Proportionality in international humanitarian law

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Chapter 4

Chapter 4: Proportionality in International Law

"In plain English proportionality means that 'you must not use a steam hammer to crack a nut, if a nutcracker would do'"[1]

4.1 Introduction

The question could be asked whether the widely recognised process of the fragmentation of international law[2] has led to the result that there could be no general principle of proportionality applicable throughout the entire field of international law, including all its sub-branches. In this study, it is established that the rather general notion of proportionality is indeed multi-faceted and may have a very distinct meaning in different contexts. Nonetheless, proportionality has a general core that applies in law in general, including in international law and in its sub-branches. In the context of armed conflict, it may even be the case that to a certain situation in which military (counter-) measures amount to an armed conflict, different fields of international law simultaneously apply a different standard of proportionality.

This chapter deals with the origins and earliest manifestations of the notion of proportionality in general international law. To this end, historic origins of the notion of proportionality are traced in Section 4.2, and two types of manifestations of proportionality are identified and discussed. The subject of the subsequent Section 4.3 is an examination of the notions of 'equity' and 'reasonableness' in international law and how these relate to proportionality. Section 4.4 discusses proportionality in international law in relation to the law on countermeasures, in order to be able to compare the notion of proportionality in international law in peacetime with the notion in times of armed conflict. The manifestations of the proportionality principle in legal frameworks that apply during armed conflict are the subject of the next chapter.

4.2 Origins and Functions of Proportionality in International Law

The roots of the notion of proportionality are deep and have been traced to ancient Greek, Rome, Egypt and Babylonia.[3] There is however no gradual development visible in the legal history of the principle, nor had the principle an equivalent meaning in the different contexts

1 Lord Diplock in R v Goldstein (1983) 1 WLR 151 at 155, as quoted in Arancibia, p. 297.

2 For a short and concise discussion of the notion of the fragmentation of international law, see for example Shaw 2014, pp. 46-47.

3 See for example Delbrück, p. 1140, Christoffersen 2009, p. 33-34.

where it appeared. The literal translation of proportionality, the Latin *proportio*, is 'an equal part' and thus implies a comparison between the shares, or interests, of different actors. The principle has as its main objective to find a fair balance. When law is understood as a system to organise society, the notion of proportionality serves to distribute the shares or interests of individuals in an equal manner. The principle of proportionality is thus inherent to any legal system in an organised society, be it today or in the past, because it is a fundamental concept of justice.[4]

The notion of proportionality was an important basic ethical principle in both ancient Greek and Roman philosophy. It was used to determine the relation between two goods, prescribed the avoidance of radical behaviour and that moderation was needed whenever different interests were to be balanced.[5] Proportionality is a tool to make a comparison between two entities or interests, because "[n]othing is proportional to itself."[6] Aristotle wrote about what he called 'distributive justice', which means that the benefits that accrue from a common asset must be distributed to individuals in proportion to their merit, because it is required by justice.[7] Thus, for example with regard to a common property, there must be a proportionate balance between the merit and context of a claim on that property. Moderation and reasonableness of behaviour towards other actors is a logical and normal feature of any type of legal system and may be found in national legal systems around the world.[8] Proportionality may even be labelled as a "fundamental concept of justice as old as organised society".[9]

Cicero regarded proportionality as a means to determine whether a State could resort to war after exploring all peaceful alternatives. This theory was later developed for the purpose of the waging of a Just War by legal philosophers like Augustine, Aquinas and Grotius.[10] As Aquinas wrote: "whenever a thing is for an end, its form must be determined proportionally to that end; as the form of a saw is such as to be suitable for cutting … everything that is ruled and measured must have a form proportionate to its rule and measure."[11] Grotius later argued, based on his view on Natural Law,[12] that for a war to be started justly, the use of

4 Christoffersen 2009, p. 13.

5 Delbrück, p. 1140.

6 Fotion, p. 91.

7 Crawford, MPEPIL, paragraph 3.

8 The rule of proportionality is well-established in national law, in particular in the administrative law of many States. See for example Krüger-Sprengel, p. 183: "La règle de proportionalité est aussi largement consacrée par le droit interne (…) liant l'administration publique dans son action á l'égard des citoyens." For example, in Dutch administrative law, proportionality is codified in the *Algemene Wet Bestuursrecht*, article 3:4: "(1) The public organ must weigh all interests directly involved in the decision, in so far as a statutory provision or the nature of the power exercised does not contain a limitation. (2) the harmful consequences which the decision would have for one or more interested parties may not be disproportionate to the aims pursued by the decision."

