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Amichai Cohen and David Zlotogorski. *Proportionality in International Humanitarian Law: Consequences, Precautions, and Procedures*. Oxford University Press, 2021. Pp. 280. £80.00. ISBN: 9780197556726.

In recent years, proportionality in international humanitarian law (IHL) has received renewed attention from scholars and practitioners. Monographs on the subject were

- ¹¹ See, e.g., STEPHEN HOLMES, *PASSIONS AND CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY* (1997); WALTER E. MURPHY, *CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER* (2008).
- ¹² By, for example, preventing the ruling majority from manipulating the electoral system to limit party political competition. For an example of a judicial intervention based on such a rationale, see Nález Ústavního soudu ze dne 24.01.2001 (ÚS) [Decision of the Constitutional Court of Jan. 24, 2001], sp.zn. Pl. ÚS 42/2000 publ. in: *Sbírka nálezů a usnesení ÚS*, sv. 21, č. 16 (Czech), discussed in Keith Crawford, *A System of Disproportional Representation: The Proposed Electoral Law for the Czech Republic*, 38 REPRESENTATION 46 (2001).

written by Larry May and Michael Newton, and by Jeroen van den Boogaard.¹ The International Committee of the Red Cross (ICRC) published a lengthy report based on an international meeting of experts on proportionality, and another report was published by Chatham House.²

In view of this, one might be forgiven for asking whether there is a need for another monograph on this topic. In the first sentence of *Proportionality in International Humanitarian Law: Consequences, Precautions, and Procedures*, Amichai Cohen and David Zlotogorski explain why the answer to that question is in the affirmative. This is because “[t]here are few concepts in international law that both captivate and stir bitter debates as much as the application of the principle of proportionality in contemporary armed conflict” (at 3).

The book aims to describe proportionality as it is currently understood in IHL. It consists of fourteen chapters in total. These chapters are grouped in three parts. Part I of the book, entitled “General Concepts,” presents the general concept of proportionality in IHL, including a discussion of the ethical and constitutional foundations of proportionality in IHL, as well as providing a general overview of proportionality in IHL. Part II of the book, entitled “The Practical Application of Proportionality,” discusses the major questions, disagreements, and opinions that have been raised regarding the actual implementation of proportionality in modern IHL. This includes chapters on the two values to be weighed in a proportionality analysis, military advantage and incidental civilian harm. Part III of the book is entitled “Understanding Proportionality.” This part of the book presents the authors’ view on proportionality, focusing in particular on the implementation of proportionality through procedures.

The book makes clear that there are different views on, and interpretations of, many aspects of the interpretation and application of the principle of proportionality. In particular, in Part II, which according to the authors is the backbone of the book, a great many aspects of the principle are analyzed extensively. The authors set out the different views on these aspects by states and scholars. In many cases, they also set out their own position, providing reasoning for that position which is frequently very convincing.

The analysis in Part II leads the authors to the conclusion that almost every issue relating to the correct application of proportionality gives rise to serious disagreement. This is not only based on a substantive legal analysis of different aspects of proportionality, but also on a discussion in chapter 11 of empirical research on the application of the principle of proportionality by academic experts in IHL and military officers. Interestingly, they show that this research found that experts and officers did not reach reasonable convergence levels on the maximum number of

¹ MICHAEL NEWTON & LARRY MAY, *PROPORTIONALITY IN INTERNATIONAL LAW* (2014); JEROEN VAN DEN BOOGAARD, *PROPORTIONALITY IN INTERNATIONAL HUMANITARIAN LAW: PRINCIPLE, RULE AND PRACTICE* (2019) (Ph.D. dissertation, University of Amsterdam) (on file with author).

² INT’L COMM. RED CROSS, *INTERNATIONAL MEETING REPORT: THE PRINCIPLE OF PROPORTIONALITY IN THE RULES GOVERNING THE CONDUCT OF HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW* (2016); EMANUELA-CHIARA GILLARD, *PROPORTIONALITY IN THE CONDUCT OF HOSTILITIES: THE INCIDENTAL HARM SIDE OF THE ASSESSMENT* (2018).

civilian lives that might be risked in scenarios presented to them. Chapter 11 also discusses an attempt to create a formula for calculating proportionality, of which the authors consider that it is doubtful whether the formula actually provides practical assistance.

The authors appear to have little confidence that disagreements on the interpretation and application of the principle of proportionality can be resolved any time soon. Indeed, they go so far as to state that perhaps the principle is inherently vague, and intentionally so.

This leads them to argue that proportionality is not so much about the numbers, as about ensuring the undertaking of a process that weighs competing interests. The main argument in the book is that application of proportionality should focus on what the authors call the procedural aspects of proportionality. By this they refer to the precautions taken before an attack, the decision-making process, and the institutions put in place in order to verify the rule of proportionality was properly applied (at 177).

The authors offer three justifications for their emphasis on a procedural approach to proportionality. These are that:

- Procedures create a “zone of reasonableness”;
- Procedural and bureaucratic mechanisms create clarity concerning who takes decisions and is accountable for those decisions;
- Organizational culture: The requirement that decisions be reached in accordance with clear guidelines and procedures ensures that more people are involved in the decision-making process. This means that a wider and more diverse range of opinions and interests will be reflected in the decision-making process.

