[The Relationship Between Context and Proportionality: A Reply to Cohen and Shany](http://justsecurity.org/22948/response-cohen-shany/%22%20%5Co%20%22The%20Relationship%20Between%20Context%20and%20Proportionality%3A%20A%20Reply%20to%20Cohen%20and%20Shany)

May 11, 2015

By Michael Schmitt

Just Security

<http://justsecurity.org/22948/response-cohen-shany/>

I am honored that Deans Amichai Cohen and Yuval Shany, both superb scholars that I hold in the highest regard, have [responded](http://justsecurity.org/22786/contextualizing-proportionality-analysis-response-schmitt-merriam/) to the *Just Security* [post](http://justsecurity.org/22392/legal-operational-assessment-israels-targeting-practices/) I wrote with my colleague at the Naval War College, Maj. John Merriam. Our post was a short summary of field research we conducted several months ago into Israeli targeting practices. The resulting articles can be found [here](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2596836) (for a non-lawyer audience) and [here](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2593629) (for lawyers). Unfortunately, I believe my two friends misunderstood our key operational conclusions and, more problematically, albeit certainly unintentionally, mischaracterized my positions on the international humanitarian law (IHL) rule of proportionality. Allow me to clarify the points Maj. Merriam and I were making in the pieces and set forth my own views on proportionality.

To begin with, the focus of our research was not proportionality. In the law review article, the discussion of proportionality occupies a mere three of the 50 pages of text and we did not, because we did not see them as controversial, address the issues they raise in any depth. Rather, our goal was to examine the operational environment in which the Israel Defense Forces (IDF) operates to better understand the context in, and perspective from, which it applies IHL.

Two contextual factors loomed large in our view. First, nearly all of the Israeli population is within range of the Hamas or Hezbollah rockets that are regularly launched directly at civilians. Second, we were struck by the population’s high level of concern for members of the IDF, concern that can in part be explained by the frequent combat in which the IDF finds itself, combined with near-universal conscription. The greatest significance of these contextual factors is how Israel’s enemies exploit them operationally by attacking civilian population centers and conducting “snatch” operations of IDF soldiers and civilians.

This obviously colors Israel’s understanding of the battlespace and its application of IHL; indeed, use by the enemy of context to offset conventional advantages the IDF enjoys is a central driver of Israel’s approach to combat and law. It would be naïve to suggest otherwise. But responsiveness to context is not an Israel-unique reality. It always drives application of the law during an armed conflict. Such IHL concepts as “feasibility” in the[precautions in attack requirement](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule15) or the requirement to give [warnings](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule20) of attack “unless circumstances do not permit” are by definition contextual. Context does not excuse non-compliance with IHL principles and rules, but it does shape the boundary of their prescriptive reach.

There is no IHL rule with respect to which this is truer than [proportionality](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule14). The rule, which is undoubtedly customary in nature, prohibits attacks “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.” Although we did not, contrary to the impression created by the Cohen-Shany post, unpack the rule in the Israeli context, it is interesting to do so.

First, let me address the rocket threat. Cohen and Shany state that Maj. Merriam and I “appear to allow for the possibility that a proportionality analysis would include the weighing of broad strategic considerations, such as the impact of Hamas’ rocket infrastructure on the Israeli public view of itself as being under ‘siege’.” Absolutely not. However, the fact that the rockets are used to directly target civilians does, in my estimation, affect the military advantage of striking them. Civilians who are not participating in the hostilities, unlike military objectives, members of the armed forces, and directly participating civilians, are protected from attack under IHL. In light of that legal protection, my view is that stopping attacks on civilians (that also constitute war crimes) yields an especially high military advantage. The advantage is far from “strategic” in the sense used by Cohen and Shany; it is very direct, tactical if you will, because a particular attack using that weapon is foiled.