9 Christofferson 2010, p. 33.

10 Fotion, p. 92.

11 Aquinas, *Summa Theologica*, as quoted in Crawford, MPEPIL, paragraph 4.

12 For a brief explanation of Grotius' view on Natural Law, see Scobbie 2018, pp. 58-60.

armed force should be a proportionate measure, and in addition, the conduct of the warring State during the war must also be proportionate in relation to its aim.[13]

Proportionality is also found as a restraining principle of punishment. This is already embodied in the *lex talionis* of the biblical Old Testament, that has always operated "to restrain wanton or excessive retaliation and cannot be understood to have authorized cruelty as an acceptable form of punishment."[14] It has also been included in national criminal codes, where it plays a restraining role, and may be regarded as a fundamental principle.[15]

Keeping in mind the distinction between legal principles and rules that was introduced in Part II, the connection between proportionality and the existence of competing principles, as basis for rules, is "as close as it could possibly be."[16] This is the logical result of the need to establishing a balance between competing interests, embodied in legal principles. Proportionality thus follows from the nature of principles. Likewise, international law has its own concept of proportionality. But there is not just one concept of proportionality in international law: the idea is present in many aspects of international law and also in different sub-branches of international law. The subjects of international law, including States, international organisations and individuals, interrelate in many ways, with sometimes very divergent interests. The nature of these diverging interests is different in the respective branches of international law, thus the applicable proportionality equations are accordingly dissimilar. All these manifestations must however be deemed to be grounded in the common root of balancing relevant interests.

The protection of human beings and the enhancement of their well-being, which may in short be called 'human dignity', is a factor that is important in many relations between the subjects of international law.[17] But there are also other factors that usually are balanced against human dignity, such as the sovereignty of States or other collective interests such as security concerns or free trade. The balance of interests in the light of human dignity is even more important in times of armed conflict, because the preservation of human dignity is in that situation more in danger than in times of peace. Given the fact that other considerations are balanced against human dignity, it is clear that human dignity as such is not "an absolute principle."[18]

The notion of proportionality is often linked to the notions of necessity, suitability and choice of the appropriate measure.[19] The latter notion dictates whether a certain measure is not only necessary to achieve its objective, but also whether there is another act possible with less harmful effects instead of the measure under scrutiny. Sometimes the terms

13 Fotion, p. 92 and Crawford, MPEPIL, paragraph 5.

14 For a description of the *lex talionis* ("an eye for an eye", etc.) and the principle of proportionality in punishment, see Fish.

15 Section 718.1 of the Canadian Criminal Code: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." See Fish, p. 7.

16 Alexy, p. 66.

17 See also Alexy, p. 64.

18 Alexy, p. 64.

19 The term used for the 'choice of the appropriate measure' in Dutch is 'subsidiariteit'.

proportionality and necessity are even used interchangeably: when a certain act is not *necessary*, it is sometimes said that it is therefore disproportionate.[20] It must however be kept in mind that the notions of necessity and proportionally are closely related, yet they have a distinct function. The sequence is that first, it must be determined whether a certain measure is necessary, because if it is not, it is usually already prohibited on that ground. Necessity implies that it is unavoidable to address a situation and that there are no feasible alternatives than to take action. But if a certain measure is necessary, it may nonetheless be illegal if it is subsequently found to be disproportionate on qualitative or quantitative grounds. Both grounds are equally important to balance the aim and the effects of the measure. The qualitative and quantitative elements represent different sides of the same coin and must be seen together and in relation to the factual circumstances. Suitability requires a measure to be appropriate for the achievement of its objective. In other words, the measure and its objective must have a certain causal relationship.

