INTERNATIONAL LAW

International Law: A Shield for the Powerful or a Rule for All?

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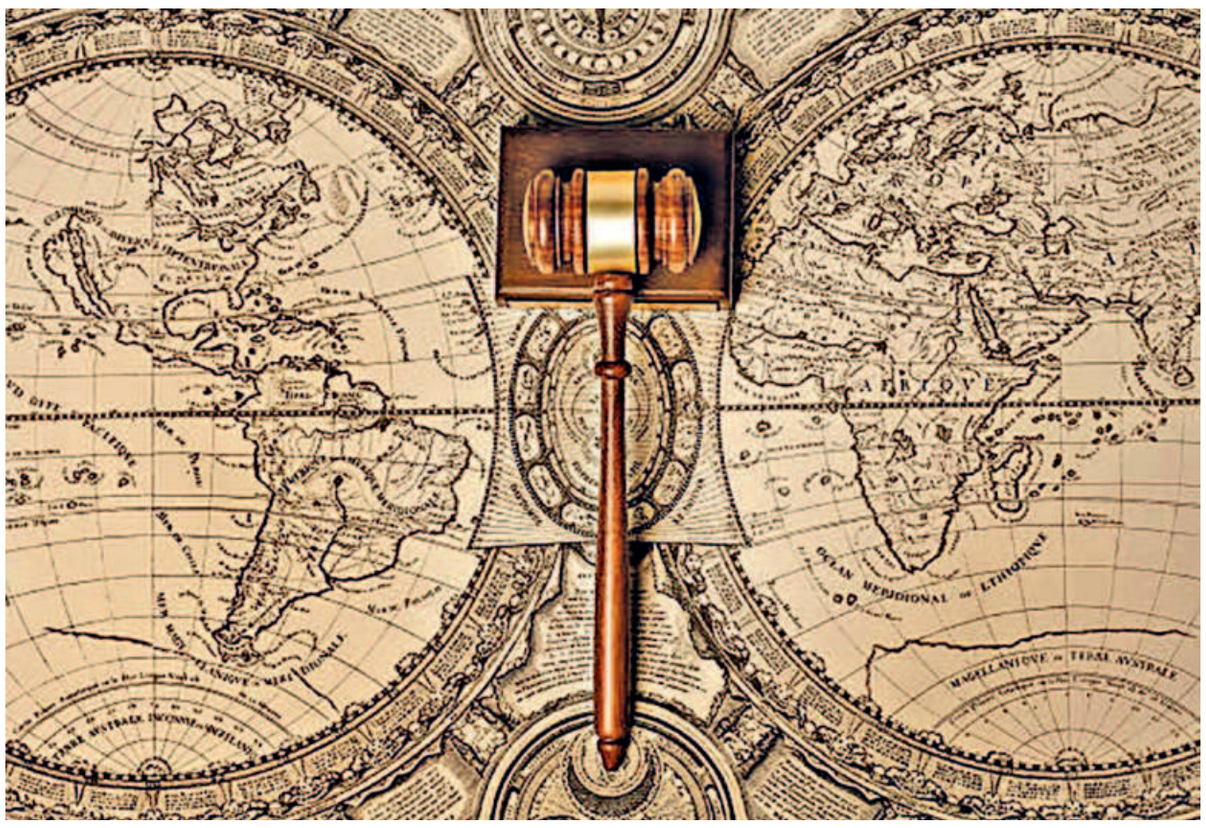
MD. IMAMUNUR RAHMAN

A compelling exchange once took place between Shami Chakrabarti, former president of the UK-based human rights organisation Liberty, and the eminent jurist Lord Thomas Bingham following his lecture on 'The Rule of Law'. Lord Bingham, a staunch defender of the principle, asserted that international law is, indeed, 'law'. Yet, as recent global events starkly demonstrate to us, for many the concept is a façade—a set of rules selectively applied and easily discarded by the powerful. This raises a critical question: in a world witnessing devastating conflicts such as the military operations in Gaza, and the recent strikes against Iran by Israel and the United Staes, is international law a universal principle, or an instrument of power?

The situation in Gaza presents a profound challenge to the core tenets of jus in bello, or international humanitarian law. Proponents of Israel's initial military actions ground their arguments in the right to self-defence under Article 51 of the UN Charter. The principles of distinction (civilian vs combatant), proportionality, and precaution, enshrined in the Geneva Conventions and their Additional Protocols, are not discretionary. The decimation of Gaza's hospitals, the use of starvation as a weapon of war through the prevention of humanitarian aid, and direct attacks on women, children, and aid workers are not mere collateral damage, but potential grave breaches of international law.

