Balancing Test: International Court of Justice (ICJ)

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A. Introduction: The Balancing Test as a Conflict-Settling Procedure

1 The term ‘balancing test’ is not technically precise. It broadly refers to a number of techniques aimed at settling conflicts or even indirect collisions between international law rules that cannot be settled by means of classical conflict-settling rules, such as → *lex specialis* or *lex posterior*, on the basis of the analysis of the interest respectively underlying the conflicting or colliding rules. Although vastly heterogeneous, all the techniques using a balancing test are based on a tripartite logical procedure: first, they extract from each conflicting rule the abstract interest respectively protected; second, they determine the concrete interest to the full respect of each rule in the light of the particular circumstance of the case; and third, they proceed to balance these interests against each other and determine a new normative balance, applicable in that particular case only.

2 Although not rarely used in the context of domestic legal orders, the balancing test appears to be particularly appropriate in international law, where indirect collisions frequently occur among rules created for different purposes, having the same formal rank and being designed to govern States’ conduct in different situations. Without a balancing test, many of these conflicts would remain unsettled.

3 In a theoretical perspective, the techniques of conflict-settling based on the balancing test are conceptually opposed to the techniques based on the formal criterion of normative hierarchy. The higher rank of a rule has the effect of granting general prevalence to the interests and values protected by it over those protected by an inferior rule. Conversely, the balancing test is not based on the all-or-nothing logic, but rather tends to determine the appropriate balance between the interests respectively protected by the conflicting rules, through the determination of the weight assigned to each in the light of the circumstance of each particular case.

4 The story of the balancing test in international law constitutes a living paradox. On the one hand, techniques of conflict-settling based on a balance of interests have long been an integral, albeit tacit, part of the → *methodology of international law*, frequently used in diplomatic and judicial practice in a growing number of areas covered by international law rules. On the other hand, apart from specific cases where this technique was incorporated in special rules of conflict—such as, for example, the limit of → *proportionality* in → *self-defence*—explicit reference to a balancing test remained rare and episodic up to the second half of the past century. Only recently were these techniques popularized in international law, following those in vogue in other legal domains, such as the case law of the Court of Justice of the European Union (‘CJEU’) and that of the → *European Court of Human Rights (ECtHR)*, where the application of a balancing test is a daily task (→ *Balancing Test: Court of Justice of the European Union (CJEU)*; → *Balancing Test: European Court of Human Rights (ECtHR)*).

5 This paradoxical situation vividly emerges from the case law of the world courts. Both, the → *International Court of Justice (ICJ)* and its predecessor, the → *Permanent Court of International Justice (PCIJ)*, made, from their inception, significant use of the technique of analysis based on a balancing test. However, the PCIJ never mentioned these techniques and only recently did the ICJ expressly refer to them.

6 This cautious stance may relate to the more general reluctance of the two Courts to unveil the methods of analysis used to decide a case. It was perhaps reinforced by the mistrust of States for techniques superimposing an analysis of interests, which grant

considerable leeway to the international judges, over formalized rules created through classical law-making procedures.

7 There may be a further reason which accounts for this reluctance. It may lay in the will of the two Courts, the custodians of the international orthodoxy, not to prompt a change in the classical egalitarian structure of the legal relations among sovereign States, which could be altered by the idea that a State has the authority to determine the modality of exercise of rights possessed by another.

8 This lack of clarity makes it particularly difficult, and sometimes even arbitrary, to identify the cases decided by the PCIJ and the ICJ on the basis of a balancing test and to distinguish the diverse sub-methods of interest-balancing. It may also explain why the inclusion of these techniques of analysis in the toolkit of the two Courts is not universally accepted by legal scholarship.

9 This state of things makes it particularly difficult to identify and to classify every single case where the ICJ/PCIJ used, directly or indirectly, a balancing test, a very controversial task indeed. Fortunately, for the purposes of the present entry, it does not appear to be necessary. What seems to be necessary is, rather, to present the evolutionary process through which the two Courts gradually accepted the balancing test as a powerful tool of conflict-settling. Therefore, the analysis will proceed on the basis of an incremental method aimed at determining the various steps along which the doctrine of the balancing test progressively took shape in the case law of these Courts. In particular, the analysis of the case law will show how the use of this technique has gradually matured into a fully-fledged, and technically quite sophisticated, instrument of conflict-managing and conflict-settling, having a very broad, potentially unlimited, scope.

10 Before commencing the analysis, a word on terminology is in order. The very term ‘balancing test’ evokes what is now probably the most popular and sophisticated technique of conflict-settling based on the analysis of interest, namely proportionality. However, in the early case law other notions were used, such as good faith (→ *Good Faith (Bona fide)*), reasonableness (→ *Reasonableness in International Law*), and the like. In spite of their technical diversity, these notions tend to convey the idea that international rights and obligations have to be exercised according to their proper function. Indeed, the notion of function and the other related notion of functional power, appear to be consubstantial to that of the balancing test. It does not seem improper to assume that most cases in which the two Courts reasoned in terms of reasonableness or good faith, would probably be regarded as an exercise of balancing of interests.

