A Taxonomy of Proportionality in International Courts

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Abstract:

If lawyers seek to define a 'universal' or 'global' norm through the trends of international courts rather than through domestic or even regional ones, the arguments of proportionality’s champions who claim its ‘near’ universal appeal as a judicial tool become problematic. In the international adjudication of individual rights, the ‘principle of proportionality’ is often clear and explicit, but ‘proportionality as a judicial tool’ produces inconsistent results. For example, the ECtHR, through cases such as Behrami and Saramati, employs a proportionality that elevates institutional conceptions of rights over individual ones, whereas the ICJ, in adjudicating the human right to self-determination, has debatably done just the opposite in recognizing the ‘unilateral’ form of that right. Moreover, the ECtHR and the ECJ both tend to avoid proportionality altogether when it is 'hierarchy inhibiting'. In international humanitarian law, the notion of proportionality is infused with outdated assumptions about symmetry of capacity and ends that are justifiable, and in ICL, while the ICC and hybrid tribunals claim to recognize a plurality of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 various ICL tribunals, for example). In international economic law, meanwhile, the WTO’s proportionality based the ‘General Exceptions’ of GATT Art. XX produce inconsistent ‘proportions’ with respect to ‘public morals’; and in international investment law (IIL), arbitral tribunals such as the ICSID asymmetrically apply proportionality to the actions of states and not to investors.

KEYWORDS: proportionality, universality, legitimacy, international constitutionalism, ECtHR, ICJ, WTO

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I. Introduction

‘Proportionality’—or at least one conception of it1—is an interpretive tool judges in many domestic and international courts employ to evaluate and ultimately ‘balance’ the appropriateness of 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 insofar as the values it projects and the fact that it is employed in a variety of domestic jurisdictions can be described as a ‘global’ norm.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

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1 See Vicki C. Jackson, Constitutional Law in the Age of Proportionality, 8 Y.L.J. 128 (2016) (defining three conceptions of ‘proportionality’). Domestic and international courts apply proportionality tests in different ways, sometimes with three steps and sometimes with four.

2 See id. This is a paraphrasing of one of Professor Jackson’s definitions. In reference to the title of this article, the Oxford Dictionary defines ‘delusion’ as an “idiosyncratic belief or impression maintained despite being contradicted by reality or rational argument.”

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., Vicki C. Jackson, Constitutional Law in the Age of Proportionality, 8 Y.L.J. 128 (2016); Alec Stone Sweet & Jud Mathews, Proportionality Balancing and Global Constitutionalism, 47 Col. J. Int'l L. (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, for example, HCJ 2056/04 Beit Sourik Vill. Council v. Gov’t of Israel, 58(5) PD 807 [2004] (Isr.), translated in 2004 Isr. L. Rep. 264. See also Gráinne de Búrca, The Principle of Proportionality and its Application in EC Law, 13 Y.B. Eur. L. 105, 113 (1993). 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. 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 MAX WEBER, BASIC CONCEPTS IN SOCIOLOGY (1922).
shoring up the institutional appearance of a ‘neutral’ third party. And insofar as international law exhibits characteristics of domestic constitutionalism—through international courts and through documents such as the European Convention on Human Rights or the International Bill of Rights—the principle of proportionality plays an indispensable role in protecting the fundamental rights of individuals from inappropriate state action.

Indeed, proportionality’s pervasiveness and importance in the domestic constitutional courts of Western countries, in the domestic courts of former Western colonies, and in a handful of international treaties has led many scholars to declare that the principle of proportionality is universal or near-universal. 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, at the ECJ, at the ECtHR, and at the AB of the WTO—at least if one conceptualizes ‘proportionality’ as a structured approach to judicial review. Even those scholars who recognize rejections of proportionality in the United States, most of South America, most of Africa, China, ASEAN, India, Russia, and the non-political rights adjudicated in various international courts, nevertheless view proportionality’s role, as originally conceived at the German Federal Constitutional Court (GFCC), to be 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 (Julian Rivers trans., Oxford University Press 2002) (1986). The ECJ courts and virtually all of Europe’s countries employ proportionality tests. For example, Canada, and debatably Malaysia employ proportionality. The European international courts (ECJ, ECtHR) and the WTO employ proportionality. The international criminal courts employ a slightly different form.

5 The International Bill of Rights refers to the 1948 Universal Declaration on Human Rights (UDHR), the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).
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 (Julian Rivers trans., Oxford University Press 2002) (1986). The ECJ courts and virtually all of Europe’s countries employ proportionality tests. For example, Canada, and debatably Malaysia employ proportionality.
7 The European international courts (ECJ, ECtHR) and the WTO employ proportionality. The international criminal courts employ a slightly different form.
8 Bernard Schlink, Proportionality in Constitutional Law: Why Everywhere But Here?, 22 Duke J. of Comp. & Int’l L. 291 (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. 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 (2010).
10 See Vicki C. Jackson, Constitutional Law in the Age of Proportionality, 8 Y.L.J. 128 (2016).
proportionality as a so-called ‘global model,’ if not global reality, for constitutional rights. \(^{13}\) Somewhere, 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” and “guides us on our difficult path to find answers.” \(^{14}\) Indeed, one that constitutes “the ultimate rule of law”. \(^{15}\)

But proportionality means different things to different courts, and sometimes different things within the same court. Indeed, whatever its state-based usefulness, if one defines a ‘global norm’ through international World Order 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, but the principle produces inconsistent results: the ECtHR, through cases such as Behrami and Saramati,\(^{16}\) employs a proportionality that elevates institutional conceptions of rights over individual ones by avoiding application when it is ‘hierarchy inhibiting’; whereas the 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 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 ECCC, the ICTY, and the ICC, for example). \(^{18}\) In international economic law, meanwhile, the WTO’s proportionality based on the ‘General Exceptions’ of GATT Art. XX produce inconsistent ‘proportions’ with respect to ‘public morals’;\(^{19}\) and in international investment law (IIL), arbitral tribunals such as the ICSID asymmetrically apply proportionality to the actions of states and not to investors. \(^{20}\)


\(^{15}\) See David M. Beaty, The Ultimate Rule of Law (2004).

