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Judith Gardam
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Necessity, Proportionality and the Use of Force by States

There has been considerable debate in the international community as to the legality of the forceful actions in Kosovo in 1999, Afghanistan in 2002 and Iraq in 2003 under the United Nations Charter. There has been consensus, however, that the use of force in all these situations had to be both necessary and proportional. Against the background of these recent armed conflicts, this book offers the first comprehensive assessment of the twin requirements of necessity and proportionality as legal restraints on the forceful actions of States. It also provides a much-needed examination of the relationship between proportionality in the law on the use of force and international humanitarian law.

JUDITH GARDAM teaches public international law at Adelaide Law School in South Australia. She is an acknowledged international expert in the field of the protection of civilians in times of armed conflict, and in particular on the issue of women and international humanitarian law. She has published widely on international humanitarian law and the United Nations Charter regime on the use of force.

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Foreword

Those who regard the present as a period when the rules of international law concerning the use of force by States are specially contested are probably new to the field, or have short memories. They have always been contested. This has been so ever since the end of World War I when attempts began to be made to institute, or re-institute, constraints on resort to war. Whether they concerned Korea, Suez, Hungary, Cuba, the Congo, Czechoslovakia, Vietnam, Panama, Grenada, Nicaragua, Iraq or Yugoslavia (to cite some cases since 1945) debates over intervention, pre-emption and anticipatory self-defence have raged. Indeed, they have often seemed little more than a dialogue of the deaf.

Dr Gardam's aim is more restricted and may be correspondingly more determinate. In this well-informed study, she seeks to analyse the specific requirement of proportionality (and the related concept of necessity) as it relates both to the rules relating to the use of force and the rules of international humanitarian law restricting how force should be used in international and increasingly also in internal armed conflict. There is a considerable point to this inquiry. Even when the occasion for the use of force is controversial, as it so often is, the protagonists will assert that their action is limited to what is necessary and is proportionate, and this assertion will often be able to be tested against the facts in a way which does not depend on the underlying controversy about whether force should have been used at all. Moreover, arguments based on necessity and proportionality have a useful strategic value even after the decision to use force has been taken and acted on and is effectively irrevocable. Have the intervening forces withdrawn promptly? Have they caused wanton damage, unrelated to the needs of the mission? More fundamentally, perhaps, have they left the people of the target State freer or less free in terms of their capacity to manage their own affairs?

Most international lawyers are (with the late Oscar Schachter) reluctant to regard denial of self-determination or violation of human rights as a justification for unilateral military action, at least in circumstances falling short of extreme emergency. But these considerations, among others, remain relevant in assessing the issue of quantum, so to speak.

At the same time, and almost in counterpoint with the fluctuating fortunes of the *jus ad bellum*, international humanitarian law has been developing its own rules of proportionality in the attempt to limit the scope for so-called military necessity. Again, this has sometimes been an effective basis for criticism of the conduct of actions already undertaken on other grounds, and the issues are even becoming the subject of a certain volume of jurisprudence, not limited to the work of the *ad hoc* international criminal tribunals. Hersch Lauterpacht once remarked that the laws of war were at the vanishing point of international law. We would not say that today, whereas we might be tempted to think so of the *jus ad bellum*, subject as it has been to distortion and arguably abusive interpretations.

For this and other reasons we maintain the functional separation of international humanitarian law from the rules relating to the use of force by States. But that separation prompts one to ask whether the notions of proportionality at play in the two fields have much in common. In the area of international humanitarian law proportionality concerns the relation of means to ends, the latter being assumed to be licit for this purpose. In the context of the rules concerning the use of force the matter is more difficult. For example, in a case of so-called pre-emptive self-defence considerations of proportionality may be difficult if not impossible to apply, and that impossibility may reflect back on the very issue of the lawfulness of the conduct taken. In the absence of a clearly defined and reasonably proximate or imminent attack, to what must the conduct be proportionate? And how can necessity be judged in such cases?

Dr Gardam does not ignore these difficulties. At the same time, she provides a balanced and careful review of the practice and doctrine in this difficult area, and thereby makes a distinct contribution to the literature.

