The Rise and Rise of Proportionality in Public International Law

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In 1992 the Australian High Court handed down two ground breaking decisions: ACTV v The Commonwealth and Nationwide News v Wills. Within those decisions was the foundations of a new principle for determining legal validity, that of proportionality. Proportionality is the concept that a law can not be excessive in the means it employs to achieve desired ends.

This article asks whether this notion of proportionality can be transferred to the international sphere as an ethic of customary international law. That is, can proportionality be seen as a guiding principle in international action of or between nation states.

The argument is that yes, it can be viewed in such a light. Evidence for this is drawn primarily from the role of proportionality in the use of force and in the law of the sea. The article also discusses proportionality in evolving European Community law and in laws on international human rights.

Evidence from these areas demonstrates that proportionality is indeed an emerging ethic in international law. The article argues that on this basis its development and furtherance as a guiding principle should be encouraged and formally recognised as an international law requirement; a consideration in international policy and activity.

Introduction

Despite attempts at harmonisation through treaty relations and state participation in multilateral organisations, the international arena is a composite of unsettled and unsettling structures. The volatility of global politics and discordant national perceptions of legitimate

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lawful conduct constitute a precarious, usually unsuitable basis for an international rule of law.

The argument of Carbonneau,[1] which opens this article, is well suited to premise a discussion of the developing ethic of proportionality in international law. It appears from such a discussion that the present method of treaty management and implementation is undermined by parties who, in protecting their sovereignty and international rights may cause the entire treaty to fail. Nation states attempting to justify and agree on modes of action is laborious and complex,[2] hence, it is suggested that some of these difficulties can be overcome by the adoption of the notion of proportionality in treaty rights, duties and actions of nation states.[3] This implies that proportionality is increasingly seen as a pre-emptory consideration in public international law requirements. It is, as the title suggests, on the rise.

Given the present inconclusive jurisprudence on the role of proportionality in public international law, my aim here is to outline where proportionality is prominent in international affairs and whether a claim can be based on this presence for recognition as a part of customary international law. I will argue that because of the need for rationality in international law, proportionality is a principle which should be considered an integral part of treaty obligations. As such, after providing a delineation of proportionality, I discuss proportionality in the use of force, law of the sea and ancillary areas which employ proportionality. I will then discuss the question whether a

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1 Carbonneau, T E, "American and Other National Variations on the Theme of International Commercial Arbitration" (1988) 18 *Georgia Journal of International and Comparative Law* 143.

2 This has been amply demonstrated earlier this year with the strikes by the United States on Iraq. From the original coalition of 30 countries in the 1991 Gulf War, only four (Australia, United Kingdom, Japan and New Zealand) were in complete support of the military action. Tempered approval was forthcoming from France and Germany, but there was not the resounding approval as in 1991. Perhaps it is not too cynical a view that the approving countries were/are either facing an election or are a new government, eager to demonstrate foreign policy ability.

3 As such, it should be noted that this paper may be more descriptive in nature as opposed to an analytical exposition. One can not analyse the effect of an event if it is yet to be completely instituted within the international law paradigm; this paper is argumentative, not analytical.

claim to customary international law status is justified. From this I shall draw my conclusions.

What is proportionality?

Proportionality is an ethic of law enforcement and enactment which deems that laws are to be constructed and implemented in a manner which is "in proportion" to the aims of the law. In a domestic Australian context, Fitzgerald[4] has noted that it is

> "ingrained with the notion of governing in the interests of the people ... (it is) an ethic generated from the touchstone of the interests of the people. It is an ethic which says that good government is government which is to the point, clear, precise and necessary ... (it will) instil an ethic of efficiency, responsibility and accountability."[5]

Within this context, proportionality is best known as a tool of determining constitutional (legislative) validity. Given foundation in the groundbreaking cases of *ACTV v The Commonwealth*[6] and *Nationwide News Pty Ltd v Wills*,[7] it has been reaffirmed in *Cunliffe v The Commonwealth*[8] and most recently *Leask v The Commonwealth*.[9] While the outcome of these cases are irrelevant for my purposes here, these decisions place proportionality as an issue requiring the Parliament's attention and consideration; failure to do so places any legislation at peril of being declared invalid for being excessive or overbearing in operation.

If we are to transpose this exposition, the aims and essence of proportionality within an international sphere materialise. It would require treaties or international action to be entered into for the best interests of the populations of nations. It would instil the ethics which Fitzgerald discusses — efficiency, necessity, provision —

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4 Fitzgerald, B. F, "Proportionality and Australian Constitutionalism" (1993) 12 (2) *University of Tasmania Law Review* 263.
5 Id, pp 268-269.
6 (1992) 66 ALJR 695.
7 (1992) 177 CLR 1.
8 (1994) 124 ALR 120.
9 (1996) 70 ALJR 995.

into international interaction. This "transplantation" is best evoked by drawing on Kirby J's comments in the *Leask* case where he spoke of this concept as a generic guiding principle, not constrained by adherence to pedantic rules or strict formulations. To use proportionality in international law as reflecting Kirby J's formulation of it as a "useful test of generic application" would, I suggest, reap significant benefits in terms of controlling international interaction, be that in a theatre of war or in determining trade disputes. These factors are presently stumbling blocks in international law because of the absence of proportionality.

