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The Principle of Proportionality in Modern Ius Gentium

RESEARCH ARTICLE

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ABSTRACT

The principle of proportionality refers to the criteria for fair and optimal balancing of interests. It is widely applied to international disputes and has gained institutional and scholarly acceptance in the field of international law. This paper aims to explore the longue durée of the principle, drawing on an interdisciplinary perspective on international law. It affirms the traditional role of proportionality in international legal sphere and values its familiar role in introducing flexibility in law, remaining close to its conventional interpretation. However, the paper also questions its contemporary ethos, as it is based historically on its relation to equity. To this end, it examines the historical roots of the principle as part of the early modern law of nations, as well as how such a general principle should be seen as applicable to private relationships. The aim is therefore to re-think the principle of proportionality in modern ius gentium as based on how public and private law principles need to be interpreted relative to each other and continue to be shaped continuously as an extension of their shared history. It is in this sense that we can examine the need for equity in the international sphere, which will be demonstrated concretely for three distinct areas where proportionality predominates: the law of war, the law of maritime delimitation and international human rights law.

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INTRODUCTION

In his lectures in the University of Salamanca, Francisco de Vitoria referred to *ius gentium* as a problem of justice that was not for jurists only.[1] Historically, legal studies were focused on wide-ranging religious and philosophical questions, needing layers of perspectives to be analysed. This paper acknowledges that law is inherently interdisciplinary, even among legal experts. Specifically, it considers the roots of what would turn into our conception of expediency, becoming an integral component of moral justifications in international law. This is the principle of proportionality, which, as its modern reflection, is at once a pivotal instrument of judicial review and a pragmatic method whereby to sustain flexibility in law.[2]

This article argues that recognizing the historical role of Roman *ius gentium* in the development of the modern concept of proportionality is essential for its operation. The legal tools by which the principle operated in the private sphere were initially developed in Roman inter-state concepts like *fides* – fidelity. Proportionality serves to the prohibition of abuse of rights and positions and secures *bona fides* (good faith) in the international community.[3] In this sense, private and public law narratives have been and remain closely intertwined and have been ever since the classical era.

The relationship between international law as the "lawless law of nations" and private law is not novel.[4] Nowadays, the boundary between public and private spheres is fading; political roles assumed by public/private entities are not easily differentiable, and by extension, the principle of proportionality gains more importance in both realms. This implies that any strict divisions between public and private law are misleading, or at best exist for pragmatic reasons, when seen from the perspective of anarchic States and international law as a system of coordination rather than a system of subordination. To understand proportionality in modern *ius gentium,* thus, requires that we recognize how both need to be interpreted relative to each other, and shaped by a shared history, which cannot be grasped from a perspective that insists on their separation.[5]

This is particularly clear when considering the natural law characteristics of proportionality and is more clearly visible in systemic international law compared to other areas. Hence, one should look beyond positive law to achieve equitable solutions in international conflicts. Additionally, proportionality was first applied to private relationships and it is in this respect gaining importance today as an analytical tool that supports the need to assess different party interests in both public and private spheres. This approach goes beyond the more familiar idea that proportionality derives from the Roman law of nations, *ius gentium.* Historically, however, the principle of proportionality was concretized in *ius honorarium* -Roman judge-made law-, and became part of daily legal life. Also, in this sense, morality plays a significant role in the relations between sovereign States, with the Roman law on proportionality turning into a universal principle for resolving conflicting fundamental norms.[6]

Contemporary analysis benefits from recognizing its historical roots more substantially, with a focus on the *longue durée* of proportionality as an interdisciplinary perspective on international law and its role as a general principle of law.[7] References to antiquities are, therefore, not included for nostalgic reasons; rather, the emphasis on history of law demonstrates how contemporary legal fields revolve around a restrictive, and occasionally even a misguided understanding of the principle of proportionality. By contrast, a historically informed understanding shows "how" we are shifting towards the ancient principle in its classical and early modern definitions. This implies that a trend is visible in a wide range of new developments, each of which upsets the perceived (19th century) ontological foundations of law.

More specifically the paper examines proportionality as a function of equity.[8] The historical link to the present is clear: unequal cases must be treated differently in proportion to inequalities.[9] Our modern understanding of equity hereby mirrors the abstract principle of *aequitas* in Roman law. While it might be conventional to observe that there is a need for equity in law, it is less so to approach this situation from its historical relation to proportionality, manifesting itself in many different contexts, such as military conflicts, maritime delimitation and restrictions of fundamental rights and freedoms alongside numerous other global problems.[10] The main contribution of the article is, thus, a demonstration of how historical approaches to the principle of proportionality apply to contemporary questions in law regarding equity.[11]

The sections of the paper are organized chronologically. First, it focuses on the definition of equity in history of private law with special emphasis to *ius gentium*. The examination deals with the relationship between equity and *fides publica,* and its direct relation to good faith. Secondly, the paper addresses the translation of private law principles into the semantics of international law in the early modern era. Thirdly it evaluates the interdependent relationship between equity and proportionality in three distinct areas of international law today, which are typically studied independently: law of war, maritime delimitation, and international human rights law.

1. ROMAN *AEQUITAS*

Nothing starts *ex nihilo*. In order to understand the implications of proportionality, one needs to revisit its ancient roots and its different applications in various

factual situations. Proportionality is about balance. It reflects the balance between necessities and equity. Hence, it demonstrates itself in the re-calibrating function of Roman *aequitas*. In the classical era the word *aequus* referred to the balance between opposing interests. The famous Digest text attributed to Celsius well reflects this notion: *'ius est ars boni et aequi'* (law is the art of good and equitable).[12] Initially the concept of *aequitas* in Roman law was rarely used in international context. Rather, it was central in private relations. The praetors used different procedural methods to provide substantial equity. It has been an achievable goal to provide factual justice.

In the international realm, *ius fetiale* was considered as the provider of *aequitas*. The college of Roman State priests -*fetiales*- were entrusted with the legal relations with foreign countries. The fetial law belonged to the common law of all nations, *ius gentium,* founded on *Fides*: the religious-moral value of honesty and loyalty. The college of the *fetiales* was devoted to *Iuppiter*, the patron of *fides* which was, according to Cicero the *fundamentum iustitiae* (foundation of justice).[13] Having its roots in the fetial law, *fides* became a standard of conduct in private relations. It was later transformed into the contemporary principle of *bona fides* (good faith): *honesty, loyalty, and reasonableness*.[14] The Roman doctrine of good faith developed in the context of the praetorian remedies to sustain equity in everyday legal relationships. It followed a parallel trajectory in medieval legal scholarship whereby it was considered as the application of *aequitas naturalis* within private law. Further, it also served as a test for proportionality.

The word *aequitas* derives from the Greek word *epiekieia,* which reflects expediency in intellectual and moral sense. The Ionic-Attic origin of '*epiekieia*' refers to moderation.[15] As one of its functions, proportionality is found in various shapes throughout the history of legal thought. The idea of 'justice as proportionality' was first found in the Nicomachean Ethics of Aristotle.[16] Aristotelian proportionality reflects the later-named idea of distributive justice, referring to a relative equity in the treatment of different individuals based on pre-conditional differentiation criteria. The proportion is determined based on the degree to which the differentiation criteria are fulfilled.[17] Mainstream legal scholarship identifies distributive justice as the allocation of (public or private) goods within a structure based on proportionality. Commutative (or rectifying – coming from the Latin word *rectum*) justice, which is understood as the rectification in private exchanges, also derives from distributive justice. It refers to the idea of 'correction' as returning something to its 'rightful' owner.

