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## Book Review

Cannizzaro, Enzo. *Il principio della proporzionalità nell'ordinamento internazionale*. Milano: Giuffrè. 2000. Pp. xiv, 511. €36.15.

The principle of proportionality can be seen operating in various fields of international law. At first sight, the clearest examples of the operation of the principle are to be found in relation to countermeasures, self-defence, international humanitarian law, European Community law and human rights law. But, on closer inspection, the principle of proportionality also emerges from other areas of law, for example the law of the sea, the treatment of aliens, and international environmental law.

Because of the relatively many areas of the law in which the principle operates, one might expect it to be the subject of much academic study. However, this is not the case: works dealing with the principle of proportionality are few, and are usually confined to one particular area of the law. Moreover, these works have not considered the structure and the content of the principle per se, nor its relationship to other legal concepts such as good faith or abuse of right. Finally, because such studies have tended to concentrate on only one particular area of law, they have not considered the question of whether proportionality has a different content and structure as between the various fields of law in which it operates, or whether it instead operates uniformly in the different areas of law. In short, the principle of proportionality has been, until now, paradoxically a well-known but still relatively unknown concept.

Cannizzaro's book attempts to fill this gap in the literature by adopting an entirely new approach: the book aims to be a comprehensive study of the principle of proportionality, covering *all* the fields of international law in

which the principle operates. Such a comprehensive study was necessarily a difficult undertaking, for two reasons. First, the sheer breadth of the areas of law in which the principle operates necessarily made the task a difficult one. Secondly, the author had to seek a unitary concept of the principle of proportionality, a concept which could be applied to very different fields of international law. Cannizzaro has met both challenges, and has produced a monograph which, in my view, is the most valuable doctrinal study to date on the principle of proportionality in international law.

Previous works dealing with the principle of proportionality have tended to adopt an abstract analysis of the general role of the principle. Cannizzaro rejects this approach, and instead adopts a successful combination of studying both the practice and the theory of the principle. His initial premise (one which is confirmed at the end of the book) is that proportionality has a common conceptual core, but assumes a partly different content depending on the different function it performs in any particular area of law.

In the Introduction to the book, Cannizzaro makes his first attempt to identify this common core through research on comparative and European Community law. In some domestic legal systems, proportionality appears mostly in the form of a limit to the exercise of public powers over private individuals. In European Community law, proportionality performs the same function, and also operates in order to mediate between the sovereignty of the member states and their obligation to adhere to Community law. In short, the principle appears in particular to operate where there is a public authority, which has power over individuals, in circumstances in which it is necessary to limit the discretionary power of that public authority. In other

words, the principle of proportionality is particularly suited to *public law*.

Therefore, at first sight, it might appear that proportionality finds little application within the traditional international legal system, which is structured in a decentralized way, and is more akin to private law than to public law. However, Cannizzaro rejects the premise that proportionality can only develop within the framework of legal relations between public and private actors. Instead, he asserts that the principle also operates within the framework of legal relations between equal entities, where one actor has the power to interfere unilaterally with the legal interests of other actors, that is, where a subject has *unilateral powers of a functional character*. Therefore, proportionality can work in international law in respect of norms that establish *functional powers of states*. In fact, as the book ably demonstrates, in international law there are many primary and secondary norms that give functional powers to states; in such cases, states must subject the exercise of those powers to a test of reasonableness, and must avoid abuse. In sum, proportionality serves as a means of social control of the unilateral powers delegated by international law to states.

After the Introduction, the substantive chapters of the book are divided into three parts. The three parts correspond to the three different functions of proportionality that the author identifies.

Part I deals with proportionality as a means of coordination between conflicting legal positions. Here, proportionality operates as a limit to the unilateral power of a state to interfere with the legal position of other actors. Here, the purpose of the principle is to achieve a fair balance between conflicting legal positions.

