1 The place of necessity and proportionality in restraints on the forceful actions of States

Introduction

This work addresses the development and current content of necessity and proportionality in the law on the use of force (*ius ad bellum*) and the law of armed conflict (*ius in bello*) or international humanitarian law (IHL).[1] Before turning to a detailed consideration of the history and the modern content of necessity and proportionality in these two regimes, this first chapter provides an overview of the evolution of these twin concepts as part of the attempt by States through the development of legal norms to restrict the circumstances in which States can resort to force and, where these restraints fail, to place limits on the manner in which ensuing hostilities are conducted.

Necessity and proportionality are concepts that over the years have had differing applications in international law in the context of both pacific and non-pacific actions of States. Today, for example, a state of necessity may be invoked by a State as a defence to a breach of an obligation imposed by international law.[2] Currently, the practical relevance

[1] The terms *ius in bello* and *ius ad bellum* are of recent coinage, although used to describe developments that occurred over many centuries. See R. Kolb, 'Origin of the Twin Terms *Jus ad Bellum* and *Jus in Bello*' (1997) 320 *IRRC* 553. The term IHL is increasingly used to refer to the body of law that was previously known as the law of armed conflict. Moreover, within the regime of IHL, a distinction is sometimes drawn between those rules that govern the conduct of hostilities, the 'Law of The Hague', and those that protect the victims of armed conflict, the 'Law of Geneva'. See J. Gardam (ed.), *Humanitarian Law* (Dartmouth Publishing Co. Ltd, Aldershot (UK), 1999), p. xi (for an explanation of the various terms used to describe this area of the law). Today, the choice of terminology is a matter of preference without legal significance.

[2] See Art. 25 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission 53rd Sess. (23 April–1 June and 2 July–10 August 2001), GAOR 56th Sess. Supp. No. 10 (A/56/10) (hereafter Draft

of the doctrine of necessity in the context of the forceful actions of States is largely limited to its operation in *ius ad bellum*. In that regime, necessity determines whether the situation warrants the use of armed force. As for IHL, the idea of necessity is traditionally regarded as a fundamental concept within that system. IHL is commonly described as a balance between the demands of military necessity and considerations of humanity. However, necessity has never assumed a clearly identifiable role in IHL, despite its seeming centrality to the regime.[3]

Proportionality is familiar to international lawyers as a requirement of legitimate counter-measures.[4] The doctrine is also represented in the law of treaties,[5] human rights law[6] and maritime delimitation.[7] The fundamental nature and operation of proportionality in international law

Articles); see also B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Stevens and Sons, London, 1953), pp. 69–77; and B. Rodick, *The Doctrine of Necessity in International Law* (Columbia University Press, New York, 1928) (tracing the development of the doctrine of necessity from the time of Grotius until the early period of the League of Nations).

[3] But see E. Rauch, 'Le Concept de Nécessité Militaire dans le Droit de la Guerre', Rapport présenté au Comité pour la protection de la vie humaine dans les conflits armés, VIIIe Congrès de la Société internationale de droit pénal militaire et de droit de la guerre, Ankara, October 1979 (Brussels, Societé international de droit pénal militaire et de droit de la guerre, 1981) (arguing that military necessity is the most misunderstood of all the principles of the law of war, and outlining the four fundamental concepts (of which proportionality is one) that together constitute the doctrine of military necessity in IHL). See the further discussion of this doctrine in IHL, note 26 below and the accompanying text.

[4] See Art. 51 of the Draft Articles; and G. Arangio-Ruiz, 'Third Report on State Responsibility' (1991) II *YBILC*, paras. 63–8. See also *Case Concerning the Gabcikovo-Nagymaros Project* (*Hungary* v. *Slovakia*), ICJ Reports 1997, 3 at 56, where the test of proportionality is articulated to require that 'the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question'.

[5] See D. Greig, 'Reciprocity, Proportionality and the Law of Treaties' (1994) 34 *Virginia JIL* 295.

