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The Charles H. Stockton
Distinguished Essay:

Proportionality: Reconsidering the
Application of an Established
Principle in International Law

Rüdiger Wolfrum

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I. INTRODUCTION—THE MEANING OF THE CONCEPT
AND ITS CHANGE

Tullius Cicero, followed by Augustin and Thomas Aquinas, in respect of the legality of war (*bellum justum*), discussed the concept of proportionality. This concept was, in the same context, developed and further defined by Hugo Grotius.¹ He argued that there were six considerations to take before one could engage in a just war. These were just cause, rightful intention, proper authority and public declaration of war, necessity (war as the last resort), probability of success, and the proportionality of the response to an aggression (proportionality in the narrow sense).² Grotius added that not only resorting to war was dominated by the concept of proportionality but also the conduct of war itself. This approach prevailed.

Traditionally, the principle of proportionality is defined as limiting State action to rational and reasonable means with the view to achieve a goal permissible under international law, without unduly encroaching on protected rights of another State or States or individuals. The principle applies to the planning, as well as the implementation, of State activities.

The application of the principle of proportionality is common in national constitutional and administrative law. A vast national jurisprudence exists in this regard. Due to the plurality of approaches in the various national legal systems, it is hardly possible though to draw any sustainable conclusions from national experiences in the context dealt with in this contribution.

In the following essay, after a brief account of the historical development of the principle of proportionality and an analysis of the relevant provisions of the United Nations Convention on the Law of the Sea (UNCLOS), it will be considered whether the principle only limits the competences of States—as traditionally envisioned—or even enlarges them so as to meet community interests. It should be stated at the outset that UNCLOS does not refer explicitly to proportionality—the term does not appear in the text. However, there are several provisions in UNCLOS that require an acting State, when planning or taking action, to weigh its rights and interests against equally

1. See Emily Crawford, *Proportionality*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (last updated May, 2011), <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1459?rskey=2XQ0Fc&result=5&prd=MPIL>; Eric Engle, *The History of the General Principle of Proportionality: An Overview*, 10 DARTMOUTH LAW JOURNAL 1, 3–5 (2012).

2. HUGONIS GROTII, *DE IURE BELLI AC PACIS*, Ch. 2 (1670).

guaranteed interests and rights of other States. Generically speaking, this is what the principle of proportionality requires.

II. FIRST APPLICATIONS IN INTERNATIONAL LAW—THE *CAROLINE* INCIDENT AND THE *NAULILAA* CASE

The well-known *Caroline* incident constituted an act of self-defense in 1837 in a war between Canada and the United Kingdom.³ The Canadian rebels received support from the United States via the steamer *Caroline*. Since the United States was unable or unwilling to halt this support a British contingent entered the United States, set the vessel on fire, and sent it over the Niagara Falls. The U.S. Secretary of State, Daniel Webster, requested that the UK government demonstrate that the actions had fulfilled the requirements of self-defense. Additionally, Webster stated that acts of self-defense must be limited by that necessity and kept clearly within it. That means he distinguished, as did Hugo Grotius, between the justification of the act and its conduct, both to be guided by the principle of proportionality.

The *Naulilaa* case also resulted from an armed conflict—actually an armed reprisal.⁴ At the beginning of the First World War, three members of a German delegation—two of them officers—were killed by members of the Portuguese colonial armed forces when Portugal still was a neutral power in the war. In response to this killing German colonial armed forces from the German South-West Africa colony (today Namibia) destroyed several Portuguese forts (including Naulilaa) and caused severe casualties and damage to property. On the basis of the Versailles Treaty, Portugal successfully invoked the international responsibility of Germany. An arbitral procedure was established. The Arbitral Tribunal held that the German reprisal as a response to the killing of three Germans was excessive and out of proportion to the act that had motivated them.

There is, from the perspective of the principle of proportionality, a clear difference between the *Caroline* incident and the *Naulilaa* case. While the principle of proportionality was referred to as a justification for an act of self-defense (and affirmed) in the *Naulilaa* case, the arbitral tribunal criticized the way the armed reprisal had been carried out, ruling that the actions undertaken by German military forces had been disproportional to the Portuguese attack.

3. See R. Y. Jennings, *The Caroline and MacLeod Cases*, 32 AMERICAN JOURNAL OF INTERNATIONAL LAW 82 (1938).

4. *Naulilaa Arbitration (Port. v. Ger.)*, 2 R.I.A.A. 1011, 1028 (1928).

III. A BRIEF ACCOUNT OF THE CONSEQUENTIAL DEVELOPMENT OF THE PRINCIPLE

The principle of proportionality was incorporated into several branches of public international law, in particular in the rules concerning self-defense and in international humanitarian law. The rules concerning self-defense were particularly influenced by the *Caroline* incident—to be more precise, by the demands and statements of Secretary of State Webster.

