THE OPACITY OF PROPORTIONALITY IN INTERNATIONAL COURTS: COULD CATEGORIES CLARIFY?

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ABSTRACT

Proportionality is often applied in international courts with the assumption that reasons can have universally consistent 'weight' and that, as such, international judges can weigh reasons against one another. This Article shows that this weighing often amounts to an expression of belief, either about what is 'right' or about what is politically expedient. Expressing such beliefs while weighing a state's right against an individual or a state's right against another state often produces obscure (if not absurd) forms of reasoning. Instead, international courts should seek to occupy a legal space that neither enhances nor inhibits beliefs about what is right. With an eye toward cases of non-instrumental public morals and cases in which 'right' is intrinsic or internal to a group rather than external or dependent upon a state or government, this Article argues that the opacity of proportionality undermines its utility in non-instrumental 'right' adjudication. While proportionality undoubtedly has utility in international adjudication, it is obfuscated by the opacity of its application. Thus, after identifying proportionalities of hierarchy, morality, and principle, this Article suggests that, because proportionality is not a single definable thing, international courts should employ a categorical approach to define sets of issues to which they can apply specific types of proportionality.

I. INTRODUCTION

'Proportionality'—or at least one conception of it[1]—is an interpretive tool judges in many domestic and international courts employ to evaluate and ultimately 'balance' the appropriateness of

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1. *See* Vicki C. Jackson, *Constitutional Law in the Age of Proportionality*, 8 YALE L.J. 3094 (2015) (defining three conceptions of "proportionality"). Domestic and international courts apply proportionality tests in different ways, sometimes with three steps and sometimes with four.

state action concerning various rights.[2] As a tool for determining judicial outcomes, claims that 'proportionality' is emerging as a 'universal' value have some credibility due to the values it projects, as well as its use in various domestic jurisdictions globally.[3] In the 'new global constitution' model described by Stone Sweet and Mathews, otherwise known as the 'Triad Model,' proportionality serves to endow domestic judges with legitimacy in resolving disagreements through shoring up the institutional appearance of a 'neutral' third party.[4] Insofar as international law exhibits characteristics of domestic constitutionalism—through international courts and through documents such as the European Convention on Human Rights (ECHR) or the International Bill of Human

2. *See id.* This is a paraphrasing of one of Professor Jackson's definitions. I am tempted to describe the idea that there is a single definition of proportionality itself as 'delusion,' which the Oxford Dictionary defines as an "idiosyncratic belief or impression maintained despite being contradicted by reality or rational argument." But Professor Jackson's definitions will be less offensive to proportionality's disciples, and hopefully they won't read this footnote.

3. The bulk of scholarship championing the universality of proportionality arises from this fact: its application at the state level seems to work remarkably well as a consistent judicial tool to protect individuals from legislatures. *See, e.g.*, *id.*; Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 73 (2008); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005). On the role of proportionality in international law and administrative law, see Gráinne de Búrca, *The Principle of Proportionality and its Application in EC Law*, 13 Y.B. EUR. L. 105, 113 (1993) (concluding that the European Court of Justice considers whether (i) the government "measure [was] a useful, suitable, or effective means of achieving a legitimate aim or objective," (ii) the government could have attained that goal in a "less restrictive" manner, and (iii) "the measure [has] an excessive or disproportionate effect on the complainant."). *See also* Beit Sourik Vill. Council v. Gov't of Isr., Isr. L. Rep. 2004 264 (2006) (translating HCJ 2056/04 Beit Sourik Vill. Council v. Gov't of Isr. 58(5) PD 807 (2004) (Isr.) (holding that an administrative agency must meet all three of the "appropriate measure," the "least harmful measure," and the "proportionate measure" tests to determine if administrative action is proportionate and applying these tests to military strategies. Note, however, that it is important to keep the concept of "judicial outcomes" separate from the concept of "judicial interpretation;" the former calls on a judge to make a normative declaration on what 'ought to be,' whereas the latter may be thought of as a factual articulation of "what is."). Drawing on Max Weber's definition of normative as opposed to sociological definitions of legitimacy, a legitimate normative definition of proportionality would call a test that produces outcomes that are *intrinsically* superior; Weber also defines as sociologically legitimate those institutions that are *perceived* as superior. *See* MAX WEBER, BASIC CONCEPTS IN SOCIOLOGY 72, 81 (1922) (H.P. Secher trans., Philosophical Library, Inc. 1962). When projected from the domestic to the international stage, the principle of proportionality certainly carries the sociological definition of legitimacy when European audiences are asked, but as with many claims to universality, it would be inaccurate at best to make a claim to proportionality's outcomes as *intrinsically* superior.

See generally id.

4. Stone Sweet & Mathews, *supra* note 3, at 73.

Rights[5]—the principle of proportionality plays an indispensable role in protecting the fundamental rights of individuals from inappropriate state action.[6]

Indeed, proportionality's growing pervasiveness in the domestic constitutional courts of Western countries,[7] in the domestic courts of former Western colonies,[8] and in a handful of international treaties[9] has led many scholars to declare that the principle of proportionality is universal or near-universal.[10] But a review of the sources cited in this literature reveals that proportionality's universalist champions are actually speaking about the use of the principle in Europe, Canada, Israel, South Africa, New Zealand, as well as at the European Court of Justice (ECJ), the European Court of Human Rights (ECtHR), and the Appellate Body (AB) of the World Trade Organization (WTO)[11]—at least if one conceptualizes 'proportion-

5. The International Bill of Human Rights refers to the 1948 Universal Declaration on Human Rights (UDHR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights. Office of the U.N. High Commissioner for Human Rights, Human Rights: A Compilation of International Instruments, at 1, 7, 17, U.N. Doc. ST/HR/Rev. 6 (Vol. 1/Part 1), U.N. Sales No. E.02.XIV.4 (2002).

6. Proportionality's role, as originally conceived at the German Federal Constitutional Court (GFCC), was to do exactly this: the structure of Alexy's proportionality (the classic model) assumes a state-individual relationship in which both parties carry rights and obligations to one another. This in turn presumes two dimensions: a state-individual relationship carries implications of social contract theory, whereby the individual gives up a portion of autonomy to the state in return for the benefits of collective governance and dispute resolution; a rights-obligations relationship carries implications of symmetry, that is, that parties to a dispute each carry both rights and obligations to one another. Neither of these dimensions holds true, however, across international courts, as this Article will attempt to demonstrate. For the classic GFCC approach to proportionality, see Robert Alexy, A Theory of Constitutional Rights 66–69 (Julian Rivers trans., Oxford Univ. Press 2002) (1986).

7. The EC courts and virtually all of Europe's countries employ proportionality tests.

8. For example, Canada and, debatably, Malaysia employ proportionality.

9. The European international courts (ECJ, ECtHR) and the WTO employ proportionality. The international criminal courts employ a slightly different form.

10. *See, e.g.*, Bernard Schlink, *Proportionality in Constitutional Law: Why Everywhere But Here?*, 22 Duke J. Comp. & Int'l L. 291, 296 (2012). Apparently, by referring to "proportionality" being "everywhere," Professor Schlink actually meant Israel, Canada, and South Africa, along with "most of Europe." *Id.* Internationally speaking, he was referring to "the European Court of Justice, the European Court of Human Rights, and the Panels and Appellate Body of the World Trade Organization." *Id.* at 298. Especially the WTO's use of proportionality, through TRIPS and GATT XX, places proportionality within the auspices of "public international law," but the International Court of Justice (ICJ)—what might be thought of as the "Supreme Court" of international law, as least according to the *Genocide* case—has yet to explicitly adopt the principle of proportionality. For a discussion on balancing IP rights in TRIPS, see Lea Shaver, *The Human Right to Science and Culture*, 1 Wis. L. Rev. 121 (2009).

11. *See, e.g.*, Schlink, *supra* note 10, at 296, 301; Kai Möller, The Global Model for Constitutional Rights (2012); Alec Stone Sweet & Giacinto della Canaeo, *Proportionality,*

ality' as a structured approach to judicial review.[12] Even those scholars who recognize rejections of proportionality in the United States, most of South America, most of Africa, China, the Association of Southeast Asian Nations (ASEAN), India, Russia, and the non-political rights adjudicated in various international courts, nevertheless view proportionality as a so-called 'global model,' if not global reality, for constitutional rights.[13] Somehow, without procuring the recognition of most of the world, proportionality is lauded as a global norm: one that "respon[ds] to a universal legal problem" by "guid[ing] us on our difficult path to find answers."[14] Indeed, one that constitutes "the ultimate rule of law."[15]

Various courts throughout the world, as well as decisions within the same court, interpret proportionality differently. Indeed, whatever its state-based usefulness, if one defines a 'global norm' through international legal trends rather than through domestic or even regional ones, proportionality's claim to 'near' universality becomes problematic. In the international adjudication of individual rights, the use of 'proportionality' is clear and explicit. However, the principle produces inconsistent results: the ECtHR, through cases such as *Behrami* and *Saramati*,[16] employs a propor-

General Principles of Law, and Investor-State Arbitration: A Response to José Alvarez, 46 N.Y.U. J. Int'l L. & Pol. 911, 915 (2014). Stone Sweet cites his own work with Jud Mathews, Stone Sweet & Mathews, *supra* note 3, at 73, in claiming a global diffusion of proportionality, because it has "appeared" in Europe and in former European colonies. This 'global' claim, as usual, completely ignores Asia, most of Africa, the United States, and all of South America. The occasional Asian exception is Malaysia. Malaysia's judges interpreting the non-Sharia civil legal code occasionally make use of proportionality-like reasoning. *See, e.g.*, Mat Shuhaimi bin Shafiei v. Kerajaan Malaysia, [2017] 1 MLJ 436, https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2016/11/Mat-Shuhaimi-Shafiei-v-Kerajaan-Malaysia-Judgment-CoA.pdf [https://perma.cc/ER7R-HDFR].

