easily foreseen frontal clash in the war arena chosen by the latter, in order to exploit the element of surprise regarding the time and place of their counterattack. In some cases—e.g., due to the balance of power between the adversaries—this is the only available alternative that can allow them to defend themselves.

100. Eliot A. Cohen, *The Strategy of Innocence? The US, 1920–1945*, in *THE MAKING OF STRATEGY: RULERS, STATES AND WAR* 428, 464 (Williamson Murray, MacGregor Knox & Alvin Bernstein eds., 1994). See also DIMA ADAMSKY, *THE CULTURE OF MILITARY INNOVATION* 76–79 (2010) ("The translation of enormous resources into firepower, technology, and logistical ability and a consequent inclination for direct attack date back to the military experience of the American Civil War." *Id.* at 78–79). See also the Colin Powell doctrine, *supra* note 18.

Ironically, in many cases, the geographical constraint works against its de-escalation rationale by increasing the hazards of war and the damage caused by it. The geographical constraint allows an attacker to concentrate its army in the belligerent arena (without assigning substantial reserves to protect its entire territory), which could lead to a direct encounter between massed armies in a relatively limited space. Frontal clashes between the belligerents in the designated war arena—a natural result of confining the defending State’s military response to the location chosen by the attacker—could trigger a deadly war of attrition.¹⁰¹ In many cases, though, an indirect self-defensive counterattack, remote from the front lines and the war arena,¹⁰² could succeed in halting and repelling the attacker at a relatively lower price. Bearing in mind the rationale of *ad bellum* proportionality—namely, to reduce war’s hazards and de-escalate conflicts¹⁰³—the legal rules should not prevent a defender from mounting a less deadly indirect counterattack on the attacker’s distant positions, as long as it operates within the halt and repel strategic rationale. Though the potential risk of ignoring the geographical constraint is to spread a conflict on a global scale, allowing the victim State to exercise only minimal force in self-defense limits the potential of globalizing of the conflict.

Although the discussion thus far has been normatively based, the positive law relating to the geographical constraint in general, and States’ practice in particular, is disputed as well, reflecting the argument that a self-defensive strategy is contextually based. There are contradictory examples of State practice. For example, in the 1982 Falklands War—which, as mentioned above, was mainly over the sovereignty of the isolated islands¹⁰⁴—the aims of both the British grand strategy and the military strategy were geographically limited. The expulsion of Argentina from the Falkland Islands did not

101. See generally CARTER MALKASIAN, *A HISTORY OF THE MODERN WARS OF ATTRITION* 17–19 (2002).

102. For example, in light of the devastating effects of attrition during World War I, Liddell Hart, a military theorist and historian, argued that the function of grand strategy should be to identify the enemy’s “Achilles’ heel” and then strike it, rather than fight the enemy at his strongest points. B.H. LIDDELL HART, *PARIS, OR THE FUTURE OF WAR* 22 (1972). For Hart’s “strategy of indirect approach,” see BRIAN BOND, *LIDDELL HART: A STUDY OF HIS MILITARY THOUGHT* 37, 64 (1977). Thousands of years earlier, Sun Tzu wrote that “He who knows the art of the direct and the indirect approach will be victorious. Such is the art of maneuvering.” SUN TZU, *THE ART OF WAR* 106 (Samuel B. Griffith trans., 1963).

103. See *supra* note 47.

104. See *supra* text accompanying notes 30–31.

require any attacks within Argentina, and the sea battle was restricted to the exclusion zone surrounding the islands, the sole exception being the sinking of the Argentine cruiser *General Belgrano*.¹⁰⁵ However, in the First Gulf War, the coalition allies, in an attempt to drive the Iraqi forces from Kuwait, chose strategically not to limit their attack to the territory of Kuwait, in light of Iraq's strong military capability.¹⁰⁶ If the allies' policy, their grand strategy, had been aimed at making territorial gains, it should have been prohibited. But since their invasion of Iraq was motivated by the operational advantages it offered, it was still within the strategic halt and repel framework. The allies' de-escalatory halt and repel war aim was demonstrated, however, by their decision to end the ground war on Iraqi soil after only one hundred hours, without the complete destruction of the Iraqi army.¹⁰⁷

