

Security and Human Rights – Mind the Balance!

On Security in International Human Rights Law and the Dangers of the Normalization of Emergency

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In this article, the author analyzes the issue of the balance between human rights and security. More precisely, she addresses three specific questions: Firstly, should human rights be “balanced” against security *per se*? Secondly, considering that human rights may be restricted on security grounds in certain circumstances, should the Israeli practice of balancing human rights and security be taken as an example? And thirdly, if one does so, should the Israeli practice also be followed by transposing this reasoning onto circumstances where the state of emergency has become ordinary?

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Introduction: The Balance between Human Rights and Security

Security is routinely invoked as a ground to justify “limits” on human rights (HR), and this is the case both in domestic human rights law (DHRL) and in international human rights law (IHRL).

The relationship between HR and security in a democracy has become particularly pressing recently in the United States and in Europe, especially post-2001 with the rise of terrorism and the corresponding invocation of security by domestic authorities to justify measures affecting the rights of individuals in the context of the prevention or repression of terrorism. In the last fifteen years or so, cases have multiplied in practice giving rise to a detailed case-law¹ and nuanced doctrinal analyses of what is usually described

as the “balance” between HR and security².

While the potential conflict between HR and security is one that can be encountered in any democracy, it is obviously more often in a context of armed conflict that their balancing becomes a common operation for lawyers. Once emergency and insecurity have become so ordinary as to constantly call for security-based limits on HR, however, one may wonder about the applicability of the usual HR reasoning and tests used to justify such security-based limitations on HR. As a matter of fact, other regimes of international law, such as international humanitarian law (IHL) in particular, have been developed to address emergency and security threats in the context of armed conflicts. They have gradually given rise to adapted tests that do not consider insecurity as an exception to individual rights as it would be the case in peacetime, but as a routine concern. No wonder therefore that the relationship between IHLs and IHRLs respective treatment of the relationship between individual rights and security is of primary concern to specialists when they discuss the relationship between those two concurrently applicable regimes of international law.³

In this context, the Israeli practice of balancing HR and security stands out, both in its sheer volume and its degree of detail. This is due in large part to its routine application to the military occupation of the Occupied Palestinian Territories (OPT) by Israel ever since 1967, and the alleged constant state of emergency that has ensued both for and within the (1948 borders of the) State of Israel.

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¹ See e.g. CJEU, *European Commission and Others v. Yassin Abdullah Kadi*, C-584/10 P, EU:C:2013:518 (*Kadi II*).

² See J. WALDRON, ‘Security and Liberty: The Image of Balance’, (2003) 11:2 *The Journal of Political Philosophy* 191-210; J. WALDRON, ‘Security as a Basic Right (After 9/11)’, in C. R. BEITZ / R. E. GOODIN (eds), *Global Basic Rights*, Oxford: OUP 2009, 207-26; D. COLE / J. LOBEL, *Less Safe, Less Free – Why America is Losing the War on Terror*, New York / London: New Press 2007; D. COLE (ed.), *Securing Liberty: Debating Issues of Terrorism and Democratic Values in the Post-9/11 United States*, New York: International Debate Education Association 2011.

³ See Y. SHANY, ‘Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror’, in O. BEN-NAFTALI (ed.), *International Humanitarian Law and International Human Rights – Pas de Deux*, Oxford: OUP 2011, 13-33; E. BENVENISTI, *The International Law of Occupation*, 2nd edn, Oxford: OUP 2012, Introduction.

More specifically, there are three kinds of situations which, at different times, or even at the same time and in a merged fashion, have led to the balancing between HR and security in Israel: (i) military security in the context of occupation in the OPT; (ii) settlers' security in the context of occupation in the OPT; (iii) and civilian security in the context of terrorist attacks on Israeli territory.⁴ Importantly, the majority view in Israel is that there should be no distinction between the HR and security balancing in time of war and military occupation and that same balancing in time of peace, and no discontinuity as a result between times of emergency and ordinary life.⁵ While some arguments for this position have been advanced (e.g. the extension of the scope of ordinary judicial review to cover activities related to the military occupation of the OPT and, accordingly, of HR protection in that context as well), there are important arguments against that extension.⁶ One may mention, first of all, the fact that there have hardly been any cases in practice where the Israeli Supreme Court (Israeli SCt) has decided against the executive (and the military) in that context, hence actually playing a legitimizing and condoning role of violence across the board;⁷ second, the contamination of ordinary HR reasoning in IHRL through different restriction tests coming from IHL; and, finally, the threat to the purpose and integrity of IHL itself.

Nevertheless, and despite those controversies in the Israeli case-law and scholarship⁸, the Israeli practice is regularly invoked in current American and European debates as an example about how to balance HR with security concerns in the context of the application of

IHRL in a democracy.⁹ True, the sheer quantity of that balancing practice by Israeli authorities, but also the detail of the conceptualization it has given rise to, both in judicial reasoning and academic analysis,¹⁰ provide a ready explanation for its relevance abroad where the problem is more recent.¹¹ Still, it is important to pause to reflect about the justification of balancing HR with security before endorsing it too quickly, both in future Israeli cases and in other contexts and especially the American and European ones.

Three questions arise in this respect. (i) Should we actually “balance” HR against security *per se* and, if so, how should we do that? This is a legal-philosophical question pertaining to the moral justifications of HR restrictions and the kinds of restrictions one should deem justified. (ii) Provided security may amount to a ground to restrict HR in certain circumstances, should we take the Israeli practice of balancing HR and security as an example in this respect? This is a legal-doctrinal question pertaining to the international legal validity, in both IHRL and IHL, of the reasoning of the Israeli SCt pertaining to the balance between HR and security. (iii) Provided we do, should we also follow the Israeli example in transposing what should amount to exceptional reasoning in situations of armed conflict onto circumstances where emergency has become ordinary as it is the case of the long-term occupation of Palestine by Israel? This is a legal-structural question pertaining to the transposition of a form of reasoning adapted to emergency situations such as armed conflicts, mostly stemming from IHL, to ordinary circumstances of life in a democracy where terrorist attacks occur that lie at the core of IHRL, and hence to the content of so-called international occupation law (IOL).

Critical reflection, and caution about balancing HR with security does not only matter for the legitimacy of future HR reasoning in Europe, and in particular for the securing of justice in democracies facing terrorism, but also for future HR protection in the OPT

⁴ See D. KRETZMER, *The Occupation of Justice*, Albany: State University of New York Press 2002, Ch. 7 and 8.

⁵ See on the case-law of the Israeli SCt, KRETZMER (n 4); A. BARAK, *The Judge in a Democracy*, Princeton: Princeton University Press 2006, Ch. 7.

⁶ See KRETZMER (n 4), Ch. 7 and 8.