Instead of 'linking' proportionality to necessity and suitability, some authors divide the notion of proportionality into three sub-elements: suitability, necessity and proportionality *stricto sensu*.[21] Proportionality *stricto sensu* must then be understood as the more quantitative comparison of the effects of the measure and its purpose. Proportionality *stricto sensu* serves to ensure that the former is not disproportionate or excessive compared to the latter. As was mentioned above, a fourth sub-element could be added to this when proportionality is understood as a general notion in law, i.e. the choice of the appropriate measure.

Often, a proportionality requirement is implied in law, and not expressly spelled out in the relevant rule of customary or conventional international law. However, in general terms, it seems that there are two main functions that the proportionality principle performs: (1) as a limit on the functional powers of an entity, and (2) as a means to resolve conflicts between competing interests.[22] These two main functions are discussed in the following Sections.

4.2.1 Proportionality as a Limit on the Functional Powers of an Entity

Proportionality may operate to restrict interference of the larger entity to the interests or rights of its constituents. This type of proportionality is a well-established legal notion in a number of national jurisdictions, in particular in Europe[23] and it was subsequently also transplanted into European law.[24] In domestic public law, proportionality delineates the

20 See for example Franck 2008b, p. 8, and Gardam 2004.

21 Alexy, p. 66, Cottier et.al., p. 629, Krommendijk and Morijn, p. 438, see also Emiliou, p. 24-37 and p. 268.

22 Cannizzaro 2000, p. 464.

23 See Ellis for an overview.

24 Arai-Takahashi 2002, p. 190.

extent to which the State and its organs may interfere with the rights of its citizens.[25] The principle of proportionality thus:

> "constitutes a legal and judicial standard to assess the reach and effect of measures taken by States or individuals. In particular, it facilitates the solution of conflicts or tensions between different rights and obligations by providing a tool to evaluate justifications for interferences with other rights and obligations. The principle is used to determine whether a measure has gone too far, in law or in fact. It helps to construe the border between legitimate governmental regulation and excessive interference with rights and obligations."[26]

The proportionality principle in international human rights law may serve to balance the importance of the protection of the fundamental rights of individuals against the interference by authorities.[27] An example is the Olsson judgement, in which the European Court of Human Rights holds that "the notion of necessity implies that the interference [with a right protected by the European Charter of Human Rights] corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued."[28]

A similar function is found in European Law, where proportionality governs the extent to which the European Union (EU) is allowed to interfere with the legal systems of the EU member States and also for the protection of fundamental freedoms within the context of European Law. This concerns the question of whether a subject must be handled on the European level or on the level of its member States. The European Court has consistently applied proportionality as "one of the general principles of Community law."[29] Proportionality as a principle of European law originates from a legal notion found in the legal systems of various European States. The two major influences in this respect were German and French law, which have served as the source for some of the most important principles used by the European Court of Justice. [30]

Furthermore, there is a strong resemblance with the way courts in the United States of America apply the "doctrine of the 'less restrictive alternative' (...) to assess the compatibility of state legislation with the United States Constitution: the question there too is whether the [S]tate interest, however legitimate, could be achieved in a matter less damaging to free trade than the one actually adopted."[31] Thus particularly in the context of review mechanisms,

25 Cannizzaro 2000, p. 455.

26 Krommendijk and Morijn, p. 438.

27 Emiliou, p. 1, referring to Schwarze 1992, p. 679. See also Arai-Takahashi 2002, p. 190-191.

28 See Olsson v. Sweden (No. 1), 130 Eur. Ct. H.R. (ser. A) at 31-32, para. 67 (1988), available online: https://www.legal-tools.org/doc/ed874f/pdf/; See also Franck 2008b, p. 12-13.