The association of Greek philosophy to Roman law is well-established and hardly controversial in the literature.[18] Especially, the effect of the Stoic school of thinking in the second century BC contributed the close contact of Greek and Roman philosophy. Classical Roman jurists amalgamated the Greek legal philosophy with distinctly Roman legal concepts.[19] The works of Cicero presents a ground-breaking eclecticism in how he uses the legal concepts deriving directly from Greek philosophy. In parallel, we witness his usage of *'iustum'* or *'rectum'* to refer to Roman *aequitas*.[20] For Cicero, law was nothing but the *recta ratio*, the fair proportion.[21] The Roman understanding of proportionality was rather focused on the idea of restitution and correction, especially when applied by praetorian remedies.

Aristotle defined 'just' as the ratio between two variables about two parties, mediated by an abstract principle of proportionality. Yet, he used his idea of proportionality instrumentally, to declare warfare as a natural way of acquisition. Hereby, it was justified to use the proportional and necessary amount of force to govern the 'barbarians', who were destined to be governed by nature.[22] Aristotelian proportionality, with its colonial origins, is superficially explained in international law as the legal rule that the State action must be a rational means to a permissible end. Nonetheless, a different source also refers to flexible applications of the strict rules; the fine tuning of conflicting interests for a higher goal. Roman *aequitas* shows that the principle of proportionality is more than the Aristotelian understanding of balancing competing interests. Rather, it includes a wide range of policy analysis captured in the *Zeitgeist* of classical era.[23]

Aristotle's abstract understanding has evolved as a general principle of Roman law through practice and its legal implementation. However, the Roman understanding of proportionality required an extra layer of "rationality". The Euro-centric legal paradigm's adoption of the principle of proportionality can be best understood if it is read through the principle of good faith and "reasonableness" as its criterion. Proportionality requires an analytical procedure of balancing whereby a priority relation between conflicting arguments or interests and values is established.[24] The Roman private law roots of the principle are evident, especially in contract law, regarding the performances of the parties.

Proportionality in Roman private law is witnessed as a tool for rationality in contractual relations, applied through the praetorian mechanisms. To illustrate this, the late Roman doctrine of *laesio enormis* (gross disparity) was seen as its mathematical application required by equity. Classical Roman law, especially the Republican era, is compatible to the current notion of the free, liberal, market in how buyers and sellers were free to agree on a certain price ––called *'pretium'* ––.[25] Such micro-free markets reflected the relative state of nature of the parties, where they were guided by their self-interest. Roman contract law adopted certain measures to prevent plausible abuses from such agency, such as the requirement of *bona fides* and the prohibition of the

abuse of rights. In the late empire, with the constitution of Diocletian (C 4 44 2), the rules concerning the *iustum pretium* (just price) were accepted to restitute the balance between party performances and later taken into *Corpus Iuris Civilis*.

As such, if the selling price of a plot of land was less than ½ of its fair (market) price, the magistrate could rescind the sale because of gross disparity.[26] The buyer could then save the contract by paying the remaining amount. It is known that CIC contains many interpolations on the original texts, and it is highly disputed whether this text includes one, nonetheless the idea of fairness dates back to the classical era.[27] Later, the medieval legal scholarship adopted this inherent imbalance between party performances as *dolus ex re ipsa,* being intrinsically fraudulent as a conceptual antonym of *bona fides*. Christianized Byzantine effects in classical Roman law penetrated into Western codifications, making the principle of proportionality and its technical application a general principle of private law.[28]

Aristotelian *recta ratio,* as reflected in the Roman concept of *aequitas,* directly affected the European legal thought. Coming from the Roman tradition, the principle of proportionality aims to find the *recta ratio* in inter-personal relations (contract law), inter-states relations (just war doctrine and maritime delimitation), or between persons and the States (human rights). Roman classical texts became the source of international legal thought through the works of Hugo Grotius, among many others, and the principle of proportionality evolved through a legal-ethical dialogue that became one of the core concepts of international legal theory.

2. TOWARDS THE CONTEMPORARY INTERNATIONAL PARADIGM

The medieval and early modern scholars used Roman private law doctrines to legitimize actions pertaining to international law. Especially the works of Hugo Grotius are crucial when examining how classical Roman law became central to modern law. Grotius is the principal scholar who took the Aristotelian idea of 'justice as proportionality' and connected it to the contemporary understanding of equity and the balance of interests. The institutional acceptance of proportionality based on the works of Grotius were, in time, embraced by both naturalist and positivist traditions. Moreover, this includes the transition of proportionality from the private sphere to the public sphere and vice versa. Specifically, today's private law vs. public law debate is tied up with Grotius' and the various early modern theories of international relations inspired by his thought.

Proportionality is not always seen as a substantial principle of public international law. Rather, it lies behind international law as a "meta-principle".[29] The Article 38(1)c of the Statute of the ICJ accepts *"the general principles of law recognized by civilized nations"* as the primary sources of international law. It is sometimes argued that "the general principles of international law" are unique to international law.[30] Nevertheless, general principles in the sense of the Article 38 derive from both national and international rules.[31] Especially, private law principles are closely linked with the morality of international law as a basic form of civil law applied to inter-state horizontal relationships in the systemic level.[32] The general principles of international law are primarily extracted from a mass of rules and accepted as to be no longer directly connected with State practice.

In this sense, proportionality is a general principle of modern *ius gentium* as a function of equity, with its own foundations in the international legal order. The international legal theory recognizes three applications of Roman *aequitas:* The possibility of choosing between several interpretations of law (*intra legem)*, the role of the filling of a *lacunae* or elaborating the rules that are too general (*praetor legem),* and softening of the application of a legal norm for extra-legal reasons (*contra legem).*[33] Proportionality as a general principle mainly serves the *intra legem* application of equity in international legal order.[34]

When equity in international law is seen through the lens of private law, the early modern social contract theories become central for understanding how proportionality is translated from private to public law, vice versa. Scholarly literature suggests that the contemporary notion of proportionality entered the stage of international law primarily via human rights and the German legal tradition.[35] However, the theories of Hugo Grotius and Christian Wolff are well-equipped to emphasize the metamorphosis of the principle in early modern *ius gentium* through its relation to *fides* and *aequitas*. The Grotian idea of a secular international law was drawn from Roman private law rules. Unlike the scholastics that preceded him, he used the perspective of civilian tradition and developed his own theory of proportionality, as based on a sophisticated elaboration of the Roman law of contracts and property.[36]

The importance of the Grotian doctrine does not only stem from its secular characteristics, but also from his approach to the foreign elements in law. Considering the political context of the lowlands of his era, it was not a mere coincidence. Grotius was from a country that was not yet a country, and in this sense, he applied a futuristic understanding of Roman law. As a Protestant scholar, he witnessed the tension between different sovereigns and people, public and private, insider and outsider spaces from various dimensions where he ended up using the juridical-rhetoric weapons of the Scholastics to justify his theory of international relations.

Furthermore, Grotius' theory on the law of nations was based on a body of deductions derived from

general principles of justice, in addition to a doctrine based upon consent.[37] Consent as an inherently private element of contract theory was essential to build the secular foundations of his thought. As such, he replaced the religious essence of *ius naturale* with the idea of sociability of men, later associated with Rousseau. Arguably, Roman private law was relatively secular and applicable to the liberal understanding of private property that Grotius wanted to justify with his legal grounds. Grotius argued for proportionality as a requirement when strict justice is enforced. His idea of proportionality was a guiding standard to achieve equity for distributive and commutative justice reasons.[38]

In the enlightenment era, Christian Wolff gave lectures on *De Iure Belli ac Pacis* and provided his own edition of Grotius' masterpiece in 1734.[39] Wolff, who used the term *Vertrag* for first time in a scholarly work, aimed to include the necessary theoretical certainty to the works of Grotius while developing his own natural law theory built upon contract law principles. He categorized *ius naturale* as necessary and voluntary. The former was the law of nature applicable to natural persons (individuals) and legal persons (States), who are in a state of nature in micro-macro sense. The voluntary natural law rules referred to *ius gentium*, dictated by the *civitas gentium maxima*, the family of civilized nations.[40] It was the result of leaving the relative state of nature by creating an alliance of civilized nations for which proportionality became a generally recognized principle.