12. *See* Jackson, *supra* note 4, at 3098.

13. This is the title of Professor Kai Möller's first book, which celebrates the emerging hegemony of proportionality: The Global Model for Constitutional Rights (2012). In the case of the United States, there are interesting arguments to be made that the Supreme Court does, in fact, employ a proportionality test, but its categories of 'scrutiny' offer judges and lawyers greater discretion. Jackson, *supra* note 4, at 3100 n.29; Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. Rev. 1267 (2007); Jack Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 Chi.-Kent L. Rev. 49 (2007); *see also* Richard A. Primus, *Canon, Anti-Canon and Judicial Dissent*, 48 Duke L.J. 243 (1998); *cf.* Jamal Greene, *The Anticanon*, 125 Harv. L. Rev. 379 (2011). Some view this discretion as an illegitimate deployment of judicial subjectivity. *See* Schlink, *supra* note 10, at 299. Indeed, even Justice Breyer has argued that, under certain circumstances, proportionality would provide greater objectivity in U.S. courts. *See, e.g.*, United States v. Alvarez, 132 S. Ct. 2537, 2551–57 (2012).

14. *See, e.g.*, Schlink, *supra* note 10, at 296, 301.

15. *See* David M. Beatty, The Ultimate Rule of Law (2004).

16. *See* Behrami v. France, No. 71412/01; Saramati v. France, Germany, and Norway, No. 78166/01, ¶¶ 126, 149, 151–52 (May 2, 2007), https://hudoc.echr.coe.int/eng?i=001-

tionality that elevates institutional conceptions of rights over individual ones by avoiding application when it is hierarchy inhibiting, whereas the International Court of Justice (ICJ), in adjudicating the human right to self-determination, has debatably done just the opposite in recognizing the 'unilateral' form of that right.[17] In international criminal law, while the International Chamber of Commerce (ICC) and hybrid tribunals claim to recognize a plurality of retributive or expressive punishment, the principle of proportionality disintegrates this claim through practice (this is evident through sentencing at the Extraordinary Chambers in the Courts of Cambodia (ECCC), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the ICC, for example).[18] In international economic law, meanwhile, the WTO's proportionality based on the 'General Exceptions' of General Agreement on Tariffs and Trade (GATT) Art. XX produce inconsistent 'proportions' with respect to 'public morals.'[19] In international investment law (IIL), arbitral tribunals such as the International Centre for Settlement of Investment Disputes (ICSID) asymmetrically apply proportionality to the actions of states and not to investors.[20]

Certainly part of the problem is definitional. To establish a conceptual framework for 'proportionality,' therefore, Professor Vicki

80830 [https://perma.cc/LB9S-E5MA#{%22itemid%22:[%22001-80830%22]}]http:/www.echr.coe.int/eng?i=001-80830.

17. *See* Accordance with International Law of the Unilateral Declaration of Independence in Respect to Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403, 438, 452 (July 22).

18. The Extraordinary Chambers of the Courts of Cambodia (ECCC), International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Court (ICC) are all tasked with trying those individuals most responsible for war crimes and crimes against humanity. All three tribunals forbid the death penalty (as do all U.N. tribunals) but allow a maximum sentence of life after an assessment of "gravity." The ICC places a cap on the number of years that can be assigned (30), but still allows for a life sentence. U.N. General Assembly, Rome Statute of the International Criminal Court, art. 77, 17 July 1998, 2187 U.N.T.S. 135 [hereinafter Rome Statute]. Given the nature of the crimes, however, the process of balancing crime against punishment borders on the absurd, and the sentence is virtually always the maximum, regardless of the gravity of the crime, as the nature of the crimes charged at these tribunals requires that a guilty sentence incur a life sentence, at least in the view of most judges. For a discussion on 'gravity' problems at the ICTY and International Criminal Tribunal for Rwanda (ICTR), see Barbora Halo, *Sentencing of International Crimes at the ICTY and ICTR*, 3 Amsterdam L.F. 4 (2012).

19. *See, e.g.*, Appellate Body Report, *EC—Seal Products*, WTO Doc. WT/DS400/AB/R (adopted Nov. 25, 2013) [hereinafter AB—*Seal Products*].

20. This is a symptom of the international investment law (IIL) system itself more than a symptom of 'proportionality' as such. *See* Christian Tietje & Kevin Crow, *The Reform of Investment Protection Rules in CETA, TTIP, and Other Recent EU-FTAs: Convincing?*, *in* Mega-Regional Agreements: TTIP, CETA, TiSA. New Orientations for EU External Economic Relations 87 *passim* (Stefan Griller et al. eds., 2017).

C. Jackson provides three distinct approaches to understanding 'proportionality': "as [(i)] a legal principle, [(ii)] a goal of government, and [(iii)] a particular structured approach to judicial review."[21] The 'legal test' or "structured approach" to 'proportionality' conjures three to four specific prongs in and of itself, most typically articulated as 'legitimacy or suitability,' 'reasonableness or rationality,'[22] 'necessity,' and 'balancing.'[23] Indeed, each of these prongs calls for culture-specific value assessments of objectivity, and the resulting cultural flexibility of proportionality is largely responsible for claims to its near-universal application at the domestic level:[24] individual states can determine 'objectiveness' as it is understood within the culture of that state. On the international level, however, the objectivity of proportionality's dimensions crumble. 'Reasonableness,' for example, whether applied to the actions of an individual in a civil or criminal context, or applied to an exercise of institutional power, must appeal to an objective standard for reasonability. Reasonability is inevitably infused with what Bruno Latour calls "particular universalism":[25] the process by which one society takes the values in which it believes—constructed from and corroborated by its own understanding of history—and projects these values onto all other societies.[26] The same can be said for proportionality's other prongs.

While some scholars already have noted that 'proportionality' communicates different things to different international lawyers in different contexts, the existing literature nevertheless seems ambivalent to the opacity of proportionality. While Ulf Linderfalk notes the communicative usefulness of proportionality as shorthand for complex legal concepts,[27] Thomas Cottier and his collaborators note that proportionality is problematic in some international

21. Jackson, *supra* note 4, at 3098.

22. The concepts of 'reasonableness' and 'rationality' differ insofar as rationality describes a normative result. Rationality as optimality can be opposed to the idea of reasonableness when rationality describes the process of making the 'best choice' whereas reasonableness describes the process of making a choice based on the appropriate efforts of bounded agents. *See, e.g.*, Bruce Chapman, *The Rational and the Reasonable: Social Choice Theory and Adjudication*, 61 U. Chicago L. Rev. 41 *passim* (1994).

23. *See, e.g.*, Kai Möller, *Proportionality and Rights Inflation* 2 (London Sch. Econ. & Political Sci. Law Dep't Law, Society and Economy, Working Paper No. 17, 2013, https://www.lse.ac.uk/collections/law/wps/WPS2013-17_Moller.pdf [https://perma.cc/6KSS-XBAZ].

24. *See id.*

25. Bruno Latour, We Have Never Been Modern 105 (1993).

26. *Id.* at 105–06; *see also* Gilbert Rist, The History of Development (2008).

27. Ulf Linderfalk, *Towards a More Constructive Analysis of the Identity of Special Regimes in International Law—The Case of Proportionality*, 2 Cambridge Int'l L.J. 850, 878 (2013).

courts because it originally evolved to deal with vertical disputes (citizen v. state) while international courts classically dealt with horizontal disputes (state v. state).[28] While these observations and criticisms are useful, I want to suggest that they fall short of locating proportionality's utility in international law. To demonstrate this point, Part II identifies a proportionality of hierarchy in international institutional rights adjudication, a proportionality of morality in international economic tribunals, and a principled proportionality in international humanitarian law. This Article briefly discusses two major problems that emerge from the application of these 'proportionalities': the problem of subjective application (Part III) and the problem of dissent (Part IV). It then suggests that a categorical approach which employs the concepts of 'unity' and 'pluralism' as diagnostic tools might provide a transparent and effective means to decide whether proportionality should be used in a given case, therefore making the application of proportionality more predictable (Part V). Finally, Part VI concludes with a short summary and a long chart illustrating international law's 'proportionalities.'

II. 'Proportionality' or 'Proportionalities'?

Proportionality in international courts takes on different appearances depending on the type of right the court typically adjudicates, the type of treaty the court adjudicates, and the type of deference the court allows. This is true not only for the structure of proportionality as a judicial tool, but also for the application of proportionality within a single structure (this is most evident at the WTO). Courts that typically adjudicate human rights, framed broadly to include the International Bill of Human Rights, tend to favor outcome-driven interpretations.[29] The deployment of outcome-driven reasoning favors classic articulations of proportionality, such as Alexy's,[30] because the balancing prong provides a check against interpretations that are reasonable, necessary, and legitimate, but nevertheless have potential to produce unpalatable outcomes from a human rights perspective.

28. Thomas Cottier et al., *The Principle of Proportionality in International Law: Foundations and Variations*, 18 J. World Inv. & Trade 634 (2017).

29. Interpretation in International Law (Andrea Bianchi et al. eds., 2015); Handyside v. UK, 5493/72 Eur. Ct. H.R. 24–25 (1976). In *Handyside v. UK*, a rationale is given for the law's predictable outcome, but the conjunctive "however" is used to favor outcome-driven interpretation nevertheless. *Id.*

30. *See* Robert Alexy, *supra* note 6.