The International Court of Justice (ICJ) ruled in the *Nicaragua* case that Article 51 of the UN Charter “does not contain any specific rule whereby self-defence would warrant only measures which are proportional to an armed attack and necessary to respond to it, a rule well established in customary international law.”⁵ In its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court repeated this ruling and added: “This dual condition applies equally to Article 51 of the Charter, whatever means of force employed.”⁶ In the *Case Concerning Oil Platforms*⁷ the ICJ stated that the United States must show that “its actions were necessary and proportional to the armed attack made on it, and that the platforms were a legitimate military target open to attack in the exercise of self-defence.”⁸ Since “proportionality” is considered the “quintessential factor” of self-defense⁹ some clarification is needed to determine what this term means—or rather what it does not mean. It does not mean a precise equation of causalities and damage. However, there must be some symmetry or approximation between the legal counter-measure and the original unlawful use of force.¹⁰

The principle of proportionality—understood as the principle that the losses resulting from a military action should not be excessive in relation to the expected military advantage—is enshrined in the Protocol (I) Additional

5. *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. 14, 94 (June 27).

6. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8).

7. *Oil Platforms (Iran v. U.S.)*, Judgment, 2003 I.C.J. 161, ¶ 51 (Nov. 6).

8. For criticism that the ICJ was mixing *jus ad bellum* and *jus in bello* considerations, see YORAM DINSTEIN, *WAR AGGRESSION AND SELF-DEFENCE* 183–84 (6th ed. 2017).

9. *Id.* at 267–68. It does not mean a precise equation of causalities and damage. However, there must be some symmetry or approximation between the legal counter-measure and the initial illegal act.

10. *Id.* at 268 (referring to the *Oil Platforms* case, 2003 I.C.J. at 198–99).

to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflicts (AP I).¹¹ Although the principle is not the subject of a specific article in AP I it is reflected in two provisions. Article 51(5)(b) prohibits an attack that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof that would be excessive in relation to the concrete and direct military advantage anticipated. In nearly identical words, Article 57(2)(a)(iii) and (b) require precautionary measures to be taken to avoid collateral damage that would be excessive in relation to the concrete and direct military advantage anticipated.¹² Thus, the principle of proportionality balances the demands of military necessity and humanity.¹³ This has been further exemplified in the rules of the Program on Humanitarian Policy and Conflict Research (HPCR) Manual on International Law Applicable to Air and Missile Warfare,¹⁴ summarizing in Rule 14 the principle of proportionality: “An attack that may be expected to cause collateral damage which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.”¹⁵

The principle of proportionality equally plays a role under World Trade Organization (WTO) law. For example, Article 20(a), (b), and (d) of the 1947 General Agreement on Tariffs and Trade (GATT) provides that States may pursue certain policies that are legitimate as exceptions to the free trade regime if they meet certain qualifications, the existence of which have to be demonstrated by the State concerned.¹⁶ One of them is the necessity test.

11. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

12. As to the legislative history of these central provisions, *see* MICHAEL BOTHE ET AL., *NEW RULES FOR VICTIMS OF ARMED CONFLICT* 309–10, 360–61 (1982) (stating that Article 51 contains “a codification in fairly concrete terms of the principle of proportionality”).

13. Concerning the application of the principle, *see* UNITED KINGDOM MINISTRY OF DEFENCE, *THE MANUAL OF THE LAW OF ARMED CONFLICT* 25 (2004).

14. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIVERSITY, *MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE* r. 35(a), (b), (c) (2013).

15. *Id.* r. 14.

16. General Agreement on Tariffs and Trade art. 20(a), (b), (d), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (“(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 Agreement including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices”).

The WTO Appellate Body report *Brazil-Retreaded Tyres* has contributed to the understanding of the necessity test.¹⁷ It is first necessary to identify the objective pursued by the measures in question and to establish whether such objective falls under subsections a, b, or d of Article 20 of the 1947 GATT. It then has to be established whether the measure contributes to the achievement of this objective. The final step is the “weighing and balancing of the interests involved.”¹⁸ The Report stated:

178. We begin our analysis by recalling that, in order to determine whether a measure is “necessary” within the meaning of Article XX(b) of the GATT 1994, a panel must consider the relevant factors, particularly the importance of the interests or values at stake, the extent of the contribution to the achievement of the measure’s objective, and its trade restrictiveness. If this analysis yields a preliminary conclusion that the measure is necessary, this result must be confirmed by comparing the measure with possible alternatives, which may be less trade restrictive while providing an equivalent contribution to the achievement of the objective. This comparison should be carried out in the light of the importance of the interests or values at stake. It is through this process that a panel determines whether a measure is necessary.¹⁹

The proportionality principle also plays a role in respect of the European Convention on Human Rights and Fundamental Freedom and European Union law as well as in other branches of international law if one considers the mechanism applied rather than using the term “proportionality.”

IV. THE PROPORTIONALITY PRINCIPLE UNDER UNCLOS

A. Applications Under Various Terms

The issue of proportionality constitutes a structural element in UNCLOS, although the term is not used explicitly. The principle dominates the delimitation of competing national maritime zones—the EEZ and the continental shelf. In the delimitation cases decided by the ICJ, the International Tribunal

17. WTO, Report of the Appellate Body, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R ¶¶ 133–83 (Dec. 3, 2007).

18. For further details, see Rüdiger Wolfrum, *ARTICLE XX*, in *WTO: TRADE IN GOODS* 455, 459–62 ¶¶ 15–18 (Rüdiger Wolfrum et al. eds., 2011).

19. WTO, Report of the Appellate Body, *supra* note 17, ¶ 178 (footnotes omitted) (the analysis of the WTO panel was shared by the Appellate Body at ¶¶ 182–83).

for the Law of the Sea (ITLOS), and arbitral tribunals, frequently the issue was of relevance as to whether the size of the zones in question had to be in proportion to the length of the relevant coastlines.