The legal theories of Grotius and Wolff illuminated the international sphere, seen as a legal vacuum, a real-world state of nature. Here, the state of nature is not used as a mythical pre-political state, but as the relationship between individuals or States towards each other.[41] International legal order represents an anarchy, as opposed to a hierarchy, as there is no sovereign authority over the states in the traditional sense. Roman private law principles as the reflections of the *sauve-qui-peut* egoistic social interactions therefore provided a counterpoint. They generated rules for a social order in which relationships were horizontal and applicable to both natural persons and States as legal persons. The ontology of Roman private law was anthropocentric, revolving around private and public actors that have interests and identities such as survival, autonomy, and economic well-being as motivational dispositions.[42]

In this sense, proportionality has been acting as an agent of equity in both national, international, and systemic levels. The analogy between Roman private law and the general principles of international law has continued after the international system was established. In this "new state of nature", the modern *ius gentium* is founded on equity and reason. In parallel to the early modern understanding, reason -*rerum natura*- requires proportionality as the last resort to operate as a corrective element to provide *in factum* justice. This idea mirrors Roman *ius praetorium* and how equity in international law transcended the pre-legal sphere.[43] Its role is visible and its application is juridical.

3. 'PROPORTIONALITY AS JUSTICE': *IUSTUM BELLUM*

The role of proportionality in international law can be analysed in a wide spectrum, from international criminal law to international environmental law. The first of the three contemporary topics that this paper will examine carries historical importance as well as social gravity as it deals with the State's coercive recourse to military force and choice of weapons. Specifically, our current condition mirrors how the doctrine of "just war" was developed through the antique, medieval and early modern religious, and political philosophy as an application of the principle of proportionality.

Throughout history, philosophers and jurists aimed at distinguishing 'just' war from 'unjust' war. 18th century positivist scholars like von Martens considered the use of force as justifiable unless it was manifestly unjust, while they equated justice and proportionality in an Aristotelian sense.[44] The concept of just war existed in Roman public international law, as the affirmation of power-asymmetries between different political entities and stoic perspectives of equity. *Iustum bellum* has been a concrete manifestation of Roman principles in the international legal order. However, it was Christianity that gave material content to the formal concept of *iustum bellum*.

The Aristotelian idea of proportionality in the use of force is mostly associated with St. Augustine and St. Thomas Aquinas. Although St. Augustine did not directly refer to 'proportionality' between the force and the threat, he is one of the earliest philosophers who used the term 'just war.'[45] After Constantine's conversion to Christianity, St. Augustine combined the Roman and Christian traditions of natural law. St. Augustine's work presented a shift in paradigms from the pagan understanding towards the Christian understanding of just war.[46] *Fides*, the former Roman goddess became the Christian concept of 'faith' as a middle ground between reasonable loyalty in daily legal relations and a means of maintaining the peace.

Influenced by St. Augustine, Aquinas used the Aristotelian concept of proportionality in a more analytical way. According to the Thomistic philosophy war was sinful, yet there were certain exceptions. The sovereign had *auctoritas principis* to declare war if there was a *justa causa* (e.g. self-defense) and the belligerents had *recta intentio*. The *recta intentio* was the intention to promote good or to avoid evil as a reflection of subjective *bona fides*. Bartholus, a commentator of private law, adopted the divine understanding of Thomistic *ius naturale* and

interpreted classical texts as an illustration of how *ius gentium* and civil law were constantly under each other's influence.[47]

The Thomistic idea of proportionality required certain conditions for the use of force: necessity and proportionality. The use of force was justifiable if only it was necessary and in moderation. However, the Christian philosophy on the just war was controversial. Both de Vitoria and Suarez emphasized the religious and moral weight of the concept. As opposed to the Scholastics that reject the idea that a war can be just, Hugo Grotius adopted the medieval religious-philosophical notions of *iustum bellum* from a secular perspective. He introduced the idea of proportionality in the modern sense of balancing the legitimate and non-legitimate interests of two opposite parties. Together with the theories of Gentili, the discussion of just war moved to proportionality: the differences in the 'degrees' of justice on behalf of the belligerent parties.[48] Such shift was possible through the systematic interpretation of Roman law, which legitimized a quasi-secular idea of just war by going back to its roots.

Just war in classical Roman philosophy revolved around two main concepts: *Fides* and self-defense. In the pre-classical era, a war was seen as just only if it was initiated by an action taken by the *collegium fetialium*. They were under oath to *Fides* (the goddess of loyalty) when deciding whether there was a violation of a duty on behalf of a foreign nation towards Rome.[49] *Fides,* etymologically, comes from the word *foedus*, the foreign alliances made by Rome, and breaking such alliances constituted a violation of *fides*.[50] Starting from the Republican period, the relationship between *fides*, good faith, the prohibition of abuse of rights, and proportionality started to become more visible.

Cicero used Stoic philosophy to explain Roman public law: no war was just unless it was required by *fides* or self-defense.[51] Attacks during a truce were contrary to *ius gentium* because of being contrary to *fides*. The principle of *bona fides* flourished from the idea of just war, and became applicable in contractual relations. The violation of *fides* was considered as *casus belli* in the public sphere and an independent source of obligation in the private sphere. The idea behind it relates to distributive justice, reflected in the concept of *aequitas* in the Praetorian law.

The history of Roman *fides* is another reason why Grotius based his legal theory in Roman texts rather than staying within the confines of the Christian narrative. The colonial discourse in Roman texts reflects a rhetoric that glorifies Rome which was essential in justifying the expansion towards 'other' territories.[52] It reflects the paradigm of civilization contraposed to 'barbarianism'. In other words, medieval and contemporary construction of 'others' originated from antiquity studies, justified by the concept of *Fides*. Webster explains it with the large infiltration of Hellenistic thought in imperial Rome. The Greek influence in Roman culture and law reinforced the myths of civilization-bringing heroes, like Heracles, as a moral justification of *iustum bellum*.[53] The contemporary doctrine of just war cannot be understood without its colonial critique, since even nowadays, the idea of civilization is embedded in the legal questions.

IUS AD BELLUM

Since the classical era, the use of force has been justified for colonial reasons, which is to say that ethical grounds precede its legal understanding. Roman ideas about just war were focused on expediency and fairness as moral justifications. As such, they are translated into the modern legal thought as a semi-analytical measure. The concept of just war is thought to have changed after the Peace of Westphalia in 1648 when the State practice began to reflect the Machiavellian ideology that a necessary war was a just war.[54] While this could be interpreted as the basic form of moral relativism in a *valueless* society, the evolution of international law shows us that there are no drastic changes. The contemporary view of the just war doctrine falls within the context of international humanitarian law as an extension of modern *ius gentium*. Essentially, proportionality as a general principle assumes the role of Roman *fides*.

