

PROPORTIONALITY IN INTERNATIONAL LAW

Proportionality Conference

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Introduction

It was the war between Israel and Hezbollah in Lebanon in 2006 which first aroused my interest in the subject.

The media kept calling and the question was always the same: was the Israeli response to the July 12 attack, in which 3 Israeli soldiers had been killed and 2 captured, *disproportionate*?

After the attack by Hezbollah, Israel had complied with the U.N. Charter by notifying The Security Council that it would take countermeasures in self defense, as permitted by art. 51 of the Charter. In the ensuing months of conflict, Israeli land, air and sea forces destroyed roads and bridges, airports, power stations and whole urban neighborhoods that were thought to harbor Hezbollah. About 1000 civilians in Lebanon were killed, with 3,500 wounded and almost a million displaced. Hezbollah, for its part, fired hundreds of rockets into Israel, killing 50 civilians and causing 114 military casualties.

Were Israel's countermeasures disproportionate, the media wanted to know.

What, I wanted to know, does *disproportionate* mean. What is the measure of a counter-measure's proportionality?

A common starting point is the famous generality of the *Caroline Doctrine* enunciated in 1837 by U.S. Secretary of State Webster : “It will be for the British to show that the local authorities of Canada, even supposing the necessity of the moment... did nothing unreasonable or excessive; since the [countermeasure], justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.”

As we shall see, we have come some distance, since then, in specifying the content of the doctrine of proportionality. That we have, is due not to any specificity emanating from the word *proportionality*—itself, but from its placement, in practice, in an institutional setting within which space is created to permit a legitimate organ to render a *second opinion*. This second opinion reviews whether the countermeasure taken by the victim of an unlawful act is, itself, lawful because proportionate.

Proportionality in Jus ad Bellum

Historically, the “just war doctrine” provided the overarching principle by which the proportionality of recourse to force was assessed. Among other things, this asserts that the means deployed against an aggressor must be proportionate to the minimum level of force necessary to achieve redress. Today, relevant international law is codified in the UN Charter. Art. 2(4) prohibits the use of coercive force against states. Article 51 makes an exception when force is used as a countermeasure to an attack.

In seeking to establish a legal threshold for a state’s legal recourse to force, the International Court of Justice has deployed the principle of proportionality, adjudicating

claims arising out of U.S. support for the Contras in Nicaragua during a civil war and, again, in rendering a second opinion as to the appropriateness of the deployment of Ugandan troops on the territory of the neighboring Congo Republic as countermeasure to deal with insurgents operating in Uganda from bases in the Congo. In both these disputes, the ICJ found itself having to consider the abstract principle of proportionality as it applied in actual circumstances of military conflict.

In the Nicaragua case, the judges examined evidence of complicity by Nicaragua in the activities of insurgents in neighboring El Salvador and concluded that “even assuming [acts of complicity] to have been established and imputable to that state, [they] could only have justified proportionate countermeasures...” Examining the evidence before it – the quality of which was no doubt affected by the U.S. refusal to participate in the proceedings – the Court concluded with regard to American mining of Nicaraguan ports and bombing of oil installations, that “whatever uncertainty may exist as to the exact scale of the aid received by the Salvadorian opposition from Nicaragua, it is clear that these U.S. activities could not have been proportionate to that aid.”

In 2005, the Court heard the case in which the Congo alleged that it had been invaded by Ugandan armed forces. Uganda responded that it was merely taking countermeasures against FUNA insurgents based in the Congo and supported by the Sudan. On the facts, it concluded that “the taking of airports and towns many hundreds of kilometers from Uganda’s border would not seem proportionate, nor to be necessary to that end.”

Proportionality in *Jus in Bello*

International law has long prohibited the use of weapons which, by their very nature, inflict greater damage on an enemy than necessary to prevail in the combat. In 1132, the Lateran Council declared the crossbow an “unchristian” weapon. Sixteen states, meeting in St. Petersburg in 1868, prohibited the use of certain kinds of bullets in order to preclude the “useless aggravation of the suffering of disabled men”.

Implicit in the law is the widespread recognition that an assessment of the requisite proportionality of military tactics deployed in combat should not be left solely to the unfettered discretion of the combatants. It requires recourse to second opinions that can determine, legitimately, in the words of a 1928 arbitration between Portugal and Germany, whether there had been “an evident disproportion between the [provocation] and the...acts of retaliation that followed.” In its advisory opinion on *Threat or Use of Nuclear Weapons*, the ICJ has held that “it is accordingly prohibited to use weapons causing...a harm greater than that unavoidable to achieve legitimate military objectives....”