[6] See e.g. General Comment No. 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add. 11, 31 August 2001, para. 4 (stressing the need for derogation from human rights norms to be demonstrably proportionate); and the Individual Opinion of Elizabeth Evatt and David Kretzmer Co-signed by Eckart Klein (Concurring) in *Faurisson* v. *France*, Communication No. 550/1993, Human Rights Committee, Views of Committee, 8 November 1996, UN Doc. A/52/40 (1999), vol. II, p. 84 (considering proportionality as an element of determining whether restrictions on freedom of speech met the test of being necessary for the respect of the rights or reputations of others in terms of Art. 19(3)(a) of the International Covenant on Civil and Political Rights). See also the reference to proportionality in the work of other human rights agencies and tribunals; for example, Report of the Director of the United Nations Mission for the Verification of Human Rights and of Compliance with the Commitments of the Comprehensive Agreement on Human Rights in Guatemala, UN Doc. A/49/856, paras. 133–7 (1995); and *Ergi* v. *Turkey*, 1998-IV ECtHR, paras. 79, 80 and 86.

[7] See *North Sea Continental Shelf Cases* (*Federal Republic of Germany* v. *Denmark*; *Federal Republic of Germany* v. *The Netherlands*), ICJ Reports 1969, 3 at 52–4; *Tunisia* v. *Libya*, ICJ Reports

is by no means settled and awaits further development.[8] In the context of IHL, proportionality is widely acknowledged as a general principle of law in the sense that it underlies and guides the application of the whole regime.[9] Nowadays, the principle also functions within IHL as a concrete legal norm that requires a balance to be struck between the achievement of a particular military goal and the cost in terms of civilian lives.[10] Moreover, several of the other specific rules of IHL owe their derivation to its influence. For example, the emerging protections for the environment in IHL are based on considerations of proportionality.[11] Also proportionality (along with necessity) not only is one of the requirements of legitimate self-defence under the United Nations system but has a part to play in the collective security system.[12] The claim of

1982, 1 at 75; *Gulf of Maine Case*, ICJ Reports 1982, 246 at 334–7; and *Libya* v. *Malta*, ICJ Reports 1995, 29 at 43.

[8] See R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford University Press, Oxford, 1994), pp. 228–37 (for an analysis of the operation of proportionality in international law). Proportionality in municipal legal systems is also still in the formative stage: see J. Delbruck, 'Proportionality' in R. Bernhardt (ed.), *The Encyclopedia of Public International Law* (New Holland Publishing, New York, 1981–91), vol. 3, p. 1144.

[9] As one commentator observes, proportionality in *ius in bello* contributes to the 'equitable balance between the necessities of war and humanitarian requirements': C. Pilloud *et al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Geneva, 1987), p. 683; and see M. Bothe, K. Partsch and W. Solf, *New Rules for Victims of Armed Conflicts* (Martinus Nijhoff, The Hague, 1982), pp. 192–8, 297–320 and 348–69. See also the judgment of the Trial Chamber of the ICTY in the *Kupreskic Case*, Case No. IT-95-16-T-14, Judgment, January 2000, para. 524 (observing that proportionality in *ius in bello* is a general principle of law); and Higgins, *Problems and Process*, pp. 232–4.

[10] See Art. 51(5) of Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted in 1977, 12 December 1977, (1979) 1125 UNTS 3 (hereafter Additional Protocol I); and J. Gardam, 'Proportionality and Force in International Law' (1993) 87 *AJIL* 391 at 407–10.

[11] E.g. Art. 35(3) of Additional Protocol I prohibits the employment of 'methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment'; and see Art. 8 (2) (b)(iv) of the Rome Statute of the International Criminal Court, UN Doc. A/Conf.183/9 (17 July 1998) (hereafter Statute of the ICC), criminalising the launching of an attack in the knowledge that it will cause excessive, widespread, long-term and severe damage to the natural environment.

[12] See J. Barboza, 'Necessity (Revisited) in International Law' in J. Makarczyk (ed.), *Essays in International Law in Honour of Judge Manfred Lachs* (Martinus Nijhoff, The Hague, 1984), p. 27 at p. 34: 'the outer limits of self-defence are established by necessity . . . It is the rule of proportionality which expresses just that meaning. In the last analysis, proportionality means that the defensive action must not go beyond what is necessary in order to defeat the purpose of attack.' See also J. Quigley, 'The United States and the United Nations in the Persian Gulf War: New Order or Disorder' (1992) 25 *Cornell JIL* 1 at 17. In the context of collective security action, see B. Simma (ed.), *The Charter of*

proportionality to have progressed further, however, so as to have a wider role as a principle that infuses international law generally, derives support from its origins and prevalence in the municipal system of States,[13] but remains a matter of debate.[14]