In looking to the international context for a definition, Fenrick[10] states proportionality (in war) is an ideal which seeks to institute the "prohibition of unnecessary suffering which postulates that degrees of violence not necessary for the overpowering of the opponent should not be permitted."[11] To this end, proportionality in international arenas serves the same purpose as in determining Australian legislative validity. It is the tool which determines the extent and severity of military or political action. Given this foundation, proportionality can be seen to play a real role in the governing of international actions and in the effect that such actions can have on people.

Despite the clarity in these definitions, they are somewhat misleading. While proportionality appears to be a clear and uncomplicated concept, the balancing of interests and restraining of institutional actors creates considerable problems. Proportionality is not as clear as would appear for, as Clain[12] states, it is easier to formulate than apply to circumstances. Perhaps this can be traced to the general difficulty the law has in reconciling human benefits with legal directives — the moral/legal dichotomy. It can be argued that a finely tuned concept of proportionality

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10 Fenrick, W. J, "The Rule of Proportionality and Protocol I in Conventional Warfare" (1982) 98 *Military Law Review* 91.

11 Id, p 94. See also on this Ghering, J, "Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I" (1980) 90 *Military Law Review* 48, pp 54-58. Here Ghering outlines provisions from military manuals and instruction texts.

12 Clain, L, "Gulf of Maine — A Disappointing First in the Delimitation of a Single Maritime Boundary" (1985) 25 (2) *Virginia Journal of International Law* 521, p 538.

overcomes the "all or nothing" result such a divide often presents. This role for proportionality arises from contemplation of the alternative; the predetermining of limits of action would invariably lead to further conflicts or disputes, or indeed, be ignored.

Given such an argument, I shall outline where proportionality operates in international law, leading to a discussion of its suitability as an ethic of customary law governing international conduct.

Proportionality in the use of force

Transformations in the "global balance of power have generated extensive debate about how best to ensure international security beyond the cold war."[13] Implicit in this debate is proportionality and the role it may play in international activity. Its increasing status as a directive of force represents a change from traditional security to broader concerns and global emphasis.[14] This suggests a greater cognisance of different modes and levels of action; a greater understanding of cause and effect and the use of that information to shape decisions. Despite this, assessing "means and ends in situations of great complexity and uncertainty is never easy."[15]

The genesis of proportionality in the use of force is found in Protocol I.[16] The aim of this agreement is to "regulate

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13 Tow, W. T, "Northeast Asia and International Security: Transforming Competition to Collaboration" (1992) 46 *Australian Journal of International Affairs* 1, p 1.

14 Alagappa, M, "The Dynamics of International Security in Southeast Asia: Change and Continuity" (1991) 45 *Australian Journal of International Affairs* 1, p 1.

15 Schachter, O, "Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity" (1992) *American Society of International Law Proceedings* 39, p 39.

16 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts. See in particular Article 35 (methods of warfare are not unlimited), Article 51 (parties must be aware of collateral damage), and Article 57 (protection of civilians in the face of attack). Hereinafter referred to as Protocol I. It should be noted that Protocol II, which arises as another codicil to the same convention deals with proportionality in internal armed conflicts. Given the internal specificity of Protocol II it will not be discussed within this paper. Additionally, it is to be noted that there is a distinct ethic of proportionality in self defence following the case of *The Caroline* 1841 reported in (1906) *Digest of International Law*

the conduct of belligerents engaged in combat."[17] Thus it aims to monitor the impact of warfare on civilian populations within a war zone. Moreover, it seeks to force the actors in warfare to be cognisant of the tangential effects of their actions. This equates with Cameron's[18] principles of Protocol I, namely to:

(1) define the rules as to who may participate in war;

(2) stipulate the means by which war was conducted;

(3) describe the way in which sites may be bombed and targeted; and

(4) regulate the formation of truces.

Gardam[19] states that such an approach mirrors the Christian theory of a "just war" and the secular theories of Grotius and Vattel.[20] This stresses that actors in warfare do not have an open range of tools with which to effect their force, but rather the methods used must be constructed with the interests of the civilian population in mind.[21] From this statement of principle, some argue the emergence of a customary international law rule.[22]

One area effected by proportionality is selecting targets. Legitimate military targets must be chosen in realisation of the effects such a strike will have. This in itself can be difficult: the example of power stations, which serve not only to assist the operation of enemy regimes but also to

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412. Here it was held that self defence was permissible if it was: (a) necessary; (b) immediate; and (c) proportionate. While these factors may be seen as guiding lights in other instances of the use of force, they do remain, for the time being, limited to self defence. See Dinstein, Y, "Implementing Limitations on the Use of Force" (1992) *American Society of International Law Proceedings* 54, p 57. Articles 2(3), 2(4) and 51 of the UN Charter are also relevant in any discussion of self defence, however the discussion in this paper is limited to international conflicts and as such will not address self defence situations.

17 Fenrick, already cited n 10, p 92.

18 Cameron, P J, "The Limitations on Methods and Means of Warfare" (1985) 9 *Australian Yearbook of International Law* 247, p 252.

19 Gardam, J, "Proportionality and Force in International Law" (1993) 87 *American Journal of International Law* 391, pp 394-395.

20 For a greater exposition of the just war theory see Melzer, Y, *Concepts of Just War* Sijthoff, Leyden 1975, pp 26-39, and pp 50-53.

