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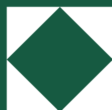
Dana Schirwon

The obscurities of jus ad bellum proportionality and its interplay with jus in bello



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Dana Schirwon

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To Dave
and my parents

Preface

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This thesis is dedicated to my parents Marion and Jürgen and my partner Dave.

Dana Schirwon Berlin, 29 December 2023

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Abbrevations

AJIL	American Journal of International Law
AP I	Protocol Additional to the Geneva Conventions of 12 August 1249, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977
arg. e contr.	*argumentum e contrario* (Latin for “converse argument”)
ARSIWA	ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts
ASIL	Proceedings of the Annual Meeting of the American Society of International Law
ASM	Acta Societas Martensis
AVR	Archiv des Völkerrechts
AYIL	Australian Yearbook of International Law
ASIL	American Society of International Law
BJIL	Berkeley Journal of International Law
BYBIL	British Year Book of International Law
CJIL	Chicago Journal of International Law
CJTL	Columbia Journal of Transnational Law
CLN	Covenant of the League of Nations
DRC	Democratic Republic of the Congo
DRiZ	Deutsche Richterzeitung
EJIL	European Journal of International Law
esp.	especially
et seq.	*Et sequens* (Latin for “following page”)
et seqq.	*Et sequentes* (Latin for “following pages”)
EU	European Union
FW	Die Friedens-Warte
GC I	Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949
GC III	Geneva Convention III relative to the Treatment of Prisoners of War of 12 August 1949

GC IV	Geneva Convention IV relative to the Protection of Civilian Persons in Time of War of 12 August 1949
GDR	German Democratic Republic (*Deutsche Demokratische Republik*)
IAC	International Armed Conflict
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	International Humanitarian Law
ILC	International Law Commission
ILR	Israel Law Review
ILS	International Law Studies
IMT	International Military Tribunal of Nuremberg
IRRC	International Review of the Red Cross
ISIS	so-called "Islamic State in Iraq and Syria"
JUFIL	Journal on the Use of Force and International Law
LJIL	Leiden Journal of International Law
LOAC	Law of Armed Conflict
LRTWC	Law Reports of Trials of War Criminals
mno.	Margin Number
MJIL	Melbourne Journal of International Law
MiJIL	Michigan Journal of International Law
MiLR	Michigan Law Review
MPEPIL	Max Planck Encyclopedia of Public International Law
MPYIL	Max Planck Yearbook of International Law
MLR	The Modern Law Review
NAM	Non-Alignment Movement
NIAC	Non-international Armed Conflict
NILR	Netherlands International Law Review
NJIL	Nordic Journal of International Law
NYIL	Netherlands Yearbook of International Law
OASC	Charter of the Organization of American States

OCHA	United Nations Office for the Coordination of Humanitarian Affairs
PCIJ	Permanent Court of International Justice
PoW	Prisoner(s) of war
RGBl.	Reichsgesetzblatt
RIS	Review of International Studies
s.	Sentence
UK	United Kingdom of Great Britain and Northern Ireland
UN	United Nations
UNC	Charter of the United Nations
UNCIO	Documents of the United Nations Conference on International Organization
UNCLT	Documents of the United Nations Conference on the Law of the Treaties
UNEF	United Nations Emergency Force
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
UNSC	Security Council of the United Nations
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of the Treaties
VJIL	Virginia Journal of International Law
WHO	World Health Organization
WIPO	World Intellectual Property Organization
YJIL	Yale Journal of International Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZfV	Zeitschrift für Völkerrecht

Chapter 1 Preliminary remarks

A. Introduction

> Is proportionality, like beauty, purely in the eye of the beholder: too subjective to be taken seriously?