By contrast, tribunals that typically adjudicate economic issues, like the WTO or IIL's various arbitral tribunals, tend to favor 'security and predictability'-driven interpretations.[31] In such tribunals, proportionality is either not explicitly allowed or disallowed, as under the ICSID Convention and the world's various bilateral investment treaties (BITs),[32] or it is applied unevenly, somewhat haphazardly, depending on the situation before the tribunal, as at the WTO.[33] There are several ways one might approach an explanation of these differences. For example, one might differentiate the proportionalities used in both outcome and security driven tribunals into categories describing two different kinds of legal problems: those that involve interstate relations and those that involve relations between individuals and the state.[34] However, while this conceptualization might explain why the ECtHR functions similarly to domestic courts applying proportionality to strike an appropriate balance of institutional rights versus individual rights, it falls short of explaining the lack or asymmetry of proportionality emerging from the ICSID tribunals.[35] These tribunals adjudicate disputes that involve state interference with individual rights, and they are generally at liberty to employ the interpretive tools available through public international law, yet proportionality is virtually never applied.[36]

When it comes to 'proportionality' in international courts, one can observe several avenues through which 'preference expressions' are formalized through the processes that lay claim to 'triad neutrality.' The following sections will provide examples of proportionality's preference expressions in (i) human rights law, (ii) international economic law, and (iii) international humanitarian law. These subsections will demonstrate that the problematic nature of proportionality is rooted in the procedures of interna-

31. Interpretation in International Law, *supra* note 29.

32. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T 1270.

33. *See* Axel Desmedt, *Proportionality in WTO Law*, 4 J. Int'l Econ. L. 441–80 (2001).

34. While traditionally the law that governed interactions between nations only, public international law has gradually stretched its boundaries to include obligations and duties between individuals and states. Generally speaking, state liabilities to individuals expanded through human rights instruments and through IIL, while individual liabilities to states (collectively) increased through international criminal law.

35. For a discussion of this asymmetry, see Tietje & Crow, *supra* note 20.

36. The only ICSID case where proportionality was debatably applied was Annulment Board of Continental Casualty v. Argentina, ICSID Case No. ARB/03/9, Annulment Proceeding, (Sept. 16, 2011).

tional courts and in the assumption that it can be applied to non-instrumental morals and accompanying rights.

A. *International Human Rights Law: The ECJ, the ECtHR, the ICJ, and Hierarchies of Rights*

The ECtHR and the ECJ, both courts that have explicitly adopted 'balancing' tests through statute and case law, avoid applying proportionality when cases potentially concern international law that is 'hierarchically superior' to the treaties on which those courts are established. This common characteristic is somewhat surprising, given that the two courts could today be characterized as representing the two outermost points on the pendulum of the 'constitutionalism' versus 'pluralism' debate.[37] While the ECJ embraced strong constitutionalist tendencies early in its history as it fought to establish its place in the EC legal hierarchy (see *Van Gend en Loos*,[38] *Costa v. ENEL*,[39] and *Simmenthal*,[40] to name a few),[41] it shifted course explicitly in 2009 through the case of *Kadi v. Commission*.[42] Perhaps because of the existence of the ECtHR, with its rigid constitutionalist approach to individual rights,[43] the ECJ in *Kadi* felt at liberty to define and promote a plurality of legal orders, specifically with respect to the EC and the United Nations Security Council (UNSC).[44] Note the role proportionality played in that case: the ECJ overturned an earlier General Court decision which held that an evaluation of the execution of UNSC Resolutions restricting Kadi's access to his assets by the European Community (EC) would be tantamount to an evaluation of the Security Council

37. Prabhakar Singh & Sonja Kübler, *Constitutionalism and Pluralism: Two Ways of Looking at Internationalism*, *in* Critical International Law: Postrealism, Postcolonialism, and Transnationalism 304, 314 (Prabhakar Singh & Benoît Mayer eds., 2014).

38. Case C-26/62, N.V. Algemene Transport-en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1.

39. Case C-6/64, Flaminio Costa v. Enel, 1964 E.C.R. 585.

40. Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A., 1978 E.C.R. 629.

41. Singh & Kübler, *supra* note 37, at 309–10.

42. *See generally* Joined Cases 402 & 415/05, Kadi v. Council and Commission, 2008 E.C.R. I-6351.

43. For example, an explicit balancing test case be seen in Article 10 Freedom of Expression of the European Convention, and the ECtHR is tasked with determining whether the state's legitimate policy concerns justified an imposition on the individual right to expression. For a meta-analysis of Article 10 cases at the ECtHR and a comparison to expression cases at other international and domestic courts, see Glob. Freedom Expression Colum., https://globalfreedomofexpression.columbia.edu (last visited Dec. 14, 2018) [https://perma.cc/SF8C-2F7E].

44. Joined Cases 402 & 415/05, Kadi v. Council and Commission, 2008 E.C.R at I-6380.

Resolutions themselves. The Resolutions were lawfully enacted under Chapter VII of the United Nations (U.N.) Charter, and as such, the General Court found that it had no competence to decide the case. So long as this strict constitutionalist perspective stood, proportionality was not employed at all, even though individual rights were at stake.[45] Rather, the General Court only 'examined' whether the UNSC had 'respected' *jus cogens*, in particular certain fundamental rights, and ultimately decided that it did not find a violation of this standard.[46] However, reversing the case on appeal, the ECJ was able to separate its application of proportionality from an evaluation of the UNSC's Resolutions by drawing a distinct line between the UNSC's Resolutions and the EC's adoption of regulations which gave the SC Resolutions effect. Thus, the ECJ balanced the infringement imposed by the EC's regulations, which placed Kadi on a list of individuals subject to sanctions without his knowledge and without opportunity to contest,[47] against the regulations' potential to prevent terrorist attacks, and easily found a violation of Kadi's due process and property rights.[48]

By contrast, the ECtHR's strict adherence to constitutional principles have ironically elevated, through the judicial tool of proportionality, institutional conceptions of rights over individual ones. The consolidated 2007 cases of *Behrami* and *Saramati* illustrate the ECtHR's voluntary subordination to the UNSC.[49] In those cases, Security Council Resolution 1244, which was lawfully enacted under Chapter VII of the U.N. Charter, authorized the U.N. to establish military and peacekeeping operations in Kosovo, through the NATO-backed Kosovo Force militia,[50] and later, through the U.N. Interim Administration for Kosovo (UNMIK).[51] The case of *Behrami* was particularly heartbreaking: a little boy lost his life after accidentally detonating an explosive device left in a field,[52] which

45. *Id.* at I-6372.

46. *Id.* at I-6463.

47. These comprised violations of Kadi's due process and property rights. *See id.* at I-6407–08.

48. *Id.* at I-6385.

49. *See* Behrami v. France, No. 71412/01; Saramati v. France, Germany, and Norway, No. 78166/01, ¶¶ 126, 149, 151–52 (May 2, 2007), https://hudoc.echr.coe.int/eng?i=001-80830 [https://perma.cc/LB9S-E5MA#{%22itemid%22:[%22001-80830%22]}].http:/www.echr.coe.int/eng?i=001-80830.

50. The Kosovo Force (KFOR) has been led by NATO since 1999. *See Kosovo Force: August 1999 to Date*, Defence Forces Ireland, http://www.military.ie/overseas/current-missions/kfor/ (last visited Mar. 31 2017) [https://perma.cc/T3ZH-5M7T].

51. Behrami, No. 71412/01; Saramati, No. 78166/01, ¶ 149.

52. *Id.* at ¶¶ 5–6.

UNMIK did not locate.[53] The bomb was left in a sector of Kosovo for which France was responsible during the Kosovo's 1999 humanitarian crisis,[54] and accordingly, the boy's father lodged a complaint with the ECtHR alleging that the French government's actions had infringed upon his son's right to life (Article 2 of the ECHR).[55] The ECtHR found that the ECHR could not be interpreted to subject the acts and omissions of ECHR parties covered by UNSC Resolutions to the scrutiny of the ECtHR.[56] To do so, the ECtHR reasoned, would be to interfere with the fulfilment of the UN's key mission in Kosovo.[57] The Court concluded that "It would also be tantamount to imposing conditions on the implementation of a UNSC Resolution; conditions not provided in the text of the Resolution itself."[58] Because the ECtHR dismissed the case for lack of competence, it never examined whether the French government's actions were proportionate to the alleged infringement upon the right to life, nor did it approach the question of whether the Resolution itself was proportionate in light of its aim.

Four years later, the ECtHR revisited a similar question, but 'proportionality' was again ignored, perhaps as a result of the ECJ's *Kadi* decision in 2009, when the ECtHR clarified in *Al-Jedda v. United Kingdom* that unless Security Council Resolutions expressly state otherwise, Resolutions should be interpreted in a manner consistent with the ECHR.[59] The ECtHR distinguished the case from *Behrami* and *Saramati* by noting that, in Kosovo, Resolution 1244 required the U.N. to authorize a military force, and then authorize the actions of that force, whereas with Resolution 1511 (the Resolution at issue in *Al-Jedda*), the U.N. delegated its objectives to U.K. soldiers already present in Iraq. Thus, the U.K. government bore responsibility under the ECHR to conduct investigations into allegations of its agents' violations of the right to life under Article 2 of the ECHR, even if those violations took place in an extra-ECHR jurisdiction like Iraq.[60] The ECtHR took the rigid constitutionalist position that when the organizational actions at issue are attributable to the UN, the Court cannot assert its

53. *Id.* at ¶ 6.

54. *Id.* at ¶ 3.