29 Franck 2008b, p. 27. This however does not mean that its application is always clear. According to Arai-Takahashi: "The application of the proportionality yardstick remains rudimentary in the jurisprudence of both the Human Rights Committee and the Inter-American Commission and Court of Human Rights, and this makes it difficult to identify any policy grounds operating behind the decisions of these monitoring bodies." See Arai-Takahashi, p. 187.

30 Emiliou, p. 1.

31 Emiliou, p. 217.

proportionality is used to assess the suitability and necessity of measures, and to consider how (dis)proportionate the adverse effects of the measure are on affected individuals.[32]

It may be concluded at this point that proportionality plays a role in international law as a "key tool of modern administrative law to ensure the purposive rationality of public action."[33]

4.2.2 Proportionality as a Means to Resolve Conflicts between Competing Interests

Where the proportionality principle is used as a technique to evaluate the interests of equal actors, the principle of proportionality serves to decide where the balance is between two competing, but not necessarily equal interests. Cannizzaro denies any normative content to the principle of proportionality when it fulfils this function in international law. Rather, he regards the principle of proportionality as a '*technique*' or a "flexible tool for the analysis of conflicts between competing legal situations and interests."[34]

For example, the concept of proportionality is used in the resolution of disputes in the field of international trade. The World Trade Organisation has its own system for the settlement of disputes, requiring countermeasures in this context to be "equivalent to the nullification of impairment."[35] Because the arbitration panels have frequently dealt with the issue of proportionality, the notion of proportionality in this context has been defined to a rather large extent. In a case between Canada and Brazil, which is quoted by Franck, the arbitration panel said that "a countermeasure is appropriate *inter alia* if it effectively induces compliance."[36] In the case of a subsidy, in this case for the sale of Brazilian airplanes, a counter measure is proportionate and appropriate if it is used to "inducing the withdrawal of the prohibited subsidy."[37] Arbitrators use the principle of proportionality in disputes under International Investment Law to "balance human rights protection imperatives against investors' interests in the light of the different international obligations underlying the dispute."[38] Also in the Law of the Sea, proportionality is used to achieve a fair balance between the competing interests of neighbouring States, as the International Court of Justice decided in the Continental Shelf Cases.[39]

32 Arancibia, p. 297, discussing the impact in the British Courts.

33 Franck 2008b, p. 31, quoting R. Thomas, *Legitimate Expectations and Proportionality in Europe*, 2000, p. 77.

34 Cannizzaro 2000, p. 456 and p. 481.

35 Franck 2008b, p. 9.

36 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)

37 Franck 2008b, p. 10.

38 Krommendijk and Morijn, p. 423.

39 See North Sea Continental Shelf Cases (ICJ Reports 1969, p. 48) and Tunisia-Libya Continental Shelf Case (ICJ Reports (1982) p. 60. See also Cannizzaro 2000, p. 460-462.

In the law of countermeasures outside of armed conflict, proportionality is used for the appraisal whether a certain countermeasure is proportionate in relation to a prior wrongful act. This type of proportionality analysis is slightly different in nature, because it concerns the use of proportionality as a limit for enforcement measures which makes it adjacent to the proportionality standard in the *ius ad bellum*. An example of such an unlawful act with regard to another State is a breach of a treaty obligation.[40] The aim of the countermeasure should serve "neither as punishment for past, nor as means to deter future, wrongs."[41] The authority to use a countermeasure is always "hedged by the principle of proportionality."[42] The arbitration tribunal in the *Naulilaa* case held that the countermeasures were to have the equivalent effect of the initial wrongful act.[43] Nowadays, article 60 of the Vienna Convention on the Law of Treaties may serve as an example of how proportionality manifests itself in this context. In this provision, proportionality plays a role, without being explicitly mentioned, in the determination of which type of countermeasure a State may take in case a party to a treaty has breached an obligation that arises from that treaty.[44] In addition, the ICJ decided that the ILC draft rules on countermeasures should be used to determine the legality of a countermeasure.[45] Article 51 of the draft-articles now echoes the decision of the ICJ in the *Gabcikovo-Nagymaros* case, codifying the proportionality principle for this branch of international law. It states that "countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question."[46] The proportionality principle in the law of international countermeasures is a means to resolve conflicts between competing interests as well as a general interpretative tool to reach an equitable result and aims to prevent countermeasures from "spiralling out of control."[47] Not only should the proportionally equation in countermeasures consist of a quantitative component (how much damage has been caused?), there is also a qualitative factor (how important was the interest that was violated?).[48] In more simple terms, this