More than ten years ago, Thomas Franck posed this legitimate question when analysing proportionality, inter alia as a requirement of Art. 51 UNC.[1] He comes to the conclusion that proportionality is in fact like beauty, yet both do not exclusively lie in the eye of the beholder. As subjective the assessment of beauty appears, sociologists found out that we all agree on a common measurable sense of beauty.[2] Hence, beauty does not solely lie in the eye of the beholder, it also relies on an objective common sense. In Franck's view, the same applies to proportionality. Despite its indeterminate characteristics, with the help of institutions that apply proportionality in practice, it would become objectively determinable.[3]

While the aesthetics of this analogy are quite convincing, the recent years of belligerent crises, especially in the middle east, put Franck's perception to the test.[4] When states, although invoking their right to self-defence, in fact broadly targeted civilians within their allegedly defensive military operation, one might scrutinise the proper functioning of proportionality as limiting requirement of self-defence.[5] The shameless threat to use defensive

1 *Franck,* Proportionality in International Law, Law & Ethics of Human Rights, Vol. 4, 2010, pp. 229 et seqq. (p. 242).

2 *Cowley/Springen,* The Biology of Beauty, Newsweek, Vol. 127, 1996, pp. 60 et seqq.

3 *Franck*, Proportionality in International Law, in: Law & Ethics of Human Rights, 4 (2010), p. 242.

4 Which is why Tams and Brückner disagree with Franck and concluded in an analysis of the conflict between Israel and Lebanon in 2006 that jus ad bellum proportionality in fact lies in the eye of the beholder. See *Tams/Brückner*, The Israeli Intervention in Lebanon - 2006, in: *Ruys/Corten/Hofer*, The Use of Force in International Law: A Case Based Approach, 2018, pp. 673 et seqq.

5 In the context of the Second Lebanon War (2006), the Israeli military operations against Gaza (2008-2014), the Russian invasion into Georgia (2008) and the Turkish invasion into north-eastern Syria (2019) the broad targeting of civilians was heavily criticised as disproportionate acts of self-defence. See for details chapter 4, section C., pp. 213 et seqq.

force in a disproportionate manner expressed by a former US President on Twitter marks yet another rock bottom in the recent history of jus ad bellum proportionality.[6]

While the beauty of the proportionality requirement also lies in its flexibility that allows the consideration of the individual circumstances of each case, this characteristic also constitutes the crux of the matter. In particular, the indeterminacy of jus ad bellum proportionality puts an obstacle to compliance in practice and, simultaneously, makes it easy to apply the requirement as it serves a state's policy. Thus, an indeterminant requirement of Art. 51 UNC in fact endangers the main aim of the UN: the maintenance of international peace and security. Therefore, despite the recent challenges of jus ad bellum proportionality, this thesis will take the rare optimism of Franck as an example and determine the content of jus ad bellum proportionality.[7]

As a consequence, the following examination will clarify the obscurities of jus ad bellum proportionality with the help of the methodology of international treaty law: by interpreting the legal basis of the right of self-defence, Art. 51 UNC, as a treaty norm. Hence, the methodology of international treaty law also prescribes the approach of this analysis. Besides other preliminary remarks, this methodology shall be defined in this first chapter.

Jus ad bellum proportionality did not emerge in a legal vacuum, it rather constitutes the result of a historical and philosophical development. The roots of jus ad bellum proportionality reach far into the past of Ancient Greece when renowned philosophers such as Plato and Aristotle expressed first ideas of proportionality while a common system of peace, the Koine Eirene, was founded. These early ideas of proportionality emerged over time to evolve into various distinct principles of proportionality. As an analysis of domestic criminal legislation will show, one of these principles is horizontal proportionality that applies to coordinative legal systems and

6 Tweet of former US President Trump on 5 January 2020 threatening that "should Iran strike any U.S. person or target, the United States will quickly & fully strike back, & perhaps in a disproportionate manner." See *Van Ho*, Twitter's Responsibility to Suspend Trump's, and Rouhani's, Accounts, Part 1, Opinio Juris, 21 January 2020, http://opiniojuris.org/2020/01/21/twitters-responsibility-to-suspend-trumps-and-rouhanis-accounts-part-1/ (last updated 10 December 2021).