55. See Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention on Human Rights (ECHR)].

56. Behrami, No. 71412/01; Saramati, No. 78166/01, ¶ 149.

57. *Id.* at ¶¶ 149, 151–52.

58. *Id.* at ¶ 149.

59. Al-Jedda v. United Kingdom, 2011-IV Eur. Ct. H.R. 305, 374 (2011).

60. *Id.* at 366. Iraq is not a party to the ECHR.

authority concerning those actions, even if carried out under an ECHR Party's authority. Although the ECHR applied in *Al-Jedda*, the ECtHR did not explore the question of whether the U.K.'s actions in Iraq were proportionate to the alleged infringement on the right to life.

Still another approach to proportionality can be seen in the ICJ's recent jurisprudence. The ICJ does not hear complaints from individuals, only states, and has firmly asserted its authority over other international courts when it comes to interpreting questions of general international law.[61] Yet the ICJ's interpretation of what constitutes international law—especially customary international law (CIL)[62]—has many problematic features. For example, while the ICJ most frequently cites international treaties as a determining authoritative factor for finding that a rule is CIL,[63] the second most common authority is an agreement between parties to a dispute.[64] This second authority is highly problematic from a doctrinal perspective because, as Joseph Weiler put it, "You take two nice cozy Western countries agreeing that a rule is a customary rule of international law, and then the whole world is bound by that."[65]

The ICJ does not *do* proportionality as traditionally conceived; it does not 'weigh and balance' 'legitimate' state interests. Perhaps this is unsurprising given the inherent difficulties faced by courts that govern disputes between two sovereign entities: how can judges balance the proportionality of each sovereign's domestic assessment of a 'just' act against the other? While the WTO has explicitly attempted such analyses (discussed in Section II(b)), the ICJ has generally opted for what might be described as a more categorical approach.[66] For example, in the *Kosovo Succession* Advisory Opinion, the ICJ's recognition of the unilateral right to self-deter-

61. Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment, ¶¶ 112–13 (Int'l Crim. Trib. for the Former Yugoslavia, Mar. 24, 2000); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 403 (Feb. 26) (noting the ICTY's misuse of its judicial authority and correcting the ICTY's interpretation of the Convention).

62. Traditionally drawn from consistent state practice and *opinio juris*. For a recent and thorough criticism on how these sources too might be considered 'essentially disputed concepts' due to the wide variance in legal traditions that train judges to identify them, see Anthea Roberts, Is International Law International? 1 (Oxford Univ. Press 2017).

63. Niels Petersen, *The International Court of Justice and the Judicial Politics of Identifying Customary International Law*, 28 Eur. J. Int'l L. 357, 369 (2017).

64. *Id.*

65. *EJIL Live!: Interview with Niels Petersen*, Eur. J. Int'l L. (Aug. 2, 2017), http://www.ejil.org/episode.php?episode=30 [https://perma.cc/MK4G-TAH3].

66. I am using the term "categorical approach" to refer to systems of reasoning that set out categories for circumstances under which cases should be accorded greater degrees

mination might be read similarly to the ECtHR's assessment that the UN's structural rights outweigh individual ones, at least insofar as both cases used categories to avoid balancing rights against one another.[67] In *Kosovo Succession*, the ICJ found that in the absence of compelling reasons to refuse Kosovo's petition for an opinion, it had no reason to refuse one, and in the absence of a reason to find declarations of independence prohibited under international law, it had no reason to deny Kosovo's declaration to that effect; but 'absence of reason' was an *ex ante* categorical assessment.[68]

Some have read the ICJ's reliance on compelling reasons, and on the absence of reason, as evolving in recent years into a 'proportionality of reasonability.'[69] This breed of proportionality appears more clearly in the ICJ's cases that recognize some degree of a 'unity' in interest. For example, in the *Whaling in the Antarctic* case,[70] the alleged violation did not intrude upon the interests of any particular state, but rather, the unified interests of a plurality of states. This was the ICJ's interpretation of the object and scope of the Montego Bay Convention, which regulates whaling and allows for exemptions only "for the purposes of collecting scientific data . . . ."[71] In that case, the requirement that interests be *bona fide*—a requirement which aims at protecting the expectations of the counterpart—did not satisfy the Court.[72] Rather, the ICJ reviewed the exercise of a specific power in the treaty—the power of derogation—in light of the overall system of the Montego Bay Convention. The ICJ first noted that a derogation for the purposes of scientific research could not simply depend on the State's perception of scientific research, but on the overall goal of the whaling treaty on which it was based. The ICJ then parsed the treaty language into two cumulative requirements: (i) the actor in question must be engaged in 'scientific research,' and (ii) the act in question must be for the 'purpose' of that research. The ICJ

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of judicial scrutiny, such as the scrutiny tests employed by the United States Supreme Court.

67. Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Request for Advisory Opinion, 2010 I.C.J. 141, ¶ 79 (July 22).

68. *Id.* at 1–2.

69. *See, e.g.*, Deborah Russo, *The Use of Proportionality in the Recent Case-law of the ICJ*, *in* PROPORTIONALITY IN INTERNATIONAL COURTS: CONVERGENCE IN LAW AND METHOD? 10 (Mads Andenas & Giuseppe Bianco eds., 2016).

70. Whaling in the Antarctic (Austl. v. Japan: N.Z. Intervening), Judgment, 2014 I.C.J. Rep. 148 (Mar. 31).

71. Convention on the Law of the Sea, Dec, 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 1, 1994).

72. Whaling in the Antarctic, 2014 I.C.J. Rep. 148.

found, after answering the first prong in the affirmative, that to determine 'purpose' it needed to assess whether the act was 'reasonable in relation to achieving' the stated objectives of the research. It therefore approached the requirement of 'reasonableness' in a 'structured' way, following some (but not all) of the phases of Alexy's proportionality test,[73] in an effort to guarantee an objective review of the exercise of the power of derogation.[74] The Court considered, for example, whether Japan had sought out less restrictive alternative means (i.e., methods that would have allowed for the killing of fewer whales) in determining whether Japan was acting 'reasonably.' What the ICJ calls a reasonability assessment, in some ways, reflects 'proportionality.'

The ICJ jurisprudence indicates that in cases where the Court is not required to balance the interests of two states, and is instead tasked with achieving the common interests of a plurality of states, the Court seeks to employ some version of proportionality to avoid the appearance of 'subjective reasonability.'[75] But this is not the proportionality one can observe in the domestic courts of Europe, Canada, Israel, or South Africa. Indeed, in its issue-based application of this structured approach to 'reasonability,' the ICJ more closely mirrors the issue-based application of 'scrutiny' seen in U.S. courts.[76] A different standard is applied when interpreting whether something is 'right,' especially where what is 'right' is internally determined, just as where 'strict scrutiny' is applied when certain rights or classifications are at stake. Already, in the courts tasked with litigating international human rights issues, we can observe a plurality of 'proportionalities' emerging. It would appear that 'proportionality' hides in instances where treaty-based proportionality clashes with institutional hierarchy but appears de facto through judicial reasoning in instances where pre-agreed instrumental rights are concerned. The ICJ in practice appears to

73. Applying "legitimacy" through "purpose" and collapsing "necessity" into a broader "reasonab[ility]." *See* ROBERT ALEXY, *supra* note 6.

74. Whaling in the Antarctic, 2014 I.C.J. Rep. 148.

75. Russo, *supra* note 69, at 12.

76. U.S. Courts apply 'strict scrutiny' to only those rights protected as 'fundamental,' either in the U.S. Constitution, or because they are 'implicit in the concept of ordered liberty' and 'deeply rooted in American society.' This differs from proportionality because it does not weigh all rights against public interest; it elevates a certain class of rights above others and places a heavy burden on the government to justify its violation of those rights. The concept of varying levels of scrutiny first appeared in Footnote 4 of *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 (1938), and was first clearly articulated in *Korematsu v. United States*, 323 U.S. 214, 216 (1944).

categorically avoid applying proportionality to individual rights cases, but it does not make any categorical preference explicit.

B. *International Economic Law: The WTO, the ICSID, and Morality in Proportionality*

Some scholars have argued that proportionality emerged in international economic law as early as the pre-WTO era in the 1989 case of *U.S.-Section 337 of the Tariff Act of 1937*.[77] In that case, an arbitral panel deployed a 'least restrictive means' to determine what was 'necessary' to protect public morals under Article XX of the GATT, which contains a list of "General Exceptions" to the Agreement's other articles.[78] Just over a decade later, the AB more explicitly produced the WTO's version of proportionality in *Korea-Beef*.[79] That case laid down general guidelines for the WTO's 'necessity' analysis. The AB stressed that such analysis must proceed on a case-by-case basis, through a "process of weighing and balancing a series of factors," including "the extent to which the measure contributes to the realization of the end pursued," and the impact of the measure on trade.[80] However, in order to apply the "least restrictive means" test, judges and the claimant State are expected to identify specific policy alternatives that were "reasonably available" to the defendant State at the time of violation.[81] The public morals exception of Article XX(a) of the GATT also appears in Article XIV of the General Agreement on Trade in Services (GATS)—another of the WTO's agreements.[82]

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77. Stone Sweet & Mathews, *supra* note 3, at 73; *see also* Report by the Panel, *United States-Section 337 of the Tariff Act of 1930*, L/6439-36S/345 (Nov. 7, 1989), GATT BISD (36th Supp.) at 345 (1989).

78. General Agreement on Tariffs and Trade, Article XX, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, 562 [hereinafter GATT Article XX].

79. Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 164, WTO Doc. WT/DS161/AB/R (adopted Dec. 11, 2000).