\(^{16}\) See ECtHR, Behrami v. France, Saramati v. France.

\(^{17}\) See ICJ, Advisory Opinion on the Unilateral Declaration of Independence of Kosovo.

\(^{18}\) 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 UN 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 to a guilty sentence. UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), art. 77, July 1998, ISBN No. 92-9227-227-6, available at: http://www.refworld.org/docid/3ae6b3a84.html [accessed 31 March 2017]. 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 ICTR, see Barbora Halo, Sentencing of International Crimes at the ICTY and ICTR, 4 Amsterdam Law Forum 4 (2012).

\(^{19}\) See, e.g., WTO AB, EC – Seals.

\(^{20}\) This is a symptom of the IIL system itself more than a symptom of ‘proportionality’ as such. See Christian Tietje and Kevin Crow, The Reform of Investment Protection Rules in CETA, TTIP, and Other Recent EU-FTA: Convincing? in MEGA-REGIONAL
Certainly part of the problem is definitional. To establish a conceptual framework for ‘proportionality’, therefore, Professor Vicki C. Jackson provides three distinct approaches to understanding ‘proportionality’: “[1] as [a] legal principle, [(2) as] a goal of government, and [(3) as] 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, an act which is inevitably infused with what Bruno Latour called “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.

Noting the inconsistency of proportionality’s inevitable subjectivity with claims to universalism, this Section contends that, amongst and within international courts, the diversity of proportionality itself undermines claims to its universality; it would be more accurate to identify a ‘global norm’ of emerging ‘proportionalities’ rather than ‘proportionality’, and these proportionalities can be categorized by the type of interpretation favored by the tribunal employing the proportionality (Part II). This paper briefly discusses two major problems that emerge from the application of these ‘proportionalities’ in international courts: the problem of subjective application (Part III) and the problem of dissent (Part IV). It then suggests that a categorical approach based using ‘unity’ and ‘pluralism’ diagnostic tools may provide a more appropriate use for proportionality (without resolving its inherent problems) (Part IV). Finally, the conclusion summarizes major findings and offers an explanation for proportionality’s diversity (Part VI).

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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 (1994).
²⁴ Id.
²⁶ Id. at 105-6. See also Gilbert Rist, *The History of Development* (2008).
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 Rights, tend to favor outcome-driven interpretations. 27 The deployment of outcome-driven reasoning favors classic articulations of proportionality, such as Alexy’s, 28 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. 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. 29 In such tribunals, proportionality is either not explicitly allowed or disallowed, as under the ICSID Convention and the world’s various BITs, 30 or it is applied unevenly, somewhat haphazardly, depending on the situation before the tribunal, as at the WTO. 31 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. 32 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. 33 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. 34

When it comes to ‘proportionality’ in international courts, one can observe several avenues through which ‘preference expressions’ are formalized through the process of Alec Stone Sweet’s so-called ‘triad neutrality’. The following sections will provide examples of proportionality’s preference expressions in various branches of international law in an attempt to demonstrate that the problematic nature of proportionality is rooted in how courts conceptualize the tool itself, rather than in its application. These

27 Andrea Bianchi, Daniel Peat, Matthew Windsor (eds.), INTERPRETATION IN INTERNATIONAL LAW (2015); ECtHR, Handyside v. UK, App. No. 5493/72 (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 17 UST 1270, TIAS 6090, 575 UNTS 159, hereinafter “ICSID Convention”.
32 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 international investment law, while individual liabilities to states (collectively) increased through international criminal law.
33 For a discussion of this asymmetry, see Christian Tietje and Kevin Crow, The Reform of Investment Protection Rules in CETA, TTIP, and Other Recent EU-FTA: Convincing? in MEGA-REGIONAL AGREEMENTS: TTIP, CETA, TISA. NEW ORIENTATIONS FOR EU EXTERNAL ECONOMIC RELATIONS (OUP 2017).
34 The only ICSID case where proportionality was debatably applied was by the Annulment Board of Continental Casualty v. Argentina (2011).
sections will explore (a) human rights law; (b) international economic law; and as an outlier example highlighting the existence of ‘proportionalities’, (c) international humanitarian law.

a. International Human Rights Law: The ECtHR, the ECJ, the ICJ, and the Proper Place of Institutional Rights

The European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ), though both Courts that have explicitly adopted ‘balancing’ tests through statute and caselaw, 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. 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, Costa v. ENEL, Simmental, to name a few), it shifted course explicitly in 2009 through the case of Kadi v. Commission. Perhaps because of the existence of the ECtHR, with its rigid constitutionalist approach to individual rights, the ECJ in Kadi felt at liberty to define and promote a plurality of legal orders, specifically with respect to the EC and the UN Security Council. Note the role proportionality played in that case: the ECJ overturned an earlier General Court decision which held that an evaluation of the EC’s execution of United Nations Security Council (UNSC) Resolutions restricting Kadi’s access to his assets would be tantamount to an evaluation of the Security Council Resolutions themselves. The Resolutions were lawfully enacted under Chapter VII of the UN 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. Rather, the General Court only ‘examined’ whether the UNSC had ‘respected’ jus cogens, in particular certain fundamental rights, and it did not find a violation of this standard. 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

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37 ECJ Case No. C-6/64 (1964).
40 ECJ Case No. C-402 and 415/05 (2008).
41 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 Columbia University Global Freedom of Expression Initiative, available at https://globalfreedomofexpression.columbia.edu.
42 Id.
43 Id.
44 Id.
sanctions without his knowledge and without opportunity to contest,\textsuperscript{45} against the regulations’ potential to prevent terrorist attacks, and easily found a violation of Kadi’s due process and property rights.\textsuperscript{46}