⁷ See O. BEN-NAFTALI, ‘PathoLAWgical Occupation: Normalizing the Exceptional Case of the Occupied Palestinian Territory and Other Legal Pathologies’, in O. BEN-NAFTALI (ed.), *International Humanitarian Law and International Human Rights Law – Pas de Deux*, Oxford: OUP 2011, 129-200.

⁸ See e.g. O. BEN-NAFTALI / A. M. GROSS / K. MICHAELI, ‘Illegal Occupation: Framing the Occupied Palestinian Territory’, (2005) 23:3 *Berkeley Journal of International Law* 551-614; A. M. GROSS, ‘Human Proportions: Are Human Rights the Emperor’s New Clothes of the International Law of Occupation?’, (2007) 18:1 *European Journal of International Law* 1-35; BEN-NAFTALI (n 7); A. M. GROSS, *The Writing on the Wall – Rethinking the International Law of Occupation*, Cambridge: CUP 2017.

⁹ See e.g. A. BARAK, ‘Human Rights in Times of Terror – A Judicial Point of View’, Opening of the Judicial Year Seminar, European Court of Human Rights, Strasbourg, 29th January, 2016, http://www.echr.coe.int/Documents/Speech_20160129_Barak_JY_ENG.pdf; J. LIMBACH, ‘Human Rights in Times of Terror. Is Collective Security the Enemy of Individual Freedom?’, (2009) 1:1 *Goettingen Journal of International Law* 17-27.

¹⁰ See BARAK (n 5), Ch. 16 and 7.

¹¹ Other explanations may include the tight relationship between German and Israeli constitutional traditions (e.g. on notions such as “democratic self-defence” or “militant democracy”), especially among the older generation of Israeli judges. See also KRETZMER (n 4), 15.

and, by extension, in Israel itself. It has long become clear indeed that Israeli democracy has paid a heavy toll for the banalization or, worse, normalization of HR violations and injustices occurring in the OPT.¹² The quasi-automatic way in which HR are balanced against security is arguably a central part of that problem. Drawing from the Israeli experience with HR balancing with security and transplanting it elsewhere should clearly be resisted therefore.

The structure of the argument defended in this article is three-pronged. We first need to clarify what is meant by “human rights” and “security” (I.) and how the restrictions of HR work in general (II.), before addressing the security-based restrictions to HR more specifically and how some form of balancing may be justified among them, both in general and in the context of the Israeli occupation of Palestine (III.).

I. Basic Notions

Among the basic notions required for a discussion of the potential balancing between HR and security, it is important to clarify at the outset what is meant by “human rights” (A.) and by “security” (B.).

A. Human Rights

The HR, and the duties they give rise to, applicable to HR violations committed by Israel in the OPT stem from DHRL, IHL and IHRL.

DHRL binds Israel in the shape of that State’s own catalogue of basic rights arising under the Israeli Basic Law and their respective interpretations by the Israeli Supreme Court. It also includes the DHRL that was applicable in Palestine before the occupation, provided there was any under British Mandate or Jordanian law, and that binds Israel as an Occupying Power.¹³

IHL also protects some of the individual rights of the occupied population.¹⁴ To that extent, those IHL individual rights duties also bind Israel towards the Palestinian population *qua* Occupying Power under IOL.

Last but not least, IHRL binds Israel as a State, and

stems from the most important IHRL treaties ratified by Israel¹⁵, but also from customary IHRL¹⁶. It also binds Israel as an Occupying Power to the extent that the IHRL that was applicable in Palestine before occupation, provided there was any under British Mandate or Jordanian law, is to be respected as well.¹⁷ One may also mention, to the same effect, the IHRL principle under which the IHRL applicable to a population follows that population in all circumstances, and even in case of occupation.¹⁸

Importantly, IHL and IHRL may overlap to the extent that the scope of IHRL is materially and territorially such that it also applies to armed conflicts, including occupation,¹⁹ and applies outside of the State’s official territorial boundaries, provided its authorities exercise personal or territorial jurisdiction (or effective control) outside of its territory²⁰.

This last point is particularly sensitive with respect to the individual HR that are also protected under IHL. Indeed, the individual rights protected under IHL/IOL are not protected in the same way as in IHRL. In particular, first of all, they only pertain to the HR of the occupied population, and not of the population of the Occupying Power. Second, they are submitted to a (military) necessity test that differs from the proportionality test used in IHRL. And, finally, the competing security concern that may apply to set limits upon them are strictly military and do not extend to the security concern of the civilian population of the Occupying Power, whether in the occupied territories or on its official territory.²¹ To that extent, the relationship between IHL and IHRL matters when both regimes apply concurrently to a given individual

¹² See KRETZMER (n 4), Conclusion; D. SHULMAN, ‘Israel’s Irrational Rationality’, *New York Review of Books*, 22nd June, 2017, <http://www.nybooks.com/articles/2017/06/22/israels-irrational-rationality>.

¹³ Art. 43 Regulations concerning the Laws and Customs of War on Land, annexed to the Hague Convention (IV) respecting the Laws and Customs of War on Land (1907; Hague Regulations), and its reference to the “laws in force in the country”.

¹⁴ E.g. Geneva Convention (IV) on Civilians (1949; Geneva Convention [IV]); Hague Regulations.

¹⁵ E.g. International Covenant on Civil and Political Rights (1966; ICCPR); International Covenant on Economic, Social and Cultural Rights (1966; ICESCR); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984; CAT); International Convention on the Elimination of All Forms of Racial Discrimination (1965; CRC).

¹⁶ See ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136, par. 157.

¹⁷ See Art. 43 Hague Regulations.

¹⁸ See HRC, *General Comment 20*, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), p. 200.

¹⁹ See ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p. 226; ICJ, *The Wall* (n 16); ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, ICJ Reports 2005, p. 168.

²⁰ See ICJ, *The Wall* (n 16).

²¹ See GROSS, ‘Human Proportions’ (n 8), 25-6; BEN-NAFTALI (n 7), 177-8.

right's violation,²² since their joint application may affect the content and restriction of that right in those cases.²³

B. Security

Security is a vague and polysemic concept. Although it is used broadly, especially with respect to ways of protecting it and to the consequences of not doing so, it is almost never defined.

From a *philosophical* perspective, security refers to a collective good (and, potentially, an individual/collective interest in that good), i.e. the absence (and not only the “freedom from”) of risk/threat of violation of another good (individual or collective), i.e. usually life or (physical or material) integrity.

Depending on its subjects, there are many types of security:²⁴ (i) personal security, i.e. the individual security of people; (ii) public/collective/“homeland”²⁵ security, i.e. the collective security of a whole population; (iii) national security, i.e. the security of the State or its government (e.g. its sovereignty, integrity, or capacity to function); (iv) international security (pertaining either to the State's external or to the international community's security as a whole). Those different types of security may pull into different directions and do not necessarily overlap with one another. For instance, public or homeland security is not necessarily aggregative of personal security, and national security may be at risk without public insecurity.

