

ON PROPORTIONALITY OF COUNTERMEASURES IN INTERNATIONAL LAW

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I. IN SEARCH OF THE PROPORTIONALITY PRINCIPLE

In courts and tribunals, political arenas like the United Nations Security Council, and popular and scholarly journals, discursive recourse to the principle of proportionality has become frequent and vehement. It tends most audibly to arise in the midst of military conflicts pitting states against each other. But it also emerges in interstate trade disputes and when states, seeking to protect national security or public health, restrict internationally protected human rights.

The mainstream of international proportionality discourse is encountered where one party has taken an action thought to be unlawful by another, and that second party has resorted to countermeasures. Proportionality is the principle used to assess the lawfulness of the countermeasures. It is intended to act as a brake on escalating cycles of transactional violence.

Not all proportionality discourse arises in this way. Proportionality also enters into the legal discourse between coastal states allocating their “fair” shares of territorial seas, exclusive economic zones, and oceanic and subsoil resources.¹ It arises when a person convicted of an international crime asserts the ensuing sentence to be disproportionate.² For the purposes of this essay, however, attention will focus on the categories of proportionality discourse that are paradigmatic. Put formulaically, most proportionality discourse occurs when *A* has done (or threatens to do) *X* to *B*, and *B* responds by doing *Y* to *A*. The issue then crystallizes as an inquest into whether countermeasure *Y* is “equivalent” (i.e., *proportionate*) to *X*.

The conflict may be one entailing a state’s recourse to military force to retaliate against an actual or putative attacker, or a government’s use of restrictions to curb the free speech rights of a militant dissident. In the operation of a trade regime, it may involve the imposition by one state of retaliatory duties on the products of another state thought to be inhibiting imports through unnecessarily onerous health regulations. In each of these disparate instances, the issues are essentially the same: first, whether the provocation (*X*) was unlawful and, second, if so, whether the presumptively legal countermeasure (*Y*) was proportionate to *X*. In these

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¹ *In re Arbitration (Guy./Surin)*, para. 392 (Perm. Ct. Arb. Sept. 17, 2007), available at <<http://www.pca-cpa.org>>; see also *Continental Shelf (Libya v. Malta)*, 1985 ICJ REP. 13, 56, para. 78 (June 3); D. M. McRae, *Proportionality and the Gulf of Maine Maritime Boundary Dispute*, 1981 CAN. Y.B. INT’L L. 287, 290.

² *Prosecutor v. Galić*, No. IT-98-29-A, at 204-05, paras. 6-7 (Nov. 30, 2006) (Meron, J., sep. & partially diss. op.).

instances, an otherwise lawful response to an unlawful act, if it crosses the threshold of proportionality, may become unlawful. Obviously, the weighing involved in calculating proportionality poses difficult and delicate questions, made more so in the unique matrix of any particular conflict, as the factual specifics of measures and countermeasures are likely to require an awkward balancing of apples and oranges. How carefully this task is handled by the relevant legal, political, and other forums will determine the legitimacy, and thus the compliance pull on the disputants, of any effort to invoke the principle of proportionality.

Proportionality, like Beauty . . .

It is said about the principle of proportionality that, like beauty, it exists only in the eye of the beholder. This is plausible, but it is not true.

It is plausible because, so far, the principle of proportionality has mostly eluded definition in any but the most general terms. This obscurity can undermine its credibility. If a legal rule, one meant to guide the conduct of disputing parties, cannot be ascertained with precision, how can it be expected to govern their behavior in actual situations of conflict?

While the question is germane, its practical answer is simple: proportionality demonstrably *does* play an important part in the actual discourse that ignites in courts, political forums, scholarly writings, and the public media when real conflicts engage actual persons, institutions, and states. In legal, political, and academic institutions, and even in the popular media, an active, ongoing proportionality discourse is taking place. It becomes audible whenever there is a conflict in which a party defending its challenged rights and interests uses countermeasures that, in turn, are challenged as excessive. It also appears when governments exercise their option to derogate, when “necessary,” from treaty-protected human rights or treaty-based commitments to free trade.

Demonstrably, too, the proportionality principle affects not only the discourse—the terms in which the parties to a dispute advance their self-justification—but also the terms in which disputes are ultimately settled. A rich vein of jurisprudence, a convergence of many dispute-settling judgments rendered by a multiplicity of courts, tribunals, and arbitrators, validates the conclusion that “proportionality constitutes a general principle of international law.”³ This effect on actual conflicts is not much diminished by the vagueness of the principle itself. Nevertheless, the vagueness of a legal norm, no matter how frequently invoked, may tend to undermine its legitimacy over time, and thus its capacity to pull those to whom it is addressed toward compliance. Is this the Achilles heel of the proportionality principle? That proportionality is both so frequently and avidly invoked and yet so imperfectly defined poses the central conundrum toward which this inquiry is directed. What accounts for the remarkable currency of a principle that is so little analyzed?

The question has broader jurisprudential implications. Under what circumstances do such vague, yet revered, legal principles as proportionality retain (or lose) their capacity to affect the behavior of those to whom they are addressed and whose conduct they seek to modify? The pragmatic answer suggested by the evidence presented in this essay is that this will depend, at least in part, on the credence given to the institutions and processes by which the principle is

³ ENZO CANNIZZARO, IL PRINCIPIO DELLA PROPORZIONALITÀ NELL'ORDINAMENTO INTERNAZIONALE 481 (2000) (Eng. summary); *see also* Enzo Cannizzaro, *Contextualizing Proportionality: jus ad bellum and jus in bello in the Lebanese War*, INT'L REV. RED CROSS, NO. 864, Dec. 2006, at 779.

being applied in situations of conflict, episode by episode. Some quite general legal principles seem effectively to husband their discursive power. An example is the UN Charter's recognition, in Article 1(2), of a "right to self-determination," a principle that, despite its vagueness, has launched a hundred decolonizations. On the other hand, the Charter's prohibition on the threat or use of force by states (Article 2(4)), despite its specificity, has languished in public disregard.

Such differences in a principle's "compliance pull"⁴ may be explicable by many variables, but among them surely must be the extent to which the principle has been accepted and internalized in the conscience and conduct of those to whom it is addressed. A not entirely satisfying, but probably valid, explanation for at least part of the causal difference between some widely implemented principles and others that are largely neglected is that, in practice, the former have developed the advantage of momentum, while the latter have not. If so, then a major variable determining the compliance pull of a principle is the credibility of the process by which, in habitual practice, that principle is applied to a broad range of actual disputes. That variable, as it happens, is particularly relevant to the relative success of the principle of proportionality, which, as this essay will demonstrate, finds wide and specific institutional acceptance and implementation in various treaty regimes.

Indeterminacy and Legitimacy

Vague principles—for example, the right of a state to use force in self-defense in the event of an attack by another—tend to invite scofflawry. Nevertheless, it is one of the paradoxes of the law that some very broad and elastic principles—despite, or perhaps even because of, their lack of precision—may actually have a profound and lasting effect on the jurisprudential context within which they operate. The role of the principle of "due process" within the U.S. legal system is but one of many examples. Such an inverse and counterintuitive correlation between a legal principle's determinacy and its capacity to affect conduct cannot be explained solely in terms of how often the principle is invoked in litigation, although that may, indeed, have been a factor in securing its legitimacy. Rather, the phenomenon may be attributable primarily to the hold the principle—despite its elasticity—has taken on the judicial, but also on the political, imagination of the epistemic community in which it is used as the prism for viewing, arguing, and ultimately resolving disputes.

One way to understand the dynamic quality of some vague, yet powerful, legal principles is to view them operationally. What do they achieve, in practice? An answer suggested by examining the evidence generated by the operation of the principle of proportionality is that they appear to achieve their dispute-resolving project by deliberately creating a space for "second opinions" to which claims of disputants can be referred. The principle does not create a rule for conflict resolution so much as it creates an institutional process to which a dispute can be referred for a credible opinion to trump and supplant the rival opinions expressed by the disputants. These second opinions are rendered in many contexts but appear primarily after a person, government, or institution has taken an action against another in response to what is believed to be a detrimental and unlawful provocation. Such retaliations or countermeasures may even be modulated by the mere possibility that a second opinion might be obtained. The

⁴ THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 45–46 (1990).

second opinion would examine whether the initial provocation was, indeed, unlawful and, if so, whether the response to it was proportionate.

What effect the prospect of such a review is likely to have on the conduct of disputing parties will depend, at least in part, on the perceived gravitas of the authority with the jurisdiction to deliver it. That, in turn, will depend on the eminence of those (often, but not invariably, judges) charged with rendering the opinion. It will also depend on the quality of the second opinion's reasoning: its coherence with and adherence to principles established in resolving other disputes. Finally, it will depend on the legitimacy of the institutional setting (often, but not invariably, a court) in which the dispute is resolved by the rendering of a second opinion and on that opinion's ability to pull the disputants toward compliance and engage the sympathy and support of bystanders to the dispute.

It may well be that the surprising jurisprudential success of some broad principles, despite their vagueness, is simply due to their having provided what turns out to be an efficient process for rendering such second opinions. Specifically, any legitimacy deficit the principle of proportionality incurs because of its vagueness may be compensated by its utility as a restraint on what might otherwise be an unchecked *circulus inextricabilis* of provocations and retaliations.

This restraining effect suggests that proportionality may surely resemble beauty, but not because proportionality (or, for that matter, beauty) exists only in the subjective eye of the beholder. Rather, proportionality (again, like beauty) has attained purchase as a governing principle because, under the aegis of a credible decision-making process, a general system of subsidiary rules has evolved that demonstrably affects outcomes (whether in wars, trade disputes, or beauty contests). In other words, the general principle has achieved currency because, in its frequent application, case by case, it has shed much of its indeterminacy. When it comes to dispute settlement, it has dawned on the global system, proportionality is a tool that seems to work.

The Proportionality Universe

In this study of proportionality, the primary focus will be on its role in modulating the escalation of conflict between states. That role, typically, is evident in the work of interstate tribunals such as the International Court of Justice (ICJ), and in intergovernmental arbitrations under the auspices of the World Trade Organization (WTO). Interstate conflict, however, is not the only locale of proportionality discourse, and so references and comparisons will be made with the analogous role of proportionality in refereeing conflicts between individuals and various levels of authority. Much of that sort of conflict—for example, between assertions of a person's right to freedom of speech and a regime's invocation of its right to protect security—plays out in national and regional courts, where administrative or executive decisions of governments or intergovernmental institutions, made in reliance on discretionary executive powers, are tested against the treaty-embedded (or constitutional) rights of individuals: the issue being whether they interfere “disproportionately” with those rights and liberties. Even in that context, however, the discourse still takes on the general contours of an examination of whether a response (*X*) by authority *A* (the regulatory regime) to *B*'s provocation *Y* (the threat of terrorism) is proportionate.

Proportionality may also enter into the legal process of an international criminal tribunal called upon to render a “second opinion” on persons engaged in directing and deploying the

instruments and strategies of war. In assessing their command decisions, the tribunal may have to determine whether the individuals acted in a manner reasonably responsive to the exigencies of combat.

The principle of proportionality may emerge as determinative in shaping second opinions in at least six different settings:

- disputes regarding the proportionality of a state's coercive recourse to military force in the light of limitations imposed by Articles 2(4) and 51 of the UN Charter;
- disputes regarding the proportionality of a state's choice of weapons and tactics in the light of constraints imposed by the Hague and Geneva Conventions;
- trials conducted before international criminal tribunals in which measures taken by individuals in a military conflict may be disproportionate to the objective of the conflict, and thus may manifest themselves as war crimes, crimes against humanity, or gross violations of human rights;
- disputes regarding the proportionality of nonmilitary countermeasures taken by one state against another;
- disputes in which the proportionality of countermeasures taken in trade disputes is challenged before a WTO arbitral panel under the General Agreement on Tariffs and Trade; and
- disputes in which regulations imposed by national, regional, or international authorities to safeguard health, public order, and security are claimed to infringe disproportionately upon personal rights protected under human rights conventions.

In each of these contexts, the process by which a dispute is addressed is likely to invoke the principle of proportionality.

II. PROPORTIONALITY AND MILITARY MATTERS

The Principle of Proportionality in Initiating Recourse to Military Force (Jus ad Bellum)

Historically, the "just war" doctrine provided the overarching principle by which the proportionality of a recourse to force was assessed. The doctrine held that (1) any state resorting to war should calibrate its response in proportion to the demonstrable wrong perpetrated against it, and that (2) the means deployed as a countermeasure against a perpetrator be proportionate to the minimum force necessary to achieve redress. The doctrine was designed to ensure that states would not resort to unprincipled and unnecessarily brutal violence under cover of redressing an alleged wrong.

Today, the international law regarding recourse to force by states is codified in the United Nations Charter. Article 2(4) prohibits the use of coercive force against other states. Article 51 makes an exception when force is used as a countermeasure to an attack. It seems to be a question of fact whether, in any particular instance, a military response fits within the ambit of the Article 51 exception to Article 2(4)'s prohibition. It is that, of course, but it is also a matter of law. Although the law, as refined by judges' decisions, recognizes a right to respond with military force to an armed attack, it warns as well that this right is not absolute, depending, rather,

on whether the provocation was of such magnitude as to warrant a full-scale military response. A small border incursion, for example, might not justify a war.

In seeking to establish a legal threshold for a state's recourse to military force, the International Court of Justice has deployed the principle of proportionality, adjudicating claims arising out of U.S. support for the contras of Nicaragua during a civil war and the deployment of troops by Uganda to strike at insurgents operating out of the neighboring Democratic Republic of the Congo. In both of these legal disputes, the Court found itself having to consider the abstract principle of proportionality as it applied in circumstances of actual military conflict.

The issue first came before the ICJ in the highly contentious 1986 *Nicaragua* case.⁵ Nicaragua complained of direct American military attacks on its ports and villages, as well as indirect U.S. support for Nicaraguan contra insurgents. In refuting Nicaragua's claim to have been wrongfully attacked, the United States argued that it had acted in response to infiltration by Nicaraguan-based insurgents into neighboring El Salvador, a state with which the United States was allied. Reviewing the evidence of complicity, the Court found that Nicaragua's aid to the Salvadoran insurgents did not rise to the level of an armed attack within the meaning of Article 51. Thereby, the judges rejected the legality of the American tactical military actions inside Nicaragua. "The acts of which Nicaragua is accused," the majority opinion said, "even assuming them to have been established and imputable to that State, could only have justified proportionate counter-measures . . . They could not justify. . . intervention involving the use of force."⁶

Given its appraisal of the facts before it, the Court did not

regard the United States activities . . . relating to the mining of the Nicaraguan ports and the attacks on ports, oil installations, etc., as satisfying [the criterion of proportionality]. Whatever uncertainty may exist as to the exact scale of the aid received by the Salvadoran armed opposition from Nicaragua, it is clear that these latter United States activities in question could not have been proportionate to that aid.⁷

The Court did not indicate what level of countermeasures would have been appropriate, had the judges been convinced that Nicaraguan-sponsored activities inside El Salvador did constitute an armed attack. Would the American countermeasures then have satisfied the test of proportionality?⁸ We do not know. The Court's judgment left no doubt, however, that, even if the circumstances had warranted military countermeasures, the applicable test would still have been "whether the response to the attack" met "the criteria of the necessity and the proportionality of the measures taken in self-defence."⁹

This reasoning suggests that the principle of proportionality imposes an inescapable constraint on the level of permitted force, even when exercised in reliance on the legitimate right to self-defense. The dissenting American judge, too, accepted that states engaging in an act of individual or collective self-defense must be able to demonstrate not only that they were subject

⁵ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 ICJ REP. 14 (June 27).

⁶ *Id.* at 127, para. 249.

⁷ *Id.* at 122, para. 237.

⁸ *Id.*

⁹ *Id.* at 103, para. 194.

to an actual armed attack but also that the countermeasures taken were themselves “necessary and proportionate.”¹⁰

This last part of Judge Schwebel’s opinion relates not to the *jus ad bellum*, which is the basis of the Court’s *dispositif*, but to the *jus in bello*, the law on the conduct of hostilities, which, strictly speaking, need not have been addressed since the Court found that Nicaragua had not committed an armed attack. Nevertheless, a majority of the judges used the occasion to assert that the test of proportionality applies to military conflict in two distinct senses. First, proportionality is relevant to determining whether there is *any* right, in the specific context of a provocation, to use military force in self-defense or only a right to take more limited countermeasures (*jus ad bellum*).¹¹ Second, even in the event of a demonstrable transborder armed attack, one warranting a military response, the Court may review whether the level of countermeasures deployed is permitted by law: whether it is proportionate to the attack itself and to the needs of self-defense (*jus in bello*).

In 2005 the Court decided a case in which the Congo alleged that it had been invaded by the armed forces of Uganda.¹² Uganda replied that it had been operating militarily on Congolese soil solely to counteract the offensive capabilities of safe havens established there by the Former Uganda National Army (FUNA), a Sudanese-supported militia seeking to destabilize Uganda. The Court concluded that the evidence did not support the Ugandan claim to have been attacked or threatened on such a scale as to give rise to a right to resort to military force in self-defense on the territory of the Congo.¹³ The majority therefore did not think it necessary “to enquire whether such an entitlement to self-defence was in fact exercised in circumstances of necessity and in a manner that was proportionate.”¹⁴ As in the *Nicaragua* case, however, the Court chose to make observations on this very point, adding that “the taking of airports and towns many hundreds of kilometres from Uganda’s border would not seem proportionate . . . , nor to be necessary to that end.”¹⁵

Repeating the analytical approach used in *Nicaragua*, the Court employed proportionality in two ways. First, it assessed the right of Uganda to resort to force under Article 51 by reviewing whether it had been the victim of an actual armed attack attributable to the Congo. The majority concluded that no such attack had occurred as would justify Uganda’s military response. Controversially, the judges were unwilling to hold the government of the Congo directly responsible for the FUNA’s cross-border incursions. Nevertheless, the Court then went on to review the proportionality of Uganda’s response. Strictly speaking, these further observations were dicta. Nevertheless, the Court, in both instances, staked out the right to determine, case by case, whether a provocation rises to a threshold permitting the taking of military countermeasures (the *jus ad bellum*). In neither case, however, was that threshold made significantly

¹⁰ Judge Schwebel defends the proportionality of U.S. countermeasures in his magisterial dissenting opinion, *id.* at 269–70, 514–21, paras. 7, 9, 201–14. Some authorities take the position that the real test of legality is always and fundamentally “the well-established requirement of necessity and proportionality.” John Norton Moore, *The Secret War in Central America and the Future of World Order*, 80 AJIL 43, 107 (1986).

¹¹ For example, American assistance to Salvadoran counterinsurgency efforts would presumably have been legal, insofar as these were deployed inside El Salvador.

¹² Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda) (Int’l Ct. Justice Dec. 19, 2005), available at <<http://www.icj-cij.org>>.

¹³ *Id.*, para. 146.

¹⁴ *Id.*, para. 147.