Necessity

Necessity and ius ad bellum

The modern idea that force is only necessary when peaceful means have been to no avail is evident throughout analyses of the just war by commentators such as Vattel.[15] Over the years, however, necessity has had a number of meanings in different contexts in the relations between

the United Nations: A Commentary (Oxford University Press, Oxford, 1994), p. 631: 'The principle of proportionality, as recognised in international law, must be taken into consideration especially with regard to measures under Article 42. This principle finds expression in the Charter in the fact that these measures must be necessary ("as may be necessary").'

[13] For examples of the varying role of proportionality in municipal legal systems, see T. Hartley, *The Foundations of European Community Law* (4th edn, Clarendon Press, Oxford, 1998), pp. 148–9 (discussing the derivation from German constitutional law of proportionality in European Community law, as embodied in the Maastricht Agreement (Treaty on European Union)); and see J. Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *MULR* 1 (detailing the role of proportionality in Australian constitutional law). Proportionality is a well-established component of the criminal law of many municipal systems in the context of provocation, self-defence and sentencing: see e.g. S. Yeo, 'Proportionality in Criminal Defences' (1988) 12 *Criminal LJ* 211; and R. G. Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19 *MULR* 489. The doctrine has encountered a mixed reception in administrative law in the context of delegated legislation: see S. Boyron, 'Proportionality in English Administrative Law: A Faulty Translation?' (1992) *Oxford Journal of Legal Studies* 237; and cf. the position in Australia, in P. Bayne, 'Reasonableness, Proportionality and Delegated Legislation' (1993) 67 *Australian LJ* 448.

[14] See e.g. Higgins, *Problems and Process*, pp. 228–36, who doubts whether proportionality has attained the status of a general principle of law but concludes that it nevertheless operates to 'ease' the 'appropriate application' of other norms of international law. Even this function, Higgins suggests, is in reality limited to the context of *ius ad bellum*. Cf. the approach of Delbruck, 'Proportionality', p. 1144; F. Krüger-Sprengel, 'Le Concept de Proportionnalité dans le Droit de la Guerre', Rapport présenté au Comité pour la protection de la vie humaine dans les conflits armés, VIIIe Congrès de la Société internationale de droit pénal militaire et de droit de la guerre, Ankara, October 1979 (Brussels, Société international de droit pénal militaire et de droit de la guerre, 1981), p. 194; and M. Bothe, 'Les Limites des Pouvoirs du Conseil de Sécurité' in R. Dupuy (ed.), *The Development of the Role of the Security Council Peace-Keeping and Peace-Building: Workshop, The Hague, 21–23 July 1992* (Martinus Nijhoff, Dordrecht, 1993), p. 67 at pp. 78–9, all of whom regard proportionality as a general principle of law.

[15] See e.g. E. de Vattel, 'Le Droit de Gens, ou Principes de la Loi Naturelle, Appliqués à la Conduite et aux Affaires des Nations et des Souverains', vol. III, trans. by C. Fenwick,

States. It is perhaps best known as the plea that States began to rely on during the nineteenth century to justify actions, including the use of force, that were in breach of the State's international obligations or were otherwise perceived as unfriendly.[16] A component of this developing practice, however, was what is now known as necessity in the modern law of self-defence, in the sense that the action must be by way of a last resort after all peaceful means have failed.[17]

In the context of the use of force, at this time, the resort to war was regarded as a sovereign right of States. There were no legal rules limiting its use. The situation was described by Hall in his *Treatise on International Law* as follows:

> However able law might be to declare one or two combatants to have committed a wrong, it would be idle for it to affect to impart the character of a penalty to war, when it is unable to enforce its decisions . . . International law has consequently no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation.[18]

There were, however, legal rules regulating what were known as hostile measures short of war. As Brierly observes, this distinction was never very satisfactory, as States were at liberty to legalise any measures of dubious legality by declaring a state of war to exist.[19] Although the right to resort to war was unregulated, nevertheless the practice of States was generally to provide reasons for their resort to war. That is, States argued that their actions were necessary to avoid being perceived as engaging in untrammelled aggression.[20] This behaviour, however, was dictated by political not legal considerations. In the context of hostile measures short of war and other non-forceful measures, similar practices were adopted. Various broad categories were developed by commentators to encompass these differing practices.[21] For many years, the right of self-preservation explained much State practice of the period. Other so-called

in J. Scott (ed.), *The Classics of International Law* (Carnegie Institute, Washington DC, 1916), p. 305, para. 190.