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 Bebrami and Saramati illustrate the ECtHR’s voluntary subordination to the UNSC.\textsuperscript{47} In those cases, Security Council Resolution 1244, which was lawfully enacted under Chapter VII of the UN Charter, authorized the UN to establish military and peacekeeping operations in Kosovo, through the NATO-backed KFOR militia,\textsuperscript{48} and later, through the UN Interim Administration for Kosovo (UNMIK).\textsuperscript{49} The case of Bebrami was particularly heartbreaking: a little boy lost his life after accidentally detonating an explosive device left by KFOR troops in a field,\textsuperscript{50} which UNMIK had later failed to locate.\textsuperscript{51} The bomb was left in a sector of Kosovo for which France was responsible during the Kosovo’s 1999 humanitarian crisis,\textsuperscript{52} 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 ECHR).\textsuperscript{53} The ECtHR found that the European Convention on Human Rights (ECHR) could not be interpreted to subject the acts and omissions of ECHR Parties covered by UNSC Resolutions to the scrutiny of the ECtHR.\textsuperscript{54} To do so, the ECtHR reasoned, would be to interfere with the fulfilment of the UN’s key mission in Kosovo.\textsuperscript{55} 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.\textsuperscript{56}

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.\textsuperscript{57} The ECtHR distinguished the case from Bebrami and Saramati by noting that, in Kosovo, Resolution 1244 required the UN 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 UN 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 ECHR, even if those violations took place in an extra-ECHR jurisdiction like Iraq.\textsuperscript{58}

\textsuperscript{45} These comprised violations of Kadi’s due process and property rights. See \textit{id.}
\textsuperscript{46} \textit{Id.}
\textsuperscript{47} See ECtHR, Bebrami v. France; Saramati v. France, App. No. 71412/01 and 78166/01 (2007).
\textsuperscript{48} The Kosovo Force (KFOR) has been led by NATO since 1999. See, e.g., \url{http://www.military.ie/overseas/current-missions/kfor/} (accessed 31 March 2017).
\textsuperscript{49} ECtHR, Bebrami v. France, App. No. 71412/01 (2008).
\textsuperscript{50} \textit{Id.}
\textsuperscript{51} \textit{Id.}
\textsuperscript{52} \textit{Id.}
\textsuperscript{53} See European Convention on Human Rights (ECHR), Article 2.
\textsuperscript{54} ECtHR, Bebrami v. France, App. No. 71412/01 (2008).
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Al-Jedda v. United Kingdom}, 53 EHRR 23 (2011).
\textsuperscript{58} \textit{Id.} Iraq is not a party to the ECHR.
Apparently, the ECtHR took the rigid constitutionalist position that when the organizational actions at issue are attributable to the UN, the Court cannot assert its authority concerning those actions, even if carried out under a ECHR Party’s authority. At any rate, 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.

From atop the hierarchy which the ECtHR and ECJ sought to avoid disrupting, 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. Yet the ICJ’s interpretation of what constitutes international law—especially customary international law—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, the second most common authority is an agreement between parties to a dispute, which 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.”

It is perhaps surprising, then, that the ICJ does not do proportionality as traditionally conceived, as the ‘weighing and balancing’ of ‘legitimate’ state interests is a practice in which a great number of state courts engage. Perhaps this is best explained by 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 later), the ICJ has generally opted for what might be described as a more categorical approach. For example, in the Kosovo Succession Advisory Opinion, the ICJ’s recognition of the unilateral right to self-determination might be read to 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. 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

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59 Prosecutor v Aleksovski (Judgment) ICTY-95-14/1-A, ICTY Appeals Chamber (24 March 2000), [112]–[113]; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) [2007] ICJ Rep 43, [403]. (Noting the ICTY’s misuse of its judicial authority and correcting the ICTY’s interpretation of the Convention.)
60 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? (OUP 2017).
62 Id.
64 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 of judicial scrutiny, such as the scrutiny tests employed by the United States Supreme Court.
Kosovo’s declaration to that effect; but ‘absence of reason’ was an *ex ante* categorical assessment.\(^{66}\) However, others have read the ICJ’s reliance compelling reasons, and on absence of reason, has evolved in recent years into what some have argued is a ‘proportionality of reasonability’.\(^ {67}\) 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,\(^ {68}\) the violation claimed did not intrude upon the interests of any particular state, but rather, the unified interests of a plurality of states in proper realization of the object and scope of the Montego Bay Convention (regulating whaling), which allows for exemptions only “for the purposes of scientific research”.\(^ {69}\) 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.\(^ {70}\) 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 it drew this observation from the overall goal of the whaling treaty on which it was based. The ICJ then parsed the treaty language into two cumulative requirements: (1) the actor in question must be engaged in ‘scientific research’, and (2) the act in question must be for the ‘purpose’ of that research. After answering the first prong in the affirmative, the ICJ found 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,\(^ {71}\) in an effort to guarantee an objective review of the exercise of the power of derogation.\(^ {72}\) 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, but rather, tasked with achieving the common interests of a plurality of states, the Court seeks to employ some version of proportionality, presumably to avoid the appearance of ‘subjective reasonability’.\(^ {73}\) 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.\(^ {74}\)

\(^{66}\) Id.

\(^{67}\) See, e.g., Deborah Russo, *The Use of Proportionality in the Recent Case-law of the ICJ*, in Mads Andenas & Giuseppe Bianco (eds.), *Proportionality in International Courts: Convergence in Law and Method?* (CUP 2016).


\(^{69}\) See, e.g., Deborah Russo, *The Use of Proportionality in the Recent Case-law of the ICJ*, in Mads Andenas & Giuseppe Bianco (eds.), *Proportionality in International Courts: Convergence in Law and Method?* (CUP 2016).

\(^{70}\) Id.

\(^{71}\) See, e.g., Deborah Russo, *The Use of Proportionality in the Recent Case-law of the ICJ*, in Mads Andenas & Giuseppe Bianco (eds.), *Proportionality in International Courts: Convergence in Law and Method?* (CUP 2016).

\(^{72}\) See, e.g., Deborah Russo, *The Use of Proportionality in the Recent Case-law of the ICJ*, in Mads Andenas & Giuseppe Bianco (eds.), *Proportionality in International Courts: Convergence in Law and Method?* (CUP 2016).