80. *Id.*

81. The Appellate Body (AB) further summarized and refined its approach to GATT Article XX in *Brazil-Tyres*. *See generally* Appellate Body Report, *Brazil–Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R (Dec. 3, 2007) (providing an overview of the AB's approach as it has evolved since *Korea-Beef*).

82. GATS includes exceptions, inter alia, for measures "necessary to protect public morals or to maintain public order," "necessary to protect human, animal or plant life and health," and "necessary to secure compliance with [otherwise GATS-consistent] laws or regulations." *See* General Agreement on Trade in Services art. XIV(a), Marrakesh Agreement Establishing the World Trade Organization Annex 1B, Apr. 15 1994, 1869 U.N.T.S. 183. GATT Article XX includes ten general exceptions, dealing with, inter alia, measures "necessary to protect public morals," "necessary to protect human, animal or plant life or health," and "relating to the conservation of exhaustible natural resources if such measures

Neither exception provided the basis of a WTO decision until 2005, when the AB in *U.S.-Gambling* was tasked with deciding whether the U.S.'s public moral interest in preventing the unregulated spread of gambling services online outweighed the interests of WTO Members who provided those services to customers in the U.S.[83] In that case, the AB employed the Art. XX proportionality test set out in *Korea-Beef* to find that the U.S's interest outweighed the interests of other WTO Members in trade liberalization, primarily defining the U.S.'s moral interest upon evidence that countries apart from the U.S. also have public aversions to gambling.[84] The AB ultimately found, however, that the U.S. had failed to demonstrate the chapeau elements of Art. XIV.[85]

The proportionality in the AB's *Gambling* decision is highly problematic for at least two reasons. First, it defines 'morality' as a majority-rule concept, with allusions to a 'moral majority' or at least 'moral plurality' and states the threshold for legitimate public morals appears to depend on whether several other states share similar morals. Second, the AB's analysis of alternatives that were "reasonably available" to the United States essentially precludes a requirement that parties negotiate on alternatives.[86] It thereby renders its own balancing of a 'legitimate' moral as decisive, which in turn precludes a genuine assessment of 'necessity'—the cornerstone of WTO proportionality. However, the AB attempted to rectify its problematic public morals approach years later in the 2014 case of *EC-Seals*, when there was a claim that a certain method of

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are made effective in conjunction with restrictions on domestic production or consumption."

83. *See* Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R (Apr. 7, 2005) [hereinafter AB—*Gambling*]; Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/R (Nov. 10, 2004) [hereinafter PR—*Gambling*].

84. AB—*Gambling* upheld the definition reached by the Panel Report, which justified its finding that gambling concerned "public morals" conflating the terms with "public order" because a handful of other countries, jurists, and organizations considered the two concepts similar or synonymous. For example, the Panel Report, ¶ VI.857, cites as "Examples of WTO Members that have relied on 'public moral' grounds to justify certain restrictions include Israel and the Philippines. In this regard, the 1999 Trade Policy Review of Israel observed that Israel maintained an import prohibition on '[t]ickets or publicity items for lottery or gambling' and identified the reason for this prohibition as '[p]ublic morals.' Similarly, the 1999 Trade Policy Review of the Philippines listed limitations on foreign ownership of gambling operations (e.g., racetracks) under a heading that referred, *inter alia,* to limitations 'for reasons of . . . risk to health and morals.'" See PR—*Gambling* at ¶¶ VI.853 – VI.860.

85. AB—*Gambling* at ¶ 327.

86. *Id.* at ¶ 308.

harvesting seal pelt was repulsive to the public morals of the EC.[87] This was the first and only WTO case to invoke Article XX(a) on the basis of so-called non-instrumental morality. In *Gambling*,[88] *Tuna II*,[89] *Clove Cigarettes*,[90] and other WTO disputes, public morals were invoked (successfully and unsuccessfully) based on specific policy concerns such as reducing youth gambling or smoking. Such concerns are what Robert Howse and his collaborators have termed "instrumental" moral concerns.[91] By contrast, *EC-Seals* based its arguments on both instrumental moral concerns *and* non-instrumental ones—namely, that the EC thought it was intrinsically wrong or unethical to kill seals in what it deemed to be a cruel fashion. Drawing on the proportionality jurisprudence clarified in *Brazil-Tyres* and set out in *Korea-Beef*, paragraphs 5.198 to 5.200 show the AB going well beyond the *Gambling* 'moral majority' standard:

> We . . . do not consider that the term "to protect," when used in relation to 'public morals' under Article XX(a), required the Panel, as Canada contends, to *identify the existence of a risk* to EU public moral concerns regarding seal welfare . . . .
>
> We . . . have difficulty accepting Canada's argument that, for the purposes of an analysis under Article XX(a), a panel is required to *identify the exact content of the public morals standard* at issue.
>
> Members may set different levels of protection even when responding to similar interests of moral concern.[92]

Here, the AB appears to openly embrace a pluralistic approach to defining public morals. A state need not identify a risk that public morals will be harmed, neither the panel nor the state needs to identify the exact content of the moral standard, and the state is free to pursue the level of protection it deems necessary, within reason, when responding to a public moral concern.[93] Of course,

87. AB—*Seal Products*, *supra* note 19.

88. AB—*Gambling*, *supra* note 83.

89. *See also* Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 7.307, WTO Doc. WT/DS381/AB/RW (Nov. 20, 2015) (identifying the conservation and welfare of dolphins as a policy concern).

90. *See also* Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 5, WTO Doc. WT/DS406/AB/R (Apr. 4, 2012) (identifying reducing youth smoking as a legitimate policy objective).

91. *See* Robert Howse & Joanna Langille, *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values*, 37 YALE J. INT'L L. 367, 412 (2012) [hereinafter Howse & Langille, *Permitting Pluralism*]; Robert Howse et al., *Pluralism in Practice: Moral Legislation and the Law of the WTO After Seal Products*, 48 GEO. WASH. INT'L L. REV. 81, 82–83 (2015) [hereinafter Howse et al., *Pluralism in Practice*].

92. AB—*Seal Products*, *supra* note 19 (emphasis added).

93. *See id.*

there is always the chapeau to Article XX, which would still force a state to apply measures protecting public morals in a non-arbitrary and even-handed manner.[94] In an article anticipating just such a pluralist approach to morality, Howse and Langille identified the difficulty of applying a proportionality assessment to non-instrumental bases for a panel or AB evaluation of "public morals."[95] Non-instrumental morals do not readily lend themselves to quantifiable assessments or cost-benefit analyses, yet should not be devalued for these reasons. For example, adopting discriminatory measures to reduce the risk that alcohol or pork would be inadvertently consumed is very much a matter of public morals in some states, yet it is non-instrumental insofar as the morality is attached to a belief about something intrinsic to alcohol or pork rather than to the public effects of alcohol or pork.[96]

This version of proportionality places panels in the awkward position of being unable to dictate the legitimacy of a moral concern at the same time as it is able to balance a moral one Member has defined as legitimate against the free trade interests of other Members. Howse and his collaborators,[97] and earlier scholars,[98] have suggested that a scrutiny-based approach, more akin to that employed in the U.S., might do away with the problematic notion of "balancing" the public morals of various states in an international court. They respectively suggest that panels accord stricter scrutiny either to 'good faith' requirements of the chapeau of Article XX or pay closer attention to the application of the public morals exception, especially to "reasonably available alternatives," at the same time as they open up greater leeway in defining what constitute public morals. However, both of these suggestions are still problematic. First, greater emphasis on good faith would still require a panel's subjective evaluation of which types of morals can be asserted in good faith, and second, greater emphasis on the

94. *See* GATT Article XX Chapeau.

95. *See* Howse & Langille, *Permitting Pluralism*, *supra* note 91, at 388.

96. *See Pluralism in Practice*, *supra* note 91, at 84; Joost Pauwelyn, *The Public Morals Exception After Seals: How to Keep It in Check?*, Int'l Econ. L. & Pol'y Blog (May 27, 2014), https://worldtradelaw.typepad.com/ielpblog/2014/05/the-public-morals-exception-after-seals-how-to-keep-it-in-check.html#comment-6a00d8341c90a753ef01a511c0dbc1970c [https://perma.cc/8GP3-C5JA].

97. *See* Howse & Langille, *Permitting Pluralism*, *supra* note 91, at 417, 426; *see also* Howse et al., *Pluralism in Practice*, *supra* note 91, at 87 (identifying that some scholars have wrongly suggested that a "strict scrutiny" approach should be applied by the WTO because it would second guess the moral and religious beliefs of Member states).

98. *See* Jeremy C. Marwell, *Trade and Morality: The WTO's Public Morals Exception After Gambling*, 81 N.Y.U. L. Rev. 802, 806 (2006).

AB's assessment of "reasonably available alternatives" would still preclude negotiation between the parties on what those alternatives might be, *ex ante* determining which alternatives are "reasonable."

Notwithstanding these problems, GATT XX proportionality has migrated to other branches of international economic law. Some authors actively argue that IIL arbitral tribunals should explicitly adopt the GATT XX proportionality analysis;[99] these scholars contend that "proportionality analysis offers the best available doctrinal framework with which to meet the present challenges" arising from the investment treaty system.[100] However, others have noted that "there does not seem to be a strong legal basis for the application [of the proportionality analysis] in the cases where it has been applied and that the conceptual foundations for using proportionality analysis in investment arbitration are shaky" at best and scandalous at worst.[101] Perhaps because of this, there are few instances of proportionality analysis in IIL tribunals, but one example can be found in the ICSID case of *Continental Casualty v. Argentina*.[102] In that case, the Tribunal imported 'least restrictive alternative' proportionality from the WTO's GATT XX analyses in an effort to interpret Article XI of the U.S.-Argentina BIT, which protected each state's right to take 'necessary' measures to protect public order and various state interests.[103] The most obvious problem with the Tribunal's analysis in *Continental Casualty* is that GATT XX—an article adopted to list situations in which trade discrimination between states is permissible—has nothing to do with the regulatory rights protected under Article XI of the U.S.-Argentina BIT, which protects state parties from liability to investors whose interests may be negatively impacted when either state regulates on the basis of legitimate public policy concerns. Indeed, the 'balancing' matrix articulated in GATT XX, and as interpreted by WTO case law, is built upon completely different balances of interests

99. *See* Alec Stone Sweet, *Investor-State Arbitration: Proportionality's New Frontier*, 4 L. & Legal Ethics of Hum. Rts. 46, 50 (2010).