21 Gardam, already cited n 19, p 397

22 Brownlie, I, *International Law and the Use of Force by States*. Oxford University Press, Oxford 1963, p 41.

support the civilian populations defy such easy categorisation.[23] Viviani explains, calling for assessment of the environmental and political ramifications of attacks.[24] She notes that the Gulf war was an example whereby the Allied forces paid scant attention to the environmental impact from blanket bombing. Additionally, Viviani alleges there was no consideration of the political turmoil incited between Kurds and Shi'ites in the first instance, and between the Israelis and Palestinians in the second.[25]

Therefore proportionality in warfare forbids inflicting "suffering, injury, or destruction not actually necessary for the accomplishment of legitimate military purposes."[26] Thus, under Protocol I, proportionality applies "wherever armed forces engage the armed forces of a foreign state or enter territory of a foreign state without permission."[27] However an assessment of such "means and ends" is necessarily subjective.[28] Kalshoven[29] has phrased this into a two step process. Initially, there must be a consideration of the necessity of the attack and possible collateral damage should be assessed. He states that "the cut off line beyond which the collateral damage is no longer regarded as acceptable may be found with the aid of the principle of proportionality."[30] Thus while there is a positive duty to attempt to limit the damage that military action causes, the question remains whether there is a duty to seek out information about a target.[31] Some see this as unnecessary. Moore[32] states that abstract evaluation is immaterial; we

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23 Gardam, already cited n 19, p 407.

24 Viviani, N, "The Gulf War — Summing Up the Issues", in Selochan, V (ed), *The Gulf War Issues and Implications for Australian and Asia*, Griffith University Press, Brisbane 1992, p 130.

25 I shall return to the issue of the Gulf War a little later in this paper as it is a recent and tangible example of the arguments for the operation of proportionality in Armed international conflict.

26 Fenrick, already cited n 10, p 93.

27 Id, 98. The actual directive to proportionality is ensconced in Articles 51 and 57 of Protocol I.

28 Fenrick, already cited n 10, p 126.

29 Kalshoven, F, "Implementing Limitations on the Use of Force" (1992) *American Society of International Law Proceedings* 40, p 41.

30 Ibid.

31 Hampson, F, "Implementing Limitations on the Use of Force" (1992) *American Society of International Law Proceedings* 45, p 48.

32 Moore, J N, "The Secret War in Central America and The Future of the World Order" (1986) 80 *American Journal of International Law* 43, p 127.

should focus on the condemnation of aggressive attack as opposed to determining if it is proportionate. This is resonate of the approach taken by Lauterpacht[33] in his stating that where a state "shocks the conscience of the world" it is guilty of an international crime regardless of the context of the actions. As evocative and compelling as this mode of contemplation is, it remains an unsteady foundation on which to measure international action; personality politics and cultural relativism make that point strongly. A clearer notion of proportionality, as an enunciated ethic as opposed to a test of "outrageousness" may solve such an issue.

In assessing whether an ethic of proportionality applies in warfare it appears, with such wide writings that it may be at a minimum a part of the judicial process if nothing more compelling.[34] However such optimism should be tempered by reality, for as Greig[35] observes, progress remains piecemeal. Regardless, mere increasing judicial consideration of proportionality represents a tangible shift in the application of international law.[36] A change which, in the terms of Miler means that humankind will guard against the excesses of institutional elites[37] and ensure

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33 Lauterpacht, H, *International Law: A Treatise*, Peace Press, London, 1955, p 312.

34 Recalling that under Article 38 of the International Court of Justice Treaty the court may look to treaties, customary international law and scholarly writings on an issue in formulating its judgments.

35 Greig, D W, "The Underlying Principles of International Humanitarian Law" (1985) 9 *Australian Yearbook of International Law* 48, p 57.

36 Id, p 84.

37 Miler, R, "Commentary on the Underlying Principles of International Law" (1985) 9 *Australian Yearbook of International Law* 90, p 91. This usage of "institutional" power raises 2 points. Initially there is the governmental power, however it also prompts the spectre of international corporations being subjected to a proportionality test on the use of their economic power. Instances where this could have been used include Shell in Nigeria, Union Carbide in India and logging interests in Malaysia and the Pacific Islands. While not within the warfare arena, their power is considerable and questions as to limitations placed on these international actors are pertinent and relevant. For a broader argument on this see Said, A A and Simmons, L R, *The New Sovereigns*, Spectrum, New York, 1975 and Sampford, C, "Law, Institutions and the Public/Private Divide" (1991) 20 *Federal Law Review* 185. For an argument for wider public powers of review to be placed on corporations within the Australian domestic sphere, see Loftus, P, "Common Heads of Obligation: An Institutional Law Construction of the Duties of Public Officials" (1995) 2 (2) *Deakin Law Review* 255.

warfare is governed by the constraints of civilisation.[38] On a broader perspective and in reference to my aim in this article, it evidences the rise of this concept to form a significant contemplation in the advent and passage of hostile action of one country against another. This is the first example of the rise of proportionality.

Given the preceding notes, an analysis of proportionality in the Gulf War as a mini case study is appropriate. Accepting that intervention is appropriate when a state's actions impact on the "conscience and security of the world"[39] the Gulf War is an apposite vehicle to assess proportionality in war.[40] In assessing the increasing role of a (relatively) indeterminate concept in international action such a case study is useful as it bases the discussion in reality and allows the consideration of tangible events. It is, perhaps, the ultimate, if circumstantially unfortunate, litmus test.