Tribunals have attempted, with varying degrees of success, to apply the “no greater harm than absolutely necessary” test. In the 2003 *Oil Platforms* case between Iran and the U.S., the ICJ applied its “necessity and proportionality” test to determine the lawfulness, of U.S. destruction of Iranian oil platforms in the Persian Gulf, with considerable loss of life, in response to the Iranian attack on an American warship. “As a response to the mining, by an unidentified agency, of a single United States warship, which was severely damaged but not sunk, and without loss of life [this cannot be regarded] in the

circumstances of this case, as a proportionate use of force in self-defence.”

Such battlefield second opinions, of course, are subject to severe criticism. The judges risk being charged with amateurish second-guessing of the tactical and strategic options available to field commanders. They are likely to encounter obstacles in obtaining access to evidence as well as knotty problems pertaining to the allocation of the burden of proof. In the *Oil Platforms* case, the Court also had to decide whether the proportionality of a countermeasure was to be determined by reference to one particular “triggering” incident, or in the overall context of the larger conflict.

That difficulty became especially apparent in the 2006 war between Israel and Hezbollah. The Israeli action had been set off by the July 12 raid that caused the killing of three, and capture of two, Israeli soldiers. But, the 2006 U.N. Secretary General’s Report cites a litany of prior cross-border incidents launched by Hezbollah, including numerous raids and rocket attacks on Israeli villages. What is the baseline against which the proportionality of countermeasures should be assessed? Is it the totality of all prior provocations? Is a countermeasure’s “necessity” to be determined by the level of force necessary to balance the force used by the other side? Or is it the level of force necessary to discourage further aggressive activity? What of those disputes in which a State has no recourse to an equivalent force: when it does not have its own suicide bombers to respond to those deployed against it?

The Role of Proportionality in Determining Individual Criminal Conduct

International law, in the past half century, has begun to deploy against unlawful conduct by individuals. To that end, it has applied the principle of proportionality to determine the

guilt or innocence of those who have used tactics causing serious suffering to protected civilians when such tactics were defended as necessary and proportionate. This development is part of the legacy of the Nuernberg trials of 1946-49.

A contemporary example of this weighing was undertaken by the Office of the Prosecutor of the International Tribunal for the Former Yugoslavia, which established a committee of experts to review the NATO aerial bombardment of Belgrade during the 1999 Kosovo war with a view to determining whether to prosecute those individuals who had ordered a tactic which had caused the death of numerous civilians, notably in the destruction of the national broadcasting headquarters. The experts concluded that prosecutions were not warranted because, although civilian casualties “were unfortunately high” the tactics “do not appear to be clearly disproportionate.” This conclusion is supported by careful analysis of the legitimacy of the targets chosen: bridges, convoys, the radio and television station, and by weighing the military importance of each against the civilian casualties inflicted. While “commanders have a duty to distinguish military objectives from civilians or civilian objectives,” the report concludes, “it appears that with the use of modern technology, the obligation to distinguish was effectively carried out in the vast majority of cases.” It found that the commanders did not display “the degree of recklessness in failing to take precautionary measures which would sustain criminal charges.”

Although these standards for applying the proportionality principle were not enunciated by a tribunal but, rather, by its prosecutorial staff, such standards have also been applied by the judges in criminal proceedings. In the *Krupreskic* prosecution, the ICTY tribunal

held countermeasures “must not be excessive compared to the precedent unlawful act of warfare but also...must stop as soon as that unlawful act has been discontinued.” In the *Galic* case the tribunal concluded that “in determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.” In the *Kordic* prosecution, the tribunal held that the test of the proportionality of a countermeasure is whether it deployed “the amount and kind of force necessary to defeat the enemy.”

Proportionality in Non-Military Countermeasures

As noted, the international legal system still depends heavily on the right of an aggrieved party to seek rectification or restitution through self-help. This is specifically recognized by the *Draft Articles on Responsibility of States* prepared by the International Law Commission for the UN General Assembly, which require that the countermeasures withstand the test of being proportionate to the actual injury caused. In the 1997 litigation between Slovakia and Hungary concerning the *Gabcikovo-Nagymaros Project*, the ICJ had to assess the proportionality of non-military countermeasures taken by Czechoslovakia (later, Slovakia) against Hungary after the latter had violated a treaty requiring it to construct public works intended to facilitate shipping, flood control and energy development on a part of the Danube shared by both nations. Czechoslovakia had responded to Hungary’s default by diverting a part of the Danube and constructing alternative public works along the course of the diversion.

Addressing the claims of Hungary, the Court said, “the effects of a countermeasure must be commensurate with the injury suffered....Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube...failed to respect the proportionality which is required by international law.” It concluded that this “was not a lawful countermeasure because it was not proportionate.”