Similarly, Andreas Zimmermann correctly claims that if an attacker's military command and control centers are located in its hinterland, they can be attacked by the defender, even if the initial attack was limited to the border

105. See GARDAM, *supra* note 9, at 164. Both Greenwood and Gardam use the example of the sinking of the Argentinian cruiser *General Belgrano* outside the total exclusion zone that had been declared by the United Kingdom to demonstrate their overarching approach. Greenwood states: "[t]he legality of the attack on the General Belgrano depended, therefore . . . whether the General Belgrano was so impeding the operation to retake the islands that sinking it became a reasonable and necessary step towards the achievement of that objective." Greenwood, *The Relationship between Ius ad bellum and Ius in bello*, *supra* note 7, at 224. Gardam claims that the cruiser did not appear to pose an immediate threat at the time of the attack and that the attack was a preemptive and escalatory strike. Accordingly, there are doubts regarding the proportionality of this attack as an act of self-defense. GARDAM, *supra* note 9, at 171–72. It should be noted that from an *in bello* perspective this attack was probably lawful. The cumulative requirements for deeming an object a legitimate military target ("military objective") are (a) that its "nature, location, purpose or use" makes an "effective contribution to military action" (of the adversary), and (b) that its total or partial destruction or neutralization must offer a "definite military advantage" in "the circumstances ruling at the time." API, *supra* note 41, art. 52(2).

106. GARDAM, *supra* note 9, at 164. Instead of explaining the strategic difference between the two cases, as suggested by me, Gardam argues for an existing legal rule (adhered to in the Falklands campaign) and a disputed exception (in the Gulf). In her view, much of the other State practice supporting invasion of an adversary's territory is unlawful and "is perhaps best seen as a breach of the requirements of proportionality rather than the establishment of a different rule." *Id.* at 164–65.

107. See, e.g., ELIOT A. COHEN, SUPREME COMMAND: SOLDIERS, STATESMEN AND LEADERSHIP IN WARTIME 194–98 (2003).

zone.¹⁰⁸ The Eritrea Ethiopia Claims Commission also recognized that it is impossible to limit the defending State's response to the area where the first attack took place.¹⁰⁹

Though the focus of this article is on geographical constraint as a factor used to assess the proportionality of a defensive response in international armed conflicts,¹¹⁰ the geographical constraint seems to be even less relevant in non-international armed conflicts. This irrelevancy was demonstrated, for example, as regards the international response to the 9/11 al-Qaeda attacks, executed by transnational non-State actors. In this context, "recent practice suggests that geographical factors that may be considered relevant to the proportionality of inter-State self-defence are of limited relevance: hence states hit by terrorist attacks on their home soil have asserted a right to respond against terrorists at their base"¹¹¹ The disregard of the geographical constraint by this international response is a natural consequence of the wholesale rejection of linearity by non-State actors. They usually break the linearity whenever they can to bypass what is perceived by them as an uneven battlefield. Non-State actors often see the violation of linearity as a strategy

108. Andreas Zimmermann, *The Second Lebanon War: Jus ad bellum, Jus in bello and the Issue of Proportionality*, 11 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW ONLINE 99 (2007), https://www.mpil.de/files/pdf2/mpunyb_03_zimmermann_11.pdf (arguing that the self-defender's response must "be able to diminish the military abilities of the aggressor and to induce the enemy not to continue its attack." *Id.* at 123).

109. Eritrea-Ethiopia Claims Commission, Partial Award: Jus ad Bellum Ethiopia's Claims 1–8 (Eth. v. Eri.), ¶ 19 (Perm. Ct. Arb. Dec. 19, 2005), *reprinted in* 45 INTERNATIONAL LEGAL MATERIALS 430 (2006) ("once the armed attack in the Badme area occurred and Ethiopia decided to act in self-defense, a war resulted that proved impossible to restrict to the areas where that initial attack was made").

110. *See supra* note 5.