Moreover, as Maj. Merriam and I stated in our longer article, “preventing terror among the civilian population, as distinguished from fear that is only incidental to lawful attacks, is a legitimate military objective. This is so based on the fact that the LOAC [IHL] prohibits attacks, ‘the primary purpose of which is to spread terror among the civilian population.’” It follows that stopping such attacks is a military advantage. The IDF lawyers with whom we spoke agreed with this proposition, which strikes me as rather uncontroversial.

There is no question that the attacks against Israel are designed to terrorize the civilian population. Thus, while a broad purpose of keeping lawful attacks from frightening the population is not proper military advantage vis-à-vis the proportionality analysis, stopping rocket attacks that are unlawful because they are designed to terrorize the population certainly qualifies. The distinction is subtle, but unquestionably valid.

The second assertion of Cohen and Shany is that Maj. Merriam and I “implicitly claim that certain cultural factors — such as Israel’s exceptional aversion to loss and capture of soldiers — may be factored in when assessing the proportionality of Israel’s response.” Again, this misconstrues our position. We did not suggest that the civilian population’s concern for soldiers was an appropriate factor for consideration when assessing the potential military advantage of an operation to thwart a kidnapping or recapture a soldier. The point we made was that, for reasons we explained, Israel’s enemies view such captures to be a victory of strategic proportions in an asymmetrical conflict.

Translated into IHL terms, the capture of an Israeli soldier yields a high military advantage for Hamas and Hezbollah because there are few other ways they can militarily affect the IDF’s operations and calculations given its overwhelming military superiority. Therefore, it is not the Israeli population’s perception of the operation that affects military advantage, but rather that of Hamas or Hezbollah. A failed kidnap attempt or the recapture of a soldier is, from their perspective, a significant operational failure with a corresponding loss of potential military advantage. Therefore, foiling a capture is fairly considered by the IDF to be militarily advantageous and is appropriately factored into the proportionality analysis, not just in terms of securing the safety of the soldier concerned, but also with respect to denying the enemy an important military aim. I struggle to see how denying the enemy an avowed military aim achieved by military means cannot constitute military advantage. The fact that a military operation may be designed to eventually foster political ends is irrelevant; after all, as Cohen and Shany rightly note, all of war is ultimately a Clausewitzian endeavor.

Allow me to turn to my own position on the law governing qualification as military advantage in the proportionality calculation. Readers will find it very mainstream. To begin with, I am hesitant to completely agree with Cohen and Shany when they assert “proportionality analysis should hinge on a *tactical* decision reached by the relevant decisionmaker” and that “IHL requires that collateral damage to civilians and civilian objects would not be excessive in relation to the ‘concrete and direct military advantage’ of the specific attack.” Thankfully, as I shall explain, they added a saving parenthetical clause —“which may, however, be assessed in light of the overall military operation.”

If Cohen and Shany are using the term “tactical” as referring to the [tactical level of war](http://www.dtic.mil/doctrine/dod_dictionary/data/t/7465.html), a term of art in the military profession, they are simply wrong. There is no doubt that military effects at the [operational](http://www.dtic.mil/doctrine/dod_dictionary/data/o/5960.html), and occasionally even [strategic](http://www.dtic.mil/doctrine/dod_dictionary/data/s/7287.html), levels of war may qualify as military advantage. The classic example is a strike against an enemy military leader. It is entirely appropriate to consider the effect his death will have on enemy military operations at the campaign level or even the enemy’s broader military wherewithal. The same is true with attacks against enemy command and control nodes. Striking them will almost always generate military effects at the operational level of war and, in conjunction with other operations, sometimes at the strategic level.

In fairness to Cohen and Shany, the tactical-operational-strategic framework, which underpins planning and execution of military operations, is frequently used as a form of cognitive shorthand when explaining the phrase “definite military advantage” in the definition of [military objectives](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule8) and, as here, when doing so with respect to “concrete and direct military advantage” in the proportionality formula. This makes some sense, for strategic effects are often attenuated from ongoing or prospective military operations or they may not be military in nature at all. By contrast tactical and operational level effects almost always qualify on these two counts. But the approach, albeit useful for purposes of broad explication, is legally imprecise. It is not the level of war that matters, but rather the extent to which the advantage in question is 1) military in nature and 2) direct.