11 For these reasons, the analysis of the following section will focus on the substance of the reasoning of the PCIJ/ICJ, without paying much attention to the terminology employed. It will proceed on the basis of the assumption that the term ‘balancing test’ is sufficiently wide to include many situations where a normative conflict is settled not on the basis of a formal criterion but rather on the basis of a functional analysis, which considers the respective weight of the interests underlying the conflicting legal rules.

B. Territorial Sovereignty and International Obligations: The Negative Dimension of the Balancing Test

12 A very rudimentary form of balancing test emerges from the very first cases decided by the PCIJ. Much of this case law concerns a collision between the right of territorial sovereignty and international obligations of the territorial States, aimed precisely at limiting the absolute conception of → *sovereignty*. This is a classic situation emerging from the international law of the time, where international obligations were conceived of, as they

still are most commonly today, as exceptions to the otherwise unfettered right of territorial sovereignty.

13 The best example of this situation is perhaps in the case of *Jurisdiction of the European Commission of the Danube* (1927, 63 ff; → *European Commission of the Danube, Jurisdiction of the (Advisory Opinion)*). In this case, the PCIJ dealt with the unusual problem of the coexistence of territorial titles on the same territory: an almost perfect symmetrical conflict, whereby no entity could claim to have the authority to determine the modalities of the exercise of the rights possessed by another. Albeit implicitly, these modalities were judicially determined through a functional adjustment of the diverse territorial titles, on the basis of the respective weight attributed to the respective interests at stake.

14 A different situation was presented in *Oscar Chinn* (1934, 79 ff.). This is the first in the PCIJ case law to deal with an asymmetrical conflict, namely a conflict where the holder of one of the conflicting rights also possesses the power to regulate the exercise of the right of the other. In spite of its remoteness in time, the → *Oscar Chinn Case* provides for a paradigmatic example of the kind.

15 The critical issue in this case concerned the existence of a power of Belgium, flowing from its title of territorial sovereignty, to reduce the transport tariffs on the river Congo (→ *Congo River*) in order to attenuate the consequence of an economic crisis adversely affecting river trading, even if this measure interfered with the right to navigate, and the commerce, of a British company. Although the two rules at stake—the right to territorial sovereignty of Belgium, and the right to navigate of the United Kingdom—had formally equal rank, the PCIJ implicitly accepted that the title of sovereignty also entailed the authority to regulate the exercise of the British right of navigation and trade on the river Congo (→ *Navigation, Freedom of*).

16 After describing the deep impact of the economic depression and the importance of fluvial transportation for the economy of the colony, the Court indicated that the power to regulate the social and economic relations within its territory, flowing from the general title of sovereignty, needed to be exercised so as not to impinge exceedingly upon its international obligation.

17 The Court’s line of reasoning develops along two apparently contradictory propositions. On the one hand, ‘[t]he Belgian Government was the sole judge of this critical situation and of the remedies that it called for’; on the other hand this unfettered right ‘was subject of course to its duty of respecting its international obligations’ (*Oscar Chinn*, 79). The Court went on by determining that the Belgian measures adopted to assist trade in time of crisis were reasonably related to the exceptional character of the situation and reasonably impinged upon the British rights: a reasoning which, to contemporary eyes, appears to be inspired by the notion of balancing. Consequently, the British claim was rejected. The following passage illuminates the reasoning of the Court:

> having regard to the exceptional circumstances in which the measures of June 20th, 1931, were adopted and to the nature of those measures, that is to say, their temporary character and the fact that they applied to companies entrusted by the State with the conduct of public services, these measures cannot be condemned as having contravened the undertaking given by the Belgian Government in the Convention of Saint-Germain to respect freedom of trade in the Congo (*Oscar Chinn*, 86).

18 The importance of *Oscar Chinn* mainly lies in the standard identified by the PCIJ to settle conflicts between the rights flowing from the title of territorial sovereignty and the international limitations thereto. It recognized a large discretion of the State to determine the scope and purpose of its sovereign powers. At the same time, it conducted an enquiry over the existence of a reasonable link between the measure adopted and the sovereign function it was designed to fulfil.

19 This standard was used, with some minor adjustments, in the subsequent case law. In *Corfu Channel, United Kingdom v Albania*, 1949, 29 (→ *Corfu Channel Case*) the ICJ found that a State has the power to regulate the passage of → *warships* through a strait for purposes of → *security* and public order, but not to prohibit it.

20 The reasoning of the ICJ seems to follow closely the methodology inaugurated by the PCIJ in *Oscar Chinn*. In both cases, the Courts admitted that the otherwise unrestrained right to territorial sovereignty was curtailed by the need to abide by the international obligations of the territorial State. In both, they accepted that the rights flowing from the territorial sovereignty entitled the territorial State to determine the modalities of the exercise of territorial rights possessed by third States. In both, finally, the ensuing conflict was settled by a twofold assessment: the recognition of a large discretion for the territorial State to determine its public policy needs and to enact measures necessary to fulfil it; and the existence of a reasonable link between these public policy interests, as determined by the territorial State, and the regulations imposed on the rights and interests of the third State. This technique prompted the final holding that Albania could determine the modalities of passage of the British warship; upon the condition, however, that these modalities did not substantially impair the rights of passage granted by international law.

21 In spite of these analogies, the two cases differ in many respects. Whereas *Oscar Chinn* seems to be based on considerations of equity and good sense, in *Corfu Channel* the reasoning of the Court seems to have matured into an emerging judicial doctrine.