111. Christian J. Tams & James G. Devaney, *Applying Necessity and Proportionality to Anti-Terrorist Self-Defense*, 45 ISRAEL LAW REVIEW 91, 104 (2012). For the different approaches regarding whether the existing self-defense justification is sufficient where a non-State actor relocates to another country or whether a new *ad bellum* validation is required, see, e.g., L. R. Blank, *The Extent of Self-Defence Against Terrorists Groups: For How Long and How Far*, 47 ISRAEL YEARBOOK ON HUMAN RIGHTS 265, 307–8 (2017). However, in non-international armed conflicts, even if there is *ad bellum* justification for using force in a third sovereign State—either Security Council authorization (under UN Charter Article 42), or consent, or self-defense—a different issue is the geographical limits (if any) to the reach of IHL in such a conflict. *See, e.g.*, Michael N. Schmitt, *Charting the Legal Geography of Non-International Armed Conflict*, 90 INTERNATIONAL LAW STUDIES 1, 8–18 (2014).

meant to even the odds,¹¹² and one can't expect their victims to respect this linearity either.

However, the positive law regarding the geographical constraint in inter-State wars is mixed. In the *DRC v. Uganda* case, the ICJ asserted in its majority opinion that Uganda's response to the DRC's trans-border attacks, on areas hundreds of kilometers beyond the Uganda-DRC border, "would not seem" proportionate.¹¹³ Indeed, the fact that a self-defensive strategy is contextually based and not geographically restricted is reflected in the dispute regarding the positive law and can be demonstrated in the inconsistency of States' practice.

The discussion above has concentrated on the geographical constraint of proportionality, as suggested by the overarching view. In the following discussion, the argument regarding its counter-effectiveness in the strategic sphere will be extended to other suggested linear factors.

B. The Counter-Effectiveness of other Linear Constraining Factors under ad bellum Proportionality

Imposing operational linearity upon the defending State in the means it uses—even though they may be lawful under the law of armed conflict—may seem natural under the proportionality requirement; nonetheless, it harms its ability to defend itself properly. This is true whether the limitation applies to the location of the belligerency, as discussed earlier, or to the means used—e.g., the "significant limitations on the weapons available to States in the exercise of their right to self-defence."¹¹⁴ According to Gardam, "[t]he weaponry chosen in any particular case must remain defensive in character."¹¹⁵ Normatively, constraints on the means of defense unnecessarily

112. Non-State actors' strategy of violating linearity explains why they usually do not respect the peaceful status quo (the *ad bellum* rules), nor adhere to the *in bello* rules. See, e.g., M. Cherif Bassiouni, *The New Wars and the Crisis of Compliance with LOAC by Non-State Actors*, 98 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 711 (2008); Eyal Benvenisti, *The Law of Asymmetric Warfare*, in LOOKING TO THE FUTURE: ESSAYS IN INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 931, 931 (H. Arsanjani et al. eds., 2010).

113. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, 223, ¶147 (Dec. 19) ("The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometers from Uganda's border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, nor to be necessary to that end.")

114. GARDAM, *supra* note 9, at 171.

115. *Id.*

restricts the defending State's ability to protect itself, in addition to the limits imposed by the halt and repel requirement.¹¹⁶ The notion that offense and defense are absolutely dichotomous concepts, as reflected by the defensive means constraint, is not accepted by military thinking; rather, as Clausewitz noted, "defense in war can only be relative . . . a defensive campaign can be fought with offensive battles, and in defensive battle, we can employ our divisions offensively."¹¹⁷ In reality, there are military scenarios that validate the cliché that "the best defense is a good offense." Legally, too, this phenomenon is reflected in Additional Protocol I, Article 49(1): "'Attacks' means acts of violence against the adversary, whether in offence or in defence."¹¹⁸ It is not whether military means are dubbed offensive or defensive that should matter, but rather whether their actual use occurs in a defensive (halt and repel) or offensive strategic context.