\(^{73}\) 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.* (1938), and was first clearly articulated in *Korematsu v. United States* (1944).
That is, when state sovereignty is not at stake, a different ‘balancing’ standard is applied, just as where certain rights or classifications are at stake, ‘strict scrutiny’ is applied. Already, in the courts tasked with litigating international human rights issues, we can observe a plurality of ‘proportionalities’ emerging.

b. International Economic Law: The WTO, the ICSID, and the Inconsistency of Proportionality

Some scholars have argued that proportionality emerged in international economic law as early as the pre-WTO era, in a 1989 ruling of a General Agreement on Tariffs and Trade (GATT) panel: U.S.-Section 337 of the Tariff Act of 1937. That Panel deployed a ‘least restrictive means’ test to reject the United States’ claim for an exemption from certain GATT obligations under Article XX of the GATT, which contains a list of “General Exceptions”—situations in which WTO Members may be permitted to breach the GATT. Measures that come under one of the exceptions listed in Article XX and meet the conditions that have been developed by Panels and the AB are granted an exception to violate other GATT provisions. Permissible exceptions include measures “necessary” to: protect public morals, intellectual property, and the life and health of humans, animals, and plants; secure compliance with customs rules; to prevent “deceptive practices” in the marketplace; and to conserve “exhaustible natural resources.”

In WTO jurisprudence, litigating Article XX has been the principal means of testing the limits of state competences to deal with negative externalities of trade and other policy problems unilaterally.

The leading AB ruling concerning the WTO’s version of proportionality is Korea-Beef (2001). 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. However, the application of the “least restrictive means” test is conditioned by a constraint. To reject an Article XX defense, 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. The public morals exception of Article XX(a) GATT also appears in Article XIV of the General Agreement on Trade in Services (GATS)—another of the WTO’s agreements. 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

77 GATT Article XX.
79 Id.
80 The AB further summarized and refined its approach to Article XX GATT in Brazil-Tyres (2007). See Appellate Body Report, Brazil-Measures Affecting Imports of Retreaded Tyres, l 141-44, WT/DS332/AB/R (Dec. 3, 2007). In this ruling, the AB provides an overview of its approach as it has evolved since Korea-Beef.
81 GATS includes exceptions, inter alia, for measures “necessary to protect public morals or to maintain public order,” “necessary to prevent human, animal or plant life and health,” and “necessary to secure compliance with [otherwise GATS-consistent] laws or regulations.” See GATS, art. XIV. 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 are made effective in conjunction with restrictions on domestic production or consumption.” See GATT, art. XX.
services online outweighed the interests of WTO Members who provided those services to customers in the U.S.\(^2\) In that case, the AB employed the Art. XX proportionality test set out in *Korea-Beef* to find that the U.S.’s moral interest outweighed the interests of other WTO Members in trade liberalization, and it defined the U.S.’s moral interest mainly based upon evidence that countries apart from the U.S. also have public aversions to gambling.\(^3\) The AB ultimately found, however, that the U.S. had failed to demonstrate the chapeau elements of Art. XIV.\(^4\)

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 reference to a ‘moral majority’ or at least ‘moral plurality’; according to the AB, 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,\(^5\) and 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.

The AB attempted to rectify its problematic public morals approach years later in the 2014 case of *EC-Seals*, in which it was claimed that a certain method of “harvesting” seal pelt was repulsive to the public morals of the European Community (EC).\(^6\) This was the first (and so far the only) WTO case to invoke Article XX(a) on the basis of so-called non-instrumental morality. That is, in *Gambling*,\(^7\) *Tuna II*,\(^8\) *Clove Cigarettes*,\(^9\) and other WTO disputes, public morals were invoked (successfully and unsuccessfully) based on specific policy concerns, such as reducing youth gambling or smoking.\(^0\) Such concerns are what Robert Howse and his collaborators have termed “instrumental” moral concerns.\(^1\) 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*, paras. 5.198 to 5.200 show the AB going well beyond the *Gambling* ‘moral majority’ standard:

1. “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”.

2. “We…have difficulty accepting Canada’s argument that, for the purposes of an

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83 Id.

84 Id.

85 Id. at par. 320.


analysis under Article XX(a), a panel is required to identify the exact content of the public morals standard at issue”.

(3) “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, 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 non-instrumental morals cannot be devalued for these reasons, in fact one might even call it ‘immoral’ to do so. 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, and 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 AB’s assessment of “reasonably available alternatives” would still preclude negotiation between the parties on what those alternatives might be, ⁹⁹ ex ante determining which alternatives are “reasonable.” Accordingly, I would suggest that there is a third alternative: greater emphasis on party negotiation, which could be accomplished either through judicial deference, or through recalibrating the DSU to require that any time alternatives are sought,

⁹³ Id.
⁹⁴ See GATT art. XX Chapeau.
⁹⁵ Robert Howse and Joanna Langille, Permitting Pluralism.
⁹⁷ Robert Howse and Joanna Langille, Permitting Pluralism; Robert Howse, Joanna Langille, Kate Sykes, Pluralism in Practice.
parties rather than AB members should determine what those alternatives are. But an exploration of that suggestion beyond the scope of this paper.

Notwithstanding its questionable legitimacy, GATT XX proportionality has migrated to other branches of IEL. Some authors actively argue that international investment law (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 the conceptual foundations for using proportionality analysis in investment arbitration are shaky at best, scandalous at worst.101 Perhaps because of this, there are few instances of proportionality analysis in III. 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 US-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 US-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 with completely different procedural outcomes, for example, the WTO’s AB may decide a GATT XX exception applies, but the 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 customary international law, it is not incorporated into the text of any existing BIT,104 and it is not general principle of law (no matter how much some of its global constitutionalist champions wish it were).105 Apart from the obvious flaws in importing such a rule on the basis of VCLT 31 (as the Tribunal found106), 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 possible107), proportionality of the WTO’s type cannot, as a matter of principle, be applied in the III. context. The test for Art. XX General Exceptions was established on the premise that all parties to