7 Franck prominently proclaimed the death of the prohibition of the use of force in article of 1970: *Franck,* Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States, AJIL, Vol. 64, 1970, pp. 809 et seqq.

therefore also constitutes the underlying principle of proportionality within Art. 51 UNC. These historical, philosophical and jurisprudential origins of jus ad bellum proportionality shall be pointed out in the second chapter.

Pursuant to Art. 31 VCLT, the ordinary meaning of a treaty norm shall be elaborated with the help of a literal, contextual and teleological interpretation of the norm. Accordingly, the wording of Art. 51 UNC along with its systematic context within the UNC must be analysed. A crucial part of the context of Art. 51 UNC constitutes the peremptory prohibition of aggression and its interplay with the right of self-defence. Furthermore, a teleological interpretation shall illustrate the intentions of the drafters with the help of the preamble and the travaux préparatoires of the UNC. These aspects of treaty interpretation will be provided in the third chapter.

As Franck argued, proportionality becomes determinable with the help of its application by international institutions. This rationale is also acknowledged by international treaty law. Accordingly, the subsequent practice of a norm by the international community forms an integral part of the contextual interpretation pursuant to Art. 31 para. 3 VCLT. Such practice not only includes state practice but also the application of Art. 51 UNC by other institutions of the UN such as the UNGA, the ILC and the ICJ. This analysis on how jus ad bellum proportionality has been applied by practice will be demonstrated in the fourth chapter.

The ICJ implied the relevance of violations of international humanitarian law within the assessment of jus ad bellum proportionality within its Nuclear Advisory Opinion of 1996. This relevance was further affirmed by recent state practice as the elaboration of chapter 4 will reveal. However, according to the principle of separation of jus ad bellum and in bello the two branches of law shall be treated distinctively. The fifth chapter shall set out what merits bear the implications of a certain relevance of jus in bello violations within the assessment of jus ad bellum proportionality and whether this complies with the principles of international law.

With the help of the comprehensive analysis as sketched out above, it will be possible to define the content and application of jus ad bellum proportionality. In this context, the remaining questions of the scope and legal consequences shall also be answered with the help of the analysis of contemporary international law. These conclusions will be drawn out in the sixth chapter.

After the completion of this book, the Israel-Hamas-War unfolded in October 2023 and was still ongoing when this book went into print. At this present moment, it is not possible to fully overlook all facts that would

be necessary to fully analyse this incident in the state practice section. Therefore, the relevance of this incident for this book's analysis will be pointed out briefly in an outlook.

B. Definitions

For the following analysis, the definitions of a few terms are crucial and will not be subject to further discussion. As some scholars might disagree or the terms might have a different meaning in other contexts, it is necessary to briefly set out working definitions of these terms to avoid any confusion or imprecision.

I. Right of self-defence

The main legal source of this work is Art. 51 UNC, which governs a state's right to self-defence against an armed attack.[8] Thus, the term 'self-defence' in the following analysis will always refer to the right of self-defence pursuant to Art. 51 UNC, unless otherwise stated.

Furthermore, this analysis distinguishes between 'self-defence', 'defensive action' and 'defensive operation'.[9] While self-defence constitutes the legal institution that exceptionally allows the use of force by a state, defensive action and operation refer to the factual scope of self-defence. In the macro view of jus contra bellum, a defensive operation aggregates every action a defending state endeavours in the pursuit of its defence. Whereas a defensive action means a distinguishable single action within the overall defensive operation. At the macrolevel of jus ad bellum, such a single action still maintains a broader scope than the micro-levelled jus in bello, which governs each action individually – meaning every single shot. Therefore, a defensive action comprises of several single actions which may be subsumed to one defensive action due to temporal, geographical and personal correlations.

8 The discussion whether this right also authorises non-state actors to self-defence is not relevant to the definition and for reasons of simplicity left aside here.

9 Also *O'Meara*, Necessity and Proportionality and the Right of Self-Defence in International Law, 2021, pp. 100 et seq.