22 Of particular interest is the conceptual distinction between regulations which merely determine the modalities of exercise of the right of passage, inherent in the general right of territorial sovereignty, and other regulations which affect the very substance of the right. After insisting on the relevance of the strait for international navigation, the Court added: ‘Albania, in view of these exceptional circumstances, would have been justified in issuing regulations in respect of the passage of warships through the Strait, but not in prohibiting such passage’ (*Corfu Channel*, 29).

23 The most controversial issue concerns the very sensitive balance between the power of the sovereign State to determine its public policy objectives and the obligation to respect its international obligations. Even though in *Corfu Channel* the ICJ did not expressly engage with this problem, which constitutes a conundrum in the doctrine of the balancing test, it clearly demonstrated awareness of its existence and gave to it a pragmatic solution which prepared the ground for further development.

24 A further step in this progressive determination of a functional approach was made in *Right of Passage over Indian Territory, Portugal v India*, 1960, 6, where the ICJ was asked to determine whether India possessed the power to regulate a right of passage possessed by Portugal over its territory and the limits thereto (→ *Right of Passage over Indian Territory Case*).

25 The reasoning of the decision is, by itself, quite disappointing. The Court accepted that, due to serious security reasons, the measures taken by India, which had progressively restricted the modalities of the passage and ultimately suspended its exercise, were reasonable and, therefore, lawful.

26 However, the application of a functional test emerges from the various declarations and opinions of the judges, either concurring or dissenting. These declarations and opinions, comprehensively considered, clarify that the centre of gravity of the decision laid in the search for the appropriate balance between the reasons of security put forward by India and the need to not excessively hamper the right possessed by Portugal (*Right of Passage over Indian Territory, Portugal v India*, 1960, declaration by Judge Basdevant, 48; separate opinion by Judge Wellington Koo, 62; dissenting Opinion of Judge Armand-Ugon, 84; dissenting opinion by Judge Sir Percy Spender, 97, who speaks of a system of 'controllable discretion, one which must be used reasonably and not capriciously, one which must be exercised in good faith' (at 107)). Thus, the very philosophy of the balancing test, never expressly mentioned, silently emerges through the notions used by these judges, such as reasonableness, good faith, and abuse of right.

27 In two subsequent cases, the ICJ consolidated the idea that the → *margin of appreciation* of the sovereign State to determine the objectives of its action does not entail absolute discretion in the choice of the means to be employed to attain these objectives.

28 In *Rights of Nationals of the United States of America in Morocco, France v United States*, 1952, 176 (→ *United States Nationals in Morocco Case*), the Court said: 'the power of making the valuation rests with the Customs authorities, but it is a power which must be exercised reasonably and in good faith' (at 212). In this case, the difficult task of curtailing the prerogative connected with sovereignty was entrusted to the uncertain notion of reasonableness and good faith.

29 A step forward in the search for an appropriate → *standard of review* for public policy choices made by the territorial State, interfering with its international obligations, was made in *ELSI, United States v Italy*, 1989.

30 The case concerned a dispute on the international legality of the seizure by Italy of certain plants possessed by the United States ('US') for public policy reasons. The measures of seizure were declared null and void by an Italian Court. On that basis, the US argued that the seizure ordered by Italy infringed a bilateral treaty between the two countries, which prohibited each party to take arbitrary or discriminating measures against goods possessed by citizens of the other. In spite of the unlawfulness of the requisition under Italian law, the ICJ found that the seizure did not amount to a breach of the treaty. The Court said: '[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law' (*ELSI*, at para 128). A plausible reading of this cursory passage is that measures unlawful under national law, but plausibly related to general interests pursued by the territorial State, acting as a public authority, fall nonetheless within the scope of domestic public policy and, therefore, could legitimately justify an interference in the implementation of the international obligation of the acting State.

31 These cases, which are very different from each other, do have common features. In all of them, the ICJ endeavoured to determine the most appropriate standard of review for actions of the territorial State, undoubtedly related to its sovereign right to regulate social

and economic factors within its territory, but interfering with the exercise of its international obligations.

32 On the one hand, the ICJ recognized the primary competence of States to determine and to implement public policy requirements even at the cost of interfering with their international obligations. On the other hand, far from upholding the absolute discretion of the claiming States, it reasserted that these discretionary powers had to be exercised under international control. In all of them, we can find a still-unaccomplished analysis of the interests, though concealed under more classical notions such as good faith, reasonableness, and the like. In a sense, these techniques constitute a negative form of balancing test. Instead of applying this test to the interests respectively realized and curtailed by the sovereign action of a State, the ICJ used the analysis of interests in its negative dimension, to exclude an improper or arbitrary exercise of the rights of sovereignty.

C. From the Negative to the Positive Dimension: The Test of Proportionality

33 The conception of sovereignty, as conferring on the territorial State the primary responsibility to regulate the exercise of rights of other States on its territory, subject to a review based on a positive analysis of interests, acquired a central role in *Navigational and Related Rights, Costa Rica v Nicaragua*, 2009, 213 (→ *Dispute regarding Navigational and Related Rights Case (Costa Rica v Nicaragua)*). The Court explicitly indicated that Nicaragua, as a sovereign power, had the right to regulate the exercise of the navigational rights possessed by Costa Rica, subject to a double standard of review: a standard of reasonableness on the regulation and a standard of proportionality on the restraint imposed on the navigational rights.