¹⁵ *Id.*

more determinate by the opinion rendered. While both decisions appear to imply that the provision of sanctuary and support for a cross-border insurgency might potentially rise to the level of an armed attack, justifying a military response, neither offers a principled rule by which that threshold may be determined in subsequent disputes.¹⁶

In dissenting opinions, several of the judges argued that the FUNA's activities, while not necessarily attributable directly to the Congolese government, nevertheless emanated from Congolese territory; they were attacks that the government was legally obliged to prevent and for which, because of its failure to take the necessary preventive measures, it should be held accountable at law. In such circumstances, they argued, the Article 51 right of self-defense should be construed as permitting retaliatory military action on the territory from which the FUNA forces were operating. On this reasoning, the legality of Ugandan countermeasures would be determined by whether "the armed action by the irregulars amount[s] to an armed attack and, if so, [whether] the armed action by the attacked State [is] in conformity with the requirements of necessity and proportionality."¹⁷

The dissent points to an important issue that is likely to loom larger, in future. In both the *Nicaragua* and *Congo* cases, the majority characterized the Court's primary task as one of attribution: was the state from which insurgents were operating legally responsible (in the sense of Charter Article 51) for their activities in El Salvador and Uganda? Put that way, and answered by the Court in the negative, the question precluded invocation of the right of self-defense. But the judges could have replaced the question of attribution with a finding of liability of states for injurious effects emanating from their territory and affecting the rights of neighboring states. The Court would then have had to inquire whether the Congo could have prevented the cross-border attacks. Or it could have examined how else El Salvador and Uganda, by measures confined to their own territory, might have prevented the insurgents from continuing their incursions. Put that way, the question of attributability is replaced by others of true proportionality. Could Nicaragua have prevented the wrong to El Salvador by reasonable measures against the infiltrators? Could Uganda have prevented continuing infiltrations by means less deleterious to the rights of the Congo? For example, might it have been feasible to construct an impenetrable wall on the borders between El Salvador and Nicaragua, or between the Congo and Uganda? Or might more concentrated military efforts on the Salvadoran and Ugandan sides of the border have prevented the infiltrations? By characterizing the issue strictly in terms of attributability, however, the Court made it unnecessary to survey whether the infiltrations, in both instances, might have been defeated through means less intrusive in its effect on the territorial sovereignty of Nicaragua and the Congo, and so more proportionate to the safeguarding of the legitimate interests of El Salvador and Uganda. Indeed, in other kinds of international disputes, an examination of whether less intrusive means might have served equally well to protect each party's legitimate interests has become a common way to introduce the notion of proportionality into second-opinion assessments of countermeasures.

¹⁶ In both cases, the ICJ also established its right to render a "second opinion" as to the proportionality of the actual countermeasures taken (the *jus in bello*). The Charter's text, however, while limiting the right to initiate military hostilities, says nothing about an obligation to apply proportionality once hostilities have begun. For an application of that principle to the *jus in bello*, it is necessary to look elsewhere (see the next section below).

¹⁷ Armed Activities on the Territory of the Congo, *supra* note 12, Separate Opinion of Judge Kooijmans at 7, para. 31. To the same effect, see *id.*, Separate Opinion of Judge Simma at 3, para. 13.

The Principle of Proportionality in the Military Conduct of Hostilities (Jus in Bello)

The law pertaining to the conduct of hostilities (*jus in bello*) appears to operate independently of the law pertaining to the initiation of hostilities (*jus ad bellum*). The *jus in bello* limits the choice of means with which to wage war, regardless of whether or not the war is initiated lawfully (e.g., in self-defense against an armed attack). It circumscribes the permitted means with which to conduct hostilities, whether the war is just or unjust.

This characteristic troubles some moral philosophers, one of whom has written indignantly that the “level of destruction permitted in a war against a genocidal enemy such as Nazi Germany is surely greater than in the Falklands War.”¹⁸ In this view, it is morally indefensible that “the same *in bello* rules apply to both sides of a conflict whatever the justice of their aims.”¹⁹

As the preceding discussion of ICJ cases has demonstrated, such equivalence is not a precise summary of the applicable law. The *ad bellum* rules tell us that any war that is waged for a prohibited purpose (e.g., aggression) would be unjustified in sacrificing any of its opponent’s lives or goods to achieve an impermissible end, no matter how proportionate those costs may be to attaining its (unlawful) goal. Nevertheless, in the *jus in bello*, the innocent party’s choice of means is undeniably as constrained by the principle of proportionality as that of the aggressor. The law of war purports to impose responsibilities of proportionality equally on lawful and unlawful belligerents. To lawyers, this equivalence is morally acceptable because law’s purpose is, first, to prevent war but, failing that, to humanize the conflict as much as possible. The purpose of the principle of proportionality, as it operates in the *jus in bello*, is both to prohibit the use of particularly destructive weapons and to constrain the excessive use of weapons whose deployment is not prohibited.

Efforts to ban particularly destructive or indiscriminate weapons have a long, cross-cultural history. “For example,” Adam Roberts and Richard Guelff report,

in ancient times, the Laws of Manu (the greatest of the ancient Hindu codes) prohibited Hindus from using poisoned arrows; and the Greeks and Romans customarily observed a prohibition against using poison or poisoned weapons. During the Middle Ages the Lateran Council of 1132 declared that the crossbow and arbalest were “unchristian” weapons.²⁰

In 1868, in the St. Petersburg Declaration, sixteen states agreed to prohibit the use of certain kinds of bullets.²¹ The stated intent was to “have the effect of alleviating, as much as possible the calamities of war” by limiting states to weakening “the military force of the enemy” by disabling “the greatest possible number of men” on the enemy side. The declaration stipulates that

¹⁸ Thomas Hurka, *Proportionality in the Morality of War*, 33 PHIL. & PUB. AFF. 34, 44 (2005).

¹⁹ *Id.*; see also E. Thomas Sullivan, *The Doctrine of Proportionality in a Time of War*, 16 MINN. J. INT’L L. 457 (2007).

²⁰ DOCUMENTS ON THE LAWS OF WAR 29 (Adam Roberts & Richard Guelff eds., 2d ed. 1989). As to the Manu code, see also PATRICK OLIVELLE, THE LAW CODE OF MANU 112–13 (2004); PATRICK OLIVELLE, DHARMAŚŪTRAS, THE LAW CODES OF ANCIENT INDIA 159 (1999); and W. S. Armour, *Customs of Warfare in Ancient India*, 8 GROTIUS SOC’Y TRANSACTIONS, PROBLEMS OF PEACE AND WAR 71, 72–77 (1922).

²¹ St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29/Dec. 11, 1868, 1 AJIL Supp. 95 (1907).

“this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable.”²² The same policy became the stated object of the 1899 Hague Declaration on Asphyxiating Gases²³ and the 1899 Hague Declaration Concerning Expanding Bullets.²⁴

Such specific prohibitions of weapons follow a realization that some weapons, by their nature, are likely to inflict greater injuries—especially on civilians, but also on the opposing army—than is actually warranted by those weapons’ strategic effectiveness. In recent times, this realization impelled states to draft the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects and its Protocol II, which partially bans the use of land mines.²⁵ In 1997 a further Convention was signed requiring the destruction of all land mines.²⁶ The 1972 UN Convention on Biological Weapons bans their development and production and requires stockpiles to be destroyed,²⁷ and the Chemical Weapons Convention of 1993 provides in similar fashion.²⁸

These treaties purport to outlaw certain weapons on the ground that their use is never justified by any sensible cost/benefit ratio. Most weapons, however, are not proscribed. Instead, the law permits their use, but only in circumstances in which they do not cause gratuitous injury, to either combatants or noncombatants. This aspect of a legal requirement of proportionality was foreshadowed and elaborated, respectively, in the Hague²⁹ and Geneva Conventions.³⁰

The impetus for making proportionality a legal requisite of the *jus in bello* gathered force after World War II, a conflict in which the traditional ratio of military to civilian casualties was radically reversed. The American siege of Manila, in February and March of 1945, caused the death of 16,000 Japanese and 1,000 U.S. military personnel, but also of 100,000 Filipino civilians.³¹ The aerial bombardment of the German city of Dresden in February of 1945 killed 25,000 and injured 30,000 inhabitants.³² Between 226,000 and 566,000 Japanese civilians died in the nuclear bombing of Hiroshima and Nagasaki.³³ These events, whatever the justifications offered for the choice of means, focused attention on tactical and strategic decisions

²² *Id.*

²³ Declaration (IV, 2) Concerning Asphyxiating Gases, July 29, 1899, 1 AJIL Supp. 157 (1907).

²⁴ Declaration (IV, 3) Concerning Expanding Bullets, July 29, 1899, 1 AJIL Supp. 155 (1907).

²⁵ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 UNTS 137, 19 ILM 1524 (1980).

²⁶ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 ILM 1507 (1997).

²⁷ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) Weapons, Apr. 10, 1972, 26 UST 583, 1015 UNTS 164.

²⁸ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 21, 103d Cong. (1993), 1974 UNTS 45.

²⁹ Convention [No. IV] Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

³⁰ Convention [No. IV] Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 UST 3516, 75 UNTS 287.

³¹ William J. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 MIL. L. REV. 91, 91 (1982).

³² *Id.* at 127.

³³ *Id.* at 122.

made in the heat of combat. That attention, in turn, led to the diplomatic negotiation of the Geneva Conventions of 1949, which, for the first time, sought to apply legal standards for the protection of combatants against unnecessary suffering, and to the drafting of Protocol I of 1977 to the Geneva Conventions. The latter established an additional standard for protecting civilian victims of international armed conflict.

Article 35 of Protocol I provides:

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.³⁴

Protocol I also specifically outlaws “indiscriminate attacks,” which are defined as those not directed at a specific military objective or that employ weapons that cannot be so directed.³⁵ While the Protocol recognizes that any attack, however carefully executed, may involve collateral damage, Article 51 prohibits attacks on civilians that cause loss of life or property deemed “excessive in relation to the concrete and direct military advantage anticipated.” Article 57(2)(a)(iii) obligates those making operational decisions to refrain from launching attacks “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.”³⁶

Left undefined is the term “excessive.” The diplomatic conference substituted it for the term “disproportionate” proposed in a draft prepared by the International Committee of the Red Cross (ICRC), but without explaining the purpose of the change. The intent of both formulations appears to be virtually interchangeable.³⁷ Also unanswered is the question of how a command decision’s lawfulness is to be reviewed after the fact. Nevertheless, the conference generally supported making a standard of proportionality central to that review. Australia, Canada, Finland, France, Germany, the United Kingdom, and the United States were among its strongest proponents. The U.S. representatives said that the new Protocol, in incorporating the principle of proportionality, was merely codifying existing customary international law.³⁸

³⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 UNTS 3 [hereinafter Protocol I].

³⁵ *Id.*, Arts. 48, 51(4). An important decision regarding the indiscriminate deployment of a weapon is that rendered by the German Federal Constitutional Court in 2006, stipulating that an armed forces authorization to shoot down any aircraft intended to be used against human lives (i.e., one that was hijacked by terrorists to be used as a weapon) is incompatible with the constitutional guarantee of the right to life (Art. 2.2, sentence 1 of the Basic Law) and Article 1.1’s guarantee of human dignity to the extent that it fails to distinguish between perpetrators and persons on board the aircraft who are not participants in the crime. Bundesverfassungsgericht, Feb. 15, 2006, No. 1 BvR 357/05, *available at* <http://www.bverfg.de/entscheidungen/rs20060215_lbvr035705en.html>.

³⁶ Protocol I, *supra* note 34, Arts. 51(5)(b), 57(2)(a)(iii).

³⁷ Fenrick, *supra* note 31, at 97.

³⁸ *Id.* at 104.

Implicit in the drafting history of Protocol I is the widespread recognition that assessment of the proportionality of military tactics deployed in combat should not be left solely to the unfettered discretion of the combatants. The Protocol, in prohibiting the causing of “superfluous injury or unnecessary suffering” and the launching of “indiscriminate attacks,” employs terms that also invoke the principle of proportionality.³⁹ The International Committee of the Red Cross has commented that these provisions impose a legal obligation on combatants to engage in “a balance between military necessity . . . and the requirements of humanity.”⁴⁰ Such provisions, the ICRC adds, preclude “a degree of violence which exceeds the level which is strictly necessary to ensure the success of a particular operation in a particular case.”⁴¹ They also prohibit the inflicting of excessive damage on either combatants or civilians,⁴² and, while not prohibiting specific tactics or weaponry,⁴³ they do impose a “rule of proportionality” that bars any “deliberate and pointless extermination of the defending enemy.”⁴⁴

The ICRC *Commentary* concludes that the *jus in bello* embraces two applications of the principle of proportionality: one inhibiting recourse to specifically prohibited weapons, and the other prohibiting the excessive deployment of permitted weapons. It requires a “balance to be struck between the achievement of a military goal and the cost in terms of lives.”⁴⁵ The law of armed conflict

is based on the fundamental principle that belligerents do not enjoy an unlimited choice of means to inflict damage on the enemy. Since the entry into force of Protocol I to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, proportionality has been both a conventional and a customary principle of the law of armed conflict.⁴⁶

Making the abstract principle of proportionality applicable to the real world of action is no easy matter. Any attempt to do so must take into account the principle’s varied origins in such diverse contexts as moral philosophy and military history. Oliver O’Donovan, the Regius Professor of Moral and Pastoral Theology and Canon of Christ Church, Oxford, has pointed out that proportionality “has to do with the rational form . . . , i.e., with the shape of a successful act of judgment.”⁴⁷ Are priests and generals likely to see matters of rationality the same way? Battlefield judgment, he points out, is not exempt from the duty to implement a standard of rationality. In longstanding moral tradition,

³⁹ See Antonio Cassese, *Weapons Causing Unnecessary Suffering: Are They Prohibited?* 58 RIVISTA DI DIRITTO INTERNAZIONALE 12, 15 (1975); Stefan Oeter, *Methods and Means of Combat*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 105, 114, para. 401 (Dieter Fleck et al. eds., 1999).

⁴⁰ ICRC, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 392, para. 1389 (Yves Sandoz, Christophe Swinarski, & Bruno Zimmermann eds., 1987).

⁴¹ *Id.* at 396, para. 1395.

⁴² *Id.* at 404, para. 1418.

⁴³ *Id.* at 409, para. 1430.

⁴⁴ *Id.* at 477, para. 1598.

⁴⁵ Judith Gail Gardam, *Proportionality and Force in International Law*, 87 AJIL 391, 391 (1993) [hereinafter Gardam, *Proportionality and Force*]; see also JUDITH GAIL GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 13 (2004) (wherein she points out that the principle applies not only to the use of force by states in self-defense, but also to the authorization by the Security Council of collective use of force by member states constituting a “coalition of the willing”).

⁴⁶ Gardam, *Proportionality and Force*, *supra* note 45, at 391.

⁴⁷ OLIVER O’DONOVAN, THE JUST WAR REVISITED 48 (2003).

an act of war is held disproportionate if the damage it does is excessive to the measure of peace it can reasonably hope to achieve. Looked at from this side, an act of judgment is proportionate in the same way as any other act may be: there is a prudent economy of expenditure and return.⁴⁸

O'Donovan traces modern ethical origins of this application of the principle of proportionality-as-rational-judgment to the sixteenth-century philosopher-theologian Vitoria. He attributes to Vitoria the view, based on ancient Roman law precedents, that war could have as its objective only "to defend the public good, to reclaim losses and indemnify oneself, and to punish the wrongful aggressor."⁴⁹ Means employed to achieve more than this, or not necessary to its achievement, were, ipso facto, unjustified.

Judge Theodor Meron has shown that the modern rules also derive from hoary admonitions in the practice of chivalry, constraints that derive from military logistics but also from the imperatives of Christian (and other) hermeneutics and that already had currency in Shakespeare's time.⁵⁰ These constraints, O'Donovan notes, are not motivated purely by humanitarian concerns, but emerge from the longstanding and universal understanding that "there comes a point at which methods of combat reach such a pitch of destructiveness that they simply cease to offer proportionate defence in any conceivable circumstance, since any use of them will destroy, more or less without remainder, the good that it purported to save."⁵¹ O'Donovan calls this extreme the "categorically disproportionate means," noting that "[p]roportion is an elastic concept, but not indefinitely elastic."⁵² Another construction of that insight informed U.S. secretary of state Webster's correspondence with his British counterpart pertaining to the 1837 *Caroline* incident:⁵³ "It will be for [the British] to show, also, that the local authorities of Canada, even supposing the necessity of the moment . . . , did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."⁵⁴

Similar reasoning underpins modern international law, which generally prohibits combatants from deploying any means or methods that exceed what is necessary for rendering the enemy *hors de combat*. The 2001 commentary by the International Law Commission (ILC) on its Draft Articles on Responsibility of States for Internationally Wrongful Acts reiterates with approval the ICJ's view, expressed in the *Nuclear Weapons* advisory opinion, that "necessity and proportionality" are always "considerations" in assessing the legality of a resort to any kind of coercion.⁵⁵ As to choice of weapons, Professor Christopher Greenwood has summarized the

⁴⁸ *Id.*

⁴⁹ *Id.* at 49.

⁵⁰ THEODOR MERON, *BLOODY CONSTRAINT: WAR AND CHIVALRY IN SHAKESPEARE* (1998).

⁵¹ O'DONOVAN, *supra* note 47, at 62.

⁵² *Id.*

⁵³ For a close examination of these events and of the modern doctrinal origins of proportionality, see John E. Noyes, *The Caroline: International Law Limits on Resort to Force*, in *INTERNATIONAL LAW STORIES* 263 (John E. Noyes, Laura A. Dickinson, & Mark W. Janis eds., 2007).

⁵⁴ R.Y. Jennings, *The Caroline and McLeod Cases*, 32 *AJIL* 82, 89 (1938) (quoting letter of Daniel Webster to British minister Henry S. Fox, Apr. 24, 1841, 29 *Brit. Foreign & St. Papers* 1129).

⁵⁵ Draft Articles on Responsibility of States for Internationally Wrongful Acts, Commentary to Art. 21, para. 4, in Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), reprinted in [2001] 2 *Y.B. Int'l L. Comm'n* 74, UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter *Draft Articles on State Responsibility*] (quoting *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 ICJ REP. 226, para. 30 (July 8)).

now-prevalent view that “the crucial question is whether other weapons or methods of warfare available at the time would have achieved the same military goal as effectively while causing less suffering or injury.”⁵⁶ This is the “least deleterious means” standard for reviewing the proportionality of an otherwise lawful countermeasure. It appears elsewhere as the “least intrusive” method of proportionately negating the effect of a wrongful act.

That standard, however, does not require an attacked state to respond only in kind. Nor does it impose an identity of content or strength as between the attack and the countermeasure. A state, to save even one of its soldiers or civilians, is not restricted to killing only one enemy soldier, although it may not kill large numbers of enemy civilians to save one of its soldiers or civilians. “If we can prevent an attack that will kill one of our civilians by killing a number of enemy soldiers,” Professor Thomas Hurka concludes, “it seems we may do so almost whatever that number is.”⁵⁷ According to Professor Roberto Ago, writing as rapporteur of the International Law Commission’s work on state responsibility, if

a State suffers a series of successive and different acts of armed attack from another State, the requirement of proportionality will certainly not mean that the victim State is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating succession of attacks.⁵⁸

Here, again, context may be decisive. Whereas so-called trade wars (see part IV below) may sometimes invoke standards of strict equivalence in assessing the proportionality of lawful countermeasures, the law of armed conflict does not do so.

Does proportionality then yield an appropriate standard for testing the legality of a countermeasure? This is not an academic question. The effectiveness of the rules in influencing difficult decisions implicating the national interest inevitably must depend, at least in part, on their clarity and on the calculations of the parties regarding the likelihood that bad consequences will follow a finding that they have acted unlawfully. A system that ensures that judicial second opinions will be accessible may also help to clarify the texts, thereby guiding adversaries in subsequent disputes. The very fact that second opinions may be forthcoming may caution decision makers by emphasizing the accountability of states and the persons acting in their name.

In the law pertaining to military conflict, however, there are as yet few circumstances in which resort to second opinions is required, hence few judicial pronouncements. A 1928 arbitral panel is generally cited as the first to accept the necessity of “admissible proportionality between the alleged offence and the reprisals exerted.” It found “an evident disproportion between the [provocation] and the . . . acts of retaliation that followed.”⁵⁹ In another case reviewing the proportionality of force used in combat, the ICJ held that recourse to nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict.⁶⁰ Nevertheless, it was unable to “conclude definitively whether the threat or use of nuclear

⁵⁶ CHRISTOPHER GREENWOOD, *COMMAND AND THE LAWS OF ARMED CONFLICT* 24 (Strategic Combat Studies Institute Occasional Paper No. 4, 1993).

⁵⁷ Hurka, *supra* note 18, at 59.

⁵⁸ Addendum—Eighth Report on State Responsibility, para. 121, UN Doc. A/CN.4/318/Add.5–7 (1980), *reprinted in* [1980] 2 Y.B. Int’l L. Comm’n, pt. 1, at 13, 69–70, UN Doc. A/CN.4/SER.A/1980/Add.1 (Part 1).