In the context of *ius ad bellum* (law on the use of force), proportionality is often considered as a social cost-benefit calculus prescribed by equity. It is defined as the total evil of the war, being comparable to the total good or the costs of the war not outweighing its benefits.[55] This helps determining whether there are any rights for a State to use military force in terms of self-defense or more limited countermeasures after provocation.[56] It aims to guarantee the tolerability of the military actions of the States whereby it requires the countermeasures to be proportionate to the attack itself and to the needs of the self-defence. The contemporary "just war" doctrine suggests that the proportionality of recourse to force should be assessed based on several parameters. Any State resorting to war should balance its response in proportion to the demonstrable wrong and the means adopted as a countermeasure against the perpetrator should be proportionate to the minimum force necessary to achieve redress.[57]

Following a Roman trajectory, the doctrine is shaped around a rather arithmetic approach in deciding the expediency in the recourse to force. The Roman *Fides* and Christian 'faith' became the measurable standard of proportionality as a reflection of the victory of science over religion after the enlightenment. This contemporary approach as a continuum of the Roman understanding of the principle is well reflected in *De Iure Belli Ac Pacis.* Chapter XXIV of the book on the 'Precautions Against Rashly Engaging in War, Even Upon Just Grounds' considers the principle of proportionality as essential in *ius ad bellum*. In the Grotian sense, proportionality is

nothing but the means and the end bearing each other. It refers to the act of weighing different interests.

Centuries later, the initiation of recourse to military force had to be regulated under the Charter of the United Nations. According to the Art. 2(4), *"all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations."*[58] Being the main norm that prohibits the use of coercive force against other States, Art. 2 refers to the 'constitutionalization' of the just war doctrine by condemning the use of force that is inconsistent with the purposes of the UN. In modern times the purpose of the UN is to operate as the new *Fides*. As such, Art. 51 of the Charter shows a viable exception. The legitimate resort to force is restricted to the use of force in self-defence and collective security action under Chapter VII. The resort to force in these situations is limited by customary law and it must be proportionate to the unlawful aggression.[59] Chapter VII enables the UN Security Council to take measures to maintain or restore international peace and security in the event of any threat to peace, breach of the peace or act of aggression. If it is necessary, these measures may include the use of armed force.[60]

Furthermore, there are two situations where such a humanitarian intervention would be valid: (1) in case of severe violations of international humanitarian law on a sustained basis, and (2) in case of a civil society being subjected to great suffering and risk. However, such intervention must be subject to certain limitations. Either the territorial State must fail to deal with the situation, the use of force must be the last resort, or the only solution after all the peaceful solutions have been exhausted. The purpose of the action must be limited to dealing with the humanitarian situation and there must be a realistic prospect of achieving the desired result. Lastly, the action must be proportionate.[61]

In March of 1999, NATO organized a humanitarian intervention to Kosovo without asking for the authorization of the Security Council. The intervention was illegitimate in terms of the UN Charter. Although it carried a great deal of controversies, some argued that the anticipatory legality of the intervention *de lege ferenda* existed.[62] Here, the principle of proportionality was a means of justification; a substitute for any type of ethical basis for the humanitarian intervention. In a sense, it demonstrated how the principle of proportionality has changed drastically and remained Roman at the same time. Proportionality was strategically used to justify the 'spirit' of the UN Charter as a method of correcting *strictum ius*.

Unlike the early modern *iustum bellum* doctrine, Art. 51 of the Charter only allows for self-defence if an armed attack occurs. Nonetheless, customary international law recognizes a wider right to anticipatory self-defence. The contemporary standards of such self-defence are traced down to the historical *Caroline Affair* of the Canadian Rebellion, when Canada was under British dominion. In December 1837, the rebel leaders gained support of a large number of American citizens, and attacked British vessels from Navy Island in Canadian waters. The force was supplied from the United States by a steamer named Caroline. At the night of 29 December, a British force attacked *the Caroline,* which was in an American port, and dragged it into the river's current towards the Niagara Falls. The US Secretary of that time, Daniel Webster, conceived the special formula for anticipatory self-defence: being necessary, instant, overwhelming, leaving no choice of means, and no moment for deliberation.[63]

Although it does not explicitly mention proportionality, the Webster formula included all the necessary components of the principle: the use of force should be proportional; it should be *extrema ratio* and *ultima solutio.* The condemnation of 'excessiveness' reflected the reasonableness criterion of *bona fides*.[64] The Webster formula also inspired the Bush formula in terms of the controversial concept of "pre-emptive self-defence."[65] Its applications, of controversial nature and entailing grave consequences, are the ultimate reason why the principle of proportionality should be evaluated more carefully and trans-historically. This requires us to recognize the basic values that underlie it, as an application of the legal theory of international law of Grotius, focused on private law principles.

Proportionality in its Roman sense is about party performances and finding the right balance between two opposing interests. As such, the exception to Art. 2(4) of the Charter is applicable when force is used as a countermeasure against an attack on territorial integrity and on the political independence of other States. However, international law does not only require proportionality to operate as a method of legitimization of war but also as the standard of *aequitas.* The permitted harmful action is limited by the requirements of proportionality. In other words, the principle of proportionality provides limits to the non-absolute right to use force.[66]

Roman law presented the behavioural standard of *bona fides* and the prohibition of the abuse of rights in civil relations. In the international sphere, the integration of humanitarian grounds, lacking in antiquity, led the ICJ to develop an individual doctrine based on the principle of proportionality in its quest for equity. The *Nicaragua Decision* provided the first insights on how the abstract principle of proportionality was considered in an actual military conflict.[67] Nicaragua complained that it was wrongfully attacked by the US which provided indirect support for the Nicaraguan contra insurgents. The reason of the conflict was the infiltration of Nicaraguan insurgents to El Salvador, an ally of the US. The ICJ considered the

aid of Nicaragua to the El Salvadorian insurgents did not necessitate an armed attack on the grounds of Article 51. The decision was based on the principle of proportionality, however it did not indicate which countermeasures would have been proportionate.[68]

The *Congo Case* gave a similar overview about the application of the principle in *ius ad bellum.*[69] In 2005, the Democratic Republic of Congo claimed that it was invaded by the armed forces of Uganda. Uganda argued that their military operation in the soil of Congo had the sole purpose of counteracting the safe havens established by the Former Uganda National Army, a Sudanese-supported military group that aims to destabilize Uganda. The ICJ established that Uganda's use of force was unjustifiable, in the absence of a legitimate attack. The taking of airports and towns many hundred kilometres away from Uganda's border was found neither proportionate nor necessary.[70]

Accordingly, the views of the Jesuit scholar Suárez and his insistence on war being juridical, and therefore not being considered just from both sides, are today rejected. The rejection is justified by proportionality as a safe-guard of equity and justice. Both the *Nicaragua* and *Congo Cases* show that proportionality is instead an exclusionary concept. That is to say, it is explained *a contrario* and decided on whether it excludes the *mala fide* –disproportionate – behaviour.[71] In none of the exemplary cases, the ICJ offered a concrete rule about the level of the proportionality itself. Therefore, proportionality in *ius ad bellum* is sometimes seen as a philosophical question rather than concerning 'actual' law, and its goal is to, progressively, establish when war is ought to be just. Theoretically, this implies that the principle continues to revolve around the Aristotelian idea of 'just' as 'proportional' and around the understanding of proportionality in Roman legal culture as a combination of change and continuity.

Modern international law presents us with stricter humanitarian considerations in its decisions on the tolerability of actions. Nonetheless, it does so by adopting the Roman perspective of empowering flexible legal mechanisms when justifying policy reasons. Its relationship with equity explains why proportionality ended up being evaluated case by case. The question whether the belligerent parties' actions are justified can only be assessed e*x post facto*. In the Hegelian sense the flexibility, inherited from antiquity, is not forward-looking. Rather, the application of the principle of proportionality in *ius ad bellum* represents the synthesis that keeps constant the considerations of equity in the international realm.