34 The power to regulate was construed as a corollary of the general rights of sovereignty. The decision clearly indicates that the State possessing sovereignty over the river has the 'primary responsibility for assessing the need for regulation and for choosing, on the basis of its knowledge of the situation, the measure that it deems most appropriate to meet these needs' (*Navigational and Related Rights*, at para 101). However, as becomes clear from the subsequent paragraphs of the decision, the regulation must be reasonable according to an objective standard. Also, in the light of its previous case law, is seems safe to assume that the limit of reasonableness imposes a plausible link between the regulation and the pursuit of a public policy.

35 By no means, however, does the review of the reasonableness of the regulation exhaust the elements of international control. In subsequent passages (*Navigational and Related Rights*, at para 103 ff), the ICJ used a balancing test to review the proportionality of the single restraint imposed on Costa Rica's navigational rights, in light of the interests claimed by Nicaragua and the degree of restraint imposed on Costa Rica's rights.

36 In analogous terms, in *Pulp Mills on the River Uruguay, Argentina v Uruguay*, 2010, 14, a double standard of review has been used to determine the legality of the regulation of the use of river waters by the State that has sovereignty over these waters. After considering that '[t]he attainment of optimum and rational utilization requires a balance between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other', the Court assessed the conduct of Uruguay in authorizing the use of the river in light of the rights and obligations prescribed by the

relevant statute (*Pulp Mills*, at para 175; → *Pulp Mills on the River Uruguay (Argentina v Uruguay)*).

37 The growing level of sophistication of the doctrine is evidenced by the different standard employed in these two cases to assess the proportionality of the contested regulation, according to the diverse nature of the interest and values at stake. In *Navigational and Related Rights*, the proportionality of the sovereign action was mainly measured on the basis of a qualitative standard, consisting in the degree of hardness imposed on the right to navigate (see, in particular, paras 104, 106, 115, 123, 126). In *Pulp Mills*, the Court employed both a qualitative and a quantitative standard of assessment of proportionality. A quantitative standard applied where the interests at stake were quantitatively measurable. This occurred, in particular, with regard to the general rule to reserve an equitable share of water to all the riparian States (*Pulp Mills*, at para 177); a qualitative standard applied to interests perceived as being also qualitatively measurable such as the issue of the damages to the environmental balance of the river (*Pulp Mills*, at paras 178 ff.).

D. Functional Powers and Freedoms of the High Seas

38 The balancing test was used by the ICJ to settle conflicts between competing rights outside the → *territorial sea* in the two *Fisheries Jurisdiction* cases (*United Kingdom v Iceland*, 1974, 3; *Federal Republic of Germany v Iceland*, 1974, 175; → *Fisheries Jurisdiction Cases (United Kingdom v Iceland; Federal Republic of Germany v Iceland)*). These two cases gave impulse to the rise of the notion of zones of → *high seas* where the coastal States possess functional powers; they set the methodological approach to solving conflicts between those powers and the traditional freedoms of the high seas (see also → *Fishery Zones and Limits*; → *Fisheries, High Seas*).

39 Apparently, the ICJ fashioned the conflict as being one of competing rights having the same formal value. Interestingly, the ICJ, after assuming, according to the traditional view, that each right should be mutually curtailed with a view to accommodating other interests entitled to equal protection, developed the notion of functional right, which is at the basis of subsequent developments in the → *law of the sea*.

40 These cases offer a precious opportunity to follow the passage from the classical conception of conflict between absolute rights to a different conception, whereby a State has the power, even outside its territory, to mould the content and the modality of exercise of other States' rights, with a view to realizing an acceptable situation for all the interests at stake. What changes with regard to the situations dealt with in the previous section is the fact that, in the case of functional powers, it is international law that predetermines the objectives and means of action designed to pursue them, within a limit of proportionality with regard to other interests and values protected by the law. In determining these objectives, a growing space is granted to common interests and values which burst into the scene of international law and demand to be considered in the overall balancing operation.

41 This logical process unfolded along three passages. First, the Court proceeded to the relativization of the notion of absolute right. In *Federal Republic of Germany v Iceland*, the Court said:

> Due recognition must be given to the rights of both Parties, namely the rights of the Federal Republic to fish in the waters in dispute, and the preferential rights of Iceland. Neither right is an absolute one: the preferential rights of a coastal State are limited according to the extent of its special dependence on the fisheries and by its obligation to take account of the rights of other States and the needs of conservation; the established rights of other fishing States are in turn limited by

> reason of the coastal State's special dependence on the fisheries and its own obligation to take account of the rights of other States, including the coastal State, and of the needs of conservation (*Fisheries Jurisdiction*, *Federal Republic of Germany v Iceland*, para 63).

42 Second, the Court went on to determine the consequences of this process of downgrading. 'Both States have an obligation to take full account of each other's rights and of any fishery conservation measures the necessity of which is shown to exist in those waters' (*Fisheries Jurisdiction*, *Federal Republic of Germany v Iceland*, para 64).