⁵⁹ *Naulilaa* (Port. v. Ger.), 4 Ann. Dig. 274, 274–75 (Spec. Arb. Trib. 1928), 2 R.I.A.A. 1011, 1028 (in French).

⁶⁰ *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 55.

weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”⁶¹ It exhibited no such ambiguity, however, in endorsing the “cardinal principle” that international law prohibits the infliction of unnecessary suffering on combatants. “[I]t is accordingly prohibited,” the ICJ opinion states, “to use weapons causing . . . a harm greater than that unavoidable to achieve legitimate military objectives.”⁶² It added that “these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.”⁶³

In the same opinion, the judges also recognized the “cardinal principle” that “States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.”⁶⁴ As many targets, in practice, have mixed civilian and military use (power stations, for example) or are used by both civilians and military personnel (strategic bridges), proportionality inevitably enters any discourse in which this “cardinal principle” is invoked.

While these judicial pronouncements have somewhat clarified the relevance of the principle of proportionality to battlefield decisions and have gone some way toward creating a space for second opinions reevaluating such decisions, they have not yet been of much help in defining the precise standards for conducting a credible reevaluation. High on the list of problems encountered in devising secondary rules applying the principle of proportionality to combat-related events, as Michael Schmitt points out, is the “apples and oranges” phenomenon: the “inherent difficulty of valuation. How does one, for instance, compare tanks destroyed to the number of serious civilian injuries or deaths caused by attacks upon them? Dissimilar entities cannot be compared absent a common currency of evaluation.”⁶⁵

Many disputes about the proportionality of a response to a provocation, whether military or not, require the comparison of quite different ingredients in the original wrong and the subsequent riposte. Does an attack by country *A*, which has a huge army but only rudimentary arms, justify a nuclear response by the victim, country *B*, which has only a small army but very sophisticated weapons? Although tribunals and other commentators frequently endorse the principle of proportionality, they have been less than fastidious in explaining the exchange rate they have used to equate disparate integers: say, the military value of bringing a war to a swift end, against the toll of civilian deaths were it to be ended by recourse to nuclear weapons.⁶⁶ At the same time, efforts at greater specificity have proven divisive, pitting judges willing to impose a full review of the proportionality of operational choices against others more

⁶¹ *Id.* at 266, para. 105(2)(E). For an analysis of the interpretative dangers to which this opinion opens the door, see W. Michael Reisman, *Holding the Center of the Law of Armed Conflict*, 100 AJIL 852, 859 (2006).

⁶² Legality of the Threat or Use of Nuclear Weapons, *supra* note 55, at 257, para. 78; see also *supra* note 35.

⁶³ Legality of the Threat or Use of Nuclear Weapons, *supra* note 55, para. 79.

⁶⁴ *Id.*, para. 78.

⁶⁵ Michael N. Schmitt, *Fault Lines in the Law of Attack*, in TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 277, 293 (Susan C. Breau & Agnieszka Jachec-Neale eds., 2006).

⁶⁶ The Tokyo District Court, in the *Shimoda* case, heard a claim against the postwar Japanese government (as surrogates for the United States) by plaintiffs who had been injured in Hiroshima and Nagasaki. While the court held for the defendant on other grounds, it did find that the atomic bombings were disproportionate, focusing on the absence of military targets in both cities and ignoring the Japanese government's plea that the tactic had shortened the war and thus reduced the number of casualties. *Shimoda v. State*, 355 Hanrei Jiho 17 (1963), translated in 8 JAP. ANN. INT'L L. 231, 240 (1964), available at <<http://www.icrc.org/ihl-nat>>.

skeptical of their ability to “second-guess” tactical and strategic choices made in battlefield circumstances.

This division became starkly apparent when, in 2003, the proportionality of battlefield tactical decisions came under review in the *Oil Platforms* dispute between Iran and the United States.⁶⁷ At issue was the legality of U.S. attacks, in 1987 and 1988, on several offshore Iranian oil production facilities. In seeking to justify those attacks, the United States claimed to be acting in self-defense. A U.S.-reflagged Kuwaiti tanker had previously been attacked by a missile and a U.S. warship had struck a mine in the Persian Gulf, incidents Washington attributed to Iran, whose gulf oil platforms had been used to facilitate those attacks. Both parties, in addition to pleading self-defense, also invoked a bilateral treaty obliging them to ensure mutual “freedom of commerce and navigation” in the gulf.⁶⁸ The United States invoked Article XX of the same agreement, stipulating that either party could take measures “necessary to protect its essential security interests.”⁶⁹

A large majority of the ICJ’s judges thought this “necessity” clause warranted the Court’s making “an assessment of the conditions of legitimate self-defence under international law.”⁷⁰ The parties, the judges said, should have been guided by the Court’s earlier opinion in the *Nicaragua* case, that “the criteria of necessity and proportionality must be observed if a measure is to be qualified as self-defence.”⁷¹

In this instance, the principle of proportionality operated against the background of a rich factual matrix. The judges were given very specific pleadings on the factual and tactical considerations that had served as the basis for actions taken. The United States argued that the oil platforms were legitimate targets for countermeasures because the Iranian military forces stationed on them had monitored the movements of U.S. vessels, coordinated mine-laying activities, assisted small-boat attacks against nonbelligerent shipping, and fired at U.S. military helicopters. These activities, Washington claimed, tactically justified the platforms’ destruction.

The Court concluded, however, that the test of proportionality could not be met solely by demonstrating that actions were taken in response to an aggressive act, but also required evidence that these “actions were necessary and proportional to the armed attack”⁷² and “that measures taken avowedly in self-defence must have been necessary for that purpose.”⁷³ This requirement, the judges said, “is strict and objective, leaving no room for any ‘measure of discretion’.”⁷⁴ Applying the “strict and objective” standard, the Court’s majority was “not satisfied that the attacks on the platforms were necessary to respond to these incidents.”⁷⁵

In coming to this conclusion, the judges appear to have had a version of the “least deleterious means” test in mind. They referred to the fact that, prior to the attack, the United States had

⁶⁷ *Oil Platforms* (Iran v. U.S.), 2003 ICJ REP. 161 (Nov. 6).

⁶⁸ *Id.* at 174–76, paras. 22–26 (quoting Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Art. X(1), Aug. 15, 1955, 8 UST 899, 284 UNTS 93).

⁶⁹ *Id.* at 179, para. 32.

⁷⁰ *Id.* at 182, para. 41.

⁷¹ *Id.* at 183, para. 43.

⁷² *Id.* at 187, para. 51.

⁷³ *Id.* at 196, para. 73.

⁷⁴ *Id.*

⁷⁵ *Id.* at 198, para. 76.

never complained of military activity on the platforms.⁷⁶ They may also have had a notion of equivalence in mind, a test more current in assessing proportionality in trade disputes. The majority placed the attack in the context of “the scale of the whole operation” against Iranian assets, which, in addition to the attack on the oil platforms, “involved, *inter alia*, the destruction of two Iranian frigates and a number of other naval vessels and aircraft. 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,” the U.S. actions could not be regarded, “in the circumstances of this case, as a proportionate use of force in self-defence.”⁷⁷ By fourteen votes to two, the Court found that the U.S. recourse to force was not “justified.”⁷⁸

British judge Rosalyn Higgins was outspoken in criticizing the Court’s conjectural treatment of the presented facts, as well as the absence of enunciated standards in the assessment of the proportionality of the U.S. response.⁷⁹ The American judge, Thomas Buergenthal, in a separate (but not dissenting) opinion, argued that a government’s “own reasonable assessment,”⁸⁰ even if subject to subsequent judicial review, should at least have been accorded more deference by the judges: a sort of margin of appreciation.

The judiciary’s role in such “battlefield” disputes is complicated by the problem of defining the applicable situational perspective from which to render a reasoned second opinion. This complexity is aggravated when what must be assessed, with the advantage of hindsight, is the proportionality of actions taken in the heat of battle. What may be reasonably proportionate in a specific circumstance can depend on whether one adopts the test of the dispassionate judge, the passionate combatant, or some other interpreter. It may depend upon whether an action appears reasonable in the light of what was known by the initiator of the attack, what ought to have been known, or what came to be known later.

This question of appropriate perspective was addressed in a 1948 trial of Nazi war criminals, in which the judges had to consider the legality of the “scorched earth” policy implemented by German forces in their retreat along the eastern front. Holding that they were “not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finnmark actually existed,” the judges, instead, focused on “the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time. . . . It is our considered opinion,” they concluded, “that the conditions as they appeared to the defendant at the time were sufficient, upon which he could honestly conclude that urgent military necessity warranted the decision made.”⁸¹

Evidently, the judiciary, in implementing the law pertaining to proportionality, faces powerful conundrums. When, as in the *Oil Platforms* litigation, judges do attempt to become specific in applying the general principle of proportionality to the facts of an actual military confrontation, they 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

⁷⁶ *Id.*

⁷⁷ *Id.* at 198–99, para. 77.

⁷⁸ *Id.* at 218, para. 125(1).

⁷⁹ *Id.* at 233–35, paras. 30–39 (Higgins, J., sep. op.).

⁸⁰ *Id.* at 285, para. 37 (Buergenthal, J., sep. op.).

⁸¹ *In re* List (Hostages Trial, 1948), 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 34, 69 (1949).

burden of proof. In the *Oil Platforms* case, the Court had to decide in addition whether proportionality was to be determined by reference to one particular incident, or in the overall context of the larger conflict. These are difficult questions. Yet, if courts are to be charged with reviewing the proportionality of choices made by states and persons in real combat, their credibility, as also the purchase of the idea of proportionality itself, will depend on the persuasiveness with which the judges are able to weigh the evidence and enunciate and apply consistent secondary rules.

To be sure, courts are not the only instrumentalities in which military proportionality is the subject of legal discourse. In 1990 proportionality discourse featured in the debates on a key Security Council resolution authorizing “States . . . to use all necessary means” to oust Iraqi forces from Kuwait “and to restore international peace and security in the area.”⁸² Whether the coalition of the willing, led by the United States, the United Kingdom, and France, was using disproportionate military means in excess of those authorized by the Council became the subject of repeated debate.⁸³ In these Security Council debates, as in the litigation before the ICJ, a salient issue was whether the parties taking countermeasures may deploy whatever means are necessary to repel the challenge, or whether the means must be limited to ones roughly equivalent to those chosen by the enemy.⁸⁴ As Professor Ago indicated in connection with the ILC’s project on state responsibility, a “limited use of armed force may sometimes be sufficient for the victim State to resist a likewise limited use of armed force by the attacking State, *but this is not always certain.*”⁸⁵ What of those disputes in which a hammer appears to be the only utensil readily available to crack a nut?

This issue was illustrated on July 12, 2006, when Hezbollah forces attacked Israel from Lebanese territory, killing three soldiers and capturing two. Israel responded with extensive air bombardment of Lebanon, whose government, including members of Hezbollah, it held responsible for failing to prevent the attacks. As required by Charter Article 51, it notified the Security Council, asserting the right to use force in self-defense.⁸⁶ In the ensuing month of conflict, Israeli land, sea, and air forces destroyed roads, bridges, airports, power stations, and whole urban neighborhoods thought to harbor Hezbollah members. In all, about 1,000 civilians in Lebanon were killed by these strikes, with 3,500 wounded and almost a million displaced.⁸⁷ Hezbollah, for its part, fired hundreds of rockets into Israel, causing 50 civilian and 114 military casualties.⁸⁸

Israel noted that “[c]ivilians do not enjoy absolute immunity. Their presence will not render military objects immune from attack for the mere reason that it is impossible to bombard them

⁸² SC Res. 678, para. 2 (Nov. 29, 1990).

⁸³ See Statement of Sir David Hannay (UK), UN Doc. S/PV.2977 (Part II) (closed), at 72 (Feb. 14, 1991).

⁸⁴ Judge Roberto Ago, in his previous capacity as rapporteur on the International Law Commission’s project to draft articles on state responsibility, tended to the former of these positions. See Addendum—Eighth Report on State Responsibility, *supra* note 58, at 69.

⁸⁵ *Id.*, para. 120 (emphasis added).

⁸⁶ Identical Letters Dated 2006/07/12 from the Permanent Representative of Israel to the United Nations Addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2006/515-A/60/937.

⁸⁷ Humanitarian Factsheets on Lebanon, UN Office for the Coordination of Humanitarian Affairs Press Releases IHA/1215 (Aug. 11, 2006), IHA/1216 (Aug. 14, 2006).

⁸⁸ Security Council Calls for End to Hostilities Between Hizbollah, Israel, Press Release SC/8808 (Aug. 11, 2006).

without causing injury to the non-combatants.⁸⁹ Initially, most members of the Security Council except Qatar and China supported Israel's claim to be acting in self-defense,⁹⁰ as did the UN secretary-general.⁹¹ When the conflict intensified, however, even states usually sympathetic to Israel began to warn it to "act in proportionate and measured ways—to conform to international law."⁹²

But proportionate to what? To the casualties inflicted by Hezbollah's July 12 raid? Or to the whole panorama of hostilities that Israel had endured over many years from Lebanese territory? The UN secretary-general's 2006 report on the United Nations Interim Force in Lebanon records a litany of previous cross-border incidents, including raids and rocket attacks on Israeli settlements, long predating the July 12 event.⁹³ Israel thus insisted that its actions were proportionate, not when weighed against one triggering incident but to the overall problem caused by Hezbollah's manifest aim of destabilizing Israel's northern frontier. Lebanon, in turn, insisted that it was being victimized disproportionately, inasmuch as its civilians were not responsible for the actions of Hezbollah but were being targeted indiscriminately.⁹⁴

As the fighting continued, most, but by no means all, states taking a position on the matter began to condemn Israel's military tactics as disproportionate.⁹⁵ The Commission of Inquiry on Lebanon established pursuant to UN Human Rights Council Resolution S-2/1⁹⁶ concluded that Israel's military campaign against Hezbollah constituted "excessive, indiscriminate and disproportionate use of force," which went "beyond reasonable arguments of military necessity and of proportionality,"⁹⁷ a conclusion endorsed by the secretary-general.⁹⁸ The UN high commissioner for human rights, Judge Louise Arbour, raised the possibility of prosecutions. "The scale of killings in the region, and their predictability," she said, "could engage the personal criminal responsibility of those involved, particularly those in a position of command

⁸⁹ Israel Ministry of Foreign Affairs, Responding to Hizbullah Attacks from Lebanon: Issues of Proportionality, Legal Background (July 25, 2006), available at <<http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings>> (quoting 2 LASSA OPPENHEIM, INTERNATIONAL LAW 415 (H. Lauterpacht ed., 7th ed. 1952)).

⁹⁰ UN Doc. S/PV.5489 (July 14, 2006); UN Doc. S/PV.5493 (July 21, 2006).

⁹¹ Secretary-General Says 'Immediate Cessation of Hostilities' Needed in Lebanon, Press Release SC/8781 (July 20, 2006).

⁹² Dr. Kim Howells MP (UK), Statement, House of Commons Debate (July 17, 2006), available at <<http://www.publications.parliament.uk/pa/cm/cmhansrd.htm>>.

⁹³ Report of the Secretary-General on the United Nations Interim Force in Lebanon (for the Period from 21 January 2006 to 18 July 2006), UN Doc. S/2006/560 (July 21, 2006).

⁹⁴ Identical Letters Dated 2006/07/17 from the Chargé d'Affaires a.i. of the Permanent Mission of Lebanon to the United Nations Addressed to the Secretary-General and the President of the Security Council, UN Doc. S/2006/529-A/60/941; UN Doc. S/PV.5493, *supra* note 90; see also Andreas Zimmermann, *The Second Lebanon War: Jus ad bellum, jus in bello and the Issue of Proportionality*, 2007 MAX PLANCK Y.B. UN L. 99, available at <<http://www.mpil.de/ww/en/pub/news.cfm>>.

⁹⁵ Press Release SC/8781, *supra* note 91. Among those asserting disproportionality, in addition to the Arab states, were Argentina, Brazil, Chile, Djibouti, France, India, New Zealand, and Switzerland, but not the United Kingdom or the United States, which, together with Israel, asserted that the war was to be seen as part of the larger war on terror. Press Release SC/8808, *supra* note 88; UN Doc. S/PV.5493, *supra* note 90, at 4-5.

⁹⁶ Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council," Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1, UN Doc. A/HRC/3/2 (Nov. 23, 2006).

⁹⁷ *Id.* at 5, para. 25 (singling out attacks on civilians in this regard); see also *id.* at 71, para. 317.

⁹⁸ Report of the Secretary-General on the Protection of Civilians in Armed Conflict at 8, para. 26, UN Doc. S/2007/643 (Oct. 28, 2007).

and control. . . . [T]he bombardment of sites with alleged military significance, but resulting invariably in the killing of innocent civilians, is unjustifiable.”⁹⁹

Some defenders of the Israeli offensive have labeled calls for proportionality an ill-disguised form of anti-Semitism, “madness,” and a recipe for national “suicide.”¹⁰⁰ They pointed out that Israel, while a party to the four Geneva Conventions, has not ratified Additional Protocol I of 1977, which contains the only express requirement concerning proportionality in its Article 51(5)(b). Other authorities responded that this proportionality requirement has become international customary law and is therefore binding even on Israel.¹⁰¹

Whatever the technical legal position, proportionality has become an undeniable part of the public assessment of state conduct. A government contemplating a military action, as a matter of calibrating its strategy in cost/benefit terms, needs to keep this element—how that action is likely to be perceived—in clear focus, whether or not it is ultimately determinative. A 2007 study commissioned by the U.S. Air Force concluded that Israel had lost the war for public opinion by bombing too many targets of questionable importance to its aims, and by not explaining, in convincing terms of military necessity, why it had bombed what it had. That study concluded that “[i]ndividual elements of each target group might have been justified, but Israel also undertook an intentionally punishing and destructive air campaign against the people and government of Lebanon.” It cautioned that, in such a struggle, the battle for public opinion is as important as any military victory and that Israel, to its cost, lost that battle.¹⁰²

Some similar issues arise in connection with the 2008 Russian invasion of Georgia, ostensibly in response to Georgia’s actions in South Ossetia. Even were the latter activities to be determined to have been unlawful—a bitterly contended conclusion, given that South Ossetia is widely recognized as part of Georgia’s sovereign territory—the proportionality of Russia’s response would yet constitute a further locus for disputation.

What may one conclude about the role of proportionality in the law pertaining to military combat? This brief summary of pertinent experience demonstrates both the shortcomings of proportionality and its latent power.

What emerges is the seemingly irresistible proclivity of parties—and even of bystanders—to conduct their discourse on the assumption that proportionality is not merely an applicable, but an important, factor in conflict containment. Incongruously, however, that realization has not as yet generated a textured, mature jurisprudence conducive to the credible weighing of a military wrong against concomitant countermeasures.

The Role of Proportionality in Determining Individual Criminal Responsibility

Not only states are meant to be restricted by the principle of proportionality when acting against others. In modern international law, individuals, too, may be held accountable for

⁹⁹ Paul Reynolds, *Q&A: Mid-East War Crimes?* BBC NEWS, July 21, 2006, available at <http://news.bbc.co.uk/2/hi/middle_east/5198342.stm>.

¹⁰⁰ Richard Cohen, Op-Ed, . . . *No, It’s Survival*, WASH. POST, July 25, 2006, at A15. For a discussion of proportionality in the context of the Israeli war against Hezbollah in 2006, see ASIL NEWSLETTER, Sept./Oct. 2006, at 1, 4–5, 12.

¹⁰¹ Zimmermann, *supra* note 94, at 127–30.