IUS IN BELLO

Proportionality has always been about normative justification. In private law, such justifications are provided based on the value of party performances relative to each other. In this sense, there is a mathematical expression involved which is aimed at an equitable ratio. Such mathematical justification requires two variables to be proportional, if a change in one is always accompanied by a change in the other, and if these changes are always related through a constant. In the context of *ius in bello,* law of armed conflict, the principle of proportionality requires a normative assessment of two variables and their relative states to each other. It is used in the 'calculations' of the lawfulness of the countermeasures taken by the belligerents. When the party "A" performs an action of "B" against the party "C" and when "C" responds by doing "D" to "A", the main problem turns into determining whether the measure "D" is proportionate to the measure "B".[72] Thus, proportionality becomes both the justification and the measurement of force that is necessary to subdue the enemy.[73]

This calculus is central in the international law jurisprudence. On the lawfulness of nuclear bombings, the ICJ established that it is prohibited to use weapons causing unavoidable harm greater than the benefits to achieve legitimate military objectives.[74] The attacks that may cause incidental loss of civilian life or injury and damage to civilians which would be 'excessive' in relation to the anticipated direct military advantages are prohibited under international law. The term "excessive" here should be understood as "disproportionate".[75]

Dividing *ius ad bellum* and *ius in bello* with a strict boundary ignores that both are interdependent. Moreover, proportionality carries separate roles in *ius ad bellum* and *ius in bello*. With its relation to *aequitas* and its Aristotelian understanding of 'just' as 'proportional', the principle of proportionality revolves around the ethical basis of *ius ad bellum*.[76] In international humanitarian law, the principle of proportionality stems from the ethical considerations behind Roman *bona fides* and the prohibition of abuse of rights/position as its extension. The application of the principle in *ius in bello* is ethically less subjective and revolves around the practicality of expediency and reasonableness. It, thus, limits the choice of means in war regardless of its lawfulness and the moral agenda of the States.[77]

What this difference demonstrates is the 'unclear' distinction of moral and legal rules, and the juxtaposition of international law rules to the neo-classical private law relations as a network of politics, morality, and horizontal relations. This includes the interdependence of the conditions of proportionality in *ius ad bellum* and *ius in bello. Ius ad bellum* dictates that any war for a prohibited purpose, such as aggression, is unjustified in sacrificing the lives of the citizens and goods of the other State. It does not matter how proportionate these costs are because they are aimed to attain an unlawful goal. Under *ius in bello*, even the innocent party's choice of means is limited by the principle of proportionality, which makes it morally challenging. The legitimacy of the Iraq

War in 1990 depended on a proportionality equation based on *ius ad bellum*. However, the detailed conduct of the attacks on several targets was also a matter for the proportionality equation in *ius in bello*.[78]

Its implications for the latter context are clear. It contributed to the legal design of international law by prohibiting the use of particular weapons and constraining the excessive use of permitted weaponry. The application of proportionality in *ius in bello* also serves to efficiency concerns, in line with a law and economics perspective. Proportionality sets a clear rule in today's post-Westphalian paradigm of anarchy by creating incentives to abstain the war, and to minimize the use of destructive weapons as much as possible. Such cost-benefit calculi in the field of international relations echo the legal rule that suggests that an act of war is proportionate if the damage it causes is not excessive to the level of peace it hopes to achieve.

The prohibition of certain destructive and indiscriminate weapons has been a central problem of the international law for ages. Roman *fides* required the prohibition of the use of poisons and poisoned arrows. In the middle ages, the crossbow and arbalest were declared as 'unchristian'.[79] In 1868 during the St. Petersburg Declaration, sixteen States prohibited the use of particular kinds of bullets in order to limit the States on weakening the military force of the counter party by harming the greatest possible number of human beings.[80] The 1899 Hague Declaration on Asphyxiating Gases and Expanding Bullets was another attempt at the protection of proportionality in the law of war.[81] Before WWI proportionality was understood as a general principle that restricts the political freedom of States in their choice of methods whereby to injure the enemy.

On the other hand, proportionality in *ius in bello* gained more importance after WWII, as the choice of means and strategic decisions of the combatant States resulted in the thousands of casualties.[82] These events led to the Geneva Conventions of 1949, that established legal standards for the protection of the combatants against unnecessary suffering and, later, to the additional Protocol I of 1977.[83] Certain specific types of weapons were likely to create greater injuries than others, and yet, their usage could never be justified by a cost-benefit analysis done by the States. Therefore, the Convention of 1972 prohibits the use of biological and toxin weapons, the Convention of 1980 partially prohibits the use of land mines, and the Convention of 1997 requires the destruction of all land mines.[84]

The use of weapons that are not included in these international documents are permitted, as they are not explicitly prohibited. In this case, the principle of proportionality acting as a method of justification in the law of war dictates that the use of such weapons is permitted only if they do not cause unnecessary harm and injury to the combatants or non-combatants.[85] Article 35 of the Protocol I sets out three basic rules for the methods and means of warfare. The first rule states: "*In any armed conflict, the right of the Parties to choose methods or means of warfare is not unlimited.*" The seconds and third rules explain this limitation: "*It is prohibited to employ weapons, projectiles, material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering*" and "*it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.*"

This article thereby reflects the private law doctrine of prohibition of the abuse of rights as a sub-application of Roman *bona fides*. While the first rule openly prohibits the abuse of the States' rights to choose methods or means of warfare, the two following rules sets the standards to decide on the existence of abuse based on proportionality. The *ratio legis* of the rule requires to interpret these norms widely and theologically. The codifications of proportionality impose legal obligations to the combatant States, to balance military necessities with the requirements of humanity. Their aim is to secure the natural rights of States in their residual 'state of nature'. Following the Roman law analogy, the contemporary understanding of proportionality works as a re-calibration mechanism to provide equitable solutions by banning the deliberate and unnecessary extermination of the other party. It requires States to not target civilians and to not use weapons that cannot distinguish between civilian and military targets. Just like *ius ad bellum*, proportionality in *ius in bello* requires the force to be the *ultima ratio*. "The least deleterious means" or "less intrusive method" standards operate as its practical applications to examine whether there are other weapons or methods of warfare that could achieve the same military goal taking less casualties. It must be evaluated according to the standard of reasonableness, as a strict equivalence of content or strength between the attack and the countermeasure cannot be settled.

Therefore, the law of war presents a clear example of the Aristotelian understanding of proportionality as justice. The assessment of proportionality presents a continuum, as it inherently gives the international actors and the judiciary a flexibility to act.[86] Such flexibility does not have to imply that there are different 'degrees' of justice when it comes to the belligerent parties, as Gentili once stated. From a historical-realist perspective, such a deduction is not necessary when it comes to the external conditions of States. The assessment of proportionality must include different security interests that can never be represented in a way that is objective. The accurate comparison between the number of destroyed tanks and serious civilian injuries is improbable because of the lack of a common method for evaluation.[87] Analysing proportionality from a wider historical and social frame, including its tensions and causal relations with private

law institutions coming from *ius gentium,* provides a broader perspective when applying international law in its modern sense.[88]

The relationship between proportionality, good faith, and equity coming from European legal history should be remembered and valued once again. Proportionality is a function of equity and a concretization of Roman *bona fides*. Therefore, it needs to be evaluated in the light of honesty, loyalty, and reasonableness in ways that recognize the benefits of flexibility in international politics. Just like Roman *aequitas* corrected existing legal rules and adjusted them to the requirements of its time, the importance of proportionality for international conventions and declarations is about its role as part of the regulatory design of international law and revolves around its relation to equity.[89]

4. PROPORTIONALITY AS A FUNCTION OF EQUITY: MARITIME DELIMITATION

Roman law provides a commonsensical and simple reasoning in the application of the principle of proportionality. This is clearly visible in the law of maritime delimitation. As Sir Francis Vallat famously stated, where a bay or gulf is bounded by several States, the most equitable solution is to divide the submarine area outside the territorial waters of the States in proportion to the length of their coastline.[90] While the law of war presents an ideal application of proportionality, it is materialistically applied in the law of the sea to achieve an equitable outcome based on geographical considerations.