43 The third and final step is the recognition that the very notion of reciprocal conflict of rights had evolved and, in light of the corresponding evolution of the law of the sea, it was transformed into a different and more complex legal relation, which included a duty to also take care of the rights of other States and of the interests of the entire → *international community*:

> it is one of the advances in maritime international law, resulting from the intensification of fishing, that the former laissez-faire treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all waters' (*Fisheries Jurisdiction*, *Federal Republic of Germany v Iceland*, para 64).

44 Independently of the outcome of the two cases, which did not stand the passing of time, they unveil the approach of the ICJ in situations of conflict between apparently unlimited and unconditional rights. This approach unfolds along three logical steps: the first concerns the identification of the abstract function which each of the conflicting rights tends to fulfil; the second concerns the concrete interests, individual or collective, underlying the exercise of those rights; the third concerns the determination of an appropriate balance between the interests at stake, also in light of positive measures of → *compensation* for those affected by this balancing operation. As is well-known, in the two *Fisheries Jurisdiction* cases, the ICJ directed the parties to start a negotiation with a view to realizing an equitable solution, taking into account their respective interests and the interests of third States and those of the international community.

45 The momentous theoretical relevance of this logical operation can hardly be overstated. It highlights that, in situations of conflict, the balancing test also requires rights traditionally considered as unqualified, ie granted to their holders without restrictions, to be amputated from some of their traditionally absolute prerogatives in order to achieve an appropriate settlement.

E. Balancing Test and Use of Force

46 The ICJ intensively used a balancing test to determine the legality of the unilateral use of force by individual States. In this field, the balancing test applies by virtue of a special rule of international law dating back to the early nineteenth century, which limits the measures of self-defence on the basis of the two standards of necessity and proportionality (see the '*Caroline case*', in Moore, *A Digest of International Law* vol 2, 1906, 409–14; → *Caroline, The*).

47 In light of these precedents, the field of the legal regulation of the use of force provided for the ideal terrain for the ICJ to further develop the balancing test doctrine.

48 In *Military and Paramilitary Activities in and against Nicaragua, Nicaragua v United States*, 1986, 14 (‘*Nicaragua*’ (→ *Military and Paramilitary Activities in and against Nicaragua Case (Nicaragua v United States of America)*), the Court upheld that the customary rule on self-defence refers to the two criteria of necessity and proportionality. Interestingly, the ICJ used a two-edged formula, indicating that the response must be ‘proportional to the armed attack and necessary to respond to it’ (*Nicaragua*, paras 176 and 194).

49 The second part of this sentence, relating to necessity, seems to adopt a purely functional standard whereby only the necessity to respond to the attack justifies the use of force in self-defence. In turn, this functionality expresses a balance of interests: on the one hand, the collective interest to preserve the stability of world order, endangered by every individual recourse to force; on the other hand, the individual interest of the attacked State to halt and repel the attack.

50 The exceptionally high value of the interests at stake requires a further guarantee, namely that the existence of the pre-conditions to resort to force be objectively assessed. This guarantee, implicit in *Nicaragua*, was made explicit in *Oil Platforms, Islamic Republic of Iran v United States*, 2013, 161 (→ *Oil Platforms Case (Iran v United States of America)*). In response to the US, which claimed some measure of discretion in assessing the necessity of the reaction, the ICJ found that ‘the requirement of international law that measures taken avowedly in self-defence must have been necessary for that purpose is strict and objective, leaving no room for any “measure of discretion”’ (*Oil Platforms*, para 73).

51 The second part of the *Nicaragua* formula, concerning proportionality, expresses a different dimension of the balancing test that related to the intensity of the response, which must be commensurate to the armed attack. The ICJ did not clarify whether this correspondence must be measured quantitatively, by reference to the means employed or the damages inflicted, or rather in qualitative terms, namely by what is needed to halt and repel the attack. The absence of further qualification seems to indicate the will of the Court to maintain both options.

52 The co-existence of these two dimensions, a qualitative and a quantitative balancing, is upheld in the part of the decision dealing with the measures involving the use of armed force allegedly taken by the US in response to the measures taken by Nicaragua against El Salvador (*Nicaragua*, para 237 ff). The ICJ found that the lack of proportionality constituted an ‘additional ground of wrongfulness’ of the US measures. The assessment of proportionality was conducted by the Court on the basis of a quantitative element, namely the ‘scale of the aid’ received by El Salvador, as well as on the basis of a qualitative element, namely the duration of the reaction, extending well beyond the need to halt and repel the attack.

53 The idea that necessity and proportionality are mere species of the genus of the overall technique of interests-balancing was upheld by *Nuclear Weapons* (1996, at paras 41 ff, 96, and 97; → *Nuclear Weapons Advisory Opinions*). While mostly following in the footsteps of the *Nicaragua* precedent, this case offers significant additions.

54 First, the Court, albeit in an unassuming tone, extended the scope of the proportionality test in the context of the self-defence rule. In paragraph 42, after saying that ‘self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law’, the Court went on by pointing out that ‘States acting in self-defence must also consider the detrimental consequences of the response in self-defence on the principles and rules of humanitarian law’ (*Nuclear Weapons*, para 42). By extending the balancing operation to these other

normative values affected by the armed response, this holding seems to shift the balance in favour of a qualitative appreciation of the interests and values at stake.