These are indeed strong arguments for attaching importance to procedures in the application of proportionality. Other arguments can easily be added. One very important one that I would add is that the use of procedures serves to institutionalize the application of proportionality. In this way, it can be ensured that all the aspects that need to be taken into account in applying proportionality are taken into account. Another reason is that the use of procedures can help those in the field apply proportionality without having to be intimately familiar with the complex legal debates on interpretation of all the aspects of proportionality.

An emphasis on a procedural approach should not be taken too far, however. In their conclusion, Cohen and Zlotogorski state that the procedural approach is the best strategy to deal with the existing vagueness of proportionality (at 232). They seem to suggest that other strategies, which try to clarify aspects of proportionality either in general or in different categories of armed conflicts, are not useful and should not be pursued. In particular, they contrast the procedural approach to two other strategies (at 232). One of these strategies is an attempt to resolve all disagreements, and create a more crystalized application of proportionality. The other is to seek to differentiate between different categories of armed conflicts, and clarify how to apply proportionality in each category. I wonder whether it would not be better to combine strategies, rather than putting all eggs in the basket of a procedural approach, as the authors seem to suggest. The drafters of procedures will have

to rely on proportionality and its different aspects, and in doing so will necessarily have to take positions on interpretation of those aspects. Cohen and Zlotogorski correctly state that it is doubtful whether it is feasible to expect all states to reach consensus regarding a more crystalized application of proportionality. It may be possible, however, to reach more agreement on particular substantive aspects, even if consensus among all states is unattainable.

Like the strategy of attempting to solve disagreements and create a more crystalized application of proportionality, the strategy to differentiate between different categories of armed conflicts and attempt to clarify how to apply proportionality in each category should not be discarded too easily. This is an approach that has been proposed by Newton and May, who have formulated a number of “rules of thumb” that should guide the decision regarding the proportionality of a specific activity, and which take into account differences between various categories of armed conflict. The authors doubt whether Newton and May have sufficiently specified how the “rules of thumb” should be applied for them to be useful in the practical application of proportionality. However this may be, the authors themselves recognize (in chapter 3) that the framework proposed by Newton and May highlights that application of proportionality cannot be assumed to be identical in all cases. By “cases,” they seem to refer at least in part to different categories of armed conflicts. This is illustrated, *inter alia*, in chapter 5, where Cohen and Zlotogorski argue that a distinction between different types of conflicts might provide a rationale for using different standards to determine how much of an imbalance between military advantage and civilian harm there must be to conclude that an attack is disproportionate.

A chapter in the book that deserves to be mentioned separately is chapter 13, which deals with judicial review and investigations. This chapter contains some interesting and innovative ideas and suggestions, some of which undoubtedly will be controversial. One such suggestion is that *ex ante* oversight of proportionality decisions by the armed forces could be provided by a committee of experts to evaluate the legality (and morality) of all standing orders and rules of engagement (RoE), focusing on the application of the principle of proportionality. This is an innovative proposal, although I wonder whether states would be willing to subject standing orders and RoE to the scrutiny of such a committee external to the armed forces. In any event, members of such a committee would need to have expertise in military operations in order to be able to understand the military-operational context of orders and RoE.

With regard to *ex post* reviews of decisions on proportionality, the authors identify several problems with a criminal law approach to such review. One of these is that in practice there is a reluctance to prosecute alleged breaches of proportionality both at the domestic and at the international level. It may be true that there are few prosecutions of alleged violations of proportionality, but it is questionable at best whether this should be a reason in itself not to pursue such prosecutions. The authors suggest that an alternative to a criminal law response to allegations or suspicions of violations of proportionality can be found in the form of commissions of inquiry (at 216). The commissions they have in mind do not seem to be international commissions of inquiry such as those established by the UN Human Rights Council to investigate

potential violations of human rights and IHL in, for example, the Occupied Palestinian Territory and Syria. Rather, they seem to be referring to commissions established by one state (at 217), such as the commission established by Israel to review the legality of the targeted killing of a Hamas commander in 2002. Cohen and Zlotogorski acknowledge the risk of states manipulating such a commission's mandate or composition to deflect or avoid responsibility. To limit this risk, they suggest that the investigative tasks be entrusted to permanent investigative bodies that would operate in addition to, or as a part of, national humanitarian law commissions or human rights institutions. The suggestion for a commission of inquiry for the purpose of *ex post* review of decisions on proportionality is innovative. It is not quite clear whether the authors suggest that such commissions would replace criminal investigations, or that they can be employed alongside criminal investigations. If the former is the case, this may fall short of what IHL requires. The authors refer to the obligation of states to exercise criminal jurisdiction over grave breaches of the Geneva Conventions and Additional Protocol I to those conventions. They distinguish this from the obligation for states to suppress other violations. However, there is now broad support for the view that states not only have an obligation to prosecute grave breaches, but also other war crimes, including violations of proportionality. This implies the need for a criminal investigation.

In conclusion, this book is an important contribution to the literature on proportionality. It provides a very useful examination of the current debates over the meaning of different aspects of proportionality. In addition, it contains a strong argument for looking at proportionality from a procedural perspective. Although this may not be the only strategy that should be pursued to confront the vagueness of proportionality, the authors make a convincing case that it is a very important one, if not the most important.

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