Security needs to be distinguished from *safety*, which refers to the absence of threat to life/physical integrity of an individual. Safety differs from security to the extent that it is only individual and physical as opposed to individual and/or collective and material and/or physical for security. Security also needs to be distinguished from *violence*: not all security threats are violent, but violence is the main case of insecurity.

In terms of its relationship to HR, security may itself be considered a HR to the extent that there may be an individual interest in the collective good of (public or homeland) security protected as HR. Some authors, like Henry SHUE, actually consider the HR to security as a “basic” right, i.e. a HR whose protection

is indispensable to the effective protection of other HR.²⁶ When security is considered a HR, the conflicts between HR and security become conflicts of rights, and, as we will see, the justifications of the mutual restrictions those rights set on one another are different from those that arise from the relationship between HR and the collective good of security.

In *legal* terms, security is just as vague a concept. One should distinguish between the different types of security protected under domestic and international law, on the one hand, and the normative forms they take depending on whether they are protected as HR or as collective goods, on the other.

In *domestic* law, security is referred to as a legal concept both under domestic security legislation and under DHRL. In the latter case, security is invoked both as a HR and as a collective good justifying restrictions to HR. In the case of security norms applicable to the OPT, one should also mention the questionable validity under IOL of the reference by Israeli authorities to pre-IHRL British Mandate and Jordanian drastic legislation pertaining to security detention.²⁷

In *international* law, security arises as a legal concept in the United Nations Charter (UNC) and its so-called “collective security system” (both as a collective good [public, national and/or international security] and as a HR [personal security])²⁸; under international development law (as a collective good [human security, i.e. some collective form of personal security]); under IHL/IOL (as a collective good [military security])²⁹; and under IHRL (as a collective good [public or national security] restricting HR and as a HR itself [personal security or safety])³⁰.

The terminology varies a lot between domestic and international law and the respective regimes within them.³¹ The case-law remains largely silent about how to interpret those different types of security, however.

²² See ICJ, *The Wall* (n 16), par. 136.

²³ See KRETZMER (n 4), Ch. 7.

²⁴ See WALDRON, ‘Security as a Basic Right’ (n 2), 210-5.

²⁵ See on this post-9/11 notion, WALDRON, ‘Security as a Basic Right’ (n 2), 212.

²⁶ See H. SHUE, *Basic Rights – Subsistence, Affluence and U.S. Foreign Policy*, 2nd edn, Princeton: Princeton University Press 1996, 20 ff. For a discussion, see L. LAZARUS, ‘The Right to Security’, and V. TADROS, ‘Rights and Security’, in R. CRUFT / M. LIAO / S. M. RENZO (eds), *The Philosophical Foundations of Human Rights*, Oxford: OUP 2015, 423-41 and 442-58.

²⁷ See KRETZMER (n 4), 121-4. See also BENVENISTI (n 3), Ch. 8.

²⁸ E.g. Art. 1, 33, 39 and 42 UNC.

²⁹ E.g. Art. 5, 27 par. 4, 49, 53, 78 Geneva Convention IV; Art. 52 Hague Regulations.

³⁰ E.g. Art. 5 European Convention on Human Rights (1950; ECHR); Art. 9 ICCPR.

³¹ See e.g. the reference to “public safety and public life”, in Art. 43 Hague Regulations.

It usually conflates personal, public and national security, and sometimes even assimilates security and safety or security and public order. Moreover, States are usually granted a broad margin of appreciation in this respect. Accordingly, those different types of security protected under domestic and international law, and within each of them and their respective regimes, may conflict with one another or some of them may be subsumed under stronger or weaker ones depending on the needs of the authorities invoking security to limit HR.

This is particularly problematic in the OPT due to the joint application of IHL and IHRL by Israeli authorities when identifying a threat to security and the conflation between IHL's "military and security needs" with the security needs of the State of Israel and its citizens, both in the OPT and in Israel, and not only of the military, including interest in land and economic interests.³²

II. Restrictions of Human Rights in General

HR are only rarely absolute, and their restrictions are a central part of HR reasoning in practice. After explaining why HR restrictions are justifiable in the first place (A.), this section distinguishes between different grounds for the justification of HR restrictions (B.).

A. Justifying Human Rights Restrictions

HR practice shows that, in some cases, HR have to be restricted to further other moral or social interests or the HR of others with which they conflict. Thus, free movement may sometimes have to be restricted in the interest of security. When such restrictions are justified, the right is not deemed as violated.

At the same time, however, we like to think that free speech, like other HR, is not reducible to other moral interests such as security and cannot simply be weighed and balanced against those interests like any other interest.³³ That resistance to balancing HR grows even stronger when it is meant to take place against other HR, as in balancing the right to free movement against the right to security. This puzzling

position is difficult to define with precision, but it clearly holds a middle ground between the two positions that long prevailed over how to resolve conflicts between moral rights, on the one hand, and between moral rights and other moral considerations, on the other: in short, Kantian absolutism, and the derived prioritization of HR, on the one hand, and utilitarian relativism, and the corresponding weighing and balancing of HR, on the other.

The puzzle that faces HR theorists is reconciling the specific stringency of HR for them to be able to protect individuals as ends in themselves with the reality of their conflict with other moral considerations, including other HR, and the need to settle such conflicts. It reflects the sheer theoretical difficulty of conceptualizing moral trade-offs that are not quantitative and do not actually imply "weighing and balancing" HR. This theoretical puzzle is well reflected in James GRIFFIN's contention that "human rights are resistant to trade-offs, but not completely so".³⁴ Solving the puzzle requires, as I have argued elsewhere,³⁵ finding a way between stating the radical incommensurability of HR (literally, their inability to be compared and ranked to one another) and resorting to pragmatic solutions to settle their conflicts, on the one hand, and emphasizing their commensurability and applying quantitative weighing and balancing to reconcile them in case of conflict, on the other.

Interestingly, this theoretical ambivalence is echoed in the HR practice, and in particular in IHRL.³⁶ Restrictions to HR are usually hard to justify legally. Moreover, even though trade-offs are common in practice, HR reasoning is also structured so as to exclude them in some cases. As a result, an important part of the practice endorses a form of HR balancing,³⁷ while other parts reveal attempts to "restrict restrictions" of HR (from the German *Schrankenschränken*) and even to organize hierarchies between HR with certain rights being deemed as absolute (so-called "absolute rights")³⁸ or with absolute thresholds of protection being established within the content of certain HR (so-called "core duties" or "inner core" – from the

³² See Israeli SCt, 15 March 1979, *Ayub et al. v. Minister of Defence et al.*, H.C. 606/78 (the *Beth El* case). See KRETZMER (n 4), 116-8.