55 This impression is enhanced by the second significant addition, namely by the need to consider the risk of escalation engendered by the threat or use of nuclear weapons in reaction to a conventional attack. This is a further and decisive element pleading for a qualitative assessment of the proportionality of self-defence, which must consider not only the interests of parties concerned, but also the collective normative values respectively attained and affected by the action.

56 A further, and decisive, development of the balancing test, comes from the most mysterious and controversial holding of the advisory opinion. Requested to pronounce on the lawfulness of the threat or use of nuclear weapons in extreme circumstance of self-defence, the Court declared, by seven votes against seven, with the casting vote of the President, that it 'cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake' (*Nuclear Weapons*, at paras 96, 97).

57 Mostly interpreted as a → *non liquet*, this holding can more appropriately be read as an exemplary application of a balancing test. This can be easily understood if one considers that this holding was pronounced by the ICJ in the context of an advisory opinion, where the ICJ was asked to state the law and not to apply it. Due to the nature of the balancing operation, which strictly depends on the circumstances of each concrete case, in the context of an advisory opinion the ICJ could well define the terms and conditions for a balancing operation, but it could not bring it to its ultimate conclusions (→ *Advisory Opinion: International Court of Justice (ICJ)*).

58 This is precisely what the Court did. After finding that no rule on international law specifically authorizes or prohibits the threat or the use of nuclear weapons, it drew the obvious consequence that the legality of these conducts depended on a balancing test, to be conducted in the light of the specific circumstances of the case, related, in particular, to the interests protected by the rule on self-defence on the one hand, and to those protected by international humanitarian law (→ *Humanitarian Law, International*) on the other.

59 In the view of the current writer, by this finding, far from pronouncing a *non liquet*, the Court has rather recognized that a general rule settling that particular situation does not exist and, instead, it is governed by conflicting sets of international law rules. In turn, this conflict must be settled on each specific situation and on the basis of a case-by-case analysis of the interests and values at stake. Coherently with this methodological direction, the Court chose to follow a more engaging, but even more appropriate path: to determine the procedure to be followed in order to determine a case rule for each specific situation.

F. Restating the Methodology: Proportionality and Margin of Discretion in the Balancing Test Doctrine

60 In spite of its success, the balancing test is not immune from criticism. An obvious critical notation concerns the margin of indeterminacy which is inherent in the determination of the interpreters and, therefore, lends itself to allegations of subjectivism.

61 This criticism identifies a real difficulty in the doctrine of the balancing test. As we know, this test unfolds along a threefold operation. It requires: to de-compose, in a normative conflict, the interests underlying the conflicting rules; to assess the weight of each single interest in the concrete situation at hand; to re-compose, on the basis of this interest-analysis, a new normative balance, destined to govern the concrete situation at hand. Whereas the second and the third operation were subject to an incessant flow of

literature and case law, among which was ICJ case law, the third operation mainly remained in shadow. Yet, the outcome of each balancing test strictly depends on the existence of an appropriate method to determine the appropriate level of protection for each of the interests.

62 This problem is automatically solved where a rule of international law predetermines not only the interests protected and the means to attain it, but also the level of protection permitted for these interests. The problem remains, however, in all the cases in which such a rule did not develop. For example, to determine the proportionality of a restrictive regulation of the → *innocent passage* in its territorial sea imposed for environmental reasons it is necessary to preliminarily determine the acceptability of the standard of environmental protection sought by the territorial State.

63 The determination of the appropriate level of protection of the interests of the State having a legally or factually dominant position, as compared against the tolerability of the sacrifice imposed on the interests of the State having a correspondingly legally or factually subordinate position, represents a crucial issue for a doctrine on the balancing test. However, whilst frequently allocating the competence to a State to determine the modality of exercise of rights possessed by other States, international law rarely says anything about this level of protection.

64 On the one hand, excessive deference to States' discretion may deprive the international control of effectiveness. For example, by claiming a particularly high level of environmental protection within its territorial waters, a coastal State can make the exercise of the right to innocent passage particularly difficult or even impossible. On the other hand, objective standards of control over discretionary powers may severely restrict or even nullify the margin of discretion of States and, by so doing, render virtually senseless the recourse to a balancing test. As stated above, the very meaning of the test is to settle conflicts among rules which cannot be solved on the basis of their formal value. If the intensity of the interests underlying a rule of law were uniform and predetermined in any situation, there would be no need to have recourse to a test whose very essence lies in the determination of the respective weight of a multiplicity of competing interests.

65 This problem has occasionally arisen in ICJ case law. In *Navigational and Related Rights* (paras 87 ff, 109 ff), for example, the ICJ used reasonableness as a balancing standard to assess whether the 'negative impact on the exercise of the rights in question (is) not manifestly excessive when measured against the protection afforded to the purpose invoked'. In this perspective, the level of protection 'afforded to the purpose invoked' by the territorial State determines what is the tolerable impact on the exercise of the rights of another State, with the consequence that, by raising the bar of the protection for its public policy interest, the former State can freely impinge upon the rights of the latter. What lacks in this reasoning, however, is precisely an element capable of measuring what is an appropriate level of protection for the purposes invoked by the regulating State.