¹⁰² Steven Erlanger, *Book Faults Israeli Air War in Lebanon*, N.Y. TIMES, Oct. 14, 2007, at A14 (a prepublication report excerpting the study, WILLIAM M. ARKIN, DIVINING VICTORY: AIRPOWER IN THE 2006 ISRAEL-HEZBOLLAH WAR (2007)).

crimes against humanity and violations of the laws of war. Such personal accountability was established by the Nuremberg trials in the period 1946–1949, and proportionality figures in its reckoning.¹⁰³

One of the most important of the cases against Nazi war criminals involved the industrialists who had brought Adolf Hitler to power and enabled his war machine's quest for world domination. In the *Krupp* case, the Military Tribunal was faced with the munitions magnate Alfried Krupp's defense that the "act charged [brutal exploitation of slave labor] was done to avoid an evil both serious and irreparable" to himself and his family.¹⁰⁴ Testimony revealed that the anticipated evil would have been minimal when compared with the wrong inflicted by Krupp. The Tribunal paraphrased the defense plea thus:

To avoid losing my job or the control of my property, I am warranted in employing thousands of civilian deportees, prisoners of war, and concentration camp inmates; keeping them in a state of involuntary servitude; exposing them daily to death or great bodily harm, under conditions which did in fact result in the deaths of many of them; and working them in an undernourished condition in the production of armament intended for use against the people who would liberate them and indeed even against the people of their homelands.¹⁰⁵

The judges rejected that plea, not because harm to the self is always irrelevant to assessing the legal consequences of the harm one may cause to others, but, rather, because, in the specific factual context, "it is difficult to conclude that the law of necessity justified a choice favorable to [defendants] and against the unfortunate victims who had no choice at all in the matter. Or, in the language of the rule, that the remedy was not disproportioned to the evil."¹⁰⁶ The judges examined evidence of what might have happened to Krupp, who was closely connected to Hitler, had he resisted the slave labor policy. They concluded that the consequences, compared with the effects of his brutal implementation of the slave labor policy, would have been negligible.¹⁰⁷

The case may be taken to stipulate that impugned actions cannot be excused unless it can be shown that the losses inflicted—in this case on the workers by Krupp's complicity—are outweighed by the costs that would have been incurred had those actions been resisted. This formulation of the principle of proportionality was reiterated, but considerably refined, when a committee established by the prosecutor at the International Criminal Tribunal for the Former Yugoslavia (ICTY) considered whether, in law and on the evidence, there were insufficient grounds to seek an indictment against those who had designed NATO's aerial bombardment of Belgrade in the Kosovo war.¹⁰⁸ The committee undertook its work with an extensive examination of the way the principle of proportionality affects any evaluation of means deployed in combat. "The main problem with the principle of proportionality," it reported,

¹⁰³ 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, NUERNBERG, OCTOBER 1946–APRIL 1949 (1950).

¹⁰⁴ *Id.*, United States v. Alfried Krupp, Case 10, at 1443 (U.S. Mil. Trib. III 1948).

¹⁰⁵ *Krupp*, *id.* at 1444–45.

¹⁰⁶ *Id.* at 1445.

¹⁰⁷ *Id.*

¹⁰⁸ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia paras. 71–79 (June 8, 2000), *reprinted in* 39 ILM 1257 (2000) [hereinafter ICTY Final Report]. On June 2, 2000, the prosecutor announced her decision not to take the issue to the Security Council. UN Doc. S/PV.4150, at 3 (June 2, 2000).

is not whether or not it exists but what it means and how it is to be applied. . . . It is much easier to formulate the principle of proportionality in general terms than it is to apply it in a particular set of circumstances because the comparison is often between unlike quantities and values.¹⁰⁹

Having acknowledged the difficulty of the task, however, the report made a creditable effort to implement and elucidate the general principle. In particular, it endorsed “the accepted interpretation that overall military advantage is considered in proportionality analysis, not just that resulting immediately and directly from an attack.”¹¹⁰ Sifting through the evidence pertaining to NATO’s high-altitude bombing, the committee concluded that it did not warrant bringing a criminal prosecution against those who had ordered the action because, although the civilian casualties “were unfortunately high,” the tactics deployed “do not appear to be clearly disproportionate.”¹¹¹ The committee supported this conclusion by carefully analyzing the legitimacy of the targets—bridges, convoys, and the radio and television station—and by weighing the military importance of each against the civilian casualties inflicted. Each was found to have been a valid target, even if some were of double use for both military and civilian purposes.¹¹² While “commanders have a duty to distinguish military objectives from civilians or civilian objectives,” the report noted, “it appears that with the use of modern technology, the obligation to distinguish was effectively carried out in the vast majority of cases.”¹¹³ After examining whether the “commanders displayed the degree of recklessness in failing to take precautionary measures which would sustain criminal charges,”¹¹⁴ the committee concluded that they had not.

Whatever one may think of these findings, the reasoning used to reach them is buttressed by credible evidence, thoroughly examined. The prosecutor’s committee endorsed the secondary rule that proportionality must be determined in the overall panorama of a conflict, rather than by a narrower episodic focus. Its report sustains the conclusion that, however difficult the process of fact-finding and despite the paucity of legal precedents, it is perfectly possible to apply the principle of proportionality to combat decisions and render a plausible second opinion.

This conclusion is reinforced in international criminal cases brought against individuals, where tribunals have applied principles derived from the law of state responsibility. In 2000 the trial chamber of the International Criminal Tribunal for the Former Yugoslavia, in denying the defense of a military officer charged with war crimes, examined his claim to have been exercising the right of belligerent reprisal. The judges stressed that the principle of proportionality

¹⁰⁹ ICTY Final Report, *supra* note 108, 39 ILM at 1271, para. 48.

¹¹⁰ Schmitt, *supra* note 65, at 297; see ICTY Final Report, *supra* note 108, at 1272, para. 52.

¹¹¹ ICTY Final Report, *supra* note 108, at 1279, para. 77.

¹¹² *Id.* at 1278–79, paras. 75–77.

¹¹³ *Id.* at 1273, para. 56.

¹¹⁴ *Id.* at 1276–77, para. 70. “But,” according to David Kennedy,

it is extremely difficult to see how one might, in fact, weigh and balance civilian deaths against military objectives. The idea of proportionality—or necessity—encourages a kind of strategy, and ethic, by metaphor: the metaphor of weighing and balancing. I have learned that if you ask a military professional precisely how many civilians you *can* kill to offset how much risk to one of your own men, you won’t receive a straight answer.

DAVID KENNEDY, OF WAR AND LAW 143 (2006); see also *Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity*, 86 ASIL PROC. 39 (1992) (discussion by Oscar Schachter, at 39; Françoise Hampson, at 45; Yoram Dinstein, at 54; Ruth Wedgwood, at 58).

requires “not only that the reprisals must not be excessive compared to the precedent unlawful act of warfare, but also that they must stop as soon as that unlawful act has been discontinued.”¹¹⁵ Moreover, “damage to civilians must not be out of proportion to the direct military advantage gained by the military attack.”¹¹⁶ The Tribunal held that, although these requirements are derived from the text of Geneva Protocol I, they “are now part of customary international law, not only because they specify and flesh out general pre-existing norms, but also because they do not appear to be contested by any State, including those which have not ratified the Protocol.”¹¹⁷ Today, these principles of proportionality, specifically conceived to limit the discretion of states, also limit that of individuals.

Three years later, another trial chamber of the ICTY, in the 2003 *Galić* case, endorsed the *Hostages Trial* rule on the appropriate judicial perspective in rendering second opinions on state conduct of warfare.¹¹⁸ “In determining whether an attack was proportionate,” the judges said, “it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.”¹¹⁹ In rendering its “second opinion” as to this balance, the Tribunal placed itself neither in the position of the actual perpetrator at the moment of choosing between available options, nor in that of a person with perfect hindsight, but, rather, in that of an international version of the common law’s reasonable man, who has carefully considered all the evidence available at the critical time and shaped a rational choice between available means.¹²⁰ One year later, in the *Čerkez* case, ICTY judges further developed this standard. After careful examination of the evidence available to the perpetrators, they concluded that the “wilful and large scale destruction of Muslim shops and houses” was “not justified by military necessity.”¹²¹

Other parts of the law established with regard to the responsibility of states have been incorporated in the jurisprudence of personal criminal liability for violations of the law of armed combat. Thus, the ICTY, following the Geneva Conventions and the ICJ, has held that

the general lawfulness of destroying the life or limb of an enemy combatant is restricted by the principles of necessity and proportionality. . . . It follows that the unnecessary or wanton application of force is prohibited and that “a belligerent may only apply that amount and kind of force necessary to defeat the enemy.”¹²²

¹¹⁵ Prosecutor v. Kupreškić, No. IT-95-16-T-14, para. 535 (Jan. 14, 2000).

¹¹⁶ *Id.*, para. 524. “The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack.” Prosecutor v. Galić, No. IT-98-29-T, para. 58 (Dec. 5, 2003); see also YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 119–29 (2004) (including a nuanced discussion of the law’s evolution, leading to the conclusion that “[n]owadays, customary international law recognizes the principle of proportionality” as applicable to attacks on, or collateral damage to, civilians in armed conflict, *id.* at 120).

¹¹⁷ Prosecutor v. Kupreškić, *supra* note 115, para. 524.

¹¹⁸ See text at note 81 *supra*.

¹¹⁹ Prosecutor v. Galić, *supra* note 116, para. 58.

¹²⁰ Another “objective criterion” has been proposed: “how a reasonable commander should have determined whether there existed military necessity.” YUSUF AKSAR, *IMPLEMENTING INTERNATIONAL HUMANITARIAN LAW: FROM THE AD HOC TRIBUNALS TO A PERMANENT INTERNATIONAL CRIMINAL COURT* 170 (2004).

¹²¹ Prosecutor v. Kordić and Čerkez, No. IT-95-14/2-A, para. 426 (Dec. 17, 2004).

¹²² *Id.*, para. 686 (quoting Professor Greenwood, *Historical Development and Legal Basis*, in *THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS*, *supra* note 39, at 1, 30, para. 130).

III. THE PRINCIPLE OF PROPORTIONALITY IN NONMILITARY COUNTERMEASURES

The principle of proportionality has gained in specificity through the enunciation and cross-referencing of applicable standards by tribunals rendering second opinions on the lawfulness of military measures used in conflicts between states. It has also benefited from tribunals' second opinions on the lawfulness of nonmilitary measures.¹²³

The right to respond to an unlawful provocation with nonmilitary countermeasures is specifically recognized in the International Law Commission's draft articles on state responsibility.¹²⁴ This presumptive act of codification situates lawful countermeasures in the context of the right to self-help. It envisions various nonmilitary responses intended to effect restitution, reparations (compensation), and satisfaction. Each license to respond, however, is hedged by the principle of proportionality. While a state unlawfully transgressing against another is "under an obligation to make restitution,"¹²⁵ and the victim is allowed to secure restitution "to re-establish the situation which existed before the wrongful act was committed,"¹²⁶ restitution may not impose a burden "out of all proportion to the benefit"; for example, under circumstances in which compensation offers a reasonable alternative remedy.¹²⁷

Insofar as restitution cannot make good the damage caused, the articles call for compensation but provide that the amount "is not concerned to punish the responsible State, nor does compensation have an expressive or exemplary character."¹²⁸ In other words, the compensation demanded should be proportionate to the actual injury caused, yet serve neither as punishment for past, nor as means to deter future, wrongs. In the event that restitution or compensation cannot redress the injury—for example, when the wrong is not material but results purely from bad faith, as in the breach of an international obligation owed by one state to another—then the articles hold the wrongdoer "under an obligation to give satisfaction."¹²⁹ However, this, too, "shall not be out of proportion to the injury and may not take a form humiliating to the responsible State."¹³⁰

The effect of these provisions' references to proportionality is to give notice that the responding state's choice between available strategic options is open to post hoc review by a "second opinion" as to the appropriateness of the option chosen. If the second opinion finds the

¹²³ Article 2(4) of the UN Charter bars states "from the threat or use of force" without specifying a distinction between military and nonmilitary force. It may be surmised that this ban was intended to apply to military force, despite efforts by some to have it be applicable to all force. For a discussion of this point, see NIKOLAS STÜRCHLER, *THE THREAT OF FORCE IN INTERNATIONAL LAW* 44–52 (2007). In the *Corfu Channel* case, the ICJ expressed the view that a demonstration of naval force by Britain in the territorial waters of Albania, when provoked by mine laying, and deploying no actual recourse to military force, did not constitute a violation of Article 2(4) because it was not intended to exercise political pressure on Albania but merely to sweep mines. *Corfu Channel (UK v. Alb.)*, Merits, 1949 ICJ REP. 4 (Apr. 9).

¹²⁴ See *supra* note 55.

¹²⁵ *Id.*, Art. 35.

¹²⁶ *Id.*

¹²⁷ *Id.*, Art. 35(b).

¹²⁸ *Id.*, Commentary to Art. 36, para. 4.

¹²⁹ Draft Articles on State Responsibility, *supra* note 55, Art. 37(1).

¹³⁰ *Id.*, Commentary to Art. 37(3) (quoting the tribunal in the *Rainbow Warrior* arbitration to the effect that "a long established practice of States and international Courts and Tribunals of using satisfaction as a remedy . . . relates particularly to the case of moral or legal damage done directly to the State, especially as opposed to the case of damage to persons involving international responsibilities," *Rainbow Warrior (NZ/Fr.)*, 20 R.I.A.A. 217, 272–73, para. 122 (1990)).

response disproportionate—for example, if “less intrusive means” would have sufficed—then responsibility for acting unlawfully may attach to both parties. In 1997 the ICJ rendered a second opinion in just such circumstances in the *Gabčíkovo-Nagymaros* case, having examined the proportionality of nonmilitary countermeasures taken by Czechoslovakia after Hungary 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.¹³¹ Czechoslovakia (acting on behalf of what later became Slovakia) 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, “[T]he effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.”¹³² It added that

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—with the continuing effects of the diversion of these waters on the ecology of the riparian area [in Hungary]—failed to respect the proportionality which is required by international law.¹³³

It concluded that the Czechoslovak diversion “was not a lawful countermeasure because it was not proportionate.”¹³⁴

In the *Gabčíkovo* case, the principle of proportionality proved determinative, as it did in the Report of the Prosecutor’s Committee to Review the NATO Bombing Campaign Against Yugoslavia. But, whereas the latter carefully spelled out the criteria for reaching its conclusion, the ICJ, in *Gabčíkovo*, seemed to assume that any reasonable person would agree, once having accepted the general requirement of proportionality, that Czechoslovakia’s unilateral diversion of an international river, one actively used by both it and Hungary for navigation, irrigation, and power generation, was not a proportionate response to Hungary’s failure to carry out its obligation to construct the previously agreed-upon scheme of public works. Although such an assumption may be reasonable, the Court missed an opportunity to develop the jurisprudence of proportionality, either by spelling out secondary rules for weighing one kind of wrong against a very different kind of remedy (perhaps by monetizing each), or by developing the general theory of retributive restraint implicit in the “least intrusive means” standard.

It is a characteristic of the proportionality principle, as of all such general principles of law, that they cry out for creative efforts by those charged with rendering second opinions to seek to narrow the principle’s band of indeterminacy. Instead, too often tribunals, in the face of scant evidence, fail to make a credible calculation of proportionality, settling for a defensible, but largely undefended, conclusion that a disputed action was, or was not, proportionate. Aware that majorities become harder to build as the judges seek to explain their conclusions, tribunals are tempted to write as if the thing explained itself. The cases pertaining to war seem particularly susceptible to such elision, but the problem also arises in nonmilitary disputes. An

¹³¹ *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 ICJ REP. 7 (Sept. 25).

¹³² *Id.* at 56, para. 85.

¹³³ *Id.*

¹³⁴ *Id.*, para. 87.

example is the 1978 *Air Services* arbitration between France and the United States.¹³⁵ In that case, the issue of proportionality arose because the United States had suspended all of Air France's flights between Los Angeles and Paris in response to France's refusal to allow Pan American, an American carrier flying between the same cities, to stop in London for a change of gauge. On its face, the American countermeasure had more severe economic consequences for Air France than the French policy had imposed on the U.S. competitor.¹³⁶ Was the response disproportionate? The tribunal agreed with France that "all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach; this is a well-known rule."¹³⁷ Nevertheless, the tribunal found that if

the importance of the issue is viewed within the framework of the general air transport policy adopted by the United States Government and implemented by the conclusion of a large number of international agreements with countries other than France, the measures taken by the United States do not appear to be clearly disproportionate when compared to those taken by France.¹³⁸

The tribunal came to this conclusion by relying on a rule that had not been urged by either party, one that "permits states to apply countermeasures that would be disproportionate in an economic sense, in order to enforce a principle."¹³⁹

Instead of explaining this defensible, but not self-evident, conclusion, the tribunal complained of the paucity of evidence. "Neither Party," the decision observed, "has provided the Tribunal with evidence that would be sufficient to affirm or reject the existence of proportionality in these terms and the Tribunal must be satisfied with a very approximative appreciation."¹⁴⁰ This sort of complaint—the paucity of pleaded facts on which a tribunal can render an informed second opinion regarding the necessity, equivalence, and proportionality of countermeasures—is echoed in much litigation involving proportionality. One wonders, though, whose fault this is. Judges and arbitrators have ways of alerting disputants to their desire for presentations with better production, targeting, or analysis of evidence and data. When tribunals want and need the help of disputing parties in marshaling the evidence necessary to reach a reasoned conclusion, they should ask for it.

Sometimes, however, the tribunal has no opportunity to obtain greater assistance from the parties. An instance is the ICJ's advisory opinion on Israel's decision to construct a barrier-wall in the West Bank of the Palestinian territories to keep out persons bent on committing terrorist acts within Israel.¹⁴¹ That issue came before the Court in 2004, when the UN General Assembly invited it to assess "the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, . . . considering the rules and principles of international

¹³⁵ Air Services Agreement of 27 March 1946 (U.S. v. Fr.), 18 R.I.A.A. 417 (1978) [hereinafter *Air Services Agreement*].

¹³⁶ For a full discussion, see Lori Fisler Damrosch, *Retaliation or Arbitration—or Both? The 1978 United States–France Aviation Dispute*, 74 AJIL 785, 791 (1980).

¹³⁷ Air Services Agreement, *supra* note 135, at 443, para. 83.

¹³⁸ *Id.* at 443–44, para. 83.

¹³⁹ Damrosch, *supra* note 136, at 792.

¹⁴⁰ Air Services Agreement, *supra* note 135, at 444, para. 83.

¹⁴¹ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ REP. 136 (July 9).

law.¹⁴² According to a report of the UN secretary-general, the wall's planned route virtually separated 975 square kilometers, or 16.6 percent of the West Bank, and almost four hundred thousand Palestinians from the rest of the Palestinian territory,¹⁴³ creating a "closed area" in which Palestinians' movements would be restricted and controlled.¹⁴⁴

The Court was "not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril which it has invoked as justification for that construction."¹⁴⁵ It cited with approval the general test for "necessity" proposed by the ILC: that the measures otherwise in violation of international law must demonstrably have been "the only way for the State to safeguard an essential interest against a grave and imminent peril,"¹⁴⁶ a test setting the bar somewhat higher than the "least intrusive means" standard. It confirmed its decision in the *Hungary/Slovakia* case that "the State concerned is not the sole judge of whether those conditions have been met."¹⁴⁷

Again, the second opinion was sharply criticized both for vagueness and for inappropriate judicial second-guessing of difficult security issues. It surely suffers from vagueness in reaching the conclusion that another, less intrusive route would have provided Israel with as much security and less hardship for Palestinians. But it was the refusal of Israel to engage with the ICJ that is at least partly to blame for the Court's inability to develop a more credible balancing of the countervailing rights at issue and to spell out the basis for its finding that Israel's countermeasures were disproportionate.

A broader criticism leveled at the opinion was that judges are inherently unsuited to review such tactical and strategic field decisions. This view was challenged, however, in several subsequent rulings by the High Court of Israel in actions brought by Arab landowners displaced by the barrier. The Israeli Court did not shy away from issuing second opinions, applying a test very similar to that of the ICJ. In ordering the authorities to reroute the wall, the judges held that they were "not convinced that it is essential, due to military-security considerations, to keep the current route."¹⁴⁸ In its decisions, the Israeli Court was able to engage in the careful proportionality analysis that had eluded the ICJ, comparing the government's legitimate objective with the actual means used to pursue that objective and carefully canvassing evidence of the necessity of the barrier in the light of the stated strategic objective. The judges pored over the geography and did the arithmetic. In another example, they observed in the *Beit Sourik* case that one part of the wall's route separated Arab owners from 250 hectares of their land. Yet, noting that its stated purpose was to protect the Jewish village of Modi'in Illit, they concluded, on close examination, that the primary effect of the chosen route was to protect not Modi'in Illit, but, rather, an unauthorized new settlement that might be built nearby. Thus, the High Court found that the loss of land and access imposed on the local Arab population was disproportionate and unnecessary for the legitimate self-defense of the existing settlement. The

¹⁴² *Id.* at 164, para. 66.