100. *Id.* at 76.

101. Valentina Vadi, *The Migration of Constitutional Ideas to Regional and International Economic Law: The Case of Proportionality*, 35 Nw. J. Int'l L. & Bus. 557, 578 (2015).

102. Continental Casualty Co. v. The Republic of Argentina, ICSID Case No. ARB/03/9, Decision on Partial Annulment (2011).

103. Argentina Bilateral Investment Treaty, U.S.-Arg., Nov. 14, 1991, S. Treaty Doc. No. 103-2 (1991) ("This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests.")

with completely different procedural outcomes. For example, the WTO's AB may decide a GATT XX exception applies, but the Dispute Settlement Understanding (DSU) allows both State parties to then negotiate alternative solutions, whereas an ICSID Award articulates a specific amount for which a state is liable to an investor.

Moreover, GATT XX proportionality is not a rule of CIL, it is not incorporated into the text of any existing BIT (as of September 2017) and, at least according to some prominent academics, it is not a general principle of law.[104] Apart from the obvious flaws in importing such a rule on the basis of Vienna Convention on the Law of Treaties' Article 31 (as the Tribunal found),[105] or the authoritative flaws in importing such a rule on the basis of the recommendations set out in the ILC's study on fragmentation (as some scholars claim is possible),[106] proportionality of the WTO's type cannot, as a matter of principle, be applied in the IIL context. The test for Art. XX General Exceptions was established on the premise that all parties to the GATT have rights and obligations under the WTO treaty regime, and that any Member can invoke the WTO's DSU should either party feel its rights have been violated.[107] By contrast, the IIL regime is one premised on an asymmetry of rights and obligations between investors and states.[108] Two states form an agreement to provide rights to investors from either state investing in the other state, but (notwithstanding the recent *Urbaser* Award)[109] there is no agreement between the state and the investor that the investor will be obliged to do anything. IIL's *raison d'etre* is to provide investors with rights in situations in which they may have none. Specifically, states cannot even initiate

104. *See, e.g.*, José E. Alvarez, '*Beware: Boundary Crossings' – A Critical Appraisal of Public Law Approaches to International Investment Law*, 17 J. World Inv. & Trade 171, 1952–3 (2016).

105. Continental Casualty Company Co. v. The Republic of Argentina, ICSID Case No. ARB/03/9, at ¶ 192 (2011).

106. *E.g.*, Stone Sweet & della Cananea, *supra* note 11.

107. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

108. *See* Tietje & Crow, *supra* note 20.

109. In the December 2016 Award for *Urbaser v. Argentina*, an ICSID Tribunal explicitly allowed counterclaims based on rights to which investors are bound under international law, but found that the claim in that particular case did not pass muster. In a forthcoming article, a colleague and I explain how the standard for counterclaims set out in *Urbaser* is essentially nominal because it sets out almost impossible standards for states to meet counterclaims, so while the language is nice in theory, it changes little about practice. Kevin Crow & Lina Lorenzoni, *International Corporate Obligations and the* Urbaser *Standard: Breaking New Ground?*, 36 B.U. Int'l L.J. 87 (2018).

claims against investors and can initiate successful counterclaims only under very specific circumstances.[110] Thus, because the very act of 'balancing' in proportionality presupposes a symmetry of rights and obligations for both parties to a dispute, proportionality is inappropriately applied in IIL arbitral tribunals.

Even in WTO law, the incorporation of proportionality into AB jurisprudence, like its incorporation into the European Union (E.U.) Law, emerged from judges rather than treaty language, and emerged with no justification or precise given definition.[111] Both incorporations were driven by common agents, not by any claim to a 'global norm' or 'ultimate rule of law.' At the ECJ, proportionality was introduced in the form of a least-restrictive means test, which today forms the core of the necessity analysis now used at the WTO. This test was employed during some of the most important ECJ decisions of the 1970s, eventually culminating in the famous 1979 *Cassisde Dijon* decision in which the test was applied to a number of E.U. freedoms (free movement of labor, services, and capital), and adapted to manage the expansive field of nondiscrimination.[112] Hans Kutscher and Pierre Pescatore brought proportionality to the E.U. in the 1970s, and from there, to the WTO.[113] Kutscher had been a justice on the German Federal Constitutional Court (proportionality's original advocate) from 1955 to 1969 before becoming member of the ECJ, serving as its president when *Cassisde Dijon* was decided.[114] Pescatore sat on the ECJ from 1967 to 1985. He then chaired the GATT Panel that decided *U.S.-Section 337 of the Tariff Act of 1937* in 1989, which he used to import proportionality into GATT jurisprudence.[115] The WTO-AB ruling in *Korea-Beef* was written by AB Chairman Claus-Dieter Ehlermann. As a German-trained lawyer, Ehlermann had served as Director-General of the E.U. Commission's Legal Service when *Cassis de Dijon* was decided.[116] Though obviously not dispositive, facts like these indicate that proportionality's migration to international economic courts is not the result of its superiority as a judicial tool or its status as a general principle of international law. Instead, its migration is at least partially the result of lawyers employing the

110. *See* Tietje & Crow, *supra* note 20.

111. *See* Stone Sweet & Mathews, *supra* note 3, at 143.

112. Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung far Branntwein (Cassis de Dijon), 1979 E.C.R. 649.

113. See Stone Sweet & Mathews, *supra* note 3.

114. *Id.*

115. *Id* at 50.

116. *Id.* at 61.

interpretive tools from the jurisdictions and institutions in which they were trained and with which they are familiar.

All of this underscores the point that proportionality's pervasive use should not be misunderstood as evidence of its superiority as an international judicial tool for determining hierarchies or priorities of rights. Indeed, even if Stone Sweet's and Mathews' Triad argument remains convincing insofar as proportionality increases the legitimacy of third party mediation in a disagreement, it requires a fairly specific set of judicial conditions. The argument assumes that disputes are occurring between individuals or between a state and a subject to that state, and these conditions often are not met in the international context.

C. *International Humanitarian Law: A 'Principled' Proportionality*

Violations of international humanitarian law are often (though not always)[117] adjudicated in international criminal courts such as the ICTY, International Criminal Tribunal for Rwanda (ICTR), ICC, and ECCC, where judges employ an international criminal law (ICL) proportionality that is structurally different than judges adjudicating individual or institutional rights[118] and still more different than those adjudicating the rights of states to regulate in the interest of their respective publics.[119] In ICL, the four prongs of Alexy's proportionality are invisible; the concept is rather collapsed into the single question of whether the punishment for a war criminal is proportionate to the crime committed—a kind of rough equivalency principle.[120] Individuals are tried based on accusations that it was civilians, rather than combatants, who were targeted (in combination with varying chapeau elements depending on the crime), or on accusations that the force used was gratuitous in light of the possible strategic outcomes.[121] In IHL, when civilians are killed unintentionally, the proportionality question is focused on whether a state or combatant's actions were proportionate to some legitimate means sought.[122]

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117. For an early example of 'victors' justice' literature, see Richard Minear, Victors' Justice: The Tokyo War Crimes Trial (Princeton 1971).

118. For example, the ECtHR and the ECJ.

119. For example, the WTO and the ICSID Tribunals.

120. *See, e.g.*, Carsten Stahn, The Law and Practice of the International Criminal Court 836 (2015) (discussing how the ICC uses a variety of applicable, nonbinding laws, while privileging utilitarian sentencing goals in seeking proportionality in sentencing).

121. *See* Rome Statute art. 8(2)(b)(iv).

122. *See e.g.* Geneva Convention Relative to the Treatment of Prisoners of War, art. 93, Aug. 12, 1949, 6 U.S.T. 3316; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Part II, Aug. 12, 1949, 75 U.N.T.S. 287.

This type of proportionality, the 'principle,' is a central feature of international law regulating modern military engagements, but its precise legal status is far from clear. This is because two major international treaties—the Rome Statute[123] and the 1978 Additional Protocol to the Geneva Convention[124]—provide distinct definitions of the crime of disproportionate use of force. However, many of the world's major military powers—India, China, Russia, and the United States, for example—are not signatories to either treaty. Consequently, the only framework of legal accountability for alleged proportionality violations committed by those nations is CIL, but as noted above, 'proportionality' is not a general principle of CIL. No treaty law exists that specifically addresses proportionality in the context of non-international conflicts. As already noted, the ICJ uses treaty law as the most frequent authoritative source for determining international custom,[125] but using this approach in ICL or IHL would mean applying a proportionality to states that have already implicitly rejected the principle—at least in the context of armed conflict—through rejection of the Rome Statute and the Geneva Conventions.

