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ARTICLES

Jus ad Bellum Applicability During 'Ongoing Armed Conflicts': Gaza as a Test Case

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Abstract

This article discusses the potential influence of the existence of an underlying armed conflict in Gaza on the applicability and application of *jus ad bellum*. It rejects the Israeli 'displacement' approach whereby *jus ad bellum* does not play a role during an ongoing armed conflict as it finds no support in the sources of international law, in particular state practice. The article then provides possible explanations for the Israeli reliance on 'displacement' regardless of its shaky foundations: namely, the preference to provide overall justification for the operation, to avoid difficult political topics, and to allow Israel freedom of action in other arenas (such as Lebanon and Syria). Regardless of such findings, the article acknowledges that *jus ad bellum* faces challenges to its application during hostilities. It analyses the right of self-defence, as Israel has relied on such right to justify its use of force in Gaza, addressing relatively briefly *jus ad bellum* necessity while focusing on the various approaches to *jus ad bellum* proportionality, and the differences between such approaches when it comes to the legality of the use of force in self-defence in Gaza. Ultimately, the article argues that states must provide clear pronouncements on this issue to prevent the adoption of an overly permissive approach to the regulation of *jus ad bellum* during hostilities.

Keywords: *jus ad bellum*; Gaza; proportionality; self-defence; use of force

1. Introduction

To this author's knowledge, the situation in Gaza is the only contemporary precedent in which a state has argued that the existence of an ongoing armed conflict justifies the use of force without further reference to rules restricting the use of interstate force, or *jus ad bellum*. This article surveys, but ultimately brackets, questions regarding the general applicability of *jus ad bellum* to the particular circumstances of Gaza[1] in order to examine the validity of the proposition that the existence of an ongoing

[1] Unless expressly stated otherwise, the factual information presented in this article concerning the situation in Gaza is updated as at 8 June 2025 (while bearing in mind that there is an additional delay

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armed conflict can alone justify use of force (Section 2). It examines this proposition in the light of the practice and legal opinions of states and international organisations in instances in which force was used during ongoing armed conflicts, particularly the positions put forward by states in Security Council sessions. For the purpose of this article, an 'ongoing armed conflict' is one that includes several rounds of hostilities with periods involving tension and occasional skirmishes in between. This position is in line with the broad approach to the scope of applicability of *jus ad bellum* and *jus in bello*.[2] The article then concludes that *jus ad bellum* continues to apply even in an ongoing armed conflict (Section 3). In Section 4, the article considers the influence that *jus ad bellum* has had on the ongoing hostilities in Gaza.

The discussion starts by outlining the Israeli position in relation to its use of force in Gaza and the responses of third states and international organisations. It finds that, while hostilities were ongoing in 2023 and 2024, relatively few states took issue with the manner of Israel's use of force in self-defence and the emphasis on Israel's entitlement to use force in self-defence declined as the hostilities progressed; however, this position may have shifted following the renewal of hostilities in March 2025. The article then maintains that *jus ad bellum* continues to restrict state conduct during hostilities and not only at the stage of their commencement; there are substantial challenges that must be overcome for *jus ad bellum* regulation during hostilities to be effective, one of the main challenges of which is the difficulty of deciding between the different approaches to *jus ad bellum* proportionality and, consequently, the varying potential limitations to the extent of force that could be used in self-defence. The article outlines such approaches and then demonstrates the differences and the shortcomings of each approach in the circumstances of the Gaza hostilities. In addition, several possible explanations are offered for the finding that the importance of *jus ad bellum* declined as hostilities progressed, connecting it to certain legal and political factors (including those that complicate the overall applicability of *jus ad bellum*) and, potentially, the severity of the initial armed attack and the hostilities that have ensued.

2. Overall *jus ad bellum* applicability

The hostilities in Gaza raise numerous questions of international law. Despite the importance of many other crucial issues that have arisen in connection with the situation in Gaza, the article focuses on one very specific topic: the influence of the underlying armed conflict in Gaza on the application of *jus ad bellum*. The article, therefore, will not provide clear responses to certain questions that may influence the overall applicability of *jus ad bellum* to the situation in Gaza, in particular the status of Palestinian statehood and the occupation of Gaza by Israel prior to

pending publication of the minutes of Security Council meetings) when the hostilities between Israel and Hamas in Gaza were still ongoing.

[2] The term 'ongoing armed conflict' is derived from the Israeli position on the Gaza situation, which is presented in Section 3.1. For a discussion of the broad approach to the scope of applicability of *jus ad bellum* and *jus in bello* see Section 3.1.

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7 October 2023.[3] These issues, and the positions one might adopt in relation to them, ground discussions regarding the applicability of *jus ad bellum* to Gaza. The importance of Palestinian statehood and the occupation of Gaza are accordingly mapped with a view to underlining the complexity of the applicability of *jus ad bellum* in the circumstances of Gaza.

The issue of Palestinian statehood could be significant for the applicability of *jus ad bellum* in that, notwithstanding attempts to expand the scope of the prohibition on the use of force beyond the interstate context,[4] it is still predominantly considered to require some interstate element, involving state forces, territory and, potentially, nationals and civilian vessels.[5] In other words, if Palestine is currently not a state, the Gaza situation may lack the interstate element that is required to trigger the applicability of *jus ad bellum*.[6] On the other hand, if Palestine is a state and the Gaza Strip forms part of the territory of Palestine,[7] then Hamas could be perceived

[3] The connection between these issues and *jus ad bellum* in relation to the use of force in Gaza has been outlined by Milanovic and Van Steenberghe: Marko Milanovic, 'Does Israel Have a Right to Defend Itself?', *EJIL:Talk!*, 14 November 2023, https://www.ejiltalk.org/does-israel-have-the-right-to-defend-itself; Marko Milanovic, 'A Follow-up on Israel and Gaza', *EJIL:Talk!*, 3 January 2009, https://www.ejiltalk.org/a-follow-up-on-israel-and-gaza; Raphaël Van Steenberghe, 'A Plea for the Right of Israel to Self-Defence in order to Restrict its Military Operations in Gaza: When *Jus ad Bellum* Comes to the Aid of *Jus in Bello*', *EJIL:Talk!*, 16 November 2023, https://www.ejiltalk.org/a-plea-for-a-right-of-israel-to-self-defence-in-order-to-restrict-its-military-operations-in-gaza-when-jus-ad-bellum-comes-to-the-aid-of-jus-in-bello/?utm_source=mailpoet&utm_medium=email&utm_campaign=ejil-talk-newsletter-post-title_2; Raphaël Van Steenberghe, 'The Armed Conflict in Gaza, and Its Complexity under International Law: *Jus ad Bellum*, *Jus in Bello*, and International Justice' (2024) 37 *Leiden Journal of International Law* 983, 991–94.

[4] Noelle Higgins, *Regulating the Use of Force in Wars of National Liberation: The Need for a New Regime* (Martinus Nijhoff 2010) 77, 89–90; CJR Dugard, 'The Organisation of African Unity and Colonialism: An Inquiry into the Plea of Self-Defence as a Justification for the Use of Force in the Eradication of Colonialism' (1967) 16 *International and Comparative Law Quarterly* 157, 177–85; Claus Kreß, 'At the Outer Limits of the Right of Self-Defence and Beyond: Israel's Use of Force in the Gaza Strip since 7 October 2023 and the *Jus contra Bellum*' (2025) 58 *Israel Law Review* 132, Section 3; Ka Lok Yip, 'To Call a Spade a Spade: Use of Force Depriving a People of their Right to Self-Determination as Violation of *Jus Contra Bellum*' (2024) 11 *Journal on the Use of Force and International Law* 167, 171–203; Ralph Wilde, 'Israel's War in Gaza Is Not a Valid Act of Self-Defence in International Law', *OpinioJuris*, 9 November 2023, https://opiniojuris.org/2023/11/09/israels-war-in-gaza-is-not-a-valid-act-of-self-defence-in-international-law.

[5] Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI (UN Charter), arts 2(4), 4(1); UNGA Res 3314 (XXIX) (14 December 1974), UN Doc A/RES/3314, Annex, art 3(d); ICJ, *Oil Platforms* (*Islamic Republic of Iran v United States of America*), Merits, Judgment, [2003] ICJ Rep 161, [64], [72]; ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo*, Advisory Opinion, [2010] ICJ Rep 403, [80]; Oliver Dörr and Albrecht Randelzhofer, 'Article 2(4)' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary: Volume I* (3rd edn, Oxford University Press 2012) 200, 215; Higgins (n 4) 87–89; Dugard (n 4) 168–85; Milanovic (2009) and (2023) (n 3); Kreß (n 4) Sections 2, 3.

[6] See n 3.

[7] For example, this is the conclusion of the Pre-Trial Chamber of the International Criminal Court (ICC) with respect to its jurisdiction over the situation in Palestine (at present, with respect to war crimes, crimes against humanity and genocide only, rather than aggression): ICC, *Situation in the State of Palestine*, Decision on the 'Prosecution Request pursuant to Article 19(3) for a Ruling on the Court's Territorial Jurisdiction in Palestine', ICC-01/18, Pre-Trial Chamber I, 5 February 2021, paras 112, 118; Rome Statute of the International Criminal Court (entered into force 1 July 2002), 2187 UNTS 3, art 8*bis*.

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as a non-state actor (NSA) that has gained control over Palestinian territory and uses such territory to launch attacks against Israel.[8]

The classification of Israel's presence and control over Gaza could also be important for the overall applicability of *jus ad bellum* and the legitimacy of the use of force in self-defence by Israel. In its advisory opinion on the *Legal Consequences on the Construction of a Wall*, the ICJ cast doubts on the pertinence of the use of force in self-defence in response to attacks that emanate from within an occupied territory.[9] In a more recent advisory opinion on the *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, in relation to the situation prior to the military operation in response to the 7 October 2023 attack, the ICJ pronounced that 'Israel's withdrawal from the Gaza Strip has not entirely released it of its obligations under the law of occupation. Israel's obligations have remained commensurate with the degree of its effective control over the Gaza Strip'.[10] While certain states have referred to the existence of occupation as invalidating Israel's right of self-defence in relation to Gaza,[11] it is not clear whether the ICJ intended to suggest that the occupation in Gaza and the West Bank is identical when it comes to the applicability of *jus ad bellum*.[12]

The aforementioned issues significantly complicate the applicability of *jus ad bellum* in Gaza in the ways summarised, albeit crudely, in Table 1.

Admittedly, providing clear answers to these two preliminary issues and deciding which is the correct legal construction for the applicability of *jus ad bellum* are essential to understand fully the relevance of *jus ad bellum* to the circumstances of Gaza. Discussing *jus ad bellum* without fully resolving these issues may thus create a sense of unease with the average international lawyer. However, many states have referred to the right of Israel to use force in self-defence, without fully engaging

[8] The availability of self-defence against attacks conducted by NSAs is another question that affects the availability of self-defence in the circumstances of the Gaza situation, but will not be discussed at length in this article.

[9] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, [2004] ICJ Rep 136, [139].

[10] ICJ, *Legal Consequences Arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, Including East Jerusalem*, Advisory Opinion, [2024] ICJ Rep 1, [94].

[11] UNSC, Official Records of 9439th Meeting (16 October 2023), UN Doc S/PV.9439, 12 (Jordan); UNSC, Official Records of 9443rd Meeting (18 October 2023), UN Doc S/PV.9443, 27 (Pakistan); UNSC, Official Records of 9453rd Meeting (25 October 2023), UN Doc S/PV.9453, 3 (Russia); UNSC, Official Records of 9540th Meeting (31 January 2024), UN Doc S/PV.9540, 23–24 (South Africa); UNSC, Official Records of 9696th Meeting (31 July 2024), UN Doc S/PV.9696, 15 (Palestine – which, regardless of its status under international law, has received the status of a non-member observer state in the UN); UNSC, Official Records of 9738th Meeting (2 October 2024), UN Doc S/PV.9738, 24 (Syria); for an alternative position see Terry Gill, 'The ICJ Wall Advisory Opinion and Israel's Right of Self-Defence in relation to the Current Armed Conflict in Gaza', *Armed Groups and International Law*, 13 November 2023, https://www.armedgroups-internationallaw.org/2023/11/13/the-icj-wall-advisory-opinion-and-israels-right-of-self-defence-in-relation-to-the-current-armed-conflict-in-gaza.

[12] In the *Wall* advisory opinion (n 9), the ICJ explicitly discussed the right of self-defence as a potential justification for the construction of the wall. In the *Israeli Policies* advisory opinion (n 10), the ICJ alluded only to some obligations under the law of occupation, and did not directly address self-defence; Marko Milanovic, 'ICJ Delivers Advisory Opinion on the Legality of Israel's Occupation of Palestinian Territories', *EJIL:Talk!*, 20 July 2024, https://www.ejiltalk.org/icj-delivers-advisory-opinion-on-the-legality-of-israels-occupation-of-palestinian-territories; Kreß (n 4) Section 4.2.

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Table 1. A summary of complicating issues for *jus ad bellum* applicability in the Gaza context

Statehood/occupation	Gaza is occupied	Gaza is not occupied
Palestine is a state	If the ICJ's position in the *Wall* advisory opinion is accepted, the right of self-defence may not be utilised to justify responses to attacks that emanate from within the occupied territory.	Hamas is a non-state actor that controls Palestinian territory. *Jus ad bellum* is applicable, and self-defence could be available, in so far as Israel can use force in self-defence against an NSA whose actions cannot be attributed to the host state.
Palestine is not a state	*Jus ad bellum* may not be applicable based on the lack of an interstate element, unless we accept that *jus ad bellum* also applies beyond the interstate context.	

with these questions.[13] In addition, as the only modern case in which a state has attempted to avoid the constraints of *jus ad bellum* based on the existence of an ongoing armed conflict, the Gaza situation may become an important reference point on this question of 'displacement'.[14] It therefore merits a separate analysis of this argument and the practice and statements of other states in relation to the relevance of the armed conflict to the applicability of *jus ad bellum* and its application.

3. Ongoing armed conflict

This section will present, explain and analyse the Israeli position regarding the justification to use force as part of an ongoing armed conflict, and will then continue to review relevant state practice, ultimately arguing that this position finds little to no support in the sources of international law.

3.1. Israeli position

Following the rounds of hostilities in Gaza in 2008–09 and 2014, and about a month after the attack of 7 October 2023, the Israeli government released its legal position on the various issues connected to these hostilities in official publications (the 2009 Report, the 2015 Report and the 2023 Report, respectively). These publications are indispensable for our purposes, as they present the Israeli position regarding the *jus ad bellum* aspects of the Gaza situation in detail. In the 2009 Report it was stated:[15]

> [T]his resort to force occurred in the context of an ongoing armed conflict between a highly organised, well-armed, and determined group of terrorists and the state of Israel. The Gaza Operation was simply the latest in a series of

[13] UNSC 9439th Meeting (n 11) 11; UNSC, Official Records of 9462nd Meeting (30 October 2023), UN Doc S/PV.9462, 29; UNSC, Official Records of 9479th Meeting (15 November 2023), UN Doc S/PV.9479, 15. See n 80 and Section 4.3.

[14] See Section 3.1.

[15] State of Israel, 'The Operation in Gaza: Factual and Legal Aspects', July 2009, 26 (2009 Report).

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> armed confrontations precipitated by the attacks perpetrated without distinction against all Israeli citizens by Hamas and its terrorist allies. In fact, over the course of this conflict, Israel conducted a number of military operations in the West Bank and the Gaza Strip, to halt terrorist attacks. … Even apart from the eight years of ongoing armed conflict, which justified Israel's resort to force both previously and during the Gaza Operation, Hamas' intensified armed attacks on Israel and its citizens during 2008 independently justified Israel's response to defend its citizens.

The 2015 Report followed the same line, with the following argument:[16]

> Hamas's attacks leading up to the 2014 Gaza Conflict were thus part of a larger, ongoing armed conflict. But even if one were not to consider the 2014 Gaza Conflict part of a continuous armed conflict justifying Israel's use of force both previously and during this time, Hamas's armed attacks against Israel in 2014 would independently qualify as an armed attack triggering Israel's inherent right of self-defence.

The 2023 Report similarly highlighted the context of an ongoing armed conflict:[17]

> The heinous attacks launched by Hamas and Islamic Jihad against Israel on October 7, 2023, which left over 1,400 Israeli and foreign nationals murdered and thousands more wounded, and the continuing attacks since then, took place in the context of an ongoing armed conflict between Israel and Hamas and other terrorist organizations in Gaza. For this reason, in particular, legally speaking, these attacks do not necessitate an analysis of the conditions under which Israel may resort to the use of armed force (the jus ad bellum).

Israel has argued, therefore, that the existence of an ongoing armed conflict permits a state to use force on an ongoing basis. For the purpose of this article, this position will be referred to as the 'displacement' approach, as it essentially presumes that the regulatory force of *jus ad bellum* is displaced because of the applicability of *jus in bello* during an armed conflict. More precisely, Israel does not maintain that *jus ad bellum* was entirely inapplicable, but that Israel's role as defender was determined at the commencement stage of its ongoing armed conflict with Hamas and the Palestinian armed groups, and therefore Israel's use of force beyond this stage of the armed conflict does not require a separate justification. This argument is similar to the approach of several scholars whereby if the initial armed attack justifies launching a 'war of self-defence', the victim state is entitled to use

[16] State of Israel, 'The 2014 Gaza Conflict: Factual and Legal Aspects', May 2015, 29 (2015 Report).

[17] Israeli Ministry of Foreign Affairs, 'Hamas-Israel Conflict 2023: Key Legal Aspects', 3 December 2023 (2023 Report), Annex 2, para 1, https://www.gov.il/en/pages/hamas-israel-conflict2023-key-legal-aspects.

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force throughout such 'state of war' without *jus ad bellum* imposing any further restrictions.[18]

In both the 2009 Report and 2015 Report (but not the 2023 Report), Israel formulated its position in a somewhat indirect way and connected 'displacement' with alternative arguments regarding the specific circumstances of the relevant round of hostilities.[19] Furthermore, Israel has not relied on 'displacement' in other forums (including the Security Council sessions that addressed the 2008–09 and 2014 rounds of hostilities in Gaza or in the 2006 hostilities in Lebanon, in which Israel justified its use of force independently as self-defence based on the prevailing facts and not the existence of an ongoing armed conflict).[20] In the course of the round of hostilities that followed the 7 October 2023 attack, Israel relied on self-defence or its 'right to defend its people' and likewise preferred to engage with the specific circumstances that brought about its forcible response, namely the 7 October 2023 attack.[21] Nevertheless, while Israel has not relied on 'displacement' outside its aforementioned publications on the Gaza situation, several scholars and commentators have relied on 'displacement' (or a variation of it)[22] to justify Israeli attacks in other areas, such as Syria and Lebanon.[23]

3.2. Critical analysis

Israel's position assumes that there exists an overlap between *jus ad bellum* and *jus in bello* during armed conflicts, as a result of the broad scope of the applicability of both of them. For *jus ad bellum*, the prohibition on the use of force is predominantly

[18] See Yoram Dinstein, *War, Aggression and Self-Defence* (6th edn, Cambridge University Press 2017) 280; International Law Commission (ILC), (1980) *Yearbook of the International Law Commission*, Vol II, Part 1, UN Doc A/CN.4/SER.A/1980/Add.l (Part 1), 70; William W Bishop, *International Law: Cases and Materials* (1st edn, Prentice Hall 1953) 559; Yehuda Z Blum, 'The Beirut Raid and the International Double Standard – A Reply to Professor Richard A. Falk' (1970) 64 *American Journal of International Law* 73, 77–78.

[19] 2009 Report (n 15) 26–28; 2015 Report (n 16) 28–31.