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100 Id. at 48.
103 US-Argentina BIT, art. XI. “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.”
104 As of September 2017.
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.\textsuperscript{108} By contrast, the IIL regime is one premised on an asymmetry of rights and obligations between investors and states.\textsuperscript{109} Two states form an agreement to provide rights to investors from either state investing in the other state, but (notwithstanding the recent Urbaser Award\textsuperscript{110}) there is no agreement between the state and the investor that the investor will be obliged to do anything. Indeed, IIL’s \textit{raison d’etre} is to provide investors with rights in situations in which they may have none; states cannot even initiate claims against investors, and can initiate successful counterclaims only under very specific circumstances.\textsuperscript{111} 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 EU Law, emerged from judges and not from treaty language, and emerged with no justification or precise definition given.\textsuperscript{112} 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 \textit{Cassis de Dijon} decision in which the test was applied to a number of EU freedoms (free movement of labor, services, and capital), and adapted to manage the expansive field of non-discrimination.\textsuperscript{113} Hans Kutscher and Pierre Pescatore brought proportionality to the EU in the 1970s, and from there, to the WTO.\textsuperscript{114} 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 \textit{Cassis de Dijon} was decided.\textsuperscript{115} Pescatore sat on the ECJ from 1967 to 1985. He then chaired the GATT Panel that decided \textit{U.S.-Section 337 of the Tariff Act of 1937} in 1989, which he used to import proportionality into GATT jurisprudence.\textsuperscript{116} The WTO-AB ruling in \textit{Korea-Beef} was written by AB Chairman Claus-Dieter Ehlermann. As a German-trained lawyer, Ehlermann had served as Director-General of the EU Commission’s Legal Service when \textit{Cassis de Dijon} was decided.\textsuperscript{117} Though obviously

\begin{itemize}
  \item \textsuperscript{109} See Christian Tietje and Kevin Crow, \textit{The Reform of Investment Protection Rules in CETA, TTIP, and Other Recent EU-FTA: Convincing? in MEGA-REGIONAL AGREEMENTS: TTIP, CETA, TISA. NEW ORIENTATIONS FOR EU EXTERNAL ECONOMIC RELATIONS} (OUP 2017).
  \item \textsuperscript{110} 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 \textit{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 and Lina Lorenzioni, \textit{International Corporate Obligations and the Urbaser Standard: Breaking New Ground?} B.U. Int’l L.J. (forthcoming, 2018).
  \item \textsuperscript{111} See Christian Tietje and Kevin Crow, \textit{The Reform of Investment Protection Rules in CETA, TTIP, and Other Recent EU-FTA: Convincing? in MEGA-REGIONAL AGREEMENTS: TTIP, CETA, TISA. NEW ORIENTATIONS FOR EU EXTERNAL ECONOMIC RELATIONS} (OUP 2017).
  \item \textsuperscript{112} See Stone Sweet and Mathews, \textit{Proportionality Balancing and Global Constitutionalism}.
  \item \textsuperscript{113} Case 120/78, Rewa-Zentrale AG v. Bundesmonopolverwaltung fur Brennwein (Cassis de Dijon), 1979 E.C.R. 649.
  \item \textsuperscript{114} See Stone Sweet and Mathews.
  \item \textsuperscript{115} Id.
  \item \textsuperscript{116} See Stone Sweet and Brunell.
  \item \textsuperscript{117} Id.
\end{itemize}
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; its migration is at least partially the result of lawyers employing the interpretive tools from the jurisdictions and institutions in which they were trained, and with which they are familiar. This underscores the point that proportionality’s pervasive use should not be misunderstood as evidence of its usefulness as an international judicial tool.

Indeed, although Stone Sweet and Mathews’ Triad argument remains convincing insofar as proportionality increases the legitimacy of third party mediation in a disagreement, we should bear in mind that the type of legitimacy Stone Sweet and others laud is prefaced by a fairly specific set of judicial conditions. A dispute must be between individuals, or it must be between a state and a subject to that state, to retain proportionality’s legitimacy-enhancing properties. These conditions are not met in the international context.


As a final demonstration of international law’s ‘proportionalities’, consider international humanitarian law’s theoretical approach to the concept. Violations of international humanitarian law are often (though not always118) adjudicated in international criminal courts such as the ICTY, ICTR, ICC, and ECCC. Judges at these courts employ an international criminal law (ICL) proportionality that is structurally different than judges adjudicating individual or institutional rights,119 and still more different than those adjudicating the rights of states to regulate in the interest of their respective publics.120 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;121 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.122 And 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.123

In addition to its role in IEL and HR law, the principle of proportionality is a central feature of international law regulating modern military engagements, but the legal status of this proportionality is far from clear. Two major international treaties—the Rome Statute124 and the 1978 Additional Protocol

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118 For an early example of ‘victors’ justice’ literature, see Richard Minear, Victors’ Justice: The Tokyo War Crimes Trial (Princeton 1971).
119 E.g. the ECtHR and the ECJ.
120 E.g. the WTO and the ICSID Tribunals.
123 See Geneva Conventions.
to the Geneva Convention—address war crimes and provide distinct definitions of the crime of disproportionate use of force. Many of the world’s major military powers—India, China, Russia, and the United States, to name a few—are not signatories to either treaty. Consequently, the only framework of legal accountability for alleged proportionality violations committed by those nations is CIL, and as I demonstrated above, ‘proportionality’ cannot be considered a general principle of CIL. Furthermore, no treaty law exists that specifically addresses proportionality in the context of non-international conflicts, meaning that CIL again is the only binding law available. To this end, some scholars have pointed out that the legal elements of proportionality in CIL can be clarified through the Rome Statute if considered as CIL. As already noted, the ICJ uses treaty law as the most frequent authoritative source for determining international custom, and scholars have argued that both definitions should be considered CIL doctrinally and realistically.