My view depends heavily on Cohen and Shany’s important reference to “overall military operation.” That reference derives from the generally accepted premise that “military advantage anticipated from an attack is intended to refer to the attack as a whole and not only from isolated or particular parts of the attack.” This text is drawn from the [UK’s Additional Protocol Ratifications Statement](https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=0A9E03F0F2EE757CC1256402003FB6D2) and is replicated in similar statements by,*inter alia*, Australia, Germany, Italy, and the Netherlands; military manuals, such as those of Canada; and the ICRC Customary IHL study’s commentary. The ICC Statute incorporates the notion by employing the term “[overall](https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=E4C44E2F1347B99D412566900046EACB)” when referring to military advantage.

I have set forth my understanding of “concrete and direct military advantage” on many occasions. Most recently, I address it in the chapter on targeting in Dieter Fleck and Terry Gill’s forthcoming 2d edition of the *Handbook of the International Law of Military Operations.*

Military advantage that is ‘concrete and direct’ is that which is identifiable and clearly discernable. The advantage must be ‘substantial and relatively close’ and ‘advantages which are hardly perceptible and those which would only appear in the long term should be disregarded’. There is no requirement that the advantage be great; rather, the phrase is typically interpreted in the negative as excluding advantage that is purely speculative.

The term ‘military advantage’ should not be exaggerated. Although advantage is not to be understood merely as ground gained or enemy killed, it is limited to advantage that is military in nature. Political, psychological, economic, or other forms of advantage are not the sort contemplated by the rule. Even forcing the enemy to the negotiating table is not ‘military’ advantage in the sense of the rule. Rather, military advantage is that which exhibits some direct nexus to military operations. The extent of nexus is important.

In assessing military advantage, it is necessary to consider the advantage accruing from the attack as a whole, not merely that from isolated or particular aspects of the attack. In other words, the attack must be considered in the context of the ongoing campaign. The classic example involves an attack constituting a ruse intended to cause the enemy to believe an operation is to take place at other than its intended location. Since the operation is to be mounted elsewhere, the immediate military advantage of the destruction of the target is minimal. However, if the enemy is fooled as to where the operation will actually be launched, the military advantage of the attack can prove significant.

The same text appeared in the [first edition](http://ukcatalogue.oup.com/product/9780199545896.do) and evoked no criticism during the five years since publication. Similar explanation appears in other efforts by international groups of experts examining targeting law, such as the *HPCR*[*Manual on International Law Applicable to Air and Missile Warfare*](http://www.cambridge.org/us/academic/subjects/law/humanitarian-law/hpcr-manual-international-law-applicable-air-and-missile-warfare) and the [*Tallinn Manual on the International Law Applicable to Cyber Warfare*](https://ccdcoe.org/research.html).

Of course “excessive,” the proportionality threshold, is a vague standard. Different members of the armed forces will sometimes come to differing conclusions regarding proportionality in the same or similar circumstances. Likewise, the forces of various states are more or less likely to find an operation as excessive. That is the reality of warfare. But I have no reason to believe the United States or Israel act inconsistently with the aforementioned description when assessing the military advantage to be factored into a proportionality analysis. To the best of my knowledge, neither state would embrace the positions attributed to Maj. Merriam and myself by Cohen and Shany. Israel and the United States take very conventional approaches to the matter.

As to my own views, yes, I insist that proportionality analysis is highly contextual, as are many other decisions on the battlefield that involve application of IHL. In certain circumstances, contextuality is the very basis upon which IHL’s foundational [balance](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1600241)between military necessity and humanitarian considerations is maintained. But I do not subscribe to any of the views ascribed to me in the Cohen and Shany piece. Hopefully, this response will clarify matters.