In evaluating the coalition's response to the situation in the Persian Gulf, Brugger[41] ponders whether a milder form of redress or deterrence may have been more appropriate in this situation.[42] Additionally he notes a lack of moral consideration in the part of the coalition partners.[43] Such an argument is also made by Hampson.[44] This analysis purports that the allies failed to consider long term effects on population, raising the notion of the political discordance noted by Viviani above. Hampson argues that proportionality failed in the Gulf conflict because there was an over emphasis on the attack, not the selection of the targets. He calls for greater appreciation of the consequential and cumulative effects of war in assessing

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38 Cameron, already cited n 18, p 259.

39 Klintworth, G, "The Right To Intervene in the Domestic Affairs of States" (1992) 46 (2) *Australian Journal of International Affairs* 248, p 248.

40 For a summary of coalition forces and actions see Selochan, V, *The Gulf War; Issues and Implications for Australia and Asia*, Griffith University Press, Brisbane, 1992, pp 135-137.

41 Brugger, B, "Was the Gulf War 'Just'?" (1991) 45 (2) *Australian Journal of International Affairs* 161, p 164.

42 One wonders how former Foreign Minister Evans' policy of constructive engagement, which he had implemented to spectacular ineffect with Indonesia over East Timor, would have fared. In this light, Brugger's argument is surely weakened.

43 Brugger, already cited n 41, p 168.

44 Hampson, already cited n 31, p 51.

the proportionality of an attack.[45] To this end, he provides a three step evaluative mechanism in determining whether the armed force used in the Gulf War was proportionate. These are:

(1) Could fleeing or retreating Iraqi forces be attacked?

(2) Were lawful weapons used?

(3) Was the destruction of property in excess of that demanded by the necessities of war?

In addition, he canvasses the Security Council Resolutions leading to the action against Iraq, arguing that the resolutions in themselves were proportionate, even disabling of the coalition. He states, however, that between enunciation and employment, there was a discrepancy which resulted in disproportionate action against enemy forces and populations.

As such, while noting some failures in the gap between deciding on modes of action and the action being carried out, the sum total of this stance is an affirmation of proportionality as a guiding principle in war while dissenting on whether it was evident in the coalition's actions. Additionally, it overcomes the deficiencies of the emotional instinctivness approach suggested by Lauterpacht earlier. Regardless, this argument gives force to proportionality increasingly being seen as instructing war and international law.

In responding to these attacks on the practice of the Coalition forces, Green, Counsel to the Chairman of the US Joint Chiefs of Staff, defended the allies and claimed engagement in proportionate warfare.[46] He argued:

> "(there was) a rational standard in application of force; it was a benchmark for conduct in the Gulf War. Contrary to what some believe or assert, proportionality applied by the coalition saved lives and reduced the devastation of property."[47]

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45 Id, p 54.

46 Green, F, "Implementing Limitations on the Use of Force" (1992) *American Society of International Law Proceedings* 62.

47 Id, p 67.

Thus, as Wedgwood[48] argues, proportionality is at the centre of "civilian debate on the use of force in foreign affairs...these are legal and ethical obligations that can not be left to military decision, outside the scrutiny of statesmen, lawyers and citizens." Hence, the question of whether an ethic of proportionality exists within the use of force is a resounding yes. It presents itself as a foundation principle in the assessment of the use of force and the aim of minimal non military casualties.

Despite it not having a 100% success rate, its permanence and possible customary international law status are accentuated by the Vienna Convention and the requirement that signatories to the Protocol I[49] implement it in good faith.[50] While there are problems with the application of such a rule during wartime, there is an "acknowledgment of the inevitability of civilian casualties in war" and the role proportionality can play in preventing this.[51] The ethic of proportionality is not presented as a panacea to all unnecessary wartime suffering and damage. It does, however, present itself as a method whereby such impacts can be minimised.

In this light its claim for customary status is morally strengthened. The claim for acceptance on the basis of current practice is also strong, given the discussion above. Despite this, it awaits formal recognition from judicial authority. This may be due to the lack of opportunity for judicial consideration in place of any notion of judicial spurning of the proportionality concept. Regardless, such pronouncement remains a necessary condition precedent to proportionality taking on the mantle of an ethic of public international law. This judicial inopportunity or reluctance is not as evident in another operative area of proportionality, the law of the sea.

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48 Wedgwood, R, "Implementing Limitations on the Use of Force" (1992) *American Society of International Law Proceedings* 58.

49 Which at present number 25, unfortunately excluding the main "superpowers". However the apparent adoption by the coalition (America, Russia, Great Britain, France among others) in the Gulf War may indicate a willingness to be bound in spirit if not in name.

50 Fenrick, already cited n 10, p 101. This is the *pacts sunt servanda* rule.

51 Id, pp 126-127.

Proportionality and the Law of the Sea

Proportionality in the law of the sea is evident in two main areas, delimitation disputes and the apportionment of damages after a marine collision. A broad overview of the operation of the ethic of proportionality is to reflect a balancing of interests.[52] Or, as the United Nations Convention on the Law of the Sea[53] states, proportionality facilitates:

> "international communication, the peaceful uses of the seas and oceans, the *equitable* and *efficient* utilisation of their living resources and the study, protection and preservation of the marine environment."[54]

Thus the evolution of proportionality into an ethic of all international law is likely if still somewhat distant. This is submitted as proportionality in delimitation of sovereign and resource boundaries has played an increasing role in resolving international disputes, being referred to as an "equitable criterion" of transactions.[55] Further, without this principle, resources would be "exploited, with protective measures taken only on concrete proof of damage."[56]

The main operation of delimitation proportionality is under UNCLOS which allows nations a continental shelf of 200 miles.[57] So, where ever opposite coasts are separated by less than 400 miles, a dividing agreement of the shelf will be necessary.[58] McRae[59] sees such an agreement as

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52 Baulerin, P C, "UNCLOS and US Ocean Practice" (1995) 17 *Loyal of Los Angles International and Comparative Law Journal* 899, p 906.