40 According to the Arbitral Tribunal in the Air Services Agreement, "[i]f a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by general rules of international law (...) to affirm its rights through countermeasures." Air Services Agreement of 27 March 1946 between the United States of America and France, 9 December 2978, 18 Reports of International Arbitral Awards (1978), pp. 417-493, at p. 443.

41 Franck 2008b, p. 17. But see Cannizzaro, who finds the idea of a unitary function for countermeasures unpersuasive and identifies four types of countermeasures: normative, retributive, coercive and executive countermeasures. See Cannizzaro 2001, p. 476.

42 Franck 2008b, p. 17. There are also other conditions that may preclude the wrongfulness of unlawful acts. For example, when compensation is offered, or arbitration is ongoing, this also precludes a State to take unilateral action. And again, when it comes to paying compensation for injuries suffered, the demanded compensation "should be proportionate to the actual injury caused." See Franck 2008b, p. 17.

43 Special Arbitral Tribunal, Naulilaa case, 1928.

44 Example derived from Delbrück, p. 1143. See article 60 of the Vienna Convention on the Law of Treaties.

45 See Wall Advisory Opinion and also article 22 of the ILC Draft articles on Responsibility of States for internationally wrongful acts (2001).

46 Crawford 2011, paragraph 12.

47 Franck 2008b, p. 34.

48 O'Keefe, p. 1161.

means that "the harm which results from the response to a wrong [must] not outweigh the harms occasioned by the wrong in the first place."[49]

It must be noted that proportionality is not the only notion in international law that is used to resolve conflicts between competing interests. Therefore, the next section addresses notions in international law that are akin to the use of proportionality in international law: equity and reasonableness.

4.3 Proportionality, Equity and Reasonableness

Proportionality is not the only notion in international law that aims to reach acceptable outcomes. Similar notions include equity and reasonableness.[50] In some cases these principles are used hand in hand, for example by the ICJ, which stated that "what is reasonable and equitable in any case must depend on its particular circumstances"[51] and with regard to the delimitation of the continental shelf that there must be "a reasonable degree of proportionality."[52] Similarly, the European Court of Human Rights stated with regard to restrictions upon the exercise of rights which are necessary in democratic society, that these must be "reasonably proportionate to the legitimate aim pursued."[53]

Equity is a concept that originated from the Roman Law notion of *aequitas*. Equity is an integral part of contemporary public international law and refers to "what is fair and reasonable in the administration of justice."[54] Equity is also mentioned in the ICJ Charter as a method to resolve legal disputes *ex aequo et bono*,[55] but equity is also expressly incorporated in treaty rules "in order to achieve an equitable solution".[56] Equity is used in international law to reconcile competing interests of international actors, primarily States, and also "different ethical and cultural views of the peoples in the world."[57] As such, it performs its role as part of the system of international law and it has particular significance as an "element in the progressive development of international law (...) [because] it may infuse basic considerations of fairness and justice into the fabric of the law."[58] The ICJ has stated

49 O'Keefe, p. 1160.

50 Corten 2006, paragraph 2.

51 Advisory Opinion of 20 December 1980 on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, ICJ Reports 96, 1980.

52 North Sea Continental Shelf, ICJ Reports 1969, paragraph 98, p. 52.

53 Chorherr v Austria, ECtHR Series A No 266-B paragraph 33.

54 Francioni 2013, paragraph 1.According to Blum, it was Judge Hudson who introduced the term in dispute settlement in international law, in his opinion submitted during the *Diversion of Water from the Meuse* Case (see OCIJ Serie A/B, No 70, 1937, PP. 4-89, at 76.). See also Blum, pp. 395-396.