16 See Cheng, *General Principles of Law*, pp. 70–7.

17 See *ibid*., pp. 71 and 74 (citing *The Neptune*, 4 *International Adjudication Manuscripts* 372 (1797)).

18 W. E. Hall, *A Treatise on International Law* (ed. by P. Higgins, 8th edn, Clarendon Press, Oxford, 1924), p. 82.

19 J. Brierly, *The Law of Nations* (6th edn, Clarendon Press, Oxford, 1963), p. 398.

20 See I. Brownlie, *International Law and the Use of Force by States* (Clarendon Press, Oxford, 1963), pp. 40–4.

21 *Ibid*., pp. 46–9.

rights arguably available to States were those of self-help and necessity of defence, all with varying contents.[22] The borders between these situations were not clearly defined and the practice of States did not at this time coalesce into clearly established principles of international law. Slowly, however, these practices developed into firm legal doctrines. Self-defence henceforth became a distinct legal category and has come to take its place as the situation in which there is universal consensus that States can legitimately resort to force as a matter of both conventional and customary law. Necessity was one of the components of this emerging doctrine.

The broader concept of necessity also survived this transition period and became conceptually distinct from its role in self-defence. Unlike self-defence, which is only legitimate in response to an armed attack, the modern plea of necessity outside this context does not presuppose any wrongful action by the State against which the act of necessity is taken.[23] The discussion of necessity in this work, however, is restricted to this requirement in the context of force, except to the extent that its development requires an appreciation of its broader origins. Its operation in other contexts is well described by other commentators.[24]

Necessity is nowadays firmly established as a component of legitimate self-defence. Moreover, it is assumed that any forceful action must be by way of last resort in other situations where States assert the right to use force unilaterally. The relevance of necessity in the context of force under the United Nations Charter scheme does not finish there. The requirement of necessity plays a part in the collective security system. The text of Article 42 of the Charter requires the Security Council to consider whether non-forceful measures under Article 41 would be or have proved to be inadequate before adopting forceful measures. The Charter, moreover, sets up an elaborate system that is designed to ensure that the use of force is indeed the last resort available to the Council.[25] It

[22] *Ibid*.

[23] See commentary on Art. 25, in Commentaries to the Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its 53rd Sess., Report of the International Law Commission, 53rd Sess. (23 April–1 June and 2 July–10 August 2001), GAOR 56th Sess. Supp. No. 10 (A/56/10).

[24] See e.g. Cheng, *General Principles of Law*; and R. Ago, 'Addendum to the Eighth Report on State Responsibility' (1980-II) *YBILC* 15 (where the distinction between the modern doctrines of necessity and self-defence is explained).

[25] See generally Simma, *The Charter of the United Nations* (for a discussion of the Charter system for the peaceful settlement of disputes).

is debatable, however, to what extent necessity in the context of Article 42 has a legal dimension in the sense of being a justiciable issue.

Necessity and ius in bello

In relation to *ius in bello*, necessity has a somewhat chequered history. The idea of necessity is reflected in the doctrine of military necessity and as such is consistently referred to as one of the general principles on which IHL is based.[26] Indeed, military necessity is sometimes characterised as the source of the requirement that warfare be proportionate.[27] One of its earliest formulations is contained in Article 13 of the Lieber Code, drawn up in 1863 during the American Civil War: 'Military necessity . . . consists of the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.'[28] Its restraining role is apparent, but in this formulation it added nothing concrete to the existing rules of armed conflict. There was, however, some suggestion that military necessity was an additional limitation on the positive rules regulating armed conflict and operated as an additional restraint on State action.[29]

Irrespective of the exact operation of the concept of military necessity, its original conception was not seen as in opposition to humanitarian values, in fact quite the reverse. Military necessity, however, was to acquire a somewhat disreputable air, particularly in the guise of the doctrine of *kraegraeson*, advanced by belligerents to justify their failure to comply with the applicable rules of armed conflict in situations of pressing military necessity.[30] Its articulation thenceforth underwent a

[26] See e.g. Pilloud, *Commentary on the Additional Protocols*, pp. 392–6 (in relation to military necessity and means and methods of combat).