³³ See R. NOZICK, *Anarchy, State and Utopia*, Oxford: Harper Collins 1974, 28 ff. on human rights as "side-constraints"; R. DWORKIN, *Taking Rights Seriously*, London: Duckworth 1994, 190 ff. on human rights as "trumps".

³⁴ J. GRIFFIN, *On Human Rights*, Oxford: OUP 2008, 76.

³⁵ See S. BESSON, 'Human Rights in Relation', in S. SMET / E. BREMS (eds), *When Human Rights Clash at the European Court of Human Rights – Conflict or Harmony?*, Oxford: OUP 2017, 23-37.

³⁶ See E. BREMS (ed.), *Conflicts Between Fundamental Rights*, Antwerp: Intersentia 2008.

³⁷ E.g. Art. 8 to 11 par. 2 ECHR.

³⁸ E.g. Art. 3 ECHR.

German *Kerngehalt*).

As I have argued elsewhere, there is actually a third and principled way between quantitative weighing and balancing, on the one hand, and categorical prioritizing, on the other.³⁹ Following Jeremy WALDRON, one may refer to it as “qualitative balancing”.⁴⁰ Qualitative balancing aims at the conciliation of the reasons underpinning the conflicting HR duties in case of conflict. It may therefore be described as “balancing” by lack of a better term for the comparison and mutual restriction of reasons, on the one hand, and as “qualitative” to distinguish it from quantitative balancing, on the other. One should indeed consider that HR duties do not have “weight” strictly speaking, but “stringency”. Qualitative balancing, so defined, is justified and operates by reference to the relational and egalitarian nature of HR.⁴¹ It differs from the other two alternative methods to resolve conflicts of rights mentioned before. It is clearly distinct, first of all, from the identification of formal and abstract hierarchies of rights. Such hierarchies do not correspond to the egalitarian dimension of HR: all HR and right-holders are equal. Nor do they fit the duty to reconcile reasons as far as possible rather than abide by one only. HR duties should therefore be balanced in case of conflict and cannot merely be ranked. This does not mean, however, that we should resort to a quantitative balancing of rights, and this is my second distinction. The consequentialist and even utilitarian take on HR and their relations implied by quantitative balancing does not correspond to their egalitarian dimension either.

So how does qualitative balancing work? It is equality that provides the internal ground common to all HR on the basis of which they can relate qualitatively to one another and on the basis of which they may be compared and mutually restricted in the balancing exercise. This implies resorting to the socio-comparative and hence collective dimension of all HR as equal rights *qua* internal basis of comparison and restriction between them. Importantly, the egalitarian dimension of HR dispenses from identifying a meta-value or principle external to the rights them-

selves as a basis for the comparison and restriction. It avoids thereby undermining the specificity of HR, and especially their incommensurability and special stringency.⁴²

Of course, the role of equality in qualitative balancing also implies the existence of inherent egalitarian limitations on the justifiable restrictions to every human right: the ultimate egalitarian limit to restriction is the erosion of the right itself, as this would threaten the basic moral equality of its right-holder. This is how one could interpret the role played by the so-called “inner core” of every HR among the limitations to justifiable restrictions to that right in the reasoning of the European Court of Human Rights (ECtHR). Last but not least, the egalitarian dimension of HR and their relations has institutional implications for the procedure through which their mutual restrictions are justified in case of conflict. These procedures should be democratic.⁴³ This is confirmed by the reference to the test of “democratic necessity” in the restriction test under the paragraphs 2 of Art. 8-11 ECHR and to its requirement of a (democratic) legal basis for any restriction.

B. Grounds for Human Rights Restrictions

If certain HR restrictions are justifiable in general and provided HR duties may be balanced qualitatively either when they conflict with other moral considerations (i) or among themselves (ii), more needs to be said about those two grounds for the restriction of HR and the exact conditions for those respective justifications.

Of course, both grounds are not always easy to keep apart, especially as some may argue that certain (not all) public interests are aggregative and may consist in the sum of other fundamental individual interests and the corresponding HR, as a result. This may be the case of certain types of public or national security in particular. The distinction between HR and other moral considerations matters in practice, however. Moreover, it also matters for reasons that have to do with the moral non-consequentialist specificities of HR by comparison to other moral considerations, as

³⁹ See BESSON (n 35).

⁴⁰ J. WALDRON, *Liberal Rights: Collected Papers 1981-1991*, Cambridge: CUP 1993.

⁴¹ See S. BESSON, ‘La structure et la nature de droits de l’homme’, in M. HOTTELIER / M. HERTIG (eds), *Introduction aux droits de l’homme*, Brussels: Bruylant 2014, 19-38, 19; S. BESSON, ‘Justifications of Human Rights’, in D. MOECKLI / S. SHAH / S. SIVAKUMARAN (eds), *International Human Rights Law*, 2nd edn, Oxford: OUP 2013, 34-52.

⁴² See WALDRON (n 40); WALDRON, ‘The Image of Balance’ (n 2).

⁴³ See O. DE SCHUTTER / F. TULKENS, ‘Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution’, in E. BREMS (ed.), *Conflicts Between Fundamental Rights*, Antwerp: Intersentia 2008, 169-216.

explained before. Individual rights amount to more normatively than the individual interests they protect and, even if some collective interests are aggregative, they cannot aggregate individual rights equally to other individual interests.⁴⁴

First of all, HR restrictions based on *other moral considerations*. Those may include, depending on the HR and the IHRL regime at stake, in particular the public order, morals, public health or security.⁴⁵

Depending on the IHRL regime, and the respective general or HR-specific restriction clause therein, there are usually three other conditions for the justification of HR restrictions grounded in those moral considerations. First, the justification of a HR restriction mostly requires a democratic procedure to establish the democratic necessity of the restriction. This is what one may refer to as the “necessity in a democratic society” test. Moreover, the restriction usually needs to rely on a legislative and hence public basis. Finally, it should not infringe absolute rights or core duties corresponding to the HR “inner core”.

All three conditions fit the egalitarian and, by extension, democratic justification for the qualitative balancing of HR against other moral considerations proposed in the previous section, as opposed to either quantitative “weighing and balancing” or qualitative prioritizing of HR over other moral considerations. Importantly for our purpose, the democratic necessity test is not explicitly referred to as a “proportionality test” in IHRL.⁴⁶ As I have argued elsewhere, this may actually be used in order to interpret that test differently in IHRL from the mainstream three-prong proportionality test used in many domestic traditions of public law, such as the German and Israeli ones in particular.⁴⁷ The latter proportionality test amounts either to an instrumental rationality test or to a cost-benefit test (and especially its “suitability” and “necessity” prongs). Accordingly, it brings with it a quantitative and consequentialist flavour criticized in the previous section and tends to assume the commensurability of HR and duties. So-doing, it risks watering down the equality of HR, therefore. There is, however, an alternative way to understanding “proportional-

ity” and that is as a co-relation between equal human right-holders or between them and duty-bearers.