[20] UNSC, Official Records of 6060th Meeting (31 December 2008), UN Doc S/PV.6060, 6; UNSC, Official Records of 6061st Meeting (7 January 2009), UN Doc S/PV.6061, 8; UNSC, Official Records of 6063rd Meeting (8 January 2009), UN Doc S/PV.6063, 11; UNSC, Official Records of 7214th Meeting (10 July 2014), UN Doc S/PV.7214, 6–8; UNSC, Official Records of 7220th Meeting (18 July 2014), UN Doc S/PV.7220, 7–9; UNSC, Official Records of 7222nd Meeting (22 July 2014), UN Doc S/PV.7222, 6–9; Ambassador Dan Gillermann, Identical letters dated 12 July 2006 from the Permanent Representative of Israel to the United Nations addressed to the Secretary-General and the President of the Security Council (12 July 2006), UN Doc A/60/937–S/2006/515, 1–2; UNSC, Official Records of 5489th Meeting (14 July 2006), UN Doc No S/PV.5489, 5–7.

[21] See Section 4.1.

[22] As stated above (n 18), some of these approaches argued that an armed conflict must constitute a 'war of self-defence' to continuously justify the use of force throughout that armed conflict.

[23] Blum (n 18) 77–78; Ernesto Sanchez, 'An Alternative Justification for Israel's Attacks on Hezbollah in Syria', *OpinioJuris*, 1 June 2017, http://opiniojuris.org/2017/06/01/an-alternative-justification-for-israels-attacks-on-hezbollah-in-syria; Charles J Dunlap, 'No, Ceasefires and Armistices Are Not "Outmoded"', *Just Security*, 22 January 2018, https://www.justsecurity.org/51285/no-ceasefires-armistices-outmoded.

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construed broadly, to apply to any use of armed interstate force.[24] Quite similarly, *jus in bello* is perceived predominantly as extending from the first use of interstate force and beyond the area in which hostilities take place and beyond the cessation of hostilities, until the general close of military operations.[25] Such broad applicability of both fields will result in an overlap between their applicability following the use of armed interstate force.[26] Note, however, that for both *jus ad bellum* and *jus in bello* there are scholars who interpret their scope of applicability narrowly so that their commencement is subject to a gravity threshold and that, for *jus in bello*, such applicability would end following the cessation of hostilities (particularly if the parties concluded a formal ceasefire).[27] These positions are highly controversial and, in any event, their adoption will limit the overlap between *jus ad bellum* and *jus in bello* only to periods in which hostilities are taking place.

In Israel's opinion, the result of the applicability overlap between *jus ad bellum* and *jus in bello* is that the latter prevails, while the former ceases to impose any restrictions on the parties to an armed conflict once an armed attack has occurred.

[24] Dörr and Randelzhofer (n 5) 215–16; Tom Ruys, 'The Meaning of "Force" and the Boundaries of the *Jus ad Bellum*: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?' (2014) 108(2) *American Journal of International Law* 159, 164–65.

[25] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949) 75 UNTS 31 (GCI), art 5; Convention (III) relative to the Treatment of Prisoners of War (1949) 75 UNTS 135 (GCIII), arts 111, 118; Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV), arts 6, 133; Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (entered into force 26 January 1910) *Martens Nouveau Recueil* (ser 3) 461, art 36; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (AP I), art 33; *Prosecutor v Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1, Appeals Chamber, 2 October 1995, paras 67, 70; *Prosecutor v Gotovina and Others*, Judgment, IT-06-90-T, Trial Chamber I, 15 April 2011, para 1694; International Committee of the Red Cross (ICRC), 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', 31 October 2015, 8–10, https://www.icrc.org/sites/default/files/document/file_list/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf; Jan Kleffner, 'Scope of Application of International Humanitarian Law' in Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (3rd edn, Oxford University Press 2013) 43, 61–62.

[26] This is established by the fact that, in accordance with the broad approach set out in nn 24 and 25 to the scope of applicability of *jus ad bellum* and *jus in bello*, both the prohibition on the use of force and the law of international armed conflict would apply to the same circumstances following the use of armed interstate force, creating an overlap between their respective scopes, that merits an analysis of their interacting provisions, particularly in cases in which the use of force could be permitted under *jus in bello* but prohibited under *jus ad bellum*. A classic example is the use of armed force by a state against a military objective belonging to another state during an armed conflict following a prolonged period without any hostilities.

[27] Olivier Corten, *The Law against War: The Prohibition on the Use of Force in Contemporary International Law* (2nd edn, Bloomsbury 2021) 63; Mary Ellen O'Connell, 'The Prohibition on the Use of Force' in Nigel D White and Christian Henderson (eds), *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Just post Bellum* (Edward Elgar 2013) 89, 102; International Law Association (ILA) Committee, 'Final Report on the Meaning of Armed Conflict in International Law', The Hague Conference (2010), 29–30; Michael Bothe, 'Terrorism and the Legality of Pre-Emptive Force' (2003) 14 *European Journal of International Law* 227, 235–36; Dapo Akande, 'Classification of Armed Conflicts: Relevant Legal Concepts' in Elizabeth Wilmshurst (ed), *International Law and the Classification of Conflicts* (Oxford University Press 2012) 32, 42–43.

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This is clearly demonstrated by Israel's most recent assertion in the 2023 Report, whereby '[legally speaking] the context of an ongoing armed conflict … do[es] not necessitate an analysis of the conditions under which Israel may resort to the use of armed force (the jus ad bellum)'.[28] Under the *jus ad bellum* regime of the UN Charter, this position could be sustained only if its proponents could establish that this is the appropriate manner in which the scope of the right of self-defence should be interpreted. However, as provided below, no such support could in fact be found.

First, the 'displacement' of *jus ad bellum* during armed conflicts finds no support in the relevant treaty provisions, specifically the prohibition on the use of force or the right of self-defence.[29] The preamble, purposes and drafting history of the UN Charter all point in the opposite direction, denoting an expansive interpretation of *jus ad bellum*, limited only by the narrow exceptions enshrined in the Charter,[30] while indicating the maintenance of international peace and security as the primary purpose of the Charter.[31] Furthermore, furnishing a party to an armed conflict with unlimited discretion to use force is not in line with the obligation of states to resolve their disputes peacefully, which has been interpreted as imposing duties on states during armed conflicts.[32]

The foregoing is also reflected by the legal developments that led to the adoption of a *jus ad bellum* regime that is divorced from the meaning of 'war'. In essence, such developments were designed primarily to ensure that the applicability of *jus ad bellum* (and *jus in bello*, for that matter)[33] is completely objective and factual, and to

[28] See full quote in n 17.

[29] UN Charter (n 5) arts 2(4), 51; see also API (n 25) Preamble ('The High Contracting Parties, … [e]xpressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations').

[30] *Documents of the United Nations Conference on International Organization, San Francisco, 1945, Vol VI: Commission I, General Provisions* (1945) 68–69, 400, 720–21, https://digitallibrary.un.org/record/1300969?ln=zh_CN&v=pdf; Ruys (n 24) 161–62; Corten (n 27) 62.

[31] UN Charter (n 5) Preamble ('the peoples of the United Nations, determined to save succeeding generations from the scourge of war, … [a]nd for these ends to ensure, … that armed force shall not be used, save in the common interest'), art 1(1); ICJ, *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, [1962] ICJ Rep 151, 167–68; Leland Goodrich and Edvard Hambro, *Charter of the United Nations: Commentary and Documents* (World Peace Foundation 1946) 59; Rüdiger Wolfrum, 'Article 1' in Simma and others (n 5) 108, 109.

[32] In the pre-Charter era, the League Assembly interpreted the obligation to peacefully settle disputes as applying also following the commencement of hostilities: 'Report as Provided for under Article 15, Paragraph 4, of the Covenant, drawn up by the Committee of the Assembly in pursuance of the Resolution of September 27th, 1934, and adopted by the Assembly on November 24th, 1934' (1934) 132 *League of Nations Official Journal Special Supplement* 43, 48. During the Charter era, the obligation to peacefully settle disputes (enshrined in Articles 2(3) and 33 of the Charter) was likewise referred to during armed conflicts (while hostilities were under way), inter alia, in several Security Council resolutions that refer to the obligation to peacefully settle disputes during armed conflicts. See UN Charter (n 5) arts 2(3), 33; UNSC Res 582 (24 February 1986), UN Doc S/RES/582, Preamble; UNSC Res 598 (20 July 1987), UN Doc S/RES/598, Preamble; UNSC Res 1177 (26 June 1998), UN Doc S/RES/1177, Preamble and para 3; Rama Mani, Richard Ponzio and Sam Daws, 'Peaceful Settlement of Disputes and Conflict Prevention' in Sam Daws and Thomas Weiss (eds), *The Oxford Handbook of the United Nations* (Oxford University Press 2009) 300, 303–04.

[33] In a series of meetings and committees, the ICRC expressed its concerns about the circumvention of *jus in bello* by states declining to characterise a certain conflict as 'war'. When the four Geneva Conventions

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avoid any arguments that the intention of the parties to engage in 'war' plays any significant role in the applicability of *jus ad bellum*.[34]

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were adopted in 1949, the applicability of *jus in bello* could be triggered both through a formal declaration of war or the commencement of an armed conflict, which was defined objectively and broadly: ICRC, 'Application, en cas d'hostilites non accompagnées d'une déclaration de guerre, des Conventions de Genéve et de la Convention relative au traitement des prisonniers de guerre' (Sidney H. Brown 1934); Document No 10, XVth ICRC Conference; ICRC, General Report of the International Red Cross Committee on Its Activities from August, 1934 to March, 1938 (ICRC 1938) 9; ICRC, Report on the Interpretation, Revision and Extension of the Geneva Convention of July 27, 1929 (ICRC 1937) 7–8; ICRC, Report on the XVIth International Red Cross Conference, London, June 1938 (ICRC 1938) 78; ICRC, Report on the Work. of the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of Various Problems relative to the Red Cross (ICRC 1946) 14–15; ICRC, Report on the Work of the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, 14–26 April 1947, 8–9; ICRC, Seventeenth International Red Cross Conference (ICRC 1948) 207–08, 221, 847–48; Jean Pictet (ed), *The Geneva Conventions of 12 August 1949: A Commentary to the Geneva Convention (IV) Relative to the Protection of Civilian Persons in Times of War* (ICRC 1958) 17–19; Tristan Ferraro and Lindsey Cameron, 'Article 2 – Application of the Convention' in ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (ICRC 2016) 68, 76–77; Marko Milanović and Vidan Hadzi-Vidanovic, 'A Taxonomy of Armed Conflict' in White and Henderson (n 27) 256, 265–67.

[34] While some provisions of the Covenant of the League of Nations did not expressly refer to the existence of war as a precondition for their applicability, it was still a condition in those *jus ad bellum* provisions that protected states while the League's dispute settlement mechanism was functioning properly. The same is true of the Kellogg-Briand Pact (1928), which prohibited the use of war as an instrument of national policy, but also obligated members to use only peaceful means to resolve their disputes. Compare Covenant of the League of Nations (entered into force 10 January 1920), arts 10 and 12 (which do not expressly mention war) with arts 13 and 15(6) (which prohibit going to war if the League's dispute settlement mechanism has operated properly); General Treaty for Renunciation of War as an Instrument of National Policy (1928) 796 UST 732, arts I and II. As with *jus in bello*, the definition of war and the reliance of *jus ad bellum* on war were a source of concern for states during the interwar period, with several powerful states attempting to avoid their *jus ad bellum* obligations by not characterising their actions as amounting to war; see 'Ninth Meeting (Public)' (1923) 4 *League of Nations Official Journal* 1287, 1288; 'Tenth Meeting (Public)' (1923) 4 *League of Nations Official Journal* 1294, 1297–98; 'The Japanese Reply to the Lytton Report' (1933) 37(4) *Current History (1916-1940)* 504. Consequently, between the 1930s and the eventual adoption of the UN Charter, there was a transition in *jus ad bellum* that sought to clarify that its applicability is not dependent on the intentions of the party. This transition was apparent, inter alia, in the growing reference to 'force' in relation to *jus ad bellum*. By the time the Allies started discussing the establishment of a new international organisation, the language of 'force' was well established; see Imperial Conference, 1937: Summary of Proceedings (1937) 14–15; Statement on Fundamental Principles of International Policy by the Secretary of State, 16 July 1937, and Comments of Foreign Governments, paras 712, 714, 718, 721–22, 725–26, 730–35, 737–38, 741–43, 746, 748–52, 754, 756–57, 761–763, 765, 768–69, 771–72, 774–75, 777–83, 790–92] 798, 803, 805–06, 808, 811–814, 818, https://history.state.gov/historicaldocuments/frus1937v01/comp9. This US Statement of Principles 'advocate[d] abstinence by all nations from use of force in pursuit of policy and from interference in the internal affairs of other nations'. Most governments (including Belgium, Czechoslovakia (which underlined the importance of 'settling conflicts of international concern by pacific understanding and settlement'), Austria, USSR (which emphasised the fact that 'tension, conflicts, and frictions in international relations, and particularly menaces of hostile clashes, even though at first affecting only two or a few powers, are likely eventually to affect the rights and interest of all nations'), Poland, The Netherlands, Argentina, Norway, Paraguay, Iran, Sweden, Lithuania, Portugal, Uruguay, Chile, Brazil, Turkey, Bulgaria, Switzerland, Ecuador, Nicaragua, Peru, Guatemala, Venezuela, Honduras, Bolivia, Colombia, New Zealand, Albania, Haiti, United Kingdom, Estonia, South Africa, Egypt, Free Irish State, Costa Rica, Panama, Mexico, Liberia, El Salvador, Luxemburg, China, Canada ('At this time there appears a widespread tendency to invoke force whether in the name of the principle of stability or

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Moreover, in so far as the overall structure and purpose of international law are concerned, previous discussions regarding the interaction of *jus ad bellum* and *jus in bello* focused on concerns regarding the application of the latter. Specifically, it was argued that *jus ad bellum* would undermine the equality of belligerents under *jus in bello* by distinguishing between lawful and unlawful parties to an armed conflict (according to their status under *jus ad bellum*) and adjusting the operation of *jus in bello* accordingly.[35] In order to avoid the devastating consequences this would have for *jus in bello*, the fields were perceived predominantly as independent and separate.[36] In other words, when the potential influence of *jus ad bellum* on *jus in bello* applicability was discussed, it was generally agreed that the applicability of *jus in bello* should not be influenced by *jus ad bellum*, to avoid undermining the object and purpose of *jus in bello*. However, if arguments of 'displacement' are accepted, this would undermine the ability of *jus ad bellum* to play its crucial role in the maintenance of peace and security, which is unacceptable for the same reasons.[37]

in the name of the principle of change, and both extremes seem to forget that under present day conditions the processes of force themselves set loose a progression of events which go completely beyond calculation and control and can only stultify the worthy principles in whose name the violence has been ordained'), Finland, Rumania, Siam, Spain (which noted that 'the Spanish people are the victims of a foreign invasion and suffer the sorrow of a war in defense of their independence'), Greece and Yugoslavia agreed with the stated principles, while several states explicitly emphasised the importance of abstaining from the use of force: Cuba ('As a small country, but jealous of its dignity and of its sovereignty, Cuba has heard the words, full of a just and human sentiment, of Secretary Hull, with intense sympathy, especially those which affirm that the United states advocates "abstinence by all nations from the use of force in pursuit of policy and from interference in the internal affairs of other nations"'); Latvia ('the fact that Latvia is a signatory of the Kellogg Pact obligating governments to refrain from the use of force as an instrument of policy and that the Latvian Government considers itself bound by the principles of this pact'); Australia (referring to the above cited statement of the 1937 Imperial Conference), Denmark – '[t]he Danish Government share[s] the view that hostilities in any one part of the world exercise their influence everywhere. We join in the desire for the preservation of peace expressed by Secretary of State Cordell Hull; it is also our desire that all states will refrain from the use of power against others and desist from interference in the internal affairs of other states'); Iraq ('The Royal Government of Iraq fully supports the appeal made to the nations of the world for the maintenance of universal peace by all legitimate means and advocated the principle of abstinence from use of force in the pursuit of any policy whatsoever, by which principle it was actuated when it acceded to the Briand-Kellogg Pact for the renunciation of war'); 'Eighth International Conference of American States' (1940) 34(4) *American Journal of International Law Supplement* 190, 200–01; Atlantic Charter, The Avalon Project, 14 August 1941, https://avalon.law.yale.edu/wwii/atlantic.asp.

[35] Some of these concerns were expressed following the ICJ's ambiguous pronouncement in ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Rep 226, [97]; Terry Gill, 'The Nuclear Weapons Advisory Opinion of the International Court of Justice and the Fundamental Distinction between the *Jus ad Bellum* and *Jus in Bello*' (1999) 12 *Leiden Journal of International Law* 613, 621–24; Jasmine Moussa, 'Can *Jus ad Bellum* Override *Jus in Bello*? Reaffirming the Separation of the Two Bodies of Law' (2008) 90 *International Review of the Red Cross* 963, 969–72; Marco Sassòli, 'The Separation between the Legality of the Use of Force and Humanitarian Rules to Be Respected in Warfare: Crucial or Outdated?' in Michael Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Brill 2007) 241, 250–51; Dapo Akande, 'Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court' (1997) 68 *British Yearbook of International Law* 165, 208–10.

[36] Gill (n 35) 618; Moussa (n 35) 964; Sassòli (n 35) 257.

[37] Sassòli (n 35) 252–54. While 'displacement' proponents could argue that their interpretation does not render the applicability of *jus ad bellum* impossible, it significantly limits the regime's regulatory power

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Put differently, the interaction between *jus ad bellum* and *jus in bello* should not be interpreted in a manner that would render their regulatory power practically meaningless for extended periods.[38] This result is further established by the universally accepted principle whereby preference would be given to an interpretation that maintains the effectiveness of the relevant provisions.[39] According to the latter principle, an interpretation that results in the continuous operation of both *jus ad bellum* and *jus in bello* is preferable in so far as it allows for their simultaneous applicability.

Yet, the most compelling reason for rejecting the 'displacement' approach is that it finds no support in the practice and legal opinions presented by states and international organisations, a key element for ascertaining the position of customary international law and potentially informing the interpretation of the *jus ad bellum* provisions of the UN Charter.[40] No other state except for Israel has argued that the right of self-defence continues to justify the use of force throughout an armed conflict. Furthermore, when Egypt attempted to rely on its alleged state of war with Israel as justification for the restriction of shipping in the Suez Canal in 1951,[41] the Egyptian position was rejected by the vast majority of states participating in the Security Council discussion, including Israel.[42] Another relevant example is the Israeli attack on the Osirak nuclear facility. In this instance, Israel relied, among other things, on the fact that Iraq considered itself to be in a state of war with Israel as evidence of the dangers posed to Israel by the Osirak facility, justifying Israel's

during an armed conflict, thereby diminishing its capacity to fulfil its purpose: Ka Lok Yip, 'Separation between *Jus ad Bellum* and *Jus in Bello* as Insulation of Results, Not Scopes, of Application' (2020) 58 *Military Law and the Law of War Review* 31, 33–34.

[38] This is because, as mentioned in n 25, according to the dominant approach, *jus in bello* continues to apply beyond the cessation of hostilities.

[39] ILC, *Yearbook of the International Law Commission*, Vol II (1966), UN Doc A/CN.4/SER.A/1966/Add.l, 219, https://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf; Richard Gardiner, *Treaty Interpretation* (2nd edn, Oxford University Press 2015) 179–81.

[40] Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331 (VCLT), art 31.3(b); ILC, Report of the International Law Commission: Seventieth Session (30 April–1 June and 2 July–10 August 2018), UN Doc A/73/10, 124–42; Arthur Weisburd, 'Customary International Law: The Problem of Treaties' (1988) 21 *Vanderbilt Journal of Transnational Law* 1, 20 and fn 86; Gardiner (n 39) 254–55.

[41] UNSC, Official Records of 549th Meeting (26 July 1951), UN Doc S/PV.549, 18.

