A Simple Truth about IHL:
Responding to Prof. Nolte's "Simple or Sophisticated?
The Principle of Proportionality and International Humanitarian Law"

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The article

Prof. Nolte's paper starts with the proposition that the principle of proportionality is a) a proxy for justice – i.e. an ideal; b) a norm which either corrects the legislature's work or complements it (esp. when the norm is drafted as a standard, as opposed to a rule); c) a standard which is increasingly being viewed as universal in nature – as a more or less uniform method for the application of international human rights. In this last context, Nolte explains why is the principle of proportionality an attractive candidate for universal application:

> [O]n its face it is abstract and formal, and it thereby suggests to fulfill the promise of the law to be "objective" and neutral. But it also invites substantive, value-based considerations. In addition it is a concept which is process- *and* goal-oriented without necessarily claiming to fully predetermine outcomes. It evokes a common understanding, but at the same time it refers back to the specifics. It can be understood as a principle *and* as a rule, depending on the context in which it is applied, the case to which it is applied, and the aspect of the case to which it is applied

The question that Nolte then raises is whether proportionality analysis can indeed produce determinate outcomes. In particular, he asks whether the third prong of the proportionality test – the *strict senso* test – should be avoided whenever possible (as argued by Bernhard Schlink – and, I should note, by Dr. Moshe Cohen-Eliya), in order to minimize undisciplined application of the proportionality principle: Such undisciplined application by the judiciary may undercut the predictability of the law and trespass on the constitutional roles of the legislative and executive branches of government.

Nolte responds to this approach by referring to the twin attributes of proportionality: a search for ideal (justice) and sophistication. Thus, at least in some contexts, the benefits associated with the principle (which the third prong of the test most faithfully reflects) outweigh the opposing social costs.

He then looks, in light of these general observations, at the application in international law of the principle and offers two distinctions – between the thin and thick and between the simple and sophisticated versions of the principle. Using the *Nauliaa* case (1928) – a case dealing with the proportionality of armed reprisals – as indicative of these distinctions, Nolte posits that by refusing to engage in detailed proportionality analysis, the tribunal applies a "thin" version of proportionality – essentially adopting a "clear disproportionate" standard to criticize the German military action. Under this form of analysis, the "thin" standard aims to identify the common area of illegality under all proportionality theories.

The second distinction Nolte offers on the basis of the *Nauliaa* decision is between "simple" and sophisticated" methods of analysis. A simple analysis would take into account only a few, highly visible or manifest factors suggesting proportionality or lack thereof; at the same a more sophisticated analysis would consider many other factors that may be relevant to the proportionality analysis. Hence, one can distinguish between different substantive and methodological forms of applications of the proportionality principle. These distinctions appertain to the need to persuade relevant actors that certain outcomes are "right" outcomes and have been properly reached.

Presumably, more crude analysis and outcomes would be warranted in more heterogeneous societies – where there is less agreement on substance and form. But Nolte argues that the application of the thin and simple versions of complementarity at the international level are warranted not because of its lack of homogeneity, but rather because of its lack of institutions and lack of a "shared vision of the common interest". This is particularly so in IHL – where self-enforcement is the norm. Hence, the requirements of distinction and proportionality are premised on "thin" and "simple" versions of proportionality. This is confirmed by the reference in IHL rules on proportionality to specific and visible factors, such as "direct participation in hostilities" or "excessive" harm in relation to "concrete and direct military advantage".

But IHL may also be amenable for "thick" and "sophisticated" analysis – that is, if an institution were to construe the specific articulations of distinction and proportionality as "emanations" of the more abstract notions of distinction and proportionality. In other words, a two-layered system may be put in place employing the "thick" over the "thin" and the "sophisticated" over the "simple". This is, in effect, what the Israeli Supreme Court has done, applying "thick" and "sophisticated proportionality" analysis to IHL. Such an approach allows, *inter alia*, for the application of the principles of distinction and proportionality in light of new realities on the battlefield.

The greater sophistication of the Court's analysis – as illustrated in the *Targeted Killings* case – thus allows for factoring in within proportionality analysis of the functions of the various participants in hostilities, the decision making procedures, and the evidentiary standards used by the military. At the same time, the principles are thickened by requiring the authorities to take a hard look at standards (although Nolte acknowledges that this may not necessarily increase protections to individuals on the ground).

The price to be paid for this normative development is loss of clarity in all situations where judicial review is unavailable. It may also lead to a strange outcome, where more latitude in the application of the proportionality principle would actually be granted to states offering judicial review that require more elaborated procedures for identifying participants in hostilities, than to states that do not offer such a review. The latter states may be limited to relying on clearly visible indications of participation on hostilities such as actual use of weapons during hostilities. Moreover, states belonging to the second category may selectively invoke the findings of state belonging to the first category – that may amount to "taking the sweet without the bitter" (judicial review).

So, although the Israeli Court decision may fulfill the ideal of issuing just decisions in its application of proportionality, one should take into account the fact that the standards developed by it would be typically employed in weaker institutional contexts, to which the "thin" and "simple" versions of proportionality are more apposite. So, excessive sophistication may erode the "bright lines" which the legislators tried to establish in IHL.