In the *North Sea Continental Shelf* case the ICJ stated that one of the factors considered was “the element of a reasonable degree of proportionality, which a delimitation carried out in accordance with equitable principles ought to bring about between the extent of the continental shelf areas appertaining to the coastal State and the length of its coast.”²⁰ This was the logical consequence of the doctrine developed by the ICJ in the case that “the land dominates the sea.”

In the *Black Sea* case, the ICJ developed a procedure involving several steps that clarified the meaning of the principle of proportionality in the context used.²¹ This judgment consolidates the existing jurisprudence concerning the delimitation of maritime spaces. In the first step, the Court identifies the maritime area under dispute by identifying the “relevant coasts”—as well as the length of each coast. The projection of the coasts to the sea establishes the area under dispute. The length of the relevant coasts establishes the basis of a “disproportionality test” for the final assessment of the delimitation elaborated in steps two and three (on the basis of an equidistance line possibly adjusted by taking into account relevant circumstances). An alternative means is the angle-bisector line, which has been argued frequently but adopted less than the equidistance line. The equidistance procedure has been adopted by ITLOS in the case *Bangladesh/Myanmar*²² and by the arbitral tribunal *Bangladesh v. India*.²³ Subsequent jurisprudence, such as in the cases of *Côte d’Ivoire v. Ghana*,²⁴ *Somalia v. Kenya*,²⁵ and *Costa Rica v. Nicaragua*,²⁶ follow

20. *North Sea Continental Shelf* (F.R.G./Den.; F.R.G./Neth.), Judgment, 1969 I.C.J. 3, 54 (Feb. 20); *see also* *Continental Shelf (Tunis. v. Libya)*, Judgment, 1982 I.C.J. 18 (Feb. 24); *Continental Shelf (Libya v. Malta)*, Judgment, 1985 I.C.J. 13 (June 3).

21. *Maritime Delimitation in the Black Sea (Rom. v. Ukr.)*, Judgment, 2009 I.C.J. 61 (Feb. 3).

22. *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangl. v. Myan.)*, Case No. 16, Judgment of Mar. 14, 2012, ITLOS Rep. 2012, at 4.

23. *Bay of Bengal Maritime Boundary Arbitration (Bangl. v. India)*, Award of July 7, 2014, <https://pca-cpa.org/ru/cases/18>.

24. *Delimitation of the Maritime Boundary in the Atlantic Ocean (Ghana/Côte d’Ivoire)*, Case No. 23, Judgment of Sept. 23, 2017, ITLOS Rep. 2017, at 4.

25. *Maritime Delimitation in the Indian Ocean (Som. v. Kenya)*, Judgment, 2021 I.C.J. (Oct. 12) (for discussion concerning the disproportionality test, *see* ¶¶ 175–77).

26. *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicar.)*, Judgment, 2018 I.C.J. 139, ¶¶ 107–66; 177–204 (Feb 2).

the same approach. In the disproportionality test concerning the dispute between Bangladesh and Myanmar in the *Bay of Bengal* case, ITLOS stated:

497. The Tribunal will now check whether the adjusted equidistance line has caused a significant disproportion by reference to the ratio of the length of the coastlines of the Parties and the ratio of the relevant maritime area allocated to each Party.

498. The length of the relevant coast of Bangladesh . . . is 413 kilometres, while that of Myanmar . . . is 587 kilometres. The ratio of the length of the relevant coasts of the Parties is 1:1.42 in favour of Myanmar.

499. The Tribunal notes that its adjusted delimitation line . . . allocates approximately 111,631 square kilometres of the relevant area to Bangladesh and approximately 171,832 square kilometres to Myanmar. The ratio of the allocated areas is approximately 1:1.54 in favour of Myanmar. The Tribunal finds that this ratio does not lead to any significant disproportion in the allocation of maritime areas to the Parties relative to the respective lengths of their coasts that would require the shifting of the adjusted equidistance line in order to ensure an equitable solution.²⁷

The way of reasoning of the courts or tribunals in this respect is similar. It is to be noted that this is a negative test. The court or tribunal is not called upon to establish proportionality but rather whether the demands of the principle of proportionality have been violated. In that respect, the approach developed by the ICJ differs positively from the demands of AP I. There, the reference is to proportionality, albeit the understanding that an exact proportionality cannot be achieved. This opens the interpretation of Articles 51 and 52 of AP I to subjective considerations whereas the delimitation of maritime spaces is—at least on its face—based upon objective criteria.

Another example for a constructive function of the proportionality principle is to be found in Article 47(1) of UNCLOS. It defines the ratio between land and water that qualifies an archipelago to be an archipelagic State. Different from previous examples where the request to honor the principle of proportionality is addressing a particular State, here the proportionality is referring to a factual situation that is a central precondition for the qualification of a State as an archipelagic State. Article 47 of UNCLOS has far-reaching practical consequences. It ensures that only mid-ocean archipelagos—such as the Philippines, Fiji, and Indonesia—qualify as archipelagic States,

27. *Bangl. v. Myan.*, *supra* note 22, ¶¶ 497–99.

whereas “continental archipelagos”—such as Hawaii, the Canadian Arctic Archipelago, and the Spratly Islands in the South China Sea—do not.