¹⁴³ *Id.* at 170, para. 84.

¹⁴⁴ *Id.* at 170–71, para. 85.

¹⁴⁵ *Id.* at 195, para. 140.

¹⁴⁶ *Id.* (citing Draft Articles on State Responsibility, *supra* note 55, Art. 25).

¹⁴⁷ *Id.* (quoting Gabčíkovo-Nagymaros Project, *supra* note 131, at 40, para. 51).

¹⁴⁸ HCJ 8414/05, *Yassin v. Israel* (Sept. 4, 2007), excerpted in Israel Ministry of Justice, Dep't for Human Rights and Foreign Relations, *The Security Fence 5*, para. 14, available at <<http://www.justice.gov.il/NR/rdonlyres/8FE32643-48F4-4FD5-BC15-F35ED83B232B/0/AnswerSecurityFence.pdf>>; see also Isabel Kershner, *Israel's Top Court Orders Separation Barrier Rerouted*, N.Y. TIMES, Sept. 5, 2007, at A3.

Israeli judges concluded 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 that this injury] can be substantially decreased by an alternate route.”¹⁴⁹

By the way they reviewed military-tactical decisions, the Israeli judges demonstrated an exemplary capacity to apply the principle of proportionality to complex military and logistic facts that are not the normal fare of adjudication. At the same time, it must be acknowledged that carefully reviewing the appropriateness of a separation barrier’s route presents a less onerous challenge to judges than reviewing the proportionality of tactical and strategic decisions taken in the heat of battle. Precisely in such less fraught circumstances has proportionality been most effectively applied. Most tribunals asked to give a second opinion as to the legality of countermeasures have done so in cases not involving any actual clash of armies. This effectiveness of the proportionality principle is particularly demonstrable in the field of trade disputes.

IV. THE PRINCIPLE OF PROPORTIONALITY AND DISPROPORTIONALITY IN TRADE DISPUTES

The concept of “proportionality” is a prominent feature of the dispute settlement system of the World Trade Organization. The term appears explicitly in two footnotes to the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement).¹⁵⁰ More broadly, the set of rules governing trade disputes (regarding a violation of WTO law) 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.¹⁵¹ Due attention to the concepts of equivalence and proportionality has permeated the process adopted by arbitral panels in implementing the WTO agreements.

The WTO Dispute Settlement Understanding (DSU) sets out detailed procedures for resolving trade disputes.¹⁵² If a WTO member is found to be violating WTO law and the member does not correct the violation, the DSB may authorize the suspension of concessions

¹⁴⁹ HCJ 2056/04, *Beit Sourik Village Council v. Israel* (June 30, 2004), 43 ILM 1099, 1121, paras. 60–61 (2004).

¹⁵⁰ See notes 153 & 154 *infra*. The concept of proportionality is also incorporated in Article 52(1) of the European Charter of Fundamental Rights, Dec. 18, 2000, 2000 O.J. (C 364) 1, and Article 5 of the as yet unadopted European Constitutional Treaty, and it affects the jurisprudence of both the European Court of Human Rights and the European Court of Justice. This regional jurisprudence will be summarized below.

Special thanks go to Professor Steve Charnovitz of the *AJIL* Board of Editors for helping the author find a path through the WTO regulatory thicket.

¹⁵¹ Note that the term “countermeasure” in the WTO agreement is reserved for authorized retaliation following a violation of WTO rules regarding prohibited or actionable subsidies. Nevertheless, that term has been used in a broader way in some WTO arbitrations to refer to retaliation under the DSU rather than in the narrow textual way it is used in the SCM Agreement. In this article, the term “countermeasure” will be used to refer to any retaliation authorized by the WTO. See Andrew D. Mitchell, *Proportionality and Remedies in WTO Disputes*, 17 EUR. J. INT’L L. 985 (2006); Thomas Sebastian, *World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness*, 48 HARV. INT’L L.J. 337 (2007).

¹⁵² Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU], Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex 2, 1869 UNTS 401, in WORLD TRADE ORGANIZATION, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 354 (1999) [hereinafter THE LEGAL TEXTS], reprinted in 33 ILM 1226 (1994). The WTO documents cited in this article are available at the organization’s Web site, <<http://www.wto.org>>.

or other obligations. This remedy, which is referred to as “retaliation” or “SCOO,” is available only to the aggrieved party, who is then free to impose it. Since such lawful retaliation is the principal means for enforcing the trade regime’s rules in the event of their violation, the system permits an aggrieved party considerable leeway in fashioning the appropriate countermeasure while also subordinating its discretion to a second opinion on its proportionality. To put the matter succinctly: The violation of a reciprocal obligation creates an opportunity for the injured party to seek relief by the imposition of a countermeasure. That the countermeasure does not exceed limits imposed by proportionality is superintended by the dispute settlement procedure.

For certain disputes regarding subsidies, the regular DSU procedures are supplemented by more specific procedures in the SCM Agreement.¹⁵³ Under those procedures, the aggrieved party may seek authorization to take what are termed “countermeasures.”¹⁵⁴ When the WTO law violation being complained of is a prohibited subsidy, the SCM rules provide for the remedy of “appropriate countermeasures.” To clarify the meaning of the term “appropriate,” the SCM Agreement contains two footnotes stating that “[t]his expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.”¹⁵⁵

For a case involving a prohibited subsidy, the procedural rules are straightforward. The SCM, in its Article 4 on remedies, allows a state to challenge measures that allegedly constitute export subsidies made unlawful by Article 3. If not resolved by negotiations, such a challenge may be referred to a panel by the DSB. If the panel finds that the disputed measure is a prohibited subsidy, it must be withdrawn. And if, within a stipulated time, the unlawful measure is not rescinded, the DSB may authorize the complainant state (under Article 4.10) to take “appropriate countermeasures,” a term that, as noted above, a footnote explains “is not meant to allow countermeasures that are disproportionate.” Several arbitration panels have given substance to the double-negative term “not . . . disproportionate,” thereby casting light on its logical concomitant, the principle of proportionality.¹⁵⁶

The “not . . . disproportionate” qualifier is not used in the WTO Agreement beyond prohibited subsidies because, for any other violation of WTO law, the permissible extent of countermeasures is specified in a positive way. For example, for violations involving actionable subsidies, Article 7.9 of part III of the SCM provides that the countermeasures must be “commensurate” with the degree and nature of the adverse effects caused by the subsidy. This standard is similar to the more general remedy for other infractions of the trade regime found in Article 22.4 of the DSU. It provides that the level of retaliation (or SCOO) authorized after a finding of violations “shall be equivalent to the level of the nullification or impairment” of its treaty obligations found to have been incurred by the actions of the offending party. The latter, however, may object that the countermeasure sought is not “equivalent” to the level of “nullification or impairment” (Article 22.6), and demand arbitration to determine whether the

¹⁵³ Agreement on Subsidies and Countervailing Measures, Arts. 7.9, 7.10, WTO Agreement, *supra* note 152, Annex 1A, 1869 UNTS 14, *in* THE LEGAL TEXTS 231 (1999) [hereinafter SCM Agreement].

¹⁵⁴ *Id.*, Arts. 4.10, 7.9.

¹⁵⁵ *Id.*, Arts. 4.10 n.9, 4.11 n.10.

¹⁵⁶ *E.g.*, Decision by the Arbitrator, Canada—Export Credits and Loan Guarantees for Regional Aircraft, Recourse to Arbitration by Canada Under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, paras. 3.9, 3.11, 3.38, WT/DS222/ARB (adopted Feb. 17, 2003) [hereinafter Canada—Aircraft].

impact exceeds the level of trade nullification or impairment found to have been caused by the unlawful measure.

It will be readily apparent that these texts incorporate somewhat different notions of what constitutes a permissible countermeasure. Under the part of the SCM Agreement that pertains to prohibited subsidies, the complaining state is authorized to take "appropriate countermeasures" which are "not disproportionate." Under DSU Articles 22.4 and 22.7, which set a standard applicable to any dispute, the retaliation must be "equivalent" to the trade "nullification and impairment" produced by an offending state's unlawful actions affecting trade. It thus appears that, depending on the applicable provision under which retaliatory measures have been taken, arbitrators are meant to conduct either an *instrumental* inquiry as to whether the retaliatory means were appropriate to the purpose of having the violations stopped, or a *comparative* inquiry as to the equivalence between damage inflicted by the wrongful act and that inflicted by the countermeasures taken. Both streams of WTO arbitration suggest proportionality, although they do so in different ways.

Several arbitral panels have applied these provisions and examined the differences between them. In the 1999 *Banana* dispute between the United States and the European Union, the main issue was a discriminatory tariff disadvantaging U.S. exports. Since the cause of action concerned tariffs, not subsidies, the DSU's "equivalence" standard was applied. Comparing the SCM standard of "appropriateness" with the DSU standard of "equivalence,"¹⁵⁷ the arbitral panel concluded that "the ordinary meaning of 'equivalent' implies a higher degree of correspondence, identity or stricter balance between the level of the proposed suspension and the level of nullification or impairment" caused by the unlawful measure.¹⁵⁸ Implicitly, the proportionality required by the SCM standard was seen as not requiring so strict an equivalence between an unlawful measure and the corresponding "appropriate" countermeasure. The panel also applied the stricter "equivalence" standard when it compared "the value of relevant EC imports from the United States under the present banana import regime (the actual situation) with [what] their value [would have been] under a WTO-consistent regime."¹⁵⁹ The effect of the decision was to narrow significantly the band of indeterminacy surrounding the terms "equivalent" and "appropriate." The arbitration further made a jurisprudentially significant distinction between permissibly equivalent countermeasures and those that were impermissible because they were punitive.¹⁶⁰

Equivalence was again the preferred standard for determining allowable levels of retaliation by Canada against the European Community in response to the latter's failure to rescind a scientifically unsupported ban on Canadian hormone-treated beef exports.¹⁶¹ Applying the stricter standard, the arbitration compared Canada's actual exports with those that probably would have been achieved but for the distortion brought about by the unlawful constraint. In this way, by a process of public reasoning that applies interpretative rulings made in one case

¹⁵⁷ Decision by the Arbitrators, European Communities—Regime for the Importation, Sale and Distribution of Bananas, Recourse by European Communities to Arbitration Under Article 22.6 of the DSU, para. 7.1, WT/DS27/ARB (adopted Apr. 9, 1999).

¹⁵⁸ *Id.*, para. 6.5.

¹⁵⁹ *Id.*, para. 7.1.

¹⁶⁰ *Id.*, para. 6.3.

¹⁶¹ Decision by the Arbitrators, European Communities—Measures Concerning Meat and Meat Products (Hormones), Recourse by the European Communities to Arbitration Under Article 22.6 of the DSU, paras. 20, 36, 38, WT/DS48/ARB (adopted July 12, 1999).

to subsequent cases, the jurisprudence of proportionality gradually progresses toward a degree of determinacy that the treaty text does not provide, reinforcing the text's legitimacy. (It should be noted, however, that the SCOO imposed on the European Community in this case has not succeeded in achieving compliance with the arbitral finding.)

Although the standard of equivalence is generally applied in WTO disputes, the matter remains less clear with regard to retaliation in response to prohibited subsidies, where the SCM sets the standard at "appropriateness." In a dispute between Canada and Brazil, the arbitrators allowed the former to impose countermeasures on the latter to the full value of the latter's subsidies for global sales of Brazilian airplanes, rather than limiting the countermeasures to an amount strictly equivalent to the actual loss sustained by Canada.¹⁶² The arbitrator noted that the object of the "appropriateness" standard was not merely to compensate the complaining state for actual losses, but also to induce withdrawal of the offending subsidies themselves.¹⁶³ Thus, while a "countermeasure remains 'appropriate' as long as it is not *disproportionate*,"¹⁶⁴ that proportionality is not to be calculated simply by estimating the effect of the unlawful measure on the complaining state because "a countermeasure based on the actual level of nullification or impairment will have less or no inducement effect and the subsidizing country may not withdraw the measure at issue."¹⁶⁵

The finding of the arbitrators points to the conclusion in law that a coercive measure is proportionate as long as it does not exceed the amount necessary to bring about a reversal of the state's noncompliance with a legal obligation. Rejecting Brazil's claim that the Canadian countermeasures were punitive, the arbitrators distinguished between measures "intended to ensure that the State in breach of its obligations bring its conduct into conformity with its international obligations" and those that contain "an additional dimension meant to sanction the action of that State."¹⁶⁶ The decision appears to have accepted that a proportionate countermeasure cannot always have precisely the same weight as the measure provoking it. It also accepted that retaliation, to be effective, cannot always be configured as a mirror image of the offending measure. For example, Canada could not simply grant a countervailing subsidy like Brazil's to its own aircraft export industry "because other Members than the parties compete with the products of the parties"¹⁶⁷ and thus would be adversely affected.

The arbitration concluded that "a countermeasure is 'appropriate' *inter alia* if it *effectively* induces compliance."¹⁶⁸ As a result, Canada's countermeasures could be exerted at whatever level is appropriate to "inducing the withdrawal of the prohibited subsidy."¹⁶⁹ In effect, an "appropriate" countermeasure may be more onerous than one calculated to be merely "equivalent" to the wrong inflicted, as long as it is not "disproportionate" to the objective of ending

¹⁶² Decision by the Arbitrators, Brazil—Export Financing Programme for Aircraft, Recourse to Arbitration by Brazil Under Article 4.11 of the SCM Agreement, WT/DS46/ARB (adopted Aug. 28, 2000) [hereinafter Brazil—Export Financing].

¹⁶³ *Id.*, paras. 3.44–45.

¹⁶⁴ *Id.*, para. 3.51 n.51.

¹⁶⁵ *Id.*, para. 3.54; *see also* Canada—Aircraft, *supra* note 156.

¹⁶⁶ Brazil—Export Financing, *supra* note 162, para. 3.55.

¹⁶⁷ *Id.*, para. 3.58.

¹⁶⁸ *Id.*, para. 3.44.

¹⁶⁹ *Id.*, para 3.45.

illegal conduct.¹⁷⁰ Thus, when determining the proportionality of SCOO countermeasures, the test is calculated somewhat differently for prohibited subsidies than for other types of WTO violations. This distinction, however, is justified both by the applicable text and purpose of the SCM and DSU, and by the consistent arbitral jurisprudence emerging case by case.

That consistent line of reasoning was reiterated in the 2002 disposition of a complaint brought by the European Community concerning U.S. preferential tax treatment for foreign sales corporations, which was alleged to be a form of prohibited export subsidy.¹⁷¹ The complaint was upheld, prompting the imposition of European countermeasures against U.S. exports. In upholding the European calculation, the DSB arbitration defined the applicable SCM standard (“not disproportionate”) as one imposing a relationship “understood well enough in everyday experience” when

the instrument of measurement is perception by the naked eye rather than scrutiny under the microscope. It is not meant to entail a mathematically exact equation but soundly enough to respect the relative proportions at issue so that there is no manifest imbalance or incongruity. . . . But this does not require exact equivalence—the relationship to be respected is precisely that of “proportion” rather than “equivalence”.¹⁷²

Rather than require precise equivalence, the decision continued, the proportionality of the countermeasures should be assessed by “taking into account the legal status of the wrongful act and the manner in which the breach of that obligation has upset the balance of rights and obligations as between Members. It is from that perspective that the judgement as to whether countermeasures are disproportionate is to be made.”¹⁷³

Applying this instrumental standard, the arbitration concluded that, while the actual trade distortion suffered by the European Community as a result of the unlawful U.S. export subsidy may have been only about \$1,110 million, the EC countermeasures were not disproportionate in imposing trade barriers to a value of \$4,043 million on U.S. exports, a sum derived from calculating the total annual value of all U.S. subsidies given to exporters under the unlawful program. The “United States’ breach of obligation is not objectively dismissed,” the award held, “because some of the products benefiting from the subsidy are, e.g., exported to another trading partner. It is an *erga omnes* obligation owed in its entirety to each and every Member.”¹⁷⁴ Thus, the countermeasures “are not disproportionate to the initial wrongful act to which they are intended to respond.”¹⁷⁵ The arbitration concluded: “We saw nothing in the plain language of this text [SCM Article 4.10] which, on its face, dictates that the term ‘appropriate countermeasures’ must be *limited* in its meaning to ‘equivalence’ or correspondence (or some synonym) with the ‘trade impact’ on the complaining Member.”¹⁷⁶ The decision cites Article 49 of the International Law Commission’s draft articles on state responsibility to the effect that countermeasures may be taken “against a State which is responsible for an

¹⁷⁰ *Id.*, para. 3.51 n.51.

¹⁷¹ Decision of the Arbitrator, United States—Tax Treatment for “Foreign Sales Corporations,” Recourse to Arbitration by the United States Under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, WT/DS108/ARB (adopted Aug. 30, 2002) [hereinafter U.S.—Foreign Sales Corporations].

¹⁷² *Id.*, para. 5.18.

¹⁷³ *Id.*, para. 5.24.

¹⁷⁴ *Id.*, para. 6.10.

¹⁷⁵ *Id.*, para. 6.24; see also Canada—Aircraft, *supra* note 156, para. 3.9.

¹⁷⁶ U.S.—Foreign Sales Corporations, *supra* note 171, para. 5.30.

internationally wrongful act in order to induce that State to comply with its obligations.”¹⁷⁷ This formulation may allow the countermeasures’ permitted scope to be determined by reference to the totality of the unlawful measures and, in particular, to authorize an objective assessment of what would be required to effect their discontinuance.

The standard here introduced is compared, sometimes unfavorably, with the one applied in the *Canada Aircraft* case, where the arbitrator allowed the level of countermeasures to be raised by 20 percent above strict equivalence, an amount calculated to be “reasonably meaningful to cause Canada to reconsider its current position to maintain the subsidy at issue in breach of its obligations.”¹⁷⁸ The arbitrator, in explaining this figure, admitted that “adjustments such as the one we are making cannot be precisely calibrated. There is no scientifically based formula that we could use to calculate this adjustment. In that sense, the adjustment might be viewed as a symbolic one. Even so, we are convinced that it is a justified adjustment,” in light of Canada’s long and determined resistance to compliance, to have imposed countermeasures calibrated not to achieve equivalence but, rather, “to induce compliance with WTO obligations.”¹⁷⁹ However, in both the *Foreign Sales Corporations* and the *Canada Aircraft* cases, the arbitrators sought to adjust the permitted level of countermeasures to take into account the need to overcome evident reluctance of the wrongdoer to comply with its legal obligation. In devising countermeasures, an aggrieved party may take into account the prior record of the offending party in resisting any modification of its unlawful behavior. Nevertheless, the quantitative effect of these measures must not cross the threshold from securing appropriate redress to imposing retribution.¹⁸⁰

Criticism has been leveled at these determinations. “Even assuming that the purpose of countermeasures for prohibited subsidies is to induce compliance,” Andrew Mitchell has written, “to use this as a justification for increasing countermeasures beyond the degree of culpability or harm is plainly contrary to the principle of proportionality.”¹⁸¹ All the same, a rationale seems to be running through SCM arbitrations that construes the proportionality principle as permitting countermeasures to take into account not only the actual harm done by unlawful conduct, but also the length of time and obduracy with which that conduct has been pursued, and thus the level of response reasonably presumed necessary to convince the culpable party to change course.

As a whole, the record demonstrates the arbitrators’ capacity to deploy the principle of proportionality, creating juristic space for second opinions and, operating within this space, to conceive secondary rules that make the principle more readily predictable and applicable to a widening range of disputes. The examples need not derive solely from trade law. In 2001 the Appellate Body, in a case involving measures imposed by the United States on imports of

¹⁷⁷ *Id.*, para. 5.59 (quoting Draft Articles on State Responsibility, *supra* note 55, Art. 49).