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April 2004

Preface

Proportionality is a familiar idea and is designed to ensure that the ends justify the means. Its requirements are reflected today in several diverse areas of international law. The focus of this work is the operation of proportionality as a restraint on the forceful actions of States. The concept is incorporated in the norms that govern the use of force in international relations (*ius ad bellum*) and those that regulate the conduct of hostilities (*ius in bello* or international humanitarian law (IHL)). Necessity is also a familiar idea and in common with proportionality finds various expressions in international law. It is considered here for its role in determining whether a forceful response is warranted in any particular situation.

The general structure of the work is as follows. First, I assess the development and current content of proportionality in the twin international law regimes of *ius in bello* and *ius ad bellum*. Secondly, I undertake the same task in relation to necessity but only as a component of *ius ad bellum*. In my view necessity has no detailed form in *ius in bello* and is not covered in any depth in this work. The title of the work, therefore, may initially be somewhat misleading in that a great deal more of the work is devoted to a consideration of proportionality than to necessity.

The somewhat disjointed development of the legal framework in which proportionality has operated over the years has significantly dictated the structure of this work. Prior to the emergence of a separate *ius in bello* in the nineteenth century, restraints on the resort to force and its subsequent conduct were all part of the one regime. This is no longer the case. Currently there are two separate systems of rules relevant to the forceful actions of States that incorporate the requirement of proportionality.

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Chapter 1, therefore, is primarily designed to clarify the relationship between these two systems, *ius ad bellum* and *ius in bello*, and the part played by the requirement of necessity and proportionality in these two legal regimes over the years. The discussion also assesses the shortcomings and significance of these two requirements and the extent to which they can be seen as making a contribution to ameliorating the impact of armed conflict in today's world.

Chapter 2 considers the historical development of necessity and proportionality as restraints on the forceful actions of States up to the adoption of the United Nations Charter in 1945. Although originally a single set of norms governed these events, during the nineteenth century *ius in bello* emerged as an independent set of legal rules. Indeed at the turn of the twentieth century *ius ad bellum* had been through a period of decline as the idea had gained ascendancy that war was a sovereign right of States. In contrast *ius in bello* was firmly established as a separate regime.

This situation was short-lived, however, and the twentieth century witnessed the attempts to establish a comprehensive prohibition on war that culminated in the ban on the use of force in Article 2(4) of the United Nations Charter adopted by States in 1945. Henceforth, the work takes what are now two separate areas of international law and studies in detail, first, the requirement of proportionality in *ius in bello* and, secondly, the requirements of necessity and proportionality in *ius ad bellum*.

Chapter 3 analyses the modern requirements of proportionality in IHL as it affects combatants. Proportionality in this context is represented by the fundamental principle outlawing the use of weapons causing superfluous injury or unnecessary suffering. Chapter 4 undertakes the same task in the context of civilians and civilian objects. The complex conventional provisions in Additional Protocol I to the four 1949 Geneva Conventions of 1977 that address indiscriminate attacks and the place of proportionality therein are analysed in detail. The extent to which the conventional norms are reflected in the practice of States is then assessed. The significance of non-international armed conflicts in the world today cannot be overlooked and I consider whether proportionality has any role in that context.

IHL has a distinctive regime of enforcement that includes individual criminal responsibility. In both Chapters 3 and 4 I assess the significance of this scheme for ensuring compliance with the requirements of proportionality.

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Chapter 5 returns to *ius ad bellum* and examines the content of necessity and proportionality in the modern law on the use of force in relation to unilateral State action. Chapter 6 deals with collective as opposed to unilateral actions involving the use of force. There is a significant threshold question in this latter context, namely, the extent to which the legal requirements of necessity and proportionality in *ius ad bellum* and proportionality in *ius in bello* apply in such circumstances. Only when this issue has been resolved can one turn to consider the detail of their operation. Consequently, the emphasis of Chapter 6 differs somewhat from that of the earlier chapters dealing with unilateral State action. It considers whether these requirements are applicable in the first place and, if they are, what they comprise.