Many legal experts and international bodies argue that the sheer scale of civilian casualties and infrastructure destruction goes far beyond military necessity, constituting collective punishment—a practice explicitly forbidden by the Fourth Geneva



Convention. When UN agencies like UNRWA, the largest aid provider, are systematically dismantled, it signals a strategy that weaponises aid and directly contravenes the obligation of an occupying power to ensure the welfare of the occupied population.

Simultaneously, the recent military strikes against Iran by both Israel and the United States test the boundaries of jus ad bellum, the law governing the resort to force. The justification of pre-emptive or anticipatory self-defence against a future, non-imminent threat is not recognised by many states and scholars in international law. Even if it were not a controversial doctrine, for such an action to be lawful, the threat must be instant, overwhelming, leave no choice of means, and allow no moment for deliberation. Critics argue that these strikes fail to meet this stringent Caroline test, a standard rooted in customary international law. They contend that without clear evidence of an imminent attack—a high bar that many scholars believe has not been met—these actions represent a dangerous expansion of pre-emptive action that threatens to normalise unilateral military force. This fundamentally undermines Article 2(4) of the UN Charter, which prohibits the threat or use of force against the territorial integrity or political independence of any state. When a permanent member of the Security Council like the US engages in such actions without Council authorisation, it corrodes the very system it is mandated to uphold.

This perceived hypocrisy is fuelled by the critique advanced by Third World approaches to international law (TWAIL), which posits that international law is not failing, but rather functioning as it was designed: as a system conceived by colonial powers to perpetuate a particular world order. From this perspective, the selective application of legal principles is a feature, not a bug. The swift mobilisation of international mechanisms to address conflicts in Ukraine or East Timor stands in stark contrast to the decades long paralysis concerning Palestine. Legal definitions that seem clear, such as what constitutes an 'occupation' under Article 42 of the 1907 Hague Regulations, become mired in semantic debate, and actions deemed illegal by the Security Council, such as the expansion of settlements under Resolution 2334, continue with impunity. This dissonance leads to the conclusion that the legal framework itself is a tool wielded by the powerful to legitimise their violence and perpetuate dominance.

In the face of systemic failure and institutional inaction, the oppressed are left with a bitter question: what recourse remains when the law itself becomes an instrument of their subjugation? Western discourse routinely ignores UN General Assembly Resolution 37/43, which affirms the Palestinian people's 'inalienable right' to 'self-determination, national sovereignty, and return'. This is not rhetoric or incitement, but an accurate legal recognition— when the international order fails to uphold its own principles, resistance becomes a sanctioned response to oppression. The struggle, therefore, is not merely for the enforcement of existing law, but a struggle against a rigged legal order that appears to have forsaken its promise of universal justice.

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CONSTITUTIONAL REFORM

The principle of proportionality and fundamental rights

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Recently, the Constitution Reform Commission (CRC) has made certain reform proposals to be brought to the Constitution. Two main reforms are central to the CRC's proposal relating to fundamental rights. First, the CRC advocates for the justiciability of socio-economic rights, recognising them as enforceable legal rights subject to "progressive realisation" based on available resources. Judicial oversight would ensure that the state demonstrates reasonable efforts in fulfilling these rights.

Second, the CRC proposes a general balancing test for all fundamental rights restrictions, replacing rigid limitations with a more adaptable framework. This approach fosters stronger judicial scrutiny of governmental actions, promoting a rights-respecting legal order reflecting contemporary

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constitutional trends. The general balancing test has five parts and one of them is the principle of proportionality. The current piece will attempt to delve deeper into the jurisprudence of this principle.

The proportionality doctrine employs a four-pronged test to determine the justifiability of such restrictions. It examines: (1) Proper Purpose— the restriction must pursue a legitimate objective; (2) Rational Connection—a demonstrable link must exist between the restriction and its stated objective; (3) Necessity—the least restrictive means must be used; and (4) Proportionality Stricto Sensu—a careful balancing of the importance of the objective against the harm to the right. Another critical feature of proportionality is the concept of "limits on limitations," which prevents governmental overreach in restricting rights. This comprehensive analysis ensures that limitations are not arbitrary or excessive.

Traditionally, Bangladesh's judicial system relied on the Wednesbury Unreasonableness Test (WUT) for administrative review, as established in Associated Provincial Picture Houses Ltd v Wednesbury Corporation (1948). This test sets a high threshold for judicial intervention, limiting scrutiny to cases where a decision is so unreasonable that no rational authority could have made it. Critics argue that WUT grants excessive deference to governmental discretion, inadequately protecting fundamental rights. Proportionality offers a more structured and rigorous alternative, requiring courts to assess if administrative actions are proportionate to their objectives rather than merely avoiding extreme unreasonableness.