¹⁷⁸ *Canada—Aircraft*, *supra* note 156, para. 3.121.

¹⁷⁹ *Id.*, para. 3.122.

¹⁸⁰ Decision by the Arbitrators, United States—Anti-Dumping Act of 1916 (original complaint by the European Communities), Recourse to Arbitration by the United States Under Article 22.6 of the DSU, WT/DS136/ARB (adopted Feb. 24, 2004); *see also* Decision by the Arbitrator, United States—Continued Dumping and Subsidy Offset Act of 2000 (original complaint by Brazil), Recourse to Arbitration by the United States Under Article 22.6 of the DSU, WT/DS217/ARB/BRA (adopted Aug. 31, 2004).

¹⁸¹ Andrew D. Mitchell, *Proportionality and Remedies in WTO Disputes*, 17 EUR. J. INT’L L. 985, 1004 (2006). The views of Canada and the United States are set out at DSB, Minutes of Meeting Held on 18 March 2003, WT/DSB/M/145, paras. 45–47, 49 (May 7, 2003).

Pakistani cotton yarn, supported its finding by incorporating “the rules of general international law on state responsibility, which require that countermeasures in response to breaches by states of their international obligations be commensurate with the injury suffered.”¹⁸² This reference to “general international law” was tied securely to Article 51 of the ILC’s draft articles on state responsibility, which declares that “[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.”¹⁸³ Notably, the Appellate Body, building its rule structure brick by brick, had no difficulty in incorporating relevant material from a legal instrument that had nothing whatever to do with trade as such. The reference to the articles on state responsibility by the Appellate Body in the *U.S.—Cotton Yarn* case was then cited with specific approval by another Appellate Body decision rendered the following year,¹⁸⁴ reinforcing the legitimacy of the principle through consistent application.

This process of gradual accretion is “a powerful tool wielded by the judiciary” and such arrogation by a politically unaccountable institution “tells us much about the nature, if not the maturity, of a particular legal system.”¹⁸⁵ The arbitrations, in a sense, are “making up the law,” but they are doing so by careful borrowing from more mature parts of the system. The justification for such arrogation of discretion by those empowered to render second opinions, simply, is that no trade regime could expect to operate effectively and secure the parties’ habitual compliance were it to leave adversaries free to determine two fundamental issues for themselves. The first is whether, and to what extent, a particular measure violates the rules. The second is whether, and to what extent, retributive measures may be taken by the adversely affected party against the violator. Without a credible institutional means for answering those questions, rules of conduct merely constitute an unattended armory, left open to those seeking to take the very sorts of spiraling reprisals the rules were intended to prevent.

The inclusion of an arbitration process thus fulfills the “non-escalation”¹⁸⁶ function of the regime. A move to arbitration or adjudication is necessary and inevitable if the regime is to secure its objectives. Once that move has been made, however, it is up to the instrumentality rendering the second opinion to strive to exercise its broad discretion in a reasoned, principled, and predictable fashion. If it succeeds in fulfilling that responsibility, case by case, then a growing body of clearly enunciated and consistent precedents will gradually narrow the decision makers’ ambit of discretion, as well as the principle’s band of indeterminacy. Trade arbitrations, increasingly, appear to strive to meet that challenge¹⁸⁷ despite criticism of one or another decision as unpredictable or inconsistent.¹⁸⁸

¹⁸² Appellate Body Report, United States—Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, para. 120, WT/DS192/AB/R (adopted Oct. 8, 2001).

¹⁸³ *Id.* n.90. The Appellate Body cited Article 51 of ILC, Titles and Texts of the Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading, UN Doc. A/CN.4/L.602/Rev.1 (July 26, 2001), which remained unchanged in Draft Articles on State Responsibility, *supra* note 55, adopted by the Commission later that year.

¹⁸⁴ Appellate Body Report, United States—Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, WT/DS202/AB/R, para. 259 (adopted Feb. 15, 2002).

¹⁸⁵ Axel Desmedt, *Proportionality in WTO Law*, 4 J. INT’L ECON. L. 441, 442 (2001).

¹⁸⁶ Sebastian, *supra* note 151, at 378.

¹⁸⁷ For a more critical view of arbitration’s role, see *id.* at 364–78.

¹⁸⁸ A recent WTO case criticized for its unpredictability is Appellate Body Report, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/AB/R (adopted Apr. 7, 2005).

Before passing on to the role of proportionality in other contexts, we should note that the sorts of second opinions discussed above, issued with respect to retaliatory measures taken by states against other states' alleged violations of trade agreements, do not exhaust the role of proportionality in the field of trade law. The DSU, as we have seen, provides for arbitration to determine whether restrictive policies of one state party violate the rules of the regime and thereby cause quantifiable harm to another party. Yet not all restraints are illegal. Article XX of the GATT provides a list of "general exceptions" to the prohibitions on quantitative and discriminatory restraints on trade. It states:

[N]othing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;

. . .

(d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement¹⁸⁹

The key term "necessary" has been interpreted by several GATT dispute panels. Assessing whether a restrictive provision of the United States Tariff Act of 1930 was commensurate with clause (d) of Article XX, a 1990 decision stipulated 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." The party claiming, by reference to one of the provisos of Article XX, the exceptional right not to implement a GATT obligation "is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions."¹⁹⁰ The same principle was applied in construing the legality of a Thai restriction on the importation of cigarettes, a violation of GATT that was claimed to be a health measure permitted under Article XX(b). The arbitration concluded that the restraint on cigarette imports was allowable "only if there were no alternative measure consistent with the [GATT], or less inconsistent with it."¹⁹¹

More adjudications have helped make Article XX's initially elastic principle more concrete. One involved an objection to Korean restrictions on beef imports, which forced small stores to opt to carry either domestic or imported meat, and larger stores to sell them in different locations. This "dual retail system" was defended as a way to protect consumers from fraudulent retail practices in accordance with Korea's Unfair Competition Act, a law that, it was argued, was a valid exercise of its right to implement appropriate domestic regulations in accordance with Article XX(d) of the GATT.¹⁹² In reaching its conclusion, the WTO Appellate Body

¹⁸⁹ General Agreement on Tariffs and Trade, Oct. 30, 1947, TIAS No. 1700, 55 UNTS 194 [hereinafter GATT].

¹⁹⁰ United States—Section 337 of the Tariff Act of 1930, para. 5.26, GATT B.I.S.D. (36th Supp.) at 345, 392–93 (1990).

¹⁹¹ Thailand—Restrictions on Importation of and Internal Taxes on Cigarettes, para. 75, GATT B.I.S.D. (37th Supp.) at 200, 223 (1991).

¹⁹² Appellate Body Report, Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef, para. 186, WT/DS161/AB/R & WT/DS169/AB/R (adopted Dec. 11, 2000).

examined the relevant concept of “necessity” and concluded that it was “not persuaded that Korea could not achieve its desired level of enforcement” by “selective, but well-targeted controls” and routine investigation of “potential wrongdoers,”¹⁹³ even if that “could well entail higher enforcement costs for the national budget.”¹⁹⁴ On that basis the tribunal concluded that the method of control chosen was not necessary to achieve the desired objective of consumer protection.¹⁹⁵

In another dispute, one between Canada and the European Union, the Appellate Body held that Canada had failed to establish that measures excluding its asbestos exports from the European market were “inconsistent with the obligations of the European Communities under the covered agreements,”¹⁹⁶ concluding, rather, that they were within the permissible exception (“necessary to protect human . . . health”) of Article XX(b). Specifically, the appellate tribunal found the exclusion “necessary” to France’s objective of eliminating all asbestos, and refused to heed Canada’s call to consider whether comparable levels of health protection could not have been achieved by a more selective form of prohibition. It concluded that the government’s chosen health policy—zero asbestos—could not be challenged as unreasonable on the ground that a different strategy would have been almost as efficacious in protecting the public health. France’s recourse to the exception permitted by Article XX(b) could not be reviewed by examining whether a slightly more relaxed policy might yield comparable levels of health protection with a lesser impact on trade. The tribunal could merely inquire whether the trade restriction was necessary to achieve the government’s chosen policy, not whether another policy might achieve a comparable level of health protection.¹⁹⁷ That is, it is up to the state to determine whether it seeks to eliminate, or merely to mitigate, the consequences of another state’s action that affects its people’s health. If the state decides to eliminate the threat entirely,¹⁹⁸ any means necessary to achieve that objective falls within the ambit of a discretionary countermeasure available to achieve that end. Lesser means, capable of effecting mitigation but not eradication, are not “reasonably available alternatives” to which it must have recourse. This reading makes predictable the finding by the Appellate Body of the proposition that the “necessity” of U.S. laws imposing restraints with a significant restrictive trade impact on Antiguan gambling services is not negated by the U.S. refusal of an invitation to engage in bilateral or multilateral consultations and/or negotiations with the complainant. The mere fact that “the United States did not enter into consultations with Antigua” to find other means to protect its “public morals or to maintain public order” did not demonstrate that less restrictive means were available and that the means actually deployed were therefore unnecessary.¹⁹⁹

It has been deduced from the cases that the jurisprudence recognizes a form of presumption:

¹⁹³ *Id.*, para. 180.

¹⁹⁴ *Id.*, para. 181.

¹⁹⁵ *Id.*, para. 182.

¹⁹⁶ Appellate Body Report, European Communities—Measures Affecting Asbestos and Asbestos-Containing Products, para. 193, WT/DS135/AB/R (adopted Mar. 12, 2001).

¹⁹⁷ *Id.*, paras. 168, 173–75.

¹⁹⁸ Of course, a panel would verify that the alleged threat is a real one. Moreover, a panel could look for corroboration that the defendant government is actually seeking the level of protection that it claims before a panel.

¹⁹⁹ Appellate Body Report, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, para. 373(D)(iii)(b), (iv)(a), WT/DS285/AB/R (adopted Apr. 7, 2005); *see also id.*, paras. 317–18.

[I]f the regulatory objective relates to some highly valued interest such as the protection of human life, then the challenged regulation will be upheld if there is any doubt as to the ability of the proposed alternative to achieve the same level of efficacy. This practice may be understood as a recognition of the fact that the costs of an erroneous decision—loss of life—would be extremely high, and that even a small probability of an erroneous decision counsels against condemning the measure under scrutiny.²⁰⁰

Where, however, the regulatory objective is to protect some lesser interest than life or health, the standard chosen to review a restraint on trade will tend to be more rigorous.²⁰¹

Similar “least restrictive means requirements” are attached to exceptions set out in several other trade agreements that postdate the GATT.²⁰² As with exceptions to treaty-based social rights protecting individual rights and freedoms (see below), so in the area of trade “the proportionality principle refers to the obligation to choose the *means least restrictive* of a certain societal interest” defined by a widely ratified international legal instrument.²⁰³ Thus, the proportionality of measures taken under the Sanitary and Phytosanitary Agreement has been reviewed by arbitration panels and in appeals to the Appellate Body. In the *Salmon* case, for example, Canada alleged that Australia’s ban on fresh, frozen, or chilled salmon violated the SPS Agreement’s requirement that health-protective constraints on imports not be “more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection, taking into account technical and economic feasibility.”²⁰⁴ The test, confirmed by the Appellate Body, stipulates that a measure will be found to be more restrictive than necessary (i.e., disproportionate) when (1) another measure is reasonably available to provide SPS protection, and (2) this alternative measure would achieve the appropriate level of protection, and (3) the alternative would be significantly less restrictive of trade. According to the tribunal, it is the complaining party that bears the burden of proving these three elements.²⁰⁵

This test incorporates in the context of international trade law a specialized aspect of the proportionality principle. The ubiquitous reference to the requirement that “least restrictive” measures be taken when the violation of a free trade norm is claimed to be “necessary” to protect a party’s lawful interest is also echoed in such diverse fields as the law of warfare and the law

²⁰⁰ Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403, 416 (2003). Since states are free to choose the level of consumer protection they wish to impose, the “necessity” test cannot be a strict cost-benefit analysis because the arbitration proceeds on the assumption that local benefits ipso facto justify the trade costs, so long as they are a bona fide exercise of the prudential policymaking discretion of the state and not a mere sham meant to divert trade. Donald H. Regan, *The Meaning of ‘Necessary’ in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing*, 6 WORLD TRADE REV. 347 (2007).

²⁰¹ Thus, “decisionmakers can condemn a challenged regulation even when the efficacy of the proposed alternative regulation may be less than the efficacy of the challenged regulation.” Sykes, *supra* note 200, at 416.

²⁰² Agreement on the Application of Sanitary and Phytosanitary Measures, WTO Agreement, Annex 1A, *in THE LEGAL TEXTS*, *supra* note 152, at 59 [hereinafter SPS Agreement]. Article 2.2 requires that any application to imports of measures intended to prevent the spread of diseases “is applied only to the extent necessary to protect human, animal or plant life or health.” *See also* Agreement on Technical Barriers to Trade, WTO Agreement, Annex 1A, *in THE LEGAL TEXTS*, *supra*, at 121. Article 2.2 provides that “technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create.”

²⁰³ Desmedt, *supra* note 185, at 445.

²⁰⁴ SPS Agreement, *supra* note 202, Art. 5.6.

²⁰⁵ Panel Report, Australia—Measures Affecting Importation of Salmon, para. 8.167, WT/DS18/R (adopted June 12, 1998); Appellate Body Report, para. 194, WT/DS18/AB/R (adopted Oct. 20, 1998); *see also* Appellate Body Report, Japan—Measures Affecting Agricultural Products, paras. 118–31, WT/DS76/AB/R (adopted Feb. 22, 1999).

of human rights, where similar principles have been formulated to limit recourse to exceptions. Whenever a code of law makes provision for a state of “exception” or “necessity,” there is likely also to be found, in treaty text and in judicial interpretations, some version of the “least restrictive means” principle. The application of that rule, which we will examine more closely in the context of human rights law, involves the rendering of a disinterested second opinion as to the proportionality of the exceptional measure taken by a party asserting a legitimate interest but derogating from the requirements of a treaty regime.

Observers have duly noted that neither the treaty texts, nor the pre-GATT arbitral panels have offered “much guidance as to how the necessity and least restrictive means requirements are to be implemented in practice . . . [B]ut the WTO decisions to date strongly suggest that cost-benefit logic lies at the center of analysis.”²⁰⁶ Some version of cost-benefit analysis indeed lies at the heart of many applications of the principle of proportionality. In both the European Community’s and the Council of Europe’s law (see below), in matters ranging from the regulation of property to constraints on human rights, the proportionality principle has emerged as “one of the most important unwritten principles commonly invoked” before the European Court of Justice and the European Court of Human Rights to challenge the effect of regulations on the rights of persons.²⁰⁷ What distinguishes the credible from the less credible instances of the principle’s application by the instrumentality chosen by the parties to make that determination is the meticulousness and transparency with which that inquiry is conducted and explicated—often, but not always, using cost-benefit analysis—in the rendering of second opinions.

V. THE PRINCIPLE OF PROPORTIONALITY IN DISPUTES BEFORE THE EUROPEAN COURT OF JUSTICE

The principle of proportionality is deeply ingrained in the national jurisprudence of the civil law states of Europe, and this has affected the development of proportionality as an important legal precept both in European regional law and, more generally, in international law. Rather than tackle the herculean task of examining the proportionality jurisprudence of each European state, this study will seek briefly to suggest a sense of this development by examining a few leading decisions of the European Court of Justice, which construes regional European law for the benefit of the states party to the Treaty of Rome.²⁰⁸ In applying the concept of proportionality, the European Court has consistently treated it as “one of the general principles of Community law.”²⁰⁹

The principle enters into judgments of the European Court of Justice in various ways. Thus, when a European executive or administrative regulation deprives a person or entity of rights or protections vested under European law, the Court may be asked to hold the regulation invalid. Or a national regulation may be challenged under European law protecting private property. Or a regulation may be challenged as exceeding the European Commission’s administrative discretion. Or the European Court may be asked to invalidate Community legislation

²⁰⁶ Sykes, *supra* note 200, at 407.

²⁰⁷ Desmedt, *supra* note 185, at 441.

²⁰⁸ Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hereinafter EC Treaty].

²⁰⁹ Case C-8/89, *Zardi v. Consorzio agrario provinciale di Ferrara*, 1990 ECR I-2515, 2532, para. 10.

as exceeding the limits established by the EC Treaty.²¹⁰ As Takis Tridimas has observed, “The principle of proportionality applies both to Community and to national measures and covers both legislative and administrative action.”²¹¹

While the Court takes a textual approach to determining the validity of a regulatory act, it also takes a contextual one and it is in this latter part of the analysis that proportionality has its major impact. For example, in cases involving member states’ measures restricting free movement of goods, persons, or services, or unequal protection of the sexes, the Court will examine the context within which the regulatory act operates, whether it can be shown to be appropriate and necessary to a legitimate objective; that is, whether it is proportionate. In weighing the regulatory authority of the state, or of the European Commission or Council, in instances where a regulation is alleged to violate fundamental legal protections, the Court inevitably has had to resort to the balancing that lies at the heart of proportionality. It has weighed the adverse effect on the applicant’s legally protected interest against the importance of the lawful aim served by the regulation.²¹² Accordingly, it has held that

the legality of measures imposing financial burdens on economic operators is conditional upon those measures being appropriate to and necessary for the attainment of objectives legitimately pursued by the rules in question, provided however that, where there is a choice between several appropriate measures, the least onerous measure must be used and care must be taken to ensure that the charges imposed are not disproportionate to the aims pursued.²¹³

In the words of the Court’s advocate-general:

[T]he principle of proportionality means that the burdens imposed on the persons concerned must not exceed the steps required in order to meet the public interest involved. If, therefore, a measure imposes on certain categories of persons a burden which is in excess of what 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.²¹⁴

The Court’s jurisprudence makes clear that a regulation must pass three tests if it is to be deemed a proportionate restriction of a right generally accruing to persons or other legal entities. The first test requires the Court to determine that the regulation’s true legislative purpose legitimately falls within the jurisdiction of the regulating authority.

The second requires the Court to find that the regulation is an appropriate or necessary (or, sometimes, not a manifestly inappropriate) means of achieving its purported purpose. To this end, the regulating authority must demonstrate to the Court’s satisfaction that “the measures

²¹⁰ EC Treaty, Arts. 173 (as in effect 1992) (now Art. 230), 177 (as in effect 1992) (now Art. 234), 215 (as in effect 1992) (now Art. 288). Article 173, in particular, gives the European Court of Justice jurisdiction to review acts of the Community institutions—the Commission, Council, and Parliament—for incompatibility with Community law.

²¹¹ Takis Tridimas, *The Principle of Proportionality in Community Law: From the Rule of Law to Market Integration*, 31 IRISH JURIST 83, 84 (1996).

²¹² Case C-331/88, *The Queen v. Minister for Agriculture, Fisheries and Food, ex parte Fedesa*, 1990 ECR I-4023.

²¹³ *Zardi*, *supra* note 209, at 2532-33, para. 10.