Roman *aequitas* was the standard of fairness whereby new principles and rules were developed in horizontal relationships. As such, it was the reason why the principles of good faith and prohibition of the abuse of rights were created in the first place. The prohibition of the abuse of rights was developed through a special procedural mechanism called *exceptio doli* (the exception of fraud) in contractual relations. However, it first emerged in the law of neighbors resulting from the property relations in Roman society. Roman law concerned itself with the common use of limited resources by prohibiting the possible abuse. By analogy, the maritime delimitation articulates a contemporary and international application of the basic neighbourhood liaisons, which are not as strictly regulated as in national property regimes. In Roman society, the common resources were mostly water sources or access to main roads, whereas today, a wide range of natural and technological resources gain importance in terms of equitable distribution.[91]

Other than its historical significance, the Roman understanding of proportionality uses equity as a methodological tool for the optimal use of scarce resources. In the case of maritime delimitation, this implies the assetization of nature and the optimized allocation of these assets whereby a link between equity and efficiency is created in the international realm. Providing, the Helsinki Rules refer to equitable and reasonable utilization and delimitation of continental shelves or to exclusive economic zones (EEZ) that are economic but also political assets for the States.[92]

The original reference to proportionality in maritime delimitation can be traced down to the *North Sea Continental Shelf Cases* between Germany, the Netherlands, and Denmark, where the customary rule of international law on the shelf delimitation by reference to the equitable principles was emphasized.[93] This demonstrated that proportionality is not a matter of abstract justice, but also the rule of law.[94] In this case, the Netherlands and Denmark claimed for the equidistance principle: a nation's maritime boundaries should be determined by a median line equidistant from the shores of the neighbouring States.[95] Germany instead argued that each State should have a just and equitable share of the available continental shelf that is proportionate to the length of its coastline or sea frontage. The ICJ ruled for the principle of proportionality as a final factor to be considered while giving its decision *ex aequo et bono*.

Three geographical features were set forth as a justification of the recourse to proportionality: (1) the coasts of the three States being adjacent to each other, (2) the coastlines of Germany being concave, and (3) the coastlines of the three States on the North Sea being comparable in length. Under these geographical circumstances, the principle of proportionality eliminated the shortcomings of the equidistance method that would reduce the continental shelf of Germany compared to its neighbours.[96] In this case, proportionality was considered as an illuminating tool to negotiate when the parties are obliged to act in accordance with the principles of equity. The ICJ referred to proportionality as a general principle that only provides a solution when equidistance is not equitable.

This shows that the principle of proportionality does not give a categorical solution to maritime delimitation cases. It is an aid to delimitation when a balance is needed between the States with straight and concave/convex coastlines. The geographical and material differences are *per se* capable of making the categorical solutions inequitable. This mirrors the ethos of Roman equity and the principles deriving from it, as well as the need to introduce flexibility in law. As opposed to a general rule suggesting that any State could claim a share of continental shelf that is proportionate to the length of its coast, the Roman *aequitas* requires it to be determined according to the specific geographical conditions of the case. The role of proportionality is central in providing *iustitia in factum*.[97]

The *Anglo-French Continental Shelf Arbitration* on the delimitation of the continental shelf boundary in

the Channel presents a more elaborate evaluation.[98] In this case, the Court of Arbitration did not consider proportionality as a general principle of delimitation.[99] Rather, proportionality was taken to avoid the inequitable results of delimitation of the continental shelves with individual geographical features. The case is important as it underlines its role a criterion of evaluating *aequitas* in particular geographical situations as a factor for correcting *strictum ius*.[100] The case demonstrates the clear organic relation between proportionality and equity in maritime delimitation.

However, the ICJ considered proportionality as a substantive, *"fundamental principle of ensuring an equitable delimitation between the States concerned"* in the *Tunisia-Libya Continental Shelf Case*.[101] The Court's approach underlined the ability of equity to develop general principles and open norms to introduce flexibility in law. This case sustained the role of proportionality, especially when both sates were making claims around coasts with similar geographical features.[102] The test of proportionality was applied to calculate the proportion of the relative lengths of the relevant coastlines and the ratio of the seabed area attributable to each party. [103] The *Gulf of Maine Case* between Canada and the US also underlined the implications of proportionality as a corrective factor. [104] The Court decided that in case of substantial differences in the lengths of the coasts of the parties, a correction must be made in a line drawn to implement the basic criterion of equal division of areas of overlap. By contrast the *Tunisia-Libya Continental Shelf Case* revolved around similar conditions but considered proportionality as an auxiliary criterion of correction.[105] The Court added a new point which makes the case relevant for the future: nature must be respected as a requirement of intra-generational law.

The distinction between proportionality as a test and as a corrective factor is obscure. Where the principle of proportionality is applied as a test, it is presumed that the Court has already considered the said principle when establishing the delimitation line in the first place. Nonetheless, remembering proportionality as a function of equity clarifies the obscurity in minds, not because it is not vague, but exactly because it needs to be vague. Such flexibility permitted the ICJ to reach a compromise of equity and equidistance in the *Greenland and Jan Mayen Case* between Denmark and Norway.[106] The Court referred to proportionality as a method of identification and calculation of the coasts and areas whereby it established a single coincident maritime boundary proportional to the lengths of the relevant coasts.[107] The change of perspective of the ICJ in this case shows us that the principle of proportionality is not a uniform, objective principle in maritime delimitation, but rather a function of *aequitas*. What is equitable is legal in international law as a requirement of distributive justice.[108]

The ICJ frequently addressed proportionality in maritime delimitation. However, it fails to explain what the rate of exchange in terms of balancing different interests is.[109] There is also no objective criterion to define the relevant coasts and areas, and to calculate their lengths and surfaces, especially when States have opposite coasts.[110] Yet, the systematic analysis of the jurisprudence of ICJ is relevant in many aspects. First, these cases present well-defined examples of equity as a standard for minimizing externalities by establishing property rights for the States.[111] These are concrete examples of how equity is used as an economic goal, as a concomitant of efficiency. Second, they cleared the path for the consideration of nature in the Anthropocene, making it an intra-generational legal problem. And finally, they sustain the place of proportionality as an agent of equity whereby it practically corrects the *strictum ius*. These points reflect the contemporary role of Roman *aequitas* in European legal tradition.

5. PROPORTIONALITY AS FAIR BALANCE: INTERNATIONAL HUMAN RIGHTS LAW

A Digest fragment of Ulpian reads as: "justice is the constant and perpetual will to give each, his own. The rules are these: to live honestly, not to injure others and to give each other his due."[112] Often attributed to Roman *bona fides,* this passage refers to equity. No single person should bear the complete burden of a course of action whose benefits are common to a large number of people,[113] loss should be minimized. "To give each his due" points to the balance of interests that is inherent in international human rights law. This fragment reminds us that such acts of calculation of interests come with other values. It should be fair, and it should be rational.

In light of this, the principle of proportionality takes the form of a universal standard of rationality for a fair balance of interests.[114] Proportionality is embedded in the weighing process, the calculation of competing/contradicting interests protected by law. Such calculation requires the analysis of different normative and factual elements that are often ambiguous. Thus, in human rights law, proportionality does not have the luxury to be considered as a mere balance of interests used for legal argumentation. Rather, its position as a safeguard of fairness shaped by morals and reason justifies the responsibility of the legislative and administrative powers.