[27] See e.g. Bothe, Partsch and Solf, *New Rules for Victims*, pp. 194–5; M. McDougal and F. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (New Haven, Yale University Press, 1961), p. 528; and Rauch, 'Le Concept de Nécessité Militaire', p. 213.

[28] *Instructions for the Government of the Armies of the United States in the Field*, prepared by F. Lieber, promulgated as General Orders No. 100, 24 April 1863, reprinted in D. Schindler and J. Toman (eds.), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (3rd edn, Martinus Nijhoff, Dordrecht, 1988), p. 3.

[29] See H. Meyrowitz, 'The Principle of Superfluous Injury or Unnecessary Suffering' (1994) 299 *IRRC* 98 at 106–8.

[30] This idea of military necessity is nowadays reflected in some of the provisions of IHL. See e.g. Art. 34(5) of Additional Protocol I (allowing for derogation from the provisions relating to objects indispensable to the survival of the civilian population by a party to the conflict 'where required by imperative military necessity'). For a discussion of the attitude of war crimes tribunals to pleas of military necessity, see N. Dunbar, 'Military Necessity in War Crimes Trials' (1952) 29 *BYIL* 442.

subtle change. Nowadays, military necessity is often characterised as in conflict with humanitarian values rather than as a general limitation on the resort to violence in armed conflict. Consequently, it has never really developed its potential, and arguably has no substantive content, other than where it is incorporated specifically in the provisions of IHL. In the words of one commentator, although 'military necessity is formally acknowledged as one of the primary foundations of the modern law of war' (similarly to the Martens Clause),[31] its limiting role has been largely forgotten.[32]

One area, however, in which necessity in a more general sense operates as a real restraint in IHL is in relation to belligerent reprisals. Belligerent reprisals are generally understood as measures taken by a party to the conflict that are otherwise unlawful but are justified as an enforcement measure in response to violations of international law by the adversary.[33] The resort to such means of ensuring compliance with the provisions of IHL is accepted as only legitimate by way of last resort.

Given for the most part this formal role of military necessity in IHL, in the remainder of this work it is considered only to the extent of its relevance to the particular rules that protect civilians and combatants against disproportionate attacks and means and methods of warfare that inflict superfluous injury or unnecessary suffering.

Proportionality

Proportionality prior to the United Nations Charter

The modern form of proportionality as a legal restraint on the use of force finds its derivation in just war theory.[34] A just war, *ipso facto*, was

[31] The Martens Clause, first reflected in the Preamble to the 1907 Hague Convention on the Laws and Customs of War on Land, refers to cases not covered specifically by the existing conventional rules and places all those affected by armed conflict 'under the protection and the rule of the principles of the law of nations, as they result from the usage established among civilised peoples, from the laws of humanity and the dictates of the public conscience'.

[32] B. Carnahan, 'Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity' (1998) 92 *AJIL* 213 at 230.

[33] See e.g. Department of the Army Field Manual No. 27-10, *The Law of Land Warfare* (Department of the Army, Washington DC, 1956), para. 497(a); War Office, WO Code No. 12333, 'The Law of War on Land', Part III of the *Manual of Military Law* (War Office, London, 1958), para. 642; and see the further discussion of belligerent reprisals, in chapter 3, note 85 and the accompanying text, below.

[34] There are many just war theories, as most civilisations have had highly developed rules relating to the justness of the resort to war. See e.g. M. Sornarajah, 'An Overview

a proportional one. Proportionality in that tradition, however, had a broader operation than is the case today. In just war theory, the means and ends equation of proportionality primarily involved an assessment of whether the overall evil of resorting to war was balanced by the overall good that would ensue. Moreover, just war theory was inextricably intertwined with Christian moral values, and mercy and charity were an integral part of the proportionality equation in those times. There remains a lively debate in modern times as to what constitutes a just war in this sense.[35] This aspect of proportionality, however, never became part of the legal regime on the unilateral resort to force by States. States are under no legal obligation to assess the overall relative merits of a forceful response in self-defence against its likely consequences. Indeed, it is this very failure of the legal regime to incorporate such judgments and to allow States to act in what they perceive as 'just' and moral causes that has placed the existing framework under considerable pressure. Neither is such an assessment explicitly part of the collective security system, although it is inherent in the Security Council's mandate of maintaining or restoring peace that it would consider whether the perceived advantages of coercive actions outweigh their possible negative impact.