55 See article 38 (2) of the ICJ Statute which provides "the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto" See also Jennings, p. 30.

56 See articles 83(1) and 74(1) UNCLOS.

57 Francioni 2013, paragraph 3. See also Gourgourinis, p. 340.

58 Francioni 2013, paragraph 26.

that the legal concept of equity is held to be "a general principle directly applicable as law [and the Court] is bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result."[59] Equity can thus be understood also as a general principle of international law that must be observed when international law is applied.[60] It is result-oriented, because the result must be in accordance with a certain notion of justice.

Reasonableness has been used in many instances in international law to reach a desired outcome and in addition it has found its way into a number of positive legal rules of international law. For example, in IHRL, the concept is used to determine whether a State has concluded a criminal or administrative procedure within a 'reasonable' timeframe.[61] In the Barcelona Traction Case, the ICJ stated that "in the field of diplomatic protection as in all other fields of international law, it is necessary that the law be applied reasonably."[62] The objective of a reasonable application of international law is that it would provide legitimacy to the framework of international law in general and helps to view international law as a coherent legal framework.[63] This has both a formal and a material component. The formal component may be understood as the question whether there is a procedure in place that provides the relevant stakeholders with a realistic opportunity to plead their side of the case. But apart from this formal component, reasonableness may also be understood in the material sense and as such dictate whether in specific circumstances the outcome of a certain legal question is reasonable. The delimitation of the continental shelf is an example of a matter where the 'reasonable degree of proportionality' could provide the legal standard to solve a situation where the application of the rules to the situation at hand leads to unreasonable results. In that case, "the notion of reasonableness demonstrates the contradiction between on the one hand, the static, and in theory closed, nature of a legal system, and, on the other, the need to integrate facts, and sometimes values, within that system."[64] In fact, the link between reasonableness and proportionality is so close, that according to Corten, proportionality is one of the three criteria that need to be satisfied to assess the reasonableness of a measure under international law.[65]

When proportionality is understood as a legal notion that dictates that a State's "acts must be a rational and reasonable exercise of means towards achieving a permissible goal, without unduly encroaching on protected rights of either the individual or another State"[66],

59 Tunisia-Libya Continental Shelf (Judgment), ICJ Reports 1982, p. 60.

60 Gourgourinis, p. 344.

61 See article 6 (1) ECHR: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." (emphasis added)

62 Barcelona Traction Case, ICJ Reports 1970, paragraph 93,

63 Corten 2006, paragraph 9.

64 Corten 2006, paragraph 8.

65 Corten 2006, paragraph 20.

66 Crawford, 2011, paragraph 1.

it would be similar to claiming that the State must act reasonably and the result of its actions must be equitable.[67] Although the more positivist oriented international lawyer will regard these notions as opening the door to ethical or moral considerations, rather than legal ones,[68] these notions play an undeniable role in the system of public international law and its sub-branches. They are used as tools of interpretation of positive rules of international law and as gap-fillers.[69] Equity is a "normative flexifier mitigating the rigidity of application of positive international law"[70] and reasonableness must be granted a similar function. These notions may also be understood as principles of international law, as a separate source of material international law.[71]

According to Nasser, "the imprecision of some norms and the ambiguity found in the language [of international law] are considered manifestations of the soft law phenomenon."[72] The notions of equity, reasonableness and also proportionality may be labelled as such vague and imprecise norms. The problem of these types of norms is "one of substance rather than form: there is no doubt about their legal character, since they are part of legal binding treaties, but there is a degree of indeterminacy over the specific obligations and rights of States."[73] Proportionality is a concept that is related to equity and reasonableness, however the notions retain a separate significance and role in international law. For example, it seems that equity is mostly used to provide a solution when two similar interests must be balanced, in a more quantitative sense, whereas reasonableness is used for a clash between unequal interests, which requires a more qualitative assessment. Proportionality assessments may take into account both qualitative and quantitative factors.