66 This problem acquired a central role in *Whaling in the Antarctic, Australia v Japan: New Zealand intervening*, 2014, 226 (→ *Whaling in the Antarctic (Australia v Japan: New Zealand Intervening)*), where the ICJ was asked to determine whether activities such as killing, taking, and treating whales fell within the scope of the scientific research in the sense of the exception formulated in the first part of Article VIII (1) International Convention for the Regulation of Whaling ('ICRW'), which allows the States parties to grant a special permit to

kill, take, and treat whales ‘for purposes of scientific research’ (→ *Whaling*; → *Marine Scientific Research*).

67 In the view of Japan, each State Party to the convention had the exclusive competence to determine which activities were performed for purposes of scientific research under this provision, and to issue licences accordingly. The submission of Japan shows the main weakness of the category of the functional powers and, consequently, of the balancing test. By claiming an unfettered discretion to interpret the scope and intensity of its action, Japan would have greatly diminished the intensity of international control over the activities necessary and proportionate to attain this objective.

68 The ICJ dismissed this claim. It stated:

> The Court considers that Article VIII gives discretion to a State party to the ICRW to reject the request for a special permit or to specify the conditions under which a permit will be granted. However, whether the killing, taking and treating of whales pursuant to a requested special permit is for purposes of scientific research cannot depend simply on that State’s perception (*Whaling in the Antarctic*, para 61).

69 Therefore, the ICJ went on to identify the standard of review of States’ actions.

> When reviewing the grant of a special permit authorizing the killing, taking and treating of whales, the Court will assess, first, whether the programme under which these activities occur involves scientific research. Secondly, the Court will consider if the killing, taking and treating of whales is ‘for purposes of’ scientific research by examining whether, in the use of lethal methods, the programme’s design and implementation are reasonable in relation to achieving its stated objectives. This standard of review is an objective one (*Whaling in the Antarctic*, para 67).

70 In this passage, the ICJ made it clear that, to settle the dispute, it had to apply two different standards: a looser standard to determine the notion of ‘scientific research’, and an objective standard to determine which activities were ‘for the purposes of’ scientific research.

71 This is confirmed in the subsequent part of the reasoning. On the one hand, the Court applied a loose standard of plausibility to determine whether the Japanese programme, called Jarpa II, fell within the notion of scientific research. After recognizing that the notion of scientific research cannot be univocally determined and consequently declining to offer a general definition, the Court accepted that the mere existence in the programme of some element of scientific research was sufficient to accept the qualification given by Japan. On the other hand, the Court applied a strict standard of proportionality to determine whether the contested activities included in the programme, entailing the killing, taking, and treating of whales, were performed for the purposes of scientific research. This line of argument led inexorably to its final determination:

> An objective test of whether a programme is for purposes of scientific research does not turn on the intentions of individual government officials, but rather on whether the design and implementation of a programme are reasonable in relation to achieving the stated research objectives. … The research objectives alone must be sufficient to justify the programme as designed and implemented (*Whaling in the Antarctic*, para 97).

G. Balancing Test and (Case) Law-Making

72 In previous paragraphs the idea has been suggested that the balancing test is a method of conflict-settling based of the analysis of the interests at stake. This method is alternative to the formation of a new rule which predetermines the outcome of a conflict between competing interests or values. Instead of developing a full-fledged rule, capable of governing an indeterminate class of conducts, international law refers to the balancing test as a procedure for determining a case-by-case rule, governing a specific conduct in light of the circumstances of the case at hand.

73 However, the use of a balancing test can also be of avail in the process of normative change, whereby the obsolescence of an existing rule prompts a process of formation of another rule, capable of reflecting more closely the emerging needs of the international community and the changing social custom.

74 Of course, each rule incorporates a balancing of interests and many rules, which innovate the law and are based on a different balancing of the same interests underlying the pre-existing law. The distinctive role of the balancing test as a law-factor lies precisely in the fact that the new rule, produced through the classical → *sources of international law*, is frequently modelled after a judicial finding of the appropriateness of a new balance of the interests underlying the preexisting law to accommodate the emerging needs of the international community.

75 This is what occurred as a result of *Reservations to the Convention of Genocide* (1951, 15; → *Genocide Convention, Reservations (Advisory Opinion)*). The ICJ was asked by the United Nations ('UN') General Assembly to determine whether the traditional regime on treaties reservations accommodated the emerging need to foster a large, possibly universal, membership to the new multilateral treaties on human rights.

76 The answer of the Court was based on a threefold methodology of analysis. First, the Court extracted, from the pre-existing legal regime, the set of values and interests underlying it. Second, it assessed the obsolescence of this traditional regime, in light of the changing legal landscape and the advent of new collective values and interests emerging from the system of the UN. Third, it determined the new balance between the declining interest in the integrity of treaties and the emerging interest in the → *universality* of treaties and, as a result, it recast the new regime on treaties reservation. The legal reasoning of the ICJ was entirely based on a balancing test, used to disassemble the pre-existing legal regime and to reassemble a new one, more appropriate to the emerging values and interests of the international community.

77 It was this result, presented as the determination of the existing law, which triggered a process of change in international practice and was soon acclaimed as the new law.

78 In its most known and quoted passage, the Court, first, indicated that the old legal regime, which prohibited a State that wished to be party to a multilateral treaty from making a reservation not accepted by all the other contracting parties, mirrored the principle of integrity of multilateral treaties: this principle was defined as one of 'undisputed value' (*Reservations to the Convention of Genocide*, 21).

79 By no means, however, did the ICJ's reasoning stop here. Rather, the Court went on to refer to the new values emerging from the new international law, such as the 'universal character of the United Nations under whose auspices the Convention was concluded, and the very wide degree of participation envisaged by Article XI of the Convention' (*Reservations to the Convention of Genocide*, 21). This passage conveys the idea that the process of change in the fundamental values and interests of the international

community should prompt an analogous change in the legal regime which may impinge on the realization of the new fundamental values and principles.

80 While the ICJ presented the conclusions of the case as based on the interpretation of the Genocide Convention, the reasoning of the Court reveals that the entire operation was based on a shift in the balance of values and interests underlying the legal regime of reservations. Not only did the Court base on that shift the answer to the first question, namely whether a State could be party to the Genocide Convention even if its reservation were rejected by all the other parties. The Court also used this new balance to determine the contents of the new legal regime of treaties reservations, including the regime of admissibility of reservations and objections thereto (→ *Treaties, Multilateral, Reservations to*).

H. Concluding Remarks

81 The case law of the ICJ/PCIJ shows that the two Courts have constantly, albeit mostly silently, applied some sort of balancing test. The case law of the ICJ/PCIJ not only reveals a frequent and consistent recourse to a technique of interests-balancing, but this case law also contributed to the clarification of some of the still-untied knots which stood in the way of the development of a fully-fledged judicial doctrine on the balancing test.

82 From this case law, one can gather that the balancing test takes different shapes indeed, according to the structure of the legal relations involved. Three different situations can be detected: symmetrical conflicts between equally protected legal positions; asymmetrical conflicts between the general right to territorial sovereignty and rights of third States; and conflicts between a dominant legal position conferred for the attainment of a specific objective and a servant legal position. Although the line separating these three legal situations is far from clear, and, rather, they continuously overlap and interfere with each other, this distinction may contribute to a conceptual clarification of how the balancing test operates in different conditions.

83 The first class of situations is composed by conflicting rights, none of them having acquired a legally dominant position *vis-à-vis* the others. In these situations, the ICJ/PCIJ has typically proceeded to downgrading the absoluteness of each of the legal positions at stake, and mutually curtailed their scope so as to compensate in a new balance, including through positive measures, the respective gains and losses.

84 Also, the second class of situations involves a conflict between formally equal rights. However, one of these, namely the general right of territorial sovereignty, also incorporates, as tacitly recognized by the case law, the power to regulate the exercise of territorial rights by third States.

85 The existence of rights of third States, whose exercise interfere with the general right of sovereignty has, therefore, the effect of transforming that general right into a functional power. The State which holds sovereign power on a given territory is entitled to interfere with territorial rights of a third State with a view to compose the exercise of these rights with its power to regulate social and economic factors that come within the purview of its sovereignty. Unlike ‘pure’ functional power, this very particular legal position is not conferred by international law for the attainment of pre-determined objectives or values. It can be exercised for an open-ended set of objectives related to the tasks of a sovereign entity.

86 In this situation, therefore, the greater margin of appreciation acknowledged to the territorial State in selecting the purposes of its action is compensated by a stricter international control concerning the reasonableness of the objectives pursued and the proportionality of the means employed.

87 In the third and last class of situation, the role of the balancing test is magnified. It includes legal relations featured by the power of a State to regulate the exercise of rights held by another State in order to attain a predetermined set of objectives or values. The existence of a functional link between the measures to be taken and the objectives to be attained constitutes thus the *raison d'être* of the power and justifies the term 'functional powers', which is commonly used for this class of legal relations. In these situations, the margin of appreciation of the State is very thin and only relates to the level of protection rather than to the identification of the interests or values to be protected. As seen above, this entails a loose control of reasonableness with regard to the level of protection, and a strict control of proportionality on the protective measures.

88 Beyond their profound differences, the three situations do have a common core characteristic. In all of them, the powers conferred by international law to a State to attain an interest, or a set of interests, individual or collective, creates a dominant/servant relationship, namely a special relationship of supremacy, albeit only with regard to a particular situation. In this relationship, the dominant State has some form of entitlements *vis-à-vis* the servant State; it has the power to interfere with the enjoyment of the servant legal position and to attain certain objectives, whereas the servant State only has the right to review the legality of this action.

89 All three situations have remained relatively under-explored for decades, possibly because their very existence is logically at odds with the postulate of the sovereign equality of States (→ *States, Sovereign Equality*). Yet, precisely this principle, along with the endemic lack of authorities in international law, entails that certain functions of the international legal order must be discharged by individual States, acting unilaterally (→ *Unilateral Acts of States in International Law*), although under international supervision. Behind appearances, the international legal landscape is populated by rules that, directly or indirectly, bestow upon individual States the authority to impinge upon legally protected interests of other States to protect certain interests. In a sense, these powers fill the gap opened by the lack of institutional authorities in international law.

90 In this context, the balancing test, imprecise as it may be, discharges a vital function of the international legal order. It provides for an objective means of control on the special positions of supremacy bestowed by international law upon a State to pursue objectives related to legally protected interests, individual or collective, of that legal order. The growing use of a balancing test by international courts and tribunals unveils the emergence of a doctrine of the functional powers in international law that is gradually taking shape, and to whose development the PCIJ and the ICJ gave a significant contribution.

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