[42] Egypt's position was rejected by all participating states except for Iraq (which supported Egypt), China (which abstained because it believed that no violation of the Armistice Agreement was proven), India (which did not believe the Council is the appropriate forum or that the draft resolution would contribute to peace), and Yugoslavia (which did not specify a violation but expressed support for the resolution in 'its desire to assist in bringing about a general settlement of the broader Middle East issues'). Moreover, the US and Turkey relied only on Egypt's violation of the 1949 Armistice Agreement (and not general international law) as a basis for their vote in favour of the resolution that was eventually adopted by the Security Council. Other states (including Israel) relied on general international law or the specific provisions of the Charter: UNSC Res 95 (1 September 1951), UN Doc S/RES/95; UNSC, 549th Meeting (n 41) 2, 7, 9 (Israel); UNSC, Official Records of 551st Meeting (1 August 1951), UN Doc S/PV.551, 2, 10 (Israel); UNSC, Official Records of 552nd Meeting (16 August 1951), UN Doc S/PV.552, 2–4 (UK), 5–6 (France), 12–13 (Brazil), 8–11 (US); UNSC, Official Records of 553rd Meeting (16 August 1951), UN Doc S/PV.553, 2–4 (The Netherlands), 6–7 (Turkey), 7–11 (Iraq and China), 26–29 (Ecuador), 29–30 (India), 30–31 (Yugoslavia); Christopher Greenwood, 'The Relationship Between *Ius ad Bellum* and *in Bello*' (1983) 9(4) *Review of International Studies* 221, 224.

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attack in self-defence.[43] This argument was rejected predominantly on a factual basis, with participants (which included states as well as non-state entities entitled or invited to participate in the session, such as the International Atomic Energy Agency, the Arab League and the Palestine Liberation Organization (PLO)) denying the military nature of the facility.[44] Nevertheless, some participants directly rejected Israel's purported unlimited right to use force against military objectives based on a supposed state of war with Iraq,[45] or rejected Israel's right to use preventive self-defence during such state of war.[46] In doing so, these states explicitly or implicitly rejected 'displacement' by dismissing Israel's attempt to broaden the availability of the use of force during a state of war: explicitly, for those states that directly rejected 'displacement', by maintaining that merely being in a state of war was insufficient to justify an Israeli attack;[47] implicitly, as the concept of pre-emptive self-defence – a broad interpretation of the right of self-defence to include circumstances in which the preventive attack is not connected to a specific threat – is in many ways identical to that of 'displacement'. If it were to be accepted, it would result in overstretching the concept of self-defence, doing away with the requirement of the occurrence of an armed attack, and rendering the assessment of any limitations on the use of force in self-defence (which are connected with the armed attack) virtually impossible.[48]

On the other hand, there are many examples where, despite the existence of an ongoing armed conflict, directly involved and third states and international organisations referred to *jus ad bellum* to justify the use of force in the specific circumstances prevailing at the time. These examples include, inter alia, the armed

[43] UNSC, Official Records of 2280th Meeting (12 June 1981), UN Doc S/PV.2280, 8, 11; UNSC, Official Records of 2284th Meeting (16 June 1981), UN Doc S/PV.2284, 8. It is important to highlight that Israel did not maintain in this case that *jus ad bellum* is no longer relevant because of the existence of an underlying state of war. Instead, it used the state of war as evidence of the dangerousness of the Osirak facility.

[44] The reliance on the non-military nature of the Osirak facility as a basis for rejecting the Israeli argument of self-defence is evident in the minutes of all the Security Council Meetings that were conducted on this topic (2280-2288, references are not specified in the interest of brevity), but see also Tom Ruys, 'Israel's Airstrike Against Iraq's Osirak Nuclear Reactor – 1981' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (Oxford University Press 2018) 329, 331–33.

[45] UNSC, 2280th Meeting (n 43) 15 (Algeria); UNSC, Official Records of 2282nd Meeting (15 June 1981), UN Doc S/PV.2282, 2–3 (Uganda), 12 (Lebanon); UNSC, Official Records of 2283rd Meeting (15 June 1981), UN Doc S/PV.2283, 2 (Ireland); UNSC, Official Records of 2288th Meeting (19 June 1981), UN Doc S/PV.2288, 11 (Mexico).

[46] UNSC, Official Records of 2281st Meeting (13 June 1981), UN Doc S/PV.2281, 5 (Brazil), 7 (Pakistan), 9–10 (Bulgaria); UNSC, 2282nd Meeting (n 45) 2–3 (Uganda), 10 (UK); UNSC, 2283rd Meeting (n 45) 3 (Ireland), 5 (Yugoslavia), 7 (USSR), 12 (Romania), 14–15 (Sierra Leone); UNSC, 2284th Meeting (n 43) 3–4 (Philippines), 6 (Syria); UNSC, Official Records of 2285th Meeting (16 June 1981), UN Doc S/PV.2285, 5 (PLO), 13–14 (Bangladesh); UNSC, Official Records of 2286th Meeting (17 June 1981), UN Doc S/PV.2286, 3 (Guyana), 4–5 (Somalia), 6 (Turkey); UNSC, Official Records of 2287th Meeting (17 June 1981), UN Doc S/PV.2287, 2 (Nicaragua); Ruys (n 44) 332–33.

[47] See n 45.

[48] The temporal distinction between armed attacks and the limitations on the use of force in self-defence are discussed further in Section 4.2.

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conflicts between Israel and the Arab states,[49] India and Pakistan,[50] and Armenia and Azerbaijan.[51]

[49] The international phase of the Israeli–Arab conflict started either in 1948 (the date of the Israeli declaration of independence, which was followed by an invasion by six Arab states to the former territory of the British Mandate for Palestine), or 1950 at the latest (the date on which Israel was accepted as a UN member). It consisted of several major rounds of hostilities in 1956, 1967, 1973, 1982, 2006, and the hostilities that commenced in 2023 and, as at April 2025, are still ongoing. The discussions of these incidents are addressed below in this footnote and elsewhere in this paper (see, eg, n 95 regarding the 2006 hostilities in Lebanon). Furthermore, the conflict was also characterised by numerous skirmishes and low-scale clashes in the interim. See UNSC, Official Records of 545th Meeting (8 May 1951), UN Doc S/PV.545, 6–7 (UK), 10 (Brazil), 11 (The Netherlands and Israel), 22 (Syria); UNSC Res 92 (8 May 1951), UN Doc S/RES/92 (which expressly cited Article 2(4) as relevant to this clash between Israel and Syria); John Quigley, *The Six-Day War and Israeli Self-Defense: Questioning the Legal Basis for Preventive War* (Cambridge University Press 2012) 7–14 (on the circumstances leading up to the 1967 hostilities); Mahmoud Cherif Bassiouni and Shlomo Ben Ami, *A Guide to Documents on the Arab-Palestinian/Israeli Conflict: 1897–2008* (Martinus Nijhoff 2009) 29 ('[f]rom 1967 to 1973, the military situation remained unchanged on the Egyptian-Israeli front during a "war of attrition" that involved intermittent artillery exchanges between Egyptian and Israeli forces across the Suez Canal. These artillery battles destroyed portions of three Egyptian cities along the canal, namely, Ismailia, Port Said, and Suez. The situation's untenability increased, portending new war'); Benny Morris, *Israel's Border Wars, 1949–1956* (Oxford University Press 1993) 410–12; UNSG, Report of the Secretary-General on the United Nations Interim Force in Lebanon (21 July 2006), UN Doc S/2006/560, 4–6 (on the circumstances leading to the 2006 round of hostilities). For non-exhaustive examples of such justifications before major rounds of hostilities in 1956, 1967 and 1973, where both the directly involved states and third parties were of the opinion that there is a need to provide specific justification under *jus ad bellum* for the commencement of hostilities according to the circumstances at hand, see UNSC, Official Records of 748th Meeting (30 October 1956), UN Doc S/PV.748, 4 (Yugoslavia), 5 (USSR), 6 (Australia), 10 (Egypt), 11–12 (Israel); Alexandra Hofer, 'The Suez Crisis – 1956' in Ruys, Corten and Hofer (n 44) 36, 38–40; UNSC, Official Records of 1347th Meeting (5 June 1967), UN Doc S/PV.1347, 3–4 (Israel), 4–5 (UAR); UNSC, Official Records of 1348th Meeting (6 June 1967), UN Doc S/PV.1348, 8 (Bulgaria), 9 (Mali), 10–11 (Iraq); UNSC, Official Records of 1349th Meeting (7 June 1967), UN Doc S/PV.1349, 1–2 (USSR); John Quigley, 'The Six Day War – 1967' in Ruys, Corten and Hofer (n 44) 131, 131–37; UNSC, Official Records of 1743rd Meeting (8 October 1973), UN Doc S/PV.1743, 6 (China), 7 (USSR); UNSC, Official Records of 1744th Meeting (9 October 1973), UN Doc S/PV.1744, 2 (Yugoslavia), 8 (Syria) 14 (Indonesia), 15 (India), 17 (Sudan), 18 (Egypt); UNSC, Official Records of 1745th Meeting (11 October 1973), UN Doc S/PV.1745, 4 (Guinea), 5 (Peru); UNSC, Official Records of 1747th Meeting (21–22 October 1973), UN Doc S/PV.1747, 7–9 (Israel); François Dubuisson and Vaios Koutroulis, 'The Yom Kippur War – 1973' in Ruys, Corten and Hofer (n 44) 189, 192–95.

[50] The hostilities between India and Pakistan commenced in 1948 at the latest. Although it was concluded when a ceasefire was brokered in 1949, relations remained tense and there were frequent violations of the ceasefire. These included, for example, numerous skirmishes on the East Pakistan–Assam border, which escalated into clashes in 1958, and also the violations that preceded the recommencement of hostilities in 1965; see Mujtaba Razvi, *The Frontiers of Pakistan: A Study of Frontier Problems in Pakistan's Foreign Policy* (National Publishing House 1971) 52; UNSG, Report by the Secretary General on the Current Situation in Kashmir with Particular Reference to the Cease-Fire Agreement, the Cease-Fire Line and the Functioning of UNMOGIP (3 September 1965), UN Doc S/6651, 5. The 1965 and 1971 rounds of hostilities prompted both India and Pakistan to rely on specific circumstances to establish that they are entitled to use force, and that their opponent was not. Furthermore, in 1971 some third states also expressed their position on the Indian intervention in the situation in East Pakistan (later reconstituted as Bangladesh): UNSC, Official Records of 1238th Meeting (6 September 1965), UN Doc S/PV.1238, 9 (Pakistan), 19 (India); UNSC, Official Records of 1606th Meeting (4 December 1971), UN Doc S/PV.1606, 8–9 (Pakistan), 18–19 (US), 20 (Italy), 22 (China), 23 (Syria), 28 (Poland), 32 (India); UNSC, Official Records of 1607th Meeting (5 December 1971), UN Doc S/PV.1607, 12 (USSR); Dino Kritsiotis, 'The Indian Intervention into (East) Pakistan – 1971' in Ruys, Corten and Hofer (n 44) 169, 172–81. The last round of large-scale hostilities between India and Pakistan occurred in 1999, but it was not discussed in the Security Council. For an analysis of the international law aspects of the 1999 hostilities see VS Mani, 'Kargil Conflict International Law Perspective' (1999) 3

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3.3. Ongoing Gaza conflict

In the light of the above, it is submitted that there is sufficient evidence to support the rejection of the 'displacement' approach put forward by Israel with respect to the *jus ad bellum* legality of its operations in Gaza. While the armed conflict in Gaza between Israel, Hamas and other Palestinian armed groups could be classified as an ongoing armed conflict in which *jus in bello* continues to apply beyond the actual hostilities, this alone does not invalidate the requirement to provide independent *jus ad bellum* justifications for the use of force during such armed conflict.[52]

Given the breadth of evidence for the rejection of the 'displacement' of *jus ad bellum*, Israel's hesitancy when it comes to reliance on 'displacement'[53] (at least in so far as previous rounds of hostilities in Gaza are concerned) is understandable and is in line with the findings of this article. Yet, despite its shaky foundations, Israel still maintained this position with respect to the most recent use of force in Gaza. This is particularly interesting given that, as mentioned above, there are other arguments that Israel could have raised that would completely deny the applicability of *jus ad bellum*.[54] Why, then, might Israel be continuing to invoke the 'displacement' approach?

Himalayan and Central Asian Studies 76, 79–85; Sunil Rao, 'The Kargil Incident: Historical Analysis' (2016) 43 *Indian Historical Review* 102, 128–31.

[51] Intense hostilities between Armenia and Azerbaijan first commenced on 1992, with Armenia mostly controlling the subject of the dispute, the Nagorno-Karabakh region, by the time Russia managed to mediate a ceasefire in 1994. Despite demands by the Security Council, Armenia did not withdraw from Nagorno-Karabakh and the region suffered from constant cross-border incidents; see CFR, 'Nagorno-Karabakh Conflict', *Global Conflict Tracker*, updated 20 March 2025, https://www.cfr.org/global-conflict-tracker/conflict/nagorno-karabakh-conflict; Otto Luchterhandt, 'Learning from Georgia: A Non-Use-of-Force Treaty for Nagorno-Karabakh' in Michael Kambeck and Sargis Ghazaryan (eds), *Europe's Next Avoidable War: Nagorno-Karabakh* (Springer Nature 2013) 211, 215–16. Large-scale hostilities then recommenced in 2020, but were not the subject of any Security Council discussion, which was followed by another ceasefire brokered by Russia: 'Statement by the President of the Republic of Azerbaijan, Prime Minister of the Republic of Armenia and President of the Russian Federation', 10 November 2020, https://president.az/en/articles/view/45923. Hostilities were renewed again in 2022 with Russia once again brokering a truce. In the Security Council, both states relied on the specific circumstances prevailing at the time to justify their use of force. As for third states, France called for respect for Armenian territorial integrity, while other states did use *jus ad bellum* language but stressed the need to resolve the conflict in accordance with the principles of international law and previous statements by the parties, without siding with any of the parties: UNSC, Official Records of 9132nd Meeting (15 September 2022), UN Doc S/PV.9132, 2–3 (for a general background on the skirmishes and incidents leading to the renewal of hostilities), 3–10 (for statements by Gabon, India, Norway, Ireland, Kenya, China, Mexico, Ghana, Brazil, United Arab Emirates, Albania, United Kingdom, United states and Russia), 10 (France), 12 (Armenia), 13–14 (Azerbaijan). In September 2023 Azerbaijan launched an offensive in which it regained complete control over the region. The parties once again exchanged accusations over the present and past violations of the UN Charter, with several third states using language that alludes to the *jus ad bellum* obligations of the parties (particularly Azerbaijan: UNSC, Official Records of 9422nd Meeting (21 September 2023), UN Doc S/PV.9422, 3 (France), 4 (Malta), 5 (UAE and UK), 6 (Switzerland), 8 (Brazil and Ecuador), 10 (Mozambique and Gabon), 12 (Armenia), 16 (Azerbaijan), 18 (Germany), 19 (Türkiye).

[52] This is, of course, if we assume that *jus ad bellum* is indeed relevant to this armed conflict, as discussed in Section 2.

[53] See Section 3.1.

[54] See Section 2.

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First, it seems that Israel preferred a position that supports the applicability of *jus ad bellum* to the armed conflict in Gaza, as this position enables Israel to act and provides overall justification for its operations in Gaza. Still, Israel's position on the aforementioned overall applicability issues – namely, the status of Palestinian statehood and the Gaza occupation[55] – is that the Palestinians have yet to attain statehood and that Gaza is not occupied.[56] It is therefore difficult to surmise what is the legal construction that led to Israel's conclusion that *jus ad bellum* is applicable to Gaza. Several possibilities could be suggested: that Israel perceives every use of cross-border force as triggering the applicability of *jus ad bellum*;[57] that Israel views Gaza as a quasi-state, ruled by Hamas, thereby triggering *jus ad bellum* applicability;[58] that Israel views the scope of *jus ad bellum* obligations as extending beyond the use of interstate force;[59] that Israel, as well other states, has not considered the complicating factors that exist in the Gaza situation. In any event, some of these possibilities may contradict Israel's positions on other issues, such as Palestinian statehood, and without a clear pronouncement on this matter, it is impossible to determine the actual legal construction that forms the basis of Israel's position.

Second, it is possible that by advancing this argument in relation to Gaza, Israel is actually expressing its perceived legal basis for continued operations in other (interstate) arenas, such as Lebanon and Syria. Israel has been involved in numerous attacks against targets in these two states and 'displacement' has been put forward

[55] ibid.

[56] Attorney General of Israel, 'The International Criminal Court's Lack of Jurisdiction over the So-called "Situation In Palestine"', 20 December 2019, 2, https://www.gov.il/BlobFolder/reports/20-12-2019/en/Memorandum-Attorney-General.pdf; HCJ 9132/07 *Jaber Al-Bassiouni Ahmed v Prime Minister* (30 January 2008), para 11; HCJ 2280/24 *Gisha v Israeli Government* (27 March 2025), paras 12, 36.

[57] This position could be derived from the pronouncement of the Israeli Supreme Court, whereby every use of cross-border force amounts to an international armed conflict. While these two issues are not directly related (since, as argued throughout this article, *jus ad bellum* and *jus in bello* are separate), this decision could imply that the Israeli Supreme Court views the use of cross-border force as involving Israel's international relations; see HCJ 769/02 *Public Committee against Torture v. Government* (14 December 2006) para 18.

[58] In the pre-Charter era, the imposition of a blockade was perceived as an implied recognition of an NSA as a belligerent, triggering the applicability of the laws of war at a time when they were only automatically applicable between states during war. In other words, the imposition of a blockade has in the past equalised the status of an NSA and a state, treating the NSA as a quasi-state in so far as the laws of war were concerned. Therefore, Israel's imposition of a blockade on the Gaza Strip may suggest that it treats the Gaza Strip as a quasi-state controlled by Hamas. See Robert R Wilson, 'Recognition of Insurgency and Belligerency' (1937) 31 *Proceedings of the American Society of International Law at its Annual Meeting* 136, 141–43; Robert McLaughlin, *Recognition of Belligerency and the Law of Armed Conflict* (Oxford University Press 2020) 72–73; Charles Zorgbibe, 'Sources of the Recognition of Belligerent Status' (1977) 17 *International Review of the Red Cross* 111, 114–17. Furthermore, Israeli politicians and commentators have been repeatedly using the term 'Hamastan' to refer to the Gaza Strip, as a separate entity that is ruled by Hamas: Intelligence and Terrorism Information Center, 'The Socio-Political Makeup of "Hamastan"', 9 October 2005, https://www.terrorism-info.org.il/Data/pdf/PDF_365%20E_2.pdf; Sam Sokol, 'Responding to Gallant, Netanyahu Says He Won't Replace "Hamastan with Fatahstan" in Gaza', *The Times of Israel*, 15 May 2024, https://www.timesofisrael.com/liveblog_entry/responding-to-gallant-netanyahu-says-he-wont-replace-hamastan-with-fatahstan-in-gaza.

[59] See the position in n 4, although it is highly unlikely that this is the reason Israel is relying on *jus ad bellum*.

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by commentators as a potential justification for such attacks.[60] The fact that Israel has so far avoided officially relying on an ongoing armed conflict or 'displacement' when it comes to any area other than Gaza may serve to weaken this conclusion but could also demonstrate Israel's general lack of faith in the 'displacement' approach.

Third, Israel's narrow reading of the limitations imposed by *jus ad bellum* would also invalidate the continuous need to justify its maritime blockade of the Gaza Strip, which, in turn, justified the restrictions Israel that enforced on the passage of goods into the Gaza Strip.[61] In its analysis of the legality of the blockade, the Turkel Commission (which was established by the Israeli government to examine the legal aspects of the 2010 Gaza Flotilla incident and, in doing so, assessed the legality of the Israeli maritime blockade of Gaza) relied primarily on provisions of *jus in bello* and the law of the sea, without analysing the legality of the blockade under *jus ad bellum*.[62] Still, if we assume that *jus ad bellum* applies in the circumstances of the situation in Gaza, then the inclusion of '[t]he blockade of the ports or coasts of a state by the armed forces of another state' by the General Assembly, as an example of acts that could qualify as aggression, indicates that the imposition of the maritime blockade falls within the ambit of *jus ad bellum*.[63] From this perspective, by dismissing the continued relevance of *jus ad bellum* during the ongoing armed conflict in Gaza, Israel is provided with a blanket justification of all the measures it would employ, including the imposition of a maritime blockade, at least in so far as *jus ad bellum* is concerned.