53 Hereinafter UNCLOS.

54 UNCLOS, preamble, my emphasis. Note the similarity in adjectives as with the notion of proportionality as provided by Fitzgerald, already cited n 4.

55 Henkin, L, Pugh, R. C, Schater, O, and Smit, H, *International Law: Cases and Materials* West Publishing, New York, 1996, p 117.

56 Belsky, M H, "The Ecosystem Model Mandate for a Comprehensive United States Ocean Policy and Law of the Sea" (1989) 26 *San Diego Law Review* 417, p 432.

57 UNCLOS Article 83.

58 Fitzgerald, B F, "Portugal v Australia: Deploying the Missiles of Sovereign Autonomy and Sovereign Community" (1996) 37 *Harvard International Law Journal.* 260, p 261. See also on this Lumb, R, "The

having its foundations in the use of proportionate measures. It was perceived that a proportionate response was required where one nation had a concave shoreline while the others was relatively straight. If an equidistant line was adopted, there would be significant injustice done to the nation without the concave coast.[60] To escape this difficulty, a measure was constructed which was dependant on the length of the coastline of the nations rather than measuring out from the furthermost point of the coast. In the *North Sea Continental Shelf Cases*[61] it was stated that such an approach could establish equitable allocation.[62] Although this represents a seemingly common sense approach the finding of this decision is revolutionary. It can be seen in such a fashion in that such a construction develops uniform state action and, consequently, casts proportionality as a customary international law principle. This is a tangible evocation of proportionality in practice and effect in international law.

However, despite this auspicious holding, additional judicial embrace of the use of proportionality has been piecemeal.[63] Higgins[64] suggests that in the *North Sea Case* the court used proportionality "not as a distinct principle of delimitation" but rather as one of many measures employed to achieve a 'just' solution. She also suggests that this approach was maintained in the *Anglo-French Continental Shelf Arbitration.* Here, the court is recorded as stating that proportionality is a:

> "criterion or factor by which it may be determined whether a distinction results in an equitable delimitation of the continental shelf...

Delimitation of Marine Boundaries in the Timor Sea" (1981) 7 *Australian Yearbook of International Law* 72.

59 McRae, D M, "Proportionality and the Gulf of Maine Maritime Dispute" (1981) *Canadian Yearbook of International Law* 287, p 288.

60 Id, p 298.

61 [1969] ICJ 1.

62 Id, p 52.

63 The principle cases where this issue has been considered in the making of Maritime decisions are *North Sea Continental Shelf Cases* (1969) 3 ICJ 52; *Anglo-French Continental Shelf Arbitration* (1979) 18 ILM 397; *Tunisia v Libya* (1982) ICJ 75; *Gulf of Maine* (1984) ICJ 246; *Libya v Malta* (1985) ICJ 43; and *Portugal v Australia* (1995) ICJ 1.

64 Higgins, R, *Problems and Process: International Law and How We Use It*, Clarendon Press, Oxford, 1994, p 229.

> (proportionality was, however) clearly inherent in the notion of a delimitation in accordance with equitable principles."[65]

While that appears to be a restricted role, in *Tunisia v Libya* it is argued that the court "used proportionality as a substantive principle of delimitation."[66] This was evidenced in its use in the *Jan Mayen Case*[67] where Rauf[68] argues that proportionality of coastline to sea claimed was a fundamental plank to the courts decision. Again, it is to be stressed that while there is clear differentiation in views over the status of proportionality, its continued presence and participation in international adjudication signals the hallmarks of customary international law; that is, law not explicitly ratified by courts or treaties but which is operative. Attard[69] agrees, stating the decision of the court in using proportionality was:

> "not to refashion geography but to abate the disproportionality and inequitable effects produced by geographical configurations in a situation of quasi equality as between a number of states."

Therefore these cases indicate that if proportionality is not yet accepted as an ethic in customary international law, it is well on its way. Its continual referral and consideration can indicate no less. This exemplifies an international law body looking to whether the means and actions used by states are permissible and acceptable and the outcome is fair and just. Thus the claim to have proportionality as an

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65 *Anglo-French Continental Shelf Arbitration* (1979) 18 ILM 397 at 427.

66 Higgins, already cited n 64, p 230, and the ICJ judgment at paragraph 104.

67 *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v Norway)* (1993) ICJ 4.

68 Rauf, A, *Maritime Boundary Between Australia and Indonesia in the Timor and Arafura Seas From the 1970's to the 1990's in the Context of the International Law of the Sea.* Unpublished MPhil. Thesis, Faculty of Law, Griffith University, 1995.

69 Attard, D, *The Exclusive Economic Zone in International Law* Clarendon Press, Oxford, 1987, p 258. Attard in this book covers the topic of the EEZ in international law. The limitation of such zones could also be determined to some extent by proportionality however such a consideration is outside the scope of a paper of this nature. However it could be raised as another instance of the growing ethic of proportionality in international law interaction and disputes.

integral part of international law is strengthened by its presence in these cases.