A weighing of contradicting rights and interests in the meaning of the proportionality principle is required under Articles 56 and 58 of UNCLOS, respectively. According to Article 56(2) the coastal State in exercising its rights and duties in its exclusive economic zone shall “have due regard to the rights and duties of other States.” The counterpart to that norm is Article 58(3), which requires: “In exercising their rights and performing their duties under this Convention in the exclusive economic zone . . . States shall have due regard to the rights and duties of the coastal State.” That means both States have the obligation to organize their activities taking into account the proportionality principle. This bilateral reciprocal obligation is supplemented by Article 59, UNCLOS. This provision covers the situation that competences in an exclusive economic zone are attributed neither to the coastal State concerned nor to other States. The provision was meant to cover competences not anticipated when the Convention was adopted. This norm may, however, equally be referred to if there is a disagreement between the coastal State concerned and another State, whether a certain established competence is attributed to either of them.²⁸ This norm directs the parties involved to seek a solution on the basis of equity by adding: “and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.”²⁹ This clearly involves a weighing process typical for the proportionality principle. However, there has been an element added in the examples presented so far: the reference to community interests. This acknowledges that the Convention on the Law of the Sea is more than a network of bilateral and reciprocal rights and duties but also an instrument preserving the interests of the international community of States in the sea.

The principle of proportionality also is at the roots of the regime established by Articles 150 and 151 of UNCLOS concerning the production policy to be pursued by deep seabed mining. This rather complex regime is meant to balance the interests of the States (and industry) in deep seabed mining and the interest of the producers of the same minerals on land. Land producers—not only developing countries—were fearful that an unlimited production of minerals from the deep seabed (the “Area”) would lead to an

28. For further details, see Alexander Proelss, *Article 59*, in UNITED NATIONS CONVENTION ON THE LAW OF THE SEA: A COMMENTARY 458, ¶¶ 1, 4 (Alexander Proelss ed., 2017).

29. United Nations Convention on the Law of the Sea art. 59, Dec. 10, 1982, 1833 U.N.T.S. 397.

overproduction and consequently a destabilization of prices of the commodity concerned. To accommodate their view, it was decided to limit production from the deep seabed for an interim period so that the additional resources from the seabed would be phased into the international commodity system gradually. Seeing the international market on mineral commodities as a unity, it becomes evident that each participant will have to reduce its share proportionally to allow others to participate in this market and to benefit therefrom.

Another prime example for the accommodation of potentially conflicting interests is the interplay between Articles 192 and 193 of UNCLOS. Article 192 provides that States (not limited to States parties) have an obligation to protect and to preserve the marine environment. The way this obligation is formulated indicates that it was seen as covered by customary international law. However, Article 192 is balanced by the principle in Article 193³⁰—equally belonging to customary international law—that “States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and to preserve the marine environment.” It is evident that the States concerned must weigh and assess their various options concerning the economic use of the oceans. They have to take into consideration their own economic interests, limited by their national environmental law, but also the interests of other users of the oceans as well as the demands of the international community. In one of its early cases, ITLOS had to deal with this in a provisional measure—the *Southern Bluefin Tuna* cases.³¹ The tribunal ruled: “*Considering* that, although the Tribunal cannot conclusively assess the scientific evidence presented by the parties, it finds that measures should be taken as a matter of urgency to

30. Article 193 was evidently inspired by the wording of the Declaration of the U.N. General Assembly in G.A. Res. 1803 (XVII) (Dec. 14, 1962). The two most relevant paragraphs read:

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.

2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.

31. *Southern Bluefin Tuna Cases* (N.Z./Japan; Austl./Japan), Case Nos. 3 & 4, Provisional Measures, Order of Aug. 27, 1999, ITLOS Rep. 1999, at 280.

preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock.”³²

The tribunal had to weigh the interest of Japan in the fishing of southern bluefin tuna, in particular since the ordinary season for fishing was imminent, as well as the interests of New Zealand and Australia in fishing, and the interest of the international community in the preservation of that stock. The arguments of the latter were advanced indirectly by New Zealand and Australia. The decision of the tribunal was rendered complicated by the lack of reliable data on the fish stock in question. Therefore, the tribunal had to have recourse to the precautionary approach.³³ The tribunal obliged Japan to deduct the catches made under the scientific program concerning fishing southern bluefin tuna from the annual fishing quota of Japan. Japan fully complied and there was no fishing under the quota system in the year concerned.

Finally, it is appropriate to refer to Article 73 in connection with Article 292 of UNCLOS. Neither of these two provisions refers to the principle of proportionality, but Article 73 contains a reference to necessity. According to Article 73, coastal States may, in the exercise of their sovereign rights to explore, exploit, conserve, and manage living resources in their exclusive economic zones, take certain measures as may be necessary to ensure compliance with the applicable national law. This includes the arrest of the vessel and the crew concerned. The flag State, or an entity on its behalf, may ask for the release of the vessel, obliging it to return for the criminal or administrative procedure to follow. To guarantee the return, the coastal State may request a reasonable bond. Such a decision may be challenged by the flag State of the vessel according to Article 292 (prompt release procedure). In the cases decided upon by ITLOS³⁴ two issues were always of relevance, namely whether the measures taken by the coastal State were “necessary” and whether the bond requested was “reasonable.” Both issues require an assessment of the coastal State’s measures taken from the point of view of proportionality. ITLOS, in the *Hoshinmaru* case,³⁵ specified what it considered a reasonable bond. The case was a particular one. The *Hoshinmaru*, a

32. *Id.* ¶ 80.

