A Role for Proportionality in the War on Terror

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1. Introduction

Recent events have placed the United Nations Charter system regulating the use of force (*ius ad bellum*) under considerable strain. States are increasingly challenging its boundaries. For example, there is fundamental disagreement within the international community as to whether it is possible to reconcile with the terms of the Charter such forceful actions as the 1999 NATO intervention in Kosovo.¹ Moreover, recent strategies designed to address the threat of global terrorism, in particular the Bush doctrine of pre-emptive self-defence, are at odds with orthodox views as to the limits of preventative force.² There is, however, remarkable consensus on one issue, that despite any uncertainty as to the legal framework governing a forceful response it must be both necessary and proportionate.³

The twin requirements of necessity and proportionality owe their genesis to an exchange of diplomatic correspondence between the United States and the United Kingdom in relation to the 1837 *Caroline incident* and were articulated in the context of preventative action.⁴ Subsequently, these constraints came to

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² See National Security Strategy of the United States of America, 17 September 2002, available at <www.whitehouse.gov/nsc/print/nssall.html> visited 22 October 2004. The National Security Strategy explicitly claims that international law recognizes the right to use pre-emptive force against an “imminent threat”. Whilst acknowledging that such a right is often conditioned, for example, by “a visible mobilization of armies, navies and air forces preparing to attack”, the Strategy argues that the concept of “imminent threat” must be adapted to the reality of threats from terrorist and rogue States.
³ For example, the US was at pains to assert that its 1998 attacks on a missile training camp in Afghanistan and a pharmaceuticals camp in the Sudan were both necessary and proportionate, see Letter Dated 20th August 1998 from the Permanent Representative of the United States to the United Nations Addressed to the President of the Security Council, UN Doc. S/1998/780 (1998).


A notable exception, however, is the study of proportionality in the context of sea power by D. P. O’Connell, The Influence of Law on Sea Power (Manchester University Press, 1975).

The treaty norm of proportionality is contained in Articles 51(5)(b) and 57(2)(a)(iii) 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 (Protocol I), 12 December 1977, 1125 UNTS (1979) 31 and prohibits an attack “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”. The norm is widely regarded as reflected in customary international law. For a consideration of the IHL rule of proportionality see S. Oeter, ‘Methods and Means of Combat’, in D. Fleck (ed.), The Handbook of Humanitarian Law in Armed Conflicts, (Oxford University Press, 1995) and A. P. V. Rogers, Law on the Battlefield (Manchester University Press, 1996).