The stumbling point here, as in proportionality and warfare, is the lack of judicial ratification of the existence and importance of this principle. Until such judicial approval is granted, and granted consistently and often, claims such as mine for proportionality in international law will remain unsubstantiated not because of a lack of practice but because of a failure to recognise its operation and the corresponding necessity for recognition. This alone will give proportionality a legitimacy which its present incarnation fails to muster. As such, it may be seen as a part of customary law however opportunities for greater progress remain in the hands of the judiciary.

This method of allocation of entitlements is also used in the division of mining rights in the sea bed. While this is too large an area for exposition in this article, it should be noted that similar requirements are placed on the division of mining interests. This is perhaps best exemplified by Bravender-Coles labelling proportionality and its application as the "handmaiden of equity" and thus necessary in divisions to ensure a sense of equitableness.[70] Indeed he sees the role of proportionality in this area as but an example of the evolution of customary international law towards a full embrace of proportionality.

However this is not to say that this method of proportionate adjudication is not without its detractors. Yost[71] has stated that some nations do not believe that equal voice is afforded to all nations concerned in the division of the sea and its resources. Additionally, this approach to limitation and division has been criticised because of the necessary side effect of the limiting of state freedom of action. This underlies a main challenge to the

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[70] Bravender-Cole, P, "The Emerging Legal Principles and Equitable Criteria Governing the Delimitation of Maritime Boundaries between States" (1988) 19 *Ocean Development and International Law* 171, p 185.

[71] Yost, K, "The International Sea Bed Authority Decision Making Process: Does it Give a Proportionate Voice to the Participant's Interests in Deep Sea Mining?" (1983) 20 *San Diego Law Review* 659, p 660. She notes at 675 that if the interest in the mining resources is taken as a proportion of the national economy then the levels of input are vastly inequitable.

extent of operation of proportionality, that is, the fetters it places on a nation's sovereignty. If it is perceived that requirements of proportionality unduly or excessively restrict the freedom and liberty of states its acceptance and adherence will, understandably, be reduced. Accordingly, if states perceive this ethic to be too constrictive in nature they will not ratify the treaty, rendering it ineffectual.[72] This is a major concern to be overcome and it stands in the way of full recognition. Further, the rejection of proportionality by nation states may even place the more modest claim for acceptance as an ethic of customary law in doubt.

A second area is the use of proportionality in assessing damages resulting from a marine collision. Dubus[73] has outlined how the traditional "admiralty rule" of equal division of damages was over ruled in the case of *United States v Reliable Transfer Co.*[74] The effect of this ruling was to apportion the payment of damages according to the degree of fault of each party. One of the benefits of this approach is the apparent uniformity in law governing international marine incidents. This removes the opportunity for forum shopping[75] and places America on an equal footing with many other shipping nations who, in 1910, agreed to the doctrine of proportionate damages ensconced in article 4 of the Brussels Liability Collision Convention.[76] While minor, this is another example of the increasing acceptance of proportionality throughout international law paradigm.

Thus, I submit that proportionality in the use of force and the law of the sea exemplifies an emerging ethic in customary international law. I seek to continue this argument by outlining other occasions where international

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72 Morgan, A, "The New Law of the Sea: Rethinking the Implications for Sovereign Jurisdiction and Freedom of Action" (1996) 27 *Ocean Development and International Law* 5, p 22.

73 Dubus, G, "Proportional Fault in Maritime Collisions — Charting the New Course" (1976) 6 *Georgia Journal of International and Comparative Law* 259, p 259.

74 (1975) 421 US 397.

75 Yasgoor, S, "Comparative Negligence Sails the High Seas: Have the Recovery Rights of Cargo Owners Been Jeopardised?" (1977) 7 *California Western International Law Journal* 179, p 195.

76 Officially known as the International Convention for the Purpose of Establishing Uniformity in Certain Rules Regarding Collisions.

law uses proportionality as a guiding principle. Again, the point needs to be made that before formal acceptance of this principle can be claimed judicial ratification is required. Without this, it can only lay claim to holding sway as an ethic in customary law governing international interaction.

Other incidents of proportionality

While the central arenas of proportionality in international law have been outlined, it is also impacting on European Community (EC) treaty law and human rights concerns. This is one area where the much needed judicial contemplation is beginning to take shape. It is an encouraging development.

Beatson[77] has outlined that proportionality in EC law requires that there be a "reasonable relationship between the end achieved and the means used to achieve it." The principle of proportionality is encompassed in EC law in three main areas, through the legal frameworks of the EC;[78] through the domestic law of some of the member states; and though the European Convention on Human Rights (ECHR).[79] Proportionality as an element of European law was recognised in *Internationale Handelsgesellschaft v Einfhur-und Vorratsselle für Getreide und Futtermittel*[80] however its take-up has been a little slow and whether it can fully be described as customary in EC law is doubtful. This was demonstrated in the UK case of *R v Secretary of State for the Home Department, ex parte Brind*[81] where the House of Lords considered the scope of Article 10 of the ECHR.[82] The Lords, while recognising the treaty and its consequences, held it was only relevant if domestic

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77 Beatson, J, "Proportionality" (1988) 104 *Law Quarterly Review* 180, p 180.

78 Including, inter alia, the Treaty Establishing the European Community 1957.

79 Mullender, R, "The Principle of Proportionality in Canadian Charter Adjudication" (1993) 25 *Bracton Law Journal* 63.

80 [1970] ECR 1125.

81 [1991] 2 WLR 588.

82 Article 10 held that each nation must provide for freedom of expression. The issue was the UK government's ban on the broadcast of the voice of Sinn Fein leader Gerry Adams.

legislation was ambiguous.[83] As such, the treaty was rendered inapplicable.