Several international law historians pinpoint the modern concept of proportionality in IHL as emerging sometime in the 1970s. Curiously, other historians also pinpoint the 1970s as the period during which international human rights law established itself as an actual practice, pushed by groups such as Amnesty International and Human Rights Watch. The development of IHL’s principle of proportionality in the second half of the twentieth century followed the advent of high altitude bombing as a tactic of war, which brought the population into the battlefield in a way that had not typically been true of historical wars. In past conflicts, when noncombatants were killed in war, it was typically because they were either targeted, victims of a fairly unusual accident, or broadly targeted as a class, such as in the case of a siege. When the axis and allied powers of World War II began deploying high altitude nighttime aerial bombing raids, they were not (necessarily) targeting noncombatants, but nonetheless the strikes incurred a severe human toll. Indeed, the now ubiquitous term “collateral damage” was coined in the post-War period.

The 1978 Additional Protocol I to the Geneva Conventions reacted to concerns that what was assumed to be a ‘justified’ human toll inflicted by the Allied powers during WWII may not always suit as a suitable standard to determine ‘justifiability’. And today, if a CIL definition of proportionality can be said to exist, only the Additional Protocol I and that Rome Statute can realistically inform it, as these treaties truly comprise consistent state practice. 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 de facto

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125 GA Protocol I.
128 For a discussion on this, see id. at 261-71.
129 See Judith Gail Gardham, Proportionality and Force in International Law, 87 Am. J. Int’l L. 391 (1993); see also A.P.V. Rogers, LAW ON THE BATTLEFIELD, 208-09 (MUP 2014).
130 E.g., Samuel Moyn, The Last Utopia (HUP 2010).
131 Meriam Webster Online Dictionary.
132 See generally Rogers.
133 This is because these are the only to 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, though conditions apply to many of those signatures.
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 and direct overall military advantage anticipated.”  

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”.

The deliberate inclusion of the term “overall” indicates a greater degree of flexibility in the proportionality calculation.

The Rome Statute was drafted as a means of providing individual criminal liability for violations of international crimes over which the ICC asserts subject matter jurisdiction; this statute asserts jurisdiction over only four types of crimes: war crimes, crimes against humanity, genocide, and crimes of aggression. The Additional Protocol I, meanwhile, serves largely as a prescriptive, action-guiding document that lays out step-by-step instructions for commanders and soldiers to respect international law while engaged in military conduct. But the Additional Protocol I has a grave breach provision that obliges signatory nations to repress and treat as war crimes certain violations of the Additional Protocol I. Thus, while the Rome Statute and the Additional Protocol I serve different general purposes as legal regimes, both have a retrospective criminal law function.

But the proportionality described in these debatably CIL sources, while perhaps helpful in the historical context of WWII, increasingly loses claims to legitimacy as time passes and technology changes war. One recent contradiction in proportionality in IHL took clear form under the Obama Administration’s ‘folk international law’ understanding of IHL in developing the concept of ‘specific war’. That concept employed the use of 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. Very recently, Alejandro Chehtman has examined what this ‘intuitive’ view might say about ‘proportionality’ itself. Chehtman demonstrates through empirical data 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 that conditions of symmetrical warfare. Drones are not

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135 Rome Statute, art. 8(2)(b)(iv).

136 Id. Emphasis added.

137 Rome Statute.

138 1125 U.N.T.S. 609.


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. Moreover, ‘specific war’ through a greater 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.”

Meanwhile, in ICL, the principle of proportionality is also applied to sentencing, but the application of this brand of ‘proportionality’ does little to shore up the legitimacy of international criminal tribunals. In some international criminal tribunals, particularly those that are not controlled primarily by the UN, the death penalty is permissible and assigned for certain crimes, whereas that penalty is forbidden in all UN tribunals. The practice of sentencing in the UN tribunals is informed by a proportionality that is applied in at least two retributive dimensions: cardinal proportionality, which focuses on the seriousness of the offenses themselves, and requires that the gravity of the punishment match the seriousness of the offense; and ordinal proportionality, which focuses on the relative seriousness of the offense, and considers how offenders are treated in relation to one another. Both theories can be seen in practice at different tribunals claiming to draw justification for sentencing from ‘general principles’ of international law. But scholars such as Máximo Langer have shown (domestically) 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 demonstrated this through his analysis of unilateral and bilateral plea bargaining procedures in American criminal courts. Moreover, in his seminal work Faces of Justice, Mirjan Damaška demonstrated that ‘proportionate’ outcomes concerning punishment of individual behavior varies depending on the goal of the state, which renders the proportionalities at the ICTY and the ECCC problematic. 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. Again, a broader consideration of that the diversity of applicable proportionalities in the international context undermine Stone Sweet’s claim that it shores up

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141 Id.
142 Id.
143 At the Special Panels of the Dili District Court, Governor Abilio Soares sentence led to death penalty in 2002, even though this was a UN-East Timor hybrid tribunal; and at the Iraqi Special Tribunal, set up by the Coalition Provisional Authority with the support of UN Security Council Resolution 1483, Saddam Hussein was hastily tried and sentenced to death in 2006.
146 Id. For a discussion on the concepts of ‘ordinal’ and ‘cardinal’ proportionality as socially constructed (rather than natural) phenomena, see also Nicola Lacey and Hannah Pickard, The Chimera of Proportionality: Institutionalizing Limits on Punishment in Contemporary Social and Political Systems, 78 Mod. L. Rev. 216 (2015).
147 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.
149 Mirjan Damaška, FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS (YUP 1986).
150 Id.
the legitimacy of judicial decision through the appearance of objectivity, because the ICL judge is inevitably charges 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 has brilliantly demonstrated in her recent book *Is International Law International?*, the legal traditions in which international lawyers are trained manifest different understandings of what international law is in the first place, and as such, 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 from the methods used by judges at the ICJ, and methods used to determine ‘custom’ differ within international investment law depending on the arbitrators that compose the tribunals.