²¹⁴ Case C-114/76, *Bela-Mühle Josef Bergmann KG v. Grows-Farm GmbH*, 1977 ECR 1211, 1232 (opinion of Advocate-General Capotorti).

are appropriate and necessary for meeting the objectives legitimately pursued by the legislation in question.”²¹⁵ When the matter concerns health regulations, as in the aforementioned trade litigation, the less rigorous standard of review may apply.²¹⁶

The third test is whether the regulation, even if implemented for a legitimate purpose and employing means that are appropriate and necessary to its achievement, pursues its purpose by the least-restrictive means possible. The Court has cautioned that, when “a Member State has at its disposal less restrictive means of obtaining the same goals, it is under an obligation to make use of them.”²¹⁷ For example, in the *Commission v. Germany* case, the Court reviewed German regulations prohibiting the importation of beer containing additives. While accepting Germany’s general legislative jurisdiction to regulate the content of food and drink, it concluded that the government’s legitimate health concerns could be met by appropriate content labeling and that, when there is “a choice between various measures to attain the same objective [member states] should choose the means which least restricts the [treaty-protected] free movement of goods.”²¹⁸

In making such determinations, however, the Court has recognized that “the legislature has a wide measure of discretion” in the choice of means to achieve its legitimate policies and that these will be held unlawful “only if there has been a sufficiently flagrant violation of a superior rule of law for the protection of the individual.”²¹⁹ The legality of a measure chosen by the Community legislature “can be affected only if the measure is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue.”²²⁰

Additionally, the Court has held that regulations imposing penalties for default are subject to judicial review to ensure “that the penalty is not disproportionate to the fault.”²²¹ A regulation was ruled “contrary to the principle of proportionality in that it does not permit the penalty for which it provides to be made commensurate with the degree of failure to implement the contractual obligations or with the seriousness of the breach of those obligations.”²²² In a case involving penalties incurred by an English national in Italy for failing to comply with an Italian regulation requiring that she notify the authorities of her presence, the Court held that the period within which notification is required must be “reasonable” and that failure to comply must not incur “disproportionate penalties in relation to the gravity of the offence.”²²³ For example, imprisonment for failure to comply with the notification requirement has been held “disproportionate to the gravity of the infringement” when imposed on persons otherwise entitled by Article 39 (formerly Article 48) of the EC Treaty to “freedom of movement” within the

²¹⁵ Case C-265/87, *Hermann Schröder HS Kraftfutter GmbH v. Hauptzollamt Gronau*, 1989 ECR 2237, 2269, para. 21; *see also* Case C-11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 ECR 1125, 1136.

²¹⁶ Case C-138/78, *Stölting v. Hauptzollamt Hamburg-Jonas*, 1979 ECR 713; Case C-179/84, *Bozzetti v. Invernizzi SpA*, 1985 ECR 2301; Case C-265/87, *supra* note 215.

²¹⁷ Case C-382/87, *R. Buet v. Ministère public*, 1989 ECR 1235, 1251, para. 11.

²¹⁸ Case C-178/84, *Commission v. Germany*, 1987 ECR 1227, 1270, para. 28.

²¹⁹ *Joined Cases C-119/76 & 120/76, Ohlmühle Hamburg AG v. Hauptzollamt Hamburg-Waltershof*, 1977 ECR 1269, 1279, para. 2(c); *see also* Case C-331/88, *The Queen v. Minister for Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa*, 1990 ECR 4023, 4024, 4031-35, 4049-51, 4062-64 [hereinafter *Fedesa*].

²²⁰ *Fedesa, supra* note 219, at 4063, para. 14.

²²¹ Case C-240/78, *Atalanta Amsterdam B.V. v. Produktschap voor Vee en Vlees*, 1979 ECR 2137, 2143.

²²² *Id.* at 2151, para. 15.

²²³ Case C-118/75, *Watson and Belmann*, 1976 ECR 1185, 1191, 1200.

Community.²²⁴ Fines may be imposed, but they must be “comparable to those attaching to minor offences committed by . . . nationals” of the member state in question.²²⁵

While, inevitably, critics of European Court decisions have pointed to inconsistencies and lapses in clarity, transparency, and rigor in applying proportionality, Professor Gráinne de Búrca has noted that the “[o]ne thing which is clear is that application of the principle . . . entails an active role for courts in reviewing administrative and legislative measures.”²²⁶ As in other areas, the role of proportionality is not to prevent bad decisions but to create optimum opportunity for good ones by creating a space for rendering transparent, principled second opinions. In the EC context, the dispute often, but not invariably, juxtaposes a legislative or administrative authority to the interests of an individual or a business. In these conflicts, there is little disagreement among observers that a space for second opinions has been firmly established in practice.²²⁷ Thus, although the principle of proportionality has created the occasion for the exercise of broad powers of judicial review, the legitimacy of any particular exercise of the second-opinion power depends upon the formulation by the judiciary itself of reasoned secondary rules that effectively narrow the discretion of the panel or tribunal charged with rendering those opinions.

Any tribunal will therefore enhance not only its own credibility, but especially that of those who follow in its wake if, in addition to deciding the matter at hand, it clarifies the applicable contending legal norms and makes manifest the process it employs to weigh and compare the parties’ respective normative claims. For example, a court might review less rigorously and grant greater deference to a state’s decision to restrain treaty-protected free trade or free movement if the restraint is demonstrably protective of human health than if it is designed to protect economic or other parochial interests.²²⁸ If so, however, such a distinction is likely to gain traction only to the extent that it is clearly enunciated and persuasively demonstrated in the written opinions of the relevant tribunals.

VI. THE PRINCIPLE OF PROPORTIONALITY IN IMPLEMENTING GLOBAL AND REGIONAL HUMAN RIGHTS

The International Covenant on Civil and Political Rights (ICCPR)²²⁹ is the premier treaty governing the balance between states’ powers, on the one hand, and persons’ rights as individuals or members of groups and associations, on the other. It is the capstone of what amounts to an international Bill of Rights, which also includes the International Covenant on Economic, Social and Cultural Rights.²³⁰ Both conventions are part of a skein of six widely ratified

²²⁴ Case C-265/88, *Criminal Proceedings Against Lothar Messner*, 1989 ECR 4209, 4212, para. 14.

²²⁵ *Id.* at 4220.

²²⁶ Gráinne de Búrca, *The Principle of Proportionality and Its Application in EC Law*, 1993 Y.B. EUR. L. 105, 105.

²²⁷ The same point is made by Professor de Búrca: “it can be argued that the more clearly the agreed standards or grounds of review can be articulated, the more clearly it can be seen whether a court is genuinely attempting to apply these in a structured way to the decision taken rather than substituting its overall judgment as to what would be a better or a preferable decision.” *Id.* at 108.

²²⁸ “[T]he more ‘individual’ the interest affected by the measure under review, or the more severely an important Community interest is affected, the more closely the Court of Justice will be prepared to look at it. But this will still depend partly on the nature of the subject matter and the interest which the measure claims to serve.” *Id.* at 114.

²²⁹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171 [hereinafter ICCPR].

²³⁰ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 UNTS 3.

treaties that require states to present periodic, detailed reports on their compliance to an elected committee of experts. Under four of the treaties, an optional complaints mechanism authorizes individuals to allege violations of protected rights before a committee of experts. As of March 2008, 162 states were parties to the ICCPR and 111 parties had agreed to its optional protocol.²³¹

While the principal object of these treaties is to prohibit designated practices, some latitude is allowed in instances of national emergency. In permitting such states of exception, however, the conventions do not intend to give states *carte blanche* to diminish their obligations. According to Professor Joan Fitzpatrick, the “point of recognizing a concept of public emergencies in international human rights law was to provide reasonable limits upon the anticipated restrictions of rights that emergencies would entail. . . . Much of the work of treaty-based human rights monitors . . . has involved setting the contours for emergency derogations from such rights.”²³² In exercising a broad mandate to render second opinions, these treaty-based committees of experts have begun to establish the contours of a quasi-judicial review in which, “[a]long with the threshold of severity, the principle of proportionality is the most important and yet most elusive of the substantive limits imposed on the privilege of [emergency] derogation.”²³³ According to the ICCPR, a government’s right to violate some (but not all) of the protected rights is permitted only “to the extent strictly required by the exigencies of the situation.”²³⁴

Professor Mattias Kumm has pointed out that “rights” come in two categories: those that are absolute (“The death penalty is hereby abolished”) and those which are expressly or implicitly conditional.²³⁵ The law guarantees free speech conditionally, for the right will be construed to permit a prohibition on shouting “Fire!” in a crowded theater. Article 10(1) of the European Convention on the Protection of Human Rights and Fundamental Freedoms states: “Everyone has the right to freedom of expression.” But Article 10(2) modifies this by adding: “The exercise of these freedoms . . . may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety”²³⁶ Although such instruments, establishing expansive protection of broadly enumerated rights, when accompanied by a qualifying “give back” proviso, may not expressly stipulate that the right and the derogation must be reconciled by resort to the proportionality principle, that tends to be exactly how they have been construed by second opinions.²³⁷ Such second opinions, in the European human rights cases, are given by the European Court of Human Rights, while, in the instances arising under

²³¹ Data on ratification are available at the Web site of the Office of the United Nations High Commissioner for Human Rights (OHCHR), <<http://www.ohchr.org>>.

²³² JOAN FITZPATRICK, HUMAN RIGHTS IN CRISIS: THE INTERNATIONAL SYSTEM FOR PROTECTING RIGHTS DURING STATES OF EMERGENCY 36–37 (1994).

²³³ *Id.* at 60.

²³⁴ ICCPR, *supra* note 229, Art. 4(1). For similar provisions in regional treaties, see European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 15(1), Nov. 4, 1950, 213 UNTS 221 [hereinafter European Convention]; American Convention on Human Rights, Art. 27(1), Nov. 22, 1969, 1144 UNTS 123.

²³⁵ Mattias Kumm, *Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement*, in LAW, RIGHTS AND DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXYS 131 (George Pavlakos ed., 2007).

²³⁶ European Convention, *supra* note 234, Art. 10.

²³⁷ Kumm, *supra* note 235, at 134–35.

the ICCPR, the space for second opinions is occupied by the committee of experts. Both look to the proportionality principle to determine whether an emergency justifies a derogation from a protected human right.

Article 4(1) of the ICCPR sets out the parameters of 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*, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.²³⁸

The Human Rights Committee, established by Article 28 of the Covenant, considers the periodic reports of states parties on their compliance with the obligations assumed under the treaty. These experts also examine individual complaint petitions submitted under the optional procedure established by Article 41(1). Additionally, the Committee has adopted the practice of publishing periodic “general comments” on issues of general importance arising from its cases. General Comment No. 29,²³⁹ for example, deals with states of emergency declared by parties in justification of derogations from obligations incurred under the Covenant. General Comment No. 28 summarizes the Committee’s position regarding the principle of proportionality.

General Comment No. 29 notes that on a “number of occasions the Committee has expressed its concern over States parties that appear to have derogated from rights protected by the Covenant, or whose domestic law appears to allow such derogation in situations not covered by article 4.”²⁴⁰ In this connection, it singles out the United Republic of 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 1998.²⁴¹ It emphasizes that “the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers”²⁴² and adds that, “[w]hen considering States parties’ reports the Committee has expressed its concern over insufficient attention being paid to the principle of proportionality.”²⁴³ Thus, the “legal obligation” of states is “to narrow down all derogations to those strictly required by the exigencies,” which imposes on the Committee, as well as on the derogating state, a duty to “conduct a careful analysis . . . based on an objective assessment of the actual situation”²⁴⁴ as to “why such a measure is necessary and legitimate in the circumstances.”²⁴⁵ Both the state and the Committee must be satisfied that the emergency actually “threatens the life of the nation”

²³⁸ ICCPR, *supra* note 229, Art. 4(1) (emphasis added).

²³⁹ Human Rights Committee [HR Comm.], General Comment No. 29: States of Emergency (Article 4), UN Doc. CCPR/C/21/Rev.1/Add.11 (Aug. 31, 2001) [hereinafter General Comment].

²⁴⁰ *Id.* at 2, para. 3.

²⁴¹ Regarding Israel’s broad derogation, filed with its ratification of the ICCPR, see Adam Mizock, *The Legality of the Fifty-two Year State of Emergency in Israel*, 7 U.C. DAVIS J. INT’L L. & POL’Y 223, 227, 230–33 (2001).

²⁴² General Comment, *supra* note 239, at 2–3, para. 4.

²⁴³ *Id.* at 3, para. 4.

²⁴⁴ *Id.*, para. 6.

²⁴⁵ *Id.* at 2, para. 3.

and that the derogating measure is “strictly required” as to its “duration, geographical coverage and material scope.”²⁴⁶

These general observations have had some application in the practice of the Committee. In considering the periodic report submitted by Israel, the Committee expressed

its deep concern at the continued state of emergency . . . , which has been in effect since independence. It recommends that the Government review the necessity for the continued renewal of the state of emergency with a view to limiting as far as possible its scope and territorial applicability and the associated derogation of rights.²⁴⁷

Similarly, in 2005 the Committee, in its Concluding Observations re Syrian Arab Republic, expressed its

concern that the state of emergency declared some 40 years ago is still in force and provides for many derogations in law or practice from the rights guaranteed under articles 9, 14, 19 and 22, among others, of the Covenant, without any convincing explanations being given as to the relevance of these derogations to the conflict with Israel and the necessity for these derogations to meet the exigencies of the situation claimed to have been created by the conflict [with Israel].²⁴⁸

It recommended that the government “ensure . . . that the measures it has taken, in law and practice, to derogate from Covenant rights are strictly required by the exigencies of the situation” and that they do not implicate rights from which no derogation is allowed.²⁴⁹ In a few instances, an individual complaint against a government has provided the occasion for the Committee to review the reasonableness of a restrictive measure to the crisis to which it purported to respond.²⁵⁰

The Committee has consistently adopted the view that measures taken in derogation of the rights protected by the ICCPR are reviewable by two tests of proportionality. First, the decision to derogate must be proportionate to the perceived emergency. A single minor skirmish with a small group of disaffected persons would not, ipso facto, justify the suspension of the right to a fair trial for any person designated by the state as an “enemy.” Such a derogation is proportionate only “if and to the extent that the situation constitutes a threat to the life of the nation.”²⁵¹ Thus, the countermeasure must have been instituted in a crisis so severe as to require countermeasures that derogate from rights protected by the ICCPR. Additionally, the specific means employed to deal with the crisis must not be excessive. Sir Nigel Rodley, the British member of the Committee, has pointed out that “the mere fact that a derogation from

²⁴⁶ *Id.*, paras. 3, 4.

²⁴⁷ HR Comm., Consideration of Reports Submitted by Parties Under Article 40 of the Covenant: Concluding Observations, Israel, at 3, para. 11, UN Doc. CCPR/C/79/Add.93 (Aug. 18, 1998).

²⁴⁸ HR Comm., Consideration of Reports Submitted by Parties Under Article 40 of the Covenant: Concluding Observations, Syrian Arab Republic, at 2, para. 6, UN Doc. CCPR/CO/84/SYR (Aug. 9, 2005).

²⁴⁹ *Id.*

²⁵⁰ See *Silva v. Uruguay*, Communication No. 34/1978, para. 8.4, UN Doc. CCPR/C/12/D/34/1978 (Apr. 8, 1981). The Committee could “not see what ground could be adduced to support the contention that, in order to restore peace and order, it was necessary to deprive all citizens, who as members of certain political groups had been candidates in the elections of 1966 and 1971, of any political right for a period as long as 15 years.”

²⁵¹ See UN Doc. CCPR/C/SR.1902, at 2, para. 12 (Mar. 29, 2001) (comments of Sir Nigel Rodley (UK), member of the Human Rights Committee).

a specific provision may, of itself, be justified by the exigencies of a situation” does not necessarily justify the specific measures taken. Rather, “the specific measures taken pursuant to the derogation must themselves be shown to be required by the exigencies of the situation.”²⁵² In this test, the derogating state must demonstrate “why such a measure is necessary and would be legitimate in the circumstances.”²⁵³ Rodley emphasizes the duality of the evidentiary threshold: that “such measures [are] subject to the test of proportionality and the further test of being required by the exigencies of the situation.”²⁵⁴

As in other contexts, such power of discretionary review, giving an institution authority to render second opinions on actions by political, legislative, or executive authorities, is perpetually in need of justification against claims advanced on behalf of democratic accountability and professional credibility. The Human Rights Committee, being vested with very little but the power of persuasion, is particularly vulnerable when it comes to second-guessing the need for emergency measures in response to civil or military crises, and to quarterbacking the choice of means to deal with such crises. Nevertheless, what becomes clear is that, in creating the space for second opinions, not merely is the law constraining the discretion of the political and administrative branches of governance, but it is also legitimating those institutions’ exercise of that very broad license to devise social policy which has become the hallmark of the modern state. By devising a space for second opinions, the law legitimates the Leviathan, even as it seeks to constrain it. As modern governance expands its reach in response to contemporary concern for security, safety, and welfare, it is bound to trench on jealously guarded areas of personal freedom and individual discretion. Proportionality is the legal instrument chosen by the political process to seek demonstrable accountability through the invention of rational standards of procedure and evidence. As the interests of individuals, states, and international regimes collide, proportionality becomes the widely chosen tool of adjustment. “Proportionality is therefore a key tool of modern administrative law to ensure the purposive rationality of public action.”²⁵⁵

In the Council of Europe’s ample system for judicial review, a much richer and more specific jurisprudence has emerged with respect to this use of the principle of proportionality. The litigation typically takes the form of an action to enjoin a member state from violating rights protected by the European Charter of Human Rights. In these cases, the role of proportionality has been developed more fully by the European Court of Human Rights than has so far resulted from the proceedings of the Human Rights Committee.

As in the case of the ICCPR, the European Convention on Human Rights and its protocols do not specifically impose the principle of proportionality on governments or administrations. “Nevertheless, it has come to be recognised as one of the central principles governing the application of the rights and freedoms contained within these instruments.”²⁵⁶ The space for second opinions about the legality of acts that appear to infringe on rights protected by the European

²⁵² *Id.* at 3, para. 13.

²⁵³ *Id.*, para. 18 (statement by the chair, P.N. Bhagwati).

²⁵⁴ *Id.* at 2–3, para. 12 (Mr. Rodley).

²⁵⁵ ROBERT THOMAS, *LEGITIMATE EXPECTATIONS AND PROPORTIONALITY IN ADMINISTRATIVE LAW* 77 (2000). See, as to the situation of proportionality in the states and institutions constituting the European Union (formerly, the Community), NICHOLAS EMILIOU, *THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW* (1995).

²⁵⁶ Jeremy McBride, *Proportionality and the European Convention on Human Rights*, in *THE PRINCIPLE OF PROPORTIONALITY IN THE LAWS OF EUROPE* 23, 23 (Evelyn Ellis ed., 1999).

Convention has been created by the jurisprudence of the juridical bodies charged to interpret that instrument, case by case.

This development was inevitable. The Convention protects some rights of persons by stating obligations without any limitation (e.g., the prohibition on torture). The interpretative function then consists of defining the content and limitation of that prohibition. Other prohibitions are less absolute. The space for second opinions is reserved by Article 15 of the Convention, which stipulates that, while restrictions may be imposed on some rights “[i]n time of war or other public emergency threatening the life of the nation,” these must be limited “to the extent strictly required by the exigencies of the situation.”²⁵⁷ This provision virtually assures that there must be judicial review of whether the life of the nation is threatened and, if so, whether a particular constraint on freedom is “strictly required.”

Other citizens’ rights spelled out in the Convention are subject to textual limitations expressly framed so as to permit authorities to advance the social interest of government, such as public order, national security, or public morality and health, even when that may necessitate some restriction on the practical exercise of a protected right. Specifically, the rights set out in Articles 8–11 of the Convention—respect for private and family life, for the home and correspondence; freedom of thought, of conscience and religion; freedom of expression and of association—may be restricted to achieve legitimate social goals, but the restrictions must be “prescribed by law” and “necessary in a democratic society.” These parameters for judging the legitimacy of a derogation implicitly mandate recourse to second opinions, a function exercised by the European Court of Human Rights.

It also seems inevitable that this process of rendering second opinions should introduce the concept of proportionality. The derogations, to be lawful, must be “necessary.” It has been noted that “[f]rom ‘necessity’ to proportionality is but a small step, since for a measure to be necessary it must surely correspond to a ‘pressing social need’ both as a matter of principle and regarding its impact, its scale and its compass.”²⁵⁸ By 1988, in the *Olsson* judgment, the European Human Rights Court had taken that step, holding 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.”²⁵⁹ On many subsequent occasions, the Court has tested a restriction on a protected right by reference to the principle of proportionality.²⁶⁰

In many of these cases, the principle of proportionality is closely tied to the judges’ application of the familiar European doctrine of “margin of appreciation,” by which tribunals allow the government a degree of leeway in applying obligations or limitations on those whose rights are thereby constrained. The two doctrines are related but also different, and their melding in

²⁵⁷ European Convention, *supra* note 234, Art. 15(1).