Chapter I of Part I deals with one example of this aspect of proportionality, from the field of human rights. Chapter I is a lengthy discussion of the principle as it operates in the case law of the European Court of Human Rights. The author demonstrates that the Court has made use of the principle of proportionality in various ways. First, proportionality has been employed as a

benchmark to establish the legality of derogations by the state parties from the rights laid down in the European Convention on Human Rights. Secondly, proportionality has been used to establish the legality of interferences by states with Convention rights. Thus, proportionality has been used as a criterion to balance the interests of states and individuals. Thirdly, proportionality has also served as a means of determining the scope of application of some of the rights established by the Convention.

Chapter II gives a second example of the use of proportionality to balance conflicting interests, this time in respect of the law of the sea. The law of the sea is an area of law that particularly benefits from the use of the principle of proportionality, because the norms of the law of the sea usually do not regulate absolute legal positions, but rather regulate the functional powers of states; the norms of the law of the sea are often elastic, and only assume a more precise content in concrete circumstances. However, the breadth of the functional powers of states changes according to the different areas of the sea that are under consideration. Thus, in the territorial sea, the coastal state has a wide discretionary power, which is limited only by the need not to interfere too greatly with the freedom of navigation enjoyed by other states. Here, therefore, proportionality has only a minor role. In the exclusive economic zone, the principle of proportionality has a greater role, because the coastal state has only those powers necessary to protect certain of its economic interests. Finally, on the high seas, proportionality has a lesser role, because international law allows only a limited balance between the various conflicting interests in the free use of the high seas.

Chapter III of Part I discusses a third example of the use of the principle of proportionality as a means of coordinating competing interests, this time taken from the law relating to territorial uses. Here, the forms of functional control over the unilateral powers of states are weaker, because the powers of territorial sovereignty are open-ended, and therefore a greater discretion is granted to

states in their actions. However, proportionality is not entirely absent here, and manifests itself through the test of 'non-excessive disproportionality'. For example, proportionality exists in certain international norms relating to the treatment of aliens, in order to provide a test for non-arbitrariness in the expulsion of aliens or in the expropriation of foreign property. A similar functional control exists in certain norms of international environmental law which impose upon states a standard of due diligence in regulating dangerous activities within their jurisdiction, and in norms on the non-navigational uses of international watercourses, and in norms in the field of extraterritorial jurisdiction under antitrust legislation.

Part II of the book is, in my view, the most interesting part. It deals with proportionality as a limit to the enforcement activities of states that aim at ensuring compliance with international norms or with domestic norms. Here, proportionality does not serve to establish a normative balance between the conflicting interests of states; rather, it serves to establish a functional limit, particularly of a humanitarian character, in order to avoid the excessive exercise of power by states in their enforcement activities. Therefore, since the function of proportionality partially changes, its content also changes; what matters is not the normative balance, but rather the possible injury suffered by individuals who might be the victims of unilateral enforcement action by states. Despite this, the logical structure of the test of proportionality does not change: it still consists of judging the consistency between the achievement of a certain goal and the means employed to achieve that goal.

In Chapter I of Part II, the author deals with enforcement activities which consist of the non-international use of force. Here, proportionality manifests itself in particular in two fields of international practice. The first relates to the law of the sea, and concerns a series of disputes which have arisen from actions by coastal states seeking to enforce laws and regulations within the territorial sea, in fishing zones, or on the high seas. In this field, there is also recent treaty practice which

confirms the lawfulness of certain enforcement actions undertaken by coastal states in various areas of the sea in order to ensure the observance of international norms, and which also confirms the functional limits of such enforcement actions. The second field of practice in which proportionality manifests itself relates to the security of states, and concerns the functional limits established by international law on enforcement activities that a territorial state may use in order to defend its sovereignty against unauthorized aerial or terrestrial intruders. From an examination of both of these fields of international practice, the application of proportionality to the enforcement activities of states involves a comparison between the nature of the threat faced by the state and the risk of damage which its enforcement activities may produce.

In Chapter II of Part II, the author deals with the role of proportionality in enforcement actions which require the international use of force. He examines, first, the customary rule on self-defence, and, secondly, the rules of international humanitarian law.