The Response

I find Prof. Nolte's piece to be extremely thought provoking and interesting. By introducing the dichotomy between "simple and sophisticated" analysis and "thin and

thick" substantive contents, and tying them in to institutional considerations, Nolte no doubt advances our thinking about rule-creation and rule-application in the field of IHL. The problem I find however with his approach is two-fold: First, I question the links he draws between the two sets of categories and their humanitarian protection implications and second, I question the way these categories are then linked to notions of compliance.

It appears that Nolte's intuition is as follows: a "simple" analysis of proportionality has the potential of *improving* humanitarian protections because it casts a wide net of protections (everyone who is not "directly" participating in hostilities) and because of its ease of application, which may improve compliance. But our intuition concerning the "thin" version of proportionality may be exactly the opposite – *Nauilaa* appears in fact to stand for a "clearly excessive" standard, which severely limits humanitarian protections, limited state conduct in extreme cases only. So if the choice between package deals is either "thin and simple" or "thick and sophisticated" it appears unlikely that the first "package" will necessarily entail better consequences of humanitarian protection. Quite the contrary, I would think.

In addition, one may challenge Nolte's intuition on the protection-diluting effects of sophisticated analysis. First, the functional approach may indeed include certain new individuals within the "ring" of direct participants (and I believe that the Israeli Supreme Court has indeed went too far in this regard in certain aspects of the decision, such as the parts pertaining to the role of intelligence gatherers or voluntary human shields), but it may also remove some other individuals from the "ring" of direct participants (e.g., low-level providers of logistical services, non-voluntary human shields). More importantly, Nolte himself accepts that the ultimate outcome of the strengthening of procedural and evidentiary requirements will entail higher standards of protection. So, at the end of the day, it is doubtful whether a move to a sophisticated analysis of proportionality results in a net removal of humanitarian protections.

But the heart of Nolte's argument goes to institutional considerations. While Nolte appears to focus on the risk of abuse of sophisticated standards in the absence of adequate institutional safeguards, one could have also made the argument that the minimalism of the "thin" version of proportionality bodes well for enforcement – at least, when compared to the "thick" version.

The first question which arises, empirically, is whether Nolte is right that institutional oversight is the exception, not the rule. Here, I would dare to say, that there appears to be growing willingness on the part of some other national courts (e.g., in the UK) to review more than before some aspects of military operations or occupation situations (e.g., *Baci, Al Skeini*). More significant is the increased relevance of international courts - regional human rights courts (most notably, the ECtHR), the international criminal courts and the international court of justice, in examining the proportionality of the use of force – arguably according to the "thick and sophisticated" model. Moreover, the increased influence of international human rights agencies (such as the human rights rapporteues) and NGOs, invites force-applying states to enter into a dialogue with the international community (or at least, its self-declared proxies), also on the basis of the "thick and sophisticated" understandings of proportionality. So, while the extent of involvement of Israel's Supreme Court may be unique – it has to be borne in mind that it serves in Israel as a substitute to international institutions to which many other countries are accountable to.

Furthermore, Nolte appears to take the position that the existing factors, under the "simple" analysis, are less prone to abuse that the factors under the more "sophisticated" analysis. This may be true – but, arguably, the existing standards of "direct participation" and "excessive in relation to the concrete and direct military advantage" are sufficiently malleable and are in themselves open to abuse. As the Torture Memos show, even much more clear and stringent rules are open to abuse; hence *a fortiori* there is a risk of abuse of legal standards such as "excessive" or "direct". In other words, moving from "simple" to "sophisticated" analysis may only marginally increase the actual abuse of the relevant legal standards. At the same time, "sophisticated" analysis offers, as Nolte, acknowledges a better substantive fit between law and reality and improved procedural safeguards. So, one could argue that a move – whenever possible – to "sophisticated" analysis is *pareto optimal* or close thereto – it would not significantly increase instances of abuse but will provide a more just and effective application of proportionality by law-applying institutions.

So, I agree with Nolte that institutions matter a lot; I also agree with him that it make sense to utilize more rules and fewer standards in a weak institutional environment. Where I disagree with him is on the actual implications of the move to "sophisticated" analysis on the risk of abuse and argue that the risk remains sufficiently high under both

versions of the analysis. A negligible minimization of the risk of abuse does not justify tying the hands of institutions in a way that reduces the impact of the proportionally principle – especially, if institutions are more and more the norm and not the exception.

Finally, I would add a word on overreaching. As indicated above, one advantage of "thin" analysis may be a greater incentive to comply or a smaller incentive to try to circumvent the law altogether (e.g., by denying the applicability of the Protocol or contesting the customary nature of the principle). Such attempts are likely to succeed in the absence of strong law-enforcement institutions (but it is also prudent for law-applying institutions to abstain from overreaching).

While I am sympathetic to such arguments, in principle – as overreaching is generally a bad idea - if Nolte is right and institutions are exceptional in the field of IHL, it makes little sense to insist on the "thin" application of the proportionality principle when the substantive limits of the principle are combined with the scope of discretion attendant to states under both the "simple" and "sophisticated" methods of analysis. In effect, one of the main impacts of a normative lack of clarity of standards is to minimize the gap between the "thin" and "thick" versions of proportionality. So, if we assume lack of institutions, states applying force will always tend to construe proportionality in a thinner manner than the law originally intended to. A legal strategy which exacerbates these tendencies by accepting *ab initio* a very narrow area of lack of proportionality is thus likely to be counter-productive from a humanitarian perspective. So, in other words, institutional shortcoming should sometimes be compensated for by more restrictive – not liberal legal norms.