Fourth, the 'displacement' approach provides a way to avoid addressing more sensitive issues that are associated with other threshold arguments which address the overall applicability of *jus ad bellum:* namely, the status of Palestinian statehood and the territory of Gaza.[64] As Israel does not recognise the state of Palestine,[65] it makes perfect sense for it to refrain from bringing the issue of Palestinian statehood to the fore. In addition, Israel disagreed with the pronouncement of the ICJ in its advisory opinion on the *Legal Consequences of the Construction of a Wall* regarding the irrelevance

[60] See n 23.

[61] For more details on the blockade imposed on Gaza see United Nations Office for the Coordination of Humanitarian Affairs in Occupied Palestinian Territory (OCHA), 'The Gaza Strip: The Humanitarian Impact of 15 Years of Blockade', UNICEF, June 2022, https://www.unicef.org/mena/media/18041/file/Factsheet_Gaza_Blockade_2022.pdf.pdf.

[62] Turkel Commission, 'Report of the Public Commission to Examine the Maritime Incident of 31 May 2010', January 2010, paras 31–47, https://www.gov.il/BlobFolder/generalpage/alternatefiles/he/turkel_eng_a_0.pdf. It is possible that *jus ad bellum* was ignored by the Turkel Commission because of the complicating factors discussed in Section 2.

[63] UNGA Res 3314 (n 5) Annex, para 3(c). The Gaza blockade was indeed analysed pursuant to *jus ad bellum* by the panel appointed by the UN Secretary General and the fact-finding mission appointed by the UN Human Rights Council to investigate the 2010 Gaza Flotilla incident: UNSG, Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (September 2011), paras 71–73, https://digitallibrary.un.org/record/720841/files/966717_E.pdf (concluding that 'a blockade in those circumstances is a legitimate exercise of the right of self-defence' and that 'the Panel is not persuaded that the naval blockade was a disproportionate measure for Israel to have taken in response to the threat it faced'): HRC, Report of the International Fact-Finding Mission to Investigate Violations of International Law, including International Humanitarian and Human Rights Law, Resulting from the Israeli Attacks on the Flotilla of Ships Carrying Humanitarian Assistance (27 September 2010), UN Doc A/HRC/15/21, paras 49–50, 56.

[64] See Section 2.

[65] See n 56.

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of the right to use force in self-defence in response to attacks originating from occupied territory.[66] It has also objected to the findings of the latest advisory opinion by the ICJ,[67] in which the Court decided that Gaza remains occupied for some purposes.[68] Therefore, it is highly unlikely that Israel will rely on any alleged occupation of Gaza to justify its actions. Under these circumstances, Israel's reliance on *jus ad bellum*, including its 'displacement' in previous rounds of hostilities, allows it to circumvent the discussion of some difficult topics that may complicate the applicability of *jus ad bellum*.

4. Ongoing hostilities

As established in the previous section, the Israeli position regarding the nature of the interaction between *jus ad bellum* and *jus in bello* during the ongoing armed conflict in Gaza is unsupported by international law. Assuming that *jus ad bellum* does continue to apply during armed conflicts, this section will discuss the manner of *jus ad bellum* operation in the round of hostilities that commenced following the Hamas attack on 7 October 2023.

4.1. Israel's position

In the 2009 and 2015 Reports Israel argued, as an alternative justification for its 'continuous armed conflict' argument, that it had used force in Gaza not only to halt and repel ongoing armed attacks but also to avert the ongoing threats posed by Hamas and other Palestinian armed groups in Gaza.[69] Israel emphasised that the constant firing of rockets and mortar from Gaza to Israel and their intensification had compelled the Israeli response.[70] Furthermore, in the 2015 Report, Israel maintained:[71]

> [T]he proportionality of force used in self-defence depends upon the amount of force required to repel attacks and eliminate the continuing threat. Figures regarding the number of casualties (either looked at as a whole or as compared to losses incurred on the other side), do not, in and of themselves, point to a disproportionate use of force. In responding to Hamas's attacks, Israel used no more force, for no longer a period than necessary to accomplish its objective: protecting Israel from incessant, illegal terrorist attacks.

Similarly, throughout discussions in the Security Council of the Gaza hostilities that commenced in October 2023, Israel relied on self-defence or its 'right to defend its

[66] HCJ 4825/04 *Alian v Prime Minister*, Written Response, 23 February 2005, paras 331, 337, 531–545.

[67] HCJ 2280/24 *Gisha v Government of Israel*, Supplementary Remarks on behalf of Respondents, 12 September 2024, paras 18–28; *Gisha* (n 56) paras 38–44.

[68] See n 10.

[69] 2009 Report (n 15) paras 69–72; 2015 Report (n 16) paras 67–70.

[70] 2009 Report (n 15) para 72; 2015 Report (n 16) para 70.

[71] 2015 Report (n 16) para 69.

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people'.[72] It should be noted that while Israel did refer explicitly to self-defence, it did not rely on Article 51 of the UN Charter in doing so.[73] Furthermore, during the Security Council discussions and in the 2023 Report, Israel also made direct comparisons between the 7 October 2023 attack and the 9/11 attack, and highlighted statements by the leadership of Hamas vowing to repeat such attacks.[74]

Yet, whereas in previous rounds of hostilities in Gaza, Israel stated that its operations were a response to the ongoing threat posed to it by Hamas,[75] during the discussions of the hostilities that followed the 7 October 2023 attack, Israel may have framed the objectives of its response to this attack before the Security Council more expansively. These objectives went beyond merely halting and repelling an ongoing attack (for example, because of the continuous bombing of the Israeli civilian population and the holding of hostages[76]) or even the prevention of future attacks, to also include the far-reaching goal of the complete destruction of Hamas (or its capabilities).[77] Moreover, according to Israel, the defeat of Hamas and its refusal to release the Israeli hostages it held justified the renewal of hostilities in Gaza in 2025. On March 2025, in a Security Council session on the renewal of hostilities by Israel after an almost two-month long ceasefire, the Israeli representative stated the following:[78]

> We stand firm in our commitment to return the hostages and defeat Hama[s]. ... We will bring home every last hostage. Hamas has refused to release our hostages and repeatedly rejected all the offers, both by the United States and the mediating countries, even for the period of Ramadan. And thus, the return to fighting is a necessity.

[72] Examples include UNSC, 9439th Meeting (n 11) 11; UNSC, 9462nd Meeting (n 13) 29; UNSC, 9479th Meeting (n 13) 15; UNSC, Official Records of 9534th Meeting (23 January 2024), UN Doc S/PV.9534, 7; UNSC, 9453rd Meeting (n 11) 11; UNSC, Official Records of 9744th Meeting (9 October 2024), UN Doc S/PV.9744, 24–25.

[73] The fact that Israel did not always rely explicitly on self-defence but on its 'right to defend its people' and also that it did not refer to the UN Charter could be significant but, in the circumstances of the 7 October hostilities, it is very hard to reconcile the Israeli position with any other than the *jus ad bellum* concept of self-defence.

[74] UNSC, 9439th Meeting (n 11) 11; see also 2023 Report (n 17) para 7.

[75] See reference to the 2009 Report in n 69.

[76] For circumstances that could result in the continuation of an armed attack, see Section 4.2.

[77] UNSC, 9439th Meeting (n 11) 11 ('If Hamas has the opportunity to commit those atrocities again, it will. It will not stop until Israel is obliterated. That is why, for the safety of our people and the security of our future, Israel must obliterate Hamas first. We must do so not for revenge or retaliation but for self-preservation'); UNSC, 9462nd Meeting (n 13) 29 ('Israel will no longer live with the brutal Hamas Nazis on its border. We will not have savage ISIS Hamas death squads invading our homeland again. I reiterate that Israel's operation in Gaza is not a response to the events of 7 October; it is an act of self-defence to ensure its future'); UNSC, 9479th Meeting (n 13) 15 ('Therefore, in order to defend our future, Israel had to take action. Israel's mission, as we have stated clearly before, is to eliminate Hamas's capabilities. It is not about retaliation or revenge for Hamas's violence. It is about Israel upholding its right to self-defence and ensuring that such horrors are never repeated. It is the fulfilment of our collective oath of "never again"').

[78] UNSC, Official Records of 9881st Meeting (18 March 2025), UN Doc S/PV.9881, 24–25.

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It should be noted that, at least according to some sources, Hamas agreed to release all the Israeli hostages in return for a permanent ceasefire and the withdrawal of Israeli troops, while Israel has either rejected these terms or demanded further measures to ensure that Hamas does not retain its control over Gaza.[79] If these reports are correct, then it is not just the holding of Israeli hostages that rendered 'the return to fighting … a necessity', but the fact that Hamas meant to stay in power in Gaza and would not release the hostages unless Israel consents to this condition. Put differently, following the 7 October attack, Israel has signalled that the existence of Hamas as a military force (or even as a political entity in general, if this is Israel's intention in indicating the complete annihilation of Hamas as an objective) constitutes a threat to it. This is distinguished from particular actions precipitated by Hamas (such as the firing of rockets) that were specified as constituting an ongoing threat to Israel in previous rounds of hostilities.

Numerous states and international organisations which participated in the Security Council sessions during the end of 2023 and 2024 referred to the availability of a right of self-defence to Israel (or to Israel's 'right to defend itself') in the circumstances following the 7 October 2023 attack, in line with 'international law' and/or 'international humanitarian law'.[80] In addition, while many states referred during this period to necessity and proportionality in their statements, only a few

[79] See Jacob Magid, 'Hamas Ready To Free All Hostages at once for End to War – Palestinian Official', *The Times of Israel*, 3 April 2025, https://www.timesofisrael.com/hamas-ready-to-free-all-hostages-at-once-for-end-to-war-palestinian-official; Hannah Ellis-Petersen, 'Hamas Rejects Israel's Latest Ceasefire Proposal over "Impossible Conditions"', *The Guardian*, 18 April 2025, https://www.theguardian.com/world/2025/apr/18/hamas-rejects-israel-latest-ceasefire-proposal-gaza; Le Monde with AFP, 'Israel Offers Hamas 45-day Ceasefire, Demands Hostage Release', *Le Monde*, 15 April 2025, https://www.lemonde.fr/en/international/article/2025/04/15/israel-offers-hamas-45-day-ceasefire-demands-hostage-release_6740224_4.html; Tia Goldenberg, 'Why is an End to the War in Gaza so Elusive?', *AP News*, 7 May 2025, https://apnews.com/article/gaza-war-netanyahu-hamas-israel-ceasefire-595b92c10bddc4f3e7008710792e7877.

[80] UNSC, 9439th Meeting (n 11) 3–4 (US), 4 (UK), 5 (Malta), 8 (Albania and France); UNSC, 9443rd Meeting (n 11) 9 (Ghana), 11 (Ecuador), 30 (EU); UNSC, Official Records of 9451st Meeting (24 October 2023), UN Doc S/PV.9451, 18 (Gabon), 21 (Switzerland), 28 (Japan); UNSC, Official Records of 9451st Meeting (24 October 2023), UN Doc S/PV.9451 (Resumption 1), 8 (Luxemburg), 12 (Germany), 13 (Netherlands), 15 (Slovenia), 17 (Poland), 20 (Mexico), 22 (Lichtenstein), 23 (New Zealand), 24 (Chile), 30 (Guatemala and Canada), 32 (Ukraine), 34 (Kazakhstan), 35 (Sierra Leone), 36 (Philippines), 43 (Argentina), 44 (Norway), 47 (Australia), 50 (Ireland), 51 (Belgium and Finland), 55 (Czechia), 56 (Spain), 58 (Peru), 59 (Holy See and Iceland), 62 (Italy); UNSC, 9462nd Meeting (n 13) 13 (Brazil); UNSC, Official Records of 9472nd Meeting (10 November 2023), UN Doc S/PV.9472, 21–22 (Mozambique); UNSC, 9534th Meeting (n 72) 32 (Austria); UNSC, Official Records of 9534th Meeting (23 January 2024), UN Doc S/PV.9534 (Resumption 1), 7 (Portugal); UNSC, Official Records of 9687th Meeting (23 January 2024), UN Doc S/PV.9687 (Resumption 2), 2 (Timor-Leste). In the UN General Assembly, several other states referred to the right of self-defence, but note that the review of General Assembly statements included only English statements by states the positions of which were not cited before as part of the analysis of the Security Council sessions: UNGA, 'Tenth Emergency Special Session' (11 December 2024), https://www.un.org/en/ga/sessions/emergency10th.shtml (10th ESS), statements by Singapore (27 October 2023), Bulgaria (27 October 2023), LPDR (31 October 2023), Romania (1 November 2023), Micronesia (1 November 2023), Papua New Guinea (1 November 2023), Tonga (1 November 2023), San Marino (1 November 2023), Nauru (2 November 2023), St Vincent and the Grenadines (2 November 2023), Cyprus (2 November 2023), Marshall Islands, (2 November 2023), Palau (2 November 2023), Croatia (15 December 2023), Cabo Verde (10 May 2024), Kenya (10 May 2024), Angola (17 September 2023).

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such statements could reasonably be interpreted to refer to *jus ad bellum* necessity and proportionality,[81] as limitations imposed by customary international law on the use of force in self-defence.[82] Still, it is possible that the reference to 'international law' is alluding to additional limitations imposed on the use of force in self-defence in accordance with customary international law, which include necessity and proportionality.[83]

On the other hand, a substantial number of states and international organisations have rejected Israel's right to respond to the 7 October 2023 attack from the outset, citing various reasons such as the illegality of Israel's use of force to capture Gaza in 1967, the illegality of the Israeli occupation, the right of the Palestinians to self-determination and the unavailability of self-defence against an occupying power, or simply by characterising the Israeli actions in Gaza as 'aggression'.[84] For those states that maintained that Israel had either violated *jus ad bellum* from the outset or that *jus ad bellum* does not regulate the circumstances of the Gaza conflict, *jus ad bellum* did not play any additional role during the hostilities themselves.

In the course of the Security Council discussions of the Gaza hostilities in 2023 and 2024, only five states which referred to Israel's right of self-defence during the hostilities have at least implied that Israel has exceeded its limits.[85] Before the General Assembly, four more states maintained or implied that Israel's use of force in self-defence went beyond what is permissible in accordance with *jus ad bellum*.[86] In any event, as the hostilities progressed during 2024, the emphasis on the availability of Israel's right of self-defence declined.[87]

[81] Statements by the Netherlands, Slovenia, Norway and Finland in n 80; UNSC, 9451st Meeting (n 80) 11 (Israel); UNSC, 9472nd Meeting (n 80) 18 (Albania); UNSC, 9534th Meeting (n 72) 55 (EU); UNSC, 9534th Meeting (Resumption 1) (n 80) 11 (Ireland); UNSC, Official Records of 9883rd Meeting (21 March 2025), UN Doc S/PV.9883, 16 (UK).

[82] *Oil Platforms* (n 5) [76]; *Nuclear Weapons* (n 35) [41]; Chris O'Meara, *Necessity and Proportionality and the Right of Self-Defence in International Law* (Oxford University Press 2021) 5, 8–9.

[83] O'Meara, ibid.

[84] See n 11; UNSC, 9451st Meeting (Resumption 1) (n 80) 9 (Indonesia), 31 (Iran), 33 (Namibia), 45 (Bolivia), 48 (Bangladesh), 52 (Mauritania on behalf of OIC), 54–55 (Maldives), 57 (Tunisia); UNSC, 9534th Meeting (n 72) 9–10 (Algeria), 34 (Saudi Arabia), 36 (Kuwait), 39 (League of Arab states), 40 (Bahrain), 46 (Venezuela), 47 (Morocco), 52 (Egypt); UNSC, 9534th Meeting (Resumption 1) (n 80) 5 (Iraq), 16 (Oman); UNSC, Official Records of 9608th Meeting (25 April 2024), UN Doc S/PV.9608, 3 (Malaysia); UNSC, Official Records of 9608th Meeting (25 April 2024), UN Doc S/PV.9608 (Resumption 2), 27 (Uganda, on behalf of the Non-Aligned Countries); UNSC, Official Records of 9787th Meeting (Resumption 1) (19 November 2024), UN Doc S/PV. 9787 (Resumption 1) 6 (Qatar); UNGA, 10th ESS (n 80) statement by Sri Lanka (13 May 2024).

[85] See UNSC, 9534th Meeting (n 81) statement by Ireland; UNSC, Official Records of 9484th Meeting (22 November 2023), UN Doc S/PV.9484, 17–18 (Albania, although it cannot be conclusively determined that Albania's concern as a result of 'the extreme disproportionate impact the Israeli response to Hamas is having on civilian lives in Gaza' actually refers to *jus ad bellum*); UNSC, Official Records of 9790th Meeting (20 November 2024), UN Doc S/PV.9790, 6 (China); UNSC, Official Records of 9794th Meeting (25 November 2024), UN Doc S/PV.9794, 10 (Guyana).

[86] UNGA, 10th ESS (n 80) statements by St Vincent and the Grenadines, Kenya, Angola, Singapore (17 September 2024).

[87] A rough approximation could be established by comparing the references to self-defence in three general discussions convened by the Security Council on the situation in Gaza (in its 9451st, 9534th and 9608th Meetings) and the decline in the number of third states and international organisations that referred to the availability of self-defence with regard to the Gaza situation. For illustration purposes only, if, at the 9451st Meeting, 34 states and international organisations referred to the availability of

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On March 2025, Israel renewed hostilities in Gaza, ending a two-month ceasefire, and suspended the passage of humanitarian aid into Gaza for a period of more than two months.[88] In the general discussion of April 2025, the trend of the decline in the number of references to the right of self-defence continued.[89] Quite importantly, the renewal of hostilities seemed to cause a shift in the position of several Western states which had previously supported Israel's right of self-defence. It began by the United Kingdom and France signalling their unease with the renewal of hostilities before the Security Council,[90] and culminated in official statements by the UK, France and Canada.[91] These statements were also followed by comments of the

the right of self-defence to Israel, at the 9534th Meeting that number was reduced to 14, and by the 9608th Meeting the number was further reduced to 5. Compare UNSC, 9451st Meeting (n 80); UNSC, 9451st Meeting (Resumption 1) (n 80); UNSC, 9534th Meeting (n 72); UNSC, 9534th Meeting (Resumption 1) (n 80); UNSC, 9608th Meeting (n 84); UNSC, Official Records of 9608th Meeting (25 April 2024), UN Doc S/PV.9608 (Resumption 1); UNSC, 9608th Meeting (n 84) (Resumption 2); for a discussion of the possible implications of the decline in references to self-defence, see Section 4.3.

[88] OCHA, Statement by the Humanitarian Country Team of the Occupied Palestinian Territory – on Principled Aid Delivery in Gaza', 4 May 2025, https://www.ochaopt.org/content/statement-humanitarian-country-team-occupied-palestinian-territory-principled-aid-delivery-gaza; Jaroslav Lukiv and Paul Adams, 'Israel Blocks Entry of All Humanitarian Aid into Gaza', *BBC News*, 2 March 2025, https://www.bbc.co.uk/news/articles/c9q4w99je78o; David Gritten, 'Israel Lets Aid into Gaza after 11-Week Blockade but UN Calls It "Drop in Ocean"', *BBC News*, 19 May 2025, https://www.bbc.co.uk/news/articles/c3d4kz8p00eo.