And 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 weighting right against right. For one thing, the rights at issue are themselves often ‘essentially contested concepts’—an idea that I will discuss at greater length in the Conclusion to this article. And perhaps 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

As Jeffery Dunoff and Mark Pollack argue in a forthcoming paper, international judges—virtually all of whom are appointed for fixed terms subject to reappointment—face what Dunoff and Pollack term a ‘Judicial Trilemma’. 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. 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 ICJ and the ECtHR make extensive use of dissenting opinions, the ECJ rarely issues dissent and the WTO does not procedurally allow it. This is at least partially because, in Tribunals where

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156 Id.
157 Id. See also Jeffery Dunoff and Mark Pollack, *International Judicial Dissent: Causes and Consequences,*
reappointments are possible and terms are relatively short,\textsuperscript{158} 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.\textsuperscript{159} Judges at the ECtHR, ICJ, and ICC are elected for 9-year terms, and are generally not eligible for reappointment, so dissents in those courts are both regular and rigorous. It is notable that the only international courts that explicitly adopt an Alexy-style proportionality are those that do not issue dissents, and it is equally notable that 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.\textsuperscript{160} 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’. And 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. But “we don’t want to throw the baby out with the bath water,” to borrow a favorite phrase of Bruno Simma.\textsuperscript{161} How can we make sense of this? Proportionality obviously has some place in international courts, but how can we identify its appropriate place?

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

One may explain also explain the diversity of ‘proportionality’ by categorizing the various World Order institutions in terms of ‘horizontal’ and ‘vertical’ adjudication.\textsuperscript{162} That is, ‘horizontal’ adjudication describing disputes between states and ‘vertical’ adjudication describing disputes between individuals and states. One might initially conclude that in the latter category, disputes between individuals and states, proportionality holds a true to consistent doctrines in international law: it balances the rights of individuals against impositions on those rights by states. But a closer look at ICSID, IHL, and ICL jurisprudence reveals that this hypothesis cannot be said to hold universally true on the international level.\textsuperscript{163} One might also initially conclude that proportionality is ill-suited to disputes between states as sovereign actors whose rights cannot be ‘balanced’, as evidenced by the ICJ’s reluctance to apply proportionality, and as evidenced by the problematic “public morals” balancing in the WTO’s GATT XX jurisprudence. However, the hypothesis that the WTO’s public morals jurisprudence undermines all of its attempts to employ proportionality too crumbles in light of the WTO’s general jurisprudence,\textsuperscript{164} which consistently

\textsuperscript{158} 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.

\textsuperscript{159} ICSID Convention, art. 48.

\textsuperscript{160} This is demonstrated in Section II above.


\textsuperscript{162} These classifications speak to the ‘directionality’ of rights and obligations at the various international tribunals. For a recent discussion on the directionality ethics of obligations and correlative rights, see Mark Timmons, Obligations of Gratitude and Correlative Rights, 5 Ox. Studies in Normative Ethics 1 (2015).

\textsuperscript{163} Section II of this paper.

\textsuperscript{164} That jurisprudence that balances non-Art. XX(a) exceptions, such as environmental concerns, public health, etc.
balances the non-public based regulatory interests of states against the rights of other states to reduced barriers to trade through GATT XX’s other (non-public-morals) exceptions, generally to considerable success.

How, then, shall we make sense of the successes and failures of proportionality’s incarnations in international law? I want to suggest that 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 World Order institutions—thinking of ‘pluralism’ and ‘unity’ as prescriptive can help us conceptualize different types of problems that ultimately stem from universalist approaches to international law.\(^\text{165}\) The cases above can be described as featuring 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). My suggestion is that, 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, as demonstrated through past decisions. 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. In other words, when pluralism is practiced, proportionality has either a reduced place in international adjudication, or no place at all. By contrast, when unity is needed, as is the case when a plurality of states share a common interest, regardless of sovereignty concerns, proportionality is exactly the medicine to be prescribed, as evidence by the *Whales* case at the ICJ.\(^\text{166}\)

Although scholars often speak of ‘proportionality’ as if it were one clear idea, one can decipher a distinct range of proportionalities emerging in World Order courts and tribunals.\(^\text{167}\) In the same vein as those scholars who reject calls for international constitutionalism,\(^\text{168}\) this paper rejects the notion that international lawyers *need* unified judicial tools such as proportionality to combat fragmentation in international law, propounded by Alec Stone Sweet among others.\(^\text{169}\) Stone Sweet’s interpretation of proportionality is almost entirely outcome-driven; he borders on *ad hominem* attack of José Alvarez, for example, for critiquing the ICL and the Annulment Committee’s application of the principle, but offers little by way of substantive refute.\(^\text{170}\) Indeed, attempts to cross pollinate proportionality into some international legal regimes is not only problematic, it is also unprincipled, as illustrated by the ICSID *Continental* case. However, as Koskenniemi notes, there is an implicit tendency toward apathy inherent in

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\(^{167}\) This is evident both between the courts analyzed in Section II of this paper, and even within the WTO and ICSID tribunals, depending on the nature of the right to be balanced, and on the international context of the right.


\(^{169}\) See Stone Sweet and Mathews.

some of pluralism’s champions; as he puts it, pluralism “ceases to pose demands on the world.”¹⁷¹ 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 the good life, proportionality cannot help by balancing one state’s perception against the economic interests of all. As seen in EC-SeaIs, 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; 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.

VI. Conclusion: Proportionality as an ‘Essentially Contested Concept’

‘Proportionality’ is never really exactly the same thing in any of these courts. International courts must occupy a legal space that neither enhances nor inhibits certain beliefs about what is ‘right’, especially in the metaphysical sense. In cases of non-instrumental public morals, or in cases in which the ‘right’ is intrinsic or internal to a group, not external or dependent upon a state or government, the judicial tool of proportionality makes no sense. For example, 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 by its terms and from an external point of view, it is neutral. When internal belief dictates truth, there can be no co-existence, balancing is absurd from the internal point of view. With religious and metaphysical questions, therefore, courts would do far better to take a categorical approach. This is especially true in international courts, where European legal traditions lay claim to value-infused language of ‘neutrality’.¹⁷² To provide one quick example of this, consider the 2008 case Dogru v. France in which the ECtHR decided that France’s Conseil d’État did not violate Article 9 of the Convention,¹⁷³ citing what I would argue are three ‘loaded’ interpretations of ‘neutrality’. First, the ECtHR found that the statute had neutral language because it described ‘clothing designed to conceal the face’. Second, it found that the motivation behind the law was neutral because the government was able to cite explanations for the law that did not involve discrimination, for example, security concerns. And finally, the court shifted its language from its early Dahlab v. Switzerland decision,¹⁷⁴ which contained similar facts, from balancing a specific threat of terrorism against the infringement on Article 9 to balancing what it termed a “general threat” to the public at large posed by garments designed to conceal the face.¹⁷⁵ All of these rationales employ languages of neutrality that mask a tyranny of the moral majority. The same can be said of any

¹⁷¹ Martti Koskenniemi, The Fate of Public International Law, 70 Mod. L. Rev. 1 (2007).
¹⁷² 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. Intl L. & Pol’y 353 (1986) (quoting passages from the Bible to illustrate the ‘naturalness’ of the principle).
¹⁷⁵ Id.
‘essentially disputed concept’, such as ‘democracy’, ‘Christian Doctrine’, ‘art’, or as I believe this paper demonstrates, ‘Proportionality’.