If a CIL definition of proportionality can be said to exist, only the Additional Protocol I and that Rome Statute can realistically inform it.[126] However, these treaties are themselves inconsistent in their definitions. Article 51(5)(b) of the Additional Protocol prohibits attacks which "may be expected to cause" injuries or damage to civilians "which would be excessive in relation to the concrete and direct military advantage anticipated," noting that such attacks are "indiscriminate," i.e. de facto disproportionate.[127] The Rome Statute, by contrast, offers a different definition of proportionality violations, prohibiting attacks "intentionally launch[ed] . . . in the knowledge that such attack will cause" injuries or damage to civilians "which would be clearly excessive in relation to the concrete

123. *See* Rome Statute art. 8(2)(b)(iv).

124. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Conflicts art. 51, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

125. Petersen, *supra* note 63, at 369.

126. This is because these are the only two widely ratified treaties that offer guidance for the application of the principle via widely accepted standards. The Rome Statute has more than 120 signatories and the Additional Protocol I has more than 170 (although conditions apply to many of those signatures).

127. *See* Protocol I art. 51; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]; *see also* William Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 Mil. L. Rev. 91, 99 (1982).

and direct overall military advantage anticipated."[128] Although the two definitions are linguistically and structurally similar, the terms of the Rome Statute accord a higher *mens rea* threshold, specifically through the additional requirements of intention and knowledge. Moreover, the Rome Statute definition requires injury or damage to civilians that is *clearly* excessive rather than apparently or probably excessive, as might be inferred from the Additional Protocol I definition. Lastly, the Rome Statute measures the degree of injury or damage to civilians in relation to "the concrete and direct *overall* military advantage."[129] The deliberate inclusion of the term "overall" indicates a greater degree of flexibility in the proportionality calculation.

Moreover, the proportionality described in these sources, even if they could be considered CIL, increasingly loses relevance as time passes and technology changes war. One recent contradiction in proportionality in international humanitarian law (IHL) took clear form under the Obama Administration's 'folk international law' understanding of IHL in developing the concept of specific war.[130] That concept authorized the use of drones in spite of civilian casualties on the grounds that drones may contribute to making the use of force 'proportionate' in a wider set of circumstances. But if violence can be executed with lesser risk to civilian casualty, the proportionality of that violence may intuitively carry a greater degree of international justifiability. Recently, Alejandro Chehtman examined what this 'intuitive' view might say about 'proportionality' itself.[131] Chehtman's study empirically demonstrates that resorting to military force through drones in contemporary asymmetrical conflicts is usually disproportionate. This is because, under conditions of radical asymmetry, any collateral damage is less proportionate than conditions of symmetrical warfare. Drones are not sufficiently discriminatory, and because instances of 'justified' force are more frequent due to the perception that less collateral damage occurs with each attack, the traditional understanding of 'proportionate' force actually serves to exacerbate disproportionate damage.[132] Moreover, 'specific war' through a greater

128. *See* Rome Statute art. 8(2)(b)(iv).

129. *Id.* (emphasis added).

130. *See generally* Naz K. Mozirzadeh, *Folk International Law: 9/11 Lawyering and the Transformation of the Law of Armed Conflict to Human Rights Policy and Human Rights Law to War Governance*, 5 HARV. NAT'L SEC. J. 225 (2014).

131. Alejandro Chehtman, *The* ad bellum *Challenge of Drones: Recalibrating Permissible Use of Force*, 28 EUR. J. INT'L L. 173, 173–97 (2017).

132. *Id.* at 181, 185.

number of small attacks renders each attack less capable of achieving a 'just cause' for war. Therefore, as Chehtman puts it, "[r]esorting to military force through drones in contemporary asymmetrical conflicts would generally be disproportionate not because of the harm they would expectedly cause but, rather, because of the limited harm they are ultimately able to prevent."[133]

Likewise, in ICL, the principle of proportionality is also applied to sentencing, but the application of this proportionality is inconsistent in the international context for at least three reasons. First, in some international criminal tribunals, particularly those that are not controlled primarily by the UN,[134] the death penalty is considered proportionate and assigned for certain crimes, whereas that penalty is forbidden in all U.N. tribunals.

Second, the practice of sentencing in the U.N. tribunals is informed by a proportionality that is applied in at least two retributive dimensions: *cardinal* proportionality, which focuses on the serious of the offenses themselves and requires that the gravity of the punishment match the seriousness of the offense;[135] and *ordinal* proportionality, which focuses on the relative seriousness of the offense and considers how offenders are treated in relation to one another.[136] Both theories can be seen in practice at different tribunals claiming to draw justification for sentencing from 'general principles' of international law.[137] Scholars such as Máximo Langer have shown how judicial structure is actually a more accurate predictor of sentencing outcomes than any general principle of proportionate sentencing in law, ordinal or cardinal. Langer empirically demonstrated this through an analysis of unilateral and bilateral plea bargaining procedures in American criminal courts,

133. *Id.* at 173.

134. At the Special Panels of the Dili District Court, Governor Abilio Soares sentence led to death penalty in 2002, even though this was a U.N.-East Timor hybrid tribunal; and at the Iraqi Special Tribunal, set up by the Coalition Provisional Authority with the support of U.N. Security Council Resolution 1483, Saddam Hussein was hastily tried and sentenced to death in 2006.

135. Joel Goh, *Proportionality: An Unattainable Ideal in the Criminal Justice System*, 2 Manchester Student L. Rev. 41, 60 (2013).

136. *Id*; *see also* Nicola Lacey & Hannah Pickard, *The Chimera of Proportionality: Institutionalizing Limits on Punishment in Contemporary Social and Political Systems*, 78 Mod. L. Rev. 216, 227 (2015) (discussing the concepts of 'ordinal' and 'cardinal' proportionality as socially constructed (rather than natural) phenomena).

137. Cardinal proportionality is practiced at most international criminal tribunals, whereas ordinal proportionality can be seen more clearly through the Truth and Reconciliation Commission in South Africa.

which vary greatly state to state.[138] Admittedly, Langer's results are likely influenced by the specific context of American criminal, but they nevertheless highlight the general opacity of proportionality as a legal concept.

Finally, stepping away from empirics for a moment, Mirjan Damaška's seminal *Faces of Justice* long ago demonstrated that 'proportionate' outcomes concerning punishment of individual behavior varies depending on the goal of the state.[139] Damaška argued that the activist state renders justice that serves the policy goals of the state, and therefore punishes proportionately to the fulfillment of those goals. By contrast, the reactive state's primary goal is to maintain a social equilibrium and it considers those judgments proportionate, which serve the goals of conflict resolution.[140] If we substitute 'state' with 'governing authority', either conception renders the proportionalities at the ICTY and the ECCC problematic: ad hoc and hybrid tribunals are more active than reactive and, therefore, perhaps more prone to a proportionality that serves the policy goals of the U.N. or an ill-defined 'international community.' Again, Stone Sweet's claim that proportionality shores up the legitimacy of judicial decision-making through the appearance of objectivity loses ground in the international context because the ICL judge is inevitably charged with choosing which conception of proportionality to apply.

III. The Problem of Subjective Application

Judicial application of 'proportionalities' in international tribunals is problematically subjective on at least two dimensions. First, as Anthea Roberts soundly demonstrated in a recent book,[141] the legal traditions in which international lawyers are trained manifest different understandings of what international law is in the first place and inform international judges with different conceptions of appropriate methodologies for determining what domestic custom with respect to 'proportionality' is in the first place. For example, the methodologies used to determine 'custom' by U.S.-trained judges for the purpose of the Alien Tort Statute differ drastically

138. Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 Am. J. Crim. L. 223, 224 (2006).

139. Mirjan Damaška, Faces of Justice and State Authority: A Comparative Approach to the Legal Process 71–72 (1986).

140. *Id.* at 73–80.

141. Roberts, *supra* note 62, at 2

from the methods used by judges at the ICJ,[142] and methods used to determine 'custom' differ within IIL depending on the arbitrators that compose the tribunals.[143] Roberts also revealed that, although courts such as the ICJ enjoy broad international jurisdiction, the judges that occupy its bench are predominantly European.[144] Such professional hegemony itself renders proportionality of morality problematic in international courts, as judges must sometimes weigh the morality of one culture against the morality of another.

Second, in the context of international tribunals, especially security-driven ones, the incommensurability of the values that courts attempt to 'balance' is exacerbated by the fact that moral values do not readily lend themselves to neat cost-benefit analyses or other methods of weighing right against right. The rights at issue are themselves often 'essentially contested concepts'[145] and, more importantly, the very act of balancing in interstate disputes is inseparable from the act of creating a hierarchy of values, whether economic, religious, moral, or otherwise based on ideology. A tribunal cannot 'balance' without elevating one value over another.

IV. The Problem of Dissent

The role of dissenting opinions in many international courts poses grave challenges to the legitimacy of proportionality. As Jeffery Dunoff and Mark Pollack argue in a forthcoming paper, international judges, who are virtually all appointed for fixed terms subject to reappointment, face a 'Judicial Trilemma.'[146] Given the nature of international judiciaries and the interests of the states that design them, judges can at most maximize only two of three core values: independence, accountability, and transparency.[147] Dunoff and Pollack measure this final element, transparency, by looking at the procedural allowance and actual use of dissenting opinions in international tribunals, and point out that while the

142. *See* Sosa v. Alvarez-Machain, 542 U.S. 692, 692 (2004) (addressing the Alien Tort Statute). For an ICJ example, see North Sea Continental Shelf (Fed. Rep. of Ger. v. Den.; Fed. Rep. of Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3 (Feb. 20).

143. *See* Prabhash Ranjan, *Using the Public Law Concept of Proportionality to Balance Investment Protection with Regulation in International Investment Law: A Critical Appraisal*, 3 Cambridge J. Int'l & Comp. L. 853, 853 (2014).