of the Asian Approaches to International Humanitarian Law' (1985) 9 *AYIL* 238. However, the Christian theory of the just war formed the basis of the secular just war writings of early commentators on the developing discipline of international law, such as Grotius and de Vattel. See H. Grotius, 'De Jure Belli ac Pacis Libri Tres', trans. by F. Kelsey, in J. Scott (ed.), *The Classics of International Law*, vol. II, book III (Carnegie Endowment for International Peace, Washington DC, 1925); and de Vattel, 'Le Droit de Gens'. There are a number of excellent works on the historical development and modern form of the Christian theory of the just war: see e.g. J. Johnson, *Ideology, Reason and the Limitation of War* (Princeton University Press, Princeton, 1975); J. Johnson, *Just War Tradition and Restraint of War* (Princeton University Press, Princeton, 1981); F. Russell, *The Just War in the Middle Ages* (Cambridge University Press, Cambridge, 1975); and M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (2nd edn, Basic Books, New York, 1992). The just war has also received attention from legal scholars: see e.g. W. O'Brien, *The Conduct of Just and Limited War* (Praeger, New York, 1981).

[35] For a discussion of the role of proportionality in modern just war theory, see P. Ramsey, *The Just War: Force and Political Responsibility* (University of America Press, Lanham MD, 1983), pp. 189–210; and Johnson, *Just War Tradition*, pp. 196–204. See also generally P. Ramsey, *War and the Christian Conscience: How Shall Modern War Be Conducted Justly?* (Duke University Press, Durham, NC, 1961); J. Ryan, *Modern War and Basic Ethics* (Bruce Publishing Company, Milwaukee WI, 1941); J. Ford, 'The Morality of Obliteration Bombing' (1955) 5 *Theological Studies* 261; T. Taylor, *Nuremberg and Vietnam: An American Tragedy* (Quadrangle, Chicago, 1970); Walzer, *Just and Unjust Wars*; and W. O'Brien, *The Conduct of Just and Limited War* (Praeger, New York, 1981).

The assessment of proportionality in just war doctrine, however, also took into account the means by which war was conducted and in theory operated as a restraint on the amount of damage that could be inflicted on the enemy to achieve the legitimate ends of war. It appears that it also imposed some restraints on the means of warfare. It is this latter aspect of proportionality in just war theory that found its way into the modern legal regime of proportionality and is now represented in the separate regimes of *ius ad bellum* and IHL.

During the period when war was a sovereign right of States and the resort to force was unregulated, a separate body of rules that was to become modern IHL began to emerge. Today, proportionality in IHL consists of highly developed rules prohibiting disproportionate attacks and means and methods of warfare causing superfluous injury or unnecessary suffering. How attacks and the choice of means and methods of warfare relate in general to the aims of force is an issue for *ius ad bellum*. Proportionality in this latter sense of limiting a State's overall forceful response, however, did not fall entirely into disuse despite the lack of regulation of the resort to war. States perceived some mutual benefit in limiting the impact of war even if at the time they saw no advantage to restricting the right to wage war. Thus, the limitations flowing from considerations of proportionality at this time were sometimes expressed in broad terms so as to take account not only of the use of weapons against combatants (limits on civilian casualties were as yet in the future) but also overall disproportionate warfare.

During this developmental period of IHL, proportionality therefore performed to some extent the role of the modern proportionality equations in both IHL and *ius ad bellum*. Once again the actual influence of ideas of proportionality in limiting the use of force in these times must not be over-emphasised. It was a considerable period of time before the concrete manifestations of its requirements in IHL (and indeed *ius ad bellum*) were to materialise.

Proportionality and the Charter regime on the use of force

When States once again turned their attention to limiting the right of States to resort to force, the division between IHL and the emerging *ius ad bellum* remained. Henceforth, there were two proportionality equations with distinct contents that States had to satisfy in their actions involving the use of force. Consequently, under the Charter scheme, a State must not only ensure that any forceful action it takes satisfies the requirements of IHL relating to disproportionate attacks and legitimate