In the rule on self-defence, proportionality assumes only an executive character, and not a retributive or reparatory character. In other words, a state acting in self-defence must use only such force as is necessary to resist an armed attack and to protect its territorial integrity. Moreover, the proportionality of an armed response in self-defence must be evaluated according to an objective standard, that is, according to conduct which appears reasonably necessary in each concrete case. However, once the criterion of proportionality has been satisfied as to the necessity of taking self-defence measures, a state may then take whatever action is necessary in order to defend its territorial integrity, because such integrity is considered an absolute right under international law. Thus, contrary to the position regarding enforcement activities that consist of the non-international use of force (as discussed in the previous chapter), proportionality relates only to the element of necessity of a self-defence action, but does not relate to the possible injurious effects of such an action on other actors.

By contrast, in the norms of international humanitarian law, proportionality takes into account not only the necessity of certain military action, but also the damage that such action may cause to non-combatants. In other words, proportionality requires an analysis of both costs and benefits.

Therefore, Cannizzaro concludes that there are important differences in the content and function of proportionality as between *jus ad bellum* and *jus in bellum*. However, he also concludes that it is not appropriate to apply these two normative systems independently of each other: rather, they should be considered as two subsystems of a single normative system that regulates the use of force in international law. In the framework of this single system, proportionality should be applied as a unitary standard that takes into account both military necessity and the humanitarian interests which could be affected by any military action. This new approach, according to the author, is confirmed by the International Court of Justice's 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*.

In Chapter III of Part II, the author examines the role of proportionality in the enforcement actions that a state may undertake during a 'state of necessity'. Here, proportionality has a fundamental role, in that it serves to give content to the customary rule regarding a state of necessity. In fact, the criterion for determining proportionality, on the one hand, identifies the conditions under which a state may derogate from a legal obligation (abstract proportionality), and, on the other hand, serves to establish the limits to the possible actions that a state may take to respond to a state of necessity (concrete proportionality). The latter form of proportionality relates the means employed by the state to the goal of avoiding the perceived danger: the action must be strictly proportional to that goal. Finally, the author makes some interesting remarks on the possible role of proportionality in the process of the formation of new customary international norms under conditions of necessity.

Part II of the book ends with some conclud-

ing remarks on the function and structure of proportionality in enforcement actions. The function of proportionality consists in defining the content and limits of a state's power to act unilaterally in order to attain certain objectives. These limits serve to protect the interests and values which might be damaged by those enforcement activities. The test of proportionality involves an assessment of the reasonableness of the actions taken by a state to defend its interests, and an assessment of the proportionality (in a strict sense) between the benefits of such actions and the harm done to other actors.

Part III of the book deals with proportionality as a limit to the unilateral power of a state to take countermeasures following an internationally wrongful act. There is unanimous agreement in the literature that countermeasures must be proportionate, but there is no agreement on the content of such proportionality. According to Cannizzaro, the criterion of proportionality limits the state both in its choice of the concrete goals of the countermeasures (external proportionality) and in the choice of their content (internal proportionality). This is based on the idea that countermeasures, in contemporary international law, cannot have a unitary function, but rather have multiple functions.

In particular, there are four main categories of countermeasures, divided according to their function: normative, retributive, coercive and executive. Normative countermeasures aim at restoring the normative balance upon which the breached rule was based; therefore, in assessing the proportionality of such countermeasures, one should look at the equivalence in law between the rule breached by the wrongful act and the rule breached by the countermeasure. By contrast, in retributive countermeasures (that is, imposing a cost on the state responsible for the wrongful act), proportionality is assessed in relation to the function of such countermeasures. In coercive countermeasures (that is, compelling the responsible state to respect the law), proportionality should be assessed in light of the goal of such countermeasures. Finally, executive countermeasures aim at directly execut-

ing the breached rule, for example by replacing performance by the state responsible for the wrongful act with performance by the state seeking the remedy. These latter countermeasures are permitted by international law only in exceptional cases.