Second, HR restrictions based on *other HR* when HR are in conflict with one another. The common view, and one that can be read in the ECtHR’s judgments, is that HR conflicts are conflicts between the interests these rights protect.⁴⁸ As a result, the resolution of HR conflicts is often approached as the resolution of conflicts between interests.

As I have argued elsewhere, rather than consider conflicts of HR as pertaining to rights *stricto sensu*, we should understand them as conflicts between one or many of the specific duties corresponding to those rights in a given context.⁴⁹ This qualification was first made by Jeremy WALDRON.⁵⁰ Once conflicts of HR are approached as conflicts of HR duties, it is easy to see that they are best understood as conflicts of reasons, and not (only) as conflicts of interests. This confirms, as I argued in the previous section, the inadequacy of the consequentialist and quantitative approach to their “weighing and balancing”.

True, HR protect individual objective interests that are sufficiently and equally important to give rise to duties: they work as intermediaries, in other words, between these interests and the duties. However, the *content* of HR, i.e. their corresponding duties to respect, protect, and aid, should not be equated normatively with those interests they protect as an *object* and should not be reduced to them. There is much more to the duties than the interests they are protecting against a specific threat in specific circumstances and this added normative content may enter into conflict too. Accordingly, some conflicts of rights may be traced back to conflicts of interests, of course, but they need not. Nor, and this is a second distinction,⁵¹ should the *content* of HR, i.e. their duties, be conflated with what makes them of *value*, i.e. their justifications. This is particularly important for it prevents conflating the stringency of their duties with that of their value(s) (e.g. dignity or equality). The resolution of conflicts of rights should not therefore necessarily be guided by the value(s) related to the HR.

Reducing HR conflicts to conflicts of either interests or values would approach the content of HR not only

⁴⁴ See R. DWORKIN, ‘Principle, policy, procedure’, in *A Matter of Principle*, Cambridge, Mass.: Harvard University Press 1985, 72-103.

⁴⁵ E.g. Art. 10 par. 2 ECHR; Art. 12 par. 3 ICCPR.

⁴⁶ See ECtHR, *Chassagnou and Others v. France*, app. n° 25088/94, ECLI:CE:ECHR:1999:0429JUD002508894, par. 113.

⁴⁷ See BESSON (n 35).

⁴⁸ See ECtHR, *Odièvre v. France*, app. n° 42326/98, ECLI:CE:ECHR:2003:0213JUD004232698, par. 41-9.

⁴⁹ See BESSON (n 35).

⁵⁰ WALDRON (n 40).

⁵¹ See BESSON, ‘Justifications’ (n 41).

erroneously as unique and stable over time (all the duties corresponding to a HR would have the same stringency), but also as completely unrelated to other HR and their corresponding duties (all the duties corresponding to a HR would always conflict with all the duties corresponding to another HR merely because they conflict with them in one case), thereby cutting HR duties off from their relational and egalitarian dimension to others. Considering conflicts of rights from their duty-side is actually the only way to explain some of the variations in the *occurrence*, on the one hand, and in the *scope* of those conflicts, on the other, even when they are pertaining to the same HR. It accounts for how conflicts between the same HR may give rise to different moral issues in each case and in turn to different resolutions. Protecting the egalitarian and relational dimension of HR when they conflict is precisely what the qualitative balancing of HR proposed in the previous section aims to achieve.

III. Security-Based Limits of Human Rights

There are four main constellations in HR reasoning where security may be invoked to “limit” HR *lato sensu*: security-based reservations (A.), exceptions (B.), derogations (C.) and restrictions (D.) to HR.

The main and most common kind of limits are security-based HR restrictions. It is also the one where the so-called “balancing” between HR and security should allegedly take place. Before focusing on the latter, and explaining why it is wrong to endorse the “weighing and balancing” approach in that context as well, it is important to briefly introduce the other three constellations of security-based HR limitations in this section.

Of course, there are, at least, three other contexts in HR reasoning where security may be invoked. First of all, security may be mentioned as a ground for the limitation of domestic judicial jurisdiction over the executive or the military’s security policy, and hence of domestic judicial review (e.g. on grounds of the “political question” or the “act of State” doctrines). Second, security may be invoked as a ground for the forfeiture of one’s individual rights due to anti-security activity. This is a radical consequence that only applies in IHL,⁵² however, and not in IHRL, except maybe in the guise of the prohibition of the abuse of

rights under Art. 17 ECHR. Third, security may be mentioned, in the context of “self-defence”⁵³ or “state of necessity”⁵⁴, as circumstances precluding wrongfulness and hence State responsibility.

A. Security-Based Reservations to Human Rights

Reservations to HR enable States to limit abstractly, and *ex ante*, the applicability of certain HR to given contexts, and hence to restrict their material scope. They may do so with a view to security considerations (e.g. scope exclusions at times of war).

The validity of such reservations is limited, however, both under general international treaty law and IHRL. The general limits to their content are to be found under Art. 19-20 VCLT (compatibility with the “object and purpose of the treaty” and the absence of other States parties’ objections) and Art. 53 VCLT (respect of *jus cogens*). Additional specific conditions arise under IHRL. They include, under most IHRL regimes, the requirement of an explicit statement addressed to the other State parties or the international body or court to be sent before ratification and with a sufficiently specific content, the necessity of approval by that international treaty body or a court, followed by a requirement of regular updates, often combined with regular pressure on the part of the international treaty body or court to withdraw the reservations.

The consequences of a valid security-based reservation are a State-relative and HR-specific abstract restriction of the material scope of a HR in order to avoid its application to concrete cases that would imply a conflict with personal/public/national security. In such cases, no HR duties arise and there is no need therefore to justify a security-based restriction to that HR. To date, Israel has filed no such security-based reservations pertaining to its IHRL duties.⁵⁵

B. Security-Based Exceptions to Human Rights

Exceptions to HR amount to a delineation of the material scope of HR, so as to exclude certain areas or conducts. When they are security-based, they draw

⁵³ E.g. Art. 51 UNC; Art. 21 Articles on the Responsibility of States for Internationally Wrongful Acts (UN Doc. A/RES/56/83, 12th December, 2001; ARSIWA). See ICJ, *The Wall* (n 16).

⁵⁴ Art. 25 ARSIWA. See ICJ, *The Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, p. 7; ICJ, *The Wall* (n 16).

⁵⁵ See ICJ, *The Wall* (n 16).

⁵² See e.g. Art. 5 Geneva Convention IV.

the boundaries of HR in such a way as not to give rise to tensions with security concerns or alleviate security risks.