[89] As at 3 June 2025, the 9907th meeting of the Security Council constitutes the only general discussion in the Security Council following the resumption of hostilities in Gaza. Despite the broad participation by states and international organisations in this meeting, only the US, the EU and Denmark (with the latter two emphasising the limits of such right) continued to support Israel's right of self-defence, while the UK stated that 'Hamas must no longer govern Gaza or pose a threat to Israel'. Most states that had previously supported the Israeli right of self-defence in some form did not refer to such right, and preferred instead to avoid making any references to international law, to refer to it generally, or to focus on *jus in bello*: UNSC, Official Records of 9907th Meeting (29 April 2025), UN Doc S/PV.9907, 16 (UK and US), 23 (Denmark); UNSC, Official Records of 9907th Meeting (29 April 2025), UN Doc S/PV.9907 (Resumption 1), 13 (EU).

[90] UNSC, Official Records of 9882nd Meeting (20 March 2025), UN Doc S/PV.9882, 9 (France, recognising 'Israel's right to protect its inhabitants and Israel's duty to protect its country and its people' and 'to defend itself'. Yet, France also implied that the resumption of Israel's bombing in Gaza on March 2025 would not make Israel safer and condemned it – but did not refer specifically to necessity or proportionality, or explicitly state that Israel has violated *jus ad bellum*. However, in the next Security Council meeting France seemed to have reverted back to its previous position with a slight alteration whereby 'Israel has the right to defend itself, albeit in accordance with international humanitarian law and with the awareness that there is no military solution in Gaza': UNSC, Official Records of 9883rd Meeting (21 March 2025), UN Doc S/PV.9883, 9–10 (France), 16 (UK, stressing that they 'recognise Israel's right to self-defence but civilians must be protected, and Israel must ensure its operations are proportionate to the threat posed'). In June 2025, the UK stated that '[t]his Israeli Government's decisions to expand its military operations in Gaza and severely restrict aid are unjustifiable, disproportionate and counterproductive, and the United Kingdom completely opposes them'. China, which previously characterised the Israeli operation as a violation of *jus ad bellum*, framed its objection in June 2025 in terms of *jus ad bellum* proportionality, stating that '[t]hat conflict has long exceeded the limits of a hostage rescue operation': UNSC, Official Records of 9929th Meeting (21 March 2025), UN Doc S/PV.9929, 6 (UK), 10 (China).

[91] UK Government, Prime Minister's Office, 'Joint Statement from the Leaders of the United Kingdom, France and Canada on the Situation in Gaza and the West Bank', 19 May 2025, https://www.gov.uk/government/news/joint-statement-from-the-leaders-of-the-united-kingdom-france-and-canada-on-the-situation-in-gaza-and-the-west-bank ('We have always supported Israel's right to defend Israelis against terrorism. But this escalation is wholly disproportionate').

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German Chancellor[92] which, while not attaining the official character of the preceding statements, may also imply that Germany's position regarding the operation in Gaza was being reconsidered.

4.2. *Self-defence during hostilities*

At the outset, it should be emphasised that the continued applicability of *jus ad bellum* even during hostilities is supported by practice and *opinio juris* of states.[93] This is established, inter alia, by the response of states to the Israeli invasion of Lebanon in 2006[94] and by letters sent by states to the Security Council in armed conflicts such as Vietnam,[95] Iran-Iraq,[96] and the Falkland Islands.[97] Furthermore, in the 2009 and 2015 Reports, Israel essentially accepted that if its argument regarding the irrelevance of *jus ad bellum* during a continuous armed conflict is rejected, then *jus ad bellum* remains relevant following the commencement of hostilities.[98]

As with the concept of armed conflict, the relevant treaty provisions (including supporting obligations, such as the duty to peacefully settle disputes) indicate a willingness to increase the scope of *jus ad bellum* applicability, and contain no language

[92] Nette Nöstlinger, 'Germany's Merz Blasts Israeli Offensive in Gaza', *Politico*, 26 May 2025, https://www.politico.eu/article/germany-friedrich-merz-blasts-israeli-offensive-gaza-strip (stating that he 'no longer understand[s] what the goal of the Israeli army in the Gaza Strip is' and that '[t]o harm the civilian population to such an extent, as has increasingly been the case in recent days, can no longer be justified as a fight against Hamas terrorism').

[93] A possible exception is the statement of Brian Egan, US Legal Adviser to the Department of State at the time, whereby 'once a state has lawfully resorted to force in self-defense against a particular armed group following an actual or imminent armed attack by that group, it is not necessary as a matter of international law to reassess whether an armed attack is imminent prior to every subsequent action taken against that group, provided that hostilities have not ended'. However, it is uncertain that this was indeed Egan's intention: Brian Egan, 'International Law, Legal Diplomacy, and the Counter-ISIL Campaign', *Just Security*, 4 April 2016, 6, https://www.justsecurity.org/wp-content/uploads/2016/04/Egan-ASIL-speech.pdf; Eliav Lieblich, 'On the Continuous and Concurrent Application of *ad Bellum* and *in Bello* Proportionality' in Klaus Kreß and Robert Lawless (eds), *Necessity and Proportionality in International Peace and Security Law* (Oxford University Press 2020) 41, 42 fn 1.

[94] This is because many states that referred to Israel's right of self-defence emphasised the constraints of self-defence, which included compliance with *jus in bello* and the principles of necessity and proportionality, with some of them expressing concerns about the excessiveness of the force used by Israel: UNSC, Official Records of 5488th Meeting (13 July 2006), UN Doc S/PV.5488, 4 (Peru), 5 (UK); UNSC, 5489th Meeting (n 20) 11–12 (Japan), 15 (Denmark), 17 (Greece and France); UNSC, Official Records of 5493rd Meeting (21 July 2006), UN Doc S/PV.5493, 17 (US); UNSC, Official Records of 5493rd Meeting (21 July 2006), UN Doc S/PV.5493 (Resumption 1), 2 (Russia), 8 (Ghana), 10 (Argentina), 16 (Finland on behalf of the EU and other aligned states), 18 (Switzerland), 23 (Norway), 27 (Australia), 39 (Canada), 41 (Guatemala); Christian Tams and Wenke Brückner, 'The Israeli Intervention in Lebanon – 2006' in Ruys, Corten and Hofer (n 44) 673, 678–79.

[95] Letter dated 8 May 1972 from the Permanent Representative of the United States to the United Nations addressed to the President of the Security Council (8 May 1972), UN Doc S/10631, 1–2; Letter dated 11 May 1972 from the Permanent Representative of the Union of Soviet Socialist Republics to the United Nations addressed to the President of the Security Council' (8 May 1972), UN Doc S/10643, 1.

[96] See letters in United Nations, *Repertoire of the Practice of the Security Council: Supplement 1985–1988* (1992), UN Doc ST/DPA/1/Add.10, 432, fn 53.

[97] See letters in United Nations, *Repertoire of the Practice of the Security Council: Supplement 1981–1984* (1992), UN Doc ST/PSCA/1/Add.9, 329, fn 72.

[98] See nn 69–71 above.

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to support the cessation of such applicability during hostilities.[99] Yet, the existence of hostilities and their specific characteristics – including their varying intensity levels, the participating actors, and the involvement of the international community – may all influence the manner of the scope of *jus ad bellum* constraints that are imposed on the parties to an armed conflict. In addition, the continued applicability of *jus ad bellum* during armed conflicts results in an interaction between the general rules and exceptions of *jus ad bellum*, on the one hand, and the rules of *jus in bello*. As a universal principle of law, rules are generally applicable whereas exceptions must be interpreted narrowly, to apply only during the specific circumstances that trigger their operation and only for such time as these circumstances remain relevant.[100] For *jus ad bellum*, this means that the prohibition on the use of force (as well as other related general obligations such as the duty to peacefully settle disputes) governs the legal relationship between parties to an armed conflict, unless and for such time in which one of the parties to an armed conflict establishes the existence of circumstances that permit it to use force.[101] As already mentioned, the two main exceptions that receive broad acceptance are enshrined in the UN Charter: the right of self-defence and authorisation by the Security Council according to a Chapter VII resolution.[102]

If we accept the broad position for the applicability of *jus in bello*, an armed conflict may exist in the absence of hostilities, and may indeed include several rounds of hostilities.[103] In order to conform with *jus ad bellum*, hostilities involving the use of collective 'means of injuring the enemy'[104] or, in other words, the use of armed force, require one of the parties to the armed conflict to demonstrate that it is entitled to use force according to the aforementioned *jus ad bellum* exceptions. In the round of hostilities following the 7 October 2023 attack, Israel has argued on numerous occasions that it is entitled to use force in self-defence.[105] Therefore, the analysis in this section will focus on issues that are related to the application of self-defence during the hostilities that followed the Hamas attack of 7 October 2023.

The availability of the right of self-defence is predicated on the occurrence of an 'armed attack'.[106] Depending on the factual characteristics of the particular use of

[99] See Section 3.2 and nn 29, 31 and 32.

[100] ILC, Report of the International Law Commission on Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (13 April 2006), UN Doc A/CN.4/L.682 (Fragmentation Report), paras 94–95; Jaap Hage, Antonia Waltermann and Gustavo Arosemena, 'Exceptions in International Law' in Lorand Bartels and Federica Paddeu (eds), *Exceptions in International Law* (Oxford University Press 2020) 11, 14–19; Iain Scobbie, 'Exceptions: Self-Defence as an Exception to the Prohibition on the Use of Force' in Bartels and Paddeu, ibid, 150, 157–59.

[101] ILC, Fragmentation Report (n 100) para 95; Scobbie (n 100) 160–61; André de Hoogh, 'The Compelling Law of *Jus Cogens* and Exceptions to Peremptory Norms: To Derogate or Not to Derogate, That is the Question!' in Bartels and Paddeu (n 100) 127, 133.

[102] See nn 29 and 30.

[103] See nn 24 and 25.

[104] Hague Convention (IV) (n 25) reg 22; Nils Melzer (ed), *Interpretive Guidance on the Notion of Direct Participation in Hostilities* (ICRC 2009) 43; Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (4th edn, Cambridge University Press 2022) 2.

[105] See n 72.

[106] The circumstances that would entitle a state to use force in self-defence are, in themselves, disputed. The ICJ has famously pronounced that self-defence is reserved only to respond to the gravest

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force, an armed attack could be classified as imminent,[107] ongoing or completed.[108] However, even if self-defence is available, the use of force itself is further restricted by the customary requirements of necessity and proportionality.[109] These concepts are highly disputed, and fully resolving these disputes is beyond the scope of this article. For the purpose of this article, necessity will be treated as considering whether force could be used, obligating states to resort to force only as a last resort and arguably limiting their choice of targets.[110] In that sense, the existence of hostilities may support a claim that force is the only measure that could be used in response to an armed attack. In other words, when an armed attack is ongoing, it may serve by itself as evidence that the use of force is necessary.[111] Yet, following the cessation

forms of illegal uses of force, distinguishing between the use of force in contravention of the prohibition on the use of force and an armed attack. Nevertheless, this position of the ICJ has been subjected to criticism by scholars who argue that it may not be realistic to require states to suffer attacks without being able to respond. For the ICJ position and its support see *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*), Merits, [1986] ICJ Rep 14 [191]; *Oil Platforms* (n 5) [51]; Georg Nolte and Albrecht Randelzhofer, 'Article 51' in Simma and others (n 5) 1397, 1401–403; Terry Gill, 'The Forcible Protection, Affirmation and the Exercise of Rights by States under Contemporary International Law' (1992) 23 *Netherlands Year Book of International Law* 105; Christopher Greenwood, 'Self-Defence', *Max Planck Encyclopedia of Public International Law* (*MPEPIL*), April 2011, paras 12–13, https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e401?print=pdf; Christine Gray, *International Law and the Use of Force* (4th edn, Oxford University Press 2018) 155–57; for the contrary position: Report of the Independent Fact-Finding Mission on the Conflict in Georgia: Vol II, September 2009, 249; Elizabeth Wilmshurst, 'Principles of International Law on the Use of Force by States in Self-Defence', Chatham House, 1 October 2005, https://www.chathamhouse.org/sites/default/files/publications/research/2005-10-01-use-force-states-self-defence-wilmshurst.pdf; for the related concept of 'defensive countermeasures' see *Oil Platforms* (n 5) Separate Opinion of Judge Simma, [12].

[107] Responses to a threat that has materialised as an imminent attack, which have received growing (although far from absolute) acceptance by states and scholarly opinion, were distinguished from more remote and indirect threats that are not connected to specific attacks, which are still perceived as impermissible: see Egan (n 93) 5; UK Attorney-General, 'The Modern Law of Self-Defence', 11 January 2017, 7, https://assets.publishing.service.gov.uk/media/5a7f46dfe5274a2e8ab4b32e/170111_Imminence_Speech_.pdf; Australian Attorney-General, 'The Right of Self-Defence Against Imminent Armed Attack in International Law', *EJIL:Talk!*, 25 May 2017, https://www.ejiltalk.org/the-right-of-self-defence-against-imminent-armed-attack-in-international-law; UNSG, 'A More Secure World: Our Shared Responsibility', Report of the High-level Panel on Threats, Challenges and Change (2 December 2004), UN Doc. A/59/565, 54–55; O'Meara (n 82) 58; Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge University Press 2010) 253–54; W Michael Reisman and Andrea Armstrong, 'The Past and Future of the Claim of Preemptive Self-Defense' (2006) 100 *American Journal of International Law* 525, 526; Daniel Bethlehem, 'Self-Defence Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 *American Journal of International Law* 770, 770–73; furthermore, the practice of states in response to the 1981 Israeli attack on the Osirak facility (in n 46) also represents a rejection of a broader right of self-defence against remote threats that arise out of the supposed attainment of nuclear weapons.

[108] O'Meara (n 82) 55; Ruys (n 107) 252–54.

[109] See n 82.

[110] Gray (n 106) 159–60; Ruys (n 107) 91–110; O'Meara (n 82) 30–38; Terry Gill, 'When Does Self-Defence End' in Marc Weller (ed), *The Oxford Handbook on the Use of Force in International Law* (Oxford University Press 2015) 738, 744–45.

[111] O'Meara (n 82) 57; Ruys (n 107) 97–98; Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff 1991) 152; James Green, *The International Court of Justice and Self-Defence in International Law* (Hart 2009) 80–85; Gill (n 110) 744.

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of hostilities, and for as long as the right of self-defence is still available, a state that wishes to renew such hostilities must demonstrate that the (defensive) objective of its operation could be achieved only through the use of armed force.[112]

Proportionality, which regulates the extent of force that could be used, is more relevant to the analysis of the use of force during ongoing hostilities. Scholars distinguish between two main competing notions of proportionality.[113] The 'quantitative' understanding of proportionality requires that the force that was used would not exceed the effects caused by the original armed attack.[114] On the other hand, interpreting proportionality as a 'means-end' concept would entail that such force could not exceed what is required to achieve a defensive purpose.[115] As mentioned above, there is disagreement among scholars regarding the correct approach for the determination of *jus ad bellum* proportionality,[116] and the position of

[112] Dapo Akande and Thomas Liefländer, 'Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense' (2013) 107 *American Journal of International Law* 563, 564, 568–69. In the context of an ongoing armed conflict, and as a result of the growing acceptance of the lawfulness of responding to imminent armed attacks (see n 107), it is sometimes difficult to distinguish between issues pertaining to the availability of self-defence as a whole and to the necessity of forcefully responding to previous or ongoing actual armed attacks or to future imminent armed attacks; see also discussion below of 'means-end' proportionality.

[113] Note that scholars used various names for these conceptions of *jus ad bellum* proportionality. For example, 'quantitative' proportionality is also known as a 'tit-for-tat' or 'harms-based' approach, while 'means-end' proportionality is also known as the 'teleological' approach; see Yuval Shany and Amichai Cohen, Israel-Hamas 2023 Symposium, 'International Law "Made in Israel" v. International Law "Made for Israel"', Lieber Institute, 22 November 2023, https://lieber.westpoint.edu/international-law-made-in-israel-international-law-made-for-israel; O'Meara (n 82) 101–102.

[114] Dinstein (n 18) 263 (for what Dinstein designated as 'on the spot reaction'); Van Steenberghe (2023) (n 3); Christian Tams, 'The Necessity and Proportionality of Anti-Terrorist Self-Defence' in Larissa van den Herik and Nico Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge University Press 2013) 373, 389; David Kretzmer, 'The Inherent Right to Self-Defence and Proportionality in *Jus ad Bellum*' (2013) 24(1) *European Journal of International Law* 235, 237–38; Johanna Friman, *Revisiting the Concept of Defence in the* Jus ad Bellum (Hart 2017) 87–91.

[115] Kretzmer (n 114) 237–38, 240; ILC (n 18) 69; Friman (n 114) 91–92; Claud Waldock, 'The Regulation of the Use of Force by Individual States in International Law' (1952) 81 *Collected Courses of The Hague Academy of International Law* 451, 464, https://referenceworks.brill.com/display/entries/HACO/A9789028611825-05.xml; Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963) 434.

[116] According to some scholars, the 'means-end' approach was favoured by the academic literature; see O'Meara (n 82) 101–04; Ruys (n 107) 110–12; Judith Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge University Press 2004) 160–61; Shany and Cohen (n 113) argue for a 'means-end' notion of proportionality and comment that '[i]t is quite striking that no similar statements [regarding the correctness of 'harms-based' *jus ad bellum* proportionality] can be found … in Security Council debates relating to other use of force campaigns, including the recent campaigns against ISIS and Libya, the war in Yemen, etc.'. Nevertheless, some commentators support a 'quantitative' model; see Dinstein (n 18) 282–83 (Dinstein supports a 'quantitative' model but only for engagements of a limited scale since, as mentioned in Section 3.2, if the armed attack justifies a response in the form of a 'war of self-defence', proportionality is no longer relevant); Van Steenberghe (2023) (n 3). As further discussed below, while Van Steenberghe's analysis is clearly in favour of the 'quantitative' approach his position seems also akin to 'mixed' proportionality; Adil Haque, 'Enough: Self-Defense and Proportionality in the Israel-Hamas Conflict', *Just Security*, 6 November 2023, https://www.justsecurity.org/89960/enough-self-defense-and-proportionality-in-the-israel-hamas-conflict. Haque also seems to refer to a 'mixed' understanding of *jus ad bellum* proportionality, which entails an appraisal of 'whether the harmful effects of the force taken in self-defence are outweighed by achieving the legitimate aims'. Here, the effects of the operation are

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states[117] and the ICJ[118] on this issue has been somewhat ambiguous. This indeterminacy, particularly when it comes to the position of states and international organisations, limits the ability to provide a concrete and definite verdict in terms of *jus ad bellum* proportionality, which is crucial for the efficiency of *jus ad bellum* regulation during hostilities. Furthermore, regardless of the actual legal position that most accurately reflects the state of international law, both approaches have their practical shortcomings.

For 'quantitative' proportionality, it has been argued that it involves a complex analysis of various effects that are not easily measured or compared.[119] In addition, it is difficult to quantitatively ascertain the effects of an ongoing armed attack during hostilities, as such effects can continue to materialise over time.[120] For example, if state A invades state B, the effects of the invasion, including the death of the residents of the territorial state and the destruction of its infrastructure, could not be perceived as terminated just because state B decides to forcefully respond to the invasion. 'Quantitative' proportionality may therefore be unwieldy and result in the exclusion of certain effects that occur regularly.

The aforementioned complexity is reinforced by the fact that the temporal classification of an armed attack is not always a clear-cut exercise. For example, the issue of occupation of state territory was specified as potentially bringing about the continuation of an armed attack.[121] The topic is still debated, but it should be noted that in 1973, when Egypt and Syria used force against Israel, some third states relied on a right of the Arab states to recover territory that was unlawfully occupied

not weighted against those of the armed attack but against the benefits of achieving the legitimate objectives of the operation. Haque relied on a report by the International Law Association: ILA, 'Final Report on Aggression and the Use of Force (2018), 12, https://www.ila-hq.org/en_GB/documents/conference-report-sydney-2018-7 (arguing, inter alia, that 'means-end' proportionality is essentially a question of *jus ad bellum* necessity).