Proportionality as a test of fair balance owes its doctrinal value to German legal theory.[115] *Aequitas* functions under the cloak of the test of proportionality in human rights law. German law considers proportionality as a sub-principle in the test of justification of an interference with a basic right, as well as a constitutive

element of rule of law. The basic steps of the test are not any different than Roman law. It involves expediency, necessity, and proportionality in its narrower sense. Yet, the German legal doctrine adopts the principle in a well-defined system which has influenced international human rights law jurisprudence. It is therefore not a coincidence that its German origins later spread across Europe into the Anglo-American tradition, and migrated to treaty-based regimes like the EU, ECHR, and WTO.[116]

This universal test requires that any interference with the basic rights should be expedient. First, the measures taken should be suitable to promote the legitimate objectives of the interference. Secondly, it should be the *ultima ratio/extrema solutio* as a requirement of necessity. And finally, the measure taken by the legislative and administrative authorities should be proportional.[117] These three steps present us with different sides of proportionality and its neighbouring principles: equity, reasonableness, and good faith. While *bona fides* sets the moral grounds of evaluating the extremeness of the solution, reasonableness refers to a rational relation with the abstract reasons of interference and the concrete case.[118] This inevitably requires a subjective judgment, but reasonableness provides the minimum level of objectivity as the formal criterion of fair balancing and as mirroring the *ius praetorium* of Roman times.[119] Roman *praetors* used procedural techniques to monitor the relationship between means, and ends in private relations. In human rights jurisprudence the test of proportionality fulfills this role.

Proportionality in human rights law acts a safeguard of fairness whereby it controls States' freedom to restrict the non-derogable fundamental rights. As such, it functions as a tool to prevent the States' abuse of rights.[120] The International Covenant on Civil and Political Rights (ICCPR) of 1966 is the first important treaty drafted under the roof of UN that governs the balance between State powers and the rights of individuals and members of certain groups or associations. Together with the International Covenant on Economic, Social and Cultural Rights of 1966, and the Universal Declaration of Human Rights of 1948, they constitute the International Bill of Human Rights: a widely ratified document that prohibits the violations of universally protected rights.[121]

Other tools than proportionality have been adopted by IBHR when limiting the freedom of the States. It also includes obligations under international law, and the prohibition of discrimination to guarantee fundamental rights and freedoms as a requirement of *aequitas* in international realm. The obligation to limit any derogation to the required exigencies of the situation is interpreted as an annex to test of proportionality.[122] This requires the decision to derogate to be *prima facie* proportionate to the perceived emergency of the situation. For example, a single collision in a group does not *ipso facto* justify the suspension of a right to fair trial. Additionally, it must be shown that the situation is highly severe and that it necessitates the derogation of fundamental rights. The specific measures taken after the derogation must be *a fortiori* proportionate. In this context, proportionality operates as the main instrument that assesses the substantive limits of the rights to restriction of the States. Whereby to do this, it becomes an *ex-post* check mechanism to prevent the possible abuse of rights.[123]

The ECHR developed a more elaborate understanding of the principle compared to the Committee of Experts of the UN. The Court adopts proportionality as a method of fair balance between conflicting public interests. The two-step analysis of the ECHR starts with the examination of the purpose of the countermeasure. If it is *per se* lawful, the Court questions the means employed and whether they can be considered as *ultima ratio*. This requires an interrogation on whether the same objective is capable of being pursued by alternative, less harsh means that would derogate less from the rights in question.[124] A permitted limitation must be prescribed by law and the measures should be necessary to demonstrate the legitimate objective in a democratic society.

The principle of proportionality was first understood as the prohibition of disproportionality in German law. The fair balance test developed by the ECHR also reflects this exclusionary nature. The balance is kept when the individual does not bear an excessive and disproportionate burden, which is seen through the perspectives of reasonableness. In *Sunday Times v. UK,* the ECHR questioned whether the limitation on the freedom of expression corresponds to a social need that outweighs the public interest. Although the UK argued that the objective was to protect the judiciary, the Court found a violation of the Art.10 of the European Convention of Human Rights.[125] The principle of proportionality is used to weigh the interests of the fundamental rights of the parties; States and civilians from a lens of reason. In this sense, detecting disproportionality is the starting point.

The test of proportionality and the test for "being necessary in a democratic society" often lead to similar outcomes.[126] In *Handyside v. UK,* The ECHR considered being "necessary in a democratic society," as every restriction or penalty to be proportionate to the legitimate aim pursued.[127] In other words, proportionality was considered a justification for democratic necessity. In *Dudgeon v. UK*, the Court examined the legality of the Northern Ireland's criminalization of certain homosexual acts and ruled that such a restriction cannot be regarded as necessary in a democratic society unless it is proportionate to the legitimate aim pursued.[128] There is a very thin line between necessity and proportionality: A derogation that is necessary must correspond to a social need.[129] According to the ECHR, necessity implies the interference with a fundamental right corresponding to a pressing social need which is proportionate to the legitimate aim.

The power relations between sovereign States require the recognition of their area of freedom. In this respect, democratic theory seeks to establish limitations on the concentration of power; the distribution of authority is a means to prevent tyranny, while proportionality seeks to protect the individual from abuse by the sovereign. In many cases, the principle of proportionality is closely linked to the "margin of appreciation" doctrine of the ECHR, which allows the governments a margin of discretion in exercising their functions in relation to the Convention.[130] The margin of appreciation doctrine shifts the burden of proof from the government to the complaining party regardless of the facts of the case.[131] On the contrary, the principle of proportionality is case specific because it is an application of *aequitas*. Understanding proportionality as the end justifies the means pushes us into the Nietzschean idea of moral relativism and is dangerous if societal control is not effective. Therefore, the rule of law protects the end from being arbitrarily subjective.[131] The idea of a fair balance is, regardless, a requirement of the rule of law and democracy, and therefore, it exists in the spirit of the Convention as a whole.[132]

The term "balancing" is *per se* a vague metaphor and an abstraction that describes a process of measuring competing interests to determine which one is heavier.[133] What, why, and how it is being weighed is highly ambiguous in international human rights law. The Achilles heel of the principle of proportionality is its discretionary nature. As proportionality is reviewed by the Courts, the decision may depend on the persuasiveness of the parties, since the judges are not perfectly capable of grasping the complete set of evidence.[134] However, this criticism should be approached carefully as proportionality is crucial in its ability to allow for the type of subjectivity whereby law changes its character. From this perspective, it contributes substantially to the overall legitimacy of international law.

This by no means implies that proportionality should be condensed to policy or a type of decisionism. Rather, it should be seen as a general principle of international law with the elements of reasonableness as part of *bona fides* and with its organic relation to equity. Analogous to its function in private law, the principle of proportionality is fully equipped to provide an objectified basis of holding the watchmen accountable. In human rights law, it is not a simple tool for cost-benefit calculi between competing interests. It is a safeguard of fairness above all other considerations, protecting the individual even in the context of international relations.[135]

CONCLUSION

This paper focused on three major characteristics of the principle of proportionality in modern *ius gentium:* it is an illustration of how public and private relations shaped each other throughout history, a function of Roman *aequitas*, and a principle which introduces flexibility into international law. These characteristics imply that the assumption that the principle of proportionality can be applied as an objective measure of justification in international law is, thus, wrong. No standard of objectivity remains objective when it enters the social realm of law. Studying proportionality as a concretization of Roman *bona fides* and a function of equity demonstrates that it is more than a mere ratio between two calculable interests. Without any historical awareness, proportionality ends up as merely a vague concept, intertwined with good faith and equity related to each other in a circular relationship.

Take, for example, the decisions of the ICJ or Arbitral Tribunals where they are being used inter-changeably. While this might be taken to suggest that the principle is vague, it also foregrounds that proportionality as a function of equity is case-specific and comes with a large margin of discretion to the judges. Its application therefore requires having knowledge of a substantial number of parameters and external conditions to reach a fair decision. If *bona fides* is approached as a historical methodology for providing equity, proportionality allows for a much more concrete understanding of how *bona fides* fits the contemporary dynamics of private and public law and clarifies their interdependent relation. Its broadness and elasticity are what is effective, and the quality of general principles of law can be observed in its operation and its achievement in practice. Court decisions, political forums, or scholarly writings leave this beyond dispute in the sense that the proportionality as a general principle constructs the criteria (therefore multiple elements) needed for a fair and optimal balancing of interests, applicable to international disputes.