Importantly, exceptions are easier for some HR than for others depending on how open-ended their content is and whether it is a matter of degree or not.⁵⁶ Such exceptions may result from the HR provision itself in IHRL treaties.⁵⁷ Most of the time, however, they emanate from its interpretation by the competent international body or court.⁵⁸ Unlike reservations and derogations, therefore, exceptions are general and not State-relative, and apply to all States parties to a given IHRL regime.

In case of a valid security-based exception, a given HR will not give rise to duties outside its security-sensitive scope. As a result, potential conflicts are circumvented through a narrow definition of the HR's material scope and this dispenses of the need to balance that HR and security outside of that scope. The consequences of a valid security-based exception are a general and HR-specific abstract restriction of the material scope of a HR in order to avoid its application to concrete cases that would imply a conflict with personal/public/national security. Israel has invoked and benefited from such security-based exceptions to its IHRL duties.⁵⁹

C. Security-Based Derogations to Human Rights

Derogations to HR amount to their suspensions. The suspension of a specific HR prevents its application for a certain period of time, and, as a result, no rights and duties arise from that HR in concrete cases even if those cases actually fall within the HR's scope of application. It is justified by the exceptional inability of State to protect HR due to a situation of emergency. Such emergency-based suspensions actually aim at enabling the State to set the emergency aside and to get back to full HR protection.

Of course, there are conditions to fulfil before suspending a given HR. The conditions for a HR derogation vary among IHRL regimes, but they usually include an explicit notification to the international

body or court, the existence of security concerns – and those include both national security (State) and public/collective security (people) –,⁶⁰ a time-limit based on strict conditions of necessity, the exclusion of its application to non-derogable rights (such as, in particular, the prohibition of torture, discrimination, slavery or murder), and regular updates to the international body or court.

Provided it is valid, a security-based HR derogation is both State-relative and HR-specific. It differs from a security-based HR reservation to the extent that it arises only in a case of emergency and not abstractly in all cases, and it differs from a security-based HR exception to the extent that it is State-relative and not general.

Importantly, security-based derogations are also allowed in circumstances of extraterritorial application of IHRL,⁶¹ and in the context of both an international armed conflict (IAC) and a non-international armed conflict (NIAC), thereby leading to the concurrent application with IHL.⁶² To that extent, they may apply to a context of military occupation, as it has been argued by Israel with respect to Art. 9 ICCPR.⁶³ However, as explained before, a HR derogation can only last as long as it is necessary and cannot be permanent. Moreover, it is only justified to the extent that the return to normalcy is possible and that it enables such a development. Derogations are not meant to back a long-term status of emergency and therefore should not be allowed to cover long-term occupation, especially when that occupation is intentional (“self-imposed risk” or “emergency”).

D. Security-Based Restrictions to Human Rights

Restrictions to HR are the most common kind of limits to HR, and this is also true of security-based limits to HR that usually take the shape of security-based restrictions. In such cases, a specific HR violation falls within the scope of application of that right in the ab-

⁵⁶ See WALDRON, ‘The Image of Balance’ (n 2), 198.

⁵⁷ E.g. Art. 2 par. 2 ECHR.

⁵⁸ E.g. Art. 5 par. 1 ECHR. See ECtHR, *Hassan v. the United Kingdom*, app. n° 29750/09, ECLI:CE:ECHR:2014:0916JUD002975009, par. 104.

⁵⁹ See ICJ, *The Wall* (n 16).

⁶⁰ See e.g. Art. 4 ICCPR; Art. 15 ECHR.

⁶¹ See ECtHR, *Hassan* (n 58). In that decision, however, the ECtHR interprets Art. 5 ECHR so as to expand the latter's list of scope-exclusions and hence to make the concurrent application of IHL compatible with it without resorting to derogations under Art. 15 ECHR. For a critique, see M. MILANOVIC, ‘A Few Thoughts on *Hassan v. United Kingdom*’, *EJIL: Talk!*, 22nd October, 2014, <http://www.ejiltalk.org/a-few-thoughts-on-hassan-v-united-kingdom>.

⁶² See UK House of Lords, *R. (on the application of Al-Jedda) (FC) v. Secretary of State for Defence*, [2007] UKHL 58.

⁶³ See ICJ, *The Wall* (n 16).

sence of reservations or exceptions, and there are no derogations affecting its applicability, but restricting the HR may still be justified under certain conditions or grounds. The consequence of a justified HR restriction is a State-relative and HR-specific concrete restriction to specific HR duties.

The justifications of security-based HR restrictions vary, as I explained before, depending on whether security is considered as a “public interest” conflicting with HR (1.) or as another conflicting HR (2.).

1. As a Public Interest Restriction to Human Rights

Security-related public interests, including “national security”, “public security” or “public safety”, are mentioned as grounds for HR restrictions in IHRL. This is the case in general restriction clauses,⁶⁴ but also in particular restriction clauses specific to a given HR⁶⁵.

The types of “security” at stake in those restriction clauses remain indeterminate, however, and need to be further elaborated through interpretation in each case. Depending on its subjects, the kind of security envisaged is in principle the State’s (national security), but can also amount in some cases to personal or public security, or even to personal or public safety. Most of the time, those different types of security are actually straddled in practice.

Another difficulty encountered in practice is the recourse to “weighing and balancing” between those types of security and individual HR as if justifying a HR restriction was a matter of quantitative balance between an individual’s interest (i.e. her HR) and the collectivity’s or majority of individuals’ interest (e.g. their security). In the same vein, proportionality is usually the test resorted to in this balancing exercise between HR and security.

Following Jeremy WALDRON, there are four critiques one may make to the “weighing and balancing” of HR and security.⁶⁶

First of all, weighing and balancing HR and security has consequentialist and even utilitarian implications. This is problematic because, as I explained before, HR duties *qua* moral reasons should not be “weighed” and then added/deducted like interests in a quasi-algebra-

ic fashion. Nor should the proportionality test used in this balancing exercise be equated either with a means/end rational assessment or with a cost/benefit economic calculus. It is better approached, as I argued before, as a test of the equal relation between human right-holders. Second, balancing HR and security may give rise to an unequal and hence unjust distribution of the burden of security. There is a substantial risk indeed that the same people (and hence a minority) will be those bearing the burden of the security of a majority, whereas we should all bear it equally (or, at least, take turns). This is contrary to the equality of HR and their right-holders. Third, balancing HR and security may have unintended consequences. It may enhance the States’ security powers and generalize HR restrictions and even State-originating security threats, including for the majority whose security was allegedly at stake in the first place. To quote David COLE, people may end up being “less safe and less free” as a result of the balancing of HR and security.⁶⁷ Finally, balancing HR and security may lead to an unfair assessment of risks. Security is difficult to assess objectively. As a result, it is difficult to avoid political and strategic considerations from being merged into security concerns. This is problematic because HR restrictions should not be driven merely by the subjective perception of risk, but by an assessment of whether the restriction taken in the name of security could actually have the desired consequences.