[117] Both Ruys and O'Meara maintain that state practice on this subject is unclear, while Van Steenberghe argues that 'in line with past state practice, recent state practice clearly evidences that states usually support a quantitative conception of proportionality': Ruys (n 107) 112–16; O'Meara (n 82) 107–15; Raphaël Van Steenberghe, 'Self-Defence in Response to Attacks by Non-state Actors in the Light of Recent State Practice: A Step Forward?' (2010) 23 *Leiden Journal of International Law* 183, 205.

[118] Van Steenberghe (n 117) 205 and fn 83 (arguing that the ICJ endorsed a 'quantitative' conception of *jus ad bellum* proportionality); O'Meara (n 82) 117 ('[t]he quantitative model of proportionality prima facie dominates the ICJ's jurisprudence. However, it goes too far to represent this as the Court's definitive stance on this issue. A firm and coherent line of reasoning is not reflected in the relevant cases'); Ruys (n 107) 115 ('even though the ICJ has not clarified its position on the precise content of the proportionality requirement, there is apparently a quantitative element involved in its concrete assessments thereof').

[119] Kretzmer (n 114) 278; O'Meara (n 82) 122–23.

[120] Michael Glennon, 'The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter' (2002) 25 *Harvard Journal of Law and Public Policy* 539, 551–52; O'Meara (n 82) 104, 122–25.

[121] Dapo Akande and Antonios Tzanakopoulos, 'Use of Force in Self-Defence to Recover Occupied Territory' (2021) 32 *European Journal of International Law* 1299. For the contrary position: Tom Ruys and Felipe Rodriguez Silvestre, 'The Nagorno-Karabakh Conflict and the Exercise of "Self-Defense" to Recover Occupied Land', *Just Security*, 10 November 2020, https://www.justsecurity.org/73310/the-nagorno-karabakh-conflict-and-the-exercise-of-self-defense-to-recover-occupied-land; Bernard Knoll-Tudor and Daniel Mueller, 'At Daggers Drawn: International Legal Issues Surrounding the Conflict in and around Nagorno-Karabakh', *EJIL:Talk!*, 17 November 2020, https://www.ejiltalk.org/at-daggers-drawn-international-legal-issues-surrounding-the-conflict-in-and-around-nagorno-karabakh.

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by Israel in 1967 as justification for the attack.[122] Nevertheless, in other instances, such as the Argentinian invasion of the Falkland/Malvinas Islands[123] and the Iraqi invasion of Kuwait,[124] territorial reclamation arguments were highly disputed.[125] In addition, for our purposes the continuation of an armed attack may also include the firing of rockets on the civilian population of the victim state[126] and, arguably, the capturing or holding of nationals of the victim state, if we adhere to the contested doctrine that allows states to rescue nationals who were captured and are being held in other states or territories.[127] When it comes to the capturing of nationals as part of an invasion of state territory, it could be maintained that this is distinguished from the capturing of nationals abroad, as the former could be perceived as directly connected, as an extension of the effects of the invasion itself and, consequently, of the original armed attack.[128] Furthermore, certain scholars maintain that several attacks could be accumulated, so that the response in self-defence encompasses

[122] While Syria and Egypt framed their basis to use force in 1973 as a retaliation for Israeli attacks, third states have maintained, either implicitly or explicitly, that the recovery of illegally occupied territory justifies the use of force by the Arab states against Israel; see Letter dated 6 October 1973 from the Permanent Representative of the Syrian Arab Republic to the United Nations addressed to the President of the Security Council (6 October 1973), UN Doc S/11009; Letter dated 6 October 1973 from the Minister of Foreign Affairs of Egypt to the President of the General Assembly (6 October 1973), UN Doc A/9190; Letter dated 10 October 1973 from the Permanent Representative of Algeria to the United Nations addressed to the Secretary General (10 October 1973), UN Doc A/11019, 2 (for the declaration of the non-aligned countries); UNSC, 1743rd Meeting (n 49) 6 (China), 7 (USSR); UNSC, 1744th Meeting (n 49) 2 (Yugoslavia), 14 (Indonesia), 15 (India), 17 (Sudan); UNSC 1745th Meeting (n 49) 4 (Guinea), 5 (Peru); Dubuisson and Koutroulis (n 49) 194–95.

[123] UNSC, Official Records of 2345th Meeting (1 April 1982), UN Doc S/PV.2345, 6–8.

[124] Letter from HE Tariq Aziz to the Ministers of Foreign Affairs of All Countries in the World, *Internet Archive*, 4 September 1990, 8–12, https://ia801304.us.archive.org/13/items/kuwait-question-tariq-aziz/The%20Kuwait%20Question%20-%20Letter%20Addressed%20by%20H.E.%20Tariq%20Aziz%20to%20the%20Ministers%20of%20Foreign%20Affairs%20of%20All%20Countries%20in%20the%20World.pdf.

[125] The discussion of the Argentinian position, including the support it received (mainly from some Latin American states) and its rejection by the UK and other third states, is comprehensively introduced in Etienne Henry, 'The Falklands/Malvinas War – 1982' in Ruys, Corten and Hofer (n 44) 361, 364–69. The Iraqi position was rejected and numerous Security Council resolutions were adopted in relation to Iraq's conduct, including Resolutions 660 and 678, which condemned the Iraqi invasion and with the latter famously authorising the use of force to end the threat posed to international peace and security by the Iraqi conduct: UNSC Res 660 (2 August 1990), UN Doc S/RES/660; UNSC Res 678 (28 November 1990), UN Doc S/RES/678.

[126] That the firing of rockets into the territory of a state constitutes an armed attack is not disputed. It is substantiated by the examples in the definition of aggression that have been utilised by the ICJ to indicate the forms of armed attack. Admittedly, the text of the definition is state-centric, but if we agree that NSAs may also commit armed attacks (an issue that is not covered by this article), then there is no reason not to apply it to these types of attack; see UNGA Res 3314 (n 5) Annex, para 3(a); this resolution was used by the ICJ in this context, inter alia, in *Nicaragua* (n 106) [195].

[127] For an analysis of the positions on the legality of rescuing nationals abroad see James A Green, 'Passportisation, Peacekeepers and Proportionality: The Russian Claim of the Protection of Nationals Abroad in Self-Defence', *Worktribe*, January 2010, 88–97, https://uwe-repository.worktribe.com/OutputFile/7617189; Thomas Wingfield, 'Forcible Protection of Nationals Abroad' (2000) 104 *Dickinson Law Review* 439; Francis Grimal and Graham Melling, 'The Protection of Nationals Abroad: Lawfulness or Toleration? A Commentary' (2011) 16 *Journal of Conflict and Security Law* 541, 546–52.

[128] This is deduced by comparing those captured individuals with individuals who were killed or injured during an attack, and the continuous duty of states to protect their civilians from external threats and by the fact that forcible means are being used to keep holding those nationals captive. This argument is

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several relatively smaller forcible incidents.[129] While this latter theory is not necessarily part of the *lex lata*, it could also, in practice, potentially lead to a modification of the scope of the armed attack.

In comparison, 'means-end' proportionality is more flexible in that it is not bound to the exact effects of an armed attack but to the attainment of an objective; yet the scope of this objective is not always clear. While the halting and repelling of an armed attack is the most commonly cited defensive objective,[130] it is suitable only for dealing with ongoing armed attacks (and, in this case, the challenges of deciding whether an attack is in fact ongoing are also relevant), but not with imminent or completed attacks.[131] For these latter types of armed attack, it has been suggested that, under some circumstances, the 'defensive' objective may also include the prevention and deterrence of threats or further attacks.[132] Nevertheless, unlike a response to an imminent armed attack that has yet to occur, which requires establishing the existence of an actual threat of an immediate attack,[133] the conditions that would lead to the expansion of a 'defensive' objective to include future-oriented goals beyond the halting and repelling of an armed attack are not always clear.

While states have formulated their objectives in this sense in the past, the scope of the threat that they intended to address remained ambiguous. A classic example of a defensive operation with broad objectives in the pre-Charter era is the Second World War, where the Allies stated that their war aims included the 'unconditional surrender' of Axis states.[134] These objectives were also set as the foundations of the United Nations which, at the time, was used to define the group of states that supported the Allies and their cause in the Second World War, and later became the name of the new international organisation that was established following the war. This is embodied, inter alia, by the inclusion of Article 107 in the UN Charter.[135] Nevertheless, it should be noted that the Second World War predated the UN Charter, which greatly contributed to the shaping of contemporary *jus ad bellum* and was and remains up to this day exceptional in its intensity and scope. Furthermore, the Allies' expansive war objectives were not set at the commencement of the war, but in 1943, and they were naturally influenced by the manner and the progression of the hostilities.[136] A more recent example of an operation with future-oriented goals is the invasion of Afghanistan following 9/11, in which both the UK and the US responded to a completed armed attack which caused substantial damage, and framed their

similar to the aforementioned contention whereby the continuous occupation of territory constitutes an ongoing armed attack, as applied to the forcible deprivation of freedom of individuals.

[129] Ruys (n 107) 168–75; Tams (n 114) 383, 394 fn 100; O'Meara (n 82) 79.

[130] Kretzmer (n 114) 250, 262; ILC (n 18) 69; Lieblich (n 93) 55–56, 61; O'Meara (n 82) 102–03.

[131] Dinstein (n 18) 272.

[132] Kretzmer (n 114) 262, 266, 269–70, 272–73; Lieblich (n 93) 56; Gill (n 110) 744; O'Meara (n 82) 103–04.

[133] See n 107.

[134] 'The Casablanca Conference 1943', The Avalon Project, 12 February 1943, https://avalon.law.yale.edu/wwii/casablan.asp; US Office of the Historian, 'The Casablanca Conference, 1943', https://history.state.gov/milestones/1937-1945/casablanca.

[135] UN Charter (n 5) art 107; Dinstein (n 18) 286. Dinstein refers to the Allies' expansive war aims as evidence that supports his theory of 'displacement' of *jus ad bellum* once a 'war of self-defence' commenced. Yet, as seen below, the legal conclusions that could be drawn from the Second World War as a legal precedent must take into account its exceptional characteristics.

[136] See n 134.

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objectives as designed to prevent threats and deter future attacks.[137] The invasion initially received broad support[138] and was seen by scholars as a significant milestone in the development of a more permissive *jus ad bellum* regime.[139] While the Afghanistan operation continued for more than a decade, it was not always clear that it was framed as an act of self-defence throughout that entire period.[140] Another recent example of an operation which supposedly involved relatively wide-ranging objectives is the campaign of the international coalition against ISIS[141] in which some states relied more explicitly on the threat posed by ISIS[142] whereas others merely cited the right of self-defence.[143] This campaign started, among other reasons, as a response to the ongoing ISIS attack on Iraq, but ISIS was largely driven out of Iraq in 2017; the operation continued mostly on Syrian territory,[144] and included

[137] Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council (7 October 2001), UN Doc S/2001/946, 1 ('[i]n response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States'); Letter dated 7 October 2001 from the Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council (7 October 2001), UN Doc S/2001/947 ('[t]hese forces have now been employed in exercise of the inherent right of individual and collective self-defence, recognized in Article 51, following the terrorist outrage of 11 September, to avert the continuing threat of attacks from the same source').

[138] Michael Byers, 'The Intervention in Afghanistan – 2001' in Ruys, Corten and Hofer (n 44) 625, 628–31; Carsten Stahn, 'International Law at a Crossroads? The Impact of September 11' (2002) 62 *Heidelberg Journal of International Law* 183, 189–90; Marco Frigessi Di Rattalma, 'War in Afghanistan, Self-Defence and Questions of Attribution of the September 11 Attacks to the Afghan-Taliban Regime' (2003) 13 *Italian Yearbook of International Law* 59, 59–60; Ruys (n 107) 436–37.

[139] The developments or trends in international law that intensified following 9/11 referred mainly to the broadening of the temporal and personal aspects of the right of self-defence, to potentially include forcible anticipatory responses and future-oriented goals and to go beyond a state-centric approach when it comes to the requirement of attribution of an armed attack; see Byers (n 138) 631–35; Stahn (n 138) 211–34, 254–55; Ruys (n 107) 250–52, 433–37; UNSG (n 107) 18–19, 47, 54–55.

[140] Byers (n 138) 626–28, 635. At some point the international forces operating in Afghanistan received the consent of the Afghan authorities and received some specific Security Council authorisations to use force in some specific parts of Afghanistan. Such consent (which took the form of a status of forces agreement between the US and the Afghan governments) was only granted on September 2002, following the removal of the Taliban regime, whereas the relevant Security Council authorisations could not be interpreted generally to include the territory of Afghanistan in its entirety.

[141] Olivier Corten, 'The Military Operations against the 'Islamic State' (ISIL or Daesh) – 2014' in Ruys, Corten and Hofer (n 44) 873, 873. This article will use the ISIS acronym but this NSA has also been referred to as the Islamic State, IS, ISIL or Daesh.

[142] Letter dated 23 September 2014 from the Permanent Representative of the United States of America to the UNSG (23 September 2014), UN Doc S/2014/695; Letter dated 24 July 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Turkey to the United Nations addressed to the President of the Security Council (24 July 2015), UN Doc S/2015/563; Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council (31 March 2015), UN Doc S/2015/221; Letter dated 9 September 2015 from the Permanent Representative of Australia to the United Nations addressed to the President of the Security Council (9 September 2015), UN Doc S/2015/693.

[143] Corten (n 141) 881–82.

[144] US Department of State, 'The Islamic State Five Years Later: Persistent Threats, US Options', 21 March 2024, https://www.state.gov/the-islamic-state-five-years-later-persistent-threats-u-s-options/#:~:text=From%20its%20inception%2C%20our%20military,the%20territory%20they%20once%20controlled; 'Timeline: The Rise, Spread and Fall of the Islamic State', Wilson Center, 28 October 2019,

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large-scale destruction that went mostly unnoticed by the international community. This led O'Meara to argue that in these two latter situations – in which the Security Council acknowledged that the situation constitutes a threat to international peace and security and referred to the right of self-defence[145] (or some ambiguous variation of it[146]) – the constraints of *jus ad bellum* on the use of force in self-defence could have very little practical effect.[147] Unlike the Second World War, the two other aforementioned cases concern the use of force against NSAs which is, in itself, a disputed area in *jus ad bellum*. However, all three cases may be similar in that they are all associated with a response to an armed attack of a relatively significant scope in terms of its scale and gravity.

The ICJ has stated that 'it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a state in an extreme circumstance of self-defence, in which its very survival would be at stake'.[148] This statement has sparked a lively debate, but in essence the ICJ pronounced that, at least in so far as *jus ad bellum* is concerned, a state could be permitted to use the most extreme means at its disposal when its very survival is at stake.[149] Other scholars have also cited the effects of the initial armed attack, coupled with those of the ensuing hostilities and the existence of reasonably foreseeable future attacks, as potentially influencing the scope of the objective.[150]

Nevertheless, the breadth of the debate on the application of these standards, in both scholarship in the legal opinions of states, is insufficient and, as a result, the attainment of such future-oriented objectives could be elusive. A significant question is whether such future-oriented standards refer only to imminent threats that have materialised as impending attacks or whether they refer to more general threats posed by the existence of an adversary that is opposed to the state, more closely akin to a right of pre-emptive self-defence (which is still widely considered as contrary to *jus ad bellum*).[151]

In the light of the above, the main problem of 'means-end' proportionality lies with the difficulties inherent in determining the scope of and conditions

https://www.wilsoncenter.org/article/timeline-the-rise-spread-and-fall-the-islamic-state#:~:text=The%20Iraqi%20Prime%20Minister%20Haider,world%2C%20including%20New%20York%20City.

[145] UNSC Res 1368 (12 September 2001), UN Doc S/Res/1368, Preamble; UNSC Res 1373 (28 September 2001), UN Doc S/Res/1373, Preamble; Byers (n 138) 627, 634.

[146] UNSC Res 2249 (20 November 2015), UN Doc S/Res/2249, para 5. While this paragraph does not refer directly to the right of self-defence, it has been argued that it alludes to such right: O'Meara (n 82) 202–03; Corten (n 141) 888–89; Dapo Akande and Marko Milanovic, 'The Constructive Ambiguity of the Security Council's ISIS Resolution', *EJIL:Talk!*, 21 November 2015, https://www.ejiltalk.org/the-constructive-ambiguity-of-the-security-councils-isis-resolution.

[147] O'Meara (n 82) 222–25; see also Tams (n 114) 400–01.

[148] *Nuclear Weapons* (n 35) [97].

[149] Moussa (n 35) 971–72. This is similar to an opinion that was articulated by Greenwood prior to the *Nuclear Weapons* advisory opinion: Greenwood (n 42) 223.

[150] O'Meara (n 82) 169–70; Kretzmer (n 114) 269–70, 272–73; Michael Schmitt, 'Counter-Terrorism and the Use of Force in International Law', European Center for Security Studies, January 2002, https://www.marshallcenter.org/en/publications/marshall-center-papers/counter-terrorism-and-use-force-international-law/counter-terrorism-and-use-force-international-law.

[151] Scobbie (n 100) 173–74; Gray (n 106) 236, 243–44, 252–53.

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for the attainment of a defensive objective, which is at the heart of 'means-end' proportionality. The aforementioned ambiguity risks providing states with an almost unlimited margin of appreciation when it comes to *jus ad bellum*[152] that would practically amount to the 'displacement' of *jus ad bellum* during hostilities (or even during the entire armed conflict). While the magnitude and scope of certain types of attack and hostilities may, at some specific point in time, provide a state with broad freedom in the execution of its defensive operation, the protective role of *jus ad bellum* should not be discarded off-handedly and – in line with the object, purpose and nature of *jus ad bellum* – should be sensitive to the prevailing circumstances. If this supposed development of *jus ad bellum* into a more permissive regime flows from the invasion of Afghanistan following 9/11, the dire consequences of the intervention in Afghanistan (namely, the regaining of control by the Taliban 20 years later)[153] should also serve as an appropriate reason to rethink the amount of freedom and margin of appreciation we should grant to states while engaging in defensive operations.[154] Unlike *jus in bello*, which focuses on specific attacks, *jus ad bellum* is better placed to allow states to review a military operation as a whole, not only with respect to the initial circumstances that led to its commencement but also when it comes to the manner in which force is used.[155] This could potentially be utilised to provide additional protection for the civilian population, as *jus ad bellum* allows states to rely on general figures and statistics in their appraisal of a military operation, and to reflect on the compatibility of the overall effects of the operation with a defensive objective and/or the effects of the initial armed attack to which it responds.

The difficulties encountered by both models of proportionality and the ambivalence of the positions expressed by states and international organisations could be mitigated potentially by the adoption by some scholars of a 'mixed' model, which relies predominantly on 'means-end' proportionality but leaves space for 'quantitative' proportionality, by prohibiting a response that is 'markedly asymmetric' when compared to the effects of the initial armed attack.[156] While this model is apparently

[152] Friman (n 114) 92–93.

[153] Lindsey Maizland, 'The Taliban in Afghanistan', Council on Foreign Relations, 14 August 2025, https://www.cfr.org/backgrounder/taliban-afghanistan; UK Government, 'Country Policy and Information Note: Fear of the Taliban, Afghanistan, August 2025', August 2025, https://www.gov.uk/government/publications/afghanistan-country-policy-and-information-notes/country-police-and-information-note-fear-of-the-taliban-afghanistan-february-2022-accessible.

[154] Note that in the Afghanistan context governmental consent and Security Council authorisations to use force under Chapter VII of the Charter also played a role; see n 140.

[155] Raphaël Van Steenberghe, 'Proportionality under *Jus ad Bellum* and *Jus in Bello*: Clarifying Their Relationship' (2012) 45 *Israel Law Review* 107, 115; Kretzmer (n 114) 240; Moussa (n 35) 978; Wilmshurst (n 106) 10; Akande (n 35) 191–92.