33. *See id.* at 302 (Joint Declaration of Wolfrum, V.P., Caminos, J., Rangel, J., Yankov, J., Anderson, J., and Eriksson, J.); *but see id.* at 316–19 (Separate Opinion of Treves, J.).

34. Only ITLOS has jurisdiction to decide in such a procedure unless the parties agree otherwise.

35. “Hoshinmaru” (Japan v. Russ.), Prompt Release, Case No. 14, Judgment of Aug. 6, 2007, ITLOS Reports 2005–2007, at 18.

Japanese fishing vessel, had been fishing in the Russian EEZ under a valid license. When inspected by the Russian authorities it turned out that it had misreported its catches, although its actual catches were covered by its license. The Russian authorities imposed the maximum fine upon the captain as well as on the owner of the vessel and the vessel was confiscated. The tribunal questioned whether the bond set by the Russian authorities was reasonable while resorting to all prompt release cases decided by the tribunal so far. Therefore, the reasoning of the tribunal constitutes a summing up of the tribunal's jurisprudence. The tribunal stated:

82. The Tribunal has expressed its views on the reasonableness of the bond in a number of its judgments. In the *"Camouco" Case* it stated: "the Tribunal considers that a number of factors are relevant in an assessment of the reasonableness of bonds or other financial security. They include the gravity of the alleged offences, the penalties imposed or imposable under the laws of the detaining State, the value of the detained vessel and of the cargo seized, the amount of the bond imposed by the detaining State and its form" (*ITLOS Reports 2000*, p. 10, at p. 31, para. 67). In the *"Monte Conjurco" Case* it added that: "This is by no means a complete list of factors. Nor does the Tribunal intend to lay down rigid rules as to the exact weight to be attached to each of them" (*ITLOS Reports 2000*, p. 86, at p. 109, para. 76). In the *"Volga" Case* it stated that: "In assessing the reasonableness of the bond or other security, due account must be taken of the terms of the bond or security set by the detaining State, having regard to all the circumstances of the particular case" (*ITLOS Reports 2002*, p. 10, at p. 32, para. 65). In the *"Juno Trader" Case*, the Tribunal further declared that: "The assessment of the relevant factors must be an objective one, taking into account all information provided to the Tribunal by the parties" (*ITLOS Reports 2004*, p. 17, at p. 41, para. 85).³⁶

After having summarized its jurisprudence, the tribunal reiterated more clearly than before the underlying philosophy of assessing whether the bond requested by the coastal State was reasonable.

88. The Tribunal is of the view that the amount of a bond should be proportionate to the gravity of the alleged offences. Article 292 of the Convention is designed to ensure that the coastal State, when fixing the bond,

36. *Id.* ¶ 82.

adheres to the requirement stipulated in article 73, paragraph 2, of the Convention, namely that the bond it fixes is reasonable in light of the assessment of relevant factors.

...

94. For these reasons and in view of the circumstances of the case, the Tribunal finds that the Respondent has not complied with article 73, paragraph 2, of the Convention, that the Application is well-founded, and that, consequently, the Russian Federation must release promptly the Hoshinmaru, including the catch on board and its crew in accordance with paragraph 102.³⁷

It is telling that the *Hoshinmaru* case, together with the *Tomimaru* case³⁸ submitted the same day, were the last cases that have been decided by ITLOS under the prompt release procedure.

B. *A Means of Limiting Actions*

In the majority of cases reported, the proportionality principle meant that actions undertaken by a particular State were limited with the view to respect concrete rights and interests of another State or particular persons or objects. This is clearly expressed in Articles 51 and 57 of AP I. Both provisions spell out the reasons for the limitation of a planned military action. The acting State, if it has accepted the magnitude of the risk of its planned activity, only has the option to modify its planned action. This can be done in various ways. The State concerned may decrease the intensity of the military activity planned, introduce additional precautionary measures, or alter its military action altogether. What is important is that the acting State has to take into account established facts such as the existence of protected objects (such as hospitals, cultural property, the presence of civilians, etc.). This provides objective criteria on the basis of which, in spite of the many uncertainties that will prevail, it will be possible to check retrospectively whether the military action undertaken was proportionate.

The mechanism in respect of Articles 56 and 58, UNCLOS, is different. In this situation, it is unclear which rights and interests are at stake and the State planning to act will have to assess the relevance of its rights and interests as well as the ones of other States. That means that the question whether

37. *Id.* ¶¶ 88, 94.

38. “Tomimaru” (Japan v. Russ.), Prompt Release, Case No. 15, Judgment of Aug. 6, 2007, ITLOS Reports 2005–2007, at 74.

there are conflicting interests and rights and what relevance the claimed rights and interests have is to be decided on a wholly subjective basis. This is of relevance for international courts or tribunals if they are called upon to decide on a dispute between a coastal State and another State on the basis of Articles 56 and 58 of the Convention. Anyhow, also in this constellation the principle of proportionality requires States to limit exercising their rights and interests with the view to give due regard to the rights and interests of the other side.

A different approach in the balancing of the various interests is pursued by Articles 150 and 151, UNCLOS, between the producers of the relevant resources at land and the ones at sea at the level of States. Article 151(4) establishes a scheme that limits the production of nickel and thus the production of resources from the deep seabed for an interim period.³⁹ The proportionality principle—that is the balance between the interests involved—has been made automatic on the basis of objective data.