The law of the EC has provided other ground for calls for proportionality. In the case of *Fritz Werner Industrieausrüstungen GmbH v Federal Republic of Germany*[84] the European Court of Justice (ECJ) held that import and export restrictions on European nationals should be made pursuant to the principle of proportionality. Additionally, in case of *France v The United States*[85] it was held that in an international commercial dispute any counter measures must be proportionate, aiming to settle rather than exacerbate the dispute. Such an approach mirrors another "proportionate" EC directive — anti-dumping laws. Here, proportionality is of considerable importance in determining if a nation has made a profit from dumping excess export material.[86] Proportionality allows a method of determining whether a profit was made at the expense of other members of the EC. It provides a quantitative as well as a qualitative assessment. Thus its importance and utility as a legal tool is emphasised. It also demonstrates the rise of proportionality in the mode as described above by Kirby J in *Leask* as a principle of general application. I suggest that proportionality will find greater and easier acceptance if the concept is presented in this fashion; that is as a universal, generic principle to guide behaviours in all circumstances.

Before leaving the role of proportionality in EC law, the concerns of some British jurists should be noted. They have noted the House of Lords' continual rejection of the

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83 Lewis, C, "The European Convention, Proportionality and the Broadcasting Ban" (1991) 50 *Cambridge Law Journal* 211, p 212.

84 Case of the European Court of Justice, October 17 1995. Kokot and Rudolf see this decision as significant in international law terms as it imposes the proportionality principle not only for the nationals of a country, but also for a nations government's dealings with foreign companies and people. See Kokot, J and Rudolf, B, "Proportionality of National Decisions" (1996) 90 *American Journal of International Law* 286, p 287.

85 Case concerning Air Services Agreement Between France and The United States, Arbitral Award of December 9 (1978) 18 UNRIAA 417, pp 443-446.

86 Egger, A, "The Principle of Proportionality in Community and Anti-Dumping Law" (1993) 18 *European Law Review* 367, p 384.

doctrine of proportionality, instead opting for the mild expansion of the "unreasonableness" principle developed in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[87] or through the use of Lord Diplock's "accepted moral principles" from *Council of Civil Service Unions v Minister for the Civil Service*.[88] As noted earlier, these claims and concerns of an infringement of sovereignty can not be easily dismissed and before it can be said that proportionality is a true, adhesive doctrine in the EC, it will have to be addressed.[89] This raises the issue of intersecting sovereignty or "community of principle," where neither governing body has absolute power over the jurisdiction. Given the political climate in Great Britain and the persistent protests of the "Euro-Sceptic" factions within both the Labour and Conservative Party this may be difficult to overcome; any further perceived succession of power to Brussels will be hotly contested. However, should this eventuate in the post-Maastricht Treaty EC, it is difficult to imagine proportionality not playing a part in determining the limitations and exertion of power.[90] Importantly, and out of the bounds of this article, is whether such considerations would effect economic power (and it possible uses) as well as political power.

A second arm where proportionality is making an impact is in international action for human rights. Sornarjah[91] has noted the need for a "reshaping" of international humanitarian law to accommodate the interests of developing states. He argues we are in need of a universal base for this law. I submit that such a base could be the ethic of proportionality as, due to its flexibility and demonstrated qualitative evaluative function, it satisfies the requirements ascribed to it, that of protection of civilians and environment and prevention from

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87 [1948] 1 KB 223.

88 [1985] 1 AC 375, p 410.

89 See Jowell, J, "Broadcasting and Terrorism, Human Rights and Proportionality" (1990) *Public Law* 149 and Himsworth, C, "Legitimately Expecting Proportionality?" (1996) *Public Law* 46.

90 See on this issue Fitzgerald, B F, "International Human Rights and the High Court of Australia" (1994) 1 (1) *James Cook University Law Review* 78, pp 98-99.

91 Sornarajah, M, "An Overview of the Asian Approaches to International Humanitarian Law" (1985) 9 *Australian Yearbook of International Law* 238, pp 238-239.

interference.[92] Indeed, flexibility is vital, given Whitlam's claim that human rights are forever changing.[93] This role for proportionality is ratified by Fitzgerald in his stating:

> "law is lived and experienced. Gone or going are the quests for universal and rational legal truths; in their place come quests for the better understanding of the exercise of power in cultural and historical settings and contexts."[94]

The ability to ensure international action is appropriate and relevant establishes a role for proportionality to play in international human rights.[95] Because of its adaptability it may prevent the imposition of western standards in a non-western context. Proportionality is again demonstrated to be a prism through which the law can recognise cultural relativism and personality politics while maintaining an internally consistent regimen of governing principles and laws.

An ethic of proportionality in international law?

Having noted the incidence of proportionality in international law one can assess if it is developing as an ethic of international conduct and law.[96] The evidence above suggests proportionality is emerging as a protective mechanism against indiscriminate state action.

Initially there is the clear directive established by Protocol I and its acceptance. While questions remain about the efficacy of the Gulf War conduct, its recognition by coalition members indicates it is an ideal of considerable impact. Despite this, no court has yet found it to be a compulsory requirement in warfare[97] and it may be left to

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92 Id, pp 240-241.

93 Whitlam, G, "Australia and the UN Commission on Human Rights" (1991) 45 (1) *Australian Journal of International Affairs* 51, p 58.