Under any linear constraint, especially if strictly imposed, the attacker enjoys the privilege—which it doesn't deserve—of framing and, to some extent, controlling the victim's response. Not only is the victim denied proactivity, but the attacker also gets to structure the victim's reactive response and the means it uses! Furthermore, the attacker, who has intentionally breached the *ad bellum* rules, does not have to bear the full consequences of its aggression, since the defending State is restricted in the weapons and means it can use. If an attacker were to know that the defender is not always confined to a predetermined, expected, proportionally linear response to its aggression, its costs would rise, and the potential spectrum of risks that it faces would widen. Linearity entitles aggressors to discounts, which they do not deserve. Providing this linear insurance to attackers and requiring the victim to pay the premium for it has a counter-effect, incentivizing aggression. Contrary to their intent, linear constraints may promote escalation because they distort attackers' cost-benefit calculations by reducing their potential costs. Uncertainty regarding the contours of the defending State's response should be encouraged, as long as the defensive means used by it are

116. Greenwood appears not to accept Gardam's defensive means constraint. See Greenwood, *Self-Defence and the Conduct of International Armed Conflict*, *supra* note 9, at 280 ("The State that relies upon the right of self-defence must not employ weapons . . . unnecessary for repelling that attack."). See also his concurring citation of O'Connell, who argues that the victim must not fight his defensive battle "on the opponent's terms." *Id.* Indeed, the overarching approach is not a homogenous one. See *supra* note 44.

117. CLAUSEWITZ, *supra* note 70, at 357.

118. API, *supra* note 41, art. 49(1).

lawful under the law of armed conflict.¹¹⁹ Ironically, while the linear constraints are grounded in the de-escalation rationale, their direct effect in many cases is to promote aggression and escalation.

In sum, the mistake of the overarching approach—as reflected in the “general accord” regarding the linear factors of *ad bellum* proportionality—seems to be that it creates a strategic environment that may promote aggression. In many cases, accepting the proactivity of the attacker as given and allowing only limited reactivity to the victim will not de-escalate the belligerency, as per the rationale, but rather inflame it.

C. *The Consequential Constraints are more in bello Oriented*

The common version of the overarching approach suggests restricting the destructive scope of the defending State’s response, including its effect on third States, by attributing consequentiality to *ad bellum* proportionality. The expected damage to be caused by the self-defendant to enemy forces, civilians, infrastructure, and the environment,¹²⁰ should be proportional to the threat it aims to prevent. In an extreme case, the use of force should be unlawful if the harm caused by it outweighs its benefits. This factor corresponds with a harms-benefits analysis of *ad bellum* proportionality—rejected in this article—which assumes that an exercise of necessary, minimal force in self-defense against an armed attack is always lawful.¹²¹

Furthermore, substantiating the consequential constraints as an *ad bellum* factor is problematic for two reasons. First, the destructive scope of a self-defensive campaign is a dynamic factor deriving from the mutual reactions of the adversaries at the strategic level, which in many cases can’t be anticipated. Second, its *in bello* “competitor”—namely, the law applicable in armed conflict—is specifically designed to regulate the conduct of hostilities and

119. For the deterring effects of uncertainty, see BEER, *supra* note 67, at 189 (arguing that “Thus, whenever an aggressor decides to cross the *ad bellum* Rubicon and initiate an armed attack, it will have to bear the unknown full consequences of its illegal activities. When potential aggressors internalize that there is a price—not fully known in advance—to be paid for their aggression, they may be deterred from starting hostilities in the first place; on rational players, motivated by cost-benefit calculations, it should have a substantial deterrent effect.”).

120. See *supra* text accompanying note 43.

121. See *supra* text accompanying notes 19–20, and note 27.

restrict the damage caused by it.¹²² Mutual application of both laws invites inherent friction and contradictions.¹²³ The transplantation of the *ad bellum* proportionality constraint, taken from the strategic sphere, to the *in bello* environment that regulates mainly operational and tactical activities is problematic.

The *jus in bello*—the specific rules dealing with the actual conduct of the belligerency during an armed conflict, and aimed at reducing war’s hazards and consequences—balances the demands of military necessity against humanitarian concerns.¹²⁴ Its rules—each of which “constitutes a dialectical compromise” between the principles of military necessity and humanity in a specific context¹²⁵—are mainly relevant to the operational and tactical levels of war. To achieve that delicate concrete balance, this body of law has been specifically designed by imposing a set of constraining rules enshrined in

122. When it comes to the role of human rights law in wartime, it is the law of armed conflict that dominates the war arena: “The [human rights] test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.” Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 ¶ 25 (July 8).