Interestingly, those critiques of the indeterminacy of the notion of “security” and of the moral downsides of the “weighing and balancing” of HR and security, but also of the rational instrumentality-approach to proportionality,⁶⁸ apply particularly well to what is practised by the Israeli SCt in relationship to security-based restrictions of the HR of the Palestinian population in the OPT.

First of all, with respect to the type of “security” considered by the Israeli SCt, one observes the straddling between IHRL and IHL notions of HR and security. To start with, the Court considers not only the individual rights of the occupied population, as it should under IHL, but the HR of everyone, including of Israelis in Israel and of settlers in the OPT, as one would under IHRL. The security considered by the Court,

⁶⁴ E.g. Art. 4 ICESCR.

⁶⁵ E.g. Art. 8-10 par. 2 ECHR; Art. 12 par. 3 ICCPR.

⁶⁶ See WALDRON, ‘The Image of Balance’ (n 2), 195 ff.

⁶⁷ COLE / LOBEL (n 2).

⁶⁸ Compare e.g. BARAK’s rationalized notion of proportionality (BARAK [n 5], Ch. 7), with WALDRON’s critique of proportionality-algebra (WALDRON, ‘The Image of Balance’ [n 2], 192-4).

moreover, is not only military security, as should be the case under IHL, but the personal and public security of all Israelis in Israel and in the OPT, i.e. settlers, as it may under IHRL. To do so, the Court relies in particular on an extensive interpretation of “public safety and public life” in Art. 43 Hague Regulations.⁶⁹ Second, with respect to “proportionality”, the Court does not endorse the strict military necessity test of IHL, but the three-prong proportionality test used in public law and by extension, some argue wrongly, in IHRL (i.e. suitability, necessity and proportionality *stricto sensu*).⁷⁰ This has led to the increase of military commanders’ discretion, and actually to condoning it.⁷¹ Worse, applying that instrumental rationality test of proportionality to military occupation rationalizes it and makes it a “zone of reasonableness”, to quote Martti KOSKENNIEMI.⁷²

In short, what characterizes the Israeli SCt’s reasoning in this respect is the straddling of IHRL and IHL depending on what gives the Occupying Power most leeway in the name of security at the expense of the HR of the occupied population, and eventually of their equality as human right-holders under IHRL. This has been criticized, therefore, as a perversion of the equality of HR and hence of IHRL itself by applying that law to the circumstances of long-term military occupation.⁷³

With its utilitarian flavour, first of all, the reasoning of the Israeli SCt imposes the unequal burden of security onto the Palestinians and makes them a permanent minority under IHRL.⁷⁴ It also expands, secondly, the Israeli State’s powers. This has become clear within Israeli territorial jurisdiction as well, and not just in the OPT. It suffices, for instance, to observe the extension of national security powers of the State inside Israel in response to protection against security threats posed by Palestinians, the extension of the practice of administrative detention without trial, or that of the use of

torture beyond ticking-bomb cases.⁷⁵ All this, in turn, necessarily has an impact on the civil liberties of Israelis themselves. Finally, the Israeli SCt’s reasoning also leads to an unfair assessment of risks. The (subjective) assessment of insecurity is informed by political and strategic concerns (pertaining e.g. to the settlements, the so-called “separation barrier”, natural resources and esp. water, etc.), and not only focused on military concerns.⁷⁶

2. As Human Rights-based Restriction to Human Rights

Security may also be approached as a HR in itself,⁷⁷ and its potential conflict with other HR as a HR conflict, thereby leading to justified HR-based restrictions of HR in IHRL. This is the case in general restriction clauses,⁷⁸ but also in particular restriction clauses specific to given HR.⁷⁹

Following Henry SHUE, the HR to security may actually be considered a basic right, because it is indispensable to the realization of other HR.⁸⁰ The consequence would seem to be that it can only be limited by another basic right in case of conflict, and this may imply the priority of the basic HR to security over non-basic HR.

According to Jeremy WALDRON, there are three specific critiques one may oppose to the alleged priority of the HR to security in case of HR conflict.⁸¹

First, the circularity threat. If restricting a HR is necessary to protect a basic right whose protection is necessary to other HR, the result may be to lose what we were aiming to protect in the first place. Worse, such a conflict may quickly become a conflict between basic rights to security and the resolution of such conflicts in favour of one of those basic rights may violate the equality of HR. So, the only way to save the argument from circularity would be to give up on HR equality. However, this would undermine the justification of HR altogether and especially that of basic HR, thereby setting the basic rights of others, including to se-

⁶⁹ See Israeli SCt, *Beth El* case (n 32). See KRETZMER (n 4), 119.

⁷⁰ See Israeli SCt, 30 June 2004, *Beit Sourik Village Council v. The Government of Israel and the Commander of the IDF Forces in the West Bank*, HCJ 2056/04.

⁷¹ See GROSS, ‘Human Proportions’ (n 8), 9, 29; KRETZMER (n 4), 118-20.

⁷² M. KOSKENNIEMI, ‘Occupied Zones – “A Zone of Reasonableness?”’, (2008) 41:1-2 *Israel Law Review* 13-40.

⁷³ See GROSS, ‘Human Proportions’ (n 8), 28 ff.; BEN-NAFTALI (n 7), 198 ff.

⁷⁴ See GROSS, ‘Human Proportions’ (n 8), 8, 18, 31, 35.

⁷⁵ See also GROSS, ‘Human Proportions’ (n 8), 28. On the “metastatic tendency of torture”, H. SHUE, ‘Torture’, (1978) 7:2 *Philosophy and Public Affairs* 124-43, 142-3.

⁷⁶ See KRETZMER (n 4), 195-6.

⁷⁷ E.g. Art. 5 ECHR; Art. 9 ICCPR.

⁷⁸ E.g. Art. 4 ICESCR.

⁷⁹ E.g. Art. 8-10 par. 2 ECHR; Art. 12 par. 3 ICCPR.

⁸⁰ See SHUE (n 26), 20 ff.

⁸¹ See WALDRON, ‘Security as a Basic Right’ (n 2), 221 ff.

curity, as a core limit to the priority of the basic right to security of some. Second, the absence of clear-cut answers. Security is a matter of degree and not “an all or nothing” matter. It is not clear therefore when the indispensability of the HR to security really comes in as a criterion for the justification of a HR restriction. Finally, necessary conditions for the indispensability of the HR to security to the realization of other HR cannot replace sufficient ones. Evidence that the protection of security is even sufficient to their realization should be provided for the indispensability of the HR restriction to be established, and that is not easy to provide.