As W.B. Gallie put it in his 1956 essay,\(^1\) an ‘essentially contested concept’ is a concept whose essence entails a degree of contestedness; that is, by its very nature it signifies something about which people have a strong sense of ‘truth’ yet it is not the same thing to different people, even though many people are ‘correct’ about what it is. According to Gallie, an ‘essentially contested concept’ exhibits the following four characteristics. First, it must signify or accredit some kind of valued achievement. Second, it must be of an internally complex character. Third, any explanation of its value depends on its internally complex components, but there is nothing contradictory about competing explanations of the components prior to experimentation. Finally, it must allow for considerable modification in light of changing circumstances, and the modifications cannot be prescribed or predicted in advance.

Proportionality exhibits all of these characteristics. First, varying accounts credit proportionality with achievements ranging from shoring up judicial legitimacy to embodying the notion of objectivity itself. Second, proportionality’s internal complexity is apparent much more from the caselaw that applies it than it is from the requirements of the tests involved, which demonstrate a fact-dependent complexity and a range of applications. Third, libraries have been written on each of proportionality’s pre-balancing steps—‘legitimacy’, ‘reasonability’, and ‘necessity’—yet no global consensus exists on what any of these concepts entails, which also speaks to the complexity of the ‘rules’ of proportionality. And finally, proportionality’s primary claim to universality is driven by its adaptability; in domestic courts, its very structure inherently modifies to local values consistently even though each domestic jurisdiction exhibits different circumstances. The most uneasy fit of Gallie’s characteristics is the complexity prong, but I want to suggest that this is because of ambiguity in what ‘complexity’ itself is when it comes to legal tests.

The analogy Gallie draws is to a sports match with very complicated rules, but complicated rules are not the only measure of complexity.\(^2\) I want to suggest that, because each of proportionality’s prongs have rich jurisprudential traditions that differ depending on the courts in which proportionality is applied, and because balancing incommensurable values such as morals against economic ones codified in trade agreements, proportionality in international courts is ‘internally complex’ as a concept.

Characterizing proportionality as ‘essentially contested’ by Gallie’s definition helps to explain how it is that a judicial tool that is spreading rapidly in what some scholars (too readily) term ‘the age of proportionality’ can be so ill-defined and have such severe theoretical shortcomings when it comes to application in international courts. Understanding that part of proportionality’s nature is that it is different things in different courts also highlights its inherent insufficiency as a judicial tool for certain types of international disputes.

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\(^2\) Id.
<table>
<thead>
<tr>
<th>From where does proportionalilty flow?</th>
<th>ICJ</th>
<th>ECtHR</th>
<th>ECJ</th>
<th>ICC</th>
<th>WTO</th>
<th>ICSID</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judge-made multi-factor reasonability test from CIL (problematic)</td>
<td>From the Convention, e.g. Art. 8 and Art. 10</td>
<td>Art. 5 of the Treaty of EU, Criteria set out in Protocol 2</td>
<td>International humanitarian law (proportionality violence), domestic law (proportionality sentencing)</td>
<td>GATT Art. XX, AB decisions</td>
<td>Judge-made test imported from WTO Treaties and AB decisions</td>
<td></td>
</tr>
</tbody>
</table>

| Who implements the final decisions? | States, Agencies, UN organs and agencies (advisory opinions) | Convention Member States | EU Member States | Varies, Agreement between ICC and Enforcing State | States under guidance of the DSU | The losing state |


<p>| Degree of deference after judgment? | AO's: High | High | Low, but high when it comes to individuals. | Low | High | Low |</p>
<table>
<thead>
<tr>
<th>Area of Jurisdiction?</th>
<th>193 UN Member States, multiple treaties</th>
<th>47 Council Member States, ECHR</th>
<th>28 EU Member States (soon 27), EU Law</th>
<th>124 State Parties to Rome Statute, possibly non-parties at SC motion</th>
<th>164 Member States, WTO Agreements</th>
<th>Parties to a BIT, MIT, or Investment Chapter of an FTA or MTA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jdx Range?</td>
<td>Wide</td>
<td>Narrow</td>
<td>Medium?</td>
<td>Wide</td>
<td>Wide</td>
<td>Narrow</td>
</tr>
<tr>
<td><strong>Judicial Obligations in the Judicial Trilemma?</strong></td>
<td>High transp &amp; account, low independe ne ce</td>
<td>Low Account ability; High Trans &amp; Indep.</td>
<td>Low Transparenc y (dissent); High Accountabili ty and Independenc e</td>
<td>High transparency &amp; accountabilit y, low independenc e</td>
<td>Low Transparency; High Acc. &amp; Indep.</td>
<td>High transparency &amp; accountability, low independence</td>
</tr>
<tr>
<td><strong>Elements of Proportionality</strong></td>
<td>Reasonabili ty: is purpose legitimate? did states identify less restrictive means?</td>
<td>Legit policy goals of state prop to infringe t on right</td>
<td>Article 5 and Protocol (No 2) of the ToEU. Notably, a duty to become informed before taking action.</td>
<td>Violence proportionat e to attack? To strategic aims? In sentencing, punishment proportionat e to crime?</td>
<td>Necess ary? Least restricti ve means?</td>
<td>GATT XX proportionality</td>
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