[156] The 'mixed' model for *jus ad bellum* proportionality was adopted by several scholars, who argue that states do not necessarily require equivalence between the armed attack and the response, highlighting the need for the force being used to conform with a defensive purpose. On the other hand, states did occasionally rely on the effects of the response and its relation to the effects of the initial armed attack in their analysis of excessiveness. However, advocates of the 'mixed' approach argue that, in doing so, states imply that the effects of the response are so disproportionate to those of the armed attack that the purpose of the operation could not be defensive. Thus, the quantitative analysis in this instance serves as a method for establishing the absence of a defensive purpose, and is therefore sometimes also connected to the requirement of necessity; see O'Meara (n 82) 122–25; Enzo Cannizzaro, 'Contextualizing Proportionality:

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more balanced and provides a comprehensive assessment of the effects of a defensive response, the standard of 'marked asymmetry' remains indeterminate, and the examples of practice that have been cited to establish the existence of this standard are mainly responses to armed attacks with relatively limited initial effects.[157] In so far as the 'marked asymmetry' standard is contextual, it should also be affected by the defensive purpose of the operation. Therefore, it is unclear how 'marked asymmetry' could be utilised to compare a defensive response to armed attacks of a more substantial scale. The challenge of a 'mixed' model is even greater when it comes to comparing the harmful effects of the operation with the benefits of fulfilling its defensive objectives, as it is virtually impossible to compare concrete effects with presumed benefits.[158]

In summary, while *jus ad bellum* continues to play a role during ongoing hostilities, its application raises numerous challenges, in particular because of the debate regarding the nature of *jus ad bellum* proportionality and the shortcomings of the different approaches to proportionality. These challenges will be demonstrated through the discussion of the Israeli use of force in Gaza in response to the 7 October 2023 attack.

4.3. Ongoing Gaza hostilities

While there are different approaches to proportionality, they all seem to be mindful to some extent of the effects of the initial armed attack. Therefore, a cautious survey of such effects, and of the effects of the operation launched by Israel in response, is provided below. While it is acknowledged that the actual numbers and the classification of numerous targets are highly disputed, and that there are substantial challenges when it comes to the verification of some of the data, there could be no doubt that this round of hostilities is unprecedented in its intensity and the scope of destruction. The figures presented below are therefore a mere indication of the intensity and gravity of the initial and ongoing effects of the armed attack and the Israeli response.

According to a UN fact-finding report, during the 7 October 2023 attack, more than 1,200 people were killed (of whom at least 809 were civilians), 14,790 were injured and 252 were abducted as hostages into the Gaza Strip.[159] Furthermore, thousands of rockets were fired and extensive damage was caused to military facilities and to civilian infrastructure in towns and cities that were subjected to the attack.[160] Following the 7 October 2023 attack, Hamas continued to launch thousands of rockets into Israeli territory, causing further destruction and the deaths of 18 people

Jus ad Bellum and *Jus in Bello* in the Lebanese War' (2006) 88 *International Review of the Red Cross* 779, 784; Green (n 111) 88–95; Van Steenberghe (n 155) 114.

[157] O'Meara (n 82) 108, 120, 143–44 (referring to the 1964 UK attack in Yemen, the *Oil Platforms* case, and the Israeli 2006 invasion of Lebanon); Green (n 111) 94–95 (referring to the 1971 East Pakistan conflict, 1972 Israeli incursions into Lebanon, 2002 Korean naval clash, and the 2008 Russian intervention in South Ossetia).

[158] Charles Kels, 'The Problem of Proportionality: A Response to Adil Haque', *Just Security*, 14 November 2023, https://www.justsecurity.org/90071/the-problem-of-proportionality-a-response-to-adil-haque.

[159] UN Human Rights Council, 'Detailed Findings on Attacks Carried Out on and after 7 October 2023 in Israel' (10 June 2024), UN Doc A/HRC/56/CRP.3, para 21.

[160] ibid paras 22–29.

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(as in May 2024).[161] Furthermore, Hamas and other Palestinian armed groups continue to hold Israeli hostages and, in May 2025, at least 58 Israeli hostages were still held captive in the Gaza Strip.[162] In so far as the situation in Gaza is concerned, as at 28 May 2025, the Hamas-affiliated Gaza Ministry of Health stated that 54,084 people had been killed and 123,308 were wounded in Gaza as a result of the Israeli response to the 7 October 2023 attack.[163] Moreover, the Israeli operation has reportedly caused widespread hunger and malnutrition (with Israel's decision to suspend the entry of humanitarian aid exacerbating these effects)[164] and the destruction of civilian infrastructure, including at least 92 per cent of housing units that have been either damaged or destroyed.[165] By March 2025, Israel estimated that it had eliminated approximately 20,000 Hamas fighters during the hostilities in Gaza.[166] Notwithstanding the foregoing, no serious attempts were made to provide figures that distinguish between the destruction of military and civilian infrastructure in Gaza.[167]

[161] ibid paras 6, 30–33.

[162] Daniela Pizzirani, 'What We Know about the Hostages in Gaza after Edan Alexander's Release', *ABC News*, 13 May 2025, https://www.abc.net.au/news/2025-05-13/gaza-israel-hostage-release-edan-alexander/105281790.

[163] OCHA, 'Reported Impact Snapshot', 28 May 2025, https://www.ochaopt.org/content/reported-impact-snapshot-gaza-strip-28-may-2025.

[164] ibid; UN, 'Gaza: UN Aid Teams Reject Israel's "Deliberate Attempt to Weaponize Aid"', *UN News*, 6 May 2025, https://news.un.org/en/story/2025/05/1162946.

[165] OCHA (n 163). In December 2024, the UN Satellite Centre (UNOSAT) maintained that 69 per cent of the structures in Gaza have been damaged (including 60,368 destroyed structures, 20,050 severely damaged structures, 56,292 moderately damaged structures, and 34,102 possibly damaged structures): UNOSAT, 'UNOSAT Gaza Strip Comprehensive Damage Assessment', 13 December 2024, https://unosat.org/products/4047.

[166] Ahmed Yussuf, Brianna Morris-Grant and Eric Tlozek, 'A Closer Look at the Human Toll in Gaza as Deaths Pass 50,000', *ABC News*, 24 March 2025, https://www.abc.net.au/news/2025-03-24/gaza-death-toll-50000-explained/105088110; Nidal Al-Mughrabi and Emma Farge, 'Gaza Death Toll: How Many Palestinians Has Israel's Offensive Killed?', *Reuters*, 24 March 2025, https://www.reuters.com/world/middle-east/how-many-palestinians-has-israels-gaza-offensive-killed-2025-01-15.

[167] Regarding the destruction of infrastructure, the overall numbers are presented in n 165. Nevertheless, these reports did not attempt to distinguish between military and civilian targets, the classification of which is a complex and somewhat disputed legal question. For the *jus ad bellum* requirement that the response would involve military targets and the classification of such targets, see O'Meara (n 82) 89–90; James Green and Christopher Waters, 'Military Targeting in the Context of Self-Defence Actions' (2015) 84 *Nordic Journal of International Law* 3, 8–15; Israel, on the other hand, has repeatedly argued that Hamas is intentionally using public and commercial buildings, including hospitals, for military purposes and that it is using civilians as 'human shields': UNSC 9439th Meeting (n 11) 11; see also James Pamment and others, 'Hybrid Threats: Hamas's Use of Human Shields in Gaza', NATO Strategic Communications Centre for Excellence, 2019, 158–65, https://stratcomcoe.org/publications/download/hamas_human_shields.pdf; David Deputla, 'On the Ground in Gaza: What I Saw of Israel's Military Operations', *Forbes*, 31 July 2024, https://www.forbes.com/sites/davedeptula/2024/07/31/on-the-ground-in-gaza-what-i-saw-of-israels-military-operations; Peter Beaumont, 'What Is a Human Shield and How Has Hamas Been Accused of Using Them?', *The Guardian*, 30 October 2024, https://www.theguardian.com/world/2023/oct/30/human-shield-israel-claim-hamas-command-centre-under-hospital-palestinian-civilian-gaza-city. On the method, scale and objectives of the destruction of structures in Gaza see New Israel Fund, 'Exposing the True Goals of the Israeli Government in Gaza', 24 April 2025, https://www.nif.org/stories/human-rights-democracy/exposing-the-true-goals-of-the-israeli-government-in-gaza; Breaking the Silence, 'The Perimeter: Soldier's Testimonies from the

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Because of the significant gravity of the 7 October 2023 attack, unprecedented in the Israeli–Palestinian conflict in terms of casualties and damage within Israel, there is no dispute that its magnitude is sufficient to constitute an armed attack.[168]

In relation to the various notions of *jus ad bellum* proportionality discussed in the previous section, Israel's position reflects a 'means-end' (or at least a 'mixed'[169]) approach, requiring the use of force in self-defence to conform with a defensive purpose.[170] In previous rounds of hostilities, Israel defined the defensive purpose as a response to the ongoing threat posed by Hamas and the Palestinian armed groups in Gaza.[171] In discussions regarding the hostilities following the 7 October 2023 attack, Israel went even further, stressing that the purpose of the operation is the complete destruction of Hamas and its capabilities.[172] This broad formulation of a defensive objective goes even beyond that of the US and the UK when they invaded Afghanistan, but that invasion essentially attempted to achieve the same objective, which is the complete dismantling of Al-Qaeda and the overthrow of the Taliban regime.[173]

A 'means-end' approach is understandably attractive to Israel in that, as mentioned above, it is far more flexible and may provide states with a very broad margin of appreciation to use force during the ensuing hostilities.[174] If Israel's goal of the complete destruction of Hamas is accepted as the defensive objective of its operation, then Israel may continue to use such force as is required until the achievement of 'absolute' or 'total' victory over Hamas.[175] On the one hand, the massive scale of the 7 October 2023 attack, the continuation of rocket and mortar fire following the attack, the fact that Hamas does pose an ongoing threat to Israel and that its leaders have vowed to annihilate Israel and repeat these attacks[176] may all justify the setting of a broad defensive objective. The comparison by Israel between the 7 October 2023 attack and the 9/11 attack by Al-Qaeda on the World Trade Centre is highly significant in this case. The 7 October 2023 attack, exceptional in terms of the gravity and scale of the invasion by Palestinian NSAs onto the territory of Israel, could

Gaza Buffer Zone 2023–2024', April 2025, 3–8, https://www.breakingthesilence.org.il/inside/wp-content/uploads/2025/04/Perimeter_English-2.pdf.

[168] As previously mentioned (in n 106), there is an ongoing debate over whether every use of force in violation of the prohibition on the use of force entitles a state to use force in response, or whether it is only the gravest forms of use of force that constitutes an armed attack which triggers the availability of the right of self-defence. Despite such debate, in the case of the 7 October 2023 attack, the immense scale and magnitude of the attack clearly surpasses any gravity threshold.

[169] See n 71. The potential classification of Israel's approach to proportionality as 'mixed' is based on Israel's statement that '[f]igures regarding the number of casualties … do not, *in and of themselves*, point to a disproportionate use of force' (emphasis added).

[170] The approaches to *jus ad bellum* proportionality were discussed in Section 4.2.

[171] UNSC 6060th Meeting (n 20) 6; 2009 Report (n 15) paras 42, 71; UNSC 7214th Meeting (n 20) 6–7; UNSC 7220th Meeting (n 20) 7; 2015 Report (n 16) paras 32, 69.

[172] See Section 4.1.

[173] See Section 4.2.

[174] ibid.

[175] BBC, '"We Are on Our Way to Absolute Victory" Says Israeli PM', *BBC*, 7 February 2024, https://www.bbc.co.uk/news/av/world-middle-east-68234011.

[176] Morning Joe, '"No Place on Our Land": Hamas Official Vows to Repeat Attacks on Israel "Again and Again" until It's Destroyed', *MSNBC*, 2 November 2023, https://www.msnbc.com/morning-joe/watch/hamas-official-vows-to-repeat-attacks-on-israel-again-and-again-until-it-s-destroyed-196930629782.

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definitely be dubbed the 'Israeli 9/11'.[177] Yet, attaining an 'absolute victory' is, as Israel's then Defence Minister Yoav Gallant has said,[178] perhaps not entirely possible or, at least, a highly complex task with unspecified parameters.[179] Achieving 'absolute victory' could entail, for example, the occupation of Gaza for an unspecified duration to completely dismantle the Hamas organisational structure, wipe it out as a military force or even a political entity, and prevent Hamas from rebuilding itself, at least in Gaza.[180] Such an expansive interpretation of the use of force in self-defence would arguably enable Israel to renew hostilities even following extended ceasefires, for as long as the overall objective of removing Hamas from power in Gaza is not achieved. Certain statements by high-ranking Israeli officials[181] (while bearing in mind the uncertainty regarding their actual influence on Israeli policy[182]) and

[177] Omer Dostri, 'Hamas's October 2023 Attack on Israel', *Military Review Online*, November 2023, 2, https://www.armyupress.army.mil/Portals/7/military-review/Archives/English/Online-Exclusive/2023/Dostri/Hamas's-October-2023-Attack-on-Israel-UA.pdf; Andrea Vacchiano, 'Israeli Ambassador Calls Hamas Attack on Israel "Truly Unprecedented": "This is Our 9/11"', *Fox News*, 7 October 2023, https://www.foxnews.com/world/israeli-ambassador-calls-hamas-attack-israel-truly-unprecedented-9-11; Lee Ying Shan, '"Israel's 9/11": Political Analysts React to Deadly Hamas Attack', *CNBC*, 8 October 2024, https://www.cnbc.com/2023/10/08/israels-9/11-political-analysts-react-to-deadly-hamas-attack.html. For an opinion outlining the differences see Peter Knoope, 'Comparing Hamas Attack on Israel and 9/11: A Counterterrorism Perspective', International Centre for Counter-Terrorism, 27 October 2023, https://www.icct.nl/publication/comparing-hamas-attack-israel-and-911-counterterrorism-perspective.

[178] TOI Staff and Emanuel Fabian, 'Gallant: "Absolute Victory" Slogan "Gibberish"; Netanyahu Slams His "Anti-Israel Narrative"', *The Times of Israel*, 12 August 2024, https://www.timesofisrael.com/gallant-pms-absolute-victory-slogan-gibberish-netanyahu-anti-israel-narrative.

[179] Shay Shabtai, 'What Would "Total Victory" Mean in Gaza?', Begin-Sadat Center for Strategic Studies, 27 March 2024, https://besacenter.org/what-would-total-victory-mean-in-gaza. According to Shabtai, a 'total victory' cannot be solely operational; it requires 'a strategic victory, which, given the right interfaces among military, civil and economic moves, can bring about a relatively calm security situation for a decade or more'; Furthermore, a February 2024 poll shows that most Israelis believed that an 'absolute victory' over Hamas is unlikely: Tamar Herman and Yaron Kaplan, 'Most Israelis: An "Absolute Victory" to the War is Unlikely', Israel Democracy Institute, 12–15 February 2024, https://en.idi.org.il/articles/52976.

[180] The means that Israel is permitted to employ in self-defence are also subject to restrictions imposed by other norms of international law, including *jus in bello*, the right of self-determination, and so forth. Therefore, even if some means would be lawful according to *jus ad bellum*, they may still violate other international law obligations that are applicable to Israel. This is reflected by the practice cited above (n 80), whereby even states and international organisations that noted the availability of self-defence to Israel stated that it must be done in accordance with international law and/or international humanitarian law: *Nuclear Weapons* (n 35) [42] (regarding compliance with international humanitarian law); *Legal Consequences* (n 10) [253]–[256] (on the potential infringement of the prohibition of annexation and the right of self-determination as a result of a prolonged occupation).

[181] See examples in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)*, Application Instituting Proceedings and Request for the Indication of Provisional Measures, 29 December 2023, 140, 142, 144, https://www.icj-cij.org/sites/default/files/case-related/192/192-20231228-app-01-00-en.pdf; see also Elisha Ben Kimon, 'The Goal: To Resettle Gaza. The Means: To Invalidate the Disengagement Law', *Ynet*, 28 November 2024) (in Hebrew), https://www.ynet.co.il/news/article/syqownimje; Jason Burke and Julian Borger, 'Gaza Will Be Entirely Destroyed, Israeli Minister Says', *The Guardian*, 6 May 2025, https://www.theguardian.com/world/2025/may/06/hamas-israel-hunger-war-in-gaza.

[182] Amichai Cohen and Yuval Shany, 'Selective Use of Facts and the Gaza Genocide Debate', *Just Security*, 2 January 2024, https://www.justsecurity.org/90939/selective-use-of-facts-and-the-gaza-genocide-debate.

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Israel's refusal to clarify its policy regarding the 'day after' in Gaza[183] should, at a minimum, raise serious suspicions and concerns regarding the 'defensive' objective of the Israeli operation. Together with the widespread destruction in Gaza, the desirability of discarding the additional layer of protection provided by *jus ad bellum* by allowing Israel uninhibited discretion to use force in self-defence for an unlimited duration could be questioned.

The law is not entirely clear on this issue, but a more limited conception of the defensive objective may greatly affect the permissible scope of the Israeli response. For example, the operation's defensive objective could be more directly connected to the 7 October 2023 attack. Since the Hamas leadership expressed its intention to repeat such attacks,[184] Israel's desire to dismantle Hamas's military capabilities that were used to launch the attack could potentially be perceived as more directly addressing the imminent threat that Israel faced following the 7 October 2023 attack. According to this objective, the Israeli operation would naturally be more restricted in so far as *jus ad bellum* is concerned as it would be required to demonstrate the connection between its chosen targets and the 7 October 2023 attack. Regardless, it could still include, for example, the Hamas leaders who were responsible for planning and launching the attack, the units that were used in the attack, Hamas's rocket arsenal and operators, its drone capabilities, and so forth. It is also doubtful that under a relatively more limited characterisation of the defensive objective of the operation, Israel would be entitled to renew hostilities on a whim, particularly if it could be demonstrated that the elements within Hamas that were involved in the planning and execution of the 7 October 2023 attack had already been dealt with by March 2025. Deciding whether it is Hamas as a whole, or specific Hamas elements that were instrumental in the launching of the 7 October 2023 attack, that pose an imminent threat to Israel is therefore an essential question that greatly affects the means that were available for Israel's defensive response under a 'means-end' approach to proportionality.

In any event, even under an expansive view of the defensive objective of its operation, Israel would be hard pressed to justify a complete suspension of the passage of humanitarian aid into Gaza. Admittedly, this suspension was not assessed under *jus ad bellum* by participants in the relevant Security Council sessions.[185] Still, since

[183] Alice Speri, '"There is No Day After": What US, Israel Want for Gaza after Sinwar's Death', *Al Jazeera*, 18 October 2024, https://www.aljazeera.com/news/2024/10/18/there-is-no-day-after-what-us-israel-want-for-gaza-after-sinwars-death; Yezid Sayigh, 'What "Day After" for Israel?', *Diwan*, 7 October 2024, https://carnegieendowment.org/middle-east/diwan/2024/10/what-day-after-for-israel?lang=en; Mick Krever, 'Israel Again Expands Gaza War as Netanyahu Vows He's Changing the Middle East: The Endgame Is Unclear As Ever', *CNN*, 31 March 2025, https://edition.cnn.com/2025/03/31/middleeast/israel-netanyahu-strategy-gaza-future-intl/index.html; David Gritten, 'Israel Security Cabinet Approves Plan to "Capture" Gaza, Official Says', *BBC*, 6 May 2025, https://www.bbc.com/news/articles/cwy04km1zk0o; Alexander Cornwell, 'Exclusive: US, Israel Discuss Possible US-led Administration for Gaza, Sources Say', *Reuters*, 7 May 2025, https://www.reuters.com/world/middle-east/us-israel-discuss-possible-us-led-administration-gaza-sources-say-2025-05-07; Sebastian Usher, 'Netanyahu Confirms Israel Arming Clans Opposed to Hamas in Gaza', *BBC*, 6 June 2025, https://www.bbc.co.uk/news/articles/cwyn2m9yk0vo.