144. Roberts, *supra* note 62, at 9.

145. For a definition of these, see W.B. Gallie, *Essentially Contested Concepts*, 56 Proc. Aristotelian Soc'y 167, 169 (1956).

146. *See* Jeffery L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111 Am. J. Int'l L. 225, 225 (2017).

147. *See id.*

ICJ and the ECtHR make extensive use of dissenting opinions, the ECJ rarely issues dissent and the WTO does not procedurally allow it.[148] This is at least partially because, in Tribunals where reappointments are possible and terms are relatively short,[149] dissent is undesirable for the judge wishing to be reappointed. I would suggest that a somewhat different scenario occurs with ICSID tribunals, in that arbitrators wishing to secure repeat clients of a certain type are encouraged to issue dissents when the party that appointed them loses, as is blessed by the ICSID Convention.[150] Judges at the ECtHR, ICJ, and ICC are elected for nine-year terms, and are generally not eligible for reappointment, so dissents in those courts are both regular and rigorous. The only international courts that explicitly adopt an Alexy-style proportionality are courts that do not issue dissents, and those courts that issue dissents exhibit a range of disagreement as to whether 'proportionality' was correctly applied and whether it should be applied at all.[151]

These observations about the role of dissent and proportionality are particularly troubling for at least two reasons. First, the fact that dissent exists over proportionality in any case might itself undermine the legitimacy of 'weighing and balancing.' Second, because the international courts that do voice dissent are citing international courts that do not voice dissent when applying proportionality as a 'boundary crossing' tool, the proportionality applied lacks transparency in and of itself. Indeed, these observations make proportionality appear as mere lip-service to objectivity. To borrow Bruno Simma's favorite phrase, "we don't want to throw the baby out with the bath water."[152] Although problematic, proportionality obviously has some utility in international courts. In the following Section, this Article contends that a categorical approach could clarify the parameters of that utility.

148. *See id.* at 225–26; *see also* Jeffery L. Dunoff & Mark A. Pollack, International Judicial Dissent: Causes and Consequences, 34, 38 (Mar. 2015) (unpublished manuscript), https://eustudies.org/conference/papers/download/84 [https://perma.cc/CDN3-DLCQ].

149. The WTO AB Members have 4-year terms, while the ECJ Judges have 6-year terms; both are subject to reappointment that can be blocked by Member States.

150. Convention on the Settlement of Investment Disputes between States and Nationals of Other States art. 48, Mar. 18, 1965, 17 U.S.T. 1270.

151. This is demonstrated in Section II above.

152. Bruno Simma, *International Crimes: Injury and Countermeasures. Comments on Part 2 of the ILC Work on State Responsibility*, *in* INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY 293 (Joseph Weiler et al. eds., 1989).

V. Pluralism and Unity as Cornerstones of a Categorical Approach to Proportionality

Proportionality should be applied on a categorical basis, rather than as a default tool for weighing rights and interests under a given treaty. Categorizing the types of problems courts face in terms of 'pluralism' and 'unity,' and employing these concepts as predictors for where proportionality analysis might be appropriately applied, may provide a particularly helpful prescriptive lens. While privileging either approach would create an instant hierarchy—a 'better' or 'worse' goal for international legal institutions—thinking of 'pluralism' and 'unity' as prescriptive can help conceptualize different types of problems that ultimately stem from universalist approaches to international law.[153] The cases above feature two general types of disputes: those involving a domestic interest (in due process rights, in public morals or in investment protection), and those involving a collective transnational interest (in whaling regulations, in eliminating barriers to trade or in authorizing the use of force). Within these general types, complaining parties can be individuals (e.g., the ECtHR, the ICL Tribunals, the ICSID Tribunals, etc.) or groups (e.g., states at the WTO or other groups at the ICJ, in IIL Tribunals, and etc.).

When the interests of individuals are at stake as individual persons, as opposed to a group (i.e., "the public"), proportionality is an appropriate 'medicine' for the problem because these tend overwhelmingly to be intrastate claims: an individual is bringing a claim against a state. Such disputes require unity—a state should be consistent in its protection of individual rights and should be checked against tyrannies of the intrastate majority. However, when the interests of individuals are at stake as a collective (i.e., "the public"), proportionality is an insufficient means to conceptualize the public interest at stake in the context of international law because balancing in these disputes would require courts to weigh one public's interests against another's. Such disputes should embrace pluralism—no one state's conception of the 'good' or the 'right' should be balanced against another's. Such disputes should be resolved through mediation and mutual agreement where possible, and otherwise through a series of legally specified tests. For example, if non-instrumental public morals are at stake, court statutes could place great emphasis on identifying reasonably available alternatives. If clear and convincing evidence

153. See e.g. Singh & Kübler, *supra* note 37 at 304-7.

is presented that a party acted in bad faith in violating an international agreement, court statutes could incorporate strong hurdles that favor the other party.

Attempts to cross pollinate proportionality into some international legal regimes is not only problematic, it is also unprincipled, as illustrated above through the ICSID *Continental* case. However, as Koskenniemi has pointed out, there is an implicit tendency toward apathy inherent in some of pluralism's champions; as he puts it, pluralism "ceases to pose demands on the world."[154] That is why pluralism and unity both have their places in international law, and proportionality belongs most clearly to interests of unity. When it comes to finding the proper place for individual conceptions of personal or public morality, proportionality cannot help by balancing one state's perception against the economic interests of all. As seen in *EC-Seals*, these are two types of interests, and any attempt to homogenize non-instrumental morality would be imperialistic at best. In such cases, a pluralistic approach to international law both *is* and *should be* the emerging *status quo*. Proportionality's greatest international utility lies in protecting the unified interests of collections of states and never in balancing the intrinsic assessment of 'right' or 'moral' of one state against another. This is even true at the ECtHR, where ECHR parties have agreed to uphold Convention rights and the Court uses balancing to assess whether the party had good reason to breach that agreement in a given case. Such a procedure, like the Montenegro Convention in the ICJ case, deals with a closed universe of rights which are clearly defined and to which all parties have agreed to be bound; the ECtHR represents an agreement on what is "moral" to its Members' respective publics in ways the WTO Agreements do not. Thus, where the 'right' in a given dispute is non-instrumental, proportionality (categorically) has no place.

VI. Conclusion

'Proportionality' is rarely applied uniformly amongst, or even within, courts and international courts must occupy a legal space that neither enhances nor inhibits certain beliefs about what is 'right.' In cases of non-instrumental public morals, or in cases in which the 'right' is internal to a group and not dependent upon a state or government, the judicial tool of proportionality has no

154. Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 Mod. L. Rev. 1, 23 (2007).

place. For example, even in a domestic setting, when a constitution draws a line between a religion and a state, it disfavors religion from an internal point of view; it is not 'neutral' even though it is 'neutral' by its terms. When internal belief dictates truth—when it has a monopoly on 'right'—balancing is absurd from an internal point of view. With questions that involve non-instrumental rights, therefore, courts would do better to take a categorical approach. This is especially true in international law courts, where European legal traditions lay claim to a value-infused language of 'neutrality.'[155]

155. For a sort of meta-example of how our values may infuse even the way we conceptualize the idea of the 'neutral,' see Alfred P. Rubin, *The Concept of Neutrality in International Law*, 16 Denv. J. Int'l L. & Pol'y 353, 353 (1986) (quoting passages from the Bible to illustrate the 'naturalness' of the principle).

Annex I: Proportionality in Six Prominent International Tribunals

	ICJ	ECtHR	ECJ	ICC	WTO	ICSID
From where does proportionality flow?	Judge-made multi-factor reasonability test from CIL (problematic)	From the Convention, e.g., Art. 8 and Art. 10	Art. 5 of the Treaty of EU, Criteria set out in Protocol 2	International humanitarian law (proportionate violence), domestic law (proportionate sentencing)	GATT Art. XX, AB decisions	Judge-made test imported from WTO Treaties and AB decisions
Who implements the final decisions?	States, Agencies, U.N. organs	Convention Member States	EU Member States	Varies, Agreement between ICC and Enforcing State	States under guidance of the DSU	The losing state
What types of parties to a dispute?	State v. State (contentious cases) or U.N. organs and agencies (advisory opinions)	Individual v. State, sometimes State v. State	EC v. State, State v. State, EU Institutions v. EU, Non-privileged applicants v. State / EU (rare)	International Prosecutor v. Individual (Motion to prosecute can come from SC, State, ICC)	State v. State	Individual v. State
Degree of deference after judgment?	AOs: High CCs: Low	High	Low, but high when it comes to individuals.	Low	High	Low
Area of Jurisdiction?	193 U.N. Member States, multiple treaties	47 Council Member States, ECHR	28 E.U. Member States (soon 27), E.U. Law	124 State Parties to Rome Statute, possibly non-parties at SC motion	164 Member States, WTO Agreements	Parties to a BIT, MIT, or Investment Chapter of an FTA or MTA
Jdx Range?	Wide	Narrow	Medium?	Wide	Wide	Narrow
Judicial Obligations in the Judicial Trilemma?	High transp & account, low independence	Low Accountability; High Trans & Indep.	Low Transparency (dissent); High Accountability and Independence	High transparency & accountability, low independence	Low Transparency; High Acc. & Indep.	High transparency & accountability, low independence
Elements of Proportionality	Reasonability: is purpose legitimate? did states identify less restrictive means?	Legit policy goals of state proportionate to infringement on the right	Article 5 and Protocol (No 2) of the ToEU. Notably, a duty to become informed before taking action.	Violence proportionate to attack? To strategic aims? In sentencing, punishment proportionate to crime?	Necessary? Least restrictive means?	GATT XX proportionality