123. Compare Ruys’ rejection of the type of weapon as a factor to be used in assessing proportionality, which in his view is more related to IHL. RUYS, *supra* note 35, at 123. See also Lieblich, *supra* note 10, at 16–28.

124. For example, the commentary on Additional Protocol I to the Geneva Conventions states: “The entire law of armed conflict is, of course, the result of an equitable balance between the necessities of war and humanitarian requirements.” Claude Pilloud & Jean Pictet, *Protocol I Article 57—Precautions in Attack*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 683 (Claude Pilloud et al. eds., 1987).

125. See Michel N. Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VIRGINIA JOURNAL OF INTERNATIONAL LAW 795, 798 (2010).

both treaty law—mainly the four Geneva Conventions¹²⁶ and the two Additional Protocols¹²⁷—and customary law.¹²⁸

By its rejection of the mutual exclusivity of the *ad bellum* and *in bello* rules, as suggested by the limited approach,¹²⁹ the overarching approach, motivated by its de-escalation rationale, demonstrates its dissatisfaction with the prevailing *in bello* regulation. But due to the difficulties in changing this body of law, the overarching approach wants to reform and strengthen the *in bello* rules with an external legal brake, taken from the *ad bellum* sphere. Whatever one may think of such legal ingenuity, the challenge of the overarching approach is to define the added value created by extending the *ad bellum* rules of proportionality to the *in bello* environment, and to synchronize the two regimes.¹³⁰ From this perspective, the overarching approach, as reflected by its suggested constraining factors, seems to be mistaken and counter-effective. Applying a strategic constraint to the operational and tactical levels usually isn't appropriate and would not be accepted by States. As Watkin comments:

A concern that an overemphasis on self-defense principles during an armed conflict may lead to their controlling the use of force at the tactical level of operations may be well founded. That concern is based on the self-defense

126. Geneva Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

127. API, *supra* note 41; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609.

128. State practice is considered the objective element required to establish customary law; the subjective element is *opinio juris* explicitly supporting this practice. *See, e.g.*, Michael Wood & Omri Sender, *State Practice*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 2 (Anne Peters ed.), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1107> (last updated Dec. 2020)

129. *See supra* text accompanying notes 7–8 and see the exceptional cases “short of war” where, according to Dinstein, this mutual exclusivity doesn’t apply. DINSTEIN, *supra* note 8.

130. According to Greenwood, the *ad bellum* and *in bello* rules “are separate but complementary systems of rules, which are capable of being studied and applied separately but which must both be considered in evaluating the legality of a state’s use of force. To regard them as being in competition is nonsense.” Greenwood, *The Relationship between Ius ad bellum and Ius in bello*, *supra* note 7, at 233.

concept of proportionality being given a disproportionate weight, such that it interferes with the conduct of operations necessary to provide security.¹³¹

Indeed, States are obliged only by treaty and customary law.¹³² The extension of a strategic constraint to the tactical level creates legal ambiguity, as noted by David Kretzmer: “in *jus ad bellum* the very meaning of the [proportionality] principle is shrouded in uncertainty.”¹³³

If, as has been argued, the factors suggested to assess *ad bellum* proportionality are counter-effective and, to a large extent, inapplicable, the following discussion suggests the revival of the overarching approach in a modest, limited version.

VII. THE SUGGESTED LIMITED VERSION OF THE OVERARCHING APPROACH

In light of the inherent difficulties the prevailing version of the overarching approach faces, I would like to suggest a more limited—yet attainable—version. Coherently extending the *ad bellum* rule of proportionality during the entire armed conflict seems to require first defining its relation to the *in bello* rules. In this context, I would suggest accepting that the *in bello* rules reflect the micro norms of the law of armed conflict, while the *ad bellum* proportionality constraint should function, during the belligerency, as a macro standard at the strategic level.¹³⁴ As a macro constraint, it should not dictate secondary factors and allow the self-defendant to use only the minimal military force required to regain its security during a limited period, causing minimal damage during the entire military campaign. Such a reading of *ad bellum* proportionality by the overarching approach—enabling a self-defendant to