4.4 Conclusion

In order to qualify as a general principle of international law, it needs assessing whether proportionality performs some or all of the roles of principles of international law as identified in Chapter 2 of this study. It was established in Part II that the term 'principle'

67 Cottier et al. 2018, p. 671: "Given the role of proportionality as a legal principle in different legal orders, it clearly amounts to a legal principle recognized in international law under Article 38 of the Statute of the ICJ, essentially derived from the tradition of equity"

68 Corten 2006, paragraph 1.

69 Francioni 2013, paragraph 5-5. Corten 2006, para 7-8.

70 Gourgourinis, p. 327.

71 Francioni refers to what he calls the 'high water mark' of the concept of equity, which was construed by the ICJ as a "self-standing source of legal principles" in the Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Judgment, ICJ Reports 1982, p. 18, para 70 on p. 59: "the term 'equitable principles' cannot be interpreted in the abstract; it refers back to the principles and rules which may be appropriate in order to achieve an equitable result.".

72 Nasser, p. 117.

73 Nasser, p. 117, quoting Elias and Lim in note 26. Nasser states that ":[t]he content may vary, according to the material context in which the expression is inserted, because of doubts concerning the characteristics of the expression, or because of the temporal factor. The examples are numerous and they include due diligence, reasonable, equitable, equivalence, proportionality etc."

could mean something different in varying legal frameworks and contexts. A preliminary conclusion is that the principle of proportionality in international law is multi-faceted and may have a very distinct significance in different contexts. But as became clear in this chapter, proportionality is a concept that is inherent in any legal framework, and thus plays a role in any branch of international law.[74] It allows for flexibility in the application of the rules or underlying legal principles and is also crucial in reaching a fair balance between competing interests. This confirms that the principle of proportionality "constitutes a general principle of international law".[75]

In this chapter, three basic functions of proportionality in international law are identified:

1. The function to restrict interference of the larger entity to the interests or rights of its constituents in international law (see Section 4.2.1 above), such as in IHRL;
2. The function to balance competing, and not necessarily equal interests between equal actors (see Section 4.2.2 above), such as in international law in relation to countermeasures.
3. The function of proportionality as a general interpretative tool for unclear or imprecise legal rules, similar to the role equity and reasonableness play in international law (see Section 4.3 above).

There are thus manifestations of proportionality as an interpretative tool in all legal systems, including a diverging range of branches of international law. This however does not mean that proportionality is used in a similar way in dissimilar legal frameworks. It matters to a great extent whether the proportionality principle operates to interpret a rule that regulates the relation between equal entities, such as States, or as a regulatory mechanism between unequal entities, such as a State and its citizens or an international organisation and its constituents. The different functions the notion of proportionality performs, at least in the legal frameworks that apply in peacetime, are very different and are dependent on the particular character of the different branches of international law and the types of relations they regulate. Proportionality as a principle elevated from national law is clearly discernible, for example in IHRL, applying as a mitigating factor on States' interference with their constituents. But that role is very different from the proportionality principle as it functions to secure a reasonable balance between the interests of two States, as in international law concerning countermeasures. So although proportionality is often used as an interpretative tool to solve conflicts of interests, it clearly seems to be more than that. Proportionality retains a separate significance and role in different branches of international law. This would argue against the existence of an unitary content, at least for the two first functions.[76]