Despite its advantages, Bangladesh has been hesitant to formally adopt proportionality. For instance, in Shah Abdul Hannan v Bangladesh (2010), the Supreme Court of Bangladesh (SCOB) relied on WUT to review a government policy on natural resource exploration. The court ruled that intervention was warranted only in cases of unreasonableness, arbitrariness, bad faith, procedural impropriety, or constitutional/statutory violations. It emphasised on the non-justiciability of certain executive actions, invoked the Public Trust Doctrine to protect public resources, and upheld the separation of powers by avoiding interference in complex policy matters.

However, several landmark cases have implicitly used the doctrine of proportionality in Bangladesh. In Aruna Sen v Government of Bangladesh (1974), the court scrutinised the connection between detention grounds and the Special Powers Act's objectives, effectively applying proportionality's suitability and necessity components, while emphasising procedural fairness and ensuring detention was not arbitrary or excessive. In Sheikh Abdus Sabur v Returning Officer (1988), the court assessed the reasonableness of classifications and their link to legislative objectives, implicitly incorporating proportionality by balancing these objectives with equality guarantees and ensuring no disproportionate infringement on democratic rights.

In Bangladesh, courts often engage in proportionality— like analysis without formal adoption, balancing rigid rules and subjective discretion. This approach reflects a growing judicial commitment to structured rights protection while maintaining deference to democratic governance. Hence, the proposal of the CRC may further strengthen the enforcement or application of this principle.

While proportionality has gained traction globally, particularly post-World War II, it also faces some criticisms. One concern is stricto sensu balancing, which some argue allows the courts excessive discretion in weighing competing rights, potentially undermining democratic governance. Critics contend that proportionality risks judicially rebalancing constitutional provisions in ways that intrude on legislative authority and may erode constitutional rights by making them too easily subject to limitation through balancing exercises.

In Bangladesh, the future of proportionality depends on judicial engagement and potential formal recognition. Courts already apply proportionality-like reasoning under "reasonableness" doctrines, but clearer adoption would improve legal consistency and better protect fundamental rights. This trend aligns with efforts to strengthen judicial oversight and ensure governmental accountability.

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LAW LETTER

Tortious remedies for the rape survivors

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A prominent human rights organisation Ain o Shalish Kendra reported that there was 4,787 incidents of reported rape cases in Bangladesh from January 2020 to September 2024. This implies that nearly one woman was raped in every nine hours in Bangladesh. According to legal experts, even this horrific rape data is quite underrepresented because many cases go unreported as the survivors fear stigma, get discouraged by close ones, or harbour general distrust in the justice system. In these circumstances, in addition to giving punishments to the convict, tort remedies can be a pivotal tool as they focus on the victim and make the convict accountable for rehabilitation of the victim.

The current justice system for rape victims primarily focuses on retributive justice, which refers to punishing the perpetrator proportionate to the crime committed. But this process largely overlooks the rehabilitation of the victims. In Bangladesh, it becomes extremely difficult for rape victims to live through social stigma and social misperceptions. This is even more evident when the woman is underprivileged or lives in a rural area. Moreover, rape causes serious physical and mental harm and needs speedy treatment, which also involves excessive financial burden. However, the current justice system fails to address these issues. In Bangladesh, the legal framework addressing rape is regulated by sections 375, 376 of the Penal Code 1860 and Women and Children Repression Prevention Act 2000 (WCRPA). Section 9 of the WCRPA provides death penalty as the maximum punishment for rape. In some cases, the victim also receives minimal financial compensation.

Unlike the criminal justice system, where the main focus is to punish the offender, tortious remedies' primary focus is on compensating the victim for the harm caused in every way possible and for future support and betterment of the victim. There are several remedies under tort law e.g., compensatory damages and punitive damages. The best tort remedies that would be ideal for rape victims are compensatory damages covering medical bills, therapy costs, and lost earnings due to trauma, and also acknowledging the emotional distress, pain, and suffering of the victim. Punitive damages aim to deter similar incidents from taking place again.

In the case of British American Tobacco Bangladesh Company Ltd v Begum Shamsun Nahar (66 DLR (AD) 80), the fact was that the victim was sexually assaulted, and the company, instead of remedying the situation, fired her. The victim sought damages from the company in the amount of Taka 2,50,38,000.00. This is the first tort law-based case against sexual offence in Bangladesh, demonstrating the potential of tort remedies in addressing sexual harassment and gender-based violence. Beyond merely punishing the convict, monetary reparation allows victims to rebuild their lives. It provides the financial support needed to recover from the harms sustained, access necessary resources, and move forward with both strength and independence.

In the socio-economic context of Bangladesh, where rape is considered a shame for the victim and embarrassment for her family, where financial constraint causes women to have an early marriage, be deprived of education, and so on, tort remedies can play an important role in addition to the ordinary remedies within the criminal justice system.

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