C. An Additional Element in the Exercise of Powers—Margin of Appreciation

State decisions balancing the interests of the States involved under Article 56 and 58, UNCLOS, as well as under AP I, provide the States involved with a margin of appreciation concerning the consequential risks of the planned military activities. This margin of appreciation applies to the following elements of the decisions to be taken by the State planning military activities in question under AP I: First, the military objective pursued, its scope, and, in particular, its relevance; second, the existence of protected personnel or buildings in the area and the demands for their protection (for example, are these objects or personnel being used as “human shields”?); and third, the potential impact of the military acts. There is no doubt that each of these necessary decisions is to be taken on a hypothetical, and thus subjective, basis. The same is true for balancing the interests of the coastal State in its exclusive economic zone (covered by Article 56) and other States undertaking activities in the exclusive economic zone of the former (covered by Article 58). The State concerned, be it the coastal State or the “other State,” has to anticipate which interests or rights of the counterpart might be affected. Again, this will have to be done on the basis of a hypothesis. The same situation prevails in respect of the necessity to balance resource activities and

39. See UNCLOS, *supra* note 29, art. 151(7).

the demands of the marine environment under Articles 192 and 193 of UNCLOS, respectively.

The situation is structurally different for a coastal State, which establishes a regime concerning the implementation of its fisheries regime in its exclusive economic zone, including the stipulation of what is a reasonable bond.

A problem not really approached in international jurisprudence is whether, in the case of a dispute, an international court or tribunal may replace the appreciation by the one of its own. This was the situation in the *Hoshinmaru* case.⁴⁰ ITLOS did not seem to have any doubt that it was called upon to ascertain the reasonableness of the bond as promulgated or requested.⁴¹ On the basis of this limited judicial practice, no sustainable conclusion should be drawn. This is particularly true considering that Article 189, UNCLOS, limits the jurisdiction of the Seabed Disputes Chamber⁴² with regard to the exercise by the Authority of its discretionary power. This provision explicitly states that “the Seabed Disputes Chamber shall not pronounce itself on the question of whether any rules, regulations or procedures of the Authority are in conformity with this Convention.” It would be strange if the legislative acts of the International Seabed Authority would be safe from judicial scrutiny whereas the national law of States would not be. Finally, one should take into account that the disputes under UNCLOS, although politically very relevant, are less sovereignty oriented than military actions which will be scrutinized from the point of view of Articles 51 and 57 of AP I.

D. *A Possible Means of Enlarging State Competences—The Impact of International Community Interests*

So far, the proportionality principle has been analyzed in the context of bilateral relations between States with the view to delimit the areas of competence between the States concerned. However, it is doubtful whether such

40. See “*Hoshinmaru*,” *supra* note 35, ¶ 88.

41. Judge Lucky in his separate opinion even stated that the Tribunal “would have to weigh the gravity in the same manner as a national judge.” *Id.* at 55 (referring to his separate opinion in the “*Juno Trader*” case, “*Juno Trader*” (St. Vincent v. Guinea-Bissau), Prompt Release, Case No. 13, Judgment of Dec. 18, 2004, ITLOS Rep. 2004, at 17). Judge Yanai, in a separate opinion in “*Hoshinmaru*,” *supra* note 35, at 61–63, emphasized that the low gravity of the offence would have required a lower penalty.

42. The Seabed Disputes Chamber is an autonomous chamber of the International Tribunal for the Law of the Sea consisting of eleven judges from among the twenty-one judges of the Tribunal. The Chamber has its own rules of procedure.

an approach is still up-to-date. It is well established in recent international law instruments and confirmed in academic writings that certain community interests (or more vaguely concerning the beneficiary “common interests”) exist, while references are equally made to “common concern.” To name some prominent examples: the Global Compact for Migration⁴³— which is “a non-legally binding” instrument;⁴⁴ also the Paris Agreement on Climate Change;⁴⁵ the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994 (Desertification Convention);⁴⁶ the Convention on Biological Diversity, 1992;⁴⁷ and the Vienna Convention for the Protection of the Ozone Layer,⁴⁸ including the Montreal Protocol on Substances that Deplete the Ozone Layer of 1987.⁴⁹ However, reference is not only made to the interests or concerns of the international community in treaties focusing on the protection of the environment but a similar approach is taken in the context of the protection of human rights. For example, the Universal Declaration of Human Rights, 1948, refers to a “common standard of achievement for all peoples and all nations.” The ICJ stated in its *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* that States have no interest of their own in the object of the Convention,

43. G.A. Res. 73/195, Global Compact for Safe, Orderly and Regular Migration (Dec. 19, 2018).

44. *See id.* pmb. ¶ 7.

45. U.N. Climate Change, *The Paris Agreement: What is the Paris Agreement?*, <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> (last visited Oct. 4, 2022).

46. United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, at pmb. ¶ 2, June 17, 1994, T.I.A.S. No. 01-215, 1954 U.N.T.S. 108 (stating, in the second preambular paragraph: “Reflecting the urgent concern of the international community, including States and international organizations, about the adverse impacts of desertification and drought”).

47. Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 143.

48. Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. No. 11097, 1513 U.N.T.S. 324. The Convention states in the third preambular paragraph that “biological diversity is a common concern of humankind.” It is to be noted that this treaty refers to the human being whereas other international treaties establish that they serve the interest of the international community rather than refer to States.

49. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, T.I.A.S. 89-101, 1522 U.N.T.S. 29.

but merely a common interest.⁵⁰ It is finally acknowledged that the UN Convention on the Law of the Sea is to be considered a regime, which, at least in part, serves the interests of the international community.

Establishing a regime which is meant to serve community interests is not necessarily driven merely by utilitarian considerations.⁵¹ Such establishment has a dogmatic basis. It is based upon the assumption that public international law has a particular role, namely that it should come into play for those issues, which can only be managed effectively by a common effort of the international community. The efforts to control and reduce climate change are a typical example. Only common efforts will be able to stop or at least reduce climate change.⁵²

There are three scenarios/reasons that may induce or call for the establishment of a regime based upon the principle of common interests. First, on the basis of facts, if it is established that a particular issue has to be addressed and managed in the interest of a wider community and the efficiency of such management depends upon the participation of a larger group. This is particularly relevant for international environmental law, trade law, the international regime on the protection of health, etc. Second, a certain value is accepted by the international community and its realization universally requires the participation of the international community. This is of particular relevance for the international human rights regime. Third, common spaces—spaces not under the territorial sovereignty of one State—require common governance, thus ensuring that all members of the international community can equally participate in the utilization of such spaces.⁵³

One of the earliest references of international jurisprudence to the existence of community interests may be seen in a dictum of the ICJ in its advisory opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.⁵⁴ The Court stated that in such a Convention “[t]he Contracting Parties do not have any interests of their own; they merely have, one

50. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

51. See, e.g., JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, ch. 1, ¶ 4 (1789).

52. See United Nations Framework Convention on Climate Change, pmb., May 9, 1992, 1771 U.N.T.S. 165.

53. The three scenarios belong dogmatically together; only the reasons for considering them as regimes serving community interests differ; *contra* EDITH BROWN WEISS, ESTABLISHING NORMS IN A KALEIDOSCOPIC WORLD 169–71 (2018).

54. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 50.

and all a common interest.”⁵⁵ This approach has been confirmed in the case brought by the Gambia against Myanmar⁵⁶ and it was honored by the ICJ in its Order on Provisional Measures of January 23, 2020.⁵⁷

The ICJ briefly touched upon the acceptance of community interests in respect of whaling, without, however, resolving it⁵⁸—a missed opportunity. It may be opportune to turn to that case to address the question raised here: whether via the principle of proportionality it may be possible for States—coastal ones or others—to integrate community interest in their own bundle of interests when it comes to the weighing of interests as indicated above.

The dispute between Australia and Japan required an interpretation of the International Convention for the Regulation of Whaling (ICRW).⁵⁹ The object and purpose of this Convention are set out in its Preamble, which indicates that the Convention pursues the purpose of ensuring the conservation of all species of whales while allowing for their sustainable exploitation. For example, the first preambular paragraph recognizes “the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks.” Subsequent paragraphs confirm this approach. Important in the context dealt with here is the reference to the “interest of nations,” which clearly indicates that the conservation and protection of whales is in the interest of the international community. However, the Preamble also refers to the exploitation of whales. That means that the object and purpose of the ICRW is a dual one. Amendments to the Schedule, which specifies the management of whale stocks and recommendations by the International Whaling Commission, have shifted in their emphasis between the two facets of the object and purpose of the ICRW. In their pleadings, Australia and New Zealand relied on an interpretation of the

55. *Id.* One may also refer to the Advisory Opinion of the ICJ on Reparations for Injuries suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 185 (Apr. 11), in which it refers to the international community creating an entity possessing objective international personality. Concerning the analysis of the jurisprudence of the ICJ on this issue see ANDREAS L. PAULUS, DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT 364–66 (2001).

56. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Gam. v. Myan.*), <https://www.icj-cij.org/en/case/178>. In its application and request for provisional measures Gambia relied on Article 9 of the Genocide Convention.

57. *Id.* Order of Jan. 23, 2020, <https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-02-00-EN.pdf>.

58. See Whaling in the Antarctic (*Austl. v. Japan; N.Z. intervening*), Judgment, 2014 I.C.J. 22 (Mar. 31).

59. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716, T.I.A.S. 1849; 4 Bevens 248; 161 U.N.T.S. 74.

ICRW emphasizing the object and purpose of the latter. They did not explicitly argue that they acted in the interest of the parties to the ICRW (since they were divided) or of the international community.

However, could Australia and New Zealand have advanced such an argument? Or, to put it into different words, would it be sustainable if a State used the proportionality principle to advance community interests with the consequence that the State concerned would act as an agent of the international community? One has to distinguish between the procedural issue of standing and the decision on the merits.

As far as standing is concerned, the ICJ in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case held in its judgment of July 22, 2022:

107. All the States parties to the Genocide Convention thus have a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention. As the Court has affirmed, such a common interest implies that the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are obligations *erga omnes partes*, in the sense that each State party has an interest in compliance with them in any given case.⁶⁰

This decision of the ICJ constitutes the intermediate culmination of a series of decisions starting with its advisory opinion on the Genocide Convention.⁶¹ The next step was the obiter dictum in the *Barcelona Traction* case,⁶² where the Court distinguished between obligations owed to the international community (*erga omnes* obligations) and those owed to individual States. This obiter dictum is often said to have been the response to the criticism the Court had attracted by its decision in the second phase of the *South-West*

60. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Gam. v. Myan.*), Preliminary Objections, Judgment, ¶ 107, July 22, 2022, <https://www.icj-cij.org/public/files/case-related/178/178-20220722-JUD-01-00-EN.pdf> (citations omitted); see also *Gam. v. Myan*, *supra* note 57.

61. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, *supra* note 50.

62. *Barcelona Traction, Light and Power Co., Ltd. (New Application: 1962)* (*Belg. v. Spain*) (Second Phase), 1970 I.C.J. 3 (Feb. 5); see Jean-Marc Thouvenin, *La saisine de la CIJ en cas de violation des règles fondamentales*, in FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER: JUS COGENS AND OBLIGATIONS ERGA OMNES 319, 326 (C. Tomuschat & Jean-Marc Thouvenin eds., 2006).

Africa Cases (Ethiopia v. South Africa/Liberia v. South Africa),⁶³ where the Court had stated that Ethiopia and Liberia respectively had no rights in their individual capacity⁶⁴ to call for the carrying out of the mandate. Instead, the Court emphasized that the management of the mandate system was vested in the League of Nations and individual States were restricted in participation in the management through the organs of the League. A further step into the direction that obligations towards the international community or a particular community entitles every member of such community to claim the cessation of the alleged breach by another State party is the statement of the ICJ in the dispute *Question relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*.⁶⁵

All these rulings cover situations where the claiming State advanced a claim serving the interest of the international community and where, accordingly, the question of standing had to be decided. There is another procedural situation, however, that may happen more frequently than these situations. In the other situation, a State claims before an international court or tribunal that its own rights have been violated and it advances amongst the relevant arguments that the responding State has violated community interests. In such a situation the standing of the claiming State should be beyond doubt but it may be questioned whether such an argument is admissible. A hypothetical example may illustrate the question. An archipelagic State suspends specific areas of its archipelagic waters to the innocent passage of foreign ships, invoking Article 52(2) of UNCLOS on the declared reason that this was necessary for the protection of marine biological diversity. In a subsequent legal dispute with other States, the archipelagic State claims that the

63. *South West Africa Cases (Eth. v. S. Afr.; Liber. v. S. Afr.)*, Judgment, 1966 I.C.J. 6, 19–22 et seq., ¶¶ 7–14 et seq. (July 18).

64. The ICJ distinguished between standing before the Court and the individual rights of the two applicants to call for the carrying out of the mandate. This differentiation is being emphasized by Giorgio Gaja, *Claims Concerning Obligations Erga Omnes in the Jurisprudence of the International Court of Justice*, in *GLOBAL JUSTICE, HUMAN RIGHTS AND THE MODERNIZATION OF INTERNATIONAL LAW* 39, 42 (R. Pisillo Mazzeschi & P. De Sena eds., 2018). Gaja further states that if the respondent does not object to the jurisdiction of the ICJ and the claimant pursues community interest then the Court will decide the claim on the merits. *Id.* at 43.

65. *Question relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.)*, 2012 I.C.J. 422, ¶ 69 (July 20) (“The common interest in compliance with the relevant obligations under the Convention against Torture implies the entitlement of each State party to the Convention to make a claim concerning the cessation of an alleged breach by another State party. . . . It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes* . . . and to bring the failure to an end.”).

closing of innocent passage is the result of the national process of weighing the interests of the archipelagic State with the interests of other States. It was competent to suspend innocent passage to give room to the relevant community interests set out in the Biodiversity Convention.⁶⁶ Such an argument would not be sustainable since innocent passage may only be suspended if it is “essential for the protection of [the archipelagic State’s] security. This excludes taking into account objectives other than security.

The situation is, however, different if the provision relied upon by a coastal State, for example, only requires that the interests and rights of other States may be taken into account. Here it may be argued that the coastal State may invoke considerations of climate protection as community interests with the consequence that the rights of other States in a foreign exclusive economic zone may be more limited than anticipated under Article 56, UNCLOS. Seen from this perspective, the principle of proportionality may become a mechanism to implement community interests and at the same time strengthen the competences of States.

V. SOME CONCLUDING OBSERVATIONS

The principle of proportionality—although not always referred to as such—constitutes an established principle in international law. It originated from the deliberation on the just war; it still is part of the right of self-defense but it also governs the *ius in bello* as far as the process of weighing between military necessity and the protection of non-combatants or protected objects is concerned. While the principle of proportionality is traditionally associated with the law of war, it has permeated other parts of public international law, particularly international trade law.

In all these situations, the principle of proportionality has a limiting effect for the acting State. A tendency seems to develop, though, that the development of community interest, particularly recognizable in international environmental law, may result in broadening the competences of States. If States act in implementing community interests they technically act as agents of the international community. Acting as such they may include community interests among such interests that they introduce into the weighing process with countervailing interests of others. Therefore, one may argue that via a proportionality procedure States may increase their competencies. Such a

66. Convention on Biological Diversity, *opened for signature* June 5, 1992, 1760 U.N.T.S. 143 (entered into force Dec. 29, 1993) (the Preamble of the Convention emphasizes that the protection of biodiversity is “a common concern of humankind”).

possibility should not be without limits. However, the development of such new understanding of the proportionality principle has not yet matured.