74 Delbrück, p. 1143.

75 Cannizzaro 2000, p. 481.

76 See also Pertile, p. 679-680.

There is nonetheless support from a number of authors who argue that an overarching, or 'general principle of proportionality' indeed exists in international law. This would for example be a logical position for proponents of global constitutionalism.[77] Krüger-Sprengel summarises the function of such a principle of proportionality as a general principle that must be taken into account when interpreting important rules of international law.[78] Franck notes that the role of proportionality in international law is 'central': "[t]his 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."[79] Crawford describes how proportionality becomes 'self-perpetuating',[80] because it is employed by all players in the international law field and to be a successful international lawyer, "means learning to reason and deploy the language of [proportionality analysis]."[81] Cannizzaro concludes in his 2001 study on proportionality that "proportionality represents a structural principle of international law, a principle which may be deduced from the observation of the formal structure of the legal situations to which it applies."[82] Cannizzaro furthermore states that "[w]ith respect to each of the various fields of application, proportionality maintains a common evaluative structure and unitary content."[83] It is suggested that these different authors refer to the principle of proportionality as a general interpretative tool for unclear or imprecise legal rules, similar to the role equity and reasonableness play in international law. Also, the Supreme Court of Israel recognised proportionality as a general principle of international law in the *Beit Sourik* case of 2004.[84]

The ICJ has stated with regard to the notion of equity that it is a "general principle directly applicable as law [and the Court] is bound to apply equitable principles as part of international law and to balance up the various considerations which it regards as relevant in order to produce an equitable result."[85] Equity can thus be understood also as a general principle of international law that must be observed when international law is applied.[86] It is result-oriented, because the result must be in accordance with a certain notion of justice. It may be argued that a general proportionality principle performs a similar function. The proportionality principle is used in many legal systems as a tool to interpret vague legal rules, to balance competing interests in order to provide reasonable and equitable outcomes and to protect the rights of smaller entities from excessive interference from the larger entity.

77 See for a short description of global constitutionalism: Peters, p. 331.

78 Krüger-Sprengel, p. 194-195: "un principe general don't il faut tenir compte dans l'interprétation des règles pertinentes du droit international." (translation by the author).

79 Franck 2008b, p. 34.

80 Crawford 2011, paragraph 26.

81 Crawford 2011, paragraph 26, quoting Sweet and Matthews at p. 161.

82 Cannizzaro 2001, p. 483.

83 Cannizzaro 2001, p. 481.

84 But see Dinstein 2013, p. 74, who states that this "is a completely untenable proposition. Indeed, proportionality is not even a general principle of IHL: it is patently excluded insofar as combat operations are concerned."

85 Tunisia-Libya Continental Shelf (Judgment), ICJ Reports 1982, p. 60.

86 Tunisia-Libya Continental Shelf (Judgment), ICJ Reports 1982, p. 60.

These different manifestations of proportionality are based on a general proportionality principle, which plays a similar role as equity and reasonableness do across the palette of general international law and its branches. The understanding of the notable writers mentioned above seems to imply that proportionality applies on the level of principles, not rules, and it is often used to provide an equitable outcome for dynamic situations in which a rule that provides a fixed outcome is unsuitable.[87] This does not lead to the conclusion that proportionality has a unitary substantive meaning enabling it to set aside specific legal rules. There does not seem to exist unanimity among legal doctrine and courts in the international sphere that a general principle of proportionality with this function exists in general international law, although it may exist in some national law systems. If such 'correcting' function of proportionality would be accepted to apply in all branches of international law, this would seriously impair the certainty that specific legal rules are intended to provide to the subject regulated by that rule. Nonetheless, lawyers, States or courts themselves may use proportionality on occasion to produce a desired outcome, where that would be beneficial for their case.

When compared to the roles principles of international law perform, it may be concluded that the general principle of proportionality in international law serves to fill gaps and to interpret other rules of international law. Proportionality also operates as the basis for specific proportionality rules in different branches of international law applicable in peacetime, used to balance diverging interests, without superseding these rules. The conclusion is thus that a general proportionality principle in general international law is applicable in peacetime. A follow-up question is then whether the existence of a general principle of proportionality in the general framework of international law has consequences for the way in which proportionality manifests itself in IHL. The following chapters deal with the manifestations of the notion of proportionality in international law, including those relating to the use of force and those applicable in times of armed conflict.

87 As Cannizzaro concludes, see Cannizzaro 2000, p. 481. Cannizzaro concludes that proportionality is not a rule, but a general principle of international law, more as a "technique for the legal order" to evaluate the exercise of powers by a State.