[184] See nn 74 and 176.

[185] Some participants have referred to 'international law', but did not discuss the compatibility of the suspension of the passage of humanitarian aid under *jus ad bellum*; see UNSC 9881st Meeting (n 78) 5 (Algeria, which wondered 'what those who consistently invoke Israel's so-called right to self-defence will

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Israel has in the past treated the suspension of the passage of goods into Gaza as a blockade,[186] its legality must also be reviewed simultaneously according to the limitations of *jus ad bellum*, namely the requirements of necessity and proportionality,[187] in addition to the rules of *jus in bello* which have been central to other states' commentary (and the investigations of the ICC).[188] From this perspective, at least concerning Israel's complete suspension of the passage of humanitarian aid for 11 weeks without any consideration of the needs of the civilian population of Gaza, it seems that such conduct has exceeded even the most lenient interpretation of 'means-end' proportionality, based on the dire consequences that such suspension has had on the humanitarian situation in Gaza.[189] Generally speaking, if we agree that *jus ad bellum* is applicable to the situation in Gaza, then the blockade imposed by Israel on the Gaza Strip throughout the operation must also be continuously assessed and evaluated under the lens of *jus ad bellum*, together with other forcible means that Israel has used during its operation. At least according to a 'means-end' approach, this means ensuring that the operation does not exceed its defensive objective.

say in response to this cruelty and to these atrocities in Gaza'), 6 (Somalia), 8 (Sierra Leone), 9 (Guyana), 11 (France), 14 (Russia), 16 (UK), 17 (Greece), 19 (Republic of Korea), 21 (China), 22 (Denmark), 23 (Palestine); UNSC, 9882nd Meeting (n 90) 13 (Algeria, on compliance with *jus in bello*); UNSC, 9907th Meeting (n 89) 25 (Pakistan), 30 (Panama, calling for 'respect for the rules of international law, including international humanitarian law'); UNSC, 9907th Meeting (Resumption 1) (n 89) 6 (Qatar), 10 (Indonesia, stating that 'international law and humanitarian law have been trampled'), 11 (Lichtenstein); UNSC, Official Records of 9907th Meeting (29 April 2025), UN Doc S/PV.9907 (Resumption 2), 4 (South Africa, indicating Israeli as 'violating international law, including international humanitarian law'), 5 (Jordan, stating that the 'Israeli aggression against Gaza persists, along with the killing of innocents, the destruction of vital infrastructure and the total siege imposed on the Strip, in direct violation of international law and international humanitarian law'), 6 (Tunisia, maintaining that '[t]he aggressors have also blocked humanitarian aid and used hunger as a weapon of war and collective punishment'), 8 (Spain), 16 (Switzerland), 19 (Brazil), 20 (Japan, which called on all parties to 'ensure safe and unhindered humanitarian operations and respect international law, including international humanitarian law'), 21 (Armenia, which demanded 'that the parties comply with their obligations under international humanitarian law and ensure humanitarian access'), 24 (Chile), 24–25 (Mexico), 26 (Vietnam), 33–34 (Belgium), 34 (Kyrgyzstan), 36 (Iceland), 36 (UAE), 39 (Brunei Darussalam, stating that Israel's acts also 'exemplify the occupying Power's persistent disregard for ... the Charter of the United Nations'), 40 (Cameroon); UNSC 9929th Meeting (n 90) 6 (Denmark), 20 (Yemen, on behalf of the Arab Group). However, the statement by the UK, cited in n 91, and the shift in general in the opinion of some Western states that previously supported Israel might be an exception to that, implying that they view the suspension of the passage of humanitarian aid as part of the forcible measures Israel is taking during its operation.

[186] See n 62.

[187] See n 63.

[188] See n 185; see also ICC, 'Situation in the State of Palestine: ICC Pre-Trial Chamber I Rejects the State of Israel's Challenges to Jurisdiction and Issues Warrants of Arrest for Benjamin Netanyahu and Yoav Gallant', 21 November 2021, https://www.icc-cpi.int/news/situation-state-palestine-icc-pre-trial-chamber-i-rejects-state-israels-challenges.

[189] This could explain the Israeli reliance on 'displacement', as discussed in Section 3.3; the illegality of a complete suspension of humanitarian aid is arguably also incompatible with the decision of the Israeli Supreme Court, whereby the Israeli government is obligated to continuously assess the needs of the civilian population in Gaza when it comes to the provision of humanitarian aid (although such obligation might encounter some practical difficulties and obstacles); see *Gisha* (n 56) paras 50–55; Yuval Shany and Amichai Cohen, 'Limited Protection: Israel's High Court of Justice Rejection of Gaza Humanitarian Aid Petition', *Just Security*, 1 April 2025, https://www.justsecurity.org/109731/israel-court-rejects-gaza-aid-petition.

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In so far as 'quantitative' and 'mixed' proportionality are concerned, their shortcomings in the circumstances of the Gaza hostilities that commenced following the 7 October 2023 attack are demonstrated by Van Steenberghe's analysis of the *jus ad bellum* legality of the Israeli response.[190] While seemingly espousing a 'mixed' model of proportionality,[191] Van Steenberghe proceeds to compare the effects in terms of casualties on both sides.[192] However, in doing so, Van Steenberghe does not grapple with the scope of the defensive objectives of the Israeli operation; nor does he take into account arguably ongoing effects (that is, the missile and mortar barrages and the capturing of hostages[193]). Van Steenberghe's analysis of *jus ad bellum* proportionality also does not calculate the potential implications of the Israeli limitations on the passage of humanitarian aid.[194] If we do consider these measures to fall within the ambit of *jus ad bellum*,[195] then the effects that were directly caused by such measures should also be part of the calculation of the quantitative effects, but isolating these effects might not be straightforward. Moreover, Van Steenberghe does not consider previous instances in which states responded to an initial armed attack with substantial effects, where a significant inequality between the effects of the armed attack and the response was accepted by a substantial number of states (examples include the aforementioned invasion of Afghanistan and the campaign of the Coalition against ISIS[196]). Therefore, despite the primacy of the 'means-end' analysis in a 'mixed' model of proportionality, Van Steenberghe highlighted its 'quantitative' aspects without engaging with the actual objectives of Israel's operation or with the application of the 'marked asymmetry' standard in cases where the initial armed attack was particularly grave. Having said that, there is no doubt that the effects of the Israeli response far outweigh the effects of the initial

[190] Van Steenberghe (2023) (n 3).

[191] ibid; Van Steenberghe (2024) (n 3) 994–95; see also n 156. Van Steenberghe's distinction between necessity and proportionality is not entirely clear. He argues that the analysis of what he refers to as the 'self-defence conditions' involves a quantitative analysis, while a 'manifest disproportionality' between the damage caused by the armed attack and the damage caused by the responsive means would lead to the conclusion that the response is incompatible with a defensive purpose, rendering it unnecessary and therefore illegal. Essentially, such 'quantitative' analysis serves as a method for establishing that the means adopted in an operation are incompatible with the ends of the right of self-defence. In other words, this is apparently a 'mixed' approach, which is still geared towards an appraisal of the operation vis-à-vis the purposes of self-defence (as in 'means-end' proportionality).

[192] Van Steenberghe (2023) (n 3); Van Steenberghe (2024) (n 3) 995.

[193] The quantitative measurement of both such effects could be a highly complex issue. For rockets and mortars, one could question whether, because of the existence of Israeli defence systems and the inaccuracy of the projectiles launched against the Israeli population, it is satisfying to merely take into account the actual damage that was caused or also to consider broader effects, such as the threat to the civilian population as a whole and the costs of the operation of the aforementioned defence systems. When it comes to the hostages, their capture has fuelled Israeli political discourse with respect to the hostilities to a large extent, sparking protests and calls to prioritise their release. Here, as well, if we take into account the broader psychological effects on the Israeli population as a whole, the quantitative assessment could have a different outcome, but if broader consequences are taken into account, the effects of the Israeli response in Gaza must be calculated in the same manner.

[194] The legality of the Israeli conduct concerning the passage and provision of humanitarian aid was analysed by Van Steenberghe according to *jus in bello* but not *jus ad bellum*: Van Steenberghe (2024) (n 3) 1002–05.

[195] For an assessment of the applicability of *jus ad bellum* to the Gaza blockade see Section 3.3.

[196] See discussion in Section 4.2.

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armed attack in terms of casualties and destruction and, therefore, the force that was used would most likely be perceived as excessive in accordance with 'quantitative' proportionality. For 'mixed' proportionality, as a result of the aforementioned challenges faced by a 'means-end' approach to proportionality, without clarifying the manner of application of 'marked asymmetry' in instances of armed attacks with particularly grave effects, at least up to the suspension of the passage of humanitarian aid by Israel in March 2025 it was relatively difficult to determine whether the Israeli response was excessive. Yet, as mentioned before, even a very expansive definition of a defensive objective has boundaries, which were arguably exceeded in the case of the Gaza situation.

In any event, while *jus ad bellum* did play a role during the Gaza hostilities, it is acknowledged that such role was relatively limited.[197] For states and international organisations that argued that self-defence was inapplicable or that Israel has violated it from the outset, it did not play any role in further restricting Israeli conduct, which was either unregulated by it or constituted a continuous violation of it. On the other hand, the vast majority of states and international organisations that referred to the availability of self-defence to Israel did not rely on the limitations imposed by *jus ad bellum* on the use of force in self-defence in order to restrict or otherwise criticise Israeli conduct. This conclusion still holds even if we consider the shift in the position of some Western states, which used language that might allude to *jus ad bellum*, although without conducting a detailed assessment of the *jus ad bellum* legality of the Israeli conduct.[198]

The refusal of most participants who referred to the availability of self-defence under these circumstances to engage directly with the legality of Israel's response under *jus ad bellum* – in particular, as a result of its severe effects compared to previous rounds of hostilities in Gaza – is somewhat surprising, and therefore merits some clarification. Nevertheless, the interpretation of state silence is a complex task that requires a careful analysis of state conduct in its context. It raises both doctrinal and factual problems that are relevant to international law as a whole. From a factual point of view, there are numerous reasons for states to choose to express themselves on a given topic. Such differences in motivation reinforces the doctrinal problem, which concerns the legal significance or weight we give to state silence.[199] In the case of the Gaza hostilities, two possible yet conflicting explanations are therefore offered below.

On the one hand, the silence of states could be explained as a reluctance to provide clear opinions on the issues at hand. As mentioned before, the legal basis for the applicability of *jus ad bellum* is not completely clear in this case.[200] While this did not prevent states and international organisations from articulating their positions regarding *jus ad bellum*, it could result in their unwillingness to provide a comprehensive position on *jus ad bellum* that may involve complex legal analysis of sensitive

[197] See discussion of the response to the Israeli position in Section 4.1.

[198] See nn 90–92.

[199] Danae Azaria, 'State Silence as Acceptance: A Presumption and Exception' (2024) 66 *British Yearbook of International Law* 1; Dustin A Lewis, Naz K Modirzadeh and Gabriella Blum, 'Quantum of Silence: Inaction and Jus ad Bellum' 16 July 2019, 79, http://dx.doi.org/10.2139/ssrn.3420959.

[200] See Section 2.

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issues. On the other hand, focusing on *jus in bello* allows a state to express its concerns regarding the legality of Israeli conduct during the hostilities, and circumvent these issues. There could also be other political or legal reasons for states to refuse to engage with *jus ad bellum*, including the fact that at least some states (such as the US, UK and Germany) may be legally liable for providing arms to Israel in the knowledge that Israel is using these weapons to commit internationally wrongful acts.[201] This may also explain the suspension of export licences of arms which were used in Gaza, for example by the UK and French governments.[202]

The alternative explanation is that those states and international organisations that explicitly agreed with the availability of self-defence, without fully commenting on the broad objectives put forward by Israel and did not later explicitly revise their *jus ad bellum* stance, may indeed believe that the constraints of *jus ad bellum* are more permissive during the hostilities that have ensued. This explanation is seemingly in line with a presumption of acquiescence when it comes to state silence, which becomes even more plausible when a state has already expressed its opinion on a certain topic.[203] According to this theory, the silence of states that have previously referred to the availability of Israeli self-defence could be interpreted as a continuous conviction that Israeli actions in Gaza are in line with *jus ad bellum*. In other words, if broad defensive objectives are accepted, they may affect the scope of force which could be used in relation to such objectives so that the limitations that would otherwise be imposed by *jus ad bellum* during the hostilities are marginal. This reasoning feeds back to the centrality of the 9/11 attack in the development of a more permissive *jus ad bellum* regime and the comparison between 9/11 and the 7 October 2023 attack. Yet, in comparison with the Afghanistan invasion and the campaign against ISIS, the Gaza hostilities do not deal with the collective efforts of a coalition of states against a threat that was defined by the Security Council; nor has the

[201] ILC, Report of the International Law Commission on the Work of its Fifty-third Session (23 April–1 June and 2 July–10 August 2001), UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2), (2001) *Yearbook of the International Law Commission*, Vol II, Part 2, 65–67, https://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf. See also Nicaragua's claims in *Alleged Breaches of Certain International Obligations with respect to Occupied Palestinian Territory (Nicaragua v Germany)*, Application Instituting Proceedings Containing a Request for the Indication of Provisional Measures, 1 March 2024, 15–16, https://www.icj-cij.org/sites/default/files/case-related/193/193-20240301-app-01-00-en.pdf.

[202] UK Government, 'UK Suspends Around 30 Arms Export Licences to Israel for Use in Gaza over International Humanitarian Law Concerns', 2 September 2024, https://www.gov.uk/government/news/uk-suspends-around-30-arms-export-licences-to-israel-for-use-in-gaza-over-international-humanitarian-law-concerns; Ruth Comerford, 'Macron Calls to Halt Arms Deliveries to Israel in Gaza War', *BBC*, 6 October 2024, https://www.bbc.co.uk/news/articles/cjr3zd4d8y5o.

[203] Azaria (n 199) 13–15 (referring to certain conditions that would lead to the interpretation of state silence as acquiescence: namely, that (a) the circumstances call for a positive reaction; (b) that the silent state must be 'in a position to react'; and (c) that reasonable time has passed from when the silent state was in such position to react). Our case is somewhat different, and perhaps more straightforward than the scenarios provided by Azaria. This is because the state has already expressed its position on the matter (i.e., that Israel has a right of self-defence under these circumstances) and we are interpreting the meaning of the silence of that state regarding such position in subsequent discussions. In these cases, it could be more easily deduced from the silence of states that they do not mean to contradict the position that they have previously expressed.

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Security Council referred to the right of self-defence[204] in any of the relevant resolutions concerning the Gaza hostilities.[205] Regardless, this explanation could assist in distinguishing between the current hostilities in Gaza and the 2006 Israeli invasion of Lebanon or previous rounds of hostilities in Gaza, where the effects of the initial attack were considerably less grave, and states expressly criticised the Israeli action under *jus ad bellum*.[206] It is also in line with the precedent of the campaign of the Coalition against ISIS, which also caused great destruction and likewise was not widely condemned in terms of *jus ad bellum*.[207]

As mentioned above, due caution must be exercised in basing this potential conclusion on state silence, as it may constitute part of a trend that would weaken the role of *jus ad bellum* during certain types of hostilities in which maintaining the protection provided by *jus ad bellum* would be most crucial for the maintenance of international peace and security.[208] Furthermore, while this analysis may have been more cogent before March 2025, it seems that the renewal of hostilities by Israel and the suspension of the passage of humanitarian assistance did cause a certain shift in the positions of prominent Western states, suggesting that even state silence has its limits. With the passage of time and the increased calls for the immediate cessation of hostilities, this interpretation of state practice, which would provide Israel with the right to use force for an unlimited duration, seems less likely. It is therefore surprising that many states that initially supported Israeli self-defence did not formulate their statements in a manner that more clearly rejects the overall basis for the Israeli operation (thereby prompting its immediate cessation).

5. Conclusion

While the hostilities in Gaza raise numerous questions of international law, this article has focused on the influence of the underlying armed conflict and hostilities in Gaza on the applicability and application of *jus ad bellum*. This is because the Gaza situation is the only modern precedent where a state has argued that it is entitled to use force in self-defence throughout an ongoing armed conflict, and also as the current ongoing hostilities provide an example of a response by a state to a highly severe and grave armed attack by an NSA.

The article rejected the argument that *jus ad bellum* is 'displaced' during an ongoing armed conflict, because of the lack of support for this approach in the sources of international law, in particular, the scarcity of supporting practice, express rejection

[204] See n 145 and 146; O'Meara (n 82) 222–23 (according to whom, the absence of reference to self-defence and the lack of a determination by the Security Council that Hezbollah poses a threat to international peace and security were some of the main elements that distinguish between the (lawful) invasion of Afghanistan and the campaign against ISIS from the (unlawful) 2006 invasion of Lebanon).

[205] UNSC Res 2712 (15 November 2023), UN Doc S/Res/2712; UNSC Res 2720 (22 December 2023), UN Doc S/Res/2720; UNSC Res 2728 (24 March 2024), UN Doc S/Res/2728; UNSC Res 2735 (10 June 2024), UN Doc S/Res/2735.

[206] See n 94; UNSC 6060th Meeting (n 20) 9 (South Africa), 13 (Italy), 13–14 (Viet Nam), 16 (Costa Rica), 17 (Belgium).

[207] See discussion in Section 4.2.

[208] Lewis, Modirzadeh and Blum (n 199) 79–80.

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of this approach on several occasions, and the numerous instances in which states invoked *jus ad bellum* despite the existence of an underlying armed conflict.

If *jus ad bellum* continues to impose constraints on state conduct during hostilities, and there are no other factors particular to Gaza to preclude the applicability of *jus ad bellum*, it becomes necessary to examine what the *jus ad bellum* constraints are. However, these constraints are not always clear, particularly as a result of the existence of several competing approaches to *jus ad bellum* proportionality that might determine the extent of force that could be used throughout the hostilities. The analysis of the brief statements of states and international organisations on the *jus ad bellum* aspects of the Gaza hostilities creates even more confusion regarding the correct approach, and may require a complex analysis of the significance of state silence. In this sense, the Gaza hostilities constitute yet another example of the complexities of extracting legal conclusions from the statements and practice of states and international organisations.[209] While this is a pertinent issue for public international law in its entirety, it is especially prevalent in *jus ad bellum* because of the vagueness and ambiguity regarding the legal opinion of stakeholders on the most contentious *jus ad bellum* issues, including the debate on *jus ad bellum* proportionality.

For *jus ad bellum* to fulfil its important role in limiting the overall effects of a defensive operation, additional clarity on these issues is required. Such clarity could be facilitated by encouraging states and international organisations to be more explicit about their legal understanding perhaps, for example, by referring contentious *jus ad bellum* questions to the ICJ for an advisory opinion, as matters that are closely related to the maintenance of international peace and security, the primary purpose of the Charter.[210] Advisory proceedings before the ICJ would not only provide us with a pronouncement by the principal judicial organ of the UN,[211] but would also encourage states and other stakeholders to provide their legal opinion on these issues.[212]

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[209] Another example of the potential issues with the ambiguity of state practice from another area of *jus ad bellum* is the debate between Ruys and Corten over the scope of the prohibition of the use of force, in which both scholars analyse the same state practice, but reach different conclusions. As Ruys rightly points out, a substantial portion of this debate revolves around the significance of state silence and the manner of its interpretation: Ruys (n 24) 167–68; Gray (n 106) 37.

[210] See n 31.

[211] UN Charter (n 5) art 92.

[212] ICJ, 'Advisory Jurisdiction', https://www.icj-cij.org/advisory-jurisdiction. The ICJ routinely invites states and international organisations to participate in its advisory proceedings. Such participation includes the submission of written statements and, if the Court so decides, oral pleadings.

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