In short, according to Cannizzaro, the principle of proportionality in countermeasures requires, principally, a balance between the countermeasures adopted by the state and the objective function they seek to fulfil. This conclusion allows the author to suggest an original solution to the difficult problem of countermeasures relating to international crimes committed by states. Instead of focusing on the question of which subjects are allowed to take countermeasures, the author stresses the function of the countermeasure; third states, in order to react to international crimes, may lawfully take only coercive countermeasures; executive countermeasures (for example, measures involving the use of force) may be lawfully taken only by the centralized institutions of the international community.

In his conclusion to the third part of the book, the author restates that, in the field of countermeasures, proportionality requires a congruence between the action and the function, and not, as most writers maintain, an equivalence between the wrongful act and the response to it. In my view, these conclusions on proportionality in the field of countermeasures are interesting. However, in part they differ from the conclusions reached by the author on proportionality in the field of enforcement activities of states. It would have been useful had the author explained in more depth the differences between these two fields of application of proportionality, which appear quite contiguous. In other words, it would have been interesting had the author better explained the analogies and differences between unilateral enforcement measures for producing compliance with international law and unilateral measures of reaction to internationally wrongful acts.

In a general conclusion to the book, the author maintains that proportionality constitutes a general principle of international law. In fact, proportionality, in spite of the fact that

it is applicable in many different fields of international law, maintains a substantially unitary structure and content. It also maintains a unitary function: it is a principle applicable to those legal relations in which a state is given unilateral powers to pursue certain interests. However, proportionality is not a rule with a normative content, but rather is a normative *technique* in the international legal order, a technique which allows the international community to define more precise rules of behaviour on a case-by-case basis. Therefore, proportionality serves to integrate the international legal system, which in turn serves to fill the gaps in the system itself. Moreover, the principle of proportionality must be distinguished from other mechanisms used in international law to control the unilateral power of states, such as the principles of good faith and abuse of right.

Finally, Cannizzaro contests the idea (an idea which is rather widespread in the literature) that the principle of proportionality originates from national legal systems and thus operates as a general principle of law recognized by civilized nations, in the traditional meaning of this concept. He maintains that proportionality, on the contrary, is a structural principle of international law. In his view, proportionality has its own foundation within the international legal system: that this is so can be deduced, through a process of abstraction, by examining the function and structure of various specific norms of the same system.

In my opinion, this conclusion is convincing, but is reached without sufficient argument. It would have been useful to examine in more depth the role of the general principles of law in the international legal system, and specifically to discuss the theory, supported by some authors, that general principles of law may be extracted not only from national legal systems but also from the international legal system.

In conclusion, I consider that Cannizzaro's book constitutes an important work, and makes a remarkable contribution to the theoretical and systematic organization of the principle of proportionality in international

law. One may perhaps consider that the author occasionally overestimates the role of the unilateral and functional powers of states, and consequently also overestimates the role of proportionality, in some fields of international law (for example, in the law of territorial uses, or in certain areas of the law of the sea). However, on the whole, his discussion on proportionality is very convincing. Moreover, the book has the merit of also making a contribution to the better understanding of entire categories of international legal relations, such as those relating to the functional powers of states or to the enforcement activities of states. In short, the book throws new light on some of the working features of the international legal order. There is particular merit in this, and the book stands out for the breadth of its subject area, rather than being (as so many academic monographs are these days) limited to a very precise and often rather small subject area.

It may be hoped that the book will stimulate discussion on the functional powers of states, and on the way in which international law entrusts public interest functions to individual states, and the limits thereto. It may also be hoped that the book will stimulate the interest of academic lawyers to the further study, based on inductive methods, of other elastic and general principles of law which pervade many fields of international law, such as equity, reciprocity, estoppel, good faith, abuse of right, due diligence, etc. Finally, the publication of this book would be an appropriate moment to restart the discussion, unfortunately abandoned for many years, on the overall role of general principles of law in the international legal system.

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