It is a substantive private law principle in essence. This implies that its underappreciated horizontal nature is the key characteristic that extends its wide institutional acceptance in international law and turns it into an essential tool in international relations. Definitions might change according to context. The assessment of the legality of the States' actions of the use of force in *ius ad bellum* and *ius in bello* revolves around a moral understanding of proportionality. While in maritime delimitation, it is based on the correction of *ius strictum.* When it comes to international human rights law, a more democratic notion of proportionality is required. The trans-historical analysis establishes how the principle of proportionality acts as the prohibition of the abuse of rights of the States in international anarchic legal orders. To put it differently, in each instance, it is the relation to equity that is the common feature of its application, as is reflected in State practice and judiciary decisions.

Modern *ius gentium,* therefore, shows a hybrid formation which contains the universal rules applicable

to humanity, as well as to the inter-state relations established by reason. International law is a field where the appreciation of equity is at its highest level. The social and political realities of the international community turn equity into a more centralized medium of application of the principle of proportionality, as visible in the logic of the decisions of the ICJ, ECHR, ECJ, and other conventions. Further research is required to identify the modalities of its application. Nonetheless, re-thinking the historical roots of this ethos explains why its role in international law can only be expected to increase. Greater recognition for the principle of proportionality is to be expected as the article explained that it presents no major shift other than for a need to become more systematized and institutionalized. Crucially, the significance of this trend goes beyond its application in individual cases and fields of law: for its relationship to equity to have meaning it needs to be recognized as an essential element of the enduring commitment of the entire discipline to the universal nature of law, as something that is not given but that needs to be worked towards constantly.

NOTES

1 Arthur Nussbaum, 'Just War-A Legal Concept' (1943) 42 Mich. L. Rev 453, 460.

2 In this article the expressions "principle" "norm" and "rule" are seen as intricately connected. The term principle refers to standards that create grounds for creating rules as norms and decision making procedures, interpreting rules, changing rules, and providing exceptions. In turn, norms are taken as value judgements and specified prescriptions of conduct emphasizing the normativity of the rules or principles. See for example Dworkin who explains that the practical implication of the difference is legal rules do not conflict whereas legal principles do. Similarly, Raz emphasizes their difference in character. Rules are applicable in an all-or-nothing way whereas legal principles entail a certain degree of vagueness and discretionary nature. Principles evolve like customs. Their binding nature comes from the authoritative support in a line of judgments. Joseph Raz, 'Legal Principles and the Limits of Law' (1972) 81 Yale LJ 823, 823–834. Ronald Dworkin, 'Social Rules and Legal Theory' (1972) 81 Yale LJ 855, 860.

3 The relationship among good faith, equity and proportionality sits in the middle of our discussion. For the purpose of this article, they are all addressed as universal principles of law. Good faith is primarily a general principle of European private law, owing its doctrinal value to medieval legal scholarship as the test for propotionality. Deriving from *aequitas naturalis,* it presents an example of how principles create legal rules. However, as it is codified in international law, it is generally studied in isolation.

4 Edmunds Steerling, 'The Lawless Law of Nations' (1925) 10 St Louis L Rev 171, Michael Newton and Larry May, *Proportionality in International Law* (OUP 2014).

5 The term 'modern *ius gentium*' is used to indicate the link between the classical *ius gentium*, early modern law of nations and the customary international law. Malcolm N Shaw, *International Law* (7th ed, CUP 2014), 814–15, Kaius Tuori, 'The Reception of Ancient Legal Thought in Early Modern International Law' in Bardo Fassbender and Anne Peters (eds.) *The Oxford Handbook of the History of International Law* (OUP 2012) 1012–1033, Dante Fedele, 'Ius gentium: The Metamorphoses of a Legal Concept (Ancient Rome to Early Modern Europe)' in Edward Canavagh (ed) *Empire and Legal Thought. Ideas and Institutions from Antiquity to Modernity* (Brill/Nijhoff 2020), 213–251. For the relationship between national laws and the global normative order see Jeremy Waldron, 'Foreign Law and the Modern Ius Gentium' (2005) 119 Harv L Rev 129.

6 Karl Heinz Ziegler 'Aequitas in Roman International Law' in Alfredo Mordechai Rabello (eds), Aequitas and Equity (Hebrew University 1997), 48.

7 This statement should be approached with scepticism in the sense that proportionality has different conceptions when different legal systems are compared. It is beyond the scope of this article how the real practice of High Courts differs in their approach as opposed to a unitary vision of proportionality. However, the objective of the article is to investigate the common core of various interpretations of the principle visible in its relation to equity to have a better understanding of law.

8 Thomas Cottier et al, 'The Principle of Proportionality in International Law: Foundations and Variations' (2017) 18 JWIT 628, 637. Darien Shanske, 'Four Theses: Preliminary to an Appeal to Equity' (2005) 57 Stan L Rev 2053, Alan Watson, 'Equity in the Time of Cicero' in Alfredo Mordechai Rabello (eds), *Aequitas and Equity* (Hebrew University 1997), 26.

9 See The Report of the Sixty-Second Conference, Seoul, 1986 (London, ILA 1987) 1–12. Although the Seoul declaration addresses the participation of the developing countries in international economy, the paragraph 8 of the declaration about the equitable treatment captures the meaning and role of proportionality the best. Ruth Lapidoth, 'Equity in International Adjudication' in Alfredo Mordechai Rabello (eds), *Aequitas and Equity* (Hebrew University 1997), 178, Duncan French, 'From Seoul with Love' — The Continuing Relevance of the 1986 Seoul ILA Declaration on Progressive Development of Principles of Public International Law Relating to a New International Economic Order' (2008) 55 NILR 3.

10 The contemporary discussion is central in many areas in international law including but not limited to global inequality, climate change mitigation, poverty, inter- and intra-generational equity. Although each is relevant, the influence of Roman legal doctrine is indirect and more limited in these areas. While deserving of attention, these legal problems are not addressed here as they would conflict with the purpose of the paper.

11 The approach implies a greater degree of complexity relative to established interpretations of today's legal practice. Roman law is complex and the three areas of international law each mirror the intricacies of the historical relationship between equity and proportionality. Furthermore, the paper does not separate the history of law (Roman law and European private law) from contemporary issues in international law. Naturally the latter might discuss the former a little and vice versa, but generally the literature does not merge, integrate and, thereby, challenge established legal languages, each of which has its own preferences and even formulas when it comes to how certain issues should be discussed. While outside of the scope of this paper, its approach reflects a commitment to a more interdisciplinary approach to the history of law, which has as its overarching goal to transcend the confined character of each field of law and each case individually to thereby bring out and retain a commitment to the universal character of proportionality and how it is embedded in its relation to equity.

12 Alan Watson, *The Digest of Justinian*, Vol. 1–4 (University of Pennsylvania, 1998), Celsius D.1.1.1. pr. and Paulus D.50.17.19.

13 Marcus Tullius Cicero, M. T. Griffin, and E M Atkins (tr) *On Duties* (CUP, 1991) 3.29, Ziegler (n 6) 60.

14 Talya Ucaryilmaz, 'The Principle of Good Faith in Public International Law' (2020) 68 Revista de la Universidad de Deusto 43, Robert Kolb, 'Principles as Sources of International Law (with Special Reference to Good Faith)' (2006) 53 Neth Int Law Rev 1.

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28 Hallebeek (n 26) 30.

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COMPETING INTERESTS

The author has no competing interests to declare.

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