94 Fitzgerald, already cited n 90, p 95.

95 Such a view is endorsed by Higgins, already cited n 64, p 235, where she states proportionality in human rights monitoring has a definite "operational role to play" albeit one which she sees as not entirely divorced from the necessity principle.

96 A *jus cogens* in international law terminology.

97 Fenrick, already cited n 10, p 124. As Greig states, "conduct which does not constitute a breach of any specific provision of such a treaty

international organisations to affirm its role.[98] Before one can argue that proportionality is a part of the formal, ratified international law such judicial contemplation is necessary. Until that time, one can only put forward the more modest claim of proportionality emerging as a component of customary international law.

However problems remain. Walker[99] argues that while:

> "proportionality may eliminate the grosser sorts of inconsistency, it does not tell us if orders should be based on retributive or utilitarian considerations. Nor does it tell us how to measure wickedness or severity or match one with the other."

The problems of clarity and definition have been covered earlier in this article. Suffice to say that Walker's criticisms are well founded and should be confronted. Again, the most logical arena for this is in judicial pronouncement.

This claim to customary status for proportionality can also be seen in the law of the sea. It is clear that proportionality now plays a leading role in the delimitation of marine boundaries and sea bed mining rights. Unlike warfare, this is reflected in *opinio juris* making any claim to customary status stronger. Also, proportionality is now the standard method of damage apportionment in marine

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may nevertheless amount to a breach of a general obligation not to derogate from the treaty's object and purpose." Greig, D. W, "Reciprocity, Proportionality and the Law of Treaties" (1994) 34 *Virginia Journal of International Law* 295, p 326. See also Greig, D. W, "Nicaragua and the Unites States: Confrontation over the Jurisdiction of the International Court" (1991) 62 *British Yearbook of International Law* 119, pp 161-165.

98 See Archer on this, who states that international organisations, such as NATO, ASEAN, UN, and the EC have a definitive role in deciding the *jus cogens* of international action: Archer, C, *International Organisations* (2nd Ed) Routledge, London, 1992, Chapter 4. The seeds of this can be seen in the recent discussions at the UN over the continued use of anti-personnel land mines and the recent signing of the Nuclear Arms Test Ban Treaty, although the weakness in this treaty (with some nuclear states refusing to sign) are acknowledged. Indeed one of the arguments (India's in particular) for not signing was that the treaty was disproportionate in that its provisions were excessively advantageous to established nuclear states at the expense of emerging ones.

99 Walker, N, "Legislating the Transcendental: Proportionality" (1992) 51 (3) *Cambridge Law Journal* 530, p 537.

collisions. This is an indication of the widening acceptance of proportionality as a fundamental norm of international law, affirming it as an ethic increasingly spanning the matrix of international law, not merely discrete classifications.

Finally, proportionality operates in a number of areas which, when considered in totality indicate an emerging ethic of interaction between nations. This can be seen in areas such as human rights, EC laws, and international reflection of proportionality in domestic laws.[100] The importance of proportionality to international law lies not only in its present operation but also as a principle resolving varied approaches to international conduct and fora.[101] Its adoption as an ethic of international law seems probable considering the present void in international jurisprudence. As Greig[102] states:

> "International law may be regarded as a complete system: a dispute may be resolved by the application of legal rules however the remedial side of the international legal system is under developed both in theory and practice."

That proportionality, with further judicial development, conceptual definition and nation acceptance could develop into an ethic of customary law and further balance the application of rules to circumstance is, I would suggest, irresistible.

Conclusion

My aim in this article was to demonstrate that proportionality is emerging as a tangible and forceful ethic in the operation and application of international law. I argued that while explicit inclusion in all treaties and judicial ratification is some distance away, we are moving inexorably to that end. I submit that such an argument is

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[100] Perhaps foremost in any list of nations with domestic proportionality would be Australia after the decisions in *Nationwide News Pty Ltd v Wills* (1992) 66 ALJR 658 and *ACTV v The Commonwealth of Australia* (1992) 66 ALJR 695.

[101] Wilenski, P, "Australian and US Approaches to the UN" (1992) 46 (2) *Australian Journal of International Affairs* 280.

[102] Greig, already cited n 97, p 360.

tenable on consideration of the areas of international law where proportionality is playing an increasing role. From this there is a clear trend for the increased use of proportionality not only in determining state actions but also in dispute resolution.

I have attempted to validate this argument by outlining the place of proportionality in several legal topics, namely, the use of force and maritime disputes. Additionally I addressed a number of smaller domains which also employ proportionality as a guide. In some eyes, this remains inconclusive. Higgins states inconsistencies render a principle of proportionality as doubtful.[103]

However, it is arguable that the increased usage of proportionality in case law and State action as noted in this article can lead to its being classed as a part of customary law between nations. I believe the evolution of proportionality into customary law to be a realistic proposition. If it is accepted that the function of international law is not merely the protection of national sovereignty but also to protect populations, the environment and resources then it is difficult to see how the doctrine of proportionality can be anything other than an emerging governing principle. A principle which forces institutional powers to contemplate the cause and effect of their actions. As Greig[104] has argued:

> "The balancing of interests [in the international context] is fundamental to the law's role in promoting the well being of society. In establishing and maintaining this balance, the concept of proportionality figures prominently."

I submit this is not the description of an abstract or novel theorem, but of a fundamental norm and ethic of action, behaviour and conduct on the international stage.

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[103] Higgins, already cited n 64, p 236.
[104] Greig, already cited n 97, p 295.