The issue came before the ICJ again in the 2004 advisory opinion regarding *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. According to a report of the UN Secretary-General, this wall’s route, although designed to prevent terrorist infiltration into Israel, virtually separated 975 square kilometers, or 16.6 percent of the West Bank, and almost 400,000 Palestinians, from the rest of the West Bank. Examining the limited evidence at its disposal (Israel had refused to participate in the proceedings), the Court was “not convinced that the construction of the wall along the route chosen was the only means to safeguard the interest of Israel against the peril which it has invoked as justification for that construction.” It endorsed the International Law Commission’s draft rule that the countermeasure must demonstrably be “the only way for the State to safeguard an essential interest against a grave and imminent peril.” In particular, it justified rendering a second opinion, affirming that: “the State concerned is not the sole judge of whether these conditions have been met.”

Notably, the High Court of Israel has used the same proportionality test to hold some parts of the wall to have been unlawfully sited, the judges saying they “were not convinced that it is necessary for security-military reasons to retain the current route.” To

come to that conclusion, the Israeli court carefully canvassed evidence of the routing in the light of its stated strategic objective and of all available demographic, geographic and economic factors. The Court found “that the relationship between the injury to the local inhabitants and the security benefit from the construction of the separation fence along the route, as determined by the military commander, is not proportionate [and]...can be substantially decreased by an alternate route...”

The Principal of Proportionality and Trade Disputes

The concept of proportionality is a prominent feature of the dispute settlement system of the World Trade Organization (WTO). The term appears explicitly in two footnotes in the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement). More broadly, the set of rules governing trade disputes (regarding a violation of any WTO rules) requires that any countermeasure authorized by the WTO Dispute Settlement Body (DSB) be “equivalent” to the “nullification or impairment” resulting from the trade law violation. Due attention to the concepts of equivalence and proportionality has thus permeated the process by which the WTO agreements are implemented by arbitral panels.

The WTO Dispute Settlement Understanding (DSU) sets out detailed procedures for resolving trade disputes. Under the part of the SCM Agreement that pertains to prohibited subsidies, the complaining state is authorized to take “appropriate countermeasures” that are “not disproportionate.” Under DSU articles 22.4 and 22.7, any retaliation must be “equivalent” to the unlawful trade “nullification or impairment” caused by the actions of

the other party. Arbitration panels must be used, in the event of an irresolvable dispute, to determine whether a countermeasure is “appropriate” or “not disproportionate” and whether a retaliation is “equivalent” to the unlawful “impairment” of trade. With the frequent recourse to arbitration panels and many appeals to the system’s appellate body, a substantial jurisprudence pertaining to proportionality has emerged.

There are many examples. One is the dispute arising out of Canada’s allegation that Brazil was unlawfully subsidizing the global sale of its production of aeroplanes. The WTO arbitrators ruled in favor of Canada, thereby allowing Canada to take an “appropriate” countermeasures, “as long as it is not disproportionate.” Explaining what that means, the panel said, “a countermeasure is appropriate *inter alia* if it *effectively* induces compliance” and that Canada’s countermeasures may be exerted at whatever level is appropriate to “inducing the withdrawal of the prohibited subsidy.”

Dispute arbitrations have also construed Article XX of the General Agreement on Tariffs and Trade (GATT) which provides a list “general exceptions” to Agreement’s prohibition on quantitative and discriminatory restraints on trade, if these be justified as “necessary to protect public morals,[or]...human, animal or plant life or health...” In construing the term “necessary” the arbitrators have held with some consistency, at least since a 1990 ruling disallowing several restrictive provisions of the 1930 US Tariff Act, that “a contracting party cannot justify a measure inconsistent with a...GATT provision as ‘necessary’ ...if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it.” A party using a countermeasure “is bound to use, among the measures reasonably available to it,

that which entails the least degree of inconsistency with other GATT provisions.”

The same doctrine has been applied by the European Court of Justice in reviewing national laws and orders that seek to qualify as exceptions to rules established by Community law. In the words of one European Court judgment, “where there is a choice between several appropriate measures, the least onerous means must be used and care must be taken to ensure that the charges imposed are not disproportionate to the aim pursued.” In the words of another decision, “If...a measure imposes on certain categories of persons a burden which is in excess of that which is necessary—which must be appraised in the light of the actual economic and social conditions and having regard to the means available—it violates the principle of proportionality.

Proportionality in the Law of Human Rights

The two most effective legal instruments for the protection of human rights are the International Covenant on Civil and Political Rights (ICCPR) and the European Charter of Human Rights. Each codified the rights of persons but makes provision for states of exception in which some of those rights may be suspended. Both make provision for institutional review of state compliance with its mandates. Among the matters as to which second opinions may be rendered is whether special circumstances have justified the suspension of some rights. Second opinions may also sort out priorities when a right of persons collides with a prerogative of government.