In the OPT, those critiques of HR restrictions grounded in the priority of HR to security over other HR should be of special concern. Indeed, the HR to security usually considered in the balancing exercise is only that of Israelis (whether settlers or mainland residents), thereby treating both groups of right-holders unequally or, worse, by artificially masquerading their inequality into a facade of equality and turning IHRL into an instrument of oppression.⁸² Treating both groups of human right-holders of the equal basic HR to security, i.e. Palestinians and Israelis, as proper equals would be the ultimate challenge for the Israeli SCt.

Conclusions: Beware of Ordinary Emergencies and their Banalization

To conclude, let us go back to the three questions raised in the introduction: first, about the justification of the balancing of HR and security *per se*; second, about that balancing in the Israeli SCt’s reasoning with IHRL and IHL; and finally, and more generally, about its application to long-term occupation and its respective international law regime in IOL.

First of all, the balancing of HR and security, as it is generally practised, is not an easy feature of IHRL reasoning. It is actually one we should be particularly weary of in America and Europe in the current anti-terrorism context. In short, it needs to be approached with care so as not to threaten HR reasoning with a fatal form of utilitarianism; generate an unjust distribution of the burden of security; give rise to unintended consequences including an increase in security-oriented State powers; and lead to unfair assessments of risk. To address those shortcomings, this

article has proposed to replace quantitative weighing and balancing of HR and security, and the related understanding of the proportionality test, by a more qualitative and egalitarian form of balancing, and the corresponding relational comparison and restriction test. It has also developed a taxonomy of the types of security at stake in HR reasoning depending on their subjects, thereby hopefully encouraging more fine-tuned assessments of their identification and relations in the future. It has also mapped the different constellations in which those different kinds of security concerns may be invoked to limit HR either as security-based reservations, exceptions, derogations or restrictions *stricto sensu*.

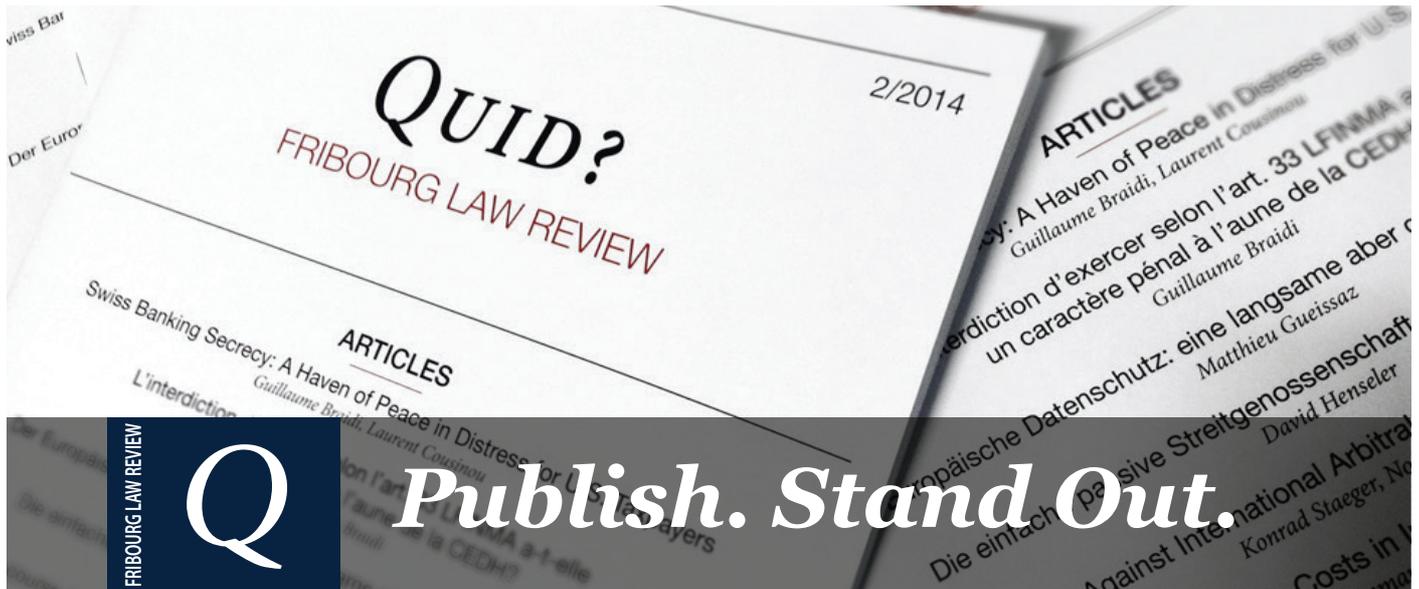
Secondly, the Israeli practice of balancing HR and security, and its recourse to proportionality may not only be criticized on those general grounds, but also on their own. The practice of the Israeli SCt is characterized indeed by the straddling of IHL rules and principles with HR-restrictions reasoning under IHRL. Over time, this has affected, within the balancing exercise: the scope of human right-holders, that has been extended by the Israeli SCt from Palestinian residents under IHL to Israeli residents and nationals (both on the mainland and in the OPT); the subjects of security, that has been extended by the Court to cover not only military security under IHL, but also the personal and public security of all Israelis as would be the case under IHRL; and the use of a three-prong public law proportionality test by the Court, instead of the military necessity test that should apply under IHL. While the concurrent application of IHL and IHRL is not in question, the application of IHRL presumes peace and ordinary circumstances of equality between human right-holders. Drawing on IHRL in spite of the lack thereof has proven problematic both for the protection of the HR of the occupied population as it is formally put on a par with Israelis whereas they are clearly not equal in practice, thereby begging the very question of the protection of their HR and making their situation worse under IHRL, on the one hand, and for the protection of military security concerns of the Occupying Power under IHL, on the other.

Finally, when applied to a long-term military occupation context such as the Israeli occupation of Palestine, security-based HR balancing under IHRL, including in its revisited qualitative and egalitarian form, may actually be counterproductive both for IHRL and IHL. The resort to security-based HR restrictions

⁸² See GROSS, ‘Human Proportions’ (n 8), 28 ff.

(that are meant to be exceptional under IHRL) in order to cover military emergency situations in the OPT (that are common under IHL) has contributed to banalizing the emergencies related to occupation and has turned the exception into the norm. There are ways of protecting HR in the context of long-term occupation while taking into account security concerns, without, however, incurring the consequences identified in this article. This requires, however, going

back to the drawing board of IOL and devising a set of international rules and principles that do not pretend to apply IHRL as if the basic conditions of equality in a democracy were respected in order to justify the recourse to exceptional “democratic self-defence”, on the one hand, and do not merely revert to IHL as if the military emergency in the OPT was new and all that was needed to fix the ills of occupation was the use of force, on the other.



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