131. WATKIN, *supra* note 10, at 75.

132. *Id.* Referring to Walzer, Watkin asserts that “the law governing the exercise of State self-defense would fundamentally alter traditional interpretations of proportionality under humanitarian law It is an approach that reignites the ‘pacifist’ antiwar debate regarding the ‘outlawing’ of war that underpinned much of the lead-up to the adoption of the UN Charter.” For the allies’ practice in the First Gulf War regarding, for example, the geographical constraint, see *supra* text accompanying notes 105–107.

133. Kretzmer, *supra* note 20, at 237.

134. For the distinction between rules and standards, see, e.g., Kathleen M. Sullivan, *The Justices of Rules and Standards*, 106 HARVARD LAW REVIEW 22, 57–59 (1992); Ronald Dworkin, *The Model of Rules*, 35 UNIVERSITY OF CHICAGO LAW REVIEW 14, 22–29 (1967).

exercise self-defense but constraining it from using unnecessary force¹³⁵— seems to be an effective macro standard that it can entertain and deliver, in its desire to reduce war’s hazards.¹³⁶ This version of the overarching approach would reject the imposition of the linear constraining factors, especially the geographic¹³⁷ and that on the “means used,” as an *ad bellum* proportionality constraint. Simultaneously, it will allow enough room for the *in bello* constraining factors to operate coherently.

Such a limited version of the continuing application of *ad bellum* proportionality’s constraining role should be applied in a case-by-case manner, taking into account the full circumstances of the adversaries and the fighting arena. It seems to be consistent with Greenwood’s introduction of a standard of reasonableness in the exercise of self-defense.¹³⁷

This requirement of proportionality . . . means that it is not enough for a state to show that its initial recourse to force was a justifiable act of self-defence and that its subsequent acts have complied with the *ius in bello*. It must also show that all its measures involving the use of force, throughout the conflict, are reasonable, proportionate acts of self-defence. Once its response ceases to be reasonably proportionate then it is itself guilty of a violation of the *ius ad bellum*.¹³⁸

Indeed, in addition to such an *ad bellum* macro standard at the strategic level, the constraining norms should mainly be based upon the current specific *in bello* rules regulating the ways and means whereby a self-defendant

135. While a constraint on using unnecessary force might seem to be based upon the necessity principle, this article follows Gardam’s analysis of proportionality, considering the necessity requirement to enable the use of force by a victim State only as a last resort, when non-forcible measures have failed to restore its security. See Gardam’s analysis *supra* note 35.

136. Compare with the new approach to proportionality in armed conflict suggested by Lubell and Cohen, termed by them “strategic proportionality.” This effect-based version of proportionality “requires an ongoing assessment throughout the conflict, balancing the overall harm against the strategic objectives.” See Lubell & Cohen, *supra* note 5, at 162. This article, however, rejects any reading of an effect-based *ad bellum* proportionality. It argues that once the resort to force is necessary as a matter of last resort of self-defense, it should be allowed, though exercised by minimum force. The latter is an issue of proportionality. See *supra* text accompanying notes 19–20.

137. Compare with the introduction by Dinstein’s limited approach of the “standard of reasonableness,” applicable only to the initial categorical decision on the use of force. See Dinstein’s quote *supra* note 11.

138. Greenwood, *The Relationship between Ius ad bellum and Ius in bello*, *supra* note 7, at 223. He further argues that “international law contains no rigid rules about what amounts to reasonable measures of self-defence.” *Id.*