The general system of State responsibility is applicable to any failure by States to abide by the constraints imposed by these norms of international law but is not discussed in any detail, as it is outside the scope of this work. The same is the case with the vexed question of the relationship between the International Court of Justice and the Security Council and the role of the former in ensuring compliance with any restraints on the Council's powers.

Chapters 5 and 6 do not consider in any comprehensive manner the situations in which States can lawfully resort to force under the United Nations Charter regime. No topic appears to receive more attention from scholars than the assessment of what State practice indicates as to *lex lata* or *lex ferenda* in this area. There is endless debate about such questions as the scope of self-defence (both individual and collective) under the Charter regime, the compatibility of humanitarian intervention with Charter principles and how, or indeed whether, the Charter can adapt itself to the phenomenon of global terrorism. Scholars even question whether there is any law on this topic at all. Moreover, the relationship between unilateral and collective forceful actions under the Charter remains controversial. I do not intend to add anything new to this debate.

What I do provide is an in-depth analysis of a hitherto neglected question. That is, once it has been determined that there are legal grounds for the resort to force, how does the extra requirement that force be necessary operate in the practice of States? Additionally, how does proportionality act as a constraint on the nature and degree of force that States may utilise in their response? Throughout the work I consider the basic framework of the situations in which States assert the right to use force, but only in order to provide a context for the discussion of necessity and proportionality. Indeed, it is impossible to apply proportionality

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without identifying the aim of the forceful action against which the response is to be measured.

Overall, the work seeks to clarify an area of international law that is of considerable importance and frequently misunderstood. References to necessity and proportionality abound in the public utterances of States and in the work of commentators. There is, however, no comprehensive assessment of the detailed operation of these restraints in the context of the forceful actions of States. Neither is there such a study of the relationship between proportionality in *ius ad bellum* and IHL. This work remedies that omission.

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Abbreviations

<i>AJIL</i>	<i>American Journal of International Law</i>
<i>AYIL</i>	<i>African Yearbook of International Law</i>
<i>BYIL</i>	<i>British Yearbook of International Law</i>
<i>Columbia JTL</i>	<i>Columbia Journal of Transnational Law</i>
<i>CWC</i>	<i>Conventional Weapons Convention</i>
<i>ECtHR</i>	<i>European Court of Human Rights</i>
<i>EJIL</i>	<i>European Journal of International Law</i>
<i>GAOR</i>	<i>General Assembly Official Records</i>
<i>ICC</i>	<i>International Criminal Court</i>
<i>ICJ</i>	<i>International Court of Justice</i>
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
<i>ICRC</i>	<i>International Committee of the Red Cross</i>
<i>ICTR</i>	<i>International Criminal Tribunal for Rwanda</i>
<i>ICTY</i>	<i>International Criminal Tribunal for the Former Yugoslavia</i>
<i>IHL</i>	<i>international humanitarian law</i>
<i>ILJ</i>	<i>International Law Journal</i>
<i>ILM</i>	<i>International Legal Materials</i>
<i>IRRC</i>	<i>International Review of the Red Cross</i>
<i>JIL</i>	<i>Journal of International Law</i>
<i>LJ</i>	<i>Law Journal</i>
<i>LR</i>	<i>Law Review</i>
<i>MLR</i>	<i>Modern Law Review</i>
<i>MULR</i>	<i>Melbourne University Law Review</i>
<i>NYIL</i>	<i>Netherlands Yearbook of International Law</i>
<i>OTP</i>	<i>Office of the Prosecutor</i>
<i>Proc. ASIL</i>	<i>Proceedings of the American Society of International Law</i>
<i>RIAA</i>	<i>Reports of International Arbitral Awards</i>

<i>Riv. DI</i>	<i>Rivista di Diritto Internazionale</i>
SC	Security Council
SCOR	<i>Security Council Official Records</i>
TIAS	<i>Treaties and Other International Acts Series</i>
<i>UCLA PBLJ</i>	<i>UCLA Pacific Basin Law Journal</i>
UNGA	United Nations General Assembly
UNTS	<i>United Nations Treaty Series</i>
WVLR	<i>West Virginia Law Review</i>
YBILC	<i>Yearbook of the International Law Commission</i>
YIL	Yearbook of International Law