

# Necessity and Proportionality *ad bellum*

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# Outline of Presentation

- Necessity and proportionality in the context of the law relating to the use of force; basic content and function and their legal pedigree.
- The continuous relevance of the jus ad bellum throughout any use of force.
- Necessity as the *conditio sine qua non* for the exercise of self-defence
- Proportionality and its relationship to necessity.
- How is proportionality measured?
- Consequences of unnecessary or disproportionate use of force.
- The role of necessity and proportionality in targeting.
- The role of necessity and proportionality in relation to the temporal and geographical scope of the exercise of self-defence.

# Basic Content and Function of Necessity and Proportionality *ad bellum*

- Necessity and proportionality *ad bellum* are part of the customary law component of the right of self-defence. They also play a role in regulating the use of force on the basis of a UNSC mandate, but that will not receive further attention here.
- In relation to self-defence, necessity denotes the existence of an ongoing, recurring or imminent armed attack and the lack of feasible alternatives to address that threat
- Proportionality *ad bellum* relates to the degree of force required under the circumstances to ward off, and where relevant, forestall continued attack from the same author within the reasonably proximate future.

# Continuous Relevance of the *jus ad bellum*

- While the *jus ad bellum* is sometimes characterized as being solely relevant to the question of the legality of resorting to force, it is obvious that the principles of necessity and proportionality *ad bellum* would be virtually meaningless unless they continued to operate throughout the duration of the application of the use of force.
- That signifies that necessity and proportionality will play a role in regulating the degree and scale of the use of force alongside other relevant bodies of international law including, but not necessarily limited to IHL.
- They operate alongside each other within their respective spheres of application and are essentially complementary. Any use of force will have to comply with the requirements of all relevant international law in order to qualify as lawful under international law as a whole.

# Necessity as the *conditio sine qua non* for the exercise of self-defence

- No exercise of self-defence is lawful in the absence of a clear necessity to resort to armed force to thwart, forestall or overcome an armed attack.
- It is partly dependent on whether there is clear and credible evidence of the existence of an ongoing or of an imminent armed attack. It is also dependent on whether there are credible alternatives to the employment of unilateral force in self-defence
- Once a necessity of self-defence ceases to be present through a prolonged and sustained cessation of an attack, action by the UNSC which succeeds in removing the necessity of self-defence, or other measures short of using force at the international level, the right of self-defence ceases to be operative.

# Proportionality and its Relationship to Necessity

- Proportionality and necessity *ad bellum* are directly linked while at the same time having distinct functions
- Proportionality is in some respects the “flip side” of the principle of necessity since it is primarily related to what level of force is required under the circumstances to effectively counter an armed attack
- But since there is a quantitative element in the principle of proportionality alongside the qualitative element referred to earlier, it is also related to the scale and scope of the attack and requires that the defence be roughly commensurate to the scale of the attack.

# How is proportionality *ad bellum* measured?

- Consequently, proportionality has both a qualitative element related to the necessity of self-defence and a quantitative element.
- What degree of force is required to effectively neutralize the ongoing or imminent attack?
- What is the scale of the attack and how much force will suffice to effectively ward off or neutralize the attack and where relevant to forestall an imminent or recurring attack within the immediate future?
- It is **not** about measuring the degree of harm likely to be inflicted in the exercise of self-defence and matching it to the degree of harm likely to be inflicted by the attack

# Consequences of Excessive or Unnecessary Force

- Any use of force in self-defence must comply and continue to comply with the requirement that an ongoing necessity of self-defence remains present and that the degree of force used to ward off or thwart the attack does not exceed what is reasonably required under the circumstances to mount an effective defence .
- Force which does not meet these requirements ceases to be lawful

# The Role of Necessity and Proportionality in Targeting

- The principles of necessity and proportionality will play a role alongside IHL and other relevant rules relating to the application of force in targeting. They will act as additional restraints on targeting where IHL is applicable. They will provide a legal basis in targeting outside of armed conflict to preclude a use of force being deemed as arbitrary under IHRL.
- They will play a role in determining whether a given potential (type of) target may be engaged even if it constitutes a lawful target under IHL.
- They will also play a role in determining where, how and how long military objectives may be engaged during a situation where IHL is applicable

# Geography and Duration of Armed Conflict and Necessity and Proportionality *ad bellum*

- Hence, the geographical and temporal scope of the use of force will be directly influenced and largely determined by the principles of necessity and proportionality
- For example, a local and incidental armed attack will not require a protracted or extensive use of force to effectively respond to it.
- Force that is not required nor instrumental in warding off or forestalling further attack is neither necessary, nor proportionate in *ad bellum* terms
- A use of force in a particular region or area of operations will not normally require the use of force far removed from where the force is taking place and a defensive use of force to neutralize a specific threat of imminent attack from a particular source or location will not require expansion of the application of force geographically or temporally beyond what is necessary to achieve that end- and so forth....

# Concluding Remarks

- Necessity and Proportionality *ad bellum* have a key function in determining not only whether a resort to self-defence is lawful but in regulating its application for as long as self-defence is being lawfully exercised.
- It operates alongside other relevant bodies of international law in determining what may be targeted and where and how long force may be used.
- Failure to comply with the requirements of either or both principles renders (continued) resort to force unlawful.