may exercise its defense. If the legal aim is to reduce war's hazards, these rules may be strengthened internally rather than by the importation of incoherent external vectors that would probably damage them. Since *in bello* proportionality deals exclusively with only one factor—prohibiting excessive collateral damage to civilians in relation to the military advantage gained by the attack¹³⁹—the *in bello* necessity principle could play an additional constraining role of limiting consequential damages. Although the positive necessity principle justifies the mere use of lethal force, normatively, it should not only facilitate wielding the military sword but also function as a shield, protecting both combatants and noncombatants and their objects from excessive use of force.¹⁴⁰ Indeed, traditionally the necessity rule has had a dual function, on the one hand enabling the use of military force whenever necessary, but on the other hand, limiting it to only the degree of force required to achieve the legitimate military purpose of the conflict.¹⁴¹ Currently, however, it has failed to function as a substantial constraining standard, as initially expected.¹⁴² Furthermore, strengthening the *in bello* rules requires us to think strategically—to face reality—and to leverage military strategy as a constraining tool by demanding that militaries operate coherently within the framework of any lawful strategic aim in their operational use of force. For example, requiring adherence in targeting to strict and definite lawful war aims, as strategically selected by a belligerent, might substantially moderate the scope of lawful targets and reduce humanitarian damage, especially in limited wars.¹⁴³

139. See *supra* note 45.

140. See generally Yishai Beer, *Humanity Considerations Cannot Reduce War's Hazards Alone: Revitalizing the Concept of Military Necessity*, 26 EUROPEAN JOURNAL OF INTERNATIONAL LAW 801 (2015) (arguing, based on both utilitarian and moral grounds, that the time has come to revisit the necessity principle and challenge some prevailing norms, reflecting the current balance reached in light of the principles of humanity and military necessity).

141. See, e.g., Gabriella Blum, *The Laws of War and the "Lesser Evil,"* 35 YALE JOURNAL OF INTERNATIONAL LAW 1 (2010).

142. Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AMERICAN JOURNAL OF INTERNATIONAL LAW 213, 229 (1998). Referring to this historic restrictive function, which “seems to have been forgotten,” he then concludes that “military necessity is widely regarded today as an insidious doctrine invoked to justify almost any outrage. As a result, the principle has not been allowed to play the creative role that it is capable of playing.” *Id.* at 230.

143. See WATKIN *supra* note 10, at 78–88. See generally Yishai Beer, *Military Strategy: The Blind Spot of International Humanitarian Law*, 8 HARVARD NATIONAL SECURITY JOURNAL 333 (2017).

In sum, achieving the aim of reducing war's hazards requires strengthening the *in bello* rules at the operational and tactical levels and the application, under the overarching approach, of a strategic continuing proportionality standard, binding upon State leaders, of using minimal force at all levels. This isn't the maximalist version of this approach, but rather an effective, less ambitious extension of the *ad bellum* proportionality requirement to the conduct of hostilities.

VIII. CONCLUDING REMARKS

A priori, a strong case can be made for the traditional binary distinction between *jus ad bellum* and *jus in bello* due to the different contexts of the *ad bellum* right to exercise military force and the *in bello* rules regulating the conduct of adversaries engaged in an armed conflict. This difference seems to create a legal dichotomy between the mere right to use force and the rules related to how to fight right, and it appears to be coherent with the classic binary distinction between war and peace.¹⁴⁴ However, the modern overarching approach doesn't accept this dichotomy. It wants to reduce war's hazards by applying the *ad bellum* rules continuously during the conduct of armed conflict. To that end, it has established factors that define the essence of the *ad bellum* proportionality requirement.

This article argues that while the extension of *ad bellum* proportionality as a macro constraint during fighting is justified—e.g., to proscribe opportunistic changes of war aims at the grand strategy level—the secondary factors suggested by the overarching approach are mistaken. The constraining factors, mainly the geographic and “means used,” are relevant factors in assessing proportionality in a given case, but they can't be generally imposed as strict limitations. These factors, especially if strictly imposed, crystallize a maximalist version of the overarching approach, producing a counter-effect to its moderating rationale, and they may contradict the *in bello* rules applicable in armed conflict. Instead, this article suggests that validating the *ad bellum* proportionality requirement during armed conflict requires its minimal extension. This can be achieved by constraining the *ad bellum* permission to use force, during all stages of the armed conflict, to the minimum needed to achieve a lawful war aim.

144. Grotius' statement that between war and peace there is no intermediate state reflects this traditional wisdom in international law. For the current disputed validity of this statement, see, e.g., DINSTEIN, *supra* note 8, at 17.