²⁵⁸ Marc-André Eissen, *The Principle of Proportionality in the Case-Law of the European Court of Human Rights*, in *THE EUROPEAN SYSTEM FOR THE PROTECTION OF HUMAN RIGHTS* 125, 126 (R. St. J. Macdonald, F. Matscher, & H. Petzold eds., 1993).

²⁵⁹ *Olsson v. Sweden* (No. 1), 130 Eur. Ct. H.R. (ser. A) at 31–32, para. 67 (1988); *see also* the subsequent cases cited in Eissen, *supra* note 258, at 127 n.8.

²⁶⁰ *See, e.g., Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) 5 (1976); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) 5 (1981); *Leander v. Sweden*, 116 Eur. Ct. H.R. (ser. A) 6 (1987); *Open Door & Dublin Well Woman v. Ireland*, 246–A Eur. Ct. H.R. (ser. A) 8 (1992).

a single opinion can be confusing,²⁶¹ because the margin of appreciation, once conceded as a matter of law, seems to shift the burden of proof away from the constraining authority to the complaining party, and does so regardless of the facts of the case. The principle of proportionality, on the other hand, is case and fact specific. In many instances, it requires the tribunal to weigh the actual evidence of situational necessity. The Court is tasked to assess whether the government might have achieved its regulatory purpose by alternative ways that would have been less derogatory of the protected rights.

Typical of the balancing mandated by the European Convention is its Article 8:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Articles 9–11 of the Convention contain very similar formulations of rights and potential derogations. These provisions are the locus of much of the European Court's jurisprudence pertaining to the margin of appreciation and to proportionality.

The margin of appreciation was first invoked by the European Court in the 1976 decision *Handyside v. United Kingdom*.²⁶² In refusing to assist a London publisher whose revised edition of *The Little Red Schoolbook* had been banned as violative of obscenity laws and who was proceeding under Article 10(2) of the Convention, the Court said that national authorities were far better positioned to enact and enforce the regulation of morals, which might vary from state to state. "Consequently," it held, "Article 10 §2 leaves to the Contracting States a *margin of appreciation*."²⁶³ In subsequent cases, the Court has confirmed that its "supervision should not be substituted for the assessment of appropriate policy made by national authorities."²⁶⁴ The jurisprudence leaves unclear, however, whether the doctrine is invoked to allow the Court to relinquish its role in the rendering of second opinions, deferring, instead, to the national authorities, or whether the Court, in determining the proportionality of a state's regulatory response to special circumstances, is putting its finger on the scale to give governments some evidentiary advantage.

In those cases before the European Court in which proportionality plays a role, it is not unusual for the Court to say that it goes "hand in hand" with the margin of appreciation, whereas the true intent seems to be to deploy proportionality as a check on the margin's impact.

²⁶¹ "The margin of appreciation can come into play whenever a case raises a Convention issue that requires a balancing of interests In principle the margin of appreciation is relevant to the (numerous) elements of the Convention in respect of which a proportionality test is applied." T. Jeremy Gunn, *Deconstructing Proportionality in Limitations Analysis*, 19 EMORY INT'L L. REV. 465, 487 (2005) (quoting PIETER VAN DIJK & G. J. H. VAN HOOFF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 85 (3d ed. 1998)).

²⁶² *Handyside v. United Kingdom*, *supra* note 260.

²⁶³ *Id.* at 22, para. 48 (emphasis added).

²⁶⁴ YUTAKA ARAI-TAKAHASHI, THE MARGIN OF APPRECIATION DOCTRINE AND THE PRINCIPLE OF PROPORTIONALITY IN THE JURISPRUDENCE OF THE ECHR 236 (2002); *see, e.g.*, *Stubbings v. United Kingdom*, 1996–IV Eur. Ct. H.R., para. 55; *Stoll v. Switzerland*, App. No. 69698/01, 44 Eur. H.R. Rep. 1089, 1105, para. 43 (2007) (4th sec.).

In *Dudgeon v. United Kingdom*,²⁶⁵ a case contesting the legality of Northern Ireland's criminalization of certain 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 legitimate aim pursued."²⁶⁶ Summing up, the judges said that "the restriction imposed on Mr. Dudgeon under Northern Ireland law, by reason of its breadth and absolute character, is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved."²⁶⁷ The judgment tends to analogize between the textual test of "pressing social need" and the test of the proportionality of the state's response, but it is far from clear just how the two tests fit together.

In another case, *Niemietz v. Germany*,²⁶⁸ petitioner claimed that a police search of his office violated his privacy rights protected by Article 8 of the Convention. The Court held that the police had acted in accordance with the law, that its aims were legitimate, but that the interference was not necessary in a democratic society because it was disproportionate to the state's aims.²⁶⁹ Loosely examining the specific context of the search, the judges concluded that the warrant had been drafted too broadly, and that the authorities had created no procedural safeguards applicable to searches of lawyers' offices. Thus, the search "impinged on professional secrecy to an extent that appears disproportionate in the circumstances."²⁷⁰ Gradually, the jurisprudential gaps are being filled in, as the "margin of appreciation" is increasingly subordinated to the mandates of the proportionality principle, even when a governmental exercise of regulatory power is held not to have been disproportionate. Thus, in finding that Turkey's ban on the Refah (Welfare) Party was permitted by the Convention, the Court engaged in a very specific (if controversial) assessment of the proportionality of such an infringement on political rights to the threat posed by the banned party to the state's lawful aim of preserving secularism as a foundational principle of public order. It concluded that "the interference in issue in the present case cannot be regarded as disproportionate in relation to the aims."²⁷¹

Like other tribunals charged with rendering second opinions, the European Court has applied the proportionality principle to a two-step review of acts that infringe rights. First, it determines whether the purpose (or countermeasure) being pursued is *per se* a lawful one, when set against the conduct occasioning it. Then, if the answer to the first inquiry is affirmative, the judges review the specific means employed in advancing the purpose to determine whether it could have been pursued by means that would have derogated less from protected rights.

VII. CONCLUSIONS

Across a broad range of subjects, there is an overlapping consensus that the principle of proportionality governs the extent to which a provocation may be lawfully countered by what might otherwise be an illegal response. In that sense, proportionality serves an exculpatory

²⁶⁵ *Dudgeon v. United Kingdom*, *supra* note 260.

²⁶⁶ *Id.*, para. 53.

²⁶⁷ *Id.*, para. 61.

²⁶⁸ *Niemietz v. Germany*, 251-B Eur. Ct. H.R. (ser. A) 25 (1992).

²⁶⁹ *Id.*, para. 37.

²⁷⁰ *Id.*

²⁷¹ *Refah Partisi (Welfare Party) v. Turkey*, 2003-II Eur. Ct. H.R., para. 134.

function. *A*'s prohibited discriminatory duty, imposed on the exports of country *B*, may be lawful if it can be shown to be a reasonable response to *B*'s having misused sanitary regulations to exclude privileged trade in products made in *A*. The banning of a newspaper may not violate freedoms protected by human rights laws if the editors have repeatedly published incendiary falsehoods that have provoked race riots. Even the bombing of a hospital may be permitted if it is being used to rain shells on a nearby kindergarten.

Always, in determining whether a countermeasure is proportionate, the first task is to examine whether the initial provocation was unlawful. If it was not, the countermeasure, ipso facto, would be disproportionate and unlawful. That, however, is not the end of the inquiry. Even if the unlawfulness of the initial provocation can be demonstrated, that would not, by itself, establish the proportionality, and, thus, the legality, of the response. Only if the provocation is unlawful *and* the countermeasure is proportionate would its unlawfulness be cured. If a response, even to an unlawful action, is disproportionate, it would be as unlawful as (or *even more unlawful than*) the provocation itself.

That is the central role assigned to proportionality in international law. This centrality results both from proportionality's impressive historical and cultural pedigree and from the underdeveloped state of a global legal system still quite reliant on mutuality of obligation, reciprocity, and self-enforcement. In this, international law is hardly unique. Underdeveloped legal systems almost inevitably generate a notion of self-enforcement and then develop the principle of proportionality to keep countermeasures from spiraling out of control. The Old Testament's injunction "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe"²⁷² makes these parameters clear: that the original provocation must be demonstrable; that, if proven, it may license an otherwise illegal response; but that any such response may not exceed a limit set by proportionality. The Holy Quran contains a very similar injunction.²⁷³ In primitive societies, as in the modern "community" of nations, proportionality assumes a central role, both *permitting* and *limiting* discretionary reprisal and other countermeasures that, of necessity, must still be relied upon to fill the void left by the absence of a centralized system for the law's enforcement. If the core institutions of a community are too weak to be relied upon to take firm countermeasures against a wrongdoer, then those institutions may need to be authorized to license appropriate countermeasures to be taken by the victim of the wrongdoing. The community's

²⁷² *Exodus* 21:23–25. For an excellent discussion of proportionality as a limitation on the scope of biblical countermeasures, see ALAN M. DERSHOWITZ, *THE GENESIS OF JUSTICE* 253–57 (2000). According to Professor Morris J. Fish, "the *lex talionis* of the Old Testament marked a turning point in the evolution of lawful punishment. It introduced a policy of restraint and it sanctified proportionality as a moral principle of punishment." Morris J. Fish, *An Eye for an Eye: Proportionality as a Moral Principle of Punishment*, 28 OXFORD J. LEGAL STUD. 57, 57 (2008). The *lex talionis* appears three times in the Old Testament: in *Exodus*, as "eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise"; in *Leviticus*, as "fracture for fracture, eye for eye, tooth for tooth"; and, in *Deuteronomy*, as "life for life, eye for eye, tooth for tooth, hand for hand, foot for foot." *Exodus* 21:24–25, *Leviticus* 24:20, *Deuteronomy* 19:21; see also *Matthew* 5:38. One of the principal innovations of the Old Testament, in this respect, is to introduce the symmetry of its formulation for that of Hammurabi's Code, a millennium earlier, which authorized the punishment of an innocent person (the perpetrator's son or daughter) for the action of the wrongdoer. See *Deuteronomy* 24:16: "The fathers shall not be put to death for the children, neither shall children be put to death for the fathers; every man shall be put to death for his own sin." The Old Testament's formulation is also believed to have been intended to facilitate a measure of monetary compensation. Fish, *supra*, at 60.

²⁷³ Holy Quran 5:45: "Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal."

core institutions' primary function may then be to determine the proportionality of these countermeasures.

There is not only broad agreement as to the proper role assigned to proportionality in the international order, but also a high degree of accord, in the practice of states and tribunals, as to the appropriate standards by which the proportionality of a response can be determined. While, so far, any formal definition of the proportionality principle has tended to the very general, its application in practice and in various contexts is amply demonstrable. That practice is generating a jurisprudence that is becoming quite specific, dispute by dispute and adjudication by adjudication. Once again, international law is developing rather like the common law, broadening precedent by precedent.

A law that develops in this way, rather than by painstaking definition and codification of rights and duties *ab initio*, inevitably broadens the scope for second opinions rendered in adjudication and arbitration or in less formal and more political settings. That is certainly true of the law of proportionality, which, by its very generality, has created a large space for third-party decision making and has become a staple in second-opinion discourse, whether in judicial or quasi-judicial proceedings, or in the forums of politics and public opinion.

Some of this case-centered development has been disappointingly episodic. An arbitration may decide little but one dispute, sometimes employing reasons that are but dimly stated in purely formulaic and conclusory language. At the same time, each reference of a dispute to review evokes the possibility that a well-crafted second opinion, through its precision, will both deepen and narrow the jurisprudential stream while strengthening its embankments.

In this essay we have focused on the many instances of well-crafted second opinions that have made certain propositions clear. We have alluded to the well-established rule that any countermeasure must demonstrably have been taken in response to a major wrong inflicted by a state on the state responding to it. While this rule narrows somewhat the ambit of indeterminacy, uncertainty may remain, in some contexts, about what actually constitutes an illegal provocation. This can be as much a matter of attribution as of definition. Is it lawful for a state to invade its neighbor if that neighbor fails to prevent its territory from being used to launch attacks across the common border? Are illegal attacks across a border by insurgents to be attributed to the state from which they are launched? There may be a growing inclination to answer that question in the affirmative. However, the *jus ad bellum*, at least as construed to date by the ICJ, has not yet concluded that the insurgents' provocation can be attributed to the passive host state. Thus, any military countermeasures taken against the state from which the attacks were launched remain open to the charge of being "disproportionate" when weighed against the nonculpability of that state.

Less controversial is the requirement that countermeasures taken must not be excessive in relation to the (lawful) advantage anticipated. In the military context, this restriction is set out in Protocol I to the Geneva Conventions, which makes clear that tactics deployed in conflict are not to be left solely to the discretion of the combatants but are also subject to second-opinion review. The standard, here, is that the tactics chosen must not cause superfluous injury or unnecessary suffering. It subjects the choice of means to a test of appropriateness and economy, which closely approximates the principle of proportionality. Significantly, this test, by which the choice of countermeasures is assessed to determine whether other measures could have achieved the desired result with greater economy and lower cost to competing rights, has its greatest contemporary currency in the fields of trade and regulation of commerce. Here, the

test is used to determine whether regulators are pursuing their regulatory objectives “in the manner that is ‘least restrictive’ of other societal values.”²⁷⁴

In requiring that legitimate self-defense under international law be subject to the criteria of necessity and proportionality, the Nuremberg Tribunal, the ICJ, and the Criminal Tribunal for the Former Yugoslavia have gone some way toward narrowing the range of indeterminacy in the context of forceful countermeasures. In deciding on tactics, the generals must weigh the cost an action may impose on the enemy against the cost to their own forces if that action were forsworn. Obviously, it is especially difficult to render convincing second opinions when assessing, after the fact, the necessity and economy of battlefield tactical decisions. Nevertheless, the very fact that military and civilian tacticians have been held accountable to second opinions—for example, to the “reasonable commander” test—must have some restraining effect on the choice of measures employed in battle. The established principle that countermeasures must stop as soon as they have achieved their (legitimate) objective may have similar effect on those caught up in the heat and passion of battle.

It is surely significant that, while proportionality’s provenance was first written against the background of clashing armies, its purchase is now more often evident in other contexts. In trade law it seems clear that proportionality is a requisite of lawful countermeasures and, as such, that it implicates, at first, a notion of equivalence between provocation and response. Concepts of appropriateness, equivalence, and proportionality have been explicated in numerous trade arbitrations. In clarifying the rules, the trade arbitrations have particularly focused on the special circumstances in which countermeasures, to be effective, must exceed the severity of the initial provocation to achieve the necessary deterrent effect.

The symbiosis between trade arbitrations and cases involving military tactics is replicated by the law pertaining to human rights. Measures taken by a government in response to a perceived citizen provocation must not only not exceed those necessary to achieve the legitimate objective of maintaining order, but also not unnecessarily violate the rights of the persons against whom they are taken. This “least violative means” test for implementing the proportionality principle, so central to human rights law, has proven equally useful in trade disputes, as well as in cases arising under the *jus in bello*. It affords a relatively precise measure for conducting a post hoc review of the means chosen. Could a less draconian countermeasure have secured the right to an adequate remedy?

In each of these areas of law, the prospect that a second opinion, implementing increasingly clear standards, could be brought to bear retroactively on the choices made by authorities, whether contemplating the imposition of preventive detention or punitive tariffs, is likely to counsel caution in the choice of means. If the potential for such review also has the preemptive effect of making disputatious recourse to second opinions less necessary in practice, then the principle of proportionality will have passed the most stringent test of a legal principle’s efficacy.

In military as in trade law, precise rules are evolving that impose constraints at the same time as others that afford a measure of latitude in the taking of countermeasures. An aggrieved party is not required to respond only in kind, whether the subject is trade, the use of force, or human rights. In assessing the acceptability of a response, the principle of proportionality allows those affronted by unlawful conduct to respond by taking into account the level of response necessary

²⁷⁴ Sykes, *supra* note 20, at 403.

to prevent recurrences. This latitude may turn on the severity, frequency, and duration of the unlawful behavior. It potentially also invokes a version of the “precautionary approach” so well known from its deployment in environmental law.²⁷⁵ In particular, this essay endorses the view of Mads Andenas and Stefan Zleptnig “that comparative legal thinking based on insights gained from the principle of proportionality in other legal orders, and the role of principles generally, may help structure and rationalise this process.”²⁷⁶

The steady erosion of proportionality’s indeterminacy should not obscure the lacunae that remain. Many areas of the law remain to be developed. The rule against inflicting “superfluous” casualties leaves unilluminated whether it is permissible to kill large numbers of civilians to achieve a necessary military objective (destroying enemy forces deliberately dispersed in a civilian neighborhood) or to bring a costly war to a speedier end (the nuclear bombing of Hiroshima and Nagasaki). The judicial and arbitral decisions make clear, moreover, that the case-based process that enables greater determinacy to be achieved depends upon securing second opinions that exhibit a high level of legitimacy, not only in the precision of their draftsmanship and the power of their reasoning, but also in the marshaling of sufficiently firm foundations of fact and fact analysis. In putting its bets on deference to adjudication and arbitration, the principle of proportionality has been forced to confront an uncomfortable existential reality: that the production of skimpy facts presents at least as much of an obstacle to the law’s development as skimpy reasoning. The failure of parties to present tribunals with the necessary factual evidence has been a recurrent theme of complaints by judges and arbitrators functioning in each of the areas of the law subject to the proportionality principle.

So, too, with the following of precedent. The legitimacy of second opinions is reinforced where the opinion follows earlier decisions made in similar circumstances. As the WTO Appellate Body said in its 2008 report in *United States—Final Anti-dumping Measures on Stainless Steel from Mexico*,²⁷⁷ “[A]lthough adopted panel reports are not binding, except with respect to resolving the particular dispute between the parties, they should be taken into account where they are relevant to any dispute.”²⁷⁸ The Appellate Body quoted with approval the statement of an ICSID arbitration tribunal that, although it is not bound by previous decisions, “[a]t the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases.”²⁷⁹ In the large universe of proportionality second opinions, this sensible prescription is not invariably applied by courts, tribunals, and panels.

Is proportionality, like beauty, too subjective to be taken seriously? Modern research is concluding that beauty is not solely in the eye of the beholder. While it has long been assumed that

²⁷⁵ “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” Rio Declaration on Environment and Development, princ. 15, June 14, 1992, UN Doc. A/CONF.151/5/Rev.1 (1992), 31 ILM 874, 879 (1992).

²⁷⁶ Mads Andenas & Stefan Zleptnig, *Proportionality and Balancing in WTO Law: A Comparative Perspective*, 20 CAMBRIDGE REV. INT’L AFF. 71, 72 (2007).

²⁷⁷ Appellate Body Report, *United States—Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (adopted Apr. 30, 2008), 47 ILM 475 (2008).

²⁷⁸ *Id.*, 47 ILM at 503, para. 146.

²⁷⁹ *Id.*, para. 160 n.313, 47 ILM at 515 (quoting *Saipem S.p.A. v. People’s Republic of Bangladesh*, ICSID No. ARB/05/07, at 20, para. 67 (Mar. 21, 2007), available at <<http://worldbank.org/icsid>>).

ideals of beauty vary from era to era, from culture to culture, and from person to person, recent experiments have led to the conclusion “that people everywhere—regardless of race, class or age—share a sense of what’s attractive. . . . that we judge each other by rules” that are quite determinate, whether we are aware of them or not.²⁸⁰ Certainly, there can be intense differences of opinion as to whether any particular person is beautiful, but even the disputants tend to share standards; they just apply them differently in a particular instance. That is what makes a beauty contest interesting. Since its expert judges have the final say, the contest is likely to produce rational answers to sensible questions. Similarly, in many kinds of international legal disputation, adversaries must increasingly contemplate that there will be persuasive answers to profoundly important questions pertaining to the legality and proportionality of the measures and countermeasures they might deploy.

²⁸⁰ Geoffrey Cowley with Karen Springen, *The Biology of Beauty*, NEWSWEEK, June 3, 1996, at 60; see also Raj Persaud, *Science Rewrites the Rules of Attraction*, FIN. TIMES (London), Apr. 30, 2005, at 3.