CONFERENCE

60 Years Since the Adoption of the Universal Declaration of Human Rights and Genocide Convention

December 9-10 2008

Placing things in Proportion

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I. Introduction: The Limits of our Discussion

"Proportionality" has become a common term, widely used by human rights organizations, politicians, soldiers and laypersons. But its precise legal meaning is little understood. NGOs allege that a certain attack was disproportionate because civilians were killed; military officers retort that the action was proportional because the enemy fired first. From a legal standpoint, both claims are inaccurate, and based on irrelevant conceptions of proportionality.

The goal of this paper is not to justify or discredit the use of proportionality, but rather to clarify its parameters, and identify the problems confronting attempts to apply it, especially in the context of military operations.

My main claim in this paper is the following: Proportionality cannot be analyzed as a legal term disconnected from the institutions that apply it. Proportionality may be understood only in the context of its application by the courts. As said, my examples will draw from the area of military operations, where courts are *a-prior* more reluctant to intervene.

II Proportionality as a measure of constitutionality

The goal of proportionality is to provide human rights and international humanitarian law with a workable mechanism that can help solve the basic dilemma of human

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rights – the balancing act which needs to be taken when human rights conflict with each other and with state interests. Without such a mechanism lists of human rights remain exactly that – a catalogue of rights which cannot serve as a constitutional basis for actions. In order for the lists of rights to become an influential and efficient tool – they must include a gauge for declaring when they are to be preferred over other rights, and when they should give way to important state interests.
As the European court of Human Rights stated in the Klass case:

> [S]ome compromise between the requirements for defending democratic society and individual rights is *inherent* in the system of the Convention [cite omitted]. As the Preamble to the Convention states, "Fundamental Freedoms ... are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which (the Contracting States) depend". In the context of Article 8 (art. 8), this means that a *balance* must be sought between the exercise by the individual of the right guaranteed to him under paragraph 1 (art. 8-1) and the necessity under paragraph 2 (art. 8-2) to impose secret surveillance for the protection of the democratic society as a whole. (emphasis added)[1]

The balancing, however, may be accomplished with several tools. One of the main tools used by courts, committees and scholars is the "proportionality" test. It is on this balancing mechanism that I wish to focus.

[1] *Klass v. Germany*, Judgment of 6 Sept. 1978, at para. 59

III. Proportionality in human rights and humanitarian law instruments: A measure for ascertaining the truth

There are two basic ways to balance the classic conflict between human rights and state interests to which I referred above. We can term the first solution "vertical" - since it involves limiting human rights when they conflict with state interests. The other solution is "horizontal": it involves balancing human rights and state interests and requiring each of these to compromise. The vertical solution is quite clear – once it is ascertained that the state interests are real and concrete, human rights should give way to the extent required by the interests. I call this the *simple* or the *logical* solution. No system recognizing the importance of human rights could deny that an individual right should be limited only if there is a logical link between limiting the right and attaining the state goal. Classically, the Americans have adopted this solution when applying the "clear and present danger" test for limiting the freedom of speech. It also finds expression in the universal declaration of human rights:

> Article 29
>
> (2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law *solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.*

The proportionality gauge in this sense also appears in many human rights instruments. For example, article 4 of the International Covenant on Civil and Political Rights:

> ***Article 4***
>
> 1 In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant ***to the extent strictly required by the exigencies of the situation***…

One of the many possible explanations for this line of reasoning is *ascertaining the truth*. The theoretical concept is that interests should actually overcome rights. However, we would like to be sure that the interests are not merely an excuse for covering up illegitimate reasons for limiting the rights. We therefore require clear proof of the state interest. It is once the required probative level is attained that interests overcome rights.

In this case, then, "proportionality" is used as a synonym for "necessity" – the limit is approved only if it is really needed to protect some right.

IV. The Principle of Proportionality as a balancing act

The principle of proportionality can, however, also have a very different meaning - and be applied to balancing rights vis-a-vis interests. In some cases this kind of proportionality is termed proportionality *stricto sensu*.

Proportionality in this latter sense appears very rarely in international law instruments. One possible exception is its use in the First additional protocol of the Geneva Conventions of 1977, which includes several specific clauses considered to embody the proportionality concept. The clearest of these is Article 51(5), which states:

> 5. Among others, the following types of attacks are to be considered as indiscriminate [and therefore prohibited - AC]:
> (a) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and
> (b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

As can be seen, the principle of proportionality, as embodied in this and other similar articles in the first protocol, is based on the two complementary ideas described above. According to article 51(5)(a) measures have to be taken to limit the harm that efforts to attain military goals will cause to civilian populations. Geographically, the military target should be defined in the narrowest possible way. Similarly, the attacking power should consider whether there is a way to achieve the military objective with less or no damage to the civilian population. Thus employed, proportionality constitutes a logical extension of the principle of distinction: everything should be done to target exclusively military objectives.

The second section of Article 51(5) embodies the "balancing" facet of proportionality. It orders the attacking power to audit his proposed operation, comparing the foreseeable damage to the civilian population with the expected military advantage. This is not merely an extension of the principle of distinction. It requires the army to relinquish a military advantage if its exploitation threatens to cause disproportionate harm to the civilian population. Damage to the civilian population becomes prohibited once it is seen to be excessive in relation to the military advantage. It is this last requirement that has generated most of the problems with the concept of proportionality.

The use of proportionality in this second sense – that of balancing between rights and interests, although it appears in very few international instruments (treaties, conventions protocols) is very popular among courts applying international instruments.

V. Courts and the Use of Proportionality

In this short paper I cannot cover all the instances in which proportionality is used by courts applying international law. The court that makes most frequent use of this term is the European Court of Human Rights, which has used proportionality as a basis for its decision in many cases. Sometimes it uses the term in the first, logical sense; but on other occasions it has adopted a wider meaning –proportionality *stricto sensu*

Against that background, I would now like to review several specific cases – One discussed in the ECHR, another in the ICTY, and two more in the Israeli Supreme

Court. In all these cases, the courts used the proportionality test in very varying meanings. I shall attempt to extract some conclusions about the proper use of proportionality from these cases.

The McCann Case

The very famous case of McCann v. United Kingdom (1994)[2] involved an operation undertaken by a special UK military unit in Gibraltar against persons suspected of being involved in terrorist activities of the provisional IRA. The case resulted in the killing of the suspects, when the soldiers thought that they were about to detonate a bomb. The European Court of Human Rights examined whether the action of the British soldiers was in conformity with Article 2 of the European Convention on Human Rights which states:

> **ARTICLE 2**
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> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force *which is no more than absolutely necessary:*
> - *(a) in defence of any person from unlawful violence;*
> - *(b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;*
> - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The court stated in its judgment that in the interpretation of article 2(2) the "strictly proportionate" text should be used in examining whether the necessary amount of force was used.[3] The court declared that although the soldiers were justified in their use of force because of the information they had about the possibility of a bomb, the

[2] *McCann v. U.K.*, 21 E.H.R.R. 97 (1995)

[3] Article 194 to the judgment.

British authorities as a whole did not use their power in a proportionate manner because they had the ability to arrest the suspected terrorists long before the situation became one which required shooting to kill.

To me it seems clear that the court here uses the Proportionality test in the first of the meanings that I discussed earlier. I.e. – the court claims that a less injurious alternative could have been used.

However, let us look at some cases where the court used proportionality in the second of the senses that I mentioned, i.e. as a "balancing" mechanism, and attempt to assess what the court is actually doing.

The Targeted Killings case in the Israeli Supreme Court

In December 2006 the Israeli Supreme Court issued its judgment in the case of the Public Committee Against Torture v. Government of Israel.[4] In this case the court, in one of its most controversial decisions of the past decade, set limits to the use of the policy of targeted killings used by the IDF in the fight against Palestinian terrorism. The court explicitly states that the use of the policy is subject to the proportionality test *stricto sensu*- what we termed the balancing face of proportionality. The Israeli Supreme Court approved the use of targeted killings in the current conflict between Israel and the Palestinians. However, the court declared that the use of the policy of targeted killings should be limited by the test of proportionality, applied in both senses. The court declared the need to minimize the 'collateral damage' sustained by civilians not taking a direct part in hostilities (referred to by the HCJ as 'innocent civilians')[5] in the course of targeted killing operations.

However, with regard to the actual use of proportionality in this sense, the Court offered only limited guidance, referring again to ambiguous or subjective considerations: 1) the desired military advantage has to be both "direct and anticipated";[6] 2) a balance must be struck between the "state's

[4] H.C.J. 769/02 *The Public Committee Against Torture in Israel v. Gov't of Israel,* judgment of 14 Dec. 2006, <http://elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf > (hereinafter *Public Committee*).
[5] *Public Committee, supra* note 4, at para. 45.
[6] *Ibid,* ibid. This legal standard appears to derive from the language of art. 51(5)(b) of AP-I.

duty to protect the lives of its soldiers and civilians" and its "duty to protect the lives of innocent civilians harmed during attacks on terrorists".[7]

Thus described, the principle of proportionality raises some serious, perhaps even insurmountable difficulties: What value should be assigned to each of the competing variables?[8] In particular, how are we to assess the worth of human lives on both sides of the conflict? Are belligerents entitled to protect their own citizens or soldiers at the cost of endangering uninvolved enemy civilians, and at what ratio?[9] Of course, these moral dilemmas are compounded by practical difficulties: Since the proportionality test is applied *ex ante,* the military and humanitarian effects of the attack, as well as the harm it was designed to prevent, are merely speculative and ultimately depend on subjective risk assessments.

The result of all of this situation is that, as the special report to the prosecutor of ICTY regarding the NATO campaign in Yugoslavia pointed out: "[i]t is much easier to formulate the principle of proportionality in general terms than it is to apply it to a particular set of circumstances".[10] In fact, one may argue that the inability to offer more precise guidelines derives from very nature of the principle of proportionality – an open-ended legal standard designed to accommodate an indefinite number of changing circumstances and not a hard and fast set of rules. The HCJ's failure to offer more precise guidance might therefore be understandable, as it stemmed from the nature of the petition it was presented with – a general challenge to the *Targeted Killings* policy – as opposed to a specific challenge to a certain operation.[11]

Elsewhere, Yuval Shany and I have argued that the real importance of the targeted killing decision lies not in the imposition of the proportionality test, but rather in its institutional ramifications.[12] The operative part of the court's decision in this case

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[7] *Public Committee, supra* note 4, at para. 46.
[8] W.J. Fenrick, 'Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia', 12 *E.J.I.L.* (2001) 489, 499.
[9] See E. Benvenisti, 'Human Dignity in Combat: The Duty to Spare Enemy Civilians', 39 *Isr. L. Rev.* (2006) 81, 92-93.
[10] Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 39 I.L.M. 1257 (2000)
[11] However, it may be noted that another petition challenging the Prosecutor's office decision not to indict high ranking army commanders for their involvement in the targeted killing operation directed against Selah Shehada, the head of the military wing of Hamas, which resulted in the death of 15 civilians, is still pending before the HCJ (H.C.J. 8794/03 *Yoav Hess v. IDF Judge Advocate General*).
[12] Amichai Cohen & Yuval Shany : "A development of Modest Proportions" 5 JICJ (2007)

required the state to institute specific ex ante proceedings before conducting any targeted killing operation.

Even more significant is Barak's introduction of the concept of *ex post* review in the *Targeted Killings* cases – a review process that is ultimately subject to judicial supervision.[13] Here too, the specific characteristics of the review process that Barak set out in order to ensure the correct identification of civilians taking a direct part in hostilities – independence and the need to pay compensation to innocent victims in appropriate cases – would apply *a fortiori* to investigations of military operations entailing collateral damage, i.e., harm to innocent civilians.

In sum, it seems to me clear that in the *Targeted Killings* case the use of proportionality as a balancing test was intended to attain institutional supervision - with the possibility of review by court – over these complicated military operations.

The Blaskic Case of the ICTY

Another case in which a court used the term proportionality in the balancing sense with regards to military operations, was the *Blaskic* case, which dealt with an incident in the war between Croatia and Bosnia in 1993. Here, the ICTY declared that the Croatian attack on the Muslim area in the town of Vitez on April 1993 was a war crime because a *disproportional* amount of force was used.

Taken at its face value, this seems to have been a very problematic decision. Partly, this was because it seems to have implied that the fact that many civilians were killed is in itself a proof that the attacks were disproportionate.[14] If that was so, then the court seems to have created a new norm, a need for *the proportionality of consequences.* But when the decision is studied in its full context, a different picture emerges. It then becomes clear that the court was using proportionality in a completely different manner – as an institutional tool to refute a clearly false claim by the attacking party.

Courts are supposed to decide on matters that are by their nature impossible to verify. For example – in the context of illegal attacks because they are prohibited by the

[13] *Public Committee supra* note 4, at para. 54.
[14] *Prosecutor v. Blaškić*, Judgment of Trial Chamber of 3 March 2000, at para. 507

principle of distinction, the court is required to decide that the intention of the attacking party was to cause harm to civilians. The intention of the attacking army is of course something that is very tricky to prove. Hence, the court is required to use proportionality as a probative mechanism and, in the *Blaskic* case to show that the attack on Vitez was undeniably *directed against civilians*. In order to prove this intention, the court cited the staggering number of civilian casualties, and especially the almost complete absence of military casualties. The real claim of the court is the violation of the principle of distinction, proportionality was used here only as an additional proof for this assertion.

The Separation Barrier cases in the Israeli Supreme Court

The separation barrier cases in the Israeli Supreme Court are varied, and cover several difficult issues. In the main, however, they all discuss Israel's right to build a fence/wall/barrier in the territories.

One such instance was the *Beit Sourik* case,[15] which in fact generated the first principled discussion of the separation barrier. In this case, the court accepts the argument that the main purpose behind the construction of the fence is not political, but security considerations - i.e. providing protection to Israeli citizens by hindering the passage of terrorists from the territories into Israel proper, and not a political reason. Having made that declaration, the court moved to an evaluation of the the specific geographical route taken by the separation barrier. In this discussion, the court made it clear that it was using proportionality in the second of the senses set out in this paper. In other words, the context was one of balancing, or *proportionality stricto sensu:* the harm caused by the measure should stand in reasonable proportion to the anticipated military benefits thereof.[16]

The separation barrier cases of the Israeli Supreme Court are obviously distinctive from other cases dealing with the balance between human rights and military necessities. The soldier is not required to make a decision on the spot. There is ample

[15] H.C.J. 2056/04 *Beit Sourik Village Council v. Gov't of Israel*, 58(4) P.D. 807, <http://elyon1.court.gov.il/files_eng/04/560/020/a28/04020560.a28.pdf>

[16] *Ibid*, at para. 41. For a criticism of the application of the third test of proportionality in the separation barrier cases, see: M. Cohen-Eliya, 'The Formal and Substantive Meanings of Proportionality in the Supreme Court's Decision regarding the Security Fence', 38 *Isr. L. Rev.* (2005) 262, 288-289.

time for review by the court, and the court showed a willingness to review almost every kilometer, almost every meter of the route of the barrier. The separation barrier is therefore a military operation of a specific kind – one which is planned a long time beforehand, and therefore judicial review of the route is quite feasible

In the *Beit Sourik* case the court applied this test in what might be termed a 'relative manner': It was willing to regard a segment of the route of the barrier as disproportionate when convinced that there existed an alternative route that, although providing slightly less security for the State of Israel, was considerably less harmful to the Palestinians residing in the area. Perhaps, not coincidentally, these tests of proportionality also feature in HCJ's constitutional law and administrative law jurisprudence,[17] the result effectively being the full harmonization of the tests of proportionality under IHL and domestic Israeli law.[18]

Considering the remarks I made earlier about the possibility of actually balancing rights and military interests which I detailed earlier, the separation barrier cases seem very problematic, to say the least. How is it possible for the court to evaluate the actual "coorect" route?

Perhaps the court has some secret answer to the questions I raised earlier, or perhaps the court prefers to ignore them. However, I think that there are some more generous readings possible:

One possibility I suggest that the use of proportionality by the Israeli Supreme Court in the separation barrier cases is actually very close to its use by the ICTY in the *Blaskic* case. In the former, the court was highly suspicious of the military justification of the barrier's route, and used the proportionality test as a tool to

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[17] See e.g., H.C.J. 6055/95 *Tzemach v. Minister of Defense*, 53(5) P.D. 241, available at: http://elyon1.court.gov.il/files_eng/95/550/060/i15/95060550.i15.pdf>; H.C.J. 5016/96 *Horev v. Minister of Transportation*, 51(4) P.D. 1, <http://elyon1.court.gov.il/files_eng/96/160/050/a01/96050160.a01.pdf>.

[18] Indeed, in a number of cases, the HCJ maintained that the application of proportionality would lead to similar results under international and Israeli law. *Beit Sourik*, *supra* note 8; H.C.J. *Al-Ram Local Council v. Gov't of Israel*, Judgment of 13 December 2006, <http://elyon1.court.gov.il/files/04/880/054/a59/04054880.a59.pdf> (in Hebrew), at para. 46. The fusion of tests of proportionality national law and IHL may be linked also to the growing influence on IHL of human rights law (which, in turn, influences domestic constitutional and administrative law). For a discussion on the parallel application of IHL and international human rights law, see e.g., O. Ben-Naftali and Y. Shany, 'Living in Denial: The Application of Human Rights in the Occupies Territories', 37 *Isr. L. Rev.* (2003-2004) 17)..

identify those areas in which construction reflected *bona fide* security interests, as opposed to those where the real reasons were political.

A second possible reading of this decision is that since, as I said, the separation barrier cases are ones in which it is feasible for the court to review the whole route of the barrier. It therefore part of the institutional attempt of the court to control military operations.

VI. Conclusion: some observations on proportionality

What do these abovementioned cases teach us about the use of proportionality in military operations?

I submit that two main conclusions can be drawn from the cases that we have discussed, regarding the balancing between **military operations and human rights.**

The first is that the second sense of the proportionality norm – as a balancing gauge – is far too complex to be applied by soldiers on the ground. As a rule, therefore, courts do not expect soldiers on the ground to make any such application, and I submit that those which do so are acting erroneously.

My second observation is that proportionality, in the balancing sense, actually serves two completely different goals. First, is serves as a measure for ascertaining the truthfulness of security claims by the military. If the declared state interest is the true reason for the military operation, then the action should be limited to the ones specifically justified by the operations.

Second, proportionality constitutes a judicial tool that enables the courts to intervene in military operations, without taking away the flexibility which they wish to preserve in such cases. As has been shown above, courts used proportionality in the balancing sense for the following purposes: to impose on the military a requirement for investigation; to reject claims which seem preposterous; to intervene in a major infrastructure project without rejecting the claim that it is military in nature. In all these cases the court used the proportionality test as a way to impose a limited review, not confined by clearer norms. On the other hand, since such a review is not based on

strict norms, the court is left with a much needed flexibility, required by the nature of military operations.

Hence, proportionality may best be seen as part of the on going institutional struggle between courts and the armed forces over the control of military operations. It is a norm that may be best understood in this political aspect – an attempt on the part of the court to strengthen review mechanisms (and military lawyers), and to provide further tools for future courts to impose human rights norms on the military. International human rights norms here, as in many other instances, are nothing more, and nothing less, than the instruments of this struggle.