In the ICCPR system, to which 162 states are parties, an elected committee of experts examines state compliance with their treaty obligations. In the European system, compliance is determined in litigation before the European Court of Human Rights. In

guaranteeing persons' civil and political rights, the Covenant ,in Article 4 (2), makes provision for allowable derogations: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation." The Committee of Experts have singled out Tanzania in 1992, the Dominican Republic in 1993, the United Kingdom in 1995, Peru in 1996, Bolivia, Colombia and Lebanon in 1997 and Uruguay and Israel in 1998 and has emphasized that "the obligation to limit any derogations to those strictly required by the exigencies reflects the principle of proportionality which is common to derogation and limitation of powers." It has chided these and some other states for "insufficient attention being paid to the principle of proportionality."

The ICCPR committee of experts' function is largely limited to naming and shaming those found not to be in compliance with the Covenant-based obligations. The European Court of Human Rights, on the other hand, conducts full-fledged adversarial judicial inquiries into allegations of non-compliance. It has produced an extensive jurisprudence pertaining to the principle of proportionality. Derogation from some protected rights is permitted by the European Convention's article 15, "in time of war or other public emergency threatening the life of the nation" but must be limited "to the extent strictly required by the exigencies of the situation." Other rights set out in articles 8 to 11 may be restricted by the state in order to achieve legitimate social goals, but only to the extent "necessary in a democratic society." By 1988, the *Olsson* judgment had held that "the

notion of necessity implies that the interference [with a protected right] corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued.” Since then, the European Court has, on many occasions, tested a government restriction on a protected right by reference to the principle of proportionality.

In the 1981 case of *Dudgeon v. United Kingdom*, a case on the legality of Northern Ireland’s criminalization of certain consenting homosexual acts, it was noted that “a restriction on a Convention right cannot be regarded as ‘necessary in a democratic society (two hallmarks of which are tolerance and broadmindedness) unless, amongst other things, it is proportionate to the aim pursued.” Summing up, the judges said, “The restrictions imposed on Mr. Dudgeon under Northern Ireland law, by reason of its breadth and absolute character, is, quite apart from the severity of the penalties provided for, disproportionate to the aims to be achieved.” The Court seemed to have in mind the need to use the least intrusive means when venturing into the regulation of protected rights even when doing so to advance a legitimate state policy. On the other hand, in 2003, the Court, after careful examination of the social, cultural and political context, and using the proportionality test, found Turkey’s ban on the governing Refah party not to have violated the Convention, in view of the banned party’s stated rejection of the state’s constitutionally enshrined objective of preserving secularism.

Conclusions

Across a broad range of subjects, there is now wide agreement that the principle of proportionality governs the extent to which a provocation may, lawfully, be countered by what might otherwise be an unlawful response. That is the central role assigned to

proportionality in international law and it is deeply rooted in the cultural history of societies which, at an early stage of their legal development, were reliant on mutual obligation and self-help to maintain their efficacy, but which thereby sought to keep the practice of self-help from spiraling into uncontrolled violence. The Old Testament's injunctions, in Exodus – life for life, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe – insists that any response to an illegal act must be proportionate to the provocation and not exceed it. The Holy Quran contains almost the same injunction. If the core institutions of a legal system are too weak to be relied upon to take remedial action against wrongdoers, then they must at least be authorized to license appropriate action by the wronged party and to insure that its response remains within prescribed parameters.

The practice I have described demonstrates that a high degree of accord is emerging, across a broad range of issues, as to the appropriate standards by which the proportionality of countermeasures can be assessed. The practice of various institutions authorized to render second opinions as to the compliance with those standards is gradually narrowing the range of indeterminacy inherent in the term proportionality. Some of this case law has been disappointingly episodic. An arbitration may decide little but the outcome of one dispute, and do so in formulaic and conclusory terms. The well-crafted second opinion, through its precision, through its invocation of precedent, through its careful weighing of the probity of the facts presented to it, deepens and narrows the jurisprudential stream while strengthening its embankments.

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

taken seriously? Modern research is concluding that beauty is not solely in the eye of the beholder. Recent experiments, reported by Geoffrey Cowley in *The Biology of Beauty* have led to the conclusion “that people everywhere—regardless of race, class or age—share a sense of what’s attractive...that we judge others by rules.” In cosmetology, these rules emanate from beauty contests, the cosmetics, style and modeling industries, the cinema, and elsewhere, but their opinions are widely consumed, internalized and accepted. So, yes, proportionality is rather like beauty, but not because it’s so indeterminately in the eye of the beholder, but, rather, as an example of an indeterminate principle, if applied in practice through second opinions rendered by legitimate institutions, becoming gradually empowered to provide persuasive answers to difficult questions and, thereby, case by case, building the objective determinacy of the principle.