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Multipurpose Self-Defence, Proportionality Disoriented: A Response to David Kretzmer

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Abstract

The principle of proportionality cannot contribute to changing or multiplying the ends of a rule. Thus, Kretzmer's goal of (re-)constructing an up-to-date conceptual framework for the interpretation of the right of self-defence by recognizing, in addition to the traditional 'halting and repelling' rationale, prevention, deterrence, and punishment as legitimate purposes of self-defence, would have to be achieved on the basis of the inherent persuasiveness of those alleged purposes. However, Kretzmer's 'all relevant factors and goals' approach, to be applied within the framework of the principle of proportionality, would, in the typical non-judicially reviewed situation, probably lead to mutual recriminations that other actors have not taken all relevant factors and goals into account. This approach would then only provide an appearance of legality to spurious claims of self-defence. Instead, the principle of proportionality should continue be applied on the basis of a right of self-defence with a 'halting and repelling' rationale. It can thus continue to serve as a language in which states and other relevant actors meaningfully exchange views on the specific problems in difficult cases. The principle of proportionality, in this understanding, is open enough to 'fit all' modern forms of conflict.

1 Assumptions and Revisions

The right of self-defence rests on the assumption that enough common understanding exists within the international community to identify an 'armed attack' triggering the right of self-defence. The International Court of Justice even assumes that enough common understanding exists for applying the principle of proportionality to acts of self-defence.[1] Are these assumptions fictions? Certain situations which have given rise to claims of self-defence in recent years have caused legitimate controversy.

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[1] The Court claims 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 (Islamic Republic of Iran v. USA)* [2003] ICJ Rep161, at para. 73.

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International lawyers should therefore rethink the law, reassess its underlying purpose, and inquire whether the right questions are being asked. David Kretzmer undertakes this task in a thorough, perceptive, and broad-minded way. But I doubt whether his main proposition points in the right direction.

2 Proportionality and Ends

Kretzmer asserts that 'the very meaning' of the principle of proportionality in the law of self-defence 'is shrouded in uncertainty',[2] and suggests that the answer depends on what are the 'legitimate ends of force in self-defence'.[3] The point to note here is *not* the – relatively uncontroversial – assertion that the principle of proportionality describes a relationship between ends and means. It is rather the use of the plural 'ends' – which entails the proposition that the right of self-defence may serve different ends, depending on the situation. Thus, Kretzmer is not so much concerned with the principle of proportionality as such, but with the proper interpretation of the right of self-defence.

It is, of course, perfectly legitimate to concentrate on the principle of proportionality as it applies in the specific context of the *jus ad bellum*. But there is an important general feature of this principle which Kretzmer understates: whereas the principle of proportionality is all about the relationship between ends and means, it does not, as such, say anything about the ends themselves.[4] The principle rather requires and presupposes the existence of one (or more) legitimate ends, but it cannot itself produce legitimate ends.

This is not merely a formal observation. Kretzmer's main point is that the traditional 'halting and repelling theory' of self-defence does not constitute the only legitimate end of the right of self-defence. In his view, allowance should be made in certain situations for other ends as well, be they prevention, deterrence, or punishment. Regardless of whether this position is right or wrong, it is clear that the legitimacy of such other ends cannot be derived from the principle of proportionality itself. This principle cannot broaden, but only limit, the exercise of the right to self-defence. Kretzmer, however, seems to suggest that a stronger emphasis on the principle of proportionality would somehow make other ends (other than 'halting and repelling') legitimate.[5]

Admittedly, Kretzmer can also be read as trying to establish the legitimacy of other ends of self-defence independent of the principle of proportionality. In that case the significance of this principle for his argument seems to lie in an appeasement function. It would then consist in the implicit proposition that the recognition of other legitimate ends for the exercise of the right to self-defence should not give rise to concerns since the principle of proportionality would hold any ensuing broadening of the right of self-defence within reasonable bounds. I also doubt this assumption.

2 Kretzmer, this vol., at 237.

3 *Ibid.*, at 240.

4 See, e.g., J. Gardam, *Necessity, Proportionality and the Use of Force by States* (2004), at 20; for German constitutional law see Grzeszick, 'Art. 20', in R. Herzog *et al.* (eds), *Maunz/Dürig Grundgesetz Kommentar* (2011), MN. 110.

5 E.g., *supra* note 2, at 282.

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2 Situations

The principle of proportionality used to play only a limited role in the context of the right of self-defence.[6] As long as the most important typical situation for this right was the deliberate attack by the forces of one state against another state it was clear that this right implied the freedom to repel such an attack in a way which ensured that the underlying immediate threat was removed. Today, other typical situations, such as attacks by non-state actors, strikes (by missiles or otherwise), or cyber attacks, have moved to the forefront. Would the application of the principle of proportionality to such forms of attack in a 'one size fits all'[7] mode be a procrustean exercise, as Kretzmer seems to suggest?

But why not 'one size fits all'? Once the legitimate end of self-defence is ascertained (or the legitimate ends) the principle of proportionality is open to be filled with many more or less specific considerations. It is not a straitjacket.[8] But Kretzmer seems to be concerned about the principle's limitative effect if proportionality is applied to different situations only within the bounds of the traditional 'halting and repelling theory' which most commentators see as underlying the right of self-defence.[9] The case to which he frequently returns is the 2006 Israel–Lebanon/Hezbollah war.[10] Kretzmer is certainly correct when he says that a violation of the principle of proportionality cannot simply be determined by the effects which a particular military action produces, even if these effects are grave. Indeed, the character (or nature) of the attack itself must also be duly taken into account, which to a certain extent includes the likelihood of its continuation.[11] But this rather conservative observation does not justify a larger reconsideration of the law of self-defence.

3 'Halting and Repelling' and – Possibly – Other Ends of Self-defence

In my view, Kretzmer dismisses the 'halting and repelling theory' – in the sense of providing the only legitimate end of self-defence – without sufficient justification. Already his assertion that this theory 'stacks the cards in favour of the aggressor'[12] is questionable. 'Repelling', after all, is not generally understood as being limited to immediate counterforce against specific ongoing aggressive acts, but also extends to measures which bring an end to the armed aggression in a somewhat broader, socially

6 See, e.g., Randelzhofer, 'Art. 51', in B. Simma (ed.), *The Charter of the United Nations* (2nd edn, 2002), at 805; I. Brownlie, *International Law and the Use of Force by States* (1963), at 261–264; C. Gray, *International Law and the Use of Force* (3rd edn, 2008), at 150; Gardam, *supra* note 4, at 155.

7 Kretzmer, *supra* note 2, at 267.

8 Nolte, 'Thin or Thick? The Principle of Proportionality and International Humanitarian Law', 4 *Law & Ethics of Human Rts* (2010) 247.

9 Kretzmer, *supra* note 2, at 239 and 267ff.

10 *Ibid.*, at 236, 259, 264, 266 and 280f.

11 *Ibid.*, at 279.

12 *Ibid.*, at 262.

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constructed sense.[13] This broader understanding of 'repelling' is neither limited to clear cases of massive inter-state aggression, nor to what Kretzmer calls the 'trigger theory'.[14] It is true that the 'halting and repelling theory' contains an element of proportionality insofar as not every armed attack legitimizes full-scale military measures with a view to completely incapacitating or transforming the attacker.[15] But this is just another way of saying under which circumstances we can speak of the end of an armed attack. The answer mainly depends on our common understanding – which is more securely established with respect to classical situations of inter-state war than with respect to certain more recent types of conflict, such as the 2006 Israel–Lebanon/Hezbollah war.

Kretzmer calls the 'halting and repelling theory' into question and asks: how can one speak of 'halting and repelling' if one accepts the permissibility of anticipatory self-defence, i.e., if there is not yet anything to halt?[16] And how can the 'halting and repelling' theory be applied in situations in which non-state actors are occasionally conducting cross-border attacks, that is when 'the' attack has already ended and there is nothing any more to repel?[17] Is it not, he seems to ask, merely a desperate form of clinging to outdated concepts if authors assert that 'halting' also includes the stopping of attacks which have not yet inflicted any damage but which have 'only' been clearly set in motion,[18] and that 'repelling' also includes situations in which one or more pin-point attacks are not counted separately but as confirmations of the existence of an attack in a constructive sense?

Not necessarily. Just as the identification of the end of the armed attack has always been a question of social construction, the identification of what constitutes an armed attack has never been a purely factual matter. The reluctance among states and scholars to recognize an undefined 'accumulation of events' doctrine[19] has less to do with the conviction that armed attacks must necessarily be uses of force that are closely connected in time and space, but rather with the possibilities of a facile rhetorical extension and an abuse of the concept. And indeed, as Kretzmer rightly notes, when the situation arose the ICJ did not hesitate to show its willingness to apply the 'accumulation of events' concept in anything but name.[20] So the question is not so much whether an 'accumulation of events doctrine' is recognized *in abstracto*, but

[13] Greenwood, 'Self-Defence', in R. Wolfrum (ed.), *Max Planck Encyclopaedia of Public Iinternational Law* (online edn, Apr. 2011), at para. 28; Gardam, *supra* note 4, at 160–161; T. Gazzini, *The Changing Rules on the Use of Force in International Law* (2005), at 148; R. Higgins, *Problems and Process* (1994), at 232; Gray, *supra* note 6, at 150.

[14] Kretzmer, *supra* note 2, at 262–264.

[15] Gardam, *supra* note 4, at 166–167; Gazzini, *supra* note 13, at 148; O. Corten, *The Law Against War* (2010), at 489; T. Ruys, *'Armed Attack' and Article 51 of the UN Charter: Customary Law and Practice* (2011), at 117–118; Greenwood, 'Self-Defence and the Conduct of International Armed Conflict', in Y. Dinstein and M. Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989), at 273, 280–281.

[16] Kretzmer, *supra* note 2, at 250 and 272–273.

[17] *Ibid.*, at 250 and 273.

[18] *Ibid.*, at 249, n. 76 with reference to Dinstein.

[19] *Ibid.*, at 243–244 and 263.

[20] *Oil Platforms, supra* note 1, at para. 64; Kretzmer, *supra* note 2, at 244.

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which – socially constructed – typical combinations of events characterize an armed attack and thus trigger the right of self-defence and determine its exercise.

In my view, there is wisdom in maintaining the 'halting and repelling theory' as the anchor for the interpretation and application of the right of self-defence, including as the benchmark for the application of the principle of proportionality. The original purpose of this theory was to exclude armed reprisals from the realm of self-defence.[21] This purpose is still valid, and it has become even more important today. If some reactions (or non-reactions) by states against attacks by non-state actors have been interpreted as indicating a certain re-legitimation of armed reprisals,[22] this is either because silence has – mistakenly – been counted as support,[23] or because the support of certain actions in self-defence was – rightly – tied to an increased insistence on compliance with the principle of proportionality as a way of safeguarding the 'halting and repelling' function.

The view that self-defence must be limited to 'halting and repelling' of an armed attack, and not become primarily preventive, deterrent, or punitive, disregards, according to Kretzmer, certain forms of recent practice.[24] Here again, the fact that states have sometimes refrained from criticizing actions allegedly taken in self-defence which appeared to have been driven by deterrent, preventive, or punitive motives is not necessarily an indication of an acceptance by most states of such motives as independent elements of justification. Such silence can more plausibly be explained by political considerations. In addition, the fact that states claiming to act in self-defence usually emphasize the repelling function of their action and downplay any deterrent, preventive, or punitive aspects[25] is a sign of the vitality of the 'halting and repelling' rationale and of the expectation of the international community that states should be able to explain their actions in such terms and, if they do not succeed, to pay the political price of appearing insincere. Hypocrisy is not only the homage vice pays to virtue, but the prospect of having to engage in hypocritical justifications has a certain deterrent effect on which the law counts as a means of enforcement. Thus, there is no reason to postulate a 'disparity between the formal rules and the actual practice'.[26]

In his discussion of the legitimate ends of self-defence, Kretzmer mixes (subjective) motives and the (more objective) character of acts purportedly taken in self-defence. The intention to prevent, deter, or to punish may have often played a role in the (subjective) calculations of states exercising the right of self-defence, but such goals should remain legally irrelevant motives behind what must be a sufficiently demonstrable and primary 'halting and repelling' character of any action which is sought to be recognized as self-defence. It is within this conceptual framework that the principle of proportionality can help to identify whether a particular use of force in reaction to an armed attack is still characterized by the demonstrable primary function of 'halting

[21] See *ibid.*, at 251–258.
[22] *Ibid.*, at 252–253.
[23] Gray, *supra* note 6, at 198.
[24] Kretzmer, *supra* note 2, at 258 and 262.
[25] *Ibid.*, at 257–258.
[26] *Ibid.*, at 258.

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and repelling', or whether the action is rather characterized by other motives and would then go beyond the limited emergency power which the right of self-defence preserves within the framework of the collective security system of the United Nations.

Admittedly, the distinction between the (primary and objective) repelling character of an action in self-defence and its (secondary and subjective) motives is not always clear or easy to make in our context. The room which this distinction leaves for deterrent, preventive, or punitive intentions is, however, considerably smaller than if they were to be admitted as legitimate aims and subsequently limited by the application of the principle of proportionality. While the idea and the image of 'halting and repelling' do leave some room for conceiving armed attacks and their responses as social constructions subject to common understanding, they also provide a serious limitation against temptations of states to act out motives which typically carry the risk of extending the use of counterforce into the realm of efforts to impose comprehensive solutions.[27] Kretzmer certainly raises burning questions of how to conceive certain forms of armed attack for the purpose of determining the possible range of armed cross-border responses. But the answers to those questions should ultimately be derived from the character of the right of self-defence as an emergency right which only goes as far as what is generally understood as 'halting and repelling'. It should not be derived from an abstract principle which can be made to fit by way of the recognition of different ends. Such different ends would then permit action whose effect is not demonstrable but must remain speculative. It is, of course, possible that Kretzmer's and the traditional approach would arrive at the same result in some situations, but this does not mean that their difference is merely semantic. Like Kretzmer,[28] however, I refrain from going further in attempting to answer more specific questions.

4 A New Approach to Self-defence?

A more abstract way of reading Kretzmer's article would be to say that his contribution is not so much about specific outcomes, but rather about a new general approach to the right of self-defence. This approach would consist of replacing the 'halting and repelling theory' with a more abstract and sophisticated proportionality-based standard that gives room for more ends of self-defence (preventive, deterring, and punitive), depending on specific characteristics of different situations.[29] In some cases, such a new 'all relevant factors and goals' approach would lead to broader possibilities for exercising the right of self-defence, in other cases it would lead to stricter limitations. This approach could have the advantage of being more conducive to adaptations of the law to new developments and situations.

[27] Punishment has been excluded as a permissible end in the law of state responsibility. It would therefore be an anomaly if it were recognized in the law of self-defence. See Commentary on Art. 36 of the ILC Articles on State Responsibility, reprinted in J. Crawford, *The International Law Commission's Articles on State Responsibility* (2002), at 219, para. 4.

[28] Kretzmer, *supra* note 2, at 279.

[29] *Ibid.*, at 267.

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There are indeed cases in which scholars, states, international public opinion, and even courts have not spent too much effort assessing whether certain measures allegedly taken in self-defence had actually and primarily served the purpose of halting and repelling an armed attack, but where they have rather emphasized that such measures – in any case – violated the principle of proportionality.[30] Such short-cut uses of the principle of proportionality often result from the rhetorical consideration to pick the obvious and to leave open, as far as possible, more difficult aspects of the case. Kretzmer correctly observes that the principle of proportionality cannot always be applied as easily and without further explanation as some have asserted.[31] But this does not justify the conclusion that the principle of proportionality should replace, or supersede, traditional limitative devices of the law of self-defence by allowing ends other than 'halting and repelling' as justifications.

A major problem with giving up the limitative effect of the 'halting and repelling' theory and exchanging it for a broader 'all relevant factors and goals' approach lies in the (still) typical conditions for the application of the right of self-defence. As Kretzmer correctly notes, the exercise of the right of self-defence is often accompanied by conflicting perspectives with respect to which it would be very difficult to find impartial adjudicators with sufficient authority to balance all relevant factors.[32] The application of the right of self-defence takes place in a social environment in which law is a common language. But this language is subject to substantial pressures when it comes to the assessment of specific situations. For the language of law to maintain a behaviour-orienting effect in such situations it is necessary that the applicable terms are as descriptive, illustrative, fact-oriented, and verifiable for all as possible. 'Armed attack' and even 'halting and repelling' (in contrast to 'deterring', 'preventing', and 'punishing') are such terms. On the other hand, the more the language of law uses terms which are normative, value-laden, and the result of complex thought operations, the more the issues become indeterminate (in the absence of impartial adjudicators) and thereby determinable by self-interested actors. Determinacy is therefore particularly important for the law of self-defence.

When the distinction between descriptive and normative terms is applied to Kretzmer's framing of the problem it becomes clear that his use of the terminology of 'ends' and 'theories' misleadingly suggests that the 'halting and repelling theory' is a theory or an end in the same sense as prevention, punishment, or deterrence would be theories or ends. But 'halting and repelling' barely goes beyond the description of the conditions of the right of self-defence itself, which – so to speak – carries its purpose on its face, whereas prevention, punishment, and deterrence are abstract parameters whose significance in specific cases requires the law-appliers to make and share many more normative assumptions. To accept such parameters as legitimate ends would therefore also change the character of the right of self-defence.

30 *Ibid.*, at 278–279.

31 *Ibid.*, at 279.

32 *Ibid.*, at 279.

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It is true, however, that a term which appears to be comparatively clear in itself may not continue to serve its purpose in the face of new situations or borderline cases. It may then be appropriate to emphasize more indeterminate concepts, like proportionality, to enable the law to make a transition to another context. But such abstract considerations only raise the question whether, in the case of the right of self-defence, the current relative uncertainty in certain types of situations produces greater drawbacks than a 'taking all relevant goals into account' approach. That approach, however, is likely to be reduced, in practice, to a self-serving rhetorical device. I am therefore not convinced that it would outweigh the continuing benefits of the traditional 'halting and repelling theory' which combines descriptive force with a plausible purpose. Ultimately, much depends on the acceptance of the assumption that the continuing international discourse reflects sufficient common understanding – in the sense of the perception of a great majority.

5 Different Perspectives and Common Understanding

The legitimate aspiration of (re-)constructing an up-to-date conceptual framework for the interpretation of the right of self-defence should not succumb to the temptation of being open for 'all relevant factors and goals'. The International Court of Justice, in particular, should not be misunderstood as having suggested, by its detailed and fact-oriented applications of the principle of proportionality on certain occasions,[33] that such an all relevant factors and goals approach is appropriate for the overall interpretation of the right of self-defence. The legitimate differences of opinion about the application of the right of self-defence should not be papered over by an approach which typically risks leading to mutual recriminations according to which the respective other side has not taken all relevant factors and goals into account. The principle of proportionality should rather be applied on the basis of its 'halting and repelling' rationale and continue to serve as a language in which states and other relevant actors exchange views on the specific problems of difficult cases. In that sense the principle of proportionality is open enough to 'fit all'. This principle cannot, however, contribute to changing or even multiplying the ends of a rule to which it applies.

[33] In particular *Oil Platforms, supra* note 1, at paras 43, 51, and 73–77; *Congo v. Uganda, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168, at para. 147; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)* [1986] ICJ Rep 14, at paras 194 and 237; see also *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [2005